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REPUTATION RISK AND GOVERNANCE

Lessons from Royal Commissions and Public Inquiries

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Introduction

1. Governance means ‘good order’, and a key principle of good governance is risk management. One element of risk management is reputation risk, which is the focus of today’s symposium. We know that *reputation* is the opinion that people in general have about someone or something, or how much respect or admiration someone or something receives, based on past behaviour or character. Character, honour and integrity are at the heart of reputation. *Reputation risk*, in turn, is the threat or danger to the good name or standing of a person or entity. Reputational risk can arise *directly* – because of the actions of the entity; *indirectly* – due to actions of a leader or employees; or *tangentially* – through other peripheral parties, such as stakeholders and alumni.
2. The real problem with reputational risk is that it can seemingly erupt out of nowhere and without warning. Hopefully, it can be mitigated through prompt damage control measures. But *reputational damage* will occur when any kind of risk is not managed in a timely or sufficient manner. Common causes of reputational damage are regulatory contraventions or other breaches of the law, misbehaviour by leaders, and misconduct by employees. Increasingly, we can add data breaches from cyber-attacks. But a loss in reputation can have cascading and cumulative consequences for organisations. You can seldom apologize your way out of a *reputation crisis* – although that is not to say that communication won’t

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become key. Often enough, the reputation crisis has revealed there to be fundamental problems of culture and governance at play.

3. There is no better example of the consequences of reputational damage borne of poor governance and culture than the stories that have emerged through Australia's highest form of public investigation. Royal commissions have become an entrenched feature of Australian public life. They have broad powers to probe wrongdoing as well as to formulate the changes necessary to avoid a repetition. Their qualities of independence from government, their neutrality and transparency, and the delivery of a reasoned report, have made them attractive tools to Australian governments.
4. Recent royal commissions have been established to report on a vast range of matters with social, economic, and legal significance. Well known to those in the education sector is the *Royal Commission into Institutional Responses to Child Sexual Abuse*, a commission regarded as having a strong and ongoing impact.
5. There have been many more. At the national level, their subjects have been diverse, including an automated social security debt collection program, natural disaster arrangements, aged care quality and safety, misconduct in the banking, superannuation and financial services industry, misconduct affecting people with a disability, trade union governance and corruption, and the collapse of Australia's second largest insurer.¹ State based commissions have been just as varied, including water access regulation in the Murray-Darling Basin, regulation of the greyhound racing industry, and the adequacy of funding of compensation for the James Hardie Group's asbestos-related liabilities.² There are many more; these are just the commissions in which I have been involved in the past 20 years.
6. Today, I propose to focus on recent inquiries into the public sector, the corporate sector, and the not-for-profit charity sector, in order to explore issues of reputation risk and governance, before turning to lessons learned and suggested questions for school leaders and boards to take home to translate into action.

¹ *Royal Commission into the Robodebt Scheme; Royal Commission into National Natural Disaster Arrangements; Royal Commission into Defence and Veteran Suicide; Royal Commission into Aged Care Quality and Safety; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability; Royal Commission into Trade Union Governance and Corruption; Royal Commission into the collapse of HIH Insurance Limited.*

² *Royal Commission into the Murray Darling Basin (SA), Special Commission of Inquiry into the Greyhound Racing Industry in NSW, and the Special Commission of Inquiry into the Medical Research and Compensation Foundation (aka the 'James Hardie Inquiry').*

Royal Commission into the Robodebt Scheme (2022-23)

7. Let's start with the most recent. The *Royal Commission into the Robodebt Scheme* (2022-23) investigated an automated debt collection programme, established to recover apparent over-payments of social security benefits. In 2021, the Federal Court of Australia declared the scheme to be 'unlawful', and the Court's judgment decried the scheme as a '*shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration*'.³
8. The Royal Commission was chaired by the former Chief Justice of Queensland, the Hon. Catherine Holmes AC. The Commissioner explored the human cost of the Scheme, finding that people suffered from its effects '*in a multiplicity of ways*'.⁴ Giving some insight to the human trauma left in its wake, her inquiry received evidence from families affected by suicides said to be associated with the Scheme.
9. The Commission also priced the economic cost of this administrative failure. For the fiscal periods starting in 2014 and ending in 2022, the scheme had been budgeted to generate budget savings of \$4.772 billion.⁵ But it never achieved anything like that. Moreover, the Commission found that the *net* cost of this '*misbegotten idea*'⁶ - including the unreality of its projected savings, the costs of administering it, the costs of seeking expert assistance to try to remedy its failings, the costs of inquiries into it, the costs of settling the class action, and cancelling those debts - had exceeded half a billion dollars (\$565.195 million⁷).
10. As to how this had all come to pass, the Commissioner was both blunt and scathing in her assessment. She found that the Scheme was '*put together on an ill-conceived, embryonic idea and rushed to Cabinet*'.⁸ She was confident that her Commission had '*served the purpose of bringing into the open an extraordinary saga, illustrating a myriad of ways that things can go wrong through venality, incompetence and cowardice*'.⁹
11. The Commissioner made wide-ranging recommendations. Having found that one of the consequences of the Scheme was '*a loss of trust in the social security system, and in government more broadly*',¹⁰ many recommendations were directed to strengthening the public service, reflecting the importance of public servants giving '*frank and honest*

³ *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, [5].

⁴ *Report*, Vol 1, p 659.

⁵ *Report*, Vol 1, p 402.

⁶ *Ibid.*

⁷ *Report*, Vol 1, p 401.

⁸ *Report*, Vol 1, p 655.

⁹ *Ibid.*

¹⁰ *Report*, Vol 1, p 340.

advice'.¹¹ Several recommendations were concerned with reinforcing the capability of oversight agencies, including the Commonwealth Ombudsman.

12. The Commissioner also reasoned that what had happened in the case of the Robodebt Scheme '*demonstrates the need for greater transparency of Cabinet decision-making*'. As she explained, if the scheme idea that was put to Minister Morrison, and the new policy proposal that he presented to Cabinet, had been available for public scrutiny, it would have become apparent *first*, that there was in existence legal advice that the proposal could *not* lawfully operate without legislative change, and *second*, that Cabinet had been told nothing of those things.¹² To this end, the Commissioner reasoned in favour of greater transparency by advocating for repeal of freedom of information (FOI) legislation that mandates *blanket* secrecy to documents which are 'Cabinet in confidence'.¹³

13. A sealed chapter of the Royal Commission report contained referrals of information for further investigation by other bodies. The Commissioner explained that this in part was '*intended as a means of holding individuals to account, in order to reinforce the importance of public service officers' acting with integrity*'.¹⁴ The actual destination of those referrals remains confidential, and those processes are ongoing.

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2018-19)

14. These themes of transparency and accountability are common to the work of many public investigations into apparent wrongdoing. Commissioner Holmes emphasised the role of ethical and competent leadership as vital to engendering and sustaining a culture of integrity in public services. As she observed, '*culture is set from the top down*'.¹⁵

15. The importance of culture as a bellwether for governance is not new. Much has been said and written about *corporate* culture in recent decades. Several royal commissions have investigated failings in the corporate sector, including the *Royal Commission into the Collapse of HIH Insurance Ltd* (2002-2003) and the *James Hardie Special Commission of*

¹¹ *Report*, Vol 1, p 25.

¹² *Report*, Vol 1, 656.

¹³ *Report*, Vol 1, 657. Cabinet documents are, by virtue of section 34 of the *Freedom of Information Act 1982 (Cth)* exempt as a class from disclosure. Cabinet records are only released to the public and held in the National Archives of Australia once the "open access period" has been reached, which is 20 years for Cabinet records and documents, and 30 years for Cabinet notebooks. Commissioner Holmes' proposal for legislative repeal has not been accepted by the Federal Government.

¹⁴ *Report*, Vol 1, iii.

¹⁵ *Report*, Vol 1, p iii.

Inquiry (2004). Those investigations exposed considerable misconduct and resulted in wide-ranging regulatory enforcement actions, including director disqualifications, fines, penalties, compensation and banning orders.¹⁶

16. The chair of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2018-19), former High Court Justice the Hon. Kenneth Hayne AC, was quick to isolate culture as a ‘*root cause*’ of the misconduct he was uncovering in the industry.¹⁷ Culture of an entity is the shared values and norms that shape behaviours and mindsets. It is ‘*what people do when no one is watching*’ - the essentially internalised or instinctive application of shared norms and values.
17. Commissioner Hayne observed that culture can both *drive* misconduct and *discourage* it, and he firmly placed responsibility for corporate conduct - and misconduct - with the board. He recommended entities, as often as reasonably possible, to take *proper* steps to assess the entity’s culture and its governance, identify any problems with the culture and governance, deal with those problems, and determine whether the changes it has made have been effective.¹⁸

A reminder of what is at stake

18. It is helpful to appreciate again what can happen when reputational risk is not well mitigated and controlled. Cancellation of a license or registration fundamental to your ongoing operation might very well result. But it is important also to appreciate that the impact and consequences can be cascading and cumulative. The loss of reputation can trigger a loss of trust and confidence, which impacts on individuals, families, and communities who work with, or depend upon, the organisation. A reputation crisis can lead to a withdrawal of financial support, amid a frantic diversion of resources to shore up failures. Regulatory scrutiny can be triggered, which can prompt intervention by a renewed and vigorous regulator. Where loss and damage has occurred, remediation payouts may spiral, and insurance premiums skyrocket. And that is not to forget the revelations may embolden ongoing political and media scrutiny.

¹⁶ Re HIH Insurance Ltd see, for example: *ASIC v Adler* [2002] NSWSC 171; (2002) 168 FLR 253; (2002) 41 ACSR 72; 20 ACLC 576; (2002) 41 ASCR 72; *ASIC v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80; 20 ACLC 1. For James Hardie, see for example *ASIC v Macdonald (No 11)* [2009] NSWSC 287 (2009) 256 ALR 199; (2009) 230 FLR 1; (2009) 71 ACSR 368; 27 ACLC 522 and *ASIC v Macdonald (No 12)* [2009] NSWSC 714; 73 ACSR 638 (Ms Hogan-Doran was Junior Counsel Assisting the *James Hardie Special Commission of Inquiry* and subsequently appeared for ASIC in the James Hardie civil penalty proceedings).

¹⁷ *Interim Report*, Vol 1, p 87.

¹⁸ *Final Report*, Vol 1, p 36, Recommendation 5.6.

RSL NSW Charitable Fundraising Inquiry (2017-18)

19. Many independent schools are structured as incorporated entities. Your boards and its members will be subject to specific common law, equitable, and statutory obligations. I expect most will be established on a not-for-profit or ‘for-purpose’ basis. Some may be closely associated with religious charities, or at least charities established for educational purposes. So for some, the Governance Standards overseen by the Australian Charities and Not-for-Profits Commission rather than the *Corporations Act 2001* (Cth) will warrant close attention and understanding. Still, whilst their sanctions may differ, the substantive duties on directors are much the same.¹⁹
20. Of course, even charities can’t expect to escape the focused attention of a public inquiry. The *Inquiry under the Charitable Fundraising Act 1991 (NSW)* – better known as the *RSL Inquiry* – was chaired by former Supreme Court of NSW Chief Judge in Equity, the Hon. Patricia Bergin SC. This was a full-scale reputation crisis; the RSL suffered months of adverse media and political scrutiny, and concurrent investigations by state and federal regulators. Cancellation of the fundraising licenses would be disastrous, since the RSL depended on its ability to fundraise to be financially sustainable and to support defence veterans in the community. Charity deregistration would remove access to valuable tax concessions.
21. The Public Inquirer found that within the RSL entities under investigation ‘*widespread ignorance*’ of relevant law and the terms of their fundraising authorities, a matter she regarded as ‘*a cause for deep concern*’.²⁰ She found that the statutory regime for protecting funds raised was ‘*ignored or misconceived*’.²¹ She concluded there was ‘*ample evidence of cronyism, ineptitude and a lack of understanding or appreciation*’ of directors’ obligations in dealing with conflicts of interest to ensure transparency and accountability.²² She also

¹⁹ Governance Standard 5, contained in regulation 45.25(2) of the *Australian Charities and Not-For-Profits Commission Regulation 2013* (Cth), sets out the duties of responsible persons (being the directors, trustees and other persons involved in a charity’s governing body). The core duty is expressed in regulation 45.25(2)(b), which requires responsible persons ‘to act in good faith in the registered entity’s best interests, and to further the purposes of the registered entity’. The first part of this duty parallels the core duty of directors of all companies to act in good faith in the interests of the company (see *ASIC v Lewski* (2018) 362 ALR 286, 304 [71]) and the irreducible core duty of trustees to ‘perform the [trust] honestly and in good faith for the benefit of the beneficiaries’ (see *Armitage v Nurse* [1998] Ch 241, 253).

²⁰ [Report](#), p 3 [1.8].

²¹ [Report](#), p 3 [1.8].

²² [Report](#), p 5, [1.18].

found there had been a ‘cover up’ in relation to the RSL NSW President’s use of credit cards and improper conduct in dealing with expenses and reimbursements.²³

22. The constructive approach adopted by the RSL entities to the NSW inquiry ultimately saved their fundraising licenses from cancellation. The Public Inquirer acknowledged in her report that there had been apologies for the misconduct exposed. She acknowledged the approach of the RSL entities to the inquiry of making admissions and suspending fundraising pending her report, and enabling the inquiry’s conclusion in a ‘*very tight timeframe*’²⁴. She noted there had been changes in leadership, and in professional advisors and auditors, and that the new leadership had embarked on a process of reform and rebuilding which recognised the ‘*severe shortcomings and failings*’.²⁵ Significantly, these steps were understood as integral to re-establishing the *trustworthiness* of these charities.
23. A cooperative approach with the concurrent investigation by the federal charities’ regulator was also adopted and acknowledged. RSL NSW and RSL LifeCare agreed Enforceable Undertakings with the ACNC which acknowledged their failings and set out actions which would demonstrate improved governance and accountability to regain trust and maintain their registration.²⁶ The EUs noted, for example, that:
- a. RSL NSW was working to address the ACNC’s concerns, and had committed to 15 measures to demonstrate improved governance, transparency, and financial management; and
 - b. RSL LifeCare had already taken significant steps to address its governance failures, and had committed to four measures that demonstrate improved board governance, including addressing issues relating to board remuneration and risk management, as well as adherence to its Political Advocacy Policy.

Culture and integrity: reflection questions

24. As the saying goes, in today’s hyper-connected, data driven world, ‘*it takes a lifetime to build a good reputation, but you can lose it in a minute*’. In my experience, how constructively leaders and boards respond to the pressure of an inquiry and investigation strongly correlates to their outcomes and downstream consequences. Organisations and

²³ [Report](#), p 4 [1.15].

²⁴ [Report](#), p 3, [1.6].

²⁵ [Report](#), p 5, [1.21]. She also acknowledged the assistance of the RSL entities’ legal representatives as having ‘*enabled the achievement of these approaches*’: p 3, [1.6].

²⁶ See [ACNC Media Release](#) dated 15 May 2018 ‘*ACNC takes compliance action against two RSL charities*’.

institutions that seek to conceal evidence of wrongdoing, error, incompetence, or other embarrassing information will eventually come undone. Indeed, they may suffer irremediable reputational damage, which will cascade into adverse regulatory action, perhaps even criminal sanctions. By contrast, experience shows that openness and engagement will be positively acknowledged by inquirers, and begins the rebuilding of your reputation.

25. When I work with organisations and boards under the public scrutiny of a Royal Commission, I often encourage them to reflect on fundamental questions of culture and governance, as an aid to assessing the extent to which problems these provide an explanation for their current predicament. If, on reflection, that seems to be the case, I ask them to consider how might things be done differently in the future? It is the quality of those insights which, in turn, can help formulate a plan for engagement and renewal to be shared with the inquirer and any regulator. By strengthening culture and enhancing integrity, public trust and confidence can be regained, and, in due course, reputations restored. In this way, the reputational hit need not be a deadly blow. Not only can reputation be recovered, the inquiry can be embraced as an opportunity to enhance reputation.
26. So, think upon a crisis within, or that affected, your school; pause, and reflect. Looking back, when presented with a course of action, did you only ask ourselves ‘*could we*’? Looking forward, will you instead ask yourselves ‘*should we*’? In the past, did you try to *game* the system? Next time, will you instead *strive* to achieve the purpose and intent of the law? When you received complaints and media inquiries, did you *hide* and *dissemble*? Going forward, will you *foster* transparency instead? When challenged by shortcomings, did you just *shame* and *blame*? Will you now - and in the future - *embrace* accountability for your conduct and failings?

Royal Commission into National Natural Disaster Arrangements (2020)

27. I recently participated in a directors’ forum on climate risk governance. I spent most of 2020 in Canberra, as Counsel Assisting the *Royal Commission into National Natural Disaster Arrangements*, so I do have some familiarity with climate change issues, and the very substantial challenges of mitigation and adaptation we face across the globe. The directors at the forum were drawn from a wide range of industries. One was from the education sector, but was struggling to see how climate risk was a pressing concern for school boards. I hope that is not the prevailing view here today. But in case it is, I want to

refocus my final comments on demonstrating why climate risk is something for *every* board to consider, and how it will become relevant to issues of reputation risk management and good governance.

28. *First* up, the central finding of the 2020 Royal Commission was that Australia’s disaster outlook is ‘*alarming*’.²⁷ I now serve on the Board of Natural Hazards Research Australia²⁸, and the research work we have funded since that time has only reinforced that view. *Second*, periods of extreme heat, or intense rainfall, present obvious risks to the health and wellbeing of school communities. Heatwaves kill many more people in Australia than any other natural hazard, including bushfires, cyclones, and floods. But each one of those natural hazards can impact vulnerable communities, triggering disasters.
29. *Third*, as with other kinds of risks, natural hazard risks can be cascading and cumulative. That this is so was well demonstrated to me in May 2020, when I travelled to Mallacoota in eastern Victoria to interview witnesses as part of the Royal Commission. This included leaders and teachers from Mallacoota P-12 College. Their town had lost over 100 homes during the bushfires. Many families with children at the school were affected by the fires and five lost everything. Three members of staff also lost their houses.
30. When we met, they were managing not just the disruptive impact of those devastating losses, but attempting to support home schooling in a traumatised community now in lockdown. Just when the children returned to school after the fires, hungry for companionship, the coronavirus pandemic had sent most back into self-isolation. This, in a town littered with fenced up demolition sites, the prevalence of asbestos making the clean-up process drawn out and dangerous. It was a long, grieving recovery process. The school had become an important focal point for the renewal of Mallacoota.²⁹

Governance as good order – homework questions for the Board

31. Mallacoota’s experience readily demonstrates the complexity that climate risk presents to people and communities. But climate risk must be understood to be multi-faceted. Yes there are *physical* risks, which can be acute and chronic. But there are also *liability* risks, as strategic litigation aims to elevate expectations and precipitate action. And there are

²⁷ *Report*, p 100, [3.11], and p 136, [5.1].

²⁸ The new centre was announced in July 2020 with Australian government funding of \$88.1m over next 10 years to deliver world-leading, evidence-based research to support the needs of emergency services and communities across Australia to reduce climate and disaster risks, and prepare for, respond to, and recover from future natural disasters: see www.naturalhazards.com.au.

²⁹ See further <https://www.abc.net.au/news/2020-05-24/mallacoota-school-reopen-saved-bushfires-closed-pandemic/12280080>.

transition risks, which include not just changes in technology and markets, but the reputation risk of poorly managing the exposure and vulnerability of school communities to climate change impacts.

32. So, I leave you with some homework, if I may. These final two slides include Board questions which are adapted from work done by the Australian Institute of Company Directors. The most material change I have made is to remove the word ‘*climate*’ from the description of risk. But what that demonstrates is that the questions will work for your board no matter what type of risk you focus on. Whether the risk be operational, regulatory, environmental, or natural, reputation risk will act as an *amplifier* of them. These questions are consistent with the insights gleaned and lessons learned from the Royal Commissions I have discussed today. By answering these questions, you will help frame your school board’s agenda, and translate good governance objectives into action:

Position, performance and prospects

- Do we understand the risks and opportunities for our prospects over the short-, medium- and long-term?
- Have we considered both the risks inside and more broadly?
- Where material, how do risks impact on our performance and position?

Organisational strategy

- How do material risks & opportunities factor into our strategy?
- Have projections for future plans taken risks & opportunities into account?

Risk management

- How do our risk management processes incorporate and mitigate risks?
- For example, how is regulatory risk impacting personnel management?

Regulatory shifts

- How are we placed to meet evolving regulatory and policy shifts?
- How might these shifts impact on our strategy or create compliance risk issues?

Stakeholders’ expectations

- What are expectations in relation to governance - and how are these evolving?
- How may these impact on us (and any ‘social licence’ to operate)?
- Do we have internal capacity to meet these heightened pressures?

Board capacity

- Do we have the right capabilities to oversee management of risks and respond strategically?
- How can we be supported by management or external experts?