An oft cited case of banker remuneration clawback in action probably isn't

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The world is still waiting for a test case to prove clawback is feasible.

Barclays CEO Jes Staley has been fined £642,430 by the UK's Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) for attempting to unmask a whistle-blower. In addition to this public sanction, Barclays has also levied financial penalties on Staley, reducing his awarded variable remuneration for 2016 by £500,000 (See HERE).

Mr Staley attempted to identify the author of an anonymous letter received by Barclays in June 2016 that claimed to be from a Barclays shareholder. The letter contained various allegations about an employee who was a friend of Mr Staley's. Some of the allegations concerned Mr Staley.

The FCA stated that Mr Staley should have understood the conflict of interest presented by his investigating the letter and consulted with those responsible for whistleblowing before taking any action, but did not.

The investigation found this to be a breach of the requirement under the FCA's Individual Conduct Rule 2 implemented in 2016 (See HERE) to act with due skill, care and diligence.

However, the regulator said it would not pursue a more serious charge of acting with a lack of integrity.

Mr Staley has been allowed to remain in his post.

The financial penalties for the whistleblowing are unlikely to leave him overly out of pocket. Staley received a £1.3 million pound incentive in 2016. Adding the £642,430 regulatory fine and the £500,000 Barclays impost, Staley still has some change left from the bonus in the offending year.

Leaving that aside, the million-dollar question for many boards is whether the £500,000 bonus reduction was actually clawback as all media reports have stated.

Under FCA's clawback rules (effective for bonuses from 1 January 2016) all material risk taker variable remuneration must be subject to clawback provisions for a period of seven years (10 for senior managers), during which, if relevant circumstances come to light (such as employee misbehaviour, material error or a material failure in risk management), an amount corresponding to the variable remuneration awarded must be paid back to the company.

Stakeholders in Australia have been highlighting the Barclays incident as a key example of clawback in action. This worries bank boards, which are concerned about the enforcability of such policies, as well as being "the odd one out" among banks in the attraction and retention of staff.

However, stakeholders citing this as a clawback example are probably mistaken. While Barclays has a clawback policy disclosed in its annual report that meets FCA requirements, it is unclear from the wording of Barclay's statement whether malus or clawback was used in Staley's case. Barclays did not specifically mention the word clawback, which if it had activated clawback provisions, it probably would have.

Given 70% of Staley's £1.3 million pound bonus was deferred, and the legal difficulties presented by clawback, it would seem more likely that Barclays resorted to the easier process of activating malus provisions.

So the FCA's clawback laws may have to wait for another test case.

This is important for Australian banks, as they consider the potential for application of an enforceable clawback policy.

In Australia, the Banking Executive Accountability Regime (BEAR) (See HERE) does not mandate clawback. It does require authorised deposit-taking institutions to have a policy enabling malus (forfeiting of deferred remuneration). Lately, however, APRA has been encouraging companies to consider clawback policies consistent with updated Financial Stability Board initiatives (see HERE).

As regards Mr Staley's fine, in Australia civil penalties apply to the bank itself, and not the executive in question, unlike the SMR in Britain. APRA does not currently have the power to enforce sanctions on individuals at a bank aside from disqualifying them from holding positions of accountability.

BEAR also does not allow for the protection of the rights of a whistle-blower. While a company may have its own processes and rules in place for the whistleblowing process, in reality, enforcement can prove difficult, as witnessed by the case of Mr Staley.

New legislation to broaden existing protections for corporate whistleblowers is currently before the Senate and has attracted some controversy as there are questions as to whether the protections are adequate.

Whistleblower rights attracted attention in the recently proposed update of the ASX Corporate Governance Principles, which now require companies to have and disclose whistleblower policies and ensure the board is informed of breaches of those policies (see HERE) and a recent ACSI review critical of ASX 200 policies (See HERE)..

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