Morrison government overthrows another inconvenience to the banks

By Melissa Harrison

A curiously timed series of events resulted in the convenient ousting of James Shipton, head of the Australian Securities and Investments Commission (ASIC), at the same time and in a not dissimilar way to the removal of Australia Post CEO Christine Holgate. Shipton's crime appears not to be his expenses, but running afoul of Treasurer Josh Frydenberg for attempting to do exactly what the Financial Services Royal Commission recommended two years ago—enforce responsible lending laws against the banks.

On 22 October 2020, the same day Prime Minister Scott Morrison infamously threw out Christine Holgate for the supposed scandal of awarding Cartier watches to executives who landed the historic Bank@Post deal, Treasurer Josh Frydenberg received a letter from Auditor-General Grant Hehir, who relayed the Australian National Audit Office's (ANAO) concerns that the corporate watchdog, ASIC, may have overpaid benefits on behalf of ASIC's Chair and Deputy Chair and possibly breached government procurement rules.

Frydenberg's press release the next day announced an "independent" Treasury investigation into payments ASIC made on behalf of Chair James Shipton and Deputy Chair Daniel Crennan. The $118,557 paid to KPMG for taxation services to Shipton, and the $69,621 paid for relocation accommodation expenses for Crennan, made for explosive headlines. Both the Holgate and Shipton affairs were reported together as public sector expense scandals, although the reporting on Shipton, who announced he would stand aside during the investigation, did not compare to the media's vicious treatment of Holgate which dominated the news cycle.

The 23 October 2020 *Guardian* reported Morrison's revealing declaration that day that "there wouldn't be a board member of a government agency or a CEO of a government agency that did not get my message yesterday". Upon investigation of both the Holgate and Shipton affairs, it is evident that the government was unhappy with both for, each in their own way, standing up to the banks, and that Morrison's real message was "fall into line—or else".

Treasury's 'independent' investigation

There are a number of curious elements to the Shipton/ASIC expenses scandal which raise further questions. For one, Frydenberg's story doesn't add up. His explosive 23 October press release stated the Auditor-General's correspondence the day prior brought the ASIC payments to his attention; however, parliamentary testimony from ASIC officials revealed Treasury was well aware of the matter at least several months prior. Frydenberg's release also announced Treasury's "independent" investigation into the matter, headed by Dr Vivienne Thom from private workplace investigations company CPM Reviews (Thom has been referred to as the "government's go-to investigator"), but investigative reporter Anthony Klan has revealed that Frydenberg had already officially contracted the $50,000 Thom review on 15 October, a week before Frydenberg's "surprise" announcement.

Treasury's terms of reference for the investigation were also curious: Thom was not instructed to make definitive findings, only "findings of fact", and ultimately referred the matter back to ASIC and Treasury for further investigation.

Treasury received Thom's report on 17 December 2020, but sat on it for weeks until it eventually released an "abridged" version to the public on 29 January 2021. Strangely, instead of sensitive material being redacted in the original report, the entire document was a re-typed version "prepared by the Treasury". Klan revealed that in Treasury's doctored report several of Thom's key findings are simply missing, and Thom abruptly resigned from CPM Reviews after Treasury released the abridged version of her report. Klan also reported that, notably absent from the Thom report, the Auditor-General's letter, and media coverage on the Shipton matter is the fact that as well as being a recipient of the contested payments, KPMG was *also ASIC's internal auditor at the time,* but this has somehow escaped notice.

Like Christine Holgate, James Shipton appears to have been targeted by a fake expenses scandal to get him out of the way.

Treasury's role whitewashed

Largely absent from media coverage and only briefly referred to in the Thom report is acknowledgement of the failings of Treasury, which recommended Shipton's 2018 appointment to then-Treasurer Scott Morrison and was responsible for setting the terms and conditions of recruitment. In its eagerness to entice Shipton to the top job, Treasury offered a relocation package worth $250,000 which would include tax advice. However, Treasury did not properly document Shipton's employment contract or stipulate amounts it was willing to pay for individual types of relocation services offered. The Auditor-General's letter acknowledged ASIC advised Shipton it would pay the full amount "given it fitted within the overall relocation limits discussed with Treasury". ASIC had agreed to pay Shipton's expenses for relocation tax advice which was complicated by Shipton's former residencies in the United States and Hong Kong. In the end, because Shipton's total relocation expenses came in under the $250,000 offered by Treasury, he was advised by ASIC that the expenses would be covered, but was not made aware the Auditor-General's office had concerns about the payments until August 2020. For his part Deputy Chairman Crennan was initially advised by ASIC that relocation rental payments made to him were in line with ASIC's policies; however it was later determined they were likely inconsistent with the Remuneration Tribunal's policies. In mid-August, the government solicitor advised he considered it was "reasonable" for ASIC to treat Shipton's tax advice as a relocation expense. Significantly, both men had already advised they would repay the money weeks *before* Frydenberg's explosive press release on 23 October.

The Thom report contains the infamous "pub test", the same bogus catch-all which the government-commissioned Maddocks investigation had applied to the Holgate affair. Thom framed it as a "test of reasonableness", concluding: "This test of reasonableness means that a person cannot expect ASIC to cover all costs, even if the items are listed in the policy and directly related to relocation"—even though this is what ASIC and Treasury had agreed to!

The Auditor-General's letter revealed the ANAO had advised ASIC in August 2019 to refer the contested payments to the Remuneration Tribunal for clarification, but by September 2020, this still hadn't happened—a fact used by Liberal Senator James Paterson and Liberal MP Jason Falinski to loudly denounce ASIC in a Parliamentary hearing. According to Anthony Klan, however, the Remuneration Tribunal had informed ASIC it required a request in writing from the Treasurer to provide a concrete decision, *but such a letter was never sent!* This is especially curious because internal ASIC documents reveal ASIC actually wrote up a Remuneration Tribunal request on Frydenberg's behalf in May 2020. Conveniently for Frydenberg's story, the Thom review did not seek an opinion from the Remuneration Tribunal either, nor has Frydenberg's Treasury ever asked the Tribunal to determine whether the payments were in fact lawful.

Moreover, there appeared from Thom's inquiry to be significant documentation and procurement issues at both ASIC and Treasury, although Treasury has escaped unwanted attention despite its central role in the matter. These are unlikely to be properly addressed, given that even with all the media furore, a $50,000 "independent" Treasury-commissioned inquiry, and anti-Shipton parliamentary grandstanding, there is still no definitive answer as to whether ASIC's payments on behalf of Shipton and Crennan were legal or not. All-in-all, the affair is complicated and messy, but the narrative Frydenberg has driven is certainly not the full story.

Innocent, but fired

In another parallel with Christine Holgate, although Shipton was cleared of wrongdoing, he was clearly not intended to return as head of ASIC. Alongside the 29 January 2021 release of Treasury's doctored report, Frydenberg announced he and Shipton had agreed it was in the "best interests of ASIC" that Shipton ultimately step down. The media furore over the expenses scandal enabled Frydenberg to initiate deep structural changes at ASIC, which he was reported to be planning before the Thom investigation had finished. It also made Shipton's position untenable—Frydenberg has now appointed his own Chair of ASIC, astoundingly from one of the most legally troubled banks in the world, Deutsche Bank, where Frydenberg had also worked as a banker!

If Frydenberg expected Shipton to be shamed into disappearing quietly, he was disappointed. James Shipton's role at ASIC was a five-year statutory appointment, not due to be concluded until 2023, so Treasury couldn't fire him. Shipton's lawyers, who had harshly criticised that Thom's draft report "[did] not accord Mr Shipton procedural fairness, misdirects itself on the correct test to apply, erroneously applies the wrong test, is flawed as to the facts and improperly draws conclusions of law", applied pressure to the government, resulting in a temporary reprieve. The 1 February 2021 *Australian Financial Review* gushed over Frydenberg's subsequent "act of political pragmatism" in deciding to facilitate Shipton's desire to return to ASIC until a replacement head was found, ostensibly to save Shipton's reputation but also avoiding a messy lawsuit which could have revealed Treasury's role in the matter and exposed dubious inconsistencies around the entire affair.

The 19 January 2021 *AFR* reported Frydenberg was pleased because the outcome had saved him from having to admit the $50,000 inquiry was a "huge error and a waste of time", but had instead created a "fortunate outcome"—enabling Frydenberg to "achieve his long-standing ambition of overhauling ASIC".

Getting in the way?

As documented below, there are good reasons to suspect that James Shipton and Daniel Crennan's response to the very public shaming ASIC received from Commissioner Hayne at the banking royal commission, to at least make an effort at more enforcement of regulations on the banks, brought them into conflict with Morrison and Frydenberg's intention to ignore the royal commission and give the banks free rein. The 15 April 2021 *AFR* reported "there was far more to the breakdown" between Frydenberg and Shipton than relocation expenses. After Commissioner Hayne handed down his February 2019 report, Shipton reportedly "swerved to Hayne-world". The media criticised Shipton for his adoption of the royal commission's suggestion "why not litigate?", even though Frydenberg asked Shipton to do precisely that in an 11 February 2019 letter when the government wanted to be seen to be taking the royal commission's recommendations seriously (which didn't last long).

Articles in the *AFR* reported that at the 27 March 2019 *Australian Financial Review* Banking & Wealth Summit, Shipton slammed the banks for criticising ASIC's stepped-up litigation only 50 days after the royal commission's final report was published, saying that "It is extraordinary that I am up here today saying something as basic as 'obey the law'." Shipton also warned of ASIC's accelerating litigation, "particularly in relation to larger financial institutions". Shipton's Deputy Daniel Crennan, who was expressly recruited to boost ASIC's enforcement, warned cases would soon spike as ASIC pursued the banks for civil and criminal breaches of the law, specifically referring to the *Corporations Act* which requires the provisions of services "efficiently, honestly and fairly". These were "basic human concepts they are not difficult", Crennan said. "We are not going away. The best thing to do is co-operate." In a move which must have outraged the banks, Shipton exposed the myth that responsible lending laws were choking credit, pointing out these laws were nothing new, but had been in place for a decade, saying: "I really do want to debunk any myth that these regulations are causing economic concern, they are not".

By September 2019, Frydenberg was already publicly back-tracking on the government's commitment to implement the recommendations of the royal commission, splitting with Shipton on responsible lending laws. The 2 October 2019 *Guardian* reported that after heavy lobbying from the banks, Frydenberg told a property forum that if responsible lending laws were "applied too stringently" it would "inevitably reduce the availability of credit", suggesting outrageously that an "unduly restrictive application" of responsible lending laws could "do as much harm as an overly lax one".

The 15 April 2021 *AFR* reported criticism of ASIC's 2020 initiative to conduct proactive reviews into the corporate governance practises of Australia's largest companies, which the *AFR* described as "mission creep".

The long-running landmark legal case of Westpac vs ASIC, commenced under Shipton's predecessor in 2017, would test the responsible lending laws. The case infamously became known as the "wagyu and Shiraz" case after Judge Nye Perram threw out ASIC's case, saying if consumers wanted to take out a loan they could reduce expenses by not eating wagyu beef or drinking Shiraz—a ruling which angered advocates of the millions of borrowers in mortgage stress. ASIC's plan to appeal the ruling angered the banking establishment and their spruikers in the government, who were determined to revive the property bubble. According to the 13 September 2019 *Guardian,* Liberal Senator James Paterson, originally from the banker-founded Institute of Public Affairs, and Liberal MP Jason Falinski stridently attacked ASIC's decision to appeal. ASIC was ultimately deterred from appealing and taking the decision to the High Court after behind-the-scenes pressure from Reserve Bank Governor Philip Lowe and Treasury Secretary Steven Kennedy, who said the court case might undermine lending in the COVID-19 recovery.

The 25 September 2020 *Guardian* reported Frydenberg's announcement that the government was back-tracking on the first recommendation of the Royal Commission, winding back responsible lending laws to "kickstart the economy". Frydenberg said this would need to be accompanied by a "substantial reform program" which would include deregulation. The *Guardian* reported the banks complained about "onerous and complicated" responsible lending obligations, while the government claimed the current consumer protection framework had "created an atmosphere of excessive risk aversion among lenders, which has restricted the flow of credit".

How to handle James Shipton's public opposition? Frydenberg simultaneously announced that ASIC would be stripped of responsibility for enforcing the responsible lending laws, which the 24 September 2020 *AFR* reported was a surprise move which "disempower[ed] ASIC only three weeks after its chairman James Shipton insisted the responsible lending law is 'now settled' after the agency abandoned its prosecution of Westpac over thousands of home loans" (under pressure from the government). In a 23 October 2020 parliamentary hearing, ASIC Commissioners revealed they were not informed of Frydenberg's intentions and found out through reading his media statement. That same day Frydenberg issued the explosive press release that sparked the media furore over Shipton's expenses and ultimately resulted in Shipton's replacement and Frydenberg's sweeping changes at ASIC.

Fallout from Frydenberg's coup

Media reporting in the months afterwards confirmed Shipton had become a problem. Various articles in the *AFR* reported Frydenberg had "privately expressed concern about the direction and culture of ASIC under Mr Shipton's leadership", namely that Shipton's commissioners had "become quasi policymakers" through "regulatory interventions and speeches" on areas such as responsible lending and financial services, and through ASIC's responsible lending test case against Westpac. The 19 November 2020 *Guardian* reported "Frydenberg declares war on corporate regulator in a bid to reduce powers", quoting Frydenberg's 18 November declaration that "regulators do not carry out their mandates in a vacuum…. They must pursue their mandates in a manner that is consistent with the will of the Parliament", and must not "supplement, circumvent or frustrate" the Parliament, which "determines who and what should be regulated". *The Australian* on 1 February 2021 reported pressure from the banking mafia in the government, revealing that the Treasurer was "being pushed by a group of backbenchers, including Tim Wilson [also IPA], Jason Falinski and Senator Andrew Bragg with support from Senator James Paterson who want change at ASIC".

On 29 April 2021, Frydenberg announced the appointment of the new ASIC Chair, Joe Longo, who was a previous director of enforcement at ASIC in 1996-2000, formerly represented corporate crook Alan Bond, and worked for 17 years at Deutsche Bank, where the 29 April 2021 *AFR* reported he "crossed swords with regulators investigating and prosecuting the German bank". Soon after his appointment as Chair, the 3 June 2021 *AFR* reported Longo signalled his support for Frydenberg's deregulation agenda and "made it clear at his first public appearance he will be the 'business-friendly' regulator craved by Treasurer Josh Frydenberg."

Treasurer Josh Frydenberg made a big show about receiving the royal commission report, but he has abandoned any intention of acting on it, and removed James Shipton to bring ASIC back into line.

Simultaneously, Frydenberg announced Treasury would be publishing a new "Statement of Expectations", which made it clear that ASIC's operational matters were now the sole responsibility of the Chair, and emphasised that "the Government expects ASIC to support Australia's economic recovery from the COVID pandemic"—code for pumping up house prices. *The Australian* reported on 29 April 2021 that former ASIC Deputy Chair Daniel Crennan observed the statement of expectations was "a powerful tool" for the government to determine how the regulator should operate, and the new management arrangements appeared to indicate that ASIC's other commissioners wouldn't have day-to-day operational responsibilities.

Frydenberg also announced the establishment of the Financial Regulator Assessment Authority (FRAA), a supposedly independent body (although its members are appointed by Treasury) which would ensure ASIC operated effectively and was "consistent with the Government's Statement of Expectations."

In an opinion piece in the 31 January 2021 *Australian*, former ASIC Chair Tony D'Aloisio (2007-11) expressed concern over the "uncomfortable result" of the Shipton expenses scandal: "the country loses a chair of ASIC over an episode that was determined to be no more serious than a suggestion that those involved could have done better documenting relocation expenses. (And let's not forget the loss of a highly regarded deputy chair as well, who left notwithstanding exoneration)." D'Aloisio said this precedent could test the independence of the ASIC chair: "the limited grounds for removal of the chair, and then by the Governor-General, are there for a reason. They are designed to prevent undue pressure on that role, whether from within or outside. Indeed, Treasurers themselves can only issue directions to the chair if the direction is gazetted. … Future chairs will now know that even if there are no grounds for removal, they could find themselves in a situation where they need to step down." D'Aloisio said he "remain[ed] uncomfortable with the loss of two individuals to public service and the precedent that has now been created."

It is evident that Shipton's intention to enforce responsible lending laws pitted him against Frydenberg since 2019. Now, instigated by an expenses scandal, Shipton has been replaced, the laws are in jeopardy, and the Royal Commission might as well have never happened.