

THE AUSTRALIAN

Morrison's BEAR trap unfairly demonises our banks

Illustration: Eric Lobbecke.

HENRY ERGAS THE AUSTRALIAN 12:00AM October 27, 2017

Scott Morrison's proposed Banking Executive Accountability Regime (BEAR) seems designed to neutralise Bill Shorten's call for a royal commission into banking.

But by arguing that yet more intrusive regulation is needed to ensure integrity at Australia's banks, the government will simply entrench the public's belief that our financial system is riddled with misconduct.

And instead of promoting accountability and efficiency in banking, the lack of clarity, specificity and predictability in Morrison's legislation will take us ever further from the rule of law.

It is therefore Liberal values, rather than Labor's campaign against the banks, that will — to paraphrase Shakespeare's most famous stage direction — “Exit, pursued by a BEAR.”

To say that isn't to deny that some of the requirements BEAR imposes on banks are perfectly reasonable. And it is also reasonable to give the Australian Prudential Regulation Authority the powers to enforce them.

Banks benefit from implicit and explicit government guarantees; considering the risks those guarantees impose on taxpayers, APRA is surely entitled to require that banks let it know which of their executives is responsible for compliance with prudential regulation. By the same token, it is hardly objectionable to require that those executives' remuneration depends at least partly on properly discharging their regulatory responsibilities.

But the legislation goes much further. In particular, banks will face substantial penalties for conduct which adversely affects their “prudential reputation or standing”, while the banking executives held responsible for that conduct could have their remuneration slashed, be disqualified from working for a bank and/or have to pay hefty fines.

It is, however, entirely unclear what “prudential reputation or standing” means, and the legislation makes no attempt to define those terms or guide their interpretation. Nor does it end there.

In most countries, governments are expected to deal with their citizens honestly, respectfully and transparently; BEAR breaks new ground by placing the obligation the other way around, with banks and their executives being required to deal with APRA in an “open, constructive and cooperative way”.

In this respect too, banks, and individual bank executives, will incur potentially devastating penalties for breaching an ill-defined obligation, with the penalties being made especially galling by the fact nothing in the legislation prevents the officials at APRA from being as obdurate and uncooperative as they please.

Those open-ended obligations, and the offences involved in breaching them, are homegrown: they do not figure in the UK legislation on which BEAR is otherwise modelled. But the government has not explained why they are needed in a banking system which has performed far better than its UK counterpart.

If the government hasn't provided such an explanation, it is because there has been no pressure for it to do so: bankers, it is universally acknowledged, are fair game.

Indeed, going by this legislation, one could be forgiven for thinking it was bankers judge Salvatore Vasta had in mind last week when he referred to "the most recidivist corporate offenders in Australian history".

Yet the banks were not the target of Judge Vasta's opprobrium; rather, his criticism was aimed at the Construction Forestry Mining and Energy Union.

Describing the CFMEU's history of repeated law breaking as "astounding", Judge Vasta stressed that the existing penalties for its conduct are so derisory as to have no deterrent effect.

It is therefore striking that the government's proposed Ensuring Integrity amendments to the Fair Work Act, which are intended to increase those penalties, provide far greater protections to the CFMEU's thugs than BEAR affords the nation's bankers.

For example, under the amendments, for a union official to be disqualified from holding office, he or she must have committed serious offences, such as using violence, intentionally causing injury or death, engaging in extortion and blackmail, or destroying property. In contrast, APRA will be able to disqualify an executive from working in banking for mere breaches of BEAR's obligations, such as being insufficiently "open, constructive and co-operative".

Moreover, while the disqualification of union officials will require a judicial decision, with its high evidentiary and procedural standards, bank executives can be disqualified by APRA itself.

That hasn't prevented Labor from denouncing the Ensuring Integrity amendments as an unacceptable infringement of civil rights, while at the same time howling for even tougher penalties against bankers.

And since the Greens are no better, we are likely to end up with the worst of all worlds.

Protected by their political vassals, the unions will continue their descent into criminality, corrupting public life while making it harder and harder to attract investment into the industries they dominate. Meanwhile, banks, threatened with draconian penalties, will become increasingly risk-averse, eroding our ability to seize new opportunities.

All that is worrying enough. But it would be foolish to think the rot won't spread further.

After all, by appeasing the witch hunt against the banks, rather than subjecting it to the derision it deserves, Morrison is simply ensuring that the hysteria lives on, like a cancerous cell, in the political narrative, forcing the government into one defensive reaction on top of the other.

That is not only bad economics; it is also poor politics. Australians know that the country's prosperity depends on enterprise and initiative. And they have also long known that the Coalition understands business and can deal with it in a way that helps underpin solid economic performance. But instead of capitalising on that strength, the Coalition's strategy of appeasement allows Labor to cast it as a weakness.

Ultimately, attempts to appease the wolves by throwing them carcasses never work. Yes, they always begin with other people's. In the end, however, the carcass being thrown is invariably one's own.

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