More farce of fake regulation

by Wilson Sy

24 Sept.—Last Friday, 20 September, the Federal Court rejected the case of the Australian Prudential Regulation Authority (APRA) against Chris Kelaher and four other executives of two companies within the IOOF Group. The case (APRA vs IOOF) alleged that IOOF failed in their trustee duties to act in the best interest of their superannuation fund members in contravention of s52 and s52A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). IOOF shares rallied 21 per cent in two trading days.

Enforcement failures

This case is another farce of fake regulation, not necessarily because IOOF is not guilty but because enforcement of regulation usually fails, as has happened numerous times in the past. Reported the previous month, the Federal Court also rejected the case of *Australian Securities and Investments Commission* (ASIC) against Westpac for irresponsible mortgage lending and ordered the regulator to pay the bank's costs.

These are the first two major cases of enforcement action following the recommendations of the Hayne Royal Commission (HRC), which itself was another farce like most government inquiries. Limited by its terms of reference, the HRC discovered decades-long systemic fraud, misconduct and a lack of enforcement of regulation, but did not go far enough to discover why this had happened. Therefore it did not recommend any structural changes to the Australian financial system, much to the relief of the major banks.

Fake regulation and enforcement failures continue as explained in the paper[1] "The farce of fake regulation: royal commission exposed Australia", wherein the failure of the APRA vs IOOF case was anticipated:

Under immense pressure of criticism arising out of the HRC, ***the Government has belatedly provided APRA with special funding of $60 million, normally unavailable to the regulator's budget****, to show an extraordinary intent of enforcement. After nearly twenty years, APRA has recently announced its first serious enforcement action against the senior executives of IOOF, a small service provider capitalised at $1.6 billion (after a 30 per cent plunge in its share price) compared with Commonwealth Bank of Australia (CBA) at $125 billion. This may be a case of token enforcement action on a minnow. ...*

It remains to be seen whether in the enforcement of IOOF, even if a minnow, APRA can avoid the same failures of the past. Emphasis added.

Being funded by the regulated institutions, APRA has normally no budget for litigation which is assumed unnecessary. Getting the regulated institutions to pay legal costs for their own prosecution before the fact would be tantamount to a presumption of guilt, making enforcement action illogical and unwarranted.

Fake knowledge

Enforcement failures are predictable because Australian regulation was designed to be weak and ineffective under a policy of deregulation, as enforcement was deemed unnecessary under the neoliberal assumption of efficient markets. Fake regulation relies on self-regulation and self-reporting of breaches of regulation to APRA, which has fake knowledge because it does no genuine research and does not actively monitor its assumption of efficient markets.

In enforcement action, APRA is at a disadvantage with fake knowledge because it has no additional knowledge or information from its own research to provide evidence for prosecution. The farce is explained in the judgement of Justice Jayne Jagot[2]:

APRA sought to prove its case relying solely on documents brought into existence by the respondents in connection with the incidents. *As a result, there was no dispute about the primary facts. Both parties recorded the salient aspects of the facts on which they sought to rely in their written submissions.* Emphasis added.

The evidence for prosecution depends entirely on evidence submitted voluntarily by the accused which is required to self-incriminate to bring about a successful conviction. It would be laughable in the rest of society if the police were to rely solely on the evidence provided by the murderer to bring about a conviction.

Fake supervision

The *APRA vs IOOF* case proves that as a supervisor of regulated entities, APRA has gathered no foreknowledge or useful information from its supervisory activities or from its data collection. This

should be no surprise after we learnt that neither APRA nor apparently CBA management was aware that money laundering was going on through CBA ATMs between 2012 and 2015. This showed that decades of APRA supervision had produced little understanding of the management deficiencies at CBA.

The *APRA vs IOOF* case shows that institutional supervision is fake supervision because the process produces no useful insight or information for regulation. APRA's reputed knowledge working "behind closed doors" serves a similar purpose as the emperor's new clothes. Justice Jagot further explained:

For a number of reasons I have found APRA's approach unpersuasive. ***The documents were all produced with the benefit of hindsight.*** *Apart from the opinions or conclusions expressed as to breach of the statutory covenants, the documents are expressed at a high level of generality, assuming knowledge on the part of the reader as to IOOF's systems, policies and procedures (which remained unproved by other evidence).* Emphasis added.

In the Jagot judgement, there are many more scathing remarks about APRA's performance for the case. The APRA Capability Review[3] chaired by Graeme Samuel, which reported in June, wrongly assumed that lack of capability of the regulator is the problem, whereas fake regulation is the problem.

The evidence brought to the *APRA vs IOOF* case suggests that APRA had no convincing proof of the guilt of IOOF, but it just picked arbitrarily a minnow to test its enforcement powers. One can only surmise that APRA was merely "ticking a box" to show publicly it is willing to litigate following HRC recommendations. APRA is unlikely to appeal the Federal Court judgement, as it has indicated, because it would further expose fake regulation at APRA.

Fascism

The failure of the case against IOOF is good news for the major banks because if APRA cannot succeed against a minnow, what chance has it against a major bank? APRA now has the excuse for what it has always known that enforcement of regulation was made deliberately difficult by the structural design of the regulatory system. The failure of the *APRA vs IOOF* case has the consequence of protecting the major banks, because had APRA won against IOOF, it might have been obliged next to take on a bigger target, which is neither desirable nor practical for the Government.

Fake regulation may have originated from the policy of deregulation, which is consistent with the economic rationalism espoused by the Treasury. The Government may appear to be pursuing neoliberalism, but by its legislative efforts to protect the banks and the financial system, it is actually concentrating political and economic power in a *de facto* collusion with major banks.

Despite exposure by the HRC of systemic fraud and misconduct in the banks, instead of curbing the banks, the Government and the Treasury have increased their efforts to pass legislation to give them more power. The *Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018* has the potential to "bail in" or confiscate bank deposits to save insolvent banks, creating moral hazard by guaranteeing their survival. The Currency (Restrictions on the Use of Cash) Bill 2019 in restricting cash payments forces large payments through banks allowing them to extract monopoly profits from trapped deposits.

The collusion of government legislative power with private bank economic power satisfies the general definition of fascism. It is not well recognised that in Australian fascism, the banks have been controlling the national economy and its finances for the past decades. Their profit-seeking behaviour in credit allocation has inflated an epic housing bubble, destroyed productive sectors of the economy, increased wealth inequality, created a mountain of foreign debt and elevated national risk by putting the economic structure in shambles.[4]

To achieve a fairer and more robust economy, the tyranny of fascism where the Government uses the law to concentrate economic powers in the private banks needs to be stopped. The concentration of economic powers can be diffused by restoring a structural separation of the conglomerate banks, through an analogue of the US *Glass-Steagall Act.*

Footnotes

1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3375629

2. Jagot, J. (2019), "Australian Prudential Regulation Authority v Kelaher [2019] FCA 1521", Federal Court of Australia; available at: https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca1521

3. https://treasury.gov.au/sites/default/files/2019-07/190715_APRA%20 Capability%20Review.pdf

4. https://www.youtube.com/watch?v=ZK_gN8rE2QY&feature=youtu. be; https://www.youtube.com/watch?v=CpmooUYge3A&t=50s