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Thank you for inviting me to make a further submission on the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (The BEAR Bill) to the Senate Economics Legislation Committee.

I previously provided to the Economics Committee of the House of Representatives a submission on the Banking Executive Accountability Regime (**BEAR**) dated 11 August 2017 (the **August Submission**). A copy of this submission is attached. Many of the points in the August Submission are still relevant and important to the Committees' review of BEAR and I provide a short submission on the ("**BEAR Bill**") set out below.

As in the August Submission, the views and opinions set out in this submission are personal and mine only.

I set out my points on the "BEAR Bill" below.

1. The BEAR Bill should not proceed to legislation in its current form, if at all.

   If this view is rejected, an "if not why not" approach similar to the ASX Corporate Governance Principles and Recommendations could be adopted to better effect the aims of the BEAR Bill if the Committee was still of the view that some of the concepts were necessary.

2. The BEAR Bill is misguided and an unprecedented intrusion into privately owned companies and shareholder property rights. It affects fundamentally critical institutions in the Australian economy, namely Authorised Deposit Institutions (**ADI's**) including Banks.

3. The BEAR Bill substantially interferes with and disrupts accepted principles of corporate governance particularly the role of boards, executives and shareholders. It provides APRA with powers of "managing" an ADI and not simply being a Regulator as originally envisaged. It also assumes that decisions by APRA on business issues regulated by the BEAR Bill are better than those in senior management, the Board and shareholders of an ADI.

4. Corporate Governance principles have evolved over time usually with proper consideration by external bodies qualified to do so. For example, the Productivity Commission on Executive Remuneration and the ASX Corporate Governance Council dealing with corporate governance principles. The latter principles being on an "if not why not" basis for listed companies on the Australian Securities Exchange. These principles are reviewed periodically by a Council of many members independent of the ASX. The Corporations and Markets Advisory Committee (**CAMAC**) was also previously referred legal issues dealing with corporate law and corporate governance prior to it being abolished. Perhaps this body (or equivalent) might be reintroduced.

5. The interference of Regulators in setting remuneration of executive salaries is unwarranted on the evidence provided to date and does not deal with the previous research work and legislation (e.g. Remuneration Reports and the Two Strikes rule) in the Corporations Act. It is unrelated to the complaints of products and "culture" levelled mainly against the Banks or other ADI's. The history of legislation interfering with the setting of remuneration is not without some stark failures.

6. The analogy to the U.K. and Hong Kong legislation for the BEAR Bill is not a proper analogy. For example, according to the U.K. National Audit Office, peak support by the U.K. Government provided to Banks in the U.K. during the GFC consisted of:

Guarantee commitments	£1,029 billion
Cash outlay	£133 billion
Total	**£1,162 billion**

The U.K. Senior Managers Regime was put forward in this context.

This was not the case in Australia and taxpayers were not required to fund bank bail outs. The BEAR Bill therefore appears to be trying to solve a problem Australia did not have. It should be remembered that Australian banks were regarded in the top 10 banks in the world during the GFC.

7. There were however poor cultures and wealth products and losses to customers of Banks. This type of behaviour has been well chronicled. What seems to be forgotten is that reparations to affected customers has been or is being made. These problems however do not directly relate to the management of Board and Senior Executive remuneration.

   The bank products and their supervision are already supervised by APRA and ASIC and provisions for "culture" cannot and should not be legislated.

   The complaints against the Banks would not appear to warrant a regulatory control on variable remuneration which needs to be flexible to deal with the next crisis. Executive remuneration is also part of a changing economic and industry environment and needs to be easily adjusted within contractual parameters.

8. The BEAR Bill also takes away some shareholders rights including under the Corporations Act Two Strikes provisions. What happens if shareholders approve a Remuneration Report in a listed company but APRA subsequently takes issue with the variable remuneration or vice versa. How will this potential conflict be resolved?

9. Making individuals personally accountable with penalties including large fines is also unwarranted when viewed against the general uncertainty of business decisions and the damage that can be caused by piercing the corporate veil. The Corporations Act, Director and Officer liabilities, are also already some of the toughest in the world. APRA and ASIC have strong powers in this regard. No proper analysis of these existing laws and powers seems to have been significantly attempted. Were the existing laws enforced in a timely manner? Will additional legislation like the BEAR Bill be of any real positive long term cost/benefit?

10. If enacted in its present form the BEAR Bill will inevitably have some difficult and unintended consequences. For example, how do you get real teamwork and culturally aligned behaviour when some in the team have different and draconian legal responsibilities? As an analogy what would happen if some cabinet Ministers could go to jail and face large penalties for poor decisions of cabinet whilst others had no responsibility?

11. It is generally considered that Australia has excellent corporate governance standards with continual professional and well thought through reviews. The BEAR Bill does not come within this professional approach and appears to be motivated by political and populist views rather than a genuine attempt to improve corporate governance or Banking legislation in Australia.

12. One of the major issues which keeps reoccurring as a reason for the BEAR Bill is Bank "culture". If this is the main reason then the best way forward is for Banks and ADI's to look specifically at this aspect, For example, where it has failed and what, if anything, can be done to change it. There has been some interesting and relevant work in this area particularly in organisational studies and its application in practice. The Committee could no doubt obtain further evidence along these lines to better inform itself. This is the area where the Banks should focus for the most productive results (if they are not already undertaking this work).

The BEAR bill is likely to be counter-productive both in its interference in the accountability regime and in executive remuneration. Also, some of the Banks have divested or are looking at divesting all or part of their Wealth Divisions, where the problems have largely occurred. The BEAR Bill could then be fighting an issue (or the "mischief") which has already passed.

13. The Rule of Law (including citizens being innocent until proven guilty, merit reviews after Regulatory decisions, impartial judges etc) is paramount and fundamental in a proper functioning democracy and should be applied meticulously in the BEAR Bill. I refer you to the other submissions dealing with merit reviews of disqualification and penalties to "Accountable Persons" in August 2017. The BEAR Bill does now include a merit review if APRA removes an executive. The amendment is to be commended. However, it does raise an important issue as a result of its initial omission and the necessity of many strong submissions to have it included.

    There is a question of who is the "Accountable Person" or "Accountable Persons" in charge of the Rule of Law in the Federal Government? Who do we, as citizens, look to for this protection. Should legislation be introduced to protect all citizens including those in business.

14. Non-executive directors should be removed from the BEAR Bill, if legislated, otherwise the supervisory role of the board will be diminished.

15. Another approach the Senate might consider is an approach by APRA more akin to the "if not why not" approach adopted by the ASX Corporate Governance Principles and Recommendations. APRA could review variable remuneration on an "if not why not" basis which would allow Banks and ADI's to explain any divergences and allow them to act quickly in any difficult or necessary circumstances. The same principles would apply to the mapping of executive responsibilities. This approach would have many advantages including the greater flexibility and a better assessment of workability and efficiency of the BEAR Bill ideas without the heavy hand of black letter law. Legislation could then follow, if this system failed, with a much better assessment of its appropriateness and only target behaviours requiring legislation.

Thank you for your consideration of this submission.

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