

29 September 2017

Ms Kate Wall
Manager
Banking, Insurance and Capital Markets Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: bear@treasury.gov.au

Dear Ms Wall

Banking Executive Accountability Regime – exposure draft bill and explanatory memorandum

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility for developing and implementing governance and risk frameworks in public listed, unlisted and private companies. They are frequently those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). In listed companies, they have primary responsibility for dealing with the Australian Securities Exchange (ASX) and interpreting and implementing the Listing Rules. Our members have a thorough working knowledge of the *Corporations Act 2001* (the Corporations Act). We have drawn on their experience in our submission.

A core part of Governance Institute's mission is to strive to ensure that Australia's governance frameworks lead the world in facilitating a strong economy underpinned by responsible performance. To this end we must comment on the very limited seven-day period available to consult on the *Banking Executive Accountability Regime* (BEAR) exposure draft bill and explanatory memorandum.

We consider that such a short period of consultation for such an important piece of legislation risks serious unintended consequences. This is particularly the case given the maximum potential penalty for breach of the regime for a large ADI is 1,000,000 penalty units (currently \$210 million).

The Australian Government Guide to Regulation states:

Transparency can encourage genuine dialogue and build trust in the policy process, but in order for your consultation to be credible and effective, you need to engage with stakeholders in a way that is relevant and convenient for them. You also need to give stakeholders time to consider the information you give them and time to respond.

We strongly encourage Government and its departments to follow both the letter and the spirit of the Government's own Guide to Regulation to ensure both the credibility and importantly the effectiveness of their proposals.

We also note that there has been no Regulatory Impact Statement prepared in relation to the BEAR, which appears to directly contradict Principle 4 of the Government's Ten Principles for Australian Government Policy Makers.

Given that we have not had a short period of time to obtain feedback from our members, we have confined our comments to the following issues.

Director liabilities under the BEAR

We refer to our submission dated 11 August 2017 in response to the BEAR Consultation Paper. We note that our recommended approach is that any heightened standards of conduct and behaviour imposed on directors as 'accountable persons' under the BEAR must take into account the provisions of the business judgement rule in section 180 of the Corporations Act. We consider that the draft bill does not address this issue.

Meaning of accountable person

The BEAR Consultation Paper stated that the objective of defining an accountable person was to provide greater clarity in relation to the responsibilities of the most senior individuals within an ADI. The Consultation Paper specifically stated at page 5 that 'the net should not be cast so wide that responsibility can be deflected and accountability avoided... The definition of accountable persons is intended to clearly identify the most senior directors and executives....'.

We note the definition of accountable person at page 4 of the Exposure Draft:

- (1) A person is an accountable person of an ADI **or a subsidiary** of an ADI if the person:
 - (a) holds a position in or relating to the ADI **or subsidiary**; and
 - (b) because of that position, has actual or effective responsibility:
 - (i) for management or control of the ADI **or subsidiary**; or
 - (ii) for management or control of a significant or substantial part or aspect of the ADI's **or subsidiary's** operations. (our emphasis)

We consider that the effect of the definition as drafted is that directors of subsidiary boards who may not be a significant part of the operations of an ADI group will be captured by the definition of accountable persons. This is contrary to paragraph 1.79 of the Explanatory Memorandum which states 'a person is an accountable person if the person is in a senior executive position with actual or effective management or control of the ADI, or the management or control a substantial part of the ADI group's operations [sic]'. This potentially has the unintended consequence of capturing hundreds of directors on board of subsidiaries of ADI groups who are not in a position to exercise actual or effective management or control of a significant or substantial part or aspect of the ADI group's operations.

Removal and disqualification of senior executives and directors

We note that the bill grants APRA enhanced powers to remove and disqualify senior executives and directors without applying to the Federal Court. We also note that APRA's powers concerning disqualification are reviewable under the AD (JR) Act which allows an adversely affected person to seek judicial review of the lawfulness of APRA's decision. As stated in the Explanatory Memorandum it is not a 'merits review' process.

We repeat the concerns expressed in our Submission of 11 August 2017 and question why APRA requires the power of immediate removal and disqualification where it already has the power to apply to the court for such an order. We query whether APRA has applied to the court in the past to remove a director or senior manager and had such an application refused. Governance Institute has concerns about whether natural justice is being served in

circumstances where APRA has the power to remove and disqualify persons rather than apply for the court to do so. We consider that the removal and disqualification of a director or senior executive of an ADI would be a measure conducted as a last resort and in extreme circumstances bearing in mind the reputational damage to the affected person which would flow from such an action. The lack of a merits review further compounds the issue for a senior executive or director removed in a blaze of publicity.

Governance Institute does not recommend that APRA be given the power of removal and disqualification and that APRA be required to apply to the Federal Court for orders removing and disqualifying senior executives and directors as is currently the case.

If this recommendation is not followed, we would strongly encourage a mechanism to be introduced to ensure there is a full appeals process in respect of any decision made by APRA.

Governance Institute would welcome the opportunity to be involved in further deliberations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Burrell', with a stylized flourish at the end.

Steven Burrell
Chief Executive Officer