

**BANKING EXECUTIVE
ACCOUNTABILITY REGIME
RESPONSE TO EXPOSURE DRAFT BILL**

28 September 2017

EXECUTIVE SUMMARY

1. ANZ thanks Treasury for the opportunity to comment on the exposure draft of the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (**Bill**) that will establish the Banking Executive Accountability Regime (**Regime**).
2. As we noted in our submission on the consultation paper for the Regime, ANZ supports financial sector accountability for systemic issues that adversely affect customers or financial stability. This helps improve confidence in the financial system and, through that, the role of the system in intermediating credit and managing risk.
3. Our comments below are intended to help the overall design of the Regime and the implementation and interpretation of its individual provisions.
4. The most salient of these comments are the following:
 - The Bill currently applies the Regime to all subsidiaries of an authorised deposit-taking institution (**ADI**). From the Explanatory Memorandum, we understand that this is not Treasury's intent. We would endorse the position in the Explanatory Memorandum that a materiality threshold applies to who is an accountable person.
 - The accountability obligations use terms that are not defined and may be difficult to interpret in practice. Further, the obligations should consistently focus on conduct that is systemic or prudential in nature.
 - The power to ban persons from the banking industry is a significant one. Because of this, it should be made subject to an adequate merits review process to ensure it is exercised fairly. This can easily be done by designating a disqualification decision as reviewable under Part VI of the *Banking Act 1959* (Cth) (**Banking Act**).

COMMENTS ON SPECIFIC SECTIONS

SECTION 37BA

Subsidiaries

1. As drafted, the Bill will capture all subsidiaries of ADIs and certain persons within them.
2. This occurs because section 37C(e) requires an ADI to take reasonable steps to ensure that each of its subsidiaries that is not an ADI complies with the accountability obligations in paragraphs (a) to (d) of section 37C as if the subsidiary were an ADI. In addition, section 37BA(1) states that a person will be an accountable person of a subsidiary if they hold a position in the subsidiary and have actual or effective responsibility for the management or control of the subsidiary or a significant or substantial part or aspect of its operations. This section does not distinguish between persons and subsidiaries with the ability to have a material or immaterial impact on the ADI group.
3. In this regard, the Bill seems inconsistent with the Explanatory Memorandum. Paragraph 1.29 of the Explanatory Memorandum notes that '[w]here the activities of a subsidiary *are significant*, then an accountable person should have responsibility for that subsidiary' (emphasis added). Similarly, paragraph 1.79 states that 'a person is an accountable person if the person is in a senior executive position with actual or effective... management or control [of] a *substantial part* of the ADI group's operations' (emphasis added). Both references indicate that persons or subsidiaries will only be caught when they exceed a materiality threshold.
4. We believe the Bill should be conformed to the policy intent expressed in the Explanatory Memorandum.
5. Further, we note that section 37JB currently provides that a subsidiary will break the law when it allows a disqualified person to be appointed as an accountable person in relation to it. Subject to how a court interprets 'allows', this could mean that subsidiaries are criminalised if an ADI parent appoints a disqualified person to its Board. As shareholders, not corporate entities, appoint directors, we would ask that section 37JB clarify that subsidiaries are not liable for the appointment of disqualified persons to their Boards.
6. Separately, we note that the position of subsidiary directors is ambiguous under section 37BA(3)(a). This states that a person who has a responsibility for the oversight of the ADI as a member of the Board of the ADI, or a subsidiary of the ADI will be an accountable person. This drafting implies that an individual will be caught when they have responsibility for the oversight of the ADI as a member of the Board of an ADI subsidiary.

We cannot think of a situation where subsidiary Board members will have oversight of the ADI because of their subsidiary Board position.

7. We note that the first row of table 1.2 of the Explanatory Memorandum indicates that only ADI Board members and not subsidiary Board members have 'particular responsibilities'. We would ask that section 37BA(3)(a) conform with the Explanatory Memorandum.

Overall responsibility

8. We would suggest that the adjective 'overall' be inserted before 'actual' in section 37BA(1)(b) to make clear that the most senior individuals are accountable persons and that simply being in a management role should not result in a person being an accountable person. This would be consistent with paragraph 1.80 of the Explanatory Memorandum.
9. Similarly, we believe the intent of section 37BA(3) could be enhanced if 'overall' were to precede the existing drafting in all paragraphs of this section. This would make clear that the responsibility is the ultimate responsibility for that particular function. For example, a CFO and a Treasurer may share responsibility for the 'management of the ADI's financial resources' but we would think that the CFO would have 'overall' or ultimate responsibility for this function. Those with 'overall' responsibility are most likely to be capable of influencing behaviour or conduct that is systemic and prudential in nature.
10. We note that section 37BA(3)(d) already does this in relation to the risk management function. If our drafting suggestion is adopted, the existing iterations of 'overall' in this section could be deleted.
11. We do not think that the insertion of 'overall' as suggested could be used to argue that only the CEO is captured. Such an interpretation would be contrary to the intent of the Regime as evidenced in the other provisions of the Bill and the Explanatory Memorandum.

Responsibilities of directors

12. We would ask that the concept of 'responsibility' in the Bill (particularly section 37BA) align with sections 189, 190 and 198 of the *Corporations Act 2001* (Cth) (**Corporations Act**). Under these sections, directors may delegate their powers and/or rely on information or advice provided by others. The Regime should provide that a director of an ADI or subsidiary does not have responsibility in relation to the exercise of a power if they are not responsible for it under the Corporations Act.

Relating to

13. We note that the term 'relating to' used in section 37BA could potentially capture individuals not employed by ADIs or subsidiaries (eg contractors). This appears consistent

with CPS520. However, we would ask that Treasury confirm that this is its intention through the Explanatory Memorandum.

Acting executives

14. The Regime doesn't deal neatly with individuals moving temporarily into a role that would otherwise see them as 'accountable person'. We would suggest that executives performing a role on a temporary basis be excluded from the definition of 'accountable person' (or, at least, that the obligation to register them and prepare accountability statements and maps be modified).

SECTIONS 37C AND 37CA

15. We appreciate that the accountability obligations have been significantly simplified compared to those proposed in the consultation paper. However, we are concerned that they contain uncertain terms and risk overlap with the remit of the Australian Securities and Investments Commission (**ASIC**).

Systemic behaviour

16. While paragraph 1.22 of the Explanatory Memorandum states that the accountability obligations only apply to conduct that is of a systemic or prudential nature, we do not think this is reflected in the Bill. Sections 37C(a), 37C(b) and 37CA(1)(a) and (b) will apply as equally to one-off, non-systemic behaviour as they do to systemic behaviour. ASIC already enforces laws concerning honesty and integrity in financial and credit services.
17. We acknowledge that sections 37C(c)-(e) and 37CA(1)(c) and the pecuniary penalty regime are better designed at only capturing systemic behaviour. We would ask Treasury to similarly define the other accountability obligations to be consistent with the Explanatory Memorandum.

Prudential standing or reputation

18. The phrase 'prudential standing or reputation' in sections 37C(c) and 37CA(1)(c) may not be helpful in understanding what is expected of ADIs or accountable person for two reasons.
19. First, this phrase is undefined in the Banking Act. The Explanatory Memorandum does not aid its interpretation nor does the plain English meaning of the adjective 'prudential'.
20. Second, anchoring a conduct expectation in concepts of 'standing' and 'reputation' raises the issue of how these qualities will be assessed. An organisation may have different reputations with different stakeholder groups. While one group may view an ADI

negatively, another may view it positively. As noted, we do not think that 'prudential' aids in selecting which reputation is relevant.

Due skill, care and integrity

21. Sections 37C(a) and 37CA(1)(a) repeat behavioural expectations already found in the Corporations Act (eg sections 180 and 912A). In this regard, they overlap with conduct obligations already enforced by ASIC (and shareholders, in respect of directors' duties).
22. Critically, however, unlike section 180, they do not provide any safe harbour against rational decisions made in good faith that have poor outcomes. While the adjective 'due' in these sections may militate against their overly strict interpretation, we would prefer if they provided the same comfort as the business judgement rule in section 180(2).

Open, constructive and co-operative

23. We support the obligation to deal with the Australian Prudential Regulation Authority (**APRA**) in an open, constructive and co-operative way. However, we would ask that the import of this obligation be clarified. For example, will this obligation override contractual obligations to maintain confidences, fiduciary duties of confidentiality or obligations arising under the *Privacy Act 1988* (Cth)? Such clarity would help ADIs be as open with APRA as possible.
24. Critically, we think this obligation should not override legal professional privilege or, for individuals, the privilege against self-incrimination.

Joint obligations

25. We wonder whether section 37CA(2) is perhaps overbroad in its application. It currently provides that individuals who have the same responsibility have the obligation in relation to that responsibility jointly. This may mean that individuals in a horizontal relationship (e.g. Board members) would be liable for the actions of one or some of their number (e.g. a Board committee), regardless of individual fault. We would suggest that more nuance is needed to fairly allocate responsibility for events.

SECTION 37DA

26. We appreciate section 37DA(2)'s intent. However, the draft section's language of 'filling a vacancy that was not foreseen at the time it arose' could preclude situations where vacancies are generally foreseeable but their specific timing is not (eg someone who has been unwell for a period of time but unexpectedly departs).

27. We think paragraph 1.58 of the Explanatory Memorandum provides a better test of which situations of persons unexpectedly becoming accountable persons should fall within the dispensation of section 37DA.

SECTION 37DB

28. Section 37DB predicates APRA's power to give a written direction to reallocate a responsibility on whether a 'prudential risk' is likely to arise.
29. As we noted in connection with sections 37C and 37CA, 'prudential' is not a defined term in the Banking Act. Without further clarity, its use in section 37DB may give APRA's power an uncertain basis, making it difficult to both exercise and challenge.

SECTION 37E

30. Section 37E(1)(b)(ii) could be contrary to procedural fairness if ADIs were required to reduce variable remuneration on the basis that it is merely likely that an accountable person has failed to comply with the accountability obligations. Currently, we would only reduce variable remuneration if we had concluded that such a failure had occurred.
31. It may be fair, however, if variable remuneration was frozen in situations where the ADI suspects and is investigating whether an accountable person has failed to comply with their accountability obligations. The variable remuneration would then be reduced if, after the investigation has concluded, the ADI is satisfied the accountable person has failed to comply with their accountability obligations.

SECTION 37EB

32. We would submit that the language used in paragraph 1.109 of the Explanatory Memorandum is clearer than the draft Bill language concerning how variable remuneration should be valued: Variable remuneration should be valued at its *face* value at the time the decision to grant it is made.

SECTION 37FA

33. We would ask that Treasury align the drafting in section 37FA concerning 'the part or aspect of the ADI's or subsidiary's operation of which the accountable person has effective management or control' with the language in section 37BA (currently 'actual or effective responsibility for management or control...').

SECTION 37FC

34. The words '...or is likely to have failed to comply with...' in section 37FC(c) should be addressed for the same reason we noted in connection with section 37E(1)(b)(ii) (i.e. due

to procedural fairness we only reduce variable remuneration when we are satisfied that conduct failure has occurred).

35. We also note that there appears to be a missing 'accountable' in first line of section 37FC(b) prior to 'person'.

SECTION 37H

36. We note that paragraph 1.113 of the Explanatory Memorandum states that the register of accountable persons will not be public. We would ask that section 37H embed this status in law.

SECTION 37J

37. Section 37J allows APRA to disqualify a person from being or acting as an accountable person. Such a decision would have a significant impact on an individual's career and societal standing.
38. We believe that, because of the gravity of the decision, it should be a *reviewable decision of APRA* for the purposes of Part VI of the Banking Act. This will give the affected individual the opportunity to seek a review of the decision both by APRA and through the Administrative Appeals Tribunal.
39. We would also ask that the written notice given to an accountable person and the ADI concerning a potential disqualification sets out details of the alleged breach, the evidence relied on by APRA and the proposed period of disqualification. This is so the person and ADI have a genuine opportunity to provide submissions on the matter. Similarly, we ask that the period allowed to persons to provide submissions on their potential disqualification be adequate for them to consult with their legal counsel, gather evidence that may be available to them (including from the relevant ADI) and prepare submissions to APRA. Allowing individuals adequate time will be critical to ensuring that any disqualification decision takes into account all relevant information.
40. It is also important that how APRA will 'justify' its decision is clear. Thus, it may be appropriate to introduce the concept of 'prudential matters' as guiding principle in the same way that the concept informs when a pecuniary penalty is available under section 37G.

SECTIONS 61B & 61C

41. We note the broad powers given to investigators under section 61B.
42. We would ask that the power of the investigator to require an examinee to answer a question be made explicitly subject to the examinee's privilege against self-incrimination

and legal professional privilege. In addition, it should not require (or permit) the examinee to disclose material that is subject to legal professional privilege held by the ADI or a subsidiary of the ADI.

43. We note that recipients of compulsory information requests from ASIC are not required to provide information to ASIC that is the subject of a claim for legal professional privilege (see ASIC Information Sheet 165). Sections 69 and 76(1)(d) of the *Australian Securities and Investments Commission Act 2001* (Cth) preserve privilege claims in certain cases.
44. Further, we wondered whether section 61C(5) is needed given an examinee's lawyer may only address the investigator and examinee under section 61C(4) 'at such times during the examination as the investigator determines'. This means that the investigator already has the power to control the lawyer's opportunity to address the investigator and examinee.
45. We also ask that information collected in connection with the Regime be kept within APRA.

ENDS