Law Council
OF AUSTRALIA

Financial Accountability Regime Bill 2021

Senate Economics Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000[1] lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
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- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

1 Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is particularly grateful for the expertise of each of the Corporations Committee and the Financial Services Committee of its Business Law Section and the Superannuation Law Committee of its Legal Practice Section in leading the development of this submission.

Introduction

1. The Law Council makes this submission in relation to the Financial Accountability Regime Bill 2021 (**Bill**) released for comment by the Senate Economics Legislation Committee on 3 December 2021 which proposes to impose a financial accountability regime (**FAR**) on certain financial entities.

2. References to sections in this submission are to proposed sections of the Bill unless otherwise indicated.

Overview

3. In summary:

    - the Law Council's primary submission is that the Banking Executive Accountability Regime (**BEAR**) set out in Part IIA of the *Banking Act 1959* (Cth) (**Banking Act**) should be extended in its existing form to the other types of entities which are regulated by the Australian Prudential Regulation Authority (**APRA**) rather than replaced with the FAR; and
    - if that primary submission is not accepted, the next best alternative would be to remove aspects of the proposals which would add cost and divert effort from growth and job creation without a proportionate regulatory benefit. Aspects of the Bill requiring further revision in this regard are detailed below.

General Comments

Primary submission – optimal approach is to extend BEAR in its existing form to other APRA-regulated entities

4. It is acknowledged that the Government committed in 2019 to implementing all the recommendations of the Royal Commission into Misconduct in the Banking and Financial Services Industry (**Royal Commission**). These included recommendations extending the BEAR to registrable superannuation entity (**RSE**) licensees and APRA-regulated insurers.

5. The challenges for Australia, as with other countries, as we seek to maintain strong economies in the face of ongoing impacts of the pandemic, are substantial. As the Government has acknowledged in its deregulatory agenda, it is important to ensure that new regulation does not impose a disproportionate impost on business which may divert from those efforts. It is therefore reiterated that the optimal way to achieve the dual objectives of implementing the recommendations of the Royal Commission and consistency with the Prime Minister's and Government's deregulatory agenda is to extend BEAR which currently applies to authorised deposit-taking institutions (**ADIs**) in its existing form to the other types of entities regulated by APRA, rather than replacing BEAR completely with the broader FAR.

6. While similar to BEAR, FAR imposes differing, and additional, obligations compared to BEAR. This means that efficiency benefits which would arise from simply extending BEAR are not available, because:

    - FAR requires ADIs to assess and update their approaches and supporting frameworks rather than continue them; and

- newly regulated entities cannot leverage as effectively off the implementation work already done by ADIs and their advisers. Rather than those newly regulated entities being able to apply the 'tried and tested' BEAR and take guidance from that established blueprint, they will face uncertainty alongside the ADIs in applying a new regime.

7. If the BEAR is seen as having any shortcomings, it would be open, and more efficient, to make incremental changes to that regime rather than replace it with the completely new FAR.

Simpler expression

8. The Law Council welcomes the efforts which have been made to express the provisions more simply in the Bill.

Specific Comments

9. It is encouraging that some of the onerous features of the earlier exposure draft of the Bill have been lessened in a way which is consistent with the Government's deregulatory agenda, including:

    - refining the standard for taking reasonable steps so that it does not apply the unrealistic standard of 'ensuring' compliance (proposed paragraphs 22(d) and (e)); and
    - extending the time to carry out the accountable person formalities after director elections at general meetings, so that companies do not need to perform those formalities on a contingent basis for nominating candidates who are not supported by the board, just in case they are elected (proposed subsections 24(3) and (4)).

10. However, there remain features of the Bill which go beyond the requirements of BEAR and indeed the recommendations of the Royal Commission. It is submitted that those features, some of which are detailed below, would impose a significantly increased cost and regulatory burden for Australian business, without a corresponding, proportionate incremental regulatory benefit.

Section 21 – New proposed individual accountability obligation – obligation to take reasonable steps to comply with laws

11. The most onerous new aspect proposed for FAR compared to BEAR is the new accountability obligation imposed on individuals in proposed paragraph 21(1)(d) to take reasonable steps in conducting the responsibilities of their position as an accountable person to comply with a long list of laws - including all the financial services laws and any regulations, other instruments, directions or other orders made under each of them.

12. Regulated entities, of course, are obliged to comply with all those laws and regulations, not just to take reasonable steps to do so. Even for a sophisticated financial institution with significant resources at its disposal, this is an onerous task. The major banks, for example, have complex systems in place, employing specialists and engaging external legal and risk advisory expertise costing at least tens of millions of dollars each year, to identify and comply with them. This new accountability obligation will add additional costs in assisting accountable persons to demonstrate

their reasonable steps which may not necessarily result in enhanced compliance outcomes, but rather risk encouraging an incremental 'box-ticking' exercise.

13. The proposed FAR impacts a larger and more diverse group of regulated entities than BEAR and it is considered that this obligation will prove to be equally if not more challenging for non-ADI entities. The increased compliance costs associated with this obligation could threaten the sustainability of some businesses. This could potentially trigger business closures or mergers and it represents an increased barrier to new industry entrants. In the Law Council's view, this would not promote competition in the financial services sector.

14. As stated in the Law Council's earlier submission, this provision should not be included for reasons outlined above. However, if it is retained, the Law Council would welcome the requisite refined wording.

Section 32 – Self-reporting regime – practicalities and duplication

15. Proposed paragraph 32(d) imposes an obligation to notify the Regulator of non-compliance with certain obligations. The test in proposed section 21 that triggers a reporting obligation under this provision is of a 'material contravention by the accountable entity' of the specified legislation.

16. It is noted that, as had been recommended by the Royal Commission, a new breach reporting regime commenced in October 2021 for Australian financial services licence (**AFSL**) and Australian credit licence (**ACL**) holders under the Corporations Act and the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**). Establishing compliance arrangements to address the new breach-reporting obligations has involved significant cost, time and effort for licensees.

17. It is envisaged that a reportable breach of the FAR could also potentially be a reportable breach of relevant licensee obligations under either or both the Corporations Act and the Credit Act. The existing reporting regime for AFSL and ACL holders involves applying a completely different set of criteria that are multi-layered and require significant analysis and judgement.

18. The Law Council considers that introducing a separate reporting obligation under the FAR with respect to the same conduct under the same predicate legislation would unnecessarily increase costs and complexity without any demonstrable net regulatory benefit.

19. This additional complexity also increases the risk of error in deciding whether a breach is reportable and under what regime, potentially creating further breaches that need to be assessed by the Regulated Entity and the Regulator. This is contrary to the Government's stated purpose discussed above.

20. If this amendment was to proceed (which is *not* recommended), it is submitted that it would be preferable, from a practical implementation perspective, if the FAR breach reporting process could be streamlined and conformed to the existing licensee breach reporting processes referred to above, so as to avoid the need for duplicative reporting and limit the additional time and effort required to meet the FAR obligation. For example, ideally a licensee could report to the Australian Securities and Investments Commission once, using the same IT infrastructure / log in, with respect to a single set of facts that may be relevant to more than one piece of legislation.

Section 40 – register of accountable persons

21. The addition of proposed subsection 40(5), which allows the Regulator to make any of the information contained in the register of accountable persons available for public inspection on the internet, is not supported.

22. As was seen in the reporting of the Royal Commission and several subsequent investigations or proceedings, there is the real potential for inaccurate reporting. Consequentially, there is often misunderstanding in the community regarding the causes of, and individual culpability regarding, issues which arise in the financial services sphere.

23. It is submitted that publishing on the Internet details of the individuals who are accountable for different areas of a company risks imposing unfair pressure on accountable persons by individuals who may be personally disgruntled with the ADI or other regulated entities. It is not hard to envisage that disgruntled persons (like vexatious litigants) may target accountable persons personally – and unfairly - for alleged failings of the ADI or regulated entity.

Section 81 – ancillary contravention of civil penalty provisions

24. Since the effect of this provision is already captured by section 92 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), it may be preferable to include a cross-reference to that provision rather than confusing by imposing a penalty on accountable persons which effectively repeats what already exists.

25. If proposed section 81 is included, it is submitted that the penalty for an individual who is an accessory should not be the same as for a body corporate. Rather, the usual convention should apply where the individual penalty is 1/5 that of a body corporate.

Section 98 – review of operation of this Act

26. It is submitted that the original section 98, which required that the Minister review the Act in five years, should be retained. This review would provide an important avenue to test whether this level of regulation is necessary or no longer strikes the correct balance, and would allow for timely further review and amendment of the legislation if required.

Superannuation-specific comments

Contributions from the Superannuation Law Committee of the Law Council's Legal Practice Section are set out below:

Objects

27. Section 3 states that the objects will be 'to provide for a strengthened accountability framework' for accountable entities and accountable persons. This statement, and the Bill more broadly, includes no meaningful recognition of the fact that RSE licensees and their directors and senior executives are already subject to a wide array of broad-reaching accountability obligations. In the case of RSE licensees, see, for example section 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) and section 912A of the Corporations Act. And in the case of directors, see, for example, section 52A of the SIS Act and, for directors and other officers, see sections 180 – 183 of the Corporations Act.

28. This lack of recognition of pre-existing accountability obligations gives rise to a number of concerns. First, there will be considerable overlap between the FAR, on the one hand, and pre-existing legislative provisions imposing accountability obligations, on the other. The Law Council comments on this further below, under the heading 'Regulatory overlap'. Secondly, and on a related note, unless steps are taken to diminish or remove that overlap, there will, unavoidably, be considerable uncertainty regarding the true nature and extent of the universe of accountability obligations of accountable entities and accountable persons. This would be undesirable. It would also be a curious result, as it seems one of the policy objectives is to bring about a greater degree of clarity regarding responsibilities, particularly for accountable persons.

Significant related entities and connected entities

29. The rationale for having a potentially broader range of significant related entities for superannuation, compared with other industries, is unclear. For other industries an entity can only be a significant related entity if it is a *subsidiary* of the accountable entity (paragraph 12(1)(a)). For superannuation, an entity can be a significant related entity of an RSE licensee if it is a 'connected entity' (paragraph 12(3)(a)), which traces through to the Corporations Act definition of 'associated entity', and it would seem possible it could catch a shareholder in an RSE licensee, including a sponsoring employer, an employer association or a union, or even a foreign parent entity.

30. A related point is that many of the provisions concerning significant related entities proceed on the assumption that the accountable entity has at least some ability to influence the significant related entity. This assumption may be justified where a significant related entity is a subsidiary, but it does not seem accurate where a significant related entity is, say, a parent entity. If a significant related entity of an RSE licensee can be a parent entity, then the Law Council suggests that a number of the provisions that apply to the accountable entity should be adjusted to reflect the fact that the accountable entity may, in fact, have absolutely no ability to influence the significant related entity. For example, under the Bill as it currently stands, a regulator could give a direction to an accountable entity, and the direction could relate to the significant related entity (and not to the accountable entity itself), and yet the accountable entity would be under an unqualified obligation to comply with the direction (paragraphs 64(1)(d) and 66(1)(b)). In other provisions, the accountable entity's obligation in relation to a significant related entity is a reasonable steps obligation, which partially addresses the concern, but the Law Council notes that approach has not been taken consistently throughout the Bill.

31. Subparagraph 23(1)(a)(i) provides that the key personnel obligations include ensuring that the responsibilities of the accountable persons of the accountable entity *and its significant related entities* cover all parts or aspects of the operations of the accountable entity's *relevant group*. The Law Council observes that when all the defined terms are taken together, this is drafted extremely broadly, and queries whether it is intended to affect *all aspects of the group.* This concept appears to have been borrowed from the BEAR legislation and makes sense when the accountable entity is a parent company within the group (as would be case for, say, a listed entity). However, in any other case, the ability to comply with the requirement is heavily dependent on the accountable entity's ability to influence other entities within the group. For example, there could be an accountable entity which is owned by a much larger financial services entity, each with quite distinct businesses and products. It may not be possible or even appropriate for the accountable entity to alter the operations of other entities (and thereby affect their clients). For the purposes of these obligations, the Law Council suggests that there needs to be some quarantining in relation to the

parts or aspects of the broader group's business which correlates directly to the accountable entity.

32. Further as a result of the 'connected entity' concept for superannuation, the Law Council queries whether it is sufficiently clear how the regime applies when an accountable entity has related entities in other jurisdictions outside Australia. For example, is the FAR intended to apply to the foreign executive of a foreign company, which company is the ultimate owner of a superannuation fund trustee? Although subsection 23(3) deals with situations where the accountable entity is a foreign accountable entity, the situation of the *connected entity* being a foreign entity does not seem to be dealt with. The Law Council suggests that this matter should be clarified and, if it is intended to apply to foreign connected entities, then something should be provided to deal with the extent of the connection that it is necessary to have with the operations of the Australian accountable entity.

33. Subsections 12(3) and 12(4) set out a number of criteria that go towards determining whether a body corporate is a significant related entity. These criteria include if the body corporate's business or activities has (or is likely to have) a material or substantial effect on the accountable entity, or the business or activities of the accountable entity. The Law Council submits that this particular criterion is extremely broad and open to varying interpretations in its application.

34. At one extreme, it is potentially broad enough to capture passive investment vehicles established by the RSE licensee solely for the purpose of holding a particular asset or assets on behalf of the RSE licensee. These 'investment vehicle entities' do not generally have decision making power nor have a substantial operational impact on the RSE licensee outside of holding the asset - rather decisions as to whether to invest or divest in those assets are generally made by the board, an investment committee or the staff of the RSE licensee. The Law Council submits that capturing these entities adds a significant and unnecessary administrative and compliance burden on the RSE licensee (particularly if it has multiple investment vehicles) given that the overarching intention of the FAR is to drive better decision making.

Regulatory overlap

35. There are numerous aspects of the Bill where its provisions will overlap with existing provisions of the SIS Act. This is not limited to the overlap between the obligations under the FAR and the covenants imposed on RSE licensees and their directors under section 52 and 52A of the SIS Act. Instead, the overlap extends to a range of other matters, including regulatory investigations, giving directions and disqualification. However, the Bill does not include any amendments to the SIS Act provisions (or for that matter to the Corporations Act provisions) to remove the overlap. The Law Council suggests that this matter be dealt with in the Bill to avoid unnecessary overlap.

36. As a related specific example (and further to the comments made earlier in this submission), paragraph 32(d) sets out a breach notification obligation for accountable entities, and this would appear to add to (and overlap with) existing significant breach reporting obligations in the SIS Act and the Corporations Act.

37. Similarly, an action by an accountable entity or an accountable person which constitutes a breach under the FAR may also constitute a breach of the general conduct provisions under the SIS Act (for example, the covenant in paragraph 52(2)(b) to act with care, skill and diligence), and possibly also under the Corporations Act (for example, the duty in paragraph 912A(1)(a) as licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently,

honestly and fairly). The Law Council submits that there is significant regulatory overlap and the potential for 'triple jeopardy' if the one action could lead to breach of the FAR, the SIS Act and the Corporations Act, each with their own penalties.

38. Further, the Law Council notes that paragraph 21(1)(d) contains a broad list of specified statutes in relation to which an accountable person must take reasonable steps to prevent matters from arising that would (or might) result in a material contravention by the accountable entity. For an accountable person within the senior management of a superannuation fund, these statutes mean: the FAR, the *Financial Sector (Collection of Data) Act 2001* (Cth), financial services law as defined in section 761A of the Corporations Act, the SIS Act and any regulations, instruments, directions and orders made under those laws. The Law Council observes that this is a very comprehensive list of legislation, each of which on its own is extremely extensive in its type and range of provisions. Apart from the generally onerous nature of this requirement, we note in addition that it is not made clear that the accountable person need only be taking reasonable steps to prevent matters arising to the extent that they relate to that person's role. The Law Council submits that the breadth and onerous nature of this obligation be re-examined, and at the very least we submit that the responsibility should be confined to that which correlates directly with the accountable person's responsibilities.

Fund mergers

39. The superannuation industry is undergoing an almost continual process of consolidation, which is likely to accelerate with the new APRA performance assessments which have recently commenced under the 'Your Future, Your Super' reforms. In anticipation of the commencement of application of the FAR to superannuation funds during 2023, and thinking about funds which may at that time be in the process of merging, the Law Council submits that there should be a process by which the accountable entity (and its accountable persons) should be 'excused' from the application of the regime – perhaps on application to APRA. This would ensure that the costs of anticipating and complying with the regime ahead of its likely commencement during 2023 do not result in a waste of the fund's resources (member money) in circumstances where the fund is expected to cease to exist within say 12 months of the commencement of the FAR. The Law Council suggests that a transitional disapplication of the regime should be specified in the legislation for this purpose.