

1 November 2017

Mr Mark Fitt  
Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Fitt

## **Inquiry into the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 [Provisions]**

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.

In our submission to Treasury on the exposure draft bill and explanatory memorandum dated 29 September, we commented on the very limited seven-day period provided for consultation. We consider that such a short period of consultation for this important piece of legislation risks serious unintended consequences. We note that the Government has again provided very little time for stakeholders to consider the legislation and engage in consultation and we reiterate the comments made in our previous submission on this point.

### **Director liabilities under the BEAR**

Governance Institute has previously recommended 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 note with disappointment that the draft bill does not address this issue.

### **Meaning of accountable person**

We commend the Government for clarifying in the draft bill and explanatory memorandum that the definition of 'accountable person' is limited to board members with oversight over the ADI and senior executives with responsibility for management or control of significant or substantial parts or aspects of the ADI group. We consider that the definition of 'accountable person' contained in the previous draft would have had the unintended consequence of capturing hundreds of directors on the boards of subsidiaries of ADI groups who were 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**

Governance Institute notes that APRA's powers concerning disqualification of accountable persons are now subject to a merits review by the Administrative Appeals Tribunal.

While we still question why APRA requires the power of immediate removal and disqualification of accountable persons when it already has the power to apply to the court for such an order, we commend the Government for providing for a merits review of such a decision. We agree with the Government's statement contained in the explanatory memorandum that 'providing merits review ensures transparency around the decision making process.' We also consider that the provision of a merits review is an important issue of natural justice.

### **Implementing accountability requirements**

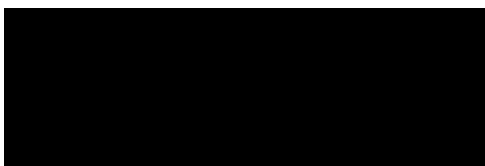
Governance Institute notes that the bill provides that the taking of 'reasonable steps' to meet accountability requirements will include, amongst other things, appropriate governance, control and risk management and safeguards against inappropriate delegations of responsibility. We also note that transitional provisions will apply to give APRA the power to determine by legislative instrument how an ADI may meet its requirements to provide accountability mapping and statements during the first 18 months of the BEAR.

We consider that the Government's efforts to provide additional guidance on accountability mapping and statements would be greatly assisted by reference to our publication *Guidelines: Whole-of-organisation governance*. The guidelines provide a principles-based approach to whole-of-organisation governance and explains how authority cascades from the board to the CEO to the executive management team and throughout the organisation. The guidelines provide a framework to enable an organisation to articulate the appropriate delegation of authority from board to management and provide for clear and effective accountability.

We attach a link to our guidance [here](#) and have also attached as a separate pdf.

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

Yours sincerely



Steven Burrell  
Chief Executive Officer

**Attachment: Guidelines: Whole-of-organisation governance**