

2 November 2017

Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Sir / Madam

Inquiry into Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Thank you for the opportunity to provide a submission to the Senate Economics Legislation Committee inquiry relating to the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (the **Bill**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 41,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD recognises the critical role that Authorised Deposit-taking Institutions (**ADIs**) play in the Australian financial system and the broader economy. Good governance of ADIs is essential to good consumer outcomes and financial stability. The AICD acknowledges the aim of the Banking Executive Accountability Regime (**BEAR**). An effective responsibility and accountability framework for directors and senior executives in ADIs is important. We support formal accountability mapping as a positive contributor to good governance.

The AICD also welcomes the significant amendments made since the Exposure Draft. In particular, we note the addition of a merits review for the Australian Prudential Regulation Authority's (**APRA**) disqualification powers, the improved definition of 'reasonable steps' and the delineation between the role of non-executive directors and executives of an ADI. These were significant concerns for the AICD, and we acknowledge and welcome the improvements made in the Bill.

However, we continue to have reservations about the design and scope of the BEAR. For example, legislating remuneration structures for senior executives in private companies is a significant change to Australia's corporate environment. The AICD would prefer that boards and ADIs make decisions on remuneration structures appropriate to their organisation's needs and strategies, working within clear prudential standards on risk and accountability.

Against this backdrop, the AICD makes the following recommendations to improve the Bill:

- We recommend that the Bill better define the conduct to which the BEAR will apply, to make clear that it is intended to capture serious matters that are systemic and prudential in nature. While this intent is set out in the Explanatory Memorandum (paragraph 1.25) the Bill instead uses the much broader language of 'prudential standing' and 'prudential reputation', which is ambiguous and likely to lead to protracted court disputes.
- We recommend that concepts such as 'open', 'integrity', 'cooperative' and 'constructive' be removed from the Bill, or better defined. Some of the obligations on ADIs and accountable persons, such as the duty to deal with APRA 'openly', 'cooperatively', and with 'integrity', are highly subjective and open to interpretation. In the AICD's view, it

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would be difficult for a person or a Court to determine whether a person has acted openly without forming a subjective view of the person's intentions, which will ultimately frustrate BEAR's aim.

- We recommend that the BEAR only target misconduct that cannot be appropriately dealt with under existing laws and regulatory powers, or at the very least, include equivalent defence and relief mechanisms which are available under equivalent laws. In relation to the obligations imposed on directors and officers (as accountable persons), the AICD is concerned that the BEAR imposes obligations on accountable persons that overlap with duties that already apply to directors and officers through the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), particularly the duty to act 'honestly', and with 'care and diligence'. However, no equivalent defence and relief mechanisms have been included.
- We recommend that indemnity and insurance law principles be applied in the same way to the BEAR as they do for other executive and company conduct. The current drafting is a departure from accepted principles and could lead to inconsistent outcomes in respect of the same conduct.

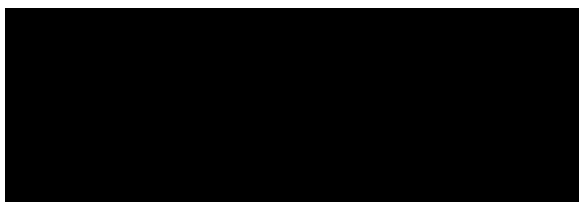
We also remain concerned that the BEAR risks blurring the role and accountabilities of APRA and the Australian Securities and Investments Commission (**ASIC**). This risk is particularly acute if the Bill is not amended to more clearly define the BEAR's application to conduct that is both 'systemic and prudential in nature' (see our recommendations above).

Given our continuing concerns, the AICD welcomes the three-year review introduced for s37KC of the Bill. We recommend that it be extended to the Bill in its entirety. This is particularly important given the limited opportunity for consultation on the BEAR to date, to test the effectiveness of the regime against the government's policy intent.

We reiterate our view that the BEAR's implementation date should be deferred, so that it commences on 1 January 2019. This will enable all ADIs to prepare their affairs to be in full compliance with the BEAR, and enable APRA to provide the industry with sufficient guidance.

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on [REDACTED].

Yours sincerely



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