

INQUIRY INTO THE TREASURY LAWS AMENDMENT (BANKING EXECUTIVE ACCOUNTABILITY AND RELATED MEASURES) BILL 2017

SUBMISSION TO SENATE ECONOMICS
LEGISLATION COMMITTEE

1 November 2017

EXECUTIVE SUMMARY

1. ANZ thanks the Senate Economics Legislation Committee for the opportunity to comment on the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (**Bill**) that will establish the Banking Executive Accountability Regime (**Regime**).
2. 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 design of the Regime and the implementation and interpretation of certain provisions.
4. Our primary observation concerns the accountability obligations that would apply to accountable persons under section 37CA.
5. As drafted, two of these three obligations (sections 37CA(1)(a)&(b)) are expressed absolutely and could be breached regardless of whether the person took reasonable steps to meet the relevant obligation. In contrast, the third obligation concerning accountable persons (section 37CA(1)(c)), together with all of the obligations concerning ADIs, would be satisfied where the person or the ADI could demonstrate that they have taken reasonable steps to meet the obligation.
6. The concept of reasonable steps is important to give clarity to accountable persons that management decisions made in good faith and through an appropriate process (comprising reasonable steps) will not breach the Regime due to an unintended poor outcome.
7. We note that the Explanatory Memorandum (paragraph 1.116) suggests that accountable persons can meet their accountability obligations by demonstrating that they have taken reasonable steps. However, we do not think that sections 37CA(1)(a) and (b) of the Bill currently reflect this.
8. We would ask the Committee to consider recommending that accountable persons can meet all of their accountability obligations by taking reasonable steps.

COMMENTS ON SPECIFIC SECTIONS

SECTIONS 37AA AND 37BC

1. Sections 37AA and 37BC allow the Australian Prudential Regulation Authority (**APRA**) to give a written notice to an authorised deposit-taking institution (**ADI**) or accountable person (respectively) that it or the person need not comply with an obligation under section 37 or section 37B (as applicable) if complying would contravene the law of a foreign country.
2. As a particular conflict of laws may affect more than one ADI or accountable person, there may be utility in amending sections 37AA and 37BC to allow APRA to provide the dispensation from compliance with a section 37 or section 37B obligation to a class of ADIs or accountable persons, rather than only a single ADI or accountable person.
3. This would avoid the situation of APRA needing to give multiple notices that all addressed the same conflict of laws and would broadly replicate the class order mechanisms in the *Corporations Act 2001* (Cth) (see, for example, section 926A of that act).
4. It may also be useful if APRA were to publish any dispensations granted so that all ADIs are aware of APRA's disposition on particular conflicts of laws. Such publications need not disclose the identity of the specific ADI or person in respect of which the dispensation was granted.
5. We also note that section 37AA should also empower APRA to provide a dispensation where it is the application of a foreign law to a subsidiary that creates the conflict. This would cover the situation where the ADI would otherwise be required to ensure its subsidiary acts in a way that would be contrary to a foreign law (eg by section 37C(e)).

SECTION 37C

6. Section 37C(c) obliges ADIs to take reasonable steps to conduct their business to prevent matters arising that would adversely affect the ADI's prudential standing or prudential reputation.
7. As drafted, this section could be breached if the prudential standing or prudential reputation of an ADI were adversely affected to any degree (eg a minor issue without consumer detriment that becomes public).
8. The Committee may like to consider whether the phrase 'and materially' should be inserted after 'adversely' to clarify that the obligation will not be breached by minor diminutions of an ADI's prudential standing or prudential reputation.

SECTION 37CA

Reasonable steps

9. Sections 37CA(1)(a) & (b) impose accountability obligations on accountable persons that are expressed without reference to whether the person has taken reasonable steps to meet the behavioural standard. Thus, an accountable person could breach the obligation to act with honesty and integrity regardless of whether they have taken reasonable steps to so act.
10. In contrast, section 37C states that ADIs need 'to take reasonable steps' to meet the various accountability obligations. This means that ADIs will not breach their obligation to, for example, conduct business with honesty and integrity if they take reasonable steps to do so.
11. Similarly, and in contradistinction to sections 37CA(1)(a) & (b), accountable persons would only breach section 37CA(1)(c) where they fail to take reasonable steps to conduct their responsibilities to prevent matters from arising that would adversely affect the prudential standing or prudential reputation of the ADI.
12. If accountable persons cannot rely on the reasonable steps test for all of their accountability obligations, there is a risk that decision making within ADIs becomes excessively cautious. Accountable persons should be able to make good faith management decisions without the risk of breaching their accountability obligations. This could be achieved by making clear that all accountability obligations can be met by taking reasonable steps.
13. We note that the Explanatory Memorandum states, at paragraph 1.116, that '[w]hen an accountable person can show he or she has taken reasonable steps to meet his or her accountability obligations then he or she would not be in breach of those obligations'. We would agree with the sentiment of this statement. However, we do not think that the current drafting of the Bill reflects it.
14. We would ask the Committee to recommend the reasonable steps test clearly apply to all three of the accountability obligations concerning accountable persons.

Joint accountability

15. Section 37CA(2) provides that if accountable persons have the same responsibility that gave rise to their designation as an accountable person, they have the accountability obligations jointly in relation to that responsibility.

16. This section may operate to mean that accountable persons will be accountable for the actions of another regardless of the competency with which they approach their own role. It may be more appropriate to introduce a concept into this section that allows the behaviour of each individual accountable person to be recognised in determining their culpability.

SECTION 37E

17. The definition of 'remuneration' in section 37E(3) may benefit from additional clarity concerning whether it is intended to capture amounts paid to accountable persons that are collateral to their salary.
18. For example, the Explanatory Memorandum could clarify whether amounts such as relocation costs that are paid when an individual joins the ADI or benefits that are paid to accountable persons due to the location of their employment (eg school fees when posted outside of Australia) are to be included in the definition of 'remuneration'.

SECTION 37EC

19. We note that section 37EC could be used by APRA to approve a remuneration deferral period of less than four years in situations where an ADI is buying out the remuneration of a new hire that has accrued at their prior ADI employer. This is welcomed.
20. However, we note that such recruitment processes often occur over short timeframes. Needing to secure APRA's approval for a truncated deferral period may introduce delays to recruitment processes. It may be preferable if the Bill simply provided that deferral periods run from the point when the accountable person first becomes entitled to the remuneration at their original ADI employer rather than restarting when they shift ADI employers.

SECTION 37JC

21. Section 37JC provides that either an ADI or a subsidiary of an ADI will breach the section if it allows a disqualified person to act as an accountable person in the ADI or the subsidiary.
22. This provision places a direct obligation and risk of penalty on subsidiaries. All other provisions of the Regime concern ADIs. The provision would remain effective if it were to concern ADIs only. Thus, the section could provide that the ADI breaches the section if it allows a disqualified person to act as an accountable person in any of its subsidiaries.

SECTION 62AA

23. The regime makes clear that evidence is not admissible in a proceeding if it discloses a matter in respect of which a person could claim legal professional privilege (section

61H(5)) and allows lawyers to refuse to comply with requests for information, books, accounts or documents on the grounds of legal professional privilege (section 62AA).

24. It would be appropriate for the Bill to include a provision like section 62AA concerning non-lawyers (eg ADIs and accountable persons) to highlight that they may also refuse to comply with a request for information, books, accounts or documents on the grounds of legal professional privilege.

ENDS