

Australia's Banking Executive Accountability Regime: A Dangerous Bill

**IN
SHORT**

The Situation: On 22 September 2017, the Australian Government released a draft bill for the introduction of a Banking Executive Accountability Regime ("Proposed BEAR") allowing only five working days for submissions.

The Result: The Proposed BEAR will give the Australian Prudential Regulation Authority ("APRA") extensive enforcement powers of the kind it has never exercised previously, and it will materially affect the relationship and dynamic between APRA and authorised deposit-taking institutions ("ADIs").

The Outcome: The Government's proposal to implement the Proposed BEAR within nine months will not achieve sensible, balanced or fair regulation of the banking industry.

The Australian Government, on 22 September 2017, introduced a draft bill calling for the introduction of the Proposed BEAR, which would grant APRA extensive enforcement powers over the regulation of Australia's banking industry. This *Commentary* summarises four areas of concern with the Proposed BEAR.

Disqualification Powers of APRA

APRA will be granted the power to disqualify—on seven days' notice, without court order and without giving reasons—any accountable person that APRA determines has failed to comply with his or her obligations under the Proposed BEAR.

Whilst APRA is required to give the person and the relevant ADI an opportunity to make submissions before the disqualification, APRA is not required to give reasons for the proposed disqualification or to allow a reasonable time for such submissions to be made.

Further, once a submission is received, APRA is able to "discuss any matter contained in the submission with such persons as it considers appropriate for the purpose of assessing the truth of the matter". APRA is entirely unconstrained as to how it conducts this process and could seek to require accountable persons (of the relevant ADI or of other ADIs) to engage in such discussions on the basis that one of their accountability obligations is to deal with APRA in an "open, constructive and co-operative way" (which obligation is discussed further below).

There is no avenue for a disqualified person to make a merits-based appeal. The only appeal avenue available is to seek a review of APRA's decision to disqualify on the limited grounds available in judicial review.

APRA's proposed disqualification powers allow for the arbitrary exercise of power in contravention of the rule of law. At the least, the provisions relating to the exercise of APRA's proposed disqualification powers are grossly deficient from the perspective of natural justice.

APRA's proposed disqualification powers allow for the arbitrary exercise of power in contravention of the rule of law. At the



least, the provisions relating to the exercise of APRA's proposed disqualification powers are grossly deficient from the perspective of natural justice.



Examination Powers of APRA

In addition to the power to "discuss" matters with people for the purposes of disqualification, the draft bill proposes to give APRA examination powers which will not be limited to the Proposed BEAR. ADIs will need to be prepared for APRA to use its examination powers not only in relation to specific issues in respect of the Proposed BEAR, but also more generally as an enforcement regulator in relation to prudential matters.

The draft bill includes a provision which would permit APRA to provide copies of transcripts of examinations to potential private litigants (one may ask who might fill that description), which may see an increase in class actions or vexatious or mischievous claims against ADIs in relation to prudential matters and in relation to issues that are the subject of the Proposed BEAR in particular.

Legal Professional Privilege

The Proposed BEAR's accountability obligations require ADIs and accountable persons to deal with APRA in an "open, constructive and co-operative way".

APRA could seek to argue that this obligation abrogates legal professional privilege (despite High Court authority that would weigh against that argument).

This issue is of particular concern as the Proposed BEAR does not expressly provide that persons with responsibility for the legal function of an ADI, such as the general counsel, are excluded from the definition of "accountable persons".

Any doubt about the application of the Proposed BEAR to the person with responsibility for the legal function creates an untenable predicament for that person insofar as the Proposed BEAR may apply to them and they are potentially required to deal with APRA in an "open" way.

Indemnification and Insurance

The Proposed BEAR will prohibit ADIs (and their related bodies corporate) from indemnifying, or paying a premium for a contract insuring, accountable persons against the "consequences" of breaching their obligations.

This prohibition appears to go beyond the well-understood and applied prohibitions under the Corporations Act against a company indemnifying, or paying a premium for a contract insuring, its officers.

This is particularly the case insofar as the prohibition in the Proposed BEAR relates to the "consequences" of breaching obligations which, other than a carve-out for legal costs, are at large and arguably would cover collateral consequences (such as subsequent civil actions, reputational damage and loss of earning capacity).

FOUR KEY TAKEAWAYS

1. APRA will have the power to disqualify—on seven days' notice, without court order and without giving reasons—any accountable person they determine has failed to comply with obligations under the Proposed BEAR. There is no avenue for a disqualified person to make a merits-based appeal.
2. The draft bill proposes to give APRA examination powers which will not be limited to the Proposed BEAR, and includes a provision which would permit APRA to provide copies of transcripts of examinations to potential private litigants.
3. The Proposed BEAR's accountability obligations require ADIs

CONTACTS



Tim L'Estrange
Sydney



Mark B. Crean
Sydney



John Emmerig
Sydney

and accountable persons to deal with APRA in an "open, constructive and co-operative way", and APRA could potentially argue that this obligation abrogates legal professional privilege.

4. The Proposed BEAR will prohibit ADIs (and their related bodies corporate) from indemnifying, or paying a premium for a contract insuring, accountable persons against the "consequences" of breaching their obligations.



Daniel P. Moloney
Sydney

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[Australian Court of Appeal Approves Use of "Holding" Deed of Company Arrangement](#)



[Judicial Guidance about "Perfection by Possession" under Australia's Personal Property Securities Act](#)



[The Fed's Small BHC Policy Statement—Regulatory Relief for Bank Growth and Acquisitions](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a legal institution with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2017 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113