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## **Submission to the Treasury in relation to the Banking Executive Accountability Regime**

The Westpac Group (**Westpac**) is pleased to provide a submission in response to the Consultation Paper released in July 2017 (**Consultation Paper**) in relation to the Banking Executive Accountability Regime (the **Regime**).

### **Executive summary**

Westpac is supportive of the rationale for the Regime. Clear and transparent accountability for organisations and individuals is an essential part of good corporate governance. The standards set by the Regime will help provide greater stakeholder confidence in how ADIs and individuals make decisions and respond when things go wrong.

In seeking to ensure that the Regime is as effective as possible and does not result in unintended consequences, we believe that a number of core corporate governance principles should be applied when designing and implementing the Regime. These principles include the need to ensure:

- procedural fairness for individuals and ADIs;
- existing clear distinctions between the roles and responsibilities of non-executive directors and management are maintained;
- clarity of standards, to minimise duplication and the risk of confusion; and
- an effective regime that results in governance benefits without creating undue complexity.

Applying these principles, we have identified a number of issues set out in this response that we believe require further consideration. Overall, we believe that the implementation of the Regime, working alongside Australia's existing broad governance requirements and the appropriate application of fines or other sanctions, will play an important role in rebuilding trust and confidence in the financial sector.

While recognising the importance of implementing the Regime in a timely manner, Westpac considers that Treasury, APRA and ADIs should have appropriate time to develop and consider the new legislation, particularly due to the relatively short consultation period offered in relation to the Consultation Paper. A considered review of the exposure draft of the legislation will be important to assess the legislation against the overall system of regulation for ADIs, thereby avoiding unintended consequences such as duplication, differing and potentially conflicting standards and resulting confusion for ADIs, non-executive directors and executives. Sufficient time should also be provided for APRA to propose, consult and make changes to existing rules and prudential standards to ensure clarity, certainty and practicality to implement.

Similarly, other regulators, including those who oversee responsible manager-type regimes such as ASIC and AUSTRAC, should also be engaged to consider impacts or necessary changes to regulatory guidance and requirements, thereby mitigating the risk of complexity and potential double jeopardy (i.e. being penalised twice for the same offence).

In terms of implementation of the Regime, Westpac considers that a period of 18 months following the enactment of the legislation and finalisation of relevant prudential standards and guidance would be required in order to ensure that organisations have sufficient time to prepare for and comply with the new requirements.

Westpac would welcome the opportunity to participate in further consultations or discussions as the Regime is developed.

## Recommendations

A summary of Westpac response and recommendations is set out below

Institutions to be covered by the Regime	All APRA regulated entities	Westpac recommends that the Regime should apply to APRA-regulated non-ADIs (such as standalone insurance and superannuation companies that are not ADIs) to ensure that consistent governance standards apply across the regulated financial services sector.
	Subsidiaries of an ADI or ADI group	<p>Westpac recommends that the requirements of the Regime should apply to the ADI and not to the ADI-Group subsidiaries (of which there may be hundreds across a large ADI-Group), given the existing Group-wide governance for ADI subsidiaries, and Group-wide remit of the Regime’s proposed obligations for the ADI itself and ADI Accountable Persons. Application of the Regime to all ADI subsidiaries would result in significant administrative overhead, without any corresponding governance benefit.</p> <p>In the event that the Regime is applied to subsidiaries of an ADI, Westpac recommends that the Regime should only apply to those subsidiaries of the ADI that are APRA regulated, and where the organisational structure of the Group, split of key responsibilities and authorities between the ADI and the regulated subsidiary board and management, supports a need to extend the regulatory regime.</p>
	Foreign subsidiaries	Westpac recommends that foreign subsidiaries of ADIs that meet particular conditions as set out in our detailed response below, should be excluded from the application of the Regime.
	Prescribed element	<p>Westpac is of the view that the prescribed functions as set out in Table 1 of the Consultation Paper sufficiently capture the functions which should be accountable under the Regime at the ADI level, other than in respect of non-executive directors (in the role of Chair or Chair of a Committee) who should be excluded from the application of the Regime (please see our comments below).</p> <p>We would however suggest that APRA be given discretion to amend the list set out in Table 1 in consultation with a particular ADI, to a give a level of flexibility to deal with both diverse and changing organisational structures and roles.</p>
	Principles-based element	Westpac agrees with including a principles-based assessment in the Regime so that the individuals to be covered would include those who have significant influence over the conduct and

		behaviour of the ADI (at a Group level) and whose actions could pose risks to the business and its customers, subject to our comments below on their application to individuals operating within subsidiaries and businesses of the ADI-Group more broadly.
	Accountable persons in ADI subsidiaries and businesses	<p>In Westpac's view, accountable persons under the Regime should be the most senior accountable individuals within the ADI-Group who are responsible for a particular prescribed function or principles-based function and not the individuals that report into these senior executives across the ADI-Group. This will provide the most effective way to meet the policy intent of the Regime, being to ensure clear accountability but not to 'cast the net too widely'.</p> <p>In order to implement the Regime, the ADI will need to consider appropriate governance to support its accountable persons in meeting the requirements of the Regime, which will itself require clear responsibilities and accountability for other managers in the organisation. It is important that the ADI has the opportunity to do this in a way that is appropriate to the size, business mix and complexity of the ADI, in compliance with CPS 220. Including additional roles into the 'Accountable Persons' group has the potential to create duplication of governance without a clear benefit in terms of the policy goals of the Regime.</p>
	Non-executive directors	Recognising the existing significant duties already imposed on directors, the well-established governance and legal principles relating to director liability and the existing ability for private and public enforcement of those duties under Australian law, Westpac is of the view that non-executive directors should not fall within the scope of the Regime. Maintaining the existing distinction between the role of non-executive directors and management is critical for the operation and effectiveness of the Regime.
Expectations of ADIs and accountable persons under the Regime	Overall	<p>Westpac is of the view that the expectations for both ADIs and accountable persons are sufficiently broad as drafted, and that there are no further behaviours which should be included.</p> <p>Westpac recommends that the expectations on accountable persons be included within existing accountability frameworks that already exist such as the fit and proper framework in CPS 520 or CPS 220, to ensure existing principles can continue to be relied upon and there is no duplication.</p>
	Open and co-operative with APRA	Westpac supports the principle that ADIs should deal with APRA in an open and transparent way and that accountable individuals should be open and co-operative with APRA. In defining these principles we recommend that additional clarity is provided as to the regulatory expectations for compliance, recognising the subjective nature of the requirements and that ADIs and APRA will

		have established engagement models which ought to be preserved and utilised where possible.
	Reasonable steps	Westpac supports the principle that an ADI and accountable persons should take reasonable steps to comply with the specific obligations that will be imposed on them under the Regime. We recommend that APRA provide clear guidance (or other appropriate commentary) on their expectations as to how 'reasonable steps' will be interpreted.
	Non-executive directors	<p>As noted above, Westpac is of the view that non-executive directors should not fall within the scope of the Regime. We acknowledge the fact that the Board is ultimately responsible for the sound and prudent management of the Group, however the scope of the Regime should recognise that this duty is discharged through the oversight of the effectiveness of management's implementation of the policies, processes and procedures that are put in place to meet the ADI's prudential requirements.</p> <p>In the event that non-executive directors are included within the scope of the Regime (in the role of Chair or Chair of a Committee), Westpac recommends that the standards for non-executive directors be specifically drafted to take into account the nature of the role of a non-executive director noted above. Extending the proposed standards (some of which reflect a distinct managerial focus) to non-executive directors blurs the existing distinction between the roles of the board and management.</p> <p>For example, in respect of the accountable person's duty to take reasonable steps to <i>ensure</i> that the activities or business of the ADI are controlled effectively and comply with regulatory requirements and standards (which is a duty that is included in the Regime), insofar as this applied to non-executive directors it should be interpreted having regard to the fact that their role is to ensure the appropriate oversight and challenge of management, rather than assuming the responsibilities of an executive role. Where the word 'ensure' is used, Westpac would also like confirmation that it will be interpreted in a manner consistent with Prudential Standard APS 001 which states that "when used in relation to a responsibility of the Board, ["ensure"] means to take all reasonable steps and make all reasonable enquiries as are appropriate for a board so that the board can determine, to the best of its knowledge, that the stated matter has been properly addressed".</p>
Remuneration	Definition of variable remuneration	Westpac recommends that a clear definition of variable remuneration be provided as this is critical for ADIs to effectively assess and comply with the remuneration aspects of the Regime.

	Deferral of variable remuneration	Overall Westpac supports the deferral of variable remuneration, subject to the definition of variable remuneration being clear and a reasonable period of time being provided for transitional arrangements to be implemented.
	Expansion of existing regulatory powers	<p>Westpac supports the ability for APRA to oversee and set governance principles for ADIs in relation to their remuneration policies (as already exists in CPS 510).</p> <p>Westpac supports APRA having the power to review an ADI's remuneration policy and provide feedback where it does not meet the requirements of the Regime. However, similar to the position with the roles of non-executive directors and management, the distinct roles of the regulator and the ADI should remain clear. Accordingly, the draft legislation and supporting prudential standards should specify that the implementation of governance principles and accountability for the effective management of an ADI's remuneration policy, should remain with the ADI.</p> <p>We are of the view that APRA's intervention powers should not be expanded in relation to the determination of individual remuneration outcomes as this is inconsistent with a principles based regulatory framework and the necessary separation of the roles of the regulator and the ADIs.</p>
Implementation and Transitional Issues	Registration	Westpac supports the registration process with APRA, subject to clarity being given as to how this will operate in conjunction with the existing Fit and Proper requirements set out in CPS/SPS 520.
	Accountability mapping	<p>Westpac supports the preparation of accountability maps to better identify and document the responsibilities of senior executives. Westpac recommends that a prescribed minimum set of allocated responsibilities should be included and that aside from the minimum set, individual organisations should have discretion to identify the additional list of responsibilities on the accountability maps which would be most useful to them.</p> <p>Westpac recommends that a reasonable period of time should be provided to allow for an update of accountability statements and maps following the departure of an accountable person or a business restructure.</p>
	Removal and disqualification	Westpac considers that it would be appropriate for any removal and disqualification power to be contained in legislation, for example alongside the existing disqualification powers in Part II Division 3 of the Banking Act 1959 (Cth), rather than within the prudential standards.

		<p>Given the punitive nature of these powers, consistent application of the removal and disqualification powers is essential in providing individuals with due process, which will help underpin confidence in the Regime. Therefore while Westpac is broadly supportive of an appropriately structured disqualification regime, we strongly recommend the inclusion of a Court-based appeal process (that considers whether it is justified for the disqualification to occur and is not merely an appeal on the basis of error of law) in the disqualification regime (to supplement the appeals process in the Administrative Appeals Tribunal). The use of the word 'justified' would be aligned with the current section 21 of the Banking Act 1959 (Cth). Alignment with the existing provisions of the Banking Act would ensure existing principles would continue to apply as section 21 sets out the factors that the Court may take into account when deciding whether or not the disqualification is justified.</p> <p>Westpac recommends that limitations on insurance coverage for removal and/or disqualification of accountable persons be aligned with the restrictions set out in section 199B of the Corporations Act 2001 (Cth).</p>
	Civil penalties	<p>While Westpac is supportive of the imposition of civil penalties, given the proposed maximum fine, we recommend that the application of a fine should apply to a material breach of the ADI duties determined by reference to specific materiality criteria and should only be used in 'exceptional circumstances'. An example of this might be where the breach in question has adversely impacted on the stability of the financial system.</p> <p>Westpac is of the view that it is appropriate for APRA's fining power to be triggered by the material failure of an ADI to meet its expectations under the Regime and that, given the broad nature of this power, it is not necessary to create a specific ability to fine ADIs for the failure to implement a specific aspect of the Regime, for example, the failure to hold accountable persons to account under the Regime. This proposed additional power is duplicative and risks a disproportionate emphasis that could have the unintended consequence of affecting the overall balanced application of the Regime by APRA and the nature of its implementation by ADIs. We believe that a balanced application of the entire Regime is essential from a procedural fairness perspective for individuals, as well as for the sound running and management of the ADI.</p> <p>Westpac is of the view that the proposed definition of large ADIs is appropriate.</p>
	Transition period	<p>Westpac proposes a minimum transition period of 18 months after the passing of the legislation and finalisation of relevant prudential standards and guidance for the implementation of the</p>

		Regime.
	Costs	Significant costs will be incurred by ADIs in implementing and embedding the Regime within their organisation. It is difficult to quantify the magnitude of the costs at this stage as further clarification is required regarding particular aspects of the Regime as set out in this submission before the practicalities of implementation can be assessed.



## Detailed rationale for recommendations

### Institutions to be covered by the Regime

#### *APRA Regulated Entities*

The Consultation Paper provides that the scope of the Regime is intended to apply only in relation to a business that is an ADI or an ADI subsidiary, but will not apply to other APRA-regulated entities (for example, superannuation or insurance companies that are not subsidiaries of an ADI). While we recognise the important role of ADIs within the Australian community, limiting the scope of the Regime to ADIs only has the potential to lead to uneven standards of governance being applied across entities regulated by APRA, which in turn may impact customer and other outcomes. Without alignment, non-ADI APRA-regulated entities that operate superannuation and insurance businesses would be subject to significantly lower governance and behavioural expectations compared to those applied to their ADI competitors (that provide the same services to Australian consumers and businesses). Care should also be taken when implementing the Regime to ensure that the outcomes of the Regime are achieved without causing a competitive disadvantage between ADIs and non-ADIs that compete against each other in areas outside of banking.

Anticipating that the new conduct requirements will reflect a clear and appropriate standard of conduct for ADIs, we are of the view that extending the Regime to all APRA-regulated entities would offer positive stakeholder benefits more broadly across the industry and align with APRA's stated objectives of financial safety and efficiency, competition and competitive neutrality, thereby delivering a better outcome for the financial system as a whole.

We note also that consultation papers were released by both the Financial Conduct Authority and PRA in the UK on 26 July 2017 which seek to extend the implementation of the UK Senior Managers & Certification Regime to insurers.

#### *APRA-regulated subsidiaries*

Westpac is of the view that the Regime should apply to the ADI and not to all of ADI-Group subsidiaries<sup>1</sup>. Within an ADI-Group context, subsidiaries operate within the Group's Subsidiary Governance Framework and overall Risk Management Strategy. Amongst other things, this enables the ADI to meet its prudential obligations, rather than the subsidiaries operating in an autonomous and isolated manner with no input from the ADI. In addition, subject to these governance requirements and specific licensing obligations, the businesses of an ADI operate by accessing expertise, resources and services from the broader ADI-Group, providing further support to our position that the Regime should apply to the ADI and not the individual ADI-Group subsidiaries.

The Regime itself contemplates a Group-wide remit for ADI accountable persons, and Group-wide governance will be required to enable the ADI to meet its obligations. Extending the Regime to all ADI-Group subsidiaries would result in significant administrative overhead, cost and duplication without any corresponding governance benefit.

In the event that ADI subsidiaries are included within the scope of the Regime, greater clarity is recommended in the draft legislation to ensure that the Regime operates as intended within an ADI-Group context. Large ADIs, like all other major corporate entities, maintain significant

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<sup>1</sup> Westpac currently has 194 consolidated controlled subsidiaries.

numbers of subsidiaries many of which would not serve an operating or customer-facing purpose. These will include holding companies, investment vehicles and companies that exist for historical reasons despite their main business no longer operating.

In our view if the Regime includes subsidiaries of an ADI, it should only apply to those subsidiaries that are APRA-regulated and where the organisational structure of the Group, split of key responsibilities and authorities between the ADI and the regulated subsidiary board and management, supports a need to extend the regulatory regime.

#### *Foreign subsidiaries*

In the event that ADI subsidiaries are included within the scope of the Regime, to ensure international comity and avoid the potential for conflicts of law, Westpac is of the view that the application of the Regime should not extend to or relate to the conduct of subsidiaries of those Australian ADIs which:

- operate solely outside Australia;
- are subject to the oversight of foreign regulators (including foreign prudential regulators); or
- do not have customer-facing operations in Australia.

The exclusion of foreign entities is consistent with the UK Senior Managers Regime and Hong Kong Managers-in-Charge measures.

#### **Individuals to be covered by the Regime**

Westpac is of the view that ADIs should be required to implement a governance framework that identifies key management and clearly establishes the responsibilities of those individuals.

The “accountable persons” (being those individuals subject to the Regime) should be identified by the ADI on the basis that:

- good corporate governance practices will vary between institutions due to differences in the relative size, business mix and complexity of each institution; and
- institutions should be accountable and responsible for selecting and implementing their corporate governance structures.

#### *Prescribed roles*

In our view the prescriptive element of the proposed definition of accountable persons captures the roles which, at a minimum should be subject to enhanced accountability under the Regime as set out in Table 1 other than in relation to non-executive director roles (such as Chair and Chair of a Committee) which in our view, should be excluded as noted below. However, we would suggest that APRA be given discretion to amend the list set out in Table 1 in consultation with a particular ADI to take into account differences between institutions based on size, business mix and complexity, as well as changing organisational structures and roles.

#### *Principles-based element*

In relation to the principles-based element of the definition of “accountable persons”, Westpac agrees with including a principles-based assessment, at the ADI level, of those individuals who have significant influence over conduct and behaviour of the ADI and whose actions could pose risks to the business of the ADI and its customers (at a Group level) subject to our comments

below on their application to individuals operating within subsidiaries and businesses of the ADI-Group more broadly.

#### *Application of the Regime to Accountable Persons in ADI Subsidiaries*

As discussed above, in our view, further clarity is needed on how the prescribed roles and the principles-based assessment will apply to individuals operating within subsidiaries and businesses within an ADI-Group. To ensure comparability and consistency across ADIs, it is important that accountable persons that are subject to the Regime are defined with reference to the responsibilities of those individuals in the context of the ADI-Group as a whole, rather than being determined simply on the basis of the legal structure of the group, so as to mitigate the variability of ADI structures and lessen the risk of senior executive accountability being diluted through the proliferation of roles within the ADI subsidiaries.

In Westpac's view, accountable persons under the Regime should be the most senior accountable individuals within the ADI-Group who are responsible for a particular prescribed function or principles-based function, and not the individuals that report into these senior executives across the ADI-Group. In order to implement the Regime, the ADI will already need to consider appropriate governance to support its accountable persons in meeting the requirements of the Regime and this will be most effective if an ADI retains the ability to shape this governance in a way that is appropriate to the size, business mix and complexity of the ADI, in compliance with CPS 220.

Clarifying the application of the Regime to those most relevant individuals within an ADI-Group would deliver on the objective set out in the Consultation Paper of ensuring that it is clear who is ultimately accountable and responsible for specific responsibilities.

#### *Non-executive directors*

Under existing Australian laws, there are significant duties already imposed on directors (including the statutory duties to act with due care and diligence and the duty to act in good faith and for a proper purpose) with well-established governance and legal principles relating to director liability. There are also fiduciary duties imposed on directors and officers (who stand in a fiduciary capacity) to act, for example, in good faith in the best interests of the company and for a proper purpose. There is already the ability for both private and public enforcement of those duties, with existing consequences for non-compliance.

When implementing the UK Senior Managers regime, the Financial Conduct Authority included non-executive directors who chaired the Board or Board Committees within the scope of the regime. We understand that this was at least in part due to a less comprehensive pre-existing public enforcement mechanism for directors' duties in the UK. The UK primarily relies on private enforcement, in which a company (or its shareholders) take action. Even allowing for separate FCA Conduct Principles and Rules that impose broad obligations on firms as well as individuals, these did not allow for criminal prosecution. In Australia however, the legal duties and obligations of directors are subject to both public enforcement (by ASIC) and private enforcement (by shareholders, employees and other stakeholders). The existing regime in Australia is well understood and regularly enforced by ASIC.

In our view, therefore, the policy objectives of the Regime are best served by preserving the existing distinction between the role of non-executive directors and management, and not duplicating or adding confusion to what is an established area of the law and governance. This would also include the ability of directors to rely on the defences and qualifications set out in the

Corporations Act 2001 (Cth) in relation to the discharge of their directors' duties such as the business judgment rule, the ability to rely on expert advice and delegations.

### **Expectations of ADIs and Accountable Persons under the Regime**

Overall, the new expectations for ADIs and accountable persons under the Regime are appropriately principles-based and reflect existing regulatory and community standards expected of ADIs and senior executives. We are of the view that the expectations, as drafted, are sufficiently broad and that no additional obligations are required.

We consider that there is merit in seeking to align the new conduct expectations:

- where they apply to accountable persons, with well-established principles, including the fitness and proprietary requirements in CPS 520. Many of the individuals that will have expectations under the Regime will already be subject to these duties and requirements; and
- where they apply to the ADI, with the risk management requirements in CPS 220.

Westpac suggests Treasury clarify how the new expectations will be embedded in the existing accountability framework that exists in Australia and whether the changes will be introduced in new legislation, embedded in the existing fit and proper framework in CPS 520 or CPS 220, or detailed in prudential guidance to ensure existing principles can continue to be relied upon and there is no duplication.

#### *Dealing with APRA in an open and co-operative way*

We support the principle of an ADI being required to deal with APRA in an open and co-operative way and for accountable persons to be open and co-operative in their engagements with APRA.

Given the subjective nature of this principle, we consider that additional clarity is required to understand how APRA will interpret this requirement in order to ascertain any potential impact (for example how APRA will view any claims for privilege over information in determining whether an ADI has discharged its obligations under the Regime). ADIs and APRA will have established engagement and communication models that ought to be preserved and utilised where possible.

#### *Take reasonable steps*

We broadly support the expectation on:

- ADIs to take reasonable steps to act in a prudent manner, maintain a culture which supports adherence to these standards, organise and control affairs responsibly and effectively and ensure the Regime is implemented; and
- individuals to take reasonable steps to ensure that the activities or business of the ADI for which they are responsible are controlled effectively and comply with relevant regulatory requirements and standards, that delegations are appropriate and are discharged effectively and expectations and accountabilities of the Regime are applied and met.

We would however recommend that APRA provide clear guidance on what would encompass "reasonable steps" in regard to both of these expectations.

### *Non-executive directors*

As noted above, Westpac is of the view that non-executive directors should not fall within the scope of the Regime. In the event that non-executive directors are included within the scope of the Regime (in the role of Chair or Chair of a Committee), Westpac recommends that the standards for non-executive directors are specifically drafted to take into account the nature of the role of non-executive directors. Extending the proposed standards (some of which reflect a more managerial focus) to non-executive directors blurs the existing distinction between board and management. While we acknowledge the fact that the Board is ultimately responsible for the prudent risk management of an ADI, the Regime should recognise that this duty is discharged through the oversight of the effectiveness of management's implementation of the policies, processes and procedures in place to meet the ADI's prudential requirements.

For example, in respect of the accountable person's duty to take reasonable steps to *ensure* that the activities or business of the ADI are controlled effectively and comply with regulatory requirements and standards, non-executive directors' roles are to ensure appropriate oversight and challenge of management, rather than to assume the responsibilities of an executive role.

Where the word 'ensure' is used, Westpac would also like confirmation that it will be interpreted in a manner consistent with Prudential Standard APS 001 which states that "when used in relation to a responsibility of the Board, ["ensure"] means to take all reasonable steps and make all reasonable enquiries as are appropriate for a board so that the board can determine, to the best of its knowledge, that the stated matter has been properly addressed".

### **Remuneration**

We support the remuneration proposals in the Consultation Paper, however we would appreciate clarification on the specific aspects set out below to allow us to fully assess the impact on our business, employees and stakeholders.

#### ***The definition of variable remuneration***

Our remuneration policy supports an integrated approach to designing and managing variable remuneration for all employees. Variable remuneration includes short term incentives (STIs), comprising cash and deferred equity, and for a limited population, long-term incentives (LTIs).

A clear definition of variable remuneration is critical for ADIs to effectively assess and comply with the remuneration requirements in a transparent and consistent manner. In line with Westpac's remuneration policy, we support a holistic and principles based definition of variable remuneration, for example:

*'Variable remuneration includes the maximum value of all forms of discretionary remuneration which are based on individual and/or company performance and/or which remain at risk and subject to forfeiture by the executive after award; such remuneration includes short-term incentives and long term incentives, either in the form of upfront or deferred cash, or deferred equity awards, irrespective of whether the award is subject to further performance based vesting requirements or not.'*

#### ***The deferral of variable remuneration***

Westpac's remuneration policy includes deferred STIs and LTIs that seek to encourage behaviour that supports our long-term financial soundness and risk management framework by ensuring a significant portion of executives' variable remuneration remains subject to forfeiture and malus.

For Group Executives, our initial assessment indicates that we are well placed to comply with the requirement, noting significant remuneration changes would be required for any executive accountable person below this level. On this basis, we support the requirement subject to obtaining further information regarding coverage and transitional arrangements.

Assuming that a holistic and principles based definition of variable remuneration is adopted, under our current remuneration arrangements we do not consider that an increase in fixed pay will necessarily result from the implementation of the deferral requirement.

***The expansion of existing regulatory powers***

Westpac’s remuneration policy includes a range of tools to reduce variable remuneration in the event of misconduct in addition to disciplinary actions and/or termination of employment. Importantly, these mechanisms can be implemented directly by Westpac without requiring external approval or intervention.

We consider that APRA’s existing intervention powers under Section 11CA of the Banking Act 1959 (Cth) are appropriate, including the ability to direct an ADI to take action to comply with a prudential requirement or banking law.

We support the ability for APRA to oversee and set governance principles for ADIs in relation to their remuneration policies (such as CPS 510). We support APRA having the power to review an ADI’s remuneration policy and providing feedback where it does not meet the requirements of the Regime. However, similar to the position with the roles of non-executive directors and management, the separate role of the regulator and the ADI should remain clear so that there is no dilution of responsibility for the operation of an ADI. Accordingly, the draft legislation and supporting prudential standards should specify that the implementation of the governance principles and accountability for the effective management of the ADI’s remuneration policy should remain with the ADI. In Westpac’s view, granting APRA the power to amend ADI remuneration policies may introduce the risk of undermining an entity’s corporate accountability principles under the Regime.

We do not support the extension of APRA’s intervention powers to the determination of individual remuneration outcomes which would be inconsistent with a principles based regulatory framework and the necessary separation of the role of the regulator and the ADI. We believe that boards and management should continue to be able to assess, and be accountable for, the design and operation of remuneration frameworks that support long-term financial soundness. Transparency in relation to remuneration outcomes already exists through the existing remuneration reporting and disclosure practices.

**Implementation and Transitional Issues**

***Registration***

Westpac supports the registration process with APRA.

Westpac recommends that clarity be given on how registration of accountable persons with APRA will operate in conjunction with the Fit and Proper requirements under CPS/SPS 520.

***Accountability mapping***

We support the further enhancement of governance within ADIs through refining the identification and documentation of responsibilities of senior executives using accountability mapping. We believe this will provide additional clarity to individuals about the scope of their

responsibilities and will assist in identifying who is responsible for specific tasks in the event of wrongdoing.

Due to the scale and complexity of large ADIs, and changing business needs, Westpac does not consider it appropriate or practicable for accountability mapping to cover all aspects of an ADI-Group's operations. Rather, a prescribed minimum set of allocated responsibilities would ensure that the ADI can monitor and maintain compliance with the Regime while providing the flexibility to define responsibilities across the organisation in accordance with business need, structure and materiality. Aside from the minimum set of prescribed responsibilities, individual organisations should have discretion to identify the additional list of responsibilities on the accountability maps which would be most useful to them. This discretion may also assist in mitigating compliance costs by allowing regulated ADIs to determine the best way of meeting regulatory objectives without the process simply becoming a tick-box exercise.

In addition, a reasonable time period should be provided to allow the ADI to update the accountability statements and accountability maps following the departure of an accountable person or a business restructure.

### ***Removal and disqualification***

It is important to ensure that the powers of removal or disqualification of individuals are exercised consistently. Given the punitive nature of these powers, consistent application is essential in providing individuals with due process, which will help underpin confidence in the Regime.

Westpac considers that it would be appropriate for any removal and disqualification power to be contained in legislation, for example alongside the existing disqualification powers in Part II Division 3 of the Banking Act 1959 (Cth), rather than within the prudential standards.

The proposed Regime in effect reinstates the disqualification regime that existed prior to 2008. Under that regime, it was open to APRA to disqualify key personnel from any APRA-regulated institution, where APRA was satisfied that the relevant individual was not fit and proper. We understand that the key factor that led to the Government changing the pre-2008 regime was the perceived lack of consistency in how the disqualification power was applied when compared with court-administered decisions. In our view, these concerns can be avoided by including a Court-based appeals process whilst still providing APRA with primary responsibility for exercising removal/disqualification powers.

The Consultation Paper refers to an appeals process without providing further details on the forum for such appeals. Given the seriousness of the consequences for the individual concerned in the event of removal or disqualification (including their ability to be gainfully employed going forward) and the need for consistency in application, Westpac strongly recommends the inclusion of a court-based appeal process (that considers whether it is justified for the disqualification to occur and not just merely an appeal on the basis of error of law) in the disqualification regime (to supplement the Administrative Appeals Tribunal).

If APRA's powers to remove and disqualify approved individuals are enhanced, having a Court based appeals process will preserve the ability for individuals to seek judicial review of a decision, whilst providing APRA with the immediate and primary power to respond to material misconduct. The use of 'justified' would be aligned with the current section 21 of the Banking Act 1959 (Cth). Alignment with the existing provisions of the Banking Act would ensure existing

principles would continue to apply as section 21 sets out the factors that the Court may take into account when deciding whether or not the disqualification is justified.

Key points that will need to be considered when looking to enhance APRA's powers in relation to disqualification will be due process and time frames for receiving and addressing allegations of misconduct, which are important in ensuring that APRA has access to considered and complete information as part of its decision-making.

Also, clarification should be provided as to whether the disqualification by APRA of a non-executive director of an ADI would constitute grounds for ASIC to apply to disqualify the individual from managing corporations outside of the ADI, under their existing powers contained in the Corporations Act 2001 (Cth).

#### *Insurance coverage*

The Consultation Paper proposes that there may be a restriction on insurance coverage for individuals. In our view taking out insurance in respect of such matters does not of itself lead to inappropriate regulatory outcomes. Indeed, insurers expect parties seeking insurance to have in place policies and procedures to mitigate insured risks. Westpac suggests that restrictions on insurance coverage in respect of the Regime be aligned with section 199B of the Corporations Act which prohibits a company from paying for insurance that covers company officers for liabilities (other than legal costs) arising from the wilful breach of a duty, the misuse of their position or the misuse of information.

#### **Civil penalties**

Westpac agrees that corporate governance and stakeholder confidence is enhanced through appropriate transparency on how an organisation ensures that its people are accountable when things go wrong. Equally important is that consequence and transparency are fair, proportionate and subject to due process.

While supporting the principle of corporate accountability, the proposed triggers for the significant fines should, in our view, be limited to material breaches.

Given the significant consequences attached to the proposed fining regime and APRA's interest in the prudential strength of ADIs, we think it is important to include legislative guidance as to what would constitute a material breach. We are of the view that the factors relevant to a determination of a significant breach under s62A of the Banking Act 1959 (Cth) may also be applied in this context:

- the number or frequency of similar breaches;
- the impact the breach has or will have on the ADI's ability to conduct its business;
- the extent to which the breach indicates that the ADI's arrangement to ensure compliance with the Regime might be inadequate; and
- the actual or potential financial loss arising or that will arise from the breach to the depositors or members of the ADI.

In addition, Westpac considers that the imposition of penalties under the Regime should be used by APRA as a 'last resort', with in all but the most exceptional circumstances, their existing regulatory powers (e.g. APRA's ability to give directions or impose an authorisation condition) continuing to offer appropriate recourse. Limiting the scope of the offence to "exceptional circumstances" would also minimise the risk of duplication of existing offences or penalties. One



example of such ‘exceptional circumstances’ may include where the breach in question has adversely impacted on the stability of the financial system

Westpac is also of the view that it is not appropriate for a specific offence to be established in circumstances where an ADI ‘fails to hold accountable persons to account under the Regime’. While Westpac agrees that appropriate consequences are an important part of management accountability, an ADI’s accountability in this regard is already reflected in the ADI duties of:

- conducting its business with due care, skill and diligence; and
- taking reasonable steps to:
  - act in a prudent manner;
  - organise and control its affairs responsibly and effectively; and
  - ensure that these expectations and accountabilities of the Regime are applied and met throughout the ADI-Group.

Westpac is of the view that it is appropriate for APRA’s fining power to be triggered by the material failure of an ADI to meet its expectations under the Regime and that, given the broad nature of this power, it is not necessary to create a specific ability for APRA to fine ADIs for the failure to implement a specific aspect of the Regime, for example, the failure to hold accountable persons to account under the Regime. This proposed additional power is duplicative and risks a disproportionate emphasis that could have the unintended consequence of affecting the overall balanced application of the Regime by APRA and the nature of its implementation by ADIs. We believe that a balanced application of the entire Regime is essential both from the perspective of procedural fairness for the accountable person as well as from the perspective of the sound running and management of the ADI.

Westpac views the proposed definition of large ADIs as appropriate.

### ***General Implementation and Transition Issues***

Westpac considers that both APRA and ADIs require appropriate time to develop and implement the Regime. Given the impact of the Regime, it is in the mutual interests of APRA, ADIs and deposit holders that the Regime is both certain and clear.

Given the very limited consultation period offered in relation to the Consultation Paper, Westpac suggests that the Government release the draft legislation for consultation, with a reasonable time period for considered review and feedback.

Westpac is also of the view that the new Regime should only come into effect at least 18 months after the legislation has been enacted and the relevant prudential standards and guidance have been finalised to allow organisations time to prepare and comply with the new requirements, particularly in relation to:

- the development and implementation of accountability maps;
- registration of individuals with APRA;
- development and implementation of support structures and delegations;
- establishment of first, second and third lines of defence to deliver to the requirements of the regulations;
- review and amendment of remuneration policies and frameworks; and
- the setup of reporting capabilities.

In addition this period will also provide ADIs with sufficient time to review and assess the impact of the Regime on competitiveness of remuneration packages versus those of other financial

institutions and to understand the broader implications for talent acquisition and retention. To the extent changes are required to CEO remuneration, shareholder approval will be required at the AGM (which occurs once per financial year).

Significant costs will be incurred by ADIs in implementing and embedding the Regime within their organisation. It is difficult to quantify the magnitude of the costs at this stage as further clarification is required regarding aspects of the Regime as set out in this submission before the practicalities of implementation can be assessed.

For further information in relation to any matters raised in this submission, please contact Brett Gale, Group Head of Government Affairs and Communication Strategy on (02) 8253 4159 or [bgale@westpac.com.au](mailto:bgale@westpac.com.au).

Yours sincerely



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