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Manager  
Banking, Insurance and Capital Markets Unit  
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The Treasury  
Langton Crescent  
Parkes ACT 2600  
[bear@treasury.gov.au](mailto:bear@treasury.gov.au)

Dear Sir/Madam

**Banking Executive Accountability Regime**

We attach our submission on the consultation to the exposure draft of the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017.

If you have any questions please contact Stuart McCulloch or Michelle Levy.

Yours faithfully



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Encl

We appreciate the opportunity to provide a submission in response to Treasury's exposure draft of the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (the **Draft Bill**).

Given the very limited time afforded to stakeholders to prepare a response to the Draft Bill, this submission is necessarily short and focusses on key areas of concern. We would encourage the Government to provide stakeholders with further time to respond to the Draft Bill so that interested parties may properly consider the draft legislation and the Government is afforded the benefit of the considered views of the industry.

We continue to support the views expressed in our previous submission dated 7 August 2017 prepared in response to the July 2017 Consultation Paper. In particular, the concerns expressed in our previous submission concerning the proposed regime and its consistency with the Government's objective of cutting red tape and avoiding duplicative regulatory regimes. Our specific concerns with the Draft Bill are detailed below.

### **Application to subsidiaries**

As currently drafted, the Draft Bill applies not only to ADIs but to all subsidiaries of an ADI, regardless of their size.

This is as a result of the wording of section 37BA(1) of the Draft Bill, which provides that:

A person is an accountable person, of an ADI or a subsidiary of an ADI, if the person:

- (a) holds a position in, or relating to, the ADI or subsidiary; and
- (b) because of that position, has actual or effective responsibility:
  - (i) for management or control of the ADI or subsidiary; or
  - (ii) for management or control of a significant or substantial part or aspect of the ADI's or subsidiary's operations. (our emphasis)

Therefore, a person having management or control of a substantial part of the subsidiaries operations, regardless of the size of its operations in the context of the ADI as a whole, will potentially be captured by s37AB(1)(b) as an Accountable Person. This is not consistent with the draft Explanatory Memorandum to the Draft Bill, which states (at [1.29] – [1.30]):

Where the activities of a subsidiary are significant, then an accountable person should have responsibility for that subsidiary. This is intended to capture, for example, large insurance or wealth management arms of an ADI. If an ADI's wealth management arm acts in breach of BEAR obligations, then it may adversely affect the prudential standing or reputation of the ADI.

To reflect Treasury's stated intention, we consider s37AB(1) should be amended to make it clear that a person will only be an Accountable Person where they have actual or effective responsibility for the management or control of a subsidiary of an ADI where the activities of that subsidiary are significant to the ADI's operations as a whole.

### **Scope of conduct obligations**

Section 37C(c) introduces a new obligation on ADIs to take reasonable steps in conducting their business to prevent matters from arising that would adversely affect the ADI's prudential standing or reputation. A similar obligation arises with respect the conduct of an Accountable Person's responsibilities. We understand that it is the Government's intention that this obligation apply to matters affecting an ADI's "prudential reputation" and not reputational matters at large. If this is Treasury's intention, it should be clarified in the text of the legislation. Moreover, guidance should be provided as to the matters that APRA would consider to fall within the meaning of "prudential reputation". For example, whether it only extends to matters relating to whether an ADI is capable of repaying its financial commitments or whether it has a broader meaning.

**Further guidance on application to Non-Executive Directors**

The Draft Bill defines Accountable Persons to include those persons with responsibility for "oversight of the ADI as a member of the Board of the ADI, or a subsidiary of the ADI". This will include all non-executive directors. Non-executive directors will therefore be subject to the obligations set out in s37AC of the Draft Bill. Given the oversight role performed by non-executive directors and the existing obligations that apply to directors under the *Corporations Act 2001* (Cth), we do not consider it appropriate for the regime to apply to non-executive directors.

In the event that the legislation ultimately passed does apply to non-executive directors, further guidance should be provided as to how they would demonstrate compliance with the obligations set out in s37AC of the Draft Bill. Whilst we welcome the guidance that has been provided in the Draft Bill as to what constitutes the taking of "reasonable steps" by an Accountable Person in the discharge of their responsibilities (including by ensuring appropriate governance arrangements, delegations and procedures are in place), further guidance should be provided as to how this guidance applies to non-executive directors, particularly having regard to the nature of their oversight role and the collective decision making process that they are involved in as members of the Board.

**Implementation timeline**

It is proposed that the key requirements of the Draft Bill will come into force from 1 July 2018. Assuming that the Draft Bill is tabled before Parliament in October 2017 and passes quickly through the House of Representatives and the Senate, this will allow approximately 7-8 months for ADIs to implement the regime. Our alliance partner, Linklaters, acted for many clients in both the UK and Hong Kong on the implementation of their senior manager regimes. The experience of advising clients on accountability regimes in those jurisdictions is that a very significant amount of work was required in implementing the requirements of the regime, revising policies and procedures and employment terms, ensuring that senior managers properly understood the requirements of the new regime and assisting senior managers with documenting the governance and management arrangements in place to assist in demonstrating the taking of reasonable steps. In light of this, we would urge the Government to revise its proposed implementation date from 1 July 2018 to at least 1 January 2019.

If you would like to discuss any aspect of our submission, please contact Stuart McCulloch or Michelle Levy.

Yours faithfully

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