



BANKING EXECUTIVE ACCOUNTABILITY REGIME

RESPONSE TO EXPOSURE DRAFT BILL

29 September 2017

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The logo for Ashurst, consisting of the word "ashurst" in a lowercase, bold, sans-serif font.

By email: tony.mcdonald@treasury.gov.au

Dear Mr McDonald

Banking Executive Accountability Regime – Merits Review

Thank you for the opportunity to provide a submission in relation to the exposure draft of the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Bill)* and Explanatory Memorandum.

This submission only addresses the absence of merits review of decisions to disqualify accountable persons under proposed s 37J.

The proposal that disqualification decisions under proposed s 37J of the *Banking Act 1959* (Cth) not be subject to merits review, including by an independent tribunal such as the Administrative Appeals Tribunal (**AAT**), represents a significant departure from longstanding Commonwealth policy, which in our submission is without any justification. The proposal is inconsistent with the Commonwealth administrative law framework developed over the past forty years.

Under Commonwealth policy, decisions which will, or are likely to, affect the interests of a person should be subject to merits review, unless it would be inappropriate or there are factors justifying its exclusion (see paragraph 4.2.4 of the Commonwealth's Australian Administrative Law Policy Guide:

<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian-administrative-law-policy-guide.pdf>

and the Attorney-General Department's website at:

<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/default.aspx>).

This has been longstanding policy under both Coalition and Labor Governments.

The circumstances in which merits review would be inappropriate and the factors which may justify its exclusion are discussed in the Administrative Review Council's report "What decisions should be subject to merits review?":

<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (the **ARC Merits Review Report**).

See also the Administrative Review Council's *Better Decisions* Report:

<https://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf>.

None of those circumstances which might suggest merits review not be included apply to decisions under proposed s 37J.

The proposal that there not be merits review, including external merits review, is inconsistent with this policy, and nor is there any reason apparent for departing from it. Decisions affecting persons' livelihoods are amongst those that most directly affect a person, and if the policy is applied it follows there would be merits review of decisions under proposed section 37J. We understand that proposed departures from this policy can be discussed with the Administrative Law Branch of the Attorney-General's Department:

<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/default.aspx>.

The only suggested justification for the exclusion of merits review of s 37J decisions of which we are aware is the maintenance of trust in and integrity of the financial system. Such a factor is not a reason under Commonwealth policy for excluding merits review, but more importantly there is no basis to conclude that merits review would in any way undermine the objective of maintaining trust in and the integrity of the financial system. The long accepted rationale for merits review is to ensure quality of decision-making. Ensuring disqualification decisions are correct and preferable (which is the primary purpose and effect of merits review and the task of the Administrative Appeal Tribunal – see for example paragraphs 2.5 and 2.9 of the *Better Decisions* Report) cannot in any way undermine the financial system – on the contrary, better decisions can only increase confidence in it. To suggest otherwise is at fundamental odds with the policy underpinnings of the Commonwealth merits review system.

In our submission, it is the current proposal of only allowing judicial review that risks undermining confidence in the financial system and APRA's role in it. Disqualification decisions are very serious decisions and it is inevitable there will be occasions when affected individuals seek to challenge APRA decisions under s 37J, exercising whatever legal rights they have (noting that judicial review is to a significant degree constitutionally entrenched by s 75(v) of the Constitution). On judicial review, it can be expected the Courts will scrutinise APRA decisions closely, given the impact on the disqualified person, who will be an individual. A Court determination that APRA has made a decision affected by legal error (which is the essence of judicial review) has much more potential to be detrimental to the regard in which APRA is held in the community, than an AAT decision does. An AAT decision does not carry the same connotations in the community, partly as informed persons appreciate the nature of merits review and that it does mean that APRA made a legal error (unlike an adverse Court ruling), and partly because of the status of Courts. The objective of maximising trust in the financial system (including by ensuring APRA is a highly regarded regulator) will be better achieved by including, rather than excluding, merits review by the AAT.

A further consideration is that excluding merits review and leaving only judicial review as an avenue of challenge to disqualification will result in APRA and affected individuals expending both their own time and money on litigation in the Courts, and Court resources being expended in

dealing with judicial review applications. It can be expected that AAT review, with its more flexible procedures, will generally be more cost effective and that including AAT review is likely to reduce overall the number of issues arising out of s 37J decisions with which the Courts ultimately have to deal.

In our submission, there is no justification for the proposed departure from longstanding bipartisan Commonwealth policy which has the effect that merits review should be available in respect of disqualification decisions such as those in the proposed s 37J. To do so would be counterproductive in any event.

Thank you for considering this submission.

If you have any questions please contact Andrew Carter on (02) 9258 6581 or Silvana Wood on (02) 9258 6334.

Yours sincerely

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