

29 September 2017

Mr. Tony McDonald
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The Treasury
PARKES ACT 2600



By email: bear@treasury.gov.au

Dear Sir

Banking Executive Accountability Regime – Draft legislation

Thank you for the opportunity to provide a submission on the exposure draft of the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017*. We are also grateful for Treasury undertaking discussions with the Commonwealth Bank (CBA) and look forward to continuing this constructive dialogue. CBA welcomes BEAR's guiding principles that senior executives and directors conduct themselves with honesty and integrity and to ensure the business activities for which they are responsible are carried out effectively.

CBA has contributed to and endorses the submission of the Australian Bankers' Association (ABA) in response to this consultation. However, in addition to this submission, we wish to highlight the following matters.

1. Scope – accountable person and subsidiaries

We are concerned with the proposed broad application of BEAR to an ADI's subsidiaries, both within and outside Australia. CBA has identified 266 subsidiaries that may be impacted under this provision. The majority of these subsidiaries are holding companies, trustee companies, investment vehicles or special purpose vehicles, and do not materially impact the ADI's business as a whole.

Moreover, a potential accountable person within the ADI subsidiary will report into a group executive or through a manager reporting to a group executive. Importantly, this individual will not have autonomous management responsibility for the subsidiary on a standalone basis.

Given the specific role and functioning of many subsidiaries, we believe it would not be a good policy outcome if all subsidiaries are in scope under BEAR. This approach also appears to conflict with the draft explanatory memorandum that focuses on the concept of a subsidiary's significance in the ADI group (paragraphs 1.29 and 1.30). In order to improve the operation of BEAR, whilst upholding BEAR's policy intent of enhancing accountability of individuals with significant influence in an ADI, we believe

a materiality threshold should be explicitly included in the legislation. Under this mechanism, “accountable persons” must be able to influence or impact the whole, or substantial part of, the ADI and its subsidiaries as a consolidated group.

Recommendation 1

The legislation should clarify that BEAR applies to an ADI group and accountable persons must have effective responsibility for the whole, or substantial part of, the ADI group.

2. Transition

In our implementation of the UK Senior Managers and Certification Regime (**UK SMCR**), we found the reforms ultimately enhanced accountability. However, the allocation of prescribed responsibilities to specific individuals and changes to employment terms required significant time and resources.

Whilst we welcome the remuneration transition provisions included in the exposure draft, we are concerned with the requirement to have all policies, including remuneration, in place by 1 July 2018. In particular, this provision may actually require all employment contracts to be updated from the commencement date of the new policy. This appears to be inconsistent with the proposed transition provisions for existing contracts.

Accordingly, we support the ABA’s proposed phased approach to implementation. This proposal ensures the organisation and key decision makers are in scope from the commencement date, with further transition for any additional roles that may be identified.

Recommendation 2

A phased approach to implementation from 1 July 2018 is adopted.

3. Foreign subsidiaries

It is CBA’s view that foreign subsidiaries should not be subject to BEAR regime in the way the draft legislation proposes. Given they are subject to strong prudential regulation in own sovereign jurisdictions, foreign subsidiaries and their staff should not be required to comply with BEAR obligations or be subject to APRA’s exercise of powers under BEAR (e.g. disqualifying and reallocating staff). The New Zealand Banking Association is providing detail on the sovereignty and extraterritoriality issues raised in the New Zealand context, including regulatory overlap and / or inconsistency.

If the Government proceeds with including foreign subsidiaries in the BEAR regime, we support the ABA’s submission, which recommended that:

- where ADIs/subsidiaries and accountable persons are subject to a foreign regime, they are not expected to comply with BEAR so as to be in breach of such laws. BEAR will not apply in such circumstances to the extent of any inconsistency; and
- to the extent that an accountable person is holding a position at a foreign prudentially regulated entity that is part of an ADI group, the exercise of APRA’s

powers under BEAR over that foreign entity should only be undertaken in consultation with the relevant foreign regulator.

Recommendation 3

Foreign subsidiaries and staff that are subject to prudential regulation in their own jurisdiction should not be subject to the BEAR regime.

Thank you for the opportunity to comment on the exposure draft. CBA remains committed to working with the government to ensure the practical design of regime that enhances the accountability, transparency and scrutiny of the entire financial services industry.

For further information, please contact Ms. Jane Couchman (Executive General Manager Compliance) at Jane.Couchman@cba.com.au.

Yours sincerely



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