



29 September 2017

Mr Tony McDonald  
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Financial Systems Division  
The Treasury  
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By email: [bear@treasury.gov.au](mailto:bear@treasury.gov.au)

Dear Mr McDonald,

## **SUBMISSION ON THE BANKING EXECUTIVE ACCOUNTABILITY REGIME: EXPOSURE DRAFT LAW AND EXPLANATORY MATERIALS**

National Australia Bank Limited (NAB) welcomes the opportunity to comment on the Department of Treasury's consultation on the Banking Executive Accountability Regime (the BEAR) exposure draft law (ED) and explanatory materials (EM). As a member of the Australian Bankers' Association (ABA), NAB has also contributed to and is supportive of the ABA's submission to this consultation.

NAB considers that allowing only one week for written submissions is an insufficient period of time to comprehensively review the ED, for what is a significant change to the governance of Authorised Deposit-taking Institutions (ADIs). NAB also notes this is the third Department of Treasury consultation on draft legislation in the last six months<sup>1</sup>, in respect of which it has adopted a truncated process. NAB encourages the Government to adopt a more considered approach to developing public policy in future.

NAB's most significant concerns on the ED and EM are as follows<sup>2</sup>.

### **A. Commencement date of the BEAR - implementation timeline**

NAB notes that the BEAR will commence on 1 July 2018 (with some phasing to accommodate changes in employment arrangements). Whilst NAB acknowledges the rationale for a very short implementation period, NAB encourages APRA (and if appropriate, the Treasury) to engage with ADIs promptly on two matters:

- (i) an agreed approach to prioritise implementation of the BEAR (including accountability statements and accountability maps) for the most senior executives in an ADI by 1 July 2018 (such as the Board and the executive team of the ADI) and thereafter all other accountable persons by an agreed date after APRA has had the opportunity to provide guidance; and

<sup>1</sup> NAB had just 39 hours to respond to a confidential consultation on draft legislation to enact the *Major Bank Levy*, and just eight business days, from 14-23 August, to respond to the consultation on *Credit Cards: improving consumer outcomes and enhancing competition*.

<sup>2</sup> All references in this submission to Sections or Divisions are to the ED, unless otherwise provided.

- (ii) prudential guidance in respect of the additional powers and responsibilities granted to APRA under the ED (eg Division 2 – Accountability Obligations, Division 5 – Notification Obligations, Division 6, Subdivision B – Registration of accountable persons).

Without an early indication of APRA’s approach to these matters, the already short implementation period will be reduced further.

## **B. Individuals in scope of the BEAR as accountable persons**

We urge that the ED and APRA provide greater clarity as to who are accountable persons.

The definition of an accountable person in section 37BA<sup>3</sup> creates another ‘class’ of senior executives, in addition to the existing classifications of senior managers, responsible persons and key management personnel and their attendant obligations<sup>4</sup>. The compliance costs of managing multiple regimes responsibly are considerable.

Critically, we urge the Government to amend the definition to remove directors of all ADI subsidiaries. This could include more than 100 employees of NAB who, for the most part, are not senior executives. This is inconsistent with the stated intention for the BEAR to apply to only the most senior and influential executives in an ADI.<sup>5</sup>

We also propose the inclusion of the word ‘overall’ in the description of the responsibilities in 37BA(3). That is, an accountable person is a person with ‘overall responsibility’, not just ‘responsibility’. This, too, would be more in accordance with the stated intention.

Further, we re-emphasise the critical importance – for individuals and ADIs – to have certainty at the outset (through the registration process proposed) as to who is an accountable person. It would be seriously undesirable for the ADI and the individual for APRA to revisit the question of who is an accountable person with hindsight.

## **C. APRA’s new powers in relation to disqualification and examination of individuals**

NAB remains of the view that APRA should not be permitted to disqualify an accountable person without a fair and clearly defined process, including judicial determination of breach, in line with the current requirement for it to apply to the Federal Court.<sup>6</sup> Subdivision C does not address our concerns. It gives APRA broad powers to disqualify accountable persons. However, accepting that APRA may require enhanced powers in certain circumstances, NAB recommends certain minimum amendments to the disqualification process which we set out in Appendix A. These proposed amendments provide a level of procedural fairness for ADIs and individuals, including a merits review of an APRA disqualification decision. The seriousness of disqualification demands a sound process with demonstrable consistency.

## **D. Scope of the accountability obligations for ADIs and accountable persons**

The BEAR has the potential to materially extend the role of APRA, and in doing so alter its supervisory relationship with ADIs. The ED creates this potential through (i) APRA’s very broad new disqualification and civil penalties powers; and (ii) the absence of any standards, limitations or guidance on of APRA applies the BEAR (in particular, the accountability obligations). To address these issues, and preserve the twin peaks of financial regulation, NAB recommends that the ED adopt:

- the limitation on accountability obligations set out in the EM: namely, that the BEAR will apply only to matters of a ‘systemic and prudential nature’<sup>7</sup> for the ADI group;
- the Corporations Act<sup>8</sup> measure of how a ‘reasonable person’ would exercise their accountability obligations if they were an accountable person of an ADI in the ADI’s circumstances;<sup>9</sup> and

<sup>3</sup> Set out in the ‘General principle’ (section 37BA(1)) and the ‘Particular responsibilities’ (section 37BA(2))

<sup>4</sup> The class of ‘accountable persons’ under the BEAR (as set out in Section 37BA), and related accountability obligations, will be also be in addition to directors and officers duties under the *Corporations Act 2001 Cth* and the requirements under CPS 520 Fit and Proper, for example.

<sup>5</sup> See paragraph 1.80 of the EM.

<sup>6</sup> See page 2, of NAB’s Submission on the Proposed BEAR dated 3 August 2017 (August Submission).

<sup>7</sup> The term, ‘systemic and prudential’, is discussed in paragraphs 1.22 (in relation to and ADI) and 1.93 (in relation to an accountable person) of the EM.

<sup>8</sup> All references in this submission to the *Corporations Act* are to the *Corporations Act 2001 (Cth)*.

<sup>9</sup> Section 180(1) of the *Corporations Act 2001 (Cth)* which provides that the degree of care and diligence to which a director of a corporation is required to exercise their powers and discharge their duties is measured against how a ‘reasonable person’ would

- the defences and protections afforded to individuals accused of failing to comply with the BEAR, adopting the approach set out in the Corporations Act.

This approach provides appropriate limitations for APRA, as well as more certainty for ADIs and accountable persons (including for non-executive directors of ADIs).

**E. Deferred remuneration obligations**

NAB acknowledges the detail provided on variable remuneration in the ED and EM and has made recommendations on drafting and points of clarification in Appendix A.

**F. Application of BEAR to other prudentially regulated institutions**

NAB believes the BEAR should apply to all prudentially regulated financial institutions, not just those controlled by an ADI.<sup>10</sup> By excluding prudentially regulated institutions not in an ADI group, the ED could incentivise institutions to pursue regulatory arbitrage by seeking lesser-regulated structures; even if that is not in the interests of customers or the financial system. A failure by an ADI, a general or life insurance company, or a superannuation provider, to meet the proposed expectations under the BEAR, could equally undermine trust in, as well as the soundness and stability of, the financial system.

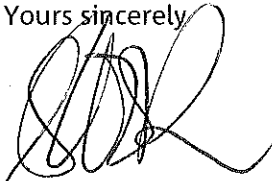
**G. The need for a review of BEAR within two years**

NAB recommends a Government review of the BEAR within two years from commencement. This could include considering whether it should be expanded to all prudentially regulated institutions. The Senior Managers Regime (SMR) in the UK commenced in March 2016 for banks. The Financial Conduct Authority is currently consulting on proposals to extend the SMR to all FCA regulated firms.<sup>11</sup> Such a review could also consider more generally any unintended consequences from the BEAR and relevant learnings from the SMR.

NAB's detailed comments on the ED and EM are set out in the Appendix.

Whilst acknowledging the Government's desire to introduce the BEAR into Parliament quickly, NAB encourages further careful and detailed consideration of the final legislation in the light of the submissions you receive. If we can be of any assistance to you in that endeavour, please contact us.

Yours sincerely,



**Sharon Cook**

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exercise those duties if they were a director or officer of a corporation in the corporation's circumstances, and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

<sup>10</sup> See page 2 of the August Submission.

<sup>11</sup> See Strengthening individual accountability in insurance: extension of the Senior Managers and Certification Regime to insurers – CP14/1, available at <http://www.bankofengland.co.uk/pru/Pages/publications/cp/2017/cp1417.aspx>

## APPENDIX: DETAILED NAB SUBMISSION ON THE ED (BASED ON FORMAT IN THE CONSULTATION GUIDE)

Issue	Bill ref.	NAB Submission
Definitions		<b>August Submission</b> – means the submission made by NAB on 3 August 2017 in response to the Department of Treasury July 2017 Consultation Paper regarding the proposed banking executive accountability regime.
Which entities are covered by the BEAR?		
Coverage of ADIs and subsidiaries	37	NAB remains of the view that the BEAR should apply to all prudentially-regulated entities and non-operating holding companies of such institutions. Entities such as life insurers and superannuation providers, with similar risk profiles to ADIs, should be held to the same heightened standards of responsibility and accountability in the BEAR. This reduces the risk of regulatory arbitrage and helps to ensure the objectives of the BEAR, in improving community confidence in financial institutions, are met.
Application to foreign ADIs	37(2)(b)	Since the BEAR will apply to foreign subsidiaries and branches of ADIs, NAB recommends that an amendment is made to <b>section 37(2)</b> to provide that to the extent of any inconsistency between the BEAR and the laws of the local jurisdiction (of the relevant subsidiary or branch), the local laws will prevail. This approach is consistent with the Department of Treasury’s position in its July 2017 Consultation Paper to ensure consistency between international frameworks, so far as practicable.
Minister’s power to exempt ADIs	37A 37KA	NAB strongly recommends that the ED require the Minister and APRA to provide appropriate level of transparency with respect to the various powers granted to them to vary/amend notice periods and allow exemptions to the BEAR. NAB’s principal concern in this respect goes to the consistency and fairness of process under the BEAR, across the industry. This is particularly the case since there is no provision for a merits review of the exercises of these powers.
Coverage of accountable persons	37B	Please see discussion below in relation to section 37BA.
Definition of small, medium and large ADI	37G(3)	No comment.
Who is an accountable person?	37BA	
General definition of accountable person	37BA(1)	NAB is very concerned that under section 37BA, the BEAR will apply to the directors of <i>all</i> subsidiaries in an ADI group. This should not be the case unless the individuals otherwise meet the requirements of the ‘General principles’ in section

37BA(1) or one of the 'Particular responsibilities' in section 37BA(2) and (3). Paragraph 1.80 of the EM appears to acknowledge that it is not the Government's intention that 'simply being in a management role in a subsidiary means the person is an accountable person'. This intent is not carried into the drafting of the ED.

For the reasons set out below, NAB strongly recommends an amendment to the ED to ensure it is consistent with the stated intent of the BEAR, as set out in the EM.

NAB's concern with the definition of an accountable person arises because references to 'subsidiary' in section 37BA(1)(a) and (b), and 37BA(3)(a) have the effect of capturing a person 'in a position or role relating to' the subsidiary (that is, not the ADI group, or the ADI alone), which gives that person 'actual or effective responsibility for management or control' of the subsidiary or a 'significant or substantial part or aspect of the subsidiary's operations'. If the subsidiary owns and operates a significant or substantial operation of the group as a whole, this may be appropriate. However, for NAB, 'a significant or substantial part' of its subsidiaries' operations will, in almost all cases, not be significant or substantial in the context of the group as a whole. Furthermore, the NAB group has more than 150 subsidiaries, in respect of which it has around 100 directors across these companies, many of whom would be considered 'middle management' rather than 'senior executives'.

For NAB, it is only in the case of Bank of New Zealand, that a significant part of its operations is conducted by a subsidiary. Typically, business lines and operations of the NAB group are undertaken by a number of subsidiaries, relying on employees of NAB Limited to undertake all related roles and responsibilities.

The definition of 'accountable person' should be agnostic to the entity structure of an ADI group. Instead, an accountable person should be defined by reference to the significance or materiality of the business line or operations to the ADI group, as a whole. NAB's view appears to be consistent with paragraph 1.10 of the EM which provides that 'an accountable person is a Board member or senior executive with responsibility for management or control of significant or substantial parts or aspects of the ADI group'.

NAB acknowledges the point made in the EM at paragraph 1.29 that consumers associate the wide range of financial services and activities provided by subsidiaries

		under an ADI brand. However, the EM provides that it is only where the activities of a relevant subsidiary are 'significant' that the BEAR would require an accountable person for that subsidiary. Again, the requirement of the BEAR to identify an accountable person is not relevant to the subsidiary, but to the operations, business line or activities that are significant to the ADI group, as a whole.
Types of responsibilities for accountable persons covered by the BEAR	37BA(3)	NAB notes the kinds of responsibilities set out in <b>section 37BA(3)</b> and the EM at paragraph 1.82, which also provides that an ADI may not have a separate person corresponding to each of the functions listed in section 37BA(3). Read together, the ED and the EM support an interpretation that it is the person within an ADI with <i>overall</i> responsibility for the 'Particular responsibilities' who will be the accountable person. NAB believes the drafting of section 37BA(3) would benefit from a clarification of this intention by inserting the word 'overall' as the first word in paragraphs 37BA(3)(a) to (j).
APRA's power to exclude particular responsibilities from the operation of the BEAR	37BB	Please refer to discussion in relation to <b>section 37BA(1) and (2)</b> above. If it is not appropriate to amend the ED (which is NAB's strong preference) regarding the application of the BEAR to directors of subsidiaries, an alternative would be for ADIs, such as NAB, that have a large number of subsidiaries that do not (alone) conduct significant or substantial operations in the context of the group as whole to request the Minister to issue a legislative instrument or class exemption.
Who is prohibited from being an accountable person?	37DA	No comment.
<b>What are an ADI's BEAR obligations?</b>		
Accountability obligations of an ADI and subsidiaries	37C	<p><b>Section 37C</b> covers the types of behaviours NAB would also expect of accountable persons (subject to its comments regarding the drafting of Section 37BA and references to 'subsidiaries').</p> <p>As discussed in its August Submission, NAB notes with concern the potential for overlap of section 37C with existing laws and regulation in relation to senior executives in ADIs. This is particularly the case in respect of directors and officers duties under the Corporations Act, and the senior managers regime under the <i>Banking Act</i> and prudential guidance (CPS 520). NAB urges APRA to provide guidance on how it will exercise its powers under the BEAR, to the extent of its overlap with the powers of the Australian Securities and Investment Commission (ASIC) (eg in respect of banning and breach reporting). This is particularly the case if the reference to 'reputation' is retained in section 37C(c) and section 37CA(1)(c).</p>

We recommend that 'reputation' be deleted from those sections or at least be described as 'prudential reputation' with guidance given as to what APRA interprets it to mean.

NAB is very concerned that there is no standard, limitation or guidance on how APRA will interpret and apply the accountability obligations, in exercising its civil penalty and disqualification powers under section 37J. Further discussion of an appropriate standard is set out below in relation to Section 37C and Section 37CA. With respect to any limitation or guidance, paragraphs 1.22 and 1.93 of the EM helpfully refer to the BEAR being applicable to matters of a '**systemic or prudential nature**'. However, this language (or the concept of limiting what the BEAR covers) is not clearly translated to the ED. NAB emphasises that this limitation needs to be explicit in the ED – in relation to the accountability obligations of both ADIs and accountable persons.

NAB recommends that this could be achieved, consistent with the policy intention of the BEAR set out in the EM, through amendments to the ED, as follows. The references to ADIs and accountable persons taking 'reasonable steps' in relation to their accountability obligations (see sections 37C(c)-(e) and section 37CA(1)(c)) could be inserted in the introductory paragraph of section 37C and Section 37CA(1):

**"37C The accountability obligations of an ADI**

The accountability obligations of an ADI are to take reasonable steps to ensure that:"

and

**"37CA The accountability obligations of an accountable person**

- (1) The accountability obligations of an accountable person of an ADI, or of a subsidiary of an ADI, are to take reasonable steps to:"

As a consequence of these amendments, it would then be necessary to remove the words 'take reasonable steps' in paragraphs 37C(d)-(e) and paragraph 37CA(1)(c).

NAB also makes the following points on each sub-section:

		<p><b>Section 37C(a) and section 37CA(1)(a)</b> – NAB recommends that the standard of behaviour (for an ADI and accountable person) under this section (and section 37CA(1)(a)) is the same as is applied in section 180(2) of the Corporations Act. The ED should also provide similar or the same defences and qualifications applicable to section 180 of the Corporations Act, also apply to the BEAR (being sections 180(2), 189 and 190).</p> <p><b>Section 37C(b) and section 37CA(1)(b)</b> - this behaviour is consistent with NAB’s current approach to its relationship with APRA. NAB strongly recommends an amendment to the ED to formally provide that this obligation does not ‘displace legal professional privilege’ (as acknowledged in paragraphs 1.39 and 1.97 of the EM). This becomes particularly important in light of the introduction of examination powers in Schedule 2. In addition, the ED should except an ADI or accountable person from compliance with section 37C(b) to the extent they are precluded through the operation of another law, such as the Privacy Act, from complying with the BEAR, or they are acting under a direction from APRA.</p> <p><b>Section 37C(c) and section 37CA(1)(c)</b>– NAB believes the reference to ‘reputation’ in these sections is open to interpretation. It is also conceivable that an ADI, in compliance with its prudential obligations, acts in a way that damages its reputation.</p> <p><b>Section 37C(d)</b> – NAB welcomes a degree of clarity as to what ‘reasonable steps’ includes, as set out in section 37CB. As discussed above, it would provide greater certainty on the application of this section and its equivalent under section 37CA to make the amendments to those sections set out above.</p> <p>NAB suggests, as a minor drafting point, that the ED is consistent in referring to ‘accountability obligations’ rather than, at times, ‘accountability requirements’ or ‘responsibilities’ (see section 37C(d), section 37CA(1)(c)).</p>
Key personnel obligations of an ADI and subsidiaries	37D	<p>NAB welcomes the approach under <b>Section 37DA(2),(3) and (4)</b> which contemplates APRA having the power to determine a period by which a person who becomes an accountable person as a result of filling an unexpected vacancy, must be registered. NAB recommends that a similar approach is adopted if a person takes on an accountable person role in an acting capacity. On occasion, individuals are appointed in an acting capacity to executive roles at very short</p>



		<p>notice, particularly if the incumbent resigns to accept a position at a competitor and leaves the organisation almost immediately. In these circumstances, NAB proposes that APRA may by written notice given to an ADI determine a period during which the accountable person does not require to be registered, and may not have liability under the BEAR, provided that they remain in an acting capacity. It would not exempt the ADI from liability under its accountability obligations if there was a failure by the acting person to comply with their accountability obligations.</p> <p><b>Section 37DB</b> – NAB recommends that this provision is amended to confirm that a direction by APRA under section 37DB(1) applies on a prospective basis such that APRA cannot (with the benefit of hindsight) revisit an ADI’s accountability map or allocation of responsibilities.</p>
<p>Deferred remuneration obligations of an ADI and subsidiaries</p>	<p>37E</p>	<p><b>Section 37E(1)(b)</b> - NAB recommends that remuneration should not be reduced where a failure to comply with accountability obligations is a ‘likely failure’. Rather, the release of deferred amounts or any the reduction in variable remuneration should be delayed until the nature and scope of the failure is determined.</p> <p>This could be managed by requiring that the ADI’s remuneration policy not allow the release of deferred remuneration or the payment of an amount of variable remuneration until any investigation into a potential failure to comply with accountability obligations has been finalised and an outcome determined. Alternatively, the ADI’s remuneration policy could allow any reduction in variable remuneration to only be paid to the individual after the completion of investigations where it determined that the executive had not failed to comply with accountability obligations.</p> <p>NAB would welcome clarity, either in the EM or prudential guidance, as to how, under Section 37E(1)(b), an ADI should determine an amount that is ‘proportionate’ to the failure or likely failure. To the extent that remuneration that relates to the year(s) of the failure is still subject to deferral, it is recommended that any adjustment should be made first to remuneration that is deferred and/or relates to the year in question and then current year remuneration is adjusted where required.</p> <p>The practical application of the remuneration provisions is not clear from the ED if an employee has not been an accountable person for the full year. For instance where an employee is appointed to an accountable person position for say 3</p>

		months of the year (ie appointed to the role on 1 July). NAB recommends that an approach similar to the UK guidance regarding Material Risk Takers. This approach would mean that deferral rules don't apply unless the employee remains in the MRT role for 3 months or more.
Notification obligations of the ADI	37F	No comment.
ADI obligations to provide accountability statements	37FA	NAB urges APRA to promptly develop guidance for the registration process under which an ADI will engage with APRA to conclude its accountability statements and accountability map. In particular, NAB emphasises the critical importance for individuals and ADIs to have certainty as to who is an accountable person and the serious undesirability of APRA revisiting the question as to who is an accountable person, or who was responsible for a certain business line, with hindsight.
ADI obligations to provide accountability maps	37FB	Please refer to discussion above on section 37FA.
ADI obligations to notify APRA of certain events	37FC	No comment.
Registering an accountable person	37HA	No comment.
<b>What are an accountable person's BEAR obligations?</b>		
Accountability obligations of an accountable person	37CA	<p>Please refer to discussion above in relation to section 37C.</p> <p>Whilst there is potential under the ED for the Minister to prescribe the parameters of APRA's disqualification power (under <b>section 37J(4)</b>) (which would give ADIs and accountable persons some certainty as to the standard to which they are being held to account), the EM does not provide any standard, limitation or guidance on this point currently. For this reason, NAB has recommended the amendments to section 37C and section 37CA, as set out above.</p> <p>Please also refer to discussion above in relation to the need for the same defences and qualifications available to directors and officers under the Corporations Act being available under very similar provisions (such as section 37CA(1)(a)) under the BEAR.</p> <p>Specifically, NAB recommends that the ED adopt the Corporations Act measure of how a 'reasonable person' would exercise their accountability obligations if they were an accountable person of an ADI 'in the [ADI's] circumstances and occupied the office held by, and had the same responsibilities within the corporation as the [accountable person]' (see section 180(2) of the Corporations Act, amended here to insert language from the BEAR). This approach provides clarity, and more certainty, including for non-executive directors of ADIs, as to the assessment of their</p>

		<p>particular responsibilities, in the context of the particular company (a bank, which holds a position of trust in the community, and specific prudential obligations under law and regulation).</p> <p>NAB recommends that section 37CA(2) is amended to provide that individuals should be responsible (and thus open to both an ADI's and APRA's power to defer or reduce remuneration; or for APRA to disqualify) to the extent of their own actions (or omissions). An individual should not be liable for the actions (or omissions) of another accountable person.</p>
<b>Deferral of remuneration</b>		
Deferred remuneration obligations of an ADI	37E	Please refer to discussion above in relation to section 37E
Definition of remuneration	37E(3)	No comment.
Meaning of variable remuneration	37EA	No comment.
Method for calculating amount to be deferred	37EB	<p>NAB recommends consideration be given to the wording of Section 37EB(2) as to how remuneration is to be valued. The intent outlined in the EM (see discussion of use of face value at paragraph 1.109) is unclear and could be interpreted as referring to fair value. For example, please refer to the equivalent provision in the UK Remuneration Code at paragraph 16.8 which provides:</p> <p><i>“where remuneration is, when awarded, subject to any condition, restriction or other similar provision which causes the amount of the remuneration to be less than it otherwise would be, that condition, restriction or provision is to be ignored in arriving at its value”.</i></p> <p>NAB recommends that the ED adopt this approach.</p>
Shorter deferral periods may apply	37EC(3)-(5)	No comment
Exemption for small amounts of deferred remuneration	37ED	NAB recommends that the exemption for small amounts of deferred remuneration be extended to apply to all ADIs.
Adjusting remuneration policies	37E(1)(b)37E(1)(c)	Please refer to comments above in relation to section 37E
<b>What are the Minister's powers?</b>		
Minister will define small, medium and large ADI	37G(3)	No comment.
Minister's power to exempt ADIs or subsidiaries	37A 37KA	No comment.
<b>What are APRA's powers?</b>		
APRA's power to prescribe additional	37BA(4)	NAB recognises a potential need for APRA to re-allocate responsibilities and to

responsibilities for accountable persons		prescribe additional responsibilities to accountable persons. However, it would be of concern if this gave APRA the ability to revisit an ADI's accountability statement or accountability map in hindsight to identify a gap or indicate a failure by the ADI to comply with its key person accountabilities. NAB seeks prudential guidance to the effect that having registered, and where appropriate consulted with APRA on accountability statements and maps, APRA will not revisit its acceptance and registration of those documents.
APRA's power to exclude particular responsibilities for accountable persons	37BB	Please see discussion above in relation to section 37BA.
APRA's power to direct an ADI or subsidiary to reallocate responsibilities held by accountable persons	37DB	Please see discussion above in relation to section 37BA(4).
APRA's power to disqualify an accountable person	37J	<p>NAB has concerns about APRA having a power to disqualify accountable persons. It places APRA in the role of both supervisor and enforcement agency.</p> <p>The process set out in section 37J does not afford an accountable person the ability to rely on any prescribed defences or safe harbours, and does not require APRA to prove (by any standard other than to the regulator's own satisfaction or consideration of what is justified in the circumstances) that the accountable person has not complied with his or her accountability obligations.</p> <p>As discussed in relation to section 37CA, APRA is given no standard or limitation to apply in making a potentially career ending decision for an individual. Whilst NAB recognises that one of the key objectives of the BEAR is to ensure that APRA can act promptly in circumstances of a matter of a 'systemic and prudential nature', it would be inappropriate were the process not to be procedurally fair, also for the individual.</p> <p>The ED provides that APRA must give the accountable person and the ADI given notice of a disqualification (7 days after which, the disqualification takes place). The ED also provides that APRA must give the accountable person and the ADI an opportunity to make submission on the matter. However, the ED does not provide for:</p> <ol style="list-style-type: none"> <li>(1) a fair notice period for the ADI and accountable person to provide submissions;</li> <li>(2) APRA to give the ADI and the accountable person notice of the basis on which APRA will disqualify the accountable person (which is clearly</li> </ol>

		<p>relevant to their respective submissions); and</p> <p>(3) APRA having an obligation to review and consider, and if necessary, engage with the ADI and the accountable person on their respective submissions (the drafting of section 37J(5)-(7) suggests that this process will take place in 7 days, which is not adequate time given the materiality of the decision).</p> <p>NAB strongly recommends that the matters in paragraphs (1) to (3) are addressed in the ED. In their absence, the disqualification power is not procedurally fair to the accountable person.</p> <p>Through section 37J, the ED effects a very material change from the current requirement for APRA to obtain an order from the Federal Court to disqualify an individual (based on a judicial review of the merits). NAB accepts that this may be appropriate in some circumstances. However, in accepting this change, NAB strongly recommends that, in addition to the matters set out above, the Administrative Appeals Tribunal (AAT) is given the authority to review any disqualification decision by APRA. This is consistent with the AAT's role in relation to ASIC's banning and enforcement powers under the Corporations Act and would, thus, seem an appropriate and consistent approach to the exercise of APRA's powers under the BEAR.</p> <p>It is also unclear why there is a lack of consistency in the BEAR as between the application of civil penalties to an ADI, as compared to the disqualification of an individual when (fundamentally) the relevant behaviours are the same. Section 37(G)(1) specifically refers to 'prudential matters', whereas section 37J makes no such limitation on APRA's power. It is not a symmetrical approach: the accountability obligations, in respect of which sections 37G and 37J can be exercised by APRA, must all, explicitly, be limited by reference to 'prudential matters' (and otherwise as set out above in relation to the specific sections of the ED setting out the accountability obligations).</p>
APRA's power to vary or revoke the disqualification of an accountable person	37JA	Whilst noting APRA has the power to revoke or vary a disqualification on application by an individual, this does not ensure a fair hearing or consideration of the merits of APRA's claim that an accountable person has not complied with their accountability obligations. This is particularly the case given the likely reputational damage (in addition to financial impact) to the individual. Please also refer to comments on section 37J.
APRA's examination powers	Sch. 2	NAB emphasises the importance of the proposed amendments to section 37J, given

		the application of APRA's examination powers to ADIs under the BEAR. Please also refer to comments above in relation to section 37CA(1)(b) regarding legal professional privilege.
<b>Penalties and other enforcement powers</b>		
Consequences and penalties applicable to an ADI	37G	<p>NAB notes that under section 37G, an ADI is liable to a pecuniary penalty if the ADI contravenes its accountability or other obligations under the BEAR, and the contravention relates to a prudential matter. NAB welcomes the clarification that the contravention in question must relate to a prudential matter as this assists in assessing the application of the BEAR. NAB also recommends, having regard to its August Submission and paragraph 1.22 of the EM, that prudential guidance is introduced to make clear that a failure by an ADI to comply with its accountability obligations must be 'systemic and prudential' in nature.</p> <p>Paragraph 1.126 of the EM also notes that the Government expects that APRA would only seek a civil penalty for significant breaches of the BEAR. We recommend that the ED be amended so that Division 6 only applies to contraventions materially adversely affecting the prudential standing of an ADI.</p> <p>As discussed in the comments on section 37J above, NAB also recommends the application of the same 'prudential matters' limitation to the accountability obligations of accountable persons.</p>
Consequences and penalties applicable to an accountable person	37J	Please see above discussion of section 37J.
Consequences applicable to a person prohibited from being an accountable person	37JB	No comment.
<b>Insurance</b>		
Prohibition on indemnification of ADIs and accountable persons	37KB	No comment.
<b>Commencement date and transitional provisions</b>	Part 3	NAB accepts that the BEAR will commence on 1 July 2018.