
FINANCIAL REGULATOR ASSESSMENT AUTHORITY BILL 2020

FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE—
STRONGER REGULATORS (2020 MEASURES)) BILL 2020

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout these explanatory materials.

<i>Abbreviation</i>	<i>Definition</i>
APRA	Australian Prudential Regulatory Authority
APS employee	Australian Public Service employee (see section 2B of the <i>Acts Interpretation Act 1901</i>)
ASIC	Australian Securities and Investments Commission
Assessment Authority Bill	Financial Regulator Assessment Authority Bill 2019
Authority	Financial Regulator Assessment Authority
Department	At this time, means the Department of the Treasury (see section 19A of the <i>Acts Interpretation Act 1901</i>)
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Minister	At this time, means the Treasurer or another Treasury portfolio Minister (see section 19 of the <i>Acts Interpretation Act 1901</i>)
Secretary	Secretary of the Department
SES employee	Senior Executive Service employee (see section 2B of the <i>Acts Interpretation Act 1901</i>)
Stronger Regulators Bill	Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2020 Measures)) Bill 2020

Chapter 1

Establishing the Financial Regulator Assessment Authority

Outline of chapter

1.1 The Assessment Authority Bill gives effect to recommendation 6.14 of the Financial Services Royal Commission—the creation of a new authority to assess the effectiveness of each of APRA and ASIC in discharging its statutory functions and meeting its statutory objects. This authority is known as the Financial Regulator Assessment Authority.

1.2 Schedule [6.14] to Stronger Regulators Bill makes amendments consequential to the enactment of the Assessment Authority Bill.

Context of the measure

1.3 In February 2019, Commissioner Hayne recommended (see recommendation 6.14) establishing a new authority to assess the effectiveness of each regulator in discharging its statutory functions and meeting its statutory objects.

1.4 The Financial Services Royal Commission highlighted that while APRA and ASIC operate within complex accountability frameworks, the regulators' effectiveness in delivering on their mandates is not subject to consistent and independent expert review over time.

1.5 In its response to the Financial Services Royal Commission—*Restoring trust in Australia's financial system*—the Government agreed to create an independently-chaired body to regularly review and report on the performance of APRA and ASIC.

1.6 The Assessment Authority Bill creates a statutorily independent Authority consisting of three appointed part-time members (including the Chair) and an ex-officio member, being the Secretary of the Department of the Treasury (or a nominated SES employee in the Department). The Authority will be supported by a secretariat staffed by the Department.

1.7 APRA and ASIC are independent regulators, responsible to the Parliament. This independence is critical to their ability to fulfil their mandates, and for them to have the confidence of the consumers who rely on them. Regulator independence is also important for maintaining the confidence of the market as well as maintaining the market's confidence

in the credibility of the regulators. Such independence is also valued highly by international peer regulators and bodies such as the International Monetary Fund.

1.8 In order to not unreasonably impact regulators' independence, the Government's response clarified that the new authority will not have the ability to direct, make, assess or comment on the regulators' specific enforcement actions, regulatory decisions, complaints and like matters.

1.9 As is also appropriate, there are other bodies (such as ombudsmen, courts and tribunals) in place to investigate complaints about individual matters or offer avenues of appeal from individual decisions.

Relationship with other oversight and assessment mechanisms

1.10 Both APRA and ASIC are already subject to an array of external assessment, review and oversight, including:

- scrutiny by parliamentary committees;
- ministerial oversight including ministerial direction in particular respects;
- the requirement to report annually against the Government's Regulator Performance Framework;
- the public governance framework established by the *Public Governance, Performance and Accountability Act 2013*, which includes requirements such as the publication of annual reports containing statements of performance;
- audits of annual financial accounts and ad hoc performance audits by the Australian National Audit Office; and
- the International Monetary Fund's Financial Sector Assessment Program.

1.11 While both regulators are accountable to the Parliament, the Financial Services Royal Commission noted that Parliamentary committees, including Senate Estimates, have some limitations in assessing the effectiveness of the regulators (for example, the fields of expertise required to assess the regulators).

1.12 Both agencies report extensively on their activities, but these reports are not necessarily subject to rigorous and consistent external analysis. Performance audits by the Australian National Audit Office are conducted on an ad hoc basis.

1.13 The International Monetary Fund's Financial Sector Assessment Program reviews the regulators on a five yearly basis, with a focus on matters related to the resilience and systemic risks of the financial sector.

1.14 While regulators are also subject to the *Public Governance, Performance and Accountability Act 2013*, this does not require the measures of effectiveness included in the corporate plan to be assessed by an external third party.

1.15 The Authority's activities are designed to complement and augment the existing external accountability mechanisms that apply to the regulators, not to duplicate them. Its reports would inform and improve the performance of other accountability mechanisms, such as Parliamentary committees, and would also allow for comparison of regulator performance against their domestic and international peers where practicable.

Summary of new law

1.16 There are three key components in the Assessment Authority Bill.

1.17 First, it establishes the Financial Regulator Assessment Authority and provides for its functions and powers. APRA and ASIC are required to cooperate with the Authority to enable the Authority to perform its functions and exercise its powers. This cooperation includes providing information and documents requested by the Authority.

1.18 Second, it sets out how members and staff members of the Authority are appointed or made available, and how the Authority makes decisions (including delegations).

1.19 Third, to safeguard information that APRA and ASIC provide to the Authority, it prohibits the unauthorised use or disclosure of protected information provided to the Authority (contravention of the prohibition is a criminal offence).

Detailed explanation of new law

Establishment of the Authority

1.20 The object of the Assessment Authority Bill is to provide for the independent assessment of APRA's effectiveness and ASIC's effectiveness (these expressions are defined in section 13 of the Assessment Authority Bill). [*Section 3 of the Assessment Authority Bill*]

1.21 To this end, the Assessment Authority Bill establishes the Financial Regulatory Assessment Authority. The Authority has four members. Three of the members are *appointed members*, which include the Chair and two other members. A fourth member is the *Departmental member*, which will be the Secretary of the Department or a nominated

SES employee. *[Section 5 (definitions of ‘appointed member’ and ‘Departmental member’) and sections 9 and 10 of the Assessment Authority Bill]*

1.22 The appointed members are appointed by the Minister under Division 3 of Part 3 of the Bill, and will be independent of the Government. The identity of the Departmental member is determined by or under Division 2 of Part 3 of the Bill. Staff are made available to the Authority under Part 3 of the Bill.

1.23 Having a Departmental member of the Authority ensures that the advice provided to the Minister by either the Authority or the Department is not duplicative. The Authority will retain strong statutory independence in the preparation and content of its reports and reviews.

1.24 The Authority will be treated as part of the Department for the purposes of the *Public Governance, Performance and Accountability Act 2013*. *[Section 11 of the Assessment Authority Bill]*

1.25 This means that members of the Authority are officials of the Department for the purposes of the accountability obligations under that Act, including, for example, the general duties of an official in that Act (see sections 25 to 29 of that Act). Furthermore, an annual report prepared by the Secretary of the Department will be required to cover the Authority’s activities (see section 46 of that Act). Public resources expended for the purposes of the Authority will also be used and managed by the Department, through the Secretary as the accountable authority.

Functions and powers of the Authority

1.26 The Authority’s key functions are to:

- biennially assess and report to the Minister on APRA’s effectiveness and on ASIC’s effectiveness; *[Paragraphs 12(1)(a) and (b) and subsection 14(1) of the Assessment Authority Bill]*
- when requested by the Minister, undertake or cause someone else to undertake capability reviews of each of APRA and ASIC and report to the Minister; and *[Paragraphs 12(1)(c) and (d) and subsection 12(3) of the Assessment Authority Bill]*
- on an ad hoc basis, either on its own initiative or when requested by the Minister, report to the Minister on any matter relating to either or both of APRA’s effectiveness and ASIC’s effectiveness. *[Paragraph 12(1)(e) of the Assessment Authority Bill]*

1.27 Assessments of each regulator’s effectiveness look backward at how effectively the regulator has achieved its statutory mandate, while

capability reviews look forward at how each regulator is able to achieve its statutory mandate in the future.

1.28 Biennial assessments consider APRA's or ASIC's effectiveness comprehensively. The level of detail for which a biennial assessment report will cover any particular aspect of APRA's or ASIC's effectiveness may vary depending on the result of the Authority's assessment of that aspect.

1.29 Ad hoc assessments will only consider particular matters relating to either or both regulators' effectiveness, being determined by the Authority (for self-initiated reports) or the matters covered by the terms of reference given by the Minister.

The meaning of APRA's and ASIC's effectiveness

1.30 The meaning of *APRA's effectiveness* and *ASIC's effectiveness* is defined broadly. An assessment of each regulator's effectiveness requires consideration of each of the following:

- its effectiveness in achieving the objects for which the regulator is established, specified:
 - for APRA—in section 8 of the *Australian Prudential Regulatory Authority Act 1998*; and
 - for ASIC—in section 1 of the *Australian Securities and Investments Commission Act 2001*;
- the effectiveness of each regulator in performing its statutory functions and exercising its statutory powers;
- the extent to which it is independent in performing its statutory functions and exercising its statutory powers;
- the effectiveness of its frameworks for executive accountability (see recommendation 6.12 of the Financial Services Royal Commission, which recommended that each of APRA and ASIC be subject to executive accountability principles consistent with the Banking Executive Accountability Regime (BEAR));
- the extent to which it complies with Division 4 of Part 2 of the Assessment Authority Bill (requiring the regulators to cooperate with the Authority); and
- other matters connected with the performance of either regulator's statutory functions or the exercise of either regulator's statutory powers that are specified in the rules (if any).

[Section 13 of the Assessment Authority Bill]

1.31 In response to recommendation 6.9 of the Financial Services Royal Commission, the Government is amending the *Australian Securities and Investments Commission Act 2001*, and the *Australian Prudential Regulation Authority Act 1998*. The amendments to these Acts will require APRA and ASIC to cooperate with each other, to share information with each other on request, and for each to notify the other when it forms the reasonable belief that a material breach may or has occurred in respect of a law which the other regulator administers. Once enacted, these obligations will become part of each regulators' statutory functions that the Authority would consider.

1.32 A key role of the Authority in assessing the effectiveness of the regulators will be to develop or identify benchmarks, standards and metrics—both quantitative and qualitative—that can assist in determining effectiveness and assessing it over time. These should include clear measures of performance tied to the relevant regulator's core statutory functions and remain relatively stable over time.

Matters not within the Authority's functions

1.33 The regulators are independent entities responsible to the Parliament, they are not accountable to the Authority.

1.34 Accordingly, the Authority does not have the power to direct the regulators to implement any recommendations it makes.

1.35 Further, the Authority's functions do not include assessing or reporting on only a single case. [*Subsection 12(2) of the Assessment Authority Bill*]

1.36 A single case may only involve the single performance of a function, or the single exercise of a power by a regulator. Alternatively, a single case may also involve the performance of multiple functions and/or exercise of multiple powers by a regulator (e.g. several actions may be taken to enforce a single compliance matter).

1.37 For example, the Authority is not permitted to assess and prepare a report about the effectiveness of one particular regulatory action or enforcement matter undertaken by APRA or ASIC. This safeguards the independence of the regulators and ensures that the functions of other government bodies responsible for investigating complaints about individual matters (such as the Ombudsman) are not duplicated by the Authority. The focus of the Authority is on each regulator's effectiveness at a high level—that is, how well the organisation is delivering on its statutory mandate.

1.38 While the Authority will be responsible for reporting to the Minister on the effectiveness of the regulators, the Department remains

responsible for advising the Minister on the regulators' funding and efficiency, as well as their role in the financial system more broadly. It is not the role of the Authority to report on these matters, or on broader financial system policy.

1.39 APRA and ASIC also have policy-making powers to make legislative instruments. To avoid impinging on the regulators' independence in exercising these powers, the Authority is not empowered to review the effectiveness and performance of the exercise of these powers by the regulators. *[Paragraphs 13(1)(b) and (2)(b) of Assessment Authority Bill]*

Independence of the Authority

1.40 The Authority is independent in the performance of its functions and exercise of its powers. In particular, it is not subject to directions by anyone, including the Minister, in relation to how a particular assessment or capability review is undertaken, or the content of any reports to the Minister. It has full discretion in performing its functions and exercising its powers. *[Section 19 of the Assessment Authority Bill]*

1.41 The Authority remains subject to the Assessment Authority Bill, which, for example, allows the Minister to set terms of reference for capability reviews or ad hoc reports the Minister requests from the Authority about a regulator (under subsection 12(4)).

1.42 The Authority, as is usual, is also subject to other laws of the Commonwealth. For example, the Secretary of the Department, as accountable authority for the Authority, has certain limited powers of direction and instruction under the *Public Governance, Performance and Accountability Act 2013*. Such powers will not prevent the Authority from independently carrying out its functions.

Timing of assessments and capability reviews

1.43 The Authority is required to undertake assessments of the effectiveness of APRA and the effectiveness of ASIC at least once every two years, beginning in 2021. *[Subsection 14(1) of the Assessment Authority Bill]*

1.44 The Minister is required to consider requesting the Authority to undertake a capability review of APRA and ASIC at least once every four years, beginning in 2021. *[Subsection 14(2) of the Assessment Authority Bill]*

1.45 In assessing APRA's effectiveness and ASIC's effectiveness, and in undertaking a capability review of either regulator, the Authority may take into account an assessment or review undertaken by another person. *[Section 15 of the Assessment Authority Bill]*

1.46 For example, the International Monetary Fund regularly assesses APRA (and other bodies) under the Financial Sector Assessment Program.

Enabling the Authority to take other assessments into account in preparing its reports will avoid duplicating other external assessments of APRA or ASIC.

Terms of reference for ad hoc assessment reports and for capability reviews

1.47 Where the Minister requests the Authority to undertake a capability review or ad hoc report on a matter relating to the effectiveness of each regulator, the request may include terms of reference.

[Subsection 12(4) of the Assessment Authority Bill]

1.48 These terms of reference may, for example, cover matters such as:

- the matters to be considered by a capability review or report;
- a requirement for a capability review or report to include recommendations; and
- the timeframe in which a capability review or report is to be provided to the Minister.

1.49 A ministerial request made in writing is declared not to be a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*. *[Subsection 12(5) of the Assessment Authority Bill]*

1.50 This is not a substantive exception to the *Legislation Act 2003*, as the request would *not* otherwise be a legislative instrument for the purposes of that Act. Instead, this exception is included to assist readers of the legislation.

Cooperation with the Authority in performing its functions

1.51 APRA and ASIC (including their members and staff), are required to cooperate with the Authority (including its members and staff) to the extent reasonably necessary to enable the Authority to perform its functions and exercise its powers. *[Subsection 20(1) and (5) of the Assessment Authority Bill]*

1.52 Without limiting the general obligation, this cooperation includes each of the following information-sharing obligations:

- giving the Authority any requested information;
- producing any requested document in APRA's or ASIC's possession; and
- answering the Authority's questions.

[Subsection 20(2) of the Assessment Authority Bill]

1.53 Whether a request by the Authority is ‘reasonably necessary’ to enable the performance of its functions and exercise of its powers will need to be determined on a case-by-case basis.

1.54 Legal professional privilege does not excuse the requirement for a regulator (or its members or staff) to provide information, produce a document or answer a question. However, providing the information, document or answer does not represent a waiver of a right to claim legal professional privilege. This information is also protected by Part 4 of the Assessment Authority Bill. *[Section 21 of the Assessment Authority Bill]*

1.55 Persons required to provide information, produce documents or answers questions will be given reasonable time before being required to do so. *[Subsections 20(3) and (4) of the Assessment Authority Bill]*

1.56 The information sharing required by APRA and ASIC as part of its cooperation obligations differ from other bodies’ more formal coercive powers to issue notices to require a person to provide information, produce documents or answer questions. In particular, there is *not* a criminal offence provision associated with the statutory obligations to cooperate. Instead, the Authority may report on the extent of compliance with the obligations in its assessment reports. *[Paragraphs 13(1)(g) and (2)(f) of the Assessment Authority Bill]*

Processes to be followed in relation to reports and reviews

1.57 Before giving an assessment report or capability review on APRA or ASIC to the Minister, the Authority is required to first give a copy of the proposed report or review to the relevant regulator so that they may comment on it. The Authority is required to consider any comments and to provide them to the Minister. *[Subsections 16(1) and (2) of the Assessment Authority Bill]*

1.58 The formal consultation process envisaged by these provisions is not intended to prevent the Authority from consulting with APRA and ASIC throughout the process of preparing an assessment report or capability review.

1.59 The Minister is required to table a copy of a biennial report assessing a regulator’s effectiveness in each House of the Parliament. Capability reviews and ad hoc reports may also be tabled in Parliament in the general course. *[Section 17 of the Assessment Authority Bill]*

1.60 The Authority is not permitted to publish an assessment report or capability review unless the report or review has been tabled in a House of the Parliament, or the report or review has been published by the Minister. *[Subsection 16(4) of the Assessment Authority Bill]*

1.61 The Authority is required to give a final report or capability review to the regulator(s) to which the report or review relates.
[Subsection 16(3) of the Assessment Authority Bill]

Other functions and powers of the Authority

1.62 The Authority may also have functions conferred by other provisions of the Assessment Authority Bill or of another law of the Commonwealth, and has any other function incidental or conducive to the performance of any of its functions. *[Paragraphs 12(1)(f) and (g) of the Assessment Authority Bill]*

1.63 The Authority has power to do all things necessary or convenient to be done in connection with the performance of its functions.
[Section 18 of the Assessment Authority Bill]

1.64 Despite this general power, it is intended that public resources expended in relation to the Authority will be committed by the Secretary of the Department (or the Secretary's delegate) under Division 5 of Part 3 of the Assessment Authority Bill, and under other general arrangement-making powers such as those in the *Public Governance, Performance and Accountability Act 2013*.

Members, staff and consultants

Appointment and conditions of appointed members

1.65 The Minister appoints members (other than the Departmental member) of the Authority by written instrument. The Minister is required to appoint one of these members as the Chair. Each of the appointed members, including the Chair, is appointed on a part-time basis. The tenure of each must not exceed five years, but members may be reappointed. The total tenure of an appointed member can be no more than 10 years. *[Sections 24 and 25 of the Assessment Authority Bill]*

1.66 The Minister may appoint an acting member (other than the Departmental member) or an acting Chair to act:

- during a vacancy in either of these positions; or
- during the period an appointed member or the Chair is absent from duty or unable to perform the duties of the office.

[Section 26 of the Assessment Authority Bill]

1.67 Members will be remunerated, and granted allowances, in accordance with a determination made by the Remuneration Tribunal. A leave of absence for an appointed member of the Authority is granted by the Minister. *[Sections 27 and 28 of the Assessment Authority Bill]*

1.68 The Minister may delegate the powers to appoint an acting Chair and to grant any appointed member a leave of absence to the Secretary of the Department or an SES employee or acting SES employee in the Department (other than a staff member of the Authority). *[Section 47 of the Assessment Authority Bill]*

1.69 An appointed member is not permitted to engage in any other paid work that conflicts or could conflict with the proper performance of the member's duties—for example, work that is remunerated by APRA or ASIC. *[Section 30 of the Assessment Authority Bill]*

1.70 Section 29 of the *Public Governance, Performance and Accountability Act 2013* requires the members, as officials of the Department, to disclose material personal interests in accordance with rules made for the purposes of that section. In addition to those rules (which require disclosure to other persons, such as to the other members of the Authority), appointed members are required to make these disclosures to the Minister. Failure to do so will constitute non-compliance with section 29 of that Act. *[Section 31 of the Assessment Authority Bill]*

1.71 Engaging in paid work that conflicts with the appointed member's duties may result in termination of appointment. Failure to disclose material personal interests may also result in termination. Other grounds for termination are misbehaviour, inability to perform the duties of the office due to physical or mental incapacity, insolvency or bankruptcy, or consecutive absences from meetings other than on formal leave of absence. *[Section 33 of the Assessment Authority Bill]*

1.72 The Minister may determine other terms and conditions on which an appointed member holds office. *[Section 29 of the Assessment Authority Bill]*

1.73 An appointed member may resign by giving the Minister a written resignation. *[Section 32 of the Assessment Authority Bill]*

Departmental member

1.74 Either the Secretary of the Department or an SES employee in the Department may be the Departmental member. The Departmental member is not made by appointment, but is determined by operation of the Assessment Authority Bill. By default, the Secretary is the Departmental member, unless the Secretary has nominated an SES employee in the Department. *[Subsection 23(1) of the Assessment Authority Bill]*

1.75 A nomination by the Secretary must be done in writing. *[Subsection 23(2) of the Assessment Authority Bill]*

1.76 A nomination is not a legislative instrument (see item 22 of the table in section 6 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

1.77 The nomination may be varied or revoked in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Meetings and decision making

1.78 The Chair is required to convene meetings of the Authority to enable the Authority to perform its functions. The Authority may determine how its meetings are conducted, including how decisions are made during meetings. It can also determine that decisions can be made without meetings. [*Sections 34 and 35 of the Assessment Authority Bill*]

1.79 Rules made for the purposes of section 29 of the *Public Governance, Performance and Accountability Act 2013* will impact on whether individual members of the Authority are allowed to vote on proposed decisions (whether at meetings or otherwise) when the member has a personal material interest in the matter being considered.

Staff and consultants

1.80 The Authority will be assisted by a secretariat staff, consisting of APS employees in the Department (made available to the Authority by the Secretary). These APS employees are referred to as ***staff members*** for the purposes of the Assessment Authority Bill. [*Section 5 (definition of ‘staff member’) and section 36 of the Assessment Authority Bill*]

1.81 The Department (through the Secretary) may engage consultants to assist the Authority, for example to assist the Authority to conduct a particular aspect of a performance assessment or in the conduct of a capability review. [*Section 37 of the Assessment Authority Bill*]

Information Management

1.82 The Authority needs access to a wide range of information from APRA or ASIC in order to perform its assessment reporting and capability review functions. Some of this information will not be suitable for publication or further disclosure. This information is referred to in the Assessment Authority Bill as protected information. In handling protected information:

- the Authority is prohibited from including any protected information in a report or review and must consult with APRA and ASIC (as relevant) to ensure that such information is not included;

- an offence provision with a maximum sentence of two years' imprisonment also prohibits the unauthorised use or disclosure of protected information by entrusted persons; and
- an entrusted person is not required to provide protected information to a court or tribunal (it is intended that this information would be sought by courts or tribunals, where appropriate, directly from APRA or ASIC).

[Sections 39 to 41 of the Assessment Authority Bill]

What is protected information?

1.83 **Protected information** includes information prohibited from being disclosed under a law of the Commonwealth other than the Assessment Authority Bill. This includes:

- information that APRA is required to protect under section 56 of the *Australian Prudential Regulation Authority Act 1998*; and
- information that ASIC is required to protect under section 127 of the *Australian Securities and Investments Commission Act 2001*.

[Section 5 of the Assessment Authority Bill (paragraph (a) of the definition of 'protected information')]

1.84 Protected information also includes information the disclosure of which would or could reasonably be expected to found an action for breach of a duty of confidence. *[Section 5 of the Assessment Authority Bill (paragraph (b) of the definition of 'protected information')]*

1.85 This ensures that information provided by industry participants to APRA or ASIC will not be included in any assessment reports or otherwise disclosed to the public by the Authority.

1.86 Protected information includes information protected by legal professional privilege. This is required as this privilege does not excuse disclosure of information to the Authority under Division 4 of Part 2 of the Bill. *[Section 5 of the Assessment Authority Bill (paragraph (c) of the definition of 'protected information')]*

1.87 Protected information also includes information the disclosure of which would have negative effects. For example, this includes where publication may prejudice an enforcement matter (within the meaning of the *Privacy Act 1988*). *[Section 5 of the Assessment Authority Bill (paragraph (d) of the definition of 'protected information')]*

Offence for unauthorised use or disclosure of protected information

1.88 The unauthorised use or disclosure of protected information by an entrusted person is a criminal offence punishable by up to two years' imprisonment. An ***entrusted person*** is defined broadly to cover the people that may receive protected information in the course of their duties. This includes members and staff members of the Authority as well as the Secretary, any APS employees, or consultants or contractors for the Authority (and their employees). [*Section 5 (definition of 'entrusted person') and subsection 40(1) of the Assessment Authority Bill*]

1.89 An entrusted person's use or disclosure of protected information is authorised by any of the following circumstances:

- use or disclosure in performing functions or exercising powers (for example, the use or disclosure is done in the course of assessing the effectiveness of the regulators, allowing entrusted persons to share protected information with one another in the course of carrying out the Authority's core functions); [*Section 42 of the Assessment Authority Bill*]
- disclosure to the Secretary of the Department, or to APRA or ASIC; [*Section 43 of the Assessment Authority Bill*]
- use or disclosure to an 'enforcement body' for or directly related to 'enforcement-related activities' (these expressions have the same meaning as in the *Privacy Act 1988*). [*Section 44 of the Assessment Authority Bill*]

1.90 Disclosure *not* being authorised by any of sections 42, 43 or 44 is an element of the offence. This means an evidential burden does *not* rest with the defendant to adduce evidence that the use or disclosure was authorised in those ways.

1.91 There are two specific defences to the offence, being where the information is already lawfully available to the public, or the use or disclosure is either authorised by a Commonwealth law or is done in compliance with a requirement of a Commonwealth law. These defences apply in addition to general defences such as those included in the *Criminal Code*. [*Subsections 40(2) and (3) of the Assessment Authority Bill*]

1.92 A defendant bears an evidential burden in relation to these defences. This is appropriate as, in many cases, it will be peculiarly within the knowledge of the defendant how the information may be publicly accessed, or the means by which the conduct was authorised by another law of the Commonwealth.

1.93 Section 15.4 of the *Criminal Code* (Extended geographic jurisdiction—category D) applies this offence provision to any entrusted

person outside Australia, including any overseas appointed members.
[Subsection 40(4) of the Assessment Authority Bill]

Miscellaneous

Crown and geographic application

1.94 The Assessment Authority Bill, once enacted, will bind the Crown in each of its capacities. However, the Bill will not make the Crown liable to be prosecuted for an offence. *[Section 6 of the Assessment Authority Bill]*

1.95 The Assessment Authority Bill, once enacted, will extend to every external Territory, and will extend to acts, omissions, matters and things outside Australia. *[Section 7 of the Assessment Authority Bill]*

Protection from liability

1.96 Members and staff members of the Authority are protected from civil liability for loss, damage or injury of any kind suffered by another person in the good faith performance of functions or exercise of powers of the Authority or of the member and staff member. *[Section 46 of the Assessment Authority Bill]*

1.97 This enables the Authority to efficiently perform its functions and exercise its powers, without being hampered by undue concerns over potential civil liability. APRA and ASIC staff members and individuals are also protected from any civil liability resulting from compliance with providing information in accordance with subsection 20(2).

Delegations

1.98 The Minister, the Authority and the Secretary of the Department all have powers to delegate their functions or powers under the Assessment Authority Bill.

1.99 The Minister may delegate the following functions or powers to the Secretary, to an SES employee or an acting SES employee in the Department, but not to a staff member of the Authority (any delegated powers may not be exercised by the Departmental member):

- appointing an acting Chair of the Authority under subsection 26(2); and
- granting leave to any appointed member under section 28.

[Section 47 of the Assessment Authority Bill]

1.100 The Authority may delegate the following functions or powers to a member or a staff member:

- consulting with APRA and ASIC on reports and reviews under subsection 16(1) or (3) or 39(2); and
- requesting information, documents or answers to questions from APRA and ASIC under subsection 20(2) (the delegate for this power must be at least Executive Level 2).

[Section 48 of the Assessment Authority Bill]

1.101 The Secretary may delegate the following functions or powers to an SES employee or an acting SES employee in the Department (any delegated powers may not be exercised by the Departmental member):

- making APS employees in the Department available to the Authority under section 36 (this power may not be delegated to a staff member); and
- engaging consultants to assist the Authority under section 37.

[Section 49 of the Assessment Authority Bill]

Rules

1.102 The Minister has the power to, by legislative instrument, make rules prescribing matters:

- required or permitted by the Assessment Authority Bill to be prescribed by the rules; or
- necessary or convenient to be prescribed for carrying out or giving effect to the Assessment Authority Bill.

[Section 50 of the Assessment Authority Bill]

1.103 The following matters are required or permitted to be prescribed by the rules:

- positions of APRA staff members and ASIC staff members that will be executives covered by the Authority’s assessment of the framework of accountability for APRA and ASIC executives; *[Section 5 (definitions of ‘APRA executive’ and ‘ASIC executive’) and paragraphs 13(1)(f) and (2)(e) of the Assessment Authority Bill]*
- any additional matters connected with the performance of the functions, and the exercise of the powers, of APRA and ASIC to be assessed as part of the effectiveness of those regulators; *[Paragraphs 13(1)(h) and (2)(g) of the Assessment Authority Bill]*
- remuneration and allowances for appointed members, where this has not been done by the Remuneration Tribunal. *[Subsections 27(1) and (2) of the Assessment Authority Bill]*

Consequential amendments

1.104 APRA will be able to disclose protected information (within the meaning of the *Australian Prudential Regulation Authority Act 1998*) to Authority officials (both the members and staff members of the Authority). Disclosure in this way will not contravene the offence provision in that Act protecting the secrecy of that information. That offence provision will also not apply to the use or disclosure of that information by Authority officials, as the secrecy provision in the Assessment Authority Bill will apply instead. [*Schedule [6.14] to the Stronger Regulators Bill, items 1 to 6, section 56 of the Australian Prudential Regulation Authority Act 1998*]

1.105 ASIC will be authorised to disclose information given to it in confidence in the performance of functions and exercise of powers under corporation legislation, and to disclose protected information to the Authority. [*Schedule [6.14] to the Stronger Regulators Bill, item 7, subsection 127(2A) of the Australian Securities and Investments Commission Act 2001*]

1.106 Consequential amendments are made to secrecy provisions in the *Insurance Act 1973* and the *Life Insurance Act 1995* to refer to the new exceptions to APRA's secrecy provision. [*Schedule [6.14] to the Stronger Regulators Bill, items 9 and 10, subsection 109E(1) of the Insurance Act 1973 and subsection 231E(1) of the Life Insurance Act 1995*]

Application and transitional provisions

Commencement

1.107 The Assessment Authority Bill will commence in its entirety on 1 July 2020. [*Section 2 of the Assessment Authority Bill*]

1.108 Consequential amendments to other Commonwealth Acts included in the Stronger Regulators Bill will commence at the same time as the Authority Bill. However, these consequential amendments will not commence at all if the Assessment Authority Bill does not commence. [*Section 2 of the Stronger Regulators Bill*]

Timing of reporting functions

1.109 The assessment reporting and capability review timeframes will not commence until 2021, to allow time for members and staff of the Authority to be appointed, and for the Authority to meet and determine its method of operations. [*Section 14 of the Assessment Authority Bill*]

Application of information disclosure provisions

1.110 The ability for APRA and ASIC to disclose information to the Authority will apply to information obtained before or after the commencement of the measure. *[Schedule [6.14] to the Stronger Regulators Bill, items 8 and 11, Part 33 of the Australian Securities and Investments Commission Act 2001]*