

EXPOSURE DRAFT

2019-2020-2021

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

Financial Accountability Regime Bill 2021

No. , 2021

(Treasury)

**A Bill for an Act to provide for strengthened
accountability obligations for certain financial
entities, and for related purposes**

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1 **A Bill for an Act to provide for strengthened**
2 **accountability obligations for certain financial**
3 **entities, and for related purposes**

4 The Parliament of Australia enacts:

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Chapter 1 Introduction

Part 1 Preliminary provisions

Section 1

Chapter 1—Introduction

Part 1—Preliminary provisions

1 Short title

This Act is the *Financial Accountability Regime Act 2021*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Objects of this Act

The objects of this Act are:

- (a) to provide for accountability obligations for certain financial entities; and
- (b) to provide for accountability obligations for persons who hold certain positions, or have certain responsibilities, related to those financial entities.

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Introduction **Chapter 1**
Preliminary provisions **Part 1**

Section 4

1 **4 Act binds the Crown**

2 (1) This Act binds the Crown in each of its capacities.

3 (2) This Act does not make the Crown liable to be prosecuted for an
4 offence.

5 **5 Extension to external Territories**

6 This Act extends to every external Territory.

7 **6 Extra-territorial application**

8 This Act extends to acts, omissions, matters and things outside
9 Australia.

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Chapter 1 Introduction

Part 2 Interpretation

Section 7

Part 2—Interpretation

7 Definitions

In this Act:

accountable entity: see section 8.

accountable person: see sections 9 and 10.

ADI has the same meaning as in the *Banking Act 1959*.

Note: ADI is short for authorised deposit-taking institution.

affected person: see section 86.

annual turnover, of an accountable entity during a 12-month period, has the same meaning as in section 761A of the *Corporations Act 2001*.

APRA means the Australian Prudential Regulation Authority.

APRA staff member has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

ASIC means the Australian Securities and Investments Commission.

ASIC staff member means a staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*) of ASIC.

Australia, when used in a geographical sense, includes the external Territories.

authorised NOHC:

- (a) of an ADI—means an authorised NOHC (within the meaning of the *Banking Act 1959*) of the ADI; and
- (b) of a general insurer—means an authorised NOHC (within the meaning of the *Insurance Act 1973*) of the general insurer.

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Section 7

- 1 Note: NOHC is short for non-operating holding company.
- 2 ***benefit derived and detriment avoided*** has the same meaning as in
3 the *Corporations Act 2001*.
- 4 ***civil penalty order*** has the same meaning as in the Regulatory
5 Powers Act.
- 6 ***civil penalty provision*** has the same meaning as in the Regulatory
7 Powers Act.
- 8 ***connected entity***, in relation to an RSE licensee, means a
9 connected entity (within the meaning of the *Superannuation*
10 *Industry (Supervision) Act 1993*) of the RSE licensee.
- 11 ***constitutionally covered body***: see section 12.
- 12 ***constitutional corporation*** means a corporation to which
13 paragraph 51(xx) of the Constitution applies.
- 14 ***decision-maker*** for a reviewable decision means:
15 (a) if APRA made the reviewable decision—APRA; or
16 (b) if ASIC made the reviewable decision—ASIC.
- 17 ***enhanced notification threshold***: see subsection 29(3).
- 18 ***financial year***, in relation to an accountable entity or significant
19 related entity:
20 (a) if the accountable entity or significant related entity is a
21 company that is registered under the *Corporations Act*
22 *2001*—has the same meaning as in that Act; or
23 (b) if:
24 (i) the accountable entity or significant related entity is not
25 a company that is registered under the *Corporations Act*
26 *2001*; and
27 (ii) the accountable entity or significant related entity is
28 incorporated or registered under another law; and
29 (iii) a definition of ***financial year*** applies in relation to that
30 other law;
31 has the same meaning as in that other law; or

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Chapter 1 Introduction

Part 2 Interpretation

Section 7

1 (c) in any other case—means a period of 12 months starting on
2 1 July.

3 **foreign accountable entity** means:

4 (a) a foreign ADI (within the meaning of the *Banking Act 1959*);

5 or

6 (b) a foreign general insurer (within the meaning of the
7 *Insurance Act 1973*); or

8 (c) an eligible foreign life insurance company (within the
9 meaning of the *Life Insurance Act 1995*) that is registered
10 under section 21 of the *Life Insurance Act 1995*.

11 **general insurer** has the same meaning as in the *Insurance Act*
12 *1973*.

13 **internal decision reviewer**: see subsection 89(1).

14 **investigator** means a person the Regulator appoints under
15 subsection 42(1).

16 **lawyer** means a duly qualified legal practitioner and, in relation to
17 a person, means such a practitioner acting for the person.

18 **life company** means a company that is registered under section 21
19 of the *Life Insurance Act 1995*.

20 **minimum deferral period**, for variable remuneration of an
21 accountable person, has the meaning given by subsection 26(1).

22 **Minister rules** means the rules made under subsection 99(1).

23 **officer** has the meaning given by section 9 of the *Corporations Act*
24 *2001*.

25 **private health insurer** has the same meaning as in the *Private*
26 *Health Insurance (Prudential Supervision) Act 2015*.

27 **reconsideration decision** means a decision made under
28 subsection 89(2).

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1 **registered NOHC**, of a life company, means a registered NOHC
2 (within the meaning of the *Life Insurance Act 1995*) of the life
3 company.

4 Note: NOHC is short for non-operating holding company.

5 **Regulator** means either APRA or ASIC, but, if the context requires
6 the reference to be particularly to one of those bodies, then
7 Regulator means that body.

8 Note: However, ASIC may only exercise powers and perform functions
9 under this Act in relation to certain persons (see subsection 33(2)).

10 **Regulator rules** means the rules made under subsection 100(1).

11 **Regulatory Powers Act** means the *Regulatory Powers (Standard*
12 *Provisions) Act 2014*.

13 **related**: the question whether 2 bodies corporate are **related** to each
14 other is to be determined for the purposes of this Act in the same
15 way as for the purposes of the *Corporations Act 2001*.

16 **relevant group**, of an accountable entity, means the accountable
17 entity and its significant related entities.

18 **remuneration**, of an accountable person, has a meaning affected
19 by subsection 23(3).

20 **reviewable decision**: see section 86.

21 **RSE licensee** means a constitutional corporation or a body
22 corporate that:

- 23 (a) holds an RSE licence granted under section 29D of the
24 *Superannuation Industry (Supervision) Act 1993*; and
25 (b) is not the trustee of a fund that is an exempt public sector
26 superannuation scheme (within the meaning of that Act).

27 **significant related entity** has the meaning given by section 11.

28 **subsidiary**: the question whether a body corporate is a **subsidiary**
29 of another body corporate is to be determined for the purposes of
30 this Act in the same way as for the purposes of the *Corporations*
31 *Act 2001*.

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Chapter 1 Introduction

Part 2 Interpretation

Section 8

- 1 **this Act** includes:
- 2 (a) the Minister rules; and
- 3 (b) the Regulator rules; and
- 4 (c) the Regulatory Powers Act as it applies in relation to this
- 5 Act.

6 **variable remuneration** has the meaning given by section 24.

7 **8 Meaning of *accountable entity***

8 *ADIs and authorised NOHCs of ADIs*

9 (1) A body corporate is an ***accountable entity*** if both of the following

10 apply to the body corporate:

- 11 (a) it is an ADI or an authorised NOHC of an ADI;
- 12 (b) it is a constitutionally covered body.

13 Note: For when a body corporate is a ***constitutionally covered body***, see

14 section 12.

15 (2) The ADI or authorised NOHC is an ***accountable entity*** from the

16 start of the later of:

- 17 (a) 1 July 2022; and
- 18 (b) the day that is 6 months after the commencement of this Act.

19 *Other bodies corporate*

20 (3) A body corporate is an ***accountable entity*** if all of the following

21 apply to the body corporate:

- 22 (a) it is:
- 23 (i) a general insurer; or
- 24 (ii) an authorised NOHC of a general insurer; or
- 25 (iii) a life company; or
- 26 (iv) a registered NOHC of a life company; or
- 27 (v) a private health insurer; or
- 28 (vi) an RSE licensee;
- 29 (b) it is a constitutionally covered body;

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Section 9

- 1 (c) it is included in a class of bodies corporate specified in an
2 instrument made under subsection (5).
- 3 (4) The body corporate is an **accountable entity** from the start of the
4 later of:
- 5 (a) the day that is 6 months after the instrument commences; and
6 (b) the day (if any) specified in the instrument in relation to that
7 class of bodies corporate.
- 8 *Minister may declare classes of bodies corporate*
- 9 (5) The Minister may, by legislative instrument:
- 10 (a) declare one or more classes of bodies corporate for the
11 purposes of paragraph (3)(c); and
12 (b) specify a day from which bodies corporate in that class are
13 accountable entities for the purposes of paragraph (4)(b).

9 Meaning of **accountable person**

Accountable persons of accountable entities

- 14
- 15
- 16 (1) An individual is an **accountable person** of an accountable entity if:
- 17 (a) either of the following applies:
- 18 (i) in the case of an accountable entity other than an RSE
19 licensee—the person holds a position in the accountable
20 entity or in another body corporate of which the
21 accountable entity is a subsidiary;
- 22 (ii) in the case of an accountable entity that is an RSE
23 licensee—the person holds a position in the accountable
24 entity or in another body corporate of which the
25 accountable entity is a connected entity; and
- 26 (b) because of that position, the person has actual or effective
27 senior executive responsibility:
- 28 (i) for management or control of the accountable entity; or
29 (ii) for management or control of a significant or substantial
30 part or aspect of the operations of the accountable entity
31 or the accountable entity's relevant group.

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Chapter 1 Introduction

Part 2 Interpretation

Section 9

1 Note 1: For the definitions of *connected entity*, *relevant group* and
2 *subsidiary*, see section 7.

3 Note 2: This section is subject to section 10 (when a person is not an
4 accountable person).

5 *Prescribed responsibilities*

6 (2) An individual is also an *accountable person* of an accountable
7 entity if the person:

8 (a) holds a position in, or relating to, the accountable entity; and

9 (b) because of that position has a responsibility, relating to the
10 accountable entity, of a kind specified by the Minister rules
11 for the purposes of this paragraph.

12 (3) For the purposes of paragraph (2)(b), the Minister rules may
13 specify a kind of responsibility by reference to:

14 (a) a level of responsibility; or

15 (b) responsibility for a matter.

16 *Prescribed positions*

17 (4) An individual is also an *accountable person* of an accountable
18 entity if the person holds a position in, or relating to, the
19 accountable entity that is of a kind specified by the Minister rules
20 for the purposes of this subsection. For the purposes of this Act, the
21 person's responsibilities are taken to include the responsibilities
22 associated with that position.

23 *Accountable persons of foreign accountable entities*

24 (5) An individual is an *accountable person* of an accountable entity
25 that is a foreign accountable entity if the person:

26 (a) has a responsibility of a kind mentioned in subsection (1) or
27 (2); or

28 (b) holds a position of a kind mentioned in subsection (4);
29 in relation to a branch of the accountable entity that is operating in
30 Australia.

Accountable persons of significant related entities

- 1
- 2 (6) An individual is an **accountable person** of a significant related
- 3 entity of an accountable entity if:
- 4 (a) the person holds a position in the significant related entity;
- 5 and
- 6 (b) because of that position, the person has actual or effective
- 7 senior executive responsibility:
- 8 (i) for management or control of the accountable entity; or
- 9 (ii) for management or control of a significant or substantial
- 10 part or aspect of the operations of the accountable entity
- 11 or the accountable entity's relevant group.

12 Note: For the definitions of **relevant group** and **significant related entity**,

13 see section 7.

14 **10 When a person is not an accountable person**

15 *When persons are not accountable persons*

- 16 (1) A person is not an **accountable person** of an accountable entity, or
- 17 of a significant related entity, if each of the person's
- 18 responsibilities that would (apart from this subsection) cause the
- 19 person to be an accountable person is either:
- 20 (a) a responsibility excluded under subsection (2) in relation to
- 21 that accountable entity or that significant related entity; or
- 22 (b) a responsibility excluded under subsection (3) in relation to a
- 23 class of accountable entities or significant related entities that
- 24 includes that accountable entity or that significant related
- 25 entity.
- 26 (2) For the purpose of paragraph (1)(a), the Regulator may, by written
- 27 notice given to an accountable entity or a significant related entity,
- 28 exclude specified responsibilities.
- 29 (3) For the purpose of paragraph (1)(b), the Regulator rules may
- 30 exclude specified responsibilities relating to:
- 31 (a) a class of accountable entities specified in the instrument; or

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Chapter 1 Introduction

Part 2 Interpretation

Section 11

1 (b) a class of significant related entities specified in the
2 instrument.

3 *Relationship with other provisions*

4 (4) This section applies despite section 9.

5 *Notice not a legislative instrument*

6 (5) A notice under subsection (2) is not a legislative instrument.

7 **11 Meaning of *significant related entity***

8 *Significant related entities of accountable entities other than RSE*
9 *licensees*

10 (1) Subject to subsection (2), a body corporate is a ***significant related***
11 ***entity*** of an accountable entity that is not an RSE licensee if all of
12 the following apply to the body corporate:

- 13 (a) it is a subsidiary of the accountable entity;
14 (b) it, or its business or activities, has (or is likely to have) an
15 effect on the accountable entity, or the business or activities
16 of the accountable entity, that is material and substantial;
17 (c) it is a constitutionally covered body;
18 (d) it is not an accountable entity itself.

19 Note 1: For the definition of *subsidiary*, see section 7.

20 Note 2: For when a body corporate is a *constitutionally covered body*, see
21 section 12.

22 (2) A body corporate is not a ***significant related entity*** of an
23 accountable entity (the ***first accountable entity***) if:

- 24 (a) the body corporate is also a subsidiary of another accountable
25 entity; and
26 (b) that other accountable entity is a subsidiary of the first
27 accountable entity.

28 Example: Company A is a subsidiary of the authorised NOHC of an ADI, and
29 also a subsidiary of the ADI. Both the ADI and the authorised NOHC
30 are accountable entities. Under this subsection:

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Section 11

- 1 (a) if the business of Company A has a material and substantial
2 effect on both the ADI and the authorised NOHC—Company A
3 would be a significant related entity only in relation to the ADI;
4 but
5 (b) if the business of Company A did not have a material and
6 substantial effect on the ADI—Company A would not be a
7 significant related entity in relation to either the ADI or the
8 authorised NOHC.

9 *Significant related entities of accountable entities that are RSE*
10 *licensees*

- 11 (3) A body corporate is a **significant related entity** of an accountable
12 entity that is an RSE licensee if all of the following apply to the
13 body corporate:
14 (a) it is a connected entity of the accountable entity;
15 (b) it, or its business or activities, has (or is likely to have) an
16 effect on the accountable entity, or the business or activities
17 of the accountable entity, that is material and substantial;
18 (c) it is a constitutionally covered body;
19 (d) it is not an accountable entity itself.

20 Note: For the definition of **connected entity**, see section 7.

21 *Material and substantial effect*

- 22 (4) For the purposes of paragraphs (1)(b) and (3)(b), in determining
23 whether a body corporate has (or is likely to have) an effect on an
24 accountable entity, or the business or activities of an accountable
25 entity, that is material and substantial, the following matters may
26 be taken into account:
27 (a) the nature of the body corporate's business or activities;
28 (b) the scale of the body corporate's business or activities;
29 (c) the nature and extent of any interdependency between the
30 body corporate and the accountable entity;
31 (d) any organisational, financial or administrative arrangements
32 between the body corporate and the accountable entity;
33 (e) any other relevant matter.

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Chapter 1 Introduction

Part 2 Interpretation

Section 12

1 **12 Meaning of *constitutionally covered body***

- 2 (1) A body corporate is a ***constitutionally covered body*** if any of the
3 following apply to the body corporate:
- 4 (a) it is a constitutional corporation;
- 5 (b) it carries on the business of banking (within the meaning of
6 paragraph 51(xiii) of the Constitution), other than State
7 banking not extending beyond the limits of the State
8 concerned;
- 9 (c) it carries on the business of insurance (within the meaning of
10 paragraph 51(xiv) of the Constitution), other than State
11 insurance not extending beyond the limits of the State
12 concerned;
- 13 (d) it is the trustee of a superannuation fund (within the meaning
14 of the *Superannuation Industry (Supervision) Act 1993*) the
15 sole or primary purpose of which is the provision of old-age
16 pensions (within the meaning of paragraph 51(xxiii) of the
17 Constitution).
- 18 (2) A body corporate is also a ***constitutionally covered body*** if:
- 19 (a) the conduct of the body corporate affects (or is capable of
20 affecting) the activities, functions, relationships or business
21 of another body corporate; and
- 22 (b) the other body corporate is covered by subsection (1).

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Obligations under the Financial Accountability Regime **Chapter 2**
Obligations of accountable entities and accountable persons **Part 2**
Accountable entities **Division 1**

Section 13

1 **Chapter 2—Obligations under the Financial**
2 **Accountability Regime**

3 **Part 2—Obligations of accountable entities and**
4 **accountable persons**

5 **Division 1—Accountable entities**

6 **13 Obligations of accountable entities**

- 7 (1) An accountable entity must comply with:
8 (a) its accountability obligations under Part 3; and
9 (b) its key personnel obligations under Part 4; and
10 (c) its deferred remuneration obligations under Part 5; and
11 (d) its notification obligations under Part 6.

12 Note: Failure to comply with an obligation under this Chapter is a
13 contravention of a civil penalty provision (see section 76).

- 14 (2) Subsection (1) does not apply to:
15 (a) an accountable entity that:
16 (i) the Minister has exempted under section 14; or
17 (ii) is included in a class of accountable entities that the
18 Minister has exempted under section 14; or
19 (b) a foreign accountable entity, except to the extent that it
20 operates a branch of the foreign accountable entity in
21 Australia.
- 22 (3) Subsection (1) does not apply to an accountable entity and an
23 obligation to the extent that the accountable entity is not required
24 to comply with the obligation because of subsection 15(2).

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Chapter 2 Obligations under the Financial Accountability Regime

Part 2 Obligations of accountable entities and accountable persons

Division 1 Accountable entities

Section 14

14 Minister may exempt accountable entities

Exemption of particular accountable entities

- (1) The Minister may, by written notice given to an accountable entity, exempt the accountable entity from compliance with this Chapter.

Class exemptions

- (2) The Minister may, by legislative instrument, exempt a class of accountable entities from compliance with this Chapter.

Notice not a legislative instrument

- (3) A notice under subsection (1) is not a legislative instrument.

15 Inconsistency with corresponding foreign laws

- (1) If the Regulator is satisfied that an accountable entity would contravene a law of a foreign country if the accountable entity were to comply with a particular obligation under section 13, the Regulator may:

- (a) give a written notice specifying that obligation to the accountable entity; and
- (b) specify in the notice:
 - (i) the extent to which the accountable entity need not comply with that obligation; and
 - (ii) conditions to which the notice is subject.

Note: A decision not to specify an obligation, or to specify conditions, is a reviewable decision (see Part 5 of Chapter 3).

- (2) An accountable entity is not required to comply with that obligation:
- (a) to the extent compliance would result in the accountable entity contravening that law of a foreign country; or
 - (b) if the notice specifies the extent to which the accountable entity need not comply with that obligation—to the extent so specified;
- if the conditions (if any) specified in the notice are complied with.

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Obligations under the Financial Accountability Regime **Chapter 2**

Obligations of accountable entities and accountable persons **Part 2**

Accountable entities **Division 1**

Section 15

1

(3) A notice under subsection (1) is not a legislative instrument.

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Chapter 2 Obligations under the Financial Accountability Regime

Part 2 Obligations of accountable entities and accountable persons

Division 2 Accountable persons

Section 16

1 **Division 2—Accountable persons**

2 **16 Obligations of accountable persons**

3 (1) An accountable person must comply with their accountability
4 obligations under Part 3 in relation to each of the responsibilities
5 that cause the person to be an accountable person of an accountable
6 entity or a significant related entity.

7 (2) Subsection (1) does not apply to an accountable person to the
8 extent that the person is an accountable person of an accountable
9 entity to which section 13 does not apply because of subsection
10 13(2).

11 (3) Subsection (1) does not apply to an accountable person and an
12 obligation to the extent that the accountable person is not required
13 to comply the obligation because of subsection 17(2).

14 **17 Inconsistency with corresponding foreign laws**

15 (1) If the Regulator is satisfied that an accountable person of an
16 accountable entity, or of a significant related entity, would
17 contravene a law of a foreign country if the person were to comply
18 with a particular obligation under section 16, the Regulator may:

- 19 (a) give a written notice specifying that obligation to the
20 accountable person; and
21 (b) specify in the notice:
22 (i) the extent to which the accountable person need not
23 comply with that obligation; and
24 (ii) conditions to which the notice is subject.

25 Note: A decision not to specify an obligation, or to specify conditions, is a
26 reviewable decision (see Part 5 of Chapter 3).

27 (2) An accountable person is not required to comply with that
28 obligation:
29 (a) to the extent that compliance would result in the accountable
30 person contravening that law of a foreign country; or

EXPOSURE DRAFT

Obligations under the Financial Accountability Regime **Chapter 2**

Obligations of accountable entities and accountable persons **Part 2**

Accountable persons **Division 2**

Section 17

- 1 (b) if the notice specifies the extent to which the accountable
2 person need not comply with that obligation—to the extent
3 so specified;
4 if the conditions (if any) specified in the notice are complied with.
- 5 (3) The Regulator must give a copy of the notice to the accountable
6 entity or significant related entity.
- 7 (4) A notice under subsection (1) is not a legislative instrument.

EXPOSURE DRAFT

Chapter 2 Obligations under the Financial Accountability Regime

Part 3 Accountability obligations

Section 18

Part 3—Accountability obligations

18 The accountability obligations of an accountable entity

The accountability obligations of an accountable entity are to take reasonable steps to:

- (a) conduct its business with honesty and integrity, and with due skill, care and diligence; and
- (b) deal with the Regulator in an open, constructive and cooperative way; and
- (c) in conducting its business, prevent matters from arising that would (or would be likely to) adversely affect the accountable entity's prudential standing or prudential reputation; and
- (d) ensure that each of its accountable persons meets their accountability obligations under section 19; and
- (e) ensure that each of its significant related entities complies with paragraphs (a), (b), (c) and (d) as if the significant related entity were an accountable entity.

Note: See also section 20 (taking reasonable steps).

19 The accountability obligations of an accountable person

(1) The accountability obligations of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, are to conduct the responsibilities of their position as an accountable person:

- (a) by acting with honesty and integrity, and with due skill, care and diligence; and
- (b) by dealing with the Regulator in an open, constructive and cooperative way; and
- (c) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would (or would be likely to) adversely affect the prudential standing or prudential reputation of the accountable entity; and

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Obligations under the Financial Accountability Regime **Chapter 2**
Accountability obligations **Part 3**

Section 19

- 1 (d) by taking reasonable steps in conducting those
2 responsibilities to ensure that the accountable entity complies
3 with any of the following that applies in relation to the
4 accountable entity:
5 (i) this Act;
6 (ii) the *Banking Act 1959*;
7 (iii) the credit legislation (within the meaning of the
8 *National Consumer Credit Protection Act 2009*);
9 (iv) the *Financial Sector (Collection of Data) Act 2001*;
10 (v) the financial services law (within the meaning of
11 section 761A of the *Corporations Act 2001*);
12 (vi) the *Insurance Act 1973*;
13 (vii) the *Life Insurance Act 1995*;
14 (viii) the *Private Health Insurance (Prudential Supervision)*
15 *Act 2015*;
16 (ix) the *Superannuation Industry (Supervision) Act 1993*;
17 (x) any regulations or other instruments, directions or
18 orders, made under a law mentioned in
19 subparagraphs (i) to (ix).

20 Example: Cherie is an accountable person of an ADI and has senior executive
21 responsibility for management of the ADI's financial resources.
22 Cherie must take reasonable steps to ensure that the management of
23 those resources complies with the requirements under the laws, orders
24 and directions mentioned in subparagraphs (d)(i) to (x) that apply in
25 relation to financial resource management.

26 Note: See also section 20 (taking reasonable steps).

- 27 (2) If more than one of the accountable persons of an accountable
28 entity, or of a significant related entity of an accountable entity,
29 have the same responsibility mentioned in section 9 in relation to
30 the accountable entity or significant related entity, all of those
31 accountable persons have the accountability obligations jointly in
32 relation to that responsibility.

33 Note: Under section 61, the Regulator may direct an accountable entity to
34 reallocate a responsibility of an accountable person.

EXPOSURE DRAFT

Chapter 2 Obligations under the Financial Accountability Regime

Part 3 Accountability obligations

Section 20

1 **20 Taking reasonable steps**

2 Without limiting what constitutes the taking of reasonable steps in
3 relation to a matter for the purposes of this Part, the taking of
4 reasonable steps in relation to that matter includes:

- 5 (a) having appropriate governance, control and risk management
6 in relation to that matter; and
7 (b) having safeguards against inappropriate delegations of
8 responsibility in relation to that matter; and
9 (c) having appropriate procedures for identifying and
10 remediating problems that arise or may arise in relation to
11 that matter; and
12 (d) taking appropriate action to ensure compliance in relation to
13 that matter; and
14 (e) taking appropriate action in response to non-compliance, or
15 suspected non-compliance, in relation to that matter.

EXPOSURE DRAFT

Obligations under the Financial Accountability Regime **Chapter 2**
Key personnel obligations **Part 4**

Section 21

Part 4—Key personnel obligations

21 The key personnel obligations of an accountable entity

- (1) The key personnel obligations of an accountable entity are:
- (a) subject to subsections (2) and (3), to ensure that the responsibilities of the accountable persons of the accountable entity and its significant related entities cover:
 - (i) all parts or aspects of the operations of the accountable entity’s relevant group; and
 - (ii) each of the responsibilities to which subsection 9(2) applies; and
 - (b) to ensure no accountable person of the accountable entity is prohibited under section 22; and
 - (c) to comply with any directions the Regulator gives to the accountable entity under section 61; and
 - (d) to take reasonable steps to ensure that each of the accountable entity’s significant related entities complies with paragraphs (b) and (c) as if the significant related entity were an accountable entity.

Note: For the definition of *relevant group*, see section 7.

- (2) Paragraph (1)(a) does not apply in relation to a responsibility excluded by the Regulator under subsection 10(2) or (3).
- (3) If the accountable entity is a foreign accountable entity, the accountable entity’s obligation under paragraph (1)(a) is taken to be an obligation to ensure that the responsibilities of the accountable entity’s accountable persons cover:
- (a) all parts or aspects of the operations of each branch of the accountable entity operating in Australia; and
 - (b) for each of those branches, each of the responsibilities to which subsection 9(2) applies.

EXPOSURE DRAFT

Chapter 2 Obligations under the Financial Accountability Regime

Part 4 Key personnel obligations

Section 22

1 **22 People prohibited from being an accountable person**

- 2 (1) A person is prohibited from being an accountable person if the
3 person:
- 4 (a) is not registered under the register established under section
5 37; or
6 (b) is disqualified under section 39.
- 7 (2) However, if a person becomes an accountable person of an
8 accountable entity, or of a significant related entity of an
9 accountable entity, by filling a temporary or unforeseen vacancy,
10 paragraph (1)(a) does not apply to the person until the person has
11 been an accountable person for:
- 12 (a) 90 days; or
13 (b) such other period as is determined under subsection (3) or
14 prescribed by the Regulator rules.
- 15 (3) The Regulator may, by written notice given to an accountable
16 entity or significant related entity, determine a period for the
17 purposes of paragraph (2)(b).
- 18 (4) If a determination made under subsection (3) is inconsistent with
19 Regulator rules made for the purposes of paragraph (2)(b), the
20 determination prevails and the Regulator rules, to the extent of the
21 inconsistency, do not have any effect.
- 22 (5) A notice under subsection (3) is not a legislative instrument.

EXPOSURE DRAFT

Part 5—Deferred remuneration obligations

23 The deferred remuneration obligations of an accountable entity

(1) The deferred remuneration obligations of an accountable entity are:

- (a) to ensure that, in relation to the variable remuneration of an accountable person of the accountable entity:
 - (i) the payment of a portion of that variable remuneration is deferred for a period; and
 - (ii) the amount of that portion is at least the amount required under subsection 25(1); and
 - (iii) that period is not shorter than the minimum deferral period (see section 26); and
- (b) to have a remuneration policy in force that requires that, if the person has failed to comply with their accountability obligations under section 19, the person's variable remuneration is to be reduced by an amount that is proportionate to the failure; and
- (c) to ensure that, if the remuneration policy requires the variable remuneration to be reduced because of that failure, the amount of the reduction is not paid or transferred to the person; and
- (d) to take reasonable steps to ensure that, if variable remuneration may become payable to an accountable person of a significant related entity of the accountable entity, the significant related entity complies with paragraphs (a), (b) and (c) as if the significant related entity were an accountable entity.

(2) A reduction of variable remuneration:

- (a) need not be a reduction of variable remuneration relating to a period in which the failure occurred; and
- (b) may be a reduction to zero.

(3) **Remuneration**, of an accountable person, includes:

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Section 24

- 1 (a) in relation to an accountable person of an accountable
2 entity—any remuneration that:
3 (i) is an amount paid or payable, or property transferred or
4 transferrable, to the accountable person by a related
5 body corporate of the accountable entity; and
6 (ii) relates wholly or partly to the responsibilities that cause
7 the person to be an accountable person of the
8 accountable entity; or
9 (b) in relation to an accountable person of a significant related
10 entity—any remuneration that:
11 (i) is an amount paid or payable, or property transferred or
12 transferrable, to the accountable person by a related
13 body corporate of the significant related entity; and
14 (ii) relates wholly or partly to the responsibilities that cause
15 the person to be an accountable person of the significant
16 related entity.

17 Note: For when bodies corporate are *related*, see section 7.

18 **24 Meaning of *variable remuneration***

- 19 (1) The ***variable remuneration*** of an accountable person of an
20 accountable entity or a significant related entity:
21 (a) means so much of the accountable person's total
22 remuneration as is:
23 (i) conditional on the achievement of objectives; and
24 (ii) not remuneration of a kind prescribed by the Regulator
25 rules for the purposes of this subparagraph; and
26 (b) includes so much of the accountable person's total
27 remuneration as is remuneration of a kind determined under
28 paragraph (3)(a) or prescribed by the Regulator rules.
29 (2) However, remuneration of a kind determined under
30 paragraph (3)(b) is not ***variable remuneration*** of an accountable
31 person of an accountable entity or a significant related entity.
32 (3) The Regulator may, by written notice given to an accountable
33 entity or a significant related entity, determine that:

EXPOSURE DRAFT

- 1 (a) remuneration of a particular kind, of one or more accountable
2 persons, or of a class of accountable persons, of the
3 accountable entity or significant related entity, is variable
4 remuneration; or
5 (b) remuneration of a particular kind, of one or more accountable
6 persons, or of a class of accountable persons, of the
7 accountable entity or significant related entity, is not variable
8 remuneration.

9 Note: A decision that remuneration is, or is not, variable remuneration is a
10 reviewable decision (see Part 5 of Chapter 3).

- 11 (4) A notice under subsection (3) is not a legislative instrument.
12 (5) Regulator rules made for the purposes of paragraph (1)(b), or a
13 determination given under paragraph (3)(a), may also identify the
14 day, or a way of working out the day, on which the minimum
15 deferral period for the variable remuneration starts.

16 **25 Minimum amount of variable remuneration to be deferred**

- 17 (1) The amount of an accountable person's variable remuneration that
18 is required to be deferred under subparagraph 23(1)(a)(ii) is 40% of
19 the accountable person's variable remuneration for the financial
20 year in which the minimum deferral period for the variable
21 remuneration starts.

22 Note 1: For when the minimum deferral period starts, see section 26.

23 Note 2: For the applicable financial year, see subsection (5) of this section.

24 *Working out value of variable remuneration*

- 25 (2) For the purposes of this section, the value of variable remuneration
26 of an accountable person that has been deferred is taken to be:
27 (a) if a written notice given under subsection (3) determines a
28 way to work out that value—the value worked out in that
29 way; or
30 (b) if paragraph (a) does not apply and the Regulator rules
31 prescribe a way to work out that value—the value worked out
32 in that way; or

EXPOSURE DRAFT

Section 26

1 (c) if paragraphs (a) and (b) do not apply—what would have
2 been the value of that remuneration if it had instead been paid
3 or transferred to the person at the start of the minimum
4 deferral period for the variable remuneration.

5 (3) The Regulator may, by written notice given to an accountable
6 entity or a significant related entity, determine the way to work out,
7 for the purposes of this section, the value of variable remuneration
8 of accountable persons of the accountable entity or significant
9 related entity.

10 Note: A decision that the value of variable remuneration is to be worked out
11 in a particular way is a reviewable decision (see Part 5 of Chapter 3).

12 *Notice not a legislative instrument*

13 (4) A notice under subsection (3) is not a legislative instrument.

14 *Financial year*

15 (5) In determining an amount of an accountable person's variable
16 remuneration for the purposes of this section, use the financial year
17 of the accountable entity or significant related entity of which the
18 person is an accountable person.

19 Note: See section 7 for the definition of *financial year*.

20 **26 Minimum deferral period for variable remuneration**

21 (1) The *minimum deferral period* for the variable remuneration of an
22 accountable person of an accountable entity or a significant related
23 entity is the period:

- 24 (a) starting on the day determined under subsection (2) or (3);
25 and
26 (b) ending on the day determined under subsection (4).

27 *When the deferral period starts*

28 (2) The minimum deferral period for the variable remuneration of an
29 accountable person starts (subject to subsection (3)) on the later of
30 the following days:

EXPOSURE DRAFT

- 1 (a) the day after the day on which the decision was first made
2 that the person's total remuneration would be wholly or
3 partly conditional on the achievement of objectives;
4 (b) if the achievement of those objectives (as first decided) is to
5 be measured by reference to a particular period—the day that
6 period starts.

7 (3) However, if:

- 8 (a) the variable remuneration is remuneration of a kind
9 determined under paragraph 24(3)(a), or prescribed by the
10 Regulator rules for the purposes of paragraph 24(1)(b); and
11 (b) the determination provides, or the Regulator rules provide,
12 for when the minimum deferral period for the variable
13 remuneration starts;

14 then the minimum deferral period starts on the day so provided.

15 *When the minimum deferral period ends*

- 16 (4) The minimum deferral period for the variable remuneration of an
17 accountable person ends on the earliest day worked out under an
18 applicable item of the following table.

19

End of minimum deferral period		
	Column 1	Column 2
Item	If...	the period ends on...
1	it is the last day of the period of 4 years after the start of the minimum deferral period	(a) that last day, unless paragraph (b) applies; or (b) if, on the day determined under paragraph (a), the accountable entity or significant related entity considers that the accountable person is likely to have failed to comply with their accountability obligations under section 19—the later day on which the entity determines whether or not the person has failed to comply
2	the accountable person ceases to be an accountable person because of the person's death, serious	(a) the day on which the person so ceases, unless paragraph (b) applies; or (b) if, on the day determined under paragraph (a), the accountable entity or significant related entity is not yet satisfied on reasonable

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Chapter 2 Obligations under the Financial Accountability Regime Part 5 Deferred remuneration obligations

Section 26

End of minimum deferral period		
	Column 1	Column 2
Item	If...	the period ends on...
	incapacity, serious disability or serious illness	grounds that the person has complied with the person's accountability obligations under section 19: (i) the day on which the entity is so satisfied (whether the compliance occurred on or before the entity being so satisfied); or (ii) if the day mentioned in subparagraph (i) does not occur—the day determined under item 1
3	a circumstance determined under subsection (5), or prescribed by the Regulator rules for the purposes of this item, exists or occurs in relation to the accountable person	(a) the day on which the circumstance occurs or begins to exist, unless paragraph (b) applies; or (b) if, on the day determined under paragraph (a), the accountable entity or significant related entity is not yet satisfied on reasonable grounds that the person has complied with the person's accountability obligations under section 19: (i) the day on which the entity is so satisfied (whether the compliance occurred on or before the entity being so satisfied); or (ii) if the day mentioned in subparagraph (i) does not occur—the day determined under item 1

1

2

3

4

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6

Note: In relation to item 1, if the accountable entity or significant related entity determines that the person has failed to comply, the remuneration policy must require the amount of variable remuneration paid or transferred to the person to be reduced by an amount that is proportionate to the failure: see paragraph 23(1)(b).

7

8

9

(5) The Regulator may, by written notice given to an accountable entity, determine circumstances for the purposes of item 3 of the table in subsection (4) in relation to either or both of the following:

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Obligations under the Financial Accountability Regime **Chapter 2**
Deferred remuneration obligations **Part 5**

Section 27

- 1 (a) the accountable entity;
2 (b) one or more significant related entities of the accountable
3 entity.

4 *Notice not a legislative instrument*

- 5 (6) A notice under subsection (5) is not a legislative instrument.

27 Exemption for small amounts of variable remuneration

7 (1) Paragraph 23(1)(a) does not apply in relation to the variable
8 remuneration of an accountable person for a financial year if the
9 amount of the person's variable remuneration that is required, or
10 would apart from this section be required, under
11 subparagraph 23(1)(a)(ii) to be deferred for that financial year is
12 less than:

- 13 (a) the amount (if any) prescribed by the Minister rules; or
14 (b) if no amount is prescribed for the purposes of
15 paragraph (a)—\$50,000.

16 *Financial year*

17 (2) For the purposes of subsection (1), use the financial year of the
18 accountable entity or significant related entity of which the person
19 is an accountable person.

20 Note: See section 7 for the definition of *financial year*.

28 Exemption for variable remuneration payable for temporary performance

- 23 (1) This section applies if:
24 (a) a person becomes an accountable person of an accountable
25 entity or a significant related entity by filling a temporary or
26 unforeseen vacancy; and
27 (b) the person is not registered under Division 1 of Part 3 of
28 Chapter 3.

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Chapter 2 Obligations under the Financial Accountability Regime
Part 5 Deferred remuneration obligations

Section 28

- 1 (2) Paragraph 23(1)(a) does not apply in relation to the variable
2 remuneration of the accountable person for the period that starts
3 when the person becomes an accountable person and ends after:
4 (a) 90 days; or
5 (b) if another period determined under subsection 22(3) or (4)
6 applies in relation to the accountable person—that other
7 period.

EXPOSURE DRAFT

1 **Part 6—Notification obligations**
2

3 **29 The notification obligations of an accountable entity**

4 *Core notification obligations*

- 5 (1) The notification obligations of an accountable entity are:
6 (a) to notify the Regulator of an event mentioned in section 30:
7 (i) within the period, after the event, provided under
8 subsection (5) of this section; and
9 (ii) in accordance with the requirements under
10 subsection (6) of this section; and
11 (b) to take reasonable steps to ensure that each of its significant
12 related entities complies with paragraph (a) as if the
13 significant related entity were an accountable entity.

14 *Enhanced notification obligations*

- 15 (2) In addition to subsection (1), if the accountable entity meets the
16 enhanced notification threshold under subsection (3), then the
17 notification obligations of the accountable entity are:
18 (a) to give to the Regulator a document complying with
19 section 31 (an *accountability statement*) for each of its
20 accountable persons; and
21 (b) to ensure that the Regulator is notified of any material change
22 to the information contained in the accountability statement
23 for each of its accountable persons:
24 (i) within the period, after the change, provided under
25 subsection (5); and
26 (ii) in accordance with the requirements under
27 subsection (6); and
28 (c) to give to the Regulator a document complying with
29 section 32 (an *accountability map*) within the period, after
30 the body corporate starts being an accountable entity in

EXPOSURE DRAFT

Chapter 2 Obligations under the Financial Accountability Regime Part 6 Notification obligations

Section 29

- 1 accordance with subsection 8(2) or (4), provided under
2 subsection (5) of this section; and
3 (d) to ensure that the Regulator is notified of any material change
4 to the information contained in the accountability map:
5 (i) within the period, after the change, provided under
6 subsection (5); and
7 (ii) in accordance with the requirements under
8 subsection (6); and
9 (e) to take reasonable steps to ensure that each of its significant
10 related entities complies with paragraphs (a) and (b) as if the
11 significant related entity were an accountable entity.

Enhanced notification threshold

- 12
13 (3) For the purposes of subsection (2), the Minister rules may set out
14 how to determine when an accountable entity meets the **enhanced**
15 **notification threshold**.
16 (4) Without limiting subsection (3), the Minister rules may do either or
17 both of the following:
18 (a) specify a method for working out the enhanced notification
19 threshold;
20 (b) specify different methods for working out the enhanced
21 notification threshold for different circumstances.

Period for compliance

- 22
23 (5) For the purposes of subparagraphs (1)(a)(i) and (2)(b)(i) and (d)(i)
24 and paragraph (2)(c), the period is:
25 (a) 30 days; or
26 (b) such other period (if any) prescribed by the Regulator rules.

Requirements for notice

- 27
28 (6) For the purposes of subparagraphs (1)(a)(ii) and (2)(b)(ii) and
29 (d)(ii), the notice must:
30 (a) be in the form approved in writing by the Regulator; and
31 (b) contain the information that the form requires.

EXPOSURE DRAFT

30 Events for which the Regulator must be notified

For the purposes of paragraph 29(1)(a), the following events must be notified to the Regulator by an accountable entity:

- (a) a person ceasing to be an accountable person of the accountable entity or of a significant related entity of the accountable entity;
- (b) the dismissal or suspension of an accountable person of the accountable entity, or of a significant related entity of the accountable entity, because the person has failed to comply with their accountability obligations under section 19;
- (c) the reduction of the variable remuneration of an accountable person of the accountable entity, or of a significant related entity of the accountable entity, because the person has failed to comply with their accountability obligations under section 19;
- (d) the accountable entity reasonably believes that:
 - (i) the accountable entity has breached its accountability obligations under section 18 or its key personnel obligations under section 21; or
 - (ii) an accountable person of the accountable entity, or of a significant related entity of the accountable entity, has breached their accountability obligations under section 19;
- (e) a material change occurs to information relating to an accountable person of an accountable entity, or a significant related entity of an accountable entity, that is contained on the register established under section 37.

31 Accountability statements

For the purposes of paragraph 29(2)(a), an accountability statement for an accountable person of an accountable entity, or of a significant related entity, must:

- (a) contain a comprehensive statement of:
 - (i) the part or aspect of the operations of the accountable entity, or of the significant related entity, for which the

EXPOSURE DRAFT

Chapter 2 Obligations under the Financial Accountability Regime

Part 6 Notification obligations

Section 32

- 1 accountable person has actual or effective responsibility
2 for management or control; and
3 (ii) the responsibilities of the accountable person, including
4 any responsibilities to which paragraph 21(1)(a) or
5 subsection 21(3) applies, as the case requires; and
6 (iii) the matters (if any) prescribed by the Regulator rules;
7 and
8 (b) include a statement by the accountable person declaring that:
9 (i) the content of the accountability statement is accurate;
10 and
11 (ii) the accountable person understands their accountability
12 obligations under section 19.

13 **32 Accountability map**

- 14 For the purposes of paragraph 29(2)(c), an accountability map of
15 an accountable entity must contain the following information:
16 (a) the names of all of the accountable persons of the
17 accountable entity and each of its significant related entities;
18 (b) details of the reporting lines and lines of responsibility of
19 those accountable persons;
20 (c) sufficient information to identify an accountable person for
21 each of the responsibilities to which paragraph 21(1)(a) or
22 subsection 21(3) applies (as the case requires);
23 (d) information (if any) prescribed by the Regulator rules.

1 **Chapter 3—Administration**
2

3 **Part 2—The Regulator**

4 **Division 1—Arrangements for administration**

5 **33 Administration of this Act**

- 6 (1) Subject to this section, APRA and ASIC each have the general
7 administration of this Act.

8 Note: Generally, APRA and ASIC are not referred to in these provisions and
9 the Regulator is used instead (see the definition of *Regulator* in
10 section 7).

- 11 (2) Despite subsection (1), the powers and functions conferred on
12 ASIC by the provisions of this Act are conferred only in relation to
13 the following persons:

14 (a) accountable entities that hold an Australian financial services
15 licence (within the meaning of the *Corporations Act 2001*) or
16 an Australian credit licence (within the meaning of the
17 *National Consumer Credit Protection Act 2009*);

18 (b) significant related entities of accountable entities mentioned
19 in paragraph (a);

20 (c) accountable persons of accountable entities mentioned in
21 paragraph (a) or of significant related entities mentioned in
22 paragraph (b).

23 Note: This also affects the operation of the Regulatory Powers Act (see the
24 definition of *this Act* in section 7).

- 25 (3) Subsection (2) does not apply in relation to the making of a
26 legislative instrument.

- 27 (4) The Minister may, by legislative instrument, give APRA or ASIC
28 directions about the performance or exercise of its functions or
29 powers under this Act.

EXPOSURE DRAFT

Chapter 3 Administration

Part 2 The Regulator

Division 1 Arrangements for administration

Section 34

1 **34 Arrangement for administration**

- 2 (1) APRA and ASIC must enter into an arrangement relating to the
3 administration of this Act.
- 4 (2) The arrangement must include provisions relating to the matters (if
5 any) specified in the Minister rules.
- 6 (3) APRA and ASIC must each publish the arrangement on its
7 website.
- 8 (4) If the arrangement is not entered into within 6 months after the
9 commencement of this Act, the Minister may, by notifiable
10 instrument, determine arrangements between APRA and ASIC
11 relating to the administration of this Act.
- 12 (5) A failure to comply with this section does not invalidate the
13 performance or exercise of a function or power by APRA or ASIC.

14 **35 Agreement about exercise of powers**

- 15 (1) Subject to this section, neither APRA nor ASIC may perform a
16 function or exercise a power under this Act without the agreement
17 of the other.
- 18 (2) Subsection (1) does not apply in relation to any of the following:
19 (a) the performance or exercise of a function or power under a
20 provision of:
21 (i) Division 1 of Part 3 of this Chapter (which is about
22 registration of accountable persons); or
23 (ii) Part 4 of this Chapter (which is about regulatory powers
24 and enforcement) other than section 60 or 61 (which are
25 about directions);
26 (b) a power exercisable only by APRA in relation to a person
27 because of the effect of subsection 33(2); or
28 (c) the performance or exercise of a function or power under the
29 Regulatory Powers Act as it applies in relation to this Act.
- 30 (3) A failure to comply with subsection (1) does not invalidate the
31 performance or exercise of a function or power.

1 **Division 2—Information sharing**

2 **36 Disclosure of information and documents between APRA and**
3 **ASIC**

- 4 (1) APRA and ASIC may share with each other information that is
5 disclosed or obtained, or a document that is given or produced,
6 under or for the purposes of this Act.

7 Note: In this subsection, *this Act* includes the Regulatory Powers Act (see
8 section 7).

- 9 (2) If either APRA or ASIC (*the recipient*) obtains information, or
10 gives or produces a document, that is covered by subsection (3), it
11 must disclose the information, or give a copy of the document, to
12 the other.

- 13 (3) For the purposes of subsection (2), the information and documents
14 are the following:

- 15 (a) information provided to the recipient under Part 6 of
16 Chapter 2 (notification obligations);
17 (b) information provided to the recipient under Division 1 of
18 Part 3 of this Chapter (registration of accountable persons);
19 (c) a notice given by the recipient to another person under this
20 Act;
21 (d) information or a document (if any) prescribed by the Minister
22 rules.

- 23 (4) If either APRA or ASIC discloses information or gives a document
24 under subsection (1) or (2) to the other, it need not notify any other
25 person that it plans to disclose the information or give the
26 document, or that it has done so.

27 Note: Information disclosed, or documents produced, under this section is
28 authorised under section 56 of the *Australian Prudential Regulation*
29 *Authority Act 1998* and section 127 of the *Australian Securities and*
30 *Investments Commission Act 2001* (which are about secrecy
31 obligations).

EXPOSURE DRAFT

Chapter 3 Administration

Part 3 Registration and disqualification of accountable persons

Division 1 Registration of accountable persons

Section 37

1 **Part 3—Registration and disqualification of**
2 **accountable persons**

3 **Division 1—Registration of accountable persons**

4 **37 Register of accountable persons**

- 5 (1) The Regulator must establish and keep a register of accountable
6 persons.
- 7 (2) The register may be kept by electronic means.
- 8 (3) The register is not a legislative instrument.
- 9 (4) The register must contain, for each accountable person:
10 (a) the person's name; and
11 (b) the date of the person's registration as an accountable person;
12 and
13 (c) the date the person ceases to be an accountable person; and
14 (d) details of any disqualification of the person under section 39;
15 and
16 (e) details of any variation or revocation of disqualification
17 under section 40; and
18 (f) such other information as the Regulator considers
19 appropriate.

20 **38 Registration of a person as an accountable person**

- 21 (1) An accountable entity may apply to the Regulator to register a
22 person as an accountable person.
- 23 (2) The application must:
24 (a) be in the form approved in writing by the Regulator; and
25 (b) contain the information that the form requires; and

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Administration **Chapter 3**
Registration and disqualification of accountable persons **Part 3**
Registration of accountable persons **Division 1**

Section 38

- 1 (c) include a signed declaration that the accountable entity is
2 satisfied the person is suitable to be an accountable person;
3 and
4 (d) if the accountable entity is required under section 29 to give
5 an accountability statement complying with section 31—
6 include the accountability statement for the person.
- 7 (3) The Regulator may, by written notice given to the accountable
8 entity, request the accountable entity to give to the Regulator
9 further information in relation to the application.
- 10 (4) The Regulator must, within the period provided under
11 subsection (5), register a person as an accountable person if:
12 (a) the application meets the requirements of subsection (2); and
13 (b) the accountable entity gives to the Regulator any further
14 information requested under subsection (3) in relation to the
15 application;
16 unless the accountable entity withdraws the application before the
17 day of registration.
- 18 (5) The period for registration under subsection (4) is the period of 21
19 days after the later of:
20 (a) the day the application is made; or
21 (b) if the Regulator requests the accountable entity to give
22 further information under subsection (3) in relation to the
23 application—the day the accountable entity gives the further
24 information to the Regulator.

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Chapter 3 Administration

Part 3 Registration and disqualification of accountable persons

Division 2 Disqualification of accountable persons

Section 39

1 **Division 2—Disqualification of accountable persons**

2 **39 Regulator may disqualify an accountable person**

3 *Disqualification by the Regulator*

4 (1) The Regulator may disqualify a person from being or acting as an
5 accountable person, for a period that the Regulator considers
6 appropriate, if the Regulator is satisfied that:

- 7 (a) the person has not complied with their accountability
8 obligations under section 19; and
9 (b) having regard to the seriousness of the non-compliance, the
10 disqualification is justified.

11 Note: A decision to disqualify a person is a reviewable decision (see Part 5
12 of Chapter 3).

13 (2) For the purposes of subsection (1), the Regulator may disqualify a
14 person from being or acting as an accountable person of one or
15 more of the following:

- 16 (a) a particular accountable entity;
17 (b) a particular significant related entity of an accountable entity;
18 (c) a class of accountable entities;
19 (d) a class of significant related entities of accountable entities;
20 (e) any accountable entity;
21 (f) any significant related entity of an accountable entity.

22 *Written notice*

23 (3) The Regulator must give written notice of a disqualification to:

- 24 (a) the person; and
25 (b) if (apart from this section) the person is an accountable
26 person of an accountable entity—the accountable entity; and
27 (c) if (apart from this section) the person is an accountable
28 person of a significant related entity of an accountable
29 entity—both the accountable entity and the significant related
30 entity.

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- 1 (4) A disqualification takes effect on the day specified in the notice
2 (which must be at least 7 days after it is given).
- 3 (5) Before disqualifying a person, the Regulator must give written
4 notice to each person mentioned in paragraphs (3)(a) to (c), giving
5 each of them an opportunity to make submissions on the matter.
- 6 (6) If a submission is made to the Regulator in response to the notice,
7 the Regulator must have regard to the submission and may discuss
8 any matter contained in the submission with such persons as it
9 considers appropriate for the purpose of making a decision under
10 this section.
- 11 (7) A notice given under subsection (5) must state that any
12 submissions made in response to the notice may be discussed by
13 the Regulator with any other persons as mentioned in
14 subsection (6).

15 *Notice not a legislative instrument*

- 16 (8) A notice under subsection (3) or (5) is not a legislative instrument.

17 **40 Regulator may vary or revoke a disqualification**

- 18 (1) The Regulator may vary or revoke a disqualification made under
19 section 39 on its own initiative or on application by a person
20 disqualified under that section.

21 Note: A decision to vary or revoke a disqualification, or to refuse to vary or
22 revoke a disqualification, is a reviewable decision (see Part 5 of
23 Chapter 3).

- 24 (2) A variation or revocation of a disqualification takes effect on the
25 day on which it is made.
- 26 (3) The Regulator must give the person written notice of:
27 (a) a variation or revocation of a disqualification; or
28 (b) if the person applied for a disqualification to be varied or
29 revoked—a refusal to vary or revoke the disqualification.
- 30 (4) A notice under subsection (3) is not a legislative instrument.

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Chapter 3 Administration

Part 3 Registration and disqualification of accountable persons

Division 2 Disqualification of accountable persons

Section 41

1 **41 Allowing a person disqualified by the Regulator to act as an**
2 **accountable person**

- 3 (1) An accountable entity or a significant related entity contravenes
4 this subsection if:
- 5 (a) a person is disqualified under section 39 from being, or
6 acting as, an accountable person of the accountable entity or
7 significant related entity; and
 - 8 (b) the person is, or acts as, an accountable person of the
9 accountable entity or significant related entity; and
 - 10 (c) the accountable entity or significant related entity allows the
11 person to be, or act as, an accountable person.

12 Note: An accountable entity may also contravene a civil penalty provision if
13 it fails to ensure that its accountable persons are not prohibited from
14 being accountable persons (see sections 22 and 76).

15 *Fault-based offence*

- 16 (2) An accountable entity or a significant related entity commits an
17 offence if it contravenes subsection (1).

18 Penalty: 250 penalty units.

19 *Strict liability offence*

- 20 (3) An accountable entity or a significant related entity commits an
21 offence of strict liability if it contravenes subsection (1).

22 Penalty: 60 penalty units.

EXPOSURE DRAFT

1 **Part 4—Regulatory powers and enforcement**

2 **Division 1—Investigations**

3 **42 Regulator may arrange for investigation and report**

4 *Appointment of investigator*

- 5 (1) The Regulator may, in writing, appoint a person (the *investigator*)
6 to investigate and report in relation to an accountable entity or a
7 significant related entity if the Regulator reasonably believes that:
8 (a) the accountable entity or the significant related entity has
9 contravened a provision of this Act; or
10 (b) an accountable person of the accountable entity, or of the
11 significant related entity, has contravened a provision of this
12 Act.

13 *Requirement to assist investigator*

- 14 (2) The accountable entity or significant related entity must give the
15 investigator:
16 (a) access to its books, accounts and documents; and
17 (b) such information and facilities as the investigator requires to
18 conduct the investigation and produce the report.
- 19 (3) A person commits an offence if:
20 (a) the person is subject to a requirement under subsection (2);
21 and
22 (b) the person fails to comply with the requirement.

23 Penalty: 50 penalty units.

24 Note: Chapter 2 of the *Criminal Code* sets out the general principles of
25 criminal responsibility.

- 26 (4) If a person does, or fails to do, an act in circumstances that give
27 rise to the person committing an offence against subsection (3), the
28 person commits an offence against that subsection in respect of:

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 1 Investigations

Section 43

- 1 (a) the first day on which the offence is committed; and
2 (b) each subsequent day (if any) on which the circumstances that
3 gave rise to the person committing the offence continue
4 (including the day of conviction for any such offence or any
5 later day).

6 Note: This subsection is not intended to imply that section 4K of the *Crimes*
7 *Act 1914* does not apply to offences against this Act.

- 8 (5) Nothing in this section is intended to limit the operation of any
9 other provision of this Act.

10 **43 Investigator may require production of books etc.**

11 (1) If an investigator reasonably believes that a person has custody or
12 control of any books, accounts or documents relevant to the
13 investigator's investigation, the investigator may, by written notice
14 given to the person, require the person to produce any or all of the
15 books, accounts or documents to the investigator.

16 (2) The notice must specify the day by which the books, accounts or
17 documents are to be produced (which must be at least 14 days after
18 the day the notice is given to the person).

19 (3) A person commits an offence if:
20 (a) the person is required to produce books, accounts or
21 documents in accordance with a notice given to the person
22 under subsection (1); and
23 (b) the person fails to comply with the requirement.

24 Penalty: 30 penalty units.

25 **44 Concealing books, accounts or documents relevant to** 26 **investigation**

27 A person commits an offence if:

- 28 (a) the person knows that an investigator is investigating, or is
29 about to investigate, a matter; and
30 (b) the person:

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Investigations **Division 1**

Section 44

- 1 (i) conceals, destroys, mutilates or alters a book, account or
2 document relating to the matter; or
3 (ii) if a book, account or document relating to the matter is
4 in a particular State or Territory—takes or sends the
5 book, account or document out of that State or
6 Territory; and
7 (c) the person intended that the investigation or proposed
8 investigation would be delayed or obstructed as a result of
9 that conduct.

10 Penalty: Imprisonment for 2 years.

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 2 Examinations

Section 45

1 **Division 2—Examinations**

2 **45 Notice requiring appearance for examination**

3 If an investigator reasonably believes or suspects that a person (the
4 *examinee*) can give information relevant to the investigator's
5 investigation, the investigator may, by written notice given to the
6 examinee, require the examinee:

- 7 (a) to give the investigator all reasonable assistance in
8 connection with the investigation; and
9 (b) to appear before the investigator for examination.

10 Note: Failure to comply with a requirement made under this section is an
11 offence (see section 49).

12 **46 Conduct of examinations**

13 (1) The investigator may examine the examinee on oath or affirmation
14 and may, for that purpose:

- 15 (a) require the examinee to either take an oath or make an
16 affirmation; and
17 (b) administer an oath or affirmation to the examinee.

18 Note: Failure to comply with a requirement made under this subsection is an
19 offence (see section 49).

20 (2) The oath or affirmation to be taken or made by the examinee for
21 the purposes of the examination is an oath or affirmation that the
22 statements that the examinee will make will be true.

23 (3) The investigator may require the examinee to answer a question
24 that is put to the examinee at the examination and is relevant to a
25 matter that the investigator is investigating, or is to investigate.

26 Note: Failure to comply with a requirement made under this subsection is an
27 offence (see section 49).

28 (4) The examiner may make an audio, or audio visual, recording of all
29 or any part of the examination.

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1 **47 Who may be present at examinations**

- 2 (1) The examination must take place in private.
- 3 (2) The following people may be present at the examination:
- 4 (a) the investigator;
- 5 (b) the examinee;
- 6 (c) the examinee's lawyer;
- 7 (d) either or both of the following:
- 8 (i) an APRA staff member approved by APRA to be
- 9 present;
- 10 (ii) an ASIC staff member approved by ASIC to be present;
- 11 (e) a person directed by the investigator to be present.

12 Note: For the definitions of *APRA staff member* and *ASIC staff member*,

13 see section 7.

- 14 (3) A person commits an offence if the person:
- 15 (a) is present at an examination; and
- 16 (b) is not a person mentioned in subsection (2).

17 Penalty: 30 penalty units.

- 18 (4) The examinee's lawyer may, at such times during the examination
- 19 as the investigator determines, address the investigator and
- 20 examine the examinee about matters about which the investigator
- 21 has examined the examinee.
- 22 (5) The investigator may require a person to stop addressing the
- 23 investigator or examining the examinee if, in the investigator's
- 24 opinion, the person is trying to obstruct the examination by
- 25 exercising rights under subsection (4).

26 Note: Failure to comply with a requirement made under this subsection is an

27 offence (see section 49).

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 2 Examinations

Section 48

1 **48 Record of examination**

2 *Written record of statements*

3 (1) The investigator must cause a written record (including a transcript
4 of an audio, or audio visual, recording) to be made of statements
5 made at the examination.

6 (2) The investigator may require the examinee to read the written
7 record, or to have it read to the examinee, and may require the
8 examinee to sign it.

9 Note: Failure to comply with a requirement made under this subsection is an
10 offence (see section 49).

11 *Copies of record*

12 (3) The investigator must give a copy of a written record to the
13 examinee, without charge, but subject to such conditions (if any) as
14 the investigator imposes.

15 *Use of copies*

16 (4) If the investigator gives a copy of a written record to a person
17 under subsection (3) subject to conditions, the person, or any other
18 person who has possession, custody or control of the copy or a
19 copy of it, must comply with the conditions.

20 Penalty: Imprisonment for 6 months.

21 **49 Offences**

22 A person commits an offence if:

- 23 (a) the person is subject to a requirement under this Division;
24 and
25 (b) the person refuses or fails to comply with the requirement.

26 Penalty: 30 penalty units.

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Evidentiary use of certain material **Division 3**

Section 50

1 **Division 3—Evidentiary use of certain material**

2 **50 Statements made at an examination—proceedings against**
3 **examinee**

4 *Admissibility of statements made at examination*

5 (1) Subject to this section, a statement that a person makes at an
6 examination of the person is admissible in evidence against the
7 person in a proceeding.

8 *Self-incrimination exception*

9 (2) The statement is not admissible if the statement is not admissible in
10 evidence against the person under section 83.

11 *Irrelevant statement exception*

12 (3) The statement is not admissible if it is not relevant to the
13 proceeding and the person objects to the admission of evidence of
14 the statement.

15 *Related statement exception*

16 (4) The statement (the *subject statement*) is not admissible if:
17 (a) it is qualified or explained by some other statement made at
18 the examination; and
19 (b) evidence of the other statement is not tendered in the
20 proceeding; and
21 (c) the person objects to the admission of evidence of the subject
22 statement.

23 *Legal professional privilege exception*

24 (5) The statement is not admissible if:
25 (a) it discloses matter in respect of which the person could claim
26 legal professional privilege in the proceeding if
27 subsection (1) did not apply in relation to the statement; and

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 3 Evidentiary use of certain material

Section 51

1 (b) the person objects to the admission of evidence of the
2 statement.

3 *Joint proceedings*

4 (6) Subsection (1) applies in relation to a proceeding against a person
5 even if it is heard together with a proceeding against another
6 person.

7 *Record is prima facie evidence*

8 (7) If a written record of an examination of a person is signed by the
9 person under subsection 48(2), or is authenticated in a manner (if
10 any) specified in the Minister rules, the record is admissible in a
11 proceeding as prima facie evidence of the statements it records.

12 *Admissibility of other evidence*

13 (8) This Division does not limit or affect the admissibility in the
14 proceeding of other evidence of statements made at the
15 examination.

16 **51 Statements made at an examination—other proceedings**

17 *Admissibility of absent witness evidence*

18 (1) If direct evidence by a person (the *absent witness*) of a matter
19 would be admissible in a proceeding, a statement that the absent
20 witness made at an examination of the absent witness and that
21 tends to establish that matter is admissible in the proceeding as
22 evidence of that matter in accordance with subsection (2).

23 *Requirement for admissibility*

24 (2) The statement is admissible:
25 (a) if it appears to the court or tribunal that:
26 (i) the absent witness is dead or is unfit, because of
27 physical or mental incapacity, to attend as a witness; or

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Evidentiary use of certain material **Division 3**

Section 52

- 1 (ii) the absent witness is outside the State or Territory in
2 which the proceeding is being heard and it is not
3 reasonably practicable to secure their attendance; or
4 (iii) all reasonable steps have been taken to find the absent
5 witness but they cannot be found; or
6 (b) if it does not so appear to the court or tribunal—unless
7 another party to the proceeding requires the party tendering
8 evidence of the statement to call the absent witness as a
9 witness in the proceeding and the tendering party does not so
10 call the absent witness.

11 **52 Weight of evidence under section 51**

- 12 (1) If evidence of a statement made by a person at an examination of
13 the person is admitted under section 51 in a proceeding, in deciding
14 how much weight (if any) to give to the statement as evidence of a
15 matter, regard is to be had to:
16 (a) the length of period between the statement and the matter to
17 which the statement relates; and
18 (b) any reason the person may have had for concealing or
19 misrepresenting a material matter; and
20 (c) any other circumstances from which it is reasonable to draw
21 an inference about the accuracy of the statement.
22 (2) If the person is not called as a witness in the proceeding:
23 (a) evidence that would, if the person had been so called, have
24 been admissible in the proceeding for the purpose of
25 destroying or supporting their credibility is so admissible;
26 and
27 (b) evidence is admissible to show that the statement is
28 inconsistent with another statement that the person has made
29 at any time.
30 (3) However, evidence of a matter is not admissible under this section
31 if, had the person been called as a witness in the proceeding and
32 denied the matter in cross-examination, evidence of the matter
33 would not have been admissible if adduced by the cross-examining
34 party.

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 3 Evidentiary use of certain material

Section 53

1 **53 Objection to admission of statements made at examination**

2 *Notice of intention to apply to admit evidence and statements*

3 (1) A party (the **adducing party**) to a proceeding may, not less than 14
4 days before the first day of the hearing of the proceeding, give to
5 another party to the proceeding written notice that the adducing
6 party:

7 (a) will apply to have admitted in evidence in the proceeding
8 specified statements made at an examination; and

9 (b) for that purpose, will apply to have evidence of those
10 statements admitted in the proceeding.

11 *Notice to set out etc. statements*

12 (2) A notice under subsection (1) must set out, or be accompanied by
13 writing that sets out, the specified statements.

14 *Notice of objection*

15 (3) Within 14 days after a notice is given under subsection (1), the
16 other party may give to the adducing party a written notice:

17 (a) stating that the other party objects to specified statements
18 being admitted in evidence in the proceeding; and

19 (b) specifies, in relation to each of those statements, the grounds
20 of objection.

21 *Extension of objection period*

22 (4) The period prescribed by subsection (3) may be extended by the
23 court or tribunal or by agreement between the parties concerned.

24 *Notice etc. to be given to court or tribunal*

25 (5) On receiving a notice given under subsection (3), the adducing
26 party must give to the court or tribunal a copy of:

27 (a) the notice under subsection (1) and any writing that
28 subsection (2) requires to accompany that notice; and

29 (b) the notice under subsection (3).

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Evidentiary use of certain material **Division 3**

Section 54

1

Action by court or tribunal

2

(6) If subsection (5) is complied with, the court or tribunal may either:

3

(a) determine the objections as a preliminary point before the hearing of the proceeding begins; or

4

5

(b) defer determination of the objections until the hearing.

6

Right to object to admission of statement

7

(7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceedings, unless:

8

9

10

11

(a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or

12

13

(b) the court or tribunal gives the other party leave to object to the statement being so admitted.

14

15

54 Copies of, or extracts from, certain books, accounts and documents

16

17

(1) A copy of, or an extract from, a book, account or document to which subsection 42(2) or 43(1) or paragraph 58(5)(f) applies, is admissible in evidence in a proceeding as if the copy were the original book, account or document or the extract were the relevant part of original book, account or document.

18

19

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21

22

(2) A copy of, or an extract from, a book, account or document is not admissible in evidence under subsection (1) unless it is proved that the copy or extract is a true copy of the book, account or document, or of the relevant part of the book, account or document.

23

24

25

26

(3) For the purposes of subsection (2), a person who has compared:

27

(a) a copy of a book, account or document with the book, account or document; or

28

29

(b) an extract from a book, account or document, with the relevant part of the book, account or document;

30

31

may give evidence, either orally or by an affidavit or statutory declaration, that the copy or extract is a true copy of the book,

32

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 3 Evidentiary use of certain material

Section 55

1 account or document, or relevant part of the book, account or
2 document.

3 **55 Admissibility of investigation report**

4 Subject to section 56, if a copy of a report under subsection 42(1)
5 purports to be certified by the Regulator as a true copy of such a
6 report, the copy is admissible in a proceeding (other than a criminal
7 proceeding) as prima facie evidence of any facts or matters that the
8 report states an investigator to have found to exist.

9 **56 Exceptions to admissibility of investigation report**

- 10 (1) If a party to a proceeding tenders a copy of a report under
11 subsection 42(1) as evidence against another party, the copy is not
12 admissible under section 55 in the proceeding as evidence against
13 the other party unless the court or tribunal is satisfied that:
14 (a) a copy of the report has been given to the other party; and
15 (b) the other party, and the other party's lawyer, have had a
16 reasonable opportunity to examine that copy and to take its
17 contents into account in preparing the other party's case.
- 18 (2) Before or after the copy tendered in evidence is admitted in
19 evidence, the other party may apply to cross-examine, in relation to
20 the report, a specified person who, or 2 or more specified persons
21 each of whom:
22 (a) was concerned in preparing the report or making a finding
23 about a fact or matter that the report states the investigator to
24 have found to exist; or
25 (b) whether or not pursuant to a requirement made under this
26 Part, gave information, or produced a book, account or
27 document, on the basis of which, or on the basis of matters
28 including which, such a finding was made.
- 29 (3) The court or tribunal must grant an application made under
30 subsection (2) unless it considers that, in all the circumstances, it is
31 not appropriate to do so.

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Evidentiary use of certain material **Division 3**

Section 57

- 1 (4) The court or tribunal must refuse to admit the copy, or must treat
2 the copy as not having been admitted, if:
3 (a) the court or tribunal grants the application or applications
4 made under subsection (2); and
5 (b) one or more persons to whom the application or any of the
6 applications relates:
7 (i) are unavailable; or
8 (ii) do not attend to be cross-examined in relation to the
9 report; and
10 (c) the court or tribunal is of the opinion that to admit the copy
11 under section 55 in the proceeding as evidence against the
12 other party without the other party having the opportunity to
13 cross-examine the other person or persons would unfairly
14 prejudice the other party.

15 **57 Material otherwise admissible**

16 Nothing in this Division renders evidence inadmissible in a
17 proceeding in circumstances where it would have been admissible
18 in that proceeding if this Division had not been enacted.

EXPOSURE DRAFT

Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 4 Requesting information

Section 58

1 **Division 4—Requesting information**

2 **58 Regulator may request information**

3 *Request for information from accountable entities*

- 4 (1) The Regulator may request an accountable entity to give to the
5 Regulator information relating to any of the following:
- 6 (a) the accountable entity;
 - 7 (b) a significant related entity of the accountable entity;
 - 8 (c) an accountable person of the accountable entity, or of a
9 significant related entity of the accountable entity;
 - 10 (d) a related body corporate of the accountable entity;
 - 11 (e) a related body corporate of a significant related entity of the
12 accountable entity;
 - 13 (f) if the accountable entity is an RSE licensee—a connected
14 entity of the accountable entity.

15 Note 1: Failure to comply with the request is an offence (see section 59).

16 Note 2: For when bodies corporate are *related*, see section 7.

17 *Request for information from significant related entities*

- 18 (2) The Regulator may request a significant related entity of an
19 accountable entity to give to the Regulator information relating to
20 any of the following:
- 21 (a) the accountable entity;
 - 22 (b) the significant related entity;
 - 23 (c) an accountable person of the significant related entity;
 - 24 (d) a related body corporate of the significant related entity.

25 Note 1: Failure to comply with the request is an offence (see section 59).

26 Note 2: For when bodies corporate are *related*, see section 7.

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1 *Request for information from accountable persons*

- 2 (3) The Regulator may request an accountable person of an
3 accountable entity, or of a significant related entity, to give to the
4 Regulator information relating to:
5 (a) the accountable entity; or
6 (b) the significant related entity.

7 Note: Failure to comply with the request is an offence (see section 59).

8 *Purposes of request*

- 9 (4) The Regulator may only request the information for one or more of
10 the following purposes:
11 (a) performing a function or exercising a power of the Regulator
12 under this Act;
13 (b) ensuring compliance with this Act;
14 (c) in relation to non-compliance, or suspected non-compliance,
15 with this Act.

16 *Requirements of request*

- 17 (5) The request:
18 (a) must be made in writing; and
19 (b) must state what information must be given to the Regulator;
20 and
21 (c) may require the information to be verified by statutory
22 declaration; and
23 (d) must specify a day on or before which the information must
24 be given; and
25 (e) must contain a statement to the effect that a failure to comply
26 with the request is an offence; and
27 (f) may include a requirement to produce books, accounts or
28 documents.
- 29 (6) The day specified under paragraph (5)(d) must be at least 14 days
30 after the day on which the request was made.

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Part 4 Regulatory powers and enforcement

Division 4 Requesting information

Section 59

1 **59 Failing to give information**

2 A person commits an offence if:

3 (a) the person is given a request under section 58; and

4 (b) the person fails to comply with the request.

5 Penalty: 200 penalty units.

6 Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of
7 criminal responsibility.

8 Note 2: See also subsection 4B(3) (body corporate multiplier) and section 4K
9 (continuing and multiple offences) of the *Crimes Act 1914*.

10 Note 3: See also sections 83 (self-incrimination) and 84 (legal professional
11 privilege).

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Regulator's power to issue directions **Division 5**

Section 60

1 **Division 5—Regulator's power to issue directions**

2 **Subdivision A—Kinds of directions**

3 **60 Direction dealing with non-compliance**

4 *Power of the Regulator to give direction*

5 (1) The Regulator may give an accountable entity a direction of a kind
6 specified in subsection (2) if the Regulator reasonably believes
7 that:

- 8 (a) the accountable entity has contravened a provision of this
9 Act; or
10 (b) the accountable entity is likely to contravene a provision of
11 this Act and the direction is reasonably necessary to ensure
12 compliance with the provision; or
13 (c) an accountable person of the accountable entity, or of a
14 significant related entity of the accountable entity, has
15 contravened a provision of this Act; or
16 (d) an accountable person of the accountable entity, or of a
17 significant related entity of the accountable entity, is likely to
18 contravene a provision of this Act and the direction is
19 reasonably necessary to ensure compliance with the
20 provision.

21 Note 1: A decision to give a direction under this section is a reviewable
22 decision (see Part 5 of Chapter 3).

23 Note 2: For variation and revocation of a direction given under this section,
24 see subsection 33(3) of the *Acts Interpretation Act 1901*.

25 *Kinds of direction*

26 (2) The kinds of direction that the accountable entity may be given are
27 directions to do, or to cause a significant related entity of the
28 accountable entity to do, any one or more of the following:

- 29 (a) to take specified action to deal with the ground for giving the
30 direction;

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Division 5 Regulator's power to issue directions

Section 60

- 1 (b) to order an audit of the affairs of the accountable entity or
2 significant related entity, at the expense of the accountable
3 entity or significant related entity, by an auditor chosen by
4 the Regulator;
- 5 (c) to make changes to the accountable entity's or significant
6 related entity's systems, business practices or operations;
- 7 (d) to reconstruct, amalgamate or otherwise alter all or part of:
8 (i) the business, structure or organisation of the
9 accountable entity or significant related entity; or
10 (ii) the business, structure or organisation of the
11 accountable entity's relevant group;
- 12 (e) to do, or to refrain from doing, anything else in relation to the
13 affairs of the accountable entity.

14 Note: For the definition of *relevant group*, see section 7.

- 15 (3) The direction must:
- 16 (a) be given by notice in writing to the accountable entity; and
17 (b) specify the ground referred to in subsection (1) as a result of
18 which the direction is given; and
19 (c) specify the time by which, or period during which, the
20 direction is to be complied with; and
21 (d) state that the accountable entity could commit an offence if
22 the accountable entity fails to comply with the direction.

23 Note: See section 62 (offence for non-compliance with a direction).

24 *Power to comply*

- 25 (4) The accountable entity has power to comply with the direction
26 despite anything in its constitution or any contract or arrangement
27 to which it is a party.
- 28 (5) If the direction requires the accountable entity to cause a
29 significant related entity to do, or to refrain from doing, an act or
30 thing:
- 31 (a) the accountable entity has power to cause the significant
32 related entity to do, or to refrain from doing, the act or thing;
33 and

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- 1 (b) the significant related entity has power to do, or to refrain
2 from doing, the act or thing;
3 despite anything in the significant related entity's constitution or
4 any contract or arrangement to which the significant related entity
5 is a party.

6 *Direction not a legislative instrument*

- 7 (6) A direction under subsection (1) is not a legislative instrument.

8 Note: Under paragraph 11(2)(c) of the *Legislation Act 2003*, the Regulator
9 may register a direction under this section as a notifiable instrument.

10 **61 Direction to reallocate responsibilities**

11 *Power to give direction*

- 12 (1) The Regulator may give an accountable entity a direction to
13 reallocate a responsibility to which paragraph 21(1)(a) applies if
14 the Regulator reasonably believes that the current allocation of the
15 responsibility is likely to give rise to:
16 (a) a prudential risk; or
17 (b) a risk of significant and systemic non-compliance with a law,
18 order or direction mentioned in subparagraphs 19(1)(d)(i) to
19 (x).

20 Note 1: A decision to give a direction under this section is a reviewable
21 decision (see Part 5 of Chapter 3).

22 Note 2: For variation and revocation of a direction given under this section,
23 see subsection 33(3) of the *Acts Interpretation Act 1901*.

- 24 (2) If both of the following apply:
25 (a) the person allocated the responsibility is an accountable
26 person of the accountable entity;
27 (b) the accountable entity has given an accountability statement
28 for the accountable person under section 29;
29 the Regulator must have regard to the responsibilities set out in the
30 accountability statement.
31 (3) The direction must:

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Division 5 Regulator's power to issue directions

Section 62

- 1 (a) be given by notice in writing to the accountable entity; and
2 (b) specify the time by which, or period during which, the
3 direction is to be complied with; and
4 (c) state that the accountable entity could commit an offence or
5 be liable to a civil penalty if the accountable entity fails to
6 comply with the direction.

7 Note: See section 62 (offence for non-compliance with a direction) and
8 paragraph 21(1)(c) (key personnel obligations of accountable entities)
9 and section 76 (civil penalty provisions).

10 *Direction not a legislative instrument*

- 11 (4) A direction under subsection (1) is not a legislative instrument.

12 Note: Under paragraph 11(2)(c) of the *Legislation Act 2003*, the Regulator
13 may register a direction under this section as a notifiable instrument.

14 **Subdivision B—Non-compliance with directions**

15 **62 Offence provision for non-compliance with a direction**

16 *Accountable entity*

- 17 (1) An accountable entity contravenes this subsection if:
18 (a) the accountable entity is given a direction under section 60 or
19 61; and
20 (b) the accountable entity fails to comply with the direction.
21 (2) An accountable entity commits an offence if the accountable entity
22 contravenes subsection (1).

23 Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of
24 criminal responsibility.

25 Note 2: See also subsection 4B(3) (body corporate multiplier) and section 4K
26 (continuing and multiple offences) of the *Crimes Act 1914*.

27 Note 3: An accountable entity may also contravene a civil penalty provision if
28 it fails to comply with a direction given under section 61 (see
29 paragraph 21(1)(c) and section 76).

30 Penalty: 50 penalty units.

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Regulator's power to issue directions **Division 5**

Section 63

Officer of accountable entity

- 1
2 (3) An officer of an accountable entity contravenes this subsection if:
3 (a) the accountable entity is given a direction under section 60 or
4 61; and
5 (b) the officer fails to take reasonable steps to ensure that the
6 accountable entity complies with the direction; and
7 (c) the officer's duties include ensuring that the accountable
8 entity complies with the direction; and
9 (d) the accountable entity fails to comply with the direction.
- 10 (4) An officer of an accountable entity commits an offence if the
11 officer contravenes subsection (3).

12 Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of
13 criminal responsibility.

14 Note 2: See also subsection 4B(3) (body corporate multiplier) and section 4K
15 (continuing and multiple offences) of the *Crimes Act 1914*.

16 Penalty: 50 penalty units.

Subdivision C—Secrecy and disclosure provisions relating to directions

63 Regulator may determine that a direction is covered by secrecy provision

When this section applies

- 17
18
19
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21
22 (1) This section applies if the Regulator has given an accountable
23 entity a direction under section 60 or 61.

Power of Regulator to make determination

- 24
25 (2) The Regulator may determine, in writing, that the direction is
26 covered under this subsection if the Regulator considers that the
27 determination is necessary:
28 (a) to protect the depositors (within the meaning of the *Banking*
29 *Act 1959*) of any ADI; or

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Division 5 Regulator's power to issue directions

Section 64

- 1 (b) to protect the policyholders (within the meaning of the
2 *Insurance Act 1973*) of any general insurer; or
3 (c) to protect the policy owners (within the meaning of the *Life*
4 *Insurance Act 1995*) of any life company; or
5 (d) to protect the policy holders (within the meaning of the
6 *Private Health Insurance (Prudential Supervision) Act 2015*)
7 of a health benefits fund (within the meaning of that Act) of
8 any private health insurer; or
9 (e) to protect the beneficiaries (within the meaning of the
10 *Superannuation Industry (Supervision) Act 1993*) of a
11 registrable superannuation entity (within the meaning of that
12 Act) of any RSE licensee; or
13 (f) to promote financial system stability in Australia.

14 Note: For repeal of a determination, see subsection 33(3) of the *Acts*
15 *Interpretation Act 1901*.

- 16 (3) The Regulator must give the accountable entity a copy of the
17 determination as soon as practicable after making it.

18 *Regulator must consider other determinations*

- 19 (4) If the Regulator makes a determination under subsection (2), the
20 Regulator must consider whether it is appropriate in the
21 circumstances to also make a determination under either or both of
22 subsections 66(2) and 66(4).

23 *Determination not a legislative instrument*

- 24 (5) An instrument under subsection (2) is not a legislative instrument.

25 **64 Secrecy relating to directions**

- 26 (1) A person commits an offence if:
27 (a) the Regulator has given an accountable entity (the ***directed***
28 ***accountable entity***) a direction under section 60 or 61; and
29 (b) the direction is covered by a determination under
30 subsection 63(2); and

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Section 65

- 1 (c) the person is, or has been, covered by subsection (2) of this
2 section in relation to the direction; and
3 (d) the person discloses information; and
4 (e) the information reveals the fact that the direction was given.

5 Penalty: Imprisonment for 2 years.

- 6 (2) A person is covered by this subsection in relation to the direction if
7 the person is:
8 (a) the directed accountable entity; or
9 (b) a significant related entity of the directed accountable entity;
10 or
11 (c) an officer, employee or contractor of the directed accountable
12 entity at a time on or after the Regulator gave the directed
13 accountable entity the direction; or
14 (d) an officer, employee or contractor of a significant related
15 entity of the directed accountable entity at a time on or after
16 the Regulator gave the directed accountable entity the
17 direction; or
18 (e) any other person who, because of their employment, or in the
19 course of that employment, has acquired information that
20 reveals the fact that the direction was given.

21 *Exception*

- 22 (3) Subsection (1) does not apply if:
23 (a) the disclosure is authorised by section 65, 66, 67, 68, 69, 70
24 or 71; or
25 (b) the disclosure is required by an order or direction of a court
26 or tribunal.

27 Note: A defendant bears an evidential burden in relation to a matter in
28 subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

29 **65 Disclosure of publicly available information**

30 A person covered by subsection 64(2) in relation to a direction may
31 disclose information that reveals the fact that the direction was

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Division 5 Regulator's power to issue directions

Section 66

1 given, to the extent that the information has already been lawfully
2 made available to the public.

3 **66 Disclosure allowed by the Regulator**

4 (1) A person covered by subsection 64(2) in relation to a direction may
5 disclose information that reveals the fact that the direction was
6 given if:

- 7 (a) a determination under subsection (2) or (4) of this section
8 allows the disclosure by the person; and
9 (b) if the Regulator has included conditions in the
10 determination—those conditions are satisfied.

11 *Determinations relating to specified person*

- 12 (2) The Regulator may, in writing, make a determination allowing:
13 (a) a specified person covered by subsection 64(2) in relation to
14 a specified direction; or
15 (b) a specified person covered by subsection 64(2) in relation to
16 a direction that is in a specified class of directions;
17 to disclose specified information in relation to the direction.
- 18 (3) The Regulator must give a copy of the determination as soon as
19 practicable after making it to:
20 (a) the directed accountable entity; and
21 (b) the person specified, or each person specified, in the
22 determination.

23 *Determinations relating to specified class of persons*

- 24 (4) The Regulator may, by legislative instrument, make a
25 determination allowing a specified class of persons covered by
26 subsection 64(2) in relation to a direction that is in a specified class
27 of directions to disclose:
28 (a) specified kinds of information in relation to the direction; or
29 (b) any kind of information in relation to the direction.

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Regulator's power to issue directions **Division 5**

Section 67

Conditions in determinations

- 1
- 2 (5) The Regulator may include conditions in a determination under
3 subsection (2) or (4) that relate to any of the following:
4 (a) the kind of entities to which the disclosure may be made;
5 (b) the way in which the disclosure is to be made;
6 (c) any other matter that the Regulator considers appropriate.

Determination not a legislative instrument

- 7
- 8 (6) An instrument under subsection (2) is not a legislative instrument.

67 Disclosure to legal representative for purpose of seeking legal advice

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10

11 A person covered by subsection 64(2) in relation to a direction may
12 disclose information that reveals the fact that the direction was
13 given if:

- 14 (a) the disclosure is to the person's legal representative; and
15 (b) the purpose of the person making the disclosure is for the
16 legal representative to provide legal advice, or another legal
17 service, in relation to the direction.

68 Disclosure under the APRA Act

- 18
- 19 (1) A person covered by subsection 64(2) in relation to a direction may
20 disclose information that reveals the fact that the direction was
21 given if:
22 (a) the person is:
23 (i) an APRA member (within the meaning of the
24 *Australian Prudential Regulation Authority Act 1998*);
25 or
26 (ii) an APRA staff member; or
27 (iii) a Commonwealth officer (within the meaning of the
28 *Crimes Act 1914*) who is covered by paragraph (c) of
29 the definition of **officer** in subsection 56(1) of the
30 *Australian Prudential Regulation Authority Act 1998*;
31 and

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Division 5 Regulator's power to issue directions

Section 69

- 1 (b) the information is protected information (within the meaning
2 of subsection 56(1) of that Act), or is contained in a protected
3 document (within the meaning of that subsection); and
4 (c) the disclosure is in accordance with a provision mentioned in
5 paragraph 56(2)(c) of that Act.

6 Note: For the definition of *APRA staff member*, see section 7.

7 *Relationship to APRA Act secrecy provision*

- 8 (2) Disclosure of information in relation to a direction is not an
9 offence under section 56 of the *Australian Prudential Regulation*
10 *Authority Act 1998* if the disclosure is authorised by section 65, 66,
11 67, 69, 70 or 71 of this Act.

12 **69 Disclosure under the ASIC Act**

13 A person covered by subsection 64(2) in relation to a direction may
14 disclose information that reveals the fact that the direction was
15 given if:

- 16 (a) the person is:
17 (i) a member of ASIC; or
18 (ii) an ASIC staff member; or
19 (iii) a Commonwealth officer (within the meaning of the
20 *Crimes Act 1914*) who, because of their employment, or
21 in the course of that employment, has acquired the
22 information (other than an employee of the body to
23 which the information or document relates); and
24 (b) the information is protected information (within the meaning
25 of subsection 127(9) of the *Australian Securities and*
26 *Investments Commission Act 2001*); and
27 (c) the disclosure is authorised use and disclosure of the
28 information under section 127 of that Act.

29 Note 1: For the definition of *ASIC staff member*, see section 7.

30 Note 2: A disclosure of information permitted by section 65, 66, 67, 68, 70 or
31 71 of this Act is an authorised disclosure for the purposes of
32 subsection 127(2) of the *Australian Securities and Investments*
33 *Commission Act 2001*.

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Regulator's power to issue directions **Division 5**

Section 70

1 **70 Disclosure in circumstances set out in the Minister rules**

2 A person covered by subsection 64(2) in relation to a direction may
3 disclose information that reveals the fact that the direction was
4 given, if the disclosure is made in circumstances (if any) prescribed
5 by the Minister rules.

6 **71 Disclosure for purpose**

7 A person covered by subsection 64(2) (the *relevant person*) in
8 relation to a direction may disclose information that reveals the fact
9 that the direction was given if:

- 10 (a) another person covered by subsection 64(2) in relation to the
11 direction disclosed that information to the relevant person for
12 a particular purpose in accordance with section 66, 67, 68, 69
13 or 70, or in accordance with a previous operation of this
14 section; and
15 (b) the disclosure by the relevant person is for the same purpose.

16 **72 Exceptions operate independently**

17 Sections 65, 66, 67, 68, 69, 70 and 71 do not limit each other.

18 **Subdivision D—Other provisions relating to directions**

19 **73 Direction not grounds for denial of obligations**

20 *When this section applies*

- 21 (1) This section applies if an accountable entity, or a significant related
22 entity of an accountable entity, is party to a contract, whether the
23 proper law of the contract is:
24 (a) Australian law (including the law of a State or Territory); or
25 (b) law of a foreign country (including the law of part of a
26 foreign country).

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 5 Regulator's power to issue directions

Section 73

1

Direction does not allow denial of obligations

2

- (2) The fact that the accountable entity is given a direction under section 60 does not allow the contract, or a party to the contract (other than the accountable entity or a significant related entity of the accountable entity), to do any of the following:

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- (a) deny any obligations under the contract;
- (b) accelerate any debt under the contract;
- (c) close out any transaction relating to the contract;
- (d) enforce any security under the contract.

This subsection has effect subject to this section.

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- (3) If the accountable entity or the significant related entity is prevented from fulfilling its obligations under the contract because of a direction under section 60, the other party or parties to the contract are, subject to any orders made under subsection (4) of this section, relieved from obligations owed to the accountable entity or significant related entity under the contract.

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Application to the Federal Court

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- (4) A party to a contract to which subsection (3) applies may apply to the Federal Court of Australia for an order relating to the effect on the contract of a direction under section 60. The order may deal with matters including (but not limited to):

- (a) requiring a party to the contract to fulfil an obligation under the contract despite subsection (3) of this section; or
- (b) obliging a party to the contract to take some other action (for example, paying money or transferring property) in view of obligations that were fulfilled under the contract before the direction was made.

The order must not require a person to take action that would contravene the direction.

30

Covered bonds

31

32

- (5) Subsection (2) does not prevent the exercise of a contractual right in relation to an asset that secures liabilities to holders of covered

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1 bonds (within the meaning of the *Banking Act 1959*), or their
2 representatives, if payments under the covered bonds to the holders
3 or representatives are not made.

4 **74 Information to the Minister about certain directions**

- 5 (1) If the Minister requests the Regulator to provide information about:
6 (a) any directions under section 60 or 61 to a particular
7 accountable entity; or
8 (b) any directions made under section 60 or 61, during a
9 specified period, to any accountable entities;
10 the Regulator must comply with the request.
- 11 (2) The Regulator may provide any information that it considers
12 appropriate to the Minister about:
13 (a) any directions given under section 60 or 61; or
14 (b) any revocations of any such directions.
- 15 (3) If the Regulator provides the Minister with information about a
16 direction and then later revokes the direction, the Regulator must
17 notify the Minister of the revocation of the direction as soon as
18 practicable after the revocation.
- 19 (4) Failure to comply with this section does not affect the validity of
20 the direction or revocation.

21 **75 Relationship with other laws**

22 If a direction given under section 60 or 61 is inconsistent with the
23 Minister rules or the Regulator rules, the direction prevails and the
24 rules, to the extent of the inconsistency, do not have any effect.

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 6 Civil penalties

Section 76

1 **Division 6—Civil penalties**

2 **76 Civil penalty provision for non-compliance with obligations**

- 3 (1) A person contravenes this subsection if:
4 (a) the person is an accountable entity; and
5 (b) the person is subject to an obligation under Chapter 2; and
6 (c) the person fails to comply with the obligation.

7 Note: It is generally not necessary to prove a person's state of mind in
8 proceedings for a contravention of a civil penalty provision (see
9 section 94 of the Regulatory Powers Act).

- 10 (2) A person is liable to a civil penalty if the person contravenes
11 subsection (1).

12 Note: Section 92 of the Regulatory Powers Act (which deals with ancillary
13 contravention of a civil penalty provision) applies in relation to this
14 subsection.

15 **77 Civil penalty provisions—enforcement**

16 *Civil penalty provisions enforceable under Regulatory Powers Act*

- 17 (1) Each civil penalty provision of this Act is enforceable under Part 4
18 of the Regulatory Powers Act.

19 Note: Part 4 of the Regulatory Powers Act allows a civil penalty provision to
20 be enforced by obtaining an order for a person to pay a pecuniary
21 penalty for the contravention of the provision.

22 *Authorised applicant*

- 23 (2) For the purposes of Part 4 of the Regulatory Powers Act, the
24 Regulator is an authorised applicant in relation to the provisions
25 mentioned in subsection (1).

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Civil penalties **Division 6**

Section 78

1 *Relevant court*

2 (3) For the purposes of Part 4 of the Regulatory Powers Act, the
3 Federal Court of Australia is a relevant court in relation to the
4 provisions mentioned in subsection (1).

5 *Liability of Crown*

6 (4) Part 4 of the Regulatory Powers Act, as that Part applies in relation
7 to the provisions mentioned in subsection (1), does not make the
8 Crown liable to a pecuniary penalty.

9 *Extension to external Territories*

10 (5) Part 4 of the Regulatory Powers Act, as it applies in relation to the
11 provisions mentioned in subsection (1), extends to every external
12 Territory.

13 **78 Civil penalty provisions—amount of penalty**

14 (1) Despite subsection 82(5) of the Regulatory Powers Act, the
15 pecuniary penalty payable:
16 (a) by a person; and
17 (b) under a civil penalty order under Part 4 of that Act (as that
18 Part applies because of section 77 of this Act);
19 must not be more than the maximum penalty amount worked out
20 under this section for a contravention by the person.

21 *Maximum amount of civil penalty*

22 (2) For the purposes of subsection (1), the maximum penalty amount
23 for a contravention by a body corporate of a civil penalty provision
24 under this Act is the greatest of the following:
25 (a) 50,000 penalty units;
26 (b) if the court can determine the benefit derived and detriment
27 avoided because of the contravention—that amount
28 multiplied by 3;
29 (c) either:

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 6 Civil penalties

Section 78

- 1 (i) 10% of the annual turnover of the body corporate for the
2 12-month period ending at the end of the month in
3 which the body corporate contravened, or began to
4 contravene, the provision; or
5 (ii) if the amount worked out under subparagraph (i) is
6 greater than an amount equal to 2.5 million penalty
7 units—2.5 million penalty units.

8 Note: For the meanings of *annual turnover* and *benefit derived and*
9 *detriment avoided*, see section 7.

10 *Additional relevant matter*

- 11 (3) In addition to the matters a court must take into account under
12 subsection 82(6) of the Regulatory Powers Act in determining the
13 pecuniary penalty for a contravention of a civil penalty provision
14 by an RSE licensee, the court must take into account the impact
15 that the penalty under consideration would have on the
16 beneficiaries of any registrable superannuation entities of which
17 the RSE licensee is a trustee.

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Administration **Chapter 3**
Regulatory powers and enforcement **Part 4**
Enforceable undertakings **Division 7**

Section 79

1 **Division 7—Enforceable undertakings**

2 **79 Enforceable undertakings**

3 *Enforceable provisions*

- 4 (1) The provisions of this Act are enforceable under Part 6 of the
5 Regulatory Powers Act.

6 Note: Part 6 of the Regulatory Powers Act creates a framework for
7 accepting and enforcing undertakings relating to compliance with
8 provisions.

9 *Authorised person*

- 10 (2) For the purposes of Part 6 of the Regulatory Powers Act, the
11 Regulator is an authorised person in relation to the provisions
12 mentioned in subsection (1).

13 *Relevant court*

- 14 (3) For the purposes of Part 6 of the Regulatory Powers Act, the
15 Federal Court of Australia is a relevant court in relation to the
16 provisions mentioned in subsection (1).

17 *Other undertakings*

- 18 (4) An authorised person may accept an undertaking in connection
19 with a matter in relation to which the Regulator has a power or
20 function under this Act. The undertaking must be expressed to be
21 an undertaking under this subsection.

- 22 (5) The power in subsection (4) is in addition to the power of an
23 authorised person under subsection 114(1) of the Regulatory
24 Powers Act.

- 25 (6) Part 6 of the Regulatory Powers Act, other than subsections 114(1)
26 and (2), applies to an undertaking accepted under subsection (4) of
27 this section as if it were an undertaking accepted under
28 subsection 114(1) of the Regulatory Powers Act.

EXPOSURE DRAFT

Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 7 Enforceable undertakings

Section 79

1

Extension to external Territories

2

(7) Part 6 of the Regulatory Powers Act, as it applies in relation to the provisions mentioned in subsection (1), extends to every external Territory.

3

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EXPOSURE DRAFT

1 **Division 8—Injunctions**

2 **80 Injunctions**

3 *Enforceable provisions*

- 4 (1) The provisions of this Act are enforceable under Part 7 of the
5 Regulatory Powers Act.

6 Note: Part 7 of the Regulatory Powers Act creates a framework for using
7 injunctions to enforce provisions.

8 *Authorised person*

- 9 (2) For the purposes of Part 7 of the Regulatory Powers Act, the
10 Regulator is an authorised person in relation to the provisions
11 mentioned in subsection (1).

12 *Relevant court*

- 13 (3) For the purposes of Part 7 of the Regulatory Powers Act, the
14 Federal Court of Australia is a relevant court in relation to the
15 provisions mentioned in subsection (1).

16 *Consent injunctions*

- 17 (4) A relevant court may grant an injunction under Part 7 of the
18 Regulatory Powers Act in relation to a provision mentioned in
19 subsection (1) of this section by consent of all the parties to
20 proceedings brought under that Part, whether or not the court is
21 satisfied that section 121 of that Act applies.

22 *Extension to external Territories*

- 23 (5) Part 7 of the Regulatory Powers Act, as it applies in relation to the
24 provisions mentioned in subsection (1), extends to every external
25 Territory.

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Chapter 3 Administration

Part 4 Regulatory powers and enforcement

Division 9 Miscellaneous

Section 81

1 **Division 9—Miscellaneous**

2 **81 Physical elements of offences**

3 (1) This section applies if a provision of this Act provides that a person
4 contravening another provision of this Act (the *conduct provision*)
5 commits an offence.

6 (2) For the purposes of applying Chapter 2 of the *Criminal Code* to the
7 offence, the physical elements of the offence are set out in the
8 conduct provision.

9 Note: Chapter 2 of the *Criminal Code* sets out general principles of criminal
10 responsibility.

11 **82 Contravening an offence provision or a civil penalty provision**

12 (1) This section applies if a provision of this Act provides that a person
13 contravening another provision of this Act (the *conduct provision*)
14 commits an offence or is liable to a civil penalty.

15 (2) For the purposes of this Act, a reference to a contravention of an
16 offence provision or a civil penalty provision includes a reference
17 to a contravention of the conduct provision.

18 Note: This also affects references in the Regulatory Powers Act to a
19 contravention of an offence provision or a civil penalty provision: see
20 the definition of *this Act* in section 7.

21 **83 Self-incrimination**

22 (1) An individual is not excused from complying with a requirement
23 under this Act to give information, produce a book, account or
24 document or sign a record on the ground that doing so would tend
25 to incriminate the individual.

26 Note: A body corporate is not entitled to claim the privilege against
27 self-incrimination.

28 (2) However, the information given, the record signed or the book,
29 account or document produced by the individual in compliance

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- 1 with the requirement, is not admissible in evidence against the
2 individual in criminal proceedings, other than proceedings in
3 respect of the falsity of the information, if:
- 4 (a) before complying with the requirement, the individual claims
5 that giving the information, signing the record or producing
6 the book, account or document might tend to incriminate the
7 individual; and
- 8 (b) giving the information, signing the record or producing the
9 book, account or document might in fact tend to incriminate
10 the individual.
- 11 (3) If, at general law, an individual would otherwise be able to claim
12 the privilege against self-exposure to a penalty (other than a
13 penalty for an offence) in relation to giving information, producing
14 a book, account or document, or signing a record under this Act,
15 the individual is not excused from giving the information,
16 producing the book, account or document, or signing the record,
17 under those provisions on that ground.
- 18 Note: A body corporate is not entitled to claim the privilege against
19 self-exposure to a penalty.

84 Legal professional privilege

- 20 (1) This section applies if:
- 21 (a) under this Act, a person requires a lawyer;
- 22 (i) to give information; or
- 23 (ii) to produce a book, account or document; and
- 24 (b) either:
- 25 (i) giving the information would involve disclosing; or
- 26 (ii) the book, account or document contains;
- 27 a privileged communication made by, or on behalf of or to
- 28 the lawyer in their capacity as a lawyer.
- 29
- 30 (2) The lawyer is entitled to refuse to comply with the requirement
31 unless:
- 32 (a) if the person to whom, or by or on behalf of whom, the
33 communication was made is a body corporate that is under

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Section 85

- 1 administration or is being wound up—the administrator or
2 the liquidator of the body; or
3 (b) otherwise—the person to whom, or by or on behalf of whom,
4 the communication was made;
5 consents to the lawyer complying with the requirement.
- 6 (3) If the lawyer so refuses, they must, as soon as practicable, give to
7 the person who made the requirement a written notice setting out:
8 (a) if the lawyer knows the name of the person to whom, or by or
9 on behalf of whom, the communication was made—that
10 name and address; and
11 (b) if subparagraph (1)(a)(i) applies and the communication was
12 made in writing—sufficient particulars to identify the
13 document containing the communication; and
14 (c) if subparagraph (1)(a)(ii) applies—sufficient particulars to
15 identify the book, account or document, or the part of the
16 book, account or document, containing the communication.
- 17 (4) A person commits an offence if the person refuses or fails to
18 comply with a requirement under this section.
- 19 Penalty: 30 penalty units.

85 Powers of Court relating to non-compliance with this Act

- 21 (1) If the Regulator or an investigator is satisfied that a person has,
22 without reasonable excuse, failed to comply with a requirement
23 made under this Act, the Regulator or the investigator may, by
24 writing certify the failure to the Federal Court of Australia.
- 25 (2) If the Regulator or the investigator certifies the failure under
26 subsection (1), the Federal Court of Australia may inquire into the
27 case and may order the person to comply with the requirement as
28 specified in the order.

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Part 5—Review of decisions

86 Reviewable decisions

A decision by the Regulator referred to in column 1 of an item of the following table is a *reviewable decision*. Each person referred to in column 2 of the item is an *affected person* for the decision.

Reviewable decisions		
	Column 1	Column 2
Item	Decision	Affected person
1	A decision under subsection 15(1) not to specify an obligation that an accountable entity need not comply with	The accountable entity
2	A decision under subsection 15(1) to specify conditions to which a notice specifying an obligation that an accountable entity need not comply with is subject	The accountable entity
3	A decision under subsection 17(1) not to specify an obligation that an accountable person of an accountable entity, or of a significant related entity of an accountable entity, need not comply with	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
4	A decision under subsection 17(1) to specify conditions to which a notice specifying an obligation that an accountable person of an accountable entity, or of a significant related entity of an accountable entity, need not comply with is subject	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
5	A decision under subsection 24(3) that remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is,	All of the following: (a) the accountable person; (b) the accountable entity;

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Reviewable decisions		
	Column 1	Column 2
Item	Decision	Affected person
	or is not, variable remuneration	(c) the significant related entity
6	A decision under subsection 24(3) to vary the remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, that is, or is not, variable remuneration	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
7	A decision under subsection 24(3) to refuse to vary the remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, that is, or is not, variable remuneration	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
8	A decision under subsection 25(3) that the value of variable remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is to be worked out in a particular way	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
9	A decision under subsection 25(3) to vary the way that the value of variable remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is to be worked out	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
10	A decision under subsection 25(3) to refuse to vary the way that the value of variable remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is to be worked out	All of the following: (a) the accountable person; (b) the accountable entity; (c) the significant related entity
11	A decision under subsection 39(1) to disqualify a person from being or acting as an accountable person	All of the following: (a) the person; (b) an accountable entity;

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Reviewable decisions		
	Column 1	Column 2
Item	Decision	Affected person
		(c) a significant related entity
12	A decision under subsection 40(1) to vary or revoke a disqualification of a person from being or acting as an accountable person	All of the following: (a) the person; (b) an accountable entity; (c) a significant related entity
13	A decision under subsection 40(1) to refuse to vary or revoke a disqualification of a person from being or acting as an accountable person	All of the following: (a) the person; (b) an accountable entity; (c) a significant related entity
14	A decision under subsection 60(1) to give a direction to an accountable entity to do something, or to cause something to be done	Both of the following: (a) the accountable entity; (b) if another person is subject to the direction—that person
15	A decision under subsection 60(1) to vary or revoke a direction given to an accountable entity to do something, or to cause something to be done	Both of the following: (a) the accountable entity; (b) if another person is subject to the direction—that person
16	A decision under subsection 60(1) to refuse to vary or revoke a direction given to an accountable entity to do something, or to cause something to be done	Both of the following: (a) the accountable entity; (b) if another person is subject to the direction—that person
17	A decision under subsection 61(1) to give a direction to an accountable entity to reallocate a responsibility of a person	Both of the following: (a) the accountable entity; (b) the person
18	A decision under subsection 61(1) to vary or revoke a direction given to an accountable entity to reallocate a responsibility of a person	Both of the following: (a) the accountable entity; (b) the person

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Section 87

Reviewable decisions		
	Column 1	Column 2
Item	Decision	Affected person
19	A decision under subsection 61(1) to refuse to vary or revoke a direction given to an accountable entity to reallocate a responsibility of a person	Both of the following: (a) the accountable entity; (b) the person

1 87 Notice of decisions and review rights

2 (1) If written notice of a reviewable decision is given to an affected
3 person, the notice:

4 (a) must include a statement setting out particulars of the
5 person's review rights; and

6 (b) may impose conditions relating to the disclosure of
7 information contained in reasons for the decision that are
8 included in the notice.

9 (2) A person commits an offence if:

10 (a) the person is given a notice of a reviewable decision; and

11 (b) the notice includes a condition relating to the disclosure of
12 information; and

13 (c) the person fails to comply with the condition.

14 Penalty: Imprisonment for 2 years.

15 88 Affected person may request reconsideration of reviewable 16 decision

17 (1) An affected person for a reviewable decision may request the
18 decision-maker to reconsider the decision.

19 Note: For the meaning of *decision-maker*, see section 7.

20 (2) The request must:

21 (a) be made in writing; and

22 (b) set out the reasons for the request; and

- 1 (c) be given to the decision-maker within 21 days after the
2 affected person is notified of the reviewable decision.

3 **89 Reconsideration of reviewable decision**

- 4 (1) If a request is made under section 88 by an affected person for a
5 reviewable decision, the decision-maker must:
6 (a) personally reconsider the decision to which the application
7 relates; or
8 (b) cause the decision to be reconsidered by a delegate of the
9 decision-maker who:
10 (i) was not involved in making the decision; and
11 (ii) occupies a position that is at least the same level as that
12 occupied by the person who made the decision.

13 The person who reconsiders the decision is the *internal decision*
14 *reviewer*.

- 15 (2) After reconsidering the reviewable decision, the internal decision
16 reviewer must:
17 (a) affirm the decision; or
18 (b) vary the decision; or
19 (c) set the decision aside and substitute a new decision.

- 20 (3) After the internal decision reviewer makes the reconsideration
21 decision, the reviewer must give written notice of the following to
22 the applicant:
23 (a) the reconsideration decision;
24 (b) the date that decision takes effect;
25 (c) the reasons for that decision.

26 Note: Section 27A of the *Administrative Appeals Tribunal Act 1975* requires
27 the applicant to be notified of the applicant's review rights.

- 28 (4) The notice may impose conditions relating to the disclosure of
29 information contained in the reasons for the decision.

- 30 (5) A person commits an offence if:
31 (a) the person is given a notice under subsection (3); and

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Part 5 Review of decisions

Section 90

1 (b) the notice includes a condition relating to the disclosure of
2 information; and

3 (c) the person fails to comply with the condition.

4 Penalty: Imprisonment for 2 years.

5 (6) The internal decision reviewer is taken to have affirmed the
6 reviewable decision if the reviewer does not give notice of the
7 reconsideration decision to the applicant within 60 days after
8 receiving the application.

9 (7) The reconsideration decision is taken to have been made under the
10 provision under which the reviewable decision was made other
11 than for the purposes of section 88.

12 **90 Review by the Administrative Appeals Tribunal**

13 (1) Applications may be made to the Administrative Appeals Tribunal
14 for review of a reconsideration decision of an internal decision
15 reviewer.

16 Note: For the definitions of *internal decision reviewer* and *reconsideration*
17 *decision*, see section 7.

18 (2) An application under subsection (1) may be made only by, or on
19 behalf of, a person affected by the reviewable decision.

20 (3) Subsection (2) has effect despite subsection 27(1) of the
21 *Administrative Appeals Tribunal Act 1975*.

1 **Part 6—Miscellaneous**
2

3 **91 Indemnifying accountable entities**

- 4 (1) A related body corporate of an accountable entity must not
5 (whether by agreement or by making a payment and whether
6 directly or through an interposed entity):
7 (a) indemnify the accountable entity against the consequences of
8 breaching an obligation under this Act; or
9 (b) pay, or agree to pay, a premium for a contract insuring the
10 accountable entity against the consequences of breaching an
11 obligation under this Act.
- 12 (2) Subsection (1) does not apply to a liability for legal costs.
- 13 (3) Anything that purports to indemnify or insure a person against a
14 liability, or exempt them from a liability, is void to the extent that
15 it contravenes subsection (1).

16 **92 Causes of action not created**

17 This Act does not have the effect of creating a cause of action that
18 would not have existed if this Act had not been enacted.

19 **93 Compensation for acquisition of property**

- 20 (1) If the operation of this Act would result in an acquisition of
21 property (within the meaning of paragraph 51(xxxi) of the
22 Constitution) from a person otherwise than on just terms (within
23 the meaning of that paragraph), the Commonwealth is liable to pay
24 a reasonable amount of compensation to the person.
- 25 (2) If the Commonwealth and the person do not agree on the amount
26 of the compensation, the person may institute proceedings in the
27 Federal Court of Australia or the Supreme Court of a State or
28 Territory for the recovery from the Commonwealth of such
29 reasonable amount of compensation as the court determines.

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Section 94

1 **94 Conduct of directors, employees and agents**

2 *State of mind of an individual*

3 (1) If, in proceedings for an offence against this Act, it is necessary to
4 establish the state of mind of an individual in relation to particular
5 conduct, it is sufficient to show:

6 (a) that the conduct was engaged in by an employee or agent of
7 the individual within the scope of actual or apparent
8 authority; and

9 (b) that the employee or agent had the state of mind.

10 *Conduct of an individual*

11 (2) Any conduct engaged in on behalf of an individual by an employee
12 or agent of the individual within the scope of actual or apparent
13 authority is taken to have been engaged in also by the individual
14 unless the individual establishes that they took reasonable
15 precautions and exercised due diligence to avoid the conduct.

16 Note: Part 2.5 of the *Criminal Code* and section 97 of the Regulatory
17 Powers Act deal with responsibility of bodies corporate for offences
18 and civil penalties.

19 *Limitation on imprisonment*

20 (3) If:

21 (a) an individual is convicted of an offence; and

22 (b) the individual would not have been convicted of the offence
23 if subsections (1) and (2) had not been enacted;

24 the individual is not liable to be punished by imprisonment for that
25 offence.

26 *Extended meaning of state of mind*

27 (4) A reference in subsection (1) to the state of mind of a person
28 includes a reference to:

29 (a) the person's knowledge, intention, opinion, belief or purpose;
30 and

- 1 (b) the person's reasons for the intention, opinion, belief or
2 purpose.

3 *Engaging in conduct*

- 4 (5) A reference in this section to engaging in conduct includes a
5 reference to failing or refusing to engage in conduct.

6 **95 Protection from liability—general**

- 7 (1) A person is not subject to any liability to any person in respect of
8 anything done, or omitted to be done, in good faith and without
9 negligence in the exercise or performance, or the purported
10 exercise or performance, of powers, functions or duties under this
11 Act.
- 12 (2) Subsection (1) does not apply to a person referred to in section 58
13 of the *Australian Prudential Regulation Authority Act 1998* and, to
14 avoid doubt, does not affect the operation of that section.

15 Note: Section 58 of the *Australian Prudential Regulation Authority Act 1998*
16 deals with protection from liability for APRA, APRA members,
17 APRA staff members and their agents.

18 **96 Protection from liability—directions and secrecy**

- 19 (1) An action, suit or proceeding (whether criminal or civil) does not
20 lie against a person in relation to anything done, or omitted to be
21 done, in good faith by the person if:
- 22 (a) the person does the thing, or omits to do the thing, for the
23 purpose of any of the following:
- 24 (i) complying with a direction under this Act given by the
25 Regulator to an accountable entity;
- 26 (ii) complying with section 64 (secrecy) in relation to a
27 direction under this Act given by the Regulator to an
28 accountable entity; and
- 29 (b) it is reasonable for the person to do the thing, or to omit to do
30 the thing, in order to achieve that purpose; and
- 31 (c) the person is any of the following:

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Section 97

- 1 (i) an officer or senior manager of the accountable entity,
2 or of a member of the accountable entity's relevant
3 group;
4 (ii) an employee or agent of the accountable entity, or of a
5 member of the accountable entity's relevant group;
6 (iii) the accountable entity or a member of the accountable
7 entity's relevant group.

8 Note: For the definition of *relevant group*, see section 7.

9 (2) For the purposes of paragraph (1)(b), treat it as reasonable for a
10 person to do a thing, or to omit to do a thing, in order to achieve a
11 purpose unless no reasonable person in that person's position
12 would do the thing, or omit to do the thing, in order to achieve that
13 purpose.

14 (3) In this section:

15 *employee* of an accountable entity, or of a member of an
16 accountable entity's relevant group, includes a person engaged to
17 provide advice or services to the accountable entity or member.

18 97 Protection from liability—provisions do not limit each other

19 The following provisions do not limit the operation of each other:

- 20 (a) section 95 of this Act;
21 (b) section 96 of this Act;
22 (c) section 58 of the *Australian Prudential Regulation Authority*
23 *Act 1998*.

24 98 Review of operation of this Act

- 25 (1) The Minister must cause a review of the operation of this Act to be
26 undertaken as soon as possible after the fifth anniversary of the
27 commencement of this Act.
28 (2) The persons undertaking the review must give the Minister a
29 written report of the review within 6 months of the commencement
30 of the review.

- 1 (3) The Minister must cause a copy of the report of the review to be
2 tabled in each House of the Parliament within 15 sitting days of
3 that House after the report is given to the Minister.

4 **99 Minister rules**

- 5 (1) The Minister may, by legislative instrument, make rules (the
6 *Minister rules*) prescribing matters:
7 (a) required or permitted by this Act to be prescribed by the
8 Minister rules; or
9 (b) necessary or convenient to be prescribed for carrying out or
10 giving effect to this Act.
- 11 (2) To avoid doubt, the Minister rules may not do the following:
12 (a) create an offence or civil penalty;
13 (b) provide powers of:
14 (i) arrest or detention; or
15 (ii) entry, search or seizure;
16 (c) impose a tax;
17 (d) set an amount to be appropriated from the Consolidated
18 Revenue Fund under an appropriation in this Act;
19 (e) directly amend the text of this Act.
- 20 (3) In this section, a reference to this Act does not include a reference
21 to the Minister rules, the Regulator rules or the Regulatory Powers
22 Act.

23 **100 Regulator rules**

- 24 (1) APRA and ASIC may jointly, by legislative instrument, make rules
25 (the *Regulator rules*) prescribing matters:
26 (a) required or permitted by this Act to be prescribed by the
27 Regulator rules; or
28 (b) necessary or convenient to be prescribed for carrying out or
29 giving effect to this Act.
- 30 (2) To avoid doubt, the Regulator rules may not do the following:
31 (a) create an offence or civil penalty;
-

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- 1 (b) provide powers of:
2 (i) arrest or detention; or
3 (ii) entry, search or seizure;
4 (c) impose a tax;
5 (d) set an amount to be appropriated from the Consolidated
6 Revenue Fund under an appropriation in this Act;
7 (e) directly amend the text of this Act.
- 8 (3) Regulator rules that are inconsistent with the Minister rules have
9 no effect to the extent of the inconsistency, but the Regulator rules
10 are taken to be consistent with the Minister rules to the extent that
11 the Regulator rules are capable of operating concurrently with the
12 Minister rules.
- 13 (4) In this section, a reference to this Act does not include a reference
14 to the Regulator rules, the Minister rules or the Regulatory Powers
15 Act.
- 16