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Dear Manager

**Banking Executive Accountability Regime – Draft Bill**

These comments are about six aspects of the draft Bill.

The first is the failure (in proposed s 37KB) to prohibit an ADI insuring itself against the consequences of breaching an obligation under this regime.

The second is an internal inconsistency in the wording of proposed s 37EC.

The third is an apparent anomaly, in the unexplained implication that being on the Board of a subsidiary can itself give oversight of the parent ADI.

The fourth is the ambiguity as to whether a member of the Board of an ADI will always be an accountable person simply because they hold that office.

The fifth is the specification of the accountable person of a foreign ADI.

Lastly, there are several simple typographical errors (a missing word or a wrong provision number).

**Insurance against consequences of breach**

The Bill does not prohibit an ADI itself buying the insurance against its own breach; contrast the opening words of s 37KB(1) with those of s 37KB(2). If existing law is relied on as already covering this, that could usefully be explained in the Explanatory Memorandum (which now says the Bill imposes this prohibition).

**Section 37EC**

Proposed subsection 37EC(2) requires that the ADI itself (not the subsidiary) be satisfied of specified matters, but subsection 37EC (3) refers to APRA being satisfied “the ADI or subsidiary has taken all reasonable steps to satisfy itself” of those same matters. The words “or subsidiary” seem anomalous.

**Non-executive Directors**

Proposed s 37BA(3)(a) makes a person an accountable person of an ADI if they have “responsibility for oversight of the ADI as a member of the Board of the ADI, or a subsidiary of the ADI”.

It is not apparent how being a member of the Board of a subsidiary could ever give a person responsibility for oversight of the parent company.

There is scope to put beyond doubt the question of whether a member of the Board of an ADI will always be an accountable person because of this provision. The drafting might be read as suggesting that, to attract the definition, the particular Board member must not only simply hold the office of director but also (albeit it in that capacity) have responsibility for oversight of the ADI. The draft Explanatory Memorandum says at 1.83 (emphasis added): “The Government would *generally* expect non-executive directors to be accountable persons”. It is not apparent how corporations law would allow any member of the Board of a company to not have responsibility for oversight of that company.

**Accountable person of a foreign ADI and its subsidiaries**

Proposed s 37BA(6) makes the head of an Australian branch of a foreign ADI an accountable person “of an ADI or a subsidiary of an ADI”. The scheme of the legislation requires identification of which ADI (or subsidiary) a person is an accountable person of. The wording of s 37BA(6) does not expressly make that link. Perhaps what is intended is that, without limiting subsection (1), a person who has responsibility for the conduct of all the activities of an Australian branch of a foreign ADI is an accountable person of that ADI and of any subsidiary of that ADI.

**Typographical corrections**

Proposed s 37BB(3)(b), change “a subsidiary an ADI” to “a subsidiary of an ADI”.

Proposed s 37E(1)(d)(i), change “payable an accountable person” to “payable to an accountable person”

Proposed s 37KA(1)(b), change 37D(d) to 37D(1)(d).

Proposed s 37KA(1)(c), change 37E(d) to 37E(1)(d).

Proposed s 37KA(1)(d), change 37F(d) to 37F(1)(d).

Yours sincerely

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