



20 September 2021

Regulatory Powers and Accountability Unit  
Financial System Division  
Commonwealth Treasury  
Via email at [FAR@treasury.gov.au](mailto:FAR@treasury.gov.au)

## **Financial Accountability Regime (Consequential Amendments and Transitional Provisions) Bill 2021**

The Australian community expects that banking executives are held to account for misconduct that occurs under their watch. Despite this, the Banking Royal Commission found that regulators had failed to sanction executives who broke the law, promoting an industry culture that rewarded misconduct.<sup>1</sup> Commissioner Kenneth Hayne identified the very first norm of conduct that should govern financial services regulation is to, “apply and enforce the law”.<sup>2</sup> The Commission found that, “adequate deterrence of misconduct depends upon visible public denunciation and punishment.”<sup>3</sup>

The Treasury consultation on the new Financial Accountability Regime (**'FAR'**) is an opportunity to evaluate the effectiveness of the existing Banking Executive Accountability Regime (**'BEAR'**) and apply learnings to strengthen the new regime. In order to be effective, the FAR will need a greater range of sanctions to prosecute executives and financial institutions, and stronger enforcement by corporate regulators.

The BEAR regime has been in operation for over three years, coming into effect on 1 July 2018. Since that time:

- no executives have been disqualified
- no executives have had their bonuses clawed back
- no banks have been fined.

**If the BEAR's impact is measured in financial terms - by the amount of executive remuneration clawed back or the amount of fines issued - then its impact has been precisely zero.**

This despite strong and clear evidence of forms of executive conduct in major institutions that the BEAR was designed to punish and deter.

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<sup>1</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019, Final Report, p.2

<sup>2</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019, Final Report, p.12

<sup>3</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019, Final Report, p.12

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A clear example is APRA's failure to sanction a single Westpac executive for breaking anti-money laundering laws on over 23 million occasions. Westpac admitted to failing to "carry out the appropriate customer due diligence in relation to suspicious transactions associated with possible child exploitation".<sup>4</sup> As a result, AUSTRAC fined Westpac a record \$1.3 billion for breaches of anti-money laundering laws.<sup>5</sup> This record fine is a clear indicator of the seriousness of the allegations and the failure of senior management for its lack of appropriate risk controls.

The Westpac breaches of anti-money laundering laws occurred between 2013 to November 2018.<sup>6</sup> The BEAR regime applied to large ADIs, including Westpac, from July 2018.<sup>7</sup> The BEAR should have been activated in this case. The legislation requires Westpac to have an accountable Anti-Money Laundering Officer who has an obligation to act with "due skill, care and diligence".<sup>8</sup> Failure to control for a breach of the law of such a large magnitude likely risks the "prudential reputation" of Westpac, satisfying the legal threshold for APRA to use their BEAR powers.<sup>9</sup> However, in failing to sanction a single executive for such an egregious breach of the law APRA sends a clear message to the industry that individuals are not personally accountable for misconduct. This should have been the test case of APRA's new powers.

The community needs strong enforcement because, left to their own devices, the banks have a track record of rewarding senior executives for misconduct that is profitable. In 2016, the Commonwealth Bank was in the midst of:

- the fees-no-service scandal;
- an investigation into CBA's life insurance business;
- anti-money laundering and counter-terrorism financing investigations; and
- investigation into the mis-selling of junk insurance.

Despite this, the Banking Royal Commission revealed the Commonwealth Bank board rewarded every senior executive of the bank with a large short-term bonus.<sup>10</sup> The only executive to have their bonus cut was Commonwealth Bank's Head of Wealth who had their short-term bonus cut by 5%.<sup>11</sup>

### **Strengthen sanctions and enforcement of the FAR**

CHOICE welcomes the Federal Government's proposal for ASIC to jointly administer the FAR. As a conduct regulator, ASIC will be better positioned to prosecute executives who breach their accountability obligations. Strong enforcement of the FAR is required to ensure that positive cultural change occurs within financial institutions.

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<sup>4</sup> AUSTRAC, 2020, 'AUSTRAC and Westpac agree to proposed \$1.3bn penalty', <https://www.austrac.gov.au/news-and-media/media-release/austrac-and-westpac-agree-penalty>

<sup>5</sup> Ibid

<sup>6</sup> <https://www.austrac.gov.au/about-us/media-release/civil-penalty-orders-against-westpac>

<sup>7</sup> <https://www.apra.gov.au/sites/default/files/2020-12/BEAR%20information%20paper%20December%202020.pdf>

<sup>8</sup> s37CA(1)(a) *Banking Act 1959* (Cth)

<sup>9</sup> s37CA(1)(c) *Banking Act 1959* (Cth)

<sup>10</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2018, transcript, P-6749

<sup>11</sup> Ibid, P-6753

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**CHOICE supports the passage of the FAR legislation. However, we recommend a number of amendments to strengthen enforcement and increase the range of sanctions available for regulators.**

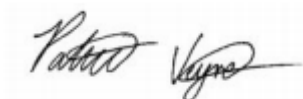
In particular, CHOICE is calling on the Federal Government to:

- impose civil penalties of \$1,050,000 for individuals for breaches of accountability obligations (as originally proposed by the Government);
- require 100% of an accountable person's variable remuneration to be subject to deferred remuneration obligations;
- add an accountability obligation that requires entities and accountable persons to “pay due regard to the interests of customers and treat them fairly”; and
- expand accountability obligations to include all executives and senior management of accountable entities.

In August 2021, CHOICE drafted a joint consumer submission with Consumer Action Law Centre, Financial Counselling Australia, and Super Consumer Australia that addresses in detail the consumer group's policy recommendations.<sup>12</sup>

If designed correctly, the FAR regime will be a gamechanger in reforming corporate culture and improving outcomes for consumers. However, failing to learn the lessons of the BEAR will risk creating a weak law that does not hold financial executives to account, allowing a toxic culture of misconduct to continue.

Yours sincerely,



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Senior Policy & Campaigns Adviser.  
CHOICE

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<sup>12</sup> CHOICE, August 2021, 'Joint consumer submission to Treasury on the Financial Accountability Regime', <https://www.choice.com.au/consumer-advocacy/policy-submissions/2021/august/joint-consumer-submission-to-treasury-on-the-financial-accountability-regime>