

24 August 2021

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Financial System Division  
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Treasury  
Langton Crescent  
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Dear Ms Reeve

## AFIA COMMENTS ON THE FINANCIAL ACCOUNTABILITY REGIME (FAR) PACKAGE

The Australian Finance Industry Association (AFIA) appreciates the opportunity to make a submission to the Treasury on the draft legislation, explanatory materials, and associated documents for the Financial Accountability Regime (FAR Package).

AFIA is a leading advocate for the Australian financial services industry. We support our members to finance Australia's future. We believe that our industry can best support Australia's economy by promoting choice in and access to consumer and business finance, driving competition and innovation in financial services, and supporting greater financial, and therefore social, participation across our community.

AFIA represents over 100 providers of consumer, commercial and wholesale finance across Australia. These banks, finance companies, fleet and car rental providers, and fintechs provide traditional and more specialised finance to help businesses mobilise working capital, cashflow and investment. They are also at the forefront of financial innovation in consumer finance.

## OUR SUBMISSION

AFIA members remain committed to ensuring that all Australians have continued access to finance, while enhancements to consumer protections are made following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

AFIA supports the policy intent of the FAR and the key objective to 'improve the operating culture of entities in the banking, insurance and superannuation sectors and to increase transparency and accountability across these sectors—both in relation to prudential matters and conduct related matters.' This aligns closely with our strategic goal, ultimately aimed at, driving a culture of integrity, transparency and fairness across the industry.

AFIA believes some modifications and clarifications are needed to enhance the implementation of the FAR to ensure it improves governance and accountability structures and consumer protections, while promoting access to finance, competition and innovation, and participation.

Without these changes, the FAR is at risk of further complicating the legal and regulatory framework and impeding competition and innovation in financial services, which is contrary to the stated policy intent as well as initiatives to support our economic recovery.

### **Proportionate and scalable regulation**

Regulation should be targeted and right-sized to ensure it promotes access to and choice in consumer and business finance. In relation to the FAR Package, we recommend:

- individual and joint and several liability clauses be reviewed and certain clauses removed to ensure there is appropriate individual accountability for senior executives
- the accountable person matrix should be clarified and expanded to accommodate smaller organisations' business models, in particular those financial institutions that do not apportion end-to-end accountability and/or align responsibilities for senior executives based on technical skills
- there is flexibility in the quantum of deferred remuneration provisions to accommodate smaller organisations, in particular those financial institutions that will need to make adjustments to total remuneration packages with less ability to absorb consequent changes and/or to compete for senior executive talent
- the ADI threshold for enhanced compliance obligations is increased to \$20 billion to align with APRA guidelines for a simplified capital framework.

### **Competition and innovation in markets**

Regulation should be balanced to ensure it fosters competition and innovation in Australia's financial services industry. In relation to the FAR Package, we recommend:

- alignment between financial regulators and greater consistency with other regulations – especially the Design and Distribution Obligations (DDO) and draft APRA Practice Guide (draft CPS 511 and CPG 511)
- any penalties imposed, because of their quantum, do not inadvertently lead to either a reduction in investment from existing financial institutions or a lack of investment from potential new onshore and offshore financial institutions – this would have the multiplying effect of conflicting with the Federal Government's broader economic recovery agenda, including the Digital Economy Strategy<sup>1</sup>.

Attachment 1 provides further comments on the FAR Package.

### **CLOSING REMARKS**

AFIA supports the policy intent of the FAR to ensure compliance systems, policies and procedures, and processes align with good governance and culture across all financial institutions. We recognise stronger governance and accountability is key in rebuilding trust in the financial services industry.

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<sup>1</sup> [Australia's Digital Economy | Australia's Digital Economy \(pmc.gov.au\)](https://pmc.gov.au/digital-economy)

However, it is important, particularly at this point in our economic recovery from the COVID-19 global pandemic that:

- legislation and regulation is proportionate and scalable so changes are targeted to deliver the policy intent, while supporting the offer of financial products, services and technologies from a range of different business models
- material changes to legal and compliance requirements only occur where there has been demonstrated market failure and changes are targeted to addressing these failings, without inadvertently causing detriment to access to finance, competition and innovation, and participation
- reforms focus on reducing harm to consumers caused by misconduct and strengthening governance, risk management and market integrity by making individuals more accountable for their conduct.

Should you wish to discuss our submission or require additional information, please contact me or Karl Turner, Executive Director, Policy at [karl@afia.asn.au](mailto:karl@afia.asn.au) or 02 9231 5877.

Yours sincerely

Diane Tate  
**Chief Executive Officer**

## ATTACHMENT 1 – SPECIFIC COMMENTS ON THE FAR PACKAGE

### PROPORTIONATE AND SCALABLE REGULATION

#### Liability clauses should be reviewed

##### Individual liability

AFIA supports the removal of individual civil penalties for breaches of their accountability obligations from the FAR legislation. This proportionate approach balances individual accountability and any liability for consumer harm with ensuring Australian financial services organisations continue to have the capacity to attract and retain talented senior executives.

This is also consistent with the scope of the applicable Financial Services Royal Commission recommendations and does not create conflicts of law with existing duties and obligations of company officers under the Corporations Act.

This approach also aligns with CAMAC<sup>2</sup>, which stated ‘as a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories’.

CAMAC went on to set out the principles for corporate liability provisions, including:

- liability for breach of a legal requirement by a company should fall in the first place on the company itself
- approaches to personal liability would not influence the behaviour of those individuals who control and manage the company, whether through their being held accountable by shareholders or otherwise
- an individual who is personally implicated in such a breach – who helps in or is privy to the misconduct – should be exposed to personal liability as an accessory in accordance with ordinary criminal law principles
- there were already areas within the Corporations and other Acts<sup>3</sup> where personal liability could be imposed on various individuals below board level for their breaches of:
  - internal management duties
  - information disclosure duties
  - financial reporting duties
  - external administration duties.

However, there is a concern that inclusion of ancillary liability provisions in the Bill (as detailed in clause 76<sup>4</sup> and which incorporate the Regulatory Powers (Standard Provisions) Act 2014) undermine and remove the intent for there to no longer be civil penalties of this nature.

Therefore, we recommend:

- the application of ancillary liability provisions should be removed
- various other clauses be removed/reconsidered – in particular:
  - clause 19(1)(d) – as this was not included in Banking Executive Accountability Regime (BEAR) and is not necessary given other related obligations in the Bill

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<sup>2</sup> [Personal Liability Report \(camac.gov.au\)](https://www.camac.gov.au/Personal-Liability-Report)

<sup>3</sup> [Corporate Duties Below Board Level \(camac.gov.au\)](https://www.camac.gov.au/Corporate-Duties-Below-Board-Level)

<sup>4</sup> [Financial Accountability Regime Bill 2021 - Exposure Draft \(treasury.gov.au\)](https://www.treasury.gov.au/Financial-Accountability-Regime-Bill-2021-Exposure-Draft)

- clauses 20(d) and 20(e) – as these are in part addressed by accountable persons already being required to act with 'due skill, care and diligence.'

### Joint and Several liability

As mentioned above, accountable persons are already required to discharge their respective responsibilities by acting with 'due skill, care and diligence'.

AFIA members have raised concerns about the operation of proposed joint and several liability, particularly with respect to end-to-end product responsibility in certain organisational structures.

The Policy Proposal Paper states that 'where an accountable entity registers multiple individuals with each individual being accountable for some but not all stages of the product value chain for the same product or service, these individuals will be held jointly accountable for the end-to-end product responsibility in relation to that product or service<sup>5</sup>.'

AFIA members note that, within their organisations, multiple individuals can have responsibility for a given product, depending on the product lifecycle (i.e. development, implementation or operation).

Therefore, we recommend that joint accountability should not be imposed where individual responsibility is clear for a specific phase in the product lifecycle. This approach will ensure clearer accountabilities, while not unfairly holding an individual responsible for issues being dealt with by another responsible person in the chain.

Joint and several liability is also not in line with CAMAC's findings<sup>6</sup> or practical when reviewing various business models or distribution practices – especially those that relate to the management and oversight of non-proprietary or third party distribution channels.

AFIA believes that making people jointly and severally liable for the actions of individuals outside their organisations and/or outside of their area of accountability, which is common among smaller organisations), is likely to:

- create ambiguous legal obligations causing more complexity in compliance systems and unnecessary costs
- be a deterrent in attracting talent to the financial services industry or a detraction for those in the industry in seeking promotions
- potentially drive the wrong behaviours as individuals know that liability for their actions could be 'compensated' by others
- inadvertently impact the customer experience and customer satisfaction by slowing down process which impacts on speed and access to finance.

### **Accountable persons matrix should be clarified and expanded**

The Policy Proposal Paper<sup>4</sup> provides for multiple people to hold responsibility for end-to-end product responsibility and that it is not necessary for an individual holding end-to-end product responsibility to have the technical expertise on every stage of the product value chain.

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<sup>5</sup> [Financial Accountability Regime - List of prescribed responsibilities and positions \(treasury.gov.au\)](#)

<sup>6</sup> [Personal Liability Report \(camac.gov.au\)](#)

However, many organisations operate matrix structures, i.e. a combination of end-to-end and vertical structures (where responsibility is based on technical skills, such as finance, risk, technology).

Therefore, we recommend that further clarity be provided on how organisations, especially smaller organisations, will be included in the FAR legislation.

#### **Quantum of deferred remuneration provisions should be more flexible**

AFIA believes that the current requirement<sup>7</sup> to defer at least 40 per cent of variable pay for four years does not consider the size of the entity or the seniority of the individual, which is currently the case under the BEAR.

We are concerned this will result in organisations, especially smaller organisations, having to grant higher fixed pay (i.e. salaries) to compensate for these deferrals and/or being impeded in competing for senior executive talent.

Therefore, we recommend flexibility is provided on how organisations, especially smaller organisations, implement the amount of deferred remuneration.

#### **ADI threshold for enhanced compliance obligations is increased to \$20 billion**

AFIA notes the proposed tiered approach for the 'core' and 'enhanced' compliance model. This approach will assist reduce the regulatory burden on smaller ADIs without creating any material additional risk.

While we recognise that further consultation on the threshold is expected during September/October 2021,<sup>8</sup> we recommend that the ADI threshold for enhanced compliance obligations should be increased from \$10 billion to \$20 billion to align with the threshold used by APRA in its simplified capital framework for smaller, less complex ADIs.

### **COMPETITION AND INNOVATION IN MARKETS**

#### **Alignment and consistency should be adopted across financial regulators and regulations**

##### ASIC and APRA

The Information Paper accompanying the draft legislation sets out the details on joint administration, and that further content will be provided in due course.

When this regulatory guidance is provided by APRA and ASIC, it will be important that it:

- establishes a clear governance framework, with examples and guidelines outlining the approach both regulators will take when administering FAR – this will ensure certainty and consistency in regulatory expectations
- articulates scenarios where ASIC and APRA may have divergent views – this will accommodate a proportionate and scalable regulatory framework and clarify the process to be undertaken as well as regulatory expectations
- streamlines information requests related to FAR obligations, i.e. through the single data collection portal (APRA Connect)

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<sup>7</sup> [Financial Accountability Regime Bill 2021 - Exposure Draft Explanatory Materials \(treasury.gov.au\)](#)

<sup>8</sup> [Exposure Draft Legislation Q&A – Financial Accountability Regime \(treasury.gov.au\)](#)

- provides clarity on how the financial regulators will conduct surveillance activities, monitor compliance, and pursue enforcement action (e.g. both regulators should not be able to pursue enforcement action for the same breach or offence).

AFIA recommends that adequate time for consultation with industry is provided, given significant details will be contained in regulatory guidance that will impact on compliance systems, policies and procedures, and operations across financial institutions. It is important to ensure certainty and consistency in the expectations set by both regulators and how the new framework will impact on financial institutions.

### Other regulations

In terms of consistency with other regulations, we recommend that:

- FAR aligns with draft APRA Practice Guide (draft CPS 511 and CPG 511) – in particular, in relation to the basis on which the deferred amount of an accountable person’s variable remuneration is to be calculated
- examples of short term incentive (STI) and long term incentive (LTI) calculations are included that reflect different financial year ends
- clarity is provided about how FAR aligns with the Design and Distribution Obligations (DDO)
- clarity is provided about how FAR interacts with the new Breach Reporting regime and whether a materiality threshold for FAR breach reporting is possible to assist with implementation (noting the Breach Reporting Regulations are yet to be finalised, including potentially the inclusion of a materiality threshold to improve reporting processes for the financial regulators and regulated entities)
- clarity is provided on who appoints the investigator under clause 1.137 of the Explanatory Memorandum<sup>9</sup> and how this aligns with enforceable undertaking provisions and/or section 19 notices issued by ASIC.

### **Penalties should not lead to inadvertent consequences**

AFIA notes that the potential maximum penalty for breaches of the FAR by accountable entities is set out in s78(c)(ii) of the draft legislation and aligns with the Corporations Act penalties of 2.5 million penalty units or \$555 million.

When setting penalties there needs to be objectivity.<sup>10</sup> Factors such as proportionality, mitigating steps the individual and/or financial institution has taken, and any disciplinary actions taken (i.e. remuneration adjustment, employment/ role adjustment, etc) should be considered.

AFIA is also concerned that significant civil penalties may have adverse direct and indirect consequences for raising governance and accountability standards and improving practices across the industry.

Therefore, we recommend a balanced approach – any penalty imposed should balance deterring poor conduct with ensuring there are no inadvertent consequences, such as a reduction in investment from existing financial institutions or a lack of investment from potential new onshore and offshore financial institutions.

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<sup>9</sup> [Financial Accountability Regime Bill 2021 - Exposure Draft Explanatory Materials \(treasury.gov.au\)](https://www.treasury.gov.au)

<sup>10</sup> [Cooper, Jenny --- "Making the penalty fit the crime: the pros and cons of civil penalties as a means of enforcing commercial law" \[2016\] OtaLawRw 1; \(2016\) 14 Otago LR 213 \(nzlii.org\)](#)

This approach would also ensure alignment with the Federal Government’s broader economic recovery agenda, including the Digital Economy Strategy<sup>11</sup> as it would help support Australia being positioned as a financial services hub, ongoing competition and innovation as well as continued access to finance by customers.

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<sup>11</sup> [Australia's Digital Economy | Australia's Digital Economy \(pmc.gov.au\)](https://www.pmc.gov.au/digital-economy)