

Briefing paper

August 2018



Prepare for the BEAR

1. Introduction

The Banking Executive Accountability Regime (**BEAR**) was introduced by the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures Act 2018* (Cth) (the **BEAR Act**), which amends the *Banking Act 1959* (Cth) (the **Banking Act**).

The BEAR obligations apply to authorised deposit-taking institutions (**ADIs**) and their subsidiaries. People who qualify under the BEAR Act as an 'accountable person' of the ADI (an **Accountable Person**) are also individually subject to some obligations of the BEAR.

The BEAR commenced for large ADIs on 1 July 2018. Large ADIs are those with at least \$100 billion in resident assets. For all other ADIs, the BEAR starts on 1 July 2019.

There are four broad categories of obligations introduced by the BEAR Act which are set out in the table on the next page. They are accountability obligations, key personnel obligations, notification obligations and deferred remuneration obligations.

The accountability obligations apply to both ADIs and Accountable Persons. The other obligations apply only to the ADI itself.

In this paper we look in detail at the BEAR obligations and discuss how medium and small ADIs can prepare for the BEAR when it commences to apply to them on 1 July 2019. We have included references to the relevant sections of the Banking Act in case you want to check the wording of the original legislation.

Obligations	Summary of obligations
Accountability	<p>General standards of good conduct, including honesty, care and diligence, and dealing openly with APRA.</p> <p>Reasonable steps to prevent adverse effect on prudential standing or reputation of the ADI.</p>
Key personnel	<p>Responsibilities of Accountable Persons must cover all operations and specified functions.</p> <p>Accountable Persons must not be unregistered or banned persons.</p> <p>ADIs must comply if APRA directs them to reallocate responsibilities.</p>
Notification	<p>APRA must be given an accountability statement for each Accountable Person, and an accountability map.</p> <p>APRA must also be advised of certain events in relation to Accountable Persons and breaches of the accountability obligations.</p>
Deferred remuneration	<p>A portion of variable remuneration for Accountable Persons must be deferred for at least 4 years.</p>

2. Key actions to take

The following is a list of key actions that ADIs can take to prepare for the BEAR.

- Identify the Accountable Persons (see section 3).
- Prepare an accountability statement for each Accountable Person (see section 6.2).
- Prepare an accountability map for the ADI (see section 6.3).
- Review position descriptions for Accountable Persons and make sure that they are consistent with their accountability obligations (see section 4.2).
- Review delegations and delegation frameworks to ensure that they are consistent with the accountability obligations and accountability map.
- Update remuneration policy, employment contracts and compensation plans to reflect accountability obligations and deferred remuneration requirements (see

section 7).

- Include accountability obligations in performance reviews of Accountable Persons.
- Update APRA reporting requirements to include in changes to Accountable Persons, reductions in variable remuneration, and breaches of the BEAR (see section 6.4).

This is not a complete list of what an ADI may have to do, and ADIs will need to seek their own legal advice on their obligations and how they apply.

3. Accountable Persons

The first thing to do is to identify the Accountable Persons of the ADI. The BEAR Act says that someone may be an Accountable Person because of general principles, or if they have particular responsibilities.¹

3.1 General principles

Under the general principles, a person will be an Accountable Person of an ADI if that person, because of his or her position, has actual or effective senior executive responsibility for management or control of the ADI, or for management or control of a significant or substantial part or aspect of the operations of the ADI or the corporate group of the ADI and its subsidiaries.

3.2 Particular responsibilities

A person will also be an Accountable Person if that person, because of his or her position, has one of the particular responsibilities listed in the BEAR Act (the **Particular Responsibilities**). These include:

- Responsibility for oversight of the ADI as a member of the Board of the ADI.
- Senior executive responsibility for carrying out the management of all the business activities of the ADI and its subsidiaries, including allocating to Accountable Persons responsibility for all parts or aspects of the corporate group, where that senior executive reports directly to the Board of the ADI (i.e., a CEO).
- Senior executive responsibility for any of the following:
 - management of the ADI's financial resources;
 - overall risk controls and/or overall risk management arrangements

¹ Banking Act s 37BA. Section references in following footnotes refer to the Banking Act.

of the ADI;

- management of the ADI's operations;
- information management, including information technology systems, for the ADI;
- management of the ADI's internal audit function;
- management of the ADI's compliance function;
- management of the ADI's human resources function; or
- management of the ADI's anti money laundering function.

APRA may add to this list by making a legislative instrument.

In the case of a foreign ADI, the Particular Responsibilities are senior executive responsibility for the conduct of all the activities of an Australian branch of the foreign ADI.

3.3 Qualifications and exceptions

Even if a person would an Accountable Person under the general principles or Particular Responsibilities, that person will not be an Accountable Person if the person's responsibilities are excluded by written notice given by APRA to an ADI or subsidiary.²

APRA may also, by legislative instrument, exclude specified responsibilities that would otherwise cause a person to be an Accountable Person.

3.4 Who is prohibited from being an Accountable Person?

A person is prohibited from being an Accountable Person if the person is not registered with APRA as an Accountable Person as required (see section 6.2), or if that person is disqualified.³

APRA has the power to disqualify a person from being an Accountable Person if APRA is satisfied that the person has not complied with his or her accountability obligations (see section 4.2), and having regard to the seriousness of the non-compliance, the disqualification is justified. Before disqualifying a person, APRA must give written notice to the person and the ADI, giving them an opportunity to make submissions.⁴

If a person becomes an Accountable Person by filling a temporary vacancy or a vacancy that was

not foreseen at the time it arose, the APRA registration requirement does not apply until the person has been an Accountable Person for 28 days (or such other period as is determined by APRA by giving written notice to an ADI, or by legislative instrument).

4. Accountability obligations

4.1 Accountability obligations of the ADI

The ADI has to take reasonable steps to:

- conduct its business with honesty and integrity, and with due skill, care and diligence;
- deal with APRA in an open, constructive and cooperative way;
- in conducting its business, prevent matters from arising that would adversely affect the ADI's prudential standing or prudential reputation;
- ensure that each of its Accountable Persons meets his or her accountability obligations (see section 4.2); and
- ensure that each of its subsidiaries that is not an ADI complies with the above as if it were an ADI.⁵

4.2 Accountability obligations of an Accountable Person

An Accountable Person must conduct the responsibilities of his or her position as an Accountable Person:

- by acting with honesty and integrity, and with due skill, care and diligence;
- by dealing with APRA in an open, constructive and cooperative way; and
- by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would adversely affect the prudential standing or prudential reputation of the ADI.

If more than one of the Accountable Persons has the same responsibility in relation to the ADI or subsidiary, all of those Accountable Persons have the accountability obligations jointly in relation to that responsibility.⁶

² S 37BB.

³ S 37DA.

⁴ S 37J.

⁵ S 37C.

⁶ S 37CA.

4.3 What are reasonable steps?

Taking reasonable steps by an ADI or an Accountable Person for the purposes of the accountability obligations includes, but is not limited to, having:

- appropriate governance, control and risk management in relation to the matter;
- safeguards against inappropriate delegations of responsibility in relation to the matter; and
- appropriate procedures for identifying and remediating problems that may arise in relation to the matter.⁷

4.4 Implementing the accountability obligations

An ADI may wish to review the following matters to be satisfied that it is taking reasonable steps to comply with the accountability obligations:

- governance, control and risk management frameworks and policies, to ensure that they address the accountability obligations;
- delegations of responsibility, to ensure that Accountable Persons have appropriate allocations of responsibility relative to their role and capacity; and
- procedures for identifying and remediating problems. These may include, for example, reviews of performance, feedback and complaints processes, and compliance issue management.

5. Key personnel obligations

5.1 What are the key personnel obligations?

The key personnel obligations of an ADI are:

- to ensure that the responsibilities of the Accountable Persons of the ADI and its subsidiaries (other than any responsibilities excluded by APRA) cover:
 - all parts or aspects of the operations of the ADI corporate group; and
 - each of the Particular Responsibilities;
- to ensure that none of the Accountable Persons of the ADI are prohibited from being an Accountable Person (see section

3.4);

- to comply with any directions APRA gives to the ADI to re-allocate responsibilities (see section 5.2); and
- to take reasonable steps to ensure that each of the ADI's subsidiaries that is not an ADI complies with the second and third points above as if the subsidiary were an ADI.⁸

If the ADI is a foreign ADI, the ADI's obligation under the first point above refers to all parts or aspects of the operations of each Australian branch of the ADI, and ensuring that in each Australian branch of the ADI, the Accountable Person has responsibility for all activities of the branch.

5.2 APRA may direct an ADI to reallocate responsibilities

APRA may give an ADI a written direction to reallocate a responsibility which is covered by the key personnel obligations, if APRA has reason to believe that the current allocation of the responsibility is likely to give rise to a prudential risk.⁹

5.3 Implementing the key personnel obligations

Complying with the key personnel obligations requires an ADI to align the responsibilities of key personnel to the ADI's operations. Critical to this task is to prepare accountability statements for each Accountable Person and an accountability map for the ADI. These are part are of the notification obligations discussed below.

6. Notification obligations

6.1 What are the notification obligations?

The notification obligations of an ADI are:

- to give to APRA an accountability statement (see section 6.2 below) for each of its Accountable Persons;
- to ensure that APRA is notified of any change to the accountability statement within the required period;
- to give to APRA an accountability map (see section 6.3 below);
- to ensure that APRA is notified of any change to the accountability map within the required period;
- to notify APRA of certain events (see

⁷ S 37CB.

⁸ S 37D.

⁹ S 37DB.

section 6.4 below) within the required period; and

- to take reasonable steps to ensure that each of its subsidiaries that is not an ADI complies with the above obligations in relation to accountability statements and notifications to APRA.¹⁰

The required period for notification is 14 days or such other period as determined by APRA by legislative instrument.

6.2 What must an accountability statement include?

An accountability statement must contain a comprehensive statement of:

- the part or aspect of the ADI's or subsidiary's operations of which the Accountable Person has actual or effective responsibility for management or control;
- the responsibilities of the Accountable Person, including any responsibilities over areas to which the key personnel obligations apply (see section 5.1), as the case requires; and
- any matters determined by APRA by legislative instrument.¹¹

APRA is required to maintain a register of Accountable Persons. An ADI can apply to APRA for registration of an Accountable Person, which must be in the form approved by APRA and include the accountability statement for that Accountable Person.¹²

6.3 What must an accountability map include?

An accountability map of an ADI must contain:

- the names of all of the Accountable Persons of the ADI and its subsidiaries;
- details of the reporting lines and lines of responsibility of those Accountable Persons;
- sufficient information to identify an Accountable Person for each of the areas covered by the key personnel obligations (see section 5.1), as the case requires; and
- any matters determined by APRA by legislative instrument.¹³

6.4 What events have to be notified to APRA?

The following events must be notified to APRA by an ADI:

- a person ceasing to be an Accountable Person;
- the dismissal or suspension of an Accountable Person because the person has failed to comply with his or her accountability obligations;
- a reduction of the variable remuneration of an Accountable Person (see section 7.2) because the person has failed to comply with his or her accountability obligations; and
- the ADI becoming aware of a breach by the ADI of its accountability obligations, or a breach by an Accountable Person of his or her accountability obligations.¹⁴

6.5 Implementing the notification obligations

To implement the notification obligations, an ADI must prepare accountability statements and an accountability map and ensure that it has processes in place both to provide these to APRA, and to notify APRA of the notifiable matters referred to in section 6.4. Accountability statements need to be consistent with the position descriptions for the roles they cover, and accountability maps need to be consistent with reporting lines in the organisation, so position descriptions and reporting lines may have to be reviewed and revised.

7. Deferred remuneration obligations

7.1 What are the deferred remuneration obligations?

The deferred remuneration obligations of an ADI are:

- **retaining variable remuneration:** to ensure that, in relation to the variable remuneration of an Accountable Person of the ADI, the payment of at least a specified portion of that variable remuneration (see section 7.2) is deferred for at least the minimum period (see section 7.4);
- **remuneration policy:** to have a remuneration policy that requires that if an Accountable Person has failed to comply with his or her accountability obligations,

¹⁰ S 37F.

¹¹ S 37FA.

¹² S 37HA.

¹³ S 37FB.

¹⁴ S 37FC.

the person's variable remuneration is to be reduced by an amount that is proportionate to the failure. (The reduction need not be a reduction of variable remuneration relating to a period in which the failure occurred, and may be a reduction to zero);

- **non-payment when required by policy:** 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 to the person; and
- **compliance by subsidiaries:** to take reasonable steps to ensure that, if variable remuneration becomes payable to an Accountable Person of a non-ADI subsidiary, the subsidiary complies with the above as if it were an ADI.¹⁵

Remuneration of an Accountable Person includes remuneration that is paid or payable by a related body corporate of the ADI (or subsidiary), but if that related body corporate is a non-ADI holding company of the ADI (or subsidiary), it does not include remuneration that relates only to the Accountable Person holding a position in that related body corporate.

The deferral of variable remuneration does not apply in relation to the variable remuneration of an Accountable Person for a financial year if the amount of the person's variable remuneration that would otherwise have to be deferred for that financial year is less than \$50,000, or such other amount determined by the Minister by legislative instrument.¹⁶

7.2 What is variable remuneration?

The variable remuneration of an Accountable Person of an ADI, or a subsidiary of an ADI means so much of the Accountable Person's total remuneration as is *conditional on the achievement of objectives*. However, APRA has the power to include or exclude remuneration as variable remuneration. APRA can exercise this power by written notice to an ADI or by legislative instrument.¹⁷

7.3 What is the minimum amount of variable remuneration to be deferred?

The following table sets out the minimum amount of variable remuneration which must be deferred for an Accountable Person.¹⁸

Accountable Person role	Amount payable for the financial year in which the decision was made granting the variable remuneration
Chief Executive Officer of large ADI (CEO)	The lesser of 60% of variable remuneration or 40% of total remuneration.
Accountable Person of large ADI or its subsidiary, other than CEO	The lesser of 40% of variable remuneration or 20% of total remuneration.
Accountable Person of medium ADI ¹⁹ or its subsidiary	The lesser of 40% of variable remuneration or 20% of total remuneration.
Accountable Person of small ADI or its subsidiary	The lesser of 40% of variable remuneration or 10% of total remuneration.

The value of variable remuneration of an Accountable Person of an ADI, or a subsidiary of an ADI, that is deferred is the value it would have been if it had instead been paid to the person at the time the decision to grant it was made. However this is subject to APRA's powers. APRA has the power to determine the way to work out the value of variable remuneration of Accountable Persons of the ADI or subsidiary. It can exercise this power by giving written notice to the ADI. APRA also has the power to issue a legislative instrument setting out the way to work out the value of variable remuneration of Accountable Persons of an ADI (or subsidiary) included in a specified class of ADIs (or subsidiaries).

7.4 What is the minimum period of deferral?

The required period in relation to variable remuneration of an Accountable Person is 4 years or any shorter period approved by APRA, starting on the day after the day on which the decision was made granting the Accountable Person the variable remuneration.²⁰

However, if at the end of the deferral period the ADI or subsidiary considers that the Accountable Person is *likely to have* failed to comply with his or her accountability obligations, the deferral period is extended until the day the ADI or subsidiary determines whether he or she *has* failed to comply.

An ADI may apply to APRA to approve a shorter period of deferral if the ADI is satisfied that:

- based on the information known at the time

one with not more than \$10 billion. These thresholds are set out in the [Banking Executive Accountability Regime \(Size of an Authorised Deposit-taking Institution\) Determination 2018](#) and they are indexed to GDP.

²⁰ S 37EC.

¹⁵ S 37E.

¹⁶ S 37ED.

¹⁷ S 37EA.

¹⁸ S 37EB.

¹⁹ A medium ADI is one with more than \$10 billion and less than \$100 billion in total resident assets, and a small ADI is

of the application, the Accountable Person has complied with his or her accountability obligations; and

- it is unlikely that further information will become known, before the end of the 4 year deferral period, that indicates that the Accountable Person did not comply with those obligations.

APRA may approve a shorter period if it is satisfied that the person is no longer an Accountable Person of the ADI or subsidiary because of death, serious incapacity, serious disability or serious illness.

APRA may also approve a shorter period if it has given a written notice of circumstances when a shorter period may apply, or has made a legislative instrument setting out those circumstances.

However APRA must also be satisfied that the ADI or subsidiary has taken all reasonable steps to satisfy itself of the matters mentioned above when the ADI makes an application for a shorter deferral period.

7.5 Implementing the deferred remuneration obligations

To implement the deferred remuneration obligations, ADIs should review and update remuneration policies, employment contracts and compensation plans to reflect the deferred remuneration requirements and to ensure that they are put into effect in HR processes, including for when variable remuneration is to be reduced.

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