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1 November 2017

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Bill).

Thank you for the opportunity to provide further information with respect to the Bill.

On 29 September 2017, BOQ made a submission to the Treasury in relation to the draft exposure bill for the Banking Executive Accountability Regime (**BEAR**). It is pleasing to see that aspects of the draft exposure bill addressed in that submission have been amended in the Bill that was introduced to the House of Representatives.

This letter addresses certain aspects of the Bill which BOQ believes require further consideration.

Legal professional privilege

The Bill will grant APRA more extensive investigative powers, including in relation to the production of documents, the conduct of examinations and the evidentiary use of material obtained.[1] These powers are in similar terms to powers granted to ASIC under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).[2]

As under the ASIC Act[3], the Bill expressly preserves legal professional privilege in certain circumstances.[4] The Bill is otherwise silent as to legal professional privilege.

This is significant in circumstances where the accountability obligations in the Bill require ADIs and accountable persons to deal with APRA in an *"open, constructive and co-operative way"*.[5]

The Explanatory Memorandum for the Bill states that this obligation does not displace legal professional privilege[6], however this does not constrain APRA in arguing[7] that it does so by necessary

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[1] Sections 61A to 61Q of the Bill.

[2] Sections 19 to 27, 67, 76 to 82 of the ASIC Act.

[3] Sections 69 and 76(1)(d) of the ASIC Act.

[4] Sections 61H(5) and 62AA of the Bill.

[5] Sections 37C(b) and 37CA(1)(b) of the Bill. There is no similar obligation under the ASIC Act, which could provide a basis for APRA to take a different position to ASIC as to abrogation of legal professional privilege (ASIC Information Sheet 165 provides for the making of claims of legal professional privilege in answer to compulsory notices and examination questions).

[6] Paragraphs 1.46 and 1.114.

[7] The argument could be supported by the proposition that the word "open" must be given some meaning beyond "constructive and co-operative".

implication having regard to the decision of the High Court in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[8] (***Daniels***).

While the response to this concern may be that the obligation to deal with APRA in an *"open, constructive and co-operative way"* does not satisfy the test to abrogate privilege identified by the High Court in *Daniels*, this may be uncertain in the absence of specific consideration of this obligation by the Courts.

One of the objectives of the Bill is to ensure transparency of obligations for accountable persons and ADIs. BOQ is concerned that a fundamental issue such as legal professional privilege has been left unclear in circumstances where it is easily addressed in the Bill.

The preservation of legal professional privilege is particularly important given the Bill does not expressly exclude the person with responsibility for the legal function of an ADI from the definition of accountable person. The person with responsibility for the legal function would not usually come within the definition of accountable person in the Bill. This does not exclude the possibility that APRA may at some stage maintain that this person nonetheless meets the definition in respect of a particular ADI.

The person with responsibility for the legal function must be able to provide advice freely to the ADI and is subject to professional obligations and rules applying to legal professionals. Any doubt about the application of the BEAR to the person with responsibility for the legal function creates an untenable predicament for that person insofar as the BEAR may apply to them and they are potentially required to deal with APRA in an *"open"* way.

Recommendations

The Bill should expressly:

(a) confirm that the obligation to deal with APRA in an *"open"* way does not abrogate legal professional privilege (as stated in the Explanatory Memorandum); and

(b) exclude the person with responsibility for the legal function of an ADI from the definition of accountable persons.

Indemnification and insurance

The Bill proposes to prohibit ADIs (and their related bodies corporate) from indemnifying, or paying a premium for a contract insuring, accountable persons against the *"consequences"* of breaching their obligations under the BEAR.[9]

As outlined in BOQ's submission dated 29 September 2017, the *Corporations Act 2001* (Cth) (**Corporations Act**) already contains well understood and applied provisions in relation to the circumstances in which a company is prohibited from indemnifying, or paying a premium for a contract insuring, a person who is or has been an officer.[10]

The directors and insurers of ADIs understand those provisions, and the proposed additional regime in the Bill is not consistent with those provisions. BOQ cannot see a sound policy reason for different provisions to apply to ADIs, particularly in the uncertain terms proposed.

On the contrary, the Government and APRA should be ensuring that the most talented of directors and officers remain and are attracted to roles within ADIs. BOQ has concerns that these provisions in the Bill, as stated, may have the opposite effect.

Although the Bill confirms that it will not create any causes of action that would not have existed but for its enactment,[11] this will not prevent the making of claims (based on existing causes of action) based on information about compliance with obligations under the BEAR.

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[8] [2002] HCA 49.

[9] Section 37KA(2) of the Bill.

[10] Sections 199A and 199B of the Corporations Act.

[11] Section 37KB of the Bill.

The individual accountable persons, who are already exposed to severe penalties under the BEAR for any failures by them, will necessarily be caught up in any such collateral actions. The possible *"consequences"* of breaches by such accountable persons could arguably include any consequences of such collateral actions.

This is particularly concerning as the provisions prohibiting ADIs from indemnifying or insuring accountable persons are in wide terms that could expose those persons to *"consequences"* for acts done in good faith that would previously have been covered by directors' and officers' insurance.

Recommendation

ADIs that are subject to the Bill should continue to be subject to the same provisions relating to indemnification of officers, and payment of insurance premiums for officers, as other large companies under the Corporations Act.

Alternatively, the prohibition in the Bill should be limited to insuring and indemnify against the *consequences under the Act* for breaching accountability obligations.

Unintended consequences

The BEAR is a significant piece of reform which is being introduced and implemented with limited consultation. As a result, there is an increased risk of unintended consequences that may be counter to the key objective of the BEAR *"to improve the operating culture of ADIs and increase transparency and accountability across the banking sector"*.[12]

The BEAR will only apply to ADIs - not to any other APRA regulated entities, to any non-ADI lenders or to other companies providing financial services. The personal liabilities faced by directors and senior executives of ADIs will be greater than their peers in non-ADI businesses. As the Australian Bankers' Association has noted in previous submissions in relation to the BEAR[13], this will likely have an effect on the ability of ADIs to attract and retain experienced directors and senior executives.

Recommendation

An important way to keep ADIs on an even footing with other companies seeking the services of experienced directors and senior executives is for the BEAR to adopt the same provisions relating to indemnification of officers, and payment of insurance premiums for officers, as other large companies under the Corporations Act (as recommended above).

Disproportionate burden on regional banks

As stated in the regional banks' submission to the Productivity Commission[14], the burden of implementing and complying with new and changed regulation falls most heavily on smaller and medium ADIs, given that the costs of compliance are typically fixed and independent of an ADI's size.

Even where large ADIs incur higher absolute costs of regulation and other obligations, it is expected to be the case that small and medium ADIs will incur higher costs relative to their total revenue or assets.

Given this, it is expected that the responsibility of implementing and complying with the BEAR may fall most heavily on small and medium ADIs.

Recommendation

The BEAR should be implemented having regard to the disproportionate burden on small and medium ADIs, including in respect of the exercise of powers granted to the Minister and APRA.

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[12] Explanatory Memorandum for the Bill at paragraph 1.7.

[13] See ABA submission dated 4 August 2017 at page 4 and ABA submission dated 29 September 2017 at page 4.

[14] See Submission to Productivity Commission dated 22 September 2017 by Bendigo and Adelaide Bank, Bank of Queensland, ME Bank, Suncorp Bank, and AMP Bank at 5.6.

Should you wish to discuss any of the matters raised in this submission, please contact Kerensa Sneyd, Senior Manager Regulatory Strategy, on [redacted]

Yours sincerely

[redacted]

Michelle Thomsen
General Counsel and Company Secretary
Bank of Queensland Limited