

9 August 2017

Manager – Banking, Insurance and Capital Markets Unit
Financial Systems Division
The Treasury

To the Manager – Banking, Insurance and Capital Markets Unit,

RE: Banking Executive Accountability Regime

CHOICE welcomes the opportunity to provide comment on the proposed Banking Executive Accountability Regime (the BEAR). We strongly welcome the intent of these reforms. The community rightly expects that banking executives are held accountable for major scandals. However, we believe the proposed regime developed by Treasury falls short of the intention of the reforms as it will fail to hold executives accountable for incidents that have caused widespread consumer harm.

An accountability regime must hold executives accountable for consumer harm

Treasury have restricted the application of the BEAR so it will only apply to “poor conduct or behaviour that is of a systemic and prudential nature.”¹ This misses the crucial elements of the United Kingdom model that ties accountability measures to poor consumer outcomes, not just prudential matters.

Under the proposed model, no executive would necessarily face consequences for the string of scandals that the Review of the Four Major Banks (also known as the Coleman Report) identified as harmful to consumers and where no executive incurred a penalty. These incidents include:

- Poor financial advice at NAB;
- CommInsure’s mishandling of life insurance claims;
- NAB’s failure to pay 62,000 wealth management customers the amount that they were owed;
- CBA’s poor administration of hardship support;
- ANZ’s OnePath improperly collecting millions of dollars in fees from hundreds of thousands of customers; and
- ANZ improperly collecting fees from 390,000 accounts that had not been properly disclosed.²

We note that the ASIC enforcement taskforce is considering “[t]he adequacy of ASIC’s power to ban offenders from occupying company offices following the commission of, or involvement in, serious

¹ Consultation paper, p.7.

² Standing Committee on Economics, *Review of the Four Major Banks, Second Report*, (Commonwealth of Australia), Canberra, p.34.

contraventions where appropriate.”³ However, the taskforce inquiry is ongoing and it is unclear what recommendations will be put forward to empower ASIC to act against executives who are responsible for consumer harm.

In contrast, the United Kingdom’s Senior Manager’s Regime (SMR) gave new powers to the prudential regulator (the Prudential Regulation Authority, or PRA) and the consumer and conduct regulator (the Financial Conduct Authority, or FCA). The regulators have worked together to clarify requirements that industry must meet, ensuring that the UK regime covers prudential and consumer matters. The UK scheme has been running for around one year with some success and plans to extend the obligations to the wider financial services industry.⁴

The UK regime requires institutions to clearly assign responsibility to specific managers. Senior managers have a statutory duty of responsibility, requiring them to take all reasonable steps to prevent regulatory breaches in the areas of the bank for which they are responsible.⁵ In addition, there are individual conduct rules that requires senior managers to act with integrity and pay due regard to the interests of customers and treat them fairly.⁶

These essential elements, notably the requirement for accountable persons to pay due regard to the interests of consumers and treat them fairly, are absent from the BEAR proposal. As it stands, the BEAR proposal does not deal with the behaviour from industry that causes the greatest harm to consumers and creates the greatest need for intervention.

Recommendations:

- That any accountability regime holds executives accountable for both prudential matters and consumer outcomes. This will likely require powers to be shared between APRA and ASIC. These powers should be developed in tandem rather than isolation to ensure that there are no gaps in the system.
- An executive accountability regime should require all accountable persons to take all reasonable steps to prevent regulatory breaches, including breaches of regulations related to consumer protection, in the areas of the bank for which they are responsible.
- All accountable persons should be required to act with integrity and pay due regard to the interests of customers and treat them fairly.
- There must be significant penalties for accountable persons and ADIs for contravening the BEAR provisions in order to have a deterrent effect against poor behaviour. These penalties must be supported by a proactive and effective enforcement regime.

³ ASIC Enforcement Review, Terms of Reference, available at: <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review/Terms-of-Reference>

⁴ <https://www.fca.org.uk/news/news-stories/senior-managers-and-certification-regime-one-year>

⁵ Deloitte (2016), *Senior Managers Regime: individual accountability and reasonable steps*, p.6.

<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-senior-manager-regime.pdf>

⁶ *Ibid.*, p. 17 and <https://www.fca.org.uk/publication/documents/strengthening-accountability-in-banking-slides.pdf> slide 29.

Application of the BEAR to large non-ADIs and smaller institutions

Treasury proposes that the following institutions are captured by the BEAR regime:

- Australian Deposit-taking Institutions (ADIs), where the ADI is the parent company.
- Any subsidiary companies, such as insurers or wealth management businesses.

This scope rightly captures large institutions that have developed sales-focused cultures which have caused the greatest harm to consumers in recent years. However, the scope excludes organisations with banking subsidiaries where a parent company is an insurer, wealth management company or other kind of business. The risk of cross-selling and consumer harm is as present in these business models. The BEAR should, at a minimum, apply to all ADIs regardless of whether the ADI is a parent company or subsidiary. We also recommend that the Treasury also consider extending application of the BEAR to non-ADI lenders, given the proposal to provide APRA with new powers to regulate these entities.⁷

Please contact eturner@choice.com.au with any questions about this submission.

Yours sincerely,



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⁷ Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017