

1 November 2017

By email: economics.sen@aph.gov.au

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

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

We welcome the opportunity to provide comments in relation to the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (the Bill)*.

We support the Banking Executive Accountability Regime (**BEAR**) reforms, as it is clear the community expects banking executives to be held accountable for major scandals. We believe it is imperative that a better culture of personal accountability is instilled at the very top of banks.

We are particularly supportive of the Australian Prudential Regulation Authority (**APRA**) having oversight of accountable persons' remuneration. We have outlined in previous submissions how remuneration can lead to poor consumer outcomes by encouraging bank staff to prioritise their commissions and bonuses over the interests of customers.¹ This has also been acknowledged by the Australian Securities and Investments Commission (**ASIC**), for example, in its recent review of mortgage broker remuneration.²

While we support the BEAR reforms, we believe improvements could be made to the Bill to ensure that the accountability regime better links executive remuneration and any penalties to widespread consumer harm. We also believe that it is imperative that ASIC is given equivalent powers to ensure it can effectively regulate non-ADI entities. This could be achieved via the proposed ASIC product intervention powers, or by extending ASIC's current powers to disqualify

¹ For example: Consumer Action Law Centre et. al., *Submission: Design and Distribution Obligations and Product Intervention Power Proposals Paper*, 15 March 2017, available at: <http://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/03/FINAL-Joint-Consumer-Submission-DADOs-and-PIPs-15032017.pdf>.

² Australian Securities and Investments Commission, *REP 516 Review of mortgage broker remuneration*, 16 March 2017, available at: <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-516-review-of-mortgage-broker-remuneration/>.

people from managing companies or engaging in financial services.³ We note that the Financial Conduct Authority (**FCA**) is extending the United Kingdom's equivalent regime to cover insurers and non-prudentially regulated firms as well as banks.⁴

The Bill has restricted the application of the BEAR so it would only apply to “conduct that is systemic and prudential in nature.”⁵ 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, we are concerned that executives may still avoid direct consequences for scandals similar to those identified by the Review of the Four Major Banks (also known as the Coleman Report) as harmful to consumers. No executive was terminated following the scandals identified in the Report.⁶

The United Kingdom's Senior Manager's Regime (**SMR**) gave new powers to the prudential regulator (the Prudential Regulation Authority, or **PRA**) and the FCA. The regulators have worked together to clarify requirements that industry must meet, ensuring that the United Kingdom scheme covers both prudential and consumer matters. The United Kingdom scheme has been running for around one year with some success and, as noted above, there are plans to extend the obligations to the wider financial services industry.⁷

The UK regime requires institutions to clearly assign responsibilities to specific managers. Senior managers have a statutory duty, requiring them to take reasonable steps to prevent regulatory breaches in the areas of the bank for which they are responsible.⁸ 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.⁹

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 Bill. As it stands, the Bill does not deal with the behaviour from industry that causes the greatest harm to consumers and creates the greatest need for intervention.

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,

³ In our submission, we recommended ASIC be empowered to make a broad range of product interventions, particularly in relation to remuneration: <http://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/03/FINAL-Joint-Consumer-Submission-DADOs-and-PIPs-15032017.pdf>.

⁴ Financial Conduct Authority, *Senior Managers and Certification Regime*, 3 August 2017, available at: <https://www.fca.org.uk/firms/senior-managers-certification-regime>.

⁵ *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 – Explanatory Materials*, paragraph 1.25.

⁶ Senate Standing Committee on Economics, *Review of the Four Major Banks – First Report*, 24 November 2016, pp. 14-15, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Four_Major_Banks_Review/Report.

⁷ Financial Conduct Authority, *Senior Managers and Certification Regime: one year on*, 7 March 2017, available at: <https://www.fca.org.uk/news/news-stories/senior-managers-and-certification-regime-one-year>.

⁸ Deloitte, *Senior Managers Regime: individual accountability and reasonable steps*, 2016, p.6. <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-senior-manager-regime.pdf>.

⁹ Financial Conduct Authority, *Code of Conduct (COCON)*, November 2017, available at: <https://www.handbook.fca.org.uk/handbook/COCON.pdf>.

serious contraventions where appropriate.”¹⁰ 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.

Recommendations:

1. The accountability regime should hold ADIs and accountable persons responsible for both prudential matters and consumer outcomes. This would 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.
2. The accountability regime should require accountable persons to take 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.
3. All accountable persons should be required to act with integrity and pay due regard to the interests of customers and treat them fairly.
4. There must be significant penalties for accountable persons and ADIs for contravening the BEAR provisions to deter poor behaviour. These penalties must be supported by a proactive and effective enforcement regime. This includes public reporting of APRA enforcement actions, such as naming disqualified accountable persons.

We have **attached** our initial submission to the Treasury consultation on the proposed regime for your reference.

Please contact Katherine Temple on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about our submission.

Yours sincerely



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¹⁰ The Treasury, *ASIC Enforcement Review*, accessed 1 November 2017, available at: <https://treasury.gov.au/review/asic-enforcement-review/>.