

FINANCIAL ACCOUNTABILITY REGIME TO INTRODUCE OBLIGATIONS ON RSE LICENSEES AND INSURERS

24 January 2020 | Australia

Legal Briefings - By **Michael Vrisakis and Steven Rice**

Reforms proposed by the Government this week will impose significant obligations on registrable superannuation entity licensees and insurers. These reforms will also have implications for banks that are already subject to the Banking Executive Accountability Regime (**BEAR**).

On 22 January 2019, Treasury released a proposal paper (**Paper**) on extending BEAR to all APRA-regulated entities. The new regime will be called the Financial Accountability Regime (**FAR**) and submissions on the proposal paper are due on 14 February 2020.

WHAT THIS MEANS FOR YOU

If you are an RSE licensee or insurer, you will need to make sure your organisation is prepared for:

- **accountability obligations**, such as the obligation on your organisation to take reasonable steps to prevent matters that would adversely affect your organisation's prudential standing or prudential reputation;
- **accountable persons**, who must be identified from the people in your organisation who have actual or effective senior executive responsibility. Accountable persons will be required to individually meet their own accountability obligations;

- **key personnel obligations**, such as an obligation to ensure that the responsibilities of the accountable persons in your organisation covers all aspects of the operations of your corporate group;
- **deferred remuneration obligations**, such as the proposed obligation to defer 40% of the variable remuneration of your accountable persons for at least four years unless an exception applies;
- **accountability statements**, which you will need to produce for each accountable person and which will need to include information such as the aspects of your organisation for which the accountable person has a responsibility to manage or control; and
- **accountability maps**, which will need to explain the reporting lines and lines of responsibility for the accountable persons in your organisation.

There are some proposed exemptions for smaller APRA-regulated entities.

If you are an authorised deposit-taking institution (**ADIs**), you will need to prepare your organisation for two potentially overlapping regimes dealing with individual and organisational accountability. The Paper foreshadows that transitional arrangements will be introduced which will regard ADIs that are meeting their obligations under BEAR as also meeting their obligations under FAR.

The Government has not yet proposed a commencement date for FAR, but it is important to start preparing early because these obligations can require consideration of the responsibilities of the senior executives in your organisation.

BACKGROUND

On 1 February 2019, the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) recommended extending the scope of and administrative responsibility for BEAR.

The Paper proposes that FAR will mirror BEAR, subject to some differences which are set out below.

FAR IN A NUTSHELL

BEAR already imposes obligations on ADIs to assign senior executive responsibility for the ADI's business.

FAR will apply to ADIs and all other APRA-regulated entities, including

- general and life insurance licensees;
- private health insurance licensees;
- registrable superannuation entity (**RSE**) licensees; and
- licensed non-operating holding companies.

Entities that are solely regulated by ASIC would not be included in FAR, but the Paper proposes that the Minister will be given the power to bring these entities into the regime. The Minister, ASIC and APRA would also be able to exempt entities from FAR.

ADDITIONAL RESPONSIBILITIES OF ACCOUNTABLE PERSONS

Under BEAR, a person is regarded as an “accountable person” if they are in a senior executive position with actual or effective management or control of the ADI, or the management or control a substantial part of the ADI group’s operations, or have a prescribed responsibility in relation to the ADI. The Paper indicates that APRA and ASIC may prescribe the following additional responsibilities for the purposes of defining an accountable person:

- senior executive responsibility for management of a significant business division;
- senior executive responsibility for management of the entity’s dispute resolution function (internal and external);
- senior executive responsibility for management of client or member remediation programs (encompassing hardship considerations where relevant);
- senior executive responsibility for service provision and maintenance (i.e. the services equivalent to product responsibility);
- senior executive responsibility for the setting of incentives (including incentives for staff and outward facing incentives such as loyalty programs); and
- senior executive responsibility for breach reporting.

The Paper also provides an indicative list of additional responsibilities for foreign branches, insurers and RSE licensees.

APRA's consultation on introducing an end-to-end product responsibility will effectively merge with FAR, and in this regard the Paper foreshadows that APRA and ASIC could prescribe an additional responsibility for:

"end-to-end management of a given product or product group, including but not limited to all steps in the design, delivery, maintenance, and any necessary remediation of customers in respect of the product or product group."

DIFFERENCES BETWEEN FAR AND BEAR

The Paper proposes that FAR will have some differences to BEAR. Under the proposed FAR:

- **reduced obligations** will apply to smaller entities (**core compliance entities**) that have total assets of less than a threshold prescribed by APRA and ASIC. These entities would not be required to submit accountability maps and statements to APRA and ASIC. All other entities (**enhanced compliance entities**) would be required to satisfy all the obligations under FAR, although APRA and ASIC would have the power to reclassify entities as either a core compliance or enhanced compliance entity;
- **a senior executive will be regarded as an accountable person** if they hold a responsibility that is prescribed by APRA and ASIC. This differs from BEAR, which prescribes these responsibilities in legislation, although APRA has the power under BEAR to determine additional responsibilities;
- **accountable persons would have an additional accountability obligation** to take reasonable steps in conducting their responsibilities to ensure that the entity complies with its licensing obligations;
- **entities will be required to defer 40% of the variable remuneration** of all their accountable persons for at least four years, unless the deferred amount is equal to or less than \$50,000 or if variable remuneration is not a feature of the person's remuneration structure;
- **entities and accountable persons will be required to deal with both ASIC and APRA in an open, constructive and cooperative way** in respect of FAR;
- **updated accountability maps and statements** will need to be sent to APRA or ASIC only when material changes are made, or only annually if immaterial changes are made. BEAR does not currently distinguish between immaterial and material changes;
- **regulated entities must notify APRA or ASIC** if they become aware that it has breached a key personnel obligation;
- **persons who become an accountable person by filling a temporary vacancy** will

need to be notified to APRA or ASIC before the end of a longer time period prescribed by the regulator (the Paper foreshadows that this is likely to be 90 days);

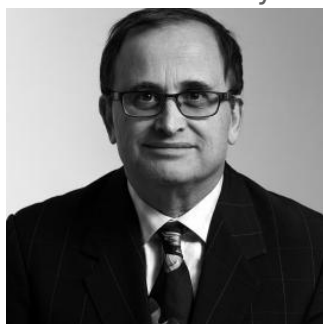
- **penalties** on regulated entities and accountable persons for breaches of FAR will be aligned with the revised penalty framework in the *Corporations Act 2001* (Cth) and other financial services legislation. Accountable persons will also be liable for civil penalties under FAR. Courts will be required to consider the impact on fund members when setting a penalty in respect of RSE licensees; and
- **APRA will have a non-objections power** to veto the appointment or reappointment of directors and senior executives of regulated entities when the entity applies to register an accountable person. The Paper suggests that this would be exercised by APRA as a reserve power.

MAKING A SUBMISSION

Submissions on the Government's proposals can be made by email to FAR@treasury.gov.au or by mail until 14 February 2020.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MICHAEL VRISAKIS
PARTNER, SYDNEY

+61 2 9322 4411
Michael.Vrisakis@hsf.com



RUTH STRINGER
CONSULTANT,
SYDNEY

+61 2 9225 5099
ruth.stringer@hsf.com



PHILIP HOPLEY
SPECIAL COUNSEL,
SYDNEY

+61 2 9255 5988
philip.hopley@hsf.com



STEVEN RICE
SPECIAL COUNSEL,
SYDNEY

+61 2 9225 5584
steven.rice@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2020