

TO [REDACTED]
General manager, GCRA
APRA

By email: far@apra.gov.au

17 AUGUST 2023

Dear [REDACTED],

KWM - Submission on FAR Consultation Draft Regulator Rules

We refer to the early consultation materials concerning the proposed Financial Accountability Regime released by APRA and ASIC on 20 July 2023.

Our submission is limited to observations concerning the list of “key functions” set out in the draft Regulator Rules and further explained in the accompanying materials. We are not making any submissions in relation to the draft transitional rules.

Proposal to record additional key functions in FAR register - regulatory overreach

Our first concern is that the regulators appear to be extending the operation of section 10 of the Financial Accountability Regime Bill, beyond that contemplated in the Bill. Section 10(2) sets out circumstances in which a person will be an accountable person: they must have a position in an accountable entity and have a responsibility prescribed by the Minister in the Minister rules. The regulators have no authority to add to that list of responsibilities by making rules under s105 of the FAR Bill: declaring responsibilities is reserved to the Minister, and the proposed Minister Rules have been the subject of consultation.

However, the regulators now propose a list of “key functions” that must be assigned to an accountable person and recorded in the FAR register. If no accountable person determined under s10 would otherwise be responsible for one of these “key functions”, these rules will have the effect of expanding the list of responsibilities for which persons will be accountable, beyond those in the Minister rules for the purposes of section 10(2), or the responsibilities contemplated by s10(3). They may also force changes to allocation of responsibilities away from the most appropriate person. For example, some of these functions are likely to be the responsibility of a general counsel who is not an accountable person.

Notwithstanding the assertion in the consultation materials that “the concept of key functions does not expand the definition or scope of responsibilities of accountable persons under the Minister rules and s10 of the FAR Bill”, it will expand the scope of responsibilities. This is an instance of regulatory overreach.

Further, the declaration of these key functions would not be subject to the discipline of any legislative review process and would set a precedent for the addition of further “key functions” with similar consequences.

We submit that the information to be included in the FAR register for each accountable person should include the responsibilities for which they are accountable under s10, and not any additional functions.

Concerns with “key functions”

If this proposal survives at all, we have concerns about the inclusion of the following key functions:

- *Product design and distribution obligations: Disregard for prior consultation outcomes:* The inclusion of this function is particularly objectionable because it was removed from the original FAR proposal after consultation, for very good reasons. In other words, the outcome of the consultation process was that this function should not be a function for which an accountable person should be responsible. Further, there is already a comprehensive regime to regulate design and distribution obligations, including identification of “regulated persons” under the regime, which should not be muddled by adding it to the responsibilities of accountable persons. We also note that APRA has firmly discouraged joint accountability for particular responsibilities under BEAR, again for good reasons, and yet is now proposing to require accountability for a function which by its nature is the responsibility of more than one person.
- *Product origination:* Related to product design and distribution - see above.
- *Financial and regulatory reporting: Duplication:* There is already a comprehensive regulatory regime for accountability for financial and regulatory reporting, including individual accountabilities. It is unnecessary and confusing to add functional obligations for something that is already a core responsibility of an accountable person.
- *Financial services regulatory engagement: Duplication:* Every accountable person will already have a statutory obligation to “deal with the Regulator in an open, constructive and cooperative way” (s21(1)(b)). Regulators have multiple points of engagement with accountable entities. We do not see any point in adding this function, which on any reading will be part of the role of almost every accountable person.
- *Monitoring representatives and staff - financial or credit products/services; Training of relevant staff and representatives—financial products/services/credit activities: Duplication:* Every accountable person will already have a statutory obligation to “take reasonable steps in conducting [their] responsibilities to prevent matters from arising that would (or would be likely to) result in a material contravention [of relevant financial services laws]”. This is unnecessary duplication. Further, these look like second line of defence functions - see the comments below about the regime being designed to apply to “the most senior and influential executives”.
- *Collections and enforcement; Hardship processes; Scam management: Not primary responsibilities of senior executives:* According to paragraph 1.7 of the Explanatory Memorandum for the current FAR Bill, the FAR regime is designed to impose a strengthened responsibility and accountability framework on “the directors and the most senior and influential executives (accountable persons) [of accountable entities]”. These functions do not fit within the primary responsibilities of anyone who would otherwise be an accountable person.

In summary, we are concerned that the proposed regulator rules include matters that amount to regulatory overreach, disregard for prior consultation processes, unnecessary regulatory duplication, and inclusion of functions for which the regime was not intended.

We request an opportunity to discuss these issues with APRA and ASIC before the proposed rules are finalised.

Yours sincerely

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