



30 April 2019

Ms Heidi Richards  
General Manager  
Policy Development  
Policy and Advice Division  
Australian Prudential Regulation Authority

By email: [ADIpolicy@apra.gov.au](mailto:ADIpolicy@apra.gov.au)

Dear Ms Richards

**Consultation on Determination under  
Paragraph 37EA(4)(b) of the Banking Act - BEAR variable remuneration**

The Australian Financial Markets Association (AFMA) is responding to the consultation on the Banking Executive Accountability Regime (BEAR) – Consultation On Determination under Paragraph 37EA(4)(b) of the Banking Act 1959. This has regard to certain variable remuneration which is not variable remuneration for the purposes of the BEAR, where certain conditions are met and the legislative instrument intended to ensure that application of the deferred remuneration obligations across ADIs is consistent with the intent of the BEAR.

AFMA has reviewed the draft schedule in consultation with its members. We have the following comments we would ask you to consider please.

**1 ADI – Non-banking group activities**

We wish to request more clarity on two aspects of variable remuneration under the draft schedule, which we believe is consistent with APRA's policy intent as set out in the April and October 2018 Information Papers and the BEAR legislation's explanatory memorandum (EM). These two points are -

- A. The instrument has the effect that any variable remuneration paid by a subsidiary of a NOHC to an 'accountable person' (AP) that relates to the AP's non-banking group activities is excluded from that AP's variable remuneration for the purposes of BEAR.

B. That any amount of excluded variable remuneration under the above will also remain excluded from the determination of Total Remuneration under Section 37EB.

### **1.1 Point A**

To achieve clarity we would propose that the instrument wording be changed to the following:

#### *Kinds of remuneration that are not variable remuneration*

1. *In relation to an accountable person of an ADI or its subsidiary, where the ADI is not a foreign ADI – any amount of remuneration that:*
  - a) *is paid or payable to the accountable person by a related body corporate of the ADI or subsidiary;*
  - b) *relates only to the accountable person’s role and responsibilities in respect of holding a position in one or more related bodies corporate of the ADI or subsidiary; and*
  - c) *the related bodies corporate referred to in (a) and (b) are not ADIs or subsidiaries of ADIs.*

*Note: Paragraph 1 does not apply to any amount of remuneration that is paid or payable to an accountable person by a non-ADI holding company or a subsidiary of an ADI where the remuneration relates only to the accountable person holding a position in the non-ADI holding company. This is because subsection 37E(3) of the Banking Act 1959 (the Act) already excludes such an amount from being remuneration of an accountable person.*

The proposed wording change follows this line of reasoning. There needs to be the ability to apportion payment made by a non-ADI holding company or its subsidiary to the AP to the extent that it relates to that AP’s activities for the non-ADI holding company or subsidiaries, not limited to where the payment by the non-ADI holding company or its subsidiary only relates to the non-banking group position. By changing “*holding a position*” to “*role and responsibilities in respect of*” makes it clear that it is about the role an otherwise accountable person plays in the non-banking group, rather than by reference to a position they hold in the non-banking group. They may be employed by the non-banking group, but their role or position is one that applies to the whole group – bank and non-bank, hence the need for their remuneration to be apportioned in accordance with the split of their activity/role. This is in keeping with the intent of the legislation as outlined in the revised EM at paragraph 1.126.

### **1.2 Point B**

In addition we believe that another note should be added to the draft schedule to make it clear that any amount of excluded variable remuneration due to the operation of the instrument is also excluded from an AP’s total remuneration for the purposes of Section 37EB.

While variable remuneration is given meaning at Section 37EA, total remuneration referred to in section 37EB is not defined in the legislation. However, we believe that it is appropriate that any amount of remuneration being excluded from variable remuneration under the above legislative instrument is not relevant to BEAR and as such

is not relevant to the determination of total remuneration of each AP under BEAR and specifically section 37EB.

Our suggestion for wording this additional note is as follows:

*Note 2: For the avoidance of doubt, any kinds of remuneration that are not variable remuneration under this instrument are not considered part of total remuneration for the purposes of Section 37EB.*

## **2 Foreign ADIs**

### **2.1 Equivalency**

The stated objectives of the remuneration deferral obligations of the BEAR are to “ensure[s] that accountable persons have clear incentives to make decisions which account for longer term effects. It also ensures that accountable persons are properly held to account for those decisions that have negative future consequences.” **[Schedule 1, item 1, section 37E].**

AFMA believes that where the accountable person’s sole responsibility under the BEAR is limited to that of Senior Officer Outside of Australia (SOOA), and that person is remunerated in a capacity other than for those responsibilities, then the legislative objectives are met where the accountable person’s remuneration is otherwise subjected to a regime of equivalency, such as where that Accountable Person is also subject to the rules on remuneration for Material Risk Takers as developed by the European Banking Authority.

To address this we would suggest that paragraph 2 of the instrument be amended so as the types of remuneration that are not considered variable remuneration are described as follows:

- a) *is paid or payable to the accountable person by the foreign ADI or a related body corporate of the foreign ADI; and*
- b) *the remuneration paid to the accountable person is subject to a period of deferral under the requirements of a foreign regime of equivalency; or*
- c) *relates only to the:*
  - i) *activities of the foreign ADI outside of Australia or the activities of a non-ADI related body corporate\*; or*
  - ii) *accountable person holding a position in an Australian-incorporated non-ADI subsidiary of the foreign ADI or non-ADI related body corporate\*.*

\* See next section 2.2 for explanation

### **2.2 Where ADI is not the parent of the related body corporates**

In addition to our comments above, AFMA considers the wording of the draft schedule in regards to foreign ADIs does not effectively reflect the clearly expressed intent of the letter of 1 April 2019 in one further respect. Our concern is that the draft schedule suggests a differentiation between organisational structures, which is problematic in cases where the ADI is not the parent of the related body corporates. The letter says the following -

APRA has today released for consultation a draft schedule of the kinds of remuneration that are not variable remuneration, to be made by legislative instrument. APRA proposes that, irrespective of the organisational structure or whether the ADI is a locally incorporated ADI or foreign ADI, where an individual has both an accountable person role with an ADI (or subsidiary of an ADI) and another role, only the portion of the individual's variable remuneration that relates to the accountable person role would be subject to the deferral requirements under Division 4 of Part IIAA of the Act.

On the other hand, in the second paragraph of the draft schedule, the kinds of remuneration that are not variable remuneration for accountable persons in foreign ADIs are described as:

- a) *is paid or payable to the accountable person by the foreign ADI or a related body corporate of the foreign ADI; and*
- b) *relates only to:*
  - i) *the activities of the foreign ADI outside of Australia; or*
  - ii) *the accountable person holding a position in an Australian-incorporated non-ADI subsidiary of the foreign ADI.*

This wording assumes that all related body corporate of the foreign ADIs are a subsidiary of the foreign ADI. As a result:

- It does not exclude the SOOA activities outside of Australia for non-ADI work.
- It does not exclude activities of domestic accountable persons for non-ADI subsidiaries. This language works in an organisation structure where the foreign ADI is the top group entity but not if the foreign ADI is one the subsidiaries and the non ADI securities subsidiaries for example are not subsidiaries of the ADI.

To address this problem we have the following wording to suggest for the second paragraph -

- a) *is paid or payable to the accountable person by the foreign ADI or a related body corporate of the foreign ADI; and*
- b) *relates only to:*
  - i) *the activities of the foreign ADI outside of Australia or the activities of a non-ADI related body corporate; or*
  - ii) *the accountable person holding a position in an Australian-incorporated non-ADI subsidiary of the foreign ADI or non-ADI related body corporate;*

Thank you for your attention to this comment. Please contact David Love either on 02 ----- if further clarification or elaboration is desired.

Yours sincerely

**David Love**  
**General Counsel & International Adviser**