



Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018

No. 5, 2018

**An Act to amend the *Banking Act 1959*, and for
related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018

No. 5, 2018

An Act to amend the *Banking Act 1959*, and for related purposes

[Assented to 20 February 2018]

The Parliament of Australia enacts:

1 Short title

This Act is the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018*.

No. 5, 2018

Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018

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2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	20 February 2018
2. Schedule 1, items 1 to 6	1 July 2018.	1 July 2018
3. Schedule 1, item 7	The later of: (a) the start of 1 July 2018; and (b) immediately after the commencement of item 4 of Schedule 4 to the <i>Treasury Laws Amendment (Banking Measures No. 1) Act 2018</i> . However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.	1 July 2018
4. Schedule 1, item 8	1 July 2018.	1 July 2018
5. Schedule 1, item 9	The later of: (a) the start of 1 July 2018; and (b) immediately after the commencement of item 4 of Schedule 1 to the <i>Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018</i> . However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.	

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
6. Schedule 1, items 10 to 13	1 July 2018.	1 July 2018
7. Schedule 1, item 14	1 July 2023.	1 July 2023
8. Schedule 1, items 15 to 17	1 July 2018.	1 July 2018
9. Schedule 2	1 July 2018.	1 July 2018

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—The Banking Executive Accountability Regime

Part 1—Main amendments

Banking Act 1959

1 After Part II

Insert:

Part IIAA—The Banking Executive Accountability Regime

Division 1—Obligations under the Banking Executive Accountability Regime

Subdivision A—ADIs

37 Obligations of ADIs

- (1) An ADI must comply with:
 - (a) its accountability obligations under Division 2; and
 - (b) its key personnel obligations under Division 3; and
 - (c) its deferred remuneration obligations under Division 4; and
 - (d) its notification obligations under Division 5.
- (2) However, this section does not apply to:
 - (a) an ADI:
 - (i) that the Minister has exempted under section 37A; or
 - (ii) that is included in a class of ADIs that the Minister has exempted under section 37A; or
 - (b) a foreign ADI, except to the extent that it operates a branch of the foreign ADI in Australia.

37A Minister may exempt ADIs

Exemption of particular ADIs

- (1) The Minister may, by written notice given to an ADI, exempt the ADI from compliance with this Part.

Class exemptions

- (2) The Minister may, by legislative instrument, exempt a class of ADIs from compliance with this Part.

37AA Inconsistency with corresponding foreign laws

- (1) If APRA is satisfied that an ADI would contravene a law of a foreign country if the ADI were to comply with a particular obligation under section 37, APRA:
 - (a) may give to the ADI a written notice specifying that obligation; and
 - (b) may specify in the notice:
 - (i) the extent to which the ADI need not comply with that obligation; and
 - (ii) conditions to which the notice is subject.
- (2) An ADI is not required to comply with that obligation:
 - (a) to the extent compliance would result in the ADI contravening that law of a foreign country; or
 - (b) if the notice specifies the extent to which the ADI need not comply with that obligation—to the extent so specified; if the conditions (if any) specified in the notice are complied with.

Subdivision B—Accountable persons

37B Obligations of accountable persons

- (1) An accountable person must comply with his or her accountability obligations under Division 2 in relation to each of the responsibilities that cause him or her to be an accountable person of an ADI, or of a subsidiary of an ADI.

- (2) However, this section does not apply to an accountable person to the extent that he or she is an accountable person of an ADI, or a subsidiary of an ADI, to which section 37 does not apply because of subsection 37(2).

37BA Meaning of *accountable person*

General principle

- (1) An individual is an **accountable person**, of an ADI or a subsidiary of an ADI, if he or she:
- (a) either:
 - (i) in the case of the ADI—holds a position in the ADI or in another body corporate of which the ADI is a subsidiary; or
 - (ii) in the case of a subsidiary of the ADI—holds a position in the subsidiary; and
 - (b) because of that position, has actual or effective senior executive responsibility:
 - (i) for management or control of the ADI; or
 - (ii) for management or control of a significant or substantial part or aspect of the operations of the ADI or the relevant group of bodies corporate that is constituted by the ADI and its subsidiaries.

Particular responsibilities

- (2) Without limiting subsection (1), an individual is also an **accountable person** of an ADI if he or she:
- (a) holds a position in, or relating to, the ADI; and
 - (b) because of that position, has a responsibility, relating to the ADI:
 - (i) of a kind set out in subsection (3); or
 - (ii) of a kind determined under subsection (4).
- (3) For the purposes of subparagraph (2)(b)(i), the following are the responsibilities:
- (a) responsibility for oversight of the ADI as a member of the Board of the ADI;

- (b) senior executive responsibility for carrying out the management of all the business activities of the ADI and its subsidiaries, including:
 - (i) allocating to accountable persons responsibility for all parts or aspects of the relevant group of bodies corporate that is constituted by the ADI and its subsidiaries; and
 - (ii) reporting directly to the Board of the ADI;
 - (c) senior executive responsibility for management of the ADI's financial resources;
 - (d) senior executive responsibility for overall risk controls and/or overall risk management arrangements of the ADI;
 - (e) senior executive responsibility for management of the ADI's operations;
 - (f) senior executive responsibility for information management, including information technology systems, for the ADI;
 - (g) senior executive responsibility for management of the ADI's internal audit function;
 - (h) senior executive responsibility for management of the ADI's compliance function;
 - (i) senior executive responsibility for management of the ADI's human resources function;
 - (j) senior executive responsibility for management of the ADI's anti-money laundering function.
- (4) APRA may, by legislative instrument, determine a responsibility for the purposes of subparagraph (2)(b)(ii) (other than a responsibility set out in subsection (3)).
- (5) Subsection (2) does not apply in relation to a position that a person holds in an Australian branch of a foreign ADI.

Head of an Australian branch of a foreign ADI

- (6) Without limiting subsection (1), an individual is also an **accountable person**, of an ADI that is a foreign ADI, if he or she has senior executive responsibility for the conduct of all the activities of an Australian branch of the foreign ADI.

37BB Exception for responsibilities excluded by APRA

- (1) Despite section 37BA, a person is not an *accountable person*, of an ADI or a subsidiary of an ADI, if each of the person's responsibilities that would, apart from this section, cause the person to be an accountable person of the ADI or subsidiary is either:
 - (a) a responsibility excluded under subsection (2) of this section in relation to that ADI or subsidiary; or
 - (b) a responsibility excluded under subsection (3) of this section in relation to a class of ADIs or subsidiaries that includes that ADI or subsidiary.
- (2) APRA may, by written notice given to an ADI or a subsidiary of an ADI, exclude specified responsibilities that would, apart from this section, cause any person who holds a position in, or relating to, the ADI or subsidiary to be an accountable person.
- (3) APRA may, by legislative instrument, exclude specified responsibilities that would, apart from this section, cause any person who holds a position in, or relating to:
 - (a) an ADI included in a class of ADIs specified in the instrument; or
 - (b) a subsidiary an ADI included in a class of such subsidiaries specified in the instrument;to be an accountable person.

37BC Inconsistency with corresponding foreign laws

- (1) If APRA is satisfied that an accountable person, of an ADI or a subsidiary of an ADI, would contravene a law of a foreign country if he or she were to comply with a particular obligation under section 37B, APRA:
 - (a) may give to the accountable person a written notice specifying that obligation; and
 - (b) may specify in the notice:
 - (i) the extent to which the accountable person need not comply with that obligation; and
 - (ii) conditions to which the notice is subject.

- (2) An accountable person is not required to comply with that obligation:
- (a) to the extent compliance would result in the accountable person contravening that law of a foreign country; or
 - (b) if the notice specifies the extent to which the accountable person need not comply with that obligation—to the extent so specified;
- if the conditions (if any) specified in the notice are complied with.
- (3) APRA must give a copy of the notice to the ADI or subsidiary.

Division 2—Accountability obligations

37C The accountability obligations of an ADI

The accountability obligations of an ADI are to take reasonable steps to:

- (a) conduct its business with honesty and integrity, and with due skill, care and diligence; and
- (b) deal with APRA in an open, constructive and cooperative way; and
- (c) in conducting its business, prevent matters from arising that would adversely affect the ADI’s prudential standing or prudential reputation; and
- (d) ensure that each of its accountable persons meets his or her accountability obligations under section 37CA; and
- (e) ensure that each of its subsidiaries that is not an ADI complies with paragraphs (a), (b), (c) and (d) as if the subsidiary were an ADI.

37CA The accountability obligations of an accountable person

- (1) The accountability obligations of an accountable person of an ADI, or of a subsidiary of an ADI, are to conduct the responsibilities of his or her position as an accountable person:
- (a) by acting with honesty and integrity, and with due skill, care and diligence; and
 - (b) by dealing with APRA in an open, constructive and cooperative way; and

- (c) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would adversely affect the prudential standing or prudential reputation of the ADI.
- (2) If more than one of the accountable persons of an ADI or a subsidiary of an ADI have the same responsibility mentioned in section 37BA in relation to the ADI or subsidiary, all of those accountable persons have the accountability obligations jointly in relation to that responsibility.

Note: Under section 37DB, APRA may direct an ADI to reallocate a responsibility of an accountable person.

37CB Taking reasonable steps

Without limiting what constitutes the taking of reasonable steps in relation to a matter for the purposes of this Division, the taking of reasonable steps in relation to that matter includes having:

- (a) appropriate governance, control and risk management in relation to that matter; and
- (b) safeguards against inappropriate delegations of responsibility in relation to that matter; and
- (c) appropriate procedures for identifying and remediating problems that arise or may arise in relation to that matter.

Division 3—Key personnel obligations

37D The key personnel obligations of an ADI

- (1) The key personnel obligations of an ADI are:
 - (a) subject to subsections (2) and (3), to ensure that the responsibilities of the accountable persons of the ADI and its subsidiaries cover:
 - (i) all parts or aspects of the operations of the relevant group of bodies corporate that is constituted by the ADI and its subsidiaries; and
 - (ii) each of the responsibilities to which subsection 37BA(2) applies; and
 - (b) to ensure none of the accountable persons of the ADI are prohibited under section 37DA; and

- (c) to comply with any directions APRA gives to the ADI under section 37DB; and
 - (d) to take reasonable steps to ensure that each of the ADI's subsidiaries that is not an ADI complies with paragraphs (b) and (c) as if the subsidiary were an ADI.
- (2) Paragraph (1)(a) does not apply in relation to a responsibility excluded by APRA under subsection 37BB(2) or (3).
- (3) If the ADI is a foreign ADI, the ADI's obligation under paragraph (1)(a) is taken to be an obligation to ensure that the responsibilities of the ADI's accountable persons cover:
- (a) all parts or aspects of the operations of each Australian branch of the ADI; and
 - (b) for each Australian branch of the ADI, the responsibility to which subsection 37BA(6) applies.

37DA People prohibited from being an accountable person

- (1) A person is prohibited from being an accountable person if the person:
- (a) is not registered under Subdivision B of Division 6; or
 - (b) is disqualified under section 37J.
- (2) However, if a person becomes an accountable person of an ADI, or a subsidiary of an ADI, by filling a temporary vacancy or a vacancy that was not foreseen at the time it arose, paragraph (1)(a) does not apply to the person until the person has been an accountable person for:
- (a) 28 days; or
 - (b) such other period as is determined under subsection (3) or (4).
- (3) APRA may, by written notice given to an ADI, determine a period for the purposes of paragraph (2)(b) in relation to the ADI or a subsidiary of the ADI.
- (4) APRA may, by legislative instrument, determine a period for the purposes of paragraph (2)(b).

37DB APRA may direct an ADI to reallocate responsibilities

- (1) APRA may give an ADI a written direction to reallocate a responsibility to which paragraph 37D(1)(a) applies if APRA has reason to believe that the current allocation of the responsibility is likely to give rise to a prudential risk.
- (2) In deciding whether to issue a direction under subsection (1), APRA must have regard to the responsibilities of the accountable person set out in the accountability statement for the person under section 37F.
- (3) The direction may specify the period within which it is to be complied with.
- (4) APRA may, by written notice given to the ADI, vary the direction if, at the time of the variation, it considers that the variation is necessary and appropriate.
- (5) The direction has effect until APRA revokes it by written notice given to the ADI. APRA may revoke the direction if, at the time of revocation, it considers that the direction is no longer necessary or appropriate.

Division 4—Deferred remuneration obligations

37E The deferred remuneration obligations of an ADI

- (1) The deferred remuneration obligations of an ADI are:
 - (a) to ensure that, in relation to the variable remuneration of an accountable person of the ADI:
 - (i) the payment of a portion of that variable remuneration is deferred for a period; and
 - (ii) the amount of that portion is at least the amount required under section 37EB; and
 - (iii) that period is at least the period required under section 37EC; and
 - (b) to have a remuneration policy in force that requires that, if the person has failed to comply with his or her accountability obligations under section 37CA, the person's variable

- remuneration is to be reduced by an amount that is proportionate to the failure; and
- (c) to ensure that, if the remuneration policy requires the variable remuneration to be reduced because of that failure, the amount of the reduction is not paid to the person; and
 - (d) to take reasonable steps to ensure that, if:
 - (i) variable remuneration may become payable to an accountable person of a subsidiary of the ADI; and
 - (ii) the subsidiary is not an ADI; the subsidiary complies with paragraphs (a), (b) and (c) as if the subsidiary were an ADI.
- (2) A reduction of variable remuneration:
- (a) need not be a reduction of variable remuneration relating to a period in which the failure occurred; and
 - (b) may be a reduction to zero.
- (3) **Remuneration**, of an accountable person, includes:
- (a) in relation to an accountable person of an ADI—any amount of remuneration that:
 - (i) is paid or payable to the accountable person by a related body corporate of the ADI; and
 - (ii) if that related body corporate is a non-ADI holding company of the ADI—does not relate only to the accountable person holding a position in the related body corporate; or
 - (b) in relation to an accountable person of a subsidiary of an ADI—any amount of remuneration that:
 - (i) is paid or payable to the accountable person by a related body corporate of the subsidiary; and
 - (ii) if that related body corporate is a non-ADI holding company of the subsidiary—does not relate only to the accountable person holding a position in the related body corporate.

37EA Meaning of *variable remuneration*

- (1) The ***variable remuneration*** of an accountable person of an ADI, or a subsidiary of an ADI:
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Schedule 1 The Banking Executive Accountability Regime
Part 1 Main amendments

- (a) means so much of the accountable person's total remuneration as is conditional on the achievement of objectives; and
 - (b) includes so much of the accountable person's total remuneration as is remuneration of a kind determined under paragraph (3)(a) or (4)(a).
- (2) However, remuneration of a kind determined under paragraph (3)(b) or (4)(b) is not **variable remuneration** of an accountable person of an ADI, or a subsidiary of an ADI.
- (3) APRA may, by written notice given to an ADI, or a subsidiary of an ADI, determine that:
- (a) remuneration of a particular kind, of one or more accountable persons of the ADI or subsidiary, is variable remuneration; or
 - (b) remuneration of a particular kind, of one or more accountable persons of the ADI or subsidiary, is not variable remuneration.
- A determination under this subsection may apply to all accountable persons of the ADI or subsidiary, or be limited to a particular accountable person or class of accountable persons of the ADI or subsidiary.
- (4) APRA may, by legislative instrument, determine that:
- (a) remuneration of a particular kind is variable remuneration; or
 - (b) remuneration of a particular kind is not variable remuneration.

37EB Minimum amount of variable remuneration to be deferred

- (1) The amount of an accountable person's variable remuneration that is required to be deferred under subparagraph 37E(1)(a)(ii) is as follows:

Minimum amount of variable remuneration to be deferred		
Item	If the accountable person is:	... the amount is:
1	The Chief Executive Officer of a large ADI	The lesser of: (a) 60% of the Chief Executive Officer's variable remuneration for the financial

Minimum amount of variable remuneration to be deferred		
Item	If the accountable person is:	... the amount is:
		year (the <i>relevant financial year</i>) in which the decision was made granting the variable remuneration; or (b) 40% of the Chief Executive Officer's total remuneration for the relevant financial year.
2	An accountable person of: (a) a large ADI; or (b) a subsidiary of a large ADI; other than the Chief Executive Officer of a large ADI	The lesser of: (a) 40% of the accountable person's variable remuneration for the relevant financial year; or (b) 20% of the accountable person's total remuneration for the relevant financial year.
3	An accountable person of: (a) a medium ADI; or (b) a subsidiary of a medium ADI	The lesser of: (a) 40% of the accountable person's variable remuneration for the relevant financial year; or (b) 20% of the accountable person's total remuneration for the relevant financial year.
4	An accountable person of: (a) a small ADI; or (b) a subsidiary of a small ADI	The lesser of: (a) 40% of the accountable person's variable remuneration for the relevant financial year; or (b) 10% of the accountable person's total remuneration for the relevant financial year.

- (2) For the purposes of this section, the value of variable remuneration of an accountable person of an ADI, or a subsidiary of an ADI, that has been deferred is taken to be:
- (a) the value worked out, for the accountable person, in the way determined under subsection (3) or (4); or
 - (b) if no such determination applies in relation to the accountable person—what would have been the value of that

remuneration if it had instead been paid to the person at the time the decision to grant it was made.

- (3) APRA may, by written notice given to an ADI or to a subsidiary of an ADI, determine the way to work out, for the purposes of this section, the value of variable remuneration of accountable persons of the ADI or subsidiary.
- (4) APRA may, by legislative instrument, determine the way to work out, for the purposes of this section, the value of variable remuneration of:
 - (a) accountable persons of an ADI included in a specified class of ADIs; or
 - (b) accountable persons of a subsidiary of an ADI included in a specified class of subsidiaries of ADIs.

37EC Minimum period of deferral

- (1) The required period under subparagraph 37E(1)(a)(iii) in relation to variable remuneration of an accountable person of an ADI, or a subsidiary of an ADI, is:
 - (a) 4 years; or
 - (b) a shorter period approved by APRA under subsection (4) in relation to the variable remuneration;starting on the day after the day on which the decision was made granting the accountable person the variable remuneration.
- (2) However, if, at the end of the period under subsection (1), the ADI or subsidiary considers that the accountable person is likely to have failed to comply with his or her accountability obligations under section 37CA, that period is extended until the day the ADI or subsidiary determines whether he or she has failed to comply.
- (3) An ADI may apply to APRA for APRA to approve a shorter period under subsection (4) in relation to the variable remuneration of an accountable person of an ADI, or a subsidiary of an ADI, if the ADI is satisfied that:
 - (a) based on the information known at the time of the application, the accountable person has complied with his or her accountability obligations under section 37CA; and

- (b) it is unlikely that further information will become known, before the end of the 4 year period mentioned in paragraph (1)(a), that indicates that the accountable person did not comply with those obligations.
- (4) APRA may approve a shorter period in relation to the variable remuneration of a person if APRA is satisfied that:
 - (a) either:
 - (i) the person is no longer an accountable person of the ADI or subsidiary, because of the person's death, serious incapacity, serious disability or serious illness; or
 - (ii) a circumstance determined under subsection (5) or (6) exists relation to the person; and
 - (b) the ADI or subsidiary has taken all reasonable steps to satisfy itself of the matters mentioned in paragraphs (3)(a) and (b).
- (5) APRA may, by written notice given to an ADI, determine circumstances for the purposes of subparagraph (4)(a)(ii) in relation to the ADI and/or one or more subsidiaries of the ADI.
- (6) APRA may, by legislative instrument, determine circumstances for the purposes of subparagraph (4)(a)(ii).

37ED Exemption for small amounts of variable remuneration

- (1) Paragraph 37E(1)(a) does not apply in relation to the variable remuneration of an accountable person for a financial year if the amount of the person's variable remuneration that is required, or would apart from this section be required, under subparagraph 37E(1)(a)(ii) to be deferred for that financial year is less than:
 - (a) the amount determined under subsection (2); or
 - (b) if a determination under subsection (2) is not in force—
\$50,000.
- (2) The Minister may, by legislative instrument, determine an amount for the purposes of paragraph (1)(a).

Division 5—Notification obligations

37F The notification obligations of an ADI

- (1) The notification obligations of an ADI are:
 - (a) to give to APRA a document complying with section 37FA (an **accountability statement**) for each of its accountable persons, and to ensure that APRA is notified of any change to the accountability statement within the period, after the change, provided under subsection (2); and
 - (b) to give to APRA a document complying with section 37FB (an **accountability map**), and to ensure that APRA is notified of any change to the accountability map within the period, after the change, provided under subsection (2); and
 - (c) to notify APRA of an event mentioned in section 37FC within the period, after the event, provided under subsection (2); and
 - (d) to take reasonable steps to ensure that each of its subsidiaries that is not an ADI complies with paragraphs (a) and (c) as if the subsidiary were an ADI.
- (2) For the purposes of paragraph (1)(a), (b) or (c), the period is:
 - (a) 14 days; or
 - (b) such other period as determined under subsection (3).
- (3) APRA may, by legislative instrument, determine, for the purposes of paragraph (2)(b), a period mentioned in paragraph (1)(a), (b) or (c).

37FA Accountability statements

- (1) For the purposes of paragraph 37F(1)(a), an accountability statement of an ADI, or of a subsidiary of an ADI, for an accountable person of the ADI or subsidiary must contain a comprehensive statement of:
 - (a) the part or aspect of the ADI's or subsidiary's operations of which the accountable person has actual or effective responsibility for management or control; and

- (b) the responsibilities of the accountable person, including any responsibilities to which paragraph 37D(1)(a) applies or subsection 37D(3) applies, as the case requires; and
 - (c) the matters determined by APRA under subsection (2).
- (2) APRA may, by legislative instrument, determine matters for the purposes of paragraph (1)(c).

37FB Accountability map

- (1) For the purposes of paragraph 37F(1)(b), an accountability map of an ADI must contain the following information:
- (a) the names of all of the accountable persons of the ADI and its subsidiaries;
 - (b) details of the reporting lines and lines of responsibility of those accountable persons;
 - (c) sufficient information to identify an accountable person for each of the responsibilities to which paragraph 37D(1)(a) applies or subsection 37D(3) applies, as the case requires;
 - (d) information of a kind determined by APRA under subsection (2).
- (2) APRA may, by legislative instrument, determine kinds of information for the purposes of paragraph (1)(d).

37FC Events for which APRA must be notified

For the purposes of paragraph 37F(1)(c), the following events must be notified to APRA by an ADI:

- (a) a person ceasing to be an accountable person of the ADI or a subsidiary of the ADI;
- (b) the dismissal or suspension of an accountable person by the ADI, or subsidiary of the ADI, because the person has failed to comply with his or her accountability obligations under 37CA;
- (c) the reduction of the variable remuneration of a person by the ADI, or subsidiary of the ADI, because the person has failed to comply with his or her accountability obligations under section 37CA;
- (d) the ADI becoming aware of:

- (i) a breach by the ADI of its accountability obligations under section 37C; or
- (ii) a breach by an accountable person of the ADI, or of a subsidiary of the ADI, of his or her accountability obligations under section 37CA.

Division 6—Enforcement and administration

Subdivision A—Civil penalties

37G Pecuniary penalty for non-compliance with this Part

- (1) An ADI is liable to a pecuniary penalty if:
 - (a) the ADI contravenes its obligations under this Part (other than this Division); and
 - (b) the contravention relates to prudential matters.
- (2) The amount of the pecuniary penalty is an amount not exceeding:
 - (a) if the ADI is a large ADI—1,000,000 penalty units; or
 - (b) if the ADI is a medium ADI—250,000 penalty units; or
 - (c) if the ADI is a small ADI—50,000 penalty units.
- (3) The Minister may, by legislative instrument, determine:
 - (a) the kinds of ADIs that are large ADIs; and
 - (b) the kinds of ADIs that are medium ADIs; and
 - (c) the kinds of ADIs that are small ADIs.
- (4) In determining the pecuniary penalty, the Federal Court of Australia must have regard to the impact that the penalty would have on the viability of the ADI.
- (5) Subsection (4) does not limit subclause 1(3) of Schedule 2.
- (6) This section is a civil penalty provision.

Subdivision B—Registration of accountable persons

37H Register of accountable persons

- (1) APRA must establish and keep a register of accountable persons.
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- (2) The register may be kept by electronic means.
- (3) The register is not a legislative instrument.
- (4) The register must contain, for each accountable person:
 - (a) the person's name; and
 - (b) the date of the person's registration as an accountable person; and
 - (c) the date the person ceases to be an accountable person; and
 - (d) details of any disqualification of the person under section 21 or 37J; and
 - (e) details of any variation or revocation of disqualification under section 22 or 37JA; and
 - (f) details of any direction APRA has given in relation to the person that is:
 - (i) a direction under section 11CA of a kind mentioned in paragraph 11CA(2)(c) or (d); or
 - (ii) a direction under section 23; and
 - (g) such other information as APRA considers appropriate.

Note: For disclosure of information on the register, see section 56 of the *Australian Prudential Regulation Authority Act 1998*.

37HA Registration of a person as an accountable person

- (1) An ADI may apply to APRA to register a person as an accountable person.
- (2) The application must:
 - (a) be in the form approved in writing by APRA; and
 - (b) contain the information that the form requires; and
 - (c) include a signed declaration that the ADI is satisfied the person is suitable to be an accountable person; and
 - (d) include the accountability statement for the person under section 37F.
- (3) APRA may, by written notice given to the ADI, request the ADI to give to APRA further information in relation to the application.
- (4) APRA must, within the period provided under subsection (5), register a person as an accountable person if:

- (a) the application meets the requirements of subsection (2); and
 - (b) the ADI gives to APRA any further information requested under subsection (3) in relation to the application;
- unless the ADI withdraws the application before the day of registration.
- (5) The period for registration under subsection (4) is the period of 14 days after:
- (a) the day the application is made; or
 - (b) if APRA requests the ADI to give further information under subsection (3) in relation to the application—the day the ADI gives the further information to APRA.

Subdivision C—Disqualification of accountable persons

37J APRA may disqualify an accountable person

Disqualification by APRA

- (1) APRA may disqualify a person from being or acting as an accountable person, for a period that APRA considers appropriate, if APRA is satisfied that:
- (a) the person has not complied with his or her accountability obligations under section 37CA; and
 - (b) having regard to the seriousness of the non-compliance, the disqualification is justified.
- (2) For the purposes of subsection (1), APRA may disqualify a person from being or acting as an accountable person of one or more of the following:
- (a) a particular ADI;
 - (b) a particular subsidiary of an ADI;
 - (c) a class of ADIs;
 - (d) a class of subsidiaries of ADIs;
 - (e) any ADI;
 - (f) any subsidiary of an ADI.

Written notice

- (3) APRA must give written notice of a disqualification to the person and the ADI.
- (4) A disqualification takes effect on the day specified in the notice, which must be not earlier than 7 days after it is signed.
- (5) Before disqualifying a person, APRA must give written notice to:
 - (a) the person; and
 - (b) the ADI;giving each of them an opportunity to make submissions on the matter.
- (6) If a submission is made to APRA in response to the notice, APRA must have regard to the submission and may discuss any matter contained in the submission with such persons as it considers appropriate for the purpose of assessing the truth of the matter.
- (7) A notice given under subsection (5) to an accountable person and an ADI must state that any submissions made in response to the notice may be discussed by APRA with any other persons as mentioned in subsection (6).
- (8) Part VI applies to a decision by APRA under this section to disqualify a person.

37JA APRA may vary or revoke a disqualification

- (1) APRA may vary or revoke a disqualification made under section 37J on its own initiative or on application by a person disqualified under that section.
- (2) A variation or revocation of a disqualification takes effect on the day on which it is made.
- (3) APRA must give the person written notice of:
 - (a) a variation or revocation of a disqualification; or
 - (b) if the person applied for a disqualification to be varied or revoked—a refusal to vary or revoke the disqualification.
- (4) Part VI applies to a decision by APRA under this section to:

- (a) vary a disqualification; or
- (b) refuse to vary or revoke a disqualification.

37JB Self-incrimination

To avoid doubt, subsection 52F(2) does not apply to APRA's consideration of whether to make a decision under section 37J or 37JA.

37JC Allowing a person disqualified by APRA to act as an accountable person

- (1) An ADI, or a subsidiary of an ADI, contravenes this subsection if:
 - (a) a person is disqualified under section 37J; and
 - (b) the person is or acts as an accountable person of the ADI or subsidiary; and
 - (c) the person is disqualified from being or acting as an accountable person in the ADI or subsidiary; and
 - (d) the ADI or subsidiary allows the person to be or act as an accountable person.

Fault-based offence

- (2) An ADI, or a subsidiary of an ADI, commits an offence if it contravenes subsection (1).

Penalty: 250 penalty units.

Strict liability offence

- (3) An ADI, or a subsidiary of an ADI, commits an offence of strict liability if it contravenes subsection (1).

Penalty: 60 penalty units.

Division 7—Miscellaneous

37K General administration of this Part

APRA has the general administration of this Part.

37KA Indemnifying ADIs and accountable persons

- (1) A related body corporate of an ADI must not (whether by agreement or by making a payment and whether directly or through an interposed entity):
 - (a) indemnify the ADI against the consequences of breaching an obligation under this Part; or
 - (b) pay, or agree to pay, a premium for a contract insuring the ADI against the consequences of breaching an obligation under this Part.
- (2) An ADI, or a related body corporate of an ADI, must not (whether by agreement or by making a payment and whether directly or through an interposed entity):
 - (a) indemnify a person who is or was an accountable person of the ADI against the consequences of breaching an obligation under this Part; or
 - (b) pay, or agree to pay, a premium for a contract insuring such a person against the consequences of breaching an obligation under this Part.
- (3) This section does not apply to a liability for legal costs.

37KB Causes of action not created

This Part does not have the effect of creating a cause of action that would not have existed if this Part had not been enacted.

37KC Review of operation of Part

- (1) The Minister must cause a review of the operation of this Part to be undertaken.
- (2) The review must:
 - (a) start 3 years after the commencement of this section; and
 - (b) be completed within 6 months.
- (3) The Minister must cause a written report about the review to be prepared.

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- (4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

Part 2—Other amendments

Australian Prudential Regulation Authority Act 1998

2 Subsection 56(1) (after paragraph (ca) of the definition of *protected document*)

Insert:

; or (cb) a person in relation to whom information is, or was, required to be given under Part IIAA of the *Banking Act 1959*;

3 Subsection 56(1) (after paragraph (ca) of the definition of *protected information*)

Insert:

; or (cb) a person in relation to whom information is, or was, required to be given under Part IIAA of the *Banking Act 1959*;

4 Paragraph 56(2)(c)

Omit “or (7C)”, substitute “, (7C), (7D), (7E) or (7F)”.

5 After subsection 56(7C)

Insert:

(7D) It is not an offence if:

- (a) the disclosure of protected information or the production of a protected document is to an ADI (within the meaning of the *Banking Act 1959*); and
- (b) the information, or the information contained in the document, as the case may be, is information contained in the register kept under section 37H of the *Banking Act 1959*.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7D) (see subsection 13.3(3) of the *Criminal Code*).

(7E) It is not an offence if:

- (a) the disclosure of protected information or the production of a protected document is to an individual; and

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- (b) the information, or the information contained in the document, as the case may be, is only personal information about the individual; and
- (c) the information, or the information contained in the document, as the case may be, is information contained in the register kept under section 37H of the *Banking Act 1959*.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7E) (see subsection 13.3(3) of the *Criminal Code*).

(7F) It is not an offence if:

- (a) the disclosure of protected information or the production of a protected document is by APRA; and
- (b) the information, or the information contained in the document, as the case may be, is information that discloses:
 - (i) whether a person is disqualified under section 37J of the *Banking Act 1959*; or
 - (ii) a decision made under Subdivision C of Division 6 of Part IAA of that Act, or the reasons for such a decision.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7F) (see subsection 13.3(3) of the *Criminal Code*).

6 Paragraph 56(12)(a)

Omit “and (7C)”, substitute “, (7C), (7D), (7E) and (7F)”.

Banking Act 1959

7 After paragraph 2A(d)

Insert:

- (e) providing for heightened accountability for banking directors and senior executives through the Banking Executive Accountability Regime; and

8 Subsection 5(1)

Insert:

accountable person has the meaning given by sections 37BA and 37BB.

9 Subsection 5(1) (at the end of the definition of *direction under this Act*)

Add:
; (h) section 37DB.

10 Subsection 5(1)

Insert:

large ADI means an ADI of a kind determined under paragraph 37G(3)(a).

medium ADI means an ADI of a kind determined under paragraph 37G(3)(b).

non-ADI holding company, of another body corporate, means a body corporate (other than an ADI) of which the other body corporate is a subsidiary.

remuneration, of an accountable person, includes the meaning given by subsection 37E(3).

small ADI means an ADI of a kind determined under paragraph 37G(3)(c).

variable remuneration has the meaning given by section 37EA.

11 After subsection 11AF(1AB)

Insert:

(1AC) Without limiting the prudential matters in relation to which APRA may determine a standard, a standard may provide for matters relating to Part IIAA (the Banking Executive Accountability Regime).

12 Paragraphs 11CG(1)(b) and (2)(a)

Omit “or 29”, substitute “, 29 or 37DB”.

13 Subsection 11CG(2A)

Omit “or 29”, substitute “, 29 or 37DB”.

14 Section 37KC

Repeal the section.

Part 3—Application of amendments

15 Requirement to register

If, immediately before the commencement of Part IIAA of the *Banking Act 1959* as amended by this Act, a person held a position, in or relating to an ADI or a subsidiary of an ADI, that causes the person on that commencement to be an accountable person of that ADI or subsidiary, paragraph 37DA(1)(a) of that Act as so amended does not apply in relation to that person until the end of the period of 90 days after that commencement.

16 Deferral of variable remuneration

- (1) Division 4 of Part IIAA of the *Banking Act 1959* as inserted by this Act applies in relation to the variable remuneration of an accountable person only if the decision granting the accountable person the variable remuneration was made on or after 1 January 2019.
- (2) Despite subitem (1), if an accountable person's variable remuneration is payable under a contract entered into before the day this Act received the Royal Assent, Division 4 of Part IIAA of the *Banking Act 1959* as inserted by this Act does not apply in relation to the variable remuneration until 1 January 2020.
- (3) Despite subitem (1), if:
 - (a) an accountable person's variable remuneration is payable under a contract entered into before the commencement of Part IIAA of the *Banking Act 1959* as inserted by this Act; and
 - (b) apart from this subitem, the application of Division 4 of that Part in relation to the variable remuneration would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph);

that Division does not apply in relation to the variable remuneration to the extent that it would result in such an acquisition.

Note: Because this subitem prevents Division 4 of Part IIAA of the *Banking Act 1959* from giving rise to such an acquisition of property in relation to variable remuneration

payable under such a contract, compensation will not be payable under section 69E of that Act.

17 Accountability statements and accountability maps

- (1) APRA may, by legislative instrument, determine, in relation to accountability statements and accountability maps mentioned in section 37F of the *Banking Act 1959* as inserted by this Act, transitional requirements applying during the period (the *transition period*) of 18 months after the commencement of Part IIAA of the *Banking Act 1959* as so inserted.
- (2) Compliance during the transition period with those transitional requirements, to the extent that they relate to accountability statements, is taken, for the purposes of the *Banking Act 1959*, to be compliance with paragraph 37F(1)(a) of that Act as inserted by this Act.
- (3) Compliance during the transition period with those transitional requirements, to the extent that they relate to accountability maps, is taken, for the purposes of the *Banking Act 1959*, to be compliance with paragraph 37F(1)(b) of that Act as inserted by this Act.
- (4) This item does not limit the ways paragraph 37F(1)(a) or (b) of the *Banking Act 1959* as inserted by this Act may be complied with during the transition period.

18 Application to small and medium ADIs

- (1) Despite item 15 and subitem 16(1), Part IIAA of the *Banking Act 1959* as inserted by this Act applies in relation to the following on and after 1 July 2019:
 - (a) a medium ADI;
 - (b) a small ADI;
 - (c) an accountable person of a medium ADI;
 - (d) an accountable person of a small ADI.
- (2) Despite subitem (1), if:
 - (a) an accountable person's variable remuneration is payable under a contract entered into before the commencement of Part IIAA of the *Banking Act 1959* as inserted by this Act; and

- (b) apart from this subitem, the application of Division 4 of that Part in relation to the variable remuneration would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph);

that Division does not apply in relation to the variable remuneration to the extent that it would result in such an acquisition.

Note: Because this subitem prevents Division 4 of Part IIAA of the *Banking Act 1959* from giving rise to such an acquisition of property in relation to variable remuneration payable under such a contract, compensation will not be payable under section 69E of that Act.

- (3) Despite item 17, transitional requirements determined by APRA under that item apply in relation to a medium ADI, or a small ADI, on and after 1 July 2019.

Schedule 2—Examination powers

Banking Act 1959

1 Subsection 5(1)

Insert:

investigator means a person APRA appoints under subsection 13(4), 13A(1) or 61(1).

lawyer means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person.

2 Subsection 52F(1)

Omit “to APRA”, substitute “, produce a book, account or document or sign a record”.

3 Subsection 52F(2)

After “the information given”, insert “, the record signed or the book, account or document produced”.

4 Paragraph 52F(2)(a)

Omit “before giving the information”, substitute “before complying with the requirement”.

5 Paragraph 52F(2)(a)

After “claims that giving the information”, insert “, signing the record or producing the book, account or document”.

6 Paragraph 52F(2)(b)

After “giving the information”, insert “, signing the record or producing the book, account or document”.

7 Part VII (heading)

Repeal the heading, substitute:

Part VII—Financial records

8 After section 60

Insert:

Part VIII—Powers of APRA

Division 1—Investigations

9 After section 61

Insert:

61A Investigator may require production of books etc.

- (1) If an investigator reasonably believes that a person has custody or control of any books, accounts or documents relevant to the investigator's investigation, the investigator may, by written notice given to the person, require the person to produce any or all of the books, accounts or documents to the investigator.
- (2) A person commits an offence if he or she refuses or fails to comply with a requirement under this section.

Penalty: 30 penalty units.

61B Concealing books, accounts or documents relevant to investigation

A person commits an offence if:

- (a) the person knows that an investigator is investigating, or is about to investigate, a matter; and
- (b) the person:
 - (i) conceals, destroys, mutilates or alters a book, account or document relating to the matter; or
 - (ii) if a book, account or document relating to the matter is in a particular State or Territory—takes or sends the book, account or document out of that State or Territory or out of Australia; and

- (c) the person intended that the investigation or proposed investigation would be delayed or obstructed as a result of that conduct.

Penalty: Imprisonment for 2 years.

Division 2—Examinations

61C Notice requiring appearance for examination

If an investigator reasonably believes or suspects that a person (the *examinee*) can give information relevant to the investigator's investigation, the investigator may, by written notice given to the examinee, require the examinee:

- (a) to give the investigator all reasonable assistance in connection with the investigation; and
- (b) to appear before the investigator for examination.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 61G).

61D Conduct of examinations

- (1) The investigator may examine the examinee on oath or affirmation and may, for that purpose:
 - (a) require the examinee to either take an oath or make an affirmation; and
 - (b) administer an oath or affirmation to the examinee.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 61G).

- (2) The oath or affirmation to be taken or made by the examinee for the purposes of the examination is an oath or affirmation that the statements that the examinee will make will be true.
- (3) The investigator may require the examinee to answer a question that is put to the examinee at the examination and is relevant to a matter that the investigator is investigating, or is to investigate.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 61G).

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- (4) The examiner may make an audio, or audio-visual, recording of all or any part of the examination.

61E Who may be present at examinations

- (1) The examination must take place in private.
- (2) The following people may be present at the examination:
- (a) the investigator;
 - (b) the examinee;
 - (c) the examinee's lawyer;
 - (d) an APRA staff member approved by APRA to be present;
 - (e) a person directed by the investigator to be present.
- (3) A person commits an offence if the person:
- (a) is present at an examination; and
 - (b) is not a person mentioned in subsection (2).

Penalty: 30 penalty units.

- (4) The examinee's lawyer may, at such times during the examination as the investigator determines, address the investigator and examine the examinee about matters about which the investigator has examined the examinee.
- (5) The investigator may require a person to stop addressing the investigator or examining the examinee if, in the investigator's opinion, the person is trying to obstruct the examination by exercising rights under subsection (4).

Note: Failure to comply with a requirement made under this subsection is an offence (see section 61G).

61F Record of examination

Written record of statements

- (1) The investigator must cause a written record (including a transcript of an audio, or audio-visual, recording) to be made of statements made at the examination.

- (2) The investigator may require the examinee to read the written record, or to have it read to him or her, and may require him or her to sign it.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 61G).

Copies of record

- (3) The investigator must give a copy of a written record to the examinee, without charge, but subject to such conditions (if any) as the investigator imposes.

Use of copies

- (4) If the investigator gives a copy of a written record to a person under subsection (3) subject to conditions, the person, or any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

Penalty: Imprisonment for 6 months.

61G Offences

A person commits an offence if he or she refuses or fails to comply with a requirement under this Division.

Penalty: 30 penalty units.

Division 3—Evidentiary use of certain material

61H Statements made at an examination—proceedings against examinee

Admissibility of statements made at examination

- (1) Subject to this section, a statement that a person makes at an examination of the person is admissible in evidence against the person in a proceeding.

Self-incrimination exception

- (2) The statement is not admissible if the statement is not admissible in evidence against the person under section 52F.

Irrelevant statement exception

- (3) The statement is not admissible if it is not relevant to the proceeding and the person objects to the admission of evidence of the statement.

Related statement exception

- (4) The statement (the **subject statement**) is not admissible if:
- (a) it is qualified or explained by some other statement made at the examination; and
 - (b) evidence of the other statement is not tendered in the proceeding; and
 - (c) the person objects to the admission of evidence of the subject statement.

Legal professional privilege exception

- (5) The statement is not admissible if:
- (a) it discloses matter in respect of which the person could claim legal professional privilege in the proceeding if subsection (1) did not apply in relation to the statement; and
 - (b) the person objects to the admission of evidence of the statement.

Joint proceedings

- (6) Subsection (1) applies in relation to a proceeding against a person even if it is heard together with a proceeding against another person.

Record is prima facie evidence

- (7) If a written record of an examination of a person is signed by the person under subsection 61F(2), or is authenticated as mentioned in subsection 290(7) of the *Superannuation Industry (Supervision)*
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Act 1993, the record is, in a proceeding, prima facie evidence of the statements it records.

Admissibility of other evidence

- (8) This Division does not limit or affect the admissibility in the proceedings of other evidence of statements made at the examination.

61J Statements made at an examination—other proceedings

Admissibility of absent witness evidence

- (1) If direct evidence by a person (the **absent witness**) of a matter would be admissible in a proceeding, a statement that the absent witness made at an examination of the absent witness and that tends to establish that matter is admissible in the proceedings as evidence of that matter in accordance with subsection (2).

Requirement for admissibility

- (2) The statement is admissible:
- (a) if it appears to the court or tribunal that:
 - (i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness;
 - (ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not reasonably practicable to secure his or her attendance; or
 - (iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or
 - (b) if it does not so appear to the court or tribunal—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

61K Weight of evidence under section 61J

- (1) If evidence of a statement made by a person at an examination of the person is admitted under section 61J in a proceeding, in
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deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:

- (a) the length of period between the statement and the matter to which the statement relates; and
 - (b) any reason the person may have had for concealing or misrepresenting a material matter; and
 - (c) any other circumstances from which it is reasonable to draw an inference about the accuracy of the statement.
- (2) If the person is not called as a witness in the proceeding:
- (a) evidence that would, if the person had been so called, have been admissible in the proceeding for the purpose of destroying or supporting his or her credibility is so admissible; and
 - (b) evidence is admissible to show that the statement is inconsistent with another statement that the person has made at any time.
- (3) However, evidence of a matter is not admissible under this section if, had the person been called as a witness in the proceeding and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party.

61L Objection to admission of statements made at examination

Notice of intention to apply to admit evidence and statements

- (1) A party (the ***adducing party***) to proceedings may, not less than 14 days before the first day of the hearing of the proceeding, give to another party to the proceeding written notice that the adducing party:
 - (a) will apply to have admitted in evidence in the proceeding specified statements made at an examination; and
 - (b) for that purpose, will apply to have evidence of those statements admitted in the proceeding.

Notice to set out etc. statements

- (2) A notice under subsection (1) must set out, or be accompanied by writing that sets out, the specified statements.

Notice of objection

- (3) Within 14 days after a notice is given under subsection (1), the other party may give to the adducing party a written notice:
- (a) stating that the other party objects to specified statements being admitted in evidence in the proceeding; and
 - (b) specifies, in relation to each of those statements, the grounds of objection.

Extension of objection period

- (4) The period prescribed by subsection (3) may be extended by the court or tribunal or by agreement between the parties concerned.

Notice etc. to be given to court or tribunal

- (5) On receiving a notice given under subsection (3), the adducing party must give to the court or tribunal a copy of:
- (a) the notice under subsection (1) and any writing that subsection (2) requires to accompany that notice; and
 - (b) the notice under subsection (3).

Action by court or tribunal

- (6) If subsection (5) is complied with, the court or tribunal may either:
- (a) determine the objections as a preliminary point before the hearing of the proceeding begins; or
 - (b) defer determination of the objections until the hearing.

Right to object to admission of statement

- (7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceedings, unless:

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- (a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or
 - (b) the court or tribunal gives the other party leave to object to the statement being so admitted.

61M Copies of, or extracts from, certain books, accounts and documents

- (1) A copy of, or an extract from, a book, account or document to which subsection 13(1), 13B(1), 61(2), 61A(1) or 62(1) applies, is admissible in evidence in a proceeding as if the copy was the original book, account or document or the extract were the relevant part of original book, account or document.
- (2) A copy of, or an extract from, a book, account or document is not admissible in evidence under subsection (1) unless it is proved that the copy or extract is a true copy of the book, account or document, or of the relevant part of the book, account or document.
- (3) For the purposes of subsection (2), a person who has compared:
 - (a) a copy of a book, account or document with the book, account or document; or
 - (b) an extract from a book, account or document, with the relevant part of the book, account or document;may give evidence, either orally or by an affidavit or statutory declaration, that the copy or extract is a true copy of the book, account or document, or relevant part of the book, account or document.

61N Report under section 61

Subject to section 61P, if a copy of a report under subsection 61(1) purports to be certified by APRA as a true copy of such a report, the copy is admissible in a proceeding (other than a criminal proceeding) as prima facie evidence of any facts or matters that the report states an investigator to have found to exist.

61P Exceptions to admissibility of report

- (1) If a party to a proceeding tenders a copy of a report as evidence against another party, the copy is not admissible under section 61N
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in the proceeding as evidence against the other party unless the court or tribunal is satisfied that:

- (a) a copy of the report has been given to the other party; and
 - (b) the other party, and the other party's lawyer, have had a reasonable opportunity to examine that copy and to take its contents into account in preparing the other party's case.
- (2) Before or after the copy tendered in evidence is admitted in evidence, the other party may apply to cross-examine, in relation to the report, a specified person who, or 2 or more specified persons each of whom:
- (a) was concerned in preparing the report or making a finding about a fact or matter that the report states the investigator to have found to exist; or
 - (b) whether or not pursuant to a requirement made under this Part, gave information, or produced a book, account or document, on the basis of which, or on the basis of matters including which, such a finding was made.
- (3) The court or tribunal must grant an application made under subsection (2) unless it considers that, in all the circumstances, it is not appropriate to do so.
- (4) The court or tribunal must refuse to admit the copy, or must treat the copy as not having been admitted, if:
- (a) the court or tribunal grants the application or applications made under subsection (2); and
 - (b) one or more persons to whom the application or any of the applications relates:
 - (i) are unavailable; or
 - (ii) do not attend to be cross-examined in relation to the report; and
 - (c) the court or tribunal is of the opinion that to admit the copy under section 61N in the proceeding as evidence against the other party without the other party having the opportunity to cross-examine the other person or persons would unfairly prejudice the other party.

61Q Material otherwise admissible

Nothing in this Division renders evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding if this Division had not been enacted.

Division 4—Information**10 After section 62**

Insert:

Division 5—Miscellaneous**62AA Legal professional privilege**

- (1) This section applies if:
 - (a) under this Act, a person requires a lawyer;
 - (i) to give information; or
 - (ii) to produce a book, account or document; and
 - (b) either:
 - (i) giving the information would involve disclosing; or
 - (ii) the book, account or document contains;
a privileged communication made by, or on behalf of or to the lawyer in his or her capacity as a lawyer.
- (2) The lawyer is entitled to refuse to comply with the requirement unless:
 - (a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is under administration or is being wound up—the administrator or the liquidator of the body; or
 - (b) otherwise—the person to whom, or by or on behalf of whom, the communication was made;
consents to the lawyer complying with the requirement.
- (3) If the lawyer so refuses, he or she must, as soon as practicable, give to the person who made the requirement a written notice setting out:

- (a) if the lawyer knows the name of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and
 - (b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and
 - (c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the book, account or document, or the part of the book, account or document, containing the communication.
- (4) A person commits an offence if he or she refuses or fails to comply with a requirement under this section.

Penalty: 30 penalty units.

62AB Powers of Court relating to non-compliance with this Act

- (1) If APRA or an investigator is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Act, APRA or the investigator may by writing certify the failure to the Federal Court of Australia.
- (2) If APRA or the investigator certifies the failure under subsection (2), the Federal Court of Australia may inquire into the case and may order the person to comply with the requirement as specified in the order.

11 Before section 62A

Insert:

Part IX—Miscellaneous

12 Application of amendments

The amendments made by this Schedule apply in relation to investigations that commence on or after the commencement of this Schedule.

*[Minister's second reading speech made in—
House of Representatives on 19 October 2017
Senate on 6 February 2018]*

(244/17)

No. 5, 2018

*Treasury Laws Amendment (Banking Executive Accountability and
Related Measures) Act 2018*

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