
FINANCIAL ACCOUNTABILITY REGIME BILL 2021

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of contents

Glossary..... 1

Chapter 1 The Financial Accountability Regime..... 3

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
APRA	The Australian Prudential Regulation Authority
ASIC	The Australian Securities and Investments Commission
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Financial Services Royal Commission Final Report	The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
the Regulator	Generally, the Regulator is both APRA and ASIC. However, if an accountable entity does <i>not</i> hold an Australian financial services licence or an Australian credit licence, then the Regulator for that accountable entity and its significant related entities and accountable persons is only APRA.

Chapter 1

The Financial Accountability Regime

Outline of chapter

- 1.1 This chapter provides an overview of the Financial Accountability Regime.
- 1.2 Throughout this chapter, the Bill refers to the Financial Accountability Regime Bill 2021.

Context of measure

1.3 The Australian financial system is central to the economy and plays an essential role in promoting economic growth. Decisions taken by directors and senior executives of financial institutions are important and have flow on effects for the Australian economy and for consumers.

1.4 A key objective of the Financial Accountability Regime is to improve the operating culture of entities in the banking, insurance and superannuation sectors and to increase transparency and accountability across these sectors—both in relation to prudential matters and conduct-related matters.

1.5 The *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* enacted the Banking Executive Accountability Regime, which commenced on 1 July 2018. The Banking Executive Accountability Regime is an accountability framework for directors and senior executives of authorised deposit-taking institutions (entities that carry on banking business) and their subsidiaries.

1.6 The Financial Services Royal Commission made a number of recommendations relating to extending the Banking Executive Accountability Regime to other APRA-regulated industries and to have APRA and ASIC jointly administer the extended regime.

1.7 As part of the Government’s response to the Financial Services Royal Commission Final Report on 4 February 2019, the Government announced it would implement:

- recommendation 3.9—to extend provisions modelled on the Banking Executive Accountability Regime to registrable superannuation entity licensees;

- recommendation 4.12—to extend provisions modelled on the Banking Executive Accountability Regime to insurers regulated by APRA;
- recommendation 6.6—to have APRA and ASIC jointly administer the Banking Executive Accountability Regime;
- recommendation 6.7—to make it clear that authorised deposit-taking institutions and their accountable persons must deal with both APRA and ASIC in an open, constructive and cooperative way; and
- recommendation 6.8—to have APRA and ASIC jointly administer the extended regime.

1.8 The Financial Accountability Regime is the Government’s implementation of those Financial Services Royal Commission recommendations. The Regime is designed to improve the risk and governance cultures of Australia’s financial institutions by imposing a strengthened responsibility and accountability framework for those institutions and the directors and the most senior and influential executives (accountable persons) of those institutions.

Summary of new law

1.9 The Financial Accountability Regime imposes four core sets of obligations:

- accountability obligations—which require entities in the banking, insurance and superannuation sectors and their directors and most senior and influential executives to conduct their business in a certain manner;
- key personnel obligations—which require entities in the banking, insurance and superannuation sectors to ensure that all areas of their operations and those of their group are attributed to directors and most senior and influential executives that are regulated by the Regime;
- deferred remuneration obligations—which require entities in the banking, insurance and superannuation sectors to defer at least 40 per cent of the variable remuneration (for example, bonuses and incentive payments) of their directors and most senior and influential executives for a minimum of 4 years, and for their variable remuneration to be reduced where accountability obligations are breached; and

- notification obligations—which require:
 - entities in the banking, insurance and superannuation sectors to meet the core notification requirements to provide the Regulator with certain information about them and their directors and most senior and influential executives; and
 - for entities above a certain threshold, which will be determined by rules made by the Minister under the Bill, those entities will need to prepare and submit accountability statements and accountability maps.

1.10 The Regime will apply to authorised deposit-taking institutions and their authorised non-operating holding companies from the later of 1 July 2022 or six months after commencement. Once the Regime has taken effect for such bodies, the Banking Executive Accountability Regime will be repealed.

1.11 The Regime can be additionally applied to any class of the financial institutions listed below:

- general insurers;
- life insurers;
- registered or authorised non-operating holding companies of the above entities;
- private health insurers; and
- registrable superannuation entity licensees (or RSE licensees).

1.12 The Regime will take effect for a class of these entities listed in paragraph 1.11 after the Minister makes a declaration to apply the Regime to that class. The proposed commencement day for these entities is the later of 1 July 2023 or 18 months after commencement of the Regime.

1.13 Entities to which the Regime applies are referred to in the Bill as ***accountable entities***.

1.14 The directors and most senior and influential executives of accountable entities regulated by the Regime will also be directly regulated by the Regime. The directors and senior executives regulated by the Regime will be determined by:

- a general principle set out in the Bill, which applies to persons having actual or effective senior executive responsibility for management or control of the accountable entity or its relevant group; and

- a list of prescribed responsibilities and/or positions that will be set out in rules made by the Minister under the Bill— including responsibilities to particular kinds of accountable entities.

1.15 These directors and senior executives are referred to in the Bill as **accountable persons**.

1.16 The Regime directly regulates the conduct of accountable persons by giving the Regulator the power to disqualify someone from being an accountable person of an authorised deposit-taking institution, an insurer, a registrable superannuation entity licensee or a licensed non-operating holding company. The Regulator may also direct an accountable entity to reallocate responsibilities of an accountable person to address prudential risks or systemic risks of non-compliance.

1.17 The Regime will be jointly administered by APRA and ASIC under administration and enforcement provisions set out in the Bill. However, for entities not licensed under financial services law or credit legislation, the Regime is regulated solely by APRA. The Bill refers to APRA and ASIC collectively (or just to APRA, where it is the sole regulator) as the **Regulator**.

Detailed explanation of new law

1.18 The object of the Financial Accountability Regime is to impose a strengthened accountability framework for certain entities in the banking, insurance and superannuation sectors and their directors and most senior and influential executives. [Section ^3]

1.19 The Regime will achieve this by placing legal obligations on certain entities within these sectors, referred to as **accountable entities**. Some corporate groups may have multiple accountable entities. [Section ^8]

1.20 Some of the legal obligations in the Regime will require an accountable entity to take reasonable steps to ensure that its **significant related entities** (for most entities, its significant subsidiaries) comply with certain obligations under the Regime. However, those significant related entities will not generally be subject to direct legal obligations under the Regime. [Section ^11]

1.21 The Regime also places legal obligations on persons who hold key positions or responsibilities such as the directors and most senior and influential executives of accountable entities, referred to as **accountable persons**. [Section ^9]

1.22 The Bill provides a number of definitions to create the new Regime and interact smoothly with existing frameworks. [Section ^7]

Entities regulated by the Financial Accountability Regime

Accountable entities

1.23 The Financial Accountability Regime imposes strengthened obligations on certain entities in the banking, insurance and superannuation sectors. It does this by regulating *accountable entities*.

1.24 An accountable entity is generally the entity which is licensed or otherwise authorised by APRA to carry on banking, insurance or superannuation business.

1.25 In the banking sector, the following bodies corporate are accountable entities:

- an authorised deposit-taking institution under the *Banking Act 1959*; and
- an authorised non-operating holding company under the *Banking Act 1959*.

[Section 8(1)]

1.26 In other financial industries, the Minister may declare by legislative instrument that bodies corporate of one or more of the following classes are accountable entities:

- for general insurance:
 - a general insurer under the *Insurance Act 1973*;
 - an authorised non-operating holding company of a general insurer under the *Insurance Act 1973*;
- for life insurance:
 - a life company registered under the *Life Insurance Act 1995*;
 - a registered non-operating holding company of a life insurer under the *Life Insurance Act 1995*;
- for private health insurance—a private health insurer under the *Private Health Insurance (Prudential Supervision) Act 2015*; and
- for superannuation—a licensed trustee of a superannuation entity (a registrable superannuation entity licensee or RSE licensee under the *Superannuation Industry (Supervision) Act 1993*).

[Section 8(3) and (5)]

1.27 To be an accountable entity, a body corporate must also be a constitutionally covered body, meaning it is a constitutional corporation or

carries on the business of banking, insurance or superannuation as required by section 12 – or its conduct affects (or could affect) such another body corporate. [Sections ^8(1)(b), ^8(3)(b), and ^12]

1.28 The Financial Accountability Regime will take effect progressively over time in relation to different classes of entities in the banking, insurance and superannuation sectors.

1.29 In the banking sector, the Regime will apply to accountable entities from the later of 1 July 2022 or six months after commencement of the Bill. [Section ^8(2)]

1.30 For entities in the other financial industries, the Regime will apply from the later of the day six months after commencement of the Minister’s declaration in relation to that class of entity, or the day specified in the Minister’s declaration. [Section ^8(4)]

1.31 The proposed commencement day for these other entities is the later of 1 July 2023 or 18 months after commencement of the Regime.

Significant related entities

1.32 The Financial Accountability Regime imposes some obligations on an accountable entity in relation to its ***significant related entities***.

Significant related entities of accountable entities (other than for superannuation)

1.33 In general (other than for superannuation), an entity will be a significant related entity of an accountable entity if it is:

- a subsidiary of the accountable entity; and
- the effect of the subsidiary on the accountable entity is material and substantial.

[Section ^11(1)]

1.34 The Bill sets out a list of factors to assist an accountable entity or a court in considering whether the relationship between an accountable entity and another entity is sufficiently material and substantial, to make the other entity a significant related entity. [Section ^11(4)]

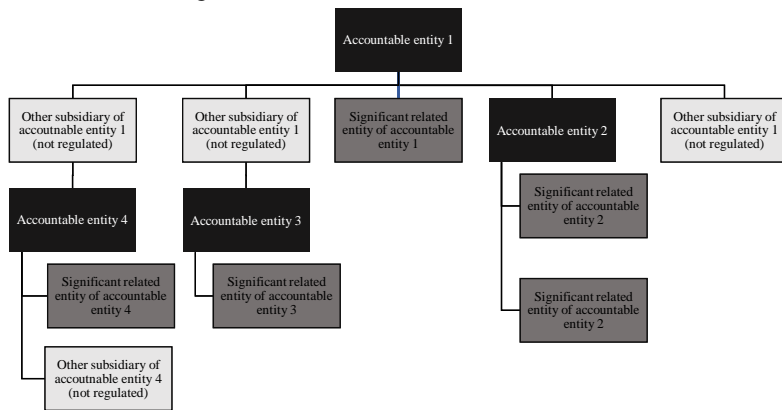
1.35 The Regime recognises that related entities’ operations may be significant to the accountable entity’s business, and that consumers often associate the wide range of financial services and activities provided by their significant related entities under the accountable entity’s brand. Poor behaviour in a significant related entity can have a negative effect on the accountable entity’s brand and public standing, and has the potential to adversely affect the prudential standing or prudential reputation of the accountable entity itself.

1.36 In general, a given significant related entity can only be related to one accountable entity, being its closest parent accountable entity. This rule provides clarity around the operation of the Regime and ensures that each significant related entity is the sole responsibility of its most closely related accountable entity. [Section 11(2)]

1.37 As for an accountable entity, a significant related entity must be a constitutionally covered body meeting the requirements of section 12. [Sections 11(1)(c) and 12]

Diagram 1.1—Accountable entities and their significant related entities

The below corporate group contains four accountable entities (none of which are in the superannuation sector), each of which have obligations in relation to the conduct of its significant related entities.



Significant related entities for superannuation

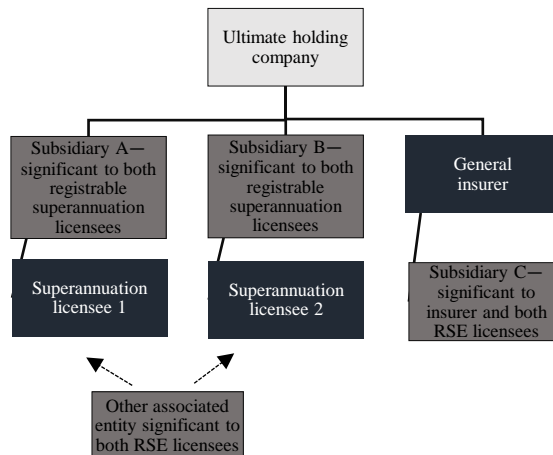
1.38 A significant related entity of an accountable entity that is a registrable superannuation entity licensee (or RSE licensee) includes a wider variety of entities than subsidiaries. This includes entities such as other related bodies corporate of the licensee and entities with certain control relationships with the licensee (see also the definition of **connected entity** in section 10 of the *Superannuation Industry (Supervision) Act 1993*, and section 50AAA of the *Corporations Act 2001*). [The definition of ‘connected entity’ in section 7 and section 11(3)]

1.39 Different related entities are covered by the Regime for registrable superannuation entity licensees as they may have a different operating structure to other types of accountable entities. In particular, a connected entity of a registrable superannuation entity licensee could have a material and substantial impact on the licensee but may not be a subsidiary of the licensee. These connected entities can be significant related entities of registrable superannuation entity licensees. Additionally, unlike other accountable entities, a related entity can be a

significant related entity of more than one registrable superannuation entity licensee.

Diagram 1.2—Significant related entities of registrable superannuation entity licensees

The below group of entities contains three accountable entities, two registrable superannuation entity licensees and a general insurer. The other controlling entity provider is a significant related entity to both funds, as are subsidiaries A and B. Subsidiary C is a significant related entity to both funds and the general insurer. The other associated entity is associated with both funds and is a significant related entity to both of those funds. In each of these cases, more than one accountable entity will be responsible for each of these significant related entities.



Accountable persons

1.40 The conduct of a business is ultimately determined by its directors and its most senior and influential executives. These directors and executives of accountable entities are regulated by the Financial Accountability Regime as *accountable persons*.

1.41 The Regime places a series of obligations on accountable persons such as requirements to act with honesty and integrity, and with due skill, care and diligence and deal with APRA and ASIC in an open, constructive and cooperative way. Breaches can result in disqualification as accountable persons.

1.42 A person is an accountable person if the person:

- holds a position in the accountable entity or a significant related entity; and
- has senior executive responsibility for management or control of the accountable entity or a significant or

substantial part or aspect of the operations of the accountable entity or the accountable entity and its group of significant related entities.

[Section ^9(1) and (6)]

1.43 An accountable person also includes any person who holds a position in relation to an accountable entity and who has one of the prescribed responsibilities or positions listed in the Minister rules. The Minister rules may identify a kind of responsibility by reference to the level or matter of responsibility. *[Section ^9(2) to (4)]*

1.44 One person can be an accountable person of multiple accountable entities and can hold multiple prescribed responsibilities or positions listed in the Minister rules. An accountable person may also be employed by a body other than the accountable entity or one of its significant related entities.

1.45 In practice, accountable persons will generally only include the directors and senior executives of an entity, such as the Chief Executive Officer and officers reporting directly to the Chief Executive Officer. Therefore, lower level executives are generally not expected to be accountable persons under the Regime.

1.46 For a foreign accountable entity in the banking or insurance sectors, the accountable persons' responsibilities will relate to the Australian branch, rather than to the entity as a whole. *[Section ^9(5)]*

1.47 Despite the above, the Regulator can, by written notice, exclude certain responsibilities from the Regime, meaning that persons with only those excluded responsibilities are *not* accountable persons. This exclusion can be done:

- in relation to a particular entity; or
- in relation to a class of entities.

[Section ^10(1) to (4)]

1.48 The written notice to exclude certain responsibilities from the Regime is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. *[Section ^10(5)]*

Obligations in the Financial Accountability Regime

Outline of obligations in the Regime

Obligations of accountable entities

1.49 Under the Regime, accountable entities must comply with their accountability obligations, key personnel obligations, deferred

remuneration obligations and notification obligations (as described below). [Section ^13(1)]

1.50 If an accountable entity fails to comply with any of these obligations, it may be subject to a civil penalty of up to 50,000 penalty units, three times the value of the benefit derived or detriment avoided by the entity, or 10 per cent of the entity's annual turnover up to 2.5 million penalty units. For further analysis of the civil penalties in the Regime please see paragraphs 1.124-1.129 and 1.197-1.202 below. [Sections ^76 to ^78]

1.51 Contravention may also enable other enforcement actions to be taken under the Regime such as a direction by a Regulator, or under another Act regulating the relevant accountable entity (e.g. for authorised deposit-taking institutions under the *Banking Act 1959*). [See for example section ^60]

Obligations of accountable persons

1.52 Under the Regime accountable persons must comply with their accountability obligations. [Section ^16(1)]

1.53 If an accountable person fails to comply with any of these obligations, their variable remuneration will need to be reduced by the accountable entity or significant related entity by an amount proportionate to the failure. [Section ^23]

1.54 Failure to comply with an obligation may also enable other enforcement actions to be taken under the Regime, such as disqualification of the accountable person or reallocation of their responsibilities. [Sections ^39 and ^61]

Exemptions of accountable entities and accountable persons from obligations

1.55 The Minister has the power to exempt a particular accountable entity or a class of entities from the obligations under the Regime. Where this is done, the obligations will not apply to the accountable entity, to any of its significant related entities, or to an accountable person of the entity. [Sections ^13(2)(a), ^14, and ^16(2)]

1.56 The obligations apply to a foreign accountable entity (in the banking or insurance sectors), but only to the operations of the entity's branch in Australia. The obligations apply to the same extent to an accountable person of such an entity or any of its significant related entities. [Sections ^13(2)(b) and ^16(2)]

1.57 An accountable entity or an accountable person is not required to comply with an obligation in the Regime if the Regulator is satisfied that the entity or person complying with the obligation would breach a corresponding foreign law. [Sections ^13(3), ^15, ^16(3), and ^17]

1.58 Certain decisions of the Regulator relating to these exemptions are subject to reconsideration by the Regulator, and to review by the Administrative Appeals Tribunal. See below for explanation of reviewable decisions and the merits review process. [Sections ^15, ^17, and ^86]

Accountability obligations

Accountability obligations of accountable entities

1.59 The Bill establishes obligations of an accountable entity under the Financial Accountability Regime, which relate to both conduct-related and prudential matters. [Section ^18]

1.60 An accountable entity must take reasonable steps to conduct its business with honesty and integrity, with due skill, care and diligence, and in a manner that prevents adverse impact on its prudential standing. [Section ^18(a) and (c)]

1.61 These obligations extend beyond those currently in the Banking Executive Accountability Regime by requiring entities to deal in an open, constructive and cooperative way to both APRA and ASIC. [Section ^18(b)]

1.62 An accountable entity is also required to take reasonable steps to ensure that:

- its accountable persons comply with their own accountability obligations; and [Sections ^18(d) and ^19]
- its significant related entities comply with the accountability obligations of an accountable entity as if it were an accountable entity. [Section ^18(e)]

1.63 An accountable entity must comply with each of these obligations. For instance, not acting with due skill would result in the accountable entity failing to meet its accountability obligations.

Accountability obligations of accountable persons

1.64 The obligations of an accountable person under the Financial Accountability Regime are set out in the Bill. These obligations relate to both conduct-related and prudential matters. [Section ^19]

1.65 An accountable person is required to act with honesty and integrity, with due skill, care and diligence, and in a manner that prevents adverse impact to the entity's prudential standing. [Section ^19(a) and (c)]

1.66 These obligations extend beyond those currently in the Banking Executive Accountability Regime by:

- extending the requirement for accountable persons to deal in an open, constructive and cooperative way to both APRA and ASIC; and [Section ^19(1)(b)]

- introducing a new obligation to require accountable persons to take reasonable steps, in conducting their responsibilities, to ensure the accountable entity complies with certain laws relating to the financial sector. [Section ^19(1)(d)]

1.67 The accountable person would only be required to take reasonable steps to ensure compliance by the entity with the laws that apply to the business of the entity that is within their area of responsibility.

1.68 If multiple accountable persons have the same responsibility for the same accountable entity, they are jointly and severally liable for any breaches in relation to that responsibility. This is designed to prevent accountable persons from avoiding their obligations under the Regime by shifting responsibility to other accountable persons. [Section ^19(2)]

1.69 An accountable person must comply with each of these obligations. For instance, not acting with due diligence would result in the accountable person failing to meet their accountability obligations.

Taking reasonable steps

1.70 The Bill provides additional detail on what amounts to taking reasonable steps to support proactive compliance by accountable persons and accountable entities, rather than a set-and-forget attitude. This includes taking appropriate action to ensure compliance and in response to non-compliance, or suspected non-compliance, in relation to a particular matter. [Section ^20]

Key personnel obligations

1.71 The Financial Accountability Regime requires accountable entities to ensure that the responsibilities of their accountable persons collectively cover all parts or aspects of their business including the business of their significant related entities. [Section ^21]

1.72 This will include having accountable persons who are responsible for all of the responsibilities prescribed in the Minister rules. [Section ^21(1)(a)(ii)]

1.73 Accountable entities are not required to have accountable persons for responsibilities which have been excluded by the Regulator. [Section ^21(2)]

1.74 Foreign accountable entities (in the banking and insurance sectors) are only required to comply with the key personnel obligations in relation to the operations of their Australian branches. [Section ^21(3)]

1.75 An accountable entity is required to ensure each of its accountable persons (and those of its significant related entities) is registered with the Regulator before occupying an accountable person

role, and has not been disqualified by the Regulator. [Sections ^21(1)(b) and ^22]

1.76 However, accountable persons filling temporary vacancies or unforeseen vacancies have up to 90 days after becoming an accountable person to be registered. Appointing an accountable person to fill a permanent position on a fixed-term contract will not constitute a temporary vacancy to which this longer period will apply (the vacancy itself must be temporary). The Regulator can extend this period in relation to particular entities by written notice, or generally in the Regulator rules. [Section ^22(2) to (5)]

Deferred remuneration obligations

1.77 The Regime requires accountable entities and their significant related entities to defer at least 40 per cent of the variable remuneration of each of their accountable persons (for example, bonuses and incentive payments) for a minimum of four years. [Sections ^23(1), ^25, and ^26]

1.78 The Regime also requires accountable entities:

- to have a remuneration policy that requires the variable remuneration of accountable persons to be reduced if they breach their accountability obligations;
- not to pay variable remuneration that has been reduced; and
- to take reasonable steps to ensure that their significant related entities comply with the above.

[Section ^23(1)]

1.79 The amount an accountable person's variable remuneration is reduced by is determined by the accountable entity or significant related entity. The amount reduced must be proportionate to the failure to comply with the person's obligations. It does not need to relate to the period in which the failure occurred, and the accountable person may not have any variable remuneration left after the reduction. [Section ^23(2)]

1.80 The requirement to defer variable remuneration ensures that accountable persons have clear incentives to promote effective risk management when making decisions which have longer-term effects. It also ensures that accountable persons are properly held to account for those decisions that have negative future consequences.

When do deferred remuneration obligations apply?

1.81 The Regime applies to variable remuneration, which is remuneration conditional on the accountable person achieving particular objectives (such as performance metrics and service requirements). The deferral requirement does not apply to ordinary salary and wages nor does it apply to an accountable person whose total remuneration does not include any variable remuneration. [Section ^24(1)(a)]

1.82 The Regime applies to variable remuneration paid in cash and also other forms of remuneration such as shares and options. [Section ^23(3)]

1.83 The remuneration can be paid directly by the accountable entity but also other entities in the corporate group to which the accountable entity belongs. [Section ^23(3)]

1.84 For the Regime to apply to the variable remuneration paid by other entities in a corporate group, the variable remuneration must be wholly or partly related to the accountable person's role, and cannot be solely remuneration for other work that they may perform. [Section ^23(3)]

1.85 The Regulator can also include or exclude certain types of remuneration from the Regime as being variable remuneration, either for a particular entity or entities generally (including a class of entities). Decisions of the Regulator relating to variable remuneration are subject to reconsideration by the Regulator, and to review by the Administrative Appeals Tribunal. [Sections ^24(1)(b) and (2) to (5), and ^86]

Minimum amount of variable remuneration to be deferred

1.86 Generally, the Regime requires at least 40 per cent of a person's variable remuneration for the relevant financial year to be deferred. The meaning of financial year is specific to each accountable entity. [Section ^25(1) and (5), and the definition of 'financial year' in section ^7]

1.87 The Regulator may determine a method for working out how much variable remuneration is to be deferred, either for a particular accountable entity or significant related entity or for a class of such entities. This could be used for particular forms of remuneration such as shares and options. If this is not done, the value of the remuneration to be deferred is based on the value it would have had if it was paid at the start of the minimum deferral period and is calculated based on maximum opportunity. [Section ^25(2) to (5)]

1.88 Decisions of the Regulator relating to variable remuneration are subject to reconsideration by the Regulator, and to review by the Administrative Appeals Tribunal. [Section ^86]

Minimum period of deferral

1.89 Generally, the Regime requires the accountable person's variable remuneration to be deferred for at least four years. [Section ^26(1) to (4)]

1.90 There are two circumstances in which the minimum deferral period may be shorter than four years:

- if a person stops being an accountable person due to death, or serious illness, disability or incapacity; or [Section ^26(4)]

- if the Regulator determines other circumstances allowing for a shorter deferral period, either generally or for the particular entity. [Section ^26(4) to (6)]

1.91 The accountable person may have a shorter minimum deferral period on the occurrence of one of the listed circumstances without approval from the Regulator. However, the shorter minimum deferral period will not end until the accountable entity is reasonably satisfied that the person has complied with their accountability obligations. If the accountable entity is never so satisfied, the default approach of four years applies, and the amount of deferred remuneration may be reduced by an amount proportionate to the failure to meet obligations. [Section ^26(4)]

1.92 The deferral period will start on the later of:

- the day after the day on which the decision was first made for the accountable person to be able to earn the amount of variable remuneration;
- the first day of the performance period, if the variable remuneration is measured by reference to that period. [Section ^26(2)]

1.93 If the variable remuneration is remuneration of a kind determined by the Regulators or prescribed by the Regulator rules, then the deferral period may start on the day determined by the Regulators. [Section ^26(3)]

1.94 The deferral period is intended to be consistent with provisions of APRA's proposed prudential standard to regulate remuneration in APRA-regulated industries (*Prudential Standard CPS 511 Remuneration*) that would also require deferral of variable remuneration for an overlapping class of persons in those industries. This will enable persons regulated by both regimes to comply with the requirements under each framework.

1.95 If an accountable entity discovers during the period that an accountable person is likely to have breached their accountability obligations, then the deferral period will be extended until such time as the entity completes its investigation of the breach. [Section ^26(4)]

Exemptions

1.96 The deferred remuneration obligations do not apply to an accountable person whose deferred variable remuneration in a particular financial year for the accountable person's entity would be less than a certain threshold. Generally, the threshold is \$50,000. The Minister can make an instrument determining a different amount. [Section ^27]

1.97 The deferred remuneration obligations do not apply to an accountable person while the person is filling a temporary or an unforeseen vacancy, who is not registered or required to be registered

under the Regime because they only hold the position for 90 days or less. [Section ^28]

Notification obligations

1.98 The Regime requires an accountable entity to provide the Regulator with particular information about the entity and its accountable persons. All accountable entities are required to comply with the core notification obligations, while a subset of such entities is required to comply with the enhanced notification obligations. [Section ^29]

Core notification obligations

1.99 Each accountable entity must notify the Regulator of certain events relating to the accountable persons of the entity, as well as to certain breaches of the Regime by the entity or its accountable persons. [Sections ^29(1)(a) and ^30]

1.100 There are two new events that must be notified to the Regulator beyond the events requiring notification under the Banking Executive Accountability Regime. They are when:

- the accountable entity reasonably believes that it has breached its key personnel obligations; and
- a material change occurs to information on the register of accountable persons about an accountable person.

[Section ^30(d)(i) and (e)]

1.101 The Regime also requires accountable entities to take reasonable steps to ensure their significant related entities comply with these requirements as if they were accountable entities. [Section ^29(1)(b)]

1.102 Generally, the notification must be provided within 30 days of the event occurring. The notice must be provided using the form approved by the Regulator. [Section ^29(5) and (6)]

1.103 The Regulator can provide for a longer period than 30 days for compliance. [Section ^29(5)(b)]

Enhanced notification obligations – accountability statements and maps

1.104 In addition to the core notification obligations, accountable entities that meet the enhanced notification threshold are required to provide the Regulator with an ***accountability statement*** for each of its accountable persons and an ***accountability map***. [Section ^29(2)]

1.105 An accountability statement is a comprehensive statement of the accountable person's responsibilities, and any other matters determined in the Regulator rules. [Section ^31(a)]

1.106 An accountability statement must also include a statement by the accountable person declaring that the content of the accountability

statement is accurate, and that the person understands their accountability obligations. [Section ^31(b)]

1.107 An accountability map is a document outlining all the accountable persons in a group comprised of the accountable entity and its significant related entities, the responsibilities of each accountable person and the lines of reporting and responsibility between those accountable persons, any other matters determined in the Regulator rules. [Section ^32]

1.108 The Minister rules will outline the threshold to determine which accountable entities will need to comply with the enhanced notification requirements. [Section ^29(3) and (4)]

1.109 The accountability statement of an accountable person must accompany the person's application for registration. [Section ^38(2)(d)]

1.110 An accountability map must be provided to the Regulator within 30 days of an entity becoming subject to the Financial Accountability Regime, or within the period set in the Regulator rules. [Section ^29(2)(c) and (5)]

1.111 Generally, an accountable entity must ensure the Regulator is notified of any material change to the accountability map and accountability statement(s) within 30 days of the change occurring. The Regulator rules can prescribe an entity a different period. [Section ^29(2)(b) and (d)]

1.112 The Regime also requires accountable entities to take reasonable steps to ensure their significant related entities provide accountability statements as if they were accountable entities. [Section ^29(2)(e)]

1.113 The Banking Executive Accountability Regime required all authorised deposit-taking institutions to provide accountability maps and statements to APRA, and to notify APRA of all changes to accountability maps and statements. The Financial Accountability Regime reduces the regulatory burden and compliance costs by only requiring accountable entities that meet the enhanced notification threshold to prepare and submit accountability maps and statements and to notify the Regulator of material changes to these documents. The Regulator may provide guidance on what constitute material changes.

Administration and enforcement

General administration

1.114 The Regime will be administered and enforced by both APRA and ASIC. This will ensure the Regime is enforced from both a prudential perspective and a conduct and consumer outcomes-based perspective. [Section ^33]

1.115 ASIC will only be able to administer or enforce the Regime in relation to an accountable entity that has either an Australian financial services licence or an Australian credit licence, its significant related entities and accountable persons of these entities. However, this will not limit ASIC's powers to make legislative instruments (the Regulator rules) under the Bill. [Section ^33]

1.116 APRA and ASIC are required to enter into an arrangement outlining their general approach to administering and enforcing the Regime within 6 months of the commencement of the Bill. If this does not occur, the Minister may determine an arrangement for this purpose. [Section ^34]

1.117 APRA and ASIC are required to reach agreement before exercising certain powers or performing certain functions under the Regime except in cases of administration of the Register, and certain compliance and enforcement decisions. [Section ^35]

Information sharing

1.118 APRA and ASIC may share information that is obtained, produced, or disclosed under or for the purposes of the Bill, and are required to share certain information necessary to enable the joint administration and enforcement of the Regime. This is in addition to other information-sharing frameworks available to APRA and ASIC under the enabling legislation for the Regulators. [Section ^36]

1.119 One Regulator does not need to notify any person that it plans to, or has, shared information with the other Regulator. This will enable APRA and ASIC to efficiently perform their functions as joint regulators of the Bill. While the natural justice hearing rule will not apply to the act of information sharing between the Regulators, this is a limited restriction as procedural fairness will still be afforded in relation to uses of the shared information. This approach ensures the interests of affected persons are taken into account in making substantive decisions. [Section ^36(4)]

Administration and enforcement powers

1.120 Both APRA and ASIC have a variety of tools to administer and enforce the Regime. These include:

- maintaining an up-to-date register of accountable persons;
- civil penalties in relation to non-compliance by accountable entities;
- the power to require accountable entities, significant related entities and accountable persons to provide information or documents to the Regulator;

- the power to conduct investigations (including examinations) into possible contraventions of the Regime;
- the power to disqualify a person from being an accountable person for a period;
- the power to direct an accountable entity to reallocate responsibilities of its accountable persons;
- the power to direct an accountable entity in relation to non-compliance by an accountable entity or its accountable persons;
- the power to accept enforceable undertakings;
- the power to seek an injunction order from a Court; and
- the power to apply to a Court for an order to enforce a requirement made under the Act.

Registration of accountable persons

1.121 The Regulator must establish a register of accountable persons covered by the Regime. This will enable clear oversight of the accountable persons of each accountable entity and its significant related entities. The register will include details in relation to each accountable person's role, for example, name and date of registration. [Section ^37]

1.122 For a person to be registered under the Regime, an application must be submitted to the Regulator by their accountable entity using an approved form, and include a signed declaration from the accountable entity that the person is suitable to be an accountable person. If the accountable entity meets the enhanced notification threshold, the application must also include the accountability statement for the accountable person. The accountable entity must also provide any further information requested by the Regulator in relation to the application. [Section ^38(1) to (3)]

1.123 The Regulator is required to register an accountable person within the later of 21 days after an application is made, or 21 days after the day, any further requested information is given to the Regulator by the accountable entity. [Section ^38(4) and (5)]

Civil penalties for contravention of the Regime

1.124 An accountable entity that breaches its obligations under the Regime may be subject to a civil penalty. [Section ^76]

1.125 The maximum penalty for a body corporate, including an accountable entity, is calculated using a formula where the maximum penalty is at least 50,000 penalty units. The maximum penalty may be

greater depending on the benefit derived or detriment avoided by the entity, and the entity's annual turnover. [Section ^78(1) and (2)]

1.126 The maximum civil penalties are necessary to provide a strong deterrence to malfeasance or non-compliance in the industry, the performance of which is central to the broader economy. The method for calculating the pecuniary penalty applicable provides flexibility and ensures the penalty reflects the seriousness of the contravention and community expectations. The penalties will further ensure that incurring a civil penalty is not considered a cost of doing business, and the amount is appropriate to deter and punish misconduct.

1.127 In practice, it is intended that courts would determine which method provides the greatest penalty, and then use discretion to impose an appropriate penalty up to that amount.

1.128 The civil penalties in the Regime are consistent with some of the ASIC-administered regimes, including the *Corporations Act 2001*, *Insurance Contracts Act 1984*, *Australian Securities and Investments Commission Act 2001*, and the *National Consumer Credit Protection Act 2009*, and are comparable to those in the Banking Executive Accountability Regime.

1.129 The Regulator has the power to commence civil penalty proceedings in the Federal Court. Civil penalty provisions will be enforced under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*, with modifications set out in the Bill to provide for the maximum penalties set out above, and to ensure that additional matters relevant to the Regime are taken into account by a court in determining the appropriate penalty. [Sections ^77 and ^78]

Information-gathering powers

1.130 The Regulator may request information from accountable entities, significant related entities or accountable persons, for the purpose of administering or enforcing the Regime. The information requested may relate to any entity or person that may be regulated by the Regime, or to the related body corporate or connected entity of a regulated entity. [Section ^58(1) to (3)]

1.131 The request must be made in accordance with certain requirements as to its purpose and content. [Section ^58(4) to (6)]

1.132 This provision is similar to APRA's information-gathering powers in section 62 of the *Banking Act 1959*, with necessary changes to tailor the provision to the Regime.

1.133 Failing to comply with a request for information is an offence subject to a maximum penalty of 200 penalty units. Please see below for more detailed analysis of offence provisions in the Bill. [Section ^59]

Investigation powers

1.134 The Regulator has powers to investigate an accountable entity or its significant related entity if the Regulator believes that the entity or an accountable person of the entity has contravened the Bill. These powers are similar to those in Part VIII of the *Banking Act 1959*, with necessary changes to ensure the provisions are tailored to the Regime. The Regulators may act cooperatively as the investigation is carried out; however, a single investigator will be appointed to lead the conduct of the investigation.

1.135 The Regulator commences an investigation by appointing an investigator to conduct the investigation and prepare a report.
[Section ^42(1)]

1.136 The entity is required to assist with the investigation by providing access to information, including books, accounts or documents or extracts of these materials that are relevant to the investigation. The investigator may also require any person to produce those documents if they believe that the person has knowledge or access to the information.
[Sections ^42(2) and ^43(1)]

1.137 An investigator may, by written notice, require the person to produce any or all relevant documents within a certain time period, but must provide at least 14 days' notice. *[Section ^43(3)]*

1.138 It is an offence not to provide or to conceal information relevant to the investigation from the investigator. The maximum penalty for failing to provide information is 50 penalty units for the entity being investigated, and 30 penalty units for other persons. If the entity fails to provide information, on the first day and any subsequent days after a request is made, then the entity will commit a continuing offence. The maximum penalty for concealing information is two years' imprisonment. The penalties are consistent with penalties in the Banking Executive Accountability Regime. For further analysis of penalties in the Financial Accountability Regime please see paragraphs 1.124-1.129 and 1.197-1.202. *[Sections ^42(3), ^42(4), ^43(3), and ^44]*

1.139 The Regulator's power to appoint an investigator, and the requirement to assist the investigator, do not affect the operation of other provisions in the Bill. *[Section ^42(5)]*

Examinations

1.140 The investigator may give notice, in writing, requiring a person to appear for an examination to assist with the investigation. The person attending the examination may be required to answer questions from the investigator under oath or affirmation. The examination may be recorded and conducted in the presence of persons such as lawyers, and an officer of both APRA and ASIC (irrespective of which Regulator appointed the

investigator). To reinforce privacy and accountability considerations, it is an offence to be present at an investigation without authorisation, subject to a maximum penalty of 30 penalty units. [Sections ^45 to ^47]

1.141 A written record may be produced from the statements made by the person at the examination. The person must be given a copy of the written record but it may be subject to any conditions imposed by the investigator. It is an offence to fail to comply with these conditions, subject to a maximum penalty of 6 months' imprisonment. [Section ^48]

1.142 It is also an offence not to comply with any other requirement relating to examinations, subject to a maximum penalty of 30 penalty units. [Section ^49]

1.143 The penalties relating to examinations are consistent with penalties in the Banking Executive Accountability Regime. For further analysis of penalties in the Financial Accountability Regime please see paragraphs 1.124-1.129 and 1.197-1.202.

Evidentiary use of certain material

1.144 Any of the statements made by a person at an examination may be used as evidence against the person in a proceeding or in other proceedings, subject to certain rules and exceptions. These provisions are based on Part VIII of the *Banking Act 1959*. [Sections ^50 to ^57]

Disqualification of accountable persons

1.145 The Regulator can disqualify a person from being an accountable person for a period if the Regulator is satisfied that the accountable person has breached their accountability obligations under the Regime. The power is required as accountable persons have significant power in accountable entities (which themselves are central to the Australian financial system) and should exercise due skill, care and diligence in relation to their roles. In some cases, the appropriate remedy for contravention of the Regime will be that, the current or former accountable persons will not be able to hold such a role going forward.

1.146 The Regulator can disqualify a person if they have breached their accountability obligations and their disqualification is justified, having regard to the seriousness of the breach. [Section ^39]

1.147 The person can be disqualified from being an accountable person from an accountable entity, a significant related entity, or a class of such entities. The Regulator must give written notice to the accountable person and the accountable entity, and if relevant to the significant related entity, to give them an opportunity to make submissions. A written notice is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. The disqualification takes effect from the date specified in the notice. [Section ^39(3) to (7)]

1.148 Accountable entities breach their key personnel obligations if they appoint an accountable person who has been disqualified. [Section ^21(1)(b)]

1.149 The Regulator may vary or revoke a disqualification if the Regulator considers it appropriate or on application of the disqualified person. The Regulator must give written notice of the variation or revocation, or if the person applied, a refusal. A written notice is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. The variation or revocation takes effect from the day it was made. [Section ^40]

1.150 An accountable entity or significant related entity commits an offence if they appoint an accountable person who has been disqualified under the Regime. The fault-based version of the offence has a penalty of 250 penalty units and the strict liability offence has a penalty of 60 penalty units. These offence provisions apply in addition to a contravention by the accountable entity of the key personnel obligations. These penalties are consistent with the penalties in the Banking Executive Accountability Regime. While there is no ambiguity as to whether a person is disqualified or not, if an accountable entity or significant related entity does so intentionally and if the fault elements can be established, a higher penalty is imposed. Otherwise a strict liability offence applies. The penalty for the offence complies with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. [Section ^41]

1.151 Decisions by the Regulator to disqualify a person, to vary a disqualification, or to refuse to vary or revoke a disqualification, are subject to reconsideration by the Regulator, and to review by the Administrative Appeals Tribunal. [Section ^86]

Directions

Directions relating to non-compliance

1.152 The Regulator can give an accountable entity a direction under the Regime.

1.153 The power is designed to be used to direct an accountable entity to take actions to address non-compliance, or likely non-compliance, with the Regime by the accountable entity or accountable persons. A similar power exists under the *Banking Act 1959* and other legislation regulating APRA-regulated institutions.

1.154 The Regulator can give an accountable entity a direction if the Regulator believes the accountable entity or one of its accountable persons has:

- breached the Regime; or

- is likely to breach the Regime and the direction is necessary to prevent the breach.

[Section ^60(1)]

1.155 The directions can include directions to cause the accountable entity or any of its significant related entities:

- to take a specific action;
- to undertake an audit;
- to make changes to internal systems and practices;
- to reconstruct, amalgamate or otherwise alter part of the entity's structure; and
- to not take a specific action.

[Section ^60(2)]

1.156 The directions must be given in writing, specify the breach or likely breach which forms the basis of the order as well as a period by which the direction must be complied with, and state that the accountable entity could commit an offence if the accountable entity fails to comply with the direction. *[Section ^60(3)]*

1.157 An accountable entity or significant related entity may comply with a direction despite anything in the entity's constitution or any contract to which the entity is a party. A direction does not, except in limited cases, affect the obligations of parties under such contracts. The Federal Court may make an order on how such contracts operate. *[Sections ^60(4) and (5) and ^73]*

1.158 Decisions by the Regulator to give, vary, or revoke directions – or to refuse to do so – are subject to reconsideration by the Regulator, and to review by the Administrative Appeals Tribunal. *[Section ^86]*

1.159 Information about the directions may be provided by the Regulator to the Minister, on the Regulator's own initiative or on request by the Minister. *[Section ^74]*

1.160 Non-compliance with a direction may attract a civil penalty and may also be an offence. The maximum penalty for an accountable entity or an officer of an accountable entity which commits an offence by not complying with a direction is 50 penalty units. Please see below for detailed analysis of penalty and offence provisions. *[Sections ^62 and ^76]*

Directions to reallocate responsibilities

1.161 The Regulator can direct an accountable entity to reallocate the responsibilities of its accountable persons. *[Section ^61]*

1.162 The power is designed to be used in exceptional circumstances to direct an accountable entity to reallocate the responsibilities of its

accountable persons that will minimise prudential risk or serious non-compliance risks. A similar power exists under the Banking Executive Accountability Regime, with the power in the Financial Accountability Regime expanded to cover serious non-compliance risks.

1.163 In order to direct an accountable entity to reallocate the responsibilities of its accountable persons the Regulator must be satisfied that the current allocation of responsibilities is likely to give rise to:

- a prudential risk; or
- a risk of significant and systemic non-compliance with financial laws.

[Section ^61(1)]

1.164 The Regulator must have regard to the responsibilities set out in the accountability statement, where a statement for the accountable person has been given. *[Section ^61(2)]*

1.165 A direction to reallocate responsibilities must be given in writing, specify a period by which the direction must be complied with, and state that the accountable entity could commit an offence or be liable to a civil penalty if it fails to comply with the direction. *[Section ^61(3)]*

1.166 Decisions by the Regulator to give, vary, or revoke directions – or to refuse to do so – are subject to reconsideration by the Regulator, and to review by the Administrative Appeals Tribunal. *[Section ^86]*

1.167 Information about the directions may be provided by the Regulator to the Minister, on the Regulator’s own initiative or on request by the Minister. *[Section ^74]*

1.168 If a direction relating to non-compliance or a direction to relocate responsibilities is inconsistent with the Minister rules or the Regulator rules, the direction prevails and the rules, to the extent of the inconsistency. *[Section ^75]*

Offences for failing to comply with directions under the Bill

1.169 An accountable entity commits an offence if it does not comply with a direction from the Regulator under the Bill. The maximum penalty is 50 penalty units. Failure to comply with a direction to reallocate responsibilities may also contravene civil penalty provisions of this Bill. *[Sections ^62(1) and (2), and ^76]*

1.170 A director, senior executive, or other senior employee of an accountable entity commits an offence if they fail to take reasonable steps to ensure that the accountable entity complies with a direction from the Regulator under the Bill. The maximum penalty is 50 penalty units. The offence applies more broadly than just accountable persons because of the importance of ensuring compliance with the Regulator’s directions to the administration and enforcement of the Regime. *[Section ^62(3) and (4)]*

Secrecy provisions relating to directions under the Bill

1.171 The Regulator may determine that secrecy arrangements apply to a direction given under the Bill. This can be done if the Regulator considers it is necessary to protect certain customers of accountable entities, or to promote financial system stability in Australia. [Section ^63]

1.172 Where secrecy arrangements apply to a direction, a directed accountable entity or another person (such as an employee or contractor of the entity) commits an offence for disclosing information revealing the fact that the direction was given, except in limited circumstances. The maximum penalty for contravening the secrecy arrangements is two years imprisonment. [Section ^64]

1.173 Disclosure of information covered by the secrecy arrangements is not prohibited where the information has already been lawfully made available to the public, or in other specific circumstances prescribed in the Bill. These circumstances include where disclosure is to a legal representative to seek legal advice, authorised under the Regulators' legislation or the Minister rules, or is to another person who is subject to the secrecy arrangements and is for the purpose of one of these specific circumstances. [Sections ^65 to ^72]

Enforceable undertakings

1.174 The Regulator can accept enforceable undertakings in relation to the Regime, including from any accountable entity. These may relate to compliance with the Regime by an accountable entity or an accountable person. Undertakings may also be accepted in relation to any matter in relation to which the Regulator has a power or function under the Bill.

1.175 The Regulator can enforce enforceable undertakings in the Federal Court.

1.176 Enforceable undertakings will be accepted and enforced under Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014*, with modifications set out in the Bill to ensure all relevant kinds of undertakings set out above can be accepted. [Section ^79]

Injunctions

1.177 The Regulator may apply for an injunction in the Federal Court to uphold the requirements of the Bill. The Court may grant an injunction requiring or restraining conduct, for instance to restrain a person from engaging in conduct that contravenes a direction given by the Regulator under the Bill. The Court may also grant an injunction by consent of all parties to the relevant proceedings.

1.178 Injunctions will be enforced under Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*, with modifications set out in the Bill to ensure it works under the Regime. [Section ^80]

Court orders for compliance

1.179 If the Regulator believes that a person has failed to comply with a requirement made under the Bill, the Federal Court may order that person to comply. [Section ^85]

Miscellaneous provisions

Indemnification and insurance for accountable entities

1.180 A related body corporate of an accountable entity is prohibited from indemnifying the entity against the consequences of breaching the Regime, and from paying insurance premiums insuring the entity from those consequences. This does not apply to legal costs. [Section ^91]

1.181 There is no prohibition in the Bill relating to indemnification of, or payment of insurance premiums relating to, accountable persons.

Privilege against self-incrimination and legal professional privilege

1.182 A person cannot refuse to give information or to provide documents on the basis of the privileges against self-incrimination or exposure to a penalty. However, if an individual makes a valid claim before producing the information, that information is not admissible as evidence against the individual in criminal proceedings, other than proceedings in respect of the falsity of the information. [Section ^83]

1.183 A lawyer can refuse to comply with the requirement to provide information or to produce a document if doing so would breach legal professional privilege. However, this exception does not apply if the person to whom the information relates consents to the lawyer releasing the information. If the lawyer refuses to comply, the lawyer must instead disclose the name of the person to whom (or on whose behalf) the privileged communication was made. If a lawyer fails to comply with these requirements, the lawyer commits an offence subject to a maximum penalty of 30 penalty units. [Section ^84]

1.184 These provisions are necessary for the efficient regulation of the Regime, ensuring that access to information relevant to an investigation is not denied. The approach taken balances the public interest in accountability among vital financial services with protection of individual privileges. To strike the right balance, the abrogation of the privilege against self-incrimination is limited, such that information produced after making a valid claim is not admissible in evidence against the individual in criminal proceedings, and the sharing of such information is limited by the information sharing provisions in the Regime and each Regulator's information protection regimes.

Conduct of directors, employees and agents

1.185 It may be necessary to establish the state of mind of an individual in proceedings for offences against this Bill. In these circumstances, it is sufficient to show that an employee or agent of the individual engaged in the relevant conduct and had the relevant state of mind. State of mind includes knowledge, intention, opinion, belief or purpose. [Section ^94]

1.186 This conduct is limited to conduct by an individual's employee or agent within the scope of actual or apparent authority, and will not be attributed to the individual where that individual can establish that they exercised due diligence to avoid the conduct. [Section ^94]

1.187 An individual will not be imprisoned if they are convicted of an offence in section 94 but they would not have been convicted if not for the enactment of subsections 94(1)-(2). [Section ^94(3)]

Protection from liability

1.188 A person is not liable for the performance of powers, functions or duties under this Bill, if done in good faith and without negligence. This protection from liability does affect the operation of section 58 of the *Australian Prudential Regulation Authority Act 1998*, which applies to APRA, APRA members, APRA staff members and their agents. [Section ^95]

1.189 Certain actions and omissions are protected from liability under the Bill. These include anything done or omitted in good faith if the action or omission is done in compliance with a direction or secrecy provision of this Bill, and it is reasonable for the person to have done the act or omitted to do the act.

1.190 This protection applies to persons who are an employee, agent, officer or senior manager of an accountable entity, or a member of an accountable entity's group, or accountable entity or member of an accountable entity's group. [Section ^96]

1.191 The prescribed protections from liability in the Bill are intended to work alongside each other and not to limit the operation of each other, or that of section 58 of the *Australian Prudential Regulation Authority Act 1998*. [Section ^97]

Offences

1.192 The Bill creates offences relating to information gathering powers, the appointment of disqualified accountable persons, non-compliance with directions and legal professional privilege.

1.193 Most of the offence provisions in the Bill have been transposed from the *Banking Act 1959*. It is appropriate that this conduct remains

classified as criminal due to the nature of the wrongdoing involved (see Chapter 2 of the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*). The strong deterrent effect of a criminal sanction is necessary for this Regime because of the central role that directors and senior executives in the Australian financial system play in the Australian economy. [Sections ^41 to ^49, ^59, ^62, and ^64]

1.194 This rationale also applies to new offence provisions relating to the failure to comply with a condition of a notice which relates to the disclosure of information. These offences and their maximum penalties accord with the treatment of failing to comply with a condition of a notice issued by a Regulator in the *Banking Act 1959*. [Sections ^87 and ^89]

1.195 Further, this Bill applies Chapter 2 of the *Criminal Code*, such that the physical elements of the offence are set out in the conduct provision. [Section ^81]

1.196 Any contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the conduct provision. [Section ^82].

Penalties

1.197 The penalties for offences in the Bill are consistent with the penalties in the offence provisions of the *Banking Act 1959*, upon which they are based. [Sections ^41 to ^49, ^59, ^62, and ^64]

1.198 Five offences include a custodial sentence as the maximum penalty. These penalties are justified either because of the nature of the offence, involving dishonesty, or because of the serious consequences that committing the offence may have on the economy where the offence involves secrecy relating to directions, may have on the economy. [Sections ^44, ^48, ^64, ^87, and ^89]

1.199 Pecuniary penalties relating to offences in the Bill are not large and are suitably proportioned when applied to corporations and individual persons, consistent with the Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. [Sections ^41 to ^43, ^45 to ^49, ^59, and ^62]

1.200 The civil penalties in the Regime are consistent with some of the ASIC-administered regimes, including the *Corporations Act 2001*, *Insurance Contracts Act 1984*, *ASIC Act 2001*, and the *National Consumer Credit Protection Act 2009* and are comparable to those in the Banking Executive Accountability Regime.

1.201 The maximum civil penalties are necessary to provide a strong deterrence to malfeasance or non-compliance in the industry, the performance of which is central to the broader economy. The method for calculating the pecuniary penalty applicable provides flexibility and

ensures the penalty reflects the seriousness of the contravention and community expectations. It will further ensure that incurring a civil penalty is not considered a cost of doing business, and the amount is appropriate to deter and punish misconduct.

1.202 In practice, it is intended that courts would determine which method provides the greatest penalty, and then use discretion to impose an appropriate penalty up to that amount to suit the particular circumstances of each case.

Merits review

1.203 Certain decisions of the Regulator are subject to merits review. Reviewable decisions, and the persons affected by each type of decision, are listed in the table in section 86. Such decisions are set out throughout this explanatory memorandum, where the substantive provisions are explained. [Section ^86]

1.204 Where a decision is reviewable, the Regulator must give a person affected by the decision the reasons for the decision and information about the person's review rights. [Section ^87(1)]

1.205 To seek review, a person affected by a reviewable decision may first apply for the Regulator that made the original decision to reconsider the decision. The Regulator must reconsider the decision within 60 days and notify the applicant of the outcome by written notice. If the Regulator does not notify the applicant in that time, the decision is taken to be affirmed. [Sections ^88 and ^89]

1.206 A notice to an affected person of a reviewable decision, or of a reconsideration decision, may contain conditions relating to disclosure of information about the reasons for the decision. For example, the Regulator may include a non-disclosure condition in a notice relating to a decision about a direction. As such, the maximum penalty for not complying with a notice condition is two years imprisonment, aligning with the penalty for disclosure of information about a direction that is subject to secrecy arrangements in section 64, and according with the treatment of failing to comply with a condition of a notice issued by a Regulator in the *Banking Act 1959*. [Sections ^87(2) and ^89(5)]

1.207 Following internal reconsideration of the decision, a person affected by the decision may seek review of the reconsidered decision by the Administrative Appeals Tribunal. A review by the Tribunal is conducted in accordance with the *Administrative Appeals Tribunal Act 1975*. [Section ^90]

1.208 Certain decisions of the Minister and of the Regulator are not subject to merits review. [Sections ^10(2), ^14(3), and ^22(3)]

1.209 With regard to the Administrative Review Council’s publication “*What Decisions Should be Subject to Merits Review?*”, the effect of ousting the objectives of merits review are outweighed by the benefits that will follow the exclusion of review of such decisions.

1.210 The decisions by the Regulator and Minister not subject to merits review are made in favour of the relevant entity who is the subject of the administrative decision, by reducing the scope of their responsibilities or providing an exemption from compliance with the Regime. Challenges to the Minister’s decision not to exempt an accountable entity may undermine public and industry confidence in the prudential and financial system, and create financial uncertainty.

1.211 If requested, the Minister must provide reasons for the decision, as required by section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

Rules

1.212 The Minister may make rules, known as the **Minister rules**, prescribing matters under the Bill. This includes matters required or permitted by the Bill to be prescribed by the Minister rules, as well as anything necessary or convenient for carrying out or giving effect to the Bill. [Section ^99]

1.213 The Regulator may also make rules, known as the **Regulator rules**, prescribing matters required or permitted by the Bill to be prescribed by the Regulator rules. [Section ^100]

1.214 These delegations do not include the power to modify, or exempt from, the operation of the primary law, set taxes, contain offences or civil penalties. The exercise of these delegations will be through legislative instrument and is therefore subject to disallowance and will be subject to appropriate parliamentary scrutiny.

Other miscellaneous provisions

1.215 This Bill does not have the effect of creating a cause of action that would not have existed without this Bill being enacted. [Section ^92]

1.216 The Commonwealth is liable to pay compensation if the operation of the Bill results in an acquisition of property otherwise than on just terms. [Section ^93]

1.217 The Minister must ensure that a review into this Bill is undertaken as soon as possible after the fifth anniversary of this Bill’s Commencement. The Minister will receive a report of the review within six months of the review starting, and must table the written report in each House of Parliament within 15 sitting days of receiving it. [Section ^98]

Application and transitional provisions

1.218 The Bill commences on the day after Royal Assent. *[Section ^2(1)]*

1.219 The Bill applies within Australia and its external territories, as well as having extra-territorial application. *[Sections ^4 to ^6]*

1.220 The Regime will apply to authorised deposit-taking institutions and their authorised non-operating holding companies from the later of 1 July 2022 or six months after commencement of the Bill. *[Section ^8(2)]*

1.221 The Regime will apply to other financial institutions after the Minister makes a declaration by legislative instrument covering those financial institutions. *[Section ^8(3) and (5)]*

1.222 The declaration can specify an industry or a class within the industry (for example – general insurers with total assets over \$2 billion). *[Section ^8(5)]*

1.223 The declaration determines the time when the Regime applies to the accountable entity. The time must be at least six months after the declaration is made, to give industry time to prepare for the changes. *[Section ^8(4)]*

1.224 The proposed commencement day for these other entities is the later of 1 July 2023 or 18 months after commencement of the Regime.