



# Super 2020: the BEAR necessities and a FAR horizon

Law Council Conference 2020

—

March 2020  
Mark Standen

—

## 1. Introduction

- 1.1 Corporate governance regulation in Australia has been on a trajectory of expansion over the last two decades. We quickly moved from talk of corporate law economic reform and simplification in the late 90's to the world of ASX corporate governance principles and recommendations, APRA governance standards, ever-increasing financial services law reform and most recently to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**FSRC**). Pursuant to one of the key recommendations of the FSRC, the latest dimension of reform is the pending introduction of the Banking Executive Accountability Regime (**BEAR**) into the regulation of the superannuation industry.
- 1.2 However, having grown accustomed to the BEAR terminology over the last couple of years, we must now adjust to a new name for the regime in its proposed broader application to ADIs, insurers and RSE licensees, the Financial Accountability Regime (**FAR**). This much more forgettable title has been proposed in the Proposal Paper issued by Treasury on 22 January 2020 (**Proposal Paper**)<sup>1</sup>. This is perhaps a better title than the alternative previously in circulation, the Financial Executive Accountability Regime or FEAR.
- 1.3 No doubt the volume and pace of change over that period contributed to many of the problems identified in the FSRC, but there is now nowhere to hide. The BEAR/FAR is a significant reform which is focussed on the accountability of not only the relevant institution but also on those individuals who will have the pleasure and pain of being designated as '**Accountable Persons**'.
- 1.4 So, to business. This paper proceeds initially by providing an overview of the BEAR/FAR, describing what the FAR regime will entail in the superannuation context. After making some observations and comments on some issues of interest, I will then move on to describe some of the practical issues trustees will face in implementing the FAR regime, informed by the experience of ADIs over the last two years.
- 1.5 Important aspects of the FAR regime relating to key personnel and deferred remuneration obligations will be addressed by my co-presenter, Jennifer Darbyshire.

## 2. An overview of the BEAR/FAR

### Introduction of BEAR in Australia

- 2.1 The BEAR took effect in Australia on 1 July 2018 (in relation to the four major banks) following passage of the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth). The effect of this legislation was to insert Part IIAA into the *Banking Act 1959* (Cth). The provisions took effect in relation to other authorised deposit-taking institutions (**ADIs**) on 1 July 2019.
- 2.2 The Explanatory Memorandum to the legislation described the BEAR as a '*strengthened responsibility and accountability framework for the most senior and influential directors and executives of [ADIs] and their subsidiaries*'.<sup>2</sup>
- 2.3 Politically, the introduction of the BEAR was seen by some commentators as an effort by the Federal Government to thwart Opposition calls for a banking Royal Commission. However, the context for its introduction includes the findings of the House of Representatives Standing Committee on Economics, which noted that '*the majority of banks have a "poor compliance culture" and have repeatedly failed to protect the interests of consumers. This is a culture that senior executives have created. It is a culture that they need to be accountable for*'.<sup>3</sup>
- 2.4 In that distant world that existed before the FSRC, Prime Minister Morrison (in his then capacity as Federal Treasurer) positioned the introduction of the BEAR as a response to community anger

---

<sup>1</sup> *'Implementing Royal Commission Recommendations 3.9,4.12,6.6,6.7 and 6.8 Financial Accountability Regime'* Proposal Paper

<sup>2</sup> Parliament of the Commonwealth of Australia, 'Revised Explanatory Memorandum' *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017* (Cth) [1.1].

<sup>3</sup> Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Economics, *Review of the Four Major Banks: First Report* (2016) 15 [3.10-3.11]  
<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Economics/Four\\_Major\\_Banks\\_Review/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Four_Major_Banks_Review/Report)>.

over overpaid bankers treating customers poorly, and was quoted as saying that *'Australians remain puzzled by the big salaries, the rate rises and the fees for everything. Too often, through their own actions, banks confirm some of the worst views Australians have of them'*<sup>4</sup>.

### Origins in the UK

- 2.5 The BEAR was derived from the Senior Managers and Certification Regime (**SMCR**) introduced in the United Kingdom in 2016, which applies to banking, insurance and reinsurance firms regulated by the Financial Conduct Authority (**FCA**) and the Prudential Regulation Authority (**PRA**).
- 2.6 In the aftermath of the 2008 Global Financial Crisis and the 2012 LIBOR scandal, the UK government established a Parliamentary Commission on Banking Standards (**PCBS**) in the hope of improving the public's perception of the banking industry.<sup>5</sup> In its final report, the PCBS recognised that *'too many bankers, especially at the most senior levels, have operated in an environment with insufficient personal responsibility. Top bankers dodged accountability for failings on their watch by claiming ignorance or hiding behind collective decision-making.'*<sup>6</sup> To address these issues, the PCBS recommended assigning key responsibilities to specific senior executives in banks and holding them accountable for their decisions in those areas for which they were responsible.<sup>7</sup>
- 2.7 Broadly, under the *'senior manager regime'* component of the SMCR, the most senior managers in regulated institutions are required to be approved by the FCA or the PRA before commencing their roles, and must have a *'Statement of Responsibility'* clearly indicating their areas of accountability. The senior managers must together have responsibility for each of the institution's business functions and activities (as described in a *'Management Responsibilities Map'*), and are subject to an annual certification requirement. In addition, the *'certification regime'* component of the SMCR requires an employee who has a role that carries with it the potential for significant harm to the firm or its customers to be certified by the firm on an annual basis as being fit and proper to perform their role. Finally, the regime includes Conduct Rules applicable to senior managers (in some areas) and to the broad range of staff.
- 2.8 In a consultation paper released prior to the introduction of the BEAR into legislation, it was noted that there was a *'benefit to ensuring consistency as far as possible and practicable'* between the BEAR and similar international frameworks such as the SMCR and Hong Kong's *'Managers-in-Charge'* regime.<sup>8</sup> As it happens, the BEAR regime mirrors many of the aspects of the SMCR, such as the requirement to submit accountability statements and accountability maps,<sup>9</sup> but nevertheless differs in some important respects from the UK version.
- 2.9 Before describing the key elements of the FAR, it may be useful to note the circumstances surrounding the proposed extension of the regime to the superannuation industry.

### Expansion of the application of BEAR to the superannuation industry

- 2.10 The FSRC constituted a watershed in establishing the extent of the divergence between community expectations of the financial services sector and the demonstrated conduct of key institutions. The superannuation sector was the subject of scathing criticism from Commissioner Hayne, who in chapter 4 of the Final Report of the FSRC (*'Superannuation'*) noted a number of areas of particular concern, including:
- (a) inadequate application of the statutory covenant requiring trustees and their directors to perform their duties and exercise their powers in the best interest of members. In dismissing concerns expressed by a number of trustees in their submissions to the effect that the covenant is complex and to be considered in the light of all relevant circumstances, the Commissioner said that *'It should be concerning to regulators that professional trustees apparently struggle to understand their most fundamental obligation'*;

---

<sup>4</sup> For example, Sydney Morning Herald, 15 October 2017)

<sup>5</sup> Simon Hills, 'The Senior Managers and Certification Regime' (2016) 31(10) *Journal of International Banking Law and Regulation* 557.

<sup>6</sup> Report of the Parliamentary Commission on Banking Standards, *Changing banking for good* (2013) vol 1, 8.

<sup>7</sup> *Ibid* 10.

<sup>8</sup> The Treasury, 'Banking Executive Accountability Regime: Consultation Paper' (2017) *Australian Government* 3 <<https://treasury.gov.au/consultation/c2017-t200667>>.

<sup>9</sup> See James McCalman, Angus Young and Raymond Chan, 'Regulating the culture of banks in the United Kingdom: strengthening legal accountability or just better leadership?' 32(6) *Journal of International Banking Law and Regulation* 261, 266 for a thorough discussion of the Senior Managers and Certification Regime.

- (b) the Commissioner also expressed the view that the FSRC case studies had revealed that trustees too often did not keep the interests of beneficiaries *'front of mind'*, usually due to the existence of conflicts of interest. The Commissioner said that trustees rarely sought to avoid a conflict; that care should be taken not to assume that identification and purported management of conflicts satisfies the statutory obligation; that entities rarely identified how the interests of beneficiaries were prioritised over others that conflicted; that none said that the trustee should have avoided the conflict, and that policies to identify and manage conflicts were often ineffective – this included in the area of profit-for-member funds, where shareholder or nominating organisations may seek to pursue interests differing from those of members;
- (c) in the context of conflicts, the Commissioner noted the existence of recurring issues and difficulties requiring close and continuing attention from trustees and regulators. These are largely to do with the choice of entities to provide outsourced administration or investment services and the related setting of fees; the day-to-day administration of the fund where information is supplied to trustees by entities within the same corporate group, and the consequent need for trustees to expose the premises on which information is provided so that the trustee can reach a full understanding of the courses of action available to it, and also for ongoing care and diligence on the part of the trustee; and
- (d) shortcomings in the practical implementation of frameworks designed to manage conflicts of interest. The Commissioner noted the acknowledgment provided by the Chair of APRA that the regulator needs to consider how to *'get deeper'* in identifying where frameworks and policies are not effective.
- 2.11 It is therefore not surprising that, in the Final Report of the FSRC, Commissioner Hayne commented on the governance, regulation and supervision of superannuation funds and said *'There is no reason in principle why the directors and the senior executives of at least the large superannuation funds should not be subject to statutory obligations of a kind generally similar to those imposed on members of the boards and banking executives by the BEAR – to conduct the responsibilities of their positions:*
- *by acting with honesty and integrity, and with due skill, care and diligence;*
  - *by dealing with APRA and ASIC in an open, constructive and co-operative way; and*
  - *by taking reasonable steps in conducting those responsibilities to prevent matters arising that would adversely affect the prudential standing or prudential reputation of the fund'<sup>10</sup>.*
- 2.12 The Commissioner also said that *'if the BEAR is seen as a necessary step in the proper supervision and regulation of (at least some of the) banks, proper supervision and regulation of superannuation funds needs no less. And imposing these obligations should not increase the regulatory burden to any significant extent'*.
- 2.13 The Commissioner accordingly recommended the extension of the BEAR to RSE licensees (Recommendation 3.9), as well as to APRA-regulated insurers and to all APRA-regulated financial services institutions (Recommendations 4.12 and 6.8). In his FSRC Implementation Roadmap of August 2019, the Treasurer indicated that legislation for this purpose would be consulted on and introduced by end-2020, and also committed to extending the BEAR to non-prudentially regulated financial entities to be administered by ASIC. The Proposal Paper represents the next step in this process.
- 2.14 The Commissioner's view (underlying his comment that the compliance burden of preparing accountability statements and maps should not be significant) is that senior executive responsibility for major functions should already be identified in a properly governed entity (or at least be readily identifiable), and that accountability mapping is likely already required by prudent administration.
- 2.15 While the Commissioner's position is unassailable, the practical experience on the ground is that most organisations have found implementation of BEAR to require significant time and project resourcing. The Proposal Paper also notes that *'Since the BEAR commenced on 1 July 2018, industry feedback suggests that the development, submission and updating of accountability maps and statements poses a significant compliance burden on smaller entities. APRA has found*

---

<sup>10</sup> FSRC Final Report, Volume 1, p264.

*that accountability maps and statements are of most benefit for large and more complex institutions'.*

#### **A thumbnail sketch of the BEAR**

- 2.16 At a high level, the BEAR operates to impose a particular set of obligations on ADIs and a more limited set of obligations on those individuals falling within the description of '*accountable persons*' of the ADI (typically comprising the board and some or all members of the C-suite).
- 2.17 Both the ADI and accountable persons are subject to '**accountability obligations**'. These are expressed in similar but not identical terms, and share common elements relating to:
- (a) quality of conduct (with honesty and integrity, and with due skill, care and diligence);
  - (b) manner of dealing with APRA (open, constructive and cooperative); and
  - (c) the prevention of matters arising that would adversely affect the prudential standing or prudential reputation of the ADI.
- 2.18 In addition, the ADI is subject to:
- (a) **key personnel obligations** (relating primarily to ensuring the breadth of coverage of the responsibilities of the accountable persons, to ensure none of the accountable persons are prohibited from acting in that capacity and to comply with certain APRA directions);
  - (b) **deferred remuneration obligations** (relating to deferral of variable remuneration of accountable persons for minimum periods and a requirement to have a remuneration policy in force requiring reduction in variable remuneration of an accountable person on a proportionate basis in the case of failure to comply with accountability obligations); and
  - (c) **notification obligations** (relating to the provision to APRA of accountability statements for each accountable person and of an accountability map and notification of specified events, including on becoming aware of a breach by the ADI or an accountable person of their accountability obligations).
- 2.19 This paper does not discuss the key personnel obligations and deferred remuneration obligations, which I will leave for my co-presenter.

#### **Who is an Accountable Person?**

- 2.20 In broad terms, the BEAR defines an individual to be an '*accountable person*' of an ADI or a subsidiary of an ADI if he or she holds a position in the ADI (or another body corporate of which the ADI is a subsidiary) or in a subsidiary of the ADI and, because of that position, has actual or effective senior executive responsibility for management or control of:
- (a) the ADI; or
  - (b) 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<sup>11</sup>.
- 2.21 In addition, individuals with particular prescribed responsibilities in relation to the ADI fall automatically within the definition of accountable persons. These include board members, CEO, and those having senior executive responsibility in key areas such as financial resource management, risk, operations, information and IT systems management, internal audit, compliance, human resources and anti-money laundering<sup>12</sup>. Effectively, the definition covers the board, CEO and other members of the C-suite.
- 2.22 The FSRC also recommended that a new responsibility be added for all steps in the design, delivery and maintenance of all products offered to customers and any necessary remediation for customers in respect of any of those products (**end to end product responsibility**).
- 2.23 Under the Proposal Paper, the list of prescribed areas of responsibility for FAR entities is significantly expanded from those listed in the BEAR provisions. In addition to including end to end product responsibility, the list of responsibilities that would generally be expected to apply to all locally incorporated FAR entities includes senior executive responsibility for:

---

<sup>11</sup> *Banking Act 1959* (Cth) s 37BA(1).

<sup>12</sup> *Banking Act 1959* (Cth) s 37BA(3).

- (a) management of a significant business division;
  - (b) management of the entity's dispute resolution function (internal and external);
  - (c) management of client or member remediation programs (encompassing hardship considerations where relevant);
  - (d) service provision and maintenance (ie the services equivalent to product responsibility);
  - (e) the setting of incentives (including incentives for staff and outward facing incentives such as loyalty programs); and
  - (f) breach reporting.
- 2.24 This list represents a substantial expansion of the current list contained in the BEAR, and will apply to all FAR entities. Entities currently subject to BEAR will transition to the FAR. In addition, APRA and ASIC will be entitled to prescribe additional particular responsibilities over time and to prescribe particular responsibilities for foreign entities subject to the FAR.
- 2.25 In the superannuation context, there had been speculation whether the list of prescribed areas of responsibility might be expanded, for example, to give specific recognition to the role of chief investment officer or officer having executive responsibility for membership matters. In the event, the Proposal Paper indicates that, for insurers and RSE licensees, an additional set of particular responsibilities will apply, namely senior executive responsibility for management of:
- (a) the insurer's or RSE licensee's claims and benefits entitlement handling functions;
  - (b) the insurer's or RSE licensee's investment function;
  - (c) the insurer's or RSE licensee's actuarial function;
  - (d) the insurer's underwriting of its insurance business;
  - (e) the RSE licensee's financial advice service (if any);
  - (f) the RSE licensee's insurance offerings; and
  - (g) the RSE licensee's retirement offerings.
- 2.26 Accordingly, there is potential for superannuation trustees to have up to 22 prescribed accountable persons, putting aside members of the board and the possibility of multiple or overlapping roles. This would appear to be an extraordinary result, noting that this extends well beyond the customary members of the board and C-suite and will potentially create a great deal of tension between employees in roles subject to FAR (and its attendant remuneration, civil penalty and other consequences) and employees in non-FAR regulated roles.

### **The end to end product (and service) responsibility**

- 2.27 As noted above, the BEAR does not currently contain the end to end product responsibility which is to be introduced (together with services equivalent) under FAR.
- 2.28 Many organisations are expected to struggle with a lack of alignment between the regulatory requirement to have an accountable person with this broad area of prescribed responsibility and the manner in which products and services are in practice designed, delivered, maintained and, if necessary, remediated within the organisation. A distinction between products and services offered by a superannuation trustee or other affected organisation will also not be clear in many cases.
- 2.29 In the case of superannuation trustees, the suite of products and services will include the broad range of pensions, annuities, life insurance and investment options made available through the fund and also any relevant financial advice service. Senior executive responsibility on an end to end product and service basis appears to be something of an over-arching concept potentially subsuming or overlapping with a number of the other prescribed areas of responsibility (such as finance, operations, compliance, risk, claims and benefits, and financial advice) and is therefore likely to be a cause of confusion at least in the early stages of implementation of FAR.

### **Types of compliance entities**

- 2.30 In recognition of the compliance burden mentioned in the Proposal Paper, it is proposed that entities will be classified either as '*core compliance entities*' or '*enhanced compliance entities*'.

This classification will be based on a total asset metric and, in the case of RSE licensees, will depend on whether the combined total assets of all RSEs under the trusteeship of a given RSE licensee is greater than \$10 billion. The key difference between the two classifications is that core compliance entities will not be subject to the requirement to submit accountability maps and statements to ASIC and APRA, but there is an expectation that these entities will undertake a process of identifying and registering their accountable persons to cover all aspects of their business. Given this expectation, core compliance entities will still need as a practical matter to undertake most of the work necessary in the case of enhanced compliance entities - one therefore wonders about the utility of the concession.

### **Registration of accountable persons and accountability statements**

- 2.31 APRA is required to establish and keep a register of accountable persons containing prescribed personal details (including name, date of registration, date of cessation and disqualifications)<sup>13</sup>. There is no equivalent to the certification process in the UK, as APRA is required to register an individual as an accountable person where a proper application is made. Under s37HA, an application for registration must include a declaration that the ADI is satisfied the person is suitable to be an accountable person and an '*accountability statement*' for the person required to be given under s37F.
- 2.32 An '*accountability statement*' for this purpose is a comprehensive statement setting out:
- (a) the part or aspect of the operations of which the person has actual or effective responsibility for management or control; and
  - (b) the responsibilities of the accountable person<sup>14</sup>.

### **Accountability obligations of the entity and accountable persons**

- 2.33 Broadly, the accountability obligations of the ADI under BEAR (and of FAR entities, including RSE licensees, under the Proposal Paper) are to take reasonable steps to:
- (a) conduct its business with honesty and integrity, and with due skill, care and diligence;
  - (b) deal with APRA in an open, constructive and cooperative way;
  - (c) in conducting its business, prevent matters from arising that would adversely affect the ADI's prudential standing or prudential reputation;
  - (d) ensure that each of its accountable persons meets his or her accountability obligations; and
  - (e) ensure that each of its subsidiaries that is not an ADI complies with (a) to (d) as if it were an ADI. (Under the Proposal Paper, this limb will be amended to refer to '*significant or substantial*' subsidiaries, namely those that have a material impact on the activities of the FAR entity).
- 2.34 Under FAR, the obligation to deal with APRA in an open, constructive and cooperative way will be supplemented by an obligation in the same terms relating to dealings with ASIC. This potentially represents a momentous shift in the manner in which Australian corporations are required to deal with their conduct regulator, as opposed to their dealings with APRA as their prudential regulator. In this respect:
- (a) the proposed joint administration of the BEAR/FAR, together with strengthened engagement, cooperation and information sharing between the two organisations under their recently updated Memorandum of Understanding (itself a step flowing from FSRC recommendations), must by necessity have a chilling effect on the longstanding cooperative relationship that has existed between APRA and prudentially-regulated entities; and
  - (b) it is unclear how an organisation is to be permitted to strenuously pursue its own rights, including in the areas of privilege and in circumstances where investigations and proceedings may be on foot, when it is also under a statutory obligation to be open, constructive and cooperative with the regulator with whom it is in dispute.

---

<sup>13</sup> *Banking Act 1959* (Cth) s 37H.

<sup>14</sup> *Banking Act 1959* (Cth) s 37HA and s 37FA.

- 2.35 For an accountable person, the obligations under BEAR are to conduct the responsibilities of his or her position:
- (a) by acting with honesty and integrity, and with due skill, care and diligence;
  - (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<sup>15</sup>.
- 2.36 Under the Proposal Paper, the list of accountability obligations will be extended to include *'taking reasonable steps in conducting their responsibilities as an accountable person to ensure that the entity complies with its licensing obligations'*. The commentary in the paper states that *'the addition of this obligation extends the obligations of accountable persons beyond only conduct that adversely affects prudential standing or reputation of the entity to conduct that affects entities complying with obligations "under each of the respective licensing regimes that apply"'*.
- 2.37 It is assumed that, for a superannuation trustee, the reference to *'licensing regimes'* is not intended to be confined to the trustee's RSE licence, but would also extend to include its Australian financial services licence. If this is correct, this extension of the regime will be particularly important for trustees holding an AFSL for the purpose of dealing in financial products and other superannuation trustees licensed to provide financial product advice.
- 2.38 Effectively, the FAR will add another dimension of regulatory support to the obligations of (APRA-regulated) entities which hold an AFSL under s912A of the *Corporations Act*, including the obligations to provide licensed services efficiently, honestly and fairly, to have adequate arrangements in place for the management of conflicts and obligations relating to compliance with law, resourcing, competence, training, dispute resolution and risk management, with similar impacts for holders of credit licences.
- 2.39 For the purpose of what constitutes the taking of reasonable steps (whether by the ADI or an individual), the BEAR provides (in summary) that such steps include:
- (a) appropriate governance, control and risk management;
  - (b) safeguards against inappropriate delegations of responsibility; and
  - (c) appropriate procedures for identifying and remediating problems that arise or may arise<sup>16</sup>.
- 2.40 This is a key area of practical importance for accountable persons, on which I comment further below.

### **Notification obligations**

- 2.41 Under BEAR, the ADI is obliged to give APRA an accountability statement for each of its accountable persons, and also an accountability map naming all of the accountable persons, details of the reporting lines and lines of responsibility of those persons and sufficient information to identify an accountable person for each of the responsibilities covering all parts or aspects of the operations of the ADI and its subsidiaries<sup>17</sup>.
- 2.42 Under the Proposal Paper, similar obligations will apply. Although core compliance entities will not be required to submit accountability maps and statements, they will be expected to undertake a process of identifying and registering their accountable persons to cover all aspects of their business.
- 2.43 An ADI is currently obliged under BEAR to notify APRA within 14 days of any change to an accountability statement or accountability map and of the occurrence of specific events, including (in summary) a person ceasing to be an accountable person; dismissal, suspension or reduction of variable remuneration because a person has failed to comply with accountability obligations; and the ADI becoming aware of a breach by the ADI or an accountable person of their accountability obligations<sup>18</sup>.

<sup>15</sup> *Banking Act 1959* (Cth) s 37CA(1).

<sup>16</sup> *Banking Act 1959* (Cth) s 37CB.

<sup>17</sup> *Banking Act 1959* (Cth) s 37F and s37FB.

<sup>18</sup> *Banking Act 1959* (Cth) s 37F and s37FC.



- 2.44 Under the Proposal Paper, updated accountability maps will only need to be provided following any material changes, and accountability statements will only need to be updated on any change of accountability. A 30 day notification period will apply. An annual submission of a revised copy of accountability maps and statements will be required if there have been immaterial changes over the year.

### **Co-regulation between APRA and ASIC**

- 2.45 Under FAR, ASIC will become a joint administrator of the regime with APRA. Each regulator will be given powers to prescribe certain details, including classification of entities, exemption circumstances, the list of particular responsibilities, notification timeframes and content of accountability maps and statements. The powers are to be exercised jointly where an entity is regulated by both ASIC and APRA, with coordination and sharing of information in relation to enforcement matters.

### **Civil penalties**

- 2.46 Significant changes are proposed under the Proposal Paper in relation to the imposition of civil penalties.
- 2.47 Under the BEAR, an ADI is potentially liable for pecuniary penalties not exceeding 1,000,000 penalty units (\$210m) for a large ADI, 250,000 penalty units (\$52.5m) for a medium ADI and 50,000 penalty units (\$10.5m) for a small ADI. Accountable persons do not have civil liability, but may be subject to disqualification as an accountable person and to the operation of the deferred remuneration obligations.
- 2.48 However, under the FAR, penalties will be aligned with the maximum penalty framework under the *Corporations Act*, *Australian Securities and Investments Commission Act 2001 (Cth)*, *National Consumer Credit Protection Act 2009 (Cth)* and *Insurance Contracts Act 1984 (Cth)*. In this respect:
- (a) the maximum penalties under the FAR will be the greater of:
    - (i) \$10.5m (50,000 penalty units);
    - (ii) the benefit derived/detriment avoided by the entity because of the contravention multiplied by three (where this can be determined by the court); and
    - (iii) 10% of the annual turnover of the body corporate (capped at \$525m or 2.5m penalty units);
  - (b) civil penalties will be introduced for accountable persons. The maximum penalties will be the greater of:
    - (i) \$1.05m (5,000 penalty units); and
    - (ii) the benefit derived or detriment avoided because of the contravention, multiplied by three (where the court can determine it); and
  - (c) when considering whether to impose a civil penalty, the court will be required to consider the impact that the penalty has on the viability of prudentially regulated entities.
- 2.49 The Proposal Paper indicates that RSE licensees will be prohibited from using trust assets to pay a civil penalty arising from breaching an obligation under the FAR and that provision will be made for the court to have regard to the impact of the penalty on the trustee's superannuation fund membership.

### **Non-objections power**

- 2.50 The Proposal Paper provides that APRA will be provided with a power to veto the appointment or reappointment of directors and senior executives of FAR entities, following recommendations made in the APRA Capability Review. The non-objections power will be solely exercisable by APRA and only during the period in which the entity applies to register an accountable person and that registration taking effect. This is intended to operate as a reserve power where APRA holds existing information regarding a particular person that conflicts with the obligations that would be placed on him or her as an accountable person.

### 3. Other Observations

- 3.1 Before moving to address some of the implementation issues for RSE licensees arising from the FAR, it may be useful to make some additional observations on a selection of issues that have emerged from the BEAR, with an eye to application in the superannuation context. These relate to:
- (a) the duties of honesty and integrity and due skill, care and diligence under the FAR regime;
  - (b) the concepts of prudential standing and prudential reputation;
  - (c) the relationship between the FAR and managerial liability more broadly;
  - (d) the position of an RSE licensee within a regulated group/grappling with the outsourcing model; and
  - (e) aspects of particular relevance to industry funds.

#### **Due skill, care and diligence and the taking of reasonable steps**

- 3.2 Accountability obligations to act with honesty and integrity, and with due skill, care and diligence are imposed on both the entity and the individual accountable person under the BEAR. On their face, these provisions closely reflect the duties imposed on directors and officers at common law and under the statutory formulation in sections 180 and 181 of the *Corporations Act*.
- 3.3 In the context of determining whether a person has exercised due skill, care and diligence under the *Corporations Act* and the general law, the required approach to be adopted by a director or officer under the case law might be summarised as an exercise in balancing the foreseeable risk of harm to any of the interests of the corporation against the potential benefits that might have been expected to accrue to the company from the conduct in question<sup>19</sup>. The test is an objective one in the sense that the question is what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances if he or she was acting on their own behalf.
- 3.4 These accountability obligations are also similar to the covenants specified in sections 52 and 52A of the *Superannuation Industry Supervision Act 1993 (Cth) (SIS Act)*. It should be noted that the statutory formulation in the SIS Act differs from the more general formulation, referring to acting honestly '*in all matters concerning the entity*' and to the standard of care, skill and diligence in relation to all matters concerning the entity '*a prudent superannuation trustee would exercise in relation to an entity of which it is the trustee and on behalf of the beneficiaries of which it makes investment*'. Commensurate terminology is used for '*a prudent superannuation entity director...*'. The SIS Act wording imports a higher standard than the *Corporations Act* formulation, introducing an element of '*professionalism*' into the required standard.
- 3.5 For RSE licensees and accountable persons, the obligations relating to skill, care and diligence and to the taking of reasonable steps will include familiarity with the specific statutory and regulatory regime applicable to RSEs as well as the trust deed for the fund and underlying concepts of trust law. As is evident in the remarks of Commissioner Hayne, there will no doubt need to be a renewed focus on the avoidance as well as management of conflicts and on the ultimate interests of fund members.
- 3.6 More generally, as noted earlier, the BEAR provides that reasonable steps (whether to be taken by the ADI or an individual accountable person), include:
- (a) appropriate governance, control and risk management;
  - (b) safeguards against inappropriate delegations of responsibility; and
  - (c) appropriate procedures for identifying and remediating problems that arise or may arise.

Individual accountable persons will need to consider how these elements can be demonstrated in relation to their particular areas of responsibility.

- 3.7 In the UK context, the Financial Conduct Authority has issued guidance on the analogous provisions under the SMCR, extracted below:

*'4.1.4 It is important for a manager to understand the business for which they are responsible. A manager is unlikely to be an expert in all aspects of a complex financial services business. However, they*

---

<sup>19</sup> See for example *ASIC v Cassimatis (No 8)* [2016] FCA1023

should understand and inform themselves about the business sufficiently to understand the risks of its trading, credit or other business activities.

...

4.1.8 The following is a non-exhaustive list of examples of conduct by a manager that would be in breach of rule 2.

- (1) Failing to take reasonable steps to ensure that the business of the firm for which the manager has responsibility:
  - (a) is controlled effectively;
  - (b) complies with the relevant requirements and standards of the regulatory system applicable to that area of the business; and
  - (c) is conducted in such a way to ensure that any delegation of responsibilities is to an appropriate person and is overseen effectively.
- (2) Failing to take reasonable steps to adequately inform themselves about the affairs of the business for which they are responsible, including:
  - (a) permitting transactions without a sufficient understanding of the risks involved;
  - (b) permitting expansion of the business without reasonably assessing the potential risks of that expansion;
  - (c) inadequately monitoring highly profitable transactions or business practices, or unusual transactions or business practices;
  - (d) accepting implausible or unsatisfactory explanations from subordinates without testing the veracity of those explanations; and
  - (e) failing to obtain independent, expert opinion where appropriate.
- (3) Failing to take reasonable steps to maintain an appropriate level of understanding about an issue or part of the business that the manager has delegated to an individual or individuals (whether inhouse or outside contractors).<sup>20</sup>

3.8 There is no case law in Australia relating directly to the BEAR duties. However, there has been one case in the UK<sup>21</sup> in which the FCA imposed a financial penalty and prohibition order on the defendant (Mr Palmer) for breach of his obligations to exercise due skill, care and diligence in his role as a group chief executive and director of a parent institution having two subsidiaries operating a financial adviser network of which he was alleged to be de facto chief executive and controlling influence. In broad terms, the FCA was successful in its claim before the relevant Tribunal that there had been a breach of duty, based on failure to take adequate steps to ensure that customer risks arising from the business model were being effectively managed by the subsidiaries; to ensure the subsidiaries put in place an appropriate control framework to control or mitigate risks to underlying customers; and to receive adequate reporting and assurance.

3.9 In view of this type of guidance, which appears equally relevant in determining whether reasonable steps may have been taken in given circumstances, it might be suggested that typical indicia of potential FAR contraventions in terms of the due skill, care and diligence obligations and obligations to take reasonable steps will include:

- (a) inadequate understanding of the business for which an accountable person is responsible;
- (b) the absence of an adequate plan for identifying, mitigating and managing risks of harm to all of the entity's interests and otherwise conducting its business in a prudent way;
- (c) unclear accountabilities;
- (d) poor resolution of identified issues in a timely manner;
- (e) inadequate or poor monitoring or supervision;
- (f) poor delegation frameworks or practices;
- (g) delays or cost over-runs without active remedial management;
- (h) failures to comply with the law;
- (i) patterns and trends in complaints and compliance breaches;
- (j) funding and resourcing which is insufficient when balanced against the magnitude and probability of potential harm to all the interests of the entity; and

<sup>20</sup> Financial Conduct Authority Code of Conduct (COCON), Release 47, January 2020

<sup>21</sup> *Palmer v The Financial Conduct Authority* [2017] UKUT 0313 (TCC)

- (k) regulator concern or enforcement action.
- 3.10 Although not stated in the legislation, the Explanatory Memorandum to the BEAR legislation indicates that reasonable steps will be systematic in nature, and should be considered in terms of the individual's functions or responsibilities.<sup>22</sup>
- 3.11 Another key aspect emerging from the FSRC that may impact in the area of care and diligence and reasonable steps relates to the recognition by the Chair of APRA Wayne Byres in evidence to the FSRC that APRA needs to '*get deeper*', going beyond being satisfied that an organisation may have adequate policies and frameworks in place. Similarly, boards and other accountable persons may need to do more to satisfy themselves that the various policies and frameworks put in place by their organisations to manage risk are working as intended, particularly (in the case of RSE licensees) in the interests of fund members. This may entail a need to avoid conflicts where previously identification and management may have been thought sufficient.
- 3.12 It is important to recognise that the mere occurrence of a negative legal or regulatory outcome does not automatically lead to the conclusion there has been a BEAR (or FAR) breach. The exercise is, instead, forward-looking as to what should reasonably have been done at the time, not backward looking to what action would have avoided the harm to the entity's interests. In other words, it is necessary to put yourself '*in the shoes*' of the relevant accountable person and the entity at a point in time, based on what was known then, and ask if what was done or not done fell within an objectively reasonable range of steps that were appropriate in all the circumstances prevailing at the time to both protect and advance the interests of the entity (including, in the case of an RSE licensee, the fund and beneficiaries) – including its:
- (a) commercial performance;
  - (b) interest in compliance with the law; and
  - (c) prudential standing and reputation.
- 3.13 The application of duties to RSE licensees and other entities that are derived from statutory and general law principles relating to the liability of individual directors and officers may give rise to some conceptual awkwardness. However, this will not be insuperable, noting that courts have recognised (for example) that corporate bodies may in some circumstances fall within the description of '*shadow directors*' and therefore be subject to the range of duties applicable to directors.
- 3.14 In the context of the FSRC, boards have been recently concerned about practices around the taking of minutes and the demonstration of constructive challenge of management. Such concerns are sharpened by the need for both directors and the C-suite to demonstrate that they have taken reasonable steps in the context of the BEAR. One of the outcomes of this environment is an increasing practice of keeping more formal minutes of meetings of senior leadership teams. A useful reference point in this area is the '*Joint statement on board minutes*' published in August 2019 by the Australian institute of Company Directors and the Governance Institute of Australia.

### **Prudential standing and prudential reputation**

- 3.15 The terms of the BEAR accountability obligations of both entities and accountable persons direct our attention to the concept of '*prudential standing or prudential reputation*' of the entity. Under FAR, as noted earlier, in the case of RSEs these obligations will extend to the prudential standing or prudential reputation of the trustee..
- 3.16 These terms are not specifically defined in the BEAR legislation. In the absence of any definitive authority, it seems likely that:
- (a) those terms should be given their ordinary meaning, as considered in the regulatory context to which they relate;
  - (b) in the BEAR context, '*prudential*' should be understood by reference to the '*prudential matters*' which APRA is to promote (consistently with the *Banking Act 1959 (Cth)*), which are directed at the protection of depositors in ways that are consistent with the continued development of a viable, competitive and innovative banking industry and the promotion of financial system stability in Australia. It is not just any reputational damage that is a cause

---

<sup>22</sup> Parliament of the Commonwealth of Australia, 'Revised Explanatory Memorandum' *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Cth)* [1.118].

of concern under BEAR, but the possibility exists that what might be seen as damage in non-core areas or not going to core prudential matters may, through mere association or 'volume of noise' begin to affect the broader prudential reputation and standing of the bank;

- (c) similarly, for RSEs under FAR, reference should be made to the main object of the SIS Act, which is expressed in s3(1) to include making '*provision for the prudent management of superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision by APRA, ASIC and the Commissioner of Taxation*'. It might be suggested, therefore, that prudential standing and prudential reputation will in the context of an RSE be linked closely to the regard in which the fund is held among fund members, research analysts, advisers, regulators, industry press (and ultimately the media generally) in terms of '*prudent management*'; and
- (d) it is conceivable there may be differences between banking and superannuation in this area of prudential reputation and standing. In banking, prudence is focussed on minimum capital, liquidity and diversification standards, all with a view to maintaining confidence among the depositor base. In superannuation, '*prudence*' is linked to the general law duties of trustees and should be seen as including steps not just to '*maintain the corpus*' but also to manage towards an appropriate strategy of achieving capital and income growth. Might it be possible the reputation of an RSE licensee is a more fragile thing than the reputation of a banker?

### **Managerial liability more broadly**

- 3.17 Under BEAR, the consequences of breach for individual accountable persons are broadly confined to deferred remuneration consequences and the reputational and professional impact of disqualification for a period considered appropriate by APRA from acting as an accountable person. These are very powerful regulatory tools, as illustrated in the recent furore over anti-money laundering compliance issues at Westpac, which included media musings over the possibility that the disqualification remedy might be applied to Westpac board members.
- 3.18 As noted above, the FAR will go further by imposing significant new civil penalties which are likely to be of real concern to individuals, driven at least in part by perceived concerns about the tyranny of '*reasonableness being determined in hindsight*', and also the broad reach of the expanded accountability obligations.
- 3.19 The new provisions will apply alongside the existing *Corporations Act* and SIS Act provisions relating to the duties of directors and officers, and also the existing section 52A SIS Act covenants imposed on directors of corporate trustees of RSEs. It might be argued that the BEAR and FAR provisions cover much of the same ground as director and officer duty provisions, albeit in a more specific and detailed manner, but it is instructive to note the recent (November 2019) Discussion Paper 87 issued by the Australian Law Reform Commission entitled '*Corporate Criminal Responsibility*'. That paper explains '*the ALRC's current focus on managerial liability, rather than the liability of directors per se, as being based on the perception among consultees and commentators that, in many cases, directors may not be the most appropriate target for responsibility in relation to misconduct arising from the day-to-day management of a corporation.*'<sup>23</sup>.
- 3.20 The Discussion Paper also notes that '*a corollary of this perception is that the senior executive team – composed of the CEO, CFO and heads of department etc – has been too often shielded from responsibility in relation to conduct over which they had significant influence or supervision...in agreement with the literature, consultations by the ALRC indicate that the current regime setting out individual liability for corporate conduct provides too many opportunities for senior executives to evade personal liability.*'<sup>24</sup>
- 3.21 The Discussion Paper proposes (Proposals 9 and 10) that the *Corporations Act* be amended to:
  - (a) provide that, when a body corporate commits a relevant offence, or engages in conduct the subject of a relevant offence provision, any officer who was in a position to influence the conduct of the body corporate in relation to the contravention is subject to a civil

---

<sup>23</sup> ALRC Discussion Paper 87, paragraph 7.30.

<sup>24</sup> *ibid*, paragraphs 7.31 and 7.33

penalty, unless the officer proves that the officer took reasonable measures to prevent the contravention; and

- (b) include an offence of engaging intentionally, knowingly or recklessly in conduct the subject of a civil penalty provision as set out in Proposal 9.

3.22 Interestingly, the Discussion Paper notes that the ALRC considered whether an approach modelled on the BEAR could be appropriate in the broader corporate law context. This option was not pursued, due to BEAR being relatively untested and *'reservations expressed by consultees'*<sup>25</sup>.

### **RSE licensees within larger organisations/grappling with the outsourcing model**

3.23 Potentially complex issues are likely to arise for RSE licensees within corporate structures headed by another APRA-regulated entity subject to the FAR, especially but not exclusively where major parts or substantially all of their business administration processes have been outsourced under a life policy issued by a life insurer within the same corporate group or under an administration services agreement with a related party. In this respect:

- (a) independent directors sitting on trustee boards will no doubt keenly feel the weight of their new accountabilities and potential disqualification orders and civil penalties, bringing a reinforced focus to the avoidance or management of conflicts, the quality of information flows and otherwise addressing issues of the type raised for criticism in the FSRC (as noted above). In view of commentary in the FSRC Final Report, trustees would be well-advised to review all forms of service fees, advice fees and other forms of deductions from member accounts for consistency with the best interests and sole purpose requirements;
- (b) the accountable persons of the RSE licensee are unlikely to be the same individuals as the accountable persons of the broader organisation, although there may be overlap in some cases (especially where functions of the RSE licensee are outsourced within the broader organisation). Indeed, RSE licensees will need to have accountability coverage in a number of prescribed areas that do not apply, for example, in the case of a bank;
- (c) accountable persons of the RSE licensee will need to be in a position to demonstrate performance of their accountability obligations in relation to the RSE licensee, regardless of any responsibilities they may have in relation to the broader organisation;
- (d) the question of what constitutes reasonable steps that should be taken by an accountable person of the RSE licensee in these circumstances will raise particular issues, including:
  - (i) whether an Office of the Superannuation Trustee (or equivalent) is or should be in existence; how it should be structured (or restructured); whether it is properly resourced, skilled and empowered; and whether the board of the trustee is confident that this body is truly able to perform its functions in the interests of fund members in a non-conflicted way;
  - (ii) what arrangements should be in place between the RSE licensee and other entities within the group for the provision of information or, for example, empowering the accountable persons of the RSE licensee to direct that action be taken or not taken where necessary for the fulfilment of their accountability obligations;
  - (iii) review and analysis of the adequacy and effectiveness of the risk management framework of the broader organisation as it applies to the RSE licensee; and
  - (iv) what mechanisms will exist to facilitate the ability of the board members and other accountable persons of the RSE licensee to *'look deeper'* to ensure that the right member outcomes are being achieved, rather than merely being satisfied that appropriate policies and protocols are in place? Similarly, what mechanisms will assist the RSE licensee and its accountable persons to demonstrate that priority has been given to the interests of fund members?; and
- (e) administration services arrangements will continue to attract intense focus in the areas of monitoring and reporting and in boards seeking better support in being able to address

---

<sup>25</sup> *ibid*, paragraph 7.75.

drivers of behaviour within the service provider that may militate against the interests of fund members.

- 3.24 From the perspective of the APRA-regulated entity at the top of the corporate structure, the activities of the RSE licensee will constitute one area within the broader range of activities of the entity that must be covered within its own accountability mapping and statements. The question of what will constitute reasonable steps in relation to the activities of the RSE licensee will no doubt be influenced by the existence of independent directors on the trustee board, but nevertheless one may anticipate discussions about (for example) the application to, and adoption by, the trustee of group risk management frameworks and other policies and protocols and information flows and reporting generally.
- 3.25 It is critical for superannuation trustees to recognise that it will not be possible to outsource compliance with the FAR. Even in circumstances where some or all of the executive accountable persons may be employed outside the trustee, the members of the Board will remain subject to their own accountability obligations and potential civil liability. An even more basic question that trustee boards may need to revisit is the extent to which it remains appropriate and consistent with the accountability obligations of both the trustee and themselves individually for all or large parts of the activities of the trustee to be outsourced to other organisations. Even where there is no realistic alternative, trustees are likely to be wise, having regard to the duty of care, skill and diligence applicable both to the trustee and the board and to the terms of the trustee's outsourcing policy, to make sure there exists a demonstrable capacity to properly supervise and monitor the performance of the outsourced service provider of the various activities delegated to it.

### **Industry funds**

- 3.26 As is apparent from the Final Report of the FSRC, the need to better address conflicts is not confined to retail funds. In the context of industry funds, Commissioner Hayne was not impressed by distinctions between directors based on their association with a shareholder or nominating organisation, and considered the central issue to be the need for a board of a trustee to be skilled and efficient in the proper supervision of the fund in the best interests of members. Despite being enshrined in the SIS Act, the notion of a *'representative director'* did not sit well with the Commissioner. In this respect:
- (a) the introduction of FAR into the superannuation sector should result in a serious focus on the part of trustee boards on the quality of individual directors and on the *'realpolitik'* of how the fund is administered having regard to the influence of associated organisations. The liability profile of accountable persons under FAR should be a cause for concern for candidates for positions that may in earlier times have been regarded as sinecures; and
  - (b) the introduction of FAR will also bring a new frame for the consideration of potential fund mergers. The FSRC noted evidence that processes related to board composition of merged funds are important in the success or failure of merger proposals – to the extent that considerations of this kind may not be in the best interests of fund members and the prudent management of the relevant funds, FAR should be a catalyst for change.

## **4. Implementation of the FAR**

### **Where does an RSE licensee start in implementing the FAR?**

- 4.1 An important initial task is to undertake a survey of the manner in which authority is distributed under the constituent documents of the trustee and the superannuation fund. This will entail a review of the corporate constitution, trust deed, charters, delegation framework and other aspects of the governance architecture applicable within the organisation, including authorities conferred on third parties under appointments of outsourced service providers. Where these are out of date, limited in scope, internally inconsistent or otherwise flawed there is an obvious task to bring them up to standard.
- 4.2 In the case of an RSE licensee within a larger regulated organisation, the analysis of the distribution of authority will be made more complex by the extent to which relevant accountable persons or other staff members engaged in the activities of the trustee are exercising authority delegated from the broader organisation.

- 4.3 Perhaps the most important step in the early stages of implementation is to undertake an analysis of how responsibilities are allocated between, and actually performed in practice by, the senior executives of the organisation. In broad terms, this is done with a view to identifying those individuals who have actual or effective senior executive responsibility for management or control of the trustee or a significant or substantial part or aspect of the trustee's operations, or who have a prescribed responsibility.
- 4.4 This analysis involves a process of due diligence, including review of the way in which management committees operate, the manner of individual and collective decision-making, reporting lines, whether decision-making takes place in a manner consistent with charters and other operational and governance artefacts and identification of areas of overlapping responsibility. This is typically done in conjunction with interviews of the relevant senior executives and secretariat.
- 4.5 In this respect, APRA has indicated its view that a carefully considered and thorough implementation requires *'honest discussion to build a clear, transparent and common understanding of who is accountable, what action is expected and how consequences will be applied for any failure to meet obligations'*<sup>26</sup>. APRA has also said it expects the allocation of the prescribed responsibilities *'to appropriately reflect the size and nature of an ADI's business, and accurately reflect the way senior executive responsibilities are held across the ADI's operations'*.<sup>27</sup>
- 4.6 In some cases, this process can result in recalibration and adjustments between senior executives. In particular, there may be cases where more than one executive may appear to have a role in the performance of key functions – APRA notes that the BEAR permits joint accountability, but considers individual accountability to be the clearest form of accountability.<sup>28</sup>
- 4.7 The output of this process should comprise clear and concise accountability statements for each accountable person, stating the actions, decisions and outcomes for which the person is accountable (with particular attention given to the allocation of key functions of prudential significance), together with an accountability map. Some key functions may appear on multiple accountability statements, reflecting the varying accountabilities of different roles.
- 4.8 Engineering the FAR also requires an examination of how FAR compliance will operate in conjunction with existing compliance systems relating, for example, to fit and proper policies, breach reporting, whistle blowing policies and processes for conduct of investigations and regulator engagement. Given the seniority of the people involved and the potential sensitivity of issues that may be raised, it can be a delicate question where the *'FAR function'* should best be housed within an organisation – within HR? Compliance? Legal? Who is best placed, for example, to make an assessment whether a CEO may be in breach of their FAR obligations?
- 4.9 Processes also need to be built catering for handover of accountabilities when personnel or roles change, and for compliance with notification obligations.
- 4.10 Other areas for structural refinement or practical consideration for RSE licensees are likely to include:
- (a) creating a *'cascade'* of accountability statements applicable to key reports sitting within the organisational structure below the formally designated accountable persons. Clear lines of accountability beneath the accountable person are increasingly seen as essential in enabling the accountable person to properly meet their own accountabilities;
  - (b) taking an inventory of long-standing or entrenched problem areas affecting prudential management of the superannuation fund. Although these problematic issues may pre-date the introduction of the FAR, it will be important for the relevant accountable persons to be in a position to have a *'reasonable steps'* strategy in place and ready for execution as soon as possible after they are appointed as accountable persons;
  - (c) the interplay between the desire of an accountable person to demonstrate that they have taken reasonable steps in addressing a particular issue with an executive leadership style that may favour more *'agile'* approaches to decision-making. If an agile leadership team seeks to reduce the frequency of regular documentary reporting and the formality of its proceedings, there may arise inadequacies in the ability to demonstrate the taking of

<sup>26</sup> APRA Information Paper *'Implementing the Banking Executive Accountability Regime'* 17 October 2018, p7

<sup>27</sup> *ibid*, p11

<sup>28</sup> *ibid*, p12



reasonable steps and, for example, an (unhelpful) incentive for accountable persons to make their own notes;

- (d) education, support and reassurance for those individuals who are newly appointed as accountable persons;
- (e) potential revision of the entity's approach to minute taking at both board and leadership team level (as briefly mentioned above);
- (f) how best within the circumstances of a particular organisation to balance the focus on individual accountability that is so central in FAR with the emphasis on collective accountability of leadership teams contained within the APRA Prudential Review of CBA; and
- (g) ensuring there is appropriate legal involvement in the project to provide assurance that what is being put in place is legally defensible.

4.11 In short, a practical approach to a FAR implementation project for an RSE licensee is likely to include the following steps:

- (a) determine an executive sponsor for the project and establish a supporting steering group (ie, CEO, Business Executive, CRO, Head of Legal, or HR);
- (b) gather a picture of current state (organisational structure charts, role descriptions, employment arrangements, etc) so that a 'gap analysis' to FAR target state can be determined;
- (c) schedule board and executive team briefings to raise awareness and answer questions the board and executive may have on the implications of FAR on their roles;
- (d) conduct sessions where key executives can workshop how they might respond to some of the scenarios criticised in the FSRC, or which may be identified as being issues of concern within the organisation, if they were the relevant accountable persons;
- (e) gather a multidisciplinary team to support the project, including specialised experience in legal, executive remuneration and governance;
- (f) start the process early as industry has found the process more complicated than originally anticipated and have needed time to understand and resolve the complexities; and
- (g) see the opportunities for the organisation and the industry and communicate those benefits early on to key stakeholders.