And the BEAR continues... for super and insurance

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- The government has announced plans to extend the Banking Executive Accountability Regime (the BEAR) to the superannuation and insurance industries.
- It is wise for affected governance professionals to begin planning for implementation now so that they are prepared in advance.
- The process of ensuring compliance with the BEAR is beneficial to the overall governance of the entity, as it creates a clear understanding of the roles and responsibilities of critical individuals and departments.

In the wake of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the 'Royal Commission Inquiry'), many entities are gearing up for a substantial regulatory change agenda. The government has recently announced an ambitious Implementation Roadmap for the remaining recommendations arising from the Royal Commission Inquiry. Most recommendations are proposed to be implemented by mid-2020 and all by the end of 2020. Not the least of these recommendations is the extension of the Banking Executive Accountability Regime (the BEAR) to the superannuation and insurance industries.

What is the BEAR?

The BEAR applies to authorised deposit-taking institutions (ADIs) and was enacted under the Banking Act 1959 (Cth). It imposes accountability obligations on ADIs and senior executives and directors who fall within the definition of being an 'accountable person'. Accountable persons are generally those persons who fall within the particular responsibilities categories specified under the regime, which includes directors (as members of the board) and senior executives responsible for key functions, such as management of financial resources, operations, technology, audit, compliance, risk, human resources and anti-money laundering.

The accountability obligations are extensive and include obligations on the ADI and accountable persons to:

- act with honesty and integrity, and with due care and diligence
- deal with the Australian Prudential Regulation Authority (APRA) in an open, constructive and cooperative way
- take reasonable steps in conducting responsibilities to prevent matters from arising that affect the prudential standing or prudential reputation of the ADI.

The ADI must also ensure that each of its accountable persons meets their accountability obligations. In addition to the accountability obligations, a number of administrative obligations apply to the ADI: to register accountable persons, to notify changes to accountability statements and maps and to report breaches of the regime, within prescribed timeframes.\

How will the superannuation and insurance industries be affected by the extension of the BEAR?

The proposed roadmap for the implementation of an accountability regime for the superannuation and insurance industries is to consult on the current proposals, and to introduce legislation for any amendments, by the end of 2020.[1]

It is anticipated that the accountability obligations and administrative obligations are likely to mirror those that were imposed on ADIs. However, there may be some differences in the construction of the legislation and the manner in which the regime is implemented or applied, which are unique to these industries.

For the insurance sector additional responsibilities, such as a particular responsibility for claims administration, may be included. In circumstances where claims administration is managed by a related entity, or third-party entity, the application of the regime to these activities will require careful consideration of the contractual arrangements in place to manage them. In addition, many insurance entities have different functions responsible for designing, pricing, distributing and administering insurance policies. If the new product responsibility released by APRA for consultation on 28 June 2019 for ADIs is carried across to insurers, identifying and registering accountable persons to hold end-to-end product responsibility for each product the insurer offers will be challenging.

For the superannuation sector, the structure of superannuation entities is also likely to have a significant impact on the interpretation of an accountable person and allocation of particular responsibilities. It has been reported that many trustees outsource functions to, or acquire products and services from, related party or third-party service providers.[2] Some of the functions observed to be commonly outsourced by trustees include: auditing, administrative services, legal services, asset allocation, sales and marketing, custody, actuarial services and investment management.[3]

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Many of these outsourced activities reflect the particular responsibilities categories under the BEAR. In the case of ADIs, when particular responsibilities were outsourced, the ADI was required to nominate an individual in the ADI as having ultimate accountability for the activities performed by the outsourced service provider. The trustees of the superannuation entity and their directors may therefore be ultimately accountable for these responsibilities. Relying on the strength of contractual arrangements with service providers will therefore be critical for superannuation entities as well.

How can insurance and super entities prepare?

While some of the detailed provisions under each sector's regime may be different, the primary objective of accountability for all senior managers and directors involved in the management or control of these entities, will be the same. Therefore, insurance and superannuation entities (and their directors and senior executives), should ensure that they are properly prepared for the upcoming regulatory changes.

While waiting for the legislation to be released, entities could conduct a preliminary review of what will be required to implement the necessary changes. Given the ambitious timeframes proposed by the government for all of the recommendations, the potential impact of implementation should also be assessed in the broader context of upcoming regulatory changes, to determine if supplementary resources may be required.

As those that have already been through the BEAR experience would know, it is critical when implementing the accountability regime to have a clear understanding of the role of senior management and the board and where their responsibilities under the regime may overlap or differ. When issuing guidance on the implementation of the BEAR, APRA considered the clearest form of accountability is where one individual is appointed as being accountable for a responsibility.[4] In practice, this was found to be challenging for some ADIs, particularly where certain responsibilities were shared, but the details of how those responsibilities were shared were not clearly documented or understood.

It is also necessary to consider the governance, risk and compliance frameworks needed to support accountable persons and the entity in meeting their obligations under the regime. For example, where one individual, such as the chief risk officer, may be accountable for the overall management of risk, multiple individuals (such as the board and other senior executives) may have specific responsibilities to implement the risk management framework associated with the performance of their role. Therefore, an effective risk management framework, which clearly sets out the different roles and responsibilities of key positions in the entity, is required in order to reflect these responsibilities accurately in an accountability statement, and for the entity and relevant individuals to effectively meet accountability obligations.

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Some key activities entities could be undertaking now to prepare for the implementation of an accountability regime are as follows:

- examine the lessons learned from the banking sector and its experience with the regime
- begin identifying responsible persons and mapping accountabilities
- examine the remuneration structure to see if any changes may be required
- for superannuation, consider how the obligations would interact with the *Superannuation Industry (Supervision) Act 1993*
- for insurance, consider which entities within the group and which responsibilities are likely to be captured by the regime
- map governance and decision-making structures, including board committees and management committees
- review board, board committee and management committee charters
- review delegation frameworks and associated documentation
- review position descriptions and employment documentation for the board and senior management
- assess human resources policies and governance, risk and compliance frameworks for any potential changes that may be necessary.

How will the BEAR be regulated?

Once the amendments come into effect, the responsibilities for entities under the BEAR (or BEAR equivalent) will be a priority for APRA and soon the Australian Securities and Investments Commission (ASIC). Regulation of the executive accountability regime is to be extended to ASIC in addition to APRA, to implement recommendations that relate to joint administration and co-regulation of the accountability regime.

Alongside the roadmap for implementing the recommendations, the government has also provided a record level of funding to the financial regulators APRA and ASIC in the 2019-20 Budget.[5] In addition, a number of measures are directed at strengthening the powers of the financial regulators, such as increased penalties and supervision powers.

Further, the Royal Commission Inquiry focused heavily on the culture and governance of entities, and many of the recommendations in the Final Report sought to remedy what were found to be shortcomings in these areas. On 29 August 2019, APRA released its Corporate Plan for 2019-2023, which heralded the transformation of governance, culture, remuneration and accountability across all regulated financial institutions as one of its key strategic focus areas. The Plan also highlights the superannuation industry as another focus area, placing registerable superannuation entities under even greater scrutiny.

Conclusion

Once the legislation is released and a clear timeline for implementation is known, affected entities that have undertaken preliminary planning will be better placed to efficiently plan and allocate the resources necessary to implement the regime.

While these changes may be viewed as placing a greater regulatory burden on the superannuation and insurance industries, the banking experience has shown that there are benefits to be gained from effective implementation of the BEAR. The process of mapping accountabilities and developing accountability statements for accountable persons allows for more certainty and awareness of the accountability of individuals within the entity, as well as clearer focus on the roles and responsibilities at senior executive and board levels. The BEAR, if implemented correctly, can lead to better governance and improved overall performance.

Notes

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1 Australian Government, August 2019, *Restoring Trust in Australia's Financial System – Financial Services Royal Commission Implementation Roadmap*, p 9.
2 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, July 2018, *Legal Framework Governing Aspects of the Australian Superannuation System, Background paper 25*, p 37.
3 Ibid, p 70.
4 APRA, 17 October 2018, *Information Paper – Implementing the Banking Executive Accountability Regime,* p 12.
5 Australian Government, August 2019, *Restoring Trust in Australia's Financial System – Financial Services Royal Commission Implementation Roadmap*, p 4.

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