

## Article Information

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## The Financial Accountability Regime - The Kill(ed) Bill Vol.3: Staying alert in the face of inevitable impending change

**There will soon be clearer direction regarding the long-awaited implementation of the Financial Accountability Regime (“FAR”), an initiative to bolster accountability standards and transparency in the financial services industry, which had been the direct response to recommendations made in the Financial Services Royal Commission. As the Senate readies itself for further sittings in July and August 2023, there may soon finally be some movement to cement the FAR as part of Australian law. With this in mind, we advise all superannuation trustees, life insurers and other APRA-regulated entities to keep ahead of the curve by staying aware of these inevitable changes and by taking pre-emptive preparatory action.**

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### The Background - What is the Financial Accountability Regime?

The final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (“**Financial Services Royal Commission**”), which was released in February 2019,<sup>[1]</sup> contained 76 recommendations made by the Royal Commissioner Kenneth Hayne AC KC.<sup>[2]</sup>

In response, numerous iterations of the Financial Accountability Regime Bill (“**the FAR Bill**”) have since been introduced into Parliament in an attempt to implement recommendations 3.9, 4.12, 6.6, 6.7 and 6.8 of the Financial Services Royal Commission which would extend to all APRA-regulated entities.<sup>[3]</sup> The Bill to introduce the FAR would establish “*a financial accountability regime to impose accountability, key personnel, deferred remuneration and notification obligations on directors and senior executives of financial entities in the banking, insurance and superannuation industries.*”<sup>[4]</sup>

With the introduction of each iteration of the draft FAR Bill, while there has been significant delay, there have also been multiple opportunities for public and industry consultation on each version of the FAR Bill.

The FAR Bill was first made available for consultation between the period 16 July 2021 to 13 August 2021 (“**the FAR Bill 2021**”),<sup>[5]</sup> and was first introduced to Parliament and read for the first time on 28 October 2021.<sup>[6]</sup> However, the Far Bill 2021 lapsed at the dissolution of Parliament on 11 April 2022.<sup>[7]</sup>

The FAR Bill was once again introduced on 8 September 2022 (“**the FAR Bill 2022**”),<sup>[8]</sup> with the FAR Bill 2022 being available for consultation between the period 12 September 2022 and 7 October 2022.<sup>[9]</sup> While the FAR Bill 2022 progressed to Second Reading in the Senate on 25 October 2022, it was discharged from the Senate Notice Paper on 9 March 2023 and therefore did not proceed.<sup>[10]</sup> The FAR Bill 2022 was discharged due to Senate policy disagreements on the proposed amendments to the civil penalty provisions and how they may apply in respect of banking executives.<sup>[11]</sup> There was debate as to whether these civil penalties were too harsh and whether the changes would cause “deep uncertainty in the financial services sector.”<sup>[12]</sup> While these civil penalty provisions would target the big banks and the big bank executives, carving out the smaller banks,<sup>[13]</sup> the Senate discourse on these amendments could not be settled leading to the FAR Bill 2022 being discharged from the Senate Notice Paper.

Relevantly, the Government introduced the FAR Bill 2023 into Parliament on 8 March 2023.<sup>[14]</sup> The FAR Bill 2023 has

substantially the same design as the FAR Bill 2021 and the FAR Bill 2022 and was passed by the House of Representatives on 22 March 2023. It is currently at the second reading stage in the Senate (as of 22 March 2023) and will not be considered by the Senate until the Senate sits again between 31 July 2023 to 10 August 2023.[\[15\]](#)

It is noted that with each delay in the passing of the FAR Bill, there have also been minor amendments made to each iteration of the FAR Bill. Notably, the FAR Bill 2023 does not include individual penalties for senior executives if they are not compliant with their obligations under the FAR,[\[16\]](#) however the FAR Bill 2023 still contains deferred remuneration obligations in relation to senior executives.

### **Who does the FAR Bill apply to?**

Unlike the Banking Executive Accountability Regime (“**BEAR**”) (which applies only to authorised deposit-taking institutions (“**ADIs**”)), the FAR will extend to all APRA-regulated entities, including insurance companies (including life insurance companies), superannuation trustees and licenced non-operating holding companies (“**NOHCs**”).

### **Current Status of the Bill and commencement dates**

When it sits again between 31 July 2023 and 10 August 2023, while there is no certainty that the Senate will pass the Bill (as was the case previously in relation to the FAR Bill 2022), if the Bill is indeed passed by the Senate, the FAR Bill 2023 will likely receive Royal Assent in August 2023.

The obligations under FAR will apply to different types of APRA-regulated entities at staggered times, with the earliest date of application of the FAR being from February 2024 (6 months after Royal Assent). ADIs will be required to comply with the FAR 6 months after the date of Royal Assent.[\[17\]](#) All other APRA-regulated entities (including life insurance companies, superannuation trustees and NOHCs) will be required to comply with the FAR 18 months after the date of Royal Assent.[\[18\]](#) Therefore, the date for compliance for non-banking APRA-regulated entities will likely be February 2025.

### **Purpose of the FAR Bill**

The introduction of the FAR Bill was as a response to the findings of the Financial Services Royal Commission and has, as its key objective, to strengthen the accountability requirements within the financial services industry. The effect of new FAR will be to improve the risk and governance culture of APRA-regulated entities through the imposition of higher burdens of compliance upon financial institutions. The strengthening of the existing accountability regime through the introduction of the FAR will contribute in a significant way to establishing a more transparent and resilient financial services industry.

The Hon. Stephen Patrick, the Minister for Financial Services and Assistant Treasurer, in his second reading speech of the FAR Bill 2023 on 8 March 2023, stated:[\[19\]](#)

*The Financial Accountability Regime Bill 2023 establishes the Financial Accountability Regime, or FAR, which replaces and extends the existing Banking Executive Accountability Regime, following a number of recommendations from the banking royal commission, commonly known as the Hayne royal commission.*

*The bill underscores the government’s commitment to finalise the action necessary to fully address the banking royal commission and implement measures that compel the financial services industry to act in the public’s interest.*

*Financial services executives make decisions that impact upon the lives of ordinary Australians who have no choice other than to engage with the system that they operate. As a result, the community reasonably expects high standards of accountability and integrity of financial services directors and executives.*

...

*In essence, the FAR extends the existing responsibility and accountability framework to the insurance and superannuation sectors, to ensure that heightened accountability obligations are in place across the wider financial industry.*

### **Key Functions of the FAR Bill**

The FAR Bill 2023 imposes the following new sets of obligations upon APRA-regulated entities:[\[20\]](#)

1. Accountability Obligations - With the implementation of the FAR, APRA-regulated entities will now be required to

comply with more stringent accountability standards in the course of conducting their business. They will be required to conduct their business with honesty, care, skill and diligence.

2. **Key Personnel Obligations** - APRA-regulated entities must nominate senior and influential executives to be responsible for all areas of their business operations. By introducing transparency measures, this will ensure key responsibilities are appropriately allocated to the right persons and mitigates any “finger pointing” or instances where there is avoidance of responsibility as specific listed people will now be held accountable for set functions of the business.
3. **Deferred Remuneration Obligations** - The directors and senior executives of APRA-regulated entities may be financially sanctioned, having at least 40% of their variable remuneration deferred for a minimum period of 4 years for any non-compliance with their accountability obligations.
4. **Notification Obligations** - There will be certain reporting obligations required, especially for entities above a certain threshold, in the form of accountability statements and accountability maps.

Furthermore, the Financial Accountability Regime (Consequential Amendments) Bill 2023 (“**FAR Consequential Amendments Bill**”) sets out the transitional arrangements that will apply to ADIs once the FAR is implemented including how they will transition from the BEAR to the FAR. Once the FAR is implemented, the BEAR will be repealed and will no longer apply.

### **Non-Compliance Penalties**

The FAR has numerous avenues of enforcement should an APRA-regulated entity not comply with its obligations under the FAR. Enforcement mechanisms include directions powers, disqualification, enforceable undertakings, injunctions, civil penalties and in some limited instances, criminal offences.[\[21\]](#)

Civil penalties for bodies corporate are the greater of either 50,000 penalty units, an amount equal to three times the benefit derived and detriment avoided (if this is able to be determined by a court), or 10% of the annual turnover of the body corporate (unless it is greater than 2.5 million penalty units, in which case the maximum amount will be 2.5 million penalty units).[\[22\]](#) The value of a penalty unit is \$313 in 2023, pursuant to the *Crimes (Amount of Penalty Unit) Instrument 2023*, and has been calculated pursuant to the indexation formula as prescribed by the *Crimes Act 1914*. This means that the maximum civil penalty for body corporates is either at \$15.65 million (for 50,000 penalty units) or at \$782.5 million (for 10% of annual turnover, though capped at 2.5 million penalty points).

Given that the criminal penalties will only apply in extreme cases where there is wilful violation and the existence of a positive intent to circumvent the FAR, it seems unlikely that the criminal penalties will be applied.

### **Joint Administration by APRA and ASIC**

The FAR regime will be jointly administered by APRA and ASIC with both bodies serving as the key regulators upon the introduction of FAR into the financial services industry.

On 20 July 2023, in anticipation of the official introduction of FAR (though this is conditional upon the FAR Bill 2023 being passed by Parliament and receiving Royal Assent), APRA and ASIC have commenced early consultation on the FAR by jointly releasing draft Regulator Rules (including in relation to the register of accountable persons) and Transitional rules (covering the transition of ADIs from BEAR to FAR) to support the implementation of FAR.[\[23\]](#) Consultation closes on **17 August 2023**. This provides the an important opportunity for industry to provide its comments.

### **Futureproofing - What are the next steps?**

The FAR Bill 2023 will be considered by the Senate once the sittings commence on 31 July 2023. While there is no certainty that the FAR Bill 2023 will be passed in the Senate, it is imperative that all APRA-regulated entities are aware of their potential compliance obligations under the FAR and be ready to comply with FAR once it is finalised and implemented in the Australian financial services industry.

If the FAR receives Royal Assent in August 2023, due to the staggered implementation timeline, ADIs will first need to comply with the FAR 6 months after its Royal Assent (February 2024) and all other APRA-regulated entities (including life insurance companies and superannuation trustees) will need to comply with FAR 18 months after Royal Assent (or by February 2025).

As set out above, for ADIs, the BEAR already establishes accountability obligations, deferred remuneration, key personnel and notification obligations.[\[24\]](#) This means that ADIs will already have existing systems in place to comply with their obligations around accountability and transparency, however these will require review and modification to ensure they are compliant with FAR.

In preparation for the impending FAR, non-ADI APRA-regulated entities including superannuation trustees and life insurers should examine their current policies, processes and existing systems and infrastructure relating to accountability standards as against FAR requirements. They should have regard to the systems and processes put in place by ADIs in relation to BEAR and, where possible, identify any key learnings of what was successful/what did and did not work for ADIs in implementing BEAR, given the similarity between BEAR and FAR.

APRA-regulated entities should also anticipate likely increased regulator engagement in relation to FAR and be prepared for the possibility of regulator surveillance and queries in relation to compliance. In addition, APRA-regulated entities should review the draft Regulator rules and Transitional rules released by APRA and ASIC and take the opportunity to provide feedback as part of the consultation process to assist with the smooth implementation of FAR.

- [1] 'Misconduct in the Banking, Superannuation and Financial Services Industry', *Royal Commissions* ([Web Page](#))
- [2] 'Financial Services Royal Commission - Enhancing consumer protections and strengthening regulators', *Australian Government The Treasury* ([Web Page](#))
- [3] 'Financial Accountability Regime Minister Rules 2022' *Australian Government The Treasury* ([Web Page](#))
- [4] 'Financial Accountability Regime Bill 2021', *Parliament of Australia* ([Web Page](#))
- [5] 'Financial Accountability Regime - July 2021', *Australian Government The Treasury* ([Web Page](#))
- [6] 'Financial Accountability Regime Bill 2021', *Parliament of Australia* ([Web Page](#))
- [7] Ibid.
- [8] 'Financial Accountability Regime Bill 2022', *Parliament of Australia* ([Web Page](#))
- [9] 'Financial Accountability Regime Minister Rules 2022', *Australian Government The Treasury* ([Web Page](#))
- [10] 'Financial Accountability Regime Bill 2022', *Parliament of Australia* ([Web Page](#))
- [11] Commonwealth, *Parliamentary Debates*, Senate, 22 March 2023, 17:42 ([Jenny Ware, Member for Hughes](#))
- [12] Ibid.
- [13] Commonwealth, *Parliamentary Debates*, Senate, 22 March 2023, 17:59 ([Max Chandler-Mather, Member for Griffith](#))
- [14] 'Financial Accountability Regime Bill 2023', *Parliament of Australia* ([Web Page](#))
- [15] 'Events Calendar', *Parliament of Australia* ([Web Page](#))
- [16] 'Implementing Royal Commission Recommendations 3.9, 4.12, 6.6, 6.7 and 6.8 Financial Accountability Regime Proposal Paper', *Australian Government The Treasury* (22 January 2020)
- [17] Financial Accountability Regime Bill 2023 (Cth) s9(2).
- [18] Ibid at s9(4).
- [19] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 March 2023, 1449 (Stephen Patrick, Assistant Treasurer and Minister for Financial Services).
- [20] Explanatory Memorandum, Financial Accountability Regime Bill 2023 (Cth) 1.8.
- [21] Explanatory Memorandum, Financial Accountability Regime Bill 2023 (Cth) 1.197.
- [22] Financial Accountability Regime Bill 2023 (Cth) s83.
- [23] 'APRA and ASIC commence early consultation on FAR', *Australian Securities and Investments Commission*
- [24] 'Banking Executive Accountability Regime,' *APRA*