



30 August 2019

General Manager
Policy Development
Policy and Advice Division
Australian Prudential Regulation Authority

By email: ADIpolicy@apra.gov.au

Dear Mr Brennan

APRA Banking Executive Accountability Regime Consultation on Product Responsibility

The Australian Financial Markets Association (AFMA) is making comment on APRA Banking Executive Accountability Regime Consultation on Product Responsibility as advised in APRA's letter to ADI's of 28 June 2109. In making comment we make reference also to the presentation to ADI's made by APRA on 21 August and the clarifications provided.

1. General observation

Because of the generality of the proposal AFMA considers that a guidance document will need to be developed jointly with ASIC given, that it will be administering the consumer protection and market misconduct matters in relation to section 37BA(3) *Banking Act*, because while simple in concept it will be complex in application as it sits within an existing highly regulated space. In practice, problems associated with ADI products that would need to be addressed by the accountable person will generally be of consumer protection nature rather than a prudential matter. Such guidance could be in the form of a joint regulatory guide based on the ASIC model and take into account other related aspects of novel regulation dealing with the product design obligations.

2. Not applicable to foreign ADIs

Subsection 37BA(2) of the Act does not apply to an Australian branch of a foreign ADI. It is important that this is clearly stated in the instrument implementing the rules relating to product responsibility. This is of importance because of the co-regulation nature of this rule which is discussed below and the related consumer protection regulation that is relevant to retail products of local ADIs.

While foreign ADIs understand the recommendation to have end-to-end product responsibility in their Australian operations and the desirability of preparing accountability statements as a matter of practice, this is not the subject of a formal requirement and APRA documentation should be clear on this point.

3. Clarity of responsibilities

It needs to be made clear that the relationship of product responsibility to responsibility under section 37BA(3) of the Banking Act, for ancillary services namely risk, compliance, information management, human resources, anti-money laundering is with regard to use of those ADI level services for the product and these should not be managed at the product level. In other words, the accountable person for IT systems is not accountable for a product failing because of an IT issue. It is for the person with product accountability to be responsible for the product and to address issues internally associated with the IT support for the product.

It remains the case, the product accountability must be consistent with the scope of accountability of the BEAR as a whole with regard to end-to end responsibility.

4. Relationship of services to product

The proposed coverage of products relates to all products offered by offered by the 'ADI and its subsidiaries' and is deemed to include services and white-labelled products. The reference to 'services' raises the problem of whether an accountable person would need to be nominated with end-to-end responsibility for delivery of services (such as financial advice and broking). It is the common understanding derived from the s766A(1) Corporations Act definition of 'financial service' that a service is related to an activity concerning a 'financial product'. Accordingly, 'product' and 'service' have been thought of for many years as distinct, while the wording in the proposal conflates them. In this case, would a service be related to its connection to an ADI product?

This vagueness is compounded by the statement in the proposal that responsibility would extend to 'customer experience and outcomes'. This terminology is understood to address consumer protection and market conduct matters rather than prudential matters.

It needs to be made clear how responsibility in relation to a product related service is to be applied in practice.

5. White-labelled products

In relation to white-labelled products the boundary of end-to-end responsibility for a person in one entity with those of another accountable person in another firm will have to be clearly delineated between entities. This delimitation should be a matter of bilateral agreement between the entities.

6. Application to products of ADI subsidiary

The proposed responsibility would apply to products offered by the 'ADI and its subsidiaries'. This suggests that end-to-end product responsibility will apply to products issued by non-ADI subsidiaries, such as life insurance and superannuation funds, where they are of an ADI's group.

Given that APRA will be implementing the Royal Commission¹ recommendation 6.8, to extend the BEAR to all APRA regulated entities, the timing of product responsibility in relation to non-ADI products offered by ADI subsidiaries should be coordinated with general implementation of BEAR accountability. This is particularly important because of the co-regulation issue discussed below.

7. Capital is not product

The concept of product does not apply to an ADI's own capital issuance. This principle should be clearly stated in guidance.

8. Co-regulation

The Royal Commission Recommendation 6.6 indicates there is to be joint administration of the BEAR. Clarification needs to be provided with regard to what aspects of the product accountability responsibility under Part IIAA of the Banking Act is prudential in character and what aspect is of a consumer protection market misconduct character in character. The dividing line that would appear to take a product problem into the prudential sphere would be where the product was flawed to the extent that it affects the sustainability of the issuing ADI. In that sense it is inward looking. While consumer protection looks outward to a product's effect on consumers.

APRA should therefore work with ASIC to develop regulatory guidance that provides a holistic understanding of how end-to-end product responsibility works within the context of existing financial services regulation, particularly with regard to the new product design obligation.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely



David Love
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¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial services Industry (Royal Commission), February 2019.