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Finance
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7 October 2022

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Submitted via email to: FAR@treasury.gov.au

Ms Zaheed,

Treasury Consultation - Financial Accountability Regime Minister's Rules 2022

The Australian Finance Industry Association (AFIA)[1] appreciates the opportunity to respond to Treasury's consultation on the draft Financial Accountability Regime ('FAR') Minister Rules 2022 ('the Rules').[2]

AFIA is the only peak body representing the entire finance industry in Australia. We represent 158 members, including bank and non-bank lenders, neobanks, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry.

We are the voice for advancing a world-class finance industry, with our members who are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes, and create a resilient, inclusive and sustainable future.

[1] www.afia.asn.au.
[2] www.treasury.gov.au/consultation/c2022-311520.

INTRODUCTORY COMMENTS

AFIA supports the implementation of all recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('the Royal Commission').[3]

Therefore, AFIA welcomes the introduction of the FAR, to the extent it implements Royal Commission recommendations 3.9, 4.12, 6.6, 6.7 and 6.8.[4]

The Rules for this consultation will be made pursuant to the Financial Accountability Regime Bill 2022 ('the Bill'), introduced to the House of Representatives by the Assistant Treasurer and Minister for Financial Services, Hon Stephen Jones MP, on 8 September 2022.[5] Our submission refers to the Bill as necessary, to contextualise the scheme under which the Rules operate.

AFIA notes the FAR will extend obligations similar to those in the current Banking Executive Accountability Regime ('BEAR'), under Part IIA of the *Banking Act 1959* (Cth) ('the Banking Act'), to other entities currently regulated by the Australian Prudential Regulatory Authority ('APRA'), to be known as 'accountable entities'.[6] These include the following:[7]

- Authorised deposit-taking institutions ('ADIs')
- General insurers
- Life companies
- Private health insurers
- Registrable superannuation entities ('RSEs').

This framework will also apply to the 'significant related entities' and 'non-operating holding companies' of the entities above.[8]

The FAR will replace the BEAR entirely for authorised deposit-taking institutions ('ADIs'), who will be the focus of AFIA's submission.[9] It will be jointly administered by APRA and the Australian Securities and Investment Commission (ASIC).[10]

AFIA welcomes that this legislation has been pursued in a spirit of bipartisan co-operation. We agree with the need to ensure appropriate conduct in the financial services sector. Australians should rightly be able to expect high standards of ethics and propriety from those whom they trust to deal with their money and assets.

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[3] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (4 February 2019) vol 1.
[4] Ibid at 30, 34 and 39
[5] Commonwealth Parliamentary Debates, House of Representatives, 8 September 2022, 5 (The Hon. Stephen Jones MP, Assistant Treasurer and Minister for Financial Services).
[6] Financial Accountability Regime Bill 2022 (Cth) ('FAR Bill'), clause 9.
[7] Ibid.
[8] Ibid, clauses 12 and 8 respectively.
[9] Commonwealth Parliamentary Debates, House of Representatives, 8 September 2022, 5 (The Hon. Stephen Jones MP, Assistant Treasurer and Minister for Financial Services); FAR Bill, clause 9(1)(a).
[10] FAR Bill, clause 35.

However, AFIA strongly recommends that FAR obligations for accountable entities should be implemented in a manner that supports proportionate, targeted and scalable regulatory outcomes. We believe it should not commence until 12 to 18 months after the Bill receives Royal Assent.[11] This will allow for appropriate time for financial institutions not previously covered by the BEAR to adjust to the new legislative framework.

AFIA also asks that Treasury undertake appropriate public consultation, with timeframes announced well in advance, prior to extending the FAR to other APRA-regulated entities not yet covered by the current proposals.

AFIA would caution against implementing the FAR in a way that may make it difficult for Australian financial institutions to attract and retain talented executives, in comparison to international competitors in jurisdictions where the regulatory regimes are less stringent.[12]

The FAR must also be administered such that onerous compliance requirements do not inadvertently stifle competition and consumer choice, by making it harder for smaller Australian financial institutions to compete with their larger domestic and international counterparts.[13]

AFIA is also concerned to ensure the FAR is applied such that regulatory burdens do not, by becoming overly complex, impede efficiency without a commensurate improvement in ethical standards.[14] As the Royal Commission itself noted, the complexity of a regulatory regime can itself inhibit compliance.[15]

There are four core elements of the FAR on which AFIA would like to comment, these are:

1. the accountability obligations for accountable persons and entities (and their accompanying civil penalty provisions)[16]
2. the key personnel and notification obligations[17]
3. the defined remuneration obligations[18]
4. the relevant regulatory responsibilities of ASIC and APRA.[19]

Our detailed comments on each of these aspects of the FAR are in **Attachment A.**

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[11] FAR Bill, clauses 2 and 9(2)(a).
[12] Australian Finance Industry Association, *Submission to Treasury on the Financial Accountability Regime* (24 August 2021), 2: AFIA_submission_to_Treasury_FAR_190821_final.pdf.
[13] Australian Finance Industry Association, *Submission to Treasury on the Financial Accountability Regime* (14 February 2020), 3: 140220_AFIA_Submission_Treasury_FAR-0001.pdf.
[14] Ibid, 4.
[15] Explanatory Memorandum, Treasury Laws Amendment (Measures for Consultation) Bill 2022, 5[1.4].
[16] Minister's Rules, Part 2, sections 5-6; FAR Bill, clauses 20-21. The civil penalty provisions are in clauses 80-83 of the FAR Bill.
[17] Minister's Rules, Part 3, sections 13-16 on enhanced notifications obligations for ADIs. FAR Bill clauses 23-24 on personnel obligations and clauses 31-34 on notification obligations.
[18] FAR Bill, Part 5, clauses 25-30.
[19] FAR Bill, clause 35.

CLOSING COMMENTS

AFIA welcomes further dialogue on the FAR Bill and Rules.

Should you wish to discuss our submission or require additional information, please contact Sebastian Reinehr, Senior Policy Adviser, at Sebastian.Reinehr@afia.asn.au or 0474 704 992.

Yours sincerely

Diane Tate
Chief Executive Officer

ATTACHMENT A: DETAILED COMMENTS ON THE FAR BILL AND RULES

EXECUTIVE SUMMARY

This Attachment details comments designed to ensure the FAR Bill and Rules are implemented in such a way as to achieve to objectives of the Royal Commission recommendations, without having unintended adverse consequences regarding competitiveness and the regulatory burdens imposed on the Australian finance sector.

AFIA will outline our concerns with respect to the following elements of the package:

1. the accountability obligations for accountable persons and entities (and their accompanying civil penalty provisions)[20]
2. the key personnel and notification obligations[21]
3. the defined remuneration obligations[22]
4. the relevant regulatory responsibilities of ASIC and APRA.[23]

PART 1 - THE ACCOUNTABILITY OBLIGATIONS AND CIVIL PENALTY PROVISIONS MUST BE IMPLEMENTED TO AVOID IMPEDING COMPETITION OR IMPOSING EXCESSIVE REGULATORY BURDENS

1.1 Defining the accountability obligations

The Bill and Rules operate together to impose significant accountability obligations on entities and individuals which will first be outlined, then commented upon.

The accountability obligations are in Clauses 20 to 21 of the Bill.

They require key personnel to take 'reasonable steps' to do the following:[24]

- Conduct business with honesty, integrity and due skill, care and diligence
- Deal with the regulator in an open, constructive and cooperative way[25]
- Prevent matters arising that would (or would be likely to) adversely affect the accountable entities prudential standing or prudential reputation
- Ensure each of their accountable persons meets these obligations[26]
- Ensure each of its significant related entities meets their obligations.[27]

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[20] Minister's Rules, Part 2, sections 5-6; FAR Bill, clauses 20-21. Civil penalty provisions are in clauses 80-83 of the FAR Bill.
[21] Minister's Rules, Part 3, sections 13-16 on enhanced notifications obligations for ADIs. FAR Bill clauses 23-24 on personnel obligations and clauses 31-34 on notification obligations.
[22] FAR Bill, Part 5, clauses 25-30.
[23] FAR Bill, clause 35.
[24] FAR Bill, clause 22 defines the term 'reasonable steps'.
[25] Implementing Royal Commission recommendation 6.7, see Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (4 February 2019) vol 1, 39.
[26] See Clause 10 for the definition of accountable person and clause 21 for their accountability obligations.
[27] See Clause 12.

These are very broad obligations requiring substantial interpretation, especially terms like 'honesty', 'integrity' and 'prudential reputation'.

1.2 The application of the accountability obligations

Clause 9 of the Bill outlines the entities to whom the scheme applies, including ADIs.

Section 5(2) of the Rules outlines 13 categories of individuals to whom the accountability obligations apply personally. The scheme covers persons with 'senior executive responsibility' for 'management or control' of organisational functions in accountable entities, including:[28]

1. business activities[29]
2. financial resources[30]
3. operations[31]
4. risk management
5. information management (including information technology systems)
6. internal audit
7. compliance
8. human resources
9. anti-money laundering
10. dispute resolution
11. client or member remediation programs (including hardship arrangements)
12. breach reporting
13. management or control of the business activities of a significant related entity of the accountable entity.[32]

Section 6(2) of the Rules ensures these accountability obligations also apply to members of the Board of Directors (or equivalent) of an accountable entity.[33]

[28] Explanatory Statement, Financial Accountability Regime Minister Rules 2022 (Exposure Draft), 4.
[29] Ibid, 4 – this term is intended to capture the Chief Executive Officer or equivalent.
[30] Ibid, 5 – this term is intended to capture the Chief Financial Officer or equivalent.
[31] Ibid, 5 – this term is intended to capture the Chief Operations Officer or equivalent.
[32] See Clause 12 of the Bill for the definition of 'significant related entity'.
[33] Explanatory Statement, Financial Accountability Regime Minister Rules 2022 (Exposure Draft), 5.

1.3 The application of joint liability must be carefully calibrated

Single individuals may not always have 'end-to-end' responsibility for single functions.[34] As it is put in the Explanatory Statement:[35]

> *One person may have multiple prescribed responsibilities and positions. Similarly, one prescribed responsibility or position may capture multiple individuals, such as the position of member of the board of directors, or in a job-share situation where each person is responsible for one part of the overall responsibility.*

AFIA believes the FAR should be applied so enforcement action for any single contravention is only ever pursued once. This avoids one person being penalised for the same wrongdoing multiple times due to their having multiple notional titles under the Rules.[36]

Similarly, AFIA would welcome clearer guidance on the method to be used for apportioning blame among multiple people for a single contravention, to ensure there is clear, consistent, and transparent application of the framework.

1.4 The substantial civil penalties must be carefully considered and applied

The broad accountability obligations, applying to 13 or more people plus the Board of Directors of accountable entities, are accompanied by significant civil penalties provisions, which can carry substantial financial consequences if a breach is established.

Under Clauses 81 and 83(3) of the Bill, if any accountable person intentionally breaches or aids in a breach of an accountability obligation, they can be held personally liable for either:

- Up to $1.1 million[37] **OR**
- Three times the 'benefit derived or detriment avoided'.[38]

The civil penalty provisions applied to accountable entities are even stricter. Under clause 80 of the Bill, if an accountable entity fails to comply with any of its obligations under Chapter 2 of the Bill, the entity can be fined:

- Up to $555 million[39] **OR**
- Three times the 'benefit derived or detriment avoided'.[40]

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[34] Australian Finance Industry Association, *Submission to Treasury on the Financial Accountability Regime* (24 August 2021), 5: AFIA_submission_to_Treasury_FAR_190821_final.pdf.
[35] Explanatory Statement, Financial Accountability Regime Minister Rules 2022 (Exposure Draft), 5.
[36] Section 5(2).
[37] FAR Bill, clause 83(3)(a), the equivalent of 5,000 penalty units (currently $222 each).
[38] FAR Bill, clause 83(3)(b).
[39] FAR Bill, clause 83(2)(c)(ii), the equivalent of 2.5 million penalty units (currently $222 each).
[40] FAR Bill, clause 83(2)(b).

Even more significantly, unlike the accountability obligations for individuals, those for entities are framed so breaches can be unintentional and still attract the substantial civil penalties.

A drafting note in Clause 80 of the Bill specifically states:[41]

> *It is generally **not necessary to prove a person's state of mind** in proceedings for a contravention of a civil penalty...*

These penalties for both accountable persons and entities are significantly harsher than the current penalties, under the BEAR in Part IIA of *Banking Act*, which only allows fines of:[42]

- $222 million for 'large' ADIs (over $107 billion)[43]
- $55.5 million for 'medium' ADIs[44]
- $11.1 million for 'small' ADIs.[45]

The purported genesis for the FAR Bill and Rules was the implementation of Royal Commission recommendation 6.8, which states:

> *Over time, provisions **modelled on the BEAR** should be extended to all APRA-regulated financial services institutions.*[46]

However, the potential civil penalties for breaches of accountability obligations have been increased by 150%, from $222 million under the current BEAR to $555 million under the FAR.

The FAR also removes the variant maximum penalties for 'small', 'medium' and 'large' ADIs for the purposes of the civil penalty provisions. Therefore, the FAR arguably goes substantially further than the Royal Commission recommended.

1.5 AFIA recommendations on the accountability obligations

While supporting the FAR, AFIA cautions that the accountability obligations must be applied to account for the following:

- The test for 'reasonable steps' required to meet accountability obligations, under clause 22, must be clearly articulated, with further examples and regulatory guidance

[41] This does not apply to individual accountability obligations because Note 2 in Clause 83 indicates that Clause 81 is the only civil penalty provision enforceable against individuals. Clause 81 requires intentionality.
[42] Section 37G(2)
[43] 1 million penalty units (currently $222 each). For the definitions of small, medium and large ADIs, see s 6 of the *Banking Executive Accountability Regime (Size of an Authorised Deposit-taking Institution) Determination 2021*.
[44] 250,000 penalty units.
[45] 50,000 penalty units.
[46] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (4 February 2019) vol 1, 39.

- Joint liability must be carefully calibrated, to ensuring the same individual is not penalised multiple times for a single contravention. Inversely, where blame is shared among multiple persons, regulatory guidance must more clearly show how civil penalties will apportioned[47]
- Treasury should consider if the civil penalties proposed in clause 83 of the Bill go further than the Royal Commission recommended[48]
- If the proposed civil penalties in clause 83 of up to $1.1 million for individuals and $555 million for accountable entities are retained, they must be applied to avoid making it overly cumbersome to attract and retain talented senior executives. Australian financial institutions must remain competitive internationally
- Treasury should consider if the tiering of 'small', 'medium' and 'large' ADIs from the BEAR should be retained for the proposed new civil penalty provisions[49]
- The increased compliance requirements from the accountability obligations must be applied to avoid making it harder for smaller Australian financial institutions to compete domestically, as is the case under the BEAR.[50] Otherwise, the FAR may inadvertently stifle competition and limit consumer choice.

PART 2 - THE KEY PERSONNEL AND NOTIFICATION OBLIGATIONS MUST BE IMPLEMENTED TO AVOID IMPEDING COMPETITION OR IMPOSING EXCESSIVE REGULATORY BURDENS

2.1 Outlining the key personnel and notification obligations

Clause 23 of the Bill obligates accountable entities to ensure that they have an 'accountable person' covering each of the relevant aspects of their business outlined in section 5(2) of the regulations, as discussed in **Part 1 of Attachment A.** [51]

Under Part 6 of the Bill, accountable entities must meet certain 'notification requirements', obligating them to provide information to the Regulator.[52] Notification must be given whenever any of the circumstances in clause 32 occurs.

Under Part 3 of the Rules, accountable entities with assets valued over the 'enhanced notification thresholds' must meet the 'enhanced notification obligations'[53] Additional obligations include:

- All accountable persons having to provide to the regulator regular 'accountability statements', in accordance with the requirements of clause 33

[47] Explanatory Statement, Financial Accountability Regime Minister Rules 2022 (Exposure Draft), 5.
[48] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (4 February 2019) vol 1, 39.
[49] *Banking Act*, section 37G.
[50] *Banking Act*, section 37G.
[51] FAR Bill clause 10(1)(b) in operation with cl 23.
[52] Clauses 31-34.
[53] Clauses 31, 33 and 34.

- All accountable entities must provide complex 'accountability maps' in accordance with clause 34, which include the names of all their accountable persons, details of all reporting lines and lines of responsibility, and any other information as may be required by the Rules or the Regulator from time to time.

By virtue of s 80(1) of the Bill, a breach of any of the key personnel or notification obligations is punishable via the significant civil penalties outlined above, including fines of $1.1 million for accountable persons or $555 million for accountable entities.[54]

2.2 AFIA recommendations on the key personnel and notification obligations

Given the substantial compliance requirements brought about by these obligations, particularly those related to enhanced notification requirements contained in Clauses 33 and 34 of the Bill and Part 3 of the Rules, AFIA recommends:

- Section 13(2) of the Rules, and other provisions as needed, should be amended so only ADIs with total asset sizes over $20 billion should be included in the enhanced notification requirements.[55] This would return an element of tiering, currently present in BEAR but absent in FAR.[56] It is appropriate to recognise differences among different sized accountable entities. It also better reflects APRA's simplified capital framework for small, for less complex ADI's[57]
- The notification and key personnel obligations, and the significant accompanying civil penalties of up to $555 million for accountable entities, must be applied to avoid disadvantaging Australian financial institutions against their international competitors, or disadvantaging smaller domestic ADIs against larger domestic ADIs
- Treasury should consider if applying the civil penalty provisions to these key personnel and notification requirements goes further than the Royal Commission recommended, as outlined in Part 1.4 of this submission.

PART 3 – THE DEFERRED REMUNERATION OBLIGATIONS SHOULD REFLECT THE ROYAL COMMISSION'S RECOMMENDATIONS AND NOT IMPEDE COMPETITION, INTERNATIONALLY OR DOMESTICALLY

3.1 Outlining the deferred remuneration obligations

The effect of Part 5 of Chapter 2 of the Bill is that, as a general rule, 40% of all accountable persons' variable remuneration, as defined in Clause 26, must be deferred for four years.[58] The

[54] Clause 83.
[55] Australian Finance Industry Association, *Submission to Treasury on the Financial Accountability Regime* (24 August 2021), 6: AFIA_submission_to_Treasury_FAR_190821_final.pdf.
[56] Banking Act, section 37G.
[57] Australian Prudential Regulatory Authority, *Information Paper - An Unquestionably Strong Framework for Bank Capital* (November 2021), 18: Information paper - An Unquestionably Strong Framework for Bank Capital (apra.gov.au).
[58] Clause 27(1) operating in concert with clause 28(4). There are exceptions to this rule in Clauses 29 and 30.

Rules apply this obligation to all classes of senior management listed in section 5(2) and the Boards of Directors (or equivalents) of accountable entities under section 6(2).[59]

This goes further than the Royal Commission's recommended extension of BEAR to all APRA-regulated financial services institutions.[60]

Under Part IIA of the *Banking Act*, there are currently two alternative tests for measuring how much variable remuneration must be deferred.[61]

For all persons other than the Chief Executive Officer, the BEAR requires that the minimum amount of remuneration to be deferred is the '*lesser of*':

- 40% of an accountable person's variable remuneration, OR
- 20% of an accountable person's total remuneration.

By contrast, under the FAR there is a single rule, requiring deferral of 40% of variable income.

By virtue of s 80(1) of the Bill, a breach of any of the key personnel or notification obligations is punishable via the significant civil penalties outlined above, including fines of $1.1 million for accountable persons or $555 million for accountable entities.[62]

This means the FAR will be tightening Australia's deferred remuneration scheme at the same time as other jurisdictions are doing the opposite.

For example, in his recent mini-budget Kwasi Kwarteng, Chancellor of the Exchequer in the United Kingdom, announced the removal of any cap on variable remuneration.[63] There are similarly less strict rules regarding variable remuneration in other places with strong finance sectors, like: the United States (New York), Hong Kong, Singapore, Frankfurt and Paris.[64]

There is also a significant risk extending stricter deferred remuneration obligations to the classes of people outlined in sections 5(2) and 6(2) of the Rules could make it difficult for smaller Australian financial institutions to attract talent in comparison to their larger Australian counterparts, because they will not be able to pay the higher base salaries required to compensate for the stricter deferred remuneration obligations.[65] This may have the

[59] See Part 1.2 of this submission.
[60] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (4 February 2019) vol 1, 39.
[61] Section 37EB.
[62] Clause 83.
[63] S&P Global Market Intelligence, 'Bonus cap removal: What it would mean for UK banks' (21 September 2022): Bonus cap removal: What it would mean for UK banks | S&P Global Market Intelligence (spglobal.com).
[64] BBC, 'Cap on bankers bonuses gone – Chancellor confirms' (24 September 2022): Cap on bankers' bonuses gone - Chancellor confirms - BBC News.
[65] Australian Finance Industry Association, *Submission to Treasury on the Financial Accountability Regime* (24 August 2021), 2: AFIA_submission_to_Treasury_FAR_190821_final.pdf.

unintended consequence of undesirably stifling domestic competition, limiting consumer choice and impeding their scale and growth, and ultimately, ability to compete internationally.

3.2 AFIA recommendations on the deferred remuneration obligations

Given concerns for domestic competition and international comparisons, AFIA recommends Treasury consider the following regarding the deferred remuneration obligations:

- Whether it is appropriate that the deferred remuneration obligations arguably go further than the Royal Commission recommended, by being stricter than the existing BEAR. This is especially important given the up to $555 million in civil penalties for accountable entities who breach these obligations (150% higher than the BEAR)[66]
- Whether the variable remuneration provisions and accompanying potential civil penalties should apply to a smaller group of accountable persons than is presently proposed in sections 5(2) and 6(2) of the Rules
- The impact that tightening Australia's variable remuneration obligations will have on the international competitiveness of Australia's finance sector
- The effect making smaller domestic financial institutions pay higher base salaries, instead of variable remuneration, will have on competition and consumer choice in Australia. It may be appropriate to have different deferred remuneration obligations for smaller financial institutions, and different civil penalties for breaches, as is already the case under the BEAR.[67]

PART 4 – APRA AND ASIC'S ROLES UNDER THE FAR MUST BE MORE CLEARLY DELINEATED

Clause 35 of the Bill states:

> *APRA and ASIC jointly administer this Act, and must agree about how to perform functions and exercise powers under it.*

Clause 36(1) also indicates both regulators have powers of 'general administration' of the Bill.

AFIA believes this is a significant issue because it is unclear to which regulators accountable entities will be accountable for any contraventions of the legislation.

The roles of each regulator should be exhaustively defined in the Rules, so it is clear which regulator has responsibility for this administration of every provision of the Bill and Rules.

[66] Clause 83, compared to s 37G of the *Banking Act*.
[67] *Banking Act* s 37G.

This should be done in a format like an Administrative Arrangements Order, which outlines the division of ministerial responsibility where provisions of one Act are shared between multiple ministers.[68]

Doing this would provide essential clarity. This is especially important given the substantial civil penalties, which have been discussed at length in this submission, of up to $1.1 million in personal fines for intentional breaches by accountable persons and up to $555 million in fines for accountable entities.[69]

This regulatory guidance should make it especially clear which regulator can:

- Investigate suspected breaches of obligations under clause 45, and
- Disqualify accountable persons under clause 42.

The process for undertaking both these exercises must be extensively articulated to ensure consistency of application and enforcement.

[68] *Administrative Arrangements Order* (1 July 2022): Administrative Arrangements Order (AAO) made 23 June 2022 (pmc.gov.au).
[69] Clause 83.