



Enforcement Manual

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1. APRA's Methodology

Enforcement involves specific intervention and the pursuit of remedial actions where the Australian Prudential Regulation Authority (APRA) does not believe that an institution has the ability or willingness to rectify serious identified weaknesses that threaten financial viability or safety. Enforcement activities are critical to ensuring financial promises to beneficiaries continue to be met and form an important component of APRA's Framework for Prudential Supervision.

APRA maintains a separate Enforcement team in the Supervisory Support Division (SSD) to undertake enforcement activities.

The Enforcement team also has responsibility for:

- issues relating to section 66 of the *Banking Act 1959*;
- monitoring of compliance with consent conditions of Representative Offices for offshore authorised deposit-taking institutions (ADIs); and
- unauthorised entities operating in APRA-regulated industries.

2. Enforcement Consideration and Classification

Enforcement activity is overseen by the APRA Enforcement Committee.

The Enforcement Committee:

- sets priorities for all Enforcement cases, including level of importance, degree of urgency and allocation of resources;
- regularly reviews case strategies, including providing guidance for Case Managers in relation to the conduct of cases and recommendations for the relevant APRA decision-makers; and
- canvasses strategies for managing the presentation of cases likely to attract the interest of external audiences or likely to have an impact on APRA's reputation.

The Enforcement Committee comprises:

- APRA Deputy Chairman (Chair)
- Executive General Manager - SSD
- Executive General Manager - Specialised Institutions Division (SID) (or delegate)
- Executive General Manager - Diversified Institutions Division (DID) (or delegate)
- General Manager - Enforcement
- General Counsel
- Senior Manager Legal - Litigation
- Senior Manager Legal - Southwest
- Senior Manager - Enforcement (Central/Northern)
- Senior Manager - Enforcement (Southern)
- Manager - Media and Communications (observer)

The Enforcement Committee meets monthly. If guidance on a matter is required between meetings, the General Manager - Enforcement consults Enforcement Committee members and seeks the endorsement of the APRA Deputy Chairman. The Enforcement team provides administrative support to the Enforcement Committee. The Enforcement Committee's views are passed to the relevant Case Managers for their guidance.

The Deputy Chairman regularly updates the APRA Management Group on any matters that may impact APRA more broadly. The General Manager - Enforcement provides a quarterly report to the APRA Executive.

I. Notification of new cases

Case Managers notify the Enforcement Committee of potential significant new cases.

Significant cases are included on the 'significant items' list and reviewed at each Enforcement Committee meeting. Once prioritised by the Enforcement Committee, minor cases are referred to and managed by the relevant Case Manager.

II. Decisions for action

As a guide for action, the Enforcement Committee is likely to consider:

- the nature of the alleged offence, or other contravention;
- the seriousness of the alleged offence in terms of its impact on the safety of members, depositors or policy holders;
- the level of criminality;
- the threat to risk management systems;
- the potential effect on the entity;
- any flow-on effects of the alleged offence;
- APRA's investigative priorities, legislative requirements, scope and size of the investigation;
- the public interest of the matter;
- resources available including the demands of other activities already commenced;
- APRA's ability and capacity to undertake action; and/or
- if referral to the Government, external authorities or other regulators is appropriate.

III. 'No action' decisions

'No action' decisions by the Enforcement Committee are documented and placed on the institution's file, outlining the decision and the reasons for it, and noting any reference material reviewed as part of the decision-making process.

A 'no action' file note must contain an explanation of the decision and other considerations.

Responses are sent to the individual or institution informing them that APRA has completed its investigation or enquiry into the matter.

3. Investigation Action Plan policy

An Initial Action Plan (IAP) must be completed if action is recommended to the Enforcement Committee. The IAP is used to outline issues, identify decision points and allocate resources.

Assigned Case Officers will ensure that all available facts are gathered and documented to allow an efficient and considered response. In conjunction with the Case Manager, they must also explore and present the risks inherent in the proposed approach, outline the method proposed to be employed to manage the case, and consider the position of the institution's management team in relation to the case. Any reasons for potential civil, disciplinary, administrative or criminal action must be recorded.

A Case Management Plan (CMP) must be completed once the IAP is accepted by the Enforcement Committee. The CMP is a 'live' document that is regularly updated.

4. Investigation Management

An investigation establishes facts and gathers evidence to ensure that APRA's actions are supported by well-informed decisions.

Investigations inquire into breaches of statute, regulation, trust or ethics that could result in a regulated institution failing to meet its financial promises or that could create a loss of confidence in a particular industry. Investigations also seek to determine if any remedial action is required. Remedial action can be achieved with the use of moral persuasion, coercive powers, administrative measures or civil/criminal legal proceedings.

Investigations are conducted in a legal and professional manner consistent with APRA's Code of Conduct. Case Officers must always act professionally, honestly and in good faith when performing their duties. The investigation process and any subsequent actions must be expected to withstand administrative, operational and judicial review.

Communication during the course of an investigation must be clear and concise. Critical decisions must be documented and noted by amending the CMP.

Case Officers may seek expert advice or assistance if the Enforcement team lacks the necessary expertise.

I. Statements and discussions

Formal statements from witnesses may be required if proceedings are being considered.

If a Case Manager needs to take a formal statement an APRA lawyer would generally be present. It is standard practice to have witnesses sign the bottom of each page of the statement and to initial any alterations. While under no legal obligation to sign a statement other than by formal requirement under various Acts, witnesses should be requested to sign the last page immediately below the last paragraph and record the date and time. If a witness declines to sign the statement, the Case Manager must note APRA's request for the signature and any reasons offered by the witness for declining to provide one. The Case Manager must also sign each page of the statement. In addition to the Case Manager's signature, the statement must include the time the statement was obtained, where and by whom.

The Case Manager must prepare a supplementary statement if a witness wishes to change part of a signed statement, and all statements must be kept on file.

Formal statements include all relevant admissible evidence, including exculpatory evidence. The Case Manager taking the statement must fully comprehend the rules concerning hearsay (weight of evidence and admissibility) and the provisions of any relevant Evidence Act or other laws relevant to the jurisdiction in which the matter may proceed to court.

Case Managers should also consult any additional State-based requirements relevant to formal interviews of this nature.

Case Officers are also often required to conduct less formal discussions with individuals relevant to the investigation. These discussions will take place in accordance with the investigation strategy set out in the CMP and, where practical, by more than one APRA employee. They must be contemporaneously documented and include:

- the date and time;
- method of interview (i.e. in person, over the phone, etc.); and
- details of interviewee and any others present (name and other identifying information).

II. Exhibits and evidence

If APRA is provided with physical evidence in relation to an enforcement case the details must be recorded in a receipt. Any material considered relevant to the case by the Case Manager will be treated as evidence until no longer required for the investigation and/or prosecution.

There are a number of important questions to consider in assessing evidence:

- How relevant is the evidence? Does it relate specifically to the evidence rules and criteria?
- How reliable is the evidence?
- What weight should be given to it?
- What does the evidence prove?
- Is there adequate evidence to make a finding?
- Where evidence is conflicting on a key point, which evidence is preferred and why?
- Is the Case Manager reasonably satisfied, on the evidence before them, of the fact in question?
- Was any evidence disregarded? If so, is this noted on the file with reasons for the decision?

Case Managers should consider if the use of an electronic document/investigation management system is appropriate.

III. Informants and complaints

Informants may be individuals who:

- are specifically approached by APRA for information;
- offer information voluntarily to APRA whilst APRA is, for example conducting an on-site inspection; and/or
- contact APRA 'out of the blue'.

The Case Manager must always have regard to possible allegations of corruption and/or misconduct that may arise from contact with an informant. It is necessary that two APRA employees be involved in dealings with informants. Any promises or undertakings suggested and/or offered are to be documented appropriately and authorisation sought in a timely manner. In a criminal investigation, only the Commonwealth Director of Public Prosecutions (CDPP) can offer an indemnity to an informant. The Case Manager must not create any grounds which might suggest that an indemnity was offered to an informant as an inducement for information. The CDPP must be consulted immediately in cases where information from an informant is to be used as part of a criminal investigation. A separate file is maintained containing all information obtained from the informant.

While APRA is not a complaints-handling body, it does need information about the financial health and prudent management of regulated-institutions. Complaints about an individual's treatment by an APRA-regulated institution are usually referred back to the complainant for them to contact the appropriate complaints body. However, there may be instances where APRA may, subject to the consent of the individual, attempt to resolve the matter directly with the institution, provided that does not prejudice the complainant's interests. See APRA's 'Dealing with Informants and Complainants Policy' for more information.

IV. The completion of investigations

An investigation is complete when:

- the matter referred to the Enforcement team has been completed and APRA front-line supervision is informed of the outcome so that it can ensure an updated PAIRS¹ assessment is completed; and
- any related known appeals or litigation is concluded.

If a formal investigation has been undertaken under a relevant section of an industry Act, an inspector's report must be completed before a closure report is prepared.

The outcome of the investigation must be recorded and if relevant, include the name of the deciding authority (i.e. the name of the magistrate or delegate, the CDPP, etc.), and any orders or penalties accompanied by any comments relevant to the orders or penalties.

Following the conclusion of the investigation or prosecution, original documents and exhibits are, where appropriate, returned to their owner, who must provide APRA with a

¹ PAIRS is APRA's Probability and Impact Rating System, a risk assessment and supervisory response tool. This tool, along with the Supervisory Oversight and Response System (SOARS), assist APRA in making better risk judgments; quickly and consistently taking supervisory action where necessary; strengthening the ability of supervisors to take effective action; and improving oversight and reporting on problem entities. PAIRS incorporates two dimensions: the Probability and Impact of the failure of an APRA-regulated entity. Further detail can be obtained on APRA's website.

signed receipt for their return. Materials that cannot be returned to their owner must be retained on the investigation file.

A team debriefing session must always be conducted following closure of a case, concentrating on opportunities for improving systems, procedures or methodology. Outcomes of the debriefing session are recorded and provided to senior managers for possible referral to the Enforcement Committee.

5. Decision Making Policy

Formal delegations for making instruments and legislative decisions must be adhered to at all times. A register of authorised delegations is maintained by the Legal Services team and regularly reviewed by the Legal Services and Enforcement teams.

The level at which enforcement decisions are authorised is subject to the potential impact of the decision. Some decisions are made by delegates at higher levels than the minimum formally required. Consideration must be given to determining the most appropriate delegate on a case-by-case basis. When material is submitted to a delegate for the exercise of a power, it should be accompanied by a copy of the relevant delegation.

The use of a formal power under delegation is the sole responsibility of the individual delegate, regardless of any recommendations, internal policies or determinations by the Enforcement Committee.

APRA intends to fully utilise the various provisions of its legislation and to assist in resolving any ambiguities that may arise over time. Decisions are to focus on achieving specific outcomes that limit losses and/or set an example to industry.

Once a decision is taken, assigned team members implement any corresponding actions and only revisit the issue if new evidence comes to light. The decision to revisit an issue takes place in a formal team meeting environment.

I. Decision making processes

Before reaching decisions, decision makers should consider matters such as:

- A. With what authority was the decision made? Examples include:
 - legislation - the decision maker must be fully conversant with the provision of the Act which authorises the decision and any other relevant provisions or legislation; and
 - policy and guidelines.
- B. Who can exercise the power?
 - What does the relevant provision authorise? Often there are a number of tests set out in the relevant provision which need to be established before the statutory power can be exercised.
 - Are there restrictions on the exercise of the power?
 - Are there other relevant provisions of the Act or Regulations which may affect the decision? If so, decision makers must understand the meaning and effect of those other provisions.

- Are there other relevant provisions, e.g. other Acts, Regulations, taxation rulings to be taken into account?
 - Given the purpose of the power, are there factors which would be clearly irrelevant or improper to take into account?
- C. Is this a 'special case' where an exception to the general rule should be considered?
- D. What are the findings in relation to each rule or criterion?
- E. Do special circumstances make it reasonable to consider the relevance of the rules or criteria?
- F. Does the decision follow automatically or flow logically from the findings of fact?
- G. Is the decision based on the facts of the case? If the recommendation to the decision-maker (i.e. for the proposed action or 'no action') or the reasoning behind the recommendation to the decision-maker is not acceptable, it is critical that the decision-maker note the records.
- H. Have comprehensive file notes been made? In order to ascertain the steps which were taken to reach a decision, it is essential that the author of each folio be clearly marked on the cover of the folio.
- I. Has APRA promptly notified the persons affected by the decision? Where applicable, the advice should indicate the grounds for the decision i.e. set out the findings of fact and the evidence and material on which the decision was based and the reasons for the decision.
- J. Have procedures been checked to ensure that:
- administrative action is timely?
 - laws and/or guidelines are reasonable and just?
 - laws and/or guidelines are applied correctly?
 - application is fair and consistent?

6. Enforcement Action Policy

The Enforcement team will have regard to the following principles, which are considered 'good practice' in the implementation of enforcement strategies.

Enforcement seeks to:

- minimise losses to current and prospective beneficiaries by intervening actively and promptly in troubled entities;
- adopt a 'no surprises' policy, by liaising and corresponding with regulated entities to convey prudential concerns and rectify matters at an early stage;
- favour prevention over punishment by adopting pro-active measures to remedy weaknesses and forestall problems;
- encourage voluntary cooperation and compliance by providing sufficient scope for troubled entities to rectify internal weaknesses or make an orderly exit from the industry;
- make well-informed decisions by conducting comprehensive investigations, commissioning experts' reports and taking other steps to gather relevant facts and establish objective findings;
- quarantine troubled entities by closing them to new business in cases where full and prompt rectification of problem areas seems unlikely to prevent prospective beneficiaries becoming exposed to the danger already faced by existing beneficiaries; and
- promote the orderly exit of entities without a long-term future by encouraging them to:
 - merge with a competitor; or
 - voluntarily wind-up; and
 - recover losses through civil litigation where this appears to be cost-effective and in the public interest.

7. Enforcement Appeal Policy

Many decisions made by APRA are subject to internal review. Parties who are adversely affected by APRA decisions may have a right to seek an internal APRA review under the relevant legislation.

The integrity of the internal review process is paramount. Any request for an internal review will be provided to an independent person within APRA, known as the delegate. This person should have had no input into the original decision and must hold a similar or more senior position at APRA to the original decision-maker. Individuals allocated to assist with an internal review must also have had no input into the original decision and, for the purpose of the internal review, should not report to the original decision maker but where possible should report directly to the delegate. APRA lawyers providing the delegate legal advice should also be as independent of the original decision as possible.

Fair and frank advice must be provided about the review. All discussions with the original decision-maker or investigating team on the matter must be documented in the review file and limited to necessary facts. Any conversations with the applicant are to be fully documented. The delegate must be provided with:

- all relevant material relied upon during the review process;
- an analysis of the case; and
- a memo outlining the recommendation(s) and alternatives.

In summary, to make lawful decisions, decision makers must:

- abide by the rules of natural justice;
- observe any procedural requirements laid down by the relevant legislation;
- ensure they have the power to make the decision in question and that the decision can be authorised by the relevant legislation;
- take into account all relevant considerations;
- disregard irrelevant considerations;
- exercise the power for purposes authorised by the relevant legislation; and
- ensure that the result of the exercise of their powers is not uncertain.

Decision-makers must not:

- exercise their powers in bad faith;
- act at the direction or request of others;
- apply policies in an inflexible manner;
- be unreasonable;
- abuse their powers;
- make errors of law; and
- make decisions that do not have a proper basis in evidence.

Processes must be able to pass external scrutiny under the *Administrative Decisions (Judicial Review) Act 1977* and other forms of external review.

Specified APRA decisions or actions can be reviewed by the Administrative Appeals Tribunal.

8. Fiscal Recovery Policy

Recovery actions, if applicable, ensure all reasonable steps are undertaken to recoup any debt associated with the case, particularly if the Commonwealth has paid compensation or beneficiaries have incurred losses through negligence or malfeasance. Factors which must be taken into consideration as part of a recovery action are:

- the beneficiaries capacity and desire to sue;
- the ability of the entity/directors to pay compensation;
- the existence of insurance cover;
- the strength of the evidence and APRA's prospects of success; and
- the impact of litigation on the best interests of beneficiaries.

Any decision on whether or not to pursue recovery action is subject to Enforcement Committee endorsement.