



Consent to use restricted expression Offshore banking units

Banking Act 1959

I, Charles Watts Littrell, a delegate of the Australian Prudential Regulation Authority:

- under paragraphs 66(1)(d) and 66(2A)(b) of the *Banking Act 1959* (the ***Banking Act***) give the consents specified in the Schedule; and
- under paragraph 66(2)(a) of the Banking Act impose on the consents the conditions specified in the Schedule.

Note 1: By virtue of section 66 of the Banking Act, a person (whether an individual, a body corporate or a body politic) must not use the expression *bank*, *banker*, *banking*, *credit union*, *credit society* or *credit co-operative* in relation to a financial business carried on by the person except as permitted by section 66 of the Banking Act or a consent in force under that section.

Note 2: Nothing in this instrument is to be construed as authorising or permitting an offshore banking unit that is not an ADI to carry on banking business in Australia.

Subsection 8(1) of the Banking Act (so far as here relevant) prohibits a body corporate from carrying on banking business in Australia unless it is an ADI or has been exempted from that subsection by an order under section 11 of the Banking Act. *Banking business* is defined in subsection 5(1) of the Banking Act.

Dated 16 June 2005

[signed]

Charles Littrell
Executive General Manager
Policy, Research and Statistics

Schedule

Consents

Offshore banking unit

- I. An offshore banking unit may use the expression *banking* as part of the expression *offshore banking unit*, in relation to its offshore banking business, subject to:
 - (a) if the offshore banking unit is an ADI – condition 1;
 - (b) if the offshore banking unit is not an ADI – conditions 1 to 4.

Body corporate related to an offshore banking unit

- II. A body corporate that is related to an offshore banking unit may use the expression *banking* as part of the expression *offshore banking unit*, in relation to the offshore banking unit's offshore banking business, subject to condition 1.

Conditions

Condition applying generally

1. The offshore banking unit or body corporate related to the offshore banking unit must not use the expression *banking* or *offshore banking unit* in a misleading or deceptive way.
 - Example 1: If the offshore banking unit concerned is not an ADI, the expressions must not be used in such a way as to represent or suggest that the offshore banking unit is an ADI, is otherwise authorised to carry on banking business in Australia, or is supervised by APRA.
 - Example 2: If the offshore banking unit concerned is an ADI, the expressions must not be used in such a way as to represent or suggest that transactions which the offshore banking unit undertakes in the course of its offshore banking business constitute deposit-taking, or some other kind of banking business within the meaning of the Banking Act, where this is not the case.

Conditions applying to an offshore banking unit that is not an ADI

2. If the offshore banking unit issues, or arranges (whether as an agent, broker, trustee or in any other capacity) for another person to issue, an investment product to an investor, the offshore banking unit must ensure that a consumer warning is given to the investor in the following manner:
 - (a) if, before the investment product is issued to the investor, information relating to the investment product is given to the investor in one or more paper documents (whether or not such information is also given to the investor in another form) – the warning must be clearly and prominently set out in one of those documents;

- (b) if, before the investment product is issued to the investor, information relating to the investment product is given to the investor in one or more electronic communications (whether or not such information is also given to the investor in another form) – the warning must be clearly and prominently set out in one of those electronic communications;
 - (c) in any other case – the warning must be clearly and prominently set out in a paper document or electronic communication that is given to the investor before the investment product is issued to the investor.
3. The consumer warning only has to be given where:
- (a) the offshore banking unit is a resident; or
 - (b) the offshore banking unit is a non-resident and the conduct of the offshore banking unit in issuing, or arranging for the issuing of, the investment product to the investor is done in carrying on business in Australia.
4. The consumer warning does not have to be given in any of the following circumstances:
- (a) where the investor is a related body corporate of the offshore banking unit;
 - (b) where the investor is a professional investor;
 - (c) where the investment product is provided for use by or in a business that is not a small business;
 - (d) where no consideration is provided (whether directly or indirectly) for the issue of the investment product;
 - (e) where the investor has previously been given the consumer warning in the manner specified in condition 3 in relation to an investment product which is of the same kind as the investment product that is issued to the investor.

Interpretation

- A. In the consents and the conditions:

APRA means the Australian Prudential Regulation Authority.

ADI (which is short for authorised deposit-taking institution) has the meaning given in section 5 of the Banking Act.

Banking Act means the *Banking Act 1959*.

consumer warning means a statement that:

- the offshore banking unit is not authorised under the Banking Act to carry on banking business in Australia and is not prudentially supervised by APRA; and
- any deposit, other loan or investment made to or with the offshore banking unit will not be covered by the depositor protection provisions in section 13A of the Banking Act.

Corporations Act means the *Corporations Act 2001*.

debenture has the meaning given in section 9 of the Corporations Act.

financial product has the meaning given in Division 3 of Part 7.1 of the Corporations Act.

franchise has the meaning given in section 9 of the Corporations Act.

investment product means a transaction which consists of or includes:

- (a) the lending of money (with or without security) by the investor to the offshore banking unit or another person (whether by way of deposit or any other kind of loan); or
- (b) the investment of money by the investor in a managed investment scheme managed by the offshore banking unit or another person.

investor means a customer or client of the offshore banking unit.

issue has the meaning given in section 761E of the Corporations Act (which, for the purposes of this definition, is to be read as if *investment product* were substituted for *financial product* and subsection 761E(7) were omitted).

managed investment scheme:

- (a) has the meaning given in section 9 of the Corporations Act; and
- (b) also includes a scheme operated outside Australia which satisfies paragraph (a) of the definition of *managed investment scheme* in section 9 of the Corporations Act but which is not a body corporate or a franchise.

non-resident has the meaning given in section 6 of the Tax Act.

offshore banking business means the financial business carried on by an offshore banking unit in the capacity of an offshore banking unit.

Note: For the kinds of business activities that are carried on by offshore banking units, see section 121D of the Tax Act (definition of *OB activity*).

Offshore banking business is not banking business within the meaning of the Banking Act, although it may include such banking business. To the extent that it includes such banking business which is carried on in Australia, it can only be carried on by an offshore banking unit that is an ADI.

offshore banking unit means an offshore banking unit within the meaning of section 128AE of the Tax Act.

professional investor has the meaning given in section 9 of the Corporations Act.

resident has the meaning given in section 6 of the Tax Act.

small business means a business employing less than:

- (a) if the business is or includes the manufacture of goods – 100 people; or
- (b) otherwise – 20 people.

Tax Act means the *Income Tax Assessment Act 1936*.

- B. A reference to *issuing an investment product to the investor* means:
- (a) insofar as the investment product consists of or includes the lending of money by the investor – borrowing the money from the investor;
 - (b) insofar as the investment product consists of or includes the investment of money by the investor in a managed investment scheme – issuing an interest in the scheme to the investor in consideration for the money, otherwise than by way of secondary trading in the interest (whether or not there is also other consideration for the issue of the interest).
- C. An investment product is taken to be *of the same kind* as another investment product if:
- (a) both of the investment products are debentures issued by the same person; or
 - (b) both of the investment products are issued by the same person on the same terms and conditions (other than terms and conditions relating to the price of the product or the period of the investment); or
 - (c) both of the investment products are a financial product and are taken to be the same kind of financial product under the test in subsection 1012D(10) of the Corporations Act.
- D. Whether a body corporate is *related* to another body corporate is to be determined in the same way as under the Corporations Act.
- E. A reference to *an Act or provision of an Act* is a reference to that Act or provision as in force from time to time.