



# Guidelines

## Implementation of section 66 of the *Banking Act 1959*


April 2013

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# Contents

<b>Overview</b>	<b>4</b>
Restricted words and expressions	4
Use of 'merchant bank' and 'investment bank'	4
The meaning of 'financial business'	5
APRA's powers to grant consents and exemptions	5
<b>Statutory exceptions</b>	<b>5</b>
<b>Consents granted by APRA to ADIs and related entities</b>	<b>6</b>
Use of the words 'bank', 'banker' and 'banking' by an ADI operating as a bank	6
Use of the expressions 'credit union', 'credit society' and 'credit co-operative' by an ADI operating as a credit union	6
Use of the expression 'building society' by an ADI operating as a building society	6
Use of the expressions 'banker' and 'banking' by an ADI operating as credit union or building society	6
Use of restricted expressions by trustees of superannuation entities	7
Use of the expressions 'purchased payment facility provider' and 'PPF provider' by ADIs	7
Use of the expressions 'specialist credit card institution' and 'SCCI' by ADIs	7
<b>Consents granted by APRA to other entities</b>	<b>7</b>
Use of the words 'bank' by representative offices of foreign banks	7
Use of the words 'bank', 'banker' and 'banking' by foreign banks raising funds in the Australian wholesale capital market	7
Use of the expression 'offshore banking unit' by offshore banking units and related bodies corporate	8
<b>Applications for consent under section 66 of the Banking Act</b>	<b>8</b>
The threshold condition	8
Applications for consent upon receiving initial authorisation to conduct banking business	8
Credit unions and building societies seeking to operate as a bank	8
Information in support of an application for consent	9
Consideration of applications	9
<b>Applications for an exemption under section 11 of the Banking Act</b>	<b>9</b>
<b>Review of APRA's decisions</b>	<b>10</b>
<b>Contacts</b>	<b>10</b>

# Overview

1. Under sections 66 and 66A of the *Banking Act 1959* (the **Banking Act**), it is an offence for a person to use or assume in Australia certain restricted words and expressions in relation to a financial business, except where the Australian Prudential Regulation Authority (**APRA**) has granted a consent or exemption, or where a statutory exception applies.
2. These Guidelines outline the requirements of the Banking Act and set out the factors that APRA will take into account when exercising its discretion to grant a consent or exemption to permit the use of restricted words and expressions.

## Restricted words and expressions

3. Under sections 66 and 66A of the Banking Act, the use of the following terms is restricted:
  - 'bank', 'banker' and 'banking';
  - 'building society', 'credit union' and 'credit society'; and
  - 'authorised deposit-taking institution' and 'ADI'.
4. Under subsection 66(5) of the Banking Act, APRA has the power to determine any other word or expression is a restricted term and has determined the following words and expressions to be restricted terms:
  - 'credit co-operative';
  - 'purchased payment facility provider' and 'PPF provider';<sup>1</sup> and
  - 'specialist credit card institution' and 'SCCI'.<sup>2</sup>
5. Any word or expression (whether or not in English) that is of like meaning to a restricted term is also restricted.<sup>3</sup> Thus, for example, 'banc' and 'banque' are restricted terms.

6. The Banking Act also prohibits the use of restricted terms<sup>4</sup> from being used:
  - as part of another word or expression; or
  - in combination with other words, letters or symbols.
7. The Banking Act only prohibits the use of a restricted term where the term is used or assumed in relation to a financial business (see below).
8. The purpose of restricting terms is to assure the public that a financial business that describes itself as a bank, building society, credit union, credit co-operative, authorised deposit-taking institution, purchased payment facility or specialist credit card institution is in fact authorised to carry on banking business.

## Use of 'merchant bank' and 'investment bank'

9. The term 'merchant bank' was previously allowed to be used by some entities that were not authorised banks, but this arrangement has now ceased. It is no longer permissible, in the absence of specific approval from APRA, for any entity not holding a banking authority in Australia to use the term 'merchant bank'.
10. In addition, some offshore jurisdictions use the term 'investment bank' to describe firms that are not licensed banks but which engage in, among other business, debt and equity underwriting. The use of the term 'investment bank' is not allowed in Australia, in the absence of specific approval from APRA, for any entity not holding a banking authority in Australia.

1 Determination of restricted expressions, 16 November 2005 (Federal Register of Legislative Instruments No. F2005L03622).

2 Banking (restricted word or expression) determination No. 1 of 2006, dated 18 January 2006 (Federal Register of Legislative Instruments No. F2006L00211).

3 Banking Act, s 66(4)(a)(iv).

4 Banking Act, ss 66(4)(b) and 66A(2)(a). However, section 66A does not prohibit the use of the letters 'ADI' as part of another word, e.g. 'traditional': Banking Act, s 66A(3).

## The meaning of 'financial business'

11. The prohibition on the use of restricted terms and expressions only applies where the word or expression is used in relation to a financial business. For example, an organisation such as the Blood Bank does not require APRA's consent to use the restricted word 'bank' as it is not a financial business.
12. The Banking Act provides that 'financial business' means a business that:<sup>5</sup>
  - consists of, or includes, the provision of 'financial services'; or
  - relates, in whole or in part, to the provision of 'financial services'.
13. The term 'financial services' is not defined in the Banking Act. APRA considers that the term encompasses:
  - the provision of financial products as defined in the *Corporations Act 2001*;
  - the provision of finance as defined in the *Financial Sector (Collection of Data) Act 2001*;
  - banking business as defined in the Banking Act;
  - investment business;
  - insurance business;
  - superannuation business; and
  - borrowing, lending and other transactions (such as entering into hire-purchase agreements or financial leases or providing credit in other forms) in which the subject of the transaction is finance.<sup>6</sup>

<sup>5</sup> Banking Act, ss 66(4)(c) and 66A(2)(b).

<sup>6</sup> This does not include transactions (such as the purchase or sale of goods or services for a monetary consideration) in which finance (in the form of payment of a price) may be involved but does not constitute the subject of the transaction.

## APRA's powers to grant consents and exemptions

14. APRA may grant a person, or class of persons, a consent or exemption permitting the use of restricted words and expressions. A consent or exemption granted by APRA may be subject to conditions.
15. APRA may impose additional conditions upon, or vary or revoke, an existing consent or exemption.
16. When exercising its discretion to grant a consent or exemption to an ADI, APRA will take into account how the ADI is categorised. The relevant categories include:
  - banks (including Australian-owned banks, foreign subsidiary banks and branches of foreign banks);
  - credit unions;
  - building societies;
  - specialist credit card institutions;
  - purchased payment facility providers; and
  - other ADIs.

## Statutory exceptions

17. The Banking Act provides that an ADI may use the word 'banking' to refer to the fact that it has been granted an authority under the Banking Act.<sup>7</sup> For example, an ADI may, in its letterhead, refer to itself as being authorised under the Banking Act to carry on banking business.
18. The Banking Act also provides that an ADI may use or assume the expressions 'authorised deposit-taking institution' and 'ADI' in relation to its business.<sup>8</sup>

<sup>7</sup> Banking Act, s 66(1AC).

<sup>8</sup> Banking Act, s 66A(1).

## Consents granted by APRA to ADIs and related entities

### Use of the words 'bank', 'banker' and 'banking' by an ADI operating as a bank

19. APRA requires that, where an ADI wishes to operate as a bank, the ADI must hold at least \$50 million in Tier 1 capital.
20. APRA will, unless there are special circumstances, grant an ADI that wishes to operate as a bank and that holds at least \$50 million in Tier 1 capital an individual consent to use or assume the expressions 'bank', 'banker' and 'banking' on an unrestricted basis. Unrestricted consent allows the ADI to use the expressions 'bank', 'banker' and 'banking':
  - in its company name and trading or business names; and
  - to describe or to advertise its business.

However, in circumstances where the ADI has previously operated as a credit union, APRA will impose transitional conditions upon the grant of such consent (see below).

### Use of the expressions 'credit union', 'credit society' and 'credit co-operative' by an ADI operating as a credit union

21. APRA requires that an ADI wishing to operate as a credit union must have a mutual corporate structure in accordance with the Australian Securities and Investment Commission's *Regulatory Guide 147 Mutuality – Financial Institutions*, September 2000 (**ASIC RG 147**).
22. APRA has granted consent under section 66 of the Banking Act to certain specified ADIs operating as credit unions or building societies to use certain restricted terms (the **Credit Union and Building Society Consent**).<sup>9</sup>

<sup>9</sup> Consent to use restricted expressions – Class consent – Building Societies, Credit Unions and Trustees of Superannuation Entities, dated 19 May 2000 (Federal Register of Legislative Instruments No. F2007B00101).

23. The Credit Union and Building Society Consent provides that:

- a credit union specified in the consent may use the expressions 'credit union', 'credit society' and 'credit co-operative' in relation to the financial business that it carries on in the capacity of a credit union; and
- related bodies corporate of such a credit union may use the expressions 'credit union', 'credit society' and 'credit co-operative' in relation to the financial business carried on by the credit union, provided the expressions are not used in a misleading way.

### Use of the expression 'building society' by an ADI operating as a building society

24. The Credit Union and Building Society Consent provides that:

- a building society specified in the consent may use the expression 'building society' in relation to the financial business that it carries on in the capacity of a building society; and
- related bodies corporate of such a building society may use the expression 'building society' in relation to the financial business carried on by the building society, provided the expression is not used in a misleading way.

### Use of the expressions 'banker' and 'banking' by an ADI operating as credit union or building society

25. The Credit Union and Building Society Consent provides that a credit union or building society specified in the consent may use the expressions 'banker' and 'banking' (but not 'bank') in marketing and branding material to describe its banking services. In particular, a credit union specified in the consent may use the phrase 'mutual banking' in marketing and branding material. A building society specified in the consent may use the phrase 'mutual banking' provided it has a mutual ownership structure consistent with ASIC RG 147. However, the restricted terms 'bank', 'banker' and 'banking' may not be used as part of a registered corporate, business or trading name or internet domain name.

26. A body corporate related to a credit union or building society specified in the consent may similarly use the expressions 'banker' and 'banking' (but not 'bank') in marketing and branding material to describe the banking services of its related credit union or building society, provided the expressions are not used in a misleading way.

#### **Use of restricted expressions by trustees of superannuation entities**

27. Under an existing class consent,<sup>10</sup> a trustee of a superannuation entity, all the members of which are officers or employees (or former officers or employees) of an ADI, may use the ADI's name as part of the trustee's name and the superannuation entity's name if the ADI is permitted to use the word or expression as part of its name and the ADI's name is not used in a misleading or deceptive way.

#### **Use of the expressions 'purchased payment facility provider' and 'PPF provider' by ADIs**

28. Under an existing class consent,<sup>11</sup> an ADI that provides a purchased payment facility may use the expressions 'purchased payment facility provider' and 'PPF provider'.

#### **Use of the expressions 'specialist credit card institution' and 'SCCI' by ADIs**

29. Under an existing class consent,<sup>12</sup> an ADI that carries on credit card issuing and/or credit card acquiring but does not carry on any other form of banking business may use the restricted expressions 'specialist credit card institution' and 'SCCI'.

<sup>10</sup> Consent to use restricted expressions – Class consent – Building Societies, Credit Unions and Trustees of Superannuation Entities, dated 19 May 2000 (Federal Register of Legislative Instruments No. F2007B00101).

<sup>11</sup> Consent to use restricted expressions - Class consent - providers of purchased payment facilities, dated 16 November 2005 (Federal Register of Legislative Instruments No. F2005L03623).

<sup>12</sup> Banking (restricted word or expression) consent No. 1 of 2006, dated 18 January 2006 (Federal Register of Legislative Instruments No. F2006L00212).

## **Consents granted by APRA to other entities**

#### **Use of the words 'bank' by representative offices of foreign banks**

30. Where APRA grants a foreign bank authorisation to maintain a representative office in Australia under section 67 of the Banking Act, APRA will, unless there are special circumstances, grant the foreign bank individual consent to use the word 'bank' (or equivalent) in the descriptive title of its representative office in Australia where this is part of the foreign bank's corporate name. This consent is ordinarily granted at the time the foreign bank is first authorised to maintain a representative office.

#### **Use of the words 'bank', 'banker' and 'banking' by foreign banks raising funds in the Australian wholesale capital market**

31. Under an existing class consent,<sup>13</sup> foreign corporations authorised as banks in their home country (but not Australia) may use the words 'bank', 'banker' and 'banking' in relation to the business of raising funds in the Australian wholesale capital market by way of issuing securities, provided:
- the securities being offered and/or traded are in parcels of at least \$500,000; and
  - there is clear disclosure on the securities and in any information memoranda that the issuing bank is not authorised under the Banking Act.

<sup>13</sup> Banking (Exemption) Order No. 82, dated 23 September 2008 (Federal Register of Legislative Instruments No. F2008B00060).

### **Use of the expression 'offshore banking unit' by offshore banking units and related bodies corporate**

32. Under an existing class consent,<sup>14</sup> an offshore banking unit (**OBU**) (within the meaning of section 128AE of the *Income Tax Assessment Act 1936*) may use the term 'banking' as part of the expression 'offshore banking unit' in relation to its offshore banking business, provided:
- the expression 'offshore banking unit' is not used in a misleading or deceptive way; and
  - where the OBU is not an ADI, the OBU must give a consumer warning in certain circumstances.<sup>15</sup>
33. The same class consent provides that a body corporate related to an OBU may use the term 'banking' as part of the expression 'offshore banking unit' in relation to the offshore banking business of the OBU to which it is related, provided it does not do so in a misleading or deceptive way.

### **Applications for consent under section 66 of the Banking Act**

#### **The threshold condition**

34. Before applying to APRA for consent under section 66 of the Banking Act to use restricted words or expressions, applicants should consider whether such words or expressions will be used in relation to a financial business.
35. A business that does not, itself, consist of or include the provision of financial services but that relates, even in part, to the provision of financial services, qualifies as a financial business.
36. Where it is clear that restricted words or expressions will not be used in relation to a financial business, APRA's consent is not required.

<sup>14</sup> Consent to use restricted expression - Offshore banking units, dated 16 June 2005 (Federal Register of Legislative Instruments No. F2005L01597).

<sup>15</sup> The content of the consumer warning, and the circumstances in which it must be given, are set out in detail in the class consent.

### **Applications for consent upon receiving initial authorisation to conduct banking business**

37. Where a body corporate submits an application to APRA seeking authorisation to conduct 'banking business' under section 9 of the Banking Act, and where that body corporate proposes to operate as a bank, credit union or building society, the body corporate should concurrently apply to APRA for the relevant consent under section 66 of the Banking Act.
38. Where APRA grants authorisation under section 9 of the Banking Act, it will, unless there are special circumstances, concurrently grant section 66 consent on the relevant basis.

### **Credit unions and building societies seeking to operate as a bank**

39. Where an ADI operating as a credit union or building society holds at least \$50 million in Tier 1 capital, and wishes to operate as a bank, the ADI may apply to APRA for consent to unconditionally use the restricted words or expressions 'bank', 'banker' and 'banking'. APRA will consider such applications on a case-by-case basis.
40. APRA's policy is that an ADI cannot simultaneously:
- operate as a bank with unrestricted consent to use the restricted expressions 'bank', 'banker' and 'banking'; and
  - operate as a credit union or building society entitled to the benefit of the Credit Union and Building Society Consent.
41. Accordingly, where an ADI operating as a credit union or building society wishes to operate as a bank, and use the restricted words or expressions 'bank', 'banker' and 'banking' under section 66 of the Banking Act on an unrestricted basis, the ADI will not be permitted to continue to use the expressions 'credit union', 'credit society', 'credit co-operative' or 'building society' (as relevant).



42. Further, an ADI that was previously a credit union or building society and that now operates as a bank will be required to take appropriate steps to ensure that members, depositors, other customers and the general public are clearly aware that it is now operating as a bank. APRA may, for instance, grant unrestricted consent to use the restricted expressions 'bank', 'banker' and 'banking' on the condition that the ADI use the word 'bank' in its corporate, trading or business name for a finite period.

### **Information in support of an application for consent**

43. Information provided in support of an application for consent should clearly indicate:
- the 'person' (including a partnership or corporation) who proposes to carry on the business in relation to which the restricted word is intended to be used. Where relevant, a copy of the certificate of incorporation should be provided;
  - the nature of the financial business, the types of transactions entered into in the course of carrying on the business and the kinds of persons who are or are proposed to be involved in them. For example, the transactions may involve members of the general public or they may involve only persons with specialist knowledge and expertise in financial matters; and
  - the restricted words or expressions in respect of which consent is sought and the context in which such words or expressions will be used. For example, a person may propose to use only the restricted word 'banking' (but not the restricted words 'bank' and 'banker') and only in a specified internet domain name.
44. An application for consent should also contain submissions as to why a grant of consent would not defeat the purpose of the restriction. In particular, such submissions should demonstrate why unconditional consent, or consent subject to one or more specified conditions, would be appropriate. APRA will not grant consent on terms wider than is necessary for an applicant's specified purpose.
45. Where an application for consent has been submitted, APRA may seek additional information from the applicant.

### **Consideration of applications**

46. A decision as to whether APRA should grant consent will be made on the facts of the particular case, having regard to the policy approach outlined in these Guidelines.
47. Consent would only be granted if APRA is satisfied that to grant consent would not defeat the purpose of the restriction, namely the protection of the public. This purpose may be achieved by imposing conditions on the use of a restricted term, such as by requiring the person to make specific disclosures.
48. In accordance with the requirements of the Banking Act, APRA will notify ASIC of new, varied or revoked consents.

### **Applications for an exemption under section 11 of the Banking Act**

49. Section 66A of the Banking Act prohibits the use of the expressions 'authorised deposit-taking institution' and 'ADI' by a person other than an ADI. APRA is not empowered to grant consent for a person to use these expressions. Accordingly, a person, other than an ADI, who conducts a financial business and wishes to use these particular expressions, must apply for an exemption under section 11 of the Banking Act.
50. Under section 11 of the Banking Act, APRA may determine that certain provisions of the Banking Act (including sections 66 and 66A) do not apply to a particular person or class of persons.

## Review of APRA's decisions

51. Certain decisions of APRA regarding the use of restricted expressions by a particular person are subject to review in accordance with Part VI of the Banking Act. Part VI provides, in summary, that a person affected by a reviewable decision of APRA may request APRA to undertake an internal review of the initial decision. Further, upon the completion of the internal review process, such person may apply to the Administrative Appeals Tribunal for administrative review of APRA's decision.

## Contacts

Telephone: 1300 558 849

Applications should be lodged with APRA at:

- GPO Box 9836, Sydney, NSW 2001, fax number (02) 9210 3300.

An initial application can be via fax or email but APRA will not advise the applicant of its decision until the original documents are received.

Email: [info@apra.gov.au](mailto:info@apra.gov.au)

Website: [www.apra.gov.au](http://www.apra.gov.au)

Mail: GPO Box 9836 in all capital cities (except Hobart and Darwin)

For further information contact APRA's Enforcement Unit in Sydney on 02 9210 3000.



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