



23 December 2021

By email: LegislationActReview@ag.gov.au

SUBMISSION TO 2021-22 REVIEW OF THE LEGISLATION ACT 2003

The Australian Prudential Regulation Authority (APRA) welcomes the opportunity to make this submission to the *2021-22 Review of the Legislation Act 2003* (the Review).

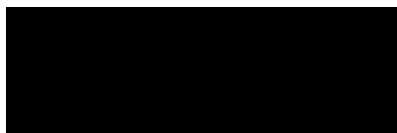
APRA is an independent statutory authority that supervises institutions across the banking, insurance and superannuation sectors. APRA's mandate is to protect the Australian community by establishing and enforcing prudential standards and practices designed to ensure that the financial promises made by the institutions APRA supervises are met within a stable, efficient and competitive financial system.

Through legislation, Parliament has delegated to APRA the role of establishing prudential and reporting standards that prescribe the prudential requirements applying to regulated entities. This submission is centred on APRA's use of these powers.

- [Attachment 1](#) provides the context for and an overview of APRA's approach to making prudential and reporting standards, including information on four areas of interest for the Review: consultation, drafting, transparency and review mechanisms.
- The Review Committee's Discussion Paper of October 2021 raised a number of questions in relation to the *Legislation Act 2003* (Legislation Act). [Attachment 2](#) provides APRA's views on certain questions from that Discussion Paper.

APRA is happy to expand on any matter discussed in this submission or that may be of interest to the Review Committee. Please contact Chris Holder on (02) 6213 5008 with any questions.

Yours sincerely,



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Attachment 1

APRA's prudential framework

APRA is an independent statutory authority established under the *Australian Prudential Regulation Act 1998* (APRA Act). APRA is responsible for the prudential regulation (Box 1) and supervision of financial institutions and for promoting financial system stability in Australia. In carrying out its functions and powers under the APRA Act, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia.

Box 1 About prudential regulation

Prudential regulation is a form of regulation that requires financial institutions to manage risks to reduce the possibility of failure and, in particular, the possibility that they may fail to meet their financial promises to certain classes of liability-holders.

APRA's objective is that, under all reasonable circumstances:

- an authorised deposit-taking institution (such as a bank, credit union or building society) that accepts deposits has the ability to repay those deposits,
- an insurance company that accepts premiums has the ability to pay claims by policyholders when an insured event occurs,
- a superannuation fund trustee that receives contributions from members manages those funds to generate retirement income in members' best interest, and
- that the Australian financial system more broadly remains stable and resilient.

Prudential regulation requires regulated financial institutions to have the appropriate governance, risk management, internal controls and financial strength to mitigate:

- financial risks, such as the risk of loss from poor lending decisions or low returns from poor investment decisions;
- operational risks, such as the failure of a computer system or fraud; and
- behavioural risks, such as poor outcomes from weak governance, organisation culture or remuneration practices.

APRA's prudential standards

Through the legislation governing APRA's regulatory oversight of each regulated industry,¹ Parliament has delegated to APRA the power to determine the prudential and reporting requirements that Australian financial institutions must meet. Primarily, these requirements are made by way of delegated legislation, known as prudential standards or reporting standards, which are supplemented by non-binding prudential practice guides that explain APRA's expectations and set out examples of good practice.

The prudential standards applying to banking and insurance activities and the reporting standards applying to all regulated entities are disallowable instruments, while those applying

¹ The relevant 'industry Acts' are the: *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, *Private Health Insurance (Prudential Supervision) Act 2015* and *Superannuation Industry (Supervision) Act 1993*. Reporting standards are made under the *Financial Sector (Collection of Data) Act 2001*.

to superannuation are not². To date, no prudential standards or reporting standards have been disallowed.

Conferring on a financial regulator the power to determine the prudential framework has distinct advantages and is an approach adopted in other jurisdictions such as the UK, Canada, Singapore and New Zealand. In particular, it facilitates a framework that is flexible, timely and responsive to industry practices, and allows for prompt and carefully targeted responses to events such as the Global Financial Crisis or COVID-19.

As a small open economy that benefits from the global flow of capital, Australia benefits from its financial institutions being subject to prudential requirements that align with internationally agreed standards, such as those set by the Basel Committee for Banking Supervision (BCBS) and the International Association of Insurance Supervisors. APRA is a member of the committees that develop these measures and is well placed to ensure they are appropriately implemented, adjusting where necessary to accommodate local conditions. Implementation of various international standards is also a commitment that Australia has made as a member of the G20.

Diverging from internationally agreed standards could have consequences for Australian financial institutions. This includes potentially increased costs of funding raised in overseas markets due to investors' uncertainty over financial institution risk profiles should the Australian prudential regime become misaligned with international standards. An increase in the cost of overseas funding could have implications for the cost of financial services in Australia with flow-on effects to the broader economy.

It is also important that the prudential framework is stable and institutions and the broader market have regulatory certainty, without the possibility of frequent wholesale changes that could arise through, for example, short sunset periods.

Consultation

APRA undertakes broad and thorough consultation before creating or amending a prudential or reporting standard. This ensures relevant considerations and evidence are brought to bear in its policy-making. The insights obtained through consultation are also important inputs to meeting Office of Best Practice Regulation requirements.

APRA's process for external consultation

External consultation on material policy decisions is conducted by publishing a consultation package on the APRA website. Depending on the matter, the consultation package may consist of a discussion paper or consultation letter³ and, depending on the stage of proposal, draft standards or guidance. Stakeholders are invited to provide submissions to APRA on the proposal for a new or amended prudential standard.

Multiple rounds of public consultation will often be undertaken for proposed regulatory changes expected to have a material impact on industry.⁴ Depending on the complexity of a proposed regulatory change and the expected impact on the industry, each round of

² An instrument (other than a regulation) relating to superannuation is not subject to disallowance (s. 9 *Legislation (Exemptions and Other Matters) Regulation 2015*).

³ Discussion papers are generally used for consulting on larger policy initiatives while a letter to industry may be used for minor policy initiatives.

⁴ APRA's proposed revisions to the capital framework for ADIs are a recent example of a multi-stage, multi-faceted consultation process undertaken by APRA over the period 2018–2021. Further information on this process can be found on APRA's website: <https://www.apra.gov.au/revisions-to-capital-framework-for-authorized-deposit-taking-institutions>.

consultation will typically be three months or greater. A shorter consultation period may apply but this is generally restricted to minor proposals expected to have a small impact on industry or those that have already been subject to significant consultation.

APRA responds to submissions by releasing 'a response to submissions' paper or letter to industry. The purpose of this response is to acknowledge the feedback received and explain the rationale for APRA's decisions in relation to issues raised in submissions. APRA considers this step important for the transparency of the policy-making process and APRA's accountability in that process.

APRA may also engage in additional consultation activities including:

- targeted consultation with industry, peer regulators and Government; and
- various informal means of consultation through mechanisms such as industry presentations, webinars, speeches, workshops, quantitative impact studies and targeted consultation with select stakeholders from industry, within government and/or the broader community.

APRA's approach to drafting prudential standards

As noted above, APRA releases a draft prudential standard for public comment as part of its consultation process. The feedback obtained through this process is central to APRA's efforts to ensure its prudential and reporting standards are clearly drafted and the requirements within those standards are understood by regulated entities.

APRA has a structured process for drafting prudential standards (or draft prudential standards for consultation) that draws on relevant technical knowledge and legal expertise within APRA. Members of APRA's policy team(s) typically draft the standards with input from technical experts. The standards are then reviewed by APRA's legal team. APRA staff tasked with drafting and reviewing prudential standards are supported by internal guidance material and periodic training on making legislative instruments. All draft and final prudential standards and guidance are reviewed by APRA's Prudential Policy Committee and approved by an APRA Member (i.e. a statutory appointee) before release.

The overall process has been designed to ensure technical precision within standards, consistency across standards and the legal compliance of standards, including with rules set by the Office of Parliamentary Counsel and the Senate Standing Committee on Regulations and Ordinances.

Transparency and accessibility

APRA's prudential standards and associated guidance are available from [APRA's website](#) under the relevant industry pages. APRA's [enabling legislation](#) is also readily available from APRA's website.

A key strategic initiative within the *APRA 2021-25 Corporate Plan*⁵ is 'Modernising the Prudential Architecture'. Over the 2021–2025 plan horizon, APRA is aiming to:

- make the prudential standards (and associated) guidance more accessible for industry, reduce burden and encourage innovation in regtech and supotech,
- build capabilities to support better regulation and digitisation, and

⁵ APRA (2021), *APRA 2021-25 Corporate Plan*, August 2021. Available at: https://www.apra.gov.au/sites/default/files/2021-08/2021-25%20APRA%20Corporate%20Plan_1.pdf.

- adapt the architecture to cater for new and emerging risks from the evolving global and domestic financial landscape.

The ultimate goal is to build a modern and adaptable prudential framework that provides a platform to maintain system stability and support innovation, in a changing operating environment. APRA expects to make further announcements on this initiative in early 2022.

Mechanisms for the review of prudential standards

APRA regularly reviews its prudential standards. The reviews consider emerging issues in regulated industries, developments in international standards, evolving best practice from around the world and consultation with Australia's other financial regulators (among other considerations). The reviews vary from broad post-implementation reviews, such as conducted on the Superannuation prudential framework⁶, to targeted reviews of specific standards or aspects of standards.

APRA also updates and strengthens the prudential framework as appropriate. APRA publishes a rolling forward agenda for policy development for the next 12–18 months on an annual basis, which outlines the plans for new or revised prudential standards and guidance — these are known as APRA's policy priorities⁷. The aim of this process is to ensure the prudential framework remains comprehensive, enforceable, proportionate and supports APRA in delivering on its mandate.

⁶ APRA (2019), *Post-implementation review of APRA's superannuation prudential framework*. Available at: <https://www.apra.gov.au/post-implementation-review-of-apras-superannuation-prudential-framework> .

⁷ The last review was published in February 2021. See: APRA (2021), *APRA's Policy Priorities*, 1 February 2021. Available at: <https://www.apra.gov.au/sites/default/files/2021-01/Information%20Paper%20-%20Policy%20Priorities%202021.pdf> .

Attachment 2

Questions raised in the Discussion Paper

In relation to some of the questions raised in the Review Committee's Discussion Paper of October 2021, in APRA's view:

- the Legislation Act is fit for purpose, the objectives set out in section 3 of the Legislation Act remain appropriate and the definition of "legislative instrument" is appropriate for meeting the objectives of the Legislation Act;
- the current sunset period is appropriate and manageable for those instruments which are made by APRA; and
- in terms of the Register's functionality, there is merit in exploring whether improvements could be made to assist users in navigating and locating specific provisions, particularly for those Acts which are long and complex, and in updating the "Enables" tab of the Register as it relates to each relevant Act such that notifiable instruments are listed separately to legislative instruments.

On the question of whether there should be a power in the Legislation Act for instruments or documents to be removed from the Register, APRA considers that there should⁸ and that such a power should be exercisable in circumstances where:

- it has been identified that an instrument or document in the Register contains an error and the circumstances are such that it would be preferable to remove the existing instrument or document entirely and replace it with a corrected version of the same; or
- a failure to remove an instrument or document would cause confusion as to the correct and current status of the law or its interpretation (for example, where an incorrect version of an explanatory memorandum has been uploaded to the Register in error).

APRA suggests that the power to remove instruments or documents should be exercisable by the First Parliamentary Counsel, given its current responsibility for maintaining the Register and its existing authority to make editorial and certain other changes to registered Acts, instruments and other documents. Further, if the power is to be exercisable in the circumstances described above, APRA would recommend a default position whereby no ongoing reference is retained in the Register to any instrument or document which has been removed.⁹

The Review Committee's Discussion Paper of October 2021 also sought views on the current framework for exemptions from the operation of the Legislation Act. APRA notes that certain exemptions relating to disallowance are not the same for all APRA-regulated industries. APRA

⁸ In APRA's view, sections 15A(5) and 15D of the Legislation Act could be read to provide the First Parliamentary Counsel with the power to remove instruments or documents from the Register. However, APRA would suggest that the Review Committee consider whether section 15A(5) of the Legislation Act should be amended to specifically include such a power or alternatively, whether the Legislation Act should be amended to include a new section for this purpose.

⁹ However, the Review Committee could also consider whether it would be appropriate to provide the First Parliamentary Counsel with a discretionary power to determine whether or not a reference to an instrument or document which has been so removed should be retained in the Register on a case-by-case basis.

would not be concerned if superannuation prudential standards were made disallowable instruments, to bring them into line with those for the banking and insurance industries.