



Prudential Practice Guide

SPG 520 – Fit and Proper

July 2013


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About this guide

Prudential Practice Guides (PPGs) provide guidance on APRA's view of sound practice in particular areas. PPGs frequently discuss legal requirements from legislation, regulations or APRA's prudential standards, but do not themselves create enforceable requirements.

Prudential Standard SPS 520 Fit and Proper (SPS 520) sets out APRA's requirements in relation to assessing the fitness and propriety of responsible persons of an RSE licensee. This PPG aims to assist an RSE licensee in complying with those requirements and, more generally, to outline prudent practices in relation to fitness and propriety.

For the purposes of this guide, and consistent with the application of SPS 520, 'RSE licensee' has the same meaning given in the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*.

Subject to the requirements of SPS 520, an RSE licensee has the flexibility to configure its Fit and Proper Policy in the way most suited to achieving its business objectives. Not all practices outlined in this PPG will be relevant for every RSE licensee and some aspects may vary depending upon the size, business mix and complexity of the RSE licensee's business operations.

Fit and Proper Policy

1. The Fit and Proper Policy of an RSE licensee assists it in prudently managing the risk that responsible persons are not fit and proper. It will form a part of the entity's broader risk management framework.
2. A Fit and Proper Policy may be developed and implemented as a group policy provided the RSE licensee meets the requirements of SPS 520, including paragraph 7 of that standard.
3. An RSE licensee may consider extending its assessment process for fitness and propriety to a wider range of persons than is required under SPS 520. The assessment process for responsible persons under the Fit and Proper Policy could be adapted for this purpose.
4. Members of the Board of an RSE licensee must collectively satisfy criteria of both fitness and propriety. The standard requires that each individual satisfies the requirements of propriety, including character, honesty, integrity, diligence and judgement. Each individual would also be expected to make a contribution to the RSE licensee satisfying the requirements of fitness at a collective level.
7. Under SPS 520, consideration of whether a particular individual is a responsible person takes into account the person's functions and duties and not simply their position title. In the case of an RSE licensee with subsidiaries, consideration also takes into account whether the conduct of persons in the subsidiaries could materially affect the RSE licensee's business operations.
8. APRA envisages that senior managers will include managers reporting directly to the Chief Executive Officer and those responsible for key aspects of risk management.
9. The application of certain provisions of SPS 520 is limited to people who are ordinarily resident in Australia. As a guide, a person might be considered ordinarily resident if they are likely to be in Australia for a majority of days in any 12-month period.
10. APRA envisages that only a limited number of the most senior people within a connected entity would perform activities that have the ability to materially impact on the business or financial standing of the RSE licensee for the purposes of subparagraph 11(f) of SPS 520 and that this would be limited to connected entities which are wholly owned subsidiaries. It may be the case that no person in a given connected entity meets this criterion.

Responsible persons

5. The responsible persons of an RSE licensee are those persons whose conduct is most likely to have a significant impact on its sound and prudent management.
6. For an RSE licensee, these persons generally comprise directors, senior managers, RSE auditors, RSE actuaries, secretaries and persons who perform certain functions in relation to connected entities.
11. An RSE licensee may seek guidance from APRA if it is unsure whether a particular person meets the definition of a responsible person.
12. Under paragraph 13 of SPS 520, APRA has the power to determine that additional persons are responsible persons. APRA does not expect that it would routinely use this power or use it to substantially increase the scope of SPS 520. APRA will consult with the RSE licensee before making such a determination.

Criteria to determine if a responsible person is fit and proper

13. Under SPS 520, the skills and experience required by each responsible person depend on the person's role. This, in turn, is affected by the role undertaken by other responsible persons. For example, a director is generally expected to understand the role and responsibilities of a director and have a general knowledge of the entity, its business and its regulatory environment. However, each director is not generally expected to have all the competencies that the Board collectively needs if other directors have those competencies or they are obtained from external consultants or experts and the Board does not unquestionably rely on their advice.
14. SPS 520 requires that, under its Fit and Proper Policy, an RSE licensee must consider the nature and extent of a number of matters in conducting fit and proper assessments. Such matters ordinarily include, when relevant:
 - (a) the person's character, competence and experience relative to the duties involved, including whether the person:
 - (i) possesses the necessary skills, knowledge, expertise, diligence and soundness of judgement to undertake and fulfil the particular duties and responsibilities of the role in question; and
 - (ii) has demonstrated the appropriate competence and integrity in fulfilling occupational, managerial or professional responsibilities previously and/or in the conduct of their current duties; and
 - (b) whether the person:
 - (i) has demonstrated a lack of willingness to comply with legal obligations, regulatory requirements or professional standards, or been obstructive, misleading or untruthful in dealing with regulatory bodies or a court;
 - (ii) has breached a fiduciary obligation;
 - (iii) has perpetrated or participated in negligent, deceitful or otherwise discreditable business or professional practices;
 - (iv) has been reprimanded, disqualified or removed, by a professional or regulatory body in relation to matters relating to the person's honesty, integrity or business conduct;
 - (v) has seriously or persistently failed to manage personal debts or financial affairs satisfactorily in circumstances where such failure caused loss to others;
 - (vi) has been substantially involved in the management of a business or company which has failed, where that failure has been occasioned in part by deficiencies in that management;
 - (vii) is of bad repute in any business or financial community or any market; or
 - (viii) was the subject of civil or criminal proceedings or enforcement action, in relation to the management of an entity, or commercial or professional activities, which were determined adversely to the person (including by the person consenting to an order or direction, or giving an undertaking, not to engage in unlawful or improper conduct) and which reflected adversely on the person's competence, diligence, judgement, honesty or integrity.
15. Conduct and events that took place overseas may also be relevant to the assessment.
16. When documenting the competencies required for each responsible person position, an RSE licensee might consider documenting any training or induction processes required for each position, on appointment to the position and on an ongoing basis.

Equal representation requirements and assessment of individuals under the RSE licensee's fit and proper policy

17. Equal representation requirements do not, in APRA's view, absolve an RSE licensee from the obligation to determine whether an individual is fit and proper to act as a director or an individual trustee of an RSE licensee.
18. Where an RSE licensee is not subject to the equal representation requirements¹, it would be prudent practice for the assessment of the fitness and propriety of a candidate for a responsible person position to take place prior to appointment or promotion.
19. Where it is not possible for an RSE licensee to undertake a fitness and propriety assessment prior to the formal appointment of an individual responsible person – for example, where a nominating body has a process for nominating appointees to a Board – it would be prudent practice for an RSE licensee to:
 - (a) make available to prospective candidates and, where applicable, to nominating bodies, a copy of the RSE licensee's Fit and Proper Policy and a summary of the duties and responsibilities of an RSE licensee (as encapsulated in the covenants described in s. 52 of the SIS Act); and
 - (b) complete the assessment of fitness and propriety as soon as possible after the appointment is made.
21. In assessing the fitness and propriety of a person to be appointed as an RSE auditor or RSE actuary, an RSE licensee would ordinarily consider whether there is a risk that the independent professional judgement of the RSE auditor or the RSE actuary may be unduly influenced by their other duties and interests.
22. There are further criteria specified in SPS 520 for the appointment of RSE auditors and RSE actuaries. These requirements reflect the importance of these positions and the need to ensure independence, including avoiding potential conflicts of interest.
23. The additional criteria applicable to the appointment of RSE auditors and RSE actuaries also require certain levels of experience. This may include experience in relation to superannuation businesses outside Australia. In such cases, the RSE licensee would be expected to consider the extent to which the person can demonstrate competency that relates specifically to Australian conditions, including Australia's prudential and regulatory requirements.

Decision standards for fitness and propriety considerations

Additional criteria applying to RSE auditors and RSE actuaries

20. The requirements applying to RSE auditors and RSE actuaries in SPS 520 apply only to auditors and actuaries that meet the definitions in the SIS Act. Those provisions do not apply to auditors or actuaries more generally or to those auditors or actuaries who are responsible persons for other reasons.
24. The fit and proper criteria in SPS 520 require the RSE licensee to assess whether responsible persons meet certain requirements. If insufficient information is available to enable the RSE licensee to prudently conclude that those requirements are met, particularly as a result of lack of cooperation by the person, the criteria would normally be regarded as not met.
25. APRA does not require an RSE licensee to necessarily bar or remove a person from a responsible person position solely on the basis that one of the matters listed at paragraph 14 of this guide has occurred. Depending on the circumstances, a listed matter may not be relevant to that assessment. Where a matter is relevant, the RSE licensee may consider it in conjunction with other relevant matters such as materiality, elapsed

¹ Refer to Part 9 of the SIS Act.

time since the event, and repetition or duration of the behaviour. SPS 520 requires an RSE licensee to apply prudent judgement in determining whether the person could be considered fit and proper for the responsible person position.

26. A person may be assessed as unfit for a particular responsible person position because of a lack of competence for that position or because of a conflict of interest that applies to the duties of that position. However, the person may still be fit and proper for another responsible person position because the competencies or conflicts were specific to the position.
27. Where a person is found to be not fit and proper due to a lack of character, diligence, honesty, integrity or judgement, that person will normally not be suitable for any responsible person position. In particular, if a responsible person's conduct is found to be misleading or deceptive in their interactions with APRA and its supervision processes, APRA would not consider the person to be fit and proper.

Process for assessment of fitness and propriety

28. When assessing a person's fitness and propriety, an RSE licensee need not make enquiries about a matter that is unlikely to be material. An RSE licensee would need to weigh the burden of documenting information and the risk of unnecessary disclosure of personal information with the possibility that this information might be material.
29. An annual performance review would typically be the appropriate time for the annual assessment of a responsible person's fitness and propriety. However, if material information adverse to the assessment becomes known to an RSE licensee during the year, SPS 520 requires that steps be taken without waiting for the annual performance review.

Attestations and representations

30. The Fit and Proper Policy may require persons to provide attestations relating to some or all of the matters required to be considered as part of a fit and proper assessment and specified in paragraph 14 of this guide.
31. For a new appointment to a responsible person position, attestations or representations may assist in satisfying the requirement to take reasonable steps under paragraph 35 of SPS 520. However, APRA does not envisage that attestations and representations would be sufficient for an RSE licensee to fully satisfy itself of a responsible person's fitness and propriety on initial assessment. An initial assessment is likely to include at least Australian criminal record checks, as well as evidence of material qualifications.
32. Attestations or representations may be appropriate for interim appointments. If an attestation is later discovered to have been given in the knowledge that it was false, this will very likely indicate that the person is not fit and proper and should be removed. If an RSE licensee appoints a person to a responsible person position without an assessment and it is later discovered that the person was disqualified from holding the position under the SIS Act, both the person and the RSE licensee may have committed an offence under the SIS Act.
33. Attestations and representations covering the matters in paragraph 14 of this guide would generally be sufficient for an annual review of a responsible person's fitness and propriety. However, these representations may not be conclusive – for example, if a person responsible for making the assessment becomes aware of any material matter not previously identified or considered.
34. For an RSE auditor or an RSE actuary, representations from a firm of which the RSE auditor or RSE actuary is a member may assist in assessing fitness and propriety.

Relying on information gathered for other fitness and propriety assessments

35. In making an assessment under its Fit and Proper Policy, an RSE licensee may consider, where prudent, taking into account other assessments of fitness and propriety or information collected for such assessments. In determining the weight to be given to other assessments, the RSE licensee would ordinarily have regard to the time elapsed since the assessment was made and whether the criteria applied were comparable and relevant. In considering whether it would be prudent to take into account previously collected information, an RSE licensee would ordinarily consider whether the information remains current. It is likely that such information would substitute for some, but not all, of the enquiries necessary for the RSE licensee's own fit and proper assessment.
36. For example, for those responsible persons who are responsible officers of the holder of an Australian Financial Services Licence², relevant information may have been gathered during the licensing process and this information may be taken into account if the RSE licensee believes that the information remains current.
37. Information gathered in support of an application for registration as a company auditor may assist an RSE licensee in determining fitness and propriety of an auditor. The Australian Securities and Investments Commission's assessment of the fitness and propriety of a company auditor may be taken into account in an RSE licensee's own assessment of the fitness and propriety of the auditor.
38. Where an RSE licensee becomes aware of information that could lead to an assessment that a person is not fit and proper, taking reasonable steps as required under SPS 520 would generally include providing the person with a fair opportunity to put matters to the RSE licensee.
39. RSE licensees may have obligations under the *Privacy Act 1988* (Privacy Act) relating to how they collect and use information about responsible persons. The obligations include informing responsible persons that information will be collected about them and the ways in which the information may be used and disclosed. An RSE licensee may need to take steps to ensure compliance with the Privacy Act, such as with National Privacy Principles 1.3 and 1.5 in Schedule 3.
40. In some instances, an RSE licensee may have information about a person that has not been collected for assessing fitness and propriety. Where this information is relevant, SPS 520 may require the use of that information for assessing fitness and propriety. The Privacy Act includes exemptions from the National Privacy Principles for conduct required by law, such as the requirement under the SIS Act to comply with the prudential standards. Where relevant, an RSE licensee may consider seeking its own legal advice on these issues.
41. As a law of the Commonwealth, SPS 520 may override inconsistent State and Territory laws, if those laws are incapable of operating concurrently with SPS 520. For example, it may be necessary to read down a State law relating to employment where there is apparent inconsistency with SPS 520, but where the position is unclear legal advice should be obtained. Accordingly, the Fit and Proper Policy of an RSE licensee needs to meet the requirements of, and be implemented in a way that complies with, SPS 520 in all respects, even if it would breach a contract or apparently conflict with another law (other than a law of the Commonwealth). This applies regardless of whether the contractual relationships are in place as envisaged by paragraph 42 of this guide.

² As defined in the *Corporations Act 2001*.

42. To assist in complying with its Fit and Proper Policy, an RSE licensee may consider putting in place appropriate contractual or other relationships. This may include responsible persons agreeing:

- (a) to provide any assistance that the RSE licensee needs to obtain information for the implementation of its Fit and Proper Policy or SPS 520, including giving consents and taking steps to ensure that any person providing information in good faith will not be made liable for providing that information; and
- (b) not to seek damages or any other remedy from the RSE licensee for implementing its Fit and Proper Policy or seeking to do so in good faith.

43. It may be necessary to amend the governing rules and/or constitution of an RSE licensee to ensure directors take office under terms that enable the RSE licensee to ensure compliance with its Fit and Proper Policy. Note that ss. 107(2)(a)(ii)(DA) and 108(2)(a)(iia) of the SIS Act require an RSE licensee to have processes in their rules for removing a member representative or independent trustee (or director) where the person no longer meets one or more of the criteria for fitness and propriety in SPS 520.

When a responsible person is not fit and proper

44. The steps that an RSE licensee takes to ensure that a person does not hold a responsible person position for which they are not fit and proper may include:

- (a) not appointing the person or terminating their engagement;
- (b) redefining the person's responsibilities pending further enquiries by the RSE licensee or until the person receives further training or experience; or

- (c) if there are no effective steps prudently available, taking steps to facilitate APRA independently considering the person's fitness and propriety. This in itself would not satisfy the RSE licensee's obligations to notify APRA of information under SPS 520.

APRA's powers

45. APRA has powers under the SIS Act that are relevant to obligations in SPS 520. These powers enable APRA to:

- (a) direct an RSE licensee to comply with a specified condition of its RSE licence³;
- (b) cancel an RSE licence⁴;
- (c) apply to the Federal Court of Australia to disqualify a person from being a trustee or a responsible officer⁵;
- (d) apply to the Federal Court of Australia to disqualify a person from being an RSE auditor or RSE actuary⁶;
- (e) direct an RSE licensee to remove an RSE auditor or RSE actuary⁷; and
- (f) suspend or remove an RSE licensee from being trustee of a superannuation entity.⁸

46. An RSE licensee is not excused from meeting its obligations under SPS 520 on the basis that APRA has powers under the SIS Act. APRA expects RSE licensees to take the action needed so that only a person who is fit and proper acts in a responsible person position.

47. It is a condition of every RSE licence that the RSE licensee must comply with the RSE licensee law.⁹ The prudential standards form part of the RSE licensee law. APRA may give a direction of the kind referred to in paragraph 45(a) of this guide if there has been a breach of a prudential standard.

3 Refer to s. 29EB of the SIS Act.

4 Refer to s. 29G of the SIS Act.

5 Refer to s. 126H of the SIS Act.

6 Refer to s. 130D of the SIS Act.

7 Refer to s. 131AA of the SIS Act.

8 Refer to s. 133 of the SIS Act.

9 Refer to s. 29E(1)(a) of the SIS Act.

48. APRA may exercise its powers referred to in paragraph 45(b) of this guide to cancel an RSE licence in circumstances that include where there has been a breach of a condition imposed on the licence or the RSE licensee has failed to comply with a direction of the kind referred to in paragraph 45(a) of this guide.¹⁰
49. The Federal Court of Australia may, on application from APRA, disqualify a person referred to in paragraph 45(c) of this guide if it is satisfied that:
- (a) the RSE licensee, while the person was a responsible officer, contravened the SIS Act and the nature of the seriousness of the contravention, or number of them, provides grounds for disqualification of that person¹¹;
 - (b) the person is not a fit and proper person to be or act as a trustee or responsible officer of a superannuation entity¹²; and
 - (c) the disqualification is justified.¹³
50. APRA may give a direction of the kind referred to in paragraph 45(e) of this guide if APRA is satisfied that the person:
- (a) is disqualified under ss. 130D or 131 from being, or acting as, an RSE auditor or RSE actuary of a superannuation entity¹⁴; or
 - (b) is not a fit and proper person to hold the appointment.¹⁵
51. APRA may exercise the powers referred to in paragraph 45(f) of this guide to suspend or remove an RSE licensee if the RSE licensee breaches any of the conditions of its RSE licence.¹⁶
52. APRA's powers apply independently of an RSE licensee's powers and duties when a responsible person is not fit and proper. APRA is not required to wait until an RSE licensee has considered whether a responsible person is fit and proper. However, APRA will generally consult with an RSE licensee and will not normally act to remove a responsible person until the RSE licensee has had sufficient time to complete its consideration.
53. If a person whom APRA considers is not fit and proper is not removed from holding a responsible person position by the RSE licensee, APRA will exercise its powers as appropriate.
54. When assessing whether a person is fit and proper for a particular responsible person position or more generally, APRA will consider, among other matters, the matters listed at paragraph 14 of this guide to the extent that they are relevant.
55. If an RSE licensee considers that a responsible person is fit and proper for a responsible person position but APRA considers otherwise, APRA may notify the RSE licensee that APRA will exercise its powers if certain requirements are not satisfied. In exceptional circumstances, APRA may exercise its powers without notification.
56. It is not necessary for a person to be a past, current or immediately prospective responsible person for APRA to consider that person's fitness and propriety. In some circumstances, APRA will need to identify persons who are not fit and proper in order to ensure they are not able to hold responsible person positions in the future.
57. A person affected by a decision made by APRA referred to in paragraphs 45(b), (e) and (f) of this guide may request that APRA review that decision.¹⁷ If APRA confirms or varies the decision, or fails to revoke the decision within 21 days, the person affected by the decision may then make an application to the Administrative Appeals Tribunal. The process for reconsideration and review is provided under s. 344 of the SIS Act.

¹⁰ Refer to ss. 29G(2)(c) and (e) of the SIS Act.

¹¹ Refer to s. 126H(4) of the SIS Act.

¹² Refer to s. 126H(5) of the SIS Act.

¹³ Refer to ss. 126H(1)(b) and 126H(7) of the SIS Act.

¹⁴ Refer to s. 131AA(2)(a) of the SIS Act.

¹⁵ Refer to s. 131AA(2)(b) of the SIS Act.

¹⁶ Refer to s. 133(1)(e) of the SIS Act.

¹⁷ A decision made by APRA to: (a) cancel an RSE license under s. 29G(1), (b) give a direction under s. 131AA(2)(b) or (c) suspend or remove a trustee of a superannuation entity is a reviewable decision. Refer to (a) s. 10(1)(dl), (b) s. 10(1)(ta) and (c) s. 10(1)(taa), respectively.

Informing APRA

58. RSE licensees are required, under paragraphs 45 to 47 of SPS 520, to provide certain information to APRA and ensure that this information remains current. To assist RSE licensees in complying with this requirement, APRA provides an annual form containing the most recent information provided to APRA regarding those in responsible person positions. The RSE licensee may use this form to ensure that the information provided to APRA is correct. Information on this process, and a standard form, are available on APRA's website at www.apra.gov.au.¹⁸
59. If an RSE licensee believes that a person has information that is likely to be material to a fit and proper assessment that it has not been able to obtain, the RSE licensee would be expected to discuss the matter with APRA.
60. The following are examples of information that APRA may require the RSE licensee to obtain under paragraph 49 of SPS 520:
- (a) specified information and documentation on any criminal record or civil finding and any prospective criminal or civil proceedings to which the person may be subject (the requirement to provide this information will be in accordance with Part VIIC of the *Crimes Act 1914* (Crimes Act))¹⁹;
 - (b) specified information from law enforcement agencies, other regulators, current and former employers of the person, professional associations and others whom APRA believes may have relevant information; and
 - (c) the reasons for the resignation, retirement or removal of a responsible person.
61. APRA may make other enquiries to enable it to assess the fitness and propriety of a responsible person.
62. If permitted by law, APRA may provide an RSE licensee with information it obtains about the fitness and propriety of a responsible person. APRA does not expect that it would ordinarily provide information other than information that is publicly available, such as the disqualification register on the APRA website.

¹⁸ Refer to *Reporting Standard SRS 520.0 Responsible Persons Information*.

¹⁹ Part VIIC of the Crimes Act places limits on the disclosure and use of information about 'spent' convictions. Part VIIC of the Crimes Act protects from disclosure not only convictions that are spent convictions under Part VIIC, but also convictions that are spent convictions under spent convictions legislation of a State or Territory.



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