Law Council
OF AUSTRALIA

Proposed changes to governance

Australian Prudential Regulation Authority

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Introduction

1. The Law Council of Australia welcomes the opportunity to provide input to the consultation by the Australian Prudential Regulation Authority (**APRA**) on Draft Prudential Standard CPS 510 (**draft CPS 510**). This submission reflects input from the Superannuation Committee of the Law Council's Legal Practice Section and the Corporations Committee and Financial Services Committee of the Law Council's Business Law Section (the **Committees**).

2. APRA is inviting feedback on the draft CPS 510, the proposed removal of routine fit and proper reporting, and related definitional changes in Prudential Standard CPS 001 Defined terms.

3. This submission commences with preliminary observations before providing detailed commentary on specific issues raised by draft CPS 510.

4. The Law Council looks forward to continuing to engage with APRA on these important governance reforms.

Preliminary observations

5. The Law Council acknowledges APRA's engagement with industry during the consultation process and recognises that APRA has, in a number of respects, fairly responded to industry feedback. However, as set out below, the Law Council has significant residual concerns, which it urges APRA to address before the standard is finalised.

6. The Law Council is broadly supportive of the objectives of draft CPS 510 and its underlying policy intent. However, the Law Council holds serious concerns—several of which are fundamental—with the draft standard as presently formulated. These concerns relate to legal certainty, practical operability, jurisdictional scope, and the risk of unnecessary duplication with existing regulatory frameworks, including the Financial Accountability Regime (**FAR**).

General comments

Use of the term "effective"

7. The Law Council is concerned by the pervasive use of the term "effective" throughout draft CPS 510. This concept is inherently outcomes-focused: it requires the production of the desired effect. Compliance can therefore only truly be measured in hindsight, creating ongoing legal risk and regulatory uncertainty for regulated entities. An entity that acts reasonably at the time of a decision may nonetheless be found non-compliant if the subsequent outcome does not meet the standard of "effectiveness" when assessed after the fact. The Law Council considers that this creates an unacceptable level of uncertainty and risk for APRA-regulated entities.

8. The Law Council recommends that APRA replace "effective" with more readily assessable terms already used elsewhere in draft CPS 510, such as "robust", "sound" or "appropriate". These terms permit assessment on the basis of the facts known at the time the decision was made, and accordingly provide significantly greater legal certainty for regulated entities seeking to ensure compliance.

9. In the alternative, the Law Council recommends that APRA's guidance for CPS 510 include clear and express statements confirming that "effectiveness" is to be assessed by reference to the facts known at the time of the relevant decision, and not by reference to outcomes that materialise after the fact.

Interpretation

Definition of "governance framework"

10. The list of actions and artefacts in Attachment B to the Consultation Paper is inconsistent with, and materially broader than, the definition of "governance framework" in paragraph 11 of the draft standard.

11. The purpose of Attachment B is unclear. The Law Council's view is that the definition in paragraph 11 is appropriate and that Attachment B should be either removed or updated to align with that definition. By way of example, among other inconsistencies:

    (a) the artefacts listed under the headings "risk & control oversight" and "APRA interaction and transparency" do not relate to the rules, processes, roles and practices that define and guide how a regulated entity is directed, controlled and held accountable;

    (b) references to conflicts management policies and processes are not limited to director conflicts; and

    (c) it is unclear what is intended by the inclusion of "approved use of group policies and functions" and "group-level internal audit and assurance arrangements".

Definition of "responsible person"

12. While the Law Council supports APRA's policy intent to simplify reporting requirements for Responsible Persons and Accountable Persons (**APs**), the Law Council is concerned that the change to the Responsible Person definition—excluding "senior managers" and including APs under paragraph 8(b)(i) of draft CPS 510—will have significant unintended consequences. Specifically, this change:

    (a) creates unnecessary duplication with FAR, which already imposes comprehensive obligations on and in relation to APs;

    (b) increases ambiguity and complexity, as the draft standard retains the potentially overlapping definitions of Responsible Persons, APs and "senior managers" (defined in CPS 001) without explaining how these terms are intended to operate and interact; and

(c) is potentially problematic because the regulated entity may have no visibility on appointments into positions that result in persons becoming APs of significant related entities.

13. The inclusion of APs presents particularly acute issues in the superannuation industry, where significant related entities include parent and sister entities, meaning that APs of a regulated entity may be employed by its parent or sibling companies. While the FAR regime:

    (a) only requires the superannuation trustee to take reasonable steps to ensure APs meet their accountability obligations;

    (b) imposes obligations directly on APs; and

    (c) grants the regulators rights to remove unsuitable APs,

    draft CPS 510 proposes to impose unconditional obligations on superannuation trustees in relation to APs, including APs employed by significant related entities. The difference in approach between FAR and draft CPS 510 is significant and becomes unworkable where the superannuation trustee has no legal right or practical ability to take any steps—reasonable or otherwise—to comply with draft CPS 510 in relation to those persons. Under the *Corporations Act 2001* (Cth) and general law, subsidiary entities are subject to the control of the head company; there is no provision in the Corporations Act or at general law that empowers a subsidiary to direct its parent. In this context:

    (a) it is unclear how a subsidiary trustee could take any steps against the group's CEO if that person fails to meet fit and proper requirements—a difficulty that is particularly acute where the head company is listed and ASX Listing Rules also apply;

    (b) nor can a subsidiary trustee take any steps in relation to a responsible person in a sister entity or parent company to comply with the trustee's conflicts policy, noting that those persons will already be subject to the group's conflicts management policy.

14. The Law Council strongly recommends that APRA refrain from imposing obligations that a trustee cannot, as a matter of law or practical reality, fulfil because it has no legal right or ability to take the action required by draft CPS 510.

15. Further, the inclusion of persons determined by APRA under paragraphs 8(b)(vi) and (vii) creates unacceptable uncertainty, as the cohort of responsible persons cannot be known with certainty at any given time. This is contrary to fundamental principles of legal certainty and makes it impracticable for regulated entities to discharge their compliance obligations.

16. The Law Council recommends that APRA narrow the scope of the "responsible person" definition to: (a) eliminate duplication and overlap with FAR; and (b) confine it to persons over whom the regulated entity has practical control.

Definition of "conflict"

17. The definition of "conflict" in paragraph 8(f) is potentially confusing as it departs from the well-established articulation of a conflict being either:

    (a) a conflict between a registrable superannuation entity (**RSE**) licensee's or responsible person's interests and their duty to the beneficiaries; and

    (b) a conflict between a RSE licensee's or responsible person's duty to another person and their duty to the beneficiaries.

18. A reference to a conflict between an RSE licensee's or responsible person's interests and the interests of beneficiaries is, in substance, a conflict that arises by virtue only because of the RSE licensee's or responsible person's duty to act in the interests of beneficiaries. It should be noted that, while the draft is written on the basis that responsible persons owe duties to beneficiaries, only one group of responsible persons—namely, Accountable Persons who are directors of the RSE licensee—owe such duties.

19. The Law Council recommends that APRA revert to the clearer and well-established articulation described above, which is supported by over a century of judicial authority.

Definition of "Interest"

20. The definition of "Interest" in paragraph 8(d) is unworkably broad. It includes any benefit to any third party, which is far too expansive to be operationalised within a conflict management regime. The breadth of this definition means that virtually any commercial interaction could constitute a relevant "interest" for the purposes of the standard. In the Law Council's view, this definition goes well beyond the established fiduciary concept of a conflict of interest and captures conflicts that could not practically be known to a regulated entity.

21. In particular, it captures the interests of any employee of an associate, meaning the conflict management rules apply to all employees in a corporate group. A regulated entity will not be able to comply with these obligations in respect of employees of other group entities if it does not control the employer entities.

22. The Law Council recommends that APRA narrow the definition of "Interest" to align with the general law rules governing conflicts of interest.

Definition of "interests of beneficiaries"

23. The Law Council's view is that the definition of "interests of beneficiaries" in paragraph 8(h) is unacceptably broad. The reference to "any interests of beneficiaries" is not appropriately delimited. The relevant interests are those arising from the superannuation fund, not any and all interests that a beneficiary might have in any context. The breadth of this definition would impose obligations on superannuation trustees that extend well beyond the scope of their trusteeship and that would be virtually impossible to discharge. For example, how would an RSE licensee identify and assess all actual and potential conflicts, or avoid and manage

them, if the interests of beneficiaries were not confined to interests in the superannuation fund? Similarly, APRA can determine that a person is a responsible person of an RSE licensee based on the impact on the interests of beneficiaries. If "interests of beneficiaries" means "any interests", this extends well beyond the scope of a beneficiary's interest in the fund. Indeed, a trustee is not permitted at law to take into account the broader interests of beneficiaries; it is limited to the impacts in relation to the beneficial interest that a beneficiary holds.

24. The Law Council recommends that the definition of "interests of beneficiaries" be refined to refer expressly to beneficiary interests in relation to the fund or registrable superannuation entity (**RSE**), thereby properly delimiting the scope of the obligations.

Definition of "close family member of a responsible person"

25. The Law Council's view is that the definition of "close family member of a responsible person" in paragraph 8(e) is too broad. The ordinary meaning of "close" family member would extend to immediate family. However, the inclusion of aunts, uncles, nephews and nieces is extremely broad. When combined with the proposed broad definition of "Interest", a responsible person would need to make enquiry into, or have knowledge of, the interests of extended family members—rather than merely immediate family—and may well not be able to obtain that information.

26. For example, it is not clear why a nephew's financial arrangements would be likely to influence the working arrangements of their aunt or uncle.

27. The Law Council recommends that the definition be narrowed to remove aunts, uncles, nieces and nephews from the scope of "close family member".

The Board—Delegation of authority (paragraphs 13–17)

Paragraph 13—Board responsibilities

28. The Law Council supports APRA's intent to provide greater clarity to, and confirm to, the industry that APRA is of the view that there is significant scope for the board to delegate to board committees and management.

29. However, some items in the list conflate the board's role in decision-making with behavioural expectations. Behaviours (such as "constructively challenge senior managers") cannot be "delegated" in any meaningful sense, making the non-delegation framing inapposite. The Law Council's view is that behavioural expectations that support board effectiveness are better addressed in guidance rather than in a prudential standard.

30. There is also potential for the list in paragraph 13 to confuse rather than clarify. In the Law Council's view, this list would unduly restrict proper delegations to board committees for review, monitoring and overseeing. The term "oversee" itself lacks clarity and can easily be confused with "monitor". For example, many Board Investment Committees monitor the implementation of the Investment Governance Framework. On one reading, this would not be permitted to the extent that it constitutes "overseeing". A further question arises: does "oversee" require a board to

approve changes to core prudential frameworks, or can this be delegated provided the board "oversees" the process?

31. There is also potential for confusion on those matters not included in the list. For example, in the superannuation context, it would appear that "overseeing" the Insurance Management Framework or the Retirement Income Strategy could be delegated.

32. There is also potential for paragraph 13 to be inconsistent with specific provisions of other prudential standards. For example, paragraph 9(b) of CPS 220 requires the board to "ensure that it forms a view on risk culture in the institution and the extent to which that culture supports the ability of the institution to operate consistently within its risk appetite, identify any desirable changes to the risk culture and ensure the institution takes steps to address those changes". This is a specific requirement that must be performed by the board and is potentially inconsistent with the board being required under paragraph 13 only to "oversee" risk culture.

33. The Law Council recommends that, rather than prescribing a closed list, APRA define the principles by which delegations should be assessed, and that individual prudential standards specify any additional matters that must be determined or decided by the board itself. This approach would also properly reflect the legal position that the board is ultimately responsible and accountable for the governance and management of the entity.

Paragraph 14—APRA engagement

34. The Law Council recommends that paragraph 14 be deleted. The requirement to deal with APRA in an open, constructive and cooperative way is duplicative of the FAR obligations that already apply to regulated entities and their directors and senior managers in relation to engagement with regulators. Retaining this duplication creates an unnecessary additional layer of obligation without commensurate regulatory benefit. In the alternative, the paragraph should cross-refer to the existing FAR obligation rather than restating it.

Paragraph 15—Delegation limitations

35. The Law Council recommends that the limitation in paragraph 15—restricting delegations to "a Board committee or senior managers of the entity"—be deleted. The constitutions of most corporations permit the board to delegate to a broader range of persons, and there is no principled basis for APRA to prescribe who within an organisation may receive a delegation. Delegation should be permitted provided that appropriate oversight is maintained. The current drafting is overly prescriptive and fails to accommodate the variety of governance structures that exist among regulated entities.

36. This restriction also creates ambiguity about whether delegates may sub-delegate.

37. The Law Council submits that restricting the class of permissible delegates is unnecessary given that, in determining to delegate, the board must already be satisfied of the matters set out in paragraph 17 (discussed below).

38. Accordingly, the Law Council recommends removing the list of persons to whom a board can delegate.

39. Additionally, appointing an agent is a form of delegation that is not contemplated under paragraph 15. The Law Council recommends that APRA expressly clarify that CPS 510 does not override the delegation framework in CPS 230 (Operational Risk Management) with respect to outsourcing and agency arrangements.

Paragraph 17(b)—"risk-based" delegation

40. The Law Council considers that the meaning of a "risk-based" delegation in paragraph 17(b) is unclear. This is not a commonly used term in the context of delegations, and it is not apparent how a regulated entity would demonstrate compliance with this requirement. For example, in what sense is a delegation to a CEO "risk-based"?

41. If the intent is to require the board to satisfy itself that the delegate is suitably qualified by training or experience, is not conflicted, is properly instructed, and that appropriate oversight arrangements are in place, then the Law Council recommends that APRA replace the term "risk-based" with express requirements to that effect.

Senior managers and management information (paragraphs 18-24)

Definition and obligations of senior managers

42. The Law Council queries the mischief that paragraphs 18 and 19 seek to address and recommends removing them from draft CPS 510 for the following reasons:

    (a) Paragraph 18 is ambiguous as to whether it is a definitional provision or an obligation-imposing provision. That is, it is not clear whether it is intended to operate as a definition of "senior manager" or as an additional set of obligations governing how a senior manager must discharge their role.

    (b) The paragraph is vague and appears to add another layer of obligation alongside FAR (without indicating how it interacts with the FAR regime), without any demonstrable regulatory benefit.

    (c) Paragraphs 18 and 19 both address senior manager responsibilities, but there is significant overlap and inconsistency between them.

    (d) Paragraphs 18 and 19 seek to impose obligations on senior managers that go beyond the parameters of the Corporations Act *and the Superannuation Industry (Supervision) Act 1993* (Cth). The appropriate way for ensuring that delegations to management are carried out in accordance with a regulated entity's obligations is through the terms of the delegation approved by the regulated entity. For example, an appropriately formed delegation to a CEO for the day to day management of the business would include the limitations or obligations attaching to that delegation. The responsibility is then on the regulated entity to monitor that delegation. Paragraphs 18 and 19 interrupt the proper flow of delegations and the required associated monitoring.

(e) It is unclear whether it is a breach of CPS 510 if there are senior managers who do not have the responsibilities set out in paragraphs 18 and 19, or if the persons carrying out the entity's relevant activities are employed by a related party service provider.

(f) Some paragraphs in draft CPS 510 appear to impose obligations directly on senior managers. However, it is doubtful that APRA has the power under the relevant prudential legislation to impose obligations directly on senior managers (as distinct from obligations imposed on the regulated entity).

(g) It will be difficult for a Board to put processes around ensuring compliance with these paragraphs and it is difficult to see how some of the obligations (such as carrying out activities in a manner consistent with the entity's culture and values) would be monitored or enforced.

Paragraphs 20 and 21—Decision-making records

43. Paragraphs 20 and 21 both refer to the Board's "risk-based decision making". It is not clear what this term means or how (it at all) it is meant to differ from just "decision making".

44. The Law Council considers that the requirements of paragraph 21 are also unclear in two respects:

(a) It is not clear whether the processes must be recorded or the considerations.

(b) If APRA's intention is to require that reasoning be set out in proposal papers (such as board papers) and that proper records of decisions (such as minutes) be maintained, this should be stated directly. The current formulation is ambiguous. It is also unclear what the bounds of "relevant decision-making" are.

45. The reference to risk appetite in paragraph 21 is duplicative of the requirement to maintain a risk appetite statement under other prudential standards. The Law Council recommends that APRA cross-refer to those existing obligations rather than imposing new requirements that cover the same ground. The concept of "relevant decision-making" is undefined and, as drafted, is overly broad. Not all decisions require documentation—for example, immaterial operational decisions made in the ordinary course of business should not attract a recording obligation.

Board composition and independence (paragraphs 25–34)

Paragraph 27—Temporary board vacancies

46. The Law Council submits that draft CPS 510 must include an automatic grace period to allow time to fill casual and unplanned board vacancies without triggering a breach. A 90-day grace period following a director's death, incapacity or unexpected resignation would give the entity a reasonable period to identify and appoint a suitable replacement.

47. The currently proposed approach—requiring an exemption application to APRA under paragraph 27—does not prevent a breach: the regulated entity will already have breached CPS 510 at the point of application. This creates a technical breach that is wholly outside the entity's control and penalises entities for inherently unforeseeable circumstances. While the Law Council accepts that RSE licensees are expected to maintain succession plans, it is unreasonable to expect an RSE licensee to have a suitable successor identified for each individual director who would be immediately available in the case of an unforeseen vacancy.

48. The Law Council notes that paragraph 26 already provides a 90-day vacancy mechanism for RSE licensees subject to basic equal representation rules. There is no principled or practical basis for treating other regulated entities differently—in each case, the entity will need to canvass and appoint a suitable replacement, which will take time. The Law Council therefore recommends that the 90-day grace period in paragraph 26 be extended to all regulated entities.

49. During consultations, APRA raised concerns about being informed when directors cease to hold office (for example, due to death). The Law Council notes that section 32 of the *Financial Accountability Regime Act 2023* (Cth) (**FAR Act**) already requires APRA-regulated entities to notify APRA when a person ceases to be an AP, which includes when a person ceases to be a director. Accordingly, notification to APRA of temporary board vacancies is already required by law and does not need to be duplicated in CPS 510.

Paragraph 30 and CPS 001

50. The reference to "non-executive director" in the definition of independent director in paragraph 30 potentially lacks clarity. "Non-executive director" in CPS 001 refers to a director who is not a member of the regulated entity's management. Consequently, an Accountable Person of a significant related entity (particularly in respect of RSE licensees, where the definition of "significant related entity" is broader) could technically qualify as a non-executive director.

51. For the avoidance of doubt, the Law Council recommends that the concept of "management of a regulated entity" be expanded to include Accountable Persons of the regulated entity and its significant related entities.

Paragraph 32—Director independence

52. Paragraph 32 of draft CPS 510 sets out a list of factors which, if present, will result in a director being treated as not independent. There are two issues with this approach.

    (a) First, the listed factors are drawn very closely from Box 2.3 of the 4th Edition of the ASX Corporate Governance Principles and Recommendations (**ASXCGPR**). However, the ASXCGPR factors operate on an "if not, why not" basis—they are not bright-line disqualifiers. APRA has taken those factors out of their original context and elevated them to mandatory bars. Listed companies frequently make their own assessment of independence notwithstanding the presence of one of those factors; under the proposed CPS 510, that discretion would be removed. The Law Council does not

consider this was intended, and recommends that paragraph 32 be made subject to the ability of regulated entities to assess that a director is independent notwithstanding the presence of one or more of these factors, provided that the regulated entity publishes an explanation of its reasoning.

(b) Second, the ASX is currently consulting on a revised edition of the ASXCGPR, which includes material changes to the factors concerning director independence. It would be strongly preferable for listed regulated entities to have a single, consistent set of factors to assess director independence, rather than having to apply two inconsistent tests. The Law Council urges APRA to avoid a repeat of the inconsistent remuneration provisions in the FAR Act and CPS 511.

Board Committees (paragraphs 35–46)

Paragraph 35(e)—Third-party expert independence

53. The requirement in paragraph 35(e) that the engagement and advice of third-party experts be "independent of the Board" is misconceived. It is unclear why a board committee, to which the board has delegated authority to fulfil the board's obligations under APRA prudential standards, should be required to obtain advice that is independent of the very board for which it is acting—and of which the committee members are themselves members. This requirement is fundamentally inconsistent with the purpose of a board delegating authority to a committee, and with the purpose of expert advice, which is to inform the committee's and the board's decision-making. It is also unclear how the advice could, in practice, be "independent" given the overlap in membership between the board committee and the board.

54. The Law Council recommends that paragraph 35(e) be deleted.

Paragraph 35(f)—Challenge to senior managers

55. Not all board committees have a role in challenging senior managers. The Law Council recommends that this obligation be confined to committees where such a role is appropriate—for example, the Risk Committee and the Audit Committee.

Obligations imposed on board committees

56. It is unclear whether the obligations in paragraph 35 are imposed on the board committees themselves or on the regulated entity. This distinction has material practical significance for enforcement: if the obligations are imposed on the committee, it is unclear how APRA would enforce them against a body that is not itself a legal entity. The Law Council recommends that the matters set out in paragraph 35 be expressed as best practice guidance in a Prudential Practice Guide rather than as mandatory obligations in the standard.

Board skills and capability (paragraphs 47–49)

Paragraph 48—Skills matrix requirements

57. A board skills matrix is a tool used to provide an overview of the mix of skills, expertise, and characteristics that the board currently has or is looking to achieve in its membership. The matrix can include different elements such as education, experience, gender, age, industry knowledge, and specific business-related skills.

58. By outlining these diverse attributes, a board skills matrix provides a clear understanding of where the Board is strong and where gaps exist, to assist the Board in planning for the future.

59. Paragraph 48 requires the board skills matrix to include clear assessment criteria and rating scales of proficiency that can be measured and verified. The practical effect of this requirement is to convert the board skills matrix into a yardstick against which the board and individual director performance will be assessed. This is a fundamental misuse of the board skills matrix, which is not designed or intended for that purpose.

60. The Law Council recommends that the requirement to include assessment criteria and rating scales be removed from the board skills matrix. Requiring excessive detail in the skills matrix risks creating an unwieldy document that diminishes its utility as a practical governance tool.

61. The Law Council also recommends that APRA consider providing guidance in a Prudential Practice Guide of its views on the minimum range of board skills required for a skills matrix.

62. There is a further issue, analogous to the director independence concern noted above. The requirement to document a board skills matrix is drawn closely from Recommendation 2.2 of the 4th Edition of the ASXCGPR. The ASX is currently consulting on a revised edition that removes the requirement to document a board skills matrix and instead gives listed entities greater flexibility in assessing the skills required on the board. It would be strongly preferable for listed regulated entities to have consistent requirements, and the Law Council submits that greater flexibility in this regard is desirable. The Law Council recommends that APRA align with the ASX's proposed approach.

Board, committee and director performance (paragraphs 50–56)

Paragraph 51(b)—Skills matrix in board performance assessments

63. While consideration of the board skills matrix is important in certain contexts, it should not form part of board performance assessments. The skills matrix is properly relevant to board composition and renewal, not performance measurement. Including it in performance assessments inappropriately conflates two distinct governance functions. The Law Council recommends that the reference to the board skills matrix be removed from paragraph 51(b).

Paragraph 51(c)—Individual director assessment against skills matrix

64. The board should be assessed against the skills matrix collectively, rather than individual directors being assessed against that matrix. It is unreasonable to assess an individual director's effectiveness by reference to a collective skills matrix, as no single director is expected to possess all of the skills identified as necessary for the board as a whole. The Law Council recommends that paragraph 51(c) be amended accordingly.

Paragraph 54(a)—Board delegations in performance assessments

65. While the Law Council agrees that the appropriateness of board delegations should be reviewed regularly, it recommends that this review be excluded from board performance assessments. The appropriateness of delegations is a governance framework matter and should be assessed in that context, not as an element of a performance evaluation of the board or individual directors.

Paragraphs 52 and 56—performance assessment report.

66. The first sentence of both paragraphs 52 and 56 requires the board to consider the performance assessment reports produced and any recommendations arising from those assessments.

67. The second sentence requires the entity to demonstrate to APRA progress against accepted recommendations from the reports. The Law Council is concerned that this creates an "if not, why not" expectation, effectively conferring considerable influence on report producers (such as external consultants) who are not themselves accountable under the prudential framework. The Law Council recommends that the standard clarify that the board retains full discretion to accept, modify or reject recommendations, and that APRA's oversight extends only to the reasonableness of the board's response.

Board renewal and non-executive director tenure (Paragraphs 57-62)

68. The Law Council notes the provisions relating to board renewal and non-executive director tenure and reserves the right to comment further on these matters as the consultation process progresses.

Group Governance (Paragraphs 63–73)

Paragraph 72(b)—Authorised deposit-taking institution (ADI)

69. The meaning of "in the context of an ADI, general insurer or life company" in paragraph 72(b) is ambiguous. It could mean either:

    (a) that the head company itself is an ADI, general insurer or life company; or

    (b) that the entity is the head of a group that contains an ADI, general insurer or life company.

70. These are materially different factual scenarios with different regulatory consequences. The Law Council recommends that paragraph 72(b) be redrafted to resolve this ambiguity.

71. Nearly all retail superannuation funds operate within a corporate group structure where remuneration is centrally determined. Currently, where an APRA-regulated entity is part of a group, paragraph 59 of CPS 511 permits the board of the APRA-regulated entity to use a group Board Remuneration Committee as its own Board Remuneration Committee. However, paragraph 72(b) of the proposed CPS 510 appears to permit this only where the corporate group is headed by an ADI, general insurer or life company. The Law Council recommends that this provision be expanded to include RSE licensees, consistent with the current position.

Conflicts management (paragraphs 74–76)

Paragraph 74(g)—Board minutes

72. The Law Council accepts that board minutes should refer to the existence of a conflict and record how it was managed. However, detailed conflict analysis is more appropriately addressed in board papers rather than minutes. The purpose of board minutes is to record decisions and the fact that conflicts were disclosed and managed; they are not intended to serve as a repository for detailed conflict analysis.

73. It is also unclear how this requirement interacts with standing director conflict declarations, which are a common and efficient mechanism for managing recurring conflicts. The Law Council recommends that CPS 510 expressly clarify how paragraph 74(g) applies where standing declarations are in place.

Paragraph 74(h)—Record-keeping costs

74. Record-keeping can be costly and the obligation must be proportionate. Not every minor potential conflict warrants comprehensive documentation. The Law Council recommends that a materiality threshold be included so that the record-keeping obligation is calibrated on the basis of a cost-benefit analysis.

Paragraph 76(b)—Definition of "relevant interest"

75. The definition of "relevant interest" in paragraph 76(b) is complex and difficult to apply in practice. The Law Council recommends that this definition be redrafted with greater clarity. As currently drafted, the definition is so broad that it is difficult to determine what constitutes a relevant interest, which fundamentally undermines the utility of the conflicts management regime.

Fit and proper assessment (paragraphs 77–81)

Paragraph 81—Annual performance assessment

76. The Law Council recommends that the second sentence of paragraph 81 be deleted. A fit and proper assessment is conceptually distinct from a director performance assessment, and conflating the two creates confusion and may produce inappropriate outcomes. For example, a director who performs well may nonetheless not be fit and proper, and vice versa.

77. The board skills matrix should influence the competencies required under the fit and proper requirements but should not be part of the assessment process itself. The skills matrix addresses collective board capability; fit and proper requirements address individual suitability.

Fit and proper criteria (paragraphs 82–87)

Paragraph 82—Duplication with FAR

78. The Law Council recommends that paragraph 82 be deleted. While the requirement to define and document competencies for responsible person positions appears in CPS 520 / SPS 520, it is now duplicative of FAR. Retaining duplicative requirements creates an unnecessary compliance burden without any corresponding regulatory benefit. APRA should cross-refer to the existing FAR obligations rather than imposing new requirements that cover the same ground.

79. Failing a fit and proper assessment has significant consequences for the individual concerned. The reasons for failure should relate solely to the individual's own acts and omissions, not to structural or organisational factors outside their control as was recognised in the Administrative Appeals Tribunal's decision in *Re VBN and Australian Prudential Regulation Authority* [2006] AATA 710.

Paragraph 85(b)—Future conflicts

80. Assessing how a person has managed conflicts is relevant to a fitness and propriety assessment. However, it is inappropriate to deem a person not fit and proper solely because of the potential for a conflict in the future. Future conflicts may never materialise and can be managed through appropriate controls if and when they arise. The Law Council **recommends** that paragraph 85(b) be amended to confine this criterion to past conduct in managing conflicts.

Paragraph 86(a)—Skills matrix in fit and proper assessments

81. While the board skills matrix is relevant to the selection of board appointees, it is not appropriate to determine that a person is not fit and proper solely because they are unable to fill a gap in the board skills matrix. Fitness and propriety must be assessed by reference to the individual's own qualities and conduct, not by reference to a collective needs assessment. The Law Council **recommends** that paragraph 86(a) be amended to make this clear.

Paragraphs 86(a) and (b)—Ongoing assessments

82. Paragraphs 86(a) and (b) appear to be relevant only to the initial fit and proper assessment, but the drafting suggests they apply to all ongoing assessments. The Law Council recommends that APRA clarify that these criteria apply to initial assessments only.

Reassessment of fitness and propriety (paragraphs 88–89)

83. The Law Council notes that some of the most significant fit and proper issues have arisen where allegations of wrongdoing against a director have been made public but have not yet been tested in court and do not relate to the regulated entity. This raises a range of serious legal issues (including defamation, discrimination and natural justice) and practical questions about the weight to be given to unproven "allegations', particularly those appearing only in the media or on social media platforms. A mere unproven allegation should not of itself result in a failure of the fit and proper assessment. The Law Council emphasises that a fit and proper assessment of a person is a different test from determining whether a regulated entity wishes to accept the risk of the person remaining a responsible person during a court process or regulatory investigation.

84. The Law Council recommends that paragraph 89(a) be amended to read: "may no longer possess the skill, character, care, diligence, honesty, integrity and judgement to perform properly the duties of the responsible person position". APRA should also include guidance on the circumstances in which allegations that have been made but not yet substantiated may trigger a fit and proper reassessment. Such guidance would assist regulated entities in navigating the significant legal and practical difficulties that arise in these circumstances.

Consequences of adverse assessments (paragraphs 91–92)

85. If an RSE licensee determines that a person is not fit and proper, it must take all reasonable steps to ensure that the person:

    (a) is not appointed to; or

    (b) for an existing responsible person, does not continue to hold,

    the responsible person position.

86. The extension of the "responsible person" definition to include Accountable Persons of significant related entities makes compliance with paragraphs 91 and 92 challenging and, in some cases, impossible. A regulated entity may have no practical ability to remove or prevent the appointment of a person who is an AP of a significant related entity, particularly where that entity is a parent company or otherwise outside the regulated entity's corporate control. The Law Council strongly recommends that APRA revisit the proposed definition to address this fundamental compliance barrier.

APRA engagement and non-constraint (paragraphs 95–101)

87. The Law Council has concerns that paragraphs 95 to 101 may be inconsistent with other whistleblowing regimes, including those established under Part 9.4AAA of the Corporations Act and provisions of other statutes which were introduced by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).

88. The meaning of "allow" in paragraphs 95 to 97 is ambiguous. It is not apparent whether APRA intends to impose a positive obligation to facilitate disclosure, or merely an obligation not to prevent it. The distinction is material and has significant practical implications for regulated entities. The Law Council recommends that APRA clarify the nature and scope of this obligation.

89. Paragraphs 99 and 100 effectively override contractual confidentiality obligations between private parties.

90. Section 34C of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) permits APRA to make prudential standards in relation to the limited prudential matters set out in subsection 34C(4).

91. The extension of paragraph 100 to professional service providers potentially captures lawyers. If that is the case, paragraph 100 could potentially be used to:

    (a) prevent an entity from instructing its lawyers to maintain legal professional privilege on privileged materials (such as communications and files) which is protected at general law; or

    (b) prevent an entity from insisting that their lawyers meet their professional obligations to the entity.

92. In *Daniels*,[1] the High Court recognised that the doctrine of client legal privilege is a rule of substantive law that safeguards legal advice and promotes the administration of justice by ensuring that clients can seek legal counsel without fear of compelled disclosure. As a rule of substantive law, client legal privilege is available to resist the giving of information or the production of documents pursuant to investigatory procedures of the kind involved in that case (i.e. an ACCC investigation). The operation of paragraphs 95 to 100, as they apply to an entity's internal or external lawyers, is potentially inconsistent with the High Court's rulings.

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[1] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [43]-[49]

93. For the reasons set out above, the Law Council strongly recommends that APRA review the legal basis for paragraphs 95 to 101 and, at a minimum, ensure they are consistent with the doctrine of client legal privilege.

94. Regardless of the position ultimately adopted by APRA in response to the concerns above, the Law Council also recommends that paragraph 100 of CPS 510 be made expressly subject to the right to maintain client legal privilege.

Appointments (paragraphs 102–106)

95. The appointments provisions in paragraphs 102 to 106 do not align with the proposed ASX Corporate Governance Council's Corporate Governance Principles and Recommendations. The Law Council recommends that APRA ensure consistency between these provisions and the ASX governance framework to avoid creating conflicting obligations for entities subject to both regimes.

Definitions

Definition of "beneficiaries"

96. The wording "within the RSE licensee's business operations" is unclear. The Law Council recommends replacing it with simpler and more precise language, such as "an RSE of which the RSE licensee is trustee". This formulation more accurately describes the relevant relationship and is consistent with the language of the SIS Act.

Additional consultation questions

97. The Law Council confirms that it has no additional comments to the questions in Section 3.1 of the Consultation Package.

Editorial comments

98. The punctuation in the definitions in paragraph 8 is inconsistent—some definitions end with a full stop and others end with a semi-colon (for example, compare subparagraph 8(e)(ii) with 8(f)(ii)).

99. Paragraph 35(a) currently reads:

> *… have a written charter that outline its authority, objectives, respective roles and responsibilities, and terms of operation;*

The word "outline" should be "outlines".

100. In paragraph 36, "where the regulated entity is a **significant financial institution**" currently appears adjacent to paragraph 36(c). This suggests that a locally incorporated regulated entity only needs to have a Remuneration Committee if it is a significant financial institution. Subsequent paragraphs make reference to a Remuneration Committee without confining it to significant financial institutions. A consistent approach would be more helpful.

101. Paragraph 67(c) currently reads:

> *where the regulated entity is a significant financial institution, a group Board Remuneration Committee that oversees the design, operation and monitoring of the remuneration framework; is appropriately composed to enable it to exercise competent and independent judgement; and has the powers necessary to perform its functions.*

It is not clear whether the text appearing after the first semi-colon belongs in that paragraph. The earlier paragraphs about the other board committees do not make reference to these matters.

102. Paragraph 97 currently reads:

> *A regulated entity must allow persons to provide information to the entity or APRA if they have concerns about accounting, internal control, compliance or audit matters.*

The Law Council recommends adding “concerning the regulated entity” to the end of this sentence to clarify its scope.

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- the South Australian Bar Association;
- the Law Society of South Australia;
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