

➤ Prudential Decisions Consultation Paper

29 June 2007

Mr André Moore
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The Treasury
Langton Crescent
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Dear Mr Moore

Review of Prudential Decisions Consultation Paper, May 2007

The Administrative Review Council welcomes the opportunity to provide comments in response to this Consultation Paper.

The Council is pleased to note that the Consultation Paper addresses a number of concerns raised by stakeholders in relation to the earlier Proposals Paper released in December last year.

The Council's comments on the Consultation Paper are as follows. They are generally supportive of the suggested approach.

Ensuring APRA's capacity to act decisively (Proposals Paper, proposal 2.5)

In its earlier submission in response to the Proposals Paper, the Council expressed concern at the suggested exclusion from merits review of certain decisions where APRA "reasonably believed that its failure to act immediately would materially prejudice the interests of beneficiaries or the stability of the Australian financial system".

The Consultation Paper amends that approach by proposing that the legislation specify when merits review would be available for decisions, including some directions decisions. A limited set of prescribed grounds would govern which decisions would not be subject to merits review.

The Council considers this to be a much more acceptable and transparent approach.

Streamlining APRA's directions powers (Proposals Paper, proposals 2.5, 2.7)

The Proposals Paper suggested consolidation of APRA's directions powers in a single general power under each relevant Act. The power would be based on s 11CA of the *Banking Act 1959* and s 230B of the *Life Insurance Act 1995*.

In response to stakeholder concerns that the general directions powers in the *Superannuation Industry (Supervision) Act 1993* are substantially different to those in the other prudential legislation, the Consultation Paper proposes only to streamline APRA's directions powers under the *Insurance Act 1973*, the Banking Act and the Life Insurance Act. As under ss 11CA of the Banking Act and 230B of the Insurance Act, the grounds on which APRA would be able to give directions would be specified.

The Consultation Paper also proposes that APRA would only be able to issue a direction if it has "reason to believe" that the prescribed grounds were met. In its previous submission to the Review, the Council expressed the view that grounds need to be established, not only by the regulator, but by a process that is externally verifiable. The proposed inclusion of a "reason to believe" threshold trigger is consistent with this view.

The Consultation Paper proposes that some directions decisions would be reviewable while others would not. Decisions requiring APRA to take immediate action "to ensure an entity is able to meet its deposit or policy holder liabilities, limit the actual or potential loss to beneficiaries, or prevent any adverse effects on the stability or reputation of the financial system" would not be reviewable.

While the issue of non-reviewable directions would be subject to the "reason to believe" threshold, several of the grounds for issue are very widely couched. Phrases such as "is, or is about to become", "is, or might be" in the first three dot points and (p 5) are illustrative. In the Council's view, their width significantly diminishes the strength of the proposed threshold trigger.

We suggest that points one (liabilities), two (risk to the security) and five (interests of depositors) incorporate a concept of materiality. In this way, the grounds could be confined, for example, to circumstances where 'there is or there might be a material risk to the security of the entity' or 'a direction is necessary to protect the material interests of depositors'. This would allow APRA to act where really necessary but not otherwise unnecessarily exclude merits review.

The Consultation Paper indicates that directions to freeze assets under s 264 of the SIS Act and directions in relation to rollovers under regulation 6.36 would remain exempt from merits review.

The Council supports the proposal to strengthen the trigger under s 264 so that a direction could only be issued if APRA had "reason to believe" that the entity's conduct is likely to have a significant adverse impact on the values of beneficiaries' interests.

Introduction of a court-based disqualification process (Proposals Paper 4.2)

The Consultation Paper indicates that the government remains committed to implementing reforms where appropriate to enhance the robustness and flexibility of the disqualification regime applying to individuals under the prudential Acts.

To this end, it is proposed to add to the *Life Insurance Act 1995* a disqualification provision modelled on s 25A (1) of the *Insurance Act 1973*. There is currently no such provision in the Insurance Act.

APRA may disqualify someone under s 25A if “it is satisfied that the person is not a fit and proper person”. While written notice is required (s 25A (4)) and particulars must be given as soon as practicable after a notice is given (s 25A (5)), this is a wide discretion with a low threshold trigger. The right of a person to apply to APRA for revocation of the disqualification (s 25A (3)) appears of limited assistance in such a context.

The Council considers that in relation to the exercise of discretions of this breadth, an external review mechanism is essential. The Consultation Paper proposes that application for disqualification should be to the Federal Court of Australia rather than to the Administrative Appeals Tribunal.

It is said that this would make the disqualification regime under the prudential Acts consistent with that under the *Corporations Act 2001*. The schemes would, be modelled on sections 206C and 206 G of the Corporations Act.

While strongly of the view that the Administrative Appeals Tribunal has both the expertise and the procedural flexibility to undertake the sort of review contemplated, the Council accepts that an approach in the area of prudential regulation coincident with that of ASIC under the Corporations Act is not without its practical efficiencies.

Concluding comment

Thank you once again for providing the Council with the opportunity to comment on the Consultation Paper. We would welcome the opportunity to comment on draft legislation arising from the Review.

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Yours sincerely

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President