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Financial Sector (Collection of Data) Bill 2001

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Financial Sector (Collection of Data) Bill 2001

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Contents

Financial Sector (Collection of Data) Bill 2001

Date Introduced: 5 April 2001

House: House of Representatives

Portfolio: Treasury

Commencement: Formal provisions and provisions dealing with the registration of corporations commence on Royal Assent. Provisions dealing with the provision of information commence on a day fixed by Proclamation, or if no such day is fixed within 12 months of the Bill receiving the Royal Assent, at the end of that period. Provisions dealing with administrative penalties commence on 1 July 2001.

Purpose

To provide the Australian Prudential Regulation Authority (APRA) with specific power to determine the information which must be provided by certain corporations and to place an obligation on such corporation to provide that information.

Background

APRA is the prudential regulator of deposit-taking institutions (banks, credit unions and building societies), insurance companies, superannuation funds, and friendly societies. It supervises over 11 000 institutions, comprising 300 deposit-takers, 40 life insurers, 160 general insurers, approximately 50 friendly societies and, directly or indirectly, about 10 000 superannuation funds.[1] APRA has three main roles, the development of standards for institutions to follow, monitoring compliance with the standards and relevant legislation and taking action when it appears an institution is in difficulty. Supervision involves both visits to institutions and 'off-site' supervision through the analysis of data.

APRA is a relatively young body, taking over the functions of a number of existing Commonwealth bodies, particularly the Insurance and Superannuation Commission and bank supervision from the Reserve Bank of Australia, in 1998-99. Supervision of credit unions, building societies and friendly societies was transferred from the States on 1 July 1999. In all, 11 Commonwealth and State agencies were amalgamated into APRA.[2] The amalgamation of agencies brought a number of administrative difficulties, including in the

collection of data where different forms were used, different information collected and some overlapping in the information collected.

A review by APRA of the data held and methods of collection was conducted in 1999 and difficulties identified included:

- 'The presence of disparate collection systems from predecessor agencies, all in various stages of disrepair'
- complex data structures understood by only a few specialists
- supporting and maintaining the various systems was 'extremely resource intensive'
- problems with the design and contents of forms, and
- data collection was labour intensive.

It was also found that there was considerable overlap between the needs of APRA, the Reserve Bank and the Australian Bureau of Statistics (ABS).[3]

The APRA Statistics Project was established in 1999 to modernise and harmonise the reporting and collection of data. This is to be done on an industry basis, with the first review concerning deposit taking institutions with other groups following over two to three years. In regard to overlapping collection of information between APRA, the Reserve Bank and ABS, APRA has stated that:

> APRA has also worked closely with the Reserve Bank of Australia and the [ABS] to improve and, where possible, rationalise the content of ADI (authorised deposit-taking institutions) returns. In future, returns for all regulated industries will be harmonised and channelled through APRA who will then forward this information to the RBA and ABS as required.[4]

One of the aims of this process is to reduce the number of returns which business make to regulatory bodies.

APRA normally performs its functions with little public notice, due to market sensitivity. However, APRA recently came to attention following the failure of HIH Insurance. The reasons for the demise of HIH and the role of APRA are being examined by the Australian Securities and Investment Commission (ASIC) and the Prime Minister has announced that a Royal Commission is to be held into matters relating to the collapse of HIH.[5] When announcing the proposed Royal Commission the Prime Minister stated:

> The Commission will…. also inquire into the adequacy of the prudential framework governing the insurance industry in Australia at both a Commonwealth and a State level. It will examine the role of the Australian Prudential Regulation Authority in relation to the collapse of HIH as well as the role of State officials or bodies whose regulatory or other activities impact upon the insurance industry.[6]

In a statement to the Senate Economic Legislation Committee on 5 June 2001, the Chief Executive Officer of APRA noted the inquiries and that it would be inappropriate to address the failure of HIH in any detail before stating:

> First, I have said publicly that, with the benefit of hindsight, APRA could have been more aggressive with HIH, and dug more into its financial condition, once we had identified concerns with its operation in the middle of 2000.

The CEO also noted that 'APRA inherited a flawed and out-of-date system of prudential regulation for general insurers. We recognised this early and have worked very hard to get a better system in place - that will happen next year and it will significantly reduce the likelihood of another HIH-like disaster.'[7]

Further details on the collapse of HIH and the Government responses can be found in the parliament Library E Brief.[8]

Main Provisions

The Bill will apply to registered and regulated entities (financial sector entities). Registered entities will be those registered under clause 8 and a regulated entity will be a body regulated by APRA under the *Australian Prudential Regulation Authority Act 1998* (the APRA Act), a supervised body under the *Insurance Act 1973* and a subsidiary of an authorised deposit-taking institution or a subsidiary of a non-operating holding company under the *Banking Act 1959* (**clause 5**).

The Criminal Code will apply to offences under the Bill (eg to determine criminal responsibility) (**clause 6**).

Clause 7 deals with the bodies which may be registered. These are companies which fall within the Commonwealth's corporation power under section 51(XX) of the Constitution and:

- their sole or principal business activity in Australia is to borrow money and provide finance
- debts due to the corporation from the provision of finance exceed 50%, or such percentage as prescribed, of the value of all the assets of the corporation, or
- the corporation provides finance in association with the retail sale of goods and the value of debts due to the corporation from that provision of finance exceeds $25 million or the amount prescribed.

The clause also lists a number of circumstances under which a corporation will not be eligible for registration, including:

- the corporation is established for a public purpose under a Commonwealth, State or Territory law
- the corporation is regulated under a number of other Acts, including the *Banking Act 1959, National Health Act 1953* and the *Insurance Act 1973*, or
- the value of the assets of the corporation and all related corporations does not exceed $5 million or such amount as prescribed.

Clause 8 provides that APRA must establish a Register of Entities which will be available for public inspection. The Register is to include the name and address of the entity and any other particulars which APRA considers appropriate (**clause 10**).

Registrable corporations which are not registered, or corporations which become eligible for registration, will be obliged to provide a range of information to APRA, including:

- particulars of the main method by which it ordinarily borrows funds and lends money
- a copy of their last audited balance-sheet or if the last balance-sheet includes liabilities and assets held in Australia, a balance sheet dealing with Australian assets.

It will be an offence, of strict liability (ie there will be no need to prove intent), to fail to register if required within the required time (generally 60 days) or to notify changes in the information supplied (**subclause 10**).

Clause 13 gives APRA extensive powers to determine standards regarding the information to be provided (the standards will be subject to Parliamentary disallowance). When determining the standards, APRA must consult with the entities concerned and try to minimise the impact on the entities concerned. Differing standards may be determined for different classes of financial sector entities. The requirement to consult may be waived where APRA is satisfied that any delay would prejudice the interests of depositors, policy holders or other members of the financial sector concerned. It will be an offence for an entity to fail to provide information required under a standard within the time allowed.

If a financial entity is required to notify APRA of certain information and has failed to do so within the required time, **clause 14** imposes an offence of strict liability on the principal executive officer (PEO) of the corporation if the PEO fails to notify the governing body of the entity that the failure of notification has occurred. APRA may exempt specific entities, or entities of a specified class, from the requirement to comply with one or more of the determined standards (**clause 16**).

Clause 17 gives APRA power to request further information or an explanation of information provided and it will be an offence for a financial sector entity to fail to comply with such a request.

Division 3 of the Bill (**clauses 18 to 25**) will give APRA power to impose administrative penalties instead of prosecuting in regard to the offences mentioned above. Such a notice

may be issued if APRA has reasonable grounds for believing that an offence has been committed and must be issued within one year of the date the alleged offence was committed. The notice of the administrative penalty must state that the penalty is only payable if the person on whom it is served does not wish the matter to be dealt with by a court. The maximum penalty that may be imposed by an administrative penalty will be the lesser of one-fifth of the maximum penalty which may be imposed by a court for the offence or 50 penalty units (a penalty unit is currently $110). (The maximum penalty which a court may impose for each breach of the provisions subject to administrative penalties is 50 penalty units. However, a separate offence may occur on each day of the breach, resulting in a much higher cumulative penalty while the restrictions on the maximum administrative penalty which may apply deals with the total penalty payable.)

APRA may withdraw an administrative penalty notice (**clause 21**) and if an administrative penalty is paid no further action may be undertaken in regard to those offences (**clause 22**).

If a corporation is convicted of an offence under the proposed Act, the Federal Court may direct the corporation to comply with the requirements of the particular standard or direction (**clause 27**). (As this only applies on conviction it will not apply where an administrative penalty is paid.)

Endnotes

1 Statement to the Senate Economic Legislation Committee, 5 June 2001, http://www.apra.gov.au/mediareleases/

2 ibid.

3 APRA, Annual Report 2000, p. 29.

4 http://www.apra.gov.au/policy/statcom/background.htm

5 Joint Press Conference, Prime Minister and Minister for Financial Services and Regulation, 21 May 2001.

6 ibid.

7 http://www.apra.gov.au/mediareleases/

8 David Kehl, 'HIH Insurance collapse', *Current Issues*, 11 June 2001 (http://www.aph.gov.au/library/intguide/econ/hih_insurance.htm).