



## Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008

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## Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008

**Date introduced:** 13 February 2008

**House:** Senate

**Portfolio:** Treasury

**Commencement:** On Royal Assent unless stated otherwise in the Table under section 2 of the Bill.<sup>1</sup>

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008 (the Bill) is an omnibus bill which amends the following Acts, collectively called ‘prudential Acts’:<sup>2</sup>

- *Banking Act 1959* (the Banking Act)
- *Insurance Act 1973* (the Insurance Act)
- *Life Insurance Act 1995* (the Life Insurance Act), and
- *Superannuation Industry (Supervision) Act 1993* (the SIS Act),

as well as the *Retirement Savings Accounts Act 1997* (the RSA Act) and the *Financial Sector (Collection of Data) Act 2001* (the FSCODA Act).

The Bill proposes to introduce various measures to improve the:

- efficiency, transparency and consistency of the process for disqualifying individuals from operating financial sector entities, and
- accountability of regulators, such as the Australian Prudential Regulation Authority (APRA),<sup>3</sup> that make administrative decisions under the legislation specified above.<sup>4</sup>

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1. Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008 section 2.
  2. *ibid.*, p. 3.

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The proposed amendments include:

- the creation of a court-based disqualification process for individuals relating to APRA-regulated entities
- streamlining APRA's (and in certain cases, the Commissioner of Taxation's) direction powers to provide greater flexibility and consistency
- removal of Ministerial consent for certain decisions made by APRA (and in certain cases, the Commissioner of Taxation), and
- widening the availability of merits review of certain decisions made by APRA (and in certain cases, the Commissioner of Taxation).

In some cases, those proposed amendments relate to decisions and powers of the Commissioner of Taxation.

## Basis of policy commitment

On 12 October 2005, the Prime Minister and the Federal Treasurer (at the time) announced the establishment of a taskforce charged with exploring the nature of the compliance burden on business from government regulation, and where appropriate, suggesting practical options for lessening the regulatory compliance burden on business.

The subsequent report released in April 2006, [\*Rethinking Regulation – Report of the Taskforce on Reducing Regulatory Burdens on Business\*](#) (the Rethinking Regulation Report), was informed by the views of stakeholders representing industry, small business, consumers and the Australian Government.<sup>5</sup> The Rethinking Regulation Report identified areas where regulatory reform might provide efficiency gains to businesses both in the short and long term.

On 15 August 2006, the Government announced its [final response](#) to the Rethinking Regulation Report, accepting all of the recommendations in relation to prudential regulation.

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3. APRA is the prudential regulator of the Australian financial services industry, overseeing banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry. See <http://www.apra.gov.au/>, accessed on 6 March 2008.
  4. Explanatory Memorandum, Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008, p. 3.
  5. See: [http://www.eowa.gov.au/Reporting\\_And\\_Compliance/Australian\\_Government\\_Response.pdf](http://www.eowa.gov.au/Reporting_And_Compliance/Australian_Government_Response.pdf)

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Subsequently, the Assistant Treasurer (at the time), the Hon. Peter Dutton MP, released a proposal paper, [Streamlining Prudential Regulation: Response to 'Rethinking Regulation' Proposals Paper December 2006](#) (the 2006 consultation paper), which detailed the government's further proposed response to the Rethinking Regulation Report.

On 16 April 2007, the Treasurer (at the time), the Hon. Peter Costello MP, announced that the Government would consider and consult further on certain measures in response to its 2006 consultation paper.<sup>6</sup>

The 2006 consultation paper proposed streamlining prudential regulation for authorised deposit-taking institutions (ADIs), general and life insurers, as well as superannuation funds. Those proposals were made in response to reports by the Commonwealth Government's Taskforce on Reducing the Regulatory Burdens on Business<sup>7</sup> and the HIH Royal Commission.<sup>8</sup>

The measures that the Government proposed in 2007 focussed on industry concerns about the way that APRA's administrative decisions were reviewed.<sup>9</sup> These concerns included:<sup>10</sup>

- inconsistencies between the regulator-based disqualification processes under the various prudential Acts and the court-based disqualification process in the *Corporations Act 2001* (the Corporations Act)
- how APRA's discretion to decide that a decision is not subject to a merits review would be implemented, and
- the possible consequences of reducing external scrutiny for initial prudential decision-making.

On 31 May 2007, Treasury released a further consultation paper (the 2007 consultation paper) proposing:<sup>11</sup>

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6. P. Costello, Treasurer, *Framework for reviewing administrative decisions by the Australian Prudential Regulation Authority (APRA)*, media release, Parliament House, Canberra, 16 April 2007. See also Treasury, *Streamlining Prudential Regulation: Response to 'Rethinking Regulation'*, media release, Parliament House, Canberra, 4 December 2006.
  7. Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and Treasurer, Canberra, January 2006.
  8. The HIH Royal Commission, *The Failure of HIH Insurance*, Report by the HIH Royal Commission to the Governor General, Canberra, April 2003.
  9. *ibid.*, Chapter 8 (Regulation of general insurance).
  10. See, in particular, Treasury, *Review of Prudential Decisions – consultation paper*, Treasury, Canberra, May 2007, pp. 1, 3–4 and Appendix.

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- a court-based disqualification of ‘responsible officers’
- application of a merits review of APRA decisions, and
- removal of the ministerial consent requirement for APRA decisions that do not involve broader policy issues.

## History of the Bill

The Bill was introduced into Parliament on 13 September 2007, but was not debated before Parliament was prorogued on 15 October 2007.

On 13 February 2008, Senator the Hon. Joe Ludwig reintroduced the 2007 Bill with amendments, often (though not solely) due to the commencement of relevant provisions in the *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007*.<sup>12</sup>

## Committee consideration

The Senate Standing Committee for the Scrutiny of Bills (the Committee) reviewed both the 2007 Bill and the current Bill. Its [report](#) on the current Bill was tabled on 12 March 2008.<sup>13</sup>

The main concern of the Committee centred on the proposed provisions that create strict liability offences. The relevant part of the Committee’s reported stated:

The Committee notes that the explanatory memorandum (paragraphs 1.16 to 1.19 and 2.20) seeks to justify the creation of these strict liability offences on the basis that they are ‘offences for non-compliance with basic regulatory requirements that should be complied with by all persons’ and that the use of offences of strict liability ‘is designed to enhance the effectiveness of the enforcement regime in deterring contravention of key prudential requirements.’

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11. Treasury, *Consultation Paper – Review of Prudential Decisions*, media release, Treasury, Canberra, 31 May 2007.
  12. The *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007* received Royal Assent on 24 September 2007: see [www.comlaw.gov.au](http://www.comlaw.gov.au), accessed on 26 February 2008. As for commencement of the various provisions, see *Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007* subsection 2(1).
  13. Alert Digest No. 1 of 2008 at <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2008/d01.pdf>, pp 32–36.

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In its *Sixth Report of 2002*, the Committee acknowledged that strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime, however, it also indicated that strict liability should only be introduced after careful consideration on a case-by-case basis of all the available options, rather than by applying a rigid formula. The Committee is of the view that the justification provided in the explanatory memorandum for the imposition of strict liability appears to be a generic one, which fails to demonstrate that consideration has been given to its application on a case-by-case basis.

The Committee **seeks the Treasurer's advice** whether consideration was given to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of each of these provisions.

*Pending the Treasurer's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

## Key issues and responses of significant stakeholders

The key issues relating to this Bill are, in general, set out in each Schedule of the Bill:

- replacing a process of disqualification by APRA with a court-ordered disqualification process (**Schedule 1** of the Bill)
- streamlining APRA's powers to give directions across various prudential legislation, as well as the Commissioner of Taxation's powers to give directions in relation to the SIS Act (**Schedule 2** of the Bill)
- removing the requirement of ministerial consent for decisions made by APRA and the Commissioner of Taxation that do not involve wider policy considerations (**Schedule 3** of the Bill), and
- expanding the scope of merits review for certain decisions made by APRA and the Commissioner of Taxation (**Schedule 4** of the Bill).

The primary rationale for each key issue is:

- court-ordered disqualification — to introduce a more flexible, yet consistent disqualification regime
- directions powers — to increase consistency, and certainty of those powers, as well as which of those powers would be subject to merits review, whilst ensuring APRA (and in certain cases, the Commissioner of Taxation) is able to make decisions quickly
- removing ministerial consent — to enhance APRA's (and in certain cases, the Commissioner of Taxation's) operational independence, as well as ensuring timeliness of the supervisory process, and

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- merits review — to increase consistency, transparency and accountability of APRA (and in certain cases, the Commissioner of Taxation).

Submissions to the 2006 consultation paper reflect stakeholders' concerns regarding transparency and accountability of the prudential decision-making process.<sup>14</sup>

### Court-ordered disqualification

Court-ordered disqualification, along the lines of the Corporations Act was generally supported by major stakeholders.<sup>15</sup>

### Streamlining directions powers

Although some stakeholders generally support streamlining APRA's directions powers across prudential legislation,<sup>16</sup> several concerns have been expressed by stakeholders, for example, proposed wording such as 'considers that' and 'has reason to believe' may result in subjective decision making by APRA that would be difficult to challenge.<sup>17</sup>

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14. See, for example, Australian Institute of Company Directors, *Submission: Streamlining Prudential Regulation*, 15 February 2007, p. 1.
  15. See, for example, Association of Superannuation Funds of Australia Ltd, *Submission – Review of Prudential Decisions Consultation Paper*, 26 June 2007, pp. 1-2; Australian Banking Association, *Submission - Review of Prudential Decisions Consultation Paper*, 4 July 2007, p. 2 (disqualification powers relating to auditors and actuaries be restricted to duties that the auditor or actuary actually performs for the entity to meet that entity's obligations under prudential legislation); Australian Institute of Company Directors, *Submission – Review of Prudential Decisions Consultation Paper*, 28 June 2007, p. 2; For examples of stakeholders that expressed support, in general, see Abacus Australian Mutuals, *Submission – Review of Prudential Decisions Consultation Paper*, 29 June 2007, pp. 1, 2; Law Council of Australia, *Submission – Review of Prudential Decisions Consultation Paper*, 2 July 2007, p. 2.
  16. See, for example, Australian Banking Association, *op cit.*, p. 4; Abacus Australian Mutuals, *op cit.*, p.2.
  17. AXA Australia, *Submission – Review of Prudential Decisions Consultation Paper*, 29 June 2007, p. 1.

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## Removing ministerial consent

Concerns have been expressed by some stakeholders that removing ministerial consent has the potential to reduce accountability of the decision maker, as well as reducing consumer confidence in the prudential regime.<sup>18</sup>

## Merits review

Some stakeholders support proposals as to what types of decisions would merits review apply and to clarify the bases on which merits review occurs.<sup>19</sup> In particular, support is expressed in relation to legislation specifying what decisions will be subject to merit review, thereby obviating the possibility of APRA using its discretion to decide on that question.<sup>20</sup>

However, concerns have been expressed about wide ranging powers given to APRA without merits review being available, as well as the bases upon which an APRA decision will be subject to merits review.<sup>21</sup>

## Financial implications

The Government states that there are no significant financial implications resulting from this Bill.<sup>22</sup>

However, as some of the amendments relate to the introduction of court-based disqualification, one could expect some reasonably significant financial implications, for example:

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18. See Australian Banking Association, op cit., pp. 3-4; Association of Superannuation Funds of Australia Ltd, op cit., pp. 1, 3-4.
  19. See Association of Superannuation Funds of Australia Ltd, op cit., p. 1; Administrative Review Council, *Submission – Review of Prudential Decisions Consultation Paper*, 29 June 2007, p. 2; Australian Institute of Company Directors, op cit., p. 2; CPA Australia, *Submission – Review of Prudential Decisions Consultation Paper*, 28 June 2007, p. 1.
  20. CPA Australia, op cit.
  21. See Australian Banking Association, op cit., p. 3; Insurance Council of Australia, *Submission – Review of Prudential Decisions Consultation Paper*, 2 July 2007, p. 1; Investment and Financial Services Association, *Submission – Review of Prudential Decisions Consultation Paper*, 5 July 2007, p. 1.
  22. Explanatory Memorandum, op. cit, pp. 3, 4.

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- the Federal Court of Australia would have to expend additional amounts of money to set up and manage these additional proceedings
- regulators such as APRA and the ATO would incur expenses in changing their procedures to accommodate these changes
- court proceedings are traditionally more expensive for parties to the proceedings (of which APRA or the ATO could be one) than administrative decision-making, and
- case management processes in courts generally involve longer periods of time for matters to be finalised – this could result in greater financial disadvantage for affected parties, such as financial loss resulting from damage to reputation.

## Compliance cost impact

The Government states that there would be a low compliance cost impact as the provisions in this Bill simplify processes and affect only a small part of the financial industry.<sup>23</sup>

## Main provisions

As the Bill contains many provisions proposing amendments to several Acts, this Digest does not address all provisions in the Bill.

Given the size of the Bill, please note that the Explanatory Memorandum to the Bill contains comparison tables within each Chapter, which set out comparisons between old and proposed laws pertinent to the Bill and may assist readers.

## Schedule 1 – Court power of disqualification

### Part 1 Schedule 1

This Part of the Bill proposes amendments to the following Acts in relation to courts' power of disqualification of people from 'responsible officer' roles in APRA related entities:

- Banking Act
- Insurance Act
- Life Insurance Act
- SIS Act, and

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23. *ibid.*

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- RSA Act.

These proposed amendments commence on Royal Assent and purport to replace an APRA-determined disqualification process with a court-based disqualification process.<sup>24</sup>

## Banking Act

The main amendments are contained in **item 7 of Schedule 1** of the Bill. These propose to substitute **existing sections 21 and 22** of the Act currently giving APRA the power to disqualify a person or determine that a person is not a disqualified person, with **proposed sections 21 and 22** which will, instead, empower the Federal Court, on application by APRA to disqualify a person, as well as revoke or vary a disqualification respectively.

**Current subsection 21(1)** of the Act provides that APRA has discretion to disqualify a person from being or acting as a:<sup>25</sup>

- director or senior manager of an ADI (unless it is a foreign ADI)
- senior manager of Australian operations of a foreign ADI, or
- director or senior manager of an authorised non-operating holding company (NOHC),

if APRA is satisfied that such person is not a fit and proper person to act in those capacities. When making such a decision, APRA may consider matters specified in the regulations or any other matter that APRA considers to be relevant.<sup>26</sup>

**Proposed section 21** provides that the Federal Court has the discretion to disqualify a person from the following positions:<sup>27</sup>

a director or senior manager of:

- (i) a particular ADI; or
- (ii) a class of ADIs; or
- (iii) any ADI;

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24. *ibid.*, p. 5.

25. *Banking Act 1959* subsection 21(1). See also *ibid* section 20 (Who is a disqualified person?). Note that items 5 and 6 of Schedule 1 of the Bill propose to amend subsection 20(1)(f) and (note) by replacing APRA disqualification with disqualification by the Federal Court of Australia.

26. *ibid.*, subsection 21(1A). See also *ibid.*, subsection 21(1B) (the extent to which APRA must comply with the way or circumstances in which, as well as the extent to which APRA must consider matters and relevant information which are specified in the regulations).

27. See, in particular, proposed *ibid.*, subsection 21(2).

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(other than a particular foreign ADI, a class of foreign ADIs

or any foreign ADI);

(b) a senior manager of the Australian operations of:

(i) a particular foreign ADI; or

(ii) a class of foreign ADIs; or

(iii) any foreign ADI;

(c) a director or senior manager of:

(i) a particular authorised NOHC; or

(ii) a class of authorised NOHCs; or

(iii) any authorised NOHC;

(d) an auditor of:

(i) a particular ADI or a particular authorised NOHC; or

(ii) a class of ADIs or a class of authorised NOHCs; or

(iii) any ADI or any authorised NOHC,

The grounds on which the Court may decide to disqualify a person under proposed section 21 include those found in the existing provisions – notably that the person ‘is not a fit and proper person’. In deciding this, the court may take into account ‘any criteria for fitness and propriety set out in the prudential standards’.<sup>28</sup> However, proposed section 21 contains a consideration seemingly not found in the existing provisions — the Court must be satisfied that disqualification is ‘justified’.<sup>29</sup> In making a decision on the ‘justification’ question, the Court may have regard to the person’s past conduct in the position from which they which are being considered for disqualification (for example, director or auditor)

**Current section 22** of the Act provides that if APRA is satisfied that a person is unlikely to be a prudential risk to any ADI or NOHC, APRA has discretion to decide that such

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28. *ibid.*, paragraph 21(3)(b).

29. *ibid.*, paragraph 21(1)(b) and subsection 21(4).

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person is not a disqualified person under the Act.<sup>30</sup> Please note that APRA currently also has the discretion to vary<sup>31</sup> and revoke<sup>32</sup> a disqualification order.

**Proposed section 22** of the Act provides that the Federal Court has power to revoke or vary a disqualification order made under **proposed section 21** of the Act, as well as a general order that a person is not a disqualified person under the Act.

The Court's proposed powers appear to be similar to that of APRA's current powers.

**Items 1-6 of Schedule 1** of the Bill are amendments that are necessary to give effect and are relevant to those amendments proposed in **item 7 of Schedule 1** of the Bill.

**Item 9** proposes transitional measures to the Banking Act to allow existing disqualifications by APRA and subsequent determination to vary or revoke such disqualifications by APRA or the AAT to continue in force after the date of Royal Assent. The proposed transitional measures would also allow the AAT to continue hearing cases that are still before it at the day of Royal Assent.

#### Insurance Act

**Items 10-21 of Schedule 1** of the Bill propose amendments to the Insurance Act.

In particular, **item 13** proposes to **substitute sections 25A and 26** of the Act, which currently give APRA the power to disqualify a person or to determine that a person is not a disqualified person. The **proposed sections 25A and 26** will instead, empower the Federal Court to disqualify a person, as well as revoke or vary a disqualification respectively.

Amendments proposed under **item 13** are broadly consistent with amendments proposed by **item 7 of Schedule 1** of the Bill.

**Items 10-12 of Schedule 1** of the Bill are amendments that are necessary to give effect and are related to those amendments proposed in **item 13 of Schedule 1** of the Bill.

**Item 17** relates specifically to auditors and actuaries but is couched in terms similar to those in **item 13** above. **Item 17** proposes to **substitute sections 44 and 45** of the Act with **new sections 43A** (a disqualified person must not act as an auditor or actuary of a general insurer), **44** (Federal Court's power to disqualify a person from being or acting as auditor or actuary of a general insurer) and **45** (Federal Court's power to revoke or vary a disqualification).

**Current section 44** of the Act provides that APRA has discretion to determine that a person will be disqualified as auditor or actuary of a general insurer if that person:<sup>33</sup>

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30. See, in particular, *ibid.*, subsections 22(1) and (2).

31. *ibid.*, subsections 21(6), 51B(3).

32. *ibid.*, subsections 21(3).

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- fails to adequately perform specified functions and duties
- does not meet fitness and propriety criteria of prudential standards, or
- are ineligible for such appointment under prudential standards.

This type of determination is reviewable under the Act.<sup>34</sup>

**Current section 45** of the Act provides that APRA also has discretion to revoke such a determination if APRA is satisfied that the person that the opposite applies.<sup>35</sup>

A section 45 determination is reviewable under the Act.<sup>36</sup>

**Proposed section 43A** of the Act provides for offences, including strict liability offences, that a person commits following disqualification orders made by the Federal Court. This amendment is similar to amendments proposed in **item 3** of **Schedule 1** of the Bill (above).

**Proposed section 44** of the Act provides that the Federal Court has discretion to disqualify a person from acting as an auditor or actuary of:

- (a) a particular general insurer; or
- (b) a class of general insurers; or
- (c) any general insurer.

It is proposed that the Court may make such an order in terms similar to that proposed in the current section 44. However, there is an additional consideration of whether the Court is satisfied that disqualification is justified, taking into account:

- the person's conduct in relation to functions and duties required by the Act or prudential standards, and
- anything else that the Court regards as being relevant.

**Proposed section 45** of the Act provides that the Federal Court also has discretion to vary or revoke a disqualification order made under **proposed section 44** of the Act.

These proposed amendments are consistent with those proposed in relation to the Banking Act and as proposed to this Act in **item 13** of **Schedule 1** of the Bill.

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33. *Insurance Act 1973* subsections 44(1) and (2).

34. *ibid.*, subsection 44(5).

35. See, in particular, *ibid.*, subsection 45(1) and (3).

36. *ibid.*, subsection 45(6).

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**Items 15, 16, 18-29** propose amendments that are necessary to give effect and are related to the proposed amendments in **item 17** of **Schedule 1** of the Bill.

**Item 21** proposes transitional amendments to the Insurance Act in the same terms as proposed in **item 9** of **Schedule 1** of the Bill (above) in relation to the Banking Act.

#### Life Insurance Act

**Items 22-34** of **Schedule 1** of the Bill propose amendments to the Life Insurance Act.

In particular, **item 33** proposes to insert **new sections 245A** and **245B** into the Act.

**Proposed section 245A** provides that the Federal Court of Australia has discretion to make an order disqualifying a person from acting as a director, principal executive officer, as well as an appointed actuary or auditor of:

- a particular company; or
- a class of companies registered under this Act, or
- any company registered under this Act,

registered under this Act.

It is proposed that the Court may only make such orders if the Court is satisfied that:

- the person is not a fit and proper person to act in those positions, or
- the order is justified.

**Proposed section 245B** provides that the Federal Court of Australia has discretion to revoke or vary a disqualification order made under proposed section 245A, as well as a general order that the person is not a disqualified person under the Act.<sup>37</sup>

These proposed amendments are broadly consistent with proposed amendments in the Banking and Insurance Acts (see **items 7, 13** and **17** of **Schedule 1** of the Bill above).

**Items 22-27, 31** and **32** propose amendments that relate to the proposed amendments in **item 33** of **Schedule 1** of the Bill above.

However, note that **item 32** proposes to **repeal subsections 245(2)-(5)** of the Act and substitute those subsections with **new subsections 245(2)-(5B)**. The proposed subsections include strict liability offences for individuals and companies involved. (Please refer to the discussion on concerns about strict liability offences expressed by the Senate Standing Committee on Scrutiny of Bills).

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37. See *Life Insurance Act 1995* subsection 245(1).

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**Item 28** proposes to **insert a new section 125A** into the Act, which would allow APRA to direct a life company to remove an auditor or actuary's appointment as the auditor or actuary of that life company. In particular, if a life company fails to comply with a direction by APRA to end the appointment of a person as its auditor or actuary, that life company commits an offence. It is important to note that such an offence is one of strict liability. (Please refer to the discussion on concerns about strict liability offences expressed by the Senate Standing Committee on Scrutiny of Bills).

**Item 29** proposes amendments relating to amendments proposed in **item 28** above.

RSA Act

**Items 35-40** of **Schedule 1** of the Bill propose amendments to the RSA Act.

In particular, **item 38** proposes to **substitute section 67** of the Act with **new sections 67, 67A and 67B**.

**Current section 67** of the Act provides that APRA has discretion to make a disqualification order relating to an approved auditor if that auditor has either failed to carry out or, adequately and properly perform his or her legal duties; or is otherwise not a fit and proper person to be an approved auditor.<sup>38</sup>

**Proposed section 67** provides that the Federal Court of Australia has discretion to make disqualification orders if the Court is satisfied that:

- the auditor has failed to carry out or, adequately and properly perform his or her legal duties
- the auditor is not a fit and proper person to be an approved auditor, and
- disqualification is justified,

by considering matters similar to those proposed in relation to the Banking, Insurance and Life Insurance Acts (please see **items 7, 13, 17 and 33** of **Schedule 1** of the Bill above).

**Proposed section 67A** provides for the Federal Court's power to revoke or vary a disqualification order under proposed section 67 of the Act.

**Items 35, 36, 37 and 39** propose amendments that relate to the proposed amendments in **item 38** of **Schedule 1** of the Bill above.

**Proposed section 67B** provides for offences, including a strict liability offence, committed by an individual who, knowing that he or she has been disqualified under proposed section 67 of the Act, is or acts as an auditor of an RSA provider. (Please refer to

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38. *Retirement Savings Accounts Act 1997* subsection 67(1).

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the discussion on concerns about strict liability offences expressed by the Senate Standing Committee on Scrutiny of Bills).

**Item 40** proposes transitional amendments to the Act in the same terms as **items 9 and 21** of Schedule 1 of the Bill above.

#### SIS Act

**Items 41-70** of **Schedule 1** of the Bill propose amendments to the SIS Act.

In particular, **items 57 and 61** propose court-based disqualification where the Regulator is APRA, while maintaining the Commissioner of Taxation's power to disqualify.

**Item 57** proposes to insert a:

- new Subdivision B into the Act – Disqualification by the Federal Court of Australia, incorporating new sections 126G, 126H and 126J, and
- new Subdivision C into the Act – Offences relating to disqualified persons, incorporating a new section 126K.

**Proposed section 126G** provides that the **new Subdivision B** applies to the extent that APRA is the Regulator.

**Proposed section 126H** provides that the Federal Court of Australia has the discretionary power to disqualify individuals from being or acting as trustees, or responsible officers of bodies corporate acting as trustees, investment managers or custodians, of superannuation entities. In using its discretion, the Court must consider matters which are broadly consistent with what is proposed in **items 7, 13, 17, 33 and 38** of **Schedule 1** of the Bill above.

**Proposed section 126J** sets out the Federal Court's power to revoke or vary a disqualification on application by the disqualified person or APRA in terms consistent with **items 7, 17, 33 and 38** of **Schedule 1** of the Bill above.

**Proposed section 126K** sets out offences that individuals commit in relation to being disqualified and acting as trustee, investment manager or custodian of a superannuation entity (or a responsible officer of a body corporate that is trustee, investment manager or custodian of a superannuation entity), which includes strict liability offences. (Please refer to the discussion on concerns about strict liability offences expressed by the Senate Standing Committee on Scrutiny of Bills).

**Item 61** proposes to insert **new sections 130D and 130E** into the Act.

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**Proposed section 130D** provides that the Federal Court of Australia, on application by APRA, would have the discretionary power to disqualify individuals from acting as approved auditors or actuaries of superannuation entities.

**Proposed section 130E** provides that the Federal Court of Australia, on application by the disqualified person or APRA, would have the discretionary power to vary or revoke a disqualification order.

**Items 43, 44, 49-56 and 69** propose amendments relating to amendments proposed in **item 57 of Schedule 1** of the Bill above.

**Items 46, 47, 55, 66** propose amendments relating to **item 61 of Schedule 1** of the Bill above.

**Item 41** proposes amendments relating to **items 61 and 63 of Schedule 1** of the Bill.

**Items 62 and 63** propose amendments allowing for the Commissioner of Taxation's powers to disqualify a person from being an approved auditor or actuary for the purposes of the Act.

**Item 62** proposes to **substitute subsection 131(1)** of the Act, which currently deals with the Regulator's<sup>39</sup> power to make disqualification orders in relation to auditors with new provisions that set out the Commissioner of Taxation's powers to disqualify a person from being an approved auditor or actuary for the purposes of the Act if that person:

- does not adequately or properly perform duties of an auditor or actuary as required under the Act, or any other Commonwealth, State or Territory laws, including the FSCODA Act, or
- is otherwise not a fit and proper person to be an approved auditor or actuary under this Act.

**Item 63** proposes to **amend paragraphs 131(7)(a) and (b)** of the Act to include actuaries in the provision relating to revocation of disqualification orders by the Commissioner of Taxation.

**Item 65** proposes to **substitute subsection 131A(3)** in the Act. The crux of this amendment is that regardless of whether a disqualification order has been made by the Federal Court of Australia under **proposed section 130D** or by the Commissioner of Taxation under **amended section 131** of the Act, the Regulator may refer an auditor or actuary to his or her professional association if the regulator is satisfied that such person has not carried out his or her duties as required or is not a fit and proper person to be an

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39. 'Regulator' means APRA, ASIC or the Commissioner for Taxation, depending on the provision: see *Superannuation Industry (Supervision) Act 1993* section 10.

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approved auditor or actuary. Subsection 131A(3) currently only refers to a disqualification order by the Regulator.

**Item 67** proposes to **insert a new section 131C** into the Act. The proposed section would provide that disqualified persons must not be auditors or actuaries of superannuation entities and sets out offences, including a strict liability offence for non compliance by individuals. (Please refer to the discussion on concerns about strict liability offences expressed by the Senate Standing Committee on Scrutiny of Bills).

**Item 68** proposes to **substitute paragraph 133(1)(a)** of the Act, which deals with the suspension or removal by the Regulator, of a trustee of a superannuation entity. It is proposed that the Regulator may also suspend or remove a trustee of a superannuation entity if that individual was disqualified from being or acting as trustee of that superannuation entity under section 126H of the Act as proposed by **item 57 of Schedule 1** of the Bill.

**Item 70** proposes transitional amendments to the Act in the same terms as **items 9, 21 and 40** of Schedule 1 of the Bill above.

#### Part 2 Schedule 1

Part 2 of the Bill proposes amendments that are contingent on the *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Investors) Act 2007* (the DMF and DOFI Act).<sup>40</sup>

Amendments are proposed to the:

- DMF and DOFI Act, and
- Insurance Act.

#### DMF and DOFI Act

**Item 71 of Schedule 1** of the Bill proposes to **repeal items 9A, 9B, 9D, 9E, 9F and 9G of Schedule 2** of the DMF and DOFI Act.

**Items 9A-9G of Schedule 2** of the DMF and DOFI Act propose to amend sections 24-26 of the Insurance Act by introducing the concept of corporate agent of a direct foreign insurer.

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40. The DMF and DOFI Act received Royal Assent on 24 September 2007: see [www.comlaw.gov.au](http://www.comlaw.gov.au), accessed on 26 February 2008. As for commencement of the various provisions, see *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Investors) Act 2007* subsection 2(1).

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**Items 10-13 of Schedule 1** of the Bill also propose amendments to sections 24-26 of the Insurance Act.

Consequently, **item 71** takes effect depending on whether the DMF and DOFI Act or this Bill commences first.

If the DMF and DOFI Act commences first, **item 71** takes effect once it commences.

#### Insurance Act

**Items 72-82 of Schedule 1** of the Bill are consequential **amendments to sections 24-25A** of the Insurance Act, as proposed by **items 10-13 of Schedule 1** of the Bill.

**Item 83 of Schedule 1** of the Bill proposes to **amend subparagraph 27(2)(a)(i)** of the Act by adding a reference to ‘corporate agent’.

If this Bill commences first, **items 10-13 of Schedule 1** of the Bill would have taken effect and because of those amendments, items 9A-9G of the DMF and DOFI Act (once those provisions commence), would not be able to operate as intended. However, **items 72-83 of Schedule 1** of the Bill would ensure that the policy intention of the DMF and DOFI Act is given effect.<sup>41</sup>

#### Schedule 2 – Direction powers

APRA has wide-ranging direction powers, which are spread out over the:

- Banking Act
- Insurance Act, and
- Life Insurance Act,

and which are, at times, ‘fragmented and inconsistent’.<sup>42</sup> This is said to make those powers ‘complex’ and uncertain in scope and application.<sup>43</sup>

This Part of the Bill proposes to amend those Acts, which commence on Royal Assent and purport to streamline APRA’s powers to give directions.<sup>44</sup>

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41. For a comprehensive explanation of how items 71-83 of Schedule 1 of the Bill works, see Explanatory Memorandum, op cit, pp. 16–17.

42. *ibid.*, p. 21.

43. *ibid.*

44. *ibid.*, pp. 4, 19–21.

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An amendment is also proposed to the SIS Act, which also relates to directions given by the Commissioner of Taxation.

## Banking Act

**Items 1-6 of Schedule 2** of the Bill propose amendments to **section 11CA** of the Banking Act.

**Item 1** proposes to **substitute subsection 11CA(1)** of the Act.

Subsection 11CA(1) of the Act sets out the bases upon which APRA may give a direction to an ADI or authorised NOHC. Amendments are proposed in an effort to promote consistency across legislation.<sup>45</sup>

**Item 1** also introduces a requirement for APRA to give written notice to the entity it directs specifying the ground(s) upon which APRA made the direction.

**Item 2** proposes to **amend subsection 11CA(2)** of the Act by inserting **new paragraphs 11CA(2)(aa) and (ab)**. These new paragraphs add two new types of directions that APRA may give under subsection 11CA(2) of the Act. APRA would be able to give a direction that the entity complies with all or part of:

- the Banking Act or the FSCODA Act, and
- a condition or direction under the Banking Act or the FSCODA Act, which the entity had contravened.

**Item 3** proposes amendments that are consistent with those proposed by **items 1-8 of Schedule 1** of the Bill.

**Item 4** proposes to insert a **new subsection 11CA(4B)** into the Act.

Section 11CA of the Act only provides for APRA's power to revoke a direction.

**Proposed subsection 11CA(4B)** provides that APRA, by written notice to the body corporate, may also vary the direction it has given if it considers that the variation is necessary and appropriate at the time of varying the direction.

**Item 5** proposes to **substitute subsection 11CA(6)** of the Act, now only referring to definitions of 'director', 'senior manager' and the 'affairs' of a body corporate. This amendment is consistent with other amendments in this Bill, such as those proposed by **items 1-8 of Schedule 1** and **item 3 of Schedule 2** of the Bill.

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45. *ibid.*, p. 21.

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## Insurance Act

**Items 7-16** of **Schedule 2** of the Bill propose amendments to the Insurance Act.

**Item 7** proposes to **repeal Division 2** of **Part IIIA** in the Act.

Division 2 relates to APRA's power to give directions to a general insurer, authorised NOHC, or a subsidiary of either a general insurer or authorised NOHC, to comply with prudential standards.

**Item 8** proposes to **repeal sections 49M-49P** of the Act.

These sections relate to accounting directions that APRA may give general insurers and compliance with such directions.

**Item 9** proposes to **repeal section 51** of the Act.

Section 51 relates to APRA's power to conduct inquiries and give directions relating to certain assets.

**Item 10** proposes to **amend subparagraph 60(2)(c)(ii)** of the Act to refer to section 104 instead of section 62.

Section 62 relates to directions that APRA may give a general insurer or authorised NOHC. See **item 12** of **Schedule 2** of the Bill (below) regarding **new section 104**.

**Item 11** proposes to repeal **section 62** of the Act.

**Item 12** proposes to insert **new sections 104-108** into the Act.

**Proposed section 104** provides that APRA may give directions in certain circumstances. Subsection 104(1) lists the bases upon which APRA may give these directions. This includes if APRA has reason to believe that there is, or might be, a material risk to the security of the assets of the general insurer or authorised NOHC, which is not subject to a merits review.

**Proposed section 105** provides that the fact that a general insurer or authorised NOHC is subject to such directions is not a ground for any other party to deny contractual obligations. Third parties are relieved from obligations owed to the general insurer or authorised NOHC if APRA's direction to that general insurer or authorised NOHC prevents it from fulfilling its contractual obligations. An application may be made to the Federal Court of Australia for an order about the effect of a direction on a contract.

**Proposed section 106** provides for discretionary and mandatory supply of information about the issue or revocation of directions by APRA.

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**Proposed section 107** provides for secrecy requirements under the *Australian Prudential Regulation Authority Act 1998* that apply unless information has been published under **proposed section 106**.

**Proposed section 108** provides that non compliance with a direction by a general insurer or authorised NOHC constitutes a strict liability offence for which the penalty is \$5 500. In addition, the new provision would provide that an officer of a general insurer or authorised NOHC commits a strict liability offence if that officer fails in his or her duty to ensure compliance with APRA's direction. (Please refer to the discussion on concerns about strict liability offences expressed by the Senate Standing Committee on Scrutiny of Bills).

**Items 13 to 15** are related amendments.

Life Insurance Act

**Items 17-25** of **Schedule 2** of the Bill propose amendments to the Life Insurance Act.

**Items 17 and 18** propose to **repeal sections 134 (Directions regarding company assets) and 150 (Regulator may give directions during or after investigations)** of the Act respectively. These directions powers are contained elsewhere through **items 12 and 19** of **Schedule 2** of the Bill.<sup>46</sup>

**Item 19** proposes to **substitute subsection 230B(1)** of the Act with **new subsections 230B(1) and 230B(1A)**. These proposed amendments set out the bases upon which APRA may give a direction to a life company and introduces a requirement for APRA to give written notice to the entity it directs specifying the ground(s) upon which APRA made the direction. These proposed amendments are consistent with those proposed by **items 1 and 12** of **Schedule 2** of the Bill.

**Item 20** proposes to **substitute paragraph 230B(2)(a)** of the Act with **new paragraphs 230B(2)(a) and (aa)**. These paragraphs are part of a subsection dealing with the kinds of directions that APRA may give a life company. The Explanatory Memorandum states that this proposed amendment is designed to address gaps in general directions powers in the Banking and Life Insurance Acts.<sup>47</sup>

**Item 21** proposes to **substitute the reference to 'director, secretary, executive officer or employee'** in **subparagraphs 230B(2)(d)(i), (ii) and (iii)** of the Act with a reference to 'director or senior manager'. 'Senior manager' would be defined as proposed by **item 23** of **Schedule 2** of the Bill below.

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46. *ibid.*, p. 27.

47. *ibid.*, p. 23.

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**Item 22** proposes to insert a **new paragraph 230B(2)(pa)** into the Act. This proposed amendment would allow APRA to give a direction to a life company about the amount of capital that the life company holds.

**Item 23** proposes to **amend subsection 230B(10)** of the Act by inserting a new definition ‘senior manager’. ‘Senior manager’ would mean someone with or who exercises any senior management responsibilities, that are within the meaning of the prudential standards, for the life company.

**Item 24** proposes to **repeal paragraphs 236(1)(zj)-(zm) of the definition of ‘reviewable decision’** in the Act. These references to directions would be redundant because the directions power would have been consolidated.<sup>48</sup>

### SIS Act

**Item 26 of Schedule 2** of the Bill proposes to **substitute subsection 264(1)** of the Act. Currently, that provision enables the Regulator to take action to protect the value of beneficiaries’ interests.

**Proposed subsection 264(1)** provides that if APRA or the Commissioner of Taxation intends to issue directions under subsection 264(2), APRA or the Commissioner of Taxation, as the case may be, must consider that the conduct that was, is or is proposed to be engaged in by a trustee or investment manager of a superannuation entity, is likely to adversely affect values of beneficiaries’ interests.

In addition, **proposed subsection 264(1)** provides that in other cases, APRA or the Commissioner of Taxation, as the case may be, must consider that the conduct that was, is or is proposed to be engaged in by a trustee or investment manager of a superannuation entity, is likely to significantly affect values of beneficiaries’ interests in an adverse manner.

### Schedule 3 – Removal of ministerial consent

**Schedule 3** of the Bill removes the requirement for ministerial consent from certain administrative decisions made by APRA and the Commissioner of Taxation. The Explanatory Memorandum submits that the removal of consent is intended to be only where the decisions do not involve wider policy considerations.<sup>49</sup>

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48. *ibid.*, p. 28.

49. *ibid.*, p. 29.

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## Part 1 Schedule 3

This Part contains those amendments intended to commence on Royal Assent of the Act.

### Insurance Act

**Items 1–27** of **Schedule 3** of the Bill propose to amend the Insurance Act.

**Items 1-7** propose to amend provisions requiring the Treasurer's agreement in order for APRA to perform certain functions by deleting that requirement to the effect that APRA may make certain administrative decisions without having to seek the Treasurer's agreement. Those decisions involve:

- revoking a general insurer's authorisation (**items 1 and 2**)
- revoking a NOHC authorisation (**items 3 and 4**)
- modifying a prudential standard under section 32 of the Act (**item 5**)
- giving a notice, to a general insurer or authorised NOHC, to show cause why APRA should not investigate the business of that general insurer or authorised NOHC, or have that business investigated and reported upon by another person (**items 6 and 7**)
- issuing directions to Lloyd's underwriters not to issue or renew policies, nor undertake liability under contracts of insurance (**items 9 and 10**)
- issuing directions about account liabilities to certain security trust fund trustees under section 76 (**items 11 and 12**)
- issuing directions to trustees not to deal with certain assets (**items 13 and 14**)
- dealing with security deposits under sections 92Q, 92R and 92S of the Act (**items 15-21**), and
- the authorisation of Lloyd's underwriters (**items 22 – 26**).

**Item 8** proposes to **substitute a bullet point in section 65** of the Act, whereby Lloyd's, or a company nominated by Lloyd's, would have to lodge a security deposit of \$2 million with APRA rather than the Treasurer.

### Life Insurance Act 1995

**Items 28–31** of **Schedule 3** of the Bill propose amendments to the Life Insurance Act.

**Item 28** proposes to **amend subsection 21(1)** of the Act, which deals with decision-making on a company's application for registration with APRA as a life insurance provider under the Act. Currently, the Treasurer must approve any decision to refuse an application for registration under that section. This provision removes the Treasurer's role from this, leaving the decision-making responsibility solely on APRA.

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**Items 29-31** remove the need for ministerial consent for APRA to:

- approve a mortgage or charge of assets of a statutory fund (**item 29**)
- issue a notice where a life company has contravened Part 4 of the Act in relation to statutory funds (**item 30**), and
- refuse to approve a distribution of retained profits or shareholder capital in a statutory fund (**item 31**).

### **SIS Act**

**Items 32–38** of **Schedule 3** of the Bill amend the SIS Act by removing the need for ministerial consent for:

- APRA to cancel an RSE licence (**items 32-34**)
- the Regulator<sup>50</sup> to decide to suspend, remove, or extend the suspension of a trustee of a superannuation entity (**item 35**)
- APRA to approve the transfer of member and beneficiary benefits in accordance with a section 145 application (**item 36-37**), and
- the Regulator to make certain directions to trustees, investment managers or other people possessing or controlling assets, under subsections 264 (3), (3A) and (4) (**item 38**).

### **Part 2 Schedule 3**

This Part contains amendments which are contingent on the commencement of the DMF and DOFI Act.

In general, **Part 2** of **Schedule 3** of the Bill proposes amendments to sections 63 and 64 of the Insurance Act, which outline processes for review of certain decisions under that Act (including the accompanying statements of notification of decisions). Currently the provisions refer to reviewable decisions of both the Treasurer and APRA. The amendments remove all references to the Treasurer from the provisions, thus establishing APRA as the sole decision-maker and reviewer for the purposes of the sections.

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50. 'Regulator' means APRA, ASIC or the Commissioner for Taxation, depending on the provision: see *Superannuation Industry (Supervision) Act 1993* section 10.

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## Division 1

**Division 1 of Part 2, Schedule 3** contains **items 39-43**, which will occur if the DMF and DOFI Act commences before this Bill. In this scenario, only certain amendments are needed as other relevant provisions will have been amended by the DMF and DOFI Act.

**Item 39** proposes to **substitute** the wording in **subsection 3(1)(note to the definition of insurance business)** of the Insurance Act to ‘Some contracts of insurance’.

**Item 40** proposes to **substitute section 3A** of the Insurance Act with a new provision. **New section 3A** would generally provide for the Insurance Regulations to specify that certain contracts are not insurance contracts for the purposes of the Insurance Act.

**Items 41 and 43** propose to **substitute the following definitions in subsection 63(1)** of the Insurance Act:

- decision maker, and
- reviewable decision.

**Item 42** proposes to **repeal paragraph (a) of the definition of ‘person affected by a reviewable decision’** in **subsection 63(1)** of the Insurance Act.

It is noted that subsection 63(1) does not yet contain these definitions, as they are due to be inserted on 1 July 2008 by the DMF and DOFI Act.<sup>51</sup>

The purpose of those amendments to definitions in subsection 63(1) of the Insurance Act is to remove all references (old and new) to the Treasurer, and consequently, ministerial consent, from prudential legislation.<sup>52</sup>

## Division 2

**Division 2 of Part 2, Schedule 3** contains **items 44–64**, which are necessary in case the DMF and DOFI Act has not commenced before the commencement of this Bill. If that happens, a wider range of amendments are needed to remove references to the Treasurer in the review processes under the Act.

## Division 3

**Division 3 of Part 2, Schedule 3** contains amendments that must occur once the Schedule 2 of the DMF and DOFI Act has commenced on 1 July 2008.

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51. See *Insurance Act 1973* Note 2, clauses 13–15.

52. Explanatory Memorandum, op. cit., p. 35.

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For example:

**Item 65** proposes to **substitute item 8 of Schedule 2** of the DMF and DOFI Act with a **new section 3A**.

**Item 66** proposes to **remove ‘misdescribed amendments’ in items 13-33 of Schedule 2** of the DMF and DOFI Act. This is to eliminate any errors that might occur as a result of the Bills’ amendments, if this Bill happens to commence prior to the DMF and DOFI Act.<sup>53</sup>

**Item 67** proposes to **substitute subsection 3(1)(note to the definition of insurance business)** in the Insurance Act to simply read ‘Some contracts of insurance’. (See **item 39 of Division 1 of Part 2 in Schedule 3**).

#### Schedule 4 – Review of decisions

**Schedule 4** of the Bill sets out proposed amendments relating to Review of decisions in the:

- Banking Act
- Insurance Act
- Life Insurance Act
- SIS Act, and
- FSCODA Act.

These amendments are aimed at expanding the scope of merits review for certain decisions made by APRA and the Commissioner of Taxation.<sup>54</sup>

In general, merits review is a process where either a person or entity, who is not the primary decision maker, reconsiders the original decision in terms of facts, law and policy in order to determine the correct or best decision that could be made given the relevant facts.<sup>55</sup>

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53. *ibid.*, p. 37.

54. *ibid.*, p. 40.

55. Administrative Review Council, *What Decisions should be Subject to Merit Review?*, Commonwealth, Ch 1 at [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Downloads\\_What\\_decisions\\_should\\_be\\_subject\\_to\\_merit\\_review#what](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#what), accessed on 12 March 2008.

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The aims of merit review are to:<sup>56</sup>

- ensure fair treatment for everyone who is affected by a decision
- improve the quality and consistency of decisions, and
- improve transparency and accountability of government decisions.

It is important to note that merits review differs from judicial review<sup>57</sup> and should not be confused.<sup>58</sup>

## **Banking Act**

**Items 1-14** of **Schedule 4** of the Bill propose amendments to the Banking Act.

**Item 1** proposes to insert a **new subsection 9(9)** into the Act.

Section 9 of the Act relates to APRA's authorisation for a body corporate to carry on a banking business. APRA may impose, vary or revoke conditions on any such authority that it grants but must provide written notice thereof.

**Proposed subsection 9(9)** provides that merits review would apply to APRA's decisions to:

- refuse to grant a body corporate authority to carry on banking business
- impose conditions or additional conditions on such an authority, and
- vary such conditions.

**Item 2** proposes to insert a **new subsection 9A(8)** into the Act.

Section 9A of the Act provides for revocation of APRA's authority to a body corporate to carry on banking business.

**Proposed subsection 9A(8)** provides that merits review would apply to APRA's decisions relating to revoking and refusing to revoke such authority.

**Item 3** proposes to insert a **new subsection 11(5)** into the Act.

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56. *ibid.*

57. For an example of legislation providing for judicial review in certain circumstances, see *Administrative Decisions (Judicial Review) Act 1977*.

58. See [http://www.lawlink.nsw.gov.au/report%5C1pd\\_reports.nsf/pages/lec-working-6-options](http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/lec-working-6-options), accessed on 12 March 2008.

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Section 11 of the Act provides that APRA may determine that provisions of the Banking Act do not apply to a person for a specified period of time.

**Proposed subsection 11(5)** provides that merits review would apply to APRA's decisions to:

- refuse to make such a determination, and
- vary or revoke such determination.

**Item 4** proposes to insert **new subsection 11AA(8)** into the Act.

Section 11AA of the Act relates to APRA's authorisation for a body corporate to be an NOHC of an ADI. The authority applies to any ADIs which are subsidiaries of that body corporate. APRA may impose, vary or revoke conditions on any such authority (on prudential matters) that it grants but must provide written notice thereof and get that authority published in the *Gazette*.

**Proposed subsection 11AA(8)** provides that merits review would apply to APRA's decisions to:

- refuse to grant a body corporate authority to be an NOHC of an ADI
- impose conditions or additional conditions on such an authority, and
- vary those conditions.

**Item 5** proposes to insert **new subsection 11AB(8)** into the Act.

Section 11AB of the Act relates to revocation of APRA's authority to a body corporate to be an NOHC of an ADI.

**Proposed subsection 11AB(8)** provides that merits review would apply to APRA's decisions relating to revoking and refusing to revoke such authority.

**Item 6** proposes to insert **new subsection 11AF(7C)** into the Act.

Section 11AF of the Act relates to APRA's power to make prudential standards for ADIs and authorised NOHCs, as well as, in writing, vary or revoke a prudential standard.

**Proposed subsection 11AF(7C)** provides that merits review would apply to APRA's decisions to:

- determine a standard for one or more specified ADI or NOHC, and
- vary such standard.

**Item 7** proposes to insert **new subsection 11CA(5A)** into the Act.

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Section 11CA of the Act relates to APRA's power to give directions.

**Proposed subsection 11CA(5A)** provides that merits review would apply to APRA's decision to give a direction on the basis that the body corporate:

- has contravened a prudential standard or requirement
- is an ADI and the direction is necessary to protect the interests of depositors of the ADI
- is an authorised NOHC and direction is necessary to protect the interests of depositors of any ADI that is a subsidiary of the body corporate
- is conducting its affairs in an improper or financially unsound way, or
- has contravened a requirement under the FSCODA Act.

**Items 8-9** propose to **restructure** and **amend section 11CB** of the Act by creating **subsections 11CB(1)** and **(2)**.

Section 11CB of the Act relates to APRA's discretionary power to certify an industry support contract. APRA may certify an industry support contract on request by all parties to the contract and if APRA considers that is appropriate to do so. APRA must provide written notification of such certification to all the parties of the contract.

**Proposed subsection 11CB(2)** provides that merits review would apply to APRA's refusal to certify an industry support contract.

**Items 10-11** propose to **amend section 11CC** of the Act by inserting **new subsections 11CC(3A)** and **(7)** into the Act.

Section 11CC of the Act relates to APRA's power to direct parties to an industry support contract to comply with the contract and to revoke such a direction.

**Proposed subsection 11CC(3A)** enables APRA to vary such a direction if APRA considers that it is necessary and appropriate to do so, at the time of the variation.

**Proposed subsection 11CC(7)** provides that merits review would apply to APRA's decisions under section 11CC to:

- give such direction
- vary such direction, and
- revoke a certification of an industry support contract.

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**Item 12** proposes to **repeal subsection 51C(4)** of the Act, removing automatic confidentiality to improve transparency of decision reviews.<sup>59</sup>

Subsection 51C(4) provides for proceedings in relation to APRA's reviewable decisions.

**Item 13** proposes to insert a **new subsection 66(2C)** into the Act.

Section 66 of the Act provides for APRA's power to give consent to the use of certain restricted words and expressions in relation to a financial business.

**Proposed subsection 66(2C)** provides that merits review would apply to APRA's decisions to:

- refuse consent
- impose conditions, or additional conditions, on consent
- vary such conditions, and
- revoke consent.

**Item 14** proposes to insert a **new subsection 67(5)** into the Act.

Section 67 of the Act relates to APRA's power to give consent to establishing or maintaining representative offices of overseas banks.

**Proposed subsection 67(5)** provides that merits review would apply to APRA's decisions to:

- refuse consent
- impose conditions, or additional conditions, on consent
- vary such conditions, and
- revoke consent.

### **FSCODA Act**

**Items 15-17** of **Schedule 4** of the Bill proposes amendments to the FSCODA Act.

**Item 15** proposes to insert a **new Part 3A – Review of decisions** into the Act.

**Proposed Part 3A** contains provisions on requirements relating to:

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59. *ibid.*, p. 45.

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- APRA’s written notice of a reviewable decision that it makes and statement regarding the availability of review of that decision
- requests for a review of decisions by APRA by written notice to APRA within a particular period of time and setting out reasons for making the request
- what APRA must do once APRA receives the request for review — reconsider its decision and either confirm, revoke or vary that decision, and
- applications made to the AAT to review decisions that APRA has confirmed or varied.

**Item 16** proposes to insert a **new definition of ‘decision’** into **section 31** of the Act, which is consistent with the definition of ‘decision’ in the *Administrative Appeals Tribunal Act 1975*.

**Item 17** proposes to insert a **new definition of ‘reviewable decision’** into **section 31** of the Act, which includes APRA’s decisions:

- not to exempt an organisation under paragraph 7(2)(j)
- not to allow a longer period of time in which a corporation can fulfil its obligations to provide APRA with information under subsection 9(3)
- to include a registered entity in a particular category under section 11, which lists the names and categories of registered entities, and
- to determine a reporting standard (or vary such standard) for a particular financial sector entity under section 1.

## **Insurance Act**

**Items 18-27** of **Schedule 4** of the Bill propose amendments to the Insurance Act.

**Item 18** proposes to insert a **new subsection 7(6)** into the Act.

Section 7 of the Act provides that APRA may determine that all or part of the Act does not apply for a specified period of time.

**Proposed subsection 7(6)** provides that merits review would apply to APRA’s decision to:

- refuse to make a determination that one or more provisions of the Act do not apply to a person
- impose conditions on or specify a period in such a determination, and
- vary or revoke such a determination.

**Item 19** proposes to insert a **new subsection 13(6)** into the Act.

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Section 12 of the Act provides for requirements relating to APRA's power to grant authorisations to body corporates to carry on insurance business.

Section 13 of the Act provides that APRA may impose conditions on such authorisations, as well as revoke or vary those conditions.

**Proposed subsection 13(6)** provides that merits review would apply to APRA's decisions to:

- impose conditions or additional conditions on such authorisations, and
- vary those conditions.

**Item 20** proposes to insert a **new subsection 15(7)** into the Act.

Section 15 of the Act relates to when APRA may revoke an authorisation to carry on insurance business.

**Proposed subsection 15(7)** provides that merits review would apply to APRA's decisions to revoke such authorisations.

**Item 21** proposes to insert a **new subsection 17(10)** into the Act.

Section 17 of the Act relates to APRA's discretionary power to direct general insurers to arrange for APRA approved assignment of liabilities to enable revocation of that insurer's authorisation to carry on an insurance business.

**Proposed subsection 17(10)** provides that merits review would apply to APRA's decisions to:

- give such directions
- refuse to approve a proposed assignment of liabilities, and
- impose conditions on an approval.

**Item 22** proposes to insert a **new subsection 19(5)** into the Act.

Section 19 of the Act relates to conditions that APRA may impose on an NOHC authorisation.

**Proposed subsection 19(5)** provides that merits review would apply to APRA's decisions to:

- impose conditions or additional conditions on an NOHC authorisation, and
- vary those conditions on such authorisation.

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**Item 23** proposes to insert a **new subsection 21(7)** into the Act.

Section 21 of the Act provides for when APRA may revoke an NOHC authorisation.

**Proposed subsection 21(7)** provides that merits review would apply to APRA's decision to revoke such authorisations.

**Item 24** proposes to insert a **new subsection 32(7)** into the Act.

Section 32 of the Act provides that APRA may determine prudential standards. In particular, paragraph 31(1)(e) provides that such standards include those that must be complied by specified general insurers, authorised NOHCs or subsidiaries thereof.

**Proposed subsection 32(7)** provides that merits review would apply to APRA's decision to determine, vary or revoke paragraph 31(1)(e) standards.

**Item 25** proposes to insert a **new subsection 49H(5)** into the Act.

Section 49H of the Act relates to requests by a general insurer that an APRA delegate's decision relating to extension of time for providing an actuary's report be reconsidered. On receiving a request, APRA may confirm, revoke or vary its decision.

**Proposed subsection 49H(5)** provides that merits review would apply to APRA's decision to confirm or vary its delegate's decision.

**Item 26** proposes to **repeal subsection 63(14)** of the Act.

Subsection 63(14) relates to requirements of hearings of proceedings about reviewable decisions of the Treasurer or APRA, as well as directions that the AAT may order.

Repealing subsection 63(14) removes automatic confidentiality to improve transparency of such decisions.<sup>60</sup>

**Item 27** proposes to insert a **new subsection 116A(7)** into the Act.

Section 116A of the Act relates to assets and liabilities of general insurers in Australia.

Subsection 116A(5) of the Act relates to APRA's power to make directions about the extent to which premiums retained under a reinsurance contract by a person outside Australia are considered to be assets in Australia for the purposes of section 28 of the Act that requires a general insurer to hold sufficient assets in Australia.

Subsection 116A(6) of the Act relates to when APRA must revoke or vary such directions.

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60. *ibid.*, p. 45.

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**Proposed subsection 116A(7)** provides that merits review applies to APRA's decisions to:

- determine amounts under subsection 116A(5), and
- vary such determinations under subsection 116A(6).

### Life Insurance Act

**Items 28-35** propose amendments to the Life Insurance Act all of which relate to matters which come within the definition of 'reviewable decision' in existing **subsection 236(1)** of the Act. The effect of the amendments is to extend the range of decisions which are reviewable.

**Items 36 and 37** proposes to **repeal subsections 236(1A) and 237(5)** of the Act respectively.

**Subsection 236(1A)** sets out what are not reviewable decisions for the purposes of the Act. According to the Explanatory Memorandum, this list has been removed to avoid the confusion of having the same decisions in both subsections 236(1) and (1A) of the Act dealing with reviewable and non reviewable decisions respectively.<sup>61</sup>

**Subsection 237(5)** provides for the procedure of proceedings relating to reviewable decisions. This amendment is similar to amendments that are proposed by **items 12, 26 and 42** of **Schedule 4** of this Bill. By removing automatic private hearings, these proposed amendments aim to improve transparency of decision-making. However, private hearings may still be available on application by the affected person.<sup>62</sup>

### SIS Act

**Items 38-41** of **Schedule 4** of the Bill proposes to amend the definition of 'reviewable decision' to include the following:

- APRA's decision to direct an RSE licensee<sup>63</sup> to modify its risk management strategy under subsection 29HB(3) of the Act: **item 38**.

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61. *ibid.*, pp. 43–44.

62. *ibid.*, p. 45.

63. An RSE (APRA regulated superannuation entity) licensee is a constitutional corporation, body corporate or group of individual trustees holding an RSE licence under section 29D: *Superannuation Industry (Supervision) Act 1993* section 10.

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- APRA's decision to direct an RSE licensee of an registrable superannuation entity registered under Part 2B of the Act to modify the entity's risk management plan under subsection 29PB(3) of the Act: **item 39**
- the Regulator's refusal to approve provision of benefits under subparagraph 62(1)(b)(v) of the Act: **item 40**.
- the Regulator's decision to suspend or remove a trustee of a superannuation entity under section 133 of the Act: **item 41**.

**Item 42** proposes to **repeal subsection 344(11)** of the Act.

**Subsection 344(11)** provides for the procedure of proceedings relating to reviewable decisions. Please refer to **item 37** of **Schedule 4** above.

## Concluding comments

The advantage of the Bill lies in its attempt to create consistency across prudential and related legislation. This is in line with the Government's announcement that it would seek to streamline prudential regulation for ADIs, general and life insurers, as well as superannuation entities.

However, some stakeholders have raised concerns about the impact of the Bill.

Notably some of the submissions to Treasury's 2007 consultation paper reflect concerns regarding the need to recognise that ministerial consent and availability of merits review are different and should not be confused. Some stakeholders are concerned that removing ministerial consent removes the 'final check' on decisions and would decrease consumer confidence in the prudential framework. In addition, as pointed out by some stakeholders, merits review occurs after an administrative decision is made, which could potentially result in an organisation suffering irreversible damage to its reputation.

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