General Manager
Financial System Division,
The Treasury
Langton Crescent
PARKES ACT 2600

11 February 2013

Dear Sir

FSC Submission on Strengthening APRA's Crisis Management Powers

The Financial Services Council (FSC) welcomes the opportunity to comment on the Treasury's Consultation Paper: Strengthening APRA's crisis management powers.

The FSC represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, private and public trustees. The FSC has over 130 members who are responsible for investing $1.8 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The Financial Services industry appreciates the initiative taken by Treasury to bring Australia's prudential management framework in line with the *Key Attributes of Effective Resolution Regimes for Financial Institutions* guidelines issued by the Financial Stability Board (FSB).

These guidelines, when taken in conjunction with an already strong prudential environment, help support a strong operating environment for the financial sector.

We structure our comments in this submission in two parts. First we offer high level commentary about the proposal and outline a range of issues and concerns that have been raised by members. This is followed with our response to the specific questions in the paper.

Please note that due to the high level nature of the consultation paper, and in the absence of specific recommendations, where the FSC indicates its support for a particular proposal our support is subject to details that will ultimately be contained in the draft legislation and further consultation on the reforms.

Financial Services Council Ltd
ABN 82 080 744 163
Level 24, 44 Market St
Sydney NSW 2000
T. +61 2 9299 3022
F. +61 2 9299 3198
E. +info@fsc.org.au
W. +fsc.org.au

We welcome further discussion in relation to our comments in this submission. Please contact me on 02 8235 2566.

Yours sincerely

BLAKE BRIGGS
SENIOR POLICY MANAGER

FSC SUBMISSION – Strengthening APRA's Crisis Management Powers

INDEX

General observations and regulatory impact statement

The paper outlines clear benefits for APRA in being able to apply a consistent framework of supervision to regulated entities, particularly during times of crisis. However, a standard approach across different types of institutions and industry sectors may fail to take into account the different risks inherent in each sector. We appreciate the awareness shown through consultations that an insurance crisis may need to be handled differently to ADIs, as an insurance failure generally takes longer to play out than a banking crisis.

The proposals may also potentially create an uneven playing field, or different expectations, between domestic parents of regulated entities compared with overseas parents. The international dimensions and the impact on the competitiveness and sustainability of Australian regulated entities needs to be considered carefully.

The proposals need to be accompanied by a comprehensive regulatory impact assessment, which not only considers the potential impact of the proposals on the safety of the financial sector, but also broadens the scope to ensure other factors, such as the impact on competition and economic growth and the effect on third parties such as large and small counterparties or suppliers to an insurer or an ADI. Ideally, the regulatory impact assessment would benefit from its own consultation process to ensure that the extent of interdependencies is properly understood.

The potential for increased regulatory intervention can have a material effect on the capacity for Australian regulated entities to do business effectively in a globally competitive environment and while international consistency in regulation can have its advantages, the relative impacts on local and offshore parties should be assessed.

Reform Timing

Members have a concern that the timing of the proposed reforms adds to a large number of other reforms already being assessed or implemented.

These additional reforms include, amongst others, conglomerate rules on:

(a) authorised deposit-taking institutions (ADIs);
(b) the Future of Financial Advice;
(c) Stronger Super;
(d) Insurance Contracts Act reforms;
(e) new Liquidity Reporting Requirements;
(f) Wall Street Reform Act (Dodd Frank);
(g) ADI Financial Claims Scheme requirements;
(h) Prudential Practice Guides for Superannuation, changes related to Basel III, and;
(i) changes to financial resource and capital requirements across different regulators.

With each additional reform, particularly where it is complex and far reaching, there is a commensurate increase in implementation risk and a need for significant internal provisioning and adjustment across systems, processes and people.

We were pleased by comments made recently by APRA that 2013 may offer a more orderly process of reforms. We submit that given the relevance of these reforms relative to conglomerate rules and others, these reforms are better addressed after current measures have been implemented.

Australia has recently been subject to a financial sector assessment program which reflects positively on the sector and the way in which it is regulated. We view this as supportive of the ongoing implementation process.

Industry and regulators will be better placed to introduce these reforms from 2014 onwards, and we understand this would still meet our commitments to the Financial Stability Board.

Oversight and Legal Processes

APRA's ability to issue orders to a company is being significantly expanded under the proposed reforms. Matching these additional APRA powers with some additional safeguards will help to ensure the proposed additional powers are justly and equitably invoked.

We propose that a series of safeguards be available to ensure that a balance of interests are taken into account; which in turn will assist APRA and industry to respond to difficult commercial environments. The proposed measures are designed to take into account the needs of all stakeholders in circumstances where institutional or systemic risks are extreme.

We present this approach as a series of options for consideration by Treasury, but are of the view there should be safeguards available both before, through consultation, and after, through a review mechanism, an order is made by APRA.

Option 1: Ministerial decision

Financial institutions (FI) are important systemically because of their unique intermediary role in the economy of dealing with the assets and liabilities of both households and businesses. Under difficult commercial conditions, such as where a FI is no longer able to trade due to solvency or similar concerns, normal community transactions are quickly adversely affected.

Given the crucial role that FIs serve in the community, we argue that some of APRA's proposed additional powers, if invoked, would benefit from ministerial review. This would allow the Minister to seek a balanced review of a proposed order from all relevant stakeholders to ensure the stability of Australia's financial system.

We submit that a process be included in these amendments which requires APRA to make a recommendation to the Minister to give effect to certain orders. A parallel to this may be found in the recent market integrity rules, or the approach concerning foreign investment review board recommendations.

We argue that the test to be applied should be similar to that used by Government in relation to other provisions such as declarations and rulings concerning foreign investment, immigration and major environmental decisions. The significance, and community impact, of an ADI or insurer collapse is more than comparable to these matters and also similarly would benefit from ministerial decision- making.

Option 2: Merits review

A merits review process is typically used to provide some right of recourse for individuals or entities adversely affected by decision-making of a government agency. The process of a merits review provides the opportunity to reconsider and review decision for the aggrieved person or entity.

Some of the proposals in the Consultation Paper would benefit from a merits review process because they are:

(a) high impact, and;
(b) the outcomes for depositors, policyholders and shareholders are uncertain.

Ensuring the additional powers, when invoked, are subject to a merits review process would not necessarily slow down engagement and decision making by APRA but would ensure that the decision making is done in a structured way and fit for the purpose of stabilising the financial system.

This would, in turn, give confidence to all stakeholders that the process of issuing orders pursuant to the additional powers would be done in a way that offers both efficacy and efficiency.

This would lead to increasing confidence over time in the implementation of the proposed additional powers, which in turn, is likely to build trust between APRA and the regulated industry, during commercially difficult times.

The proposals in the Consultation Paper do not consider a merits review process, arising from the proposed reform to expand APRA's powers. A merits review process provides an important safeguard for the regulated industries, and could be used to review decisions that adversely impinge on both consumer and commercial interests.

Option 3: Court approval

Some proposed additional powers, if invoked by APRA, have the potential to have significant adverse impact upon the rights of others. In particular, consider a scenario where APRA made an order which required a FI to suspend remittances to accounts or to meet depositor or debt claims. Such an order would have serious financial consequences for a cascading list of third parties.

The proposed reforms to extend APRA's powers provide very limited guidance on a how such a scenario would be handled. In the absence of such guidance, it would be quite unclear for the FI to know how to meet APRA's order whilst at the same time meeting its normal commercial obligations.

This is precisely the scenario which all parties would wish to avoid.

Accordingly, and given the extensive third party risks that could arise, we submit that there is value in having a binding determination issued by a court that provides all parties with certainty as to their obligations.

To ensure financial stability in the market place, the need for FIs to have certainty outweighs the risk of APRA taking an informal or discretionary approach in its use of the proposed additional powers. This, however, should be fully examined through the regulatory impact assessment.

Option 4: Review panel

An expeditious review panel that considers the commercial and regulatory aspects should be considered. The review panel would operate similarly to the Takeovers Panel or the Foreign Investment Review Board and would help ensure that the interests of

depositors, policy holders, investors and other stakeholders are considered by parties other than just the regulator itself.

The review panel should include representatives from the industry, Treasury and APRA and only matters that have material significance to the operations of the financial institution and interests of its customers should be reviewed.

The review panel would provide advice to the Minister.

This safeguard is important as it would ensure the additional powers, if proposing to be invoked are subject to a quick and decisive assessment that, has regard to APRA's knowledge and advice on an issue, as well as the views of the relevant stakeholders.

Recommendation: The FSC recommends that appropriate safeguards be created to ensure that APRA's additional powers, if invoked, are exercised in a just and equitable manner, by being subject to one or more of:

A review panel before and order is made;

Merits review;

Court approval; and

Ministerial review.

Impact of APRA Exercising the Proposed Powers

Overall impact

Having considered the options proposed in the paper, we believe implementation in practice will be quite difficult. The main difficulty is that Treasury and APRA seem to be supporting the rights of creditors at the expense of other parties in order to achieve financial system stability

It is also not clear from the proposals whether both the non-operating holding company (NOHC) and the relevant subsidiary would have a Statutory Manager (SM) appointed in the situations mentioned. For example, in the first bullet point under Option A, the paper refers to the "authorised NOHC…..provides services or conducts business essential to the capacity of the ADI to maintain its core services". However, it is not clear whether the appointment of the SM would apply to the NOHC, or the entity providing the actual services or both.

The first dot point on page 14 suggests it would not also apply to the NOHC, as the scope seems to be narrowed to the "entity…provides services or conducts functions or businesses that are considered to be essential …."

Depending whether the NOHC is or is not included in this situation will drive very different outcomes in these situations. As such, the legislation in this context will need to be drafted with considerable care.

The paper broadly assumes that those subsidiaries to which an SM has been appointed, are themselves, (on a stand alone basis), adequately capitalised to continue to provide the necessary services to the insurer or ADI.

However, depending on capital structuring, some service providing entities are unlikely to be able to continue to provide services to the life insurance or general insurance businesses in a group, in the absence of continued NOHC capital support, with or without an SM. This is likely to be even more acute in situations where the insurer and ADI themselves are not appropriately capitalised.

This will be an issue even where other subsidiaries of the NOHC (or the NOHC itself) have sufficient capital, which APRA would not be able to access, without appointing an SM to all entities of the NOHC group.

In option A, in the third dot point on page 14, the paper refers to "NOHC shareholders did not agree to that action". However, in the situation where the NOHC has or is about to be placed into liquidation or other external administration, NOHC shareholders may not actually have any claim on the assets of the company. It is difficult to see how this would work in practice.

In terms of unintended consequences associated with the proposals, there is the potential to inhibit re-capitalisation. Given the risk of SM appointment, it could be significantly more difficult to seek additional capital from external sources and/or transactions. For example, a group may seek additional capital for an entity by selling a

minority interest in that entity or another related entity. However, given the risk that APRA may appoint an SM to the entity being part-sold, it may be more difficult to achieve this, or the sale price may not be as attractive.

Recommendation: APRA should proceed by separating its goals of (i) "maintaining the stability of the financial system" and (ii) "protecting depositors or policyholders", with the extent and scale of APRA's powers being explicitly different depending on the goal. Potentially APRA would be better placed seeking stronger powers where it involves maintenance of financial stability; and seeking potentially less extensive powers where there is the goal of protecting depositors or policyholders given:

> the existence of other measures such as the Financial Compensation Scheme (e.g. bank guarantee) which already provides a level of protection to depositors and general insurance policyholders; and
> the issues regarding hierarchy of claim can be minimised, given the ranking of depositors and policyholders would be scoped out on issues of financial stability.

Management of insurers in a crisis

With reference to section 1.1.2, one of the discussion questions is framed as follows:

> *"Are there any reasons why APRA should not be empowered to appoint an SM… to insurers… in the circumstances outlined above?"*

In relation to bullet points 2 and 3 on page 18 of the paper, for life insurers these processes would be dependent on the Courts in any event. For example, to transfer policy liabilities to another insurer requires Court approval (Part 9 of Life Insurance Act). As such, it is unclear how statutory management would provide a quicker or more certain means of achieving APRA's desired outcomes; given this would not necessarily provide APRA the powers sought. It would actually end up splitting responsibilities (compared to judicial management) between the statutory management and other court processes which would seem contrary to some of the goals listed on page 18.

The treatment of non-ADI prudentially regulated entities on the same basis as ADIs seems to be a working assumption of the paper without, in our view, sufficient justification. The speed and impact of a banking crisis is distinguishable from an insurance crisis. Other factors include the place of banks at the core of the monetary system and their provision of key infrastructure for the operation of the system.

Insurers are neither of the same size or centrality to this system. Also banks have quite different liquidity and solvency risks and this should also be recognised. The parameters that should apply to ADIs and other prudentially regulated entities will be different and the ability to conduct investigations and appoint managers should be reflective of this. For these and other rationales, we do not believe that the appointment of a statutory manager should apply to non-ADIs.

The Banking Act reflects that this may occur for ADIs in certain defined circumstances reflective of the factors mentioned above. The relevant insurance legislation provides for the appointment of a judicial manager and sufficient justification has not been provided for why this approach ought to be changed other than for simple consistency with the Banking Act.

Additionally the acceleration of the appointment of an SM to a solvent regulated entity appears unnecessary given APRA's powers direction etc. and perversely may lead to more financial distress of the solvent entity.

Impact on Third Parties

Integrated financial services entities, like most other companies, engage with a large number of third parties. These third parties both add and reduce risks and are used to enhance product and service offerings to customers, which ultimately adds further value for shareholders.

Financial services firms make use of third parties extensively for the purposes of risk management, marketing and product distribution, partnering with other firms who specialise in other areas, for the provision of normal business operational needs. These third party obligations are predicated on an assessment of the ability of the firm to perform the tasks involved. They're also based on the relative skills, and the cost of providing those services internally or externally.

Although clearly this is a policy decision, it will be concerning for large suppliers that consumer interests (policy holders) are clearly being put above all stakeholders. The Government should be cognisant that this may lead to reluctance of large suppliers to contract with regulated entities in their current fashion.

Members are concerned that orders by APRA, in some circumstances, may create tension between a regulatory directive and our commercial, contractual obligations. Alternatively, under other circumstances, there may be tension not between non-contracted third parties but between the needs of depositors or policyholders and regulatory order. This could occur through differences in the fiduciary duties binding a trustee and the needs for APRA and Treasury to respond to a systemic risk.

Members are concerned that any additional powers invoked by APRA, may create tension between a regulatory directive and :

commercial, contractual obligations; and
the needs of depositors or policyholders.

This could occur through differences in the fiduciary duties binding a trustee and the needs for APRA and Treasury to respond to a systemic risk.

The extension of proposed additional powers to subsidiaries may potentially have significant consequences for the ability of those subsidiaries to contract and deal with third parties in an equal fashion to other unregulated entities. This is concerning for operating costs – presumably contracts would be altered to include clauses that are not of benefit to the life insurer to protect the interests of the supplier (e.g. faster payment cycles or some type of refund process – where a "levy" is charged on an ongoing basis and then refunded).

In each circumstance, there is a need for entities to be clear on which obligations are antecedent. Equally, there needs to be appropriate protection if one or a series of obligations are set aside.

To provide the regulator and Government as much flexibility as possible under crisis conditions, the legal obligations applicable to trustees, directors and officers, should be settled prior to any extraordinary orders being issued.

Providing a clear, black-letter approach to what obligations remain on a responsible entity and its trustees, directors and officers, when given or operating under an APRA direction, allows for greater certainty.

It also allows for APRA to have greater confidence that a directive is fully understood and implemented. It means that those responsible for implementation, in conjunction with perhaps a statutory manager will have greater clarity on which obligations they must meet.

Recommendation: Specify which obligations apply to trustees, directors, officers and other responsible parties when operating under an APRA direction.

This guidance must distinguish the hierarchy of decision making between existing legislative requirements, directions from APRA and other regulators, and with regard to the other commercial and contractual obligations on directors.

Appointing an SM to a solvent NOHC

NOHC structures are becoming more common in Australia. Some of the FSC's members operate under such a structure. This allows the organisation to quarantine risks (such as those that are not associated with the life insurers policy holders) that exist in the internal supply chain.

The consultation paper discusses appointing an SM/JM to a solvent NOHC. This is concerning in that it would signal to the market (despite the discussion of market disclosure restrictions) that the NOHC is in distress when in fact it isn't. This would cause third parties concern and would make it difficult for the FSP to expand its activities. It would also have the perverse effect of actually causing the distress rather than avoiding it.

Therefore if Treasury is keen to pursue this type of additional power the triggers would need to be very carefully designed to ensure that a NOHC is not put in an untenable position without due cause. Materiality tests would need to be constructed and be transparent.

Recommendation: An SM/JM should only be appointed at such time as the NOHC is insolvent.

It is understandable that if the Board of a NOHC refuses to comply with directions of APRA it would do so, although this seems very unlikely to occur given the nature of the penalties attached at present.

Furthermore, APRA can invoke its current power to have a Board member removed.

The consultation paper discusses strengthening and clarifying APRA's directions powers. This may well suffice and resolve the concerns that the appointment of the SM/JM is trying to address.

Recommendation: Strengthening and clarifying APRA's directions powers should be considered first before extending the powers.

Modification to the grounds for conducting an investigation (section 8.2.2)

The proposed grounds for conducting an investigation into a regulated entity on the basis that "there is, or there may be, a material deterioration in [entity's] financial condition" is very broad and there is the potential that an investigation can be ordered effectively "at will".

We are also concerned with unintended consequences which could potentially flow from the widening of grounds for investigation to include subsidiaries. For example, where the regulated entity is much smaller compared to the other related non-regulated entities. There may need to be limitations placed on what companies are included within the scope of the broadened grounds, for example only those that relate to the ongoing financial viability of the regulated entity.

The proposal should extend only to wholly-owned subsidiaries because in the case of subsidiaries with third party minority interests (such as in joint ventures involving the regulated entity and outside parties) these relationships may be adversely affected. This in turn will hinder the ability of regulated entities to enter into such arrangements and the capacity for such arrangements to foster investment and ongoing business development and expansion which can otherwise diversify risks within the system.

Recommendation: If Treasury and APRA will seek to modify the grounds for conducting an investigation on the basis of material deterioration of financial condition it will be critical for appropriate safeguards and accountability to be implemented. We recommend that this proposed ground be considered more carefully and approached with a condition that it be expected reasonably that such material deterioration will have a significant impact on financial system stability in line with Treasury and APRA's stated objectives.

The potential consequences and impact on commercial and competition factors should be considered before expanding the scope of grounds for an investigation in relation to subsidiaries.

Superannuation Issues

Overview

The paper is entitled "Crisis Management Powers" and the introduction to the paper refers to the importance of ensuring that Australia's regulators:

> "*have appropriate powers to minimise the probability of financial institution distress. In the event that a financial institution does become distressed, it is essential that regulators also continue to have the powers needed to facilitate the orderly resolution of the institution in such a way as to protect the interests of depositors, policyholders and superannuation beneficiaries and to protect the stability of the financial system.*"

The FSC supports these goals. However, it queries whether the proposals in the consultation paper dealing with superannuation are correctly categorised as crisis management or financial institution distress.

The chief recommendation for superannuation is to give APRA additional powers to direct superannuation trustees. It is the FSC's view that the additional power appears to go to matters of day to day management of trustees.

The FSC has concerns this additional power to direct superannuation trustees does not have suitable limits to ensure it is only used during crisis management and not for day to day management of trustees.

Recommendation: Given the Stronger Super reform process and the substantial increase in powers being granted to APRA as part of the Stronger Super legislation, FSC considers that extension of APRA's powers even further are excessive.

The FSC has concerns this additional power to direct superannuation trustees does not have suitable limits to ensure it is only used during crisis management and not for day-to- day management of trustees.

Part 2.3 – Directions making power for superannuation

Scope of the proposed power

The paper recommends that APRA be given specific directions making power with respect to superannuation trustees based on the following triggers:

- breach of RSE licensee law or licence condition;
- anticipated breach of the RSE licensee law or licence condition;
- promoting instability in the Australian financial system;
- conducting affairs in an improper or financially unsound way; and
- where the failure to issue the direction would materially prejudice the interests or reasonable expectations of beneficiaries of the superannuation entity (in part 2.3).

The proposal to broaden APRA's powers over RSEs to allow it to investigate any suspected contravention of SIS or a law of the Commonwealth or State or Territory that concerns the management or affairs of the entity or that relates to a superannuation interest is very broad. The argument that ASIC has such broad powers under the ASIC Act does not speak to justify the new power but rather present a clear picture of the potential for jointly regulated entities to be subject to duplicate regulation and investigation. Whether this is an appropriate outcome should be carefully considered.

FSC's views on the heads of power

Although we appreciate that it is important for RSEs to comply with the law, there are some matters outlined in paragraphs (a) and (b) are potentially (d) and (e) where a breach or anticipated breach may be technical and minor in the sense that beneficiaries can easily be put in the same position as if the breach did not occur or where a beneficiary will suffer no loss. This is consistent with references in the consultation paper to the desirability of giving a directions making power to APRA in order to allow APRA to address very specific matters, which are not necessarily significant.

While the consultation paper states the purpose of the directions powers would be for the rectification of significant problems, the broad scope of the triggers described is not consistent with this aim.

The FSC has a particular concern about the reference in paragraph (e) of APRA issuing a direction to a trustee in circumstances where, it is implied, the trustee's conduct does not meet "the reasonable expectations of beneficiaries". A trustee has various obligations including the obligation to exercise its powers and discharge its duties in the best interests of beneficiaries. These obligations do not extend to acting in accordance with the reasonable expectations of beneficiaries.

If APRA is able to issue a direction to require a trustee to act in a way APRA thinks is consistent with those expectations, the law will introduce, indirectly, a new obligation for trustees to act in accordance with beneficiaries' expectations. The term is itself uncertain, particularly in the context of defined contribution funds – for example, do beneficiaries of a fund have a reasonable expectation of a certain level of return? If so, what if, acting on APRA's direction, a trustee fails to satisfy that reasonable expectation?

Given that trustees already have very specific and onerous duties intended to protect and further the interests of beneficiaries which are supported by a long history of trust law, the FSC objects to a proposal which would:

- have the effect of introducing a new duty indirectly;
- impose a duty which has no certainty.

It is not the right time to introduce a directions-making power

The FSC is mindful of the fact that recently, there has been a wide-ranging review into the superannuation industry and that APRA's powers were a significant focus of that review and the Government's response in Stronger Super.

The *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* introduces new duties for trustees and increased powers for APRA, including a prudential standards making power. APRA has made superannuation prudential standards which will commence from 1 July 2013 together with much of the Stronger Super legislation.

There has been extensive industry consultation and a number of Parliamentary Inquiries into the Stronger Super reforms. Given this, it is unclear why further extension of APRA's powers is required at this point in time.

It is FSC's view that the superannuation industry, trustees and APRA require a period of stability to assess the effectiveness of the recent significant broadening of APRA's powers with respect to superannuation trustees before any further changes are made.

Recommendation: Allow time for the full implementation of superannuation reforms to take place and review unintended consequences arising from the reform before considering any further extension of APRA's powers within the superannuation industry.

Granting additional powers to APRA should be limited to preventing financial institution distress and not the day to day management of trustee's duties

If the Government nevertheless proceeds with the further broadening of APRA's powers, the FSC considers that APRA's directions making power in relation to superannuation fund trustees should only be able to be exercised where APRA has a reasonable belief that the direction is required to avoid or address a matter which can properly be identified as "financial institution distress".

Exemption from liability

The paper recommends that a regulated entity be relieved from liability to the extent that they act in accordance with a direction from APRA. If directions making powers are introduced into the SIS Act, the FSC strongly supports this measure.

Suspension of continuous disclosure

The paper recommends that APRA be given the power to direct a regulated entity not to make market or public disclosures of information for a maximum of 48 hours where:

a. APRA is of the view that the regulated entity (or its group) is in or is likely to be soon in financial difficulty
b. APRA is working with the entity to implement a resolution to address its financial difficulty
c. APRA is of the view that the disclosure of the entity's financial condition would destabilise the entity and potentially impede the ability to implement the resolution
d. APRA has consulted with ASIC and the Treasurer before giving the direction

Under these proposals, APRA will have the power to suspend a listed regulated entity's continuous disclosure obligation. There are, however, some serious concerns with the proposal.

It means that investors could potentially trade shares in the company without knowing the true financial condition of the entity. They would assume that if there were any material issues these would have been disclosed to the market under the continuous disclosure regime.

This has the potential to be particularly prejudicial to buyers as their securities are likely to be worth considerably less once the true position of the company is known and the terms of the bail-out are published. Typically it is investors that suffers the greatest loss in these situations. Regulators responsible for protecting investors would have allowed investors to be misled as the market would be less than fully informed.

Placing regulators in this role reverses almost 100 years of market practice for equities in Australia.

It is important to appreciate that these powers are not limited to ADIs and could apply to small and medium sized companies and not only to those that are systemically important and whose failure would threaten the stability of the financial system.

The proposal is designed to protect the entity against creditors with callable funding, but to achieve this; the solution prejudices another group of investors who are not at fault. The solution should address the problem of the callable creditors, e.g. a short-term moratorium declared by APRA, rather than inappropriately putting investors at risk.

There are also significant questions about the practicality of the powers in their exercise. The proposal appears predicated on the assumption that the serious financial difficulties of a distressed company can be kept secret.

It is likely though that there will be some external manifestation of the entity's financial difficulties (e.g. a run on deposits, a spike in CDS premiums, and a downgrade by the ratings insurers, difficulties or a higher price to be paid to access the debt or equity markets or just simply media speculation fuelled by leaks from insiders). The market

would reasonably expect a response from the entity about what it proposes to do. Silence, and non-disclosure, may however exacerbate the position of the entity as the market and other stakeholders may assume the worst.

Finally, to give proper effect to the proposal more is required than simply suspending continuous disclosure obligations. Consideration will need to be given to also suspend the prohibition on misleading and deceptive conduct and perhaps the market manipulation prohibitions, which underscores the wide-ranging implications the proposal has on the integrity of the markets.

Recommendation: Treasury and APRA should seek to address their concerns with continuous disclosure within the existing framework of the ASX Listing Rules or otherwise in a way which does not impair the integrity of the markets.

Pre-positioning

The paper puts forward the proposition that in order to properly prepare for the potential distress of a regulated entity, APRA needs a "pre-positioning power" to direct the entity to put in place measures to allow APRA to intervene smoothly if required. The paper states that it may be necessary to regulate an entity to make changes to its IT systems, its operational structure, financial support between entities or the location of specified businesses.

The circumstances in which the directors of the entity are no longer empowered to run a company are usually very clearly set out and understood (i.e. when a company is being wound up for insolvency or an administrator is appointed).

Our concern with the pre-positioning power is that it can be used by APRA at any time and it is not clear who is responsible for managing the company for that duration. Is it APRA or the directors?

The proposal contemplates the possibility that the directors in making a decision that they believe to be in the best interests of the company could be overridden by APRA. Also, the proposal does not provide for any accountability by APRA for the directions that it might make.

There will be situations where APRA's pre-positioning may, in the regulators view, facilitate preparation for distress but such intervention may also have an adverse impact on the interests of the stakeholders and shareholders of the entity.

As such a proper framework for accountability is necessary. There needs to be a clear dividing line between when the directors are responsible for decision-making in relation to a regulated entity and when those powers are suspended in favour of judgements made by APRA.

These proposals have the potential to impede competition and some businesses inclination to commence new investment in the industry if regulated entities will be subject to this APRA discretion.

Recommendation: Further consideration should be given to the potential impact of the proposals for pre-positioning including in relation to assigning responsibility, accountability and liability for the actions of APRA.

"Show cause" notification

We believe strongly that the requirement for APRA to show cause prior to appointing an investigator is good due process (section 8.2.2 of the paper). This should not be removed and indeed to ensure consistency, we suggest that this current requirement be extended to ADIs.

Recommendation: Retain the requirement for APRA to show cause prior to appointing an investigator and extend such requirement to operate in relation to ADIs.

Other issues

The industry is also concerned that it is being asked to support changes that still have a number of areas that need to be more closely considered and developed. We note that these matters raise complex questions that may need to be the subject of further consultation.

These issues include:

Uncertainty about how the changes in director disclosure obligations vis-à-vis APRA orders and other commercial obligations will be addressed through amending legislation.

Uncertainty of the effect of these changes on the use of living wills and disaster plans and guidance as to which process directors will need to give precedence.

Effects on local, unregulated, subsidiary companies, or those supervised by other regulators or in other countries.

Risk of distorted decision making if Australia introduces these changes before other countries.

Communication of actions under crisis conditions to affected stakeholders.

Need for more certainty over the effect of actions that regulators in other jurisdictions using similar powers could have in issuing directions that affect Australian interests.

Part 2: Discussion questions

Item	Question/proposal	Response

1.1.1	Four options have been identified for dealing with these issues: • Enable an SM (in the case of ADIs) or JM (in the case of insurers) to be appointed to an authorised NOHC and the subsidiaries of an authorised NOHC and of a regulated entity. • Amend the Corporations Act to provide that any liquidator or receiver appointed over a subsidiary or NOHC must cooperate with APRA. • Enhance and strengthen APRA's direction-making powers over NOHCs and related entities — including in a receivership or liquidation situation. This option can be viewed as a supplement to the above options, as opposed to being an alternative. • A combination of the above options. Are there other options to ensure that APRA has adequate power to resolve distress within groups, especially where a subsidiary provides essential services to a regulated entity? Would there be any unintended consequences of enabling APRA to appoint or seek to appoint an SM or JM to an authorised NOHC and subsidiary? What would be the implications of APRA being empowered to give directions to a subsidiary of a regulated entity or of an authorised NOHC? If an entity is in receivership or liquidation, should any power for APRA to give directions to subsidiaries be limited to defined instances, such as to the giving of directions to continue to provide essential services to the distressed entity for fair value? Would a combination of Options A and C (or other combinations) provide a more flexible tool for resolving financial distress in groups, such that the ability for APRA to give directions to subsidiaries might reduce (but not necessarily eliminate) the need to appoint a statutory or judicial manager to a subsidiary? Would any of the options discussed increase the cost of doing business?	The appointment of an SM or JM should only be applied if an ADI or insurer is insolvent. The use, in option 2, of liquidators or receivers appointed and to cooperate with APRA should be contemplated with considerable care and with the guidance of APRA and directors See also our general comments. We also have a concern that different appointments could increase the cost of doing business under distress conditions. This should be carefully explored through the regulatory impact assessment process.

1.1.2	Are there any reasons why APRA should not be empowered to appoint an SM (in addition to its existing power to apply to a Court for the appointment of a JM) to insurers (and related parties, as discussed above) in the circumstances outlined above? Are the proposed limits on the power outlined above appropriate? Are there other circumstances in which APRA should be empowered to appoint an SM to an insurer?	There should be broader limits on the powers outlined above through a process of external, legal and ministerial review, as discussed in our general comments.
1.2	If this proposal were adopted, what safeguards and limitations should be imposed on APRA's power to temporarily limit clawback? For what period would it be appropriate to suspend clawback?	We have concerns about this proposal and, at a minimum there should be a grandfathered approach to any clawback actions, other than where it is necessary to restore a minimum level of solvency.
2.1.1	Is it appropriate to clarify APRA's directions powers in the manner outlined above? Are there likely to be any unintended consequences? Are there reasons why APRA's directions powers should be limited or subject to added safeguards?	In principle, simplifying a catch-all provision across industry acts makes sense. However we are mindful that the effect of such changes could inadvertently give APRA scope beyond its normal prudential remit. If limited in some way to ensure this is not the case with appropriate safeguards we could support it.

2.1.2	Are there any circumstances in which the industry Acts should not provide protection from civil and criminal liability where a person acts in good faith and without negligence in the exercise of their duties in compliance with an APRA direction?	We strongly support this proposal. The amendments ought to be cast broadly to give confidence in the approach. This would provide omnibus protection for directors and officers complying with a direction. Amendments ought to apply across the legislation which might be utilised by APRA to issue directions and should apply to all members of a group or group of entities.
2.1.3	What are the likely implications of a specific APRA power to direct entities not to disclose materially sensitive information to the market for a limited period in certain crisis situations? Would the existence of such a power adversely affect public confidence in regulated entities? How might such powers affect market participants, including shareholders, creditors and other stakeholders? What limitations should be placed on the power to direct entities not to disclose materially sensitive information to the market? What time limit should apply to the power?	We maintain significant concerns about this provision in that it has the prospect of reducing public confidence in ADIs and insurers if it is considered that theyare withholding sensitive information. This is completely inconsistent with the legislation ADIs and insurers operate under currently and at odds with a strong culture of disclosure established over many years.
2.1.4	Is the direction power to require pre-positioning appropriate, having regard to the need for APRA to be able to implement a range of resolution options in a crisis situation?	We are concerned that the pre-positioning power is unclear. It appears that it can be applied by APRA at any time and it is unclear who will operate the company if the power is exercised. Decision making responsibility is unclear.

2.2.1	Is there any reason why the compulsory business transfer provisions of the Business Transfer Act, as they relate to parties related to a regulated entity, should differentiate between ADIs and insurers in this respect?	There are different risks between ADIs and insurers, so it is arguable that the powers may be less justified for insurers. However, for reasons for consistency we see no clear reason to differentiate the mechanisms in the Business Transfer Act.
2.2.2	Is there any reason why this statutory precondition should be retained?	We support the removal of the State and Territory pre-conditions as long as there are no barriers to giving effect to transfers under Commonwealth legislation.
2.3.2	Should anything else be included in the contents of a direction? In particular, are any of the specific kinds of directions under the Banking, Insurance and Life Insurance Acts appropriate for consideration? Should there be limitations in the scope of the contents of a direction? Is it suitable to provide APRA with the ability to direct an RSE licensee 'to take or not take specific action in relation to the structure or organisation of the affairs, or the conduct of the affairs' of the RSE? Is it suitable to provide APRA with the ability to direct an RSE licensee to remove an individual trustee, director or officer?	A directions power should be subject to the application of the controls outlined in Part 1 of this submission. This includes the opportunity for external expert, legal review and ministerial discretion in consultation with Treasury and APRA. The ability to remove a trustee, director or officer should also be conducted in a cooperative manner or be structured in such a way as to ensure that PRA maintain the burden of proof to demonstrate its evidence for such a direction. Such information should be a material part of a formal direction given, again in cooperation with the entity involved.

2.3.3	Bearing in mind the approaches taken under the Banking, Insurance and Life Insurance acts, should a failure to comply with a direction: • Be a strict liability offence? • Be able to result in personal liability against officers of an RSE? • Be a continuing offence?	Non-compliance with a direction should not be a strict liability offence. Personal liability should not be an automatic presumption for non-compliance with a direction, as there may be circumstances in which individuals are under alternate instructions. Specific statutory roles may, however, warrant different treatment.
3.1.1	Would the existence of these enhanced powers over foreign branches erode the business case for using a branch structure and potentially discourage participation in the Australian sector by foreign banks? Could this proposal have unintended effects — such as encouraging foreign branch parent companies to more rapidly strip their Australian branches of assets?	The effect of these changes is likely to vary depending on the structure used by entities to maintain an Australian presence. It may help promote a level playing field though. We would expect this to be carefully examined through a regulatory impact assessment including the effects of competition and differences in risks depending on the nature of an ADI or insurer's local presence.
3.1.2	Are the current grounds for APRA to apply for the winding up of a foreign ADI sufficient? What are the practical difficulties in winding up the Australia business of a foreign ADI?	We have few concerns with this proposal and consider the current approach appears effective.
3.1.3	That the industry Acts be amended to enable APRA to revoke the authorisation of a foreign ADI or insurer operating in Australia via a branch where the foreign regulated entity's authorisation has been revoked in its home jurisdiction.	We support this proposal.

3.2.1	That the directions power under the Insurance Act and Life Insurance Act be harmonised with that under the Banking Act in this regard. Specifically, that provisions equivalent to section 11CA(2B) of the Banking Act be inserted into the Insurance Act and Life Insurance Act.	We support the harmonisation of the legislation but not to broaden powers and meeting to simplify the operation of APRA's directions powers.
3.2.2	That the Business Transfer Act be amended to make it clear that the voluntary and compulsory transfer provisions in the Business Transfer Act apply to the Australian business of foreign ADIs, general insurers and life insurers, and their respective related parties, including subsidiaries. Would a power to compulsorily transfer the Australian business of a branch of a foreign ADI or insurer discourage foreign ADIs or insurers from opening branches in Australia? Would there be practical difficulties in implementing such a transfer?	Generally we support this proposal. However, the exercise of power needs to be appealable via the courts and subject to a review process.
4.1.1	That section 13A of the Banking Act be amended to enable APRA to appoint an SM where (in addition to the existing grounds for appointment): • there has been, or APRA has reasonable grounds to believe there will be, a material deterioration in the ADI's financial condition that could pose a risk to the ADI's depositors or to the stability of the financial system in Australia; or • the ADI has failed to comply with a direction given to it by APRA. An amendment along these lines would make the triggers for appointment of an SM in the Banking Act more consistent with those applicable to judicial management in the Insurance Act and Life Insurance Act. Is it appropriate that APRA's power to appoint an SM to an ADI be expanded in the manner proposed? Are there any safeguards that should be attached to the power?	This proposal as drafted provides significant autonomy to APRA to appoint an SM. We consider that the tests needs to be significantly narrowed or drawn more appropriately to apply only in the case of those risks which are prevalent for depositors or the financial system. Arguing that something 'could pose a risk' is too broad. On complying with an APRA direction, this should be amended to reflect a more co-operative approach if the ADI is undertaking significant efforts to attain stability and solvency or to meet the directions given to it by APRA.

4.1.2	That section 13A of the Banking Act be amended to permit APRA to appoint an administrator to take control of an ADI's business in the event that an administrator, receiver or liquidator is appointed to the authorised NOHC of an ADI, where APRA believes that this poses a significant threat to the operation or soundness of the ADI. Under this proposal, similar amendments would be made to corresponding provisions in the Insurance Act and Life Insurance Act to trigger the appointment of a JM where a general or life insurer's authorised NOHC comes under external administration.	We support the use of JM where an authorised NOHC is under external administration.
4.1.3	Section 62L of the Insurance Act and section 158 of the Life Insurance Act be expanded to state that the Federal Court may make an order that an insurer be placed under judicial management if the Court is satisfied that the insurance business of the company has been investigated under Part V Insurance Act/Division 3 of Part 7 Life Insurance Act; and that, having regard to the results of the investigation, it is in the interests of the policyholders of the insurer or of financial system stability in Australia that the order be made. • Section 62M of the Insurance Act and section 159 of the Life Insurance Act be expanded to provide that the Court may make an order that an insurer be placed under judicial management if the Court is satisfied of one of the circumstances outlined in the section and that the time needed to make or complete an investigation would be likely to be such as to prejudice the interests of the policyholders of the company or financial system stability in Australia.	We have reservations about need for a broadening of these powers to give Court the ability to be subject to a JM.
4.1.4	Is it appropriate for an SM or JM to be appointed to a bridge bank or bridge insurer? Are there any risks associated with appointing an SM or JM to a bridge bank or bridge insurer?	This depends on who maintains legal responsibility for the operation of the bridge bank or insurer. This may be superfluous in some circumstances.

4.1.5	That section 15C of the Banking Act and the equivalent provisions in the Insurance Act, Life Insurance Act and Business Transfer Act be amended to make it clear that the mere appointment of an SM or JM, or the compulsory transfer of a business does not trigger terms in contracts entitling counterparties to realise or otherwise obtain the benefit from security or collateral lodged by regulated entities with these counterparties.	We support this proposal.
4.1.6	That it be made clear in the industry Acts that any DOCA in existence at the time an SM or JM is appointed is terminated upon the appointment of an SM or JM. Further, the Court could be empowered to make orders setting aside transactions entered into or payments made under the DOCA before the appointment of the SM or JM, or altering the terms of the deed itself, having regard to the interests of depositors or policyholders. These orders could be made upon the application of an interested party. Discussion question What are the implications of this proposal for the rights of creditors under DOCAs?	We generally support this, to the extent this does not create onerous circumstances for the ADI or insurers when restoring the business.
4.2.1	That the current moratorium provisions be repealed and replaced with a new, standardised set of provisions in the industry Acts, drawing on relevant provisions in the Corporations Act and in the external administration regimes in other jurisdictions. The new set of provisions would be modified as appropriate to take into account the differences between statutory management (as a process under APRA's control) and judicial management (as a process under the Court's control). Do the measures proposed in this section strike the right balance between the protection of depositor/policyholder interests and Australian financial system stability on the one hand, and the recognition of creditor and counterparty rights on the other? Are there any other matters that should be addressed in this context?	We support the proposal, subject to the distinctions between JM and SM being retained.

4.3.1	That the Banking Act be amended to put beyond doubt that an SM is able to manage an ADI's business in accordance with the provisions of the Banking Act without being constrained by the operation of subsection 13A(3).	We support this proposal.
4.3.2	That the immunity provisions in the industry Acts be amended to ensure that the higher level of protection currently applicable to APRA staff and agents under the APRA Act is accorded to SMs and JMs.	This appears reasonable however protections that might apply to SM could already be applicable through professional standards limitations. It is accepted that SM and JM risks may be higher than normal but this does not preclude the need for protection against negligence or malfeasance. In the interests of depositholders and policyholders, some protections may need to be maintained if other remedies are not available.
4.4.1	That section 13C be expanded to enable APRA to terminate its control or to remove an SM where APRA is satisfied that the ADI has been restored to a sound financial condition and that APRA's control or statutory management are no longer required; or where voluntary winding-up proceedings have been commenced.	We support this proposal.
4.4.2	That section 14E of the Banking Act be amended to make clear that APRA can terminate the appointment of an SM and replace that person with another SM where APRA believes this would be desirable for the purpose of satisfactorily resolving the business of the ADI in statutory management, maintaining confidence in the resolution process, protecting the interests of depositors or maintaining the stability of the financial system.	We support this proposal, subject to a cooperative approach with the relevant ADI or insurer through the substitution process.

4.5.1	That similar provisions be inserted into the industry Acts to provide that directors and the secretary of an ADI or insurer must submit to the SM or JM a report as to the affairs of the institution upon the appointment of an SM or JM unless the SM or JM, with APRA's approval, waives the obligation. This proposed amendment would place a positive obligation on the secretary and directors of the financially distressed institution at the time of appointment of an SM or JM and, in doing so, would facilitate diagnosis of the financial condition of the institution. Relevant information from the former directors and secretary would be particularly helpful if there is a possibility that the FCS would be declared or if any form of public support is used in resolving the distress or failure of the institution. Further, that the directors and secretary of an ADI or an insurer at the time an SM or JM is appointed be required to prepare and submit to the SM or JM a report as to the affairs of the regulated entities, unless the SM or JM, with APRA's approval, waives the obligation to prepare the report. Failure to comply with this requirement without reasonable excuse would be an offence.	We support this proposal. APRA should have regard to the timing and resources available to directors and officers to supply the information needed in the report.

4.5.2	That the Insurance Act and Life Insurance Act be amended so that these Acts are consistent with the Banking Act in respect of section 14AD of the Banking Act. This would equip APRA and a JM with the ability to access information pertinent to their functions via the following mechanism: • Empower APRA to require, by notice, a person to provide APRA with information relating to the business of an insurer that is under judicial management. – The notice must specify the period within which the information or documents must be given to APRA, and may specify the form and manner in which the information or documents must be given. • APRA may issue the notice if: – the JM requests, in writing, that APRA require such information or documents from the person; – APRA reasonably believes that the person has the information or documents; and – APRA is satisfied that the JM requires the information for the purposes of the performance of their duties and functions under the Insurance Act or Life Insurance Act.	We support this proposal.

4.6	That the following minor and technical amendments be made to the statutory and judicial management regimes: • Repeal subsection 14C(4) of the Banking Act so that an SM is not considered to be a director for any purpose. This provision would no longer be necessary if the proposal in item 4.3.2 is implemented, which proposes a provision for comprehensive statutory immunity for SMs and JMs. • Amend the Banking Act to clarify that the Commonwealth Authorities and Companies Act 1997 does not apply to an ADI under the control of an SM. This would avoid the unintended outcome that might otherwise arise where an ADI is placed into statutory management, whereby it would be consolidated into the Commonwealth financial accounts. • Amend section 62R of the Insurance Act and section 163 of the Life Insurance Act to provide APRA with standing to apply for the replacement of a JM with another. Currently, the Court may make an order for replacement of a JM. This will clarify that APRA may apply for such an order. • Amend section 14A of the Banking Act to clarify that, upon the appointment of an SM to an ADI, any person vested with management of the ADI at that time is divested of that management, and that management of the ADI vests in the SM. This will align the Banking Act with the Insurance Act and Life Insurance Act in respect of the effect of the appointment of a JM. • Repeal section 62Q of the Insurance Act and section 162 of the Life Insurance Act on the basis that these sections are unnecessary. 71 • Amend section 62S of the Insurance Act and section 164 of the Life Insurance Act to provide for a form for the claim for remuneration and expenses by a JM. • Amend the Insurance Act and Life Insurance Act by inserting a provision corresponding to section 15 of the Banking Act to clarify that directors of a regulated entity cease to hold office when an SM or JM is appointed to the regulated entity.	

5.1.1	To remove any uncertainty in respect of the above matter, it is proposed that the Insurance Act and Life Insurance Act be amended to make it clear that: • the Federal Court is able to make a winding up order in respect of a general insurer and life company under the Insurance Act and Life Insurance Act respectively; • such an order should be able to be made whether upon application by APRA or by a JM under the Insurance Act and Life Insurance Act; • an application by APRA or a JM for winding up a general insurer or life insurer under insurance legislation should not be characterised as an application under the Corporations Act; and • subsequent to such an order being made under the Insurance Act or Life Insurance Act, winding up of the general insurer or life company is to proceed in accordance with the relevant provisions in the Corporations Act. This includes the Court being able to appoint a liquidator to the regulated entity under the Corporations Act.	We support this proposal, subject to our general comments concerning the nature of ADIs relative to insurers.
5.1.2	That the relevant legislation be amended to ensure that the Corporations Act provisions concerning voidable transactions (in particular, the definition of 'relation-back day') are applicable in a situation in which a Court has made a winding up order under the Insurance Act or Life Insurance Act.	We support this proposal.
5.1.3	Where an SM or JM is appointed to an ADI, general insurer or life insurer before it proceeds to liquidation, the relation-back day should be: • in the case where an SM is appointed, the date on which APRA appoints the SM; or • in the case where a JM is appointed, the date on which the Federal Court appoints the JM. Consideration would need to be given to whether an earlier date should apply where the company was under external administration at the time that the SM or JM was appointed, as well as whether any consequential amendment needs to be made as a result of this proposal.	We support this proposal.

5.2.1	That APRA be given standing to apply to the Court to give directions in relation to the powers of a provisional liquidator appointed to an APRA-regulated entity.	We support this proposal.
5.2.2	That section 14F of the Banking Act be amended to empower APRA to apply to the Court for the winding up of an ADI where APRA considers that the ADI is insolvent and could not be restored to solvency within a reasonable period, regardless of whether an SM has been first appointed to the ADI.	We support this proposal.
5.2.3	That the 2010 legislative amendments be extended so that the notification requirement is applicable to all forms of external administration, including those that are Court appointed. Under this proposal, persons seeking to appoint a liquidator to a regulated entity would be required to inform APRA that they wish to do so and to provide APRA with documentation in support of such appointment. It is envisaged that this requirement would be complied with if the information is provided to APRA before the external administrator is appointed. It is not intended that a failure to comply with this requirement will prevent or delay any proposed external administration of a regulated entity.	We support this proposal. The information needed for APRA should not extend beyond that needed to engage the external administrator.
5.2.4	That the industry Acts be harmonised by inserting provisions on the second and third points above into the Banking Act. Moreover, it is proposed that the provisions above be applied in the case of liquidations not just of ADIs, general insurers and life insurers, but also of authorised NOHCs and of subsidiaries of ADIs, general insurers, life insurers and authorised NOHCs	We support this proposal.
5.2.5	That Part VB, Division 1 of the Insurance Act and Part 8, Division 1 of the Life Insurance Act be amended to ensure that the Federal Court may appoint a JM to an insolvent insurer.	We support this proposal.

5.3	That the above mentioned sections of the Insurance Act and Life Insurance Act be amended to clarify that Courts and JMs, in seeking to give effect to courses of action that are considered to be most advantageous to policyholders, are not unduly constrained by the requirement to promote financial stability in cases where broader financial system stability is not relevant. Other provisions in the industry Acts that enable powers to be exercised on grounds of policyholders' interests and financial system stability will also be examined in a similar vein — to ensure that the absence of one of the two criteria does not unduly impede the exercise of the power in appropriate circumstances. These include subsection 14A(5A)(b) and subsection 14AB(8) of the Banking Act, subsection 62ZA(8) of the Insurance Act and subsection 168B(8) of the Life Insurance Act.	JMs should have regard not only to the promotion of 'financial system stability' but also the best interests of individual insureds. Making the provision more flexible and clearer in a way which recognises the prospect of competing interests can be supported.
6.1.1	That the FCS for general insurers be activated automatically at the time that APRA applies to the Court for the winding up of an insolvent general insurer where, at the time the application is made, the general insurer may be subject to claims that are eligible for protection under the FCS. As with the proposed change to the FCS for ADIs, the Minister would retain the discretion to declare the FCS for a general insurer before the application for winding up, such as when a JM is appointed, upon the recommendation of APRA.	We support a move to an automatic application of the FCS, to ease the process for policyholders and government. An automatic trigger would be best facilitated through cooperative negotiations with APRA and Government.
6.1.2	That the Insurance Act be amended to enable funds appropriated under an FCS declaration to be used to facilitate the transfer of policy liabilities from the failed general insurer to another general insurer willing to assume those liabilities in circumstances where APRA determines this to be feasible, cost-effective and efficient.	We support the proposal. We do not see any obvious legal constraints in transferring policy liabilities between entities.

6.1.3	That the Banking Act and Insurance Act be amended to enable APRA to require information from a third party where such information will facilitate FCS administration. Are there practical/legal considerations or other impediments to enabling APRA to require information relating to the FCS from third parties?	We support the proposal. The main constraint may occur where a third party (such as a reinsurer is located in other jurisdiction) acts uncooperatively, though this could be resolved through cooperation between regulators and the third parties.
6.1.4	That the Banking Act and Insurance Act be amended to require a liquidator of an ADI or general insurer that is declared to be subject to the FCS to accept as proof-of-debt the amounts paid under the FCS by APRA provided that APRA has complied with the requirements of the Banking Act and Insurance Act (as the case may be), and with any applicable contractual arrangements entered into with the liquidator. Are there practical/legal considerations or other impediments to making amounts relating to FCS payouts binding upon liquidators in the winding up of an ADI or general insurer in respect of which the FCS has been declared? Are other creditors of a failed ADI or general insurer adequately protected by the proposed safeguard? Are there other safeguards that should be considered in this proposal?	We support the proposal and submit that it will help clarify the current approach used by liquidators. Given the existing legislation and the proposed amendments no other safeguards seem necessary.
6.2.1	That subsection 5(1) of the Banking Act be amended to enable regulations to be made to vary the definition of 'net credit balance'. The regulations could provide that APRA may, in circumstances where it is not clear from the relevant contractual documentation relating to the account in question, determine the nature and amount of the deductions for fees and charges when calculating the net credit balance for the purposes of administering FCS payouts.	We support this approach as it provides an arm's-length determination for parties focused on working through or restoring the ADI. There may be a need for a submission/response process to allow APRA to determine the nature and basis of claims.

6.2.2	That the Banking Act be amended to enable the suspension of FCS payments in respect of particular frozen accounts. The proposal could consist of the following: • A definition of 'frozen accounts' could be introduced into the Banking Act (or in regulations made under the Act) to clearly identify the particular category of account that necessitates differential treatment. For example, the suspension of FCS payments will probably be required where access to the account has been frozen as a result of an enforcement action in relation to the proceeds of crime or breaches of tax laws. A suspension may be unwarranted, however, if the freeze has been imposed because an account-holder has defaulted on amounts owing to the ADI. This is because FCS payouts are made on a gross basis, with no netting of amounts payable by an account-holder to the ADI. • APRA could be empowered to determine whether an account meets the definition of a frozen account. • The liquidator (or SM, if one has been appointed) could be responsible for resolving the status of frozen accounts as soon as practicable. • The liquidator or SM could be required to report their findings to APRA. – APRA could then make a decision as to whether payments should be made to the account-holder or whether the suspension should be maintained. • Where an account-holder has more than one protected account, where one is frozen and the other(s) not frozen, APRA could make payouts in respect of any account that is not frozen.	We could support this approach, subject to consultation on the detail of amending legislation or regulations.
6.3.1.	That the same amendments as those mentioned above made to the Banking Act by the 2010 Act be made to the Insurance Act in respect of liquidators of general insurers for which the FCS has been declared.	See our comments at 6.2.2

6.3.2	That the relevant legislation be amended to provide that amounts paid out under the FCS to an insolvent policyholder must be paid by the liquidator of the policyholder to whom they are due in priority to all payments under section 556 of the Corporations Act.	We support the proposal.
6.3.3	That the Insurance Act be amended to provide APRA with the discretion to make interim payments under the FCS.	Supported.
6.3.4	Would the extension of the 28-day period of notional insurance coverage under the FCS to 90 days have any consequences other than those outlined above?	This creates additional risk for Government. This proposal also risks the prospect of temporary government/industry substitution and so has a displacement effect. Willing insurers will want to maximise time and premiums and this amendment could slightly discourage an orderly process between FCS, policyholder and insurer.
6.3.5	That the Insurance Act be amended so that APRA has a single obligation to make a decision as to whether a person is entitled to be paid under the FCS, rather than having obligations to make separate decisions as to validity/quantum and eligibility.	We support this proposal to the extent it does not have the effect of increasing overall liabilities under the scheme.
6.3.6	That the Insurance Act be amended to clarify the kind of actions that APRA may take in the course of determining a claim under the FCS. This could include actions ordinarily done in the course of determining a general insurance claim, such as engaging claims assessors, legal advisors, actuarial advisors and medical experts.	Supported.
6.4	Minor drafting amendments to the Banking Act and Insurance Act in respect of the FCS	Generally we support the proposed amendments.

7.1	Should any reforms raised in Chapter 1 in relation to the scope of APRA's directions powers also be provided for in relation to ASIC's directions powers in relation to an Australian market licence, and ASIC's and the RBA's powers in relation to clearing and settlement facilities? If a statutory management regime is introduced for FMIs, should any reforms raised in this Chapter in relation to statutory management of ADIs and their related entities also be provided for in relation to FMIs? Should any reforms raised in this Chapter in relation to the duties of external administrators be extended to external administrators of FMIs or their related entities?	Our general comments in Part 1 as to the oversight needed for the application of directions powers relating to FMI are relevant to this proposal.
7.1.2	Should any reforms raised in Chapter 3 in relation to the appointment of SMs over local branches of foreign ADIs also be adopted in any possible statutory management regime for FMIs? • Should the possible application of any statutory management regime to the domestic operations of an overseas licence holder be restricted to where an external administrator (including the equivalent of an SM) has been appointed over the licence holder in their home jurisdiction? • What should the role of an SM be, where they are appointed only over the domestic operations of an overseas licence holder? In particular, how should their relationship with a 'primary' external administrator in the licensee's home jurisdiction be defined? Is such an extension necessary, if cross-border insolvency mechanisms are reformed to enable foreign external administrators of FMIs to obtain Court ordered remedies in relation to the licensee's domestic operations? • Should the appointment of an SM over the domestic operations of an overseas licensee come to an end when a foreign external administrator obtains recognition and domestic relief under the *Cross-Border Insolvency Act 2008* (Cross-Border Insolvency Act?	A generally consistent architecture between ADIs and FMI runs the potential risk of treating the risk and response needed from regulators in a similar way. This is despite FMI and ADI having different risks and different operating and experience levels. The general approach providing for a SM regime in FMIs where conditions warrant it, otherwise, seems like it could be supported.

7.1.3	Should FMIs be carved out from the scope of the Cross-border Insolvency Act? Should any carve out be modified to give the relevant regulators the option of allowing recognitions and remedies with their consent?	Allowing local regulators to manage remedies without being obliged to follow the CBIA offers some appeal. However, there are some risks that local regulators could place creditors in other jurisdictions at risk unless they are held to a similar standard.
7.1.4	In the event that a statutory management regime was introduced for FMIs, should any reforms raised in Chapter 4 in relation to those issues also apply to such a regime?	These measures should form part of a separate consultation process.
7.1.5	Should any reforms in relation to these issues raised in Chapter 5 also be applied in relation to FMIs (with relation-back day related reforms only arising if a statutory management regime was introduced)?	This could be supported.
7.2.1	Should any reforms raised in Chapter 2 in relation to directions powers, director liability, continuous disclosure and the relevance of system stability considerations to the exercise of APRA's powers also be provided for in relation to ASIC's and RBA's regulation of FMIs?	Our general comments in Part 1 are relevant to the application of directions powers, director liability, continuous disclosure are equally relevant to FMIs.
7.2.2	Should the Business Transfer Act apply to FMIs? If so, what, if any, modifications should be provided for in how it applies to these entities? Alternatively (or additionally) should a modified Scheme of Arrangement regime apply to FMIs, upon the application of an FMI SM (if adopted)? If so, what modifications might be made to ensure the timely putting in place of binding arrangements in relation to FMIs? • Should creditors' or members' approvals be required in addition to Court approval under such a regime (as is currently the case)? • Should the Court's powers to make interim orders or make interim arrangements be enhanced to address any delays in putting in place a final binding arrangement?	The Act should apply to FMI to harmonise the approach regulators will take. A process of creditor approval should continue to apply in the case of court approvals. An interim and final approach could support stability, so we could support this.

8.1.1	Two options have been identified to address this issue: • Empower APRA to issue a notice to a holding company of an APRA-regulated entity that requires the holding company to take steps to ensure that the regulated entities it controls in the group are owned by an authorised NOHC. 105 • Require all holding companies of APRA-regulated entities to become authorised NOHCs unless exempted by APRA. Either option would achieve the desired objective of enabling APRA to require a holding company to be authorised, and thereby bring the holding company within the prudential regime to facilitate effective group supervision. The first option is considered to be preferable to the second, given that it avoids the need for all holding companies to be considered for authorisation and enables APRA to approve a group structure in connection with authorising a NOHC. In addition to these options, consideration is being given to empowering APRA to authorise a NOHC under any one of the three industry Acts and deem it to be automatically authorised under the other industry Acts where a NOHC is a holding company for more than one type of regulated entity. On this basis, a group could have a multiple-authorised NOHC. Consequently, where a group headed by a NOHC has banking, general insurance and life insurance arms, APRA could apply prudential standards to each set of industry grouping as if they were headed by independently authorised NOHCs. APRA would also be empowered to vary or revoke the multiple authorisation status of the NOHC.	There would be significant costs of meeting this requirement, particularly around the compulsory or opt-out NOHC process. We would not support this proposal. Providing an automatic authorisation under the other industry Acts carries some appeal, particularly to consolidated groups. This needs to be offset if an entity is not proposing to operate in each sector. Separately, the automatic process may have some risks particularly where less is known, at a regulatory level, where there might be new entrants to the sector.
8.1.2	That similar application provisions to those in the Life Insurance Act be added to the Banking Act and Insurance Act.	We generally support harmonisation. Whilst there is some mirroring in the Banking and Life and Insurance Acts and less overlap would be welcome, there is a risk that further provisions end up being duplicated. More detail is required to assess this proposal.

8.1.3	That the provisions on conditions of authorisation in the Insurance Act be replicated in the Banking Act and Life Insurance Act.	More detail is required to assess this proposal to establishing which exact provisions will be replicated.

8.1.4	That the industry Acts be amended to ensure consistency in the legislative framework among the industry Acts in respect of provisions on revocation of authorisation. In particular, it is proposed that the industry Acts be amended to enable APRA to revoke a regulated entity's authority in the following circumstances: • the entity has failed to comply with a requirement of the Act or of an instrument made for the purposes of this Act (including prudential standards); • the entity has failed to comply with a requirement of the FSCODA or of an instrument made for the purposes of this Act (including reporting standards); • the entity has failed to comply with a requirement of Commonwealth law that is prescribed in the regulations; • the entity has failed to comply with a direction from APRA under the Act; • the entity has failed to comply with a condition of authorisation; • it would be contrary to financial system stability in Australia for the authorisation to remain in force; • it would be contrary to the interests of depositors/policyholders of the entity for its authorisation to remain in force; • the entity has failed to pay: – an amount of levy or late penalty to which the Financial Institutions Supervisory Levies Collection Act 1998 applies; or – an amount of charge fixed under section 51 of the APRA Act; • the entity is insolvent and is unlikely to return to solvency within a reasonable period of time; • the entity has inadequate capital by reference to APRA's regulatory requirements and is unlikely to have adequate capital within a reasonable period of time; • the entity has ceased to carry on the regulated business in Australia for which it was authorised to do so; • the entity has, in connection with its application for authority, provided APRA with information that was false or misleading in a material particular; • the entity has, in connection with a prudential matter, knowingly or recklessly provided APRA with information that was false or misleading; or	The proposal is constructive and is supported, subject to consultation on amending legislation.

8.1.5	That the current provisions in the Industry Acts and SIS Act be amended to introduce a harmonised provision on the keeping and publishing of registers of authorised persons. These amendments would be based on the existing provision in section 9C of the Banking Act, which provides that APRA may, from time to time, publish a list of ADIs in the Gazette or in such other manner as APRA determines. The harmonised provision would also enable APRA to keep and publish a list of persons authorised as NOHCs under the industry Acts. This harmonised provision would enable APRA to keep and publish such registers and afford the necessary flexibility in doing so, including publishing such registers on its website if APRA considers this to be the best approach. This proposal would enhance clarity and transparency as to the identity of persons authorised by APRA. Are there any other measures that might be helpful in allowing the public to easily determine whether financial institutions are authorised by APRA?	This proposal is supported, to the extent it creates no individual privacy issues and does not increase compliance costs. A central register of institutions maintained by APRA offers the most efficient and dependable approach to logging authorised persons and ADIs. There is likely to be limited use of the register because other mechanisms or processes may already be used by the community to verify ADIs.
8.1.6	That section 10 of the Banking Act be amended to provide that, unless APRA has given prior written approval, the constitution of an ADI may not be altered to provide that the directors of the ADI are authorised to act in the interests of the ADI's holding company. That the Insurance Act and Life Insurance Act be amended to include a provision corresponding to section 10 of the Banking Act (incorporating the amendment proposed in the paragraph above). Discussion question Are there practical difficulties involved for regulated entities and their NOHCs in complying with the requirement proposed above?	
8.1.7	That the Banking Act and the Life Insurance Act be amended to bring them into line with the Insurance Act in this regard. Specifically, that the relevant provisions of the Insurance Act referred to above should be adapted for inclusion in the Banking Act and Life Insurance Act.	Some general consumer protection benefits could arise from the proposed amendments, which is constructive. More detail however would assist in fully assessing this proposal.

8.1.8	That section 17 of the Life Insurance Act be amended to make it an offence for any person to carry on a life insurance business without being registered by APRA. The nature and quantum of a penalty for committing such an offence would be commensurate with the penalty for carrying on an unauthorised insurance business under the Insurance Act	We support this proposal, if the existing provisions are not effective in limiting this already.
8.1.9	That the provisions regarding the registration of life companies be simplified by reference to the provisions on the authorisation of general insurers and ADIs.	We generally support simplification and the use of incorporation by reference.
8.2.1	That the 'show cause' notice obligations in the Insurance Act and Life Insurance Act be repealed and that these Acts be amended to empower APRA to conduct an investigation or appoint an investigator on the grounds set out in the Acts, without the need to issue a notice to show cause. As a consequence of the removal of the 'show cause' notice requirement, it is also proposed that the entry and search powers under the Insurance Act and Life Insurance Act be simplified by reference to the Banking Act to meet the Commonwealth standards set out in the Guide to Frame Commonwealth Offences, Infringement Notices and Enforcement Powers. Under sections 54 and 80 of the Insurance Act and section 140 of the Life Insurance Act, APRA can enter the premises of an insurer (or in the case of section 80, the non-residential premises of a present or former trustee, custodian or investment manager in investigating the affairs of a designated security trust fund in the context of Lloyd's underwriters) without consent or warrant for the purposes of an investigation.	Show cause requirements should still be retained because in some cases, such as insurers, timing is less crucial than at ADIs. Broader changes to refer the Insurance and Life Insurance Acts to the Banking Act by reference for other powers however, can be supported.

8.2.2	That subparagraph 52(1)(aa)(ii) and subsection 52(1B) of the Insurance Act be amended to align the Insurance Act with the Life Insurance Act and SIS Act. APRA would be allowed to give notice to investigate a general insurer where the insurer may have contravened the FSCODA or the Insurance Act. That paragraph 52(1)(a) of the Insurance Act be amended, such that it would be worded thus: 'it appears to APRA that there is, or there may be, a material deterioration in a general insurer's or authorised NOHC's financial condition'. That a new provision be included in section 136 of the Life Insurance Act to empower APRA to conduct an investigation or appoint an investigator if 'it appears to APRA that there is, or there may be, a material deterioration in a life insurer's or authorised NOHC's financial condition'. That section 52 of the Insurance Act and section 136 of the Life Insurance Act be amended to empower APRA to commence an investigation or appoint an investigator where it appears to APRA that information in its possession calls for an investigation of the whole or any part of the business of a subsidiary of a general or life insurer, or a subsidiary of an authorised or registered NOHC	This proposal needs to reflect the emphasis on solvency not material deterioration prior to the give of notice to investigate a general insurer.
8.2.3	That the provisions in section 13 relating to the power to obtain information be repealed, such that the wider powers contain in section 62 provide the mechanism for requiring an ADI to provide APRA with information. Further, that subsection 13(2) be incorporated into section 62, such that APRA can require a statutory declaration to be made in relation to information provided by an ADI, authorised NOHC or subsidiary. Subsection 13(3) should be retained.	Generally supportive of this proposal.

8.2.4	That section 61 of the Banking Act be amended to empower APRA to conduct an investigation of an ADI, authorised NOHC or subsidiary of an ADI or authorised NOHC. APRA would retain the capacity to appoint a person to conduct an investigation. If this proposal is implemented, consequential amendments would be required to section 61 to require cooperation with APRA as an investigator and to provide APRA with access to documents and systems on the same basis as current obligations apply to an ADI, authorised NOHC or subsidiary in respect of a person appointed by APRA.	The proposal can be supported inprinciple subject to further consultation and to the extent that a subsidiary is relevant, material and substantive to the ordinary or dominant business of the ADI.
8.2.5	That the Life Insurance Act be amended to empower APRA to appoint a person to conduct an investigation on APRA's behalf.	Supported.
8.2.6	That the Banking Act be simplified by reference to the other industry Acts and the SIS Act — that is section 55 of the Insurance Act, section 142 of the Life Insurance Act and section 270 of the SIS Act. These sections provide APRA with an express power to conduct examinations of persons in relation to matters that are relevant to its investigations.	
8.2.7	That APRA be given the power to direct a person or entity being investigated (and their legal representatives) not to disclose the content of the investigation. This should be included in all the industry Acts and the SIS Act.	This power needs to have regard to access to legal advice and a general concern we hold about the importance of timely and complete market disclosure for the benefit of all stakeholders.

8.2.8	That section 50 of the Insurance Act be amended so that either: • these persons are included in the definition of prescribed persons; or • a provision is inserted that allows APRA to seek the reasonable assistance of these persons in the conduct of its investigations. It is further proposed that sections 115 and 115A of the Insurance Act, and section 140 and 141 of the Life Insurance Act, are extended so that these provisions apply to a body corporate that is, or becomes, an externally-administered body corporate within the meaning of the Corporations Act.	We support this proposal.
8.2.9	That the relevant investigation and information-obtaining powers in the industry Acts be amended so that they extend to group matters, rather than being restricted to matters relating to individual members of the group. Further, that APRA be empowered to request information about non-subsidiary entities, including funds, partnerships and trusts that are controlled by groups containing authorised businesses.	This proposal generally is supported to the extent to which investigations are limited to the immediate solvency and stability concerns across that Group- rather than the powers being used at large to obtain information.

8.2.10	That subsection 131(1) of the Life Insurance Act be amended to empower APRA to require a subsidiary of a life company or registered NOHC to provide APRA with information of the kind specified in subsection 131(1). That subsection 131(1) of the Life Insurance Act be amended to allow APRA to obtain a similar scope of information to that available under the Banking Act and Insurance Act. It is also proposed that section 131 be amended to allow APRA to obtain books, accounts or documents like in the other industry Acts. Should these amendments proceed, consideration will be given to whether there is a need to retain section 132 of the Life Insurance Act. That subsection 131(2) be amended so that, in general, the period specified must not end earlier than 14 days after the day on which the notice is given to the body. However, where, in APRA's view, there is a justifiable need for urgency, it is proposed that this period may be reduced. An equivalent of these changes would be made to the Banking Act and Insurance Act. That subsection 131(4) be repealed, given that the Banking Act and Insurance Act do not provide for compensation for the cost of making copies of documents.	We can support this proposal but note that timing should be considered to be structured in a way that allows sufficient time to adequately assess the information and any unexpected complexity within an insurer's books. Using 'as soon as is practical' as a test and 'not greater than' test ensures life insurers can complete requests effectively and in cooperation with APRA.
8.2.11	That the Banking Act and Life Insurance Act be amended to align with the Insurance Act in this regard, that is an equivalent of Part VA of the Insurance Act be replicated in the Banking Act and Life Insurance Act.	Generally support subject to consultation on the details.

8.2.12	That obligations relating to investigation reports be simplified across the industry Acts and the SIS Act. These simplified obligations would provide that a report be sent at the conclusion of an investigation to the persons who have been subject to the investigation. The industry Acts and the SIS Act would be amended to achieve the following: • The industry Acts and SIS Act would provide for a report to be prepared on completion of an investigation, but this should not extend to requiring transcripts to be attached to the report as is currently the case under the SIS Act. • Upon discontinuation of an investigation, all industry Acts and the SIS Act would allow APRA to decide whether a report needs to be prepared. • Once a report is prepared, all industry Acts and the SIS Act would provide a copy to be made available to the entity being investigated. • All industry Acts would not require APRA to consult with the Attorney-General before giving a copy of an investigation report to the body investigated. This would be achieved by removing subsection 60(6) of the Insurance Act. • All industry Acts would not allow APRA to release investigation reports to the public. This would be achieved by removing subsection 60(7) of the Insurance Act.	We support this proposal. ADIs and insurers would welcome a cooperative approach with APRA, wherever possible, ahead of the release of investigative reports.

8.2.13	That section 49E of the Insurance Act be amended to address these deficiencies. Specifically, it is proposed that section 49E be amended to: • enable APRA to specify the actuary to conduct the investigation (while retaining the option of APRA allowing the insurer to select the actuary); • require the insurer to appoint the actuary on terms of reference specified or approved by APRA; • require the insurer to appoint the actuary within a time frame specified by APRA; and • require the insurer to provide the actuary's report to APRA within a time frame specified by APRA. It is also proposed that similar amendments be made to remove similar limitations on the power in Part 25 Division 3 of the SIS Act. In recognition of the importance of broad consistency of supervisory powers between the Insurance Act and Life Insurance Act, and the importance of having robust investigation powers, it is proposed that the Life Insurance Act be amended to include the same provisions in that Act.	We support this proposal.
8.2.14	That a simplified provision replace the existing sections in all three industry Acts relevant in this regard. The simplified provision should provide that a member of a relevant corporate group commits an offence if it fails to immediately inform APRA, where it becomes aware of certain matters, including that it, or another member of the group: • has breached a prudential standard; • may not be in sound financial position; • has breached a provision of the relevant Act or regulations made under the Act; and • has breached a condition of authority where applicable.	We are concerned that the immediate notification may be unworkable in some circumstances.
8.2.15	To amend the whistleblower provisions in the industry Acts to bring them into line with the equivalent provisions in the SIS Act.	We support this proposal.

8.2.16	That an amendment be undertaken to provide protection of a person who is or was any of the persons listed in the Banking Act (subsection 52A(1)), Insurance Act (subsection 38A(1)), Life Insurance Act (subsection 156A(1)) and SIS Act (subsection 336A(1)).	We support this proposal.
8.3.1	That the legislation be amended to ensure that APRA may make reporting standards in respect of subsidiaries of life companies and subsidiaries of registered NOHCs of life companies.	We are generally supportive of this principle under this proposal but mindful that this will add to the compliance costs to the extent some subsidiaries are not currently captured under the existing provisions.
8.3.2	That the list in subsection 7(2) of the FSCODA be amended to provide that authorised NOHCs of ADIs, general insurers and life companies are not registrable corporations pursuant to subsection 7(1).	
8.3.3	That the definition of 'registrable corporations' be amended to include reference to engagement in 'financial services'. In turn, the term 'financial services' would be defined by way of regulation.	We support this proposal.

8.3.4	That the FSCODA be amended such that the total period in which an entity has to correct inadequate information should be reduced from 28 days to 4 business days. APRA would retain the power to give a non-compliant entity a notice requiring further information and specifying the period within which an explanation or further information is to be given. Currently, the period must not be less than 14 days beginning on the day on which the notice is given. It is proposed that this period of notice be reduced to no more than two business days. • APRA would retain the ability to issue a subsequent direction to the entity to rectify the reporting document and supply adequate information. Subsection 17(5) currently provides that directions must specify a period within which they are to be complied with. Currently, the period specified must not be less than 14 days beginning on the day in which the directions are given. It is proposed that this period of notice be reduced to not less than 2 business days. • The FSCODA would be amended to remove the extension period provided in section 17 and to make it an offence for an entity to submit data that is incorrect, incomplete, misleading, or non-compliant, at the time of the submission of the document. Thus, if an entity is required to correct information after it has been submitted, the entity will be deemed to have committed an offence on the date it submitted the original data.	We do not support this proposal particularly as in some cases recalculations and other material may rely upon the co-operation of and put from third parties. The reduction in time frames appears excessive.
8.3.5	That section 6A be amended to provide that the FSCODA does not apply to DMFs established or controlled under state legislation.	We support this proposal.
8.3.6	That subsection 56(6A) of the APRA Act be reviewed and amended, so as to ensure that protected information and protected documents may be shared, for the purposes of prudential supervision, with auditors, actuaries and other independent experts providing professional services to regulated entities and where relevant, authorised NOHCs and subsidiaries.	We have significant reservations about this proposal as it appears to provide a broad opportunity for the handling and circulation of commercial and other information.

8.3.7	The following amendments to the APRA Act and the industry Acts are proposed. That the prudential standard-making provisions in the industry Acts be amended to make it clear that APRA may require regulated entities to publicly disclose information of a nature, and in a manner, prescribed by APRA by way of prudential standards. That subsection 56(5C) of the APRA Act be amended to provide APRA with the power to publish information that relates to identified regulated entities and is obtained under the FSCODA or the industry Acts. Currently, APRA may only publish information obtained under section 13 of the FSCODA. Under this proposal, APRA could not publish the information if it relates to individual customers or counterparties or is of a confidential or commercially sensitive nature, as determined by APRA through the process specified in section 57 of the APRA Act. That section 57 of the APRA Act be amended so that APRA may: • make a determination in relation to specific information contained in a reporting document, as opposed to being able to make a determination only in respect of the information in the entire reporting document, which is presently the case; • make a determination that a reporting document, or specific information contained in a reporting document, is not confidential in specific circumstances; and • make a determination in relation to classes or types of specific information contained in a reporting document, as opposed to being restricted to making a determination only in respect of a document that is actually given to APRA, as is currently the case.	The presumption that information should be shared more broadly runs at odds with the imperative to protect commercial information. We note some of the protections but suggest that the burden should be on APRA to demonstrate why a particular unit of information or data should be released. We understand the objectives behind this proposal but would welcome further detail.

8.4.1	That the industry Acts and the SIS Act be amended to make it an offence for a person to mislead an actuary, modelling new provisions and associated penalty provisions on those already applicable in the case of auditors. It is further proposed that these Acts be amended to require an actuary to notify APRA if they are aware of any attempt to mislead or unduly coerce them. The penalty associated with a contravention of either one of these requirements would be the same as that for an auditor	This is generally supported. However amendments need to introduce a deliberative test to allow for reasonable debate over issues between directors, officers and an actuary.
8.4.2	That the auditor and actuary regimes in the industry Acts and the SIS Act be amended to ensure that all auditors and actuaries providing information to APRA and regulated entities in accordance with these Acts and associated prudential standards are to treat this information as confidential. A failure to abide by these confidentiality obligations would be a criminal offence.	This extends the effect of a breach of contractual obligations and professional standards. Neither of these carry a criminal sanction but they do provide auditors and actuaries a significant incentive already to maintain the confidence of their work.
8.4.3	That these provisions of the industry Acts be streamlined by using the Life Insurance Act provisions as a model. Specifically, subsection 16AV(2) of the Banking Act and section 49J of the Insurance Act should be amended to provide that auditors (and, in the case of the Insurance Act, actuaries) must perform their functions and duties as set out in the prudential standards and the reporting standards. Specific functions and duties currently set out in the industry Acts (such as the duty to audit yearly statutory accounts and prepare other reports) will be moved to the standards	Supported.

8.4.4	That an equivalent of section 16AV of the Banking Act (as modified in item 8.4.3, above) be inserted into the Insurance Act and Life Insurance Act. This provision would not only apply to ADIs, insurers, authorised NOHCs and their auditors and actuaries, but also to the subsidiaries of ADIs, insurers, authorised NOHCs and their auditors and actuaries. That, where appropriate, some of the Insurance Act and Life Insurance Act provisions regarding auditors and actuaries be repealed and that the substance of the provisions be inserted into prudential standards. These changes would facilitate a consistent approach between the industries and give APRA the flexibility to change provisions regarding the appointment, termination and functions and duties of auditors and actuaries.	Supported.
8.4.5	That a consistent approach be taken across the industry Acts regarding the duty of auditors and actuaries to notify APRA and the entities they are appointed to of certain matters. As part of this, section 49A of the Insurance Act may be replicated in the Life Insurance Act. Subsections 98(1) and 98(3) of the Life Insurance Act could also apply to actuaries of registered NOHCs and subsidiaries. Further, the provisions corresponding to subsections 88(1) and 88(3) and the reworked 98(1) and 98(3) of the Life Insurance Act could be inserted into the Banking Act and Insurance Act. This will create greater consistency between the industry Acts and better protect the interests of depositors and policyholders.	Supported.

8.4.6	That the auditor and actuary provisions applying to insurers extend to their NOHCs and subsidiaries and to ensure consistency of treatment between the banking and insurance industries, the following amendments are proposed: • Enable APRA to refer an auditor or actuary of an authorised NOHC or a subsidiary of an authorised NOHC or insurer to a professional association under section 48 of the Insurance Act and section 125 of the Life Insurance Act. Currently, these sections provide that, if APRA is of the opinion that an auditor or actuary of a general insurer or life company has failed to perform their duties adequately, or is otherwise not a fit and proper person to be an auditor or actuary, APRA may refer these particulars to a professional association that may take disciplinary or other action against the auditor or actuary. • Allow APRA to direct an authorised NOHC, or the subsidiary of an ADI or authorised NOHC, to end the appointment of an auditor under section 17 of the Banking Act. Currently, the Banking Act only empowers APRA to direct an ADI to remove an auditor from their position in certain circumstances. It is also proposed that section 49R of the Insurance Act and section 125A of the Life Insurance Act be extended to enable APRA to direct a subsidiary of an insurer or authorised NOHC to remove an auditor or actuary. • Make it an offence to provide false or misleading information to auditors and actuaries of authorised NOHCs and subsidiaries of authorised NOHCs and regulated entities under section 16E of the Banking Act, section 49DA of the Insurance Act and section 91 of the Life Insurance Act. Currently, these sections only make it an offence to provide false or misleading information to auditors of ADIs and insurers. Item 8.4.1 above proposes to make it an offence to provide false or misleading information to actuaries of insurers. This proposal extends this change to auditors and actuaries of authorised NOHCs and subsidiaries of authorised NOHCs and regulated entities.	

8.4.7	That the different provisions for protection from liability in the industry Acts be reviewed and streamline. This will ensure an adequate scope and level of protection for persons when they act in exercise or performance, or purported exercise or performance, of powers, functions or duties under the industry Acts. In particular, the industry Acts will be amended to ensure that protection from liability is consistent for persons such as auditors and actuaries, and on other independent experts as proposed in Item 8.4.8 below, including protection in relation to qualified privilege. Protection from liability will also apply to both voluntary and mandatory provision of information under the industry Acts.	Supported.
8.4.8	That the industry Acts be amended to enable APRA to require regulated entities, authorised NOHCs and subsidiaries of regulated entities and authorised NOHCs to engage independent experts to review and report on specified risk management matters. That APRA be given the power to require regulated entities, authorised NOHCs and subsidiaries of regulated entities and authorised NOHCs (or a class of regulated entities, authorised NOHCs and subsidiaries of regulated entities and authorised NOHCs) to appoint an independent expert via two methods: • making prudential standards that require regulated entities, authorised NOHCs and their subsidiaries to appoint independent experts in areas and circumstances specified in the standards; and • issuing a notice to an ADI, insurer, authorised NOHC or subsidiary to require the entity in question to appoint independent experts on an ad hoc basis to provide a report in accordance with the terms of reference specified in the notice.	This proposal is particularly broad and provides little recognition of the prospect that a continuing list of risk management matters could be raised, for external review. Ordinarily this should occur only where a breach of the Act has occurred. A material financial cost could be expected, along with risks of businesses being administratively focussed through a process of continuous, external review.

8.5.1	That a standardised definition of prudential matters be introduced into the industry Acts. This would replace the existing definitions in the Banking Act and the Insurance Act. The proposed definition could be along the following lines: prudential matters means matters relating to: (a) the conduct by a regulated entity, an authorised NOHC, a relevant group of bodies corporate, or a particular member or members of such a group, of any part of its or their affairs, or the structure or organisation of a regulated entity, an authorised NOHC, a relevant group of bodies corporate, or a particular member or members of such a group, in such a way as: (i) to keep the regulated entity, authorised NOHC, relevant group of bodies corporate, or a member or members of the group in a sound financial position; (ii) to protect the interests of depositors or policyholders (as the case may be); (iii) to facilitate the effective resolution of the regulated entity, its authorised NOHC, a relevant group of bodies corporate, or member or members of the group; (iv) not to cause or promote instability in the Australian financial system; or (v) not to cause or promote instability in the New Zealand financial system [this is applicable only under the Banking Act]; (b) the conduct by a regulated body, an authorised NOHC, a relevant group of bodies corporate, or a particular member or members of such a group, of its or their affairs with integrity, prudence and professional skill.	We support a standardised definition.
8.5.2	That section 11AF of the Banking Act be amended to enable APRA to determine prudential standards in relation to the subsidiaries of ADIs, and subsidiaries of authorised NOHCs (and particular classes of these subsidiaries).	We recognise that this has the effect of broadening out the existing prudential standards to a broad class of entities. Please see our general comments about the increase in regulatory scope. We are concerned about this proposal and its reach to currently unregulated entities within consolidated ADI groups.

8.6.1	That section 20 of the Banking Act be used as a model and replicated in the Insurance Act, Life Insurance Act and SIS Act. However, the SIS Act provision should retain the reference to a civil penalty order.	Supported.
8.6.2	That the federal court be required to consider the criteria for fitness and propriety set out in the prudential standards when determining whether a disqualification is justified.15	Supported.
8.6.3	That the industry Acts and the SIS Act be amended so that APRA is only required to deal once with a person it seeks to be disqualified, rather than having to apply for disqualification under different Acts covering the same issues, should a disqualified person seek to move from one regulated industry to another.	We support option A, ie a person being subject to the one disqualification process, which would be replicated. This is on the basis that the person has access to legal recourse and a merits review process. We suggest that this be similar to the current SIS process for disqualification by the Court on the application of APRA.

8.7.1	That the record-keeping provisions be further enhanced in three ways: 1. That section 60 of the Banking Act be amended so that its requirements are clear in that they apply to foreign ADIs. The proposal is not intended to extend the scope of section 60 to keeping records pertaining to the overseas operation of a foreign ADI. It is intended that the proposal cover only the records of a foreign ADI pertaining to its business in Australia. 1.1. Section 60 of the Banking Act currently provides for how an ADI should keep financial records. Section 286 of the Corporations Act requires certain ADIs to keep financial records. However, due to the manner in which section 60 is currently worded, it does not apply to foreign ADIs. Section 286 of the Corporations Act applies to a 'company', 'registered scheme' or 'disclosing entity' as defined by that Act. This means that if the entity is registered as a foreign company under section 601CE of the Corporations Act and section 286 of the Corporations Act does not apply to the entity, the entity is not required to complete the approved form. 1.2. Most foreign ADIs appear to fall into this category and therefore are not required to complete the approved form. This is in contrast to the position under the Insurance Act where foreign general insurers fall within the scope of the record-keeping provision in section 49Q of the Insurance Act. 2. That the record-keeping requirements in the Life Insurance Act be strengthened by ensuring that they apply to all accounting records that a life company keeps for the purposes of the Life Insurance Act and prudential standards. 2.1. Sections 75 and 76 of the Life Insurance Act are limited in comparison with the requirements imposed under section 49Q of the Insurance Act (the equivalent to sections 75 and 76 of the Life Insurance Act), which applies to all accounting records that a general insurer keeps for the purposes of the Insurance Act and prudential standards. 3. That the Life Insurance Act and the Insurance Act be amended to clarify that records should be kept for a period of seven years. 3.1. These Acts do not clearly specify the length of time which life companies and general insurers must retain records.	We support this proposal.

8.7.2	That the industry Acts be harmonised such that they all include a provision to enable APRA to apply to the Court for a direction for compliance with a requirement under an industry Act if APRA is satisfied that a person has failed to comply with a requirement under the industry Act. This would provide APRA with an appropriate tool to ensure compliance in certain circumstances.	This measure provides a catch-all for APRA to enforce non-compliance with a direction. We support this proposal subject to the other comments in this submission.
8.7.3	That an equivalent of section 70B of the Banking Act be inserted into the Insurance Act and Life Insurance Act.	Supported. Provisions must spell out how obligations must be met by directors and officers especially when considering other obligations. This is in line with comments in Part 1.
8.7.4	That APRA be given the right to intervene in Court proceedings instituted under the industry Acts. A provision such as section 87CA of the Competition and Consumer Act 2010 could form the basis of this power. It is appropriate that the Court retains discretion on whether to include APRA in Court proceedings.	We can support this particularly where APRA retain the interests of depositholders and policyholders as paramount in their engagement with the courts.
8.7.5	That subsection 121(1) of the Insurance Act be amended to ensure that service of a notice on the JM, rather than on the registered office of the insurer, does not invalidate the service. That subsection 121(2) of the Insurance Act be amended to take account of the introduction of the Corporations Act. It is further proposed that an equivalent of section 121 of the Insurance Act be inserted into the Banking Act and Life Insurance Act.	Supported.

8.7.6	That the relevant legislation be amended to facilitate APRA's cooperation with, and rendering of assistance to, foreign regulators. Relevant legislation in the foreign jurisdictions mentioned above could serve as useful models for the proposed provisions. These provisions could include: • enabling APRA to collect information and conduct on-site reviews of regulated entities in Australia at the request of, and for the purpose of assisting, foreign regulators; • enabling foreign regulators to collect information directly or enable APRA to conduct on-site reviews of regulated entities in Australia that are members of groups the foreign regulator supervises. Such information collection may be permitted on a continuing basis, subject to APRA's ability to withdraw such permission at any time; • providing for the collection of information by foreign regulators to be subject to confidentiality obligations; • enabling the activities of foreign regulators to be controlled via the application of various conditions and through the withdrawal of permission if necessary; • clarifying the rights and obligations of foreign regulators permitted to conduct on-site reviews of or obtain information from a regulated entity in Australia and make it clear that a foreign regulator may not impose penalties under Australian law under any circumstances; and 156 • enabling APRA to seek the cooperation of foreign regulators in enabling APRA to conduct on-site reviews of and to collect information from APRA-regulated entities that have a presence in and are supervised by the relevant foreign regulator in a foreign jurisdiction, subject to the rights and obligations applicable in that jurisdiction. This proposal will bring the legislative framework in Australia in line with international standards and the law in other jurisdictions. This proposal will ensure that a clear legal framework exists for APRA to cooperate with foreign regulators in the sharing of information and facilitation of on-site reviews of regulated entities.	We support the proposal. However, APRA must be expected to have regard to the reasonableness and otherwise of requests and serve as a gatekeeper for any unreasonable requests or any abuse of the process if a foreign regulator is being onerous in its requests, without appropriate justification.

8.7.7	Minor drafting amendments to the industry Acts	We support these proposals.
9.1.1	That the Banking Act be amended to confer upon APRA powers to obtain information from, and to investigate a breach of, section 67. If this is implemented, then APRA could either appoint an APRA officer or an external party to carry out investigations, depending upon the circumstances. Sections 13A, 61 and 62 of the Banking Act could be used as a model for this power (as modified by the proposals elsewhere in this Discussion Paper)	We support these proposals.
9.2.1	That the Insurance Act be amended to outline the role and responsibilities of agents in Australia at a high level, and the consequences of failing to discharge these responsibilities. Amendments could include: • expressly providing that prudential standards made by APRA be made applicable to agents in Australia; • imposing an obligation on agents in Australia to comply with requirements in prudential standards applicable to them; • clarifying the role and responsibilities of an agent in Australia in providing certain information to APRA under the Insurance Act; and • providing for protection from liability for an agent in Australia acting in good faith and according to the provisions of the Insurance Act.	We support this proposal.
9.2.2	That the definition of 'subsidiary' under the Insurance Act be amended so that it aligns with the current definition of the term under the Banking Act, Life Insurance Act and prudential standards applicable to ADIs, general insurers and life companies.	We are supportive of this proposal, as it will help clarify and make consistent the meaning of this term.

9.2.3	That the class of liabilities considered to be pre-authorisation liabilities under the Insurance Act be narrowed to address the issues that exist because of how the different classes of insurers were authorised. This will ensure that protection is afforded by various provisions of the Insurance Act to liabilities that will no longer be considered pre-authorisation liabilities under this proposal. Under the proposal, section 3 of the Insurance Act would be amended so that: • the definition of pre-authorisation liability covers liabilities assumed at a time when a general insurer was not authorised under the previous authorisation provisions [section 24 (before 9 December 1971), the previous section 23 (before the GIRA came into effect on 1 July 2002)] or section 12 (after 1 July 2002); and • pre-2002 liabilities of insurers who were deemed to be authorised under the transitional provisions of the GIRA (that is Category 3 insurers) are not pre-authorisation liabilities.	
9.2.4	That subsection 116A(1) of the Insurance Act be amended to clarify the criteria in paragraphs (a), (b) and (c), and to address the impact of the application of subsection 116A(1) on the common law. This will be done in such a way as to clearly reflect the policy intent behind this provision and to address the issues that could arise from its application.	We support this proposal subject to consultation on and review of proposed amending legislation.

9.3.1	Therefore, the following amendments to the Life Insurance Act are being proposed: • Enabling certain matters in Division 4 of Part 10 relating to surrender values and paid-up policies to be specified in prudential standards — this will enable all requirements relating to surrender values and paid-up policies to be specified in a single location. • Replacing the reference to regulations in paragraph 9(1)(d) with 'prudential standard' in relation to the term beyond which a contract for payment of an annuity constitutes a life policy. • Replacing the references to regulations in the definition of 'superannuation policy' in the Schedule with 'prudential standards'. • Enabling certain matters in Part 9, relating to transfers and amalgamations of life insurance business, to be specified in prudential standards rather than prescribed in regulations. This will also facilitate alignment the Life Insurance Act with the Insurance Act in respect of documents to be lodged in transfers and amalgamations of insurance business. • Enabling certain matters currently prescribed in sections 33, 38, 39, 40, 42, 43, 45, 47, and 75 to 81, and Divisions 3, 4, 5 and 6 of Part 4, to be specified in prudential standards.	We can support this proposal subject to consultation on proposed amending legislation.

9.3.2	That the references in the Life Insurance Act to solvency and capital adequacy be updated so that there is only one trigger point in the Life Insurance Act for the exercise of certain powers (linked to capital adequacy). The definition of capital adequacy will be severed from the existing definition by making it clear under the Life Insurance Act that capital adequacy is as defined in the prudential standards. Provisions of the Life Insurance Act that are proposed to be amended include sections 3, 52, 62, 63 and 159. These amendments will facilitate the introduction of APRA's proposed approach to LAGIC. Section 31 of the Life Insurance Act currently requires life companies to have statutory funds, including separate statutory funds in respect of certain types of business. The proposal will enable APRA to specify, by way of prudential standards, other types of business in respect of which a separate statutory fund must be maintained.	We support this proposal.
9.3.3	That the Life Insurance Act be amended in order to protect the rights of policy owners of a demutualised friendly society so that they may continue to be able to vote on proposed benefit fund rule amendments, following a demutualisation of the friendly society and restructure. This could be done by expanding the categories of person who may 'adequately adopt' benefit fund rules of a company or an amendment of benefit fund rules of a company, to include those persons who because of section 16F are taken to be the owner of a policy referable to the benefit fund.	This could increase costs and complexity to a demutualised friendly society, but can be supported given it reflects the consumers' interests.
9.3.4	That the Business Transfer Act be amended to prevent life companies that are not friendly societies from undertaking voluntary transfers of business under the Business Transfer Act unless APRA has made a determination that it is appropriate in that particular case. Do members of the industry, both friendly societies and other life companies, have views on whether they prefer to effect a transfer of life business under one regime over another and why?	We can support this proposal, if the amendment is necessary given the use of other, existing provisions to transfer business.

9.3.5	That sections 12A and 12B of the Life Insurance Act be amended to enable APRA to vary or revoke declarations made under those sections. These sections could also be amended to enable further conditions to be imposed on existing declarations.	This proposal can be supported subject to controls which provide certainty for life insurers as to the application and use of any revocation.
9.3.6	That subsection 234(2) of the Life Insurance Act be amended to clarify the circumstances under which the exemption from the prohibition on carrying on mixed insurance business applies.	We support the proposal.

9.3.7	That high-level provisions be inserted into the Life Insurance Act establishing the requirements for custodian arrangements and granting APRA the power to specify the detailed requirements through prudential standards. Under the proposed approach, the burden of ensuring that assets are only dealt with in accordance with the Life Insurance Act would be placed on the Compliance Committee. This would be appropriate as they have the key responsibility for ensuring compliance with all applicable requirements. The combination of the roles of the custodian and the Compliance Committee, together with the restrictions imposed through the custodian agreement, would provide an appropriately strong level of protection for the policy owners in Australia. Further, that the Life Insurance Act be amended in a number of areas to clarify the intended operation of the Act as it relates to EFLICs. Specifically: • Amend the objects clause in section 3 of the Life Insurance Act to ensure that it appropriately takes into account the structure of EFLICs. • Clarify Part 9 of the Life Insurance Act to require the Court to consider the interests of owners of policies referable to the statutory funds of each life company affected by the scheme. The current wording could be read as requiring the Court to have regard to the interests of the policy owners of the company outside Australian that have no connection with the Australian operations. This would not preclude a Court from considering the interests of owners of policies issued by an EFLIC outside Australia, but would not require it to do so. • Clarify the responsibilities of the Compliance Committee for breaches of the Life Insurance Act. The Act treats Compliance Committee members as directors of the life company but the relative responsibility of each for any breaches of the Act is not specified. It is proposed that the Life Insurance Act be amended so that the Compliance Committee members who are resident in Australia are made responsible for breaches. • Amend Parts 8 and 9 of the Act to clarify how the Act applies to an EFLIC's business outside of Australia. In particular, to clarify: – the extent of the control by a judicial manager in Australia of an EFLIC's business outside Australia; – that references to 'the interests of owners of policies' and 'policies issued by the company' in respect of an EFLIC are intended to relate only to policies referable to statutory funds of the EFLIC, and not policies more broadly; – the power of the Court under section 176 or	There is the prospective of some competitive questions arising in this proposal, but we generally support the need for APRA to specify prudential standards for EFLIC.

9.4.1	What are the potential advantages or the potential problems with providing APRA a discretionary power to appoint an acting trustee where the existing trustee cannot be located and identified?	We don't anticipate problems with this proposal, and support the amendment.
9.4.2	Is consistent treatment between limited liability partnerships and body corporates desirable for the purposes of section 125 of the SIS Act?	We support this proposal.
9.4.3	Are APRA's primary investigation powers under the SIS Act appropriate and sufficient? Should APRA be able to investigate any contravention as far as it relates to a superannuation entity or superannuation interest?	This amendment will need to be carefully drafted to avoid capturing too broad an intent. We will need to consider any exposure draft in detail.
9.4.4	Would expanded disqualification powers for APRA maintain or enhance the integrity of the superannuation system?	This is unsupported as the case, or examples, of the current powers not being wide enough has not been made.
9.5.1	Would excluding holding companies from the definition of 'financial sector company' reduce the regulatory burden on industry? Is there any reason why the current definition should be retained?	The current approach works effectively and this definition doesn't require amendment.
9.6	Minor drafting amendments to the industry acts and other APRA-administered acts	We can generally support these proposed amendments subject to details being assessed through an exposure draft.