



**Abacus**  
Australian Mutuals

Association of Building Societies and Credit Unions

29 June 2007

Mr André Moore  
Manager Prudential Policy  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
By email: Prudentialdecisions@treasury.gov.au

Dear Mr Moore

### **Review of Prudential Decisions – Discussion Paper**

Thank you for the opportunity to comment on the Government's proposals to streamline prudential regulation in relation to the disqualification regime under the prudential Acts, the review of certain decisions by APRA and its directions powers.

Abacus – Australian Mutuals is the industry association for Australian credit unions and mutual building societies. Abacus is the new industry body drawing together the representation activities of the former Credit Union Industry Association (part of Cuscal Limited), National Credit Union Association and Australian Association of Permanent Building Societies. For more detail on Abacus and its members, see [www.abacus.org.au](http://www.abacus.org.au).

There are 150 mutual Authorised Deposit-taking Institutions (ADIs) in Australia, with more than 4.5 million members and \$60 billion in total assets. Credit unions and building societies are diverse institutions in terms of coverage, geographic footprint and asset size. Mutual ADIs range from small institutions with assets of \$10 million to large institutions with assets over \$5 billion. Credit unions and building societies are all ADIs regulated by APRA and have a strong interest in the efficiency and effectiveness of the prudential regime.

Abacus has reviewed the discussion paper and provided comments below, restricted to proposals that affect ADIs. Abacus would also welcome the opportunity to participate in further consultation on these proposals as they affect ADIs. In summary:

- Abacus supports the introduction of Court-based disqualification processes for decisions made by APRA under s21 of the *Banking Act*. Abacus does not object to Court-based processes for decisions made under s22 of the *Banking Act*.
- Abacus welcomes the Government's review of proposals for merits review of prudential decisions against the capacity for the regulator to act decisively where it has grounds to believe that major prudential risks exist. We consider that the reform proposals for ADIs generally meet this test, although we note that there are very wide 'exemptions' available that may act to limit the applicability of merits review in practice.
- Abacus recommends that directions by APRA to remove a director, senior manager or auditor under s17 and s23 of the *Banking Act 1959* should remain subject to merits review in all instances, to provide affected parties with the opportunity for review of these very serious rulings. Merits review should apply regardless of the grounds on which APRA has made its decision. Abacus would support continuation of existing merits review rather than court-based processes to ensure swift action can be taken by the regulator where grounds exist for removal directions.
- Abacus would welcome further consultation with the ADI sector on final drafting and implementation of the proposed changes.

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## 1. Introduction of a Court-based Disqualification Process

Abacus supports, in principle, establishing a Court-based disqualification order process for prudential Acts, including disqualification orders under s21 and s22 of the *Banking Act 1959*.

We understand that the triggers for the disqualification process would match the triggers contained in section 21(1) of the *Banking Act*. Further, the proposed disqualification application process is to be modelled on section 206C of the *Corporations Act 2001*.

Abacus supports a model whereby the serious decision of disqualification is subject to high standards of evidence and procedural fairness, including having APRA prove the grounds for disqualification before the Federal Court. We believe the new framework will provide a suitably robust and equitable basis for the exercise of this power. The Government is proposing that the Court have discretion to set terms on any disqualification for the period of the disqualification and the positions to which the disqualification applies. This is a sensible and equitable proposition.

We note, as related matters, distinctions in the prudential regulatory framework compared with the *Corporations Act* model. For example, there will likely be further areas for exercise of disqualification powers by APRA under the proposed model than under the *Corporations Act* framework, given the wider subjective range of fit and proper measures applying under Prudential Standard APS520 in addition to the criteria outlined in s20 of the *Banking Act 1959*. There are also differences in the definition of a senior manager for the purposes of the *Banking Act* and prudential standards and the ASIC-administered requirements for responsible officers. Notwithstanding these issues, Abacus supports the reform proposals as a sensible and robust approach to disqualifications made under the *Banking Act*.

In relation to s22 of the *Banking Act 1959* we assume that the new Court-based model would cover applications brought by either APRA or an individual (in practice, we believe these will be from affected individuals). Abacus does not object to the proposal to subject APRA's decisions under s22 to the Federal Court.

We also suggest consideration of whether there might be an interaction between a removal and disqualification decision (for example, were APRA removing an individual under s23 and seeking to disqualify them under s21) and the different review arrangements that might apply through the course of appeals (we do not consider this a significant issue).

Abacus supports the proposed reforms and would welcome further consultation on the practical implementation, including guidance for ADIs, of the model.

## 2. Ensuring APRA's Capacity to Act Decisively

As a general principle we encourage careful review of the application of merits review processes to prudential decision making. Abacus does not object to further areas of APRA's decision making, subject to careful review, being made subject to merits review provided that this expanded scope does not impact on APRA's ability to effect immediate and significant decisions where necessary to protect the interests of depositors and ensure prudential stability. The Government has proposed such a protection, however, the limitation of the expanded merits review raises issues in two areas, discussed below.

## 3. Streamlining APRA's Directions Powers

Abacus supports the Government's proposals to streamline APRA's directions powers and the grounds which APRA would have to meet before making those decisions. Abacus also notes and agrees with the Government's contention that APRA should not be constrained in certain circumstances from taking immediate action in regard to an ADI where serious prudential risks may be in place.

However, the current drafting of the merits review and directions power proposals has the capacity to render almost all decision-making by APRA exempt from any review process, by virtue of such a wide catch-all as '*the direction is necessary in the interests of depositors, policy holders or beneficiaries*'.

Without clarification of the nature and criteria that would apply to this category of direction decision ground, conceivably this exemption from merits review could be applied to every one of APRA's activities in relation to the ADI sector. If improperly used or broadly interpreted, not only would the new range of decisions to be subject to merits review never be subjected to review, but some decisions that are currently subject to merits review (eg ss 17 and 23 directions) would no longer be subject to review. Abacus recommends that further thought be given to guidance for APRA and the industry on the scope of these 'exemption' grounds for merits review.

Separately, Abacus strongly believes that directions given to an ADI under s17 (to remove an auditor) and s23 (to remove a senior manager or director) of the *Banking Act 1959* should remain subject to merits review in all instances.

While the ability of the regulator to act swiftly to remove officers where it has grounds to believe that a serious prudential issue exists should not be limited, we do not support removing merits review. Under the fit and proper standard, for example, it would likely prevent the individual taking up a role with any ADI or prudentially regulated entity in the future. Abacus recommends that the existing merits review process be retained for directions under s17 and s23 *regardless* of the grounds under which APRA has made its decision (for example, regardless of which grounds outlined in Table 4, Part B of the discussion paper are relevant to APRA's direction).

Under a merits review model (as currently applies) the burden of proof lies with the affected party, while the removal takes effect from the date of APRA's direction. We believe this model provides effective scope for urgent intervention by the regulator in the most serious of cases, while allowing affected parties access to administrative review. Abacus would not recommend extending the proposed court-based process to s23 decisions given the benefit of allowing immediate removal in extreme cases of risk, but believes that a merits review must be retained for such serious decisions.


### **Conclusion**

Mutual ADIs applaud the Government's efforts to streamline prudential regulation and reduce regulatory red tape and we look forward to continued efforts in this area.

We believe that there may be some challenges in implementing the proposals and Abacus would welcome the opportunity to discuss these matters with Treasury either separately or as part of an industry meeting if considered useful.

In the meantime, if you have any questions, please do not hesitate to contact Mark Degotardi, Senior Adviser Public Affairs, on (02) 8299 9053 or [mdegotardi@abacus.org.au](mailto:mdegotardi@abacus.org.au) myself on (02) 8299 9046 with any comments or questions.

Yours sincerely



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