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INFORMATION AND RESEARCH SERVICES

Bills Digest

No. 168 2001–02

Financial Sector Legislation Amendment Bill
(No.1) 2002

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2002

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Financial Sector Legislation Amendment Bill (No.1) 2002

Mark Tapley
Law and Bills Digest Group
17 June 2002

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Financial Sector Legislation Amendment Bill (No.1) 2002

Date Introduced: 21 March 2002

House: House of Representatives

Portfolio: Treasury

Commencement: Most provisions commence on the day after Royal Assent. Items 1-17 of schedule 4 which amend the *Insurance Act 1973* commence on 1 July 2002. Item 18 of schedule 4 is taken to have commenced on the same day as the General Insurance Reform Act received Royal Assent, that is, 19 September 2001.

Purpose

To amend nine pieces of legislation relating to the financial sector.

Background

As this Bill has no central theme the background to the various measures is included in the discussion of the main provisions.

Main Provisions

Amendments to the Australian Prudential Regulation Authority Act

The Australian Prudential Regulation Authority (APRA) was established on 1 July 1998 as the prudential regulator of banks and other authorised deposit-taking institutions, life insurance companies (including friendly societies), general insurance companies, superannuation funds and retirement savings accounts.

APRA collects levies from financial institutions that it prudentially supervises on behalf of the Commonwealth. Under section 50 of the *Australian Prudential Regulation Authority*

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Act 1998 (the APRA Act), APRA is funded by appropriations based on levies from the institutions it regulates.

APRA is not entitled to the entire amount raised by the levies. From the funds *received*, the Treasurer determines an amount that covers the costs to the Commonwealth for the provision of market integrity and consumer protection functions for prudentially regulated institutions. This amount is deducted from the levies collected and the remaining money is appropriated to APRA.

In 2001, the Australian National Audit Office (ANAO) issued a qualified audit opinion in relation to APRA's financial statements.¹ The ANAO stated that under the heading 'Revenues from Government' in its statement of financial performance, APRA reported an amount equal to the amount of levies *invoiced* less the Commonwealth's costs of providing market integrity and consumer protection functions. The ANAO commented that section 50 of the APRA Act only entitles APRA to a Special Appropriation equal to the amount of levy money *received* by the Commonwealth net of the costs of market integrity and consumer protection. It also commented that:

The policy adopted also represents a departure from Australian Accounting Standard AAS15 – Revenue, which requires that revenues be recognised when, and only when, the entity has gained control of the revenue or the right to receive the revenue.

In the view of the ANAO, the effect of APRA's reporting approach was that net operating deficit was understated by \$799 000.

Item 1 of Schedule 1 inserts a **new section 50** into the APRA Act. Each financial year the Treasurer is required to make a determination of the 'retainable amount'. This is the amount of money that is to be available cover the costs to the Commonwealth of the provision of market integrity and consumer protection functions for prudentially regulated institutions.

Retainable amounts may be specified in relation to the total amount of levy money or in respect of each class of levy. **New subsections 50(2)** and **(3)** state that levy money in excess of the retainable amount is payable by the Commonwealth to APRA. **New subsection 50(5)** effects the appropriation of these moneys from the consolidated revenue fund to APRA. As a result of these amendments APRA will be able to report amounts payable from Government regardless of whether the levy money has been received.

Amendments relating to levy collection

The purpose of the *Financial Institutions Supervisory Levies Collection Act 1998* (the Collection Act) is to allow for the collection of levies on those industries that are prudentially regulated by APRA.²

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Section 9 of the Collection Act specifies when the levy is due for payment. **Item 1 of Schedule 2** amends section 9 to ensure that entities have at least 28 days notice before a levy becomes payable.

Section 10 of the Collection Act provides for late payment penalties. The penalty rate is set at 20 per cent per annum on the amount unpaid. At present, the penalty is calculated daily and the Explanatory Memorandum states that APRA has had difficulty correctly invoicing institutions.³ **New section 10** inserted by **item 3** provides for a penalty calculation day which deems late payments to have been made on a specified date. This approach is intended to make it easier for APRA to calculate the liability of an institution.

Section 13 establishes levies and late payments as debts due to the Commonwealth. **Item 5** amends section 13 to authorise APRA to bring proceedings on behalf of the Commonwealth to recover these debts. In the event the Commonwealth is ordered to pay costs, **new subsection 13(3)** makes clear that APRA is to bear these costs.

Amendments relating to the transfer of business

The *Financial Sector Reform (Transfers of Business) Act 1999* (the Transfer Act) provides APRA with a prudential tool to facilitate a transfer of business between institutions where one institution may be in financial distress. The Act provides for voluntary and compulsory transfers of business.

In deciding whether to approve an application for a voluntary transfer of business, section 12 of the Transfer Act requires that APRA consult with the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). **New paragraph 12(2)(c)** inserted by **item 1 of schedule 3** will require APRA to also consult with the Commissioner of Taxation. The Explanatory Memorandum does not detail what revenue concerns have given rise to this amendment it merely observes that it has been the practice to ensure that applicants consult with the Commissioner of Taxation.⁴

The Commissioner of Taxation may notify APRA that he or she does not wish to be consulted about a particular transfer or a class of transfers (**new subsection 12(5)**).

Amendments relating to general insurance

APRA is the prudential regulator of the general insurance industry. An insurer may carry on general insurance business in Australia only if authorised by APRA to do so under the *Insurance Act 1973* (the Insurance Act). This legislation was substantially amended recently by the *General Insurance Reform Act 2001* (the Reform Act) which will commence on July 1 2002. **Schedule 4** amends some provisions inserted by the Reform Act which have not yet commenced.

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The Reform Act inserted a new section 25 which defined classes of people who are disqualified from being a director or senior manager of a general insurer, an authorised non-operating holding company (NOHC) or a senior manager or agent of a foreign general insurer. Paragraph 25(1)(a) provides that a person is disqualified if they commit an offence against the Insurance Act or the *Financial Sector (Collection of Data) Act 2001*. **Item 1** amends section 25 to the effect that people who are convicted of an offence against Australian or international corporations legislation are also disqualified persons.

Item 3 inserts **new section 25A** which empowers APRA to disqualify a person from being a director or senior manager of a general insurer if it is satisfied that the person is not a 'fit and proper' person to hold such an office. The meaning of the expression 'fit and proper' is not defined in the legislation. According to the Explanatory Memorandum APRA will issue a prudential standard to give some guidance as to how it will interpret the section.⁵ A decision by APRA to disqualify a person or a refusal to revoke a disqualification is subject to review by the Administrative Appeals Tribunal (AAT) (**new subsection 25A(6)**).

The Reform Act inserted section 26 which enables APRA to determine that a person is not a 'disqualified person' despite the fact that they fall within the definition of the term under section 25. APRA may only make such a determination if it is satisfied that the person is highly unlikely to be a prudential risk to any general insurer or authorised NOHC. **Item 4** amends section 26 to enable APRA to impose conditions on any determinations that it makes. The provision is intended to allow APRA greater flexibility.

Section 63 of the Insurance Act deals with review processes under the Act. Currently subsection 63(12) provides that employees of insurance companies cannot sit on the AAT if it is reviewing decisions made by the Treasurer or APRA under the Act. **Item 14** amends the subsection to ensure that the prohibition also covers employees of companies related to insurance companies.

Schedule 2 of the Reform Act provides for a transitional period of 2 years from July 1 2002 for insurers to comply with the new regime. **Item 18** will correct a drafting error so as to allow APRA to determine that all or specified provisions of the Insurance Act as amended by the Reform Act, do not apply to a person or class of persons for a specified period during the transition period.

Amendments to the Insurance Acquisitions and Takeovers Act

The *Insurance Acquisitions and Takeovers Act 1991* (Takeovers Act) establishes a regime requiring the compulsory notification of proposals relating to:

- the acquisition or leasing of assets of Australian-registered insurance companies and
- the entering into agreements relating to directors of Australian-registered insurance companies (proposals subject to the Act).

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The legislation empowers the Minister, currently the Treasurer, to stop a proposal by means of a temporary or permanent restraining order.

Schedule 5 contains amendments which abolish the concept of ‘temporary restraining orders’ for the purposes of the Act.

Section 39 of the Takeovers Act effectively gives the Treasurer 30 days to impose a temporary restraining order to prevent a transaction involving the acquisition or lease of the assets of an Australian-registered insurance company. Section 53 likewise gives the Treasurer 30 days to impose a temporary restraining order on a proposal relating to the directors of an Australian insurance company.

If the Treasurer takes no action within this timeframe he or she cannot take any action under the Act to stop the transaction from proceeding. According to the Explanatory Memorandum this time frame has proved to be too restrictive in that it usually takes longer than 30 days to obtain all the information necessary to make a decision.⁶ The Bill repeals sections 39 and 53.

Under the new regime introduced by **schedule 5** proposals subject to the Act must not be carried out unless the Minister has given a go-head decision (**new sections 40 and 54**). One draw back of these changes may be that decisions on proposals may be delayed indefinitely. With the passage of these amendments there will be no legislative impetus to deal with matters expeditiously.

Amendments to the Life Insurance Act

Section 236 of the *Life Insurance Act 1995* sets out the decisions under the Act which may be subject to merits review by the AAT. Subsection 236(1A) lists a number of ‘prudential decisions’⁷ which, if made within 5 years after 30 June 1997 are immune from review by the AAT. This period is about to expire. **Item 1** of **schedule 6** will ensure that these decisions remain beyond the scope of AAT review. The Government has taken the view that appeal action could delay APRA in taking action to protect policy holders.

Currently the lack of merits review is balanced by a requirement that the decision in question be made with the consent of the Treasurer. **Item 2** will remove this institutional safeguard.

Amendments to the Reserve Bank Act

The central theme of **schedule 7** is the transfer of powers and responsibilities from the Governor-General to the Treasurer. Examples of roles to be exercised by the Treasurer under the amendments to the *Reserve Bank Act 1959* (the RBA Act) include the:

- appointment of 6 members of the RBA Board under subsection 14(1)(d) (**item 2**)

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- termination of such Board members under section 18 (**item 7**)
- appointment of the Governor and Deputy Governor and the determination of the length of their terms under section 24 (**items 9 and 10**)
- termination of the Governor or Deputy Governor under section 25 (**item 15**)
- appointment of up to 5 members of the Payments System Board under subsection 25B(3) (**item 16**) and
- termination of such members under subsections 25L(3) and (4) (**item 18**).

Although these roles are currently assigned to the Governor-General, in practice decisions are made on the basis of advice from the Treasurer. The Government has argued that the amendments streamline the appointment and termination process.⁸ As with all significant Government appointments, Cabinet approval will still be required.⁹

Some may argue however that the claimed efficiency gains in the process of appointment and termination come at the expense of an important safeguard against capricious action by a future Treasurer. Defenders of the Office of the Governor-General have rejected the view that vice regal approval is a mere 'rubber stamp'. Sir David Smith, a former secretary to Governors-General has stated:

It would be very easy to conclude that a Governor-General who is required to act on the advice of his Ministers has no power at all, or that Ministers whose advice has to be taken have no constraints placed on the use of their executive power, but to do that would be to misunderstand the basic principle which underlies our system of responsible government.¹⁰

As Governor-General Sir Paul Hasluck remarked that while the Governor-General may not reject advice outright he is under no obligation to accept advice unquestioningly:

He can himself question a conclusion, seek to know the reason for it, draw attention to relevant considerations to ensure that they are taken in account, and satisfy himself that the proposal does express the single mind of his advisers.¹¹

The amendments proposed by the Bill will prevent the Governor-General from exercising this cautionary role in relation to Reserve Bank appointments and terminations. The approach may be contrasted with the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission where members are appointed and terminated by the Governor-General. The amendments will however bring the RBA into line with the Australian Prudential Regulation Authority where the Treasurer may appoint and terminate ordinary board members.

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Treasury Representative on the RBA Board

By virtue of section 14 of the RBA Act the Secretary to the Treasury is an ex officio member of the RBA Board. Section 22 provides that if the Secretary is unable to attend a Board meeting a Deputy Secretary of the Department may replace him. Following a restructure at Treasury the position of Deputy Secretary has been abolished. **Item 8** inserts a **new section 22** which will allow the Secretary to Treasury to nominate an SES employee in the Department to attend an RBA Board meeting at which the Secretary is not present.

It is worth noting that the position of a representative of the Treasury on the RBA Board has been a matter of public controversy. The RBA is the only central bank in the OECD that has a treasury official on its governing board.¹² Critics have claimed that this undermines perceptions of the Bank's independence from government. There is a considerable body of economic literature which suggests that central bank independence enhances the effectiveness and credibility of monetary policy.¹³ In 2000 the ALP members of the House of Representatives Standing Committee on Economics, Finance and Public Administration called for the examination of a proposal to enhance the independence of the Bank by removing the Secretary to the Treasury from the RBA Board.¹⁴ Supporters of the current arrangements argue that they assist in the co-ordination of monetary and fiscal policy.¹⁵

RBA Superannuation Fund

Section 70 of the RBA Act requires the Bank to operate a superannuation fund for its staff. It also requires that the rules for the fund be subject to approval by the Minister for Finance. **Item 19** repeals the section. According to the Explanatory Memorandum the Bank's existing superannuation fund will continue to operate¹⁶ but will be easier to administer because the need to consult the Minister of Finance on rule changes will be abolished.¹⁷

If this is the objective of the amendment then it may be asked why the requirement for Ministerial approval of rule changes was not simply deleted. The deletion of the section entirely may give rise to speculation that the Bank's superannuation fund is to be closed to new members.

RBA Head Office

Subsection 74(2) of the RBA Act states that the head office of the Bank shall not be in the same building as the head office of any authorised deposit-taking institution.¹⁸ This section has been in the RBA Act in similar terms since 1959. While the original intention of the provision is unclear, it is possible that the section reflected a concern to ensure the security of market sensitive information and a desire to prevent the RBA from being a tenant of an institution that it prudentially supervised.

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Item 20 repeals the subsection. The Explanatory Memorandum states that it ‘unnecessarily restricts the ability of the Reserve Bank, in the event of an unexpected occurrence, to find alternative short-term accommodation’.¹⁹

It may be suggested that an additional benefit of the proposal is that it will maximise the number of potential tenants for the Bank’s vacant office space at its head office in Martin Place, Sydney.

As a result of technological change, outsourcing and the transfer of responsibility for bank supervision to the Australian Prudential Regulation Authority, the number of staff at the RBA’s head office has fallen to around 715 from a peak of 1500 in the mid 1980s.

In November 2000, the Joint Committee on Public Works²⁰ approved a proposal to consolidate the Bank’s head office accommodation and lease 7000 square metres (5 floors) of surplus office space. The cost of the proposal was estimated at \$21.5 million to be funded from the Bank’s own resources. The Bank estimated that the lease of surplus office space could raise \$3.5 million per annum.

Amendments to the Superannuation Industry (Supervision) Act

Subsection 121A(1) of the *Superannuation Industry Supervision Act 1993* (the SIS Act) states that a person must not be, or act as, a trustee of a superannuation entity that is a superannuation fund with fewer than 5 members (other than a self managed superannuation fund) unless the person is an approved trustee.

The Government is concerned that an unintended consequence of this section is that a fund that does need to have an approved trustee that is being wound up may drop to fewer than 5 members. At present failure to appoint a trustee is a strict liability offence carrying a maximum penalty of 6 months imprisonment.

Item 4 of schedule 8 inserts **new subsection 121A(1A)** stating that the requirement to be an approved trustee does not apply if at the relevant time

- the fund is being wound up
- immediately before the commencement of the wind up the fund had at least 5 members, and
- the fund has not had less than 5 members for more than 1 year (unless APRA permits a longer period.).

Section 252C deals with the secrecy obligations imposed by the SIS Act particularly on taxation officers. Unauthorised disclosure can lead to a penalty of 2 years imprisonment. **Item 6** amends section 252C to make clear that it is not an offence for the Commissioner, or a tax officer to disclose information which is a description of court proceedings in

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relation to a breach or suspected breach of the Act or activity engaged in by the Commission in relation to such matter.

Presumably this amendment is intended to allow the ATO to give publicity to its enforcement activities. It is possible that some might suggest that the ATO should take care to ensure that such publicity does not lead to a 'trial by media'. Recently the ACCC has been subject to criticism over its aggressive use of the media in publicising its enforcement of the *Trade Practices Act 1974*.²¹

Amendments to the Superannuation Supervisory Levy Imposition Act

The *Superannuation Supervisory Levy Imposition Act 1998* (SSLI Act) imposes the superannuation supervisory levy on superannuation entities. 'Superannuation entity' is defined under section 10 of the SIS Act as a regulated superannuation fund²², or an approved deposit fund, or a pooled superannuation trust.

Under section 7 of the SSLI Act, the amount of levy payable by an entity is determined by multiplying the 'levy percentage' by the entity's asset value on 30 June of the previous financial year. The levy percentage is currently set at 0.025%. The maximum amount that an entity can be required to pay is capped at \$53 000. Any entity, regardless of the size of its assets must pay a levy of at least \$400.²³

Items 1 and 2 of schedule 9 seek to clarify the levy that is payable by an entity, for example a self managed superannuation fund, that becomes a regulated superannuation entity in a financial year. At present it is ambiguous as to whether entities that become 'regulated entities' in a given financial year are subject to the levy in the first year that they have this status. **Item 2** inserts **new paragraph 7(1)(a)** which makes clear that entities that were unregulated on 30 June of the previous financial year are nevertheless subject to the levy based on their asset value on that date. The Explanatory Memorandum does not state whether any revenue has been lost to the Commonwealth as a result the existing ambiguity.

Endnotes

- 1 Australian Prudential Regulation Authority, Annual Report 2001, p. 87. See: <http://www.apra.gov.au/AboutAPRA/Annual-Report-2001.cfm>
- 2 The levies themselves are imposed by a number of industry specific Acts eg *Authorised Deposit-taking Institutions Supervisory Levy Imposition Act 1998*, *Superannuation Supervisory Levy Imposition Act 1998* etc.
- 3 p. 7.
- 4 p. 9.

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- 5 p. 10. APRA's power to make prudential standards is set out in section 32. Either house of Parliament may disallow these standards.
- 6 p. 5.
- 7 Such as APRA directions that a company should increase its capital or remedy a contravention of the Act.
- 8 p. 15.
- 9 See Chapter 6, Department of Prime Minister and Cabinet, [Cabinet Handbook](#), 5th Ed 2000.
- 10 Sir David Smith, *The Role of the Governor-General: Our Australian Head of State*, Australians for Constitutional Monarchy, 1997, p. 11.
- 11 Sir Paul Hasluck, *The Office of Governor General* (originally given as the William Quale Memorial Lecture Adelaide 1972), Melbourne University Press, 1979, p. 20.
- 12 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Review of the Reserve Bank of Australia Annual Report 1999-00: Interim Report: the Wagga Wagga Hearing*, February 2001, p. 19. See <http://www.aph.gov.au/house/committee/efpa/Rba9900/fullreport.pdf>
- 13 See for example A. Alesina and L. Summers, 'Central Bank Independence and macroeconomic Performance: Some Comparative Evidence', *Journal of Money, Credit and Banking*, Vol 25, No.2 (1993) pp. 151–162.
- 14 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Review of the Reserve Bank of Australia Annual Report 1998-99: Final Report*, June 2000. See: <http://www.aph.gov.au/house/committee/efpa/Rba9899/finalreport.pdf>
- 15 R. Maddox, 'The Government's stake in Monetary Policy', *BCA papers*, September 2000 pp.81–84.
- 16 The repeal of section 70 removes the requirement for the RBA to operate a superannuation fund for its staff, it does not prevent the RBA from running a fund if it decides to do so.
- 17 p. 16.
- 18 Such as a bank, building society or credit union.
- 19 *ibid.*
- 20 Joint Standing Committee on Public Works, *Reserve Bank of Australia Proposed Head Office Building Works*, November 2000. See: <http://www.aph.gov.au/house/committee/pwc/Reserve/fullreport.pdf>
- 21 See for example R. Webb, 'The big showdown: ACCC v big business', *Sunday Age*, 12 May 2002 and A. Fels, 'Its not a trial by media', *Australian Financial Review*, 20 May 2002.
- 22 The term regulated superannuation fund is defined in section 19 of the SIS Act. To fall within this category, a fund must have a trustee; the trustee must be a corporation within the meaning of paragraph 51(xx) of the Constitution or the fund's governing rules must state that its sole or

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primary function is the provision of old- aged pensions; and the trustee must have elected that the Act apply to the fund.

- 23 These amounts are sets by Ministerial Determination. The levy amount will increase to 0.03% and the maximum amount payable to \$66 000 under a new determination recently made by the Assistant Treasurer. See:

<http://assistant.treasurer.gov.au/atr/content/pressreleases/2002/065.asp>

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