



AUSTRALIAN
SENATE

Senate Standing Committee on Regulations and Ordinances

Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_regord_ctte

14 November 2019

Senator the Hon Jane Hume
Assistant Minister for Superannuation,
Parliament House
Canberra ACT 2600
Via email: Senator.Hume@aph.gov.au
CC: Shelby.brinkley@treasury.gov.au


Dear Assistant Minister,

**Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019
[F2019L01196]**

The Senate Standing Committee on Regulations and Ordinances (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and seeks your advice in relation to this matter.

Merits review

Senate standing order 23(3)(c) requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The above instrument permits the Australian Prudential Regulation Authority (APRA) to make a number of discretionary decisions. For example, it provides that APRA may change reporting periods for an authorised deposit-taking institution (ADI) (paragraph 9), or grant an extension of time for an ADI to provide information to APRA (paragraph 11). Neither the instrument nor the explanatory statement indicates whether the decisions are subject to independent merits review.

Part 3A of the *Financial Sector (Collection of Data) Act 2001* (FSCD Act) provides that applications may be made to the Administrative Appeals Tribunal for the review of 'reviewable decisions'. Section 31 of that Act defines a 'reviewable decision' to include 'a decision to vary a reporting standard determined under section 13 for a particular financial sector entity'. Explanatory statements to similar instruments have previously stated that APRA's discretionary decisions under the reporting standards are 'reviewable decisions' within the meaning of the FSCD Act. This position was confirmed in advice provided to the committee in your letter dated 16 July 2019:

Broadly, decisions to determine thresholds, change reporting periods and grant extensions under the reporting standards are reviewable decisions under the *Financial Sector (Collection of Data) Act 2001* (the Act) and subject to merits review by the Administrative Appeals Tribunal.

However, the committee has since been informed that, having reviewed and considered the issue, APRA has now changed its position, and considers that the relevant decisions are *not* subject to merits review.

Accordingly, the committee requests your detailed advice as to why APRA's decisions under the instrument are no longer considered to fall within the definition of 'reviewable decision' in section 31 of the *Financial Sector (Collection of Data) Act 2001*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 November 2019**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website, and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to regords.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-002912

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

~~Dear Senator Fierravanti-Wells,~~ *Concetta*

I am writing in response to your two your letters on behalf of the Senate Regulations and Ordinances Committee, now the Senate Committee for the Scrutiny of Delegated Legislation, (the Committee) both dated 14 November 2019 which requested advice relating to *Financial Sector (Collection of Data) (Reporting Standard) Determinations Nos. 10 to 21 and 30 of 2019* (the Instruments).

The Committee has sought advice as to why the Australian Prudential Regulation Authority's (APRA) decisions under the Instruments are not considered to fall within the definition of 'reviewable decision' in section 31 of the *Financial Sector (Collection of Data) Act 2001* (FSCODA).

Also, in relation to the *Financial Sector (Collection of Data) (Reporting Standard) Determinations Nos. 10 to 21 of 2019* the Committee has sought advice as to:

- why the amended explanatory statements omitting information about merits review were tabled in Parliament after the disallowance period had expired, rather than before; and
- why the committee was not alerted to APRA's changed position and its intention to amend the explanatory statements to omit information relevant to merits review, noting the previous advice to the committee regarding equivalent instruments that merits review was available.

APRA's position on merits review

APRA's long-held position is that decisions made by APRA exercising discretions under its prudential and reporting standards are not subject to merits review. The standards are subject to extensive public consultation, through which APRA takes into account the impact on regulated institutions. Most of the discretions within the standards serve to allow APRA an efficient means to provide concessions or exemptions to the general rules. Often these are discretions of a relatively minor or operational nature. Moreover, Parliament granted APRA the authority to give itself such discretion within its standards, and it is difficult to envisage a circumstance in which an entity could be worse off by the exercise of the discretion than if APRA had not granted itself the discretion in the first place. As a result, in APRA's view it is not necessary or appropriate for exercise of these discretions to be subject to individual merits review.

Merits review is of course applicable where it is provided for in legislation. For example, whilst decisions under APRA's prudential standards are not subject to merits review, the enabling legislation, such as the *Banking Act 1959*, expressly provides that APRA's decision to issue a direction, including a direction to comply with the prudential standards, is a reviewable decision.

FSCODA does not expressly provide for merits review in relation to discretions exercisable by APRA under the reporting standards, other than in relation to a reporting standard made for an individual entity.

As a policy matter in this particular case, APRA considers decisions under the Instruments should be excluded from merits review. APRA's reporting standards collect financial data from regulated entities. APRA is mindful of the impacts of data collection on industry resources and undertakes a process of formal consultation on all changes to reporting standards. Major changes to data collections such as a new data collection and significant revisions to existing collections are subject to informal industry engagement, formal consultation and long lead times from initial consultations to implementation.

Material portions of the data collected are used to compile key macroeconomic indicators for Australia. The Reserve Bank of Australia uses the data to compile and publish its monetary and credit aggregates. The Australian Bureau of Statistics uses the data to compile the National Accounts. The data is also used to meet Australia's international reporting obligations. Delays caused by an entity seeking merits review could compromise these publications. As the publications are at an aggregate level, a significant lack of data from one entity caused by a merits review claim could prevent the release of the entire publication.

Why the Instruments do not fall within the definition of 'reviewable decision'

APRA may determine reporting standards to apply to classes of financial entities (such as the Instruments), but may also determine a reporting standard for a particular financial sector entity.

Section 31 of the FSCODA provides that a decision to "*vary a reporting standard determined under section 13 for a particular financial sector entity*" is a reviewable decision (paragraph (e) of the definition of "reviewable decision").

APRA considers that, when considered in context, paragraph (e) must refer to APRA's decision to formally change a standard that was determined for a particular entity, rather than referring to the exercise of a discretion, for a particular entity, within a class standard. APRA has advice of senior counsel supporting this view.

Timing of replacement explanatory statement and APRA's changed position

When APRA received queries from the Committee regarding the availability of merits review in relation to the exercise of discretions under reporting standards, it sought internal, and later, external legal advice. As a result, APRA initially incorrectly indicated the availability of merits review in the material that was tabled in Parliament.

At the time the replacement explanatory statements were prepared and lodged, external advice from senior counsel had confirmed APRA's long-held position, and therefore references to merits review were removed in the replacement explanatory statements. Unfortunately, by the time APRA had prepared the replacement explanatory statement, taking into account senior counsel's advice, the disallowance period had expired. APRA had not taken the disallowance period into account and the correspondence from the Committee had not mentioned the disallowance period or timeframe for lodgement of the replacement explanatory statement.

In my advice provided to the Committee in my letter of 16 July 2019, I relied upon this incorrect advice from APRA. I apologise for this error and have communicated my disappointment to APRA.

APRA has committed to provide additional information in explanatory statements for future reporting standards to clarify that decisions in relation to the reporting standards are not subject to merits review. Further, APRA outlined that it would lodge replacement explanatory statements to the *Financial Sector (Collection of Data) (Reporting Standard) Determinations Nos. 22 to 27 of 2019* stating the correct position.

APRA acknowledges that its previous response regarding the application of merits review for reporting standards has caused unfortunate confusion and will review its processes for tabling legislative instruments, ensure that relevant staff fully understand the parliamentary scrutiny process and in particular the importance placed on explanatory statements and the need to lodge any replacement explanatory statement before the disallowance period expires.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Jane Hume



6 February 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
Canberra ACT 2600

Via email: Senator.Hume@aph.gov.au
CC: Shelby.Brinkly@treasury.gov.au


Dear Assistant Minister,

Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019 [F2019L01196]

Thank you for your response of 22 January 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument. The committee considered your response at its private meeting on 5 February 2020.

The committee remains concerned about the scrutiny issues outlined below, and has resolved to seek further information in relation to this matter.

Merits review

Legal considerations

Your letter advises that APRA considers that section 31 of the *Financial Sector (Collection of Data) Act 2001*, 'when considered in context', only provides for merits review of APRA's decision to formally change a standard that has been determined for a particular entity, and does not provide for the merits review of discretionary decisions made by APRA under a standard. In the absence of further information to support this interpretation, it remains unclear to the committee why section 31 of the Act should be read down in this manner. Moreover, the committee has long considered that the failure of primary legislation to provide for independent merits review does not, of itself, constitute a sufficient reason to exclude such review from legislative instruments, such as APRA's reporting standards.

Policy consideration

Your letter also advises that, from a policy perspective, APRA considers that it is neither necessary nor appropriate to provide for the independent merits review of discretionary decisions made under its prudential and reporting standards, for the following reasons:

- extensive public consultation is conducted in drafting the standards;
- the discretionary decisions are minor or operational in nature;

- it is unlikely that an entity could be 'worse off' by the exercise of the discretion; and
- delays caused by an entity seeking merits review could compromise the Reserve Bank of Australia's compilation and publication of the monetary and credit aggregates, and the Australian Bureau of Statistics' compilation of the National Accounts.

Whilst noting this advice, it remains unclear to the committee how these justifications accord with the grounds for excluding merits review set out in the Administrative Review Council's guideline, *What decisions should be subject to merits review?*. For example, it is unclear why public consultation in the preparation of an instrument is a reason to exclude merits review of discretionary decisions made under the instrument, where such decisions have the capacity to affect obligations or interests. It is similarly unclear why the operational nature of the decisions alone should preclude the availability of review, without further information.

Accordingly, the committee requests your more detailed advice as to the reasons for excluding independent merits review of decisions made by APRA under its prudential and reporting standards, by reference to the factors which may justify excluding merits review set out in the Administrative Review Council's guideline, *What decisions should be subject to merits review?*.

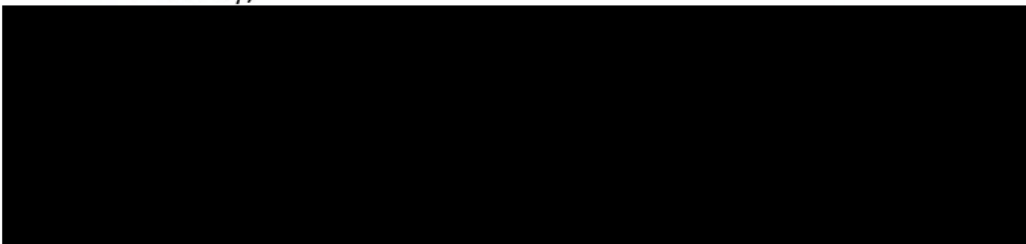
Noting that notice has been given to disallow the instrument, the committee would appreciate your response by **Wednesday 19 February 2020**, to facilitate the timely resolution of this matter before the revised disallowance period expires.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-000323

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

19 FEB 2020

Dear Senator ~~Fierravanti-Wells~~, 

I am writing in response to your letter of 6 February 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting further information in relation to the *Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019* [F2019L01196].

The Committee has requested more detailed advice as to the reasons for excluding independent merits review of decisions made by APRA under its prudential and reporting standards by reference to the factors which may justify excluding merits review set out in the Administrative Review Council's guideline, '*What decisions should be subject to merits review?*'

Why decisions under the reporting standards should not be subject to merits review

APRA considers decisions made exercising discretions under its reporting standards, including the reporting standard determined under *Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019*, should not be subject to merits review as they are financial decisions with a significant public interest element.

APRA's reporting standards collect financial data from regulated entities. This data contains critical indicators of a regulated entity's financial wellbeing, including data on an entity's assets, capital, liquidity, expenses and risk exposures. APRA relies heavily on this financial data to inform its supervisory actions towards its regulated entities. Without timely and complete data, APRA may miss indicators that an entity is taking on imprudent risk, or is in distress. The data therefore informs rapid actions APRA might take to restore or maintain investor confidence in the financial markets. APRA's supervisory decisions may be jeopardised if its receipt of data is unreliable due to entities seeking merits review under the reporting standards.

Further, as indicated in my letter of 22 January 2020, the data collected by APRA's reporting standards is often used to compile key macroeconomic indicators for Australia. The Reserve Bank of Australia uses the data to compile and publish its monetary and credit aggregates. The Australian Bureau of Statistics uses the data to compile the National Accounts. The data is also used to meet Australia's international reporting obligations.

Delays caused by an entity seeking merits review of APRA's decisions under one or more reporting standards could significantly compromise these publications. As the publications are done at an aggregate level, any lack of data from one entity caused by a merits review claim prevents the release of the entire publication.

Further detail on APRA's position

APRA notes that the Committee remains unclear as to why the definition of "reviewable decision" under section 31 of the *Financial Sector (Collection of Data) Act 2001* (FSCODA) should be read to exclude merits review of decisions made under reporting standards.

APRA acknowledges the Committee's advice that it has long considered that the failure of primary legislation to provide for independent merits review does not, of itself, constitute a sufficient reason to exclude such review from legislative instruments. Nonetheless, APRA's position is based on the following considerations.

The instrument in question permits APRA to make a number of discretionary decisions, including changing the reporting periods for an authorised deposit-taking institution (ADI) (paragraph 9), or grant an extension of time for a ADI to provide information to APRA (paragraph 11). Those discretions included in the instrument are authorised by paragraph 13(2)(f) of FSCODA, which states that reporting standards may include matters relating to:

"(f) the discretion of APRA, in particular cases, to vary reporting standards, including, but not limited to, the discretion to vary any times or periods specified in or under the standards..."

As correctly stated in the Committee's letter of 14 November 2019, Part 3A of FSCODA provides that applications may be made to the Administrative Appeals Tribunal for the review of "reviewable decisions".

Section 31 of FSCODA relevantly provides:

"reviewable decision means any of the following decisions:

...

- (d) a decision under section 13 to determine a reporting standard for a particular financial sector entity;
- (e) a decision to vary a reporting standard determined under section 13 for a particular financial sector entity."

Paragraph (d) describes "a decision under section 13 to determine a reporting standard for a particular financial sector entity". Section 13(1) does not explicitly provide a power to determine a reporting standard for a particular financial sector entity. APRA ordinarily makes reporting standards that apply to classes of financial entities (such as all ADIs or all general insurers). However, section 13(3) provides that reporting standards determined under subsection 13(1) may impose:

"(a) different requirements to be complied with by different financial sector entities or classes of financial sector entities, including (to avoid doubt) requirements to be complied with only by a particular entity or particular entities; ..."

Furthermore, subsection 13(4) clearly contemplates that a reporting standard may be determined in relation to a particular financial sector entity, directly referring to such when providing that certain matters may be included in such a standard. Similarly, subsection 13(5) refers explicitly to a reporting standard that would only affect a particular financial sector entity or entities.

There is also provision in section 13C for the Minister to direct APRA, under subsection 13(1B), to determine reporting standards to be complied with by a particular financial sector entity or entities.

Given the above, APRA considers that paragraph (d) of the definition of reviewable decision is clearly referring to a decision to determine a reporting standard for a particular entity. Paragraph (e) must then be referring to a decision to vary such a reporting standard, as opposed to making a decision using a discretion that has been created within a reporting standard in accordance with paragraph 13(2)(f). It is true that there is not a specific power to vary a reporting standard in FSCODA, however the Note to subsection 13(1) points out that:

“When APRA has determined a reporting standard, it has power at any time to revoke or vary the standard (see subsection 33(3) of the *Acts Interpretation Act 1901*).”

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Jane Hume



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**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
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27 February 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au

CC: Shelby.Brinkley@treasury.gov.au


Dear Assistant Minister,

**Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019
[F2019L01196]**

Thank you for your response of 19 February 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

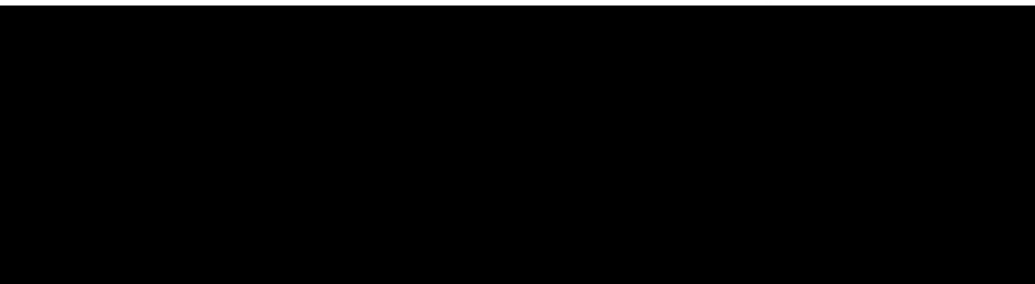
The committee considered your response at its private meeting on 26 February 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

In the future, the committee expects that where similar instruments do not provide for the independent merits review of discretionary decisions, the explanatory statements to such instruments should provide a comprehensive justification for the exclusion of such review.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation