

Chapter 3

Provisions of the Bill

3.1 Submissions clearly supported the Government's intention to introduce a fit and proper test for directors and senior managers of ADIs, with a number preferring option 3 over option 2. The International Banks and Securities Association of Australia agreed that option 3 provided the best way forward, stating:

It places a continuing obligation on ADIs to ensure their directors and senior management meet fit and proper criteria without going to the administrative effort, cost and moral hazard of APRA having to approve every appointment as in Option 2.¹

3.2 This chapter looks at the following proposed sections, which are based on the option 3 model, contained in the Bill:

- Section 19 which stipulates that disqualified persons must not act for ADIs or authorised NOHCs;
- Section 20 which defines a disqualified person;
- Subsection 5(1) which inserts a definition of 'senior manager';
- Sections 21, 22 and 23 which deal respectively with APRA's power:
 - to disqualify persons;
 - to determine that a person is not a disqualified person; and
 - to remove a director or senior manager of an ADI or authorised NOHC;
- Section 51 which allows for the reconsideration and review of decisions; and
- Section 62A which provides that an ADI or authorised NOHC is required to notify APRA immediately of any breaches of prudential requirements.

Most of these provisions are modelled on sections 24–27 and 63 of the *Insurance Act 1973*.²

1 *Submission 5*. The Australian Stock Exchange also supported Option 3. It submitted, 'ASX supports Option 3 because it represents a sensible balance between preserving the fundamental responsibilities and accountability of the Board and senior management while reserving necessary power to the supervisor to take action if required. Option 3 also provides a flexible approach, which can be more responsive to changed circumstances than the more prescriptive and interventionist approach of Option 2.' *Submission 9*.

2 Sections 24–27 of the *Insurance Act 1973* deal with disqualified persons not allowed to act for general insurers or authorised NOHCs; the definition of a disqualified person; and APRA's power to disqualify a person, to determine that a person is not a disqualified person and to remove a director or senior manager of a general insurer. Section 63 of the *Insurance Act* deals with the review of certain decisions.

Disqualified persons must not act for ADIs or authorised NOHCs

3.3 Section 19 of the Bill stipulates that a disqualified person commits an offence if the person is or acts as:

- a director or senior manager of an ADI (other than a foreign ADI); or
- a senior manager of the Australian operations of a foreign ADI; or
- a director or senior manager of an authorised NOHC.

3.4 This section also makes it an offence for a body corporate to allow a disqualified person to be or act as a director or senior manager of an ADI, or authorised NOHC.

Who is a disqualified person?

3.5 Section 20 defines a disqualified person as one who, at any time:

- has been convicted of an offence against or arising out of this Act; or
- has been convicted of an offence against or arising out of the *Financial Sector (Collection of Data) Act 2001*; or
- has been convicted of an offence against or arising out of the *Corporations Act 2001*, the Corporations Law that was previously in force, or any law of a foreign country that corresponds to that Act or to that Corporations Law; or
- has been convicted of an offence against or arising out of a law in force in Australia, or the law of a foreign country, where the offence related or relates to dishonest conduct, or to conduct relating to a company that carries on business in the financial sector; or
- has been or becomes bankrupt; or
- has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
- has compounded with his or her creditors; or
- APRA has disqualified under section 21; or
- has been disqualified under the law of a foreign country from managing, or taking part in the management of, an entity that carries on the business of banking or insurance or otherwise deals in financial matters.

3.6 While the conditions set down in this section are straightforward and objective, they do not recognise degrees or shades of seriousness.

3.7 The strict application of the criteria for disqualification concerned a number of submissions. The Credit Union Services Corporation (Australia) Limited (CUSCAL) drew attention to the broad range of proposed provisions governing disqualification and submitted that they do not:

...provide any measure of materiality to the criteria to be applied to 'disqualified persons'. It is possible that credit union employees with long

records of distinguished service may find themselves in breach of the provisions through a minor incident extending back over a lengthy career (an example could include a relationship debt issue, or previous but unspent convictions for potential minor ‘dishonesty’ offences).³

3.8 The Australian Bankers’ Association (ABA) also drew attention to the disqualification criteria, stressing in particular that the criteria apply irrespective of the gravity of the offence or the penalty incurred, including whether a custodial sentence was imposed. It underlined the same point made by CUSCAL that the provision takes no account of the magnitude of the offence or the passage of time. It stated:

The test will apply, in a sense retrospectively, to all existing employees of an ADI as well as to future employees. Some existing employees will have had long careers with the ADI perhaps joining a bank in their early years of work and performing their duties honestly and competently. The legislation will affect career paths and promotions within the ADI.⁴

3.9 APRA indicated that it was prepared to give close consideration to the personal circumstances of a disqualified person. For example it told the Committee that ‘without prejudging any decisions, APRA is likely to review sympathetically the position of persons disqualified by bankruptcies in the distant past’.⁵

Definition of senior management

3.10 Item 3 would insert the following definition of senior manager of an ADI or NOHC:

...a person who has or exercises any of the senior management responsibilities (including those specified in prudential standards) for the ADI other NOHC or for the Australian operations of the foreign ADI, as the case may be.⁶

3.11 A number of submissions expressed reservations about the broad use of the term ‘senior manager’. The International Banks and Securities Association of Australia suggested that the proposed standard would need to provide a more precise definition of senior management than is possible in the legislation so that ADIs are clear about who among their staff would be subject to the provisions of the legislation.⁷ CUSCAL made a similar point that the general definition would generate uncertainty in determining the level at which the provisions for disqualification would apply. It stated:

3 *Submission 7*, p. 3.

4 *Submission 6*, p. 2.

5 Bill Jones, opening statement, *Committee Hansard*, p. E3.

6 Clause 3 Subsection 5(1).

7 *Submission 5*, p. 2.

A workable and clear definition is essential to enable credit unions to implement the new regime effectively. This is particularly important given the strict liability offences attached to breaches of the proposed disqualified persons provisions. Breaches will carry prison terms and significant fines.⁸

3.12 The ABA reinforced this point. It stated:

Our members need greater clarity for compliance reasons in respect of the management positions within their organisations that are to be subject to the ‘fit and proper’ person test. For example, there are many positions in a bank described as ‘Senior Manager’ which, in fact, do not always qualify as executive positions. As a consequence, the reporting lines above these senior manager positions can be quite extensive.⁹

3.13 An amendment to the meaning of ‘senior manager’ agreed to by the House of Representatives will make the assessment of who is a ‘senior manager’ more certain by limiting it to that contained in the prudential standard issued by APRA. As noted in the Explanatory Memorandum ‘it will provide APRA with sufficient flexibility in defining “senior manager” to adequately apply the fit and proper test to senior managers’.¹⁰ APRA has advised the Committee that in developing the proposed standards covering the definition of senior managers and the imposition of fit and proper requirement it would consult extensively with relevant institutions.¹¹

3.14 CUSCAL supported the government amendment and was in agreement that it ‘offers a greater degree of clarity and will secure more effective implementation of the fit and proper tests for senior managers’.

APRA may disqualify a person

3.15 The Bill also allows APRA to go beyond the criteria stipulated in section 20 to disqualify a person deemed not to be a fit and proper person. Proposed section 21 states that:

APRA may disqualify a person if it is satisfied that the person is not a fit and proper person to be or to act as a director or senior manager of an ADI; a senior manager of the Australian operations of a foreign ADI or a director or senior manager of an authorised NOHC.

3.16 Unlike section 20, this clause does not lay down the criteria against which the assessment of a person’s fitness or propriety is gauged.

8 *Submission 7*, p. 2.

9 *Submission 6*, p. 1.

10 *Supplementary Explanatory Memorandum*, p. 1. Amendment 1 proposes to amend item 3 by omitting the words ‘including those specified in’ and substituting ‘within the meaning of’, House of Representatives, Amendments Financial Sector Legislation Amendment (No. 2) Bill 2002, 8 November 2002.

11 Bill Jones, opening statement, *Committee Hansard*, p. E4..

Prudential Standard

3.17 APRA explained that the starting point for the application of ‘fit and proper’ requirements resides with the board of a licensed institution. It indicated that it would establish a prudential standard requiring institutions to have policies and procedures to address fitness and propriety of directors and senior managers. It then stated:

APRA will review the policies established by institutions and monitor their compliance with these policies. In the event that APRA considers there are any deficiencies in either the policies established, or in their implementation, APRA will raise these issues with the institutions and seek action to remedy the situation. Should an institution not take the required action we would invoke direction or the proposed ‘fit and proper’ powers as appropriate.¹²

3.18 Similar to the development of other ADI Prudential Standards, APRA is to conduct extensive industry consultation on the draft standards prior to their implementation. According to the Explanatory Memorandum, APRA intends to review the proposed ‘fit and proper’ regime in consultation with industry after it has been put in place for two to three years to coincide with the review of fit and proper requirements for directors and senior managers of General Insurers (same approach has recently been adopted by APRA for General Insurers).¹³

3.19 APRA informed the Committee that the Prudential Standard to be developed will set down some key criteria that ADIs should address in formulating their policies and procedures. It indicated that Prudential Standard GPS 220 made under the *Insurance Act 1973* would provide a model. (See appendices 3 and 4) The criteria for the fit and proper test under this standard require that:

- (a) the person has not been convicted of an offence against or arising out of the Act or the *Financial Sector (Collection of Data) Act 2001*;
- (b) the person has not been convicted of an offence against or arising out of a law in force in Australia, or the law of a foreign country, if the offence concerns dishonest conduct or conduct relating to a financial sector company within the meaning of the *Financial Sector (Shareholdings) Act 1998*;

12 The *Explanatory Memorandum* stated that: ‘APRA will develop Prudential Standards requiring the board of an ADI (and authorised NOHC) to establish policies defining fit and proper standards for directors and senior managers and to monitor compliance with these standards on an ongoing basis. These Standards will also require ADIs (and their group members) to notify APRA promptly of any changes in directors and senior management and to provide it with details of these personnel. The standards will address APRA’s expectations as to minimum fit and proper criteria, ensuring the standards by which office holders will be judged are transparent.’

13 *Explanatory Memorandum*, p. 15.

- (c) the person has never been bankrupt, has not applied to take the benefit of a law for the relief of bankrupt or insolvent debtors, or has not compounded with his or her creditors;
- (d) the person has no actual or potential conflicts of interest that are likely to influence their ability to carry out their role and functions with appropriate probity and competence;
- (e) the person has adequate experience and demonstrated competence and integrity in the conduct of business duties;
- (f) the person is not of bad repute within the business and financial community...

3.20 The Committee is pleased to learn that APRA has confirmed that:

Prudential standards covering fit and proper requirements will include a requirement that ADIs and authorised NOHCs will need to submit to APRA a copy of its own internal policies established covering fitness and propriety of directors and senior managers.¹⁴

3.21 The Traditional Credit Union wanted information on the tests that could be used noting that any test would have to reflect the fact that some ADIs are mutual organisations. The National Credit Union Association submitted that:

Credit Unions are member owned and controlled mutual organisations with a long history of sound and prudential management. The only requirement for qualification, to nominate as a director of a Credit Union, is the individual to be a member and not be disqualified under the current Corporations Law. This is considered to be a fundamental and paramount principle in relation to the operation of mutual organisations such as Credit Unions, as well as a number of Building Societies, and any proposals which would interfere with that democratic right is opposed.

...

given the diversity of backgrounds of Credit Union directors, we are particularly concerned to ensure that no specific qualification criteria is prescribed in relation to academic or business activities.¹⁵

3.22 APRA accepted that a fit and proper test should not be a 'one-size-fits-all'. It explained:

While criteria such as honesty and diligence are applicable in all instances, other criteria such as adequacy of experience and demonstrated competence will need to be assessed in context. For example, the experience of an individual board member needs to be considered against the experience of a

14 *Supplementary Submission 4A.*

15 *Submission 2, p. 1.*

board collectively, and the experience/capabilities of a person acting as senior manager in a particular function may be more critical at one type of ADI than another.¹⁶

3.23 At the public hearing APRA explained further:

When assessing compliance with criteria such as expertise and experience, we will look at the context in which they are being applied. We will not be setting any minimum academic or other formal requirements per se. For example, ADI directors do not need to be ex-bankers. In reaching a decision about the fitness of those persons in particular institutions, APRA will have regard to, for example to the quality of the board as a whole, the supervision of senior managers and the structure of management and the particular qualities of individual directors and senior managers.¹⁷

3.24 In making its final point on this matter, APRA told the Committee that it would be ‘sensitive to the issues facing particular institutions’ but would not be ‘sympathetic to institutions which want to follow a minimalist or lowest common denominator approach’.¹⁸

3.25 It should be noted that APRA may also revoke a disqualification on application by the disqualified person or on its own initiative. The Bill, however, stipulates that APRA may only make the determination if it is satisfied that the person is highly unlikely to be a prudential risk to any ADI or authorised NOHC.

Committee View

3.26 The Committee notes the concerns expressed about the need for reasonableness in applying the criteria for determining whether an individual is a disqualified person. The Committee accepts that the language is clear and forthright and does not appear to allow for minor offences or offences that may have been committed decades earlier in a person’s otherwise long and unblemished career. The Committee, however, notes APRA’s advice that it would look sympathetically at the circumstances that have given rise to a disqualification.

3.27 The Committee also notes the broad and uncertain definition of ‘senior manager’ and recognises the need for the meaning of this term to be more precise in its application. It accepts that the proposed amendment to the provision would allow sufficient scope for APRA in cooperation with industry to establish a clear understanding of the application of the term ‘senior manager’.

3.28 Finally, the Committee understands that Credit Unions are member owned and controlled mutual organisations that must observe certain requirements in appointing directors. It acknowledges APRA’s assurances that it would give

16 *Submission 4*, p. 2. See also Bill Jones, APRA, opening statement, *Committee Hansard*, p. E3.

17 Bill Jones, opening statement, *Committee Hansard*, p. E3.

18 Bill Jones, opening statement, *Committee Hansard*, p. E4.

consideration to the qualification criteria for certain institutions particularly in applying strict academic or business requirements. It further notes APRA's assertion that while honesty and diligence would be required in all instances, other criteria such as adequacy of experience and demonstrated competence would 'need to be assessed in context'.

3.29 The Committee agrees with APRA that the fit and proper test should not be one that is made to fit all. It is the Committee's view that the prudential standards to be developed by APRA hold the key to resolving the matters raised above. The Committee believes that matters such as refining the definition of senior manager and having the prudential standards accommodate the particular circumstances of institutions such as Credit Unions could be addressed and settled during the consultation process that APRA is to undertake.

3.30 The authority of APRA to determine that a person is not disqualified provides another avenue for APRA to make allowances for particular circumstances. The resolution of some of these concerns could also rest with an effective appeals process which is discussed below.

Removal of a disqualified person and appeal process

3.31 Having set down the conditions under which a person is a disqualified person, new section 23 then allows APRA to remove a director or senior manager of an ADI or authorised NOHC if it is satisfied that the person:

- is a disqualified person; or
- does not meet one or more of the criteria for fitness and propriety set out in the prudential standards.

3.32 Section 51B allows a person dissatisfied with a reviewable decision by APRA to have the decision reconsidered.¹⁹ Under this provision APRA must reconsider the decision and may confirm or revoke the decision or vary it in such manner as it thinks fit.²⁰ A person may also apply to the Administrative Appeals Tribunal for the review of decisions. This applies to a decision reached by APRA after it has been requested to reconsider a decision.²¹

3.33 There were no objections raised about the provisions allowing a disqualified person the opportunity to appeal. The matter of privacy and confidentiality, however, was raised. The ABA noted that inevitably, applications for relief against disqualification would be made to APRA and it asked that 'the interests of affected

19 Section 51B—Reconsideration of decisions. A decision made by APRA to disqualify a person or to revoke a disqualification is a reviewable decision under section 51B. The refusal of APRA to make a determination that a person is not a qualified person is also a reviewable decision under section 51B.

20 Section 51B(3).

21 Section 51C—Review of decisions.

employees should be protected with effective confidentiality requirements for these processes and the final outcome irrespective of the ultimate decision by APRA'.²²

3.34 CUSCAL echoed this concern. It submitted:

Applications for relief from disqualification provided for under the Bill will require a process that ensures confidentiality, privacy and procedural fairness are observed. CUSCAL considers a transition period important to enable APRA to develop a robust and sound process for such processes, and communicate its intention and processes in these new powers to ADIs.²³

3.35 APRA advised the Committee that during the process of considering whether a person should be deemed not fit and proper and/or should be disqualified it would 'note that such consideration is governed by the secrecy provisions contained in section 56 of the APRA Act 1998 and by provisions of the Privacy Act'.

Notification of appointments

3.36 As mentioned earlier, under the proposed legislation, ADIs are to apply their own fit and proper standards in the appointment of directors and senior management and are expected to monitor compliance with these standards. They are, however, required to provide APRA with details of their directors and senior management and to notify it promptly of any changes in those personnel.²⁴

3.37 This requirement is not set down in the legislation although APRA indicated that it would be a requirement in the Prudential Standards. According to APRA, while ADIs must notify it of the appointments of directors and senior managers, it is not APRA's intention to investigate or vet prospective directors or senior managers prior to their appointment.²⁵ Nor does APRA intend to examine formally the status of directors and senior managers each year. It informed the Committee that:

...as part of its routine supervisory oversight of ADIs, APRA will observe the appointment and conduct of directors and senior management. Should APRA come to a view there are questions about the fitness and propriety of persons then, in the normal course, we will raise those concerns and seek to have them resolved (eg by an ADI obtaining the removal of a senior manager from a position). In the event that our concerns were not satisfactorily addressed we would make use of the 'fit and proper' powers to be introduced into the Banking Act.²⁶

22 *Submission 6*, p. 3.

23 *Submission 7*, p. 3.

24 *Explanatory Memorandum*, p. 8.

25 *Submission 4*, p. 2.

26 *Submission 4*, p. 2.

Transition Period

3.38 In light of the self-reporting obligation and the strict liability applying to the provision that a disqualified person must not be a director or senior manager, a number of submissions referred to the need for a suitable transition period. CUSCAL stated:

Credit Unions will be required to review employment screening, promotion and vetting procedures. The new provisions are likely to require revisions and potentially investigations into the backgrounds of current and prospective senior staff. Issues of confidentiality and privacy must also be considered.

Credit unions directors are drawn primarily from the general membership of credit unions, reflecting the principles of democratic participation in corporate governance in the credit union sector. A transition period is necessary to ensure credit unions procedures are consistent with the requirements in the Bill, and credit unions have time to develop appropriate policies.²⁷

3.39 It endorsed the amendment proposed to the Bill to secure a three-month transition period.²⁸ It suggested that at least three months would be required to enable the necessary paperwork to be completed. The Committee supports this amendment.

Duplication of the supervision function

3.40 The matter of duplication by regulatory bodies in the supervision of ADIs was also raised. The National Credit Union Association was concerned at the supervisory authority duplication with ASIC requiring notification of changes in directors and the demonstration competency of senior management.

3.41 In response to the matter of duplication of functions, APRA stated that it was aware that regulated institutions are also required to notify ASIC of changes in the composition of boards of directors. Further it noted that both ASIC and APRA seek to review the competency and other qualities of directors and senior management when authorising new ADIs. APRA assured the Committee that it is 'working closely with ASIC to address any overlap in licensing processes'. ASIC also acknowledged that

27 *Submission 7*, p. 3.

28 The *Supplementary Explanatory Memorandum* states: this amendment introduces a short transitional period of three months during which the operation of new section 19, which states that disqualified persons under the new fit and proper regime must not act for ADIs or authorised NOHCs, will be suspended. It is considered that some regulated entities...may require time in which to assess which persons may be disqualified under the new provisions and for any application to be made to APRA to have them 'undisqualified'.

there is the potential for duplication but indicated that it is looking at ways to minimise such duplication.²⁹

Reporting breaches of prudential standards

3.42 Witnesses had no difficulty in accepting the statutory obligation to report breaches in prudential standards. They did, however, express concerns at the blanket terms used in the provision. CUSCAL raised concerns about the wording of proposed section 62A and its requirement for ‘immediate’ reporting of all breaches of prudential standards to APRA.³⁰ It informed the Committee:

This requirement may exceed current reporting requirements and does not, as drafted, provide APRA with flexibility in requiring reporting of minor or technical breaches. The drafting of this provision appears to exceed the policy outlined in the Explanatory Memorandum for the Bill, which sought to establish a clear legislative requirement for ADIs to report material breaches of prudential standards to APRA.³¹

3.43 Similarly, the ABA questioned the language used in the proposed section suggesting that this was not the intention and that it should be amended to make it clear that the matters to be referred would not extend to trivial, non-material breaches.³²

3.44 At the public hearing, APRA indicated that it was prepared to take a firm but sensible and practical approach to reporting breaches. It stated:

29 Parliamentary Joint Committee on Corporations and Financial Services, *Hansard*, Scrutiny of ASIC’s annual report, 2 December 2002, pp. 32, 68. ASIC informed the Committee that ‘it is part of a bigger project we have under way to try to make sure we make it as easy as possible for people to obtain their licence from a process point of view while still protecting the integrity of a proper licensing system’.

30 Item 24 inserts new section 62A which states that a member of a relevant group of bodies corporate commits an offence if:

- a) it becomes aware of any of the following matters:
 - i) it, or another member of the group, has committed a breach of a prudential standard applying to it or to the other member, as the case may be;
 - ii) it, or another member of the group, or the group as a whole, may not be in a sound financial position;
 - iii) ...and
- b) it fails to notify APRA of the matter immediately after it becomes aware of the matter.

31 *Submission 7*, p. 4. The *Explanatory Memorandum* stated under item 24 ‘This amendment provides that an ADI, authorised NOHC or a subsidiary of such institutions is required to promptly notify APRA of any breaches of prudential requirements (for example, licensing conditions or the Prudential Standards) or any information with a material bearing on the safety and soundness of an ADI or a group to which an ADI is a member.’ p. 27.

32 *Submission 6*, p. 3.

We have carefully considered the issue of defining material breaches in legislation but came to the conclusion that this would produce complicated drafting and give rise to potential loopholes which may serve to undermine the purpose of this measure. Materiality is, of course, both a subjective issue and a relative issue insofar as the significance of a breach of standard may vary according to the circumstances...

We appreciate that there are issues with timing and the mechanism by which any breaches are notified. We will seek to work with ADIs and regulated institutions to implement appropriate notification procedures...in this context we would expect a more immediate notification of breaches of prudential standards where they related to the immediate safety and soundness of an institution than we would for matters with less immediate effect. For example, we would expect immediate notification of matters affecting liquidity and solvency while we could accept a prompt but less immediate notification of matters such as breaches of requirements to notify APRA of changes in senior managers.³³

3.45 In summing up its approach to the notification requirement, APRA told the Committee that it is better for institutions 'to err in favour of notifying APRA of potential problems rather than to err in favour of silence as might have been the practice in the past for some institutions'.³⁴

3.46 In a supplementary submission, APRA provide further assurances that it was looking at ways to tighten the compliance regime particularly in regard to reporting breaches of its prudential standards. (see Appendix 5) It informed the Committee that APRA has commenced a comprehensive stocktake of its present supervisory and enforcement powers. It explained:

The aim is to identify all significant gaps and inconsistencies in supervisory arrangements in all sectors, with a particular focus on those that restrict APRA's effectiveness. This review is giving some detailed attention to the application of fit and proper powers. The review includes application of fit and proper powers across all APRA regulated institutions, establishing and maintaining a register of persons deemed not fit and proper; specifying that where a person provided false or misleading information to APRA in the course of APRA discharging its function or powers then a person may be deemed not fit and proper and/or disqualified; a requirement to be included in legislation for a regulated institution to notify APRA of appointments of directors and senior managers; a requirement for regulated institutions to notify APRA of the removal of directors and senior managers (whether by way of dismissal, resignation or retirement) and the reasons for such changes, and a requirement for a regulated institution to provide APRA with information in relation to a director or senior manager of which the ADI may be aware and that APRA should be reasonably be made aware of in order to form a judgement as to the fitness and propriety of those persons on

33 Bill Jones, opening statement, *Committee Hansard*, p. E5.

34 *ibid.*

a continuing basis. The outcome of the review may include the request for further legislative measures.³⁵

Committee view

3.47 The Committee agrees with the view that a practical approach should be taken to the reporting requirements for ADIs and NOHCs. Clearly the legislation intends for serious breaches to be reported immediately and the Committee welcomes the firm approach being taken by APRA toward reporting breaches. It notes that APRA is reviewing its current supervisory and enforcement powers giving particular emphasis to the application of fit and proper powers. It further notes that this review may suggest that additional legislative measures are needed to strengthen the disclosure requirements on people deemed not to be fit and proper.

Conclusion

3.48 The Committee believes that the proposed legislation would provide a sturdy framework upon which to build a robust supervisory regime for ADIs and NOHCs. Clearly most of the concerns raised about the application of the fit and proper test and the disqualification and removal of directors and senior managers of ADIs could be resolved in the prudential standards to be developed by APRA.

3.49 In the Committee's view, the proposed legislation provides a flexible and cost-effective means to determine the fit and proper status of directors and managers of ADIs. It also provides APRA with both the scope and power to ensure that directors and senior managers have the degree of probity and competence commensurate with their responsibilities. The success of the legislation rests, in the main, on the prudential standards set by APRA and its commitment, determination and ability to see them upheld.

3.50 The Committee agrees with APRA's approach that the implementation stage of the fit and proper test should undergo close monitoring, analysis and evaluation with a view to assessing its effectiveness and whether legislative changes are required to improve the supervisory regime of ADIs and NOHCs.

Recommendation

The Committee reports to the Senate that it has considered the provisions of the Financial Sector Legislation Amendment Bill (No. 2) 2002 and recommends that the Bill proceed.

SENATOR GEORGE BRANDIS
CHAIRMAN