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6 June 2025

Ian Beckett
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Dear Mr Beckett

Consultation on governance and fit & proper proposals

Thank you for the opportunity to comment on the Australian Prudential Regulation Authority's (**APRA**) Discussion Paper on proposed changes to the governance and fit and proper prudential requirements (**Discussion Paper**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 53,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits, large and small and medium enterprises and the government sector.

This submission has been informed by extensive engagement with our members who sit on the boards of APRA regulated entities, along with industry bodies, legal experts and management teams at financial institutions. The AICD's APRA Forum (**Forum**), comprised of directors from across the financial services sector, has considered this consultation in depth. We also thank the APRA Chair and Deputy Chair for directly engaging with the Forum during the consultation period.

Attachment A provides our detailed response to each of the proposals. To inform our submission we commissioned Michelle Levy, Partner, Allens, to provide analysis on a number of key questions (**legal advice**). This analysis is provided at **Attachment B** and referenced in the submission.

1. Executive Summary

The AICD recognises the critical importance played by banks, insurers and superannuation trustees to the functioning of the Australian economy and the welfare of every Australian. This central role compels an elevated regulatory focus on strong governance practices at prudentially regulated entities.

Sound governance is at the heart of a well-managed entity that meets meet its regulatory requirements and community expectations, and we are pleased that APRA has found that there has been improvement in practices across APRA entities since the Hayne Royal Commission.

The AICD supports APRA modernising the governance and fit and proper prudential requirements. It is also an opportune time to reflect on the growth of prudential requirements on the board since 2012 and the broader weight of regulation that has accumulated on regulated entities.

At a principles level, many of the proposals that APRA has set out in its Discussion Paper reflect good governance practices that the AICD itself advocates, such as strong succession planning with a focus on the board's collective skills and differentiation of the board and management roles.

However, the solutions canvassed by APRA in several instances are unduly prescriptive, and risk creating significant new regulatory burden, compliance costs and complexity that could undermine effective and efficient governance practices in the sector. The AICD is also concerned that several proposals have subjective elements (whether the board or a director has the appropriate skills) that will be challenging for entities and boards to implement and for APRA to supervise.

We are particularly concerned that the proposals will add to the significant weight of new prudential, and broader, regulation that has been imposed in recent years and has weighed on the productivity of entities. We encourage APRA to the greatest extent possible to utilise existing regulatory tools and powers to target governance deficiencies rather than impose new sweeping obligations across all entities.

Where APRA considers that new targeted obligations are necessary, we recommend the adoption of an 'if not, why not' approach in place of prescription canvassed in the Discussion Paper, including on tenure and intra-group governance arrangements. Framing certain governance requirements in this manner, with entities required to document and demonstrate how they have considered and met the desired governance outcomes in ways appropriate to their specific circumstances, would provide clear accountability for meeting governance outcomes without undue prescription.

In the interests of transparency, and given the scale of the proposed reforms, we encourage APRA to present additional evidence to justify the breadth of proposals. This is particularly the case given the wide-ranging powers afforded to APRA and limited appeal avenues for regulated entities (see **legal advice**).

In **Attachment B** we have responded to each proposal. Where the AICD has not supported a proposal, we have sought to propose an alternative or identify where existing requirements or powers could address the identified issue highlighted in the Discussion Paper.

Proposals that have prompted the strongest feedback from AICD members are as follows:

- **Tenure:** The AICD does not support the proposed arbitrary tenure limit of 10 years with the option of a two-year extension subject to APRA's explicit approval. This rigid proposal does not appropriately reflect the benefits that come from long-serving directors who have developed a deep understanding of an entity's complex operations, and the flexibility needed for boards to appropriately manage renewal relevant to their individual circumstances. If a limit is deemed necessary, we have proposed a tenure of 12 years with the option of an additional two-year extension at the entity's discretion (with rigorous "if not, why not" justification to APRA and use of regulatory powers where the justification is insufficient).

- **Group independence requirements:** The AICD does not support enhanced independence requirements for entities with group structures. The problem statement for this proposal is weak and the proposal risks material unintended consequences. These include undermining consistent governance and risk oversight across group structures and significant additional compliance costs. APRA should continue utilising its existing regulatory and supervisory powers to address intra-group conflicts concerns on an entity-by-entity basis. If APRA nonetheless wishes to be more prescriptive, it should specify the outcome targeted (i.e. robust conflict management protocols) rather than how that is achieved (i.e. mandating who can sit on which boards within group structures).

- **Fit and proper person requirements**: The AICD does not support the proposal that significant financial institutions (**SFIs**) be required to 'engage proactively' with APRA prior to appointment of *all* responsible persons, as outlined in the Discussion Paper. We are concerned that this risks creating a 'de facto' approval right as demonstrated by the threat of heightened supervision if an entity does not follow APRA's advice. The proposal also raises legitimate concerns about the natural justice afforded to individuals in a non-transparent process. APRA has existing powers that it can rely on when it has concerns about a particular appointment.

- **Board skills:** The AICD supports, in principle, enhancing the baseline requirements for identifying and evaluating the collective skills of the board and this being documented in a skills matrix. However, we caution against setting prescriptive requirements on the assessment and evaluation of individual director skills. A narrow or segmented set of obligations on individual skills risks undermining the collective accountability and decision-making of the board. A comprehensive obligation in respect of the collective skills and performance of the board, supported by a skills matrix, board renewal and evaluation, negates the need for specifying a narrow approach to individual skills.

- **Role clarity:** We do not support APRA's proposal for setting specific responsibilities for the chair, board and management in the prudential requirements. The proposed responsibilities for the chair, particularly in respect of culture and fit and proper assessments, are not consistent with the chair role and the collective decision-making nature of boards. Further, we consider this proposal is unnecessary and duplicative of obligations under the Financial Accountability Regime (**FAR**).

- **Complexity and volume of governance prudential requirements:** The AICD commends APRA for recognising the complexity and volume of board level requirements across the prudential framework. This problem should be addressed via changes to the prudential framework that detail where a board can delegate an obligation to a committee or management. We are concerned that the proposed guidance-led approach is not sufficient and will result in no material reduction in the weight of regulation on the board. This work in rationalising board level prudential requirements should take precedence over implementing the other proposals set out in the Discussion Paper.

Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Simon Mitchell, Senior Policy Adviser at smitchell@aicd.com.au or Christian Gergis, Head of Policy at cgergis@aicd.com.au.

Yours sincerely,

Louise Petschler GAICD
General Manager, Education & Policy Leadership

Attachment A – Response to proposals

Overarching policy comments

The AICD supports modernisation of prudential standards *CPS 510/SPS 510 Governance* (**CPS 510**) and *CPS/SPS 520 Fit and Proper* (**CSP 520**) recognising these requirements have not materially been adjusted since CPS 510 was introduced in 2012. Further, we understand the policy rationale for having largely cross-industry requirements, including a consolidated governance and fit and proper standard.

On balance many of the proposals are an articulation of better governance practices. Further, we understand that in some cases they represent APRA codifying existing supervisory practices. However, AICD member feedback has been consistent that in totality they are excessively prescriptive, will undermine the role of the board and impose additional regulatory costs at a time of subdued productivity.

In our response we have recommended changes to a number of proposals that would reduce the level of prescription and limit the potential for unintended consequences. We have not supported several proposals and consider that in these instances APRA should utilise its existing supervisory and enforcement tools to address governance deficiencies at particular entities rather than impose new requirements across all entities. While APRA may consider it more efficient from an operational perspective to introduce blanket rules across its supervised population, such an approach risks imposing additional costs and implementation challenges upon 1,700 regulated entities, rather than the rather than the relatively specific instances of weak entity or sector governance practices that inform APRA's problem statements.

The attached legal advice from Allens confirms the breadth of APRA's existing powers, underlining the point that, were APRA willing, it could be making far greater use of them to address governance concerns with regulated entities.

Level of prescription, a principles-based approach and 'if not, why not'

AICD members have provided consistent feedback that the proposals in many areas are unnecessarily prescriptive and depart from the principles-based approach that characterises many other key components of the prudential framework and best practice governance regulation drafting more generally.

Further, for a number of proposals the outlined problem statement does not appear to be sufficiently robust to justify the application of new regulatory obligations applying to all entities. If APRA has compelling evidence, it should be presented in the interests of transparency and public accountability.

The AICD recommends that a number of the proposals can be orientated to a desired 'outcome' or set of principles rather than specifying particular governance arrangements. For example, rather than setting prescriptive board composition requirements for group entities (**Proposal 4**) our strong view is that this should be orientated to a principles-based obligation. The obligation could be framed as requiring a regulated entity board to document and demonstrate how it has considered and managed intra-group conflicts as a component of an expanded conflicts management requirement (**Proposal 3**).

Alternatively, if APRA considers specific bright lines are required in certain areas, we encourage APRA to frame obligations on an 'if not, why not' basis. If not, why not is a well-established mechanism to set governance obligations and expectations, including under the ASX Corporate Governance Principles and corporate governance obligations in the United Kingdom.

Rather than box-ticking compliance, it promotes a more deliberate and contextual approach to governance arrangements and recognises that a one-size-fits-all approach does not work across a population of entities in different industries, company sizes, and business models. Our view is that this model represents better practice for the drafting of governance regulation.

Our view is that 'if not, why not' can be utilised in many areas including to address APRA concerns with long-serving directors and intra-group conflicts.

Existing APRA powers

APRA has extensive existing powers to address governance weaknesses identified by supervisors. As detailed in the accompanying **legal advice,** these include licence conditions and directions powers under the respective Industry Acts in addition to existing prudential requirements. Further, as noted in the Discussion Paper, the increasing use of capital overlays has been a powerful tool deployed by APRA to address governance and risk deficiencies at particular entities. Lastly, since March 2025, the FAR applies to all entities and provides a new suite of regulatory powers, including those focused on the conduct of directors as accountable persons.

In totality, these powers provide APRA (alongside the Australian Securities and Investments Commission (**ASIC**) existing powers to litigate alleged breaches of directors' duties) with a broad suite of tools to target governance deficiencies at a particular entity. Further, in the past 12 months these tools have been utilised to target governance deficiencies at certain RSE licensees.[1] We note that Ms Levy in the accompanying **legal advice** concludes:

> *In our view, they are matters which could be addressed on a case-by-case basis. APRA has extensive powers now to influence and direct how a regulated entity and its connected entities are governed. It can direct an entity to appoint additional or different directors. It can require directors to attend training and it can require internal and external reviews of board performance to be undertaken*.[2]

Our policy position is that all regulators should be looking to utilise existing powers, based on current regulatory obligations, as a first step in addressing a particular market failure or conduct concern. We note that the problem statements contained in the Discussion Paper are silent on why APRA is not able to address a particular concern based on its current regulatory tool set. As a principle we do not support adding new layers of regulation and compliance requirements when it has not been established that existing requirements and regulatory tools are deficient.

If APRA has a view that its powers are not sufficient to address particular governance deficiencies, such as intra-group conflicts, it should articulate in greater detail why this is the case.

Overlap with the FAR and regulatory accumulation

APRA regulated entities and accountable persons have spent recent years implementing or preparing for the FAR. The FAR is designed to focus accountable persons on their obligations as directors and senior executives to oversee and manage the conduct of the entity. AICD members have noted that implementing the Banking Executive Accountability Regime and now the FAR has driven improvements in governance practices at entities, including documenting responsibilities at the board level.

While the Discussion Paper recognises there are areas of overlap, our view is that a number of the proposals are duplicative of the FAR, for instance the role clarity and aspects of the skills proposals. The

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[1] 'APRA varies BUSSQ's additional licence conditions' 13 March 2025; 'APRA accepts court enforceable undertaking from Cbus and launches investigation' 11 February 2025.

[2] Legal advice prepared for the AICD by Michelle Levy, Partner, Allens, June 2025, page 1.

FAR has only just commenced for insurance and superannuation entities and there is a strong case for APRA observing the effectiveness of its implementation prior to introducing broad new requirements.

More broadly, regulated entities and their boards have faced a significant increase in the overall weight of regulation in recent years through new sweeping requirements. Prominent examples include CPS 230 Operational Risk Management (**CPS 230**), the Consumer Data Right, mandatory climate reporting, design and distribution obligations, the scams prevention framework and critical infrastructure amendments. As APRA is aware the implementation of CPS 230 alone has been particularly challenging and costly for entities and has resulted in a significant increase in matters requiring board oversight and approval.

We urge APRA to be mindful of this accumulation and the impact it has had on the productivity of entities and their boards. In this environment any new governance requirements should be proportionate and targeted with a clear case that the benefits of the intervention will outweigh the additional compliance costs.

APRA supervisory capacity

Members have raised concerns with the capacity of APRA to supervise the full suite of proposals. The proposals are extensive and would require greater resourcing to support APRA supervision engagement on governance settings and governance decisions across all entities than is currently the case.

As outlined below in respect of **Proposal 2b** these concerns extend to the administrative workload that will be generated by SFIs being required to 'engage proactively' with APRA on responsible person appointments. As detailed in our response below, this proposal will be administratively complex to supervise and there is an expectation that the entity and individuals involved are afforded natural justice under a documented process if APRA raises concerns.

Proposal 1: Skills and capabilities

Require regulated entities to:

a. identify and document the skills and capabilities necessary for the board overall, and for each individual director
b. evaluate existing skills and capabilities of boards and individual directors
c. take active steps to address gaps through professional development, succession planning and appointments.

Collective board skills

The AICD in principle supports APRA enhancing the baseline requirements in CPS 510 in respect of identifying and evaluating the collective skills of the board and this being documented in a skills matrix. While we have concerns with the use of the terms 'measurable' and 'behavioural' (discussed below), a well-considered skills matrix is consistent with existing better governance practice at many entities. Our strong view is that a rigorous approach to collective skills identification and assessment via a comprehensive and up-to-date skills matrix negates the need for individual director skills identification, discussed below.

We look forward to engaging with APRA on the drafting of this proposal, were it to proceed, as it is difficult to assess the full potential impact absent draft prudential standards.

Individual director skills

We caution APRA against setting prescriptive requirements on the assessment and evaluation of individual director skills. An overly prescriptive approach would risk undermining the collective accountability of the board and may result in a narrow or 'cookie-cutter' approach to board composition.

As a matter of practice, entities and boards will seek to recruit individual directors with a particular background, skills and education to address gaps at the board. Further, existing directors will be periodically assessed for how their skills and knowledge contribute to the overall skills of the board as assessed against the matrix.

We would be concerned were APRA to require a segmented approach where directors are allocated into particular skills categories or buckets (e.g. an insurer is required to have a specified level of actuarial experience). An outcome of this nature risks a narrow, or segmented approach to board composition that belies the reality that boards are formed through a qualitative process that aligns the size and complexity of the entity with the skills matrix, existing board composition and available candidates to fill a particular position.

Well-run boards operate as collective decision-making bodies that draw on the experience and skills of all directors and do not allocate responsibility for particular areas, such as actuarial assessments, to an individual director(s). At its most extreme, it may result in circumstances where an individual director or group of directors have implicit responsibility for decision-making in a particular business area.

Directors duties, including to act in the best interests of the entity and with appropriate care and diligence, apply to all directors regardless of their background – for example, as the Centro case made clear, all directors are responsible for signing off on the financial statements regardless of whether they have an accounting background.[3]

As an alternative, and consistent with our support for Proposal 1A, we **recommend** that APRA set a high-level overarching principle of requiring a *well skilled and capable board consistent with a comprehensive, documented and up-to-date skills matrix*. This drafting approach should negate the need for prescriptive or narrow individual director skill identification and evaluation. That is, an overarching obligation will drive a collective view of skills and experience where specific skills (e.g. audit, legal, actuarial) held by directors are balanced against a broader view on directors' skills and background accounting for the entity's size, complexity and strategic direction.

Consistent with our response to **Proposal 6b** (re attributes or responsibilities for the chair, committee chairs and individual directors) we recommend that APRA articulate expectations for this in guidance on accountability statements on the FAR, if deemed necessary. A guidance led approach not only avoids duplication between the standard and FAR but also affords more flexibility to APRA to detail its expectations for what attributes/responsibilities it expects of these positions.

There is a significant difference between guidance and a prudential standard that has the force of law.

Measurement and behavioural attributes

The Discussion Paper notes that skills should be 'measurable and verifiable' and separately states that 'behavioural attributes should be observable'. We would do not support these elements being components of the prudential requirements on skills in an updated CPS 510. They are highly subjective and unclear terms that will result in uncertainty on interpretation for the entity and APRA supervisors. For

[3] AICD, *Centro: a year on*, August 2012, available here.

example, what level of interaction would APRA supervisors need to have with directors to satisfy themselves that relevant behavioural attributes had been observed? We would consider such assessments to be fraught territory for a prudential regulator and best left for the board as the accountable governance body, and the directors with individual legal obligations, to manage.

In most cases a skills matrix is based on a qualitative review of an individual's experience, skills development and education against the broader characteristics of the entity. It is also common for a director to be assessed in a binary Y/N method. It would impractical and overly complex to require a more detailed methodology, such as benchmarking the audit experience of one director against a desired target or other directors.

Our view is that requiring a robust, comprehensive and up-to-date skills matrix is sufficient to convey that the collective skills assessment cannot not be a box ticking exercise.

We **recommend** that APRA not require the inclusion of behavioural attributes as a component of the proposed prudential requirement on skills. To require behavioural attributes to be documented and assessed is highly unnecessary and duplicative of the fit and proper proposal, FAR and existing governance norms.

An assessment of behavioural traits, such as integrity and honesty, rightly occurs through the appointment process, including an enhanced fit and proper process as proposed under **Proposal 2a**. Behaviour is also clearly core to accountable person obligations under the FAR. Additionally, it is extremely common for directors to be expected to meet an entity's code of conduct, organisational values and the board charter as conditions of their appointment. Further, A small sample of publicly available skills matrices of SFI boards indicates that including behavioural traits is uncommon.[4]

Take active steps to address gaps

We in-principle support the proposal to require an entity to address skills gaps through professional development, succession planning and appointments. This is consistent with existing better practice at entities with mature governance arrangements and broader obligations for continuing professional development on AICD members.

As above, it is difficult to assess the full potential impact absent draft prudential standards. However, we note this overlaps with **Proposal 8b** on board renewal and urge APRA to avoid duplication when drafting these requirements.

We would not support APRA seeking to define what specific development, succession planning or appointments are necessary, as this appropriately remains the domain of the board.

Proposal 2: Fitness and propriety

a. Require regulated entities to meet higher minimum requirements to ensure fitness and propriety of their responsible persons.
b. Require SFIs, and non-SFIs under heightened supervision, to engage proactively with APRA on potential appointments.

Higher minimum requirements for fitness and propriety

The AICD in-principle is supportive of APRA setting out in greater detail what is required of baseline fit and proper assessment and reassessment of a responsible person under CPS 520. We understand that this is a

[4] Sample of board skills matrices on 2 June 2025: Australia and New Zealand Banking Group, AustralianSuper, Commonwealth Bank of Australia, HESTA, Insurance Australia Group, Westpac Group, QBE Insurance Group.

proposal that articulates APRA supervisory engagement with entities on some appointments, particularly at SFIs.

Absent reviewing proposed drafting changes to CPS 520 it is difficult to comment definitively on the expanded fit and proper criteria that is set out in the Discussion Paper. The exception is the proposed criteria of 'ability to commit sufficient time'. Including this as a factor would stretch the definition of 'fit and proper' beyond its ordinary understanding which is focused on the 'character, diligence, honesty, integrity and judgement' as is defined currently in CPS 520 under paragraph 30. Our strong view is that the workload of a director is a matter of capacity that is appropriately evaluated by the board, chair and by the prospective director. We **recommend** that this factor is removed as a component of a fit and proper assessment.

We also **recommend** that APRA is drafting these criteria avoid factors that are overly subjective, broad or duplicate. For instance, it is unclear what is entailed by 'character or regulatory references'. This implies a process that goes beyond existing references practices, vetting and resume checking. Further, we would not expect that an entity would be required to obtain a reference from APRA or ASIC for every responsible person appointment it makes. The regulator in many instances would not have an informed view on a responsible person's 'character'.

Lastly, a proposed standalone factor of 'reputational risk' has been proposed. This broad factor is not only highly subjective it is also duplicative of the factors that are already listed, such as criminal and conduct records. That is, an individual who has historical civil contraventions will by extension potentially impact the reputation of the entity. We **recommend** that in drafting that APRA avoids 'catch all' factors that are difficult to interpret for both the entity and the regulator, thereby exposing the individual to highly subjective critique by the regulator (e.g. based on adverse media commentary).

Engage proactively with APRA on SFI responsible person appointments

We do not support the proposal that SFIs be required to 'engage proactively' with APRA prior to appointment of all responsible persons. Our concern is that as framed in the Discussion Paper the 'engagement' will result in APRA having a de facto approval right that will undermine the role of the board to make appointments that are consistent with the operations of the entity and its strategic direction.

Currently a chair of an SFI may undertake an informal consultation with APRA on the appointment of a director or a CEO. This informal engagement allows the chair to canvas APRA's view on a particular senior appointment. However, what is being proposed is far broader in that it will establish an administrative process, will capture a far greater number of appointments and crucially carries the threat of APRA supervisory actions if an entity does not follow APRA's feedback on an appointment.

We appreciate that APRA is not seeking a legislated approval power, however the framing of the proposal is such that it will operate as one in practice without the rigour and accountability that would be applied to such a legislated obligation. The Discussion Paper states that if an entity does not address APRA's concerns with an appointment that 'this will inform the intensity of APRA supervision'. Members have been consistent that it would be a very brave entity that went against the regulator's view on an appointment and risk heightened supervision requirements.

There are currently around 50 SFIs. We estimate that these entities appoint in the aggregate hundreds of responsible persons per year. We are not satisfied that APRA currently has the supervisory capacity and resourcing support to form a view on the fitness and propriety of these appointments in a meaningful and timely manner.

Further, in the context of a de facto approval power we are also concerned about the natural justice and due process afforded to the entities and individuals involved in the APRA review of an appointment. For instance, concerns have been raised with us that APRA could raise issues with an individual based on unproven information (e.g. the role of an individual in a regulatory breach) or highly subjective assessments (regarding the character or leadership style of an individual). It is crucial that an entity and individual be afforded an opportunity to challenge or respond to any issues raised by the regulator.

It would be highly inappropriate and unjust for APRA to raise a red flag on a potential appointment without the right to challenge such a view. We would expect that APRA would follow a documented process for this consultation process rather than such 'feedback' being conveyed informally/orally, in a relatively non-accountable manner.

As noted in the **legal advice** APRA already has powers to intervene in appointments that it considers raises prudential concerns.

We **recommend** that APRA does not proceed with this proposal.

Were APRA minded to proceed with this proposal, we **recommend** that it be limited to only the appointment of accountable persons rather than the broader population of responsible persons. Further, we recommend that APRA publish detailed guidance on the process for engagement on appointments. This guidance includes the timeframes for APRA consultation and on what grounds APRA may raise concerns with an appointment. Entities and the individuals involved should be afforded the opportunity to respond to any concerns, including challenging the information that APRA has relied upon to reach a particular position.

Proposal 3: Conflicts management

a. Extend current RSE licensee conflict management requirements to banks and insurers.
b. Require regulated entities to consider perceived conflicts, in addition to actual and potential conflicts.

Extend RSE licensee conflict management requirements to banks and insurers.

The AICD supports in-principle the high-level harmonisation of conflict management requirements across the regulated industries. We recommend that this harmonisation is done in a limited and light touch manner that reflects that there exists a myriad of obligations, both inside and outside the prudential framework, that require an entity or director to consider and manage conflicts.

As noted in the Discussion Paper, *CPS 220 Risk Management* requires the development and maintenance of a conflicts policy. In addition, CPS 520 requires consideration of conflicts when assessing the appointment of a responsible person. Directors under the *Corporations Act 2001* (**Corporations Act**) (section 191) are required to disclose and manage conflicts of interest. The FAR requires accountable persons to prevent matters from arising that would adversely affect the entity's prudential standing or reputation – reputational impact is cited in the Discussion Paper as relevant to conflicts.

In totality these discrete obligations should effectively focus the mind of the director and senior executives on the identification and management of conflicts. They also provide enforcement mechanisms for APRA, and ASIC, to pursue entities and individuals for failing to properly identify and manage conflicts.

We **recommend** that in harmonising requirements that APRA utilise a minimal, light touch approach that makes use of existing prudential standards. We would not support, and do not think it is necessary, for SPS 521 to be extended to the banking and insurance industries. Rather, our view is that key principles from that standard be utilised in a consolidated and updated CPS 510, for instance establishing a conflicts management framework. To impose a new prudential standard on banks and insurers would be inconsistent with APRA's broader recognition of the sprawling and complex nature of the prudential framework under the Role Clarity proposal.

Register of duties and interests

We do not support banks and insurers being required to maintain and disclose a public register of duties and interests. We do not consider these registers provide meaningful transparency benefits for the broader community and drive a baseline, or compliance focused, mindset to conflicts disclosure that may ultimately harm internal conflicts identification and management.

In harmonising these requirements we **recommend** that this requirement be removed for RSE licensees and not extended to banks and insurers. This minimal change would not reduce the internal focus on conflicts identification and management.

Proposal 4: Independence requirements for banks and insurers

Strengthen independence on regulated entity boards by:

a. requiring that at least two of their independent directors (including the chair) are not members of any other board within the entity's group
b. making minor amendments to the independence criteria, including extending the prohibition on directors who are substantial shareholders in a regulated entity or group from being considered independent, to include material holdings of any type of security
c. extending the current requirement for bank and insurer boards to have a majority of independent directors to include boards of entities with a parent that is regulated by APRA or an overseas equivalent.

At least two directors who are not members of any other group board

We do not support the proposal that bank and insurer subsidiary boards are required to have that two of their independent directors (including the chair) are not members of any other *regulated* board within the entity's group. We understand from APRA is that this proposal, and 4c, is intended to only apply to APRA regulated entities and not non-regulated subsidiaries within the group.

It is common for both large and small banks and insurers to utilise group structures where there are both regulated subsidiaries (e.g. a life insurance company) and non-regulated subsidiaries (e.g. an employee services company). These structures bring operational flexibility that often account for the group operating in multiple markets. While some entities have moved to have distinct regulatory subsidiary boards from the group board, often at APRA's behest, we understand that more there are common boards across the group, both at regulated and non-regulated subsidiaries.

The proposed enhanced independence requirements for regulated subsidiary boards will significantly disrupt the governance arrangements at these entities and impose not insignificant compliance costs. One medium sized entity has estimated the cost will be at least $500,000 per year to meet this proposal. In isolation that sum may appear small, however when aggregated across all impacted entities, including non-SFIs, this does represent a material regulatory burden that will impact the productivity of these entities.

This impact of his proposal will extend beyond direct compliance costs, including disrupting meeting practice and the recruitment of new directors. Most troubling is that it could weaken current effective governance practices across a group. Members have been uniform in their view that common directorships and common boards within a group bring benefits in alignment of strategic and risk oversight across the regulated entities. This is particularly the case where the chair of the group entity is also the chair or a director of the subsidiary entities. For example, groups will often have common risks that apply to all its subsidiaries, such as cyber security and data protection. There is a significant benefit in a board considering risk and strategic considerations in a uniform and consistent manner. We are concerned that this proposal will have the perverse effect of weakening governance oversight across the group ultimately undermining the intent of APRA's overall package of proposals.

Further, as detailed in the attached **legal advice** the Corporations Act under section 187 provides that a director of a wholly owned subsidiary is taken to act in the best interests of that subsidiary if they act in the best interests of the holding company. Separately, legal advice prepared for the AICD by Bret Walker AO SC in 2022 confirmed that directors have considerable discretion to identify the best interests of the company, taking into account relevant facts and circumstances.[5]

We recognise that the Industry Acts, FAR and APRA's prudential framework place obligations on directors to consider and focus on the interests of the regulated entity, its financial stability and its beneficiaries.[6] However, there is clearly a tension between the APRA's proposal and concerns around intra-group conflicts and the Corporations Act director duties framework. This results in uncertainty for a board, and its legal advisers, on how to prioritise and assess any potential conflicts within group structures.

We are also not satisfied that this proposal will in practice reduce the concern that APRA is seeking to address. Ultimately it is the group executive and management who make the day-to-day decisions on the operations of the group, its subsidiaries and the allocation of resources. While the board oversees and makes key decisions it does not have management control in many of the areas where APRA may observe intra-group conflicts.

Existing powers

The problem statement for this proposal in the Discussion Paper is not strong. While APRA has identified issues with intra-group conflicts it has not established that this is widespread or such an ingrained issue that warrants such a disruptive and costly proposal that impacts all entities in a 'one size fits all' approach.

As noted in the Discussion Paper, APRA has already intervened with a number of entities where it has identified issues with the governance of intra-group conflicts. As detailed in the **legal advice** APRA has extensive regulatory tools to address intra group conflicts more generally. We note the example highlighted in the **legal advice** where in 2022 APRA issued directions to NESS Super Pty Ltd requiring it to amend its constitution so that it could appoint a second independent director. The intention was that the board would then exercise the power under the constitution to appoint the additional director in order to 'improve its governance and ensure the board's structure, skills and experience promote strong risk culture'.[7] While these directions were not strictly directed at intra-group conflicts it points the wide latitude APRA has to effect governance changes at an entity when it observes governance deficiencies.

We understand that APRA has heightened concerns with how intra-group conflicts may manifest during a crisis scenario. In particular, where a parent or related entity may inappropriately call on the assets of a regulated entity resulting in a deterioration of the entity's stability and operations. As detailed in the attached **legal advice,** this scenario is unlikely as the entity would has an obligation to notify APRA of the event and that it would already be working with APRA on a plan to address any financial stress. Further, in

5 Bret Walker AO SC and Gerald Ng advice for the AICD, February 2022, available here.

6 We note that under the *Superannuation Industry (Supervision) Act 1993* RSE licenses, via their governing rules, are required to prioritise the best financial interest of beneficiaries.

7 Legal advice prepared for the AICD by Michelle Levy, Partner, Allens, June 2025, page 4.

such a scenario the obligations on the subsidiary board in respect of the financial soundness of the entity the interests of beneficiaries would be paramount.

Our understanding of settings in the United Kingdom is that the Prudential Regulation Authority (**PRA**) adopts a bespoke or targeted approach where particular entities may have heightened requirements, for instance with ring fenced entities.[8] However, the PRA does not impose sweeping group independence requirements across all of the entities it supervises.

The results APRA have achieved in prompting changes to internal governance structures at certain entities to address intra-group conflicts reflects the effectiveness of its powers. This approach is appropriate and should continue on a case-by-case basis.

We **recommend** that APRA not proceed with this proposal and continue to rely on existing regulatory and supervisor tools to address this issue.

<u>Alternative – Principles based</u>

If APRA considers that intra group conflicts cannot solely be addressed via existing regulatory tools we **recommend** that any requirement be principles based under the expanded conflicts management requirement (**Proposal 3**). This could be framed as a requirement for the board of each regulated entity to document and demonstrate how it has robustly assessed and managed the potential for intra-group conflicts, including through board appointments and composition. A principles-based approach enables APRA to collect information on how intra-groups conflicts are being managed. It also assists APRA in utilising enforcement tools when it identifies that intra-group conflicts are not being appropriately managed.

Separately, APRA could consider requiring consideration of the effectiveness of a conflicts policy and processes within the board performance review for SFIs (**Proposal 5**).

<u>Alternative – If not, why not</u>

We consider that 'if not, why not' is a model that APRA could explore utilising if it is of the view that bright lines are required to address this concern. This approach could be combined with the principles-based alternative above.

The obligation could be framed as requiring an entity to consider having distinct board structures and composition of regulated subsidiaries to address intra-group conflicts on an 'if not, why not' basis. That is, the entity is given discretion on how it determines the composition of subsidiary boards. However, if it decides to not make changes, or has common boards across the group, it has to detail to APRA why it has made this decision accounting for its size, complexity and the effectiveness of existing governance arrangements.

Definition of independence

While the change to the definition of independence appears to be relatively minor we are not satisfied based on the information in the Discussion Paper that it is necessary.

The proposal is based on a concern that directors may have a conflict arising from holding 'other types of securities' that may impede a director's independent judgement. It is unclear what these securities may be and how they have given rise to APRA concerns. For instance, is APRA worried about directors holding significant stock options in the regulated entity or having provided a credit facility to the entity. It

8 PRA, Supervisory Statement | SS5/16 Corporate governance: Board responsibilities.

is conceivable this may be the case with smaller entities however our view is that these arrangements would still fall within the existing definition in CPS 510.

Further, the proposed definition includes 'personal relationships' as a component of the definition. The Discussion Paper is silent on the rationale for this proposed change. We are concerned that this could be broadly interpreted and capture business acquaintances, friendships or historical professional or personal connections (e.g. the individuals were executives at the same time at a particular entity). Senior directors by their nature often have extensive personal networks from a long history involved in the management and governance of regulated entities. Our view is that what APRA is seeking to capture is close business relationships, for instance where an individual may have invested in business or lent money to an individual or their business. As above, the existing definition captures these types of relationships.

We **recommend** the current definition be retained. Our reading is that the definition is flexible enough to address concerns with the holding of a wider varies of securities and separately material business relationships and APRA could clarify this in guidance.

Majority of independent directors

We in-principle support proposal 4c to require majority independent directors on regulated subsidiary boards where the parent is regulated by APRA or an overseas equivalent. This change will ensure a more consistent approach across the prudential framework. We will assess this proposal for the interaction with 4a when draft prudential standards are released.

Proposal 5: Board performance review

Require SFIs to commission a qualified independent third-party performance assessment at least every three years which covers the board, committees and individual directors.

The AICD in-principle supports requiring SFIs to undertake an independent board performance review every three years. This reflects existing practice at entities with mature governance arrangements. As noted in the Discussion Paper, it is consistent with the ASX Corporate Governance Principles.

However, we do not support a requirement that the board, and the chair specifically, be obliged to support and implement all recommendations in a review. The board should carefully consider the findings and recommendations and implement those that they consider appropriate, consistent with their directors duties and understanding of the operations of the entity.

Requiring all recommendations to be implemented would represent a significant erosion of the role of the board and chair and inappropriately cede key matters of governance to an external party. We **recommend** that this proposal be reframed as requiring the board to demonstrate how they have considered the recommendations of any review. Again, it must be stressed that the board collectively, rather than the chair (as an individual), would decide if and when recommendations were implemented.

Proposal 6: Role clarity

a. Define APRA's core expectations of the board, the chair and senior management. b. Provide additional guidance on which APRA requirements may be delegated to board committees and senior management.

Core expectations of the board, the chair and senior management

We are not satisfied that there is a strong policy case for APRA setting the core responsibilities of the board, the chair and senior management as a prudential requirement in CPS 510. While we understand APRA intentions with the proposal we do not believe that mandating responsibilities in a standard is a constructive approach to APRA's view that directors and management are not focusing on right things, including strategy over operational matters.

Further, we are concerned this proposal overlaps with the FAR and would be duplicative of the existing accountable person obligations, including developing an accountability statement for accountable persons of enhanced entities (i.e. generally SFIs). We understand that directors and executives currently undertake a thorough process to develop and maintain their accountability statements and detail their respective responsibilities. APRA has published guidance on expectations for accountability statements. Requiring specific responsibilities via CPS 510 is unnecessary in the context of this FAR obligation.

In respect of the role of the chair it is unclear whether 'culture' is in reference to 'board culture' or broader 'organisational culture'. Our view is that placing an obligation on the chair for organisational culture would be inconsistent with the chair role. While a board sets the 'tone from the top' it is ultimately senior management who have operational responsibility for organisational culture. Equally, it is difficult to define what is meant by board culture, and such a requirement, if having force of law, would need to be suitably clear and constrained. For the avoidance of doubt, we would not recommend such a requirement feature in the prudential standard.

We are concerned by the proposal that the chair be made responsible for fit and proper assessments. It is unclear if this would apply to all responsible persons across the entity or just directors. Other than the CEO, the board itself will generally not make decisions on the appointments of senior executives and senior managers, and it would be highly inappropriate for the Chair to be responsible for fitness and propriety of these appointments. As highlighted in the **legal advice** the chair has no power to exercise the company's powers separately or independently of the rest of the directors and that to delegate functions of the board to the chair may be inconsistent with the Corporations Act.

Further, we are also concerned with the practicalities of requiring this responsibility for chairs with respect to NED appointments, especially for those sitting on superannuation trustee boards. A number of these entities operate under the equal representation model, state legislation and/or restrictive constitutions that curtail the agency and discretion of a chair, in particular, to play a leading role in director appointments and influencing the composition of the board. We have had feedback from the independent chairs of RSE licensees that is can be exceptionally difficult to challenge or reject a proposed nomination from some nominating bodies under these restrictive settings. Our current view is that a mandated chair responsibility for fit and proper in this context may be challenging to meet in practice, placing the individual in an invidious position and potentially deterring well qualified independent directors from accepting chair appointments in future.

We stress Ms Levy's conclusion on this point in the **legal advice**:

> *Not only are the proposed obligations ('responsibilities') vague and uncertain, they are inconsistent with the way companies in Australia are governed. The Corporations Act vests the powers of the company in the board, namely the directors acting collectively. For the purposes of exercising the powers of the company, the Chair is only one member of the board. There is no reason to think that an APRA regulated entity would be better governed if this long-standing legal position was altered. To the contrary, there is a real risk that the benefits of the collective decision-making of a board would be lost.*[9]

We **recommend** that APRA does not proceed with this proposal. However, if APRA considers that there needs to be improvement in defining the responsibilities of the board, chair and senior management it

[9] Legal advice prepared for the AICD by Michelle Levy, Partner, Allens, June 2025, page 2.

should set these expectations in regulatory guidance to the FAR. For entities that are not 'enhanced' under the FAR this expectation could de detailed in CPG 510.

Use of guidance for detailing where board requirements can be delegated

We welcome APRA's recognition that the sprawling nature of separate and distinct board requirements throughout the prudential framework (estimated at 150) has weighed down boards at the expense of considering strategic issues.

Our strong view is that clarifying in guidance when governance requirements can be delegated to a board committee and/or senior management is not sufficient and will result in no meaningful reduction in compliance burden on the board. Directors, and their advisors, are very conscious of their obligations in law and guidance alone will not provide comfort that a specific obligation can be delegated contrary to the prudential requirement. Further, guidance in a Prudential Practice Guide can over time cease to be current based on industry developments and supervisory focus and awareness.

We recognise that at this point it is not practical for APRA to amend each prudential standard where there is a board level obligation to address this complexity. As an alternative, we **recommend** APRA considering utilising an attachment to CPS 510 to specify in table form each board level requirement in a prudential standard that can be delegated. Attachments to standards are common throughout the prudential framework to provide additional technical or definitional information, including in CPS 510 and CPS 520. In this instance, existing paragraph 18 of CPS 510 could be amended to note that the board may delegate specific prudential obligations as detailed in the relevant attachment and to the extent any conflict exists with another prudential obligations then CPS 510 prevails

Our view is that this approach would provide greater certainty and confidence to a board and may result in a meaningful reduction in the compliance burden on the board.

We would encourage APRA to take the step of rationalising board level requirements before imposing new requirements such as those contemplated by the Discussion Paper.

Proposal 7: Board committees

a. Extend the current requirement for bank and insurer boards to have separate risk and audit committees, to apply to SFI RSE licensees as well. Repeal this requirement for non-SFI banks and insurers, allowing flexibility for smaller entities.
b. Mandate that only full board members can be voting members of APRA-required board committees.

Extend the requirement for separate risk and audit committees to SFI RSE licensees

The AICD supports extending the requirement for separate risk and audit committees to SFI RSE licensees. This change will appropriately reflect the growth and increasing complexity of SFI RSE licensees and the importance of effective risk oversight.

While it is generally better practice to have separate risk and audit committees, we support repealing this requirement for non-SFI banks and insurers. Our expectation though is that many non-SFI bank and insurers will likely continue to maintain these separate committees and as a result any compliance savings from this proportionality will be minimal in the aggregate.

Only full board members can be voting members of APRA-required board committees

The AICD acknowledges that in general better governance practice is for only fully board members to be voting members of board committees. However, we are concerned that this proposal is a blunt policy measure which may result in unintended consequences through depriving a limited number of entities from external expertise that benefits the board's oversight role.

As noted in the Discussion Paper, we understand the use of non-board members is predominantly confided to RSE licensees and even then utilised in limited circumstances. For instance, a board may appoint an external expert as a voting member of the trustee's investment committee. The Discussion Paper does not establish a strong problem statement with this practice and there is no detail on where it has resulted in governance failures. In fact, to the extent APRA is concerned with the overall skills and experience of boards, particularly in the superannuation industry, this limited practice is a pragmatic approach to filling skills deficiencies in certain areas.

We appreciate there would be greater concerns if external individuals were voting members of core board committees such as the risk committee.

Our view is that the limited use of non-board members on board committees may be an appropriate governance compromise, particularly for smaller entities that may struggle to recruit directors or industry superannuation trustees that operate within the limits of the equal representation model. Member feedback indicates that using advisers alone is often not sufficient and that allowing external experts to be voting members is critical to recruiting and retaining this expertise.

We **recommend** that instead of an outright prohibition the requirement should be framed as a comply or explain obligation. Under this model, the entity would notify APRA when it made such an appointment to a board committee and detail why the appointment is necessary and consistent with the board's skill matrix.

Proposal 8: Director tenure and board renewal

a. Impose a lifetime default tenure limit of 10 years for non-executive directors at a regulated entity.
b. Require regulated entities to establish a robust, forward-looking process for board renewal.

Tenure limit

We do not support a hard 10-year hard tenure limit with the option of a two-year extension upon application to APRA as proposed in the Discussion Paper. Prescriptively setting an arbitrary tenure is not only out of step with international settings but will counterproductively weaken the governance of entities through depriving the board of experienced and skilled directors.

We are concerned that an arbitrary 10-year term limit (with the option of a 2-year extension at APRA's approval) will limit a board's role in determining its own appropriate composition and how it balances experience and entity knowledge with fresh perspectives and talent. Banking, insurance and superannuation are complex industries and there are benefits from having long serving directors who develop a deep knowledge of both the entity and the industry.

A particular concern is the impact this proposal will have on chair succession and appointment. As APRA is aware, it is very common for a chair of an entity to first be a long serving director of the entity (in a listed context, often 2 x 3-year terms). This reflects the significant experience, stability and skills benefits that come from a senior director moving into the chair position. We have received consistent feedback from directors that the 10-year term limit would unduly disrupt succession processes where an identified director is prepared for moving into the chair role. The result will be a lessening of experience and skills at the board table to the detriment of the governance of the organisation.

There are also instances where a chair may stay on for a short-extended period beyond a particular tenure limit in the entity's Constitution. This may be to help an entity navigate a particular transition or challenge, such as a merger, CEO succession or a period of financial difficulty.

Member feedback has been uniform that the option of applying to APRA for a two-year extension does not address concerns with a 10-year limit. Entities, boards and individual directors will not want to put themselves through a potentially arbitrary and unclear application process where the outcome is uncertain.

A number of the other proposals are directly relevant to APRA's concerns with board tenure and renewal. The proposals include board effectiveness, independence and skills. In conjunction with the board renewal proposal, which we support below, our view is that in totality the implementation of these proposals will drive a more considered focus on tenure and board composition.

With extensive APRA supervision of implementation we expect that in time the package of these changes will address overly long tenure at many entities.

For the reasons above, we **recommend** that APRA not proceed with this proposal.

<u>Alternative: 12 + 2 years</u>

Were APRA to proceed with a tenure limit we **recommend** this be set at 12 years with the entity having the option to extend a director for a further two years at its discretion. While a term limit still unnecessarily undermines the role of the board our view is 12 years is a compromise that gives additional flexibility to the entity while still addressing APRA's problem statement.

Our consultation with members indicates that 12 years as a limit more appropriately reflects existing practice, particularly as it relates to a chair succession. Further, we are aware of some entities that have director tenure limits of three by four-year terms in the entity's Constitution. From the Discussion Paper we note that there is a significant cohort of directors who have been on an entity board for greater than 12 years, with some greater than 20 years. A 12-year limit will address this cohort of long serving directors.

Where an entity extends a director for a further two years it should be required to demonstrate to APRA on an 'if not, why not' basis why the extension is necessary, without seeking formal approval. This element appropriately allows the entity a degree of autonomy to extend a director, particularly where there may be extenuating circumstances associated with the entity (e.g. a significant acquisition). In demonstrating why such an extension is necessary the entity would need to explain how it is consistent with the overall skills of the board and its renewal process. If APRA considers the justification is inadequate it can utilise its extensive powers to engage with the entity on board composition and the renewal process.

Renewal process

We support requiring a board to establish a forward-looking process for board renewal and consider this is consistent with stronger governance practices.

Our view is that a robust and documented renewal process is an 'outcomes focused' approach to addressing APRA's concerns with tenure at some entities. If implemented rigorously by an entity, supported by APRA guidance, our view is that this process will drive a balanced and considered approach to tenure.

Commencement, transition and proportionality

Commencement and transition

The AICD supports a sufficient transition period to allow both SFI and non-SFIs and their boards to prepare for meeting the obligations. While some requirements will be able to be met from commencement, such as skills assessments, others will take a period of time to implement.

At a minimum we **recommend** that the gap between finalisation and commencement is at least 18 months. Based on the Discussion Paper if the standards are finalised in June 2027 then the standard should commence no sooner than January 2029.

In respect of transition we **recommend** the following:

- For SFIs there is an additional one-year period from commencement to meet director tenure and any group independence requirements.
- For non-SFIs there is an additional two-year period from commencement to meet director tenure and any group independence requirements.

An appropriate transition period will provide boards with sufficient time to resolve composition issues associated with the new requirements, including having long service directors stepping down and the recruitment of new directors.

Proportionality

The AICD welcomes that APRA has sought to adopt a proportionate approach to a number of the proposals. Were APRA to proceed with group independence requirements, against the policy position of the AICD and others, we **recommend** that this apply only to SFIs.

A number of non-SFIs operate group structures that have multiple regulated entities within the group. The cost and governance complexity on these entities to meet any group independence requirements would not be commensurate with any overall governance benefits through enhanced oversight of intra-group conflicts.

As APRA is aware non-SFIs do not have the same level of resources or capacity as SFIs to implement multiple board and governance arrangements across a group. Further, these entities can struggle to recruit experienced and skilled directors and these proposals will exacerbate this challenge.

As stressed above, if APRA has supervisory concerns with the governance of intra-group conflicts at a non-SFI it can utilise its existing powers, notably licences conditions and directions, to address the concern. To impose sweeping group independence requirements across smaller entities will result in higher compliance costs for very limited governance benefits.

We support that under **Proposal 1 Skills** an entity will have a degree of discretion to meet the proposed requirements based on the business needs, size and complexity of the entity. Our view is that this is not strictly a proportionate approach but rather reflects the reality that the skills needed for being a director of a Big Four ADI will be different from that of a community owned ADI, for example. We recommend that this proposal is supported by detailed guidance on how an entity should account for differences in size and complexity when determining skills.

As noted above, we also **recommend** a proportionate approach to transition where non-SFIs are provided more time to implement certain proposals.

Attachment B – Michelle Levy (Allens, Partner) legal advice for the AICD

Provided as a separate pdf to this submission