To	Simon Mitchell and Christian Gergis, AICD
From	Michelle Levy, Allens
Date	6 June 2025
Subject	APRA discussion paper on governance

1 Your instructions

1.1 APRA has invited comments on 8 proposals set out in its March 2025 Governance Review Discussion Paper. The proposals are intended to strengthen the corporate governance of regulated entities. If adopted, APRA will implement the proposals by amending the prudential standards.

1.2 You have asked for our advice on certain aspects of the proposals. In providing our advice, we have considered the extent to which the proposals are likely to address the concerns APRA has about corporate governance. We have summarised these briefly below before setting out a summary of our advice. We have then set out your specific questions and our responses.

2 APRA's concerns

2.1 APRA says it continues to see substandard practices by certain entities in some areas, namely:

(a) inadequate skills and capabilities of directors;

(b) narrow approaches to assessing and reviewing fitness and propriety, in particular by applying a 'cursory tick-a-box exercise';

(c) insufficient attention to board performance assessments;

(d) problems stemming from overly long tenure; and

(e) inadequate management of conflicts of interest.

2.2 The proposals are intended to:

> provide a clearer statement of APRA's expectations and introduce more 'bright lines' in order to assist APRA to use existing supervisory and enforcement powers where entities have not dealt with persistent issues. This could include a higher supervisory risk rating, requirements to undertake a risk transformation process, adjusting capital requirements, or ultimately, directing an entity to remove a director or applying to the court for a director's disqualification.

3 Summary

3.1 In our view, the matters which are raised by APRA in the discussion paper are not systemic. Without understating the importance of the issues, they appear to be reasonably specific, both as the issue and the regulated entities which are affected. Given this, it is unclear why the Proposals should apply to all APRA regulated entities. There is no reason to think they would improve governance broadly, and there are some reasons to worry they could be detrimental. In particular, it is unclear in what way the independence requirements would improve the management of conflicts between regulated entities and their directors.

3.2 In our view, they are matters which could be addressed on a case by case basis where APRA has particular concerns about governance. 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.

3.3 The proposal to 'clarify' the role of members of the board, including the role of the Chair, is of particular concern. The proposed terms are very unlikely to 'clarify' those roles. Rather they would have the effect of expanding the legal obligations of directors, and in particular the Chair. 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.

4 Question 1 – APRA's powers

Explore the breadth of APRA's powers and recourse for entities to challenge supervisory intensity, adjusted capital requirements, licence conditions, directions powers.

4.1 APRA's powers are contained in the industry supervision act applicable to the relevant regulated entity: the Banking Act 1990, the Life Insurance Act 1995, the Insurance Act 1987, the Superannuation Industry (Supervision) Act 1993 and the Private Health Insurance (Prudential Supervision) Act 2015 (**Industry Acts**). They are very broad particularly when compared to ASIC's powers. In each case, APRA is given the powers to:

(a) make prudential standards which apply to regulated entities and connected entities of a regulated entity;

(b) apply conditions to the regulated entity's licence or registration; and

(c) give directions to a regulated entity or a connected entity of a regulated entity.

A connected entity is a subsidiary of a regulated entity or, in the case of an RSE licensee, an associate of the regulated entity (and therefore includes, for an RSE licensee, a parent company). A prudential standard has the force of law.

4.2 In addition, APRA has powers under the Financial Accountability Regime Act 2024 (FAR Act) including, relevantly, to give directions to regulated entities and to disqualify individual accountable persons.

Prudential standards

4.3 In addition to making a prudential standard which applies to all regulated entities or particular classes of regulated entities, APRA may make a prudential standard which applies to a single regulated entity and a single connected entity of a regulated entity. The former are legislative instruments, the latter are not. An entity may seek a review of a prudential standard which is not a legislative instrument.

4.4 A prudential standard must be consistent with the Act and regulations and it must be 'in relation to a prudential matter'. Prudential matter is defined in each of the Industry Acts in substantially the same terms with the differences being based on the different relationships between the entity and its customers and the different bases on which assets are held by an entity. In broad terms a prudential matter is a matter which (in turn) relates to:

(a) the interests of depositors, policyholders or members (depending on the entity), or their reasonable expectations;

(b) the financial soundness of the entity;

(c) stability in the relevant industry; and

(d) the 'integrity, prudence and professional skill' with which the entity conducts itself.

4.5 Accordingly, while APRA's prudential standards making power is not unlimited, the breadth of both:

(a) a power to do something which is 'related to' a matter; and

(b) the definition of prudential matters,

mean that APRA's powers are extensive and could be used to impose an obligation on a single regulated entity in order to uplift any shortcoming in its corporate governance. Having said this, we are not aware of APRA using its prudential standards making power in this way.

Licence conditions

4.6 APRA may impose an additional licence condition on a regulated entity of its own volition at any time (other than a private health insurer). Subject to the condition not being inconsistent with the general licence conditions, this power is not subject to any limitation in the Industry Acts. In particular, there is no requirement that the condition relate to a prudential matter. Therefore, APRA could and does impose licence conditions on an individual APRA regulated entity where it considers there is a shortcoming in its corporate governance which can be addressed by the condition or conditions.

4.7 Recent examples include the licence conditions APRA imposed on:

(a) United Super Pty Ltd (United Super) (CBUS) and BUSS (Queensland) Pty Ltd (BUSSQ) in August 2024 to address concerns regarding fitness and propriety processes for board members and fund expenditure management; and

(b) Mercer Superannuation (Australia) Limited in May 2024 to address risk management and compliance management deficiencies.

4.8 When APRA imposes additional licence conditions, it will usually also issue a direction to the entity to comply with the additional conditions.

Directions

4.9 APRA may give a regulated entity or a connected entity of a regulated entity a direction if the circumstances in the Industry Act apply. Again, these are substantially the same in each Act and in broad terms apply where there are serious matters requiring urgent attention, for example, if APRA has reason to believe that:

(a) the direction is necessary in the interests of depositors, beneficiaries or policyholders,

(b) the failure to issue a direction would materially prejudice the interests of depositors, beneficiaries or policy holders of the regulated entity insurer.

4.10 However, they also include circumstances where the regulated entity has contravened any of its legal obligations or is likely to do so. The Acts do not limit the exercise of a directions making power in those circumstances to a serious matter, although again APRA will typically give a direction only in response to a serious matter.

4.11 The kinds of direction APRA may give to a regulated entity or its connected entity are very broad, including, relevantly here, to require the entity to remove an officer of the entity from office or to not allow an officer from taking part in the management or conduct of the business except as permitted by APRA; and to require the entity to appoint a person as an officer for such term as APRA directs. They often accompany additional licence conditions, but not always.

4.12 For example in May 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 direction not only required the RSE licensee to amend the constitution but also gave it the power to do so. 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'. This example demonstrates the breadth of APRA's powers to address in a very specific way shortcomings identified in the governance of an individual regulated entity.

Disqualification orders

4.13 In addition to APRA's powers requiring a regulated entity or its connected entity to do something or refrain from doing some thing, each of the Industry Acts gives APRA the power to seek (but not make) a disqualification order in relation to a responsible officer. The order can only be made by the Federal Court. This requires a hearing and evidence. If APRA is successful, the court may order that a person is prohibited from acting as the responsible entity of one or more regulated entities for a period of time.

FAR Act

4.14 The FAR Act now gives APRA the power to disqualify a person, or a class of person, from being or acting as an accountable person of a regulated entity or a significant related entity of a regulated entity. APRA does not need to seek a court order. In order to exercise this power under the FAR Act, APRA must be satisfied that:

(a) the person has failed to comply with one or more of their accountability obligations under the FAR Act; and

(b) the disqualification is justified, having regard to the seriousness of the failure to comply.

4.15 The accountability obligations of an accountable person apply in addition to and overlap with obligations imposed by the prudential standards. They require the accountable person to conduct the responsibilities of their position as an accountable person:

(a) by acting with honesty and integrity, and with due skill, care and diligence; and

(b) by dealing with the Regulator in an open, constructive and cooperative way; and

(c) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would (or would be likely to) adversely affect the prudential standing or prudential reputation of the accountable entity; and

(d) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would (or would be likely to) result in a material contravention by the accountable entity of [the FAR Act or an Industry Act among other things and prudential standards and directions].

5 Challenging APRA's powers

5.1 If a regulated entity or its connected entity is subject to a prudential standard (which is not a legislative instrument) or a direction, it will breach the law if it does not comply with the standard or direction. It may ask APRA to review the decision and ask it to 'stay' the standard or direction while it is doing so. APRA is required to review the decision if the request is made during the prescribed time. If APRA confirms its decision or varies it (in a way the regulated entity is unhappy with), the regulated entity may seek a review of the decision by the Administrative Review Tribunal (**ART**). It may also ask the tribunal to stay the requirement in the standard or direction until it does so. If an accountable person is subject to a direction by APRA under the FAR Act they can also ask APRA to review its decision and again if they are unhappy with APRA's decision on review, they may seek a review of the decision by the ART.

5.2 The review by the ART is 'merit based'. The tribunal will determine the matter afresh having regard to all of the circumstances at the time of the review and form its own view about whether the standard, condition or direction which is the subject of the review should stand, be varied or revoked. In practice this means that the ART may substitute APRA's decision with its own if it thinks it is fair to do so.

5.3 Having noted the powers of a regulated entity to challenge an exercise of power by APRA, in practice this rarely occurs. We think this is in large part because APRA and its regulated entities have continuing relationships. There are often regular discussions between APRA officers and the management of regulated entities. APRA will also meet periodically with the board or Chair of each APRA regulated entity. The frequency of these meetings will depend on the issues APRA is concerned about at an industry or entity level. Even when APRA is taking enforcement action it will continue to engage with the entity. It will give the entity the opportunity to review the terms of licence conditions and directions. In practice this means that APRA will often persuade an APRA regulated entity to agree to their terms when they are imposed. Since the commencement of the FAR Act, APRA's capacity to persuade has likely been strengthened by the statutory obligation for the entity and its accountable persons to cooperate with APRA.

6 Independence requirements

What are the practical governance challenges this proposal would present for group structures and are there existing provisions in the Industry Acts that would allow APRA to address intra group conflicts in a more targeted manner?

6.1 Your question relates to proposal 4 which is intended to reduce conflicts within corporate groups which include a regulated entity. Proposal 4 is intended to apply to banks and insurers only (i.e. to all regulated entities other than RSE licensees). If adopted it will:

(a) require that at least two of a regulated entity's independent directors (including the chair) not also be a member of any other board within the entity's group;

(b) make '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; and

(c) extend 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.

We understand from your discussions with APRA that the first limb of this Proposal (requiring at least two independent directors to not also sit on another board within the group) is intended to require only that at least two independent directors of a regulated entity not also sit on another regulated entity's board where they are part of the same group.

6.2 These requirements are intended to strengthen independence on regulated entity boards. In the discussion paper APRA's says:

> … the current prudential standard does not take sufficient account of the potential for conflict between the interests of different group entities. The extent of these conflicts varies across groups. At one end of the spectrum, there are groups where interests are well aligned. In these cases, independent directors can serve on multiple boards and not encounter significant conflicts. At the other end, there are groups where interests are not well aligned. In these groups there is much higher potential for conflict between the interests of the regulated entity and other group entities. Particularly where conflicts of interest between parent and subsidiary exist, APRA has intervened to require entities to address these conflicts by restructuring boards, taking specific actions to address

conflicts, and appointing additional independent directors. In some instances, APRA has imposed capital overlays to encourage these governance concerns to be addressed.

6.3 We think there are three matters to be raised about this proposal:

(a) the first relates to the common directors;

(b) the second to the proposed definition of independent; and

(c) the third to whether, even on APRA's own terms, the proposal would be effective.

Reducing the number of common directors

6.4 If this proposal is adopted (on the basis of your discussions with APRA), each regulated entity board will be required to have at least two independent directors (including the Chair) who do not sit on the board of another regulated group entity. Your question is about the practical challenges of the proposal and alternative avenues to achieve a similar outcome. In the first instance, it will require groups which include a regulated entity to recruit additional directors (or reduce the size of one or more boards). It will also prevent a regulated entity having a common board with another regulated entity in the same group. We doubt this proposal would be effective in addressing intra-group conflicts, where they exist.

6.5 The purpose of this proposal is said to be to: 'strengthen independence by reducing the potential for an independent director to prefer (perhaps unconsciously) another entity over the interests of the regulated entity'. If the proposal is intended to apply only where there are two or more regulated entities in a group and only to directors who sit on more than one of those entity's boards, it is not clear which regulated entity's interests might be preferred, nor how. APRA refers to groups where interests are not aligned and where there is a conflict between the interests of the regulated entity and other (we assume APRA means APRA regulated) group entities. But the discussion paper does not provide any examples of when this has or might occur or in what way it compromises the governance of a regulated entity. This makes it difficult to respond to the proposal.

6.6 In the Royal Commission into misconduct in the banking, superannuation and financial services industry, a number of case studies provided examples of intra-group conflicts which led to poor outcomes for customers. However, the conflicts and their outcomes were most acute for for-profit RSE licensees. (RSE licensees are excluded from this proposal because different standards already apply to them.)

6.7 However, the conflicts in the case studies were in large part created because of the different duties of an RSE licensee and its directors. They have a duty to act in the best financial interests of members and to give priority to the interests of members. Banks and insurers do not have a duty to act in the best interests of its customers – depositors, policyholders or beneficiaries. (While a life insurance company must give priority to the interests of policyholders, that duty applies only insofar as the life company is dealing with statutory fund (policyholder) assets.) Accordingly, the law requires a regulated entity to manage any conflicts (as an AFS licensee) when they are providing financial services to customers and not avoid them or give their customers' interests priority as is the case for RSE licensees.

6.8 APRA's proposal assumes that a director of a regulated entity who is also a director of another regulated group entity will prefer the interests of one to the other despite their Corporations Act duties to act with care and diligence (section 180) and in good faith, in the best interests of the entity (section 181). In doing so, APRA does not appear to take into account the potential for section 187 of the Corporations Act to apply. It says that a director of a body corporate that is a wholly owned subsidiary of another body corporate is taken to act in good faith in the best interests of the subsidiary if the director acts in good faith in the best interests of the holding company, provided that the subsidiary's constitution authorises the director to do so.

6.9 The section does not exclude a regulated entity and, with the exception of an RSE licensee, there is nothing in the Industry Acts or otherwise which means this section should not apply to the directors of a regulated entity. The section could not be modified or excluded by a prudential standard. Accordingly, where, say, an ADI owns a general insurer, the directors of the insurer will be taken to act in the interests of the insurer if they act in the interests of the ADI.

6.10 We understand APRA may be concerned that conflicts for common directors might expose a regulated entity to risks in times of financial stress. In particular, APRA worries that the board of the regulated subsidiary might approve a proposal which jeopardises the entity's compliance with prudential standards in order to assist the regulated parent. However, we think the scenario is unlikely. In these circumstances it is highly likely the group would have an obligation to notify APRA of the event and that it would already be working with APRA on a plan to address the event.

6.11 Leaving that aside, the right or power of a director to act in the interests of a parent under the Corporations Act does not give the director the right or power to breach their obligations to one entity in favour or the other. A director's duty of care requires them to take all reasonable steps to ensure that the regulated entity complies with the law. We do not know why a director who was a director of, in our example, an ADI and insurer, would disregard their duty to take all reasonable steps to ensure that the insurer complies with its obligations because of their duty to the ADI. To the contrary, it is in the interests of an APRA regulated entity, which has an obligation to protect its prudential reputation, that its subsidiaries comply with their own legal obligations. In these circumstances there is no reason to think that the ADI and insurer should not have common boards. However, APRA's proposal would prohibit this.

Independent definition

6.12 The second aspect of this proposal is to amend the definition of independent director in the prudential standards. CPS 510 defines an ‘independent director’ as:

> a non-executive director who is free from any business or other association — including those arising out of a substantial shareholding, involvement in past management or as a supplier, customer or adviser — that could materially interfere with the exercise of their independent judgement. The circumstances that will not meet this test of independence include, but are not limited to, those set out in Attachment A.

6.13 The proposal is to define an independent director as:

> a non-executive director who is not an employee of the entity, or the group to which it belongs, and who is free from any business or personal relationship that interferes, or could reasonably be perceived to interfere, with their exercise of objective judgement *or acting in the interests of the regulated entity*.

6.14 While the definition of independent needs to be flexible, it should also be capable of being readily applied. In some respects, the proposed definition is more certain ('not an employee'), and to that extent is capable of being readily applied. However, the reference to 'business or personal relationships' is less clear than the current formulation - it is not clear whether it is intended to limit or expand the associations which under the existing definition could interfere with the exercise of independent judgment. This is not, in our view, an improvement to the existing definition.

6.15 The proposal assumes that a director of a regulated entity must always act in the interests of the regulated entity. While this is correct in the main, it may not be correct insofar as the director is the director of a subsidiary company. The law does not require a director of a regulated entity, except an RSE licensee (and in limited circumstances a life company) to act in the interests of the entity where the entity is a subsidiary and the director acts in the interests of the parent company. As noted above, the Corporations Act says that a director is taken to act in the interests of a company if it acts in the interests of its shareholder. The Proposals do not consider the relevance of section 187 of the Corporations Act.

Effectiveness

6.16 The final thing to say about this proposal is that it is not clear why it would be effective. Under CPS 510 the board of an APRA regulated entity must have a minimum of 5 directors. A board may also have more directors and in many cases the boards of regulated entities do. In any case, two directors will not be able to control a board. Where the management and resources made available to the regulated entity are provided by another group entity, the potential for 2 independent directors to have any real influence might also be expected to be limited.

6.17 In any case and again, APRA has the power now to address particular conflicts on a case by case basis. Indeed it says that it has done so in the discussion paper. Given that, it is not at all clear why additional requirements as are proposed are needed.

7 Fit and Proper

You have asked whether APRA's apparent reliance on section 20 of the FAR Act – requiring an entity to deal with APRA in an open, constructive and cooperative way - to require consultation with APRA on responsible person appointments by SFIs and non-SFIs under heightened supervision is beyond power, amounting to a de facto approval or veto power.

7.1 Your question relates to the following part of the discussion paper:

> The FAR requires regulated entities to take reasonable steps to deal with APRA in an 'open, constructive and cooperative way'. Consistent with this obligation, and to enable APRA to form a view of potential and incumbent responsible persons, APRA proposes to:
>
> - enable APRA to require an entity-led reassessment if concerns about a responsible person or candidate are not addressed by the entity in a timely manner. For example, a reassessment may be prompted in response to material regulatory findings (e.g. via prudential review) or performance assessment (e.g. via board performance review)
> - require that SFIs, and non-SFIs subject to heightened supervision, keep APRA informed of succession plans and nominations prior to appointment or public announcement
> - in prudential practice guidance, note that APRA may request an interview with any candidates for responsible person roles, prior to appointment or reappointment. This is on an exceptions basis, where further information is needed to allay any concerns it may have.

7.2 We do not know what APRA means by the first bullet point: 'enable APRA to require an entity led reassessment …'. APRA has the power now to require a regulated entity to undertake a self-assessment or to appoint an independent expert to undertake an assessment and in either case to provide a report to APRA of their findings. It can do so by means of a licence condition or direction. Moreover, APRA has imposed such licence conditions and directions on a number of regulated entities.

7.3 APRA also has the power, now, to make a prudential standard requiring a significant financial institution and a non-significant financial institution under heightened supervision, to 'engage proactively with APRA on potential appointments' of responsible persons. It is also plain that APRA can ask a regulated entity to arrange for APRA to meet with a candidate for appointment as a responsible person of a responsible entity. While APRA cannot require the person to meet with them, APRA could give a direction to a regulated entity not to appoint a person as a responsible person if they refuse to do so on the basis say, that APRA is not satisfied they are a fit and proper person.

7.4 Accordingly, despite APRA saying in the discussion paper that these proposals are 'consistent with' a regulated entity's obligation under the FAR Act to 'deal with APRA in an open, constructive and cooperative way', we do not think that APRA would need to rely on this obligation as the source of power to implement any part of this proposal. In substance, APRA already has, to use your expression, a 'de facto approval or veto power'. In addition, APRA also has a significant degree of influence with regulated entities making it unlikely that it would need to exercise that power. As we understand it, is not uncommon for a regulated entity to proactively engage APRA on proposed appointments in order that any issues can be addressed before an appointment is made.

8 Equal representation

What challenges does the equal representation model for the board composition of industry trustees?

8.1 The equal representation rules in the SIS Act require a trustee board to be made up of equal numbers of directors who are *nominated* by members or an organisation representing members and directors who are nominated by employers or an organisation representing employers. They may also have one or, with APRA's consent, more independent directors. But the important point for your question is that the equal representation rules require only that the relevant directors be nominated by members on the one hand and employers on the other.

8.2 In practice, the appointment of a member nominated, employer nominated or independent director will usually be by resolution of the directors following confirmation that the new director satisfies the trustee's fit and proper person policy. It is possible that a board might refuse to appoint a series of directors 'nominated' by members or employers and in so doing perhaps might be thought to limit the extent to which directors are as a matter of fact nominated by members and employers. However, to our knowledge the point has never been taken. Having said that, that might be because it is reasonably rare that a board refuses to appoint a nominee. It may well be a more frequent event if APRA's fit and proper person requirements become more stringent.

8.3 In saying this, it is relevant to note that, while many RSE licensees comply with the equal representation rules in the SIS Act, very few are required by the SIS Act to do so. Instead, those rules will be imposed by their constitutions and we understand in the case of some former and remaining public sector schemes, state-based legislation..

9 Clarifying board responsibilities

You have asked whether the proposals to clarify board responsibilities, including those APRA requirements that may be delegated to board committees and senior management are inconsistent with the current law which does not specify what must be done by a committee or a chair.

9.1 The proposal is for APRA to amend the prudential standards to 'include a clear articulation of the primary roles of the board, the chair and senior management'. APRA says:

> the purpose of the proposal is to be clear on APRA's expectations, and to facilitate better delegation to board committees and management. This should empower boards to spend more time on forward-looking strategy, risk and oversight.

9.2 We anticipate that APRA's expectations of what will be delegated to management or a committee will be set out in guidance rather than a prudential standard. On the other hand APRA proposes to prescribe by prudential standard those matters which must be undertaken by the board, namely:

- articulating the purpose and values of the entity, and desired culture
- overseeing development, approval and execution of the entity's strategy, objectives and risk appetite
- overseeing the effectiveness of governance and risk management frameworks
- providing leadership and constructive challenge to senior management.

9.3 It is plain that APRA has the power to require the board of a regulated entity to do certain things. It does that now. However, given that the prudential standards have the force of law and that significant penalties can apply when they are contravened, it is very important that they expressed in a way which means that a regulated entity knows what is required by it in order to comply. We worry that a requirement to 'articulate' purpose, values and desired culture' and even to provide 'constructive challenge' to management may not meet that standard.

9.4 The discussion paper also says that:

> APRA also proposes to identify the core responsibilities of the chair in prudential standards. APRA expects that this would include responsibility for culture, board performance and fit and proper assessments.

9.5 Again, casting a 'responsibility' as a legal requirement is we think misconceived. What does it mean to say that a Chair is responsible for 'culture'? How does the Chair discharge their responsibility and how will they know if they fail to do so? Again, the proposal is uncertain and unclear. We also query whether the responsibility is one which APRA can properly delegate to the Chair. It is a matter for the board, not an individual director, including the Chair, to influence the culture of an entity by setting the 'tone from the top'. They do so by example, as a group and individually, by appointing senior executives and by putting in place appropriate policies and remuneration arrangements.

9.6 The Chair of a board is nominated by the other directors to 'chair' their meetings. In order to do so, the Chair has certain duties and powers: they are of a largely procedural nature and they are not (with very limited exceptions) imposed by the law. Consistent with this, we do not think there is any impediment to APRA providing guidance on what it thinks a Chair should do and potentially even requiring, by prudential standard, the Chair to undertake certain procedural matters for the purposes of the conduct of board meetings and functioning of the board. However, we do query the extent to which APRA could exercise its standards making power to require powers of the board to be undertaken by the Chair.

9.7 Section 198A of the Corporations Act gives the board all the powers of the company except those which are reserved for the company in general meeting (shareholders). The board is made up of all of the directors acting together and, acting together, the board exercises the power of the company by passing resolutions. The Chair has no power to exercise the company's powers separately or independently of the rest of the directors. Section 198D then gives the board the power to delegate any of its powers and the board may choose to exercise that power by delegating certain powers to any person, including the Chair. However, that is a decision for the board and we think it would be inconsistent with section 198A to require the Chair to exercise a power of the company or to require the board to delegate a power of the company to the Chair.

9.8 The final aspect of this proposal is that:

> APRA proposes to amend its prudential standards to include a clear articulation of the primary roles of … senior management.

Again, using a prudential standard to articulate the roles to be undertaken by the board, the chair and senior management is in our view the work of guidance and not a prudential standard. And again, we worry that efforts to delegate functions to the Chair by prudential standards may be inconsistent with the Corporations Act. We would have the same concern if APRA purported to require any of the company's (board's) powers to be undertaken by management. Again in our view this would be inconsistent with the Act which gives the board all of the powers of the company including the power to delegate. In our view, an APRA standard could not override either power.

Thank you for asking for our advice. We would have pleased to discuss it with you.

Michelle Levy
Partner
Allens
Michelle.Levy@allens.com.au
T +61 2 9230 5170