

6 June 2025

General Manager
Policy Development
Policy and Advice Division
Australian Prudential Regulation Authority

Email: PolicyDevelopment@apra.gov.au

Dear Sirs,

RE: Governance Review – Discussion Paper (Discussion Paper)

Who we are

A national membership association, Governance Institute of Australia (Governance Institute) advocates for governance and risk management professionals, providing community and support to over 7,500 members.

As an Institute of Higher Education, the Governance Academy provides practical training and expert insights, equipping professionals with the tools to excel in their roles and drive better decision-making in their organisations.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, APRA-regulated entities, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC, the ATO and the Attorney General's Department. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group.

1. Introduction

Governance Institute endorses the remarks in the Consultation Paper about the importance of effective governance for APRA-regulated entities and the statement that 'governance arrangements need not look the same in every entity'. We also thank APRA for its engaged approach to consultation.

We have the following preliminary comments:

- We encourage APRA to consider the broader context for its proposals. Many APRA-regulated entities are also listed on the Australian Securities Exchange (ASX). Under the ASX Listing Rules they are required to report on their governance practices against the Corporate Governance Principles and Recommendations (ASX Principles and Recommendations). The ASX Corporate Governance Council closed consultation on a proposed 5th edition of the ASX Principles and Recommendations in February 2025 and the 4th edition remains in effect.¹ Many submissions to this consultation, including that of Governance Institute, commented on the prescriptive character of the proposals

¹ [Corporate Governance Principles and Recommendations](#), 4th edition, 2019, ASX Corporate Governance Council.

and the move away from the 'if not, why not' approach.² Under this approach listed entities may adopt alternative practices provided they disclose how their practices meet the spirit of the relevant Principle. This provides important flexibility for listed entities as it recognises that governance need not look the same in every entity. Where a matter dealt with in prudential standards is also dealt with by the ASX Principles and Recommendations APRA should consider whether it is appropriate to be consistent, for example, in relation to the criteria relating to independence. Where APRA considers a different approach is required for prudential reasons the rationale should be clear. Where possible APRA should not increase the regulatory burden on APRA-regulated listed entities by requiring them to adopt governance practices that differ from the ASX Principles and Recommendations, the leading Australian statement on good corporate governance practice.

- While the Consultation Paper remarks that the proposals are not 'expected to materially increase costs for regulated entities with mature governance frameworks and practices', our members report that there will nonetheless be costs for these entities such as the costs of appointing additional independent directors in groups – see below.
- The Consultation Paper refers to some of the proposals as stripping away 'unnecessary or duplicative rules and [reducing] burdens on regulated entities and their boards'. Our members support these aims, noting that reduction of regulatory burden is a recent regulatory theme with the Australian Securities and Investments Commission (ASIC) establishing a Simplification Consultative Group in 2024.³ ASX has recently announced streamlining of its listings process.⁴ As noted above, we encourage APRA to have distinct aims or problems it is addressing in each proposal that is not currently addressed by other regulation or legislation.
- APRA and ASIC jointly administer the Financial Accountability Regime (FAR Regime) designed to strengthen the responsibility and accountability of directors and the most senior and influential executives of financial institutions (Accountable Persons). FAR already imposes heightened responsibilities on Accountable Persons and APRA receives significant amounts of information under the Regime. We encourage APRA to consider the interaction between its governance proposals and the FAR requirements to ensure there is no duplication.
- From a regulatory policy perspective, we encourage APRA to use its existing powers to achieve its objectives rather than imposing prescriptive cross industry requirements. APRA already has significant supervisory and enforcement tools. Where it has concerns with particular directors or the governance practices of an entity its first option should be to use these powers. Similarly, from a regulatory policy perspective where APRA considers its existing powers are inadequate, we encourage it to seek legislative reform rather than imposing requirements through prudential standards and guidance.

² See [ASX Corporate Governance Council ASX Principles and Recommendations](#) 5th edition Consultation Draft, Governance Institute of Australia, 6 May 2024.

³ See [ASIC Annual Forum 2024: Bridging generations – regulating for all Australians](#), Speech, Joe Longo, 14 November 2024.

⁴ [ASX outlines opportunities to support Australian listed market](#), 8 May 2025.

Recommendation 1: We encourage APRA to:

- consider the broader context for its proposals and whether it is appropriate to be consistent with the ASX Principles and Recommendations and where possible not increase the regulatory burden on APRA-regulated listed entities by requiring them to adopt governance practices that differ from the ASX Principles and Recommendations
- have distinct aims or problems it is addressing in each proposal that is not currently addressed by other regulation or legislation. Consider the interaction between its governance proposals and the FAR requirements to ensure there is no duplication, and
- use its existing powers to achieve its objectives and where it considers its powers are inadequate seek legislative reform rather than imposing requirements through prudential standards and guidance.

2. Proposal 1 - Skills and capabilities**Behavioural attributes**

The Problem Statement in the Discussion Paper comments that observed shortcomings include 'a failure to specify expected experience, qualifications or behavioural capabilities'.

APRA proposes to:

...require all regulated entities to, on an ongoing basis, identify and document the *skills, capabilities and behavioural attributes* that the board needs to deliver its organisational strategy and perform its role. These attributes should be clearly defined and documented in a skills matrix. They should include specific expectations for the chair, chairs of board committees and other individual directors. Skills should be measurable and verifiable, and behavioural attributes should be observable.

It is unclear what is intended by the terminology 'behavioural capabilities' and 'capabilities' and if they differ from 'skills' and 'behavioural attributes'.

Governance Institute's position is that a skills matrix should only be used for skills and experience, not behavioural criteria, however described. These should be part of the initial, and ongoing, fit and proper analysis, required for appointment. They are of a different nature to skills. They are personal traits or behavioural qualities that each director would be expected to have on appointment, whereas skills are acquired competencies.

A skills matrix assists in assessing the collective skills of the board and identifying gaps. The ASX Principles and Recommendations focuses on skills and describes the matrix as a tool that can help the board identify gaps in collective skills – Recommendation 2.2 Commentary. The same analysis cannot be applied to attributes which all directors must possess.

Governance Institute recommends APRA avoid the terminology 'capabilities' in addition to 'skills' and 'behavioural attributes'. If this suggestion is not adopted, then the 'capabilities' should be clarified, including how it differs from 'skills' and 'attributes'. We consider the most appropriate way to confirm attributes is as part of the appointment process and the initial and ongoing fit and proper assessment.

SPS520.19 provides that 'For the purposes of the SIS Act and for the purposes of determining whether a person is fit and proper to hold a responsible person position, the criteria are whether...(a) it would be prudent for an RSE licensee to conclude that the person possesses the competence, character, diligence, experience, honesty, integrity and judgement to perform properly the duties of the

responsible person position'.⁵⁶ The Discussion Paper says: 'Proposals 1 and 2 overlap and reinforce one another. A regulated entity's fit and proper regime (Proposal 2) should set and assess a baseline of acceptable behaviour, character and qualifications to be on a financial services board or in other responsible person roles (effectively, being fit and proper is the 'ticket to play' as an industry leader)'.

The ASX Principles and Recommendations include a recommendation that appropriate checks are undertaken before appointing a director - Recommendation 1.2(a) - with the Commentary observing that this 'would usually include checks as to the person's character, experience, education, criminal record and bankruptcy history'.

Recommendation 2: Governance Institute recommends that APRA avoid the terminology 'capabilities' in addition to 'skills' and 'behavioural attributes'. As an alternative, the terminology should be clarified, including how 'capabilities' differ from 'skills' and 'attributes'. The most appropriate way to confirm attributes is as part of the appointment process and the initial and ongoing fit and proper assessment.

Recommendation 3: Governance Institute recommends the skills matrix should only be used for skills and experience, not behavioural criteria, however described.

(1) Individual director skills

While it is appropriate to identify behavioural attributes expected of individual directors, different considerations apply in respect of skills at an individual director level. The Discussion Paper observes that 'CPS 510 and SPS 510 require boards collectively to have the necessary skills, knowledge and experience to manage regulated entities appropriately. Boards are required to evaluate their collective performance on an annual basis'. SPS520.19 says 'For the purposes of the SIS Act and for the purposes of determining whether a person is fit and proper to hold a responsible person position, the criteria are whether...(b) it would be prudent for an RSE licensee to conclude that the person possesses the education or technical qualifications, knowledge and skills relevant to the duties and responsibilities of an RSE licensee'.

Principle 2 of the ASX Principles and Recommendations provides that

Structure the board to be effective and add value: The Board of a listed entity should be of an appropriate size and collectively have the skills, commitment and knowledge of the entity and the industry in which it operates, to enable it to discharge its duties effectively and to add value.

Recommendation 2.2 which supports Principle 2 is that a listed entity 'should have and disclose a board skills matrix setting out the mix of skills that the board currently has or is looking to achieve in its membership'.

The Discussion Paper problem statement includes as one of the shortcomings: 'failure to specify minimum skills and capabilities that individual directors need to fulfil their role'.

In the context of a board, a collective decision-making body, it is the collective skills of the board that are key. While the skills of individual directors need to be identified and appropriately verified, for the

⁵ All APRA Prudential Standards and Guidance referenced in this Submission are referred to by their abbreviated title.

⁶ There is an equivalent provision in CPS 520.30.

most part the identification is in the context of the skills needed on the board as a whole. It is acknowledged that, for example, in case of superannuation entity, SPS520 envisages each director having the skills 'relevant to the duties and responsibilities of an RSE licensee'.

There is a risk that in being too specific about subject matter expertise, a director who may bring skills needed to fill a gap, does not have all required skills – for example, an individual bringing specific cybersecurity or transformation experience. Conversely, a director identified as an 'expert' with a particular skillset may risk being subject to additional scrutiny or potential liability compared to other directors that are not identified as experts in that skill. If the required individual skills need to be identified, it would be prudent to limit APRA's expectation for these to, for example, an understanding of governance, such as for superannuation trustees, an understanding of fiduciary obligations and responsibilities.

Recommendation 4: Governance Institute considers that if the required individual skills are identified there is a risk that in being too specific about subject matter expertise, a director who may bring skills needed to fill a gap, does not have all required skills. If individual skills are to be identified it would be prudent to limit APRA's expectation for these to, for example, an understanding of governance or similar, such as for superannuation trustees, an understanding of fiduciary obligations and responsibilities.

(2) Verification of skills and capabilities

The Discussion Paper identifies observed shortcomings as including 'not verifying skills or capabilities, often relying heavily on self-assessment'. We agree that the verification of skills is appropriate. However, we recommend there be flexibility about how regulated entities implement verification. For example, an entity may engage an independent external provider to assist with verification of each director's skills at least on one occasion. On other occasions it may be that a director's self-assessment of their skills is challenged and verified through the observations of peers, the chair and the company secretary. We also refer to our comments on Proposal 5 below.

Recommendation 5: Governance Institute recommends there be flexibility about how regulated entities implement verification of directors' skills.

3. Proposal 2 - Fitness and propriety

The Problem Statement in the Discussion Paper observes that poor practice 'is typically characterised by a narrowly defined process that fails to generate meaningful outcomes'. Governance Institute broadly supports APRA taking steps to address this issue. However, as an opening observation we consider that fitness and propriety is a gateway to appointment as a director.

We also note a reference in the Problem Statement in the Discussion Paper to the absence of a requirement to consider 'important matters such as time capacity to fulfill the role'. We consider that director workload and the relationship to fitness and propriety is likely to be company dependent and that a director may be fit and proper for one entity and not for another. This is a potential unintended consequence of considering director workload in this context.

APRA provides context for its proposals in the Discussion Paper by the comment that 'several overseas jurisdictions can approve or veto appointments to prudentially regulated entities. While APRA does not have formal approval or veto powers, APRA seeks to heighten its oversight of, and entity focus on, the suitability of individuals in responsible person roles'. This raises the question referred to in Section 1 above of whether the appropriate regulatory mechanism for dealing with this issue is to seek legislative

reform rather than seeking to achieve a similar outcome through changes to prudential standards and guidance.

One of the proposals involves 'requiring regulated entities to notify APRA when concerns arise that may reasonably impact a person's fitness and propriety, even before a determination has been reached'. We consider this is problematic as it prejudices the outcome, and while the determination may ultimately be that the person is fit and proper, but in the meantime prejudicial and potentially unsubstantiated information has been provided to a regulator. It also does not align with SPG520.39 which provides that where an RSE licensee becomes aware of information that could lead to an assessment that a person is not fit and proper, 'taking reasonable steps as required under SPS 520 would generally include providing the person with a fair opportunity to put matters to the RSE licensee'.⁷ SPG520 also refers to appropriate use of information from a privacy perspective and notes that 'RSE licensees may have obligations under the Privacy Act 1988 relating to how they collect and use information about responsible persons. The obligations include informing responsible persons that information will be collected about them and the ways in which the information may be used and disclosed' - SPG52.40. SPS520.42 acknowledges that the legal position in relation to the use of information may be unclear.

In addition to these concerns, there are also likely to be issues at a practical level and each case is likely to be fact-specific which makes it difficult to specify triggers in advance.

APRA proposes to require SFIs, and non-SFIs subject to heightened supervision, to 'keep APRA informed of succession plans and nominations prior to appointment or public announcement'. Under the FAR Regime an Accountable Person's profile must be given to the APRA for registration before appointment by completing the appropriate form. APRA has 21 days from the date of the application, or if additional information has been requested, 21 days from when the information is provided. We consider APRA should not impose a longer period than that required for registration of an Accountable Person under FAR. We also remind APRA that listed APRA SFIs have obligations under the continuous disclosure regime.

In the context of succession plans our members report that regular engagement between APRA and regulated entities typically includes discussion about succession planning.

APRA proposes to include in prudential guidance a note that it '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'. We consider that involving itself in the appointment of directors and Responsible Persons is a significant step for a regulator, and by doing so it is potentially involving it in matters typically the regulated entity's responsibility. It also potentially compromises the independence of the regulator, because if APRA is satisfied following an interview, it has effectively given its 'imprimatur' to the appointment.

We support the proposed reduction of reporting obligations by the proposed alignment of role definitions to enable reliance on reports APRA receives under the FAR requirements rather than requiring two sets of reports.

One additional matter where we consider clarification would be helpful is what is intended by the terminology 'character or regulatory reference', particularly the concept of a regulatory reference.

Recommendation 6: Governance Institute considers that if APRA believes it does not have adequate powers to heighten its oversight of, and entity focus on, the suitability of individuals in responsible person roles it should seek legislative amendment rather than seeking to achieve a similar outcome through changes to prudential standards and guidance.

⁷ There is a similar provision in HPG 520 and APG 520.

Recommendation 7: Governance Institute considers the proposal to keep APRA informed of succession plans and nominations prior to appointment or public announcement is potentially problematic as it prejudices the outcome, and the determination may ultimately be that the person is fit and proper, but in the meantime prejudicial and potentially unsubstantiated information has been provided to a regulator.

Recommendation 8: Governance Institute considers that involving itself in the appointment of directors and Responsible Persons is a significant step for a regulator, which potentially involves it in matters that are typically the regulated entity's responsibility and also potentially compromises its independence.

Recommendation 9: Governance Institute supports the proposed reduction of reporting obligations by the proposed alignment of role definitions to enable reliance on reports APRA receives under the FAR requirements rather than requiring two sets of reports.

Recommendation 10: Governance Institute recommends APRA clarify what is intended by the terminology 'character or regulatory reference',

4. Proposal 3 – Conflicts management

We support the proper identification and management of conflicts of interest as a key aspect of good governance and note there are currently disclosure requirements applying to superannuation entities. It would be useful to understand what additional information is required, particularly from listed APRA-regulated entities which are already subject to a range of comprehensive disclosures which APRA proposes will also extend to Responsible Persons. This is a very large cohort of individuals for whom information will be disclosed and requiring disclosure of such information, particularly financial interests, will create privacy concerns for the relevant individual. We also question how this information will be assessed.

Recommendation 11: Governance Institute recommends APRA clarify what additional information is required in relation to conflicts management, particularly from listed APRA-regulated entities which are already subject to a range of comprehensive disclosures and requests further information about how this information will be assessed.

5. Proposal 4 - Independence

The Consultation Paper identifies two proposed structural changes and a revised definition of 'independence' to address the problems it has identified.

Proposal 4(a)

Feedback from our members indicates that Proposal 4(a) to require that at least two independent directors (including the chair) of a regulated entity are not members of any board within the entity's group is likely to be challenging in practice for several reasons. This is particularly the case for entities that operate under a non-operating holding company (NOHC) structure. We consider that the proposal would add substantive duplicative requirements, increase costs and resourcing difficulties without necessarily delivering a clear improvement in governance standards.

Listed companies are subject to ongoing scrutiny from shareholders on fees paid to directors. One member reports that if this proposal were implemented, the estimated additional directors' fees would be \$500K per annum given the changes that would be required to the various boards and committees.

The average fee for non-executive directors for companies with a market cap between \$2,530M and \$6,974M is \$209,014 and for chairs is \$351,898.⁸

There is also a limited talent pool of directors with ASX-Listed experience on a regulated entity, specifically in an ADI, superannuation or insurance entity, as well as other skill sets that may be required for an individual entity. To avoid conflicts of interest, directors will generally avoid being appointed on multiple entities of the same type, for example, ASX Listed ADIs. Requiring companies with a NOHC structure to appoint additional independent directors will significantly reduce the talent pool for directors with APRA-regulated entity experience.

To minimise the administrative burden and unnecessary duplication, NOHC and licenced entities often hold concurrent meetings. Appointing different independent directors, including the chair, will reduce the ability for companies to hold concurrent meetings and therefore increase duplication and associated costs, particularly with regards to the efficient running of board meetings and ensuring all NOHC directors receive required reporting for the licenced entity.

Allowing the same directors to sit on the NOHC and licenced entity does not impact the independence of directors. Companies will typically have conflict management protocols if the interests of the licenced entity conflict with those of the NOHC.

Recommendation 12: Governance Institute recommends APRA reconsider the proposal to require at least two independent directors (including the chair) of a regulated entity are not members of any board within the entity's group is likely to increase costs, reduce efficiency and create duplicative requirements without necessarily delivering a clear improvement in governance standards.

Proposal 4(b) – amendments to definition of independence

APRA proposes the following revised definition of 'independence':

...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.

We have the following concerns about the proposed definition:

- The problem statement refers to 'instances where directors considered to be independent under current prudential standard have shown a lack of independent judgement'. Given APRA has identified the issue as an absence of 'independent judgement' we question the change in the proposed definition to 'objective judgement'.
- We question the rationale for the removal of the word 'materially' from the current definition in CPS 510 and would welcome an explanation of what APRA is trying to achieve as well as how it intends to define 'material holdings'. We consider the current term 'substantial shareholding' should continue to be used to define what would be regarded as a 'material holding' and that no change is required.
- We also question the replacement of 'independent judgement' by 'objective judgement'. The term 'independent judgement', the term used in the ASX Principles and Recommendation, is widely used and understood. While the terms 'independent' and 'objective' are frequently used together, they have different meanings, one relates to freedom from influence and the other to an unbiased mental

⁸ See [A Review of 2023 Board Director Fee Adjustments](#), Guerdon and Associates, 12 February 2024

attitude.⁹ In replacing 'independent' with 'objective' APRA is potentially creating confusion. We recommend APRA retain the current formulation 'independent judgement'.

- We also question the introduction of the reference to 'acting in the interests of the regulated entity'. Directors of companies have a duty to exercise their powers and discharge their duties in good faith in the **best** interests of the corporation and for a proper purpose – section 181 of the Corporations Act. Given they have an existing duty we would welcome clarification from APRA about its intention.
- Section 187 of the Corporations Act provides that directors of wholly-owned subsidiaries of a body corporate are taken to act in good faith in the best interests of the subsidiary if (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company, (b) the director acts in good faith in the best interests of the holding company; and (c) the subsidiary is not insolvent and does not become insolvent due to the act. Therefore, the proposed definition requiring directors to act only in the best interests of the regulated entity may take away directors' ability to act in accordance with section 187 of the Corporations Act.

We consider APRA should retain the existing definition of 'independence' and aim for consistency with the ASX Principles and Recommendations - see Point 1 above.

Recommendation 12: APRA should retain the existing definition of 'independence' and aim for consistency with the ASX Principles and Recommendations.

Proposal 4(c)

We note that Proposal 4(c) refers to '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'.

We understand from recent industry consultation meetings that APRA has clarified that its intention is that this requirement only applies to **APRA regulated boards of entities** with a parent that is regulated by APRA or an overseas equivalent'. We would welcome APRA's public confirmation of this.

Recommendation 13: APRA should publicly clarify that Proposal 4(c) is only intended to apply to **APRA regulated** 'boards of entities with a parent that is regulated by APRA or an overseas equivalent'

6. Proposal 5 – Board performance review

Feedback from our members indicates that most SFIs carry out annual board, director and committee reviews and external board reviews at periodic intervals. For listed APRA regulated entities this is also covered by the ASX Principles and Recommendations - Recommendation 1.6. We agree that review should cover the board, its directors and individual committees.

There are often valid reasons why an external review will not take place at strict three-year intervals. For example, there have been new appointments to a board, and it is preferable to allow new directors time to settle into their roles before carrying out an external review. We acknowledge that SPS 510 and SPG 510 refer to annual board reviews and APRA's expectation of three-yearly external reviews. Our strong

⁹ See for example, [Mind of Jacka: Objectivity and Independence](#), Mike Jacka, *Internal Auditor Magazine*, April 2023 and [Independence and Objectivity Are Not the Same Thing](#), Richard Chambers, *Audit Beacon*, 30 October 2013.

preference is that the expectation of a three-year external review be included in guidance, accompanied by text noting that there will be circumstances that warrant delay of an external review.

In relation to the proposal for the independent triennial report to be submitted to APRA, we ask that consideration be given to the purpose of the board performance review and whether this default position could unintentionally impact the value of the process, which comes from obtaining a candid, objective perspective on the functioning of the board. While we recognise other prudential standards require various frameworks and/or policies to be independently reviewed on a periodic basis and for the corresponding reports to be submitted to APRA, we consider the board performance review to be distinct to such frameworks/policies as a corporate governance tool intended to support boards to improve their effectiveness. We recommend that instead APRA requires companies to confirm they have held their independent reviews and considered the reviewers recommendations, noting that APRA has existing powers to request a copy of the independent report in circumstances where required. By way of comparison, the Central Bank of Ireland (CBI) only requires external evaluations to be provided to the CBI where such evaluation is critical of the performance of the board.

We also note that the cost of an external board performance review for an entity can be significant ranging from \$30K (plus GST) to \$150k (plus GST).

Recommendation 14: We recommend APRA's state its expectation of three-year external reviews in guidance and that there be acknowledgement that there will be circumstances that warrant delay of an external review.

7. Proposal 6 – Role clarity

Define APRA's core expectations of the board, the chair and senior management

The Consultation Paper refers to APRA's proposal to amend its prudential standards to include a clear articulation of the role of the primary roles of the board, the chair and senior management. We also note that APRA has recently released Beta versions of Directors' guides for APRA-regulated entities. We have not had the opportunity to consider this material in detail, but a preliminary examination indicates that APRA has not indicated which areas it considers to be within the remit of the board and which can be delegated. We would be happy to engage further with APRA on this matter.

While the Corporations Act does not include a specific reference to the role of the chair, it has been the subject of considerable analysis, including in case law and in guidance.¹⁰¹¹ As the Discussion Paper notes the ASX Principles and Recommendation include commentary about the role of the chair. The Commentary to Recommendation 1.1 notes that the role and responsibilities of the chair should be set out in the board charter. Recommendation 2.5 provides that the chair should be an independent director. There is also guidance produced by industry bodies which discusses the role of the chair in detail.¹² A recent legal opinion also contains extensive discussion about the role of the chair.¹³ Given the

¹⁰ For example: *Australian Securities and Investments Commission v Mitchell (No 2)* [2020] FCA 109; *Hall and Ors v Poolman and Ors* [2007] NSWSC 1330; *ASIC v Rich* [2003] NSWSC 85.

¹¹ While there is no reference to the role of the chair in the Corporations Act there are references to procedural duties of the Chair in the Act. For example, section 251A relating to minutes.

¹² See *Role of the Chair*, Australian Institute of Company Directors, 2020 and *Chairman of the Board*, Australian Institute of Company Directors, 2nd Edition, 2013.

¹³ See *Opinion Directors' section 180 duty of care and diligence & regulatory compliance obligations*, Australian Institute of Company Directors, Michael Hodge KC and Sonia Tame, August 2024 paragraphs 45 – 47.

extensive body of existing case law and generally accepted practice we do not consider APRA should issue any further guidance on the role of the chair.

Recommendation 15: Governance Institute recommends against APRA providing any additional guidance on the role of the chair given the significant body of existing case law and generally accepted practice.

Provide additional guidance on which APRA requirements may be delegated to board committees and senior management

The proposal to provide additional guidance on which APRA requirements may be delegated to board committees and senior management is welcome.

Under the Corporations Act the starting point for consideration of delegation is section 198D which provides a broad power of delegation subject to any restriction in an entity's constitution. Directors may delegate any of their powers to a committee of directors, a director, an employee of the company or any other person. The exercise of the power by the delegate is as effective as if the directors had exercised that power themselves. Under section 190 of the Corporations Act a director remains responsible for the power delegated unless certain conditions are satisfied. These conditions are that the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Corporations Act and the constitution, if any, and the director believed: (i) on reasonable grounds; and (ii) in good faith; and (iii) after making proper inquiry if the circumstances indicated the need for inquiry; that the delegate was reliable and competent in relation to the power delegated.

While this is the basic principle, some powers must be exercised by directors themselves. For example, the Corporations Act specifies that certain matters are required of directors, such as a directors' declaration in relation to the financial statements (section 295) and approval of the annual directors' report (section 298).

Similarly, for example, in the case of ADIs, CPS510.18, and in case of superannuation entities, SPS510.9, provide: 'The Board, in fulfilling its functions, may delegate authority to management to act on behalf of the Board with respect to certain matters, as decided by the Board. This delegation of authority must be clearly set out and documented. The Board must have mechanisms in place for monitoring the exercise of delegated authority. The Board cannot abrogate its responsibility for oversight of the functions delegated to management'.

APRA imposes additional requirements through its Prudential Standards. The Discussion Paper notes that currently there are around 150 specific requirements in its standards for a typical entity board. However, from our consultation meeting with APRA, it is understood that APRA interprets the above provisions from the governance prudential standard as taking precedence over provisions in other standards referenced in the Discussion Paper. While we support this interpretation, as a practical matter many of the APRA Standards will continue to specifically refer to matters as being matters for the board. We welcome clarification from APRA about how it intends to address this issue.

The background to the requirements in the Prudential Standards is the result of the development of the Standards and Guidance over many years at different times. The Discussion Paper also refers to feedback to APRA that it would be helpful to clarify the core responsibilities of the board and its ability to delegate matters to board committees and senior management with the purpose of 'being 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'.

We consider this is a welcome development. Currently, there is a lack of clarity that the governance prudential standard provision for delegation applies in all cases or there are cases where it would be appropriate to allow delegation. Examples are in the table below.

Examples

SPS 530 Investment Governance (SPS 530)

This Standard provides an example of how the issue of delegation might be approached and the issues that arise. The objectives of SPS530 include the following statement: *'The Board of an RSE licensee is ultimately responsible for having an investment governance framework for the selection, management and monitoring of investments that is appropriate to the size, business mix and complexity of the RSE licensee's business operations'*. The reference to 'ultimately' responsible, implies delegation is permitted.

However, SPS 530.8 draws out certain matters, that the Board is required 'at a minimum' to 'approve' and a footnote to the paragraph says that 'Board' means the board of directors. SPS 530.8 states: The Board of an RSE licensee (the Board[FN3]) must, for the RSE licensee's business operations, at a minimum:

- (a) approve investment objectives for each investment *option* offered in each RSE;
- (b) approve an investment strategy, in respect of each RSE, that is consistent with the RSE licensee's duties to beneficiaries, including those in section 52(6) and (13) (if applicable) of the SIS Act and the requirements in this Prudential Standard:
 - (i) for the whole of that RSE; and
 - (ii) in respect of each investment option offered in that RSE;
- (c) monitor and assess regularly whether the investment objectives are being met; and
- (d) take appropriate and timely action regarding information contained in reports to the Board on investment matters.

Footnote [3] 'For the purposes of this Prudential Standard, a reference to 'the Board' is a reference to the Board of directors or group of individual trustees of an RSE licensee and 'group of individual trustees' has the meaning given in section 10(1) of the SIS Act'.

On a literal interpretation of the Standard the board itself must carry out these tasks. However, in the case of investment objectives for each investment option (SPS 530.8(a)), for a Fund where an investment menu has a multitude – indeed, in some case hundreds - of options, this would be an onerous time-consuming task for a board and not within the responsibilities APRA has articulated in the Discussion Paper as being central to a board role. It would be more appropriate for it to be clarified that this matter can be delegated

If delegation is permitted, this is an example of where it is appropriate for APRA to consider constraints that could apply, for example, whether:

- delegation is permitted only in the case of investment options other than MySuper on the basis MySuper is the default option of the Fund and likely to be the option with most members and funds under management and a greater level of Board engagement may be appropriate,
- the delegation must be to a board investment committee, with the specific role and expertise in considering investment related matters of the fund, or
- the investment committee must comprise a majority of non-executive directors.

SPS515 Strategic Planning and Member Outcomes, effective 1 July 2025 (SPS 515)

The requirement for board approval is found in new prudential standards, for example:

- SPS 515.08 - The strategic objectives must be approved by the Board.
- SPS 515.11 - The business plan must be approved by the Board and set out the RSE licensee's approach for implementing and delivering on its strategic objectives.
- SPS 515.17 - An RSE licensee must ensure that the use of any new fee power, or the use of an existing power for the first time, is approved by the Board." (SPS515.17).

The footnote says: 'For the purposes of this Prudential Standard, a reference to the 'Board' is to be read as a reference to the Board of directors (Board).'

SPS 160 Defined Benefit Matters

The Standard requires board approval for:

- SPS 160.10 – shortfall limits for each defined benefit fund within its business operations
- SPS 160.32(d) – a restoration plan where a fund is or is likely to be in an unsatisfactory position.

These items are of a technical nature and require no qualitative overlay. They would be best considered at Board committee level where there is the appropriate expertise and where the responsibility for ensuring controls are in place resides.

CPS 511 – Remuneration

The Standard provides:

- CPS 511.23 – the Board has ultimate responsibility for the remuneration framework and its effective application.
- CPS 511.24 – the Board must approve the remuneration framework policy.
- CPS 511.52 – the Board must approve the variable remuneration outcomes for senior managers (on an individual basis) and executive directors and on a cohort basis for highly-paid material risk-takers, other material risktakers and risk and financial control personnel.

Oversight of the remuneration framework and approval of the remuneration policy are clearly matters for the Board. However, approval of the variable remuneration outcomes for material risk-takers on a cohort basis, particularly where they are not executives. It would be more appropriate for the remuneration committee which has appropriate expertise to carry out this task.

Our preferred position is for it to be made clear that the governance prudential standard provision permitting delegation prevails over any other prudential standard imposing a requirement on boards.

If APRA reviews this position, the starting point should be that powers can be delegated unless there is a clear justification that a matter is so core to a board's responsibilities that it should remain with the board. As an alternative APRA may wish to consider whether as an alternative to not allowing a matter to be delegated, there should instead be limits on an ability to delegate in specific cases – such as to a board committee, or for entities with an office of superannuation trustee, to the head of that office, rather than to management

Recommendation 16: Governance Institute recommends that it be made clear that the governance prudential standard provision permitting delegation prevails over any other prudential standard imposing a requirement on boards. The starting point should be that powers can be delegated unless

there is a clear justification that a matter is so core to a board's responsibilities that it should remain with the board. As an alternative APRA may wish to consider whether as an alternative to not allowing a matter to be delegated, there should instead be limits on an ability to delegate in specific cases. We note that as a practical matter many of the Standards will continue to specifically refer to matters as being matters for the board and welcome clarification from APRA about how it intends to address this issue..

8. Proposal 8 – Director tenure and board renewal

Impose a lifetime default tenure limit of 10 years for non-executive directors at a regulated entity

The Discussion Paper observes that current APRA Guidance for SPS510 says 'there are limited circumstances in which tenure limits beyond 12 years would be appropriate'.¹⁴ The Problem Statement comments that there are almost 150 directors with a tenure greater than 12 years and of this group approximately 30 directors with tenure over 20 years, out of population of 1,500 non-executive directors across all APRA-regulated entities. The number of regulated entities in this group is not identified but the issue appears to relate to approximately ten per cent of directors of APRA-regulated entities.

APRA acknowledges in the Consultation Paper that the introduction of a lifetime tenure limit would make Australia's framework more 'prescriptive' commenting that overseas peer regulators do not have this power. The justification is that APRA lacks formal power to address tenure through the reappointment process and that its supervisory efforts to date have not been successful. The proposals include providing APRA with the discretion to grant two-year extensions in limited and exceptional circumstances.

As noted above in relation to Proposal 2, APRA observes it lacks the veto power over appointments that exist in three other jurisdictions. This suggests the appropriate regulatory mechanism for dealing with this issue is to seek legislative reform rather than to achieve a similar outcome through changes to prudential standards and guidance.

In the context of the ASX Principles and Recommendations, there has been extensive debate in Australia over some years about whether tenure should be a disqualifier for being classified as independent, as opposed to remaining as a board member. The current edition of the ASX Principles and Recommendations includes whether the director 'has been a director of the entity for such a period that their independence from management and substantial holders may have been compromised' – (Box 2.3.) as a factor in assessing the independence of a director. In relation to the last example - length of service as a director, the Commentary observes that:

...the Council recognises that the interests of a listed entity and its security holders are likely to be well served by having a mix of directors, some with a longer tenure with a deep understanding of the entity and its business and some with a shorter tenure with fresh ideas and perspective. It also recognises that the chair of the board will frequently fall into the former category rather than the latter. The mere fact that a director has served on a board for a substantial period does not mean that the director has become too close to management or a substantial holder to be considered independent. However, the board should regularly assess whether that might be the case for any director who has served in that position for more than 10 years.

¹⁴ There is a similar reference in HPG 510.

It is also important to recognise that reporting against the ASX Principles and Recommendations is on an 'if not, why not' basis.

It should be a matter for a board to decide the length of tenure for a director, particularly where the director is not otherwise prohibited from being a director that is not disqualified.

APRA should find an alternative means for addressing the issue in relation to the ten per cent of directors whose tenure it has identified as problematic. For example, if APRA has concerns about the way in which the relevant board is operating having regard to length of tenure of one or more directors, these may be concerns sufficient for it to consider other legislative mechanisms such as license conditions or heightened supervision.

The other point to note is that company shareholders have the right to elect or vote against the election of a director. Company shareholders can and do exercise this right. This proposal could be interpreted as impinging on the inherent right of company shareholders to determine the directors, including making their own determination that they believe a longer tenured director retains the necessary independence to continue to serve the best interests of the company.

Require regulated entities to establish a robust, forward-looking process for board renewal

The Discussion Paper says that it is proposed to require detail on 'length of term and maximum number of terms'. We consider the focus should be on the number of consecutive years rather than terms. In some cases, there may be an initial longer term, then subsequent shorter terms, which does not fit within this description. We also noted that to date this situation is not included in the Forms entities are required to complete for APRA.

Recommendation 17: Governance Institute does not support a lifetime tenure limit of ten years on the basis that it should be a matter for a board to decide the length of tenure for a director. It also potentially impinges on a key shareholder right.

Recommendation 18: Governance Institute recommends APRA seek an alternative means for addressing the issues in relation to the ten per cent of directors whose tenure it has identified as problematic mechanisms, such as license conditions or heightened supervision.

If you have any questions, please contact me or Catherine Maxwell, General Manager, Policy and Advocacy at catherine.maxwell@governanceinstitute.com.au.

Yours faithfully,

(Sgd) Katrina Horrobin

Interim CEO