# EXPLANATORY STATEMENT

## Issued by authority of the Assistant Treasurer

*Australian Prudential Regulation Authority Act 1998*

*Australian Prudential Regulation Authority Regulations 2018*

The *Australian Prudential Regulation Authority Act 1998* (the Act) establishes the Australian Prudential Regulation Authority (APRA), outlines the main purposes for which APRA exists, and grants functions and powers to APRA.

Section 60 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Australian Prudential Regulation Authority Regulations 2018* (the Regulations) is to remake the *Australian Prudential Regulation Authority Regulations 1998* (the 1998 Regulations)prior to ‘sunsetting’.

The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. The 1998 Regulationswill be automatically repealed on 1 April 2019.Legislative instruments generally cease to have effect after a specific date unless further legislative action is taken to extend their operation, such as remaking the instrument.

The Regulations remake the 1998 Regulationsby restructuring provisions to align with current drafting practices. These changes do not change the substantive meaning or operation of the provisions. The Regulations also update the list of agencies prescribed for the purposes of disclosing protected information or producing protected documents.

Draft Regulations were released for public consultation from 25 September 2018 to 23 October 2018. No submissions were received. Direct consultation with the relevant regulatory agencies (APRA and the Australian Competition and Consumer Commission (ACCC)) took place at the same time. As a result, three entities have been added to the list of agencies APRA can share protected information with, namely: the ACCC, the Australian Financial Complaints Authority andthe Department administered by the Minister administering the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Department of Home Affairs).

Details of the Regulations are set out in the Attachment.

The Regulations commenced on the day after registration.

**ATTACHMENT**

**Details of the *Australian Prudential Regulation Authority Regulations 2018***

This Attachment sets out further details of the *Australian Prudential Authority Regulations 2018* (the Regulations). All references are to the Regulations unless otherwise stated. References to a ‘corresponding provision’ are to the corresponding provision in the *Australian Prudential Regulation Authority Regulations 1998* (the 1998 Regulations).

Changes of a minor or machinery nature, such as references to section rather than regulation in accordance with modern drafting practices, are generally not specifically identified in this Attachment. Where the Regulations make changes that require further explanation, these are identified and explained in this Attachment.

Section 1- Name of Regulations

This section provides that the title of the Regulations is the *Australian Prudential Regulation Authority Regulations 2018*.

Section 2 - Commencement

This section provides that the Regulations commence the day after registration.

Section 3 - Authority

This section provides that the Regulations are made under the *Australian Prudential Regulation Authority Act 1998* (the Act).

Section 4 - Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned and any other items in a Schedule to this instrument has effect according to its terms.

Section 5 - Definitions

This section defines terms used in the instrument.

Section 6 - Cooperation with other agencies

Under section 10A of the Act, APRA should have regard to the desirability of cooperating with other financial sector supervisory agencies, and with other agencies specified in regulations, in performing and exercising its functions and powers.

Section 6 of the Regulations specifies the agencies with which APRA should cooperate for the purposes of subsection 10A(1) of the Act.

To align with current drafting practices, section 6 expands the list of agencies to give effect to subitem 7(2) of Schedule 3 to the *Australian Prudential Regulation Authority Amendment Act 2003*. That item provided that agencies specified for the purposes of paragraph 56(5)(a) of the Act at the time of the amendment were to be taken to be specified for the purposes of subsection 10A(1) of the Act as well. Those agencies are now specifically listed in section 6 of the Regulations. The effect is that the list of specified agencies is the same as under the 1998 Regulations but they are now listed in one section for clarity.

The reference to the Council of Financial Regulators in the 1998 Regulations has also been clarified by listing the individual members (excluding APRA), being: the Reserve Bank of Australia; the Australian Securities and Investments Commission; and the Treasury.

This section operates in the same way as the corresponding provision in the 1998 Regulations.

Section 7 - Liability to fringe benefits taxation

Subsections 55(1) and (2) of the Act respectively provide that APRA is not subject to taxation under the laws of the Commonwealth or of a State or Territory and that the regulations may limit the application of subsection (1).

Section 7 of the Regulations provides that APRA may be subject to taxation in relation to the *Fringe Benefits Tax Assessment Act 1986*.

This section operates in the same way as the corresponding provision in the 1998 Regulations.

Section 8 - Prescription of prudential regulation framework laws

Paragraph (o) of the definition of *prudential regulation framework law* in subsection 3(1) of the Act includes another Act that is prescribed for the purposes of the section in which the expression appears.

Section 8 of the Regulations provides that the *prudential regulation framework law* means the *Royal Commissions Act 1902* for the purposes of section 56 of the Act.

This section operates in the same way as the corresponding provision in the1998 Regulations.

Section 9 - Secrecy–disclosure of protected information or production of protected documents to specified agencies

APRA works with both domestic and international entities in order to fulfil its purposes as outlined in the APRA Act, including the maintenance of financial stability in Australia. For the purposes of conducting its mandate, APRA regularly engages with a number of Australian and international agencies and institutions in such a way that requires them to be able to share protected information in specific circumstances. Protected information is information which APRA has obtained in relation to a prudential regulation framework law, relating to a financial sector entity, a related body corporate or a customer of certain classes of financial institution.

Paragraph 56(5)(a) of the Act allows APRA to disclose protected information or produce a protected document to a financial sector supervisory agency or an agency (including foreign agencies) specified in the regulations.

Section 9 of the Regulations specifies the agencies for the purposes of paragraph 56(5)(a) of the Act. The list replicates that contained in section 5 of the 1998 Regulations with the following changes:

* the list of agencies is ordered alphabetically;
* the conditional listing of the Commissioner of Taxation covering only protected information that related to superannuation is amended to remove the conditionality. The Unconditional listing of the Commissioner of Taxation is consistent with the broader position on information sharing;
* the reference to the *Superannuation (Excluded Funds) Taxation Act 1987* is updated to the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987*;
* the Commission of Inquiry relating the HIH Insurance Group is removed as it has concluded; and
* the following agencies have been added:
	+ the Australian Competition and Consumer Commission
	+ the Australian Financial Complaints Authority
	+ the Department administered by the Minister administering the *Anti‑Money Laundering and Counter-Terrorism Financing Act 2006*

Schedule 1 - Repeals

This schedule repeals the 1998 Regulations as the instrument is due to sunset on 1 April 2019.

Under section 7 of the *Acts Interpretation Act 1901*, as applied to legislative instruments by subsection 13(1) of the *Legislation Act 2003*, the repeal of the 1998 Regulationsdoes not affect its previous operation.

**Finding table**

As a result of some of the changes described above, it became necessary to renumber provisions of the Regulations. Below is a finding table to assist in identifying which provision in the Regulations corresponds to a provision in the 1998 Regulations that has been rewritten.

References to the old law in the below table are to the 1998 Regulations*.* References to the new law are to the 2018 Regulations. Also, in the finding table, ‘no equivalent’ means that this is a new provision that has no equivalent in the old law, and vice versa.

|  |  |
| --- | --- |
| ***Old law*** | ***New Law*** |
| *Australian Prudential Regulation Authority Regulations 1998* | *Australian Prudential Regulation Authority Regulations 2018* |
| 1 – Name of Regulations | 1 – Name |
| No equivalent  | 2 – Commencement |
| No equivalent | 3 – Authority  |
| No equivalent | 4 – Schedules  |
| 3 – Definitions | 5 – Definitions |
| 3A – Cooperation with other agencies | 6 – Cooperation with other agencies |
| 4 – Liability to fringe benefits taxation (Act, s55 (2)) | 7 – Liability to fringe benefits taxation |
| 4A – Prescription of prudential regulation framework laws | 8 – Prescription of prudential regulation framework laws |
| 5 – Secrecy – disclosure of protected information or production of protected document to specified agencies (Act s 56 (5)) | 9 – Secrecy – disclosure of protected information or production of protected document to specified agencies  |
| No equivalent  | Schedule 1 – Repeals  |

### Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### Australian Prudential Regulation Authority Regulations 2018

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview of the Regulations

The purpose of the *Australian Prudential Regulation Authority Regulations 2018* (the Regulations) is to remake the *Australian Prudential Regulation Authority Regulations 1998* (the 1998 Regulations)prior to ‘sunsetting’.

### The Regulations remake the 1998 Regulations by restructuring provisions to align with current drafting practices. These changes do not change the substantive meaning or operation of the provisions. The Regulations also update the list of agencies prescribed for the purposes of disclosing protected information or producing protected documents.

### Human rights implications

The impact of the Regulations on the following human rights has been considered:

* the right to privacy and reputation, and
* the right to take necessary steps and give effective remedies.

*The right to privacy*

Section 9 of the Regulations engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) because it lists the agencies with which the Australian Prudential Regulation Authority (APRA) may disclose or produce protected information.

The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

APRA works with both domestic and international entities in order to fulfil its purposes as outlined in the APRA Act, including the maintenance of financial stability in Australia. For the purposes of conducting its mandate, APRA regularly engages with a number of Australian and international agencies and institutions in such a way that requires them to be able to share protected information in specific circumstances. Protected information is information which APRA has obtained in relation to a prudential regulation framework law, relating to a financial sector entity, a related body corporate or a customer of certain classes of financial institution.

Paragraph 56(5)(a) of the Act allows APRA to disclose protected information or produce a protected document to a financial sector supervisory agency or an agency (including foreign agencies) specified in the Regulations where satisfied that it will enable or assist them to perform their functions and exercise their powers. This allows a more efficient mechanism for APRA to share confidential information and improves listed financial sector agencies’ ability to conduct timely compliance activity and better protect the integrity of Australia’s prudential system.

Section 9 of the Regulations specifies the agencies for the purposes of paragraph 56(5)(a) of the Act. The list replicates that contained in section 5 of the 1998 Regulations with minor changes as outlined in the Attachment to this explanatory statement. The listed agencies include Commonwealth and State or Territory agencies, the Treasury of New Zealand, as well as reputable international bodies (i.e. the World Bank Group, the International Monetary Fund, the Bank for International Settlements, the Basel Committee on Banking Supervision, and the Financial Stability Board). These bodies all have appropriate safeguards for handling sensitive information.

A simple and efficient information sharing arrangement between APRA and the listed agencies is justified as it will benefit the community by enabling better monitoring of illegal and other high-risk activities and strengthen corporate compliance with banking law. Any information that is shared between agencies under section 9 of the Regulations will remain subject to strict confidential protections under Australia’s privacy laws. APRA will remain subject to the requirement to take all reasonable measures to protect confidential information from any unauthorised disclosure.

It is appropriate for the agencies to be specified in the Regulations to provide the Government with the necessary flexibility to make timely changes to support appropriate information sharing. The Regulations are subject to disallowance and parliamentary scrutiny.

*The right to take necessary steps and to give effective remedies*

Under subsections 56(7B) and (8) of the APRA Act protected information and documents may be disclosed for the purposes of a prudential regulation framework law. Section 8 of the Regulations provides that the *prudential regulation framework law* means the *Royal Commissions Act 1902* (the RC Act) for the purposes of section 56 of the APRA Act.

The RC Act authorises the Governor-General to initiate major independent public inquiries into an issue, referred to as a Royal Commission. By enabling protected information or documents to be legally provided to the Royal Commission under section 8, the Regulations engage Articles 2 and 17 of the ICCPR.

Article 17 as outlined above and article 2 provide that the rights under the ICCPR are available to all individuals without distinctions of any kind and everyone should have effective and enforceable remedies if any rights are violated. Empowering a Royal Commission to adequately investigate major issues of public interest is lawful and non-arbitrary, reasonable and proportional to the end sought (i.e. the peace, order, and good governance of the Commonwealth as per the objectives of the RC Act).

### Conclusion

To the extent that the Regulations engage the rights under Article 17 of the ICCPR, they are compatible with human rights as the limitations are appropriate and proportionate, and are consistent with Article 2 of the ICCPR and the requirements of Australia’s privacy laws.