

**Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 4 of 2023**

**EXPLANATORY STATEMENT**

**Prepared by the Australian Prudential Regulation Authority (APRA)**

*Banking Act 1959*, section 11AF

*Insurance Act 1973*, section 32

*Life Insurance Act 1995*, section 230A

*Private Health Insurance (Prudential Supervision) Act 2015*, section 92

*Superannuation Industry (Supervision) Act 1993*, section 34C

APRA may, in writing, determine a prudential standard that applies to an APRA-regulated entity under:

- (1) subsection 11AF(1) of the *Banking Act 1959* (Banking Act), which applies to all authorised deposit-taking institutions (ADIs), authorised banking non-operating holding companies (authorised banking NOHCs), and subsidiaries of ADIs and authorised banking NOHCs;
- (2) subsection 32(1) of the *Insurance Act 1973* (Insurance Act), which applies to all general insurers and authorised insurance non-operating holding companies (authorised insurance NOHCs), and subsidiaries of general insurers and authorised insurance NOHCs;
- (3) subsection 230A(1) of the *Life Insurance Act 1995* (Life Insurance Act), which applies to all life companies, including friendly societies, registered life non-operating holding companies (registered life NOHCs), and subsidiaries of life companies and registered life NOHCs;
- (4) subsection 92(1) of the *Private Health Insurance (Prudential Supervision) Act 2015* (PHIPS Act), which applies to all private health insurers; and
- (5) subsection 34C(1) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), which applies to all Registered Superannuation Entity Licensees (RSE licensees), and connected entities of RSE licensees.

On 10 October 2023, APRA made Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 4 of 2023 (the instrument), which determines a new cross-industry *Prudential Standard CPS 900 Resolution Planning* (CPS 900). Paragraphs 2 to 4 of the prudential standard specify the scope of APRA-regulated entities to which the standard applies.

The instrument commences on 1 January 2024.

## **1. Background**

APRA's mandate is to ensure the safety and soundness of prudentially regulated financial institutions so that they can meet their financial promises to bank depositors, insurance

policyholders and superannuation fund members (beneficiaries) within a stable, efficient and competitive financial system.

APRA carries out this mandate through a multi-layered prudential framework that encompasses the licensing and supervision of entities. The Banking Act, Insurance Act, Life Insurance Act, PHIPS Act and SIS Act allow APRA to issue legally binding prudential standards that set out specific prudential requirements with which APRA-regulated entities must comply.

As a resolution authority, APRA is responsible for minimising the impact of any entity failure, to ensure that losses to beneficiaries and disruption to the broader financial system can be minimised. This new prudential standard, CPS 900, aims to ensure that, in the unlikely case of an entity failure, barriers to achieving an orderly resolution by APRA have been removed in advance.

The entities to which CPS 900 applies are significant financial institutions (SFIs), and non-SFIs with critical functions.<sup>1</sup> Critical functions are any functions provided by an APRA-regulated entity that are important to financial system stability or the availability of essential financial services to a particular industry or community.<sup>2</sup>

International experience has shown that disorderly failures of financial institutions can have significant impacts for financial system stability and the broader economy. Planning for resolution well ahead of any stress emerging will reduce the risk of a disorderly failure and the need for taxpayer funded support. CPS 900 brings Australia in line with international practice on resolution planning.<sup>3</sup>

While CPS 900 commences on 1 January 2024, entities will not be subject to the requirements of the standard until notified by APRA.

## **2. Purpose and operation of the instrument**

The purpose of the instrument is to determine a new prudential standard, CPS 900.

CPS 900 requires SFIs, and non-SFIs with critical functions, to support APRA in the development and maintenance of bespoke resolution plans. Resolution plans set out the steps that APRA may take to resolve an entity in the event of non-viability.

CPS 900 sets out a framework for resolution planning that will be implemented on a case-by-case basis. The key requirements of CPS 900 are for an APRA regulated entity to:

- support APRA in the determination of whether it provides any critical functions (paragraphs 18 and 19). This is a foundational step in resolution planning, since an

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<sup>1</sup> The terms SFI and non-SFI are defined for RSE Licensees in paragraph 11(b) and (f) of CPS 900 respectively. As per the footnotes to these subparagraphs, APRA's definitional standards APS 001, GPS 001, LPS 001 and HPS 001 define these terms in relation to other APRA-regulated entities.

<sup>2</sup> See the definition of 'critical function' under paragraph 11(a) of CPS 900.

<sup>3</sup> Where appropriate for Australia, CPS 900 is aligned with the Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions* which is the international standard for resolution regimes, located online at [Crisis Management and Resolution - Financial Stability Board \(fsb.org\)](https://www.fsb.org/2013/04/key-attributes-of-effective-resolution-regimes-for-financial-institutions/).

orderly resolution would avoid significant disruption to financial stability and ensure the continued provision of critical functions;

- conduct a resolvability assessment to identify any barriers to resolution from potential options (paragraphs 20 to 22). This step provides an opportunity for entities to provide feedback to APRA on the potential costs, risks and impacts of these options and associated pre-positioning measures;
- develop and implement a pre-positioning plan to remove any barriers to resolution (paragraphs 23 to 25);
- maintain financial resources, and if required by APRA, an amount of loss-absorbing capacity (for an entity that is not an RSE licensee) to support the resolution plan (paragraphs 26 and 27);
- establish and maintain the capabilities to support APRA in effecting a resolution (paragraphs 28 to 30);
- engage expert external advisors to support with any aspect of CPS 900 or support external advisors engaged by APRA to assist in the exercise of its powers and functions under CPS 900, if required by APRA (paragraph 31);
- review and update the critical functions analysis and resolvability assessment at least every three years to ensure it remains current and effective, and where appropriate recommend any changes to the entity's pre-positioning plan (paragraphs 32 to 33); and
- notify APRA of material changes to its business or operations that may create a barrier to resolution (paragraph 34).

CPS 900 also requires the Board of an APRA-regulated entity to support APRA in resolution planning and, where applicable, provide oversight of and approve the resolvability assessment and pre-positioning plan (paragraphs 16 and 17).

### ***Exercise of discretion by APRA***

CPS 900 provides for APRA to exercise various discretions. Decisions made by APRA in exercising those discretions are not subject to merits review. This is because these decisions are preliminary decisions that may facilitate or lead to substantive decisions which are subject to merits review.

Under the Banking Act, Insurance Act, Life Insurance Act and PHIPS Act, a breach of a prudential standard is a breach of the enabling legislation, as each enabling Act provides that regulated entities must comply with the standard. Under the SIS Act, it is a condition on all RSE licences that the RSE licensee must comply with the RSE licensee law, which includes prudential standards. However, there are no penalties prescribed for breach of the prudential standards under any of these Acts. Instead, an entity's breach of the enabling legislation or RSE licence condition is grounds for APRA to make further, substantive decisions under the relevant enabling legislation in relation to the entity. Those decisions may include the decision:

- (a) to issue a direction to the regulated entity, including: a direction to comply with the whole or part of a prudential standard (section 11CA of the Banking Act, section 104

of the Insurance Act, section 230B of the Life Insurance Act, section 131D of the SIS Act); and a direction to comply with all, or specified obligations, which includes prudential standards (section 96 of the PHIPS Act); or

- (b) to revoke: an authority to carry on banking business (section 9A of the Banking Act); a banking NOHC authorisation (section 11AB of the Banking Act); an authority to carry on insurance business (section 15 of the Insurance Act); an insurance NOHC authorisation (section 21 of the Insurance Act); registration of life insurance business (section 26 of the Life Insurance Act); a life NOHC authorisation (section 28C of the Life Insurance Act); or to revoke an authority to operate an APRA-regulated superannuation fund (section 29G of the SIS Act).

It is only at this stage that an entity is exposed to a penalty, loss of licence or imposition of a penalty if it breaches the direction (50 penalty units each day under section 11CG of the Banking Act, section 108 of the Insurance Act, and section 230F of the Life Insurance Act; 30 penalty units each day under section 104 of the PHIPS Act; and 100 penalty units each day under section 131DD of the SIS Act).<sup>4</sup> In nearly all cases,<sup>5</sup> the decisions are preceded by a full consultation with the regulated entity to raise any concerns that the entity may have in relation to the decision.

The decisions of APRA to impose a direction are subject to merits review (section 11CA of the Banking Act, section 104 of the Insurance Act, section 236 of the Life Insurance Act, section 168 of the PHIPS Act and section 344 of the SIS Act), which is appropriately available at the point where an entity could be exposed to a penalty.

All decisions to revoke authorisations or registrations under the Banking Act, Insurance Act, Life Insurance Act and SIS Act are subject to merits review, unless specifically excluded by the enabling legislation.

Revocation of an authorisation to carry on banking business or a banking NOHC authorisation is subject to merits review unless either:

- (a) APRA has determined that access to natural justice and merits review is contrary to the national interest or contrary to the interests of depositors with the body corporate; or
- (b) (in the case of ADIs only) the authority is an authority that is to cease to have effect on a day specified in the authority (subsection 9A(8) of the Banking Act).

Revocation of an authorisation to carry on insurance business or an insurance NOHC authorisation is subject to merits review (sections 15 and 21 of the Insurance Act).

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<sup>4</sup> The exception is section 54B of the SIS Act, which provides that breach of a covenant under sections 52 or 52A is a civil penalty provision. The covenants include a requirement to comply with prudential standards in relation to specified topics (conflicts, capital requirements for operational risk, MySuper and choice products). CPS 900 is not a standard in relation to any of these topics.

<sup>5</sup> The Banking Act, Insurance Act and Life Insurance Act specifically provide that APRA does not need to consult where APRA is satisfied that doing so could result in a delay in revocation that would be contrary to the national interest or the interests of depositors with the body corporate (subsection 9A(4) of the Banking Act), contrary to the national interest (subsection 15(4) of the Insurance Act), or contrary to the public interest (subsection 26(5) of the Life Insurance Act), respectively.

Revocation of registration as a life insurance company or a life NOHC authorisation is subject to merits review (section 236 of the Life Insurance Act). The situation in relation to cancellation of registration under the PHIPS Act is different to the other enabling legislation.

### ***Adjust and exclude powers***

CPS 900 gives APRA the discretion to adjust or exclude a provision of the prudential standard (paragraph 12). The power to create such a discretion is provided for under subsections:

- 11AF(2) of the Banking Act;
- 32(3D) of the Insurance Act;
- 230A(4) of the Life Insurance Act;
- 92(4) of the PHIPS Act; and
- 34C(5) of the SIS Act.

APRA may exercise this power when it is satisfied that the adjustment or exclusion of a specific requirement for one or more specified regulated entities will better support APRA in meeting its objectives. For example, the adjustment or exclusion may be necessary to obtain a better prudential outcome than would be the case if the prudential requirement were applied unaltered to a particular regulated entity. A tailored approach would give APRA comfort that the prudential requirements apply appropriately to protect the interests of depositors, policyholders and fund members. APRA will also take into account other considerations, such as efficiency, competition, contestability, competitive neutrality and regulatory burden, including comparisons with the entity's peer group.

The exercise of APRA's powers is governed by a robust decision-making framework which is documented in APRA's internal policies. This framework supports APRA in fulfilling its mandate by limiting decision making to those senior APRA officers with the appropriate experience and skill to exercise prudent judgement. The framework also requires decision makers to seek advice from internal technical experts.

### ***Documents incorporated by reference***

Under paragraph 14(1)(a) of the *Legislation Act 2003* (Legislation Act), CPS 900 incorporates by reference the following documents as in force from time to time:

- Acts of Parliament and associated delegated laws; and
- Prudential Standards determined by APRA under:
  - subsection 11AF(1) of the Banking Act;
  - subsection 32(1) of the Insurance Act;
  - subsection 230A(1) of the Life Insurance Act; and
  - subsection 92(1) of the PHIPS Act.

Under paragraph 14(1)(b) of the Legislation Act, where CPS 900 incorporates by reference another Superannuation Prudential Standard determined by APRA under section 34C of the SIS Act, the Superannuation Prudential Standard referred to is the version that exists at the time the Instrument was determined.

All documents incorporated by reference in this standard are available on the Federal Register of Legislation at [www.legislation.gov.au](http://www.legislation.gov.au).

### 3. Consultation

APRA released a draft version of CPS 900 for consultation in December 2021.<sup>6</sup> This consultation ran until April 2022, with APRA receiving 23 submissions in response. During this time, APRA also met with a variety of stakeholders, including individual entities, industry associations and consultants.

APRA also released related draft guidance, *Prudential Practice Guide CPG 900 Resolution Planning* (CPG 900), for public consultation in September 2022. Consultation on the guidance involved further meetings with industry associations and regulated entities, to engage feedback on the proposed prudential standard and guidance.

In May 2023, APRA released a letter responding to issues raised during consultation on draft CPS 900 (and the related draft guidance).<sup>7</sup> Industry were generally supportive of APRA's approach to CPS 900 and the proposed requirements were not significantly amended. Minor changes were made to the standard to better explain the bespoke nature of resolution planning and to clarify certain requirements, such as the Board's role in resolution planning and APRA's expectations relating to disclosure on resolution planning. The letter also provided further clarity on a number of other areas raised in submissions. More detailed guidance on these areas was provided in the finalised CPG 900.<sup>8</sup>

### 4. Regulation Impact Statement

In developing CPS 900, the Office of Impact Analysis (formerly known as the Office of Best Practice Regulation) confirmed that a Regulation Impact Statement was not required as CPS 900 was assessed as likely to only have a minor regulatory impact.

### 5. Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at the Attachment to this Explanatory Statement.

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<sup>6</sup> See APRA Media Release - [APRA moves to strengthen crisis preparedness in banking, insurance and superannuation | APRA](#), dated 2 December 2021.

<sup>7</sup> See APRA Letter - [Recovery and resolution planning | APRA](#), dated 18 May 2023.

<sup>8</sup> See final *Prudential Practice Guide CPG 900 Resolution Planning* on APRA's website at [Strengthening crisis preparedness | APRA](#), dated 18 May 2023.

## ATTACHMENT

### **Statement of Compatibility with Human Rights**

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

### **Banking, Insurance, Life Insurance, Health Insurance and Superannuation (prudential standard) determination No. 4 of 2023**

The Legislative Instrument is 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* (HRPS Act).

### **Overview of the Legislative Instrument**

The purpose of the instrument is to determine a new *Prudential Standard CPS 900 Resolution Planning* (CPS 900). CPS 900 requires certain APRA-regulated entities (significant financial institutions (SFIs), and non-SFIs that have critical functions) to support APRA in bespoke resolution planning. The purpose of this planning is to ensure that these entities can be resolved by APRA in the event that they become non-viable.

Key requirements under CPS 900 are for an applicable APRA-regulated entity to: conduct a resolvability assessment to identify any barriers to resolution; develop and implement a pre-positioning plan to remove any barriers to resolution; establish and maintain the capabilities necessary to support APRA in effecting a resolution; and review and update the resolvability assessment at least every three years.

### **Human rights implications**

APRA has assessed the instrument and is of the view that it does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the HRPS Act. Accordingly, in APRA's assessment, the instrument is compatible with human rights.

### **Conclusion**

The instrument is compatible with human rights as it does not raise any human rights issues.