

***Superannuation (prudential standard) determination No. 2 of 2023***

**EXPLANATORY STATEMENT**

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

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

APRA may, in writing, determine, vary or revoke a prudential standard that applies to an APRA-regulated entity under subsection 34C(1) and (6) of the *Superannuation Industry (Supervision) Act 1993* (Act), in relation to Registered Superannuation Entity Licensees (RSE licensees).

On 20 November 2023, APRA made *Superannuation (prudential standard) determination No. 2 of 2023* (the instrument), which revokes *Prudential Standard SPS 510 Governance* made under *Superannuation (prudential standard) determination No. 3 of 2022* and determines a new *Prudential Standard SPS 510 Governance* (SPS 510).

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 depositors, policyholders and fund members within a stable, efficient and competitive financial system.

APRA carries out this mandate through a multi-layered prudential framework that encompasses licensing and supervision of entities. The Act allows APRA to issue legally binding prudential standards that set out specific prudential requirements with which APRA-regulated entities must comply.

In 2021, APRA determined a new *Prudential Standard CPS 511 Remuneration* (CPS 511) which sets out requirements to ensure that APRA-regulated entities maintain remuneration arrangements that provide appropriate incentives to individuals to prudently manage the risks they are responsible for, and that there are appropriate consequences for poor risk outcomes. CPS 511 commenced on 1 January 2023.

With the commencement of CPS 511 on 1 January 2023, a number of existing requirements relating to remuneration, including those detailing requirements in relation to Board Remuneration Committees and Remuneration policies, currently set out in SPS 510, have become progressively redundant as these matters are covered by new requirements in CPS 511. The application of CPS 511 is on a staggered basis commencing from 1 January 2023 and will be complete from 1 January 2024, at which time the Board Remuneration Committee requirements and Remuneration policy requirements set out in SPS 510 will no longer be applicable.

**2. Purpose and operation of the instruments**

The purpose of the instrument is to revoke the existing requirements under SPS 510 for superannuation and replace it with the new SPS 510 which incorporates necessary

consequential amendments resulting from the commencement of CPS 511. The amendments apply to RSE licensees that are not significant financial institutions from 1 January 2024. RSE licensees that are significant financial institutions were previously carved out from applying these requirements under SPS 510.

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

SPS 510 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 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 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 RSE licensee, including a direction to comply with the whole or part of a prudential standard (section 131D of the Act); or
- (b) cancel a license to operate an APRA-regulated superannuation fund (section 29G of the Act).

It is only at this stage that an RSE licensee is exposed to a penalty: loss of licence or imposition of a penalty if it breaches the direction (100 penalty units each day under section 131DD of the Act).<sup>1</sup> In nearly all cases, the decisions are preceded by a consultation with the regulated entity to raise any concerns it may have in relation to the decision.

The decisions of APRA to impose a direction are subject to merits review (subsection 10(1) and 344(1) of the Act, which is appropriately available at the point where an entity could be exposed to a penalty.

All decisions to revoke authorisations/registrations under the Act, are subject to merits review, unless specifically excluded by the enabling legislation.

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

SPS 510 gives APRA the discretion to adjust or exclude a provision of the prudential standard (paragraph 49). The power to create such a discretion is provided for under subsection 34C(5) of the 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

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<sup>1</sup> Section 54B of the Act also 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).

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 fund members. APRA will also take into account other considerations, such as efficiency, competition, contestability, competitive neutrality and regulatory burden, including comparisons with an 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), where SPS 510 refers to Acts of Parliament and associated delegated laws, this is a reference to an Act as it exists from time to time, and which is available on the Federal Register of Legislation at [www.legislation.gov.au](http://www.legislation.gov.au).

Under paragraph 14(1)(b) of the *Legislation Act 2003* (Legislation Act), SPS 510 incorporates by reference the version of the following documents that exist at the time the Instrument was determined:

- Superannuation Prudential Standard determined by APRA under section 34C of the Act, which is available on the Federal Register of Legislation at [www.legislation.gov.au](http://www.legislation.gov.au); and
- *APES 110 Code of Ethics for Professional Accountants*, which may be freely used (available from the Accounting Professional & Ethical Standards Board (APESB) at <https://apesb.org.au>). The APESB is an independent, national body that sets the code of ethics and professional standards with which accounting professionals who are members of CPA Australia, CA ANZ or IPA must comply.

### *Exemption from sunseting and disallowance*

SPS 510 is exempt from disallowance in accordance with section 44(2)(b) of the Legislation Act and regulation 9 of the *Legislation (Exemptions and Other Matters) Regulations 2015* (Legislation Regulations) as SPS 510 is an ‘instrument (other than a regulation) relating to superannuation’.<sup>2</sup> SPS 510 is exempt from sunseting in accordance with section 54(2)(b) of the Legislation Act and regulation 11 of the Legislation Regulations as this Legislative Instrument is ‘an instrument (other than a regulation) relating to superannuation’.<sup>3</sup>

### **3. Consultation**

These consequential changes were set out in various public consultation papers APRA issued as part of its consultation on new remuneration requirements. These included:

- Discussion paper - Strengthening prudential requirements for remuneration, APRA, July 2019;
- Response paper – Strengthening prudential requirements for remuneration, APRA, 12 November 2020;
- Response paper – Strengthening prudential requirements for remuneration, APRA, August 2021

No comments were received in submissions to the consultation on these consequential amendments.

### **4. Regulation Impact Statement**

The Office of Impact Analysis (formerly the Office of Best Practice Regulation) advised that no Regulation Impact Statement was required as the changes to the standards are minor and machinery.

### **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 Attachment A to this Explanatory Statement.

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<sup>2</sup> For paragraph 44(2)(b) of the Legislation Act, section 42 of the Legislation Act (disallowance of legislative instruments) does not apply to a legislative instrument in a class of legislative instrument referred to in an item of the table contained in regulation 9 of the Legislation Regulations. Item 3 of the table contained in regulation 9 of the Legislation Regulations provides that ‘an instrument (other than a regulation) relating to superannuation’ is a class of legislative instrument not subject to disallowance.

<sup>3</sup> For paragraph 54(2)(b) of the Legislation Act, Part 4 of Chapter 3 of the Legislation Act (sunseting of legislative instruments) does not apply to a legislative instrument in a class of legislative instruments referred to in an item of the table contained in regulation 11 of the Legislation Regulations. Item 6 of the table contained in regulation 11 of the Legislation Regulations provides that ‘an instrument (other than a regulation) relating to superannuation’ is a class of legislative instrument not subject to sunseting.

## ATTACHMENT A

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

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

#### ***Superannuation (prudential standard) determination No. 2 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 *Superannuation (prudential standard) determination No. 2 of 2023* is to revoke the existing requirements under *Prudential Standard SPS 510 Governance* (SPS 510) for superannuation and replace it with the new SPS 510 which incorporates necessary consequential amendments resulting from the commencement of *Prudential Standard CPS 511 Remuneration*. The amendments apply to RSE licensees that are SFIs from 1 July 2023 and all other RSE licensees from 1 January 2024.

#### **Human rights implications**

APRA has assessed the legislative 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 legislative instrument is compatible with human rights.

#### **Conclusion**

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