

**Banking (restricted word or expression) No. 2 of 2015  
Consent regarding “Offshore Banking Unit”**

**EXPLANATORY STATEMENT**

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

*Banking Act 1959*, paragraphs 66(2)(c) and 66(1)(d)

*Acts Interpretation Act 1901*, section 33

Subsection 66(1) of the *Banking Act 1959* (the Act) prohibits a person who carries on a financial business, whether or not in Australia, from assuming or using in Australia a restricted word or expression in relation to that financial business without APRA’s consent. APRA may grant consent to the use of a restricted word or expression under paragraph 66(1)(d) of the Act, and may revoke a consent under paragraph 66(2)(c) of the Act.

On 11 September 2015, APRA made Banking (restricted word or expression) No. 2 of 2015 Consent regarding “Offshore Banking Unit” which revokes the Consent to use restricted expression Offshore banking units made on 16 June 2005 (the 2005 Consent).

The 2015 Consent commences on the date it is registered on the Federal Register of Legislative Instruments (FRLI).

**1. Background**

Subsection 66(1) of the - Act prohibits a person from using or assuming a restricted word or expression in relation to a financial business without the consent of APRA. Subparagraph 66(4)(a)(i) specifies that *bank*, *banker* and *banking* are restricted words and expressions.

The 2005 Consent was made for the purposes of:

- (a) granting consent to a class of persons being offshore banking units, within the meaning of section 128AE of the *Income Tax Assessment Act 1936* (the Tax Act), to use the restricted word *banking* in relation to their offshore banking unit business; and
- (b) imposing conditions on offshore banking units in their use of the word *banking* under paragraph 66(2)(a).

Under subsection 50(1) of the *Legislative Instruments Act 2003* (the *Legislative Instruments Act*), a legislative instrument registered after 1 January 2005 will sunset on the first 1 April or 1 October falling on or after the tenth anniversary of the registration of the instrument on the FRLI. The 2005 Consent was registered on 27 June 2005 and is due to sunset on 1 October 2015.

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

The offshore banking regime is a concessional tax regime that allows entities that are determined by the Treasurer to be an offshore banking unit under section 128AE of the Tax

Act to undertake certain non-resident to non-resident financial transactions at a reduced rate of taxation.

The term *offshore banking* is recognised globally as denoting concessional rates of taxation in relation to non-resident transactions. *Offshore banking unit* has a corresponding meaning which denotes an entity – not necessarily a bank – that is entitled, under the applicable tax legislation, to carry out such transactions subject to lower rates of tax. Offshore banking units, therefore, have a legitimate case for using *banking* as part of the composite expression *offshore banking unit*, as this is the designation given to them by both the Tax Act and common usage.

The instrument grants consent to offshore banking units to use the term *banking* as part of the expression offshore banking unit in relation to their financial business. It also gives consent to related bodies corporate of offshore banking units to use *banking* in the same manner. Because the business carried on by offshore banking units can be characterised as a financial business within the meaning of subsection 66(4) of the Act, subsection 66(1) prevents their use of the expression *offshore banking unit* in connection with their offshore banking business without APRA's consent.

The instrument also imposes conditions on offshore banking units in their use of the word *banking*. Condition 3 applies to all offshore banking units and requires that the word or expression *banking* or *offshore banking unit* is not used in a misleading or deceptive way. Conditions 4 to 6 apply to offshore banking units that are not authorised deposit-taking institutions (ADIs) and prescribe the manner in which a consumer warning must be given to investors. Condition 4 seeks to ensure that an investor is not misled by the designation *offshore banking unit* into believing that they are dealing with a regulated bank. Condition 5 provides that the consumer warning only has to be given in circumstances where either the offshore banking unit or transaction involving the investor has a sufficient connection with Australia. Condition 6 sets out the exceptions to the obligation to give a consumer warning.

As the 2005 Consent is due to sunset on 1 October 2015, the purpose of the 2015 Consent is to continue to allow the current regime to operate without change. APRA conducted an assessment of the effectiveness and efficiency of continuing the 2005 Consent and concluded that it was appropriate that it be remade without amendment.

### **3. Consultation**

The 2015 Consent makes no changes to the 2005 Consent, other than to re-number the conditions on the consent. The 2015 Consent does not impose any additional requirements nor does it remove requirements; it merely allows for the continuation of the current regime.

APRA consulted with the Department of Treasury, the Australian Financial Markets Association and a sample of offshore banking units in order to determine whether the consent is operating effectively and efficiently. Responses to the consultation were supportive of remaking the consent. The responses recognised that allowing the instrument to lapse could cause significant disruption to the offshore banking regime and associated economic activity in Australia.

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

The Office of Best Practice Regulation has advised that APRA may submit a letter certifying that the instrument is operating effectively and efficiently in lieu of completing a Regulation Impact Statement.

#### **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.

## ATTACHMENT A

### Statement of Compatibility with Human Rights

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

#### **Banking (consent to assume or use restricted word or expression) No. 2 of 2015**

This 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 Instruments**

This legislative instrument revokes the 2005 Consent made under section 66 of the Banking Act, and remakes the consent unchanged as outlined in the Schedule.

The purpose of this Legislative Instrument is to continue to give consent to offshore banking units to use the restricted term *banking* when designating their offshore banking business.

#### **Human rights implications**

APRA has assessed this 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 instrument is compatible with human rights.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.