

## Banking exemption No. 5 of 2011

### EXPLANATORY STATEMENT

#### Prepared by the Australian Prudential Regulation Authority

*Banking Act 1959*, subsection 11(1)

*Acts Interpretation Act 1901*, subsection 33(3A)

Under subsection 11(1) of the *Banking Act 1959* (**the Act**), APRA may, in writing, determine that any or all of the provisions in paragraphs (a) to (e) inclusive of subsection 11(1) of the Act do not apply to a person while the determination is in force. Paragraph 11(2)(b) provides that the determination may specify the period during which it is in force.

Under subsection 33(3A) of the *Acts Interpretation Act 1901*, where an Act confers a power to make an instrument with respect to particular matters (however the matters are described), the power shall be construed as including a power to make such an instrument with respect to a particular class of those matters.

Banking exemption No. 5 of 2011 (**the new instrument**) replaces Banking exemption No. 1 of 2010 (**the existing instrument**) which exempts authorised deposit-taking institutions (**ADIs**) with farm management deposits (**FMDs**), from having to treat FMDs as unclaimed moneys under section 69 of the Act. Accordingly, ADIs are not required to include FMDs in a statement of unclaimed moneys to be submitted to the Treasurer and pay them to the Commonwealth. However, this does not affect an ADI's obligation to deal with other classes of unclaimed moneys (i.e. unclaimed moneys that are not FMDs) in accordance with section 69 of the Act.

The existing instrument replaced three previous instruments, Banking exemption No. 4 of 2006, Banking exemption No. 1 of 2008 and Banking exemption No. 1 of 2009 (collectively, **the predecessor instruments**).

The new instrument will remain in force until 31 December 2012.

#### 1. Background

##### *Section 69 of the Act*

Subsections 69(1) and (2) of the Act define 'unclaimed moneys' as all principal, interest, dividends, bonuses, profits and sums of money legally payable by an ADI and includes moneys to the credit of an account that has not been operated on either by deposit or withdrawal for a period of more than seven years. For the purpose of subsection 69(1), any account fees charged or interest paid to a FMD account is not a withdrawal or a deposit<sup>1</sup>.

Subsection 69(3) provides that an ADI with FMDs has an obligation to deliver to the Treasurer a statement of sums of unclaimed moneys<sup>2</sup> within three months after

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<sup>1</sup> Section 69(2) of the Act.

<sup>2</sup> The sums of unclaimed moneys reported on the statement must be greater than \$100 but not including unclaimed moneys held by Retirement Savings Accounts or First Home Savers Accounts. The statement of unclaimed moneys must be submitted in accordance with the requirements stipulated in sections 69(3A) and (4) of the Act.

31 December in each year<sup>3</sup>. Further, an ADI must pay to the Commonwealth, at the time of the delivery of the statement, the total amount shown in the statement<sup>4</sup>.

### *Implications for Farm Management Deposits*

The requirements under section 69 of the Act have the potential to affect FMDs in a way that is inconsistent with the policy intention of the FMD scheme.

A FMD is a tax-linked, financial risk management tool for individuals carrying on a primary production business in Australia (**FMD owners**) and is implemented commercially through participating financial institutions, including ADIs (**FMD providers**). The FMD scheme provides an incentive to the FMD owners in the form of a tax concession to encourage those FMD owners to carry over income from years of good cash flow and to draw down on that income in years of reduced cash flow. This enables the FMD owners to defer the income tax on their taxable primary production income from the income year in which they make the deposit until the income year in which the deposit is repaid, when they may face a lower marginal tax rate.

FMDs are often held for several years without being operated, which is consistent with the policy intent of the scheme as a risk management tool. Therefore, once the seven-year period has lapsed, it would appear that money to the credit of a FMD would be considered to be unclaimed moneys as defined in section 69 of the Act. As a result, FMD providers are required to report to the Treasury and transfer all unclaimed moneys to the Commonwealth within three months after 31 December each year.

If the FMD moneys are transferred as unclaimed moneys, there is a risk that the provisions would operate so as to require the Australian Tax Office (**ATO**) to treat the transfer as a withdrawal and to treat such funds as taxable income for the FMD owner. Further:

- if the FMD owner tries to increase the balance of the FMD so that the seven-year limitation in section 69 does not apply, there is a risk that the ATO will consider the whole amount to be withdrawn and redeposited; and
- in order to be eligible for the FMD tax concession, FMDs must not be withdrawn within 12 months. However, in order to avoid the application of section 69, the FMD owner would have to indicate in their tax return that a withdrawal and deposit were made in the same income year. As a result, the 12-month period will be reset. Therefore, it would seem unfair to force a FMD owner, on the seventh year of holding the FMD, to forfeit their tax concession and go through another 12-month waiting period to qualify for the tax concession they initially enjoyed.

### *Effect of Banking Exemptions*

FMD owners not using their FMDs for seven years would ordinarily be at risk of losing their deposit through the operation of the unclaimed moneys provision. This

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<sup>3</sup> It is an offence if an ADI does not give the Treasurer such a statement without a valid exemption order (section 69(3AA) of the Act).

<sup>4</sup> Section 69(5) of the Act. It is an offence if an ADI does not pay the Commonwealth the amount specified in such a statement without a valid exemption order (section 69(5A) of the Act).

position is currently being avoided by the banking exemptions which APRA has been issuing since 2006. The existing instrument and the predecessor instruments exempt ADIs from having to report and transfer FMDs to the Commonwealth as unclaimed moneys under section 69 of the Act.

### *New Legislation*

In November 2011 the ***Tax Laws Amendment (2011 Measures No. 7) Act 2011 (the Tax Laws Act)*** was enacted and received royal assent.

Schedule 5, Part 4 of the Tax Laws Act amends section 69 of the Act. The effect of the amendment is to provide that, for the purposes of subsection 69(1) of the Act, FMDs of FMD owners will only constitute unclaimed moneys where such deposits are to the credit of an account with an ADI, the account has not been operated on either by deposit or withdrawal for a period of not less than seven years, and after the first seven years of that period, the FMD provider has been unable to contact the FMD owner about those FMDs after making reasonable efforts.

The amendment made by Schedule 5, Part 4 of the Tax Laws Act will in the future obviate the need for further banking exemptions to be granted to FMD providers. However, this amendment only applies in relation to statements to be delivered after 31 December 2012. Given that the existing instrument will expire on 31 December 2011, it is necessary for APRA to issue the new instrument to extend the current treatment until 31 December 2012.

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

The purpose of the new instrument is to extend the exemption provided for in the existing instrument whereby ADIs as FMD providers are exempted from the requirement to report FMDs in their statement of unclaimed moneys to the Treasurer under subsection 69(3) of the Act. For the avoidance of doubt, the instrument repeats the exemption in the existing instrument and the predecessor instruments that exempted ADIs from the obligation to remit amounts representing FMDs to the Commonwealth under subsection 69(5), and exempted ADIs from certain criminal penalties and procedural provisions supporting subsections 69(3) and (5).

The new instrument does not exempt any ADI from its obligation to report other classes of unclaimed moneys and pay them to the Commonwealth, or exempt an ADI from any criminal offence provision if an ADI fails to comply with section 69 in relation to a non-FMD deposit. In exempting only the class of deposits comprising FMDs, the new instrument also relies on subsection 33(3A) of the *Acts Interpretation Act*.

## **3. Operation of the instrument**

The new instrument commences on 1 January 2012 and continues in force until 31 December 2012.

## **4. Consultation**

APRA consulted with the Office of Best Practice Regulation (OBPR) and the OBPR confirmed that no further regulatory analysis in the form of a regulation impact

statement is required due to the minor and machinery nature of this exemption (OBPR ID 2011/13349).