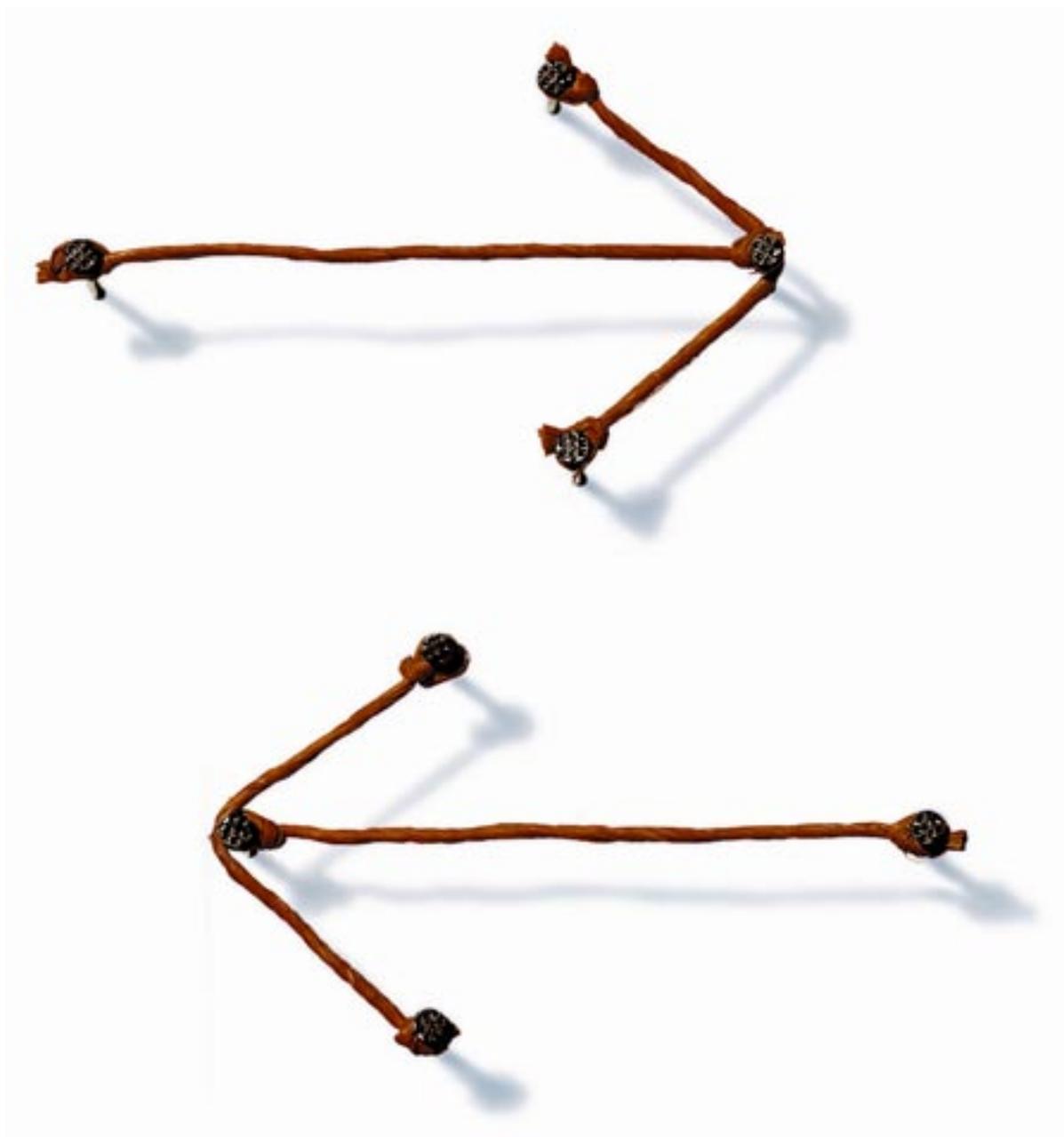




Guidelines

Implementation of Section 66 of the *Banking Act 1959*

January 2006



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Guidelines in obtaining a consent of exemption

1. This Guideline sets out the factors that the Australian Prudential Regulation Authority (APRA) intends to use in exercising its powers under the *Banking Act 1959* (the Banking Act) to consent to financial businesses using or to exempt them from the prohibition against using the following words or expressions:
 - the word 'bank', 'banker' or 'banking'; or
 - the expression 'building society', 'credit union' or 'credit society'; or
 - any other word or expression specified in a determination in force under s. 66(5); or
 - any other word or expression (whether or not in English) that is of like meaning to a word or expression covered by any of the previous dot points; or
 - the expression 'authorised deposit-taking institution' or 'ADI'.
2. A reference to a word or expression includes a reference to the word or expression being used:
 - as part of another word or expression; or
 - in combination with other words, letters or symbols.
3. The Banking Act restricts the use of these words or expressions in an attempt to assure the public that a financial business that describes itself as a bank, building society, credit union or authorised deposit-taking institution is in fact authorised as such.
4. APRA will notify the Australian Securities & Investments Commission (ASIC) of new, varied or revoked consents.

Statutory exceptions

5. Under s. 66, an authorised deposit-taking institution ('ADI') may use the word 'banking' to refer to the fact that it has been granted an authority under the Banking Act. For example, an ADI may, in its letterhead, refer to itself as being authorised under the *Banking Act 1959* to carry on banking business.
6. Section 66A allows an ADI to assume or use the expressions 'authorised deposit-taking institution' or 'ADI' in relation to its business.
7. Section 66A does not restrict the use of the letters 'ADI' as part of another word (such as 'traditional').

Consents and exemptions

For further information contact APRA's Supervisory Support Division in Melbourne on 03 9246 7500 or Sydney on 02 9210 3000.

Use of the word 'bank', etc.

8. There are a number of instances where consent under s. 66 has been granted.

Banks

9. Authorised deposit-taking institutions (ADIs) listed on the APRA web site as banks have been given an unrestricted consent to use the words 'bank', 'banker' or 'banking'. This allows the ADI to use the word bank:
 - in its company name or trading names; or
 - to describe or to advertise its business.
10. Consents are granted together with the authorities granted to ADIs.

Representative offices of foreign banks

11. A foreign bank, which has a current consent to maintain a representative office in Australia, may use the word 'bank' or its equivalent as part of the bank's corporate name in the descriptive title of its representative office in Australia.
12. Consents are granted together with a consent to maintain a representative office.

Foreign banks raising funds in Australia

13. Overseas banks may, subject to certain conditions, use the words 'bank', 'banker' or 'banking' in relation to the business of raising funds in the Australian wholesale capital market by way of issuing securities.
14. This exemption is made under Banking (Exemption) Order No. 82 dated 23 September 1996.

Use of the expression 'merchant bank'

15. A corporation that is registered under the *Financial Sector (Collection of Data) Act 2001* as a money market corporation may use the expressions

'merchant bank', 'merchant banker' or 'merchant banking' in relation to its business.

16. This exemption is made under Banking (Exemption) Order No. 104 dated 18 August 2005.

Use of the expression 'offshore banking unit'

17. By instrument dated 16 June 2005, APRA has determined a class consent allowing non-bank entities which have been declared offshore banking units under s. 128AE of the *Income Tax Assessment Act 1936* to use the word 'banking' in the term 'offshore banking unit' (OBUs) to the extent necessary to identify themselves as OBUs. The instrument also gives consent to a body corporate that is related to an OBU to use 'banking' as part of the term 'offshore banking unit' in relation to the financial businesses of the offshore banking units to which it is related.

Use of the word 'banking' by credit unions and building societies

18. ADIs listed on the APRA web site as credit unions or as building societies may use the word 'banking' in relation to their banking activities.
19. A body corporate that is related to a building society or credit union may use the word 'banking' in relation to the banking activities of the building society or credit union if the word is not used in a misleading or deceptive way.

This consent came into effect by the instrument dated 19 May 2000.

Use of the expressions 'credit union', 'credit society' and 'credit co-operative'

20. ADIs listed on the APRA web site as credit unions may use the expressions 'credit union', 'credit society' and 'credit co-operative' in relation to the financial businesses which they carry on in the capacity of credit unions.

21. A body corporate that is related to a credit union may use the expressions 'credit union', 'credit society' and 'credit co-operative' in relation to the financial business carried on by the credit union if the expressions are not used in a misleading way.

This consent is made under the instrument dated 19 May 2000.

Use of the expression 'building society'

22. ADIs listed on the APRA web site as building societies have been given consent to use the expression 'building society' in relation to the financial businesses which they carry on in the capacity of building societies.
23. A body corporate that is related to a building society may use the expression 'building society' in relation to the financial business carried on by the building society if the expression is not used in a misleading way.

This consent is made under the instrument dated 19 May 2000.

Use of the words or expressions 'bank', 'banker', 'banking', 'credit union', 'credit society' and 'credit co-operative' by a superannuation entity

24. A trustee of a superannuation entity, all the members of which are officers or employees (or former officers or employees) of an ADI, may use the ADI's name as part of the trustee's name and the superannuation entity's name if the ADI is permitted to use the word or expression as part of its name and the ADI's name is not used in a misleading or deceptive way.

This consent is made under the instrument dated 19 May 2000.

Use of the words or expressions 'purchased payment facility provider' and 'PPF provider' by ADIs

25. By instrument dated 16 November 2005, APRA determined that the expressions 'purchased payment facility provider' and 'PPF provider' are restricted expressions for the purposes of s. 66.
26. By instrument dated 16 November 2005, APRA consented to the use of the expressions 'purchased payment facility provider' and 'PPF provider' by an ADI.

Applications for consent or exemption

Applications under section 66

27. The purpose of the restriction on the assumption or use of the restricted words by non-ADIs is to ensure potential customers are not misled into believing that such institutions have the same level of capital adequacy, depositor-priority and other prudential requirements that apply to ADIs. The following paragraphs address the issues to be considered in making an application for consent to use a restricted word or for an exemption from the application of ss. 66 and 66A under section 11 of the Act.

Threshold question

28. The threshold question is whether the business is a 'financial business'. If the activity is not a financial business then APRA's consent to use the restricted words is not required.

Answering the threshold question

29. The answer to the threshold question can be 'yes' only if the answer to one of the following four questions is 'yes'. These questions are:

- (i) Does the business consist of the provision of 'financial services'?
- (ii) Does the business include the provision of 'financial services'?
- (iii) Does the business relate, in whole, to the provision of 'financial services'?
- (iv) Does the business relate, in part, to the provision of 'financial services'?

30. A business which does not, itself, consist of or include the provision of financial services but which relates, even in part, to the provision of financial services, qualifies as a 'financial business' for the purposes of this test.

Meaning of the expression 'financial services'

31. It is not possible to come up with an exhaustive and prescriptive definition of the expression 'financial services'. It has not been defined in the legislation.

32. It is APRA's view that the expression includes:

- (i) the provision of, or the supply of a service in relation to, financial products such as facilities for deposit-taking in the ordinary course of banking business, securities, futures contracts, contracts of insurance (including life insurance), retirement savings accounts and superannuation interests;
- (ii) the investment activities of superannuation funds; and
- (iii) borrowing, lending and other transactions (such as entering into hire-purchase agreements or financial leases or providing credit in other forms) in which the subject of the transaction is finance. It does not include transactions (such as the purchase or sale of goods or services for a monetary consideration) in which finance (in the form of payment of a price) may be involved but cannot properly be seen as constituting the subject of the transaction.

33. The expression would seem to include investment business, insurance business and banking business.

Meaning of the expression 'financial business'

34. As has been said, if the answer to any of the four questions specified in paragraph 29 is 'yes', the business is a 'financial business' for the purposes of s. 66(1).

APRA Consent

35. If the answer to the threshold question is 'yes', a further question arises as to whether APRA should grant consent to use the restricted word(s) or expression and, if so, whether it should be conditional.

36. A decision as to whether APRA should grant consent will be made on the facts of the particular case.

37. Consent would only be granted if APRA is reasonably satisfied that to grant consent would not defeat the purpose of the restriction, namely, the protection of the public.

38. In some cases, APRA could be so satisfied if appropriate conditions were imposed. In other cases, the imposition of conditions would not avoid the confusion referred to in paragraph 27 above and, therefore, only in an extraordinary case could approval be given (if at all).

Information in support of application

39. It is essential that the information provided in support of an application for consent specifies the 'person', or other legal entity, such as a corporation, who proposes to carry on the business in relation to which the restricted word is proposed to be used.

40. It is also essential that the application identifies not only the word (or words) but also the context in which it (or they) will be used. For example, a person may propose to use only the restricted word 'banking' (not either of the restricted words 'bank' and 'banker') and only in a specified internet domain name. Consent will not be granted in terms wider than those required for the specified purpose.

41. It is crucial that adequate, reliable information is provided not only about the nature of the business but also about the precise nature of the transactions entered into in the course of carrying on the business and the kinds of persons who are or are proposed to be involved in them. For example, the transactions may involve members of the general public or they may involve only persons with specialist knowledge and expertise in financial matters.

42. In some cases it will be necessary for APRA to seek further information. Consent would not be granted where the information provided is considered to be inadequate or unreliable, for example, where information is provided only about the nature of the business or inconsistent information is provided about the precise nature of the transactions entered into in the course of carrying on the business.

Submissions in support of application

43. An application for consent should also contain submissions as to why a grant of consent would not defeat the purpose of the restriction. In particular, such submissions should demonstrate why unconditional consent or the imposition of specified conditions would be appropriate.

44. Information to be provided should include a:

- copy of business/company registration or application for registration (if applicable);
- summary of the nature of the business applying to use the restricted word;
- description of how the restricted word will be used, for example, domain name; and
- summary of the nature of the business to be carried on with the restricted word.

Additional information may be sought by APRA if the information provided does not enable a decision to be made.

45. Applications should be lodged with APRA via GPO Box 9836, Sydney, NSW 2001, fax number (02) 9210 3300, or GPO Box 9836, Melbourne, VIC 3000, fax number (03) 9663 5085.

46. An initial application can be via fax or post, however APRA will not advise the applicant of its decision until the original documents are received.

Application for exemption order under section 11

47. Under s. 11 of the Banking Act, APRA may determine that provisions, including ss. 66 and 66A, do not apply to a particular person or class of persons. As there is no provision in s. 66A for APRA to grant consent for the use of the expression 'authorised deposit-taking institution' or 'ADI' by a non-authorised entity, an application to use these words must be made under s. 11. An application should include information and submissions similar to those required in support of an application for consent (paragraphs 39 to 46 above).



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