



Law Council  
OF AUSTRALIA

*Legal Practice Section*

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General Manager  
Policy Development  
Policy and Advice Division  
Australian Prudential Regulation Authority  
Kings Avenue  
PARKES ACT 2600

By email: [PolicyDevelopment@apra.gov.au](mailto:PolicyDevelopment@apra.gov.au)

Dear General Manager

### REMUNERATION REQUIREMENTS FOR ALL APRA REGULATED ENTITIES

1. This submission has been prepared by the Superannuation Committee (**the committee**)<sup>1</sup> of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the Australian Prudential Regulation Authority (**APRA**) in relation to the Consultation on remuneration requirements for all APRA-regulated entities.
2. The aim of this submission is to suggest areas where the wording of draft CPS 511 might be clarified or where we think the wording might not be practical; we have tried to avoid debating matters of policy, with the arguable exception in part of our submission about withholding variable remuneration during an "investigation".
3. Subparagraph 20(b)(iii) requires a Registrable Superannuation Entity (**RSE**) licensee's remuneration framework to include, at a high level, the structure and terms of remuneration arrangements for a person who is "*employed by, or is a contractor of a body corporate (including a service company) that is a related body corporate or connected entity, of the APRA-regulated entity.*" We assume that this is only intended to apply to the extent that the related body or associate provides services to the APRA-regulated entity and the person has the potential to affect the provision of those services. We suggest that this should be clarified. However, the wording should retain sufficient flexibility to accommodate situations where there is a related service company but also alternate structures whereby employees are formally employed by another related party entity (e.g. a parent entity which is not a service entity) and then seconded back to the superannuation/wealth business.
4. Further in relation to paragraph 20, where a person is a responsible person of two APRA-regulated entities (and therefore two boards have decisions to make about that person's remuneration), the remuneration framework should also be required to deal with any potential conflicts of interest.

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<sup>1</sup> The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

5. Paragraph 32 says that the three-yearly review of the remuneration framework must be by someone who is “operationally independent”. That term is not defined, and we query whether further guidance could be given about that requirement. The term suggests at least that the person need not be completely external to the RSE licensee or its related bodies corporate. Does it simply require the person to not have been involved in the design and application of the remuneration framework, or is some greater degree of independence required?
6. We query whether the four remuneration adjustment tools referred to in paragraph 36(c)<sup>2</sup> are *mandatory* for every covered person who has any variable remuneration component, or are these *examples* of what the regulated entity should consider and apply if it decides it is appropriate to do so? We note that the corresponding paragraph in the July 2019 draft of CPS 511<sup>3</sup> appeared to give these only as examples of tools to be considered. Similarly, we query whether paragraph 38 is intended to require a regulated entity to have malus provisions for all variable remuneration, or does paragraph 38 merely require that, if there are malus provisions, they must meet the requirements of the paragraph?
7. Aside from the points made in paragraphs 1 to 3 above, our more substantial concerns arise in relation to the requirement in paragraphs 39 and 56 about remuneration not vesting until an investigation is closed. Our concerns are as follows:
  - (a) The meaning of “investigation” is unclear. Does it include *internal* investigations in addition to *external* investigations by law enforcement bodies? Law enforcement bodies (e.g. APRA and ASIC), and the legislation that governs them, may distinguish between:
    - formal investigations that trigger particular investigative powers (e.g. where the regulator has formed a positive opinion that it has reason to suspect contraventions of a law have occurred); and
    - other forms of enquiry that do not trigger statutory investigative powers.
  - (b) Regulators do not always disclose which individuals they are investigating as suspected wrongdoers; and regulators may be reluctant, or unable, to formally state that they are either considering a person as a suspected wrongdoer or that they have ruled the person out as a suspected wrongdoer. A regulated entity may therefore be uncertain about its obligations, with a corresponding impact on the individuals involved. Similarly, regulators do not always disclose when they have “closed” an investigation.
  - (c) Related to paragraph b) above, investigations may continue for years with uncertainty as to who is the potential “target”, only to conclude with no action being taken.

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<sup>2</sup> That is, board discretion, in-period adjustments, malus and clawback.

<sup>3</sup> Paragraph 41

- (d) Consequently, it would be desirable to make clear that if a law enforcement body does not give a regulated entity the necessary degree of clarity about whether an individual is being investigated for a relevant kind of conduct, the entity should be entitled to make some reasonable judgement about that.
  - (e) Further, in the interests of fairness to individuals, if an external investigation has been on foot for a considerable time with no obvious progress or conclusion (e.g. no prosecution or administrative action commenced) then the individuals involved should be entitled to some form of presumption of innocence (subject to the regulated entity retaining a contractual discretion to withhold remuneration). Likewise, in relation to the potential for internal investigations to be on foot for lengthy periods thereby having an unfair impact on the individual's variable remuneration, we suggest that the remuneration framework should include provisions for the investigative process to be procedurally fair.
8. Paragraphs 47-49 and 71 differ from the previous draft in now referring to recommendations and approvals for outcomes for lower positions being on a "cohort" basis rather than an individual basis. The intention behind these changes seems practical and reasonable; that is, to reduce an excessive burden on boards. But in relation to payment of individual remuneration, any cohort and cohort outcome will be the sum of each individual outcome. Therefore, we query precisely what a board "approval" would mean in this situation and what responsibility the board would be assuming. To illustrate this, an example might be that the total variable remuneration paid to material risk-takers in a trustee entity, or a particular team in a trustee entity, should reflect the level of compliance failures or successes by the entity or team over the review period, even if the allocation of responsibility between individuals for those failures or successes was left to persons below board level to decide.
9. In relation to clawback, we query how the obligation in paragraph 54 to subject remuneration to clawback differs from the obligation in paragraph 56 to take reasonable steps to appropriately apply clawback? Does paragraph 54 simply mean that there must be the *potential* for clawback (i.e. a right to clawback in certain circumstances), and paragraph 56 is about what effort the entity must make to actually *enforce* the clawback right if those circumstances are met? (We note that these paragraphs are substantially the same as paragraphs 56-59 of the previous draft.)
10. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Dr Lisa Butler Beatty the Superannuation Committee Chair, on beattymac@gmail.com.

Yours sincerely



**Michael Tidball**  
**Chief Executive Officer**