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By email

Dear APRA

HSF Kramer submission on APRA's Governance Review - Discussion Paper

Scope of this submission

This submission is made by Herbert Smith Freehills Kramer (**HSF Kramer**) in response to the Australian Prudential Regulation Authority's (**APRA**) 'Governance Review: Discussion Paper' (**Discussion Paper**) released on 6 March 2025.

Key submissions in response to the Discussion Paper

We have advised and continue to advise numerous APRA-regulated entities on governance matters. We welcome the opportunity to provide our feedback on the Discussion Paper.

Our submissions to the specific proposals and questions raised by APRA are set out in Schedules 1 and 2 below.

Further questions

If you have any questions or comments about our submissions, please do not hesitate to contact us using the details below.

Yours sincerely

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Schedule 1

HSF Kramer submissions in response to the Proposals

Proposal	HSF Kramer submission
1. Skills and capabilities Require regulated entities to: a) identify and document the skills and capabilities necessary for the board overall, and for each individual director b) evaluate existing skills and capabilities of boards and individual directors c) take active steps to address gaps through professional development, succession planning and appointments.	While the use of a skills and capabilities matrix may be useful in assessing the skills and capabilities necessary for the board as a whole, we express concern regarding the potential for APRA to overextend its mandate by focusing on the skills and capabilities of "individual" directors in proposals 1(a) and 1(b). Typically, boards comprise directors with a diverse range of skills, and it is the collective capability of the board that should be assessed in determining whether it can effectively discharge its duties in overseeing the company. As such, we recommend APRA remove the reference to individual directors in proposals 1(a) and 1(b) to maintain the fundamental concept of collective decision-making by the board. Moreover, the requisite skills and capabilities for each entity are inherently unique, shaped by the specific industry in which the entity operates, its prevailing financial and non-financial risk profiles, and the commercial opportunities available to it. We consider APRA's emphasis on documenting the appropriate skills and qualifications may not adequately appreciate directors who can bring diverse viewpoints, insights, and relevant practical experiences to a board, but who may not necessarily possess all of the traditional financial, risk and governance credentials specified in a skills matrix. We suggest the relevant actions outlined in the ASX Corporate Governance Council's Principles and Recommendations (**ASX Recommendations**) be extended to all APRA-regulated entities, except to the extent that it would undermine the current equal representation model applicable to RSE licensees. For example, APRA-regulated entities could be required to document the biographical information of directors on their websites, including relevant experience, skills and any other material directorships. Additionally, such entities would also be required to disclose a board skills matrix that outlines the mix of skills that the board (as a whole) currently has or aims to achieve in its membership. We note that multiple APRA-regulated entities already undertake these actions in compliance with the ASX Recommendations.

Proposal	HSF Kramer submission
	We do not see any material issues with proposal 1(c). We do not consider this proposal as a whole will significantly strengthen governance.
2. Fitness and propriety Require regulated entities to meet higher minimum requirements to ensure fitness and propriety of their responsible persons. Require SFIs, and non-SFIs under heightened supervision, to engage proactively with APRA on potential appointments.	We support APRA's intention to provide further guidance to regulated entities to clarify the concept of what is 'fit and proper'. APRA has highlighted the need for verifying character references and background checks and we suggest that specific guidance be provided in respect of this including a list of searches and checks entities should undertake to effectively satisfy their duty to ensure fitness and propriety of their responsible persons. We note that these additional requirements will extend the time taken and costs required to conduct a fit and proper assessment. However, this may not pose significant issues if APRA continues to permit 'interim' appointments for a period of up to 90 days. Therefore, it would be beneficial for APRA to confirm that it will continue to allow 'interim' appointments. We do not support the proposal for APRA to require entities to notify APRA of concerns in relation to a person's fitness and propriety before a determination has been reached. Such a requirement could have adverse reputational impacts on individuals and the APRA-regulated entity, which could potentially lead to defamation claims, particularly in circumstances where there has been no investigation or determination made about the person's fitness and propriety. Further, there appears to be no proposals in relation to the consequences that may arise following such notifications. This is particularly concerning in cases where it is ultimately determined that the concerns have been addressed, and the individual is subsequently found to be fit and proper. There is a risk that notifying APRA of a concern may imply that the individual should not be considered fit and proper, particularly in circumstances where all the facts about the situation are not yet known. We also note the ambiguity in the proposal about what would trigger such a disclosure to APRA, for example, would a whistleblower report that had been made be required to be immediately reported to APRA? If so, it is unclear to us as to what stage the whistleblower disclosure requirement would crystalise. We recommend the APRA guidelines provide clear guidance on the specific circumstances under which such disclosures should be made, to avoid unnecessary reputational damage, ensure consistency with whistleblower regulations and a fair process for all parties involved.

Proposal	HSF Kramer submission
	We do not support APRA noting in prudential practice guidance that APRA may request an interview with candidates on an exceptional basis. This seems to imply that if APRA calls a candidate for an interview, the appointing entity should question their fitness and propriety. In addition, APRA's ability to share its views and consider imposing increased supervision on the entity effectively grants it veto power over an individual's eligibility. We consider that this extends beyond what is a reasonable application of APRA's role as a regulator. We note that under the Financial Accountability Regime (**FAR**), APRA does **not** 'approve' Accountable Persons prior to them being appointed as an Accountable Person. This draft proposal as currently contemplated goes much further than APRA's powers under FAR (which were carefully considered by Parliament). We understand that regulated entities may already engage with APRA on these types of matters on an informal basis and consider that there is no necessity in mandating or formalising this process. Furthermore, we have concerns over the level of influence that APRA proposes to have over the appointment of directors. It is unclear what APRA envisions in terms of the requirement for entities to keep APRA informed about succession plans and nominations prior to appointments. Will the communication occur on an informal or formal basis? How will this obligation intersect with existing requirements, such as continuous disclosure and confidentiality obligations? Taken to the extreme, is APRA comfortable creating, effectively, a list of APRA approved candidates? And will APRA provide an explanation to rejected candidates? Hence, we recommend APRA's role be limited to providing guidance and monitoring compliance, rather than exerting direct influence over individual appointments which should be a role that is confined to the board and shareholders. We consider APRA's intention to provide detailed guidance on what is 'fit and proper' will strengthen corporate governance. However, APRA should not extend their powers into exerting direct influence into board appointments.
3. Conflicts management Extend current RSE licensee conflict management requirements to banks and insurers so they are also required to: a) proactively identify actual and potential conflicts of interest and duty	We do not support this proposal. Whilst we acknowledge that banks and insurers often face tensions between the interests of shareholders and customers or policyholders, we consider that concepts relating to conflicts of interest and conflict-management are already well-established legal principles through legislation, common law and equity, including an officer's duty to act in the best interests of the company and to act for proper purpose. Given the existing legal framework and the fact that many (if not all) APRA-regulated entities have a conflict of interest policy, we consider it unnecessary for APRA to issue a prudential standard on this matter.

Proposal	HSF Kramer submission
b) avoid or prudently manage conflicts c) take remedial action when conflicts are not disclosed or managed properly. Require regulated entities to consider perceived conflicts, in addition to actual and potential conflicts.	Also, the additional conflicts of interest obligations imposed on RSEs under sections 52 and 52A of the *Superannuation Industry (Supervision) Act 1993* (Cth) address the specific policy risk associated with superannuation funds, namely the relationship between a trustee and a beneficiary. This relationship is different to the legal arrangements between customer and provider in other APRA-supervised industries. Imposing additional obligations on authorised deposit-taking institutions and insurers solely because RSEs have fiduciary obligations in their capacity as trustees is unjustified. Most APRA-regulated entities also hold an Australian Financial Services Licence (**AFSL**) and are therefore subject to the obligations under section 912A(1)(aa). ASIC has also issued 'Regulatory Guide 104: AFS licensing: Meeting the general obligations' (**RG 104**) and 'Regulatory Guide 181: Licensing: Managing conflicts of interest' (**RG 181**), which each prescribe ASIC's expectations for AFSL holders in meeting their licensing obligations. RG 181 sets out extensive expectations that should address APRA's concerns. We also query the meaning of "remedial action" in proposal 3(c). If APRA proceeds with implementing this proposal, APRA should clearly outline what remedial actions are expected to be taken by the company when conflicts are not disclosed or managed properly. We do not consider this proposal will significantly strengthen governance.
4. Independence a) requiring that at least two of their independent directors (including the chair) are not members of any other board within the entity's group b) making minor amendments to the independence criteria, including extending the prohibition on directors who are substantial shareholders in a regulated entity or group from being considered independent, to include material holdings of any type of security c) extending the current requirement for bank and insurer boards to have a majority of	We do not support this proposal. We note that the rationale for this proposal is not entirely clear. We assume this proposal is targeting companies to ensure that the same independent directors on the board of an APRA-regulated subsidiary of a non-operating holding company (**NOHC**) do not also form the board of the NOHC itself. In our view, implementing this proposal may lead to a strategic disparity between a NOHC and its wholly-owned subsidiary, potentially resulting in dysfunction and inefficiencies. For example, if a bank or insurance company and its NOHC have the same board, the directors must actively consider the interests of both shareholders and depositors, ensuring the directors are aligned in considering a balance between the needs of each stakeholder. In these instances, having the same board on both entities assists with conflict management and in any event, directors' duties require any conflicts to be managed appropriately. Furthermore, mandating entities to have different Chairs on the board of their NOHC and wholly-owned subsidiary would be disruptive to entities that currently hold concurrent meetings and is likely to be administratively burdensome.

Proposal	HSF Kramer submission
independent directors to include boards of entities with a parent that is regulated by APRA or an overseas equivalent.	Moreover, as outlined in the above proposal, we consider there are concepts related to conflicts of interest and their management which are already covered by well-established legal principles, including a director's duty to act in the best interests of the company and to act for a proper purpose whether independent or not. If APRA was to implement these restrictions, we suggest that the restrictions on directors in proposals 4(a) to 4(c) should be limited to an entity's "regulated by APRA or an overseas equivalent" rather than any entity within the group. In our view, we do not consider this proposal will significantly strengthen governance.
5. Board performance review Require SFIs to commission a qualified independent third-party performance assessment at least every three years which covers the board, committees and individual directors.	We are supportive of this proposal. However, we consider that this requirement could further strengthen governance if it were aligned with the relevant recommendations about Board evaluations set out in the ASX Recommendations. This would reduce duplication / overlap of requirements for APRA-regulated entities that are also ASX-listed. If our suggestion is adopted, SFIs would be required to establish procedures for assessing the board's performance relative to its objectives and the performance of individual directors at least annually. In our view, this approach would ensure greater consistency between regulatory regimes and SFIs may be more willing to comply as this would provide more flexibility in how they assess board and director performance.
6. Role clarity Define APRA's core expectations of the board, the chair and senior management. Provide additional guidance on which APRA requirements may be delegated to board committees and senior management.	We are supportive of this proposal and welcome any additional guidance as, in our experience, there is a lack of clarity in some sectors (at least in the superannuation sector) on the demarcation between the roles of the board and management. We consider this proposal will strengthen governance.
7. Board committees Extend the current requirement for bank and insurer boards to have separate risk and audit	We are supportive of this proposal. We consider this proposal will strengthen governance.

Proposal	HSF Kramer submission
committees, to apply to SFI RSE licensees as well. Repeal this requirement for non-SFI banks and insurers, allowing flexibility for smaller entities. Mandate that only full board members can be voting members of APRA-required board committees.	
8. Director tenure and board tenure and board renewal Impose a lifetime default tenure limit of 10 years for non-executive directors at a regulated entity. Require regulated entities to establish a robust, forward-looking process for board renewal.	We do not support imposing a lifetime default tenure limit on directors of APRA-regulated entities. However, if APRA is seeking greater transparency regarding director tenure, we suggest APRA-regulated entities instead be required to disclose directors' tenure in their Annual Reports (similar to what is required of ASX-listed entities). We note that by APRA's calculations, only approximately 13% of directors of APRA-regulated entities currently have tenures over 10 years. In our view, imposing a "blanket rule" does not take into account the individual circumstances of each entity and each individual director's tenure. There may be situations where a director has served on a board for a term or two before being appointed to the position of chair. Restricting director tenure is likely to affect not only the pool of prospective chair candidates but also the duration of a chair's service. This has significant flow on effects from a governance perspective as boards are responsible for concentrating on long-term strategic issues that may be implemented over extended time periods. Additionally, boards should maintain a mixture of tenures, including directors who have developed a long 'corporate memory'. In situations where there are numerous new directors on a board and only one director remains with extensive corporate memory, disqualifying that director due to tenure restrictions could result in a loss of valuable institutional knowledge. This could leave new directors without the necessary corporate knowledge to effectively manage the company. We acknowledge that APRA has noted no other regulator anywhere in the world imposes a hard limit on tenure of directors. However, if APRA was minded to impose a lifetime tenure limit (notwithstanding the concerns we have raised above), we suggest that such a limit be increased to 15 years, with entities being required to undertake an independence assessment each year following 10 years of tenure. We do not consider this will significantly strengthen corporate governance.

Schedule 2

HSF Kramer submissions to the discussion paper questions

Discussion Paper questions	HSF Kramer submission
Impact Will the proposed changes achieve their goal of strengthening governance? What is the anticipated impact of the proposed changes (costs and benefits)?	We have outlined in the above table whether we consider each proposal raised by APRA will significantly strengthen corporate governance. Please see responses in the table above.
Regulatory burden Are there specific opportunities to simplify, reduce or optimise requirements without diluting policy intent?	To the extent the "Skills and capabilities" (Proposal 1) and "Independence" (Proposal 2) apply to listed companies, we consider there may be duplicative elements to these proposals as the majority of listed companies already comply with these governance requirements because of the operation of the ASX Recommendations. We have also outlined in the above table any opportunities to simplify, reduce or optimise requirements. Please see responses in the table above.
Transition What would assist a smooth transition to meet updated requirements?	We recommend that APRA allow entities sufficient time to implement the updated governance requirements, particularly requirements that require board renewal and director change as there may be extensive appointment and transition processes required. Additionally, APRA should offer clear guidance on the effective implementation of these requirements and the interpretation of each proposal as to assist impacted entities to effectively put the requirements into practice.
Proportionality Some proposals are at the heart of good governance and should apply to all regulated entities. Others may be able to be explicitly modified to make it simpler for smaller and less complex entities. In all instances, APRA expects entities to comply in a way that is appropriate for their business size or complexity. • APRA sees merit in differentiating requirements in the following areas and	We agree that entities should be required to comply in a manner that is appropriate for their business size and complexity. We recognise there may be a potential risk to entities arising from ambiguity in the threshold level at which proposals apply. Accordingly, we recommend that APRA provide clear guidance on when the requirements outlined will and will not apply to different sized entities.

welcomes views on where this is appropriate. Implementation – Providing non-SFIs with more time to transition to meet updated requirements. • Skills and capabilities – Consideration of skills and minimum skills criteria to be applied in line with a regulated entity's business needs, size and complexity. Smaller, simpler entities should not expect to need the same depth and breadth of skills and capabilities as large complex entities. • Board renewal and appointments – Exempting non-SFIs from having to provide APRA with succession plans and potential nominees, unless requested by APRA on a risk basis. • Board committees – Exempting non-SFIs from having separate audit and risk committees. • Reporting – APRA does not intend to introduce any new routine reporting requirements for non-SFIs when updating governance standards. APRA proposes to require SFIs to engage early on succession planning and candidates for appointment, and to submit their triennial board performance review.	
Board delegation What responsibilities created by APRA standards do entity boards currently delegate to senior management or board committees? Which responsibilities might entity boards consider appropriate to delegate, with APRA's explicit support?	As APRA is aware, an authorised deposit-taking institution must establish certain committees including a Board Audit Committee, Board Risk Committee and Board Remuneration Committee. We understand that the boards various institutions currently delegate: • capital adequacy and liquidity monitoring within defined parameters; • risk exposure oversight within parameters; • climate change financial risk monitoring; • material outsourcing as delegated from the board; • information security oversight as delegated from the board;

	• intra-group transactions within parameters; and • assessment of fitness and propriety within parameters. Note, this is a high-level list and does not set out the specific responsibilities of an APRA-regulated entity.
Reducing Overlap How might fit and proper reporting for responsible persons be streamlined, given the introduction of accountable persons reporting under the FAR?	There should be alignment between the standards that apply to assessing suitability of an accountable person under FAR and fit and proper requirements for responsible persons. As noted above, APRA does not have powers under FAR to 'approve' the appointment of an accountable person and in our view, the prudential standards should not go beyond what Parliament has legislated under FAR.