

**Date: 28 November 2003**

**MEMORANDUM  
OF  
UNDERSTANDING**

**AUSTRALIA**

**Australian Prudential  
Regulation Authority**

**UNITED KINGDOM**

**Financial Services  
Authority**

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## Contents

<b>RECITALS</b>	<b>2</b>
<b>OPERATIVE PART</b>	<b>3</b>
Interpretation	3
Purpose and Principles	3
Provision of Unsolicited Information	3
Requests for Assistance	4
Procedure for Requests	4
Assessing Requests	5
Further Procedures for Enforcement Matters	6
Contact Points	6
Costs	6
Confidentiality and Privacy	6
Consultation	6
Commencement	6
Termination of Existing MOU	7
<b>APPENDIX 1: FURTHER PROCEDURES FOR ENFORCEMENT MATTERS</b>	<b>8</b>
Further Details to be Contained in Requests to FSA for Assistance	8
Further Details to be Contained in Requests to APRA for Assistance	8
Further Ground for Denial of Request	8
Requests to Sit in	8
Joint Investigations	9
Rights of Persons Preserved	9
<b>APPENDIX 2: PROCEDURES FOR MAKING REQUESTS UNDER MABRA</b>	<b>10</b>
A. Making a Request	10
B. The FSA may need to Satisfy Conditions and Provide Undertakings in Respect of Requested Material	11

# Memorandum of Understanding (“MoU”)

Between

**Australian Prudential Regulation  
Authority (“APRA”)**

and

**Financial Services Authority  
 (“FSA”)**

## Recitals

- A. APRA is Australia’s national prudential regulator. It is established under the *Australian Prudential Regulation Authority Act 1998* and administers legislation providing for the supervision of banks, insurance companies, superannuation funds, credit unions, building societies and friendly societies authorised to operate in Australia.
- B. The FSA is the United Kingdom’s national financial services and markets regulator. As such it administers the *Financial Services and Markets Act 2000* (“FSMA”) which provides among other things for the supervision of financial services, financial products and financial markets. Also, in its capacity as the competent Authority (i.e. the UK Listing Authority) under Part VI of FSMA, the FSA is responsible for regulating listed issuers and their corporate advisers.
- C. APRA and the FSA wish to enter into this MoU to provide a formal basis for co-operation, including for the exchange of information and investigative assistance. APRA and the FSA believe such co-operation will enable them to more effectively perform their functions.

## Operative Part

### Interpretation

1. In this MoU, unless the context requires otherwise:

“**administering**” an applicable law, regulation or requirement includes enforcing the same;

“**applicable laws, regulations and requirements**” means any law, regulation or requirement applicable in Australia and/or in the United Kingdom, and where the context permits includes:

- (a) relevant European legislation that has not yet been transposed into UK domestic law;
- (b) any law, regulation or requirement applicable in Australia or the United Kingdom; and
- (c) any rule, direction, requirement, guidance or policy made or given by or to be taken into account by an Authority;

“**Authority**” means APRA or the FSA;

“**FSA**” means the Financial Services Authority;

“**APRA**” means the Australian Prudential Regulation Authority;

“**permitted onward recipient**” means an agency or authority responsible for prosecuting, regulating or enforcing applicable laws, regulations and requirements falling within the areas of responsibility of the Authorities;

“**person**” means a natural person, legal entity, partnership or unincorporated association.

### Purpose and Principles

2. The purpose of this MoU is to establish a formal basis for co-operation, including the exchange of information and investigative assistance.
3. This MoU does not modify or supersede any laws or regulatory requirements in force in, or applying to, Australia or the United Kingdom. This MoU sets forth a statement of intent and accordingly does not create any enforceable rights. This MoU does not affect any arrangements under other MoUs.
4. The Authorities acknowledge that they may only provide information under this MoU if permitted or not prevented under applicable laws, regulations and requirements.

### Provision of Unsolicited Information

5. The Authorities may provide information, or arrange for information to be provided, on a voluntary basis even though no request has been made.

## **Requests for Assistance**

6. If a request for assistance is made, each Authority will use reasonable efforts to provide assistance to the other, subject to its laws and overall policy. Assistance may include for example:
- (a) providing information in the possession of the requested Authority, including on particular institutions/groups/affiliates (or parts thereof) with operations supervised (or prospectively supervised) by either Authority;
  - (b) confirming or verifying information provided to it for that purpose by the requesting Authority;
  - (c) exchanging information on, or discussing issues of, mutual interest including on prudential policy and practice;
  - (d) obtaining specified information and documents from persons;
  - (e) questioning or taking testimony of persons designated by the requesting Authority;
  - (f) conducting inspections or examinations of financial services providers or arranging for the same; and
  - (g) permitting the representatives of the requesting Authority to participate in the conduct of enquiries made by or on behalf of the requested Authority pursuant to paragraphs (e) - (f) above.

## **Procedure for Requests**

7. Requests for the provision of information or other assistance will be made in writing, or made orally and, unless otherwise agreed, confirmed in writing within ten business days. To facilitate assistance, the requesting Authority should specify in any written request:
- (a) the information or other assistance requested (identity of persons, issues to be pursued, questions to be asked etc.);
  - (b) if information is provided by the requesting Authority for confirmation or verification, the information and the kind of confirmation or verification sought;
  - (c) the purpose for which the information or other assistance is sought;
  - (d) to whom, if anyone, onward disclosure of information provided to the requesting Authority is likely to be necessary and, in relation to onward disclosure to a person who is not a permitted onward recipient, the purpose such disclosure would serve;
  - (e) if the request for assistance is for the purpose of actual or possible enforcement action, the matters set out in clauses 1 and 2 of Appendix 1; and

- (f) any other matters specified (including under the laws, regulations and requirements applicable to the requested Authority) by the requested Authority and by the applicable laws, regulations and requirements in relation to the requested Authority.

### **Assessing Requests**

8. Each request for assistance will be assessed on a case-by-case basis by the requested Authority to determine whether assistance can be provided under the terms of this MoU. In any case where the request cannot be fulfilled in part or whole, the requested Authority will consider whether there may be other assistance which can be given by itself or by any other authority in its jurisdiction. The requested Authority will inform the requesting Authority promptly of the outcome of its consideration of a request. Where this consideration may take some time, the requested Authority will regularly notify the requesting Authority of progress in its consideration of the request.
9. In deciding whether and to what extent to fulfil a request, the requested Authority may take into account:
  - (a) whether the request conforms with this MoU;
  - (b) whether the request involves the administration of a law, regulation or requirement which has no close parallel in the jurisdiction of the requested Authority;
  - (c) whether the provision of assistance would be so burdensome as to disrupt the proper performance of the requested Authority's functions;
  - (d) whether it would be otherwise contrary to the public interest or the essential national interest of the requested Authority's jurisdiction to give the assistance sought;
  - (e) if the request for assistance is for the purpose of actual or possible enforcement action, the further matter set out in clause 3 of Appendix 1;
  - (f) any other matters specified by the laws, regulations and requirements of the requested Authority's jurisdiction (in particular those relating to confidentiality and professional secrecy, data protection and privacy, and procedural fairness); and
  - (g) whether complying with the request may otherwise be prejudicial to the performance by the requested Authority of its functions.
10. The Authorities recognise that assistance may be denied in whole or in part for any of the reasons mentioned in paragraph 9 in the discretion of the requested Authority.

### **Further Procedures for Enforcement Matters**

11. The further procedures set out in Appendix 1 will apply in relation to actual or possible enforcement matters.

### **Contact Points**

12. The Authorities will provide a list of contact points to which information or requests for information or assistance under this MOU should be directed. Any subsequent changes to the lists will be notified by letter.

### **Costs**

13. If the cost of fulfilling a request is likely to be substantial, the requested Authority may, as a condition of agreeing to give assistance under this MoU, require the requesting Authority to make a contribution to costs.

### **Confidentiality and Privacy**

14. An Authority that receives non-public information under this MoU will only disclose that information in accordance with disclosure permitted under its applicable laws, regulations and requirements, including privacy laws. The recipient Authority will endeavour to consult with the other Authority if it proposes to pass on information to another person. The recipient Authority will endeavour to comply with any restrictions on the use of information that are agreed when the information is provided.
15. If there is a legally enforceable demand for information supplied under this MoU, the Authority receiving the demand will notify the Authority that supplied the information of the demand, unless this is not practicable for reasons of urgency. The Authority receiving the demand will use all reasonable legal means to resist such a demand, including asserting such appropriate legal exemptions or privileges with respect to that information as may be available.

### **Consultation**

16. The Authorities will keep the operation of this MoU under review and will consult when necessary with a view to improving its operation and resolving any matters arising from its operation.
17. Where the specific conduct set out in the request for assistance may constitute a breach of a law, regulation or requirement in both the territory of the requesting and the requested Authorities, the relevant Authorities will consult to determine the most appropriate means for each Authority to provide assistance.

### **Commencement**

18. This MoU will take effect when both Authorities have signed it and will continue to have effect until terminated by either Authority giving 30 days advance written notice to the other Authority provided, however, the provisions set forth under the heading "Confidentiality and Privacy" shall not terminate with respect to any information

provided or actions taken under this Memorandum prior to its termination. It may be amended by agreement in writing.

### **Termination of Existing MoU**

19. The MoU between APRA and the FSA dated 10 August 1998 is terminated.

### **Executed by the Parties:**

**For APRA**



John Laker  
Chairman

**For the FSA**



Michael Foot  
Managing Director, Deposit Takers  
and Markets Directorate

Date: *28 November 2003*

Date: *11 December 2003*



## **Appendix 1: Further Procedures for Enforcement Matters**

### **Further Details to be Contained in Requests to the FSA for Assistance**

1. If APRA makes a request to the FSA for assistance as described in this MoU that relates to actual or possible enforcement action, the following further details will be contained in the request:
  - (a) a description of the conduct or suspected conduct which gives rise to the request;
  - (b) details of the applicable law, regulation or requirement to the administration of which the request is relevant;
  - (c) the link between the specified rule or law and the regulatory functions of the requesting Authority;
  - (d) the relevance of the requested assistance to the specified rule or law; and
  - (e) whether it is desired that, to the extent permitted by the laws applying to the requested Authority, any persons from the country of the requesting Authority should be present during interviews which form part of an investigation, and whether it is desired that such persons should be permitted to participate in the questioning (as to which see clause 4 below).

### **Further Details to be Contained in Requests to APRA for Assistance**

2. If the request is made under the *Mutual Assistance in Business Regulation Act 1992* ("MABRA"), other particulars must be contained in the request.

The procedure for making a request under MABRA is set out in Appendix 2.

### **Further Ground for Denial of Request**

3. If a request for assistance as described in this MoU relates to actual or possible enforcement action, the following further matter may be taken into account by the requested Authority in determining whether to fulfil the request in whole or in part:
  - whether the request would lead to the prosecution of, or the taking of disciplinary or other enforcement action against, a person who in the opinion of the requested Authority has already been appropriately dealt with in relation to the alleged breach that is the subject-matter of the request.

### **Requests to Sit In**

4. If, following a request from the requesting Authority, the requested Authority conducts an interview of any person, the requested Authority may permit a representative of the requesting Authority to attend such an interview and to ask questions. Such requests will be in accordance with the applicable laws, regulations and requirements of the requested Authority. Requests for such assistance directed to

the FSA should conform with the FSA's published guidance in Annex 2G of Chapter 2 of its Enforcement Manual <sup>1</sup>.

### **Joint Investigations**

5. The Authorities acknowledge that, subject to secrecy and confidentiality issues, an investigation, where it concerns suspected breaches of the law of both jurisdictions, may be conducted more effectively by the establishment of a joint investigation involving members of staff from both Authorities.
6. The Authority suggesting the joint investigation will advise the other Authority of the background to the request for a joint investigation, and liaise with the other Authority to determine the likely objectives of the joint investigation, the expected resources required and the approximate duration of the proposed joint investigation. Each Authority will advise the other as soon as possible as to whether it will agree to such an investigation.
7. If the Authorities agree to take part in a joint investigation, an agreed initial action plan will be prepared setting out, among other things, the objectives, expected duration, funding, publicity and accountability arrangements, management of the joint investigation, and allocation of responsibilities.
8. Suggestions to APRA for a joint investigation should be made through the Secretary. Suggestions to the FSA should be made to the Director, Enforcement.

### **Rights of Persons Preserved**

9. Any person providing testimony, information or documents as a result of a request made under this MoU or laws applicable to a requested Authority will be entitled to all the rights and protections of the laws of the jurisdiction of the requested Authority. Where assertions are made regarding other rights and privileges arising exclusively pursuant to the laws of the jurisdiction of the requesting Authority, the Authorities will consult to determine the most appropriate way to proceed.

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<sup>1</sup> at [www.fsa.gov.uk/handbook/](http://www.fsa.gov.uk/handbook/)

## **Appendix 2: Procedures for Making Requests under the Mutual Assistance in Business Regulation Act 1992**

The object of the *Mutual Assistance in Business Regulation Act 1992* (“MABRA”) is to enable prescribed Commonwealth regulators to assist foreign regulators in their administration / enforcement of foreign business laws by obtaining information, documents and evidence and passing it to the foreign regulator. The Australian Prudential Regulation Authority is a prescribed regulator under MABRA. This summary sets out the procedures for the FSA to request information from APRA under MABRA.

### **A. Making a Request**

Subsection 6(2) of MABRA precludes APRA from taking any action unless a written request from the FSA includes:

1. The purpose for which assistance is sought and information, evidence or documents are to be used or may at any future time be used;
2. A description of the subject matter of the request and the facts of the matter including:
  - (a) the conduct under investigation;
  - (b) any periods of time to which the request relates; and
  - (c) the names, and last known addresses, of individuals to whom, or bodies corporate to which, the request relates or refers;
3. A copy of the relevant foreign business law and a statement of how the facts gave rise to a belief or suspicion that the relevant law has been, or may have been, contravened;
4. A statement as to whether the FSA would be able to comply with a similar request made by APRA;
5. A statement as to whether the FSA has sought, or could conveniently seek from another source the information, evidence or documents to which the request relates;
6. A statement of the grounds on which it is considered that APRA will be likely to be able to obtain the information, evidence or documents (the particular prudential framework law);
7. Details of the confidentiality that the FSA will accord any information provided in compliance with the request;
8. The time within which the FSA desires to receive the information;
9. Whether the FSA desires to receive the information in a single transmission or as and when each item of information becomes available;
10. The name and telephone number of a contact officer of the FSA who is familiar with the subject matter of the request and who will be available by telephone to answer

queries or clarify matters relating to the request if asked to do so by an officer of APRA;

11. An undertaking to the effect that information or evidence provided to the FSA under MABRA:
  - (a) will not be used for the purposes of criminal proceedings or proceedings for the imposition of a penalty against the person; and
  - (b) will not be used by any other person, authority or agency for the purposes of any such proceedings, in so far as the FSA can ensure it.

**B. The FSA may need to Satisfy Conditions and Provide Undertakings in Respect of Requested Material**

While APRA will consider a request (and may impose specified conditions), the Attorney General has the final decision under MABRA to authorise a request. Any request authorised by the Attorney General also may be subject to the FSA satisfying specified conditions or providing undertakings to ensure compliance with those conditions.