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To my Mum, the memory of my Dad (1945-2021),
and all others who helped me to publish my monographs

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Preface

In October 2021, with the exciting project of my two monographs on the British judges of the International Court of Justice well on the way to completion – the first, i.e., '*The British Judges of the International Court of Justice: An Explication? Overview, McNair and Lauterpacht*', had been published, and the second, i.e., '*The British Judges of the International Court of Justice: An Explication? The Later Jurists*' was in its middle phase of writing, it occurred that two further books might be possible – but, this time, in financial, rather than international, law. When I joined BPP Law School as an LLM Lecturer in 2010, the Director of LLM Programmes, Barry Rider, asked me to write and teach four modules – two of which were titled 'United Kingdom (UK) and International Banking Law' and 'UK Corporate Securities Law'. In these areas, international standards and guidelines and European Union legislation were beginning to roll off the Press at an almost alarmingly rapid rate, as a co-ordinated response to the events of the Global Financial Crisis. This was excellent news for a financial law lecturer, especially one who had a good grasp of the workings of financial instruments. Although writing these courses, and publishing articles, comments, briefings and updates – especially in Thomson Reuters' journal '*The Company Lawyer*' with the co-operation of the House Editor the late Scott McHugh who, in particular, showed a lot of enthusiasm for the publication therein of my trilogy of articles on 'Basel III implementation and the European Union' in 2012 – these were written at a time when the Capital Requirements Regulation and the fourth Capital Requirements Directive were in their formative stages, required much energy and quite a lot of time, it gave me an eagerness for, and grasp of, these developing fields. Readers of my monograph titled '*The European Union and the Global Financial Crisis: A View from 2016*' will be able to see how busy the European Union was in drafting and publishing financial legislation in the wake of the Global Financial Crisis. It was fortunate that I was able to harness this activity and put it comprehensively into writing on the cusp of the UK's Brexit vote.

These two books, as proposed in October 2021, were entitled '*An Overview of Banking Law in Six English-Language Jurisdictions*' and '*An Overview of Corporate Securities Law in Six English-Language Jurisdictions*', and the jurisdictions to be covered were Australia, Canada, New Zealand, Singapore, South Africa and the United States of America. They were to have a common introduction in each of the six country-specific chapters, which introduced the law of the place to which the relevant chapter was dedicated. This would be followed by law specific to the country and to the field. In the event, six jurisdictions proved to be a mammoth effort of research and writing – and would have led to monographs that were of lengths with which the publisher would not have been happy. Thus, reluctantly, they were revised to four jurisdictions, and became '*An Overview of Corporate Securities Law in Four English-Language Jurisdictions*' – i.e., the monograph which you are currently reading, and '*An Overview of Corporate Securities Law in Four English-Language Jurisdictions*' – its sister publication which I would also like you to acquire and assimilate.

Both books have a considerable coverage of the law in each of the four jurisdictions, although more has been omitted than has been included therein – which confirms the title 'An Overview'. If my selection of material has been reasonable, then it will provide the reader with a good idea as to the scope and content of the law of banking or – in the accompanying monograph – the law of securities' transactions, within the four jurisdictions addressed in each book. Wishing you all the best with your reading.

Graeme Baber
December 2022

List of Abbreviations

ADI	Authorised deposit-taking institution (Australia)
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
AUD	Australian Dollar(s)
BIS	Bank for International Settlements
CAD	Canadian Dollar(s)
FDIC	Federal Deposit Insurance Corporation (USA)
IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund
NOHC	Non-operating holding company (Australia)
NZD	New Zealand Dollar(s)
OCC	Office of the Comptroller of the Currency (USA)
RBA	Reserve Bank of Australia
RBNZ	Reserve Bank of New Zealand
SEC	Securities and Exchange Commission (USA)
UK	United Kingdom of Great Britain and Northern Ireland
USA	United States of America
USD	United States Dollar(s)
WTO	World Trade Organization

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Chapter 1

Australia

Abstract

The political and legal systems of Australia are based on a federal model that was founded in 1901. Sources of Australian law comprise statute law, common law and equity. The High Court of Australia is at the apex of both the federal court structure and the state court organisation in that jurisdiction. The regulatory framework for Australian banks includes the Reserve Bank of Australia (RBA), the Australian Securities and Investment Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). The APRA is the principal supervisor of the business of banking in Australia, which is carried out by authorised deposit-taking institutions (ADIs). The Banking Act 1959 provides for the APRA to prudentially supervise ADIs. The leading aims of the Act are to protect the interests of depositors in ADIs and to promote stability in Australia's financial system. The Act contains provisions that one would expect to find there – such as the authorisation framework for ADIs, and also more surprising rules – such as that giving the Act precedence over any conflicting items within the Corporations Act 2001.

Keywords: ADI, APRA, banking, court, depositors, liabilities, NOHC, offence

Introduction

The Australian legal system is introduced. Then, the regulatory framework for banks in Australia is outlined. The main section of this chapter surveys the Banking Act 1959, concentrating especially on banking business and ADIs. The last section concludes.

An Introduction to the Legal System of Australia

Essentials

The Australian political and legal systems work on a federal model that was founded in 1901[1] [1]. The Australian legal system functions on a two-tiered basis, i.e., at federal and state levels [1].

The two main sources of Australian law are statute law and common law (i.e., case law) [1]. Another such source is the law of equity [2]. The English Judicature Acts of the 1870s

[1] It is submitted that the reference to the year 1901 is to the date of entry into force of the Act to Constitute the Commonwealth of Australia, which is 1st January 1901 (Government of Australia (2022), "Infosheet 13 – The Constitution," accessed February 2, 2022, <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_13_-_The_Constitution>). The subsection entitled 'Commonwealth of Australia Constitution Act 1900', below in the current section, covers the Act to Constitute the Commonwealth of Australia.

combined the separate courts of common law (such as the Court of King's/Queen's Bench) and equity (such as the Court of Chancery), so that all courts have both common law and equitable powers – which has been applied in all states and territories of Australia except for New South Wales, whose Supreme Court includes a Common Law Division and Equity Division[2] that are each run by a Chief Judge [2].

The Parliamentary Legislative Process

Each of the nine Parliaments in Australia comprises: (i) a lower house – the House of Representatives in the federal parliament and the Legislative Assembly in the parliaments of the states and territories, (ii) an upper house – the Senate in the federal parliament and the Legislative Council in the parliaments of the states and territories, and (iii) Her Majesty the Queen or her representative (now His Majesty King Charles III or his representative) – the Governor-General at federal level, the Governor (states), or the Administrator (territories) [3]. The procedure for law-making in Australia is as follows: (i) a proposal is made for making or amending a law, (ii) parliamentary draftsmen draft the bill, and the relevant minister introduces the bill in parliament[3], (iii) the bill undergoes three readings during which it is extensively discussed and debated, (iv) if both houses of parliament pass the bill with a majority vote, then it is sent to the Governor-General/Governor for royal assent, (v) the bill becomes an Act of Parliament [4].

Subordinate Legislation

In cases in which the subject matter of legislation is technical or likely to change often, the parliament is empowered to 'delegate' the formulation of the detailed regulations to a subordinate body[4] [5]. As delegated legislation is made under the enabling Act of Parliament's authority, the rules therein must be made in the way that the enabling Act specifies [5].

The Doctrine of Precedent

A lower court in a given judicial hierarchy is bound by a decision on a point of law by a higher court on that same ladder [6]. For example, a single Supreme Court justice in New South Wales

[2] In addition to these two Divisions – which administer the trial jurisdiction of the Supreme Court of New South Wales, that Court also has a supervisory jurisdiction over other courts and tribunals of New South Wales – which is operated by its Court of Appeal and Court of Criminal Appeal (The Supreme Court of New South Wales (2022), "About the Supreme Court," accessed January 31, 2022, <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_aboutus/sco2_aboutus.aspx>).

[3] A bill may be initiated in either house of parliament, although some bills must begin in the lower house (Harris, J., and Croese, C. (2015), *Contract Law in Context* (Melbourne: Oxford University Press Australia), 7).

[4] The subordinate body is usually the Governor-General/Governor, a minister of the government department that is responsible for implementing the Act of Parliament, a local council, a statutory government agency or a professional body (Ciro, T., Goldwasser, V., and Verma, R. (2019), *Law and Business*, 5th Edition (Melbourne: Oxford University Press), 39).

is obliged to apply the rule from a decision of the Court of Appeal in New South Wales if the two cases involve similar facts [7].

Equitable Remedies

Equitable remedies are discretionary, and exist to preclude unethical conduct, i.e., behaviour that is not founded on justice, fairness and good conscience [8]. The doctrines of estoppel and unconscionable bargains comprise examples of equitable intervention [8]. Equitable remedies include an injunction – in which a court directs the defendant to cease from effectuating acts that could damage the plaintiff's interest, and an order for specific performance – which instructs the defendant to perform its contractual obligations as the parties originally agreed [9].

The Relationship between Statute Law and Common Law

If statute law and common law are at variance, then statute law prevails [10]. Statute law can alter the common law – including the principles of equity, if the relevant statute is adequately explicit in stating its intention to do this [11].

Courts

Courts fashion the law by the manner in which they interpret provisions of statutes [7]. In applying statutory rules in a variety of factual circumstances, the court my need to consider the policy underpinning the pertinent statute and the stated purpose of that statute in order to determine whether the relevant provision within it applies to a particular situation [7].

There exists a federal court system, in which there may be an appeal from federal circuit courts to the Full Court of the Federal Court of Australia[5], and from the latter to the High Court of Australia [12, 13]. There is also a state court system, in which there may be an appeal from local courts to the appropriate District Court, and from the latter to the Supreme Court of the particular state [12]. In the Supreme Court, a case is normally commenced before a sole judge, whose decision may be appealed to a three-member Court of Appeal of that Supreme Court or to the Full Court of the Federal Court of Australia [13, 14]. Whilst determinations of the Court of Appeal or the Full Court may be appealed to the High Court of Australia, the High Court must first accord special leave to appeal [15]. There is no further appeal from a judgment of the High Court of Australia [15].

[5] The Federal Court of Australia resolves disputes on federal law, such as immigration, intellectual property and taxation (Harris, J., and Croese, C. (2015), *Contract Law in Context*, 9).

Tribunals

Whilst tribunals provide a cheaper and less formal means to settle disputes than courts, unlike the latter they are not determinative of legal rights – but settle disputes concerning the application of particular provisions [16]. Tribunals may be restricted in scope – such as the Migration Review Tribunal, or general[6] – for instance the Administrative Appeals Tribunal [16]. There may be an appeal on a point of law from an administrative tribunal to the Supreme Court of the relevant state or to the Federal Court of Australia, and thenceforth to the High Court of Australia [16].

Commonwealth of Australia Constitution Act 1900

The Act to constitute the Commonwealth of Australia – whose short title is the Commonwealth of Australia Constitution Act [17] – established the Commonwealth of Australia [18]. The Federal Parliament of the Commonwealth comprises the Queen (now King Charles III), a Senate and a House of Representatives [19]. The Queen's (King's) appointment of a Governor-General is Her (His) Majesty's representative in the Commonwealth of Australia [20]. Legislative powers of the Federal Parliament include those with regard to legal tender[7] [21], banking except for state banking[8] [22], insurance bar state insurance[9] [23], promissory notes and bills of exchange [24], and bankruptcy and insolvency [25]. If the law of a state is incompatible with a law of the Commonwealth of Australia, then the latter prevails – and the former is invalid "to the extent of the inconsistency" [26].

Australia Act 1986

The Australia Act 1986 terminates the power of the Parliament of the UK to legislate for Australia or any of its states or territories [27]. It empowers the parliament of each state of Australia to legislate with extra-territorial application [28].

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[6] Some states have general tribunals that resolve administrative law challenges to decisions of the government and some private disputes – such as small claims at civil law and disagreements as to residential tenancy; these include the Victorian Civil and Administrative Tribunal and the New South Wales Civil and Administrative Tribunal (Harris, J., and Croese, C. (2015), *Contract Law in Context*, 11).

[7] The Commonwealth of Australia Constitution Act refers to "Currency, coinage, and legal tender:" (Government of Australia (2021), "Commonwealth of Australia Constitution Act 1900," adopted on July 9, 1900, entered into force on January 1, 1901, Compilation No. 6 of July 29, 1977, registered on November 18, 2021, Part V, Paragraph 51(xii)).

[8] Legislative powers of the Federal Parliament include those in respect of "Banking other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:" (Government of Australia (2021), "Commonwealth of Australia Constitution Act 1900," adopted on July 9, 1900, entered into force on January 1, 1901, Compilation No. 6 of July 29, 1977, registered on November 18, 2021, Part V, Paragraph 51(xiii)).

[9] Legislative powers of the Federal Parliament include those relating to "Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:" (Government of Australia (2021), "Commonwealth of Australia Constitution Act 1900," adopted on July 9, 1900, entered into force on January 1, 1901, Compilation No. 6 of July 29, 1977, registered on November 18, 2021, Part V, Paragraph 51(xiv)).

Comment

Australia is gradually emerging as a federal, common law system from its position in the English legal structure in the time of its status as a British colony. Australian law and practice tends to be based on that of England and Wales. Since the implementation of the Australia Act 1986, the influence of the UK Parliament over the Australian legislature has substantially declined. In the event of a clash between Australian federal law and Australian state law, the former prevails over the latter to the extent of the contradiction.

The Regulatory Framework for Australian Banks

Reserve Bank of Australia

The Commonwealth Bank of Australia was founded in 1911 [29]. It was renamed the Reserve Bank of Australia (RBA) in 1959 [30]. The general powers of the RBA are as follows[10].

> The Bank has such powers as are necessary for the purposes of this Act [(i.e., the Reserve Bank Act 1959)] and any other Act conferring functions on the Bank and, in particular, and in addition to any other powers conferred on it by this Act and such other Acts, has power: (a) to receive money on deposit; (b) to borrow money; (c) to lend money; (d) to buy, sell, discount and re-discount bills of exchange, promissory notes and treasury bills; (e) to buy and sell securities issued by the Commonwealth [of Australia] and other securities; (f) to buy, sell and otherwise deal in foreign currency, specie, gold and other precious metals; (g) to establish credits and give guarantees; (h) to issue bills and drafts[,] and effect transfers of money; (i) to underwrite loans; and (j) to do anything incidental to any of its powers [31].

The Australian Securities and Investments Commission

The ASIC is an independent agency of the Government of Australia [32]. In carrying out its functions and exercising its powers, the ASIC – under the Australian Securities and Investment Act 2001 – must try to: "maintain, facilitate and improve the performance of the financial system and the entities within that system" [33], "promote the confident and informed participation of investors and consumers in the financial system" [34], "administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements" [35], "receive, process and store, efficiently and quickly, the information given to ASIC under

[10] The RBA's website notes: "The Reserve Bank of Australia (RBA) is Australia's central bank[,] and derives its functions and powers from the *Reserve Bank Act 1959*. Its duty is to contribute to the stability of the currency, full employment, and the economic prosperity and welfare of the Australian people. It does this by conducting monetary policy to meet an agreed medium-term inflation target, working to maintain a strong financial system and efficient payments system, and issuing the nation's banknotes. The RBA provides certain banking services[,] as required[,] to the Australian Government and its agencies, and to a number of overseas central banks and official institutions. Additionally, it manages Australia's gold and foreign exchange reserves." (Government of Australia (2022), "Reserve Bank of Australia: About the RBA," accessed February 16, 2022, <https://www.rba.gov.au/about-rba/>; emphasis original).

the laws that confer functions and powers on it" [36], "ensure that information is available as soon as practictable for access by the public" [37], and "take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth [of Australia] that confer functions and powers on it"[11] [38], whilst taking into consideration the impact of the performance of its functions and the exercise of its powers will have on competition within the financial field [39].

The Australian Prudential Regulation Authority

The Australian Prudential Regulation Authority Act 1998 established the APRA [40]. The main purposes for founding the APRA are to regulate entities in the financial sector in agreement with other laws of the Commonwealth of Australia that cater for prudential regulation or "retirement income standards" [41], administer the schemes for financial claims for which the Banking Act 1959 and Insurance Act 1973 provide [42], and develop the necessary administrative procedures and practice to perform this regulation and administration [43]. In discharging its functions and exercising its powers, the APRA is to balance the following objectives: competition, competitive neutrality, contestiblility, efficiency and financial safety – and, in so balancing, is to advance the stability of the financial system in Australia [44]. The Banking Act 1959 provides for the APRA to prudentially supervise ADIs[12] [45]. It is to this federal statute that the next section turns.

Banking Act 1959

Main Objects of the Banking Act 1959

The main objects of the Banking Act 1959 are to safeguard the interests of depositors in ADIs in ways that are compatible with the ongoing development of a workable, competitive and groundbreaking banking industry [46], and to further stability in Australia's financial system [47].

Banking Business and ADIs

Authority to Carry on Banking Business

An person commits an indictable offence if (s)he or it engages in banking business[13] in Australia, and is either a body corporate that is neither the Reserve Bank of Australia nor an

[11] In the present consolidated version of the Australian Securities and Investments Commission Act 2001 – from which these quoted clauses are drawn, paragraph 1(2)(c) is omitted, i.e., the six quoted clauses originate from paragraphs 1(2)(a), 1(2)(b), 1(2)(d), 1(2)(e), 1(2)(f) and 1(2)(g) of the Australian Securities and Investments Commission Act 2001, respectively.

[12] 'ADI' is an abbreviation for 'authorised deposit-taking institution' ((Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.5(1)).

[13] 'Banking business' is "a business that consists of banking within the meaning of paragraph 51(xiii) of the [Commonwealth of Australia] Constitution [Act 1900]" or "a business that is carried on by a corporation to

ADI, or not a body corporate[14] [48]. A body corporate that wishes to acquire authority to conduct banking business in Australia must apply for this in writing to the APRA[15] [49], which may set criteria for this authority to be granted[16] [50]. If APRA grants the authority, then it must provide the applicant with written notice of the according of this permission – and the authority is to be in writing [51]. APRA may reject the application if the applicant is a subsidiary of another body corporate that does not possess a NOHC[17] authority[18] [52]; it may

which paragraph 51(xx) of the Constitution applies and that consists, to any extent, of: (i) both taking money on deposit (otherwise than as part-payment for identified goods or services) and making advances of money; or (ii) other financial activities prescribed by the regulations for the purposes of this definition" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.5(1)). Fn 8 states Paragraph 51(xiii) of the Commonwealth of Australia Constitution Act 1900. Paragraph 51(xx) of the Commonwealth of Australia Constitution Act 1900 includes powers to make laws regarding "[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth [of Australia]" amongst legislative powers of the Federal Parliament (Government of Australia (2021), "Commonwealth of Australia Constitution Act 1900," adopted on July 9, 1900, entered into force on January 1, 1901, Compilation No. 6 of July 29, 1977, registered on November 18, 2021, Part V, Paragraph 51(xx)).

[14] This offence is not committed if there is a determination in force that disapplies to the person the relevant subsection of the Banking Act 1959 – which is s.8(1) for a body corporate and s.7(1) otherwise (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, ss.7(1)(c) and 8(1)(d)). APRA may give written notice and determination that "any or all of the following provisions of this Act [(i.e., the Banking Act 1959)] do not apply to a person while the determination is in force: (a) a provision of Division 1, 1AA or 1A of Part II (other than section 11A, 11B or 11C); (b) section 66; (c) section 66A; (d) section 67; (e) section 69" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11(1)).

[15] The application must be "accompanied by a copy of the Act, charter, deed of settlement, memorandum of association and articles of association of the body corporate, or other document by which the body corporate is constituted" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.10(1)).

[16] Information that the APRA provides includes the following: "… APRA has two pathways available to become an ADI: the direct and the restricted pathway. The **direct pathway** is suitable for applicants that have existing resources and capabilities with which to establish an ADI. It allows the applicant to conduct its intended banking business from the granting of its licence. The applicant must demonstrate [that] it meets the full prudential framework and is ready to commence banking business prior to being granted an ADI licence. The **restricted pathway** is suitable for applicants that do not have the resources and capabilities to establish an ADI and need time to develop these. This pathway allows applicants to conduct limited banking business as a Restricted ADI before being required to meet the full prudential framework. It can assist applicants in seeking the investment required to operationalise their business, test their operational model, progress their compliance with the prudential framework and their application for an ADI licence. … Common characteristics of a suitable direct applicant include: • Substantial capital resources at the point of application and/or a very clear avenue for access to such capital; • A significant existing banking-related business ([such as] lending); • An existing governance structure at the point of application that wholly or substantially mirrors the requirements of APRA's governance prudential standard and any other relevant prudential standards ([such as] an independent Chair, majority independent directors on the board, board audit committee etc.); • A good breadth of suitably-experienced staff in key roles at the point of application; •A demonstrated operational track record of building or running a banking-related business. Prospective applicants will need to agree the most suitable pathway with APRA, as part of the pre-application process. Eligibility for either pathway is ultimately at APRA's discretion." (Australian Prudential Regulation Authority (2021), APRA: Guidelines – Licensing: locally-incorporated ADIs – August 2021 (Sydney: Australian Prudential Regulation Authority), 9-10; emphasis original).

[17] '*NOHC*' is an abbreviation for 'non-operating holding company' (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.5(1)).

[18] A '*NOHC authority*' is "an authority under subsection 11AA(2) [of the Banking Act 1959]" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.5(1)). That provision states: "APRA may grant the authority [to be a NOHC] if it considers it appropriate to do so." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11AA(2)). A body corporate must apply in

make the authority conditional upon the parent body corporate being an authorised NOHC[19] [53]. The APRA may impose conditions – or additional prerequisities – on the body corporate's authority to undertake banking business in Australia (as an ADI) [54], or may vary or revoke such qualifications [55]. The Banking Act 1959 provides for situations in which the APRA

writing to the APRA for the latter to be empowered to grant to the former the authority to be a NOHC; "[t]he authority operates as an authority in relation to the body corporate and any ADIs that are subsidiaries of the body corporate from time to time" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11AA(1)).

[19] An '*authorised NOHC*' is "a body corporate: (a) in relation to which an authority under subsection 11AA(2) [of the Banking Act 1959] is in force; and (b) that is a NOHC of an ADI or ADIs" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.5(1)). The second sentence of fn 18 sets out subsection 11AA(2) of the Banking Act 1959.

may[20], and must[21], revoke that authority. It also sets rules for a body corporate to carry on banking business in Australia (as an ADI) for a limited time[22].

Prudential Supervision and Monitoring of ADIs and Authorised NOHCs

The APRA, in writing, may determine standards concerning prudential issues with which all ADIs, all authorised NOHCs, the subsidiaries or ADIs or authorised NOHCs, a specified class of any of the aforementioned, or one or more of the aforementioned that are expressly identified, must comply[23] [56]. It may – in writing – vary or revoke a prudential standard [57].

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[20] The APRA *may* revoke a body corporate's authority to perform banking business in Australia as an ADI, "if APRA is satisfied that: (a) the body corporate has … provided, in connection with its application for the authority, information that was false or misleading in a material particular; or (b) the body corporate has failed to comply with any of the following: (i) a requirement of this Act [(i.e., the Banking Act 1959)]; (ii) a requirement of the *Financial Sector (Collection of Data) Act 2001*; (iii) a requirement of the regulations or any other instrument made under this Act; (iv) a requirement of a provision of another law of the Commonwealth [of Australia], if the provision is specified in the regulations, (v) a direction under this Act; (vi) a condition of its section 9 authority [(to carry out banking business in Australia as an ADI)]; or (c) it would be contrary to the national interest for the authority to remain in force; or (d) it would be contrary to financial system stability in Australia for the authority to remain in force; or (e) it would be contrary to the interests of depositors of the body corporate for the authority to remain in force; or (f) the body corporate has failed to pay: (i) an amount of levy or late penalty to which the *Financial Institutions Supervisory Levies Collection Act 1998* applies; or (ii) an amount charged under section 51 of the *Australian Prudential Regulation Authority Act 1998*; or (g) the body corporate is insolvent and is unlikely to return to solvency within a reasonable period of time; or (h) the body corporate has ceased to carry on banking business in Australia; or (j) the body corporate is a foreign corporation within the meaning of paragraph 51(xx) of the [Commonwealth of Australia] Constitution [Act 1900], and: (i) the body corporate is unlikely to be able to meet its liabilities in Australia[,] and is unlikely to be able to do so within a reasonable period of time; or (ii) an authority (however described) for the body corporate to carry on banking business in a foreign country has been revoked or otherwise withdrawn in that foreign country; (k) if the section 9 authority is to cease to have effect on a day specified in the authority – [then] it is unlikely to be appropriate, at or before that day, to grant the body corporate a section 9 authority that is not subject to a time limit" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.9A(2); emphasis original). The last sentence of fn 13 lays down Paragraph 51(xx) of the Commonwealth of Australia Constitution Act 1900. Section 51 of the Australian Prudential Regulation Authority Act 1998 states: "(1) APRA may, by legislative instrument, fix charges to be paid to APRA by a person[,] in respect of: (a) services and facilities [that] APRA provides [to] the person; or (b) applications or requests (however described) [which are] made to APRA under any law of the Commonwealth [of Australia]. … (2) A charge fixed under subsection (1) must be reasonably related to the costs and expenses incurred[,] or to be incurred[,] by APRA in relation to the matters to which the charge relates[,] and must not be such as to amount to taxation." (Government of Australia (2021), "Australian Prudential Regulation Authority Act 1998," adopted on June 29, 1998. entered into force on July 1, 1998, Compilation No. 46 of July 1, 2021, registered on July 30, 2021, s.51). Unless the APRA determines that abiding by the following procedures could engender a delay in revocation of the authority to effect banking business in Australia as an ADI which would be against both the national interest and the interest of depositors with the relevant body corporate, it must not revoke this authority under subsection 9A(2) of the Banking Act 1959, unless: (a) it has given this body corporate written notice which advises the latter: (i) that it is considering revoking the authority for reasons specified therein, (ii) that the body corporate may make submissions to it about the possible revocation, and (iii) of the date by which these submission must be made, and (b) it has considered these submissions by the date by which it had specified that it would do so (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, ss.9A(3) and 9A(4)).

[21] The APRA *must* revoke a body corporate's authority to discharge banking business in Australia as an ADI, "if: (a) the body corporate, by notice in writing to APRA, requests the revocation of the authority; and (b) APRA is satisfied that the revocation of the authority: (i) would not be contrary to the national interest; and (ii) would not be contrary to the interests of depositors of the body corporate" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.9A(1)).

[22] Sections 9D, 9E and 9F of the Banking Act 1959 set out these provisions.

[23] The Banking Act 1959 provides for the APRA to particularise its standards regarding prudential matters, thus: "A standard may impose different requirements to be complied with: (a) in different situations; or (b) in respect of

Every ADI, authorised NOHC, or a subsidiary of an ADI or authorised NOHC, must comply with each prudential standard that applies to it [58]. The APRA's is responsible for collecting and analysing information about prudential matters regarding ADIs and authorised NOHCs [59], encouraging and promoting the effectuation of sound practices by ADIs and authorised NOHCs relating to prudential issues [60], and evaluating the discharge and effectiveness of these practices [61]. The provisions within the Banking Act 1959 that concern protection of depositors – in large part, amongst others, do not apply to foreign ADIs[24].

Protection of Depositors

The APRA is obliged to exercise its functions and powers under Division 2 of Part II of the Banking Act 1959 – i.e., Provisions relating to the carrying on of banking business: Protection of depositors[25], for the safeguarding of the depositors of the sundry ADIs and for the furtherance of stability of the financial system in Australia [62]. By giving the latter notice in

different activities; including requirements to be complied with by different classes of ADIs, authorised NOHCs or subsidiaries of ADIs or authorised NOHCs." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11AF(1A)); "Without limiting the prudential matters in relation to which APRA may determine a standard, a standard may require: (a) each ADI or authorised NOHC; or (b) each ADI or authorised NOHC included in a specific class of ADIs or authorised NOHCs; or (ba) each subsidiary of an ADI or of an authorised NOHC; or (bb) each subsidiary of an ADI or of an authorised NOHC, included in a specified class of subsidiaries; or (c) a specified ADI or authorised NOHC; or (d) each of 2 or more specified ADIs or authorised NOHCs; or (e) a specified subsidiary of an ADI or of an authorised NOHC; or (f) each of 2 or more specified subsidiaries of ADIs or of authorised NOHCs; to ensure that its subsidiaries (or particular subsidiaries), or it and its subsidiaries (or particular subsidiaries), collectively satisfy particular requirements in relation to prudential matters." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11AF(1AA)); "A standard may provide for APRA to exercise powers and discretions under the standard, including (but not limited to) discretions to approve, impose, adjust or exclude specific prudential requirements in relation to one or more specified ADIs or authorised NOHCs, or one or more specified subsidiaries of ADIs or authorised NOHCs." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11AF(2)).

[24] The first three subsections of section 11E of the Banking Act 1959 read: "(1) The provisions listed in subsection (1A) do not apply in relation to: (a) business of a foreign ADI (other than Australian business assets and liabilities); or (b) the management of a foreign ADI, to the extent that the management relates to such business of the foreign ADI. (1A) The provisions are as follows: (a) sections 12, 13BA and 13C [of the Banking Act 1959], and Subdivision B of Division 2 (statutory management); (b) subsections 13A(1) to (2), to the extent that those subsections relate to statutory management; (c) sections 62B, 62C, 62D and 62E. (1B) The following provisions do not apply in relation to a foreign ADI: (a) Division 2 (apart from the provisions in that Division listed in subsection (1A)); (b) Division 2AA." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11E(1)-(1B)). A '*foreign ADI*' is "a body corporate that: (a) is a foreign corporation within the meaning of paragraph 51(xx) of the [Commonwealth of Australia] Constitution [Act 1900]; and (b) is authorised to carry on banking business in a foreign country; and (c) has been granted an authority under section 9 [of the Banking Act 1959] to carry on banking business in Australia" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.5(1)). The 'Australian business assets and liabilities' of a foreign ADI, to which paragraph 11E(1)(a) of the Banking Act 1959 refers, are: "(a) the assets and liabilities of the foreign ADI in Australia, (b) any other assets and liabilities of the foreign ADI that: (i) are related to its operations in Australia; and (ii) if regulations are made for the purposes of this subparagraph – are of a kind specified in those regulations." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.11E(3)). The final sentence of fn 13 sets out Paragraph 51(xx) of the Commonwealth of Australia Constitution Act 1900. The text to fns 15 and 16, the sentence immediately-following that text, and the text to fns 17 and 18, together comprise subsections (2), (2A), (3) and (3A) of section 9 of the Banking Act 1959.

[25] Division 2 of Part II of the Banking Act 1959 comprises sections 12-16AAA of the Act.

writing, the APRA may require an ADI to furnish it – within the time that the notice specifies – with such information, which it stipulates therein, that relates to the financial stability of the ADI[26] [63]. An ADI commits an indictable offence if it deems it to be likely that it will be unable to satisfy its obligations or considers that it is close to suspending payment, and (in either case) does not inform the APRA of the situation right away [64]. The APRA could "investigate the affairs of an ADI, appoint a person to investigate the affairs of an ADI, take control of the ADI's business or appoint an administrator to take control of the ADI's business" [65], if the ADI informs the APRA that the former deems it likely to become unable to fulfil its obligations or considers that is near to suspending payment [66], the APRA considers that the ADI – without assistance – may become unable to realise its obligations or suspend payment, or it is probable that the ADI will not be able to engage in banking business in Australia in accordance with the interests of its depositors or the stability of the financial system in that country [67], the ADI becomes unable to satisfy its obligations or suspends payment [68], an external administrator has been installed at a holding company of the ADI, and the APRA considers this appointment to present a significant threat to the stability of Australia's financial system, the ADI's functioning or soundness, or the interest of the last-mentioned's depositors [69], or – if the ADI is a foreign ADI[27] – an application for the appointment of an external administrator of that ADI has been submitted in an overseas state, or such an appointment has been made [70]. The APRA may take control of the 'target' body corporate's business or appoint an administrator to take this control [71], if that body corporate is an authorised NOHC of an ADI, a subsidiary of an authorised NOHC of an ADI, or a subsidiary of an ADI [72], the condition in subsection 13A(1D) of the Banking Act 1959[28], that in subsection 13A(1E) of the Banking Act 1959[29] or that in subsection 13A(1F) of the Banking

[26] This stipulation "may include a requirement to supply books, accounts or documents" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.13(1)). If an ADI does not observe "a requirement to provide information, books, accounts or documents under this section" (– i.e., section 13 of the Banking Act 1959 – which is entitled 'ADI to supply information to APRA'), then the APRA could "investigate the affairs of" that ADI "or appoint a person to do so" (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.13(4)).

[27] Fn 24 defines the term '*foreign ADI*'.

[28] This subsection of the Banking Act 1959 states: "The condition in this subsection is satisfied[,] if: (a) either: (i) a Banking Act statutory manager has taken control of the relevant ADI; or (ii) the conditions in any[,] or all[,] of paragraphs (1)(a), (b), (c), (d) or (e) are satisfied in relation to the relevant ADI, and APRA intends that a Banking Act statutory manager will take control of the relevant ADI; and (b) APRA considers that the target body corporate provides services that are, or conducts business that is, essential to the capacity of the relevant ADI to maintain its operations." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.13A(1D)). 'Paragraphs (1)(a), (b), (c), (d) or (e)' refers to paragraphs 13A(1)(a), 13A(1)(b), 13A(1)(c), 13A(1)(d) and 13A(1)(e) of the Banking Act 1959, respectively, which are set out in the sentence containing fn 27.

[29] This subsection of the Banking Act 1959 specifies: "The condition in this subsection is satisfied[,] if: (a) either: (i) a Banking Act statutory manager has taken control of the relevant ADI; or (ii) the conditions in any[,] or all[,] of paragraphs (1)(a), (b), (c), (d) or (e) are satisfied in relation to the relevant ADI, and APRA intends that a Banking Act statutory manager will take control of the relevant ADI; and (b) APRA considers that it is necessary for a Banking Act statutory manager to take control of the target body corporate, in order to facilitate the resolution of any of the following: (i) the relevant ADI; (ii) an authorised NOHC of the relevant ADI; (iii) a relevant group of bodies corporate of which the relevant ADI is a member; (iv) a particular member[,] or particular members[,] of such a group." (Government of Australia (2021), "Banking Act 1959," adopted on April 23, 1959, entered into force on January 14, 1960, Compilation No. 60 of December 8, 2021, registered on December 16, 2021, s.13A(1E)). 'Paragraphs (1)(a), (b), (c), (d) or (e)' refers to paragraphs 13A(1)(a),