



Guidelines

Implementation of section 66 of the *Banking Act 1959*

August 2015

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Overview

1. Under sections 66 and 66A of the *Banking Act 1959* (the **Banking Act**), it is an offence for a person to use or assume in Australia certain restricted words and expressions in relation to a financial business, except where the Australian Prudential Regulation Authority (**APRA**) has granted a consent or exemption, or where a statutory exception applies.
 2. These Guidelines outline the requirements of the Banking Act and set out the factors that APRA will take into account when exercising its discretion to grant a consent or exemption to permit the use of restricted words and expressions.
 3. The purpose of the restriction on the assumption or use of the restricted words by entities that are not authorised deposit-taking institutions (**ADIs**) is to ensure potential customers are not misled into believing that such institutions have the same level of capital adequacy, depositor-priority and other prudential requirements that apply to ADIs. APRA is of the view that the assumption or use of restricted words by non-ADIs is inherently confusing and likely to mislead potential customers. Therefore, in accordance with the purpose of the restriction, APRA is unlikely to grant consent to financial businesses that are not regulated in Australia or overseas as ADIs except in exceptional circumstances.
- ‘purchased payment facility provider’ and ‘PPF provider’.
 - 6. Any word or expression (whether or not in English) that is of like meaning to a restricted term is also restricted¹. For example, ‘banc’ and ‘banque’ are restricted terms.
 - 7. The Banking Act also prohibits the use of restricted terms² from being used:
 - as part of another word or expression; or
 - in combination with other words, letters or symbols.This would include the use of terms such as ‘investment bank’.
 - 8. The Banking Act only prohibits the use of a restricted term where the term is used or assumed in relation to a financial business (see ‘The meaning of ‘financial business’’ at paragraph 10 below).
 - 9. The purpose of restricting terms is to assure the public that a financial business that describes itself as a bank, building society, credit union, credit co-operative, authorised deposit-taking institution or purchased payment facility is in fact authorised to carry on banking business in Australia.

Restricted words and expressions

4. Under sections 66 and 66A of the Banking Act, the use of the following terms is restricted:
 - ‘bank’, ‘banker’ and ‘banking’;
 - ‘building society’, ‘credit union’ and ‘credit society’; and
 - ‘authorised deposit-taking institution’ and ‘ADI’.
 5. Under subsection 66(5) of the Banking Act, APRA has the power to determine any other word or expression is a restricted term and has determined the following words and expressions to be restricted terms:
 - ‘credit co-operative’; and
10. The prohibition on the use of restricted terms and expressions only applies where the word or expression is used in relation to a financial business. For example, an organisation such as the Blood Bank does not require APRA’s consent to use the restricted word ‘bank’ as it is not a financial business.
 11. The Banking Act provides that ‘financial business’ means a business that³:
 - consists of, or includes, the provision of ‘financial services’; or

¹ Banking Act, s 66(4)(a)(iv)

² Banking Act, s 66(4)(b) and s 66A(2)(a). However, s 66A does not prohibit the use of the letters ‘ADI’ as part of another word, e.g. ‘traditional’ - Banking Act, s 66A(3)

³ Banking Act, s 66(4)(c) and s 66A(2)(b)

- relates, in whole or in part, to the provision of ‘financial services’.

12. A business that does not, itself, consist of or include the provision of financial services but that relates, even in part, to the provision of financial services, qualifies as a financial business.

13. The term ‘financial services’ is not defined in the Banking Act. APRA considers that it is not possible to provide an exhaustive and prescriptive definition of the expression ‘financial services’, but considers that the expression ‘financial business’ generally encompasses:

- banking business as defined in the Banking Act;
- the provision of financial products as defined in the *Corporations Act 2001* including;
 - financial advice and planning business;
 - investment business;
 - insurance business;
- the provision of finance as defined in the *Financial Sector (Collection of Data) Act 2001*;
- the provision of products and services regulated under the *National Consumer Credit Protection Act 2009*;
- finance brokers;
- financial services comparison websites;
- specialist financial services directory websites;
- superannuation funds (except for self-managed superannuation funds);
- borrowing, lending and other transactions (such as entering into hire-purchase agreements or financial leases or providing credit in other forms) in which the subject of the transaction is finance⁴; and
- conduct of activities in Australia by an entity that carries on banking business in a foreign

⁴ This does not include transactions (such as the purchase or sale of goods or services for monetary consideration) in which finance (in the form of payment of a price) may be involved but does not constitute the subject of the transaction.

country but does not carry on banking business in Australia.

14. APRA also considers that the following activities are not likely to be considered as ‘financial businesses’:

- non-public share issues;
- accounting software products that access bank data; or
- private trusts (including self-managed superannuation funds).

APRA’s power to grant consents and exemptions

15. APRA may grant a person, or class of persons, a consent or exemption permitting the use of restricted words and expressions. A consent or exemption granted by APRA may be subject to conditions.

16. In determining whether to grant a consent or exemption, APRA will have regard to ensuring that the purpose of restricting the use of particular words and expressions is achieved.

17. APRA may impose additional conditions upon, or vary or revoke, an existing consent or exemption.

18. When exercising its discretion to grant a consent or exemption to an ADI, APRA will take into account how the ADI is categorised. The relevant categories include:

- banks (including Australian-owned banks, foreign subsidiary banks and branches of foreign banks);
- credit unions;
- building societies;
- purchased payment facility providers; and
- other ADIs.

Statutory exceptions

19. The Banking Act provides that an ADI may use the word ‘banking’ to refer to the fact that it has been granted an authority under the

Banking Act⁵. For example, an ADI may, in its letterhead, refer to itself as being authorised under the Banking Act to carry on banking business.

20. The Banking Act also provides that an ADI may use or assume the expressions ‘authorised deposit-taking institution’ and ‘ADI’ in relation to its business⁶.

Consents granted by APRA to ADIs and related entities

Use of the words ‘bank’, ‘banker’ and ‘banking’ by an ADI operating as a bank

21. APRA requires that, where an ADI wishes to operate as a bank, the ADI must hold at least \$50 million in Tier 1 capital.
22. APRA will, unless there are special circumstances, grant an ADI that wishes to operate as a bank and that holds at least \$50 million in Tier 1 capital an individual consent to use or assume the expressions ‘bank’, ‘banker’ and ‘banking’ on an unrestricted basis. Unrestricted consent allows the ADI to use the expressions ‘bank’, ‘banker’ and ‘banking’:
- in its company name and trading or business names and internet domain name; and
 - to describe or to advertise its business.

However, in circumstances where the ADI has previously operated as a credit union, APRA will impose transitional conditions upon the grant of such consent (see ‘Credit unions and building societies seeking to operate as a bank’ at paragraph 40 below).

Use of the expressions ‘credit union’, ‘credit society’ and ‘credit co-operative’ by an ADI operating as a credit union

23. APRA requires that an ADI wishing to operate as a credit union must have a mutual corporate structure in accordance with the

Australian Securities and Investment Commission’s *Regulatory Guide 147 Mutuality - Financial Institutions*, September 2000 (ASIC RG 147).

24. APRA has granted consent under section 66 of the Banking Act to certain specified ADIs operating as credit unions or building societies to use certain restricted terms (the **Credit Union and Building Society Consent**).
25. The Credit Union and Building Society Consent provides that:
- a credit union specified in the consent may use the expressions ‘credit union’, ‘credit society’ and ‘credit co-operative’ in relation to the financial business that it carries on in the capacity of a credit union; and
 - related bodies corporate of such a credit union may use the expressions ‘credit union’, ‘credit society’ and ‘credit co-operative’ in relation to the financial business carried on by the credit union, provided the expressions are not used in a misleading way.

Use of the expression ‘building society’ by an ADI operating as a building society

26. The Credit Union and Building Society Consent provides that:
- a building society specified in the consent may use the expression ‘building society’ in relation to the financial business that it carries on in the capacity of a building society; and
 - related bodies corporate of such a building society may use the expressions ‘building society’ in relation to the financial business carried on by the building society, provided the expression is not used in a misleading way.

Use of the expressions ‘banker’ and ‘banking’ by an ADI operating as a credit union or building society

27. The Credit Union and Building Society Consent provides that a credit union or building society may use the expressions ‘banker’ and ‘banking’ in marketing and branding material to describe its banking activities. In particular, a credit union may use the phrase ‘mutual

⁵ Banking Act, s 66(1AC)

⁶ Banking Act, s 66A(1)

banking' in marketing and branding material. A building society may use the phrase 'mutual banking' provided it has a mutual ownership structure consistent with ASIC RG 147. However, restricted terms may not be used as part of a registered corporate, business or trading name or internet domain name.

28. A body corporate related to a credit union or building society may similarly use the expression 'banking' in marketing and branding material to describe the banking services of its related credit union or building society, provided the expressions are not used in a misleading way.

Use of restricted expressions by trustees of superannuation funds

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

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

30. Under an existing class consent, an ADI that provides a purchased payment facility may use the expressions 'purchased payment facility provider' and 'PPF provider'.

Consents granted by APRA to other entities

Use of the word 'bank' by representative offices of foreign banks

31. Where APRA grants a foreign bank authorisation to maintain a representative office in Australia under section 67 of the Banking Act, APRA will, unless there are special circumstances, grant the foreign bank individual consent to use the word 'bank' (or

equivalent) in the descriptive title of its representative office in Australia where this is part of the foreign bank's corporate name. This consent is ordinarily granted at the time the foreign bank is authorised to maintain a representative office.

Use of the words 'bank', 'banker' and 'banking' by foreign banks raising funds in the Australian wholesale capital markets

32. Under an existing class consent, foreign corporations authorised as banks in their home country (but not Australia) may use the words 'bank', 'banker' and 'banking' in relation to the business of raising funds in the Australian wholesale capital market by way of issuing securities, provided:
- the securities being offered and/or traded are in parcels of at least \$500,000; and
 - there is clear disclosure on the securities and in any information memoranda that the issuing bank is not authorised under the Banking Act.

Use of the expression 'offshore banking unit' by offshore banking units and related bodies corporate

33. Under an existing class consent, an offshore banking unit (OBU) (within the meaning of section 128AE of the *Income Tax Assessment Act 1936*) may use the term 'banking' as part of the expression 'offshore banking unit' in relation to its offshore banking business, provided:
- the expression 'offshore banking unit' is not used in a misleading or deceptive way; and
 - where the OBU is not an ADI, the OBU gives a consumer warning in certain circumstances⁷.
34. The same class consent provides that a body corporate related to an OBU may use the term 'banking' as part of the expression 'offshore banking unit' in relation to the offshore

⁷ The content of the consumer warning and the circumstances in which it must be given, are set out in detail in the class consent.

banking business of the OBU to which it is related, provided it does not do so in a misleading or deceptive way.

Applications for consent under section 66 of the Banking Act

The threshold question

35. Before applying to APRA for consent under section 66 of the Banking Act to use restricted words or expressions, applicants should consider whether such words or expressions will be used in relation to a financial business and, if so, whether the applicant is regulated as an ADI in Australia or overseas.
36. Where it is clear that restricted words or expressions will not be used in relation to a financial business, APRA's consent is not required. However, before ASIC can register a business or company name which includes a restricted word or expression, ASIC will require the applicant to provide a letter from APRA confirming that it is not a financial business. See the section on 'Request for confirmation that section 66 does not apply' at paragraph 53 below for further details.

Answering the threshold question

37. A business will be a 'financial business' only if the answer to at least one of the following questions is 'yes'. The questions are:
 - Does the business consist of, or include, the provision of 'financial services'?
 - Does the business relate, in whole or in part, to the provision of 'financial services'?

Applications for consent upon receiving initial authorisation to conduct banking business

38. Where a body corporate submits an application to APRA seeking authorisation to conduct banking business under section 9 of the Banking Act, and where that body corporate proposes to operate as a bank, credit union or building society, the body corporate should concurrently apply to APRA

for the relevant consent under section 66 of the Banking Act.

39. Where APRA grants authorisation under section 9 of the Banking Act, it will, unless there are special circumstances, concurrently grant section 66 consent on the relevant basis.

Credit unions and building societies seeking to operate as a bank

40. Where an ADI operating as a credit union or building society holds at least \$50 million in Tier 1 capital, and wishes to operate as a bank, the ADI may apply to APRA for consent to unconditionally use the restricted words or expressions 'bank', 'banker' and 'banking'. APRA will consider such applications on a case-by-case basis.
41. APRA's policy is that an ADI cannot simultaneously:
 - operate as a bank with unrestricted consent to use the restricted expressions 'bank', 'banker' and 'banking'; and
 - operate as a credit union or building society entitled to the benefit of the Credit Union and Building Society Consent.
42. Accordingly, where an ADI operating as a credit union or building society wishes to operate as a bank, and use the restricted words or expressions 'bank', 'banker' and 'banking' under section 66 of the Banking Act on an unrestricted basis, the ADI will not be permitted to continue to use the expressions 'credit union', 'credit society', 'credit co-operative' or 'building society' (as relevant).
43. Further, an ADI that was previously a credit union or building society and that now operates as a bank will be required to take appropriate steps to ensure that members, depositors, other customers and the general public are clearly aware that it is now operating as a bank. APRA may, for instance, grant unrestricted consent to use the restricted expressions 'bank', 'banker' and 'banking' on the condition that the ADI use the word 'bank' in its corporate, trading or business name for a finite period.

Information in support of an application for consent

44. Information provided in support of an application for consent should clearly indicate:

- full details of the 'person' (including a partnership or corporation) who proposes to carry on the business in relation to which the restricted word is intended to be used, including full name, address and contact details. Where relevant, a copy of the certificate of incorporation should be provided;
- the nature of the financial business, the types of transactions entered into in the course of carrying on the business and the kinds of persons who are, or are proposed to be, involved in them. For example, the transactions may involve members of the general public or they may involve only persons with specialist knowledge and expertise in financial matters;
- whether or not the nature of the business requires the holding of an Australian Financial Services Licence or Australian Credit Licence or to be an authorised representative of a licence holder; and
- the restricted words or expressions in respect of which consent is sought and the context in which such words or expressions will be used. For example, a person may propose to use only the restricted word 'banking' (but not the restricted words 'bank' and 'banker') and only in a specified internet domain name.

45. Where an application for consent has been submitted, APRA may seek additional information from the applicant.

Consideration of applications

46. A decision as to whether APRA should grant consent will be made on the facts of the particular case, having regard to the policy approach outlined in these Guidelines.

47. Applications will be acknowledged upon receipt. Applications will be processed in the order received, and applications that contain all of the information required will generally be processed within 70 working days.

48. Applications made by financial businesses that are not regulated as ADIs in Australia or overseas may be made and will be considered on their merits. However, APRA considers that the use of a restricted word (or words) in relation to a financial business should be limited to ADIs and like-regulated institutions, unless there are exceptional circumstances. The onus is on the applicant to demonstrate that there are exceptional circumstances. Consent would only be granted if APRA is satisfied that to grant consent would not defeat the purpose of the restriction, namely the protection of the public.

49. In accordance with the requirements of the Banking Act, APRA will notify ASIC of new, varied or revoked consents.

Applications for an exemption under section 11 of the Banking Act

50. Section 66A of the Banking Act prohibits the use of the expressions 'authorised deposit-taking institution' and 'ADI' by a person other than an ADI. APRA is not empowered to grant consent for a person to use these expressions. Accordingly, a person, other than an ADI, who conducts a financial business and wishes to use these particular expressions, must apply for an exemption under section 11 of the Banking Act.

51. Under section 11 of the Banking Act, APRA may determine that certain provisions of the Banking Act (including sections 66 and 66A) do not apply to a particular person or class of persons. APRA does not consider it would be appropriate to consider applications for exemptions under section 11 which would undermine the purpose for which restrictions on the use of particular words and expressions were included in sections 66 and 66A of the Banking Act.

Review of APRA's decisions

52. Certain decisions of APRA regarding the use of restricted expressions by a particular person are subject to review in accordance with Part VI of the Banking Act. Part VI provides, in summary, that a person affected by a

reviewable decision of APRA may request APRA to undertake an internal review of the initial decision. Further, upon the completion of the internal review process, such a person may apply to the Administrative Appeals Tribunal for administrative review of APRA's decision.

Request for confirmation that section 66 does not apply

53. ASIC requires a non-financial business seeking to register a business or company name containing a restricted word or expression to provide confirmation from APRA that the business or company name may be registered without contravening section 66 of the Banking Act.
54. A request to APRA for confirmation that section 66 is not applicable must contain the following minimum level of detail:
 - full details of applicant including full name, address, phone number and email address; and
 - sufficient detail of the nature of the business to enable APRA to assess whether it is not a 'financial business' under section 66 of the Banking Act.
55. Requests for confirmation that section 66 does not apply will be acknowledged upon receipt. Requests that contain all of the information required will receive a confirmation letter within 5 business days.
56. If a business is related to a 'financial business' in any way, then an Application for consent may be required.

Contacts

For further information contact APRA on 1300 55 88 49

Applications and requests for confirmation that section 66 does not apply should be lodged with APRA at:

GPO Box 9836
Sydney, NSW 2001

Fax number (02) 9210 3300

An initial application may be sent via fax or email however APRA will not advise the applicant of its decision until the original documents are received.



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