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Manager
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The Treasury
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Dear Manager

Reducing barriers to the use of the words 'bank', 'banking' and 'banker'

Thank you for the opportunity to comment on draft *Treasury Laws Amendment (2017 Measures No. 8) Bill 2017: amendment to section 66 of Banking Act (the draft Bill)*.

COBA supports the Bill's objective of allowing ADIs to use the term 'bank' should they so choose. We would prefer to retain the existing review mechanisms in cases where APRA makes a determination restricting an ADI from using the term bank.

COBA is the industry association for Australia's customer owned banking institutions—mutual banks, credit unions, and building societies. Collectively, the sector we represent has \$106 billion in assets and more than 4 million customers.

COBA welcomes the Government's decision to reduce the barriers to the use of the restricted terms 'bank', 'banking' or 'banker' for ADIs offering banking services. This will increase the options for smaller ADIs to describe and brand their business and to level the playing field for smaller ADIs that offer banking services.

The changes may require APRA to more broadly review its policies related to section 66 as well as areas where 'bank' is used as a de facto size measure.

Ensuring all ADIs with banking businesses are able to use the term 'bank'

All ADIs who undertake 'banking' activities should have the option to use the terms 'bank', 'banker' and 'banking'. Currently, ADIs with less than \$50 million in capital are not eligible to apply to use the term 'bank' and APRA restricts use of the terms 'banking' and 'banker' by credit unions and building societies, i.e. they must not use those words as part of a registered corporate, business or trading name or internet domain name.

Under the proposed reforms, there are two broad ways that ADIs will be able to use the terms: undertaking a rebrand to use the terms in registered corporate, business, trading or internet domain names; or, with a 'small b' where a credit union or building society uses the terms to describe itself or its activities without rebranding.

While not all credit unions and building societies will choose to do so, the ability to describe themselves as 'small b' banks or to rebrand increases this flexibility and enables them to benefit from the broad consumer understanding of the term 'bank'.

Since 2011, 19 former credit unions or building societies have rebranded as banks (while retaining their mutual structure). Not all customer-owned banking institutions above the \$50 million threshold have chosen to rebrand as banks, with the two largest credit unions and the largest building society opting not to rebrand.

Part VI review of determinations on individual ADIs

COBA does not object to APRA retaining the ability to determine that some ADIs may not use the restricted terms.

The draft Explanatory Memorandum says it is expected that APRA would use the power to prohibit certain ADIs which do not have the ordinary characteristics of banks from utilising the term 'bank' (for example, purchased payment facilities). "This power may also be used to deny the use of the term where serious or unusual circumstances warrant APRA making this determination," the draft EM says.

Given that there is no guidance on what may constitute "serious or unusual circumstances", COBA believes such determinations affecting individual ADIs should be reviewable under the current review mechanisms provided by subsection 66(2C) of the Banking Act, which makes decisions taken under section 66 reviewable under Part VI of the Banking Act.

While the draft EM notes that there is the opportunity for review under the *Administrative Decisions (Judicial Review) Act 1977*, this is unlikely to be as efficient or to promote accountability as effectively as the existing mechanisms under Part VI.

For example, the change in the review mechanism leads to a shift from a 'merits' based review under the Administrative Appeals Tribunal to a 'lawfulness' based review (judicial review). The second reading speech of the Administrative Decisions Act¹ highlights these differences:

- "The Administrative Appeals Tribunal is empowered to review on the merits any decision of a Minister or official acting under a statutory power if, but only if, the relevant legislation provides for an appeal to the Tribunal"
- "Judicial review by the Federal Court of Australia will not be concerned at all with the merits of the decision or action under review. The only question for the Court will be whether the action is lawful..."

APRA has considerable discretion in using its powers so measures to promote accountability, such as the existing range of review mechanisms, should not be removed.

Allowing the use of credit union or building society by a mutual bank

APRA is likely to have to reconsider some of its section 66 policy positions in line with the proposed amendments. One of these positions is the use of 'credit union' or 'building society' by a mutual bank and vice versa. APRA's current interpretation of s66 notes that mutual banks will not be permitted to continue to use the expressions 'credit union' ... or 'building society'.²

Further consolidation in the mutual ADI sector is likely over coming years, and it is easy to envisage a scenario in the future where a larger mutual bank merges with a smaller credit union or building society, or a larger credit union merges with a smaller mutual bank. It is possible that the merged entity may wish to retain the existing credit union, building society or mutual bank brands. While COBA does not believe that the proposed legislative amendments prevent this, any future policy interpreting a revised section 66 should allow flexibility to use these terms.

¹ http://www.apf.gov.au/binaries/library/pubs/explanmem/docs/1977adjr_2randem.pdf

² APRA Guidelines on Implementation of section 66 of the Banking Act 1959, August 2015, see page 8.

Aligning business name registration consent policy with the proposed changes

COBA notes that, as part of the business names registration process, consent is still required from APRA.³ While this is unlikely to be problematic, COBA believes that any policy underlying APRA's consent must be in line with Government's intention to allow smaller ADIs to use the word 'bank'.

Please contact me on 02 8035 8448 or Mark Nguyen, Policy Adviser, on 02 8035 8443 to discuss any aspect of this submission.

Yours sincerely



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³ Business Names Registration (Availability of Names) Determination 2015