



FOI 22-45

8 March 2022

Trent Morrison-Francis

By email: [foi+request-8256-de77201b@righttoknow.org.au](mailto:foi+request-8256-de77201b@righttoknow.org.au)

Dear Mr Morrison-Francis,

**NOTICE OF DECISION MADE UNDER SECTION 23 OF THE FREEDOM OF INFORMATION ACT 1982 (CTH) (FOI ACT) WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

**Applicant:** Trent Morrison-Francis

**Decision-maker:** Kathryn Petrie, an authorised officer of the Australian Prudential Regulation Authority (**APRA**) for the purposes of subsection 23(1) of the FOI Act.

**FOI request:** 'Please take this request for any documents that your department holds in relation to any "Exemptions" or "Wavers" as defined by the Webster Dictionary or socially accepted definitions of the words in the country of Australia to comply with any legislation that your office has powers, authority or manages under legislation for its management as a superannuation provider.

To remove any doubt we are asking for all schemes that Commonwealth Superannuation Corporation manages including

CSS  
ABN: 19 415 776 361  
RSE: R1004649

DFRDB  
ABN: 39 798 362 763

Military Super  
ABN: 50 925 523 120  
RSE: R1000306

ADF Super  
ABN: 90 302 247 344  
RSE R1077063

ADF Cover  
ABN: 64 250 674 722

The period for the request relates to all documents created on or after the 01st January 2017 by either your office and or the Commonwealth Superannuation Corporation (where practicable if your office is not the creator of the documents).'

**(FOI request)**

**My decision:** Refuse access to the relevant documents based on the reasons outlined in this Notice of Decision.

**MATERIAL FACTS**

1. On 7 January 2022, you made the FOI request by email under the FOI Act.
2. On 7 January 2022, APRA acknowledged receipt of the request by email.
3. On 3 February 2022, the Office of the Australian Information Commissioner extended the decision date under section 15AB of the FOI Act until 8 March 2022.

**EVIDENCE AND MATERIAL RELIED ON**

4. In making my decision, I have relied on the following evidence and material:
  - a. the Applicant's request received by APRA on 7 January 2022;
  - b. acknowledgment email from FOI Officer to the Applicant dated 7 January 2022;
  - c. internal APRA email correspondence from 7 January 2022 to 7 March 2022;
  - d. relevant sections of the *Australian Prudential Regulation Authority Act 1998* (Cth) (**APRA Act**);
  - e. relevant sections of the FOI Act; and
  - f. guidelines issued by the Office of the Australian Information Commissioner to date (**FOI Guidelines**).
5. APRA has conducted all reasonable searches of its records and identified 173 documents relevant to your FOI request (**relevant documents**).

**REASONS**

6. I have decided to grant access to documents 13, 24, 25, 26, 36, 39 and 60 (the **Released Documents**) under subsection 11A(3) of the FOI Act. While access is being granted to 7 documents, Documents 13 and 25 and Documents 36, 39 and 60 are duplicate documents so access is being granted to 4 documents in total.
7. I have decided to refuse access to the remaining relevant documents. My reasons for the refusal are as follows:
  - a. section 38: All documents except the Released Documents contain 'protected information' for the purposes of section 56 of the APRA Act; and

- b. section 47C: 56 documents (which are identified in the document schedule) contain deliberative matter relating to an opinion, advice or recommendation or consultation or deliberation for the purposes for the deliberative processes of an agency.

### **Secrecy provisions**

8. I have taken the following approach in applying section 38 of the FOI Act and section 56 of the APRA Act:
  - i. under section 38 of the FOI Act, a document is exempt if disclosure is prohibited under a provision of an enactment and section 38 expressly applies to that provision;
  - ii. subsection 56(11) of the APRA Act expressly applies section 38 of the FOI Act so that any document that is a 'protected document' or contains 'protected information' within the meaning of subsection 56(1) of the APRA Act is also an exempt document under section 38 of the FOI Act;
  - iii. under subsection 56(2) of the APRA Act it is an offence to directly or indirectly disclose protected documents and/or protected information unless a specified exemption applies. This offence provision is binding on me as an APRA staff member. The offence is punishable by up to two years imprisonment;
  - iv. a 'protected document' is defined in subsection 56(1) of the APRA Act to include documents given or produced under or for the purposes of a prudential regulation framework law, and containing information relating to the affairs of a financial sector entity. The *Superannuation Industry (Supervision) Act 1993* and the *Financial Sector (Collection of Data) Act 2001* are prudential regulation framework laws. The relevant documents were provided or produced and disclosed or obtained under, or for the purposes of, these prudential regulation framework laws. Therefore, the documents are protected documents unless publicly available;
  - v. 'protected information' is defined in subsection 56(1) of the APRA Act to include information disclosed or obtained under or for the purposes of a prudential regulation framework law, and relating to the affairs of a financial sector entities. For the reasons outlined in paragraph (iv) above, information contained in the documents is protected, unless publicly available; and
  - vi. the information and the documents are not otherwise publicly available.
9. I have determined that the documents are protected documents, and/or contain protected information as defined in subsection 56(1) of the APRA Act. The documents are consequently exempt under section 38 of the FOI Act.
10. An extract of section 38 of the FOI Act and section 56 of the APRA Act are attached to these reasons.

### **Deliberative processes**

11. Subsection 47C(1)(a) of the FOI Act provides that a document is conditionally exempt if its disclosure under the Act would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or

deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency.

12. Paragraph 6.61 of the FOI Guidelines prescribes that a deliberative process may include 'the recording or exchange of opinions, advice, recommendations, a collection of facts or opinions, and interim decisions or deliberations'.
13. The relevant documents contain information that falls within the definition of deliberative matter. The relevant documents contain exchanges of APRA's opinions, advice and recommendations. I consider this information to have been prepared for the purposes of deliberative processes. Paragraph 6.56 of the FOI Guidelines provides that I am not required to consider whether harm would result from disclosure. The information in the documents is considered deliberative matter, therefore conditionally exempt under section 47C of the FOI Act.
14. An extract of section 47C of the FOI Act is attached to these reasons.

#### **Application of the public interest test**

15. I have reviewed the FOI Act and FOI Guidelines and consider the following factors favouring the disclosure of the document would apply, as disclosure would or could reasonably be expected to:
  - a) promote the objects of the FOI Act; and
  - b) reveal the context and reasons for APRA's decisions.
16. I have also considered the following factors against release would apply, as disclosure would or could reasonably be expected to:
  - a. prejudice the conduct of APRA's policy development and decision-making processes;
  - b. have a substantial and adverse effect on the proper and efficient conduct of APRA's operations;
  - c. prejudice APRA's ability to obtain similar information from bodies or entities subject to APRA's supervision, as entities may be less willing to share information with APRA if they are aware that that information were to be made publicly available; and
  - d. inhibit the ability of APRA to provide frank and complete information or advice on similar matters in the future.
17. I have not considered any of the irrelevant factors listed in subsection 11B(4) of the FOI Act in determining whether access to the documents would, on balance, be contrary to the public interest.
18. In my view, on balance, the public interest factors against release outweigh the public interest factors in favour of release of the relevant documents as the documents contain deliberative matter that was prepared, recorded or obtained for the purposes of the deliberative processes of APRA, and disclosure could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of APRA's operations.

## RIGHTS OF REVIEW

### Application for Internal Review of decision

19. Under section 54 of the FOI Act, you have the right to apply for an internal review of the decision if you disagree with my decision. If you make an application for review, another officer of APRA will be appointed to conduct the review and make a fresh decision on the merits of the case.
20. Under section 54B of the FOI Act, you must apply in writing for a review of the decision within 30 days after the day the decision has been notified to you.
21. You do not have to pay any other fees or processing charges for an internal review, except fees and charges applicable for providing access to further material, if any, in the document(s) released as a result of the review (for example, photocopying, inspection, etc).
22. No particular form is required to apply for review, although it is desirable (but not essential) to set out in the application, the grounds on which you consider that the decision should be reviewed.
23. An application for internal review of the decision should be addressed to:  
  
FOI Officer  
Australian Prudential Regulation Authority  
GPO Box 9836  
Sydney NSW 2001  
  
Telephone: (02) 9210 3000  
Facsimile: (02) 9210 3411
24. If you make an application for internal review and we do not make a decision within 30 days of receiving the application, we are deemed to have affirmed the original decision. However, under section 54D of the FOI Act, APRA may apply, in writing to the Information Commissioner for further time to consider the internal review.

### Application for review by Information Commissioner

25. Under section 54L of the FOI Act, you have the right to apply to the Information Commissioner for a review of the original decision or a review of a decision made on review.
26. Any application must be in writing and must give details of an address where notices may be sent and include a copy of the original decision or the decision made on internal review.
27. An application for review by the Information Commissioner may be lodged with one of the following:

Online	Complete and lodge the online review form at: <a href="https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/">https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/</a>
Post	Director of FOI Dispute Resolution

	GPO Box 5218, Sydney NSW 2001
Email	foidr@oaic.gov.au
Facsimile	(02) 9284 9666
Delivered in person	Office of the Australian Information Commissioner Level 3, 175 Pitt Street Sydney NSW 2000

### **Application for review by Administrative Appeals Tribunal**

28. If the decision on review by the Information Commissioner is not to grant access to all of the documents within your request, you would be entitled to seek review of the Information Commissioner's decision by the Administrative Appeals Tribunal (AAT).
29. The AAT is an independent review body with the power to make a fresh decision. An application to the AAT for a review of an FOI decision does not attract a fee. The AAT cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the AAT on 1300 366 700.

### **Complaints to the Information Commissioner**

30. You may complain to the Information Commissioner concerning action taken by APRA in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Information Commissioner will conduct an independent investigation of your complaint.
31. You may complain to the Information Commissioner either orally or in writing, by any of the methods outlined above, or by telephone, on 1300 363 992.

Kathryn Petrie  
FOI Officer  
Australian Prudential Regulation Authority

## Document schedule

Document no.	Description	Exemption(s)	Access
1	Exempt document	Section 38	Refused
2	Exempt document	Section 38	Refused
3	Exempt document	Section 38	Refused
4	Exempt document	Sections 38, 47C	Refused
5	Exempt document	Sections 38, 47C	Refused
6	Exempt document	Section 38	Refused
7	Exempt document	Section 38	Refused
8	Exempt document	Sections 38, 47C	Refused
9	Exempt document	Sections 38, 47C	Refused
10	Exempt document	Sections 38, 47C	Refused
11	Exempt document	Section 38	Refused
12	Exempt document	Section 38	Refused
13	<i>Burns and Commissioner of Taxation (Taxation)</i> [2020] AATA 671		Granted
14	Exempt document	Section 38	Refused
15	Exempt document	Section 38	Refused
16	Exempt document	Section 38	Refused
17	Exempt document	Section 38	Refused
18	Exempt document	Section 38	Refused
19	Exempt document	Section 38	Refused
20	Exempt document	Section 38	Refused
21	Exempt document	Sections 38, 47C	Refused
22	Exempt document	Section 38	Refused
23	Exempt document	Section 38	Refused
24	<i>Douglas and the Commissioner of Taxation (Taxation)</i> [2020] AATA 494		Granted
25	<i>Burns and Commissioner of Taxation (Taxation)</i> [2020] AATA 671		Granted
26	<i>GDGR and the Commissioner of Taxation (Taxation)</i> [2020] AATA 766		Granted
27	Exempt document	Section 38	Refused
28	Exempt document	Section 38	Refused
29	Exempt document	Sections 38, 47C	Refused
30	Exempt document	Section 38	Refused
31	Exempt document	Section 38	Refused
32	Exempt document	Section 38	Refused
33	Exempt document	Section 38	Refused
34	Exempt document	Sections 38, 47C	Refused
35	Exempt document	Sections 38, 47C	Refused
36	<i>Commissioner of Taxation v Douglas</i> [2020] FCAFC 220		Granted
37	Exempt document	Sections 38, 47C	Refused
38	Exempt document	Section 38	Refused
39	<i>Commissioner of Taxation v Douglas</i> [2020] FCAFC 220		Granted
40	Exempt document	Sections 38, 47C	Refused
41	Exempt document	Section 38	Refused

42	Exempt document	Section 38	Refused
43	Exempt document	Section 38	Refused
44	Exempt document	Sections 38, 47C	Refused
45	Exempt document	Sections 38, 47C	Refused
46	Exempt document	Sections 38, 47C	Refused
47	Exempt document	Sections 38, 47C	Refused
48	Exempt document	Sections 38, 47C	Refused
49	Exempt document	Sections 38, 47C	Refused
50	Exempt document	Sections 38, 47C	Refused
51	Exempt document	Sections 38, 47C	Refused
52	Exempt document	Section 38	Refused
53	Exempt document	Section 38	Refused
54	Exempt document	Sections 38, 47C	Refused
55	Exempt document	Sections 38, 47C,	Refused
56	Exempt document	Section 38	Refused
57	Exempt document	Sections 38, 47C	Refused
58	Exempt document	Sections 38, 47C	Refused
59	Exempt document	Sections 38, 47C	Refused
60	<i>Commissioner of Taxation v Douglas</i> [2020] FCAFC 220		Granted
61	Exempt document	Section 38	Refused
62	Exempt document	Section 38	Refused
63	Exempt document	Section 38	Refused
64	Exempt document	Section 38	Refused
65	Exempt document	Section 38	Refused
66	Exempt document	Section 38	Refused
67	Exempt document	Sections 38, 47C	Refused
68	Exempt document	Section 38	Refused
69	Exempt document	Sections 38, 47C	Refused
70	Exempt document	Section 38	Refused
71	Exempt document	Sections 38, 47C	Refused
72	Exempt document	Sections 38, 47C	Refused
73	Exempt document	Sections 38, 47C	Refused
74	Exempt document	Sections 38, 47C	Refused
75	Exempt document	Sections 38, 47C	Refused
76	Exempt document	Sections 38, 47C	Refused
77	Exempt document	Sections 38, 47C	Refused
78	Exempt document	Sections 38, 47C	Refused
79	Exempt document	Sections 38, 47C	Refused
80	Exempt document	Sections 38, 47C	Refused
81	Exempt document	Sections 38, 47C	Refused
82	Exempt document	Sections 38, 47C	Refused
83	Exempt document	Sections 38, 47C	Refused
84	Exempt document	Section 38	Refused
85	Exempt document	Sections 38, 47C	Refused
86	Exempt document	Section 38	Refused
87	Exempt document	Section 38	Refused
88	Exempt document	Sections 38, 47C	Refused
89	Exempt document	Sections 38, 47C	Refused
90	Exempt document	Sections 38, 47C	Refused
91	Exempt document	Sections 38, 47C	Refused
92	Exempt document	Sections 38, 47C	Refused
93	Exempt document	Sections 38, 47C	Refused
94	Exempt document	Section 38	Refused
95	Exempt document	Section 38	Refused
96	Exempt document	Section 38	Refused
97	Exempt document	Sections 38, 47C	Refused



98	Exempt document	Sections 38, 47C	Refused
99	Exempt document	Sections 38, 47C	Refused
100	Exempt document	Sections 38, 47C	Refused
101	Exempt document	Sections 38, 47C	Refused
102	Exempt document	Section 38	Refused
103	Exempt document	Section 38	Refused
104	Exempt document	Sections 38, 47C	Refused
105	Exempt document	Section 38	Refused
106	Exempt document	Section 38	Refused
107	Exempt document	Section 38	Refused
108	Exempt document	Section 38	Refused
109	Exempt document	Section 38	Refused
110	Exempt document	Sections 38, 47C	Refused
111	Exempt document	Section 38	Refused
112	Exempt document	Section 38	Refused
113	Exempt document	Section 38	Refused
114	Exempt document	Section 38	Refused
115	Exempt document	Section 38	Refused
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129	Exempt document	Section 38	Refused
130	Exempt document	Section 38	Refused
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132	Exempt document	Section 38	Refused
133	Exempt document	Section 38	Refused
134	Exempt document	Section 38	Refused
135	Exempt document	Section 38	Refused
136	Exempt document	Section 38	Refused
137	Exempt document	Section 38	Refused
138	Exempt document	Section 38	Refused
139	Exempt document	Sections 38, 47C	Refused
140	Exempt document	Section 38	Refused
141	Exempt document	Sections 38, 47C	Refused
142	Exempt document	Sections 38, 47C	Refused
143	Exempt document	Section 38	Refused
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162	Exempt document	Section 38	Refused
163	Exempt document	Section 38	Refused
164	Exempt document	Section 38	Refused
165	Exempt document	Section 38	Refused
166	Exempt document	Section 38	Refused
167	Exempt document	Section 38	Refused
168	Exempt document	Section 38	Refused
169	Exempt document	Section 38	Refused
170	Exempt document	Section 38	Refused
171	Exempt document	Section 38	Refused
172	Exempt document	Section 38	Refused
173	Exempt document	Section 38	Refused

## **FREEDOM OF INFORMATION ACT 1982 (CTH)**

### **11B Public interest exemptions—factors**

#### *Scope*

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

#### *Factors favouring access*

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
  - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  - (b) inform debate on a matter of public importance;
  - (c) promote effective oversight of public expenditure;
  - (d) allow a person to access his or her own personal information.

#### *Irrelevant factors*

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
  - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
  - (d) access to the document could result in confusion or unnecessary debate.

#### *Guidelines*

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

### **38 Documents to which secrecy provisions of enactments apply**

- (1) Subject to subsection (1A), a document is an exempt document if:
  - (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and
  - (b) either:
    - (i) that provision is specified in Schedule 3; or
    - (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.

- (1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.
- (2) Subject to subsection (3), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.
- (3) This section applies in relation to a document so far as it contains personal information about a person if:
- (a) the person requests access to the document; and
  - (b) disclosure of the document, or information contained in the document, is prohibited under section 503A of the *Migration Act 1958* as affected by section 503D of that Act.
- (4) In this section:
- enactment** includes a Norfolk Island enactment.

#### 47C Public interest conditional exemptions—deliberative processes

##### *General rule*

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
- (a) an agency; or
  - (b) a Minister; or
  - (c) the Government of the Commonwealth; or
  - (d) the Government of Norfolk Island.

##### *Exceptions*

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see section 8A);
  - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
  - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary

## AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY ACT 1998 (CTH)

### 56 Secrecy—general obligations

(1) In this section:

**body regulated by APRA** includes a body that has at any time been a body regulated by APRA.

**court** includes a tribunal, authority or person having the power to require the production of documents or the answering of questions.

**financial sector entity** has the same meaning as in the *Financial Sector (Collection of Data) Act 2001*.

**officer** means:

- (a) an APRA member; or
- (b) an APRA staff member; or
- (c) any other person who, because of his or her employment, or in the course of that employment:
  - (i) has acquired protected information; or
  - (ii) has had access to protected documents;other than an employee of the body to which the information or document relates.

**personal information** has the same meaning as in the *Privacy Act 1988*.

**produce** includes permit access to.

**protected document** means a document given or produced (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and containing information relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity;; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) of the *Financial Sector (Collection of Data) Act 2001*;
- (cb) a person in relation to whom information is, or was, required to be given under Part IIAA of the *Banking Act 1959*;

other than:

- (d) a document containing information that has already been lawfully made available to the public from other sources; or
- (e) a document given or produced under, or for the purposes of, a provision of the *Superannuation Industry (Supervision) Act 1993*:
  - (i) administered by the Commissioner of Taxation; or
  - (ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes a document that is given to APRA under Part 7.5A of the *Corporations Act 2001*, other than a document containing information that has already been lawfully made available to the public from other sources.

**protected information** means information disclosed or obtained (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity;; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) of the *Financial Sector (Collection of Data) Act 2001*;
- (cb) a person in relation to whom information is, or was, required to be given under Part IIAA of the *Banking Act 1959*;

other than:

- (d) information that has already been lawfully made available to the public from other sources; or
- (e) information given or produced under, or for the purposes of, a provision of the *Superannuation Industry (Supervision) Act 1993*:
  - (i) administered by the Commissioner of Taxation; or
  - (ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes information that is given to APRA under Part 7.5A of the *Corporations Act 2001*, other than information that has already been lawfully made available to the public from other sources.

**registered entity** means a corporation that is, or has at any time been, a registered entity within the meaning of the *Financial Sector (Collection of Data) Act 2001*.

- (2) A person who is or has been an officer commits an offence if:
- (a) the person directly or indirectly:
    - (i) discloses information acquired in the course of his or her duties as an officer to any person or to a court; or
    - (ii) produces a document to any person or to a court; and
  - (b) the information is protected information, or the document is a protected document; and
  - (c) the disclosure or production is not in accordance with subsection (3), (4), (5), (5AA), (5A), (5AB), (5AC), (5B), (5C), (5D), (6), (6A), (7), (7A), (7B), (7C), (7D), (7E) or (7F).

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (3) It is not an offence if the disclosure of protected information or the production of a protected document by a person is for the purposes of a prudential regulation framework law.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) It is not an offence if the disclosure of protected information or the production of a protected document by a person:
- (a) is by an employee of the person to whose affairs the information or document relates; or
  - (b) occurs after the person to whose affairs the information or document relates has agreed in writing to the disclosure or production.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- (5) It is not an offence if the disclosure of protected information or the production of a protected document by a person:
- (a) occurs when the person is satisfied that the disclosure of the information, or the production of the document, will assist a financial sector supervisory agency, or any other agency (including foreign agencies) specified in the regulations, to perform its functions or exercise its powers and the disclosure or production is to that agency; or
  - (aa) occurs when the person is satisfied that the disclosure of the information, or the production of the document, will assist the operator of the AFCA scheme (within the meaning of Chapter 7 of the *Corporations Act 2001*) to perform its functions or exercise its powers, and the disclosure or production is to that operator; or
  - (b) is to another person and is approved by APRA by instrument in writing.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

- (5AA) It is not an offence if the disclosure of protected information or the production of a protected document is made:
- (a) by an officer of an agency to which the information or document has been disclosed or produced under paragraph (5)(a); and
  - (b) for the same purpose as the information or document was so disclosed or produced to that agency.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5AA) (see subsection 13.3(3) of the *Criminal Code*).

- (5A) It is not an offence if the production by a person of a document that was given to APRA under section 9 or 13 of the *Financial Sector (Collection of Data) Act 2001* is to the Australian Statistician for the purposes of the *Census and Statistics Act 1905*.

Note: A defendant bears an evidential burden in relation to matters in subsection (5A) (see subsection 13.3(3) of the *Criminal Code*).

- (5AB) It is not an offence if the disclosure of protected information or the production of a protected document by a person is for the purpose of APRA complying with any of the following:
- (a) section 55B (ASIC requests);
  - (b) section 55D (Notifying ASIC of reasonable belief of material breach of ASIC provisions).

Note: A defendant bears an evidential burden in relation to the matters in subsection (5AB) (see subsection 13.3(3) of the *Criminal Code*).

- (5AC) It is not an offence if:
- (a) the disclosure of protected information or the production of a protected document is by ASIC, for the purposes of the performance of ASIC's functions, or the exercise of ASIC's powers; and

- (b) the protected information was disclosed previously to ASIC, or the protected document was produced previously to ASIC, for the purpose of APRA complying with any of the following:
  - (i) section 55B (ASIC requests);
  - (ii) section 55D (Notifying ASIC of reasonable belief of material breach of ASIC provisions).

Note: A defendant bears an evidential burden in relation to the matters in subsection (5A) (see subsection 13.3(3) of the *Criminal Code*).

(5B) It is not an offence if the production by a person of a document that was given to APRA under section 9 or 13 of the *Financial Sector (Collection of Data) Act 2001* is to:

- (a) the Reserve Bank of Australia; or
- (b) another prescribed authority.

Note: A defendant bears an evidential burden in relation to matters in subsection (5B) (see subsection 13.3(3) of the *Criminal Code*).

(5C) If:

- (a) a document is a reporting document given to APRA under section 13 of the *Financial Sector (Collection of Data) Act 2001*; and
- (b) either:
  - (i) a determination has been made under section 57 that the document does not, or documents of that kind do not, contain confidential information; or
  - (ii) a determination has been made under section 57 that a specified part of the document, or of documents of that kind, does not contain confidential information;

it is not an offence to disclose the document or that part of the document, or any information contained in the document or that part of the document, to any person (including by making the document, the part of the document or the information available on APRA's website).

(5D) It is not an offence if the production by a person of a document that was given to APRA under section 13 of the *Financial Sector (Collection of Data) Act 2001* is to the Commissioner of Taxation for the purposes of the *Major Bank Levy Act 2017* (including the administration of that Act).

Note: A defendant bears an evidential burden in relation to matters in subsection (5D) (see subsection 13.3(3) of the *Criminal Code*).

(6) It is not an offence if the disclosure of protected information or the production of a protected document is to:

- (a) an APRA member; or
- (b) an APRA staff member;

for the purposes of the performance of APRA's functions, or the exercise of APRA's powers, under a law of the Commonwealth or of a State or a Territory.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

(6A) It is not an offence if the disclosure of protected information or the production of a protected document is to:

- (a) an auditor who has provided, or is providing, professional services to a general insurer, authorised NOHC or a subsidiary of a general insurer or authorised NOHC; or



- (b) an actuary who has provided, or is providing, professional services to a general insurer, authorised NOHC or a subsidiary of a general insurer or authorised NOHC;

and the disclosure is for the purposes of the performance of APRA's functions, or the exercise of APRA's powers, under a law of the Commonwealth or of a State or Territory.

- (7) It is not an offence if the information, or the information contained in the document, as the case may be, is in the form of a summary or collection of information that is prepared so that information relating to any particular person cannot be found out from it.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

- (7A) It is not an offence if the information, or the information contained in the document, as the case may be, is all or any of the following:
  - (a) the names of bodies that are regulated by APRA;
  - (b) the addresses at which bodies referred to in paragraph (a) conduct business;
  - (c) any other information that is reasonably necessary to enable members of the public to contact persons who perform functions in relation to bodies referred to in paragraph (a).

Note: A defendant bears an evidential burden in relation to the matters in subsection (7A) (see subsection 13.3(3) of the *Criminal Code*).

- (7B) It is not an offence if the information, or the information contained in the document, as the case may be, is:
  - (a) a statement of APRA's opinion as to whether or not a body regulated by APRA is complying, or was complying at a particular time, with a particular provision of a prudential regulation framework law; or
  - (b) a description of:
    - (i) court proceedings in relation to a breach or suspected breach by a person of a provision of a prudential regulation framework law; or
    - (ii) activity engaged in, or proposed to be engaged in, by APRA in relation to such a breach or suspected breach; or
  - (c) a description of action under a prudential regulation framework law that APRA has taken or is proposing to take in relation to:
    - (i) a body regulated by APRA; or
    - (ii) an individual who holds or has held a position with or in relation to such a body.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7B) (see subsection 13.3(3) of the *Criminal Code*).

- (7C) If information referred to in subsection (7A) or paragraph (7B)(a) that relates to a body that is, or has at any time been, regulated by APRA under the *Superannuation Industry (Supervision) Act 1993* is disclosed to the Registrar of the Australian Business Register established under section 24 of the *A New Tax System (Australian Business Number) Act 1999*, the Registrar may enter the information in that Register.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7C) (see subsection 13.3(3) of the *Criminal Code*).

- (7D) It is not an offence if:

- (a) the disclosure of protected information or the production of a protected document is to an ADI (within the meaning of the *Banking Act 1959*); and
- (b) the information, or the information contained in the document, as the case may be, is information contained in the register kept under section 37H of the *Banking Act 1959*.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7D) (see subsection 13.3(3) of the *Criminal Code*).

(7E) It is not an offence if:

- (a) the disclosure of protected information or the production of a protected document is to an individual; and
- (b) the information, or the information contained in the document, as the case may be, is only personal information about the individual; and
- (c) the information, or the information contained in the document, as the case may be, is information contained in the register kept under section 37H of the *Banking Act 1959*.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7E) (see subsection 13.3(3) of the *Criminal Code*).

(7F) It is not an offence if:

- (a) the disclosure of protected information or the production of a protected document is by APRA; and
- (b) the information, or the information contained in the document, as the case may be, is information that discloses:
  - (i) whether a person is disqualified under section 37J of the *Banking Act 1959*; or
  - (ii) a decision made under Subdivision C of Division 6 of Part IIAA of that Act, or the reasons for such a decision.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7F) (see subsection 13.3(3) of the *Criminal Code*).

(8) A person who is, or has been, an officer cannot be required to disclose to a court any protected information, or to produce in a court a protected document, except when it is necessary to do so for the purposes of a prudential regulation framework law.

(9) If a person discloses information or produces a document under this section to another person, the first person may, at the time of the disclosure, impose conditions to be complied with in relation to the information disclosed or the document produced.

(9B) Subsection (9) does not apply if the information is disclosed, or the document is produced, in accordance with subsection (5AB) or (5AC).

(10) A person commits an offence if the person fails to comply with a condition imposed under subsection (9).

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(11) A document that:

- (a) is a protected document; or
- (b) contains protected information;

is an exempt document for the purposes of section 38 of the *Freedom of Information Act 1982*.

Note: For additional rules about personal information, see the *Privacy Act 1988*.

- (12) A disclosure of personal information is taken to be authorised by this Act for the purposes of paragraph 6.2(b) of Australian Privacy Principle 6 if:
- (a) the information is protected information and the disclosure is made in accordance with any of subsections (4), (5), (5AA), (5AB), (5AC), (6), (7A), (7B), (7C), (7D), (7E) and (7F); or
  - (b) the information is contained in a protected document and the disclosure is made by the production of the document in accordance with any of those subsections.