

Rob & Lesley McCormick
27th November 2017

Senate Standing Committees on Economics
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Parliament House
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Dear Senators,

Submission: Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

We are writing to you to ask that you carefully consider the proposed powers being given to APRA under the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017.

The proposed amendment legislation is, in our opinion, very difficult to comprehend and understand. However, from an overall perspective, whilst the measures being proposed are said to protect Australians from an uncontrolled financial collapse, it seems questionable as to whether these measures would in reality protect the public, but rather actually protect the entities (e.g. the banks).

The Australian Financial Review on Monday 13th November 2017 reported that the former ASIC chairman, Greg Medcraft, recently said in relation to APRA and ASIC:

"In my view the regulators actually pretty well clearly understand our roles ...I think others sometimes may not understand them clearly, frankly ...We co-operate very well at the top level but I think sometimes there's an obvious potential conflict between the role of APRA and the role of ASIC ... The role of APRA is to protect the entity, the bank, and ASIC's role is to protect consumers and investors ... Sometimes what may be good for an entity and its profitability and its soundness may not be particularly good for consumers and investors."¹

It seems that under the proposed legislation APRA may be given unlimited powers to decide matters for itself; without an opportunity for public discussion, without clear public disclosure, without an opportunity for affected parties to obtain normal legal review through the courts, without being legally accountable/responsible for decisions it makes, and without clear prior ministerial consultation and parliamentary involvement/oversight. As to the extent of the proposed legislation, if APRA perceives that there may be a financial crisis (e.g. because of either a banking or economic collapse), it seems arguable that it may have enormous non-reviewable powers to do whatever it believes is necessary for the continuing functioning of the entities (e.g. the banks).

¹ <http://www.afr.com/opinion/columnists/former-asic-chairman-greg-medcraft-takes-a-parting-shot-at-apra-20171113-gzkeh6>

Issue: What capital instruments are covered by the Bill?

The proposed legislative changes deal, inter alia, with the conversion and write-off of capital instruments. However, it is not clear as to what constitutes a capital instrument, and in the definitions it states:

conversion and write-off provisions means the provisions of the prudential standards that relate to the conversion or writing off of:

- (a) Additional Tier 1 and Tier 2 capital; or
- (b) **any other instrument.**

Clarification of what may constitute “any other instrument” would be advisable as it may be that this definition is all encompassing.

Issue: What consultation process APRA would be required to undertake before making determinations under the Bill?

The proposed legislative changes do not appear to require APRA to have prior consultations with the federal Treasurer before determinations, and there does not appear to be clear parliamentary involvement/oversight.

Issue: What power the executive and/or parliament is ceding to APRA?

In a democracy it is the government, through its ministers, that determines policies and priorities, with parliament exercising involvement/oversight. If there is an emergency, the government should be the determinant of crisis resolution powers.

Under the proposed legislation it seems that APRA may well be a power unto itself.

Issue: The possible implications to market concentration in the banking sector.

APRA’s role appears to focus solely on the continuing functioning of the entities (e.g. the banks), but in a financial crisis should this be the sole consideration for society?

Historically, the global financial crisis had only a small impact on the lives of most Australian citizens, because the Australian Government quickly stepped in to assure everyone that Australia's banking system was secure and that bank deposits were safe. The development and growth of Australia's financial institutions without a legal separation of banking functions potentially leads to questions of security for the various forms of “bank deposits”.

The measures being proposed are partly in line with the "bail-in" system developed by the Financial Stability Board. Whilst the viability and stability of the Australian banking system is vital to Australia's financial system, it is also important that the citizens of Australia have a high level of confidence in the integrity and security of the Australian banking system.

A significant part of our society clearly already wants an independent objective review of recent banking practices and APRA's involvement.

The Australian Financial Review on 20th November 2015 reported, inter alia, that:

"Australia already has a de-facto bail-in regime under the Banking Act and Business Transfer and Group Restructure Act," says Dale Rayner, a partner with Norton Rose Fulbright. "These Acts enable the compulsory transfer of assets out of a bank subject to a requirement the transfers be made on just terms." Rayner says.

APRA evidently agrees, informing the FSI that it has "compulsory transfer of business powers, which ... could be used to achieve a similar economic effect to a bail-in". "This power could be used to transfer a failing [bank's] assets to another entity, leaving behind capital instruments and certain unsecured liabilities to absorb losses," APRA says.

Andrew Jinks, a Clayton Utz partner, concurs, concluding "the Banking Act empowers APRA to sell assets on any terms it deems appropriate ... and leave unsecured creditors like senior bond holders with whatever proceeds are paid for the assets". "If the proceeds are not sufficient to repay the bonds, then investors suffer losses," Jinks says.²

Accordingly, if Australia now needs to pass additional laws to protect Australians from an uncontrolled financial collapse, the proposed effects of these legislative changes should be clearly laid out by the government so that the public can properly comprehend and understand what issues are involved.

Yours faithfully,

Rob & Lesley McCormick

² <http://www.afr.com/business/banking-and-finance/ensuring-the-major-banks-are-not-toobigtotfail-20151219-glrtq3>