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18 December 2017

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Fitt

Inquiry into the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 [Provisions]

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide comments on the *Inquiry into the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 [Provisions]* (**the Bill**) and the associated draft Explanatory Memorandum (**EM**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The ABA recognises the fundamental importance of maintaining a sound and stable financial system. Our members stand at the heart of that system and are committed to stable and competitive banking and delivering high quality services to the Australian community in a prudent and responsible manner. The strength and prudence of our institutions, overseen by the Australian Prudential Regulation Authority (**APRA**) and other regulators, are the foundations of that stability. If, despite all precautions, an Authorised Deposit-taking Institution (**ADI**) is on the point of failing to meet its financial obligations, we recognise that enhanced legislative powers of the kind proposed in the Bill may be needed in order for regulators to resolve the ADI with the least loss and disruption to the system.

Commencing in 2012, the process to strengthen APRA's crisis management powers has been a large and complex piece of reform. The ABA would like to state that the short three-week consultation period provided to industry in September 2017 to comment on the Bill (284 pages) and EM (170 pages) is an unnecessary haste. The ABA is in full agreement with the statement of APRA's Chair that this legislation is "vital infrastructure for the well-being of the financial system"[1]. Given industry and regulator support for this reform it is most regrettable that only three weeks were allowed to comment on the complexities of the Bill and EM. This cannot be the acceptable standard for Australian Public Service (**APS**) policy design and development envisaged by the PM&C.[2] This is important legislation, it deserves appropriate consultation and consideration.

[1] Opening statement of Wayne Byres, Chairman, Australian Prudential Regulation Authority – Appearance before the Senate Economics Legislation Committee, Canberra, (26 October 2017)
http://www.apra.gov.au/Speeches/Documents/Senate%20Economics%20Legislation%20Committee%20opening%20statement%20Oct2017.pdf
[2] PM&C letter to ANAO, https://www.anao.gov.au/work/performance-audit/design-and-monitoring-national-innovation-and-science-agenda#24-0-appendices

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In our September 2017 (attached) review of the draft legislation the ABA highlighted a number of concerns with the way in which a number of the proposed powers have been formulated. The ABA made a significant number of recommendations, some of which have been adopted, and others where we continue to recommend changes.

Stability is a product of confidence. An important contributor to confidence is the certainty of parties' rights and obligations. If rights and obligations are to be modified or overridden by regulatory action, it should be reasonably clear when and to whom that can happen; what the regulator is entitled to do; for what period it can intervene and what rules guide its exercise of those powers. This is not the case for a number of the powers. The less certainty in key concepts, the greater the potential for disputes.

It is also important in resolving a crisis that an ADI, authorised Non-Operating Holding Companies (**NOHC**) and related entities, as well as their officers and employees, not be burdened with conflicting duties under different laws. Certain aspects of the powers have the potential to create these issues. That will inhibit decisive, well-informed actions when speed and experience are essential.

The ABA asks the Committee to consider and ultimately adopt the following four recommendations in relation to the Secrecy provisions[3] and Resolution planning as envisaged in the EM[4].

1. Secrecy provisions

The Committee needs to give serious consideration to two important practical issues, which the ABA had previously raised, but remain unaddressed.

First, where an ADI, NOHC or other group member operates or raises funds in markets outside Australia, there are fundamental issues with secrecy orders in the context of resolution proceedings. These ADIs have disclosure duties under foreign laws, e.g. to foreign securities exchanges on which their shares or bonds are listed, or to foreign prudential regulators in countries where they carry on business. Protections given to them under Australian law, such as section 70AA will not be effective in giving immunity from liabilities and proceedings under those laws. To allow disclosure as required by foreign laws, while withholding disclosure in Australia, is impractical. Where this is an issue, as it will be in the case of the resolution of any ADI or NOHC with an offshore business or fundraising, orders requiring secrecy contrary to those laws should not be made.

The ABA requests that the Committee recommend that:

> *The legislation be amended, expanding the direction power given to APRA in section 11CH(5) such that APRA have regard to the obligations an ADI, NOHC or other group member and its officers may have under any applicable laws, including foreign laws, before making any secrecy order.*

Second, if a direction is made secret, immediate issues will arise as to who in the ADI the direction may be shown. Some sharing of the direction is essential. It cannot, in practice, remain known only to the immediate addressee. The ABA anticipates that the direction to APRA (section 11CH(5)) to consider the class of person to whom disclosure is allowed under section 11CK is intended to contemplate some necessary dissemination among officers of the corporation who need to be aware of the direction. At the very least, it would be preferable to require APRA to specify the class of person(s) as a condition of making the direction.

The ABA requests that the Committee recommend that:

> *The legislation be amended to require APRA to consider the class of person to whom disclosure is allowed under section 11CK.*

Generally, the ABA would suggest that the exception to the secrecy obligation should countenance disclosure to directors, officers and employees of various entities within the group of the entity subject to the direction, to the extent reasonably necessary in the circumstances. When dealing with corporate

[3] Section 11CH(5) of the Banking Act & Schedule 1, Part 1, Item 56 of the Bill
[4] Explanatory Memorandum, para 1.45

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groups, we note that employees may be employed in different entities and not always the entity subject to the direction (as well as their advisers). We would suggest that disclosure should also be afforded to the entities within the group itself. The ABA also requests an inclusion in the EM illustrating what kind of specifications might be made.

2. Protection of an ADI itself (and related bodies corporate) and its officers

In the ABA's view, in order for the resolution regime to work with certainty and confidence it is critical to provide comprehensive protection for the ADI and its officers from consequences under the many laws that may affect it or them if they are subject to direction by APRA.

For instance, APRA may give the ADI a direction and require it be kept secret under the proposed secrecy provisions in Pt II Division 1BA Subdivision D. Disclosure contrary to those provisions is a criminal offence.

It is conceivable that the direction will be material to the price of the ADI's securities. A listed ADI is under a legal duty to make disclosure and failure with this duty to comply, as duty may have both civil and criminal consequences under the Corporations Act.

Section 70AA offers protection against civil and criminal proceedings. There is an existing protection from liability in section 70A, but it does not apply to criminal proceedings, and whether it applies to a directed ADI itself is not clear.

The ABA requests that the Committee recommend that:

> *Clarity in key concepts is critical - the Commonwealth should include a statement in the EM clarifying the manner in which section 70A is intended to apply.*

3. Resolution planning

The ABA notes the proposed provisions for the setting and enforcing of appropriate prudential requirements for resolution planning, in particular the proposed definition of "prudential matters", the definition of "resolution" and the new direction powers proposed in section 11CA(2)(p) and (q).

We agree that there is merit in ADIs and/or NOHCs formulating plans to facilitate resolution, as well as recovery.

However, the ABA remains concerned that a requirement for a reasonable measure of resolution planning not expand into an extensive requirement for an ADI or NOHC to re-order its business at the direction of APRA to pre-position it (or parts of it) for disposal in circumstances which should be very remote, given all the other strengths of the Australian financial system and the way in which it is regulated. Pre-positioning for the remote event of resolution can impose immense regulatory costs on each ADI or NOHC for a circumstance which, with prudent management and vigilant regulation, should never arise. Further, if the need for resolution does arise, properly crafted legislative resolution powers can address issues that may arise in separating businesses and ensuring their continued operation. Resolution planning should not be a back-door Volcker rule or other similar rule for the structural separation of businesses and the duplication of systems and personnel, or for prescribing common or compatible systems among all ADIs. This would impose very real costs on the community with no commensurable benefit.

The powers proposed to be conferred on APRA create an apprehension that such measures may be in prospect. An ADI or NOHC must comply with whatever is in the prudential standard (proposed section 11AAA). Non-compliance, or the likelihood of non-compliance entitles APRA to give a direction under section 11CA. The direction may be to make changes in the ADI's systems, i.e. its business structure, its organisation or to its subsidiaries. By amending the definition of prudential matters to include "resolution", APRA is given very broad powers to introduce prudential standards, which must be complied with by subsidiaries of ADIs and authorised NOHCs of ADIs, in areas that would, typically,

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only be relevant in the case of resolution (such as on systems, business structures and organisation structures). It would be costly, and in at least some cases may be inappropriate for an ADI or NOHC to be required to make extensive structural changes, or duplicate systems, in anticipation of a remote outcome. This is particularly the case where there is no requirement that such directions be made only as part of resolution or when it is imminent, or that they be reasonably appropriate to a legitimate end, such as the protection of depositors or the stability of the financial system. Consideration should be given to the cost and complexity of the proposed resolution requirement relative to the remoteness of the risk and the level of benefit in resolution that may be derived.

The ABA requests that the Committee recommend that:

a) The Bill and associated EM be revised to make clear that the new powers are exercisable in more clearly defined circumstances and must be appropriate for more clearly defined ends. The ABA recommends that the exercise of resolution powers needs to be reasonable and proportionate to legitimate prudential matters such as protection of depositors or the stability of the financial system. This may ultimately be a matter for the prudential standards, but will need to weigh the cost and complexity of the proposed resolution requirement against the remoteness of the risk of resolution and the level of benefit in resolution that may be derived. Proposed changes are included below.

Section 11CA(2)(p) and (q)

(p) to make changes to the body corporate's systems, business practices or operations as is reasonably necessary for one or more prudential matters relating to the body corporate;

(q) to reconstruct, amalgamate or otherwise alter all or part of any of the following:

i) the business, structure or organisation of the body corporate;

ii) the business, structure or organisation of the group constituted by the body corporate and its subsidiaries,

in each case as is reasonably necessary for one or more prudential matters relating to the body corporate.

b) The Commonwealth articulate its policy in relation to resolution planning and its approach to pre-positioning in greater detail. The ABA would welcome a statement in the EM to the effect that these powers are not intended to authorise extensive requirements for structural separation, duplication of systems, prescribing common or compatible systems or other pre-positioning; and

c) A statement should be included in the EM to the effect that any planning that affects foreign subsidiaries should be conducted in consultation with the relevant foreign regulator.

If you would like any further information, please contact me on [redacted]

Yours sincerely

Signed by

Aidan O'Shaughnessy
Policy Director
[redacted]

Encl.

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08 September 2017

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Dear Patrick

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

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide The Treasury with comments regarding the Exposure Draft of the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (**Bill**) and the associated draft Explanatory Memorandum (**EM**).

With the active participation of its 25 members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and the community to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The ABA recognises the fundamental importance of maintaining a sound and stable financial system. Our members stand at the heart of that system and are committed to stable and competitive banking, delivering high quality services to the Australian community in a prudent and responsible manner. The strength and prudence of our institutions, overseen by the Australian Prudential Regulation Authority (**APRA**) and other regulators, are the foundations of that stability. If, despite all those precautions, an ADI is on the point of failing to meet its financial obligations, we recognise that enhanced legislative powers of the kind proposed in the Bill may be needed in order for regulators to resolve the ADI with the least loss and disruption to the system.

Commencing in 2012, the process to strengthen APRA's crisis management powers is a large and complex piece of reform. The ABA would like to state that the short three-week consultation period provided to industry to comment on the Bill (284 pages) and EM (170 pages) is an unnecessary haste. APRA and all ADIs have the identical desire to get this reform right. The Bill makes amendments to the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995*, *Australian Prudential Regulation Authority Act 1998*, *Payment Systems and Netting Act 1998* and the *Financial Sector (Business Transfer and Group Restructure) Act 1999*. More time is needed to properly consider the proposals to ensure the powers will operate as envisaged.

In the short time allowed for comment, the ABA has identified concerns with the way in which a number of the proposed powers have been formulated. Stability is a product of confidence. An important contributor to confidence is the certainty of parties' rights and obligations. If rights and obligations are to be modified or overridden by regulatory action, it should be reasonably clear when and to whom that can happen, what the regulator is entitled to do, for what period can it intervene and what rules guide its

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exercise of those powers. This is not the case for a number of the powers. The less certainty in key concepts, the greater the potential for disputes.

It is also important in resolving a crisis that an ADI, NOHC and related entities, as well as their officers and employees, not be burdened with conflicting duties under different laws. Certain aspects of the powers have the potential to create these issues. That will inhibit decisive, well-informed actions when speed and experience are essential.

An important issue for foreign ADIs is how the enhanced powers will be perceived by their home regulators, and we suggest some ways in which they can be improved from that perspective and in the interests of international cooperation.

We have grouped our concerns, together with points of technical details, under the main headings used in the EM. An Annexure contains specific proposed drafting. We have confined these observations to the Banking Act and related provisions that affect ADIs. Similar themes may apply to the equivalent provisions in the Insurance Act and Life Insurance Act.

As you are aware, some of our members have a corporate structure headed by an authorised Non-Operating Holding Companies (**NOHC**), with activities that are both directly regulated by APRA and not directly regulated by APRA. References in this submission to 'unregulated' or 'non-regulated' entities should be read as referring to unregulated subsidiaries of a NOHC as well as unregulated subsidiaries of an ADI, as appropriate.

This submission has been prepared with assistance as to legal matters from King & Wood Mallesons.

1. Key definitions and concepts

1.1 Definition of "resolution"

The legislation introduces an additional concept of "resolution" which is defined as follows:

> **resolution** means the process by which APRA and other relevant persons manage or respond to the failure or potential failure of an entity, including through the exercise of powers and functions under this Act or another law.

The concept is used in a number of places, including in particular the definition of "prudential matters" which in turn is used in a number of provisions.[1]

The following comments may be made about this definition:

a) It introduces a concept of 'failure'. This concept raises a number of questions. In what way is the ADI 'failing'? What is 'potential failure'? Presumably the concept is related to a failure of an ADI to meet its financial obligations, i.e. it is insolvent or likely to become insolvent, rather than any other failure in some other sense, e.g. misconduct or some failure to meet APRA's expectations in some other way.

b) If the concept of resolution is related to solvency, then the longstanding concept in the Banking Act is of inability to meet obligations, or to suspend payment, or being likely to be insolvent or suspend payment (section 13A(3)(a)). This concept is, in our view, the correct one where the primary objective of regulation is to ensure depositors and other creditors are paid in full and on time. It only creates uncertainty to introduce additional, different language to deal with the same concept or to introduce another concept.[2] The use of existing terms and concepts would

[1] For "resolution", s 13A(1E), (1F), s 14E(1)(b). "Prudential matters" is in turn used in s 9AA, 11AA, 11AF(1), 11AF(1AA), 11AF(1AB), s 11A, s 11B, s 11CA(1)(c), 31D(2)(a), 31D(3), 61(2), (3), 62(2), 62A(3), 71(2). In this submission, references to sections should be read as references to sections (or proposed sections) of the *Banking Act 1959 (Cth)* unless context requires otherwise

[2] Another concept, introduced via the prudential standards into capital instruments and now supported by (although not used in) the conversion and write-off provisions is "non-viability". This too is undefined (and APRA has declined to define it). The interrelationship of these concepts is unclear and may in itself give grounds for controversy

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also help better define which of the many powers that APRA has under the Act are relevant to resolution.

If that is the intention, we would suggest redrafting the definition of "resolution" as set out in item 1 in the Annexure.

1.2 Definition of "prudential matters"

The proposed definition of "prudential matters" is as follows:

> **prudential matters** means matters relating to:
>
> a) the conduct of any part of the affairs of, or the structuring or organising of, an ADI, an authorised NOHC, a relevant group of bodies corporate, or a particular member or members of such a group, in such a way as:
>
> i) to keep the ADI, NOHC, group or member or members of the group in a sound financial position; or
>
> **ii) to facilitate resolution of the ADI, NOHC, group or member or members of the group; or**
>
> **iii) to protect the interests of depositors of any ADI;** or
>
> iv) not to cause or promote instability in the Australian financial system; or
>
> v) not to cause or promote instability in the New Zealand financial system; or
>
> b) the conduct of any part of the affairs of an ADI, an authorised NOHC, a relevant group of bodies corporate, or a particular member or members of such a group, with integrity, prudence and professional skill.

(Bolding shows the substantive changes from the current definition).

The ABA notes that existing paragraph (a)(i) of the definition already covers members of the group. However, given the proposed expansion of APRA's powers linked to, or relying on, the definition, The ABA suggest there is a need for clarity on how paragraph (a)(i) will interact with these new powers, noting our comments in this submission for the need that the powers are exercised in relation to unregulated subsidiaries where those are material to the sound financial position of the ADI, NOHC or group as a whole.

The inclusion of paragraph (a)(ii) would make this definition extremely broad without the clarification to the definition of "resolution" proposed in the preceding paragraph. In addition, the reference to "any ADI" in paragraph (a)(iii) could be read as referring to any ADI outside of the relevant group of bodies corporate. We expect that this is intended to refer instead to *the* ADI of the relevant group of bodies corporate.

In addition, the definition now makes the resolution of a hitherto unregulated subsidiary entity a 'prudential matter'". Other powers also apply to the unregulated subsidiary entity by virtue of this definition. They may now be the subject of prudential standards[3], and of directions[4].

The ABA accepts that it may be necessary to use resolution powers in respect of an unregulated subsidiary in order to resolve an ADI. But it should not be necessary to exercise resolution powers in respect of an unregulated subsidiary independent of the resolution of the ADI. The exercise of resolution powers should be confined to an identified class of unregulated subsidiaries, such as those within the definition of a 'target body corporate'" (and see the discussion of section 13A and statutory management, below).

To address these concerns, we would suggest redrafting the definition of "prudential matters" as set out in item 1 in the Annexure.

[3] Section 11AF
[4] Proposed section 11CA(1AA) – (1AC)

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1.3 New section 11AAA

The ABA notes the inclusion of a new section 11AAA, which states that:

> *An ADI, authorised NOHC or a subsidiary of an ADI or authorised NOHC to which a prudential standard applies must comply with the standard.*

We understand that, currently, failure to comply with a prudential standard would be a breach of the standard (and hence, except where the standard is not a legislative instrument, a breach of a legislative instrument) but not a breach of the Banking Act itself. It is not a civil penalty provision and breach of a prudential standard does not give rise to an offence under the Banking Act, unless APRA issued a direction to comply with the standard and the ADI, authorised NOHC or subsidiary failed to comply with the direction.

The EM does not appear to provide an explanation of the inclusion of the new section 11AAA (other than suggesting it aligns the Banking Act with an equivalent provision in the Insurance Act).[5] We would be grateful if Treasury could please clarify the intended effect of this new section.

The change blurs a distinction drawn in the Banking Act between breaches of the Act and breaches of a prudential standard, as all breaches of a prudential standard are now by definition breaches of the Act.[6]

Whenever a change of this kind is made it raises a question as to the effect on a contract or other action that is in breach of the provision. Is such a contract or action considered void under common law principles of illegality? If no, substantive change is intended, it would be helpful if a statement to that effect were included in the EM.

2. Statutory management

2.1 Appointments to unregulated entities

The ABA notes that the Commonwealth has opted for policy choice A from section 1.1 of the 2012 discussion paper[7] and proposes broad grounds for the appointment of a statutory manager to non-regulated entities.

The exposure draft further proposes a number of circumstances where this appointment may be allowed.[8] It is important to appreciate that those circumstances are defined in a way that will be judged at the time of distress. A person dealing with an unregulated entity related to a regulated entity will not know at the time of dealing whether its counterparty has the character that makes it susceptible to these powers. A person dealing with such a body is likely to assume that its counterparty may be susceptible to the statutory management regime and, to the extent that such matters are considerations in its costs or willingness to deal, the costs of the dealing are likely to rise. This uncertainty would have consequences on the level playing field with a related body of a regulated body compared with other "unregulated" companies. The more closely defined a "target body corporate" can be, the better.

Further, in the ABA's view, the extension of the entities to which a statutory manager may be appointed to now include authorised or registered, non-operating holding companies and subsidiaries of regulated entities and is broader than the regime proposed by the Financial Stability Board (**FSB**) in its Key Attributes of Effective Resolution Regimes for Financial Institutions (**Key Attributes**). The Key Attributes state that the scope of the regime should extend to holding companies, "non-regulated operational entities within a financial group or conglomerate that are significant to the business of the group or conglomerate", or branches of foreign firms (unless the jurisdiction is subject to a binding obligation to respect resolution of financial institutions under the authority of the home jurisdiction).[9]

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[5] EM, [10.20]
[6] See e.g. section 11CA(1(a) and 9b)
[7] Discussion Paper, "Strengthening APRA's Crisis Management Powers, September 2012 available at http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2012/APRA/Key%20Docs/PDF/Discussion%20Paper.ashx pp11ff
[8] See proposed sections 13A(1B)-(1F)
[9] FSB, Key Attributes, 1.1, available at http://www.fsb.org/what-we-do/policy-development/effective-resolution-regimes-and-policies/key-attributes-of-effective-resolution-regimes-for-financial-institutions (Accessed on 4 September 2017)

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Following consultation, the FSB has further clarified the "expected coverage of resolution regimes in relation to such entities".[10] With respect to "non-regulated operational entities", the FSB has noted that these should be assessed in relation to the relevant powers under Key Attribute 3.2(iv) "so that measures can be taken in relation to such entities insofar as that is necessary to support the resolution of an affiliated financial institution or the group as a whole."[11] Relevantly, Key Attribute 3.2(iv) requires that resolution authorities should have the power to do the following:

> *Ensure continuity of essential services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor or an acquiring entity; ensuring that the residual entity in resolution can temporarily provide such services to a successor or an acquiring entity; or procuring necessary services from unaffiliated third parties.*

Specifically, in proposed section 13A(1D), the ABA suggests that APRA needs to consider 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 *and* that the appointment is necessary in order for the relevant ADI to maintain its operations.

In proposed sections 13A(1E) and (1F), we would suggest that the unregulated subsidiaries that can be placed into statutory management should be limited to a particular member or members of a relevant group of bodies corporate of which the relevant ADI or NOHC is a member that by itself is, or together are, material to the sound financial position of the ADI, the NOHC or the group.

Please see item 2 of the Annexure for suggested drafting. We note that a similar issue arises in relation to the new powers given to APRA in relation to the winding up of the subsidiaries (including unregulated subsidiaries) of a regulated entity or authorised NOHC. In this regard, please refer to our comments in paragraph 9 below under the heading "Section 62C Involving APRA in applications by liquidator and Section 62D Application by APRA for directions".

2.2 The term of statutory management

How long does statutory management last? Proposed section 13C indicates as long as APRA considers necessary or until it has applied for the ADI to be wound up. In other words, it could be indefinite.

This is important because of (a) the stays on action while the statutory manager is appointed (discussed below) and (b) the comprehensive immunity given to the statutory manager while running the business.[12]

Barring some other arrangements being put in place to ensure an entity performs its obligations while under statutory management, e.g. a Government guarantee[13], or certainty as to when statutory management may end, parties may be reluctant to deal with the ADI while it is under statutory management. We note paragraph 2.90 of the draft EM says that this is not intended to relieve the statutory manager of debts which the statutory manager may contract, or affect the liability of the ADI. But in this regard we note that:

a) Where an insolvency official akin to a statutory manager is expected to incur a personal liability it is usual for the statute to allow the official a priority claim against the company to secure his or her position. The legislation does not provide this, and without it would be expected that the statutory manager would require an indemnity from, say, APRA or the Commonwealth; and

[10] FSB, Key Attributes Assessment Methodology for the Banking Sector, Overview of the post-consultation revisions, 19 October 2016, available online at < http://www.fsb.org/wp-content/uploads/Overview-of-the-Post-consultation-Revisions.pdf (accessed on 4 September 2017)
[11] FSB, Key Attributes Assessment Methodology for the Banking Sector, Overview of the post-consultation revisions, 19 October 2016, available online at < http://www.fsb.org/wp-content/uploads/Overview-of-the-Post-consultation-Revisions.pdf > (accessed on 4 September 2017)
[12] Proposed section 14C
[13] Contrast say section sections 15C(5) and 15D(5) of the Payment Systems and Netting Act 1998 ("PSNA")

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b) Recourse to the ADI is problematical when liability cannot be enforced by proceedings.

The ABA suggests that these features of the new statutory management regime are likely to influence counterparty behaviour. Unless it is clear that arrangements are being made to ensure performance of ongoing obligations, or that the statutory management will be very short, the prospect of the appointment may encourage counterparties to take what action they can against the ADI prior to the appointment, including by withdrawing funds and cutting lines of credit.

2.3 International issues

A target body corporate may include a foreign corporation, including a foreign corporation that is itself prudentially regulated.

The ABA believes that in determining the scope and exercise of powers outside Australia, Treasury and APRA should have regard to relevant foreign regulation. In particular, there should be clarification and guidance on the interplay between APRA's powers and the powers of any foreign prudential regulator.

Lack of guidance may be troubling to foreign countries and foreign prudential regulators where Australian banks have material subsidiaries. This may be so even in New Zealand, in particular given the dependence of some New Zealand banks on funding and services from their Australian parents or subsidiaries. This is notwithstanding the comfort for New Zealand provided in section 8A of the APRA Act and section 14DA of the Banking Act.

The EM touches on cooperation with foreign regulators only in the new powers proposed for APRA to deal with branches of foreign ADIs.[14] In the ABA's view it would be helpful and advisable:

a) To include in addition to the requirements in the proposed section 13A(1D)-(1F), as a condition on the exercise of the power to appoint a statutory manager to a foreign subsidiary (or at the very least a prudentially regulated foreign subsidiary) or to a subsidiary that supplies essential services to a foreign prudentially regulated entity, that APRA has consulted with the relevant foreign regulator, and APRA considers such action necessary because the foreign regulator is not taking any satisfactory resolution action and is not likely to do so, or the action is to facilitate the foreign resolution action (please see the Annexure, item 12 for suggested drafting); and

b) The EM includes a statement that it is the policy of the Government that powers in relation to foreign subsidiaries be exercised in a cooperative manner with equivalent foreign regulators consistent with the FSB Key Attributes for Effective Resolution Regimes. It would be helpful if this made express reference to outsourcing and common group servicing arrangements.

3. Direction powers

3.1 General comments on the breadth of direction powers

Our submission in relation to direction powers fall into three categories:

1) The circumstances where the conduct of unregulated subsidiaries may give grounds for a direction to the ADI or the subsidiary (new section 11CA(1AA)): see our comments above under 1.2 – Definition of "prudential matters".

2) The breadth of the direction powers in 11CA(2)(p) and (q): these are addressed later in the submission under 10 - Resolution planning; and

3) The protection of the ADI itself (and related bodies corporate) and its officers in the event of a direction.

[14] EM para 7.7

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3.2 Protection of an ADI itself (and related bodies corporate) and its officers

In the ABA's view, in order for the resolution regime to work with certainty and confidence it is critical to provide comprehensive protection for the ADI and its officers from consequences under the many laws that may affect it or them if they are subject to direction by APRA.

For instance, APRA may give the ADI a direction and require it be kept secret under the proposed secrecy provisions in Pt II Division 1BA Subdivision D. Disclosure contrary to those provisions is a criminal offence.

It is conceivable that the direction will be material to the price of the ADI's securities. A listed ADI is under a legal duty to make disclosure and failure with this duty to comply, as duty may have both civil and criminal consequences under the Corporations Act.

Proposed section 70AA offers protection against civil and criminal proceedings, but in its current form is subject to the following limitations:

a) The protection applies to certain officers and other persons described in section 70AA(1)(c), but does not protect the ADI itself, an authorised NOHC and related bodies corporate of the ADI, the NOHC or other persons (including a body corporate) which are subject to the direction. In the ABA's view, it is critically important that the legal entities, such as the ADI itself, an authorised NOHC and related bodies corporate of the ADI, the NOHC and other persons (including a body corporate) which are subject to the direction also benefit from the protection of section 70AA. This is because these entities may be impacted by a direction (and required to act) and because a significant number of costly actions are often brought against the legal entities, rather than individuals. Additionally, not extending the benefit of the protection to entities, which may be subject to a direction increase, the likelihood is that directors, officers and employees themselves will be exposed to conflict of duty. For example, implementation of a direction may cause an entity to breach the law or other legal obligations (such as contractual commitments to customers or suppliers). This clearly exposes a director of that entity to a conflict of duty. If the entity itself was immune, there would be less (but certainly not zero) opportunity for conflict of duty. We would also suggest that ensuring that a person (including a body corporate) who may be subject to the direction would be protected under section 70AA would avoid precious time being wasted by those persons seeking advice as to whether they would be able to benefit from the protection and, accordingly, facilitate prompt compliance with the direction itself. Please see paragraph (c) below in relation to section 70A.

b) The officers and employees are also required to demonstrate they have acted reasonably. A reasonableness requirement should be imposed only in relation to matters done in connection with compliance, but not the very thing that the person has been directed to do or not do. That should need no further justification other than its existence. The "reasonableness" requirement has the potential to cause delay in the implementation of the direction. For example, this requirement could place directors in an invidious position of trying to determine whether an action to comply with a direction is "reasonable" in the circumstances so as to understand whether the immunity granted by section 70AA applies. Paragraph 3.59 of the EM states that "potential conflicts of duty could cause delay in the implementation of an APRA direction, which could be particularly problematic in a stress scenario". In our view, the "reasonableness" requirement has the potential to defeat the intent expressed in the EM, because directors/officers/employees will still need to consider conflicting duties and what is "reasonable" to implement the direction in the circumstances, and this may be difficult to determine with any certainty in the tight timeframes required for compliance; and

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c) There is an existing protection from liability in section 70A, but it does not apply to criminal proceedings, and whether it applies to a directed ADI itself is not clear.[15] The ABA would be grateful if the Commonwealth and APRA could please clarify the manner in which section 70A is intended to apply.

3.3 Some further issues with the secrecy provisions

Two important practical issues should be further considered.

First, where an ADI, NOHC or other group member operates or raises funds in markets outside Australia, there are fundamental issues with secrecy orders in the context of resolution proceedings. These ADIs have disclosure duties under foreign laws, e.g. to foreign securities exchanges on which their shares or bonds are listed, or to foreign prudential regulators in countries where they carry on business. Protections given to them under Australian law, such as section 70AA will not be effective in giving immunity from liabilities and proceedings under those laws. To allow disclosure as required by foreign laws, while withholding disclosure in Australia, is impractical. Where this is an issue, as it will be in the case of the resolution of any ADI or NOHC with an offshore business or fundraising, orders requiring secrecy contrary to those laws should not be made.

One way by which the issue could be mitigated would be by including in the direction given to APRA in section 11CH(5) that it have regard to the obligations an ADI, NOHC or other group member and its officers may have under any applicable laws, including foreign laws, before making any secrecy order.

Second, if a direction is made secret, immediate issues will arise as to who in the ADI the direction may be shown. Some sharing of the direction is essential. It cannot in practice remain known only to the immediate addressee.

The ABA anticipates that the direction to APRA (section 11CH(5)) to consider the class of person to whom disclosure is allowed under section 11CK is intended to contemplate some necessary dissemination among officers of the corporation who need to be aware of the direction. At the very least, it would be preferable to require APRA to specify the class of person(s) as a condition of making the direction.

Generally, the ABA would suggest that the exception to the secrecy obligation should countenance disclosure to directors, officers and employees of various entities within the group of the entity subject to the direction, to the extent reasonably necessary in the circumstances. When dealing with corporate groups, we note that employees may be employed in different entities and not always the entity subject to the direction (as well as their advisers). We would suggest that disclosure should also be afforded to the entities within the group itself.

Failing that, the ABA requests an inclusion in the EM illustrating what kind of specifications might be made.

3.4 International issues

Similar considerations apply to the giving of directions to foreign subsidiaries, in particular foreign prudentially-regulated subsidiaries, as apply to the appointment of a statutory manager to such an entity. Please see our comments in section 2.3 above.

[15] For instance, an ADI is given under the Act an authorisation to carry on banking business. It has duties, e.g. to comply with prudential standards (see proposed section 11AAA). To comply with those standards it may have to raise capital. But it would be surprising if by section 70A an ADI had immunity from liability to any person in connection with a capital raising undertaken to further its banking business or to comply with a prudential standard, except if it is negligent

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4. Transfer powers

4.1 General comments

The ABA welcomes the proposal to amend the transfer powers to remove technical deficiencies in the existing powers in the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (**FSBTGRA**).

Below are some specific, technical comments.

4.2 Specific comments

Existing section 25

The ABA notes that item 39 of Schedule 4 of the Bill (Section 25 (heading), states that the heading, presumably of the existing section 25, is to be repealed and replaced with "25A compulsory transfer of business determinations". However, item 54 of Schedule 4 of the Bill (Section 25A) states that the existing section is to be repealed and substituted with "25A Ministerial declaration that compulsory transfer should occur in relation to ADI". We would be grateful if Treasury and APRA could please consider whether there are intended to be two section 25As, or whether item 39 should instead refer to "25".

Section 25AA

Is it intended as a matter of policy that a transfer of shares can be of an amount less than the total number of shares in the capital of the relevant regulated entity? If it is intended there can be a compulsory transfer of an equivalent part of a business (such as some, but not all, of the shares in the transferring body) then the ABA would not object to that in principle. The language currently proposed might be thought to allow it, but proposed section 35A(1AA) would seem to preclude it by reference to "all the shares, wherever located". The definition of "partial transfer" in section 4(1) will also require amendment as it does not refer to a partial transfer of the shares of the transferring body.

The ABA also notes that there is currently no such mechanism for the transfer of business as described in section 36AE, particularly with respect to valuation, payment and resolution of disputes for the transfer of shares.

New section 35A (Time and effect of compulsory transfer – transfer of shares)

The ABA recommends the language in section 35A(1), (1AA) and (1AB) be reviewed. The point of the provisions is to transfer the shares the subject of the determination to the transferee. However, subsection (1AA) declares that all the shares in the transferring body are transferred. The words "to the extent of the transfer", included in section 35A(1) are not included.

Further, it seems odd to declare a transferee of shares as a "successor in law" of the transferor. The concept of "successor in law" is usually used in the context of conveying or vesting a bundle of rights and liabilities associated with a business. What liabilities of any of the transferring shareholders does the Government intend the transferee to inherit? Contrast in this regard subsection (1AB).

The ABA suggests that Treasury may wish to consider whether it is intended that in a given situation APRA can be both a transfer of business and a transfer of shares. This can be of use, for instance in separating a 'bad bank' from a 'good bank' prior to transferring all shares in the good bank.

Section 36AA(5)

Is it intended that the body corporate in subsection (5) is the body corporate that is, or is proposed to be, the transferring body, or is it a body corporate that is related to the body corporate that is or is proposed to be the transferring body? If the latter is the intention it should be made clear. The effect of the language would also appear to be that the transferring body (or its related body corporate, as

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applicable) is not able to assert its rights against a related body corporate. Why that should be the case is not clear.

See also comments below on the FCS in relation to section 33 of the FSBTGRA and item 13 in the Annexure.

5. Conversion and write-off of capital instruments

5.1 General comment

The ABA welcomes the proposal to provide greater certainty for the conversion and write-off of capital instruments in accordance with the proposals in proposed Subdivision B of Part II, Division 1A, sections 11CAA – 11CAC of the Banking Act.

5.2 Specific comments

Section 11CAA – definition of "specified law"

ABA notes the exclusion from the laws that are overridden by section 11CAB(2)(a) of certain laws relating to shareholdings and other laws, Australian or foreign, as may be specified in the Regulations. ABA recognises the difficult policy issues that arise in relation to overriding shareholding laws. While it is useful to have regulation power to address other laws that might be relevant, ABA would suggest that power be used sparingly.

Section 11CAB - interplay with associated contractual arrangements intended to give effect to conversion

As presently drafted, this section is expressed to apply to "an instrument that contains terms that are for the purposes of the conversion or write-off provisions …", and is expressed to give effect to the conversion of that instrument itself (see the introductory language of section 11CAB(2)). The EM goes on to state (at paragraph 5.26) that this provision is also intended to cover intra-group issuances where an instrument is issued by a holding company of a regulated entity to the market.

The ABA is aware of members who have issued instruments to the market from unlisted regulated entities within a group, which are convertible into listed ordinary shares in the listed entity and with arrangements between the listed entity and the regulated entity providing for an issue of ordinary shares within the group by the regulated entity.

Some of those intragroup arrangements are not best described as being in the form of an "instrument" that is "issued". The ABA suggests some minor changes to sections 11CAB or paragraph 5.26 (or both), as set out in items 3 and 15 of the Annexure to put that beyond doubt.

Section 11CAB(2)

The ABA recommends that in paragraph (d), in addition to the listing rules, there should be included a reference to the operating rules of a financial market or of a clearing and settlement facility through which the securities are traded. Please see item 3 of the Annexure for suggested drafting.

The ABA also requests that Treasury and APRA consider whether, in paragraph (a), there should be reference to "law in force in a foreign country" as opposed to "law of a foreign country". We would be grateful if it could be considered whether the drafting is broad enough to ensure laws such as self-executing laws of the European Union are included within the concept of non-Australian law (which we consider to be important). Some proposed changes are included in the Annexure, item 3.

Section 11CAC(3)(c)

The ABA submits that this should be limited to events that are identified in the terms of the instrument as requiring a conversion or write-off of the instrument. See item 4 of the Annexure for proposed

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drafting. So, for instance, the ABA agrees that if an instrument requires a conversion or write off because of a fall in the issuer's Common Equity Tier 1 (**CET1**) capital ratio to or below 5.125 per cent of risk-weighted assets or because the issuer is determined to be non-viable, then that should not be a matter that requires another party to do any of the acts identified in subsection (2) in relation to a contract with the issuer. But the proposed words "the occurrence of an event (which may be the making of a determination (however described) by APRA)" go well beyond that. "Results" admits a long chain of causation. For instance, the words might include a non-payment by the issuer under that contract being a background circumstance taken into account in determining that the issuer has breached its CET1 capital ratio, or may become non-viable.

The ABA also requests that Treasury and APRA consider whether, in paragraph (a), there should be reference to "law in force in a foreign country" as opposed to "law of a foreign country", for the same reasons as in regards to section 11CAB(2)(a) above.

Section 11CAC(4)

The concept of "first entity" is difficult: is this always intended to be the issuer of the instrument, or the conversion entity? If this is the case, then it seems the intention is that the issuer/conversion entity retains all its rights to deny obligations etc. under the contract in question where its capital instruments are being converted or written off, except where its counterparty is a related body corporate. It is not obvious why this should be the case.

Section 11CAC(4)

The ABA queries whether "conversion and write-off provisions" is a defined term and should be bolded and italicised where it is defined.

6. Stays

6.1 General comments

The ABA welcomes the Commonwealth's intention to ensure that current protections under the PSNA are retained and that the rights of counterparties to close-out netting contracts (as well as participants in approved RTGS systems, approved netting arrangements and netting markets) are clear. We also support clarifying that the protections available to netting and collateral arrangements under the Netting Act generally prevail, subject to the operation of specified stay provisions in limited circumstances, and notes that this reflects the approach taken in the generally-supported *Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016*. However, there are a few specific issues which should be addressed.

6.2 Specific comments

Stays regarding conversion and write off

As discussed above, the extended limb of the stays regarding conversion and write-off of relevant instruments (set out in proposed sections 11CAC(3)(c) of the Banking Act, 36C(3)(c) of the Insurance Act, and 230AAD(3)(c) of the Life Insurance Act) should be limited to events that are identified in the terms of the instrument as requiring a conversion or write-off of the instrument. It is understood that those events will be in the nature of "loss absorption events" as currently found in capital instruments.

This is because, as discussed above, we are concerned that the broad drafting of the current section 11CAC(3)(c) (and the equivalent provisions of the Insurance Act and Life Insurance Act) could cover a broad range of events which are not related to a relevant instrument, including, relevantly, a substantive default, e.g. a failure to pay or deliver, under any contract that ultimately causes APRA to make a determination that a relevant instrument is to be converted or written off. The ABA considers that it is important that counterparties' close-out rights which arise due to a substantive default (including a failure to pay or deliver) are not stayed. We do not expect that this is the policy intention of the drafting,

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but its application to a range of substantive defaults in contracts could create undesirable uncertainty, particularly as these are stays which apply permanently.

"Subsidiary"

The term "subsidiary" should be defined in the Netting Act. To ensure consistency of terminology across the Netting Act, Banking Act and Corporations Act, we submit that the "subsidiary" concept should be defined in the Netting Act in a similar way to the way in which it is defined in the Banking Act. Please see item 14 in the Annexure for proposed drafting.

6.3 Enforcement processes

The ABA also notes the Commonwealth's policy to ensure that no enforcement process in relation to the property of a body corporate can be started or continued if a statutory manager or judicial manager is in control of that body corporate's business.

Proposed section 15B(7)(c) of the Banking Act

The proceedings described in section 15B(7)(c) of the Banking Act, i.e. a proceeding to enforce any security (including a mortgage or charge) over any property that the body corporate owns, uses, possesses, occupies or in which the body corporate otherwise has an interest) (and equivalent provisions of the Insurance Act and Life Insurance Act, are exceedingly broad. Staying, during the statutory management of a body corporate, any proceeding to enforce any security (including a mortgage or charge) over any property that the body corporate owns, uses, possesses, occupies or in which the body corporate otherwise has an interest may generate significant unintended consequences. These may include preventing third parties from pursuing valuable and time-critical claims which do not directly affect the body corporate or the body corporate's business.

We have set out below two examples illustrating our concerns, the first of which we expect is an intended consequence of the reforms and the second of which may result in unintended consequences (or at the very least have a significant impact of a broad range of other Australian businesses):

Case A

Entity "A", an ADI, leases the premises in which it operates a branch from "B", the owner of the premises, and has granted security over its leasehold interest to B to secure obligations A owes to B. Clearly, the moratoria in section 15B should prevent B from enforcing the security granted by A during the statutory management of A.

Case B

Entity "A", an ADI, lends money to "B", a major supermarket business and takes security over all B's present and after acquired property to secure B's obligations under the loan. Accordingly, A has a security interest in relation to B's property.

B both owns the properties in which it has its stores and leases premises from third party owners, including "C". B has granted C a security interest to secure its obligations to pay C's rent.

B both owns the goods it sells outright and also borrows money from some suppliers to buy goods it will sell, and grants to each supplier (including a supplier we call "D") a security interest over the goods supplied by the supplier to secure B's obligation to pay the supplier the purchase price of the supplied goods (of course, a security interest may be created where a supplier supplies goods on a retention of title basis). For example, B grants "D" (a supplier) a security interest over the goods D supplies to B to secure B's obligation to pay D for those goods.

Relevantly, A, our ADI, has an interest in B's property, including B's leasehold and freehold interests and its inventory. In our example, C and D also have interests in some of B's property. However, on A becoming subject to statutory management, the moratorium in section 15B, by virtue of section 15B(7)(c), will apply such that neither C nor D (nor any other party granted security by B) can begin or continue a proceeding in a court or tribunal to enforce the security granted to them by B (even though

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this does not directly involve A). This is because we expect the proceedings by C and D would each constitute a proceeding to enforce security over property in which A has an interest (as A has a security interest over all of B's present and after acquired property).

We expect that this may have significant ramifications for the broader Australian economy, as many businesses will have granted security interests to regulated entities which cover a broad range of property.

For the purposes of section 15B(7)(c), we have assumed that the reference to "security" is referring to traditional concepts of security, i.e. mortgage, pledge, charge and lien, rather than PPSA concepts of security interest due to the use of the word "security' rather than "security interest", but this is not necessarily certain.

For this reason, the ABA suggests that Treasury and APRA may wish to consider narrowing the scope of section 15B(7)(c). Please see item 5 in the Annexure for proposed drafting.

The range of moratoria in sections 15B, 15BA, 15BB, 15BC and 15BD of the Banking Act (and the equivalent provisions in the Insurance Act and Life Insurance Act) appear to overlap and cover similar ground. Any further clarity which could be provided as to the intended scope and boundaries, of these moratoria would be welcomed.

7. Foreign branches

7.1 General comments

The ABA recognises the importance of foreign branches of ADIs to the Australian financial system, and the risks that failure of a foreign ADI may pose to that system. We acknowledge that, as part of the broader reforms contained in the Bill, some enhancement of APRA's powers when an Australian branch of a foreign ADI is in distress are warranted, and that one key area of APRA's focus in exercising these powers will usually be the stability of the Australian financial system and the protection of depositors in Australia.

Given the potential for APRA's actions in relation to a foreign ADI to have significant consequences outside Australia, the ABA believes that the potential implications on the foreign ADI's operations in other jurisdictions should be taken into account in determining the scope of the powers, and that the implications for the home regulator should be another key area of APRA's focus in exercising these powers.

The ABA believes that the proposed enhancement of powers would benefit from:

- Clarification and guidance on the interplay between APRA's powers and the powers of the foreign ADI's home regulator
- Greater precision in the definition of "Australian business assets and liabilities"; and
- Clarification on the potential reach of APRA's powers in relation to foreign ADIs, specifically to state that these powers extend only to the Australian branch, and not to foreign subsidiaries of a foreign regulated ADI; and
- Inclusion of a statutory mechanism for the recognition of foreign resolution proceedings (as distinct from the ability of a statutory manager to act consistently with a foreign home regulator or initiate a transfer of business).[16]

[16] This approach is taken in Europe, HK, Singapore, Switzerland and recommended in the FSB Principles for Cross-border Effectiveness of Resolution Actions. See, relevantly, Section 94, Monetary Authority of Singapore (Amendment) Act 2017 (No.31of 2017), Financial Institutions (Resolution) Ordinance (Ord. No. 23 of 2016, A2469), Part 13, Sections 187 to 188, Articles 94 to 96 of the European Union's Bank Recovery and Resolution Directive, and, section 37g of the Swiss Federal Act on Banks and Savings Banks (Unofficial translation issued in January 2016 by KPMG and available online at <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/02/ch-banking-act-sr952.0-en.pdf >)

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7.2 Interplay between APRA's powers and powers of a home regulator

In addition to the use of APRA's resolution powers potentially coming into conflict with the objectives of a foreign regulator in attempting to resolve a foreign ADI in a specific crisis, the ABA believes that the mere existence of these powers may be a cause for concern on the part of foreign regulators. The EM makes it clear that APRA may use powers not only "where foreign authorities are unable or unwilling to intervene", but also where foreign regulators "intervene in a manner that is inconsistent with the interests of Australian depositors or policyholders, or with the financial system stability in Australia".

In the case of a foreign regulator being unwilling or unable to intervene, the ABA acknowledges that there may be a need for APRA to use its powers. However, we suggest that the inclusion of a stated intention to exercise powers, in effect in competition with foreign regulators (or in a manner which may be contrary to the objectives of those regulators), may lead to a predisposition on the part of foreign regulators to act pre-emptively (or hastily in the event of a crisis) in an attempt to ensure their actions are not thwarted by inconsistent action by APRA. This may result in actions being taken earlier than necessary in times of crisis which may in turn be contrary to the interests of Australian depositors and, potentially, in action barring foreign banks from certain activities in the Australian market. We are concerned that such actions may be detrimental to competition and the stability of the market more generally.

The ABA supports the global trend towards more harmonised regulatory supervision, and suggests that Treasury and APRA adopt a position in relation to actions of their foreign counterparts akin to that adopted by the Prudential Regulation Authority (**PRA**) in implementing the European Union (**EU**) Bank Recovery and Resolution Directive (**BRRD**) (Directive 2014/59/EU) establishing a framework for the recovery and resolution of credit institutions and investment firms. In relation to a branch of a "third country", i.e. non-EU, institution, the PRA stabilisation and resolution powers can only be exercised either in support of third country resolution action, or independently in certain limited circumstances where:

a) Exercise of the power is approved by the UK Treasury, and the Bank of England (**BoE**) is satisfied that it is necessary having regard to the public interest in the advancement of one or more of the special resolution objectives set out in the UK Banking Act, and

b) Very broadly, the PRA and the BoE are satisfied that one or more of the following applies:

   i) The relevant bank is failing or likely to fail and either the third country resolution action has not been (and is not likely to be taken) or the BoE has refused to recognise such action; or

   ii) Debts or other liabilities owed to European Economic Area (**EEA**) creditors or otherwise arising from the business of the UK branch are unlikely to be paid as they fall due, and no third country resolution action has been taken and no normal insolvency proceedings have been initiated or are likely to be initiated in the near future.

In addition, the UK Treasury has indicated that it and the BoE consider that "cases where independent action, i.e. action independent of a foreign regulator, is needed will be exceptional" and that any such powers should only be a "back stop" to cooperation between international resolution authorities.[17]

The ABA would support changes to the Bill or the inclusion of guidance in the EM along the lines of the above. We believe that this would serve to allay the concerns of foreign regulators, allowing branches of foreign ADIs to continue to play a critical role in the Australian financial system without undue constraint from those regulators, whilst allowing APRA to achieve its stated aims in better harmony with its foreign peers.

[17] "HM Treasury, Bank Recovery and Resolution Directive (BRRD) Implementation Consultation (17 December 2015), section 4

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The two specific examples given in the next paragraphs illustrate why the resolution powers in respect of a foreign ADI's branch in Australia generally should only be used in support of the foreign proceedings.

Directors of foreign ADIs

It is proposed that the appointment of a statutory manager to a domestically incorporated ADI causes its directors to cease to hold office, but that the Industry Acts will be amended to provide that this will not be the case for a foreign ADI, whose directors will continue to hold office even where a statutory manager has been appointed over the Australian branch.[18]

It is necessarily the case that the appointment of a statutory manager to the branch in Australia cannot remove a director whose appointment is governed by foreign law. The making of the order nonetheless places the directors of a foreign ADI in a difficult position. Under foreign law, there is no automatic restriction or 'freeze' in the directors' duties or obligations with respect to the Australian branch, over which they will have little to no control while the statutory manager is in place. This may create a substantial degree of uncertainty and potential risk for such directors.

We note also that these persons will not have the benefit of section 70AA in proceedings brought outside Australia.

Non-recognition of Australian stays in foreign courts

In addition, while enhanced moratorium provisions have been included to provide better certainty during statutory management, such provisions are likely to have limited or no application in proceedings involving a foreign ADI under a foreign law governed contract in a foreign court. It is unlikely that foreign law will have regard to the Australian stay provisions in such a case. In the absence of recognition under foreign law to allow for similar moratoriums in such cases, the appointment of a statutory manager over a foreign ADI will create substantial uncertainty for the foreign ADI itself and for parties which it deals with.

7.3 Definition of "Australian business assets and liabilities"

Proposed section 11E(3) of the Banking Act provides that Australian business assets and liabilities of a foreign ADI means the following:

a) The assets and liabilities of the foreign ADI in Australia; and

b) Any other assets and liabilities that the foreign ADI has as a result of its operations in Australia.

The ABA is of the view that the scope of this definition is broad, and, particularly in relation to limb (b), unclear. It is arguable that limb (b) could extend to profits or other amounts legitimately repatriated by a branch of a foreign ADI from Australia to the foreign ADI's home jurisdiction, or legitimately transferred to another jurisdiction. On this construction, limb (b) could effectively grant APRA the ability to 'trace' the proceeds of any operations in Australia, and apply its powers to any entity within the foreign ADI group which comes into contact with those proceeds.

In the first instance, the ABA requests that limb (b) of the definition be removed as we believe that this power is beyond what would be required to resolve an Australian branch, and could potentially unduly interfere with entities outside APRA's regulatory mandate. If limb (b) is intended to capture something other than legitimately remitted assets and liabilities, we suggest clarification of the purpose behind the section and that the inclusion of a statement of that purpose in the EM would be helpful. This could also be achieved by removing limb (b) and providing that APRA may make rules (by regulation or prudential standard) for determining what constitutes an asset or liability of the foreign ADI in Australia.

[18] Proposed section 15(3A)

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7.4 Clarification that APRA's powers in relation to foreign ADIs are limited to the Australian branch and Australian business assets and liabilities

Generally, APRA's expanded powers include the ability to appoint a statutory manager to a "subsidiary" of a foreign regulated entity (sections 13A(1B) and (1C) of the Banking Act). Whilst it may be that this ability to appoint a statutory manager is intended to be limited (so that a statutory manager can only be appointed to the extent that the subsidiary falls within the foreign regulated entity's "Australian business assets and liabilities"), this is unclear from the language of the proposed reforms. In light of the broad nature of the language used in paragraph (b) of the definition of "Australian business assets and liabilities" and the potential uncertainty that that language creates (as to which, please see above), it is unclear as to what extent these powers (and associated stays) would extend to subsidiaries of a foreign regulated entity (whether in Australia or overseas). Accordingly, the ABA suggests Treasury should clarify that these provisions are intended not to apply to the subsidiaries of a foreign regulated entity.

7.5 Winding up of a foreign branch

The principle that winding up is not the most appropriate way to resolve a regulated institution (see paragraph 9.3 of the EM and our discussion in section 9.2 below) applies equally to the winding up of a foreign ADI in Australia. The winding up of a branch should only occur on the application of APRA if the ADI could not be restored to solvency within a reasonable period.[19] Further, in exercising this power APRA should be acting in support of the foreign regulator, except in the limited circumstances where independent action is warranted, as discussed in section 7.2 above.

7.6 Resolution planning

The ABA also requests that APRA considers the need for cooperation between it and a foreign regulator and encourage recognition of offshore resolution planning requirements so that a foreign ADI is able to apply a consistent approach.

8. Financial Claims Scheme

8.1 General comment

The ABA generally supports the proposed changes. However, the implications of the proposal on the declared ADI, the transferee ADI and the interaction with current APRA requirements under Prudential Standard APS 910 requires further consideration.

8.2 Specific comment – transfer of liabilities

The ABA appreciates the reasons for including the concept of a "transfer of liabilities determination", so that APRA's liability under the scheme in respect of a declared ADI can be satisfied by directing the transfer of the account to a transferee ADI under FSBTGRA.[20] This may be more convenient and less disruptive to commerce than paying out the account holders of the failed ADI and having them open new accounts with another bank or banks with the proceeds.

However, the transfer of accounts is not a simple matter. ADIs offer different products which each have their own terms and conditions for the operations of these products. These are supported by their own systems, which are not compatible with the IT systems of another ADI. Other laws impose obligations on the transferee bank in relation to the opening of accounts or any variation of their terms to align them with the terms offered by the transferee bank.

[19] See proposed section 16AAA(1)
[20] Proposed sections 16AIA – 16AIC

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Examples include:

a) Know your customer procedures

b) Anti-Money Laundering and Counter-Terrorism Financing Act 2006

c) Privacy Act 1988 (Cth) and the Australian Privacy Principles; and

d) Product Disclosure Statements for financial products (generally not deposit accounts) that fall under Chapter 7 of the Corporations Act.

In addition, whilst not statutorily binding, a transferee bank may be contractually obliged to provide customers with terms and conditions or other information that arise out of the Code of Banking Practice or the e-Payments Code. Where information is sought by APRA from third parties outside of the declared ADI, pre-existing contractual obligations and information confidentiality between the declared ADI and third parties will be affected. The legislation may want to override such statutory or contractual obligations.

The cost of establishing compatible systems and identical terms would be enormous and its effect would discourage product innovation. (See further on "Resolution Planning" below). If implemented as per the current proposals, banks would require a lead time of several years for compliance given the scale of system changes required.

Accordingly, any transfer of accounts should be on the basis that the transferee bank is free to run the account on its own terms for an equivalent account. It is noted that the compulsory transfer cannot take place without the consent of the directors of the transferee bank (existing FSBTGRA sections 25(2)(d) and 27 and proposed section 25AA(4)(d)). In order to make the transfer acceptable, the transfer certificate should relieve the transferee bank of obligations arising under specified laws in connection with the opening of the account, and override contractual terms which might otherwise prevent the transfer or put an ADI in breach of its obligations. This could be accommodated by expanding the ancillary powers relating to the certificate in section 33 of FSBTGRA as set out in the Annexure, item 13.

The ABA understands that the Federal Deposit Insurance Corporation (**FDIC**) in the US and the Financial Services Compensation Scheme (**FSCS**) in the UK provide for the transfer of liabilities in the form of deposit accounts, and that the experiences and expectations as to transfers under these regimes may be instructive to the Australian regime.[21] Under the FSCS, there is a broad discretion to pay compensation (including a sum of money to an incoming firm which agrees to be liable to the account holder) "on such terms as the FSCS considers appropriate".[22]

Please see item 13 of the Annexure for suggested drafting as to APRA's power to specify conditions in the certificate of transfer and the extent to which the receiving bank may be relieved from complying with an agreement in respect of the opening of an account.

For completeness, Prudential Standard APS 910 Financial Claim Scheme currently only contemplates payment to protected accountholders under section 16AF of the Act, rather than a transfer of their account as contemplated in the new provisions. It would appear likely that certain of the calculations and their timings as currently set out in APS 910 would need to be re-considered where the account is being transferred with the intent that it to be operable at the transferee bank rather than closed.

[21] In this regard, the ABA understands that, in the US, a "purchase and assumption transaction" is the preferred and most common method which the FDIC would use in acting to protect insured depositors. Under a purchase and assumption transaction, a healthy (acquiring) bank assumes the insured deposits of the failed bank (and the insured depositors of the failed bank immediately become depositors of the assuming bank and have access to their insured funds) (see e.g. FDIC, Payments to Depositors: https://www.fdic.gov/consumers/banking/facts/payment.html ; see also sections 3(n) and 11(f) of the Federal Deposit Insurance Act (US): https://www.fdic.gov/regulations/laws/rules/1000-100.html)

[22] See 7.2, Depositor Protection, Prudential Regulation Authority Rulebook: http://www.prarulebook.co.uk/rulebook/Content/Part/213751/06-09-2017

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9. Wind up and other matters

9.1 General comments

The ABA generally has no issue with the harmonisation and clarification of APRA's winding up powers based on APRA's experience in the application of some of these powers in other industries.

9.2 Specific comments

The ABA makes the following specific comments.

Relationship with section 459P

The ABA appreciates that, when all other options for the resolution of a financial institution have been exhausted, APRA should have the power to intervene when the institution is insolvent. We note that APRA currently has the power to apply to the Federal Court for the winding up of an ADI – under both s14F of the current Banking Act and under s459P(1)(g) of the Corporations Act (APRA is a "prescribed agency" by virtue of Corporations Regulation 5.4.01). We query whether the intention of the power in s14F (and in the proposed s16AAA) is to limit APRA's power under s459P(1)(g). This is because both sections require that APRA considers that the ADI is insolvent and "could not be restored to solvency within a reasonable period", whereas APRA can apply to the Federal Court for a winding up in insolvency under s459P(1)(g) of the Corporations Act without satisfying such a requirement.

If that is the intention, then the ABA submits that this should be made clear. If that is not the intention, then we query whether a separate winding up power in the Banking Act is necessary.

Consideration of alternatives to winding up

The Commonwealth acknowledged in paragraph 9.3 of the EM that "proceeding straight to wind-up of a regulated entity will not be an appropriate way of protecting beneficiaries and minimising impacts on the financial system, even if the entity is or is likely to become insolvent". The ABA agrees with this proposition and notes that when an application is made under s459P of the Corporations Act, the Federal Court will only wind up a company which is insolvent. We assume that the requirement in proposed s16AAA (being the same as the current test) that the ADI "is insolvent and could not be restored to solvency within a reasonable period" before APRA applies for a winding up is intended to ensure that APRA has first determined that the ADI cannot be resolved by any other means before applying to the Federal Court for a winding up of the ADI.

The ABA suggests that if this is the intention, it would be clearer if proposed s16AAA(1) were drafted as set out in item 6 of the Annexure.

The ABA notes the Commonwealth wants APRA to have the ability to apply for the winding up of an ADI without the ADI having been placed in statutory management (proposed s16AAA(2)). The ABA believes that this provision would more clearly express this intention if drafted as set out in item 7 of the Annexure.

Section 62B notice to APRA

The ABA notes that if a person other than APRA proposes to apply for the appointment of, or appoints an external administrator of an ADI or authorised NOHC, the proposed s62B requires that person to give two weeks' notice of the proposal to make the application or appointment.

The ABA submits that compliance with this notice period may not be practicable (or even possible) in these circumstances. The period is lengthy and the proposal is in contrast to the equivalent provision in the UK Banking Act (s120). Under that provision the notice must be given to the UK Financial Services Authority "when an application is made for the appointment of an administrator or when an administrator is proposed to be appointed", and that an administration order may not be determined (or an administrator may not be appointed) until two weeks after that notice has been given. We submit

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that imposing a two week notice period on the making of an application for the appointment of an administrator is not reasonable or in the interests of deposit holders (but that imposing a two week notice period from the making of the application to when the administration order is granted would be workable). Please see item 8 of the Annexure for suggested drafting.

In relation to subsection 62B(4), the drafting appears to be rather lengthy for an offence provision which appears to be dealing with a breach of subsection 62B(1) (taking into account subsections 62B(1A) and 62B(1B)). If this intention of subsection 62B(4) is to address this breach only, we would be grateful if Treasury and APRA could consider simplified drafting, as set out in item 9 of the Annexure.

Interplay between sections 62C, 62D and 62E

The ABA notes that, under proposed section 62D of the Banking Act (by virtue of section 62C), APRA may apply to the Federal Court for directions regarding any matter arising under:

a) The winding up of an entity covered by subsection 62C(4) (which includes, relevantly, *a subsidiary of an ADI or authorised NOHC*) (whether the winding up occurs as a result of an application made under the Corporations Act 2001 or by APRA under section 11EA or 16AAA); or

b) the proposed winding up of an entity covered by subsection 62C(4) (which includes, relevantly, a *subsidiary of an ADI or authorised NOHC*) (whether the winding up will occur as a result of an application made, or proposed to be made, under the *Corporations Act 2001* or by APRA under section 11EA or 16AAA).

The ABA notes that APRA is given further powers in section 62E. We also note that the proposed section 62E of the Banking Act gives APRA the power to request information from a liquidator about the "other affairs of the entity". This appears to be quite broad, given the context of the section is the winding up of the entity. We would be grateful if Treasury and APRA could consider limiting these powers to a narrower subset of issues (or even simply to information about the winding-up of the entity). Accordingly, we would suggest the deletion of "and the other affairs of the entity" in proposed section 62E. Please see item 9 of the Annexure for suggested drafting.

As noted in paragraph 2.1 above, the extension of regulatory powers to previously unregulated entities, particularly in circumstances where it is not practicable to determine whether any entity could be subject to these powers, creates uncertainty which could have consequences on the level playing field with a related body of a regulated body compared with other "unregulated" companies. Accordingly, we would suggest that the ability of APRA to apply for directions regarding a winding up or proposed winding up of a subsidiary of an ADI or authorised NOHC be limited to circumstances where the subsidiary is material to the sound financial position of the ADI, the NOHC or the relevant group of bodies corporate. Please see item 9 of the Annexure for suggested drafting.

10. Resolution planning

The ABA notes the proposed provisions for the setting and enforcing of appropriate prudential requirements for resolution planning, in particular the proposed definition of "prudential matters", the definition of "resolution" and the new direction powers proposed in section 11CA(2)(p) and (q).

We agree that there is merit in ADIs and/or NOHCs formulating plans to facilitate resolution, as well as recovery.

However, the ABA is concerned that a requirement for a reasonable measure of resolution planning not expand into an extensive requirement for an ADI or NOHC to re-order its business at the direction of APRA to pre-position it (or parts of it) for disposal in circumstances which should be very remote, given all the other strengths of the Australian financial system and the way in which it is regulated. Pre-positioning for the remote event of resolution can impose immense regulatory costs on each ADI or NOHC for a circumstance which, with prudent management and vigilant regulation, should never arise. Further, if the need for resolution does arise, properly crafted legislative resolution powers can address issues that may arise in separating businesses and ensuring their continued operation. Resolution

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planning should not be a back-door Volcker rule or other similar rule for the structural separation of businesses and the duplication of systems and personnel, or for prescribing common or compatible systems among all ADIs. This would impose very real costs on the community.

The powers proposed to be conferred on APRA create an apprehension that such measures may be in prospect. An ADI or NOHC must comply with whatever is in the prudential standard (proposed section 11AAA). Non-compliance, or the likelihood of non-compliance entitles APRA to give a direction under section 11CA. The direction may be to make changes in the ADI's systems, its business structure, its organisation or to its subsidiaries. By amending the definition of prudential matters to include "resolution", APRA is given very broad powers to introduce prudential standards, which must be complied with by subsidiaries of ADIs and subsidiaries of authorised NOHCs of ADIs, in areas that would, typically, only be relevant in the case of resolution (such as on systems, business structures and organisation structures). It would be costly and in at least some cases may be inappropriate for an ADI or NOHC to be required to make extensive structural changes, or duplicate systems, in anticipation of a remote outcome. This is particularly the case where there is no requirement that such directions be made only as part of resolution or when it is imminent, or that they be reasonably appropriate to a legitimate end, such as the protection of depositors or the stability of the financial system. Consideration should be given to the cost and complexity of the proposed resolution requirement relative to the remoteness of the risk and the level of benefit in resolution that may be derived.

The ABA requests that:

a) The proposed amendments be revised to make clear that the new powers are exercisable in more clearly defined circumstances and must be appropriate for more clearly defined ends. We suggest that the exercise of resolution powers needs to be reasonable and proportionate to legitimate prudential matters such as protection of depositors or the stability of the financial system. This may ultimately be a matter for the prudential standards, but will need to weigh the cost and complexity of the proposed resolution requirement against the remoteness of the risk of resolution and the level of benefit in resolution that may be derived. Some proposed changes are included in the Annexure, Item 11.

b) The Commonwealth and APRA articulate its policy in relation to resolution planning and its approach to pre-positioning in greater detail. The ABA would welcome a statement in the EM to the effect that these powers are not intended to authorise extensive requirements for structural separation, duplication of systems, prescribing common or compatible systems or other pre-positioning; and

c) Any planning that affects foreign subsidiaries should be conducted in consultation with the relevant foreign regulator.

Given the very short consultation period, the ability of ABA to examine and comment on these important reforms has been limited. Given the complexity of the reforms the ABA looks forward to discussing the proposals and our submission with Treasury and APRA. If you would like any further information, please contact me on [redacted]

Yours sincerely

Signed by

Aidan O'Shaughnessy
Executive Director - Industry Policy (acting)
[redacted]

ANNEXURE – PROPOSED AMENDMENTS

These are marked up to show changes against the provisions in the Exposure Draft.

Item	Proposed amendment	Theme	Other comments
Proposed Banking Act 1959			
1.	**5. Interpretation** ***prudential matters*** means matters relating to: (a)…. (i)…. (ii)____to facilitate resolution of the ADI, NOHC, or ~~member or members of the group~~ one or more members of the relevant group of bodies corporate of which the ADI or NOHC is a member that by itself is, or together are, material to the sound financial position of the ADI, the NOHC or the relevant group of bodies corporate; (iii)___ to protect the interests of depositors of ~~any~~ the ADI …… ***resolution*** means the ~~process by which APRA and other relevant persons~~exercise by APRA or an administrator appointed under this Act of powers and functions under this Act or another prudential regulation framework law to manage or respond to the entity being or being considered likely to be or to become unable to meet its obligations or suspending or being considered likely to suspend payment.~~the failure or potential failure of an entity, including through the exercise of powers and functions under this Act or another law.~~	Definition of "prudential matters" and 'resolution'	Please refer to paragraph 1.1 of our submission for further comments regarding the definition of "resolution" and paragraph 1.2 of our submission for further comments regarding "prudential matters". A definition of "prudential regulation framework law" is contained in section 3 of the Australian Prudential Regulation Authority Act 1998.

Item	Proposed amendment	Theme	Other comments
2.	**13A. Consequences of inability or failure of ADI etc. to meet certain requirements** *Appointment of administrator, or control by APRA, of NOHC or subsidiary of NOHC or ADI* (1B) APRA may take any of the actions mentioned in subsection (1C) in relation to a body corporate (the ***target body corporate***) if: (a) the target body corporate is any of the following: (i) an authorised NOHC of an ADI (the ***relevant ADI***); (ii) a subsidiary of an authorised NOHC of an ADI (also the ***relevant ADI***); (iii) a subsidiary of an ADI (also the ***relevant ADI***); and (b) the condition in subsection (1D), (1E) or (1F) is satisfied; and (c) the target body corporate is not a body corporate of a kind specified in regulations (if any) made for the purposes of this paragraph. (1D) The condition in this sub-section 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 ARA 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 and that the appointment is necessary in order for the relevant ADI to maintain its operations. (1E) The condition in this subsection is satisfied if: (a) either:	Statutory management	Please refer to paragraph 2.1 of our submission for further comments regarding the appointment of a statutory management to unregulated subsidiaries of a regulated entity or authorised NOHC.

Item	Proposed amendment	Theme	Other comments
	(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)~~(iii) a particular member or particular members of ~~such~~ a relevant group of bodies corporate of which the relevant ADI or NOHC is a member that by itself is, or together are, material to the sound financial position of the ADI, the NOHC or the relevant group of bodies corporate. (1F) The condition in this subsection is satisfied if: (a) there is an external administrator of the target body corporate, or APRA considers that, in the absence of external support: (i) the target body corporate may become unable to meet its obligations; or (ii) the target body corporate may suspend payment; and		

Item	Proposed amendment	Theme	Other comments
	(b) APRA considers that it is necessary to take an action mentioned in subsection (1C) in respect of the target body corporate in order to enable the relevant ADI to maintain its operations, or 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)~~(iii) a particular member or particular members of ~~such~~ a relevant group of bodies corporate of which the relevant ADI or NOHC is a member that by itself is, or together are, material to the sound financial position of the ADI, the NOHC or the relevant group of bodies corporate.		
3.	**11CAB. Conversion and write-off provisions** *Application* (1) This section applies in relation to an instrument that contains terms that are for the purposes of the conversion and write off provisions and that is issued by, or to which any of the following is party: (a) an ADI; or (b) a holding company of an ADI; or (c) a subsidiary or related subsidiary of an ADI; or (d) an entity of a kind prescribed by the regulations for the purposes of this paragraph. *Conversion of instrument despite other laws etc.* (2) The instrument may be converted in accordance with the terms of the instrument despite:	Conversion and write-off capital instruments	Please refer to paragraph 5.2 of the submission for further detail regarding section 11CAB. The amendment to paragraph 2(a) deals with the possibility of

Item	Proposed amendment	Theme	Other comments
	(a) any Australian law or any law ~~of~~in force in a foreign country or a part of a foreign country, other than a specified law; and (b) the constitution of the entity issuing the instrument, or any conversion entity for the instrument; and (c) any contract or arrangement to which the entity issuing the instrument, or any conversion entity for the instrument, is a party; and (d) any listing rules or operating rules of a financial market in whose official list the entity issuing the instrument, or any conversion entity for the instrument, is included and any operating rules of a clearing and settlement facility through which the instrument is traded.		supra national laws that are in force in a country while not being made by it. We would be grateful if Treasury and APRA could please consider whether the existing drafting is broad enough to ensure laws such as self-executing laws of the European Union are included within the concept of non-Australian law (which we consider to be important). If so, please disregard the change to "law *in force* in a foreign country…" [***Note to ABA and members: We note that if members wish to press this point, there may be broader ramifications to existing parts of the Banking Act (and other Acts).***]
4.	**11CAC. Conversion or write-off etc. not grounds for denial of obligations** (3) The matters are as follows: (a) a relevant instrument being converted as required by~~for the purposes of~~ the conversion and write off provisions contained in the terms and conditions of the instrument; (b) a relevant instrument being written off as required by~~for the purposes of~~ the conversion and write off provisions contained in the terms and conditions of the instrument;	Conversion or write-off capital instruments	Please refer to paragraph 5.2 of the submission for further detail regarding section 11CAC.

Item	Proposed amendment	Theme	Other comments
	(c) the occurrence of an event ~~(which may be the making of a determination (however described) by APRA)~~specified in the terms and conditions of the instrument that results in a relevant instrument being required to be converted or written off as required by~~for the purposes of~~] the conversion and write off provisions contained in the terms and conditions of the instrument.		
5.	**15B. Moratorium – effect of Banking Act statutory management on court and tribunal proceedings** (7) A proceeding in a court or tribunal is covered by this subsection in respect of a body corporate if it is any of the following: (a) proceeding against the body corporate (including a cross claim or third party claim against the body corporate); (b) a proceeding in relation to property of the body corporate; (c) a proceeding to enforce any security (including a mortgage or charge) granted by the body corporate over any property that the body corporate owns, uses, possesses, occupies or in which the body corporate otherwise has an interest.	Enforcement processes – 'security'	Please refer to paragraph 6.3 of the submission on this issue.
6.	**16AAA. APRA's powers to apply for ADI to be wound up** *Power to apply for ADI to be wound up* (1) APRA may apply to the Federal Court of Australia for an order that an ADI be wound up if APRA considers that the ADI is insolvent and could not be restored to solvency within a reasonable period, provided that APRA has first determined that the ADI could not be resolved by any means other than a winding up. *Note: This section does not apply in relation to a foreign ADI (see subsection 11E(1)).*	Wind up and other matters	Please refer to paragraph 9.2 of the submission on section 16AAA(1).
7.	**16AAA. APRA's powers to apply for ADI to be wound up** (2) To avoid doubt, subsection (1) applies whether or not ~~even if~~ an ADI statutory manager is in control of the ADI's business. (2A) The application is to be made under section 459P of the Corporations Act 2001.	Wind up and other matters	Please refer to paragraph 9.2 of the submission on section 16AAA(2).

Item	Proposed amendment	Theme	Other comments
	(3) The winding up of the ADI is to be conducted in accordance with the Corporations Act 2001.		
8.	**62B. Involving APRA in proposed appointment of external administrators of ADIs and NOHCs** (1) If~~At least 2 weeks before~~ a person other than APRA: (a) makes an application to a court under Chapter 5 of the *Corporations Act 2001* for the appointment of an external administrator of an ADI or of an authorised NOHC of an ADI; or (b) makes another kind of application (whether or not to a court) for the appointment of an external administrator of an ADI or of an authorised NOHC of an ADI; or (c) appoints an external administrator of an ADI or of an authorised NOHC of an ADI (otherwise than as the result of an application made by another person); the person must give APRA written notice that the person has made~~proposes to make~~ the application or proposes to make the appointment and the application may not be determined, or the appointment may not be made (whichever is applicable) earlier than 2 weeks from the day on which the notice is received by APRA. (1A) If there is an approved form for the notice, the person must give the notice in the approved form. (1B) Subsection (1) does not apply if APRA gives the person written notice, before the person has made~~makes~~ the application or proposed to make the appointment, that APRA consents to the ~~person making the application or~~ appointment.	Wind up and other matters	Please refer to paragraph 9.2 of the submission on section 62B(1).
9.	**62B Involving APRA in proposed appointment of external administrators of ADIs and NOHCs** …	Wind up and other matters	Please refer to paragraph 9.2 of the submission on section 62B(4) and sections 62C to 62E.

Item	Proposed amendment	Theme	Other comments
	Offence (4) A person (other than APRA) commits an offence if it does not comply with subsection 62B(1) (taking into account subsections 62B(1A) and 62B(1B)).~~:~~ ~~(a) the person:~~ ~~(i) makes an application to a court under Chapter 5 of the Corporations Act 2001 for the appointment of an external administrator of an ADI or of an authorised NOHC of an ADI; or~~ ~~(i) makes another kind of application (whether or not to a court) for the appointment of an external administrator of an ADI or of an authorised NOHC of an ADI; or~~ ~~(i) appoints an external administrator of an ADI or of an authorised NOHC of an ADI (otherwise than as the result of an application made by another person); and~~ ~~(b) APRA did not give the person written notice, before the person made the application or appointment, of APRA's consent to the person making the application or appointment, in accordance with subsection (1B); and~~ ~~(c) at least 2 weeks before making the application or appointment:~~ ~~(i) if there is an approved form for the purposes of this paragraph – the person did not give APRA notice in the approved form indicating that the person proposed to make the application or appointment; or~~ ~~(ii) otherwise – the person did not give APRA written notice indicating that the person proposed to make the application or appointment.~~ Penalty: 60 penalty units. **62C Involving APRA in applications by liquidator**		

Item	Proposed amendment	Theme	Other comments
	(1) Before making an application to a court in relation to a matter arising under the winding up of an ADI the winding up of an entity covered by subsection (4), or the proposed winding up of an entity covered by subsection (4), a liquidator must give APRA written notice that the liquidator proposes to make the application. (2) The notice must include details of the proposed application. (3) APRA is entitled to be heard on the application. (4) This subsection covers the following entities: (a) an ADI; (b) an authorised NOHC; (c) a subsidiary of an ADI or authorised NOHC. **62D Application by APRA for directions** (1) APRA may apply to the Federal Court for directions regarding any matter arising under: (a) the winding up of an entity covered by subsection 62C(4) (whether the winding up occurs as a result of an application made under the Corporations Act 2001 or by APRA under section 11EA or 16AAA); or (b) the proposed winding up of an entity covered by subsection 62C(4) (whether the winding up will occur as a result of an application made, or proposed to be made, under the Corporations Act 2001 or by APRA under section 11EA or 16AAA). (2) APRA must give the liquidator written notice that APRA proposes to make the application. (3) The notice must include details of the proposed application. (4) The liquidator is entitled to be heard on the application.		

Item	Proposed amendment	Theme	Other comments
	(5) However, APRA may only make an application under this section in respect of a subsidiary of an ADI or authorised NOHC if [APRA considers that] the subsidiary is material to the sound financial position of the ADI, the NOHC or the relevant group of bodies corporate. **62E APRA may request information from liquidator** (1) APRA may request a liquidator of an entity covered by subsection 62C(4) in writing to give APRA, within a reasonable time specified in the request, specified information in writing about: (a) the winding up of the entity (whether the winding up occurs as a result of an application made under the Corporations Act 2001 or by APRA under section 11EA or 16AAA) ~~and the other affairs of the entity~~; or (b) the proposed winding up of the entity (whether the winding up will occur as a result of an application made, or proposed to be made, under the Corporations Act 2001 or by APRA under section 11EA or 16AAA) ~~and the other affairs of the entity~~. (2) The liquidator must comply with the request. (3) However, APRA may only make a request under this section in respect of a subsidiary of an ADI or authorised NOHC if [APRA considers that] the subsidiary is material to the sound financial position of the ADI, the NOHC or the relevant group of bodies corporate. Note: Action may be taken under the Corporations Act 2001 against a liquidator who does not comply with such a request.		
10.	**70AA Protection from liability—directions and secrecy** (1) No action, suit, ~~or~~ proceeding or investigation ~~(whether criminal or civil)~~ may be brought ~~does not lie~~ against a person and no person may be subject to any liability, remedy penalty, forfeiture or punishment (in each case whether criminal or civil) in relation to anything done, or omitted to be done, in good faith by the person if:	Protection from liability	As noted in paragraph 3.2 of the submission, we would be grateful if Treasury and APRA could please clarify the manner in which section 70A is intended to apply. This could perhaps be done in the EM.

Item	Proposed amendment	Theme	Other comments
	(a) the person does the thing, or omits to do the thing, for the purpose of any of the following: (i) complying with a direction under this Act given by APRA to a body corporate; (i) complying with section 11CI (secrecy); and (b) either: (i) it is reasonable for the person to do the thing, or to omit to do the thing, in order to achieve that purpose; or ~~(i)~~(ii) the doing of the thing, or omission to do the thing, is required by the direction; and ~~(b)~~(c) the person is any of the following: (i) an ADI, NOHC, a relevant group of bodies corporate or related body corporate of an ADI or NOHC; ~~(i)~~(ii) an officer or senior manager of the body corporate, of a subsidiary of the body corporate, of an authorised NOHC of the body corporate or of a subsidiary of an authorised NOHC of the body corporate; ~~(ii)~~(iii) an employee or agent of the body corporate, of a subsidiary of the body corporate, of an authorised NOHC of the body corporate or of a subsidiary of an authorised NOHC of the body corporate. (2) In subsection (1): ***employee*** of a body corporate includes a person engaged to provide advice or services to the body corporate. ***officer*** has the meaning given by section 9 of the Corporations Act 2001.		It would be useful to clarify the persons and the powers and functions to which this section is intended to apply. If it is intended to apply to the ADI, NOHC or related bodies corporate it needs to make that clear and cover criminal proceedings as well – please see the language proposed in section 70AA(1). Reference to investigation and remedy taken from section 7(2) of the Acts Interpretation Act 1901 (Cth): "Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended." We would be grateful if the explanatory memorandum to the *Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017* could please clarify that the reference to liability includes, among other things, liabilities for damages, expenses, costs or losses (including, without limitation, breach of contract, breach of fiduciary duties, tortious

Item	Proposed amendment	Theme	Other comments
			liability, negligence, criminal liability and any other category of criminal or civil liability whatsoever). Please refer to paragraphs 3.2 and 3.3 of the submission for further detail on these points.
11.	**Section 11CA(2)(p) and (q)** (p) to make changes to the body corporate's systems, business practices or operations as is reasonably necessary for one or more prudential matters relating to the body corporate; (q) to reconstruct, amalgamate or otherwise alter all or part of any of the following: (i) the business, structure or organisation of the body corporate; (ii) the business, structure or organisation of the group constituted by the body corporate and its subsidiaries~~,~~; in each case as is reasonably necessary for one or more prudential matters relating to the body corporate	Resolution planning	Please refer to paragraph 10 of the submission for further detail on resolution planning.
12.	~~[*Placeholder for drafting regarding effect of APRA powers in New Zealand*]~~**International Matters** **Proposed new section 13A(1G)** Despite subsection (1B), APRA may not take any of the actions specified in subsection (1C) in the case of a subsidiary that is: (a) a foreign corporation, or (b) any body corporate that is supplying services essential to the capacity of a foreign corporation to maintain its operations,		Please refer to paragraph 2.3 of the submission for further detail on the effect of APRA's powers in ~~New Zealand~~relation to foreign entities, including New Zealand. A similar provision could be developed in relation to directions powers affecting foreign subsidiaries.

Item	Proposed amendment	Theme	Other comments
	unless, in addition to the condition in subsection (1D), (1E) or (1F) being satisfied: (i) APRA has first consulted with any prudential regulator of that subsidiary in the relevant foreign country (including, in the case of a subsidiary that is a New Zealand registered bank, the prescribed New Zealand authority); (ii) APRA considers it necessary to take the action because: (A) no satisfactory resolution action has been taken by the relevant prudential regulator and APRA considers that no such action is likely to be taken; or (B) such action will facilitate the resolution action taken or proposed to be taken by the relevant prudential regulator. .		
Proposed Financial Sector (Business Transfer and Group Restructure) Act 1999			
13.	**33. Certificate of transfer** (1) If: (a) APRA has made a compulsory transfer determination; and (b) APRA considers that the transfer should go ahead; and (c) the consent referred to in paragraph 25(2)(d) or 25AA(4)(d) is still in force (see section 27); APRA must, in writing, issue a certificate (a certificate of transfer) stating that the transfer is to take effect.	Financial Claims Scheme	Please refer to paragraphs 4.2 and 8.2 of the submission for further detail on section 33 of the proposed Financial Sector (Business Transfer and Group Restructure) Act 1999.

Item	Proposed amendment	Theme	Other comments
	(2) The certificate must: (a) include the names of the transferring body and the receiving body; and (b) in the case of a transfer of business—state whether the transfer is a total transfer or a partial transfer; and (c) in the case of a transfer of business that is a partial transfer—include, or have attached to it: (i) a list of the assets and liabilities of the transferring body that are being transferred to the receiving body; and (ii) any approved section 30 statement; and (d) state when the certificate is to come into force (either by specifying a date as the date it comes into force, or by specifying that the date it comes into force is a date worked out in accordance with provisions of the certificate); and (e) be signed by an authorised APRA officer. (3) The certificate may include provisions specifying, or specifying a mechanism for determining, other things that are to happen, or that are taken to be the case: (a) in the case of a transfer of business—in relation to assets and liabilities that are to be transferred, or in relation to the transfer of business that is to be effected, whether the transfer is total or partial; ~~(a)~~(b) in the case of a transfer of business, whether and on what conditions (if any) the receiving bank is relieved from complying with obligations or duties arising under any applicable law (including the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), the *Privacy Act 1988* (Cth) and the Australian Privacy Principles, provisions of Chapter 7 of the *Corporations Act 2001* (Cth)) or any code of conduct or agreement in respect of the opening of an account or other issue of a financial product occurring by reason of the transfer; or ~~(b)~~(c) in the case of a transfer of shares—in relation to shares that are to be transferred, or in relation to the transfer of shares that is to be effected.		

Item	Proposed amendment	Theme	Other comments
	(4) The certificate comes into force in accordance with the statement included in the certificate as required by paragraph (2)(d).		
Proposed Payment Systems and Netting 1998			
14	Suggested new section 5AAA (Subsidiary) or new subsection 5A(2) (with a change to the heading to be "Related body corporate"): [*] For the purposes of this Act, the question whether a body corporate is a subsidiary of another body corporate is to be determined in the same way as that question is determined for the purposes of the Corporations Act 2001.	Stays	Please refer to paragraph 6.2 of the submission in relation to the use of "subsidiary" in the PSNA.
Explanatory Memorandum			
15	5.26 Where a regulated entity is a subsidiary of one or more holding companies, the amendments are intended to cover any instrument issued to the market by a holding company of that regulated entity, and any corresponding intra-group instruments or arrangements between the ~~issued by the~~ regulated entity, the holding company and ~~or~~ any intermediate holding company in order to meet the regulatory capital requirements of the regulated entity. In this case, ~~all of those instruments will be able to convert~~ conversion will occur in accordance with the~~ir~~ terms of those instruments or arrangements despite the potential legal impediments listed at 5.27.	Conversion or write-off capital instruments	Please refer to paragraph 5.2 of the submission in relation to section 11CAB and its explanation in the EM.