8 September 2017
Senior Adviser
Banking, Insurance and Capital Markets Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email only:
crisismanagement@treasury.gov.au
Attention: Mr. Patrick Mahony

Dear Sir

EXPOSURE DRAFTS: FINANCIAL SECTOR LEGISLATION AMENDMENT (CRISIS RESOLUTION POWERS AND OTHER MEASURES) BILL 2017 (BILL) AND EXPLANATORY MEMORANDUM (EM)

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies.The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic.
Our comments are set out below.

Introductory comments

1. We appreciate and acknowledge that there are clear benefits for APRA in being able to apply a consistent framework of supervision to prudentially regulated entities, particularly during times of crisis. However, it seems us that the rigorous application of a standard approach across different types of institutions and industry sectors may fail to take into account the different risks inherent in each sector. We understand that in a practical sense, APRA is alive to the distinctions that do need to be drawn between say an insurance crisis event and an ADI crisis event. Thus regardless of the broad powers applying across the Industry Acts[1], we understand that in practice,

[1] In this submission, this expression has the meaning given to it in the Bill and EM; as do other expressions used in this submission which are defined and appear in the Bill and/or EM.

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APRA will be cognisant of the different approaches which may need to be taken having regard to the particular entity involved. It would be useful if in due course APRA could provide guidance on how and when it intends to exercise the relevant powers.

2. The international dimensions and the impact on the competitiveness and sustainability of Australian regulated entities needs to be considered carefully.

3. The proposals should be accompanied by a comprehensive regulatory impact assessment (**RIS**). This should consider the potential impact of the proposals on the safety of the financial sector. Its scope should be broadened to ensure other factors, such as the impact on competition and economic growth and the effect on third parties (such as large and small counterparties or suppliers to an insurer or an ADI). Ideally, such an RIS would benefit from its own consultation process to ensure that the extent of interdependencies is properly understood.

4. The potential for increased regulatory intervention can have a material effect on the capacity for Australian regulated entities to do business effectively in a globally competitive environment and while international consistency in regulation can have its advantages, the relative impacts on local and offshore parties should be assessed.

5. Generally, we note that in our submission of 11 February 2013 we provided detailed comments on the 2012 Treasury Consultation Paper on *Strengthening APRA's Crisis Management Powers* (**2013 Submission**). To the extent to which those proposals are replicated in the Bill and EM, we confirm our prior comments, particularly those in relation to the appropriate level of judicial review and oversight of the exercise of APRA's powers and pre-conditions to the exercise of those powers.

6. For convenience, in this submission we will adopt the chapter headings in the EM.

Chapter 1: Overview of crisis management

7. We note that at paragraph 1.12 of the EM it is indicated that other proposals in the 2012 consultation paper that were less resolution-centric and those relating to financial market infrastructure will be progressed separately. We also note that other crisis-related reforms, such as implementation of a requirement for additional loss-absorbing capacity also is being progressed separately. When these are progressed it is important that there is appropriate synergy with the crisis management powers and that there are no unintended consequences.

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Chapter 2: Statutory and judicial management

8. We note that it is proposed that the existing statutory and judicial management powers be *enhanced.* Thus, the Bill proposes to

    - enhance APRA's statutory management powers in respect of ADIs, including new statutory management powers in relation to foreign ADIs;
    - provide APRA with new statutory management powers in respect of insurers;
    - provide APRA with new statutory management powers in respect of authorised non-operating holding companies (**NOHCs**) of regulated entities, and subsidiaries of authorised NOHCs or regulated entities;
    - enhance the moratorium provisions with respect to the statutory and judicial management provisions of the Industry Acts; and
    - enhance the statutory immunity provisions applying to statutory and judicial managers.

9. As a matter of general principle, we do not disagree with the policy intention of the proposals. However, it is not entirely clear to us that there is an appropriate ability to challenge the exercise by APRA of a power where required. It is important in the end result that substantive rights of review are not impeded or abrogated.

10. As we stated in the 2013 submission, we suggest that consideration be given to the recommendation we made there as follows-

    Recommendation: The FSC recommends that appropriate safeguards be created to ensure that APRA's additional powers, if invoked, are exercised in a just and equitable manner, by being subject to one or more of:

    A review panel before an order is made;
    Merits review;
    Court approval; and
    Ministerial review.

11. We appreciate that this recommendation, if accepted, may necessitate a rethink of the structure of the Industry Acts (and other legislation) to ensure consistency across same. However, in our view, it is preferable that there be a robust and flexible regime established in the first instance, which nevertheless is consistent with the rule of law.

12. The enhanced immunities proposed for statutory and judicial managers broadly appear to be appropriate, as do the enhanced moratorium provisions in the relevant Industry Acts. Similarly, we believe the stay provisions are appropriate having regard to the policy of the proposals and for consistency reasons. We note that these particular provisions do contemplate a role for the relevant court or tribunal to give leave to beginning or continuing proceedings. There is an issue however as to how the appointment of a statutory manager is capable of being reviewed or subject to independent review. The Bill contemplates that the directors of a body corporate cease to hold office when an insurance act/life insurance act **statutory manager** takes control of the body corporate's business (@15-IA (1) and @15-LIA (1) respectively). By way of contrast, the appointment of a judicial manager has the effect that a person who had the powers and functions of an officer ceases upon appointment of a **judicial manager** (schedule 2, item 36 an schedule 3, item 30, section 62T Insurance Act and section 165 of the Life Insurance Act). The appointment of a judicial manager necessarily involves an application to the Court. However, there may well be theoretical difficulties in an "officer" of an entity now subject to statutory management having the ability to contest that decision. We would ask that this be considered to ensure that there are appropriate review and appeal rights.

13. It is important that the relevant provisions have paramount force and effect notwithstanding anything inconsistent for example in the Corporations Act or the general law, it would be useful to run a "sense check" in due course to ensure that the current drafting is consistent with this objective.

Chapter 3: Directions powers

14. We appreciate that there are circumstances where APRA may need to use specific directions powers of the kind outlined in the Bill. However, our view is that a directions power should be exercised cautiously and be subject to the safeguards which are commonly accepted in relation to administrative powers which have the potential of substantial commercial impact if exercised. In this respect we refer to the comments made in our 2013 Submission and highlight in particular, as a guiding principle, this includes the opportunity for external expert, legal review and Ministerial discretion in consultation with Treasury and APRA .

15. In principle, we agree that a general catch-all provision across the Industry Acts makes regulatory sense. However, we are mindful that the effect of such changes inadvertently could give APRA scope and powers beyond its normal and accepted prudential remit. We suggest that this power be limited to ensure appropriate safeguards

are in place and that this issue be given further consideration. For example, in the case of the proposed exercise under this head, one approach would be to permit exercise of such a wide and general power only with Ministerial consent.

16. In relation to the immunities provisions, we appreciate that the intention is to ensure that insofar as is possible, a person acting in accordance with is relieved of any other liabilities, subject to a 'reasonableness' test. However, it seems to ours that there are two issues here – first, we have some concerns that any potentially conflicting provisions in, say, the Corporations Act, such as the continuous disclosure provisions, are appropriately excluded and second, that the 'reasonableness' test adds an unnecessary complication and perhaps detracts from the immunities provided. In this latter respect, it may well be in the result unreasonable for a person to act in accordance with a direction. If the intention is to provide immunity for acting in good faith for the purpose of complying with the direction, then we do not see the need for an added test of reasonableness.

17. We appreciate that the proposed amendments do not limit any other immunities in the Industry Acts. Nevertheless, in our view this added test confuses and potentially complicates the statutory immunities.

18. We understand that it is appropriate to amend the secrecy and confidentiality provisions. The proposed provisions dealing with disclosure to legal representatives for the purposes of seeking legal advice appear not to go far enough. For example, in the circumstances outlined at paragraph 3.95 of the EM, it may be necessary for a person also to seek accounting or actuarial advice. The scope of permitted disclosure thus needs to be reconsidered.

19. We also have some concerns as to whether the proposed immunity provisions would have any extra territorial effect. In this regard, we suspect the Commonwealth Parliament is unable to bind another sovereign jurisdiction. It may be possible, but we do not know, for the Commonwealth to grant some form of indemnity to a person acting in accordance with a direction. We do not know whether there has been discussion at the international level concerning these sorts of issues. We suggest that one approach may be for the relevant governments to enter into appropriate Inter-Governmental Agreements or other relevant understandings.

Chapter 4: Transfer Powers

20. The powers this chapter are of such significance and wide import, that we suggest any exercise of the power by APRA is subject to Ministerial consent. Similarly, because of the significance of any exercise of these powers, we suggest that there be specific rights of review and appeal. Our preference would be for there to be a direct right of appeal to the Court given to the affected party, including any relevant entity.

21. We assume that any relevant constitutional law issues have been appropriately considered and factored in to the drafting in the Bill.

Chapter 5: Conversion and write-off of capital instruments

22. No comment at this stage.

Chapter 6: Stays

22. In principle, we do not disagree with the underlying themes of this chapter. We do however refer to our earlier observations concerning the extraterritorial implications of the exercise and implementation of APRA powers. Although this chapter deals with events after APRA has exercised its powers or applied to the Court, we again stress that this highlights there ought to be an appropriate appeal and review mechanism given the significance of the exercise of these powers.

Chapter 7: Foreign branches

23. Again, we do question whether actions taken in terms of the provisions contemplated by this Chapter, will be recognised in other jurisdictions and whether there needs to be some form of international agreement as to the validity of the exercise of these powers.

Chapter 8: Financial Claims Scheme

24. On the basis that the proposals represent enhancements to the existing Scheme, the same appear to be consistent with good policy outcomes.

Chapter 9: Wind-up and other matters

25. We understand that the proposals outlined in this Chapter, are directed to enhancement and harmonisation of existing powers. On this basis, the principles underlying the proposed provisions appear to be appropriate.

Chapter 10: Resolution planning

26. We acknowledge the policy intent of the proposed provisions referred to in this Chapter. However, these are very wide-ranging powers and our concern is to ensure that appropriate appeal and review rights are available. We do note that paragraph 10.23 refers to a particular decision by APRA being subject to review. Wherever reasonably practicable, we would be concerned to see that similar review rights existed in respect of other decisions of APRA. We appreciate that determination of prudential standards of the kind discussed in this Chapter, should not as such be subject to review and appeal rights. However, we anticipate that there will be extensive industry consultation before finalisation of relevant prudential standards.

Should you have any questions, please contact the writer on 02-9299 3022.

Yours Faithfully

Paul Callaghan

General Counsel