

18 December 2017

Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Secretary

Senate Economics Legislation Committee inquiry into the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Thank you for the opportunity to provide a submission to the Senate Economics Legislation Committee inquiry into the *Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (Bill)*, and the associated draft explanatory material.

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 41,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD recognises the importance of the Australian Prudential Regulation Authority (**APRA**) having the necessary powers to enable it to perform its functions effectively and expeditiously, including the resolution of regulated entities in distress. While the proposed powers in the Bill are extremely broad, it is desirable that, in the event of a crisis or an impending financial crisis, APRA has as many options in the 'regulatory toolkit' as are reasonably necessary to ensure the effective management of the crisis.

For this reason, the AICD supports the Bill in principle. We note that reform to strengthen APRA's crisis management powers was a key recommendation of the Financial System Inquiry and we welcome its progression.

It is crucial, however, that these administrative powers be subject to appropriate checks and balances, particularly given the breadth of the proposed new powers. For this reason, the AICD considers that the introduction of specific immunity provisions¹ for directors and management when complying with an APRA direction essential. Given that a failure to comply with an APRA direction is itself a criminal offence, it is just that an appropriate immunity is provided to directors and other officers. An immunity will also facilitate fulfilment of directions without reluctance, distraction or delay.

In addition to the immunity, we encourage the government to give further consideration to other appropriate checks and balances such as merits review mechanisms, direct ministerial oversight and court supervision as appropriate.

¹ Schedule 1, item 115, Schedule 2, item 118, Schedule 3, item 92, section 70AA of the *Banking Act*, section 127C of the *Insurance Act*, and section 246B of the *Life Insurance Act*.

1. Summary

Our submission focuses on the proposed immunity for directors and other officers when complying with an APRA direction. In summary:

- The AICD supports the approach taken in the Bill to the qualification of ‘reasonableness’ and the definition of what would be considered ‘unreasonable’ within the specific immunity provisions. While the AICD would have preferred that the qualification be removed entirely, the AICD believes the Bill provides sufficient clarity regarding the meaning of ‘reasonableness’ to enable directors and officers to act quickly, and with certainty, in implementing a direction from APRA.
- The AICD supports the coverage of corporate entities, including related entities, under the specific immunity provision in the Bill. This will ensure that corporate entities are not subject to legal claims (including class action claims) as a consequence of contraventions which, but for the APRA direction, would not have occurred.
- Directors and officers of some APRA-regulated entities are also subject to foreign legal obligations. The AICD is concerned that the proposed immunity provisions would not protect directors and officers from liability for breaches of foreign laws. Given the importance of the immunity in enabling directors and officers to fulfil an APRA direction without reluctance, distraction or delay, the AICD strongly recommends that the Bill be amended to provide measures to ensure directors and officers are protected from liability resulting from a breach of foreign laws.

2. Qualification of Reasonableness

The new immunity provisions in the Bill only apply to a person who is doing a thing, or omitting to do a thing, to comply with an APRA direction where it is ‘reasonable’ for the person to do so to achieve that purpose. However, it will be reasonable for a person to do a thing, or omit to do a thing, in order to achieve a purpose unless no reasonable person in that person’s position would do the thing, or omit to do the thing, in order to achieve that purpose.

The AICD welcomes the inclusion of a definition of ‘reasonableness’ within the immunity provisions.² While the AICD would have preferred that the qualification of ‘reasonableness’ be removed entirely, the AICD considers that the addition of the definition will provide greater clarity and legal certainty to those seeking to comply with an APRA direction.

3. Coverage of entities

APRA’s directions power, as proposed in the Bill, has the capacity to supplant ordinary lines of governance and accountability within regulated entities. An APRA direction may leave that entity, or an entity within that entity’s corporate group, exposed to potential liability for actions or omissions which are not otherwise protected by the equivalent of s 70A of the Banking Act.

It is foreseeable that, in the context of the use of an APRA direction or secrecy determination, there is a risk that shareholders or others may suffer loss or damage. In addition, directors and officers are subject to legal duties which relate to the interests of the entity (including directors duties under the Corporations Act), and may therefore be exposed to a conflict of duty, given that they are entitled to an immunity while the entity they govern is not. It is clearly desirable that the entity and the director’s interests align, particularly during a crisis, so that concerns as to legal liability and conflict are minimised to the greatest extent possible.

² *Schedule 1, item 252, section 70AA(2) of the Banking Act, Schedule 2, item 137, section 127C(2) of the Insurance Act; Schedule 3, item 107, section 246B(2) of the Life Insurance Act.*

For these reasons the AICD welcomes the coverage of entities, including related entities within a corporate group, under the specific immunity provisions within the Bill.

4. Foreign legal obligations

There is a risk that an APRA direction may require an entity, or its directors and officers, to take an action which attracts civil or criminal liability in, or breaches statutory obligations or other duties of, a foreign jurisdiction. This issue is particularly relevant where the APRA direction is subject to a secrecy determination, given that entities are often also subject to duties under foreign disclosure laws.

The AICD is concerned that the proposed immunity provisions would not protect entities, directors and officers from liability for breaches of foreign laws in the event of a conflict between an APRA direction and the foreign law. Given the importance of the immunity in enabling a full and timely response to an APRA direction, the AICD recommends that the government investigate measures to ensure entities, directors and officers are protected from liability resulting from a breach of foreign laws.

In particular, the AICD strongly recommends that the Bill include a statutory indemnity for directors and officers from civil and criminal liability in the Bill. The indemnity should be triggered in circumstances where those directors and officers were implementing an APRA direction.

Without a statutory indemnity, directors and officers could be faced with criminal liability for failing to comply with an APRA direction or breaching a foreign law. Such a situation would clearly be unjust. While a statutory indemnity would not be able to protect directors and officers from certain types of criminal penalties (i.e. imprisonment) it would at least protect directors and officers from other forms of liability.

Consideration should also be given to qualifying APRA's directions power, or its secrecy provisions, so that APRA must have regard to the foreign legal obligations of an entity, along with its directors and officers, in making a determination.

5. Conclusion

We hope our comments will be of assistance to the government. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on (02) 8248 2705 or at mmcgirr@aicd.com.au.

Yours sincerely



LOUISE PETSCHLER
General Manager, Advocacy