

APRA law is *bail-in!* Amend it to exclude deposits, now!

Following is the evidence that the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018, sneaked through Parliament on Valentines Day 2018, is bail-in legislation, despite official denials. The evidence also points to the likelihood that it could

be used to bail in deposits. If the government is genuine, therefore, that it doesn't apply to deposits, it must amend the legislation to explicitly exclude deposits.

CEC Research Director Robert Barwick presented this evidence to the CEC's 1 December Victorian State Seminar.

1. One of the Financial Stability Board's Key Attributes of Effective Resolution Regimes is bail-in of unsecured creditor claims, which includes deposits*

Excerpt: Financial Stability Board's Key Attributes of Effective Resolution Regimes

2011

Bail-in within resolution

3.5

Powers to carry out bail-in within resolution should enable resolution authorities to:

write down in a manner that respects the hierarchy of claims in liquidation (see Key Attribute 5.1) equity or other

instruments of ownership of the firm, **unsecured and uninsured creditor claims** to the extent necessary to absorb the losses; and to

convert into equity or other instruments of ownership of the firm under resolution (or any successor in resolution or the parent company within the same jurisdiction), **all or parts of unsecured and uninsured creditor claims** in a manner that respects the hierarchy of claims in liquidation;

* Unsecured creditors are depositors.

2. Every other jurisdiction that has bail-in includes deposits!

US Orderly Liquidation Authority bails in deposits

Excerpt: "Legislative frameworks for implementing the strategy", from 2012 Bank of England (BOE) and Federal Deposit Insurance Corporation (FDIC) joint strategy paper: *Resolving Globally Active, Systemically Important, Financial Institutions*.

Title II of the *Dodd-Frank Act* provides the FDIC with new powers to resolve SIFIs by establishing the Orderly Liquidation Authority (OLA). Under the OLA, the FDIC may be appointed receiver for any US financial company that meets specified criteria, including being in default or in danger of default, and whose resolution under the US Bankruptcy Code (or other relevant insolvency procedure) would likely create systemic instability.

Title II requires that the losses of any financial company placed into receivership will not be borne by taxpayers, but by common and preferred stockholders, debt holders, **and other unsecured creditors**, and that management responsible for the condition of the financial company will be replaced. Once appointed receiver for a failed financial company, the FDIC would be required to carry out a resolution of the company in a manner that mitigates risk to financial stability and minimizes moral hazard. Any costs borne by the US authorities in resolving the institution not paid from proceeds of the resolution will be recovered from the industry.

customers with cheque and savings accounts, and term deposits. Whilst there are differences between different classes of unsecured creditors, they all have the same legal claim on the bank. Each has freely invested in a private institution and has enjoyed a return on that investment **whilst accepting the risks associated with the investment**.

European Union's Bank Recovery and Resolution Directive (BRRD) 2016 bails in deposits

Excerpt: Addressing troubled financial institutions' problems SUMMARY OF:

Directive 2014/59/EU — rules for the recovery and resolution of credit institutions and investment firms

WHAT IS THE AIM OF THIS DIRECTIVE?

Because many EU countries had to inject public money into their banking systems to rescue banks in the wake of the 2008 financial crisis, this act sets out new rules to deal with troubled institutions.

It aims to avoid 'bail-outs' that involve the use of taxpayers' money in future cases of bank failure.

It establishes common European rules for the recovery and restructuring of failing banks.

KEY POINTS

New Zealand's Open Bank Resolution bails in deposits

Excerpt: *A Primer on Open Bank Resolution*, by Kevin Hoskin and Ian Wolford, Reserve Bank of New Zealand *Bulletin* September 2011

Under OBR, shareholders are the first to bear the bank's losses, followed by its subordinated debt holders. If there are any remaining losses, these are then allocated to the bank's unsecured creditors, **including its depositors**. ...

Unsecured creditors include a wide range of individuals and entities. At one end of the spectrum, there are large international financial institutions that invest in debt issued by the bank (commonly referred to as wholesale funding).

At the other end of the spectrum, **are**



RBNZ's Open Bank Resolution gives customers back the "unused" portion of their deposits.

This 'bail-in' mechanism, which marks a change of tack compared to the public 'bail-out' tool, entered into force, at the latest, in January 2016. EU countries could already decide to incorporate the bail-in tool into their legal systems before that date.

3. Australia's APRA crisis resolution powers law has broad language that can include deposits, which are by definition financial 'instruments'

Excerpt: Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018

Subdivision B—Conversion and write-off provisions
11CAA Definitions

In this Subdivision: clearing and settlement facility has the meaning given by Division 6 of Part 7.1 of the

4. The government and Senate inquiry confirmed that the APRA law is based on the FSB's Key Attributes—which includes bail-in of deposits

Excerpt: Senate Economics Legislation Committee Report 9 February 2018

1.12 In October 2011, the Financial Stability Board (FSB) issued its Key Attributes of Effective Resolution Regimes for Financial Institutions (Key Attributes). These Key Attributes set out the 'core elements that the FSB considers to be necessary for an effective resolution regime'. According to the FSB, the following features should form part of a jurisdiction's resolution regime:

- Scope
- Resolution authority
- Resolution powers
- Set-off, netting, collateralisation, segregation of client assets
- Safeguards

5. The government denies the APRA crisis resolution powers legislation is a bail-in law

Senate Economics Legislation Committee Chair Senator Jane Hume, in a 1 March 2018 letter to a constituent:

"While I appreciate the concerns raised by the CEC, I can assure you that **this bill does not constitute what some are referring to as 'bail-in' legislation.** Treasury, the RBA, and APRA all confirmed in their answers that **the Bill is definitely not 'bail-in' legislation.**"

Excerpt: Treasury supplementary submission to Senate Economics Legislation Committee inquiry:

Protection of depositors

Suggestions in the submissions that deposits are not protected under the *Banking Act 1959* (Banking Act), that the Bill provides APRA with bail-in powers, and that these powers are to be extended to deposits, are incorrect.

6. Confusion in government ranks on bail-in: new Senator contradicts the official denials

LNP Senator Amanda Stoker, in a 5 November 2018 letter to a constituent:

"**The legislation facilitates bail-in** as a type of resolution power which is available for dealing with financial institution distress. This was done after the G20 leaders endorsed a new **Financial Stability Board** standard for Total Loss-absorbing Capacity. Specifically, it builds on

7. Amend the law!

The only way to clarify the ambiguity in the legislation, and confusion about the legislation, is to amend it to explicitly exclude deposits from any conversion or write-off.

The proposed amendment adds to "(b) any other instrument", the following text:

"provided that a prudential standard or any other provision of this Act shall not include a power to write off or convert deposits"

and then adds to 11CAA the following inclusive

When a bank collapses, shareholders are first in line to cover the restructuring costs; then creditors would be asked to contribute, **with those with non-guaranteed deposits (over €100,000) stepping in last.**

Corporations Act 2001.

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

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

- Funding of firms in resolution
- Legal framework conditions for cross-border cooperation
- Crisis Management Groups (CMGs)
- Institution-specific cross-border cooperation agreements
- Resolvability assessments
- Recovery and resolution planning
- Access to information and information sharing.[8]

1.13 The FSB has 'urged member countries to undertake necessary legal reforms to equip the national authorities with the capacity to respond effectively and quickly to financial institution distress'.

1.14 **The legislation proposed in the bill draws on these criteria** in forming its plan for financial crisis resolution and resolution planning.

Depositors are protected by the Government's Financial Claims Scheme (FCS), which guarantees deposits up to a cap of \$250,000 per person, per authorised deposit-taking institution. A wide range of deposits are covered under the FCS, including term deposits, savings accounts, call accounts, pensioner accounts, trustee accounts and retirement savings accounts.

As APRA noted in its submission to the Committee dated 18 December 2017, while the proposed legislation includes reforms to ensure that capital instruments of authorised deposit-taking institutions (ADIs) and insurers can be written down or converted in accordance with their contractual terms, **it does not include a statutory power for APRA to write-down or convert the interests of other creditors in resolution, including depositors of a failing ADI (a so-called 'bail-in' power).**

the **Key Attributes** which specifies that Financial Stability Board jurisdictions should have in place legally enforceable mechanisms to implement a bail-in. The purpose of the Total Loss-absorbing Capacity standard ensures there are mechanisms in place to stop the 'domino effect' and reduce loss on [sic] bank shareholders, creditors and the Government."

definition of "deposit":

"'Deposit' means a deposit or account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third persons or others. Such term includes demand deposits, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts."