Australian Citizens Party

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MEDIA RELEASE

8 November 2017

Questions MPs must ask before they vote on the APRA crisis management—'bail-in'—bill

Are federal MPs willing to vote for a bill that could allow the deposits of their constituents—individuals, businesses, non-profits—to be confiscated to prop up a failing bank?

If not, they'd better seriously examine the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 that Treasurer Scott Morrison introduced into Parliament on 19 October, and demand to know whether this bill gives the Australian Prudential Regulation Authority (APRA) the power to "bail in" bank deposits. *As it stands, the broad language of the bill certainly could allow APRA to bail in deposits, unless MPs amend it to specifically exempt deposits from any bail-in*.

This APRA crisis management bill does not use the term "bail-in"—the policy developed after the 2008 crisis to prop up failing banks by confiscating (through write-off, or conversion to shares) the funds of unsecured creditors, which can include depositors. Instead of bail-in, it uses the term "conversion or write-off provisions".

The question is: Will the conversion or write-off provisions of the bill apply to bank deposits? It is already outrageous that they apply to the $43 billion of so-called hybrid securities, a.k.a. bail-in bonds —high-interest bonds that convert into worthless shares if the bank runs into trouble—that APRA has allowed the banks to sell to hundreds of thousands of "retail investors"—unsuspecting self-funded retirees, self-managed super funds and so-called "mums and dads".

Following are specific questions that MPs must ask, and demand answers to, *before* they vote on this bill:

1. Hybrid securities

APRA can order a conversion or write off "despite any impediment there may be … *in any domestic or foreign law* … other than a specified law". (Emphasis added.) This particularly applies to hybrid securities, which can automatically convert into shares, based on triggers buried in the fine print of the contracts, or which APRA can order to be converted, i.e. bailed in. Because APRA has allowed the banks to sell $43 billion worth of these hybrid securities to hundreds of thousands of Australian retail investors who are unlikely to understand they can be bailed in, it should be possible, under the provisions in the *Trade Practices Act* that protect consumers from misleading conduct, for a court to set aside a conversion, including an APRA conversion order. The changes to existing legislation contained in this bill mean that APRA does not need to consider those issues (or any other) in relation to conversion and write-off of hybrid instruments.

Question:

Will APRA's powers override the provisions in the Trade Practices Act *that protect consumers from misleading conduct, and stop courts from blocking conversions of hybrid securities if the investors were demonstrably misled about the risks?*

2. 'Other instruments'

The *Banking Act* provides that APRA can determine Prudential Standards that are binding on all Authorised Deposit-taking Institutions (ADIs i.e. banks, building societies, credit unions, etc.), and when APRA issues a new Prudential Standard it does so under the authority of the *Banking Act*, i.e. it does not require new legislation.

Section 11CAA of the new APRA bill defines that "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 [which categories include shares, cash, subordinated debt and hybrid securities]; or
(b) *any other instrument*. …" (Emphasis added.)

Question:

What other "instruments" may APRA be empowered to include in its prudential standards for conversion or write-off?

3. Deposits

Since 2003 APRA has had the power to order a bank not to repay deposits under certain conditions, including if: "there has been, or there might be, a material deterioration in the body corporate's [bank's] financial condition"; or "the body corporate is conducting its affairs in a way that may cause or promote instability in the Australian financial system". The APRA bill strengthens this section of the *Banking Act*.

Moreover, since 1 January 2013 APRA's prudential standards have incorporated the provisions of the Bank for International Settlements' (BIS) Basel III global regulatory framework on bank capital adequacy. These include "that AT1 and T2 capital instruments must be written-off or converted to ordinary shares if relevant loss absorption or non-viability provisions are triggered".

The Explanatory Memorandum of the APRA bill states that it allows for future changes to the prudential standards to expand the meaning of "capital" for conversion or write-off?

"5.14 Presently, the provisions in the prudential standards that set these requirements are referred to as the 'loss absorption requirements' and requirements for 'loss absorption at the point of non-viability'. The concept of 'conversion and write-off provisions' is intended to refer to these, while also leaving room for *future changes to APRA's prudential standards, including changes that might refer to instruments that are not currently considered capital under the prudential standards*." (Emphasis added.)

A legal expert noted to the CEC: "It is a relatively smaller step to then convert or write-off what the ADI has been prohibited from paying out [i.e. deposits]. … Unless there was a prohibition in the Bill against the making of any determination to declare deposits to be capital capable of conversion or write-off, the worry would be that APRA could make such a determination."

Question:

Given that APRA can already order banks not to repay deposits, will APRA now have the power to declare deposits to be capital, and order they be converted or written off, i.e. bailed in?

Stop this bill!

To date, the bill has advanced with virtually no scrutiny except from the Citizens Electoral Council. However, the Greens have now expressed concern that the bill could allow APRA to bail in deposits, and intend to refer it to the Senate Economics Legislation Committee for inquiry.

Join the CEC's mobilisation to stop this bill from being snuck through under the radar! Before Parliament resumes at the end of November, visit, phone or email your MP and Senators to: 1) give them this release; 2) demand they get answers to these questions; 3) demand they support a Senate inquiry that can scrutinise this bill.
