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22 August 2017

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Dear Mr McDonald

NEW APRA POWERS TO ADDRESS FINANICAL STABILITY RISKS – NON ADI LENDER RULES

Thank you for your invitation to make a submission to Treasury on the *Exposure Draft Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017 (Bill)* released for comments on 17 July 2017.

Perpetual acts as trustee for most ADI and non-ADI participants in the Australian securitisation market. In that respect, we act as trustee for securitisation trusts totalling over $400 billion. Our clients use securitisation to obtain funding from both the domestic and international debt capital markets to support their lending businesses.

Perpetual supports and commends the submission of the Australian Securitisation Forum in relation to the Bill (copy attached). In particular, Perpetual supports the following key positions:

1. Perpetual supports initiatives which are designed to ensure financial stability in the Australian economy. However, there should be greater clarity on the actual purpose of the draft legislation.

2. There is potential for the legislative proposal to negatively impact competition in the non-ADI sector with the unintended consequence of adversely affecting the sustainability of non-ADI businesses which have been so important in providing choice, innovation and competition in consumer lending.

3. Perpetual is not convinced that the new powers conferred on APRA are necessary to address financial stability risks particularly within a sector that currently represents a very small share of total lending and funding in Australia.

4. Perpetual contends that the scope of the legislative proposal is too broad and needs better definition.

5. The securitisation industry is concerned with the potential additional cost imposts arising from any new reporting requirements under FSCODA. Perpetual supports the ASF in seeking the opportunity to consult on the reporting requirements and data definitions to align them with existing obligations to stakeholders such as the RBA, Australian Bureau of Statistics, investors, credit rating agencies and others (as described in the Annexure to this submission).

Perpetual would welcome the opportunity to have further dialogue with Treasury on the matters raised in this submission.

Yours sincerely,

Geoff Lloyd
CEO & MD
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Australian Securitisation Forum

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Dear Mr McDonald

New APRA Powers to Address Financial Stability Risks – Non-ADI Lender Rules

Thank you for the invitation to make a submission to Treasury on the Exposure Draft *Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017* (**Bill**) released for comments on 17 July 2017.

The Australian Securitisation Forum (**ASF**) is an industry association representing over 100 members who participate in the Australian securitisation market. Many of the ASF's members are lenders (including ADIs and non-ADIs) who use securitisation to obtain funding from both the domestic and international debt capital markets.

General comments

The ASF submits that the non-ADI lending sector is not, and has not been, significant in terms of lending volumes in the Australian financial market. In the largest part of the non-ADI lending sector, the ASF estimates aggregate funding of residential mortgages by non-ADI lenders amounts to approximately $12 -$15 billion per year. This represents around 4.5% of the $320 billion of the annual residential mortgage loan market in Australia. Some indication in the legislation as to what levels of lending by non-ADI would be seen to be materially significant would be beneficial to provide greater certainty to the industry and to investors in residential mortgage-backed securities (RMBS) and asset-backed securities (ABS).

The ASF believes APRA currently has access to information on non-ADI lending. Non-ADI lenders typically use warehouse facilities provided by large ADIs to finance the origination of new loans before aggregating a pool of loans that can be refinanced on a matched basis via the

public securitisation market. APRA currently has the ability to access information on the eligibility criteria and volumes of mortgages and other consumer debt funded by ADI-provided warehouse facilities. We understand banks providing warehouse facilities already report quarterly to APRA on these facilities

The securitisation market is a critical source of term funding for non-ADI lenders. It is a market that provides funding on a matched basis with the underlying pool of loan receivables. An unintended consequence of the legislative changes could be to reduce the attractiveness to debt investors, particularly overseas investors, of securitisation securities including RMBS sponsored by non-ADI's. This could arise due to the broad and general scope of the proposed powers to be given to APRA. Capital market investors are likely to see the new right of APRA to make rules affecting the business of non-ADIs to be additional risk that creates uncertainty as those rules could impact such matters as the expected cash flows of the securitisation funding structures or the business viability of the sponsor non-ADI. International investors remember the intervention of APRA in the aftermath of the financial crisis, where a directive was given to ADI issuers of RMBS to not call their RMBS on the optional call dates. This created extension risk for investors as they were forced to hold the securities longer than initially expected, reducing the value of the affected securities. The new powers proposed to be given to APRA could act as a disincentive for investors to purchase non-ADI RMBS and ABS or at least incentivise them to seek an additional yield premium to compensate for the regulatory uncertainty.

Overview

This submission supports the following key positions which we expand on throughout this letter. We also provide alternative suggested drafting to the draft Bill which is attached to this submission.

1. The ASF supports initiatives which are designed to ensure financial stability in the Australian economy. However, there should be greater clarity on the actual purpose of the draft legislation.

2. There is potential for the legislative proposal to negatively impact competition and innovation in the non-ADI sector with the unintended consequence of adversely affecting the sustainability of non-ADI businesses.

3. The ASF is not convinced that the new powers conferred on APRA are necessary to address financial stability risks particularly within a sector that currently represents a very small share of total lending and funding in Australia.

4. The ASF contends that the scope of the legislative proposal is too broad and needs better definition.

5. The industry is concerned with the potential additional cost imposts arising from any new reporting requirements under FSCODA. The ASF seeks the opportunity to consult on the reporting requirements and data definitions to align them with existing obligations to

stakeholders such as the RBA, Australian Bureau of Statistics, investors, credit rating agencies and others (as described in the Annexure to this submission).

1. What is the actual purpose?

It has emerged from industry meetings with Treasury and APRA over the last week or so that the policy objective behind the proposed legislation is primarily driven by the housing market and the current levels of household debt. However, it has also become apparent that Government would like to retain flexibility to address changes in market conditions in the future.

Treasury has made it clear in meetings that the current focus is to ensure that all relevant non-ADI lenders are within the "net" of FSCODA reporting and provide the type of lending data to APRA that the Government expects should be reported to APRA. We understand that there is a strong belief that APRA does not receive all of the data on lending by the non-ADI sector, and hence APRA believes that it does not have a full picture on the level and type of lending being provided by the non-ADI sector. Taking into consideration the intended purpose of the proposed legislation, the level and format of such reporting via FSCODA should focus on the lending activity of non-ADIs in contrast to APRA's ADI reporting requirements (where prudential aspects are relevant). Given the non-supervisory focus of the proposal, the ASF submits that APRA should not levy fees for the collection of such data.

Treasury and APRA have indicated that once APRA has the necessary data, it can better understand the industry and how much credit is provided by the non-ADI sector, and then determine if any powers need to be exercised. Treasury believes that there is no immediate impact, and probably no foreseeable impact, on non-ADIs other than increased data reporting to APRA.

The non-ADIs have submitted that due to the consequential effects of the GFC, it was not until 2012 that the non-ADI sector was able to issue in the capital markets without AOFM support. However, the debt capital markets are volatile and reactive and any uncertainty on the viability of non-ADI lenders, or the integrity of securitised assets and cashflows, could have negative effects on the confidence of market investors to fund non-ADI lenders. This could well limit or indeed reduce capital markets investment, increase pricing and the cost of funding and impact the availability of warehouse funding (warehouse funders rely on capital markets issuance as their exit strategy). All of these factors have the potential to adversely affect the sustainability of non-ADI lenders' business models, even further reducing competition, entrenching ADI market power and restricting innovation and productivity in the financial sector.

Furthermore, a lot of work has been put into convincing investors, both domestic and offshore, that non-ADI investment is of no greater risk than ADI investment and this has been rewarded with varying levels of success. However, investment growth remains slow and without more clarity the proposed legislation could likely deter investment in the

sector. We note that Treasury has acknowledged that the legislation should strike the right balance to ensure such unintended consequences do not occur. Indeed, APRA's mandate is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality.

One solution to such a negative outcome is the implementation of a "transitional period" concept during which all necessary data is provided to APRA and APRA consults with the non-ADI lenders. APRA would not make any rules until after the expiry of the transitional period. This gives APRA the opportunity to assess the data and determine the current position of the different non-ADI products in the context of Australia's financial stability. Once APRA has assessed the information and consulted with non-ADI lenders, it should then issue "letters" or "guidelines" to clarify what its position is in relation to the non-ADI sector. APRA would only be able to vary or revoke such letters or guidelines with notice to the industry. This will provide a level of certainty to the industry while preserving APRA's powers to make rules.

2. What is "material" when assessing "financial instability"?

The powers that APRA can exercise are not clearly defined in the exposure draft Bill. While the Government and APRA might have a clear idea when and how APRA's intervention might be applied, the ASF is concerned that there are no limitations specifically set out in the legislation. Without such express limitations future governments and regulators could technically interfere in the non-ADI sector in a way which is not currently contemplated.

It is important that the circumstances in which APRA can issue rules under the regime be made clear, both for the non-ADI lenders but also for APRA in order to minimise the risk of legal challenge. There does not appear to be any guidance on how APRA would arrive at the conclusion that a non-ADI or a number of non-ADI lenders are making a "*material contribution to the risks of instability in the Australian financial system*". It is difficult to understand how one non-ADI lender could make a material contribution to the risks of the overall system considering its relative market share coupled with the existing shadow oversight already imposed on non-ADIs via the funding provided by ADIs and by the capital markets[1]. This is particularly the case because:

(a) the data supports the position that the non-ADI sector represents a small share of total originated lending and funding in Australia. Given that the non-ADI mortgage lending sector primarily sources funding via securitisation the funding

[1] Annexure to this submission sets out the current regulatory and supervisory framework that applies to non-ADI lenders in more detail

composition represents less than 5% of the market share of total funding, which is far from material; and

(b) non-ADI lenders operate in a range of different financing spaces and products, in not only the residential and investment property segment but also including equipment and small business finance. APRA would need to take into account the proportionate market share and origination volumes of non-ADI lenders in these specific areas, rather than as a whole (against the background of competitive neutrality consistent with section 8 of the APRA Act) before making any rule. Finding "materiality" in these circumstances is unlikely and fraught with argument.

On an industry wide basis, it is also debatable how APRA might form a view that there are a number of non-ADI lenders (including the larger ones) engaging in certain lending activities which would influence or have a *"material"* impact on the overall financial system. APRA must take into account the proportionality of size of a non-ADI rather than a "one size fits all" approach and acknowledge that some non-ADIs specialise in certain products while others do not. Assessing "instability", and the nature of funding as the source of "*instability*", will also be extremely difficult to assess and will lead to potential arguments.

In summary, there needs to be much more clarity around the circumstances in which APRA can issue directions and make rules. We note from our recent meetings that Treasury and APRA have indicated that they will not necessarily look at materiality in terms of size or market share, but rather will consider whether there is an influence on market dynamics. The issue then becomes how to balance flexibility and certainty in the context of APRA's powers under the proposed legislation, noting that unlike the Prudential Standards applying to ADIs the proposed legislation will be subject to judicial supervision in relation to the "materiality" and "financial stability" tests. One solution is to clearly set out the purpose of the legislation in the Explanatory Memorandum, and for this to be supported by APRA guidelines and letters issued to the industry following consultation.

3. What are the rules that could apply?

As highlighted by the non-ADIs at recent industry meetings with Treasury and APRA, the current draft legislation seems too broad. The Chairman of APRA, Wayne Byers, and the Treasurer, Scott Morrison, have been quoted as describing the new APRA powers as *"reserve powers"*. However, the draft legislation does not include the term *"reserve power"* and gives APRA a broad discretion to introduce rules (and exercise powers and discretions under them) which specifically targets one or more non-ADI lenders and their business operations. APRA even has the ability to direct one or more non-ADI lenders from refraining from lending money or carrying out activities that result in the funding or originating of loans.

Similarly, in the Exposure Draft Explanatory Materials:

(a) paragraph 1.8 states that "*These powers are narrow when compared to APRA's powers over ADIs*";

(b) paragraph 1.12 states that "*It is important to note that these powers do not equate to ongoing regulation by APRA of non-ADI lenders. APRA will not prudentially regulate and supervise non-ADI lenders as it does ADIs*"; and

(c) paragraph 1.14 states that "*While APRA does not have regulatory responsibility for non-ADI lenders, these changes will ensure that APRA is able to make rules relating to the lending activities of non-ADI lenders.*"

However, there are no such limits. Section 38C(1) of the draft Bill merely states that APRA may "*determine rules in relation to matters relating to lending finance*". There is no apparent limit on the rule making power at all - there is no link to the activity or activities that are allegedly materially contributing to the instability, there is no suggestion that APRA cannot impose prudential constraints on non-ADIs.

Given the nature of a non-ADI lender and the industry itself, the rule making and enforcement powers being given to APRA need to be specific and not like the prudential and supervisory oversight taken with ADIs. In addition, any rule should not impact on a non-ADI's existing commitments. We note from our discussions with Treasury that it is open to explicitly stating in the legislation what APRA's powers will not include (such as licensing and capital adequacy requirements), noting that this is not a regulatory or supervisory role for APRA.

The ASF has proposed some drafting changes in Section 38C of the draft Bill to clarify that the rules must relate to an activity (or activities) of lending finance that materially contribute to risks of financial instability, and to explicitly set out the matters that a rule cannot relate to.

APRA has also indicated that it envisages that the process for rule-making would be consultative in nature, broadly similar to how APRA consults with ADIs currently. As there is no ongoing prudential supervisory relationship between APRA and non-ADI lenders, the industry needs certainty on how this can be achieved. For example, if a direction is contested will a direction be withheld pending completion of a review process? There would be danger in the business continuity of a non-ADI particularly if the direction were to deal with the cessation of lending and subsequently it is found that the direction was unreasonable or made in error.

The ASF submits that APRA should not be permitted to make rules or give directions to cease "*all lending*". Rules should be focussed on specific issues affecting "financial stability" without impacting the whole business of a non-ADI or any dealings in respect of securitised assets, and any rule made should only become effective after a prescribed period following consultation with ASIC and the affected non-ADI lenders. Investors in the securitised bonds of a non-ADI originator relies on the non-ADI managing the underlying

security and a cessation of business imposed by APRA could well affect the value of the bonds they are holding.

Treasury has indicated that its thinking behind the severity of the consequences for non-compliance with an APRA direction is to signal the seriousness of non-compliance, and to ensure that there is no anti-avoidance by entities who choose to pay a fine instead of complying with the rules. Treasury does acknowledge that the legislation needs to strike the right balance.

The ASF submits that a direction should only be given if the non-ADI has not taken the steps which are available for it to take to comply with the whole or part of a non-ADI lender rule, and should not apply to a breach of a minor or technical nature. Any such direction must also specify time periods within which an ADI needs to take steps to adjust business models before a penalty or stop-order could be imposed. This is critical given that APRA is permitted to issue an order to a non-ADI to "*refrain from the lending of money*". The outcome could be damaging to a non-ADI's business if such a direction were made erroneously. Even a temporary cessation of lending can trigger a default under funding arrangements non-ADIs have in place or prevent the renewal of funding lines. The ASF submits that APRA's rules ought to be subject to a review mechanism to assess whether or for how long any restrictions should remain.

Given that ASIC has an existing role in regulating non-ADI lenders that hold either an Australian Financial Services Licence or an Australian Credit Licence, the non-ADI sector is keen to ensure that APRA's powers do not overlap with those held by ASIC and more specifically that there will not be replication in terms of reporting to each of ASIC and APRA.

4 Who and what is it intended to catch?

The range of entities caught by the proposed definition of a "*non-ADI lender*" as currently drafted is almost unlimited. A more specific definition of "*non-ADI lender*" should be used and broad definitions such as the misnamed "*lending finance*" and "*provision of finance*" should be restricted, not expanded as they have been.

Treasury and APRA has indicated that it is not their intention to cast the net so widely as to catch entities all the way up a funding chain, and that they do not want to "catch the same dollar twice". They are open to receiving suggestions to narrow the scope of the definition of "non-ADI lender" to catch only the finance provided to the final borrower. The proposed broad definition may needlessly capture hire purchase, finance leases, operating leases. In the context of a securitisation structure, the non-ADI lender should be clarified to refer to the "originator" or another appropriate entity, and not the SPV/Trustee. This would also clarify the reporting obligation under FSCODA and the impact of any rule. The ASF is proposing amendments to those definitions in a marked-up version of the draft Bill.

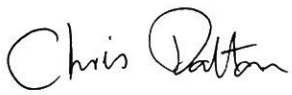
As noted in our recent meetings with Treasury, non-ADI lenders tend to have transparent reporting systems with detailed information they provide to investors and noteholders. These systems underpin the reports provided to the RBA for repo eligibility of securitised instruments. To this effect, and bearing in mind that the non-ADI lenders do not have the resources of the ADIs and that APRA's interest in data is from a financial stability and not a prudential regulation perspective – reporting under FSCOFA should be focussed and consistent. We understand from the meetings that Treasury and APRA do not wish to impose uncommercial burdens on non-ADI lenders, and in this regard:

(a) to overcome the requirement for non-ADI lenders to report multiple data sets, consistency of reporting between the regulators (and facilitating sharing of information) should be pursued; and

(b) information as to "prudential" aspects (such as revenue, expenses and other liabilities) are not relevant.

The ASF would welcome the opportunity to have further dialogue with Treasury on the matters raised in this submission and to discuss the drafting changes proposed in the redline version of the draft Bill. We will be in contact to arrange to meet shortly.

Yours sincerely



Chris Dalton
Chief Executive Officer

Annexure to ASF submission

Non-ADI lenders run specialised businesses that operate to high credit assessment and enforcement standards, and which are subject to detailed oversight by ASIC, warehouse lenders, capital market investors, rating agencies and other service providers. These high standards are evidenced by the performance of securitisations issued by Australian non-ADIs, with no default having been experienced on a rated RMBS security prior to or post the GFC.

- (**ASIC regulation of credit providers**) Non-ADIs that lend to consumers must hold an Australian Credit License (**ACL**). Consequently, these entities come under the ambit of ASIC's responsible lending conduct obligations in Ch 3 of the *National Consumer Credit Protection Act 2009*. This primary obligation is to conduct an assessment that the Credit Contract is "not unsuitable" for the consumer. The Act prohibits licensees from entering into a credit contract with a consumer if the credit contract is unsuitable for the consumer. On top of this, ASIC have recently announced a targeted surveillance operation to examine whether lenders are recommending more expensive interest-only loans when inappropriate to do so. In its announcement ASIC highlighted that it would be gathering data from non-ADI lenders using its compulsory information-gathering powers. ASIC are also requiring lenders to audit their origination processes to ensure both "serviceability" and "suitability" tests as well as hardship processes are met. These are examples of the many ways non-ADI lenders are held to account by ASIC in respect of their provision of home loan products to customers by ASIC.

- (**ASIC regulation by financial product issuers**) As issuers of financial products, non-ADI lenders are required to hold an Australian financial services (**AFS**) license. As an AFS licensee, non-ADI lenders are subject to specific obligations relating to (amongst other things) conduct and disclosure. Entities not directly regulated by APRA are subject to more stringent requirements under their AFS licence.

  ASIC regularly takes enforcement action against AFS licensees who engage in misconduct. An AFS licensee's compliance with its licence obligations is, "central to the protection of consumers and the promotion of market integrity".[1] The AFS licence regime itself is notable for its flexible approach which accommodates a diverse range of licensees. This diversity is reflected within the non-ADI lending sector not only in the range of lenders, but also in the tailored product delivery processes (including credit assessment and enforcement) required for often highly specialised customer segments.

- **(Warehouse Lenders)** The businesses run by non-ADI lenders are reliant on warehouse financing, provided by major lenders. This funding is used by non-ADI lenders to write home loans which are then pooled and sold to investors. Warehouse lenders demand high quality asset pools in the structures which they finance for three primary reasons. First, this ensures that the warehouse lender is guaranteed a return on its investment. Secondly a high performing asset pool is required to meet warehouse lenders' obligations under APRA regulations. Prudential standards, including Australian Prudential Standard 120 (**APS 120**), apply uniformly to ADIs' securitisation exposures, whether they are on an ADI's balance sheet or originated by another entity. Thirdly, to ensure the loans will meet the exacting standards required by investors that will enable them to be securitised, which is essential to ensuring the warehouse can be refinanced. Further APRA have made it known to ADIs that they would be concerned if "lending standards for loans held within warehouses are of a materially lower quality than would be consistent with industry-wide sound practices"[2]. As a result, non-ADI lenders must only originate loan books which represent viable pools of investment under prudential standards, in order to

[1] ASIC Regulation Guide 104 Licensing: Meeting the general obligations

[2] APRA Chairman, Wayne Byres (31 March 2017)
http://www.apra.gov.au/MediaReleases/Pages/17_11.aspx.

secure warehouse funding from ADIs. We have already witnessed the extent to which APRA can exert its influence over non-ADI lenders through this channel. The non-ADI lenders have necessarily amended existing warehouse facilities in order to facilitate compliance with warehouse lenders' APRA obligations. The warehouse facilities also typically require monthly reporting and annual due diligence and credit operational reviews.

- (**Capital market investors**) For public securitisation facilities funded by highly sophisticated capital market investors, those investors demand diversified, high quality assets pools. Non-ADI lenders must prepare comprehensive offering documents to secure capital market investment. These offering documents contain detailed data on the underlying pool mortgage loans including the payment type (e.g. interest only, or principal and interest), days in arrears and applicable interest rate. Sophisticated investors use this data to scrutinise the composition and quality of the mortgage loans to be funded. If the assets appear to be of poor quality, investors will either demand a higher rate of return or refuse to invest. Both responses dissuade non-ADI lenders from offering loans that are otherwise expensive or impossible to fund. In this way, capital market investors force non-ADI lenders to engage in rigorous and stable lending practices.
- (**Rating Agencies**) Most warehouse and term securitisation structures, are subject to external credit assessment by rating agencies. Rating agencies apply stringent and comprehensive assessment processes to the underlying loans, the eligibility criteria and the concentration limits before providing ratings to those structures. Often non-ADI lenders will be unsuccessful in obtaining finance from capital markets, unless the highest rating is obtained from an external rating agency for its senior notes. Moreover, under the new APS 120, warehouse financiers require warehouse structures to be externally rated, or otherwise satisfy rigorous internal credit assessments. Rating agencies represent another external pressure on the non-ADI lending sector, which drives non-ADI lenders away from originating unhealthy pools of mortgage loans. Non-ADI lenders will not originate mortgage loans if those mortgage loans prevent a rating agency from awarding the desired rating to the relevant funding structure. This is because if the desired rating is not obtained, it will be difficult for the lender to source the required funding.
- (**Lender's Mortgage Insurers**) Many of the loans originated by non-ADI lenders are covered by lenders' mortgage insurance (**LMI**). The cost of LMI is affected by the size of the loan, amount of deposit and the employment status of the borrower. If the cost of LMI is too high because of existence of high risk factors, the borrower will be unable to proceed to take out the relevant loan. In other cases, the insurer may refuse to provide LMI, if it forms the view that the borrower is unlikely to meet its obligations under the loan agreement. In this way loan mortgage insurers serve as an additional point of verification of the quality of loans originated by non-ADI lenders.
- (**FSCODA**) Many non-ADI lenders are already required to report to APRA under existing *Financial Sector (Collection of Data) Act 2001* (**FSCODA**) reporting requirements. FSCODA encourages prudent practice amongst institutions by ensuring that they examine their activities in a similar manner to that of the entity to which the relevant information is reported.
- (**RBA reporting**) The RBA imposes reporting requirements for repo eligible notes. Under these requirements entities must disclose detailed data for asset backed securities including loan level, security level, transaction level, pool level, cash flow waterfall model and related data.

The combination of these existing laws and structural features function to successfully regulate non-ADI lenders, whilst ensuring sustainability of their business models.

ASF Proposals

2016-2017

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017

No. , 2017

(Treasury)

A Bill for an Act to amend the law in relation to non-ADI lenders and registrable corporations, and for related purposes

B17HG192.V12.DOCX 30/6/2017 11:04 AM

Contents

A Bill for an Act to amend the law in relation to non-ADI lenders and registrable corporations, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the *Treasury Laws Amendment (Non-ADI Lender Rules) Act 2017*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provisions	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedules 1 and 2	The day this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Non-ADI lender rules

Banking Act 1959

1 Subsection 5(1)

Insert:

lending finance means ~~any of the following:~~the provision of finance (within the meaning of the *Financial Sector (Collection of Data) Act 2001*) excluding paragraphs (e) to (h) (inclusive) of that definition and excluding:

~~(a) the lending of money, with or without security;~~

(a) such provision of finance to an entity outside of Australia; and

~~(b) the carrying out of activities, whether directly or indirectly, that result in the funding or originating of loans or other financing.~~(b) for the avoidance of doubt, the entry into of a derivative (within the meaning of the Corporations Act 2001) transactions.

non-ADI lender has the meaning given by section 38B.

non-ADI lender rule means a rule under section 38C.

originator has the meaning given in the *Financial Sector (Collection of Data) Act 2001*.

securitisation has the meaning given in the *Financial Sector (Collection of Data) Act 2001*.

securitisation programme means a funding transaction undertaken using securitisation.

2 After Part IIA

Insert:

Part IIB—Provisions relating to the non-ADI lenders

Division 1—Non-ADI lenders

38B Meaning of *non-ADI lender*

A ***non-ADI lender*** is a registrable corporation (within the meaning of the *Financial Sector (Collection of Data) Act 2001*) which engages in the activity of lending finance.

Division 2—Non-ADI lender rules

38C APRA may make non-ADI lender rules for non-ADI lenders

(1) If APRA considers that an activity or activities engaged in by one or more non-ADI lenders ~~in relation to~~of lending finance materially contribute to risks of instability in the Australian financial system **[To discuss achieving clarity around this "gateway"]**, APRA may, in writing, determine rules in relation to ~~matters relating to~~that activity or those activities of lending finance, to be complied with by:

(a) all non-ADI lenders; or

(b) a specified class of non-ADI lenders; or

(c) one or more specified non-ADI lenders,

which activity or activities in each case, materially contribute to those risks of instability.

(2) A rule may impose different requirements to be complied with in different situations or in respect of different activities in respect of that activity of lending finance.

(3) APRA may not determine a rule in relation to:

(a) any matters contemplated under section 11CA(2)(a) to 11CA(2)(p) (but as if references to "body corporate" were references to the relevant non-ADI lender);

(b) any matter that is the subject of a prudential standard issued by APRA in respect of an ADI;

(c) the way the business affairs, operations or activities of a non-ADI lender are to be conducted or not conducted, other than in respect of the activity of lending finance that is the subject of the rule under sub-section (1);

(d) any securitisation programme;

(e) a non-ADI lender dealing with (or directing a securitisation special purpose vehicle to deal with) any assets that secure liabilities in respect of a securitisation;

(f) the exercise or non-exercise by a non-ADI lender of any right or obligation of that non-ADI lender to purchase any assets (including the assets of a securitisation);

(g) [*non-banks to indicate any other items*].

(4) Without limiting the matters in relation to which APRA may determine a rule, a rule may require:

(a) each non-ADI lender; or

(b) each non-ADI lender included in a specified class of non-ADI lenders; or

(c) a specified non-ADI lender; or

(d) each of 2 or more specified non-ADI lenders;

to ensure that its subsidiaries (or particular subsidiaries), or it and its subsidiaries (or particular subsidiaries), collectively satisfy particular requirements in relation to the matters mentioned in subsection (1).

(45) A rule may provide for APRA to exercise powers and discretions under the rule, including (but not limited to) discretions to approve, impose, adjust or exclude specific requirements in relation to one or more specified non-ADI lenders.

(56) APRA may, in writing, vary ~~or revoke~~ a non-ADI lender rule.

(7) If APRA makes a non-ADI lender rule, it must:

(a) every [6] months from the issue of that non-ADI lender rule, determine whether the activity or activities that were the basis for that non-ADI lender rule continue materially to contribute to risks of instability in the Australian financial system;

(b) unless APRA determines that the activity or activities that were the basis for that non-ADI lender rule continues materially contribute to risks of instability in the Australian financial system, in writing revoke the non-ADI lender rule; and

(c) must, in writing, revoke a rule at any time it considers that the lending activities that were the basis for that rule no longer materially contribute to risks of instability in the Australian financial system.

(~~6~~8) A rule referred to in paragraph (1)(c), or an instrument varying or revoking such a rule, has effect:

(a) from the day on which the rule, variation or revocation is made; or

(b) if the rule, variation or revocation specifies a later day—from that later day.

(~~7~~9) If APRA determines or varies a rule referred to in paragraph (1)(c) it must, as soon as practicable, give a copy of the rule, or of the variation, to the non-ADI lender, or to each non-ADI lender, to which the rule applies.

(~~8~~10) If APRA revokes a rule referred to in paragraph (1)(c) it must, as soon as practicable, give notice of the revocation to the non-ADI lender, or to each non-ADI lender, to which the rule applied.

(~~9~~11) Before making a rule, or varying or revoking a rule, APRA must :

(a) consult with ASIC; and

(b) in respect of the making or variation of a rule, consult with each non-ADI lender in respect of which the rule is to be made or which is likely to be affected by the rule. Any rule made only becomes effective after a [prescribed period] **[Period to be discussed]** following consultation with ASIC and the affected non-ADI lenders.

(~~10~~) ~~A failure to comply with subsection (7), (8) or (9) does not affect the validity of the action concerned.~~12) **[The ASF is concerned that this goes further than the current Banking Act provisions applicable to ADIs - if the non-ADI lender does not**

receive notice of the relevant rule, variation or revocation, it should not be liable for a breach]

(~~11~~13) The following instruments made under this section are not legislative instruments:

(a) a rule referred to in paragraph (1)(c);

(b) an instrument varying or revoking a rule referred to in paragraph (1)(c).

(~~12~~14) Otherwise, an instrument made under this section is a legislative instrument.

(~~13~~15) A rule may provide for a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time, despite:

(a) section 46AA of the *Acts Interpretation Act 1901*; and

(b) section 14 of the *Legislation Act 2003*.

(~~14~~16) Part VI applies to the following decisions under this section:

(a) a decision to determine a rule referred to in paragraph (1)(c);

(b) a decision to vary such a rule.

38D Division not to limit operation of other provisions

Nothing in this Division is intended to limit the operation of any other provision of this Act or of the *Reserve Bank Act 1959*.

Division 3—APRA's power to issue directions

38E APRA may give directions in certain circumstances

(1) APRA may give a body corporate that is a non-ADI lender a direction of a kind specified in subsection (2) if APRA has reason to believe that~~:~~ the body corporate has not taken the steps which are available for it to take to comply with the whole or a part of a non-ADI lender rule applicable to it, other than a breach of a minor or technical nature.

~~(a) the body corporate has contravened a non-ADI lender rule; or~~

~~(b) the body corporate is likely to contravene a non-ADI lender rule.~~

(2) The direction must:

(a) be given by notice in writing to the body corporate; ~~and~~

(b) specify the ground referred to in subsection (1) as a result of which the direction is given; and

(c) having regard to the non-ADI lender's existing commitments (or the commitments of any relevant securitisation programme), specify a period within which that non-ADI lender must take all steps available to it to comply with the relevant non-ADI lender rule.

(3) The kinds of direction that the body corporate may be given are directions to do any one or more of the following:

(a) to comply with the whole or a part of a non-ADI lender rule applicable to it;

(b) to refrain in future from ~~the lending of money, with or without security; (c) to refrain from the carrying out of activities, whether directly or indirectly, that result in the funding or originating of loans or other financing.~~conducting the activity or activities of lending finance which are the subject of a non-ADI lender rule applicable to it.

(4) Without limiting the generality of subsection (3), but subject to paragraphs (5) and (6)a direction referred to in a paragraph of that subsection may:

(a) deal with some only of the matters referred to in that paragraph; or

(b) deal with a particular class or particular classes of those matters; or

(c) make different provision with respect to different matters or different classes of matters.

(5) A direction under subsection (3) cannot be given in relation to:

(a) any securitisation programme;

(b) any lending finance which has been provided or which a non-ADI lender (or any related securitisation special

purpose vehicle) is legally committed to provide or procure the provision of; or

(c) the way in which the business affairs, operations or activities of the non-ADI lender are to be conducted or not conducted (other than in respect of a specific activity or activities of lending finance to which a non-ADI lender rule relates).

(6) Without limiting subsection (5), APRA must not direct, or give a direction that would cause or require, any party to or invertor in a securitisation programme (including any originator) to:

(a) breach any of its then current obligations in respect of lending finance;

(b) deal, or not deal, with an asset to the extent that the asset is part of that securitisation programme;

(c) deal, or not deal, with any undrawn and drawn funding, underwriting, liquidity, hedging or any other facilities in relation to that securitisation programme,

(d) undertake, or refrain from undertaking, any activity other than the activity or activity of lending finance that gave rise to the applicable non-ADI lender rule.

(~~5~~7) The direction may deal with the time by which, or period during which, it is to be complied with.

(~~6~~8) The body corporate has power to comply with the direction despite anything in its constitution or any contract or arrangement to which it is a party.

(~~7~~9) APRA may, by notice in writing to the body corporate, vary the direction if, at the time of the variation, it considers that the variation is necessary and appropriate.

(~~8~~10) The direction has effect until APRA revokes it by notice in writing to the body corporate. APRA may revoke the direction if, at the time of revocation, it considers that the direction is no longer necessary or appropriate.

(11) The revocation of a non-ADI lender rule under section 38C will be taken to be a revocation of any directions made by APRA with respect to that non-ADI lender rule.

(~~9~~12) Part VI applies to a decision to give a direction under subsection (1) as a result of the ground referred to in paragraph (1)(a) or (b).

38F Non-compliance with a direction under section 38E

(1) A non-ADI lender commits an offence if:

(a) it does, or fails to do, an act; and

(b) doing, or failing to do, the act results in a contravention of a direction given to it under section 38E.

Penalty: 50 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

(2) If a non-ADI lender does or fails to do an act in circumstances that give rise to the non-ADI lender committing an offence against subsection (1), the non-ADI lender commits an offence against that subsection in respect of:

(a) the first day on which the offence is committed; and

(b) each subsequent day (if any) on which the circumstances that gave rise to the non-ADI lender committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection is not intended to imply that section 4K of the *Crimes Act 1914* does not apply to offences against this Act or the regulations.

(3) An officer of a non-ADI lender commits an offence if:

(a) the officer fails to take reasonable steps to ensure that the non-ADI lender ~~complies~~takes all steps available to the non-ADI lender to comply with a direction given to it under section 38E; and

(b) the officer's duties include ensuring that the non-ADI lender complies with the direction, or with a class of directions that includes the direction.

Penalty: 50 penalty units.

~~Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.~~

(4) If an officer of a non-ADI lender fails to take reasonable steps to ensure that the non-ADI lender ~~complies~~takes all steps available to the non-ADI lender to comply with a direction given to it under section 38E in circumstances that give rise to the officer committing an offence against subsection (3), the officer commits an offence against that subsection in respect of:

(a) the first day on which the offence is committed; and

(b) each subsequent day (if any) on which the circumstances that gave rise to the officer committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection is not intended to imply that section 4K of the *Crimes Act 1914* does not apply to offences against this Act or the regulations.

(5) In this section, ***officer*** has the meaning given by section 9 of the *Corporations Act 2001*.

3 Subparagraph 65A(1)(a)(i)

Repeal the subparagraph, substitute:

(i) a provision of this Act, the regulations, the prudential standards or the non-ADI lender rules; or

4 Paragraph 65A(4)(a)

Repeal the paragraph, substitute:

(a) by a provision of this Act, the regulations, the prudential standards or the non-ADI lender rules to do; or

Schedule 2—Registrable corporations

Financial Sector (Collection of Data) Act 2001

1 Subsection 7(1)

After "so formed and", insert "any of the following requirements are satisfied".

2 Paragraphs 7(1)(a), (b) and (c)

Repeal the paragraphs, substitute:

(a) the business activities in Australia of the corporation include the provision of finance or the origination of the provision of finance;

(b) the corporation is specified in a determination under subsection (1A), or is in a class of corporations specified in a determination under subsection (1A).

3 After subsection 7(1)

Insert: Paragraph 7(2)(g)

(1A) For the purposes of Add the words "or is a securitisation special purpose vehicle" at the end of that paragraph (1)(b), APRA may:

(a) make a determination in writing specifying a particular corporation or corporations;

(b) make a determination in writing specifying a class of corporations or classes of corporations.

(1B) A determination made under paragraph (1A)(a) is not a legislative instrument.

(1C) A determination made under paragraph (1A)(b) is a legislative instrument.

(1D) Before making a determination under paragraph (1A)(a) or (b), APRA must consider:

(a) in the case of a determination under paragraph (1A)(a)—whether the corporation or each of the corporations

specified in the determination has business activities in Australia that include the provision of finance; or

(b) in the case of a determination under paragraph (1A)(b)—whether each corporation in the class of corporations or classes of corporations specified in the determination has business activities in Australia that include the provision of finance.

(1E) A failure to comply with subsection (1D) does not affect the validity of the determination.

(1F) As soon as practicable after making a determination under subsection (1A)(a), APRA must give a copy of the determination to each corporation specified in the determination.

(1G) A failure to comply with subsection (1F) does not affect the validity of the determination.

4 Paragraph 7(2)(h)

Repeal the paragraph.

5 Paragraph 7(2)(i)

Repeal the paragraph, substitute:

(i) the corporation is covered under subsection (2A); or

(ia) the corporation is specified in a determination under subsection (2B), or is in a class of corporations specified in a determination under subsection (2B); or

6 After subsection 7(2)

Insert:

(2A) For the purposes of paragraph (2)(i), a corporation is covered under this subsection if:

(a) the sum of the values of the corporation's assets in Australia that consist of debts due to the corporation resulting from transactions entered into in the course of the provision of finance by the corporation does not exceed:

(i) $50,000,000; or

(ii) if a greater or lesser amount is prescribed by the regulations—the amount so prescribed; and (b)

the sum of the values of the principal amounts outstanding on loans or other financing covered by subsection (2AB) does not exceed:

(i) $~~50,000,000~~100,000,000; or

(ii) if a greater or lesser amount is prescribed by the regulations—the amount so prescribed.

(2AA) For the purposes of paragraph (2A)~~(b)~~, determine the value of a loan or other financing at the time the loan or other financing arose.

(2AB) For the purposes of paragraph (2A)~~(b)~~, a loan or other financing is covered by this subsection if:

(a) the loan or other financing arose in the relevant financial year mentioned in subsection (2AC); and

(b) the funding or originating of the loan or other financing resulted from the carrying out, whether directly or indirectly, of activities by the corporation.

(2AC) In determining whether the corporation is a registrable corporation at a time, for the purposes of paragraph (2AB)(a), the relevant financial year is the most recent financial year ending before that time.

(2AD) For the purposes of working out whether a corporation (the ***test corporation***) is covered under subsection (2A):

(a) identify each other corporation (if any) that is related to the test corporation; and

(b) treat those other corporations as not being a separate entity, but rather as being a part of the test corporation.

(2B) For the purposes of paragraph (2)(ia), APRA may:

(a) make a determination in writing specifying a particular corporation or corporations;

(b) make a determination in writing specifying a class of corporations or classes of corporations.

(2C) A determination made under paragraph (2B)(a) is not a legislative instrument.

(2D) A determination made under paragraph (2B)(b) is a legislative instrument.

(2E) As soon as practicable after making a determination under subsection (2B)(a), APRA must give a copy of the determination to each corporation specified in the determination.

(2F) A failure to comply with subsection (2E) does not affect the validity of the determination.

7 Subsection 7(3)

Repeal the subsection.

8 Subsection 9(7)

Delete "another corporation and insert "another person"

[Section 13 - to discuss 13(5)(b) and 13(7)]

9 Section 13

Insert the following subsection and renumber the remainder of the section

(10) A corporation is not required by this section to give to APRA a reporting document in relation to a matter if a reporting document in relation to that matter has already been given to APRA by another person.

[Section 13B - to discuss: Why required in the context of the non-ADI regime? It should be up to the non-ADI whether it wants to disclose or not (especially given potential investor questions and concerns), not APRA]

10 Section 17

Insert the following subsection and renumber the remainder of the section

(9) A financial sector entity is not required by this section to comply with a direction given to it under subsection (3) or (4) or with such a direction as varied under subsection (6) or (7), as the case requires, if another person has so complied.

11 Section 31 (after paragraph (a) of the definition of *reviewable decision*)

Insert:

~~(aa) a decision to make a determination under paragraph 7(1A)(a);~~ (~~ab~~aa) a decision not to make a determination under paragraph 7(2B)(a);

~~9 After paragraph 32(1)(a)~~

12 Section 31

Insert the following definitions alphabetically:

~~(aa) the carrying out of activities, whether directly or indirectly, that result in the funding or originating of loans or other financing;~~ ***originator*** means, in relation to a securitisation programme, a body corporate that directly or indirectly undertakes (itself, or through an agent) the assessment of an obligor, and which approves, or otherwise procures, the provision of lending finance to that obligor.

securitisation means an arrangement involving the issue of bonds, notes, debentures or other instruments, the liabilities to the holders of which, or their representatives, are secured by assets beneficially owned by a special purpose vehicle.

~~10~~13 After subsection 32(1)

Insert:

(1A) A reference in this Act to the provision of finance does not include a reference to the following:

(a) the provision of financial product advice as defined in the Corporations Act;

(b) intra-group financing activity between corporations that are related to one another.

[Part 3A should apply to non-ADI rules and directions]