December 2018, Newsletter.

SENATE PASSES ‘BAIL IN’ LAW – HOW SAFE IS YOUR CASH NOW?

Few would know that very quietly on 14 February 2018, with just 7 senators present, the *Financial Sector Legislation Amendment (Crisis Resolution Powers And Other Measures) Bill 2017* was passed into law on a voice vote. You likely saw no press on the matter and yet the ramifications for all Australians are potentially huge.

This is a very long and complicated piece of legislation but at its very core it brings Australia into line with the ‘Bail In’ agenda of the Bank of International Settlements (BIS) as agreed at the G20 here in Brisbane in 2014. ‘Bail In’ is about government not bailing out distressed institutions as we saw in the GFC using tax payer’s money, rather using the creditors of the bank to bail itself out.

The legislation allows our banking regulator APRA ‘crisis powers’ to secretly step in and run distressed banks. It allows APRA to then confiscate and write off certain types of bonds and hybrid securities and allows them to confiscate cash savings of SMSF’s. Whereas elsewhere around the world, including our neighbours New Zealand, they specifically include the confiscation of depositors’ funds (savings), the Aussie version just cleverly doesn’t specifically exclude that….

It has been written many times of the fact that as a cash depositor in a bank you are simply an unsecured creditor of the bank. The government tries to make us all relaxed about that through their depositor guarantee scheme up to $250,000 per ADI (Authorise Deposit-taking Institution). There are traps within as one ADI includes all subsidiaries (like St George to Westpac or Bank West to CBA etc). There is also a $20b cap per ADI and that may not be enough to cover everyone in that ADI. The bigger the better is hence counterintuitive as there are more mouths to feed with that $20b. Timing is another thing. PPP’s Vern Gowdie wrote about the fact that 90% of deposits are held by just 10% of our financial institutions, or 9 banks in number. They are the ‘too big to fail’s’ and leave 75 other institutions that wouldn’t cause the chaos of the big guys if it took a while to resolve. That is where the Financial Claims Scheme (FCS) comes in to play. From the RBA:

“‘...The FCS is a form of deposit insurance that provides depositors with certainty that they will quickly recover their deposits (up to the predefined cap) in the event that an Australian ADI fails.

‘The FCS is administered by APRA and operates as follows.

• The Scheme is activated at the discretion of the Australian Treasurer where APRA has applied to the Federal Court for an ADI to be wound up. This can only be done when APRA has appointed a statutory manager to assume control of an ADI and APRA considers that the ADI is insolvent and could not be restored to solvency within a reasonable period.

• Upon its activation, APRA aims to make payments to account-holders up to the level of the cap as quickly as possible — generally within seven days of the date on which the FCS is activated.

• The method of payout to depositors will depend on the circumstances of the failed ADI and APRA's assessment of the cost-effectiveness of each option. Payment options include cheques drawn on the RBA, electronic transfer to a nominated account at another ADI, transfer of funds into a new account created by APRA at another ADI, and various modes of cash payments.'"

So to be clear APRA must first try and rescue the ADI and if that fails it must gain the support of the Treasurer to go to court to declare the ADI insolvent, it must go through the court process, and THEN you get your money "generally within seven days"

All of the above also assumes some form of order and not mass panic and bank runs as we've seen more recently in Greece and Cyprus.

Trans Pacific Partnership

TPP11 – Transhipment and Consignment concerns

1. TPP11 includes the usual “transhipment/consignment” provisions which are now in the Act

2. Generally, it means that “TPP Originating Goods” can pass through “non TPP countries” as long as they remain under “customs control” during that passage through that non TPP country. There are also restrictions on what can be done to the goods while en route

3. The problem cropped up with ChAFTA as lots of trade went through HK which has no “customs control” premises any more. We raised the issue with DFAT and Government which “fixed” the issue by passing a Regulation deeming HK to be under customs control for ChAFTA and in terms of the Act. A fairly awkward work - around but no one was terribly fussed. China imposed an additional requirement for goods going from Australia through HK into China that, along with the CoO from Australia, there needed to be a “certificate of non - manipulation” that consignment and handling of goods was in accordance with ChAFTA

4. The issue with TPP11 is that LOTS of the trade from Mexico, Canada (and ultimately Peru once it is in) will need to go into the US first for sea or air freight. Traditionally that does not take place “under customs control” and it may not even be available with air/sea/rail/road transport. The re - packing of goods can also be a problem. In that case the traditional transport arrangements may invalidate the TPP11 status of the goods shipped out of the US which could reduce the value of TPP11

5. Similarly, a lot of goods from Australia to Canada/Mexico/Peru would go first to the US and unless those goods are then moved under customs control (some sort of movement under bond provision) then they could lose their TPP11 status by going through the US. That could compromise issues such as tariff reductions in destination countries, quota entry and other benefits.

6. It’s an odd outcome of the US bailing out of the TPP11 and even odder when you recall that Australia has an FTA with the US and the US has FTAs with Mexico and Canada

7. DFAT and DoHA confirmed last week that they will be applying TPP11 “as written” with the consequence as set out above and any change or relief would need be an issue for Government

8. On the basis of DFAT and DoHA’s position we have requested that they release specific advice on this really early so that everyone could engage with their supply chain to see if the TPP11 provisions can be met for goods consigned either way through the US (doubt it). That would

include engagement with freight forwarders/customs brokers in the US along with US Customs and Border Protection

9. There could of course be a political/Government outcome here which may relax the “customs control” or “non - manipulation” provisions of TPP11 but it would need all parties to agree and even the US

10. There may be similar issues with TPP Originating goods going to/from the Asian countries which need to go through China (non TPP11) or other non TPP11 countries or TPP11 countries which have yet to ratify the deal (Malaysia for example)

ACCC takes action against NSW Ports

10 December 2018

The ACCC has instituted proceedings in the Federal Court against NSW Ports Operations Hold Co Pty Ltd and its subsidiaries Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd for making agreements with the State of New South Wales that the ACCC alleges had an anti-competitive purpose and effect.

“We are alleging that making these agreements containing provisions which would effectively compensate Port Kembla and Port Botany if the Port of Newcastle developed a container terminal, is anti-competitive and illegal,” ACCC Chair Rod Sims said.

The NSW Government privatised Port Botany and Port Kembla in May 2013 and the agreements, known as Port Commitment Deeds, were entered into as part of the privatisation process, for a term of 50 years.

The Botany and Kembla Port Commitment Deeds oblige the State of NSW to compensate the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle is above a minimal specified cap.

The ACCC alleges that entering into each of the Botany and Kembla Port Commitment Deeds was likely to prevent or hinder the development of a container terminal at the Port of Newcastle, and had the purpose, or was likely to have the effect of, substantially lessening competition.

Another 50-year deed, signed in May 2014 when the Port of Newcastle was privatised, requires the Port of Newcastle to reimburse the State of NSW for any compensation paid to operators of Port Botany and Port Kembla under the Botany and Kembla Port Commitment Deeds.

The ACCC alleges that the reimbursement provision in the Port of Newcastle Deed is an anti-competitive consequence of the Botany and Kembla Port Commitment Deeds, and that it makes the development of a container terminal at Newcastle uneconomic.

“The compensation and reimbursement provisions effectively mean that the Port of Newcastle would be financially punished for sending or receiving container cargo above a minimal level if Port Botany and Port Kembla have spare capacity. This makes development of a container terminal at the Port of Newcastle uneconomic,” Mr Sims said.

“We are taking legal action to remove a barrier to competition in an important market, the supply of port services, which has significant implications for the cost of goods across the economy, not just in New South Wales. The impact of any lessening of competition is ultimately borne by consumers.”

“If a competing container terminal cannot be developed at the Port of Newcastle, NSW Ports will remain the only major supplier of port services for container cargo in NSW for 50 years.”

“I have long voiced concerns about the short-term thinking of state governments when privatising assets and making decisions primarily to boost sales proceeds, at the expense of creating a long-term competitive market,” Mr Sims said.

“These anti-competitive decisions ultimately cost consumers in those states and impact the wider economy in the long term.”

The ACCC is seeking declarations that the compensation provisions in the 2013 Port Commitment Deeds contravene the Competition and Consumer Act 2010 (CCA), injunctions restraining the operators of Port Botany and Port Kembla from seeking compensation under these provisions, pecuniary penalties and costs.

The CCA only applies to the conduct of state governments in certain limited circumstances. The State of NSW is not currently a party to the ACCC’s proceedings and the ACCC is not seeking orders against the state.

Background

Port Botany Operations Pty Ltd is the operator of Port Botany. Port Kembla Operations Pty Ltd is the operator of Port Kembla. Both are subsidiaries of NSW Ports Operations Hold Co Pty Ltd. All are all entities within the NSW Ports group and all are parties to the 2013 Port Commitment Deeds.

Port Botany is currently the only port in NSW with dedicated container terminal facilities. Port Botany had a container throughput of approximately 2.7 million twenty foot equivalent container units (TEUs) for FY17/18.

Port Kembla has handled approximately 1,600 TEUs per year since it was privatised in 2013.

The Port of Newcastle has handled approximately 10,000 TEUs per year since it was privatised in 2014.

Under the 2013 Port Commitment Deeds, it was agreed the State of New South Wales would pay compensation to the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle exceeded a cap of 30,000 TEUs per annum (adjusted by an annual growth rate).

The compensation to be paid by the State of New South Wales to the operators of Port Botany and Port Kembla is equivalent to the wharfage fee the port operators would receive if they handled the containers.

Container traffic at the Port of Newcastle has not yet exceeded the specified cap, and therefore no payments have been made by the state under the 2013 Port Commitment Deeds.

Thank you again for your ongoing support, wishing all a very safe and pleasant Christmas and New Year’s.

Kind regards,
Cargo Network International
www.cargonmetwork.com.au

Members of CBFCA, QCCI, A.I.E, IATA, AFIF, MESCA.