



Banking Amendment (Covered Bonds) Act 2011

No. 125, 2011

**An Act to amend the *Banking Act 1959*, and for
related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Banking Amendment (Covered Bonds) Act 2011

No. 125, 2011

**An Act to amend the *Banking Act 1959*, and for
related purposes**

[Assented to 17 October 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Banking Amendment (Covered Bonds) Act 2011*.

2 Commencement

This Act commences on the day this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

Banking Act 1959

1 Subsection 5(1)

Insert:

covered bond has the meaning given by subsection 26(1).

2 Subsection 5(1)

Insert:

covered bond liabilities has the meaning given by subsections 26(4) and (5).

3 Subsection 5(1)

Insert:

covered bond special purpose vehicle has the meaning given by subsection 26(1).

4 Subsection 5(1)

Insert:

cover pool has the meaning given by subsection 26(3).

5 Subsection 5(1)

Insert:

issuing ADI has the meaning given by subsection 26(6).

6 Subparagraph 9A(2)(a)(ii)

After “1BA”, insert “or section 29”.

7 Paragraph 11CA(2)(n)

After “amount”, insert “or asset”.

8 Subsection 11CA(2)

Before “does not apply”, insert “or asset”.

9 After subsection 11CA(2)

Insert:

(2AA) However, APRA must not direct, or give a direction that would cause or require, a covered bond special purpose vehicle to:

- (a) deal, or not deal, with an asset to the extent that the asset secures covered bond liabilities of an ADI; or
- (b) make a payment, or not make a payment, in relation to a covered bond liability of an ADI.

Note: Covered bond special purpose vehicles hold assets that secure liabilities in relation to covered bonds: see Division 3A of Part II.

10 Subsection 11CD(1A)

After “Subdivision A or B”, insert “or section 29”.

11 Subsection 11CD(2)

Before “the other party”, insert “or because of a direction under section 29,”.

12 Subsection 11CD(3)

After “Subdivision A” (wherever occurring), insert “or section 29”.

13 Subsections 11CE(1) and (2)

After “Subdivision A or B”, insert “or section 29”.

14 Paragraphs 11CE(3)(a) and (b)

After “Subdivision A or B”, insert “or section 29”.

15 Subsection 11CE(4)

After “Subdivision A or B”, insert “or section 29”.

16 Paragraphs 11CG(1)(b) and (2)(a)

Omit “or 23”, substitute “, 23 or 29”.

17 Subsection 11CG(2A)

Omit “or 23”, substitute “, 23 or 29”.

18 After subsection 13A(3)

Insert:

- (3A) The assets of an ADI are taken for the purposes of subsection (3) not to include any interest in an asset (or a part of an asset) in a cover pool for which the ADI is the issuing ADI.

19 After subsection 13A(4)

Insert:

- (4A) For the purposes of subsection (4):
- (a) the ADI’s deposit liabilities are taken not to include an amount equal to the total of the face values of all of the covered bonds issued by the ADI; and
 - (b) the assets of the ADI are taken not to include:
 - (i) any interest in an asset (or a part of an asset) in a cover pool for which the ADI is the issuing ADI; or
 - (ii) any loan to a covered bond special purpose vehicle that relates to an asset (or a part of an asset) in a cover pool for which the ADI is the issuing ADI.

20 Paragraph 14B(1)(a)

After “1BA”, insert “or section 29”.

21 Subparagraph 16BA(6)(a)(iii)

After “Part II”, insert “or section 29”.

22 After Division 3 of Part II

Insert:

Division 3A—Covered bonds

24 Guide to this Division

This Division provides for the issue of covered bonds by ADIs.

An ADI issuing covered bonds must provide assets to secure the covered bonds and related liabilities. These assets are held by a covered bond special purpose vehicle. Some of the assets held by the covered bond special purpose vehicle form the cover pool for the covered bonds.

The ADI must not issue covered bonds if the combined value of assets in cover pools securing covered bonds issued by the ADI would exceed 8%, or such other percentage as is prescribed by the regulations, of the value of the ADI's assets in Australia.

25 Application of Division

This Division does not apply in relation to:

- (a) a foreign ADI; or
- (b) a bond, note or other debenture, liabilities in relation to which are secured wholly by assets that are not in Australia.

26 Covered bonds

- (1) **Covered bonds** are bonds, notes or other debentures issued by an ADI, liabilities to the holders of which, or their representatives, are:
 - (a) recoverable from the ADI; and
 - (b) secured by assets beneficially owned by a **covered bond special purpose vehicle**.

Purposes of covered bond special purpose vehicle

- (2) The purposes of the covered bond special purpose vehicle must relate only to the covered bonds.

Cover pool

- (3) The **cover pool** for the covered bonds consists of the assets beneficially owned by the covered bond special purpose vehicle to the extent that they secure the liabilities to the holders or representatives equally or in priority to any other liabilities.

Note 1: The value of the cover pool will usually exceed the value of the liabilities to the holders or representatives.

Note 2: Assets in cover pools may change from time to time.

Covered bond liabilities

- (4) The liabilities to the holders or representatives, and any other liabilities secured by assets beneficially owned by the covered

bond special purpose vehicle, are **covered bond liabilities** of the ADI.

Note: This means that liabilities incurred by the covered bond special purpose vehicle can be **covered bond liabilities** of the ADI.

- (5) However, a liability to the ADI, other than a liability in relation to a derivative or the provision of services, secured in priority to any liability to the holders or representatives is not a **covered bond liability** of the ADI.

Issuing ADI

- (6) The ADI is the **issuing ADI** for:
- (a) the cover pool; and
 - (b) the covered bond special purpose vehicle.

27 Arrangements involving several ADIs

Aggregated issuing of covered bonds

- (1) Two or more ADIs may enter into an arrangement with another entity (the **aggregating entity**) under which the aggregating entity issues bonds, notes or other debentures secured by covered bonds issued by each of the ADIs to the aggregating entity.

Other arrangements

- (2) The regulations may prescribe other arrangements that may be entered into by 2 or more ADIs for the purposes of issuing or dealing with covered bonds.

28 Restrictions on issuing covered bonds—8% rule

An ADI must not issue a covered bond if the combined value of assets in cover pools securing covered bonds issued by the ADI would exceed 8%, or such other percentage as is prescribed by the regulations, of the value of the ADI's assets in Australia.

29 Restrictions on issuing covered bonds—APRA directions

- (1) APRA may direct an ADI not to issue a covered bond.

- (2) APRA may, by written notice given to the ADI, give the ADI such a direction if:
 - (a) APRA has reason to believe that the ADI has contravened:
 - (i) this Division; or
 - (ii) another provision of this Act, a prudential requirement regulation or a prudential standard relating to covered bonds; or
 - (b) APRA has given the ADI a direction under section 11CA.
- (3) A notice under subsection (2) is not a legislative instrument.
- (4) The direction may deal with the time by which, or period during which, it is to be complied with.
- (5) The ADI has power to comply with the direction despite anything in its constitution or any contract or arrangement to which it is a party.
- (6) APRA may, by notice in writing to the ADI, vary the direction if, at the time of the variation, it considers that the variation is necessary and appropriate.
- (7) The direction has effect until APRA revokes it by notice in writing to the ADI. APRA may revoke the direction if, at the time of revocation, it considers that the direction is no longer necessary or appropriate.
- (8) Part VI applies to a decision to give a direction under subsection (1).
- (9) Information relating to directions and revocations of directions under this section is subject to the secrecy requirements in Part 6 of the *Australian Prudential Regulation Authority Act 1998*, unless the information has been published in the *Gazette* under section 11CE of this Act.
- (10) This section does not limit any other powers of APRA to give directions.

30 Cover pool monitors

- (1) Each cover pool must have a cover pool monitor.
 - (2) The cover pool monitor must:
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- (a) be registered as an auditor under Part 9.2 of the *Corporations Act 2001*; or
 - (b) hold an Australian financial services licence under that Act that covers the provision of financial services as the cover pool monitor; or
 - (c) be exempt under that Act from holding an Australian financial services licence for the provision of financial services as the cover pool monitor.
- (3) However, the cover pool monitor must not be:
- (a) the issuing ADI for the cover pool; or
 - (b) an associated entity (within the meaning of the *Corporations Act 2001*) of the issuing ADI.
- (4) The functions of the cover pool monitor are as follows:
- (a) to assess the keeping, by the issuing ADI or covered bond special purpose vehicle concerned, of an accurate register of the assets in the cover pool;
 - (b) to assess compliance by the issuing ADI with sections 31 and 31A;
 - (c) to make reports relating to the matters in paragraphs (a) and (b) available to the issuing ADI (or any substituted entity) for distribution to the holders of covered bonds or their representatives;
 - (d) to provide reports relating to the cover pool to APRA on written request by APRA;
 - (e) such functions (if any) as are prescribed by the regulations.
- (5) Copies of reports provided under paragraph (4)(d) must be provided to the issuing ADI (or any substituted entity) and the covered bond special purpose vehicle concerned.
- (6) The functions covered by paragraphs (4)(a) to (c) must be performed at least every 6 months.
- (7) The functions covered by paragraphs (4)(a) and (b) may be performed by sampling in accordance with auditing standards made under the *Corporations Act 2001*.

31 Assets that may be in cover pools

- (1) An asset in a cover pool must be one of the following:
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- (a) an at call deposit held with an ADI and convertible into cash within 2 business days;
 - (b) a bank accepted bill or certificate of deposit that:
 - (i) matures within 100 days; and
 - (ii) is eligible for repurchase transactions with the Reserve Bank; and
 - (iii) was not issued by the ADI that issued the covered bonds secured by the assets in the cover pool;
 - (c) a bond, note, debenture or other instrument issued or guaranteed by the Commonwealth, a State or a Territory;
 - (d) a loan secured by a mortgage, charge or other security interest over residential property in Australia;
 - (e) a loan secured by a mortgage, charge or other security interest over commercial property in Australia;
 - (f) a mortgage insurance policy or other asset related to a loan covered by paragraph (d) or (e);
 - (g) a contractual right relating to the holding or management of another asset in the cover pool;
 - (h) a derivative held for one or more of the following purposes:
 - (i) to protect the value of another asset in the cover pool;
 - (ii) to hedge risks in relation to another asset in the cover pool;
 - (iii) to hedge risks in relation to liabilities secured by the assets in the cover pool;
 - (i) an asset of a kind prescribed by the regulations for the purposes of this paragraph.
- (2) Paragraph (1)(i) is not limited by paragraphs (1)(a) to (h).
- (3) Despite subsection (1), a cover pool must not contain an asset of a kind prescribed by the regulations for the purposes of this subsection.

31A Maintenance of cover pools

- (1) The value of assets in a cover pool must be at least 103%, or such other percentage as is prescribed by the regulations, of the face value of the covered bonds secured by the assets.

Note: An exception to this rule is set out in subsection (5).

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- (2) The value of assets covered by paragraph 31(1)(b) (bank accepted bills or certificates of deposit) in a cover pool must not exceed 15% of the face value of the covered bonds secured by the assets.

Note: An exception to this rule is set out in subsection (6).

- (3) For the purposes of subsection (1), if the sum of:
- (a) the outstanding principal amount of a loan secured by a residential property; and
 - (b) the outstanding principal amounts of any prior or equal ranking loans secured by the property;
- exceeds 80%, or such other percentage as is prescribed by the regulations, of the value of the property (as determined by the most recent valuation of the property), then the value of the loan is reduced by the amount of the excess.
- (4) For the purposes of subsection (1), if the sum of:
- (a) the outstanding principal amount of a loan secured by a commercial property; and
 - (b) the outstanding principal amounts of any prior or equal ranking loans secured by the property;
- exceeds 60%, or such other percentage as is prescribed by the regulations, of the value of the property (as determined by the most recent valuation of the property), then the value of the loan is reduced by the amount of the excess.

Exceptions

- (5) Subsection (1) does not apply to the extent that compliance would be inconsistent with a direction given by APRA.
- (6) Subsection (2) does not apply to the extent that compliance would be inconsistent with the need to deal with an asset to satisfy a call on security in relation to a covered bond.

31B Protection of certain contractual rights

Directions by APRA

- (1) Subsection 11CD(1A) (direction not grounds for denial of obligations) does not prevent the exercise of a contractual right in relation to an asset that secures liabilities to holders of covered

bonds, or their representatives, if payments under the covered bonds to the holders or representatives are not made.

ADI statutory manager in control

- (2) Section 15C (ADI statutory manager being in control not grounds for denial of obligations) does not prevent the exercise of a contractual right in relation to an asset that secures liabilities to holders of covered bonds, or their representatives, if payments under the covered bonds to the holders or representatives are not made.

31C Powers and obligations of ADI statutory manager or external administrator

To the extent that an asset secures covered bond liabilities of an ADI, an ADI statutory manager or an external administrator has:

- (a) no powers in relation to the asset apart from the contractual powers of the ADI; and
- (b) the contractual obligations of the ADI in relation to the asset.

31D Prudential standards—treatment of assets and liabilities

- (1) This section applies for the purposes of applying:
 - (a) prudential standards in relation to assets in cover pools securing covered bonds issued by an ADI; and
 - (b) any other prudential standard in relation to the ADI.
- (2) Treat those assets as assets of the ADI to the extent that the total value of those assets at the time does not exceed 8%, or such other percentage as is prescribed by regulations made for the purposes of section 28, of the ADI's assets in Australia.
- (3) Disregard any liability of the ADI to a covered bond special purpose vehicle that relates to an asset, or a part of an asset, that is to be treated as an asset of the ADI under subsection (2).
- (4) Disregard any liability of a covered bond special purpose vehicle to the ADI that relates to an asset, or a part of an asset, that is to be treated as an asset of the ADI under subsection (2).

31E Prudential standards for covered bonds

- (1) A prudential standard may provide for any matter relating to covered bonds, including the following:
 - (a) the issuing of covered bonds;
 - (b) assets in cover pools;
 - (c) maintenance of cover pools.

Note: Prudential standards are made under section 11AF.

- (2) A prudential standard relating to covered bonds may:
 - (a) require that the following together satisfy particular requirements in relation to prudential matters:
 - (i) an ADI;
 - (ii) one or more covered bond special purpose vehicles that beneficially own assets securing covered bond liabilities of the ADI; and
 - (b) impose, in relation to assets, or parts of assets, in cover pools that are not treated as assets of an ADI under section 31D, requirements that are different from requirements imposed in relation to assets, or parts of assets, in cover pools that are treated as assets of the ADI under that section; and
 - (c) impose, in relation to a liability of an ADI to a covered bond special purpose vehicle that is not covered by subsection 31D(3), requirements that are different from requirements imposed in relation to liabilities that are covered by that subsection; and
 - (d) impose, in relation to a liability of a covered bond special purpose vehicle to an ADI that is not covered by subsection 31D(4), requirements that are different from requirements imposed in relation to liabilities that are covered by that subsection.
- (3) This section does not limit the prudential matters in relation to which APRA may determine standards under section 11AF.

31F APRA may direct covered bond special purpose vehicles to return certain assets

- (1) APRA may, by written notice given to a covered bond special purpose vehicle, direct the covered bond special purpose vehicle to return to its issuing ADI an asset to the extent that, at the time the

direction is given, the asset does not secure covered bond liabilities of the issuing ADI.

- (2) Subsection (1) applies only if APRA may give the issuing ADI a direction under section 11CA.
- (3) A notice under subsection (1) is not a legislative instrument.
- (4) The direction may deal with the time by which, or period during which, it is to be complied with.
- (5) The covered bond special purpose vehicle has power to comply with the direction despite anything in its constitution or any contract or arrangement to which it is a party.
- (6) APRA may, by notice in writing to the covered bond special purpose vehicle, vary the direction if, at the time of the variation, it considers that the variation is necessary and appropriate.
- (7) The direction has effect until APRA revokes it by notice in writing to the covered bond special purpose vehicle. APRA may revoke the direction if, at the time of revocation, it considers that the direction is no longer necessary or appropriate.
- (8) Part VI applies to a decision to give a direction under subsection (1).
- (9) Information relating to directions and revocations of directions under this section is subject to the secrecy requirements in Part 6 of the *Australian Prudential Regulation Authority Act 1998*, unless the information has been published in the *Gazette* under section 11CE of this Act.
- (10) This section does not limit any other powers of APRA to give directions.
- (11) If a direction is given under subsection (1), this Act applies in relation to the direction as if:
 - (a) the covered bond special purpose vehicle were an ADI; and
 - (b) the direction were given under section 29.

23 Subparagraph 62A(1B)(a)(ii)

After “Part II”, insert “or section 29,”.

*[Minister's second reading speech made in—
House of Representatives on 15 September 2011
Senate on 13 October 2011]*

(189/11)
