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Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Deposit Takers Bill

Purpose

1. We have considered whether the Deposit Takers Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 022618/7.9). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 21 (freedom from unreasonable search and seizure), s 25(c) (the right to be presumed innocent until proven guilty according to law), and s 27 (right to justice). Our analysis is set out below.

The Bill

4. The Deposit Takers Bill merges the currently separate regulatory frameworks for registered banks and licensed non-bank deposit takers under a single regime. The Bill repeals and replaces the Banking (Prudential Supervision) Act 1989, and the Non-bank Deposit Takers Act 2013, and makes amendments to the Reserve Bank of New Zealand Act 2021, the Financial Markets Conduct Act 2013, the Public Finance Act 1989, and the Insurance (Prudential Supervision) Act 2010.
5. The Bill modernises the Reserve Bank's (the Bank) legislation for prudential regulation and supervision of the deposit-taking sector. The main purpose of the Bill is to promote the prosperity and well-being of New Zealanders and contribute to a sustainable and productive economy by protecting and promoting the stability of the financial system. To that end, other purposes of the Bill include:
 - a. Promoting the safety and soundness of deposit takers;¹
 - b. Promoting public confidence in the financial system; and
 - c. Avoiding or mitigating adverse effects of risks involving the financial system.
6. The changes made by the Bill include:
 - a. Modernising the licensing process for entities involved in borrowing and lending;
 - b. Enabling a range of prudential standards to be applied to particular deposit takers or classes of deposit takers;

¹ Deposit taker means a person that carries on the business of borrowing and lending money.

- c. Expanding the suite of supervisory and enforcement tools available to the Bank to regulate deposit takers; and
 - d. Introducing the Depositor Compensation Scheme, a fund that will be available to compensate eligible depositors where a deposit taker is in serious financial or other difficulties, as well as creditors or shareholders that may be made worse off as a result of a resolution action under the Bill relative to outcomes under liquidation.
7. The Reserve Bank of New Zealand Act 2021 is companion legislation to the Bill, focusing on the institutional foundations for the Reserve Bank's prudential responsibilities and other functions.

Consistency of the Bill with the Bill of Rights Act

Section 14 – freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.²
9. The Bill includes provisions that limit the right to freedom of expression by:
- a. Requiring licensed deposit takers and others to provide the Bank and, in some instances, each other with information about the business, operation or management of licensed deposit takers to assist with the performance of functions under the Act.³ Contravention of most provisions which compel information is either a strict liability or infringement offence. Under clause 144, a person is not excused from answering questions or giving information on the ground that to do so would or might incriminate them;
 - b. Prohibiting communications by anyone about the exercise of certain functions under the Act;⁴
 - c. Restricting further use and disclosure of certain information by people to whom the bank shares information received under the Act;⁵ and
 - d. Requiring that information be provided in a manner specified by the Bank.⁶
10. Other provisions in the Bill limit the right to freedom of expression by placing restrictions and requirements on what deposit takers and others may communicate to the public. This includes:
- a. Prohibiting persons from falsely holding out that they are a licensed deposit taker;⁷

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

³ Clauses 30, 31, 32, 40, 43, 64, 65, 99, 101, 102, 108, 116, 119(2)(b), 120(1)(b), 121, 341, 375, 377, 378, 413, 417, and 449. Clauses 80 and 85 to 88 authorise the Bank to issue prudential standards requiring the provision of information by deposit takers or particular classes of deposit takers. Powers to compel information in the investigatory context are discussed separately below in relation to s 21 of the Bill of Rights Act (freedom from unreasonable search and seizure).

⁴ Clauses 130 and 269.

⁵ Clauses 442 and 443.

⁶ Clauses 47, 90, Part 8 subpart 4.

⁷ Clause 13.

- b. Requiring transparency around credit ratings⁸ and which financial products are protected deposits for the purposes of the depositor compensation scheme;⁹
- c. Restricting the use of the words bank, banker and banking;¹⁰ and
- d. Enabling the Bank to require deposit takers to publish reports relating to any aspect of their operations¹¹ or the fact that they have been warned by the Bank about a suspected contravention of a prudential obligation or fraudulent or reckless operation.¹²

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

11. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of s 5 of that Act. The s 5 inquiry is approached as follows:¹³
 - a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
 - b. If so, then:
 - i. is the limit rationally connected to the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
12. We consider that any limits contained within the provisions specified in para 9 above are necessary for the effective operation of the regulatory regime by which the stability of New Zealand's financial system is protected. The effective supervision of deposit takers and appropriate management of risks require the provision of information (including self-incriminating information) not only to the Bank but also to other parties, as well as the limitations on disclosure and communications about the exercise of functions under the Bill. We consider that these provisions impair s 14 no more than is reasonably necessary and are in due proportion to the importance of the objectives, noting that the obligations apply only to participants in a regulated activity and that the information that may be required is of limited expressive value.
13. We also consider that any limitations on the right to freedom of expression contained within the provisions specified in para 10 above are also justified. The public availability of this kind of information, and the restrictions imposed, are necessary to enable the public to make informed investment decisions, and to maintain the integrity of and public confidence in the financial system. We consider that these provisions impair s 14 no more than is reasonably necessary, noting again that the provisions apply only to participants in a regulated industry.
14. Overall, we consider that the limits imposed by the Bill on the right to freedom of expression are justified under s 5 of the Bill of Rights Act.

⁸ Clauses 66 to 69.

⁹ Clauses 192 and 255.

¹⁰ Clauses 422, 431, 433.

¹¹ Clause 103.

¹² Clauses 133 and 135.

¹³ *Hansen v R* [2007] NZSC 7.

Section 21 – freedom from unreasonable search and seizure

15. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal property, dignity, and privacy.¹⁴

Powers of entry, inspection and information gathering

16. The Bill contains powers of entry and inspection, and to require the provision of information in an investigatory context, that constitute search powers for the purposes of s 21 of the Bill of Rights Act.¹⁵ In particular:
- a. The Bank may enter and remain at a relevant place to carry out an on-site inspection of a regulated party, without notice, for certain purposes;¹⁶
 - b. During an on-site investigation, the Bank may require any employee, director or agent of a licensed deposit taker to answer questions and give all other information that the Bank may reasonably require for the purpose of the inspection;¹⁷
 - c. An investigator may compel the provision of information or enter and search any place for the purposes of carrying an out an investigation;¹⁸ and
 - d. The Bank may authorise an overseas supervisor¹⁹ to undertake an on-site inspection of a licensed deposit taker.²⁰

Powers to seize and manage assets

17. The Bill also contains crisis management and resolution powers. Resolution is similar to statutory management under the Corporations (Investigation and Management) Act 1989. It requires an Order in Council,²¹ which can only be sought when a licensed deposit taker is or is likely to become insolvent or has contravened certain prudential obligations, or when an overseas supervisor has taken or is taking regulatory action against the licensed deposit taker or the person who controls it. The Bank must also be satisfied that there is no reasonable prospect of the matters being adequately dealt with to its satisfaction in a timely and orderly way other than through a resolution.²²
18. The Bank must appoint or act as resolution manager in relation to a licensed deposit taker in resolution. Under cl 299, management of the licensed deposit taker vests in the resolution manager, who has broad powers to carry on the business of a licensed deposit taker²³ and

¹⁴ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

¹⁵ *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

¹⁶ Clause 112.

¹⁷ Clause 113.

¹⁸ See clauses 127 and 128.

¹⁹ Overseas supervisor means any authority or body in any country other than New Zealand that performs functions in relation to deposit takers that correspond with, or are similar to, those conferred on the Bank.

²⁰ Clauses 138 and 139.

²¹ Clause 271.

²² Clause 277.

²³ Clause 303.

manage or dispose of its property.²⁴ We consider that these powers constitute seizure for the purposes of s 21 of the Bill of Rights Act.

Are the search and seizure powers reasonable?

19. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.²⁵ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable. The reasonableness of a search and seizure can be assessed with reference to the purpose of the search and seizure and the degree of intrusion on the values which the right seeks to protect.
20. We consider the search powers in the Bill are consistent with its purposes of protecting and promoting the stability of the financial system and reasonable in the circumstances. The powers apply only to participants in a regulated activity and are necessary to monitor compliance with the regime set up by the Bill. Any intrusion into privacy is minimal, and there will not be another viable way for the bank to obtain the information. We also consider that the search powers are appropriately limited in scope, noting for example:
 - a. The Bank's search powers must be exercised at a reasonable time and in a reasonable manner;²⁶
 - b. Investigators may only enter and search a place with the consent of the occupier or a warrant;²⁷ and
 - c. The Bank must notify a licensed deposit taker if it authorises access to information by an overseas supervisor.²⁸
21. We also consider that the seizure powers discussed at paras 17 and 18 above are reasonable. While substantial and wide-ranging, they are likely to be used rarely and are subject to procedural safeguards.
22. Accordingly, we consider that the search and seizure provisions of the Bill are reasonable, and therefore consistent with s 21 of the Bill of Rights Act.

Section 25(c) – right to be presumed innocent until proven guilty

23. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.²⁹

Strict liability offences

24. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred without proof of mens rea. The accused is then required to prove a defence (on the balance of probabilities), or

²⁴ See for example clauses 307, 311 and 316.

²⁵ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [162] per Blanchard J

²⁶ Clause 112.

²⁷ Clause 128.

²⁸ Clause 139.

²⁹ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

disprove a presumption, to avoid liability; whereas in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.

25. Strict liability offences may nevertheless be justifiable limits on rights under s 5 of the Bill of Rights Act. They have been found to be more likely to be justifiable where:
 - a. The offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. The defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and,
 - c. The penalty for the offence is proportionate to the importance of the Bill's objective.
26. The Bill contains a range of strict liability offences, some of which include a defence of reasonable excuse.³⁰ Clause 184 also provides a general defence in relation to most of the strict liability offences in the Bill, for the defendant to prove that the contravention was due to the conduct of an unrelated person, an accident, or another cause beyond their control, and that they took reasonable precautions and exercised due diligence to avoid it. The Bill also preserves the common law defence of total absence of fault.
27. Most strict liability offences in the Bill (with the exception of cl 344, which we discuss separately below) are punishable by fines ranging from \$50,000 to \$100,000 for an individual and \$500,000 to \$2.5 million for body corporates.
28. The strict liability offences in the Bill operate as part of a scheme to regulate deposit takers to avoid and mitigate risks involving the financial system. Deposit takers are sophisticated commercial entities operating in a highly regulated industry, and would be in a better position to justify a contravention of the Bill's requirements than a prosecuting agency would be to prove mens rea.
29. It is a general principle that strict liability offences are associated with penalties at the lower end of the scale. The financial penalties for strict liability offences in the Bill are significantly higher than fines typically associated with strict liability offences. Nevertheless, we consider these fines are reasonable in the context of a highly regulated financial industry. The fines are likely to be commensurate to affected entities' and individuals' ability to pay, and necessary to contribute to the purposes of the offence regime (including deterrence and punishment). A court retains the discretion to impose a lower penalty than the maximum described in the Bill.
30. Accordingly, we consider that the offences in the Bill are proportionate and justifiable under s 5 of the Bill of Rights Act.

Clause 344

31. Clause 344 of the Bill provides that it is an offence for a licensed deposit taker to destroy, alter, or conceal records when in resolution. In relation to this clause, we note:
 - a. Clause 344(1)(a) creates an offence of destroying, altering or concealing records with a mens rea element of "intent to defeat the purposes of [Part 7 of the Bill]". However, this is subject to a rebuttable presumption in cl 344(3) that any person proven to have

³⁰ Strict liability offences are found in clauses 27, 33, 36, 51, 60, 100, 104, 106, 114, 117, 129, 137, 143, 151, 270, 344, 385, 399, 403, 415, 423, 432, 434.

committed the offence did so with the requisite intention. We consider this reverse onus provision engages s 25(c) of the Bill of Rights Act.

- b. Clause 344(1)(b) creates an offence of failing or refusing to answer questions asked by the Bank, to the best of their knowledge or ability. We consider this is a strict liability offence as it does not include a mens rea element.

- 32. These offences carry a penalty of one year's imprisonment or a fine not exceeding \$100,000 (or both) for an individual, and a fine of up to \$2.5 million in any other circumstances.
- 33. As with the strict liability offences discussed above, this offence applies to participants in a highly regulated industry who would generally be in the best position to justify their conduct.
- 34. Although the potential for imprisonment for a strict liability offence is highly unusual, we consider that in this instance the severity of the penalty is in proportion to the significant harm that could be caused by a contravention of s 344(1). Destroying, altering, or concealing records could severely impede the conduct of a resolution and put New Zealand's financial system at risk. The penalty generally corresponds to existing penalties applicable to deposit takers in the Reserve Bank Act 1989 and the Non-bank Deposit Takers Act 2013. As above, a court retains a discretion as to both the type and extent of any penalty. While finely balanced, we consider the potential for imprisonment as a penalty for a strict liability is a justified limit on s 25(c) of the Bill of Rights Act in this particular regulatory context.

Infringement offences

- 35. The Bill contains a number of infringement offences with associated infringement fees or fines imposed by a court.³¹ The infringement offences are strict liability offences, and accordingly they prima facie limit s 25(c) of the Bill of Rights Act.
- 36. In contrast to the other offences (including strict liability offences discussed above), the actions being punished by the infringement offences are of relatively low seriousness. As the offences seek to deter regulated entities from circumventing the requirements in the Bill, we consider that they are rationally connected to the objectives of the Bill.
- 37. The infringement offences in the Bill carry infringement fees of \$10,000 or \$20,000, or fines imposed by a court not exceeding \$25,000 or \$50,000. We note that these are relatively high penalties. However, we consider that the fees are reasonable in the circumstances largely for the reasons canvassed at paras 28 and 29 above.
- 38. We consider that, as the infringement offences in the Bill relate to public welfare regulatory matters and result only in a monetary penalty and not a criminal conviction, the limit on the right can be justified under s 5 of the Bill of Rights Act.

Section 27 – Natural justice

- 39. Section 27(1) of the Bill of Rights Act provides that every person has the right to the observance of the principles of natural justice by any public authority with the power to make a determination in respect of their rights, obligations, or interests protected or recognised by law.
- 40. Clause 421 of the Bill provides that no licensed deposit taker or related person is entitled to be consulted, informed, or make representations about the exercise or possible exercise of

³¹ Infringement offences are found in clauses 30, 31, 40, 43, 64, 65, 66, 67, 68, 69, 192.

any powers conferred by Part 7 of the Bill, which includes the Bank's powers to take resolution action in relation to a deposit taker in financial distress.

41. We accept that clause 421 of the Bill limits s 27(1) of the Bill of Rights Act, but consider the limit to be justified in terms of s 5. In the absence of such a provision, an affected entity could misuse the opportunity presented by advance notice of resolution action by taking actions that would undermine the objectives of resolution. In reaching our view that the limit in clause 421 is justified, we are mindful that its wording does not preclude prior notice or consultation in appropriate cases. We further note that equivalent provisions are a common feature of statutory management regimes, including those which currently apply to registered banks and licensed non-bank deposit takers.³²

Conclusion

42. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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³² Section 147 Reserve Bank of New Zealand Act 1989, section 64 Companies (Investigation and Management) Act 1989.