

Non-bank Deposit Takers Bill

Government Bill

Explanatory note

General policy statement

The primary purpose of this Bill is to implement the final components of the new regime for the prudential regulation of non-bank deposit takers (**NBDTs**), which arose out of the Government's Review of Financial Products and Providers.

That review was conducted in 2005–06 and was agreed to by Cabinet in 2007. The decision was taken at the time to implement the regime in two stages. The first stage is in place by virtue of the Reserve Bank of New Zealand Amendment Act 2008 (now Part 5D of the Reserve Bank of New Zealand Act 1989). This introduced requirements in relation to credit ratings, governance, risk management, capital, related party exposures, and liquidity.

This Bill covers the remaining elements of the regime. It will incorporate all the existing prudential requirements in Part 5D, and will impose additional requirements including licensing, suitability assessments of directors and senior officers, and restrictions on changes in ownership, and will give the Reserve Bank increased powers to detect and manage NBDT distress and failure.

The objectives of the Bill are to promote the maintenance of a sound and efficient financial system and to avoid significant damage to the financial system that could result from the failure of an NBDT.

The Bill—

- requires NBDTs to be licensed by the Reserve Bank. When deciding whether to grant a licence, the Bank is required to satisfy itself that the applicant can comply with prudential requirements, and must also have regard to such matters as the ownership of the NBDT and its capacity to comply with relevant securities legislation; and
- requires the suitability of directors and senior officers to be vetted by the Reserve Bank when prescribed suitability concerns are triggered; and
- empowers the Reserve Bank to de-license NBDTs in prescribed situations; and
- requires the consent of the Reserve Bank to be obtained for changes in the ownership of NBDTs (where a person acquires 20% or more of an NBDT's voting securities or the ability to appoint 25% or more of the NBDT's governing body); and
- bolsters the Reserve Bank's powers to obtain information from NBDTs, associated persons of NBDTs, and trustees; and
- empowers the Reserve Bank to remove directors of NBDTs and directors of associated persons in specified circumstances; and
- empowers the Reserve Bank to issue certain kinds of directions to NBDTs, associated persons, and trustees in specified circumstances.

Under the regulatory arrangements relating to NBDTs, the Reserve Bank, trustees, and the Financial Markets Authority will each have responsibilities for different aspects of NBDT regulation, under a range of Acts. The particular responsibilities of each are as follows:

- the Reserve Bank will have the authority to formulate, administer, and enforce prudential requirements and to monitor the NBDT sector:
- trustees will continue to have primary responsibility for the supervision of NBDTs, and NBDTs will continue to be required to have trust deeds in relation to offers of debt securities under the Securities Act 1978:
- the Financial Markets Authority will have responsibility for administering and enforcing NBDTs' disclosure requirements, under the Securities Act 1978. It will also have responsibility

for the licensing of trustees under the Securities Trustees and Statutory Supervisors Act 2011.

Regulatory impact statement

The Reserve Bank produced a regulatory impact statement on 7 June 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <http://www.rbnz.govt.nz/finstab/nbdt/4448903.pdf>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause. The Act resulting from this Bill will be the Non-bank Deposit Takers Act 2011 (the **new Act**).

Clause 2 provides that the Act comes into force on 1 June 2012. The transitional regime in *clause 87* means that existing non-bank deposit takers will be subject to most of the requirements of the new Act as soon as it comes into force, but will not be required to be licensed until 1 June 2013.

Part 1

Preliminary provisions

Clause 3 provides that the purpose of this Act is to promote the maintenance of a sound and efficient financial system and to avoid significant damage to the financial system that could result from the failure of an NBDT. This is consistent with a provision currently in Part 5D of the Reserve Bank of New Zealand Act 1989 (the **RBNZA**) that prescribes the purposes for which powers under that Part may be exercised.

Clause 4 is the interpretation section. Most of these definitions are carried over from definitions contained in the RBNZA. However, some definitions are changed and there are some new terms:

- **debt security**: this term now includes not only debt securities as defined in section 2(1) of the Securities Act 1978, but any other security declared by regulations to be a debt security:

- guaranteeing subsidiary: the definition is narrower than that in the RBNZA. The definition in the Bill includes only subsidiaries that guarantee all debt securities issued by the NBDT. The definition in the RBNZA defines guaranteeing subsidiary to include a subsidiary that guarantees only some debt securities issued by the NBDT;
- subsidiary: the meaning of this term is extended to include any entity that is classified as a subsidiary under any applicable financial reporting standard. This aligns the definition with that used in the Financial Reporting Act 1993 and in securities legislation;
- suitability concerns: these are matters, circumstances, or conditions that will be identified in regulations. If a suitability concern applies to a director or senior officer, or a prospective director or senior officer, of an NBDT, this fact must be drawn to the attention of the Bank so that it can assess whether the person is unsuitable for the particular role in the NBDT.

Clause 5 sets out the definition of NBDT. The definition is broadly the same as the definition of deposit taker in the RBNZA (ie, a person that offers debt securities to the public in New Zealand and carries on the business of borrowing and lending money or providing financial services, or is declared by regulation to be an NBDT). The new definition—

- covers every person that issues debt securities while being an NBDT (under the new Act), for as long as any of those debt securities remain unpaid; and
- covers every person that was a deposit taker (under Part 5D of the RBNZA) immediately before this Bill is introduced, for as long as any debt securities issued while being such a deposit taker remain unpaid. This is to ensure that persons presently regulated under Part 5D of the RBNZA who issue debt securities to the public in New Zealand continue to be regulated under the new Act until those debt securities are repaid; and
- does not expressly include building societies and credit unions. This means that only credit unions and building societies that issue, or have issued, debt securities (as defined in this Bill) to the public in New Zealand, and those debt securities remain unpaid, will be classed as NBDTs. Under Part 5D of

the RBNZA, credit unions and building societies were classed as deposit takers even if they had never issued debt securities to the public in New Zealand; and

- expressly excludes most entities that are in receivership or liquidation; and
- does not expressly exclude issuers of collective investment schemes, because this is unnecessary.

Clause 6 defines **related party**. The definition reproduces the definition currently in the Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010, with minor drafting modifications.

Clause 7 specifies the Bank's function under this Act, which is to act as the prudential regulator and licensing authority for NBDTs.

Clause 8 lists principles that the Bank must take into account when performing functions and exercising powers under this Act. These repeat the principles that are currently in section 157F of the RBNZA and that apply in relation to exemptions and regulations.

Clause 9 states that the Act binds the Crown.

Part 2

Licensing and prudential regulation

Subpart 1—Licensing

Clause 10 requires NBDTs to be licensed, and makes it an offence for NBDTs not to be licensed.

Clause 11 creates offences relating to holding out as an NBDT or as a licensed NBDT.

Process for obtaining licence

Clause 12 sets out how to apply for an NBDT licence.

Clause 13 provides that the Bank must not grant a licence unless it is satisfied that the applicant would be able to comply, on an ongoing basis, with the requirements of the new Act, the regulations, and any conditions of its licence, and that the requirements relating to suitability notices for its directors and senior officers have been met. The clause also sets out matters to which the Bank must have regard when deciding whether to grant a licence. These include the

applicant's incorporation and ownership structure, whether the applicant will be able to comply, on an ongoing basis, with the Securities Act 1978, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, and any regulations made under those Acts, and other matters that may be prescribed by regulations.

Clauses 14 and 15 deal with suitability notices. Suitability notices are a mechanism for notifying the Bank when suitability concerns apply in respect of a director or senior officer, or prospective director or senior officer, of an NBDT or prospective NBDT. When an applicant applies for a licence, it must provide a suitability notice in respect of each director or proposed director and each senior officer or proposed senior officer. The suitability notice must identify whether or not the person raises any suitability concerns. If the person does not, the Bank is entitled (but not obliged) to rely on that notice when deciding whether or not the person is unsuitable to be a director or senior officer of the NBDT. If the notice identifies that the person raises suitability concerns, the Bank may make inquiries about the person, and must not grant a licence unless or until it issues a notice of non-objection in relation to the person.

Conditions on a licence may include conditions relating to the provision of suitability notices before the appointment of directors and senior officers, and the circumstances in which a director or senior officer may not be appointed or may be required to resign (*see clause 18*). Non-compliance with these conditions (or any other conditions) is an offence and can lead to cancellation of a licence. In addition, directors of NBDTs will be obliged under *clause 41* to notify the Bank if an existing director or senior officer raises suitability concerns.

Clause 16 is about the grant of licences. The Bank must record the grant of a licence in a public register of NBDTs (*see clause 84*).

Conditions of licence

Clause 17 provides that the Bank may impose conditions on a licence.

Clause 18 sets out the kinds of conditions that may be imposed. These can relate to a wide range of matters, including the licensed NBDT's incorporation and ownership structure, the suitability of directors and senior officers, prudential obligations, and other matters prescribed by regulations.

Clause 19 provides for the Bank to impose, amend, or remove licence conditions.

Cancellation of licence

Clause 20 sets out the grounds for cancelling a licence. These include a failure to comply with the new Act or other relevant legislation, non-compliance with licence conditions, a failure to comply with a trust deed, and other grounds prescribed by regulations.

Clause 21 sets out the procedure for cancelling a licence.

Subpart 2—Prudential obligations

This subpart (*clauses 22 to 40*) repeats the prudential requirements that currently apply to NBDTs under Part 5D of the RBNZA. That Part was enacted in September 2008. Its provisions have been progressively brought into force since then. The provisions impose requirements on licensed NBDTs relating to governance, risk management, credit ratings, minimum capital requirements, capital ratio requirements, restrictions on related party exposures, and liquidity requirements. Detailed requirements are set out in the Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010, and in the Deposit Takers (Liquidity Requirements) Regulations 2010. It is intended that those regulations will continue to apply when the new Act is in force. The only changes made to the regulations are consequential ones (*see Schedule 3*).

The provisions setting out the prudential requirements for NBDTs have not been substantively changed (other than as set out below), because they are scheduled for a full review in 2013 (*see clause 86*). Apart from some minor drafting changes, the differences between the provisions as currently set out in Part 5D of the RBNZA and the Bill are as follows:

- in relation to governance requirements,—
 - overseas companies are specifically covered by the requirements for independent directors:
 - a failure to comply with the governance requirements is a ground for cancellation of a licence, rather than being an offence (*see clause 20*):

- *clause 25* provides that a provision in the governing document of any form of NBDT that permits its directors to act otherwise than in what they believe to be the best interests of the NBDT is of no effect. The present equivalent prohibition applies only in relation to the governing documents of licensed NBDTs that are subsidiaries. The new formulation reflects a provision in the recently enacted Insurance (Prudential Supervision) Act 2010:
- in relation to minimum capital requirements, *clause 29* authorises regulations to impose minimum capital requirements on NBDTs in relation to borrowing groups as well as on individual licensed NBDTs:
- in relation to liquidity requirements, *clause 38(2)(e)* broadens the range of matters that regulations can prescribe. Regulations can prescribe other measures relating to liquidity management (rather than just measures to ensure an NBDT maintains prudent cash flows and a level of liquidity sufficient to withstand a range of plausible liquidity shocks).

Subpart 3—Other obligations

Notifying Bank of suitability concerns

Clause 41 imposes a new obligation on directors of licensed NBDTs to notify the Bank if they are aware that a director or senior officer raises suitability concerns. The Bank must treat the notification as if it were a suitability notice that identifies that the person named raises suitability concerns. After making inquiries, the Bank may issue a notice of non-objection or advise the NBDT that no notice of non-objection will be issued.

Consent for changes of ownership

Clause 42 is a new requirement for licensed NBDTs. It requires a person to obtain the consent of the Bank before giving effect to a transaction that will increase its control or influence over an NBDT above a specified threshold. This provision is modelled on a similar provision in the RBNZA that applies to registered banks, except that the threshold for requiring consent is higher in one respect.

Additional obligations of trustees to Bank

Clauses 43, 44, and 45 reproduce existing obligations applying to trustees under Part 5D of the RBNZA, with just a minor change to the test for when a trustee must disclose information to the Bank.

Part 3**Monitoring and enforcement***Provision of information to Bank*

Clause 46 sets out the powers of the Bank with respect to requiring information, data, or forecasts from a licensed NBDT relating to the NBDT or its guaranteeing subsidiaries. This means that an existing power of the Bank in relation to registered banks, under section 93 of the RBNZA, is extended to apply in relation to NBDTs.

Clause 47 provides a new power for the Bank. It allows the Bank to require from any associated person of a licensed NBDT certain information, data, or forecasts that relate to the associated persons or the NBDT.

Clause 48 allows the Bank to require a licensed NBDT or an associated person to supply a report, prepared by an approved person, on various matters relating to the NBDT or any associated person. This power currently exists under Part 5D of the RBNZA in relation to deposit takers, but is new so far as it relates to associated persons.

Clause 49 provides that, if the Bank requires a trustee to obtain information from a licensed NBDT, the trustee must require it from the NBDT and must pass the information on to the Bank. (Where an NBDT does not co-operate with a requirement of a trustee under this provision, it is open to the Bank to seek the information directly.)

Powers where offence suspected

Clause 50 provides that if the Bank has reasonable cause to suspect that a licensed NBDT or associated person has committed an offence under the Act it may require certain information from the NBDT or associated person, and may appoint a person to enter and search a place under warrant. This carries forward an existing power of the Bank under Part 5D of the RBNZA, except that this provision extends the power so that it applies in relation to associated persons as well as to NBDTs.

Clause 51 authorises persons appointed by the Bank to enter and search a place either by consent or under a warrant issued by a Judge of the High Court or a District Court. The provisions relating to the issue of search warrants, the powers under them, and associated matters, are bulky. A good current model of these provisions is contained in Schedule 2 of the Insurance (Prudential Supervision) Act 2010, which is also administered by the Bank. This section therefore applies that schedule, with necessary modifications, in connection with warrants issued under this Part (in order to avoid repeating an identical 30-page schedule).

Provisions about information disclosed

Clause 52 carries forward an existing provision of Part 5D of the RBNZA concerning privileges that a person may claim in connection with the Bank's powers to compulsorily obtain information or to search a place. It does not override the application of section 60 of the Evidence Act 2006 (about the privilege against self-incrimination).

Clause 53 carries forward an existing provision in Part 5D of the RBNZA relating to the confidentiality of information supplied or disclosed to, or obtained by, the Bank under various provisions of the new Act. The purpose of the provision is to ensure that the information is used only for specific purposes and does not become publicly available without the consent of the person to whom the information relates or in other defined circumstances.

Clause 54 replaces an existing provision in Part 5D of the RBNZA that states that nothing in the Official Information Act 1982 or any other Act applies to information to which *clause 53* applies. *Sub-clause (1)* of the replacement repeats the existing rule, but extends it only to the Official Information Act 1982, and not to any other Act.

Power to give directions

Clause 55 sets out the powers of the Bank to issue binding directions to licensed NBDTs and associated persons. These can be issued if the Bank has reasonable grounds to believe that the NBDT or associated person is, or is likely to be, insolvent or is failing to comply with key statutory requirements or the conditions of the NBDT's licence, or that circumstances of the NBDT or an associated person or

the manner in which the affairs of the NBDT or an associated person are being conducted is prejudicial to the solvency of the NBDT. Directions may include a requirement to consult, to take specified actions to address non-compliance and financial and other difficulties, and to ensure that specified senior officers or other employees cease taking part in the business. This power is modelled on an equivalent provision relating to registered banks in the RBNZA, except that the exercise of the power under the new Act will not require the prior approval of the Minister.

Clause 56 allows the Bank to give directions to a trustee of a licensed NBDT if the Bank has reasonable grounds to believe that the NBDT or trustee is failing, has failed, or is likely to fail to comply with the new Act or the regulations. A direction may require the trustee to consult with the Bank, make changes to a trust deed, or review the NBDT's risk management programme.

Clause 57 sets out procedural requirements relating to directions.

Clause 58 sets out the obligation to comply with directions.

Power to remove or appoint directors

Clause 59 sets out the Bank's power to remove or appoint directors of licensed NBDTs and associated persons. The powers reflect those under section 113B of the RBNZA in relation to registered banks. There are equivalent powers also in relation to licensed insurers, for which the Bank is also the regulator. The power may be exercised on similar grounds to those applying to the exercise of the power to give a direction. In addition, the power can be exercised in relation to an NBDT's directors on the basis of the suitability of the director and requirements relating to suitability notices.

Clause 60 sets out procedures relating to the Bank's powers to remove and appoint directors of licensed NBDTs and associated persons.

Appeals relating to directors and senior officers

Clause 61 provides that directors and senior officers, and former directors and senior officers, of licensed NBDTs have a right of appeal to the High Court against decisions of the Bank that relate to suitability issues.

Clause 62 provides a further right of appeal to the Court of Appeal, on a question of law only, against a determination of the High Court under *clause 61*.

Offences

Clause 63 defines the 4 types of offences referred to in this Bill (tier 1, tier 2, etc) by reference to the penalties under them. Tier 1, tier 2, and tier 3 offences all carry penalties that include imprisonment, as currently available under Part 5D of the RBNZA. In general, where contravention of a particular provision is an offence, that fact is identified in the provision itself.

Clause 64 identifies 2 non-specific tier 2 offences. These relate to providing false statements, etc, and to obstructing a person exercising powers under this Act or the regulations.

Clause 65 carries forward a separate tier 2 offence of disclosing that a direction has been given to a licensed NBDT, associated person, or trustee, or that a notice requiring the removal of a director has been given to a licensed NBDT or associated person.

Clause 66 carries forward an existing provision in Part 5D of the RBNZA and provides a defence in criminal proceedings for NBDTs, associated persons, and trustees where a contravention is due to the act or omission of another person (other than a director, employee, or agent).

Clause 67 is a new provision. It provides that, if an NBDT or associated person commits an offence, the directors of the NBDT or associated person commit the same offence if it is proved that the act constituting the offence took place with the authority, permission, or consent of the director, or that the director knew, or could reasonably be expected to know, that the offence was to be committed and failed to take reasonable steps to prevent it.

Clause 68 provides an exception to the default rule about when an information for a summary offence can be laid (which is 6 months), by extending the period to 6 years, as under the RBNZA.

Part 4

Miscellaneous provisions

Exemptions

Clauses 69 and 70 carry forward an existing power under Part 5D of the RBNZA that allows the Bank to exempt licensed NBDTS, or classes of licensed NBDTs, or trustees, from compliance with particular provisions of the new Act or the regulations. An exemption cannot be given, however, from the requirement to be licensed. Exemptions can be granted on any terms and conditions the Bank thinks fit, and can be either class exemptions or individual exemptions.

Class exemptions are regulations for the purpose of both the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989. This is because class exemptions, by definition, apply to a class and are therefore somewhat legislative in character. Individual exemptions, being more administrative in character, are regulations only for the purpose of the Regulations (Disallowance) Act 1989. This distinction is consistent with the changes proposed in the Legislation Bill and with provisions recently inserted in the Securities Act 1978 that relate to exemptions.

Clause 71 sets out the legal effect of an exemption, which is that a person does not breach a requirement of the new Act if the exemption applies to that person and the person complies with the terms and conditions of the exemption.

Regulations

Clause 72 is a regulation-making power. It lists the purposes for which regulations may be made (in addition to the specific regulations relating to prudential matters in *subpart 2 of Part 2*). It includes such things as declaring a person or a class of person to be an NBDT, and declaring certain securities to be debt securities for the purposes of the new Act.

Clause 73 is a general provision relating to the regulation-making powers in *subpart 2 of Part 2*.

Clause 74 provides that any regulations made under the new Act may incorporate material by reference, the material being frameworks, standards, specifications, or requirements. It applies the provisions of *Schedule 1* to material incorporated by reference.

Clause 75 requires the Bank to consult with the Financial Markets Authority and certain other persons before recommending the making of regulations under the new Act.

Trustees and trust deeds

Clause 76 carries forward an existing provision in Part 5D of the RBNZA that provides protection from civil, criminal, and disciplinary proceedings for trustees who, in good faith, disclose information to the Bank when required to do so under the new Act.

Clause 77 carries forward an existing provision in Part 5D of the RBNZA that provides that an amendment to a trust deed that is made in order to ensure compliance with the new Act or the regulations must be treated as if authorised, despite any defect in form or despite there being no power to vary the trust deed.

Clause 78 carries forward an existing provision in Part 5D of the RBNZA that authorises trustees to amend trust deeds, unilaterally if necessary, in order to comply with a requirement of the new Act or the regulations.

Protection from liability and indemnity

Clause 79 provides a protection from liability for the Bank, directors, officers, employees, and certain appointed persons, as is presently provided under the RBNZA.

Clause 80 indemnifies the Bank, directors, officers, employees, and certain appointed persons, in the same way as is presently provided under the RBNZA.

Other miscellaneous provisions

Clause 81 sets out the requirements relating to notice and service of documents.

Clause 82 is a generic provision providing that the Bank may amend, revoke, or replace any notices, directions, or consents given under the new Act.

Clause 83 repeats a provision in the RBNZA that provides that an obligation imposed on a person by another enactment does not prevent or excuse the person from complying with the new Act or the regulations, or with any notice, direction, or condition.

Clause 84 requires the Bank to keep a public register of licensed NBDTs (as it does for registered banks).

Clause 85 carries forward an existing provision in Part 5D of the RBNZA that authorises the Bank to approve persons as rating agencies. This is necessary for the purposes of *clause 22*, which requires every licensed NBDT to have a current rating of its creditworthiness given by an approved rating agency.

Review of Act

Clause 86 carries forward an existing provision from Part 5D of the RBNZA that requires a review of that Part within 5 years of it coming into force. This provision maintains that 5-year review requirement, so that the review will be carried out by 9 September 2013. However, the review will now cover the operation of the new Act, rather than just the matters set out in Part 5D of the RBNZA.

Transitional provisions

Clause 87 is a transitional provision applying to persons that are deposit takers (under Part 5D of the RBNZA) immediately before the new Act comes into force and that will be NBDTs under the new Act. Its effect is to postpone the obligation to be licensed for 1 year, while at the same time imposing on these NBDTs most of the obligations of licensed NBDTs, and giving the Bank powers as if they were licensed NBDTs.

Clause 88 provides that existing exemptions (ie, ones granted under Part 5D of the RBNZA) continue in force after the repeal of that Part. Although section 22 of the Interpretation Act 1999 would apply to ensure that references to the repealed provisions are treated as references to the corresponding provisions of this Act that replace them, this section specifically provides that that is so, in case people are not aware of section 22 of the Interpretation Act 1999.

FMA to consult with Bank before recommending statutory management of NBDT

Clause 89 amends section 8(3) of the Corporations (Investigation and Management) Act 1989. That provision currently requires the Financial Markets Authority to consult with the Bank before recommending that a registered bank or licensed insurer be made subject to

statutory management. This amendment extends that obligation so it applies in respect of licensed NBDTs.

*Amendments to requirements to apply as
registered financial service provider*

Clause 90 amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the **FSPA**) in relation to licensed services under that Act. At present, the only licensed services are financial adviser services and being a registered bank. Acting as an insurer is due to become a licensed service under the Insurance (Prudential Supervision) Act 2010. It is appropriate that acting as an NBDT also becomes a licensed service, and this will be achieved by the amendment to Schedule 2 of the FSPA set out in *subclause (3)*. The amendment in *subclause (2)* is to section 15(2) of the FSPA. That subclause currently requires that applications under the FSPA in relation to licensed services be accompanied by any information required under another Act for licensing under that other Act. Since the information required in an application for an NBDT licence is considerable, the requirement to provide all that information to the Registrar of Financial Service Providers is burdensome. The amendment will allow the Bank and that Registrar to adjust the requirement. The form of the amendment means that this option will in fact apply in relation to all licensed services, not just in relation to NBDTs.

Consequential amendments

Clause 91 provides that consequential amendments are set out in *Schedules 2 and 3*.

Schedule 1 sets out provisions that relate to incorporation by reference. This schedule is transferred, with modifications, from the RBNZA, where it applies to both regulations made under Part 5D and to Orders in Council made under section 81 of that Act (which set out disclosure requirements for registered banks). This schedule, as set out in the new Act, will therefore apply, by virtue of a consequential amendment to section 81AA of the RBNZA, to material incorporated by reference in those Orders in Council. The main change in the schedule is that it expressly allows that, if the regulations that incorporate the material do not specify a specific version of the material to be incorporated, the relevant version of that material

is taken to be whatever version applies at the relevant date. This is a departure from the usual rule, which is that the version that applies is the version in existence at the time the material was incorporated by reference.

Schedule 2 sets out consequential amendments to the RBNZA.

Schedule 3 sets out consequential amendments to other Acts and regulations.

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Non-bank Deposit Takers Act **2011**.
- 2 Commencement**
This Act comes into force on **1 June 2012**.

Part 1 Preliminary provisions

3 Purpose

The purpose of this Act is—

- (a) to promote the maintenance of a sound and efficient financial system; and 5
- (b) to avoid significant damage to the financial system that could result from the failure of an NBDT.

Compare: 1989 No 157 s 157A

4 Interpretation 10

(1) In this Act, unless the context otherwise requires,—

approved rating agency means a rating agency approved by the Bank under **section 85**

associated person, in relation to an NBDT, means—

- (a) a person that directly or indirectly controls the management of the NBDT; or 15
- (b) a person that has a direct or indirect qualifying interest of 20% or more of the voting securities issued by the NBDT; or
- (c) a person whose management is controlled, directly or indirectly, by the NBDT; or 20
- (d) a person in whose voting securities the NBDT has a direct or indirect qualifying interest of 20% or more

Bank means the Reserve Bank of New Zealand constituted under the Reserve Bank of New Zealand Act 1989 25

borrowing group, in relation to an NBDT, means the NBDT and all its guaranteeing subsidiaries

capital ratio, in relation to an NBDT or borrowing group, means the level of capital in relation to the credit exposures and other risks of the NBDT or borrowing group 30

debt security means—

- (a) a debt security within the meaning given in section 2(1) of the Securities Act 1978; or
- (b) any other security declared by regulations to be a debt security for the purposes of this Act 35

director means—

- (a) a person occupying a position of director by whatever name called; or
- (b) in the case of an entity that does not have directors as such, any trustee, manager, or other person who acts in relation to that entity in the same or a similar fashion as a director would act were that entity a company incorporated in New Zealand under the Companies Act 1993

document means—

- (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes—
 - (i) a label, marking, or other writing which identifies or describes a thing of which it forms part, or to which it is attached; and
 - (ii) a book, map, plan, graph, or drawing; and
 - (iii) a photograph, film, or negative; and
- (b) information electronically recorded or stored, and information derived from that information

governing body means,—

- (a) in relation to a body corporate, the board of directors (or other persons or body exercising powers of management, however described) of the body corporate:
- (b) in relation to a trust, the trustees:
- (c) in relation to a unit trust, the manager and trustee:
- (d) in relation to a partnership, unincorporated joint venture, or other unincorporated body of persons, either—
 - (i) the board of directors (or other persons or body exercising powers of management, however described) of the partnership, unincorporated joint venture, or other unincorporated body of persons; or
 - (ii) if there is no board or other persons or body as described in **subparagraph (i)**, the partners of the partnership or members of the unincorporated joint venture or other unincorporated body of persons

governing document means the rules and instruments constituting, or defining the constitution of, an entity

Governor means the Governor of the Bank appointed under the Reserve Bank of New Zealand Act 1989

guaranteeing subsidiary, in relation to an NBDT, means a subsidiary of the NBDT that— 5

- (a) is unconditionally liable (whether or not jointly or severally with the NBDT or any other person) to repay all the debt securities issued by the NBDT; or
- (b) is liable to repay all the debt securities issued by the NBDT subject only to the condition that the NBDT or any other person has failed to do so 10

licence means an NBDT licence granted by the Bank under **section 16**

licensed NBDT means— 15

- (a) an NBDT that has been granted a licence and whose licence has not been cancelled; or
- (b) a person that has been granted a licence on the basis that it is not yet, but proposes to be, an NBDT, and whose licence has not been cancelled 20

Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

NBDT means a non-bank deposit taker, and is defined in **section 5** 25

overseas person means—

- (a) a body corporate incorporated outside New Zealand; or
- (b) an unincorporated body that has its head office or principal place of business outside New Zealand 30

qualifying interest, in relation to a security, means—

- (a) the legal or beneficial ownership of the security; or
- (b) the power to exercise, or control the exercise of, any voting rights attached to the security; or
- (c) the power to acquire or dispose of the security; or 35
- (d) the power to control the acquisition or disposition of the security by another person; or

- (e) the powers referred to in **paragraphs (b) to (d)** under, or by virtue of, any trust, agreement, arrangement, or understanding relating to the specified security

regulations means regulations made under this Act

related party, in relation to an NBDT, has the meaning set out in **section 6** 5

relative, in relation to any person, means—

- (a) the person's spouse, civil union partner, or de facto partner; or
- (b) any parent, step-parent, brother, sister, child, or stepchild of the person; or 10
- (c) any parent, step-parent, brother, sister, child, or stepchild of the person's spouse, civil union partner, or de facto partner

senior officer, in relation to an NBDT,— 15

- (a) means a person occupying a position that allows the person to exercise significant influence over the management or administration of the NBDT (for example, a chief executive or a chief financial officer); and
- (b) includes any class or classes of persons declared by regulations to be senior officers for the purposes of this Act; but 20
- (c) does not include any class or classes of persons declared by regulations not to be senior officers for the purposes of this Act 25

subsidiary means—

- (a) a subsidiary within the meaning of sections 5 to 8 of the Companies Act 1993; or
- (b) a company, or body corporate, or association of persons that is classified as a subsidiary in any applicable financial reporting standard (as that term is defined in section 2(1) of the Financial Reporting Act 1993) 30

suitability concerns means matters, circumstances, or conditions, identified in regulations, that must be drawn to the attention of the Bank if any 1 or more of them apply to a director or senior officer, or proposed director or senior officer, of an NBDT or proposed NBDT 35

suitability notice is a notice, in relation to a director or senior officer, or proposed director or senior officer, of an NBDT or proposed NBDT, that is supplied to the Bank and meets the requirements of **section 14**

tier 1 offence has the meaning set out in **section 63** 5

tier 2 offence has the meaning set out in **section 63**

tier 3 offence has the meaning set out in **section 63**

tier 4 offence has the meaning set out in **section 63**

trust deed, in relation to an NBDT, means a trust deed required by section 33(2)(a) of the Securities Act 1978 in respect of any debt security (as defined in that Act) offered to the public by the NBDT, whether the trust deed was registered before or after the date on which this section comes into force 10

trustee, in relation to an NBDT, means a person appointed as trustee in accordance with the Securities Act 1978 in respect of a debt security (as defined in that Act) offered to the public by the NBDT 15

voting right, in relation to any body,—

- (a) means a currently exercisable right to cast a vote at meetings of shareholders or members of that body; but 20
- (b) does not include a right to vote that is exercisable only in 1 or more of the following circumstances:
 - (i) during a period in which a payment or distribution (or part of a payment or distribution) in respect of the security that confers the voting right is in arrears or some other default exists: 25
 - (ii) on a proposal that affects rights attached to the security that confers the voting right:
 - (iii) on a proposal to put the body into liquidation or voluntary administration: 30
 - (iv) on a proposal for the disposal of the whole, or a material part, of the property, business, or undertaking of the body:
 - (v) during the liquidation, receivership, voluntary administration, bankruptcy, or statutory management of the body; and 35

- (c) does not include a right to vote that is exercisable only for a special, immaterial, or remote matter that is inconsequential to the control of the body.
- (2) In this Act, **offer of debt securities to the public** must be construed in a manner consistent with the construction and use of **offer of securities to the public** as set out in section 3 of the Securities Act 1978, but with the modification that references to securities must be taken as being references to debt securities as defined in this Act. 5
- (3) In relation to a debt security that, for the purposes of the Securities Act 1978, is a participatory security, references in this Act to a trustee must be read as references to a statutory supervisor, and references to a trust deed must be read as references to a deed of participation. 10
- Compare: 1989 No 157 ss 2(1), 157B 15

5 NBDT defined

- (1) In this Act, **NBDT** means any of the following:
- (a) a person that—
- (i) offers debt securities to the public in New Zealand; and 20
- (ii) carries on the business of borrowing and lending money, or providing financial services, or both:
- (b) a person, or a member of a class of persons (including any person or class of person identified in **subsection (2)(a) to (e)**), that is declared by regulations to be an NBDT for the purposes of this Act: 25
- (c) a person that, after this Act comes into force, issues debt securities to the public in New Zealand while being a person described in **paragraph (a) or (b)**, and any of those debt securities remain unpaid: 30
- (d) a person that,—
- (i) immediately before 3 August 2011 is a deposit taker as defined in Part 5D of the Reserve Bank of New Zealand Act 1989; and
- (ii) before this Act comes into force, issues debt securities (as defined in that Part) to the public in New Zealand while being a deposit taker and, 35

after this Act comes into force, any of those debt securities remain unpaid.

- (2) However, the following are not NBDTs:
- (a) a bank that is a registered bank under the Reserve Bank of New Zealand Act 1989: 5
 - (b) a local authority:
 - (c) the Crown (as defined in the Public Finance Act 1989):
 - (d) an entity that is in receivership (provided that no debt securities are being offered by, or on behalf of, the entity): 10
 - (e) an entity that is in liquidation (whether under Part 16 of the Companies Act 1993 or under any other enactment):
 - (f) a person, or a member of a class of persons, declared by regulations not to be an NBDT for the purposes of this Act. 15

Compare: 1989 No 157 s 157C

6 Related party defined

- (1) A person (**person A**) is a **related party** of an NBDT in each of the following cases:
- (a) person A is a director or senior officer of the NBDT or of any of its guaranteeing subsidiaries: 20
 - (b) person A is a relative of a director or senior officer of the NBDT or of any of its guaranteeing subsidiaries:
 - (c) person A is a subsidiary of the NBDT or of any of its guaranteeing subsidiaries: 25
 - (d) person A has a substantial interest in the NBDT or in any of its guaranteeing subsidiaries:
 - (e) person A is a person in which the NBDT or any of its guaranteeing subsidiaries has a substantial interest:
 - (f) another person with a substantial interest in the NBDT or any of its guaranteeing subsidiaries has a substantial interest in person A: 30
 - (g) 40% or more of person A's governing body are the same persons as 40% or more of the governing body of—
 - (i) the NBDT or any of its guaranteeing subsidiaries; 35
 - or
 - (ii) another person that has a substantial interest in the NBDT or any of its guaranteeing subsidiaries:

- (h) person A is a person, or a member of a class of persons, declared by regulations to be a related party.
- (2) In this section, a person (**person B**) has a **substantial interest** in an entity if—
- (a) person B has control, directly or indirectly, or significant influence over 25% or more of the composition of the governing body of the entity; or 5
- (b) where the entity is a company,—
- (i) person B owns, or in any way has the power to control, directly or indirectly, or has the right to acquire, 10% or more of the ordinary shares or the voting rights of the entity; or 10
- (ii) person B has, by any other means, 10% or more of the control of the entity; or
- (c) where the entity is not a company,— 15
- (i) person B is in a position to control, directly or indirectly, 10% or more of the voting rights in relation to the entity; or
- (ii) person B has, by any other means, 10% or more of the control of the entity. 20

Compare: 1989 No 157 s 157B; SR 2010/167 r 4

7 **Bank's function under this Act**

The function of the Bank under this Act is to act as the prudential regulator and licensing authority for NBDTs and to perform any other functions imposed by or under this Act. 25

8 **Principles to take into account when exercising powers**

When performing its functions and exercising its powers under this Act, the Bank must take into account the following principles:

- (a) the desirability of consistency in the treatment of similar institutions, regardless of matters such as their corporate form: 30
- (b) the importance of recognising—
- (i) that it is not the purpose of this Act to eliminate all risk in relation to the performance of NBDTs or to limit diversity among NBDTs; and 35

- (ii) that depositors are responsible for assessing risk in relation to potential investments and for their own investment choices:
 - (c) the desirability of providing to depositors adequate information to enable them to assess risk in relation to potential investments and to distinguish between high-risk and low-risk NBDTs: 5
 - (d) the desirability of sound governance of NBDTs:
 - (e) the desirability of effective risk management by NBDTs: 10
 - (f) the need to avoid unnecessary compliance costs:
 - (g) the need to maintain competition within the NBDT sector.
- Compare: 1989 No 157 s 157F
- 9 Act binds the Crown** 15
This Act binds the Crown.

Part 2

Licensing and prudential regulation

Subpart 1—Licensing

- 10 NBDTs to be licensed** 20
- (1) Every NBDT must be licensed.
 - (2) A person commits a tier 1 offence if the person is an NBDT and is not licensed.
 - (3) *See **section 87*** for the application of this section to persons who are NBDTs immediately before this section comes into force. 25
- 11 No holding out**
- (1) A person that is not an NBDT must not, directly or indirectly, hold out that the person is an NBDT.
 - (2) A person that is not licensed as an NBDT must not, directly or indirectly, hold out that the person is a licensed NBDT. 30
 - (3) A person that breaches **subsection (1) or (2)** commits a tier 1 offence.

*Process for obtaining licence***12 Application for NBDT licence**

- (1) Any person may apply to the Bank to be licensed as an NBDT.
- (2) Every application for a licence must—
- (a) be in a form, and include the information, specified by the Bank; and 5
 - (b) include the prescribed application fee (if any); and
 - (c) include a suitability notice for each director and senior officer, or proposed director or senior officer, of the applicant. 10
- (3) In **sections 13 to 19**, a reference to an NBDT includes a reference to a person that is not an NBDT but proposes to be an NBDT after it is granted a licence.

Compare: 2010 No 111 ss 17, 18

13 Determining applications for licence

- (1) The Bank must not grant a licence to an applicant unless it is satisfied that— 15
- (a) the applicant, if licensed, would be able to comply, on an ongoing basis, with this Act, the regulations, and the proposed conditions (if any) of its licence; and 20
 - (b) the Bank has received a suitability notice for each director and senior officer, or proposed director and senior officer, of the applicant and the Bank has issued a notice of non-objection in relation to any such person who raises suitability concerns. 25
- (2) In determining an application, the Bank must have regard to the following:
- (a) whether the applicant's ownership, and its incorporation and ownership structure, is appropriate having regard to the size and nature of the applicant's business or proposed business, or any part of the business or proposed business: 30
 - (b) whether the applicant will be able to comply, on an ongoing basis, with all relevant requirements of the Securities Act 1978, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, and any relevant regulations made under those Acts: 35

- (c) whether any other activities or businesses carried on, or proposed to be carried on, by the applicant are compatible with the business of being an NBDT:
- (d) whether, in the case of an applicant that is an overseas person, the law and regulatory requirements of the applicant's home jurisdiction are at least as satisfactory as the law and regulatory requirements of New Zealand that apply to NBDTs incorporated in New Zealand in relation to the following:
- (i) prudential supervision: 10
 - (ii) the duties and powers of directors:
 - (iii) the disclosure of financial and other information:
 - (iv) the licensing, registration, or authorisation of the overseas person:
- (e) any other matters identified in the regulations as matters to which the Bank must have regard. 15
- (3) **Subsection (1)** does not limit the grounds on which the Bank may otherwise refuse to grant a licence.
Compare: 1989 No 157 ss 73, 73A
- 14 Requirements of suitability notices** 20
- (1) A **suitability notice** must certify that a named director or senior officer, or proposed director or senior officer, of an NBDT—
- (a) does not raise any suitability concerns; or
 - (b) does raise 1 or more suitability concerns. 25
- (2) If a suitability notice states that the person named in it raises 1 or more suitability concerns, the notice must also—
- (a) identify the relevant suitability concern or concerns; and
 - (b) include any other information required by the Bank to be included in such notices. 30
- (3) Every suitability notice must be signed,—
- (a) if the person named is a director or proposed director of the NBDT, by the person himself or herself; and
 - (b) if the person named is a senior officer or proposed senior officer of the NBDT, by 2 directors of the NBDT. 35

- (4) Any person who signs a suitability notice and who knows, or ought to know, that the suitability notice is false or misleading in a material respect commits a tier 2 offence.

15 Dealing with suitability notices

- (1) When the Bank receives a suitability notice it may make whatever inquiries it thinks fit, including asking the person named in the notice, or any other person, to supply information or respond to queries, to assist the Bank to determine whether the person is unsuitable to be a director or senior officer (as the case may be) of the relevant NBDT. 5 10
- (2) If the suitability notice states that the person does not raise any suitability concerns, the Bank is entitled to rely on the certificate for the purpose of determining whether the person named is unsuitable to be a director or senior officer (as the case may be) of the NBDT, and may grant a licence without giving a notice of non-objection in respect of the person. 15
- (3) If a suitability notice states that the person raises 1 or more suitability concerns, the Bank must not grant a licence to the NBDT unless or until it gives a notice of non-objection in respect of the person. 20
- (4) The Bank may give a notice of non-objection in respect of a person who raises suitability concerns only if it is satisfied, after making inquiries, that the person is not unsuitable to be a director or senior officer (as the case may be) of the NBDT.
- (5) **Subsection (4)** applies whether the suitability concerns were identified in the suitability notice or came to the Bank's attention by any other means. 25
- (6) If, after making inquiries, the Bank is satisfied that a person named in a suitability notice is unsuitable to be a director or senior officer (as the case may be) of the NBDT, the Bank must notify the applicant that no licence will be granted to the applicant while the person is, or if the person becomes, a director or senior officer (as the case may be) of the NBDT. 30
- (7) **Subsections (1) to (5)** apply, with all necessary modifications, whenever the Bank is made aware that a person raises suitability concerns, and not just when a suitability notice is 35

received in respect of a person in connection with an application for a licence.

16 Grant of licence

- (1) If the Bank grants a licence to an applicant, it must—
- (a) give written notice of the decision to the applicant; and 5
 - (b) record the grant of the licence in the register of licensed NBDTs maintained under **section 84**.
- (2) If the Bank refuses to grant a licence, it must give written notice to the applicant, along with a statement of the Bank’s reasons for the refusal. 10
- Compare: 2010 No 111 s 25

Conditions of licence

17 Licence may be subject to conditions

- (1) An NBDT licence may be subject to conditions imposed by the Bank. 15
- (2) The Bank may impose conditions on a licence at the time it is granted, and may impose, amend, or remove licence conditions, in accordance with **section 19**, at any time after the licence is granted.
- (3) A licensed NBDT commits a tier 2 offence if it fails to comply with a condition of its licence. 20
- Compare: 2010 No 111 ss 21, 23

18 Kinds of licence conditions and their effect

- (1) The conditions of an NBDT licence may relate to any of the following: 25
- (a) the incorporation and ownership structure of the NBDT;
 - (b) the suitability of the directors and senior officers of the NBDT, including requirements relating to the provision of suitability notices before appointment and the circumstances in which a director or senior officer may not be appointed or may be required to resign: 30
 - (c) any of the prudential obligations of the NBDT, as set out in **subpart 2** or in regulations made under that subpart, including conditions that modify any of the requirements that would otherwise apply to the NBDT: 35

- (d) the credit exposure concentration and other risk exposures of the NBDT:
 - (e) the size and nature of the NBDT's business or proposed business, or of any part of that business, including constraints on major acquisitions: 5
 - (f) in the case of an NBDT that has not commenced operating as an NBDT, when, or the time within which, it must commence operating as an NBDT:
 - (g) any other matters prescribed by regulations.
- (2) The Bank may not impose a licence condition that operates as, or has the same effect as, an exemption granted under **section 69**. 10
- Compare: 1989 No 157 s 73

19 **Imposing, amending, and removing conditions**

- The Bank may not impose conditions on a licence, or impose new or additional conditions on, or amend or remove the existing conditions of, an NBDT's licence unless—
- (a) the Bank gives the NBDT not less than 7 working days' notice in writing of the Bank's intention; and
 - (b) the notice contains, or is accompanied by, a statement of the Bank's reasons for its proposed action; and 20
 - (c) the NBDT has a reasonable opportunity to make submissions to the Bank; and
 - (d) the Bank has regard to those submissions. 25
- Compare: 2010 No 111 s 22

Cancellation of licence

20 **Grounds for cancelling licence**

- The Bank may cancel a licence if it is satisfied—
- (a) that the licence was granted on the basis of information that was false or misleading in a material respect; or 30
 - (b) that the licence holder is failing, or has failed, to comply with this Act or the regulations, or with relevant provisions of the Securities Act 1978, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, or regulations made under those Acts; or 35
 - (c) that the requirements of **section 24** are not being met; or
- or

- (d) that the licence holder is no longer an NBDT; or
- (e) that the licence holder has been wound up, dissolved, or otherwise ceased to exist; or
- (f) that the licence holder is failing, or has failed, to comply with the terms of a trust deed relating to an offer or issue of debt securities; or
- (g) that the licence holder has requested cancellation and the Bank is satisfied that it no longer requires a licence; or
- (h) that any other matter, prescribed by regulations as a ground on which the Bank may cancel a licence, applies.

21 Procedure for cancelling licence

- (1) Before cancelling a licence, the Bank must send notice to the licence holder of its intention to cancel the licence, and the notice—
 - (a) must explain the reasons for the proposed cancellation; and
 - (b) must specify the date by which any objections to the cancellation must be received by the Bank (which must be not less than 10 working days after the date of the notice).
- (2) The Bank must have regard to any objections received.
- (3) If the Bank cancels a licence, it must—
 - (a) give written notice of the cancellation to the licence holder; and
 - (b) give public notice of the cancellation by publishing notice of it—
 - (i) in 1 or more daily newspapers circulating in each of the cities of Auckland, Hamilton, Wellington, Christchurch, and Dunedin; and
 - (ii) on an Internet site maintained by or on behalf of the Bank.
- (4) **Subsection (1)** does not apply if the reason for the cancellation is that the licence holder has requested cancellation or has ceased to exist.

Subpart 2—Prudential obligations

*Credit ratings***22 Licensed NBDTs to have current credit rating**

- (1) A licensed NBDT must have a current rating of its creditworthiness or, if required by regulations made under **section 23**, the creditworthiness of its borrowing group, that— 5
- (a) complies with the requirements prescribed by regulations made under **section 23**; and
 - (b) is given by an approved rating agency.
- (2) A licensed NBDT that breaches this section commits a tier 1 10
offence.

Compare: 1989 No 157 ss 157I, 157ZR(a), 157ZX(1)

23 Regulations relating to credit ratings

The Governor-General may, by Order in Council, on the advice of the Minister given in accordance with a recommendation of the Bank, make regulations for either or both of the following purposes: 15

- (a) providing for the following matters in relation to ratings of creditworthiness required to be held by licensed NBDTs: 20
 - (i) the type of rating (for example, whether it is a short-term or long-term rating):
 - (ii) what the rating relates to (for example, whether it indicates the creditworthiness of an NBDT with respect to a specific financial obligation or applies to the NBDT's overall creditworthiness): 25
- (b) requiring a licensed NBDT to have a rating of creditworthiness of the borrowing group of which it is part.

Compare: 1989 No 157 s 157K

Governance requirements 30**24 Requirement for independent directors**

- (1) If a licensed NBDT is a company, building society, or overseas company,—
- (a) the governing body of the NBDT must include at least 2 independent directors; and 35

- (b) the chairperson of the governing body of the NBDT must not be an employee of either the licensed NBDT or a related party.
- (2) In **subsection (1), independent director** means a director who— 5
- (a) is not an employee of either the NBDT or a related party; and
- (b) is not a director of a related party; and
- (c) does not, directly or indirectly, have a qualifying interest in more than 10% of the voting securities of the NBDT or a related party. 10

Compare: 1989 No 157 s 157L(1)

25 Certain provisions in governing document of no effect

- (1) Any provision in the governing document of a licensed NBDT that permits a director of the NBDT to act otherwise than in what the director believes to be the best interests of the NBDT is of no effect. 15
- (2) **Subsection (1)** applies despite anything to the contrary in section 131(1) of the Companies Act 1993 or any other Act. 20

Compare: 2010 No 111 s 221

Risk management programmes

26 Licensed NBDTs to have and comply with risk management programme

- (1) Every licensed NBDT must have a risk management programme that complies with **subsection (2)** and must take all practicable steps to comply with that programme. 25
- (2) The risk management programme must—
- (a) be in writing; and
- (b) set out the procedures that the NBDT will use for effectively identifying and managing the following risks: 30
- (i) credit risk;
- (ii) liquidity risk;
- (iii) market risk;
- (iv) operational risk; and
- (c) set out appropriate documentation and record-keeping requirements; and 35

- (d) describe the steps that the NBDT will take to ensure that the programme remains current, which must include procedures for—
- (i) regular review of the programme to systematically identify deficiencies in the effectiveness of the programme; and 5
 - (ii) obtaining trustee approval to amendments to the programme that are necessary to address such deficiencies; and
- (e) be appropriate to the operations of the NBDT, having regard to the factors relevant to the risks referred to in **paragraph (b)** (for example, the size of the NBDT, its funding structure, the market sector in which it operates, its business strategy, and its relationship with its borrowing group). 10 15
- (3) The Bank may issue, in the manner that the Governor thinks fit, guidelines for the purpose of interpreting the risk categories referred to in **subsection (2)(b)** that must be covered by the risk management programme.
- (4) A licensed NBDT that breaches this section commits a tier 2 offence. 20

Compare: 1989 No 157 ss 157M, 157ZR(c)

27 Trustee role in risk management programmes

- (1) Every licensed NBDT must submit a copy of its risk management programme for trustee approval. 25
- (2) As soon as practicable after it receives a copy of a risk management programme, a trustee must inform the NBDT whether it is satisfied that the risk management programme meets the requirements in **section 26(2)**.
- (3) If a trustee is not satisfied that the risk management programme meets the requirements in **section 26(2)**,— 30
- (a) the trustee may require the NBDT to amend the programme and to resubmit the programme for trustee approval within any reasonable time that the trustee may specify; and 35
 - (b) the NBDT must amend the programme and re-submit it for trustee approval.

- (4) A licensed NBDT that breaches this section commits a tier 2 offence.

Compare: 1989 No 157 ss 157N, 157ZR(d)

28 Risk management programmes to be reviewed

- (1) A trustee may require a licensed NBDT to have its risk management programme reviewed and reported on, in a specified manner, at the cost of the NBDT, within any reasonable time that the trustee may specify. 5
- (2) A review required under this section may, without limitation, include a review of the risk management programme itself, or of the manner in which it is being implemented or operated. 10
- (3) The NBDT must comply with a requirement of a trustee under **subsection (1)** within the time specified by the trustee.
- (4) A licensed NBDT that breaches this section commits a tier 2 offence. 15

Compare: 1989 No 157 ss 157O, 157ZR(e)

Minimum capital requirements

29 Regulations relating to minimum capital requirements

- (1) The Governor-General may, by Order in Council, on the advice of the Minister given in accordance with a recommendation of the Bank, make regulations for the purpose of imposing a requirement that licensed NBDTs and trustees ensure that trust deeds set out the minimum capital that licensed NBDTs, borrowing groups, or both are required to maintain. 20
- (2) Regulations made under this section may— 25
- (a) require trust deeds to set out—
- (i) the amount of the minimum capital that a licensed NBDT, a borrowing group, or both are required to maintain; and
- (ii) the form of that capital (for example, the financial instruments that may be taken into account in calculating capital); and 30
- (b) provide that the amount of the minimum capital set out in trust deeds must be not less than an amount prescribed in the regulations; and 35

- (c) provide that the form of the capital set out in trust deeds must be a form prescribed by the regulations.

Compare: 1989 No 157 s 157P

30 Ensuring minimum capital requirements included in trust deeds 5

- (1) Every licensed NBDT and trustee must comply with any requirement imposed by regulations made under **section 29**.
- (2) A licensed NBDT that breaches this section commits a tier 2 offence.
- (3) A trustee that breaches this section commits a tier 4 offence. 10
- Compare: 1989 No 157 ss 157Q, 157ZR(f), 157ZW(1)(a), 157ZX

31 Licensed NBDTs to maintain not less than minimum capital prescribed

- (1) Every licensed NBDT must maintain minimum capital of not less than any amount prescribed by regulations for the purposes of **section 29** in a form prescribed by regulations for the purposes of that section. 15
- (2) A licensed NBDT that breaches this section commits a tier 2 offence.
- Compare: 1989 No 157 ss 157R, 157ZR(g) 20

Capital ratio requirements

32 Regulations relating to capital ratios

- (1) The Governor-General may, by Order in Council, on the advice of the Minister given in accordance with a recommendation of the Bank, make regulations for the purpose of imposing a requirement that licensed NBDTs and trustees ensure that trust deeds include a capital ratio, calculated in accordance with a prescribed framework, that the NBDT must maintain. 25
- (2) Regulations made under this section may do 1 or more of the following: 30
- (a) provide for the capital ratio to be calculated in respect of either or both of the following:
- (i) the licensed NBDT;
- (ii) any borrowing group of which a licensed NBDT is part: 35

- (b) provide for the capital ratio to be set at a specified minimum level for particular licensed NBDTs or classes of licensed NBDTs:
- (c) prescribe the framework in accordance with which the capital ratio must be calculated: 5
- (d) provide for variation (whether as to content or otherwise) of the framework to apply to particular licensed NBDTs or classes of licensed NBDTs.

Compare: 1989 No 157 s 157S

33 Ensuring capital ratio included in trust deeds 10

- (1) Every licensed NBDT and trustee must comply with any requirement imposed by regulations made under **section 32**.
- (2) A licensed NBDT that breaches this section commits a tier 2 offence.
- (3) A trustee that breaches this section commits a tier 4 offence. 15

Compare: 1989 No 157 ss 157T, 157ZR(h), 157ZW(1)(b), 157ZX

34 Licensed NBDTs to maintain required capital ratio

- (1) Every licensed NBDT must maintain any capital ratio that is required to be included in trust deeds by regulations made under **section 32**. 20
- (2) A licensed NBDT that breaches this section commits a tier 2 offence.

Compare: 1989 No 157 ss 157U, 157ZR(i)

Restrictions on related party exposures

35 Regulations relating to exposure to related parties 25

- (1) The Governor-General may, by Order in Council, on the advice of the Minister given in accordance with a recommendation of the Bank, make regulations for the purpose of imposing a requirement that licensed NBDTs and trustees ensure that trust deeds include a maximum limit on exposures to related parties. 30
- (2) Regulations made under this section may do any of the following:
 - (a) provide that the maximum limit on exposures to related parties is relative to— 35

- (i) the capital of an individual licensed NBDT; or
(ii) the capital of the borrowing group of which a licensed NBDT is part:
- (b) provide that the maximum limit on exposures to related parties applies in respect of exposures of individual licensed NBDTs or any borrowing group of which a licensed NBDT is part: 5
- (c) require every licensed NBDT and trustee to ensure that trust deeds include a specified maximum limit on exposures to related parties: 10
- (d) require every licensed NBDT and trustee to ensure that trust deeds include a maximum limit on exposures to related parties that is fixed by agreement between the licensed NBDT and trustee (*see section 78* for provisions that apply if there is no agreement). 15
- (3) If **subsection (2)(d)** applies, the regulations must specify the framework (for example, covering matters as to the identification and measurement of credit exposures) in accordance with which licensed NBDTs and trustees must fix the maximum agreed limit. 20
- Compare: 1989 No 157 s 157V

36 Ensuring maximum limit on related party exposures included in trust deeds

- (1) Every licensed NBDT and trustee must comply with any requirement imposed by regulations made under **section 35**. 25
- (2) A licensed NBDT that breaches this section commits a tier 2 offence.
- (3) A trustee that breaches this section commits a tier 4 offence.
Compare: 1989 No 157 ss 157X, 157ZR(j), 157ZW(1)(c), 157ZX

37 Licensed NBDT not to exceed maximum limit on related party exposures 30

- (1) A licensed NBDT must not exceed any maximum limit on exposures to related parties required by regulations made under **section 35** to be included in the trust deed.
- (2) A licensed NBDT that breaches this section commits a tier 2 offence. 35
- Compare: 1989 No 157 ss 157Y, 157ZR(k)

*Liquidity requirements***38 Regulations relating to liquidity requirements**

- (1) The Governor-General may, by Order in Council, on the advice of the Minister given in accordance with a recommendation of the Bank, make regulations for the purpose of imposing a requirement that licensed NBDTs and trustees must ensure that trust deeds include liquidity requirements. 5
- (2) Regulations made under this section may, in relation to the liquidity requirements to be included in trust deeds, prescribe 1 or more of the following: 10
- (a) assets that qualify as liquid assets for the purposes of the regulations:
 - (b) minimum amounts of liquid assets relative to liabilities that must be maintained by licensed NBDTs:
 - (c) requirements concerning matching maturity of assets and liabilities: 15
 - (d) requirements in respect of a licensed NBDT that require the liquidity of the borrowing group of which it is part to be taken into account:
 - (e) other measures relating to liquidity management, including the management of stress situations. 20

Compare: 1989 No 157 s 157Z

39 Ensuring liquidity requirements included in trust deeds

- (1) Every licensed NBDT and trustee must comply with any requirement prescribed by regulations made under **section 38**. 25
- (2) A licensed NBDT that breaches this section commits a tier 2 offence.
- (3) A trustee that breaches this section commits a tier 4 offence.

Compare: 1989 No 157 ss 157ZA, 157ZR(l), 157ZW(1)(d), 157ZX

40 Licensed NBDTs to comply with liquidity requirements 30

- (1) Every licensed NBDT must comply with the liquidity requirements required to be included in the trust deed by regulations made under **section 38**.
- (2) A licensed NBDT that breaches this section commits a tier 2 offence. 35

Compare: 1989 No 157 ss 157ZB, 157ZR(m)

Subpart 3—Other obligations

Notifying Bank of suitability concerns

41 Directors’ obligation on becoming aware of suitability concerns

- (1) As soon as a director of a licensed NBDT becomes aware that any director or senior officer of the NBDT raises, or may raise, any suitability concerns, the director must notify the Bank of that fact or possibility. 5
- (2) Notification under this section must be treated by the Bank as if it were a suitability notice that identifies that the person named in it raises suitability concerns, and **subsections (1), (4), and (5) of section 15** apply. 10
- (3) After making inquiries, the Bank may either issue a notice of non-objection in relation to the person, or must advise the licensed NBDT that it does not intend to issue a notice of non-objection in relation to the person. 15
- (4) A director of a licensed NBDT commits a tier 2 offence if he or she fails to notify the Bank, as soon as he or she becomes aware, or ought to be aware, that a director or senior officer of the NBDT raises suitability concerns. 20

Consent for changes of ownership

42 Bank’s consent for change of ownership

- (1) A person must obtain the written consent of the Bank before giving effect to a transaction that will have the effect of—
 - (a) giving the person an increase in influence over a licensed NBDT through—
 - (i) the ability, directly or indirectly, to appoint 25% or more of the members of the governing body of the NBDT; or
 - (ii) a direct or indirect qualifying interest in 20% or more of the voting securities issued or allotted by the NBDT; or 30
 - (b) in the case of a person who has previously obtained consent under this section to an increase in influence, giving the person an increase in influence beyond the level permitted by that previous consent. 35

- (2) The Bank may, in giving its consent,—
- (a) specify the level of influence (in terms of the matters referred to in **subsection (1)(a)**) that a person may have or acquire over a licensed NBDT without the need for further consent; and 5
 - (b) impose any terms and conditions on the consent that the Bank thinks fit.
- (3) Nothing in this section invalidates any contract, or transfer of ownership, made in contravention of this section.
- (4) A person who fails to comply with **subsection (1)**, or who fails to comply with the terms and conditions of any consent given under this section, commits a tier 3 offence. 10
- Compare: 1989 No 157 ss 77A, 77B

Additional obligations of trustees to Bank

- 43 Bank may require trustee to attest to licensed NBDT's compliance** 15
- (1) The Bank may require a trustee to attest to the Bank, at a time and in a manner specified by the Bank, as to whether it is satisfied that a licensed NBDT in relation to which it is a trustee is complying with this Act and the regulations. 20
- (2) If the Bank requires a trustee to attest under this section, the trustee must either—
- (a) provide that attestation; or
 - (b) if the trustee is not able to attest to the Bank as required, report the reason, including the details of any non-compliance or suspected non-compliance by the licensed NBDT. 25
- (3) A trustee that breaches this section commits a tier 4 offence. 30
- Compare: 1989 No 157 ss 157ZE, 157ZW(1)(e), 157ZX
- 44 Trustee to report to Bank on licensed NBDT non-compliance** 30
- (1) Every trustee must, as soon as practicable, report to the Bank if it has reasonable grounds to believe that a licensed NBDT is failing, has failed, or is likely to fail, to comply in a material respect with this Act or the regulations. 35

- (2) A trustee that breaches this section commits a tier 4 offence.
Compare: 1989 No 157 ss 157ZF, 157ZW(1)(f), 157ZX(4)

45 Trustees to disclose certain information about licensed NBDTs to Bank

- (1) This section applies if a trustee, in the course of or in connection with the performance of its functions as trustee in relation to a licensed NBDT, becomes aware of information on the basis of which the trustee could reasonably form an opinion that—
- (a) the NBDT is unable to pay its debts as they become due in the normal course of business; or
 - (b) the value of the NBDT's assets is less than the value of its liabilities, including contingent liabilities; or
 - (c) it is likely that—
 - (i) the NBDT will be unable to pay its debts as they become due in the normal course of business; or
 - (ii) the value of the NBDT's assets will be less than the value of its liabilities, including contingent liabilities; or
 - (d) the NBDT has breached, or is likely to breach, in a material respect,—
 - (i) the terms of a trust deed; or
 - (ii) the terms of any offer of debt securities to which a trust deed relates.
- (2) If this section applies, the trustee must, as soon as practicable, disclose to the Bank all information held by the trustee that is relevant to the matter referred to in **subsection (1)** and obtained in the course of, or in connection with, the performance of its functions as trustee.
- (3) A trustee that breaches this section commits a tier 4 offence.
Compare: 1989 No 157 ss 157ZG(1), (3), 157ZW(1)(g), 157ZX(4)

Part 3 Monitoring and enforcement

Provision of information to Bank

- 46 Bank may require information, etc, from licensed NBDT**
- (1) The Bank may, by notice in writing to a licensed NBDT, require the NBDT to supply to the Bank any information, data, or forecasts about any of the following matters as they relate to the NBDT or its guaranteeing subsidiaries: 5
- (a) corporate matters:
 - (b) financial matters: 10
 - (c) prudential matters:
 - (d) any other matters relating to the business, operation, or management of the NBDT or its guaranteeing subsidiaries.
- (2) The notice may require that the information, data, or forecasts, or any of it, relate to business carried on by the NBDT or its guaranteeing subsidiaries in New Zealand or elsewhere. 15
- (3) The notice may also require the information, data, or forecasts, or any of it, to—
- (a) be in consolidated form; and 20
 - (b) be audited, or reviewed in a specified manner, by a person approved by the Bank; and
 - (c) relate to specified periods; and
 - (d) be supplied by a specified time, or within a specified period; and 25
 - (e) be provided in a specified form; and
 - (f) be provided to a specified place.
- (4) A licensed NBDT commits a tier 2 offence if it fails to comply with a notice given under this section. 30
- Compare: 1989 No 157 ss 93, 93B, 94
- 47 Bank may require information, etc, from associated persons**
- (1) The Bank may, by notice in writing to an associated person of a licensed NBDT, require the associated person to supply to the Bank any information, data, or forecasts about any of the following matters as they relate to the associated person: 35
- (a) corporate matters:

- (b) financial matters:
 - (c) prudential matters:
 - (d) any other matters relating to the business, operation, or management of the associated person.
- (2) The notice may require that the information, data, or forecasts, or any of it, relate to the business carried on by the associated person in New Zealand or elsewhere. 5
- (3) **Section 46(3)** applies to the notice.
- (4) An associated person commits a tier 2 offence if it fails to comply with a notice given under this section. 10
- Compare: 1989 No 157 ss 93A, 93B
- 48 Bank may require reports for investigation purposes**
- (1) For the purpose of investigating whether a licensed NBDT is complying with this Act or the regulations, the Bank may, by notice to the NBDT or any associated person, require the NBDT or associated person to supply the Bank with a report (which may comprise a series of reports), prepared by an approved person, on matters relating the business, operation, or management of the NBDT or any associated person. 15
- (2) The notice must contain a statement of the reasons why the Bank wants the report to be supplied. 20
- (3) The NBDT or associated person must provide the approved person with access to its accounting and other records and must supply information relating to those records if the approved person requests the NBDT or associated person to do so for the purposes of the report. 25
- (4) The NBDT or associated person is liable for the cost of every report that it is required to supply to the Bank under this section.
- (5) In this section, **approved person** means a person approved or appointed by the Bank for the purposes of this section. 30
- (6) A licensed NBDT or an associated person commits a tier 2 offence if it—
- (a) fails to supply a report to the Bank if required to do so under this section; or 35
 - (b) fails to supply access to its accounting and other records, or fails to provide information relating to those

records if requested to do so for the purposes of a report under this section.

Compare: 1989 No 157 ss 157ZI, 157ZS(a), (b); 2010 No 111 s 126(2)

49 Bank may require trustee to provide information about licensed NBDTs 5

(1) If the Bank, by notice in writing to a trustee, requires the trustee to obtain information from a licensed NBDT relating to the business, operation, or management of the NBDT, the trustee—

- (a) is, despite anything in any enactment, instrument, or rule of law, entitled to require the NBDT to supply the trustee with that information; and 10
- (b) must require the NBDT to supply the information; and
- (c) must supply any information so provided to the Bank.

(2) A trustee that fails to comply with **subsection (1)(b) or (c)** commits a tier 4 offence. 15

Compare: 1989 No 157 ss 157ZG(2), 157ZW(1)(g), 157ZX

Powers where offence suspected

50 Bank may require information if offence suspected

(1) If the Bank has reasonable cause to believe that a licensed NBDT or an associated person has committed an offence under this Act, the Bank may, by notice in writing, do either or both of the following: 20

- (a) require the NBDT or associated person to supply to the Bank the information, documents, or things specified in the notice, within the time specified in the notice: 25
- (b) appoint a suitably qualified person to enter and search a place under a warrant issued under **section 51**.

(2) A licensed NBDT or associated person that fails to comply with a notice given under **subsection (1)(a)** commits a tier 2 offence. 30

Compare: 1989 No 157 ss 157ZJ, 157ZK, 157ZS(c)

51 Power to enter and search

(1) A person appointed under **section 50(1)(b)** may, for the purpose of investigating whether a person is committing or has 35

- committed an offence under this Act, enter and search any place if—
- (a) the occupier of the place consents; or
 - (b) he or she obtains a warrant under this section.
- (2) A Judge of the High Court of New Zealand or a District Court Judge may issue a warrant to a Bank officer in relation to a place if the Judge is satisfied that there are reasonable grounds—
- (a) to suspect that a person is committing or has committed an offence under this Act; and
 - (b) to believe that a search will find evidential material at the place.
- (3) Schedule 2 of the Insurance (Prudential Supervision) Act 2010 applies in relation to a warrant and a search under this section, as if—
- (a) references in that schedule to applicants were references to employees of the Bank or any persons appointed by the Bank under **section 50(1)(b)**; and
 - (b) references to investigations were references to investigations by the Bank into the commission, or possible commission, of an offence under this Act by a licensed NBDT or associated person.

Compare: 2010 No 111 s 132

Provisions about information disclosed

- 52 Privileges where information required to be disclosed**
- (1) If a person could, in a criminal proceeding, assert a privilege under sections 54 to 57 of the Evidence Act 2006 in respect of any communication or information, the person is taken to have the same privilege for the purposes of—
- (a) a request under **section 48(3)** to supply access to accounting and other records of a licensed NBDT or provide information relating to those records; and
 - (b) a notice under **section 50(1)(a)**; and
 - (c) a warrant issued under **section 51**.
- (2) A person who has a privilege under this section has the right—

-
- (a) to refuse to disclose a communication or information to which the privilege would apply if it were sought to be disclosed in a criminal proceeding; and
- (b) to prevent the search of any such communication or information; and 5
- (c) to require the return of such communication or information if it is seized by a person exercising a power of search pending determination of the claim to privilege.
- (3) If a person refuses to disclose a communication or information on the ground that it is privileged under this section, the Governor may apply to a District Court Judge for an order determining whether the claim of privilege is valid; and, for the purpose of determining any such application, the District Court Judge may require the communication or information to be produced to him or her. 10 15
- (4) A District Court Judge may, on the application of the Governor, disallow a privilege claimed under this section if the Judge is satisfied that the claim to privilege would, under section 67(1) of the Evidence Act 2006, be disallowed in a proceeding. 20
- (5) **Subsection (6)** applies to documents that are books of account or accounting records referred to in section 55(1) of the Evidence Act 2006.
- (6) The application by **subsection (1)** of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect— 25
- (a) the issue of, or the obligation to comply with, a notice under **section 50(1)(a)** in respect of a document to which this subsection applies; or
- (b) the issue or execution of a search warrant under **section 51** in respect of a document to which this subsection applies; or 30
- (c) the admissibility, in a criminal proceeding under this Act, of any evidence that relates to the contents of a document obtained as a result of a notice under **section 50(1)(a)** or a search warrant issued under **section 51**. 35

- (7) Section 65 of the Evidence Act 2006 (which relates to waiver of privilege) applies in respect of any privilege under this section.
- (8) Nothing in this section affects the application of section 60 of the Evidence Act 2006. 5
Compare: 1989 No 157 s 157ZN

53 Confidentiality of information

- (1) This section applies to—
- (a) information supplied or disclosed to, or obtained by,—
 - (i) the Bank, under or for the purposes of, or in connection with, the exercise of powers conferred by this Act; and 10
 - (ii) any person appointed by the Bank under **section 50(1)(b)** to enter and search a place under warrant: 15
 - (b) information derived from, or based on, information referred to in **paragraph (a)**;
 - (c) information relating to the exercise, or possible exercise, of the powers conferred by this Act.
- (2) The Bank, any employee of the Bank, and any person appointed by the Bank under **section 50(1)(b)** may publish or disclose information to which this section applies only—
- (a) with the consent of the person to whom the information relates; or
 - (b) in statistical or summary form, arranged in a manner that prevents any information published or disclosed from being identified by any person as relating to a particular person; or 25
 - (c) to the extent that the information is available to the public under any Act (other than the Official Information Act 1982) or in a public document; or 30
 - (d) for the purposes of this Act or in connection with the exercise of powers under this Act; or
 - (e) in connection with any proceedings for an offence against this Act; or 35
 - (f) to the Registrar of the Companies Office or the Financial Markets Authority; or

- (g) to a trustee of the NBDT to whom the information relates; or
- (h) to any person who the Bank is satisfied has a proper interest in receiving the information.
- (3) A person to whom information to which this section applies is published or disclosed under **subsection (2)(d)** must not publish, disclose, or use the information except—
- (a) for the purposes of this Act or in connection with the exercise of powers conferred by this Act; or
- (b) in accordance with any conditions that may be specified by the Bank.
- (4) Information to which this section applies must not be published or disclosed under **subsection (2)(g) or (h)** unless the Bank is satisfied that satisfactory provision exists to protect the confidentiality of the information published or disclosed.
- (5) A person to whom information to which this section applies is disclosed under **subsection (2)(f), (g), or (h)** must not publish, disclose, or use the information unless the publication, disclosure, or use is—
- (a) authorised by the Bank; or
- (b) necessary or desirable in connection with the exercise of any function or power conferred by any enactment.
- (6) A person who breaches this section commits a tier 3 offence.
Compare: 1989 No 157 ss 105(2), 157ZO, 157ZP

- 54 Information compulsorily obtained or sought**
- Nothing in the Official Information Act 1982 applies to information to which **section 53** applies, whether or not the information has been published or disclosed to any person pursuant to that section.
- Compare: 1989 No 157 ss 105(8), 157ZQ

Power to give directions

- 55 Bank directions to licensed NBDTs and associated persons**
- (1) The Bank may give a licensed NBDT or an associated person a direction under this section if it has reasonable grounds to believe any of the following:

-
- (a) that the NBDT or any associated person is unable, or likely to be unable, to pay its debts in the normal course of business:
- (b) that the NBDT or any associated person, or any director or senior officer of the NBDT or any associated person, is failing, has failed, or is likely to fail, to comply with—
- (i) this Act or the regulations; or
- (ii) the Securities Act 1978 or regulations made under that Act; or
- (iii) any condition of the NBDT’s licence:
- (c) that the circumstances of the NBDT or any associated person, or the manner in which the affairs of the NBDT or associated person are being conducted, are prejudicial to the solvency of the NBDT or its ability to comply with the things listed in **paragraph (b)**.
- (2) A direction to an NBDT under this section may require the NBDT to do any of the following:
- (a) consult with the Bank, at the times and in the manner specified by the Bank, about the circumstances of the NBDT or any associated person, or about the methods of resolving any financial or other difficulties facing the NBDT or any associated person:
- (b) take any specified action to address any circumstances of financial or other difficulties of the NBDT or any associated person:
- (c) take, or refrain from taking, any specified action to address a failure, or potential failure, by the NBDT or any associated person to comply with the things listed in **subsection (1)(b)**:
- (d) ensure that any senior officer or other employee of the NBDT ceases to take part in the management or conduct of the NBDT’s business, except with the permission of the Bank and so far as that permission extends:
- (e) suspend or cease carrying on any part of its business:
- (f) carry on its business, or any part of its business, in accordance with the direction:
- (g) remove or replace its auditor, or appoint an auditor approved by the Bank.

- (3) A direction to an associated person under this section may require the associated person to do any of the following:
- (a) consult with the Bank, at the times and in the manner specified by the Bank, about the circumstances of the NBDT or the associated person, or about the methods of resolving any financial or other difficulties facing the NBDT or the associated person: 5
 - (b) take any specified action to address any circumstances of financial or other difficulties of the NBDT or the associated person: 10
 - (c) take, or refrain from taking, any specified action to address a failure, or potential failure, by the NBDT or the associated person to comply with the things listed in **subsection (1)(b)**:
 - (d) ensure that any senior officer or other employee of the associated person ceases to take part in the management or conduct of its business, except with the permission of the Bank and so far as that permission extends. 15

Compare: 1989 No 157 ss 113, 113A; 2010 No 111 ss 143–146

56 Bank directions to trustees 20

- (1) The Bank may give a direction under this section to a trustee of a licensed NBDT if it has reasonable grounds to believe that the NBDT or the trustee is failing, has failed, or is likely to fail to comply with this Act or the regulations.
- (2) A direction under this section may require a trustee to do any of the following: 25
 - (a) consult with the Bank, at the times and in the manner specified by the Bank, about the circumstances of the NBDT or trustee and the actions or proposed actions of the NBDT or trustee: 30
 - (b) make changes to a trust deed:
 - (c) arrange for a review and report on the NBDT's risk management programme.

57 Miscellaneous matters relating to directions

- (1) A direction given under **section 55 or 56** must state the grounds on which it is given and the reasons for the direction. 35

- (2) A direction to a licensed NBDT, associated person, or trustee is taken to have been given on delivery to the head office, registered office, principal place of business in New Zealand, or address for service of the NBDT, associated person, or trustee (as the case may be). 5

Compare: 1989 No 157 s 116(1); 2010 No 111 s 147

58 Obligation to comply with directions

- (1) Every person to whom a direction is given under **section 55 or 56** must comply with the direction.
- (2) A person (other than a trustee) commits a tier 1 offence if the person— 10
- (a) fails to comply with a direction given under **section 55**; or
 - (b) obstructs, hinders, or prevents an NBDT, associated person, or trustee from giving effect to a direction under this subpart. 15
- (3) A trustee commits a tier 4 offence if the trustee—
- (a) fails to comply with a direction given under **section 56**; or
 - (b) obstructs, hinders, or prevents an NBDT, associated person, or trustee from giving effect to a direction under this subpart. 20

Compare: 1989 No 157 s 114; 2010 No 111 s 148

Power to remove or appoint directors

59 Bank's powers to remove or appoint directors of licensed NBDTs and associated persons 25

- (1) The Bank may remove a director of a licensed NBDT, by notice in writing to the director, if—
- (a) any of the following apply and, in the opinion of the Bank, it is necessary to remove or replace the director: 30
 - (i) the NBDT or any associated person is unable, or likely to be unable, to pay its debts in the normal course of business:
 - (ii) the director has failed, or is failing, or is likely to fail, to comply with this Act or the regulations: 35

- (iii) the circumstances of any associated person, or the manner in which its affairs are being conducted, are prejudicial to the solvency of the NBDT or its ability to comply with this Act, the regulations, the Securities Act 1978, or regulations made under that Act; or 5
- (b) a suitability notice given in respect of the director was false or misleading in a material respect; or
- (c) the director raises suitability concerns and the Bank has not issued a notice of non-objection for the person in respect of that position; or 10
- (d) the information on which the Bank issued a notice of non-objection in relation to the director was false or misleading in a material respect; or
- (e) since the NBDT was granted a licence, or since the director was appointed, any 1 or more of the suitability concerns applies to the director and the Bank does not propose to issue a notice of non-objection in relation to the director. 15
- (2) The Bank may remove a director of an associated person of a licensed NBDT, by notice in writing to the director, if any of the following apply and it is necessary, in the opinion of the Bank, to remove or replace the director: 20
- (a) the NBDT or associated person is unable, or likely to be unable, to pay its debts in the normal course of business: 25
- (b) the director has failed, or is failing, or is likely to fail, to comply with this Act or the regulations:
- (c) the circumstances of the associated person, or the manner in which its affairs are being conducted, are prejudicial to the solvency of the NBDT or its ability to comply with this Act, the regulations, the Securities Act 1978, or regulations made under that Act. 30
- (3) The Bank may, by notice in writing to a person, appoint the person as a director of an NBDT or associated person if the Bank has exercised, or is exercising, the power in **subsection (1) or (2)** to remove a director and it is necessary to appoint a person to replace the removed director. 35
- (4) This section does not apply in respect of a director of an overseas person.

- (5) This section has effect despite any enactment, rule of law, or the terms of the governing document of the NBDT or associated person.

Compare: 1989 No 157 s 113B; 2010 No 111 s 149(5)

60 Procedures for removal and appointment of directors 5

- (1) The Bank must not exercise the power in **section 59(1) or (2)** to remove a director unless—

- (a) the Bank has given at least 7 days’ notice in writing of the Bank’s intention to exercise the power to—
 (i) the director who is to be removed; and 10
 (ii) the licensed NBDT or associated person of which the person is a director; and

- (b) the notice sets out the reasons for the proposed action; and

- (c) the director and the relevant NBDT or associated person have a reasonable opportunity to make submissions to the Bank; and 15

- (d) the Bank has regard to those submissions.

- (2) The Bank must not exercise the power in **section 59(3)** to appoint a director unless— 20

- (a) the Bank has given at least 7 days’ notice in writing of the Bank’s intention to the licensed NBDT or associated person to whom the director is to be appointed; and

- (b) the notice sets out the reasons for the proposed action; and 25

- (c) the NBDT or associated person has a reasonable opportunity to make submissions to the Bank; and

- (d) the Bank has regard to those submissions; and

- (e) the person whom the Bank proposes to appoint agrees to the appointment. 30

- (3) On exercising a power under **section 59** to remove or appoint a director, the Bank must give written notice of the exercise of the power to,—

- (a) in the case of a director of a licensed NBDT, the NBDT and each trustee; and 35

- (b) in the case of a director of an associated person, the associated person and the licensed NBDT; and

- (c) in every case, the Registrar of Companies or, in the case of a non-company NBDT or associated person whose director is being removed or appointed, whichever other registrar (if any) is appropriate.
- (4) A notice given under **subsection (3)(c)** with respect to the appointment of a director is sufficient compliance with section 159 of the Companies Act 1993 (or other equivalent provision) as long as the notice is accompanied by the form of consent and certificate required under section 152 of that Act (or other equivalent required documentation). 5
10
Compare: 1989 No 157 s 113B

Appeals relating to directors and senior officers

61 Appeal against Bank decisions on suitability

- (1) A director or senior officer, or former director or senior officer, of a licensed NBDT may appeal to the High Court against any decision of the Bank concerning— 15
- (a) the person's suitability to be a director or senior officer of the NBDT; or
- (b) the information on which a decision regarding suitability was made. 20
- (2) An appeal under this section is by way of rehearing.
- (3) A decision against which an appeal is lodged continues in force pending the determination of the appeal unless the High Court orders otherwise. 25
Compare: 2010 No 111 s 42

62 Appeal to Court of Appeal on question of law

- (1) Any party to an appeal under **section 61** who is dissatisfied with any determination of the High Court in the proceedings as being erroneous in point of law may, with the leave of the High Court or, if the High Court refuses leave, with the leave of the Court of Appeal, appeal to the Court of Appeal against the determination; and section 66 of the Judicature Act 1908 applies to any such appeal. 30
- (2) In determining whether to grant leave to appeal, the Court of Appeal must have regard to whether the question of law involved in the appeal is one that, by reason of its general or 35

public importance or for any other reason, ought to be submitted to the Court of Appeal for its decision.

- (3) The Court of Appeal, in granting leave, may impose the conditions that it thinks fit, whether as to costs or otherwise.
- (4) The decision of the Court of Appeal on any application for leave to appeal, or on an appeal under this section, is final. 5

Compare: 2010 No 111 s 43

Offences

63 Definition of tier 1, etc, offence

- (1) A **tier 1** offence is an offence for which the defendant is liable, 10
on summary conviction,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 18 months, a fine not exceeding \$200,000, or both; and
 - (b) in any other case, to a fine not exceeding \$2 million. 15
- (2) A **tier 2** offence is an offence for which the defendant is liable, on summary conviction,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 12 months, a fine not exceeding \$100,000, or both; and 20
 - (b) in any other case, to a fine not exceeding \$1 million.
- (3) A **tier 3** offence is an offence for which the defendant is liable, on summary conviction,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 3 months, a fine not exceeding \$50,000, or both; and 25
 - (b) in any other case, to a fine not exceeding \$500,000.
- (4) A **tier 4** offence is an offence for which the defendant is liable, on summary conviction, to a fine not exceeding \$200,000.

Compare: 1989 No 157 s 157ZX 30

64 General offences

A licensed NBDT, associated person, or trustee commits a tier 2 offence if it—

- (a) makes any statement or application, or supplies any document or thing, to the Bank knowing that it is false or misleading in a material respect; or 35

- (b) without reasonable excuse, obstructs or hinders an authorised person in the execution of any powers conferred on the person by or under this Act or the regulations.

Compare: 1989 No 157 s 157ZS(d)–(h)

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65 Offence to disclose giving of direction or notice

- (1) Every person commits a tier 2 offence who discloses that the Bank has given a direction under **section 55 or 56**, or has issued a notice under **section 59** requiring the removal or appointment of a director.

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- (2) Nothing in **subsection (1)** applies to the disclosure or publication of the fact that a direction has been given, or a notice has been issued, if the disclosure or publication is made—

- (a) to any director, senior officer, or professional or financial adviser of the NBDT or to an associated person or trustee of an NBDT to which the direction or notice relates; or

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- (b) with the written consent of the Bank; or

- (c) by, or on behalf of, the Bank or with the written consent of the Bank,—

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- (i) to the public or any class of the public; or

- (ii) to any person who has a proper interest in knowing that the direction or notice has been given.

- (3) Nothing in **subsection (1)** applies to the disclosure or publication of the fact that a direction has been given requiring the actions set out in **section 55(2)(d)** for the purpose of giving effect to that direction.

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Compare: 1989 No 157 s 115; 2010 No 111 s 150

66 Defence to charge under Act

- (1) In any prosecution of a licensed NBDT, associated person, or trustee or former licensed NBDT, associated person, or trustee (the **defendant**) for an offence under this Act, it is a defence if the defendant proves that—

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- (a) the contravention was due to the act or omission of another person, or some other cause beyond the defendant's control; and

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- (b) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.
- (2) For the purposes of **subsection (1)(a)**, **another person** does not include a director, employee, or agent of the defendant.
- (3) A defendant is not, without the leave of the court, entitled as part of a defence provided by this section to rely on any of the matters specified in **subsection (1)(a)** unless it has, not later than 7 working days before the date on which the hearing of the proceedings commences, served on the prosecution a notice in writing identifying the act, omission, or cause relied on by the defendant.

Compare: 1989 No 157 s 157ZT

67 Liability of directors for offences of NBDTs and associated persons

- (1) If an NBDT or associated person commits an offence under this Act, each director of the NBDT or associated person commits the same offence, and is liable for the same penalty, if it is proved—
- (a) that the act that constituted the offence took place with the authority, permission, or consent of the director; or
- (b) that the director—
- (i) knew, or could reasonably be expected to have known, that the offence was to be or was being committed; and
- (ii) failed to take reasonable steps to prevent or stop it.
- (2) A director of an NBDT or of an associated person may be convicted of an offence as a result of the operation of this section even though the NBDT or associated person has not been charged with that offence.

68 Time for laying information for summary offences

- (1) An information for an offence under this Act that is punishable on summary conviction may be laid at any time within 6 years after the date of the offence.

- (2) **Subsection (1)** applies despite section 14 of, or anything else to the contrary in, the Summary Proceedings Act 1957.

Compare: 1989 No 157 s 177

Part 4 Miscellaneous provisions

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Exemptions

69 Exemptions from Act and regulations

- (1) The Bank may exempt any licensed NBDT, class of licensed NBDTs, or trustee from compliance with any provision of—
- (a) this Act (except the requirement to be licensed); or 10
 - (b) the regulations.
- (2) The Bank must not grant an exemption under this section unless it is satisfied that—
- (a) the exemption will be consistent with the maintenance of a sound and efficient financial system; and 15
 - (b) compliance with the relevant provision or provisions would, in the circumstances, require the licensed NBDT, class of licensed NBDTs, or trustee to comply with requirements that are unduly onerous or burdensome; and 20
 - (c) the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption.
- (3) An exemption may be granted on any terms and conditions that the Bank thinks fit, including conditions, in relation to a licensed NBDT, relating to the following: 25
- (a) risk management:
 - (b) governance issues:
 - (c) disclosures relating to the NBDT's creditworthiness:
 - (d) the minimum capital ratio or minimal level of capital that the NBDT must have: 30
 - (e) the NBDT's exposures to related parties:
 - (f) the liquidity of the NBDT.
- (4) The Bank may amend or revoke an exemption in the same way as an exemption may be granted, and **section 70** applies to any amendment or revocation as if it were an exemption. 35

Compare: 1978 No 103 ss 70B–70D; 1989 No 157 s 157G

70 Status and publication of exemptions

- (1) Every exemption granted under **section 69** must—
- (a) state the date on which it comes into force, which must be a date after the date on which the exemption is granted; and 5
 - (b) include a statement of the Bank's reasons for granting the exemption (including why the exemption is appropriate).
- (2) Every exemption granted under **section 69**—
- (a) is a regulation for the purpose of the Regulations (Disallowance) Act 1989; and 10
 - (b) must be presented to the House of Representatives under section 4 of that Act.
- (3) An exemption that applies to a class of licensed NBDTs (a **class exemption**) is also a regulation for the purposes of the Acts and Regulations Publications Act 1989. 15
- (4) An exemption that is not a class exemption must, as soon as practicable after it is granted,—
- (a) be published on an Internet site maintained by or on behalf of the Bank; and 20
 - (b) be published in full in the *Gazette*; and
 - (c) be made available in printed form for purchase on request by members of the public.

Compare: 1978 No 103 s 70C

71 Effect of exemption

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A person does not breach a requirement of this Act if—

- (a) an exemption from the requirement applies to that person; and
- (b) the person complies with the terms and conditions of the exemption. 30

Compare: 1989 No 157 s 157H

*Regulations***72 Regulations**

- (1) The Governor-General may, by Order in Council, on the advice of the Minister given in accordance with a recommenda- 35

- tion of the Bank, make regulations for all or any of the following purposes:
- (a) declaring a person or class of persons to be a related party:
 - (b) declaring a class of persons to be, or not to be, senior officers: 5
 - (c) declaring a person or class of persons to be, or not to be, an NBDT (but *see* **subsection (2)**):
 - (d) declaring certain securities to be debt securities for the purpose of this Act: 10
 - (e) prescribing the matters, circumstances, or conditions that are suitability concerns:
 - (f) prescribing the application fee for a licence, or a method of calculating that fee:
 - (g) prescribing additional matters to which the Bank must have regard in determining an application for a licence: 15
 - (h) prescribing additional matters to which the conditions on licences may relate:
 - (i) prescribing grounds, additional to those in **section 20**, on which the Bank may cancel a licence: 20
 - (j) providing for any other matter contemplated by this Act, necessary for its administration, or necessary for giving it full effect.
- (2) In considering whether to advise and recommend the making of regulations under **subsection (1)(c)**, the Minister and the Bank must have regard to— 25
- (a) the nature of the business activities carried on by the person or class of persons and the extent to which those activities—
 - (i) are similar in substance to the activities of an NBDT; or 30
 - (ii) involve activities as an NBDT; and
 - (b) the public interest; and
 - (c) any other matters the Minister or the Bank considers relevant. 35
- Compare: 1989 No 157 ss 157B(2), 157C(5), (6)

- 73 Extension of regulation-making powers relating to prudential obligations**
- Regulations made under **section 23, 29, 32, 35, or 38** may—
- (a) prescribe clauses relating to all or any of the matters referred to in those sections that are deemed to be contained in, or adopted by, trust deeds; and 5
 - (b) prescribe requirements or clauses that apply to all licensed NBDTs; and
 - (c) prescribe different requirements or clauses for different classes of licensed NBDTs; and 10
 - (d) prescribe different requirements or clauses for particular licensed NBDTs.
- Compare: 1989 No 157 s 157ZY
- 74 Material incorporated by reference in regulations** 15
- (1) Any regulations made under this Act may incorporate material by reference, being material that is a framework, standard, specification, or requirement that is published by or on behalf of any body or person in any country.
 - (2) The material may be incorporated— 20
 - (a) in whole or in part; and
 - (b) with any modifications, additions, or variations specified in the regulations.
 - (3) **Schedule 1** applies to any material incorporated by reference in regulations. 25
- Compare: 1989 No 157 ss 81AA, 157W
- 75 Bank to consult before recommending regulations**
- (1) The Bank must consult with the following before making a recommendation for the making of any regulations under this Act: 30
 - (a) the Financial Markets Authority; and
 - (b) if reasonably practicable, other persons, or the representatives of those persons, who the Bank considers will be substantially affected by the regulations made in accordance with the recommendation. 35

- (2) Failure to comply with **subsection (1)** does not affect the validity of regulations.

Compare: 1989 No 157 s 157E

Trustees and trust deeds

- 76 Protection of trustees** 5
- (1) No civil, criminal, or disciplinary proceedings lie against a trustee arising from the disclosure in good faith of information to the Bank under any of **sections 43, 44, 45, and 49**.
- (2) No person may terminate the appointment of a trustee by reason of the trustee disclosing information to the Bank in good faith under any of **sections 43, 44, 45, and 49**. 10
- (3) No tribunal, body, or authority, having jurisdiction in respect of the professional conduct of a trustee, may make an order against, or do any act in relation to, that person in respect of the fact of that disclosure. 15
- Compare: 1989 No 157 s 157ZH
- 77 Amendments to trust deeds treated as authorised**
- (1) If this Act or the regulations, or the Bank acting under this Act or the regulations, requires a licensed NBDT or a trustee, or both a licensed NBDT and a trustee, to ensure that a matter is included in or excluded from a trust deed, an amendment to a trust deed in compliance with that requirement— 20
- (a) must be treated for all purposes as if it were authorised to be made and were made in accordance with the provisions of the trust deed before the amendment was made; 25
- and
- (b) applies despite any defect in the form or mode of execution of the amendment.
- (2) **Subsection (1)** applies despite there being no power of variation in the trust deed or anything to the contrary in the trust deed or other enactment, rule of law, or agreement. 30
- Compare: 1989 No 157 s 157ZC
- 78 Trustees may execute amendment to trust deeds**
- (1) This section applies if—

- (a) this Act or the regulations require a trustee, or both a licensed NBDT and a trustee, to ensure that a matter is included in or excluded from a trust deed; and
 - (b) it is necessary to amend the trust deed within a certain time in order to comply with that requirement; and 5
 - (c) the trustee has made reasonable efforts, in good faith, to negotiate with the NBDT for the purpose of agreeing to an amendment to the trust deed to ensure compliance with the requirement; and
 - (d) the trustee has not, within a reasonable period before the expiry of the time allowed for amending the trust deed, been able to reach an agreement with the NBDT about the amendment to be made to the trust deed. 10
- (2) If this section applies, the trustee may execute a deed amending the trust deed without the consent or agreement of the NBDT or any other person in order to ensure that the trust deed complies with this Act and the regulations. 15
- (3) The deed amending the trust deed—
- (a) has effect despite there being no consent or agreement of the NBDT or any other person; and 20
 - (b) must be treated for all purposes as if it were authorised to be made and were made in accordance with the provisions of the trust deed before the amendment was made; and
 - (c) applies despite any defect in its form or mode of execution. 25
- (4) **Subsection (3)** applies despite there being no power of variation in the trust deed or anything to the contrary in the trust deed or other enactment, rule of law, or agreement. 30
- Compare: 1989 No 157 s 157ZD

Protection from liability and indemnity

79 Protection from liability for Bank, etc

- (1) This section applies to the Bank, every director, officer, and employee of the Bank, and any person appointed by the Bank under **section 50(1)(b)**. 35
- (2) No person to whom this section applies is liable for an act done or omitted to be done in the performance or exercise in good

faith of the person's functions, duties, or powers under this Act.

- (3) This section and **section 80** are subject to clauses 29 and 30 of Schedule 2 of the Insurance (Prudential Supervision) Act 2010 (as applied to this Act by **section 51(3)**) and which provide for immunities in relation to the exercise of entry and search powers. 5

Compare: 1989 No 157 s 179

80 Indemnity for Bank, etc

- (1) The Crown indemnifies the persons referred to in **section 79(1)** for any liability that arises from the exercise or purported exercise of, or omission to exercise, any power conferred by this Act unless it is shown that the exercise, or purported exercise of, or omission to exercise, the power was in bad faith. 10 15
- (2) Any money required for the purposes of this section must be paid out of a Crown Bank Account without further authority than this section.
- (3) The indemnity conferred by **subsection (1)** extends to legal costs incurred in defending a proceeding. 20
- (4) Within 12 sitting days after making a payment under this section, the Minister must present to the House of Representatives a report that contains the details of the circumstances giving rise to the liability of the Crown, the amount of the payment, the person to whom the payment was made, and any other relevant matters. 25

Compare: 1989 No 157 s 179A

Other miscellaneous provisions

81 Notice and service of documents

- (1) Unless this Act provides otherwise, if a provision of this Act requires or authorises a notice, document, or notification to be given to a person, the notice, document, or notification must be in writing and must,— 30
- (a) if given to an individual, be given—
- (i) by delivering it personally or by an agent to the person; or 35

- (ii) by sending it by post addressed to the person at the person's usual or last known place of residence or business; or
- (iii) by sending it by fax or email to the person's fax number or email address provided by the person for the purpose; or 5
- (b) if given to a company within the meaning of the Companies Act 1993, be served in a manner provided for in section 387(1) or 388 of that Act; or
- (c) if given to an overseas company, be served in a manner provided for in section 389(1) or 390 of the Companies Act 1993; or 10
- (d) if given to any other body corporate, be served in a manner in which it could be given or served if the body corporate were a company within the meaning of the Companies Act 1993. 15
- (2) In the absence of proof to the contrary, a notice, document, or notification given to an individual must be treated,—
- (a) in the case of delivery by post under **subsection (1)(a)(ii)**, as having been given or provided to the person when it would have been delivered in the ordinary course of post; and, in proving the delivery, it is sufficient to prove that the letter was properly addressed and posted: 20
- (b) in the case of delivery by fax or email under **subsection (1)(a)(iii)**, as having been given or provided to the person on the second working day after the day on which it is sent. 25
- (3) Section 392 of the Companies Act 1993 applies for the purposes of **subsection (1)(b) to (d)**. 30
- (4) If a person is absent from New Zealand, a notice, document, or notification given to the person's agent in New Zealand in accordance with **subsection (1)** must be treated as having been given or provided to the person.
- (5) If the person has died, the notice, document, or notification may be given, in accordance with **subsection (1)**, to his or her personal representative. 35

Compare: 2010 No 111 s 229

82 Power to amend, revoke, or replace notices, etc

- (1) The Bank may amend, revoke, or replace any notice, direction, or consent that it is entitled to give under this Act or the regulations.
- (2) Any requirement relating to the giving of a notice, direction, or consent applies also to the amendment, revocation, or replacement of the notice, direction, or consent. 5

83 Obligations under this Act not limited

An obligation imposed on a person by any other Act or instrument does not prevent or excuse the person from complying with any provision of this Act or the regulations or with any direction, notice, or condition given or imposed under that provision. 10

Compare: 1989 No 157 s 172

84 Register of licensed NBDTs

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- (1) The Bank must keep a public register of licensed NBDTs.
- (2) The Bank must determine the form of the register and may amend the form from time to time as it considers necessary.
- (3) The Bank must take all reasonable steps to ensure that the information contained in the public register is available to members of the public at all reasonable times. 20

Compare: 1989 No 157 s 69

85 Rating agencies

- (1) The Bank may approve a person as a rating agency for the purposes of this Act. 25
- (2) In deciding whether to approve a person as a rating agency, the Bank must have regard to the following:
 - (a) the independence of the rating agency:
 - (b) the adequacy of resources available to the rating agency:
 - (c) the credibility and objectivity of the rating agency's methodology: 30
 - (d) the consistency and comparability of the rating agency's ratings when assessed against ratings industry practice:

- (e) the adequacy of the rating agency's disclosure of information, including information about its processes, experience, and ownership:
- (f) relevant international standards, codes, and recommended practices relating to the ratings industry. 5
- (3) The Bank may, at any time, review the approval of a person as a rating agency, and in conducting the review the Bank must have regard to the matters in **subsection (2)**.
- (4) If, after conducting the review, the Bank considers that the person should no longer be an approved rating agency, it may revoke the approval. 10
- (5) On request by an approved rating agency, the Bank may revoke its approval, without the need for a prior review.
- (6) A credit rating given by an approved credit agency does not cease to be a credit rating merely as a consequence of the credit rating agency ceasing to be an approved credit rating agency. 15
- (7) The Bank must publish and keep up to date a list of approved rating agencies on an Internet site, maintained by or on behalf of the Bank, that is publicly accessible at all reasonable times. 20
Compare: 1989 No 157 s 157J

Review of Act

86 Bank to review and report on operation of this Act

- (1) The Bank must, no later than 9 September 2013 (which is 5 years after the date on which section 157ZZ of the Reserve Bank of New Zealand Act 1989 came into force),— 25
 - (a) review the operation of this Act; and
 - (b) prepare a report on the review for the Minister.
- (2) The report on the review must include recommendations to the Minister on whether any amendments to this Act are necessary or desirable. 30
- (3) As soon as practicable after receiving the report, the Minister must present a copy of it to the House of Representatives.
Compare: 1989 No 157 s 157ZZ

*Transitional provisions***87 Transitional arrangements for pre-existing NBDTs**

- (1) This section applies to every NBDT that—
- (a) was a deposit taker within the meaning of section 157C of the Reserve Bank of New Zealand Act 1989 immediately before this Act comes into force; and 5
 - (b) is an NBDT within the meaning of this Act on the date on which this Act comes into force.
- (2) In this section, the **transition period** means, in relation to an NBDT, the period between the date on which this Act comes into force and the earliest of the following: 10
- (a) the date that is 1 year after the date on which this Act comes into force;
 - (b) the date on which the NBDT becomes a licensed NBDT;
 - (c) the date on which the NBDT ceases to be an NBDT. 15
- (3) During the transition period, the following apply to every NBDT to whom this section applies as if the NBDT were a licensed NBDT:
- (a) this Act, except **section 10** (licensing requirements), **section 41** (directors' obligation to notify suitability concerns), **section 42** (consent for change of ownership), and **section 59** (Bank's power to remove and appoint directors): 20
 - (b) the Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010: 25
 - (c) the Deposit Takers (Liquidity Requirements) Regulations 2010:
 - (d) the Reserve Bank of New Zealand Act 1989.

88 Exemptions continue in force

- (1) An exemption granted under section 157G of the Reserve Bank of New Zealand Act 1989 that is in force immediately before this section comes into force— 30
- (a) continues in force as if it were granted under **section 69** of this Act; and
 - (b) may be amended or revoked as if it were granted under that section. 35

- (2) A reference in an exemption to any provision in Part 5D of the Reserve Bank of New Zealand Act 1989 (ie, to any of sections 157A to 157ZZ of that Act) must be taken as a reference to a provision in this Act that corresponds (with or without modification) to that provision. 5

Compare: 2011 No 6 s 54

FMA to consult with Bank before recommending statutory management of NBDT

89 Amendment to Corporations (Investigation and Management) Act 1989 10

- (1) This section amends the Corporations (Investigation and Management) Act 1989.
- (2) Section 8(3) is amended by inserting “, non-bank deposit taker licensed under the **Non-bank Deposit Takers Act 2011**,” after “licensed insurer”. 15

Amendments to requirements to apply as registered financial service provider

90 Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008

- (1) This section amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008. 20
- (2) Section 15(2) is amended by adding “, unless otherwise agreed by the relevant licensing authority and the Registrar”.
- (3) Schedule 2 is amended by adding the following item to the table: 25

Reserve Bank of New Zealand	Licensed NBDTs	Non-bank Deposit Takers Act 2011
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Consequential amendments

91 Consequential amendments in Schedules 2 and 3

- (1) The Reserve Bank of New Zealand Act 1989 is consequentially amended in the manner set out in **Schedule 2**.
- (2) Other enactments are consequentially amended in the manner set out in **Schedule 3**. 30

Schedule 1**s 74****Material incorporated by reference****1 Effect of material incorporated by reference**

- (1) This schedule applies to material incorporated by reference in regulations made under this Act. 5
- (2) Material incorporated by reference in regulations has legal effect as part of the regulations.

2 Relevant version of material incorporated by reference

Where material is incorporated by reference in regulations, the version of the material incorporated that has legal effect as part of the regulations at a particular time (the **relevant version**) is,— 10

- (a) if the regulations do not specify a particular version of the material, the version of the material as it is at that time, regardless of whether it has been amended or replaced since it was incorporated by reference into the regulations; and 15
- (b) if the regulations specify a particular version of the material, that version.

3 Effect of expiry or revocation of material incorporated by reference 20

If material incorporated by reference in regulations expires or is revoked,—

- (a) if the regulations do not specify a particular version of the material, the material ceases to have legal effect as part of the regulations from the date of its expiry or revocation; and 25
- (b) if the regulations specify a particular version of the material, that version of the material continues to have legal effect as part of the regulations, unless or until regulations provide otherwise. 30

4 Proof of material incorporated by reference

- (1) A copy of the relevant version of any material incorporated by reference in the regulations must be—

- (a) certified as a correct copy of the material by the Governor; and
- (b) retained by the Governor.
- (2) The production in proceedings of a certified copy of the material is, in the absence of evidence to the contrary, sufficient evidence of the incorporation in the regulations of the material. 5
- 5 Access to material incorporated by reference**
- (1) The Governor—
- (a) must make material incorporated by reference into regulations available for inspection during working hours free of charge at the head office of the Bank and at any other places that the Governor determines are appropriate; and 10
- (b) must make copies of the material available for purchase at a reasonable price; and 15
- (c) may make copies of the material available in any other way that the Governor considers appropriate in the circumstances (for example, on an Internet site); and
- (d) must give notice in the *Gazette* stating— 20
- (i) that the material is incorporated in the regulations, and the date on which the regulations were made; and
- (ii) if a version of the material is specified, the version; and 25
- (iii) that the material is available for inspection during working hours, free of charge, and the location of the place or places at which it can be inspected; and
- (iv) that copies of the relevant version of the material can be purchased and the location of the place or places at which they can be purchased; and 30
- (v) if copies of the material are available under **paragraph (c)**, that the material is available in other ways, and giving the details of how and where it can be accessed and obtained. 35
- (2) A failure to comply with this clause does not invalidate regulations that incorporate material by reference.

6 Acts and Regulations Publication Act 1989 not applicable to material incorporated by reference

The Acts and Regulations Publication Act 1989 does not apply to material incorporated by reference in regulations or to any amendment to, or replacement of, that material. 5

7 Application of Regulations (Disallowance) Act 1989 to material incorporated by reference

(1) Nothing in section 4 of the Regulations (Disallowance) Act 1989 requires material that is incorporated by reference in regulations to be laid before the House of Representatives. 10

(2) The Regulations (Disallowance) Act 1989, apart from the modification to the application of section 4 of that Act made by **subclause (1)** of this clause, applies to regulations that incorporate material by reference.

Schedule 2 **s 91(1)**
**Consequential amendments to Reserve
Bank of New Zealand Act 1989**

Section 39

Insert “, the **Non-bank Deposit Takers Act 2011**,” after “of this Act”.

Section 41

Subsection (1)(c): repeal and substitute:

“(c) the Insurance (Prudential Supervision) Act 2010; and

“(d) the **Non-bank Deposit Takers Act 2011**.” 10

Subsection (2): add:

“(c) the **Non-bank Deposit Takers Act 2011**.”

Section 46(1)(b)

Omit “or of a deposit taker as defined in section 157C” and substitute
“or of a licensed NBDT as defined in the **Non-bank Deposit Takers
Act 2011**”.

Section 49(2)(h)(iii)

Omit “or a deposit taker as defined in section 157C” and substitute
“or a licensed NBDT as defined in the **Non-bank Deposit Takers
Act 2011**”.

Section 50(2)(d)(iii)

Omit “or a deposit taker as defined in section 157C” and substitute
“or a licensed NBDT as defined in the **Non-bank Deposit Takers
Act 2011**”.

Section 51

Subsection (5): omit “under either of” and substitute “under any of”.

Subsection (5): add:

“(c) the **Non-bank Deposit Takers Act 2011**.”

Subsection (9): add:

“(c) the **Non-bank Deposit Takers Act 2011**.” 30

Section 53(3)(f)(iii)

Omit “or a deposit taker as defined in section 157C” and substitute “or a licensed NBDT as defined in the **Non-bank Deposit Takers Act 2011**”.

Section 58(b)

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Insert “or a licensed NBDT (as defined in the **Non-bank Deposit Takers Act 2011**)” after “licensed insurer”.

Section 68B(1)

Omit “and Parts 5B to 5D” and substitute “, Parts 5B and 5C, and the **Non-bank Deposit Takers Act 2011**”.

10

Section 81AA(3)

Repeal and substitute:

“(3) **Schedule 1 of the Non-bank Deposit Takers Act 2011** applies to any material incorporated by reference in an Order in Council made under section 81 of this Act as if references in that schedule to regulations were references to an Order in Council made under section 81.”

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Section 159

Subsection (1)(da): repeal.

Subsection (1): insert after paragraph (e):

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“(ea) the **Non-bank Deposit Takers Act 2011**.”.

Section 162AB(1)

Paragraph (a): omit “and Parts 5B to 5D and under” and substitute “, Parts 5B and 5C, and under the **Non-bank Deposit Takers Act 2011** and”.

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Paragraph (b): omit “and Parts 5B to 5D and under” and substitute “, Parts 5B and 5C, and under the **Non-bank Deposit Takers Act 2011** and”.

Part 5D

Repeal.

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Schedule 3

Repeal.

Schedule 4

Repeal.

Schedule 3	s 91(2)
Consequential amendments to other enactments	
Part 1	
Amendments to other Acts	
	5
Financial Advisers Act 2008 (2008 No 91)	
Section 5: definition of approved rating agency : omit “Reserve Bank of New Zealand Act 1989” and substitute “ Non-bank Deposit Takers Act 2011 ”.	
	10
Financial Service Providers (Registration and Dispute Resolution) Act 2008 (2008 No 97)	
Section 5: repeal paragraph (b) and substitute:	
“(b) acting as an NBDT, as defined in the Non-bank Deposit Takers Act 2011 :”.	
	15
Securities Trustees and Statutory Supervisors Act 2011 (2011 No 10)	
Definition of deposit taker in section 4(1): repeal and substitute:	
“ deposit taker means an NBDT as defined in section 5 of the Non-bank Deposit Takers Act 2011 ”.	
Paragraph (f) of the definition of issuer obligation in section 4(1):	
repeal and substitute:	
“(f) the Non-bank Deposit Takers Act 2011 :”.	
Paragraph (f) of the definition of licensee obligation in section 4(1):	
repeal and substitute:	
“(f) the Non-bank Deposit Takers Act 2011 :”.	
	25
Part 2	
Amendments to regulations	
Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010 (SR 2010/167)	
Enacting statement: omit “sections 157B, 157K, 157S, 157V, and 157ZY of the Reserve Bank of New Zealand Act 1989” and substitute	
“ sections 23, 32, 35, and 73 of the Non-bank Deposit Takers Act 2011 ”.	
	30

Part 2—*continued***Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010 (SR 2010/167)—*continued***

Enacting statement: omit “in accordance with section 157E and taking into account the principles in section 157F” and substitute “in accordance with **section 75** and taking into account the principles in **section 8**”.

Definition of **Act** in regulation 3(1): repeal and substitute: 5
 “**Act** means the **Non-bank Deposit Takers Act 2011**”.

Regulation 3(1): insert in their appropriate alphabetical order:
 “**deposit taker** means a licensed NBDT as defined in the Act
 “**holding company** means a company that has subsidiaries;
 and a company is another company’s holding company if, but 10
 only if, that other company is its subsidiary”.

Definition of **asset sale with recourse** in regulation 3(1): omit
 “member of the borrowing group” in each place where it appears
 and substitute in each case “guaranteeing subsidiary”.

Definition of **credit rating** in regulation 3(1): omit “section 157I” 15
 and substitute “**section 22**”.

Definition of **direct credit substitute** in regulation 3(1): omit “mem-
 ber of the borrowing group” in each place where it appears and sub-
 stitute in each case “guaranteeing subsidiary”.

Definition of **forward asset purchase** in regulation 3(1): omit 20
 “member of the borrowing group” in each place where it appears
 and substitute in each case “guaranteeing subsidiary”.

Definition of **group member** in regulation 3(1): repeal.

Definition of **related party** in regulation 3(1): omit “in regulation 4”
 and substitute “in **section 6** of the Act”. 25

Definition of **substantial interest** in regulation 3(1): repeal.

Regulation 4: repeal.

Regulation 5(2)(a): omit “despite regulation 4(2)” and substitute “de-
 spite the definition of related party”.

Regulation 6: omit “section 157I(a)” and substitute “**section** 30
22(1)(a)”.

Regulation 10(3)(e): omit “member of the borrowing group’s” and
 substitute “guaranteeing subsidiary’s”.

Part 2—*continued***Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010 (SR 2010/167)—*continued***

Regulation 14(5): omit “within the meaning of section 5 of the Companies Act 1993”.

Regulation 16(2): omit “members of the borrowing group” in each place where it appears and substitute in each case “guaranteeing subsidiaries”. 5

Regulation 17(2)(a)(ii): omit “members of the borrowing group” and substitute “guaranteeing subsidiaries”.

Regulation 19(2): omit “member of the borrowing group” and substitute “guaranteeing subsidiary”.

Regulation 20: omit “member of the borrowing group” in each place where it appears and substitute in each case “guaranteeing subsidiary”. 10

Regulation 23(2): omit “section 157ZD” and substitute “**section 78**”.

Regulation 25(1): omit “member of its borrowing group” and substitute “guaranteeing subsidiary”. 15

Regulation 26(1)(b): omit “member of the borrowing group” and substitute “guaranteeing subsidiary”.

Deposit Takers (Liquidity Requirements) Regulations 2010 (SR 2010/351) 20

Enacting statement: omit “section 157Z of the Reserve Bank of New Zealand Act 1989” and substitute “**section 38 of the Non-bank Deposit Takers Act 2011**”.

Enacting statement: omit “section 157E” and substitute “**section 75**”. 25

Enacting statement: omit “section 157F” and substitute “**section 8**”.

New regulation 2A: insert after regulation 1:

“2A Interpretation

In these regulations, **deposit taker** means a licensed NBDT as defined in the **Non-bank Deposit Takers Act 2011**.” 30