

# **Non-bank Deposit Takers Bill**

Government Bill

As reported from the Finance and  
Expenditure Committee

## **Commentary**

### **Recommendation**

The Finance and Expenditure Committee has examined the Non-bank Deposit Takers Bill and recommends that it be passed with the amendments shown.

### **Introduction**

The bill seeks to implement the final components of a new regulatory regime for non-bank deposit takers (NBDTs). It would incorporate the prudential requirements already imposed under Part 5D of the Reserve Bank of New Zealand Act 1989, and introduce new measures covering the licensing of NBDTs, suitability assessments for directors and senior officers, restrictions on changes of ownership, and new powers for the Reserve Bank to detect and manage instances of distress or failure of NBDTs.

This commentary covers the main amendments that we recommend to the bill. It does not cover minor or technical amendments.

## Commencement

We recommend amending clause 2 to delay by a year some of the consequential amendments to the Financial Service Providers (Registration and Dispute Resolution) Act 2008, to allow the necessary transitional period for NBDTs to become licensed.

## Definition of non-bank deposit taker

We note that the bill proposes a broad definition of NBDT in order to allow for potential changes as a result of market innovation, while leaving scope for some entities to be exempted from the full regime. Clause 5 defines an NBDT as a person who offers debt securities to the public in New Zealand and carries on the business of borrowing and lending money, or providing financial services, or both. The bill acknowledges that this definition might at times be too broad or too narrow by including a regulation-making power in clause 72 that would allow entities to be declared to be, or not to be, NBDTs.

We recommend the following amendments to clause 5 to refine the framework for determining who is, and is not, an NBDT. Our recommended amendments to clause 72 are discussed later in this commentary.

We recommend amending clause 5(1)(c) to reflect more accurately the policy intention that, if a person were to become an NBDT after the bill came into force, the person would remain an NBDT until all the debt securities it had issued were repaid. In the bill as introduced, the person would remain an NBDT only until debt securities issued since the bill came into force had been repaid.

Similarly, we recommend amending clause 5(1)(d) so that entities that were deposit takers at the time of the bill's introduction would remain NBDTs until all debt securities they had issued had been repaid. The new definition would not capture entities that were not deposit takers under Part 5D of the Reserve Bank Act before the bill's introduction (unless they met another aspect of the definition). We note that five entities have been so declared.

In some cases an entity might be an NBDT under clause 5(1) but also be captured by clause 5(2), which specifies entities that are not NBDTs. To avoid confusion, we recommend an amendment to clause 5(2) to make it clear that a person listed in this clause would not be an NBDT even if they also fell under the definition of NBDT in clause

5(1). For example, an entity that was a deposit taker because it had debt securities unpaid would cease to be a deposit taker if it went into receivership (provided it was not offering debt securities to the public in New Zealand).

### **Directions about government policy objectives**

We recommend the insertion of a new clause, 8A, to carry over into this legislation section 68B of the Reserve Bank of New Zealand Act, which allows the Minister to direct the Bank to have regard to a government policy related to the Bank's functions. We consider it appropriate to keep all the law pertaining to NBDTs in one piece of legislation.

### **Applications for licence**

Clause 13(2)(d) sets out particular considerations that the Reserve Bank must consider in determining an application from an overseas person. We believe the provision as introduced would set a higher than necessary standard as it would require all aspects of the law and regulatory requirements in the home jurisdiction to be as good as or better than those in New Zealand. We recommend amending it to create a broader test: that the Reserve Bank must have regard to whether the specified aspects of the law and regulatory requirements of the applicant's home jurisdiction are satisfactory.

### **Conditions of licence**

In clause 17, we recommend adding an express obligation for NBDTs to comply with the conditions of their licence. This would mean that references to a "failure to comply with the Act" would automatically include a failure to comply with a condition of licence.

### **Changing conditions of licence**

In the bill as introduced, clause 19 sets out the consultation procedure to be followed before the Reserve Bank could impose any conditions on a licence, or add new conditions, or amend or revoke existing conditions. We recommend amending clause 19 so that the procedures would not apply to the conditions initially imposed on a licence, but only to changes made subsequently to them. We understand that this

would accord with the original policy intention, which was that consultation would be required only for changes subsequent to the initial licensing process.

### **Cancellation of licence**

We recommend amending clause 20 so that breaching a condition of licence would also be a ground for cancelling a licence.

We also recommend amendments to clause 21 to require the Reserve Bank to consult the trustee of an NBDT when it intends to cancel the NBDT's licence for breach of its trust deed, and to notify the trustee of the cancellation. We consider such consultation and notification appropriate because the trustee is the NBDT's supervisor.

### **Governance requirements**

Clause 25 is intended to prevent companies including provisions in their constitutions that would allow directors to act other than in the best interests of the company. We recommend an amendment to this clause to make it clear that it also applies to directors of subsidiaries, wholly owned subsidiaries, and joint venture arrangements.

### **Consent for changes of ownership**

We recommend amending clause 42(1)(a) so that the wording reflects more clearly the approach in section 77A of the Reserve Bank Act, and seeks to achieve the policy outcome sought. The aim is that prior consent be sought for any transaction that would result in a person increasing their level of influence above a specified level, or above the level previously authorised.

### **Reports for monitoring and enforcement purposes**

Under clause 48, an NBDT could be required to provide a report on various matters to help the Reserve Bank investigate its compliance. Sub-clause (2) would require the Reserve Bank to notify the NBDT as to why it wanted the report. We consider this sub-clause unnecessary, as sub-clause (1) would require that the report be for the purposes of investigating non-compliance. The comparable section in the Reserve Bank Act, section 157ZI, does not require the Reserve

Bank to state its reasons for requiring a report. We therefore recommend that sub-clause 48(2) be deleted.

### **Directions by Reserve Bank**

Clause 55 in the bill as introduced would allow the Reserve Bank to give various directions to NBDTs and associated persons. A wider range of directions could be given to NBDTs than to associated persons. We recommend amendments to clause 55 so that the same range of directions could be given to both.

We also recommend amendments to sub-clauses (2)(g) and (3)(g) to ensure that an entity would have the power to comply with a direction by the Reserve Bank to replace its auditor.

### **Removal and appointment of directors**

While clause 59 in the bill as introduced would allow the Reserve Bank to appoint a new director when one has been removed, we consider that it might be desirable in some cases to appoint an additional director without first removing an existing one. We therefore recommend amending clause 59 to allow the Reserve Bank to appoint additional directors.

We also recommend removing the reference to 7 working days' notice in clause 60. This would mean that the period of notice given by the Reserve Bank to remove or appoint a director must be reasonable in the circumstances. This amendment would maintain consistency with the equivalent provision in the Reserve Bank Act.

In clause 60(1)(a), we recommend adding trustees to the list of those who must be notified regarding the removal of a director.

### **Appeal against Reserve Bank decisions**

Clause 61(1) in the bill as introduced proposes giving directors or senior officers the right to appeal any decision by the Reserve Bank regarding their suitability. For reasons of fairness, we recommend adding an appeal right for those who were proposed as a director or senior officer but not approved by the Reserve Bank. We recommend deleting the specified right to appeal concerning information on which a decision regarding suitability was made (paragraph (b) of clause 61(1) in the bill as introduced); we consider this paragraph to

be unnecessary as its effect is caught by paragraph (a). We recommend the deletion of clause 61(1), and the insertion of new clause 6(1) which would give effect to our recommendations in this area.

## **Offences**

We recommend amendments to clauses 63 and 68 to align them more closely with the Criminal Procedure Act 2011. This entails consequential drafting amendments of a purely technical nature throughout the bill, replacing “tiers of offences” with “levels of penalties”, and reversing the order of the four levels of penalties.

## **Regulation-making power**

We recommend amending clause 72 to allow the Governor General (on the advice of the Minister and in accordance with the recommendations of the Reserve Bank) to specify additional detail in regulations as to the circumstances in which a person (or class of persons) is, or is not, an NBDT. We consider that this approach would provide useful flexibility to respond to market changes.

The amendment we recommend to clause 72(1)(c) would mean that banks, local authorities, and the Crown could not be declared to be NBDTs.

We also recommend the insertion of an additional sub-clause, 72(3), which would expressly prevent the Reserve Bank from recommending a regulation declaring a security to be a debt security unless satisfied that it was similar in substance to a debt security. This would provide an in-substance test to ensure that some forms of investment vehicle were not inadvertently captured by the otherwise broad definition of debt security in clause 4(1)(b).

## **Protection of trustees**

Clause 76 would protect trustees against any civil, criminal, or disciplinary proceedings arising from the disclosure of information to the Reserve Bank in good faith. We recommend amending this clause to include any situation where the trustee disclosed information in good faith following a direction given by the Reserve Bank under clause 56.

### **Rating agencies**

We consider that subclause 85(6) is unnecessary and recommend that it be deleted.

### **Transitional provisions**

We recommend that clause 88(1) be amended to make it clear which of the existing exemptions under Part 5D of the Reserve Bank Act would be treated as class exemptions (and therefore continue to be amended and published as regulations) and which would be treated as individual exemptions (to be amended by the Reserve Bank and published in the Gazette).

We note that not all of the exemptions currently in force under Part 5D of the Reserve Bank Act would need to continue under the bill. For example, there is currently an exemption for NBDTs in receivership or liquidation; this exemption would not be required under the bill as such entities would not fall within the bill's definition of NBDT. We therefore recommend revoking those exemptions, as set out in new clause 92.

### **Material incorporated by reference**

We recommend inserting new clause 3A into Schedule 1 to exclude material that is made or issued in New Zealand under the authority of an Act, and publicly available, from the need to be certified and made available by the Governor of the Reserve Bank. We believe it is necessary for the Governor to certify correct copies and make them available only if they originate outside New Zealand.

## **Appendix**

### **Committee process**

The Non-bank Deposit Takers Bill was referred to the Finance and Expenditure Committee of the 49th Parliament on 10 August 2011. It was reinstated as business before the 50th Parliament on 21 December 2011.

The closing date for submissions was 6 October 2011. We received and considered nine submissions from interested groups and individuals. We heard four submissions.

We received advice from the Reserve Bank of New Zealand.

### **Committee membership**

Todd McClay (Chairperson)

Maggie Barry

David Bennett

Dr David Clark

Hon Clayton Cosgrove

Paul Goldsmith

John Hayes

Dr Russel Norman

Hon David Parker

Rt Hon Winston Peters

Hon Dr Nick Smith

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**Non-bank Deposit Takers Bill**

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~

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*Hon Bill English*

## **Non-bank Deposit Takers Bill**

Government Bill

### **Contents**

		Page
1	Title	5
2	Commencement	6
<b>Part 1</b>		
<b>Preliminary provisions</b>		
3	Purpose	6
4	Interpretation	6
5	NBDT defined	11
6	Related party defined	13
7	Bank's function under this Act	14
8	Principles to take into account when exercising powers	14
8A	Bank to have regard to directions about government policy objectives	15
9	Act binds the Crown	15
<b>Part 2</b>		
<b>Licensing and prudential regulation</b>		
Subpart 1—Licensing		
10	NBDTs to be licensed	16
11	No holding out	16
<i>Process for obtaining licence</i>		
12	Application for NBDT licence	16
13	Determining applications for licence	17
14	Requirements of suitability notices	18
15	Dealing with suitability notices	18
16	Grant of licence	19

## Non-bank Deposit Takers Bill

---

	<i>Conditions of licence</i>	
17	Licence may be subject to conditions	20
18	Kinds of licence conditions and their effect	20
19	Changing or removing conditions	21
	<i>Cancellation of licence</i>	
20	Grounds for cancelling licence	21
21	Procedure for cancelling licence	22
	Subpart 2—Prudential obligations	
	<i>Credit ratings</i>	
22	Licensed NBDTs to have current credit rating	22
23	Regulations relating to credit ratings	23
	<i>Governance requirements</i>	
24	Requirement for independent directors	23
25	Certain provisions in governing document of no effect	24
	<i>Risk management programmes</i>	
26	Licensed NBDTs to have and comply with risk management programme	24
27	Trustee role in risk management programmes	25
28	Risk management programmes to be reviewed	26
	<i>Minimum capital requirements</i>	
29	Regulations relating to minimum capital requirements	26
30	Ensuring minimum capital requirements included in trust deeds	27
31	Licensed NBDTs to maintain not less than minimum capital prescribed	27
	<i>Capital ratio requirements</i>	
32	Regulations relating to capital ratios	28
33	Ensuring capital ratio included in trust deeds	28
34	Licensed NBDTs to maintain required capital ratio	29
	<i>Restrictions on related party exposures</i>	
35	Regulations relating to exposure to related parties	29
36	Ensuring maximum limit on related party exposures included in trust deeds	30
37	Licensed NBDT not to exceed maximum limit on related party exposures	30
	<i>Liquidity requirements</i>	
38	Regulations relating to liquidity requirements	30

**Non-bank Deposit Takers Bill**

---

39	Ensuring liquidity requirements included in trust deeds	31
40	Licensed NBDTs to comply with liquidity requirements	31
	Subpart 3—Other obligations	
	<i>Notifying Bank of suitability concerns</i>	
41	Directors’ obligation on becoming aware of suitability concerns	32
	<i>Consent for changes of ownership</i>	
42	Bank’s consent for change of ownership	32
	<i>Additional obligations of trustees to Bank</i>	
43	Bank may require trustee to attest to licensed NBDT’s compliance	34
44	Trustee to report to Bank on licensed NBDT non-compliance	34
45	Trustees to disclose certain information about licensed NBDTs to Bank	34
	<b>Part 3</b>	
	<b>Monitoring and enforcement</b>	
	<i>Provision of information to Bank</i>	
46	Bank may require information, etc, from licensed NBDT	35
47	Bank may require information, etc, from associated persons	36
48	Bank may require reports for investigation purposes	37
49	Bank may require trustee to provide information about licensed NBDTs	38
	<i>Powers where offence suspected</i>	
50	Bank may require information if offence suspected	38
51	Power to enter and search	39
	<i>Provisions about information disclosed</i>	
52	Privileges where information required to be disclosed	39
53	Confidentiality of information	41
54	Application of Official Information Act 1982	42
	<i>Power to give directions</i>	
55	Bank directions to licensed NBDTs and associated persons	43
56	Bank directions to trustees	44
57	Miscellaneous matters relating to directions	45
58	Obligation to comply with directions	45

## Non-bank Deposit Takers Bill

---

	<i>Power to remove or appoint directors</i>	
59	Bank's powers to remove or appoint directors of licensed NBDTs and associated persons	46
60	Procedures for removal and appointment of directors	48
	<i>Appeals relating to directors and senior officers</i>	
61	Appeal against Bank decisions on suitability	49
62	Appeal to Court of Appeal on question of law	50
	<i>Offences</i>	
63	Definitions of levels of penalties	51
64	General offences	51
65	Offence to disclose giving of direction or notice	52
66	Defence to charge under Act	52
67	Liability of directors for offences of NBDTs and associated persons	53
68	Limitation period	54
68A	Provision applying before parts of Criminal Procedure Act 2011 in force	54
	<b>Part 4</b>	
	<b>Miscellaneous provisions</b>	
	<i>Exemptions</i>	
69	Exemptions from Act and regulations	54
70	Status and publication of exemptions	55
71	Effect of exemption	56
	<i>Regulations</i>	
72	Regulations	56
73	Extension of regulation-making powers relating to prudential obligations	57
74	Material incorporated by reference in regulations	58
75	Bank to consult before recommending regulations	58
	<i>Trustees and trust deeds</i>	
76	Protection of trustees	59
77	Amendments to trust deeds treated as authorised	59
78	Trustees may execute amendment to trust deeds	59
	<i>Protection from liability and indemnity</i>	
79	Protection from liability for Bank, etc	60
80	Indemnity for Bank, etc	61
	<i>Other miscellaneous provisions</i>	
81	Notice and service of documents	61

82	Power to amend, revoke, or replace notices, etc	63
83	Obligations under this Act not limited	63
84	Register of licensed NBDTs	63
85	Rating agencies	63
	<i>Review of Act</i>	
86	Bank to review and report on operation of this Act	64
	<i>Transitional provisions</i>	
87	Transitional arrangements for pre-existing NBDTs	65
88	Exemptions continue in force	65
88A	Transitional references in Reserve Bank of New Zealand Act 1989	66
	<i>FMA to consult with Bank before recommending statutory management of NBDT</i>	
89	Amendment to Corporations (Investigation and Management) Act 1989	67
	<i>Consequential and other amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008</i>	
90	Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008	67
	<i>Consequential amendments and revocations</i>	
91	Consequential amendments in Schedules 2 and 3	67
92	Consequential revocation of regulations	68
	<b>Schedule 1</b>	69
	<b>Material incorporated by reference</b>	
	<b>Schedule 2</b>	73
	<b>Consequential amendments to Reserve Bank of New Zealand Act 1989</b>	
	<b>Schedule 3</b>	76
	<b>Consequential amendments to other enactments</b>	

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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**

- (1) This Act comes into force on ~~4 June 2012~~ 1 October 2012, except as provided in **subsection (2)**.
- (2) **Subsections (1A) and (3) of section 90** come into force on **1 October 2013**.

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## 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 10
- (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**

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- (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 20
- (b) a person that has a direct or indirect qualifying interest of ~~in~~ in 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 25
- (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 30

**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 35

**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 5

**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 10

**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— 15
  - (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 20
  - (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 25

**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: 30
- (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; 35
  - 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

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**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—

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- (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

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**level 1 penalty** means the penalty set out in **section 63(4)**

**level 2 penalty** means the penalty set out in **section 63(3)**

**level 3 penalty** means the penalty set out in **section 63(2)**

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**level 4 penalty** means the penalty set out in **section 63(1)**

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

**licensed NBDT** means—

- (a) an NBDT that has been granted a licence and whose licence has not been cancelled; or

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- (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

**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

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

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**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

**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  
(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**

**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  
(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,—

- (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  
(c) does not include any class or classes of persons declared by regulations not to be senior officers for the purposes of this Act

**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)

**suitability concerns** means the 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

**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**

**tier 2 offence** has the meaning set out in **section 63** 15

**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 20

**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 25

**trust deed**, in relation to an NBDT, means a trust deed (as defined in the Securities Act 1978) that is required, by that Act or pursuant to an exemption granted under it, in relation to debt securities (as defined in this Act) offered to the public in New Zealand by or on behalf of the NBDT 30

**trustee**, in relation to an NBDT, means a trustee (as defined in the Securities Act 1978) that is required, by that Act or pursuant to an exemption granted under it, in relation to debt securities (as defined in this Act) offered to the public in New Zealand by or on behalf of the NBDT 35

**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
- (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:
  - (ii) on a proposal that affects rights attached to the security that confers the voting right: 10
  - (iii) on a proposal to put the body into liquidation or voluntary administration:
  - (iv) on a proposal for the disposal of the whole, or a material part, of the property, business, or undertaking of the body: 15
  - (v) during the liquidation, receivership, voluntary administration, bankruptcy, or statutory management of the body; and
- (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. 20

(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. 25

~~(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.~~ 30

~~Compare: 1989 No 157 ss 2(1), 157B~~

**5 NBDT defined** 35

- (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
- (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 made under **section 72(1)(c)** to be an NBDT for the purposes of this Act: 5
- (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:~~ 10
- (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~~ 15
- (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, after this Act comes into force, any of those debt securities remain unpaid:~~ 20
- (c) a person that—
- (i) is, or has been at any time since this Act came into force, an NBDT; and 25
- (ii) has debt securities that were issued to the public in New Zealand and that remain unpaid:
- (d) a person that—
- (i) was a deposit taker (as defined in section 157C of the Reserve Bank of New Zealand Act 1999) on or after 3 August 2011 but before this Act came into force; and 30
- (ii) has debt securities that were issued to the public in New Zealand before this Act came into force and that remain unpaid. 35
- (2) ~~However,~~ Despite **subsection (1)**, the following are not NBDTs:
- (a) a bank that is a registered bank under the Reserve Bank of New Zealand Act 1989:

- (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 to the public in New Zealand by, or on behalf of, the entity): 5
- (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 made under **section 72(1)(ca)** not to be an NBDT for the purposes of this Act. 10

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: 15
  - (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: 20
  - (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: 25
  - (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; 30
    - 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. 35
- (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
- (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 5
  - (ii) person B has, by any other means, 10% or more of the control of the entity; or 10
- (c) where the entity is not a company,—
  - (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. 15

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. 20

## 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: 25

- (a) the desirability of consistency in the treatment of similar institutions, regardless of matters such as their corporate form:
- (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 30
  - (ii) that depositors are responsible for assessing risk in relation to potential investments and for their own investment choices: 35
- (c) the desirability of providing to depositors adequate information to enable them to assess risk in relation to po-

tential investments and to distinguish between high-risk and low-risk NBDTs:

- (d) the desirability of sound governance of NBDTs:
- (e) the desirability of effective risk management by NBDTs: 5
- (f) the need to avoid unnecessary compliance costs:
- (g) the need to maintain competition within the NBDT sector.

Compare: 1989 No 157 s 157F

### **8A Bank to have regard to directions about government policy objectives** 10

- (1) The Minister may direct the Bank to have regard to a government policy that relates to the Bank's functions under this Act.
- (2) The Bank must have regard to every direction given by the Minister under this section. 15
- (3) The Minister must consult with the Bank before giving a direction.
- (4) A direction must—
  - (a) be set out in a written statement signed by the Minister; and 20
  - (b) as soon as practicable after it is given, be—
    - (i) presented to the House of Representatives by the Minister; and
    - (ii) published in the *Gazette*.
- (5) The Minister may not give a direction that requires the performance or non-performance of a particular act by the Bank, or by any employee or office holder of the Bank, or the bringing about of a particular result, in respect of a particular person. 25
- (6) A direction may be amended, revoked, or replaced in the same way as it may be given. 30

Compare: 1989 No 157 s 68B; 2010 No 111 s 13

## **9 Act binds the Crown**

This Act binds the Crown.

## Part 2 Licensing and prudential regulation

### Subpart 1—Licensing

#### 10 NBDTs to be licensed

- (1) Every NBDT must be licensed. 5
- (2) ~~A person commits a tier 1 offence if the person is an NBDT and is not licensed.~~
- (2) A person that is an NBDT and is not a licensed NBDT commits an offence and is liable on conviction to a level 4 penalty.
- (3) *See section 87* for the application of this section to persons who are NBDTs immediately before this section comes into force. 10

#### 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. 15
- (2) A person that is not licensed as an NBDT must not, directly or indirectly, hold out that the person is a licensed NBDT.
- (3) A person that breaches **subsection (1) or (2)** ~~commits a tier 1 offence~~ commits an offence and is liable on conviction to a level 4 penalty. 20

#### *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— 25
- (a) be in a form, and include the information, specified by the Bank; and
- (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. 30
- (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—~~
- (a) ~~the Bank is satisfied that~~ 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 5
  - (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. 10
- (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: 15
  - (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: 20
  - (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: 25
  - (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~~ satisfactory in relation to the following: 30
    - (i) prudential supervision:
    - (ii) the duties and powers of directors: 35
    - (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.
- (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 5
- 14 Requirements of suitability notices**
- (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 10  
(b) does raise 1 or more suitability concerns.
- (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 15  
(b) include any other information required by the Bank to be included in such notices.
- (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 20  
(b) if the person named is a senior officer or proposed senior officer of the NBDT, by 2 directors of the NBDT.
- (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~~ an offence and is liable on conviction to a level 3 penalty. 25
- 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. 30
- (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 35

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.

- (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. 5
- (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. 10
- (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.
- (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. 15 20
- (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 received in respect of a person in connection with an application for a licence. 25

## 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
  - (b) record the grant of the licence in the register of licensed NBDTs maintained under **section 84**. 30
- (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.

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.
- (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. 5
- (2A) Every licensed NBDT must comply with the conditions of its licence. 10
- (3) A licensed NBDT commits ~~a tier 2~~ an offence if it fails to comply with a condition of its licence and is liable on conviction to a level 3 penalty.

Compare: 2010 No 111 ss 21, 23

**18 Kinds of licence conditions and their effect** 15

- (1) The conditions of an NBDT licence may relate to any of the following:
- (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: 20
- (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: 25
- (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: 30
- (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: 35
- (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,~~ operates, or has the same effect, as an exemption granted under **section 69**.

Compare: 1989 No 157 s 73

**19 ~~Imposing, amending, and Changing or removing~~ conditions** 5

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 to do so; and 10
- (b) the notice contains, or is accompanied by, a statement of the Bank's reasons for its proposed action; and
- (c) the NBDT has a reasonable opportunity to make submissions to the Bank; and 15
- (d) the Bank has regard to those submissions.

Compare: 1989 No 157 s 74; 2010 No 111 s 22

*Cancellation of licence*

**20 Grounds for cancelling licence** 20

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
- (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 25
- (ba) that the licence holder is failing, or has failed, to comply with 1 or more conditions of its licence; or
- (c) that the requirements of **section 24** are not being met; 30  
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 35

- (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. 5

## 21 Procedure for cancelling licence

- (1) Before cancelling a licence, the Bank must send notice to the licence holder and the trustee of its intention to cancel the licence, and the notice— 10
  - (a) must explain the reasons for the proposed cancellation; and
  - (b) must specify the date by which any objections by the licence holder to the cancellation must be received by the Bank (which must be not less than 10 working days after the date of the notice). 15
- (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 the trustee; and 20
  - (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 25
    - (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. 30

## 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— 35

- (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 4 offence~~ an offence and is liable on conviction to a level 4 penalty. 5

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: 10

- (a) providing for the following matters in relation to ratings of creditworthiness required to be held by licensed NBDTs: 15
  - (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): 20
- (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* 25

#### 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 30
  - (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— 35

- (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. 5

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. 10

- (2) **Subsection (1)** applies despite anything to the contrary in section 131(4) of the Companies Act 1993 or any other Act. 15

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. 20
- (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: 25
    - (i) credit risk;
    - (ii) liquidity risk;
    - (iii) market risk;
    - (iv) operational risk; and
  - (c) set out appropriate documentation and record-keeping requirements; and 30
  - (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
  - (ii) obtaining trustee approval to amendments to the programme that are necessary to address such deficiencies; and 5
  - (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
  - (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. 15
  - (4) A licensed NBDT that breaches this section commits ~~a tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty. 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.
- (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)**. 25
- (3) If a trustee is not satisfied that the risk management programme meets the requirements in **section 26(2)**,—
  - (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 30
  - (b) the NBDT must amend the programme and resubmit it for trustee approval. 35

- (4) A licensed NBDT that breaches this section commits a ~~tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty.

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

## **28 Risk management programmes to be reviewed** 5

- (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.
- (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~~ an offence and is liable on conviction to a level 3 penalty. 15

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

### *Minimum capital requirements*

## **29 Regulations relating to minimum capital requirements** 20

- (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. 25
- (2) ~~Regulations made under this section may—~~
- (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~~ 30
- (ii) ~~the form of that capital (for example, the financial instruments that may be taken into account in calculating capital); and~~

- (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
- (c) provide that the form of the capital set out in trust deeds must be a form prescribed by the regulations. 5
- (2) Regulations made under this section may require trust deeds to set out a minimum amount of capital that licensed NBDTs, borrowing groups, or both are required to maintain.
- (3) Regulations made under this section may also do any of the following: 10
- (a) provide that the amount of minimum capital specified in trust deeds must be not less than an amount prescribed in the regulations:
- (b) require that trust deeds define capital for the purpose of calculating the minimum capital required: 15
- (c) specify a definition of capital for that purpose.

Compare: 1989 No 157 s 157P

### **30 Ensuring minimum capital requirements included in trust deeds**

- (1) Every licensed NBDT and trustee must comply with any requirement imposed by regulations made under **section 29**. 20
- (2) A licensed NBDT that breaches this section commits ~~a tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty.
- (3) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty. 25

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~~ the amount (if any) prescribed by a trust deed in compliance with regulations made under **section 29**. 30 35

- (2) A licensed NBDT that breaches this section commits a ~~tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty.

Compare: 1989 No 157 ss 157R, 157ZR(g)

### *Capital ratio requirements*

5

## **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. 10
- (2) Regulations made under this section may do 1 or more of the following:
- (a) provide for the capital ratio to be calculated in respect of either or both of the following: 15
    - (i) the licensed NBDT:
    - (ii) any borrowing group of which a licensed NBDT is part:
  - (b) provide for the capital ratio to be set at a specified minimum level for particular licensed NBDTs or classes of licensed NBDTs: 20
  - (c) prescribe the framework in accordance with which the capital ratio must be calculated:
  - (d) provide for variation (whether as to content or otherwise) of the framework to apply to particular licensed NBDTs or classes of licensed NBDTs. 25

Compare: 1989 No 157 s 157S

## **33 Ensuring capital ratio included in trust deeds**

- (1) Every licensed NBDT and trustee must comply with any requirement imposed by regulations made under **section 32**. 30
- (2) A licensed NBDT that breaches this section commits a ~~tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty.

- (3) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty.

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.** 5

- (2) A licensed NBDT that breaches this section commits ~~a tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty. 10

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

#### *Restrictions on related party exposures*

### **35 Regulations relating to exposure to related parties**

- (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. 15

- (2) Regulations made under this section may do any of the following: 20

- (a) provide that the maximum limit on exposures to related parties is relative to—  
 (i) the capital of an individual licensed NBDT; or  
 (ii) the capital of the borrowing group of which a licensed NBDT is part: 25

- (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: 30

- (c) require every licensed NBDT and trustee to ensure that trust deeds include a specified maximum limit on exposures to related parties:

- (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 35

licensed NBDT and trustee (*see* **section 78** for provisions that apply if there is no agreement).

- (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. 5

Compare: 1989 No 157 s 157V

### **36 Ensuring maximum limit on related party exposures included in trust deeds** 10

- (1) Every licensed NBDT and trustee must comply with any requirement imposed by regulations made under **section 35**.
- (2) A licensed NBDT that breaches this section commits ~~a tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty. 15
- (3) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty.

Compare: 1989 No 157 ss 157X, 157ZR(j), 157ZW(1)(c), 157ZX

### **37 Licensed NBDT not to exceed maximum limit on related party exposures** 20

- (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~~ an offence and is liable on conviction to a level 3 penalty. 25

Compare: 1989 No 157 ss 157Y, 157ZR(k)

### *Liquidity requirements*

### **38 Regulations relating to liquidity requirements** 30

- (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.

- (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:
- (a) assets that qualify as liquid assets for the purposes of the regulations: 5
  - (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:
  - (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: 10
  - (e) other measures relating to liquidity management, including the management of stress situations.
- Compare: 1989 No 157 s 157Z 15

### **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**.
- (2) A licensed NBDT that breaches this section commits ~~a tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty. 20
- (3) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty.
- Compare: 1989 No 157 ss 157ZA, 157ZR(l), 157ZW(1)(d), 157ZX

### **40 Licensed NBDTs to comply with liquidity requirements**

- (1) Every licensed NBDT must comply with the liquidity requirements required to be included in the trust deed by regulations made under **section 38**. 25
- (2) A licensed NBDT that breaches this section commits ~~a tier 2 offence~~ an offence and is liable on conviction to a level 3 penalty. 30
- 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~~ an 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, and is liable on conviction to a level 3 penalty. 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— 25
- (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 30
- (ii) a direct or indirect qualifying interest in 20% or more of the voting securities issued or allotted by the NBDT; or
- (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

- (1) A person must obtain the written consent of the Bank before giving effect to a transaction that will result, after completion of the transaction, in—
- (a) the person increasing the person’s level of influence over a licensed NBDT such that the person will— 5
- (i) have the ability, directly or indirectly, to appoint 25% or more of the members of the governing body of the NBDT; or
- (ii) have a direct or indirect qualifying interest in 20% or more of the voting securities issued or allotted by the NBDT; or 10
- (b) in the case of a person who, with the consent of the Bank, already has at least the level of influence described in **paragraph (a)**, an increase in the person’s level of influence beyond the level permitted by the existing consent; or 15
- (c) in the case of a person who, at the time the NBDT became licensed, had at least the level of influence over an NBDT described in **paragraph (a)**, an increase in the person’s level of influence beyond the level existing at that time. 20
- (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 25
- (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. 30
- (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~~ an offence and is liable on conviction to a level 2 penalty. 35

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**

- (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. 5
- (2) If the Bank requires a trustee to attest under this section, the trustee must either—
- (a) provide that attestation; or 10
  - (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.
- (3) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty. 15

Compare: 1989 No 157 ss 157ZE, 157ZW(1)(e), 157ZX

**44 Trustee to report to Bank on licensed NBDT non-compliance**

- (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. 20
- (2) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty. 25

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— 30
- (a) the NBDT is unable to pay its debts as they become due in the normal course of business; or 35

- (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 5
  - (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,— 10
  - (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. 15
- (3) A trustee that breaches this section commits ~~a tier 4 offence~~ an offence and is liable on conviction to a level 1 penalty. 20  
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** 25
- (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:
  - (a) corporate matters: 30
  - (b) financial matters:
  - (c) prudential matters:
  - (d) any other matters relating to the business, operation, or management of the NBDT or its guaranteeing subsidiaries. 35

- (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.~~
- (2) The notice may require information, data, or forecasts relating to any business carried on by the NBDT or its guaranteeing subsidiaries, whether the business is carried on in New Zealand or elsewhere. 5
- (3) The notice may also require any or all of the information, data, or forecasts; ~~or any of it~~, to—
- (a) be in consolidated form; and 10
  - (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 15
  - (e) be provided in a specified form; and
  - (f) be provided to a specified place.
- (4) A licensed NBDT commits a ~~tier 2~~ an offence if it fails to comply with a notice given under this section and is liable on conviction to a level 3 penalty. 20
- 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: 25
- (a) corporate matters:
  - (b) financial matters:
  - (c) prudential matters: 30
  - (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.~~ 35

- (2) The notice may require information, data, or forecasts relating to any business carried on by the associated person, whether the business is carried on in New Zealand or elsewhere.
- (3) **Section 46(3)** applies to ~~the notice~~ any notice given under subsection (1). 5
- (4) An associated person commits ~~a tier 2~~ an offence if it fails to comply with a notice given under this section and is liable on conviction to a level 3 penalty.  
Compare: 1989 No 157 ss 93A, 93B
- 48 Bank may require reports for investigation purposes** 10
- (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 to 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.~~
- (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. 20
- (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. 25
- (5) In this section, **approved person** means a person approved or appointed by the Bank for the purposes of this section.
- (6) A licensed NBDT or an associated person commits ~~a tier 2~~ an offence, and is liable on conviction to a level 3 penalty, if it— 30
- (a) fails to supply a report to the Bank if required to do so under this section; or
- (b) fails to ~~supply~~ provide access to its accounting and other records, or fails to provide information relating to those 35

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~~ an offence and is liable on conviction to a level 1 penalty. 15

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

*Powers where offence suspected*

**50 Bank may require information if offence suspected** 20

(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:

(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~~ an offence and is liable on conviction to a level 3 penalty. 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 committed an offence under this Act, enter and search any place if— 5
- (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— 10
- (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. 15
- (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 20
  - (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. 25

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— 30
- (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 35
  - (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 30
  - (b) the issue or execution of a search warrant under **section 51** in respect of a document to which this subsection applies; or
  - (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— 5
- (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. 10
- (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. 15
- (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 20
- (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~~ an offence and is liable on conviction to a level 2 penalty. 25
- Compare: 1989 No 157 ss 105(2), 157ZO, 157ZP

**54 Information compulsorily obtained or sought Application of Official Information Act 1982**

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. 30

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~~ the Bank 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 as they become due in the normal course of business: 5
  - (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: 15
  - (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)**. 20
- (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: 25
  - (b) take any specified action to address any circumstances of financial or other difficulties of the NBDT or any associated person: 30
  - (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: 35
  - (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.~~
- (g) replace its auditor with an auditor approved by the Bank (in which case the NBDT has the power to give effect to the direction despite any enactment, rule of law, or the governing document of the NBDT). 5
- (3) A direction to an associated person under this section may require the associated person to do any of the following: 10
- (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: 15
- (b) take any specified action to address any circumstances of financial or other difficulties of the NBDT or the associated person:
- (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)**: 20
- (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: 25
- (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) replace its auditor with an auditor approved by the Bank (in which case the associated person has the power to give effect to the direction despite any enactment, rule of law, or the governing document of the associated person). 30
- Compare: 1989 No 157 ss 113, 113A; 2010 No 111 ss 143–146 35

## 56 Bank directions to trustees

- (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:
- (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: 5
  - (b) make changes to a trust deed:
  - (c) arrange for a review and report on the NBDT's risk management programme. 10

#### 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.
- (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). 15
- Compare: 1989 No 157 s 116(1); 2010 No 111 s 147 20

#### 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 4 offence~~ an offence, and is liable on conviction to a level 4 penalty, if the person— 25
- (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. 30
- (3) A trustee commits ~~a tier 4 offence~~ an offence, and is liable on conviction to a level 1 penalty, if the trustee—
- (a) fails to comply with a direction given under **section 56**; or 35

- (b) obstructs, hinders, or prevents an NBDT, associated person, or trustee from giving effect to a direction under this subpart.

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

*Power to remove or appoint directors* 5

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

- (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: 10
- (i) the NBDT or any associated person is unable, or likely to be unable, to pay its debts as they become due 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: 15
- (iii) the circumstances of the NBDT or 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 20
- (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 25
- (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 30
- (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. 35
- (1A) The Bank may, by notice to a person, appoint the person as a director of a licensed NBDT if—

- (a) the Bank has exercised, or is exercising, the power in **subsection (1)** to remove a director and it is necessary to appoint a person to replace the removed director; or
- (b) in the opinion of the Bank, it is necessary to appoint a person as an additional director because— 5
- (i) the NBDT is failing or has failed to comply with this Act or the regulations; or
- (ii) either of the grounds in **subsection (1)(a)(i) or (iii)** applies.
- (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: 10
- (a) the NBDT or associated person is unable, or likely to be unable, to pay its debts as they become due in the normal course of business: 15
- (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. 20
- (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.~~ 25
- (3) The Bank may, by notice to a person, appoint the person as an additional director of an associated person if— 30
- (a) the Bank has exercised, or is exercising, the power in **subsection (2)** to remove a director and it is necessary to appoint a person to replace the removed director; or
- (b) in the opinion of the Bank, it is necessary to appoint a person as an additional director because— 35
- (i) the associated person is failing or has failed to comply with this Act or the regulations; or
- (ii) either of the grounds in **subsection (2)(a) or (c)** applies.

- (4) ~~This section does~~ **Subsections (1) to (3)** do 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. 5
- Compare: 1989 No 157 s 113B; 2010 No 111 s 149(5)

## 60 Procedures for removal and appointment of directors

- (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~~<sup>2</sup> notice in writing of the Bank's intention to exercise the power to— 10
- (i) the director who is to be removed; and
- (ii) the licensed NBDT or associated person of which the person is a director; and
- (iii) if a director of a licensed NBDT is being removed, the trustee of the NBDT; and 15
- (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 20
- (d) the Bank has regard to those submissions.
- (2) The Bank must not exercise the power in **section 59(1A) or (3)** to appoint a director unless—
- (a) the Bank has given ~~at least 7 days~~<sup>2</sup> notice in writing of the Bank's intention to the licensed NBDT or associated person to whom the director is to be appointed; and 25
- (b) the notice sets out the reasons for the proposed action; and
- (c) the NBDT or associated person has a reasonable opportunity to make submissions to the Bank; and 30
- (d) the Bank has regard to those submissions; and
- (e) the person whom the Bank proposes to appoint agrees to the appointment.
- (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,— 35

- (a) in the case of a director of a licensed NBDT, the NBDT and ~~each~~the trustee; and
  - (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. 5
- (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). 10
- Compare: 1989 No 157 s 113B 15

*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—~~ 20
- (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.~~
- (1) Any of the following may appeal to the High Court against any decision of the Bank concerning the person’s suitability to be a director or senior officer of an NBDT: 25
- (a) a director or senior officer of a licensed NBDT;
  - (b) a former director or senior officer of a licensed NBDT;
  - (c) a person who was proposed to be a director or senior officer of a licensed NBDT. 30
- (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. 35
- 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 on a question of law; and section 66 of the Judicature Act 1908 applies to any such appeal. 5
- (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 public importance or for any other reason, ought to be submitted to the Court of Appeal for its decision. 10
- (3) The Court of Appeal, in granting leave, may impose the conditions that it thinks fit, whether as to costs or otherwise. 15
- (4) The decision of the Court of Appeal on any application for leave to appeal, or on an appeal under this section, is final.

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, on summary conviction,— 20
- (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 25
- (b) in any other case, to a fine not exceeding \$2 million.
- (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 30
- (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 35

- (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

**63 Definitions of levels of penalties** 5

(1) A level 4 penalty for conviction for an offence against this Act is,—

(a) in the case of an individual, imprisonment for a term not exceeding 18 months, a fine not exceeding \$200,000, or both; and 10

(b) in any other case, a fine not exceeding \$2 million.

(2) A level 3 penalty for conviction for an offence against this Act is,—

(a) in the case of an individual, imprisonment for a term not exceeding 12 months, a fine not exceeding \$100,000, or both; and 15

(b) in any other case, a fine not exceeding \$1 million.

(3) A level 2 penalty for conviction for an offence against this Act is,—

(a) in the case of an individual, imprisonment for a term not exceeding 3 months, a fine not exceeding \$50,000, or both; and 20

(b) in any other case, a fine not exceeding \$500,000.

(4) A level 1 penalty for conviction for an offence against this Act is a fine not exceeding \$200,000. 25

**64 General offences**

A licensed NBDT, associated person, or trustee commits a ~~tier 2 offence~~ an offence, and is liable on conviction to a level 3 penalty, 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 30

(b) without reasonable excuse, obstructs or hinders an authorised person in the execution of any powers con-

ferred on the person by or under this Act or the regulations.

Compare: 1989 No 157 s 157ZS(d)–(h)

## **65 Offence to disclose giving of direction or notice**

- (1) Every person commits a ~~tier 2 offence~~ who an offence, and is 5  
liable on conviction to a level 3 penalty, if the person 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.
- (2) Nothing in **subsection (1)** applies to the disclosure or publi- 10  
 cation 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 finan-  
 cial adviser of the NBDT or to an associated person or  
 trustee of an NBDT to which the direction or notice re- 15  
 lates; or
- (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,—
- (i) to the public or any class of the public; or 20
- (ii) to any person who has a proper interest in know-  
 ing that the direction or notice has been given.
- (3) Nothing in **subsection (1)** applies to the disclosure or publi-  
 cation of the fact that a direction has been given requiring the  
 actions set out in **section 55(2)(d)** for the purpose of giving 25  
 effect to that direction.

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 30  
 (the **defendant**) for an offence under this Act, it is a defence  
 if the defendant proves that—
- (a) the contravention was due to the act or omission of an-  
 other person, or some other cause beyond the defen-  
 dant's control; and 35
- (b) the defendant took reasonable precautions and exer-  
 cised 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. 5  
Compare: 1989 No 157 s 157ZT 10
- 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 to the penalty applicable to an individual for that offence, if it is proved— 15
- (a) that the act that constituted the offence took place with the authority, permission, or consent of the director; or
- (b) that the director— 20
- (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. 25
- (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** 30
- (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. 35  
Compare: 1989 No 157 s 177

**68** Limitation period

Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011, the limitation period in respect of an offence against this Act ends on the date that is 6 years after the date on which the offence was committed.

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**68A** Provision applying before parts of Criminal Procedure Act 2011 in force

Until the date appointed under section 2(2) of the Criminal Procedure Act 2011 as the commencement date (or, if no such date is appointed, the date provided in section 2(3) of that Act),—

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(a) section 68 must be read as if it provided that 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, despite section 14 of, or anything else to the contrary in, the Summary Proceedings Act 1957; and

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(b) references in this Act to liability on conviction must be taken to be references to liability on summary conviction.

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**Part 4****Miscellaneous provisions***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—

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- (a) this Act (except the requirement to be licensed); or  
(b) the regulations.

(2) The Bank must not grant an exemption under this section unless it is satisfied that—

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- (a) the exemption will be consistent with the maintenance of a sound and efficient financial system; and  
(b) compliance with the relevant provision or provisions would, in the circumstances, require the licensed NBDT, class of licensed NBDTs, or trustee to comply

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- with requirements that are unduly onerous or burdensome; and
- (c) the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption. 5
- (3) An exemption may be granted on any terms and conditions that the Bank thinks fit, including terms and conditions; ~~in relation to a licensed NBDT~~, relating to the following:
- (a) risk management:
- (b) governance ~~issues~~: 10
- (c) disclosures ~~relating to the NBDT's creditworthiness~~:
- (d) ~~the minimum capital ratio or minimal level of capital that the NBDT must have~~ minimum capital requirements:
- (e) ~~the NBDT's~~ exposures to related parties: 15
- (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. 20
- 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 25
- (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 30
- (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 35 Acts and Regulations Publications Act 1989.

- (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
  - (b) be published in full in the *Gazette*; and 5
  - (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

- A person does not breach a requirement of this Act if— 10
- (a) an exemption from the requirement applies to that person; and
  - (b) the person complies with the terms and conditions of the exemption.
- Compare: 1989 No 157 s 157H 15

### *Regulations*

## 72 Regulations

- (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 all or any of the following purposes: 20
- (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: 25
  - (c) ~~declaring a person or class of persons to be, or not to be, an NBDT (but see **subsection (2)**);~~
  - (c) declaring any person or class of persons (other than a person referred to in **section 5(2)(a) to (c)**) to be an NBDT for the purposes of this Act, or declaring that, in certain specified circumstances, such a person or class of persons is an NBDT for the purposes of this Act: 30
  - (ca) declaring any person or class of persons that meets the definition of NBDT in **section 5(1)(a), (c), or (d)** not to be an NBDT for the purposes of this Act, or declaring that, in certain specified circumstances, such a person or 35

- class of persons is not an NBDT for the purposes of this Act:
- (d) declaring certain securities to be debt securities for the purpose of this Act:
  - (e) prescribing the matters, circumstances, or conditions that are suitability concerns: 5
  - (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: 10
  - (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:
  - (j) providing for any other matter contemplated by this Act, necessary for its administration, or necessary for giving it full effect. 15
- (2) In considering whether to advise and recommend the making of regulations under **subsection (1)(c) or (ca)**, the Minister and the Bank must have regard to— 20
- (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 25
    - (ii) involve activities as an NBDT; and
  - (b) the public interest; and
  - (c) any other matters the Minister or the Bank considers relevant.
- (3) The Bank must not recommend the making of regulations under **subsection (1)(d)**, declaring certain securities to be debt securities, unless it is satisfied that the securities are similar in substance to debt securities. 30
- Compare: 1989 No 157 ss 157B(2), 157C(5), (6)
- 73 Extension of regulation-making powers relating to prudential obligations** 35
- 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
- (b) prescribe requirements or clauses that apply to all licensed NBDTs; and 5
- (c) prescribe different requirements or clauses for different classes of licensed NBDTs; and
- (d) prescribe different requirements or clauses for particular licensed NBDTs.
- Compare: 1989 No 157 s 157ZY 10
- 74 Material incorporated by reference in regulations**
- (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. 15
- (2) The material may be incorporated—
- (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. 20
- 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: 25
- (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. 30
- (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**
- (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 49, and 56.** 5
- (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 49, and 56.**
- (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. 10  
Compare: 1989 No 157 s 157ZH
- 77 Amendments to trust deeds treated as authorised** 15
- (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; and
- (b) applies despite any defect in the form or mode of execution of the amendment. 25
- (2) **Subsection (1)** applies despite there being no power of variation in the trust deed ~~or~~ and despite anything to the contrary in the trust deed or ~~other~~ any 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 35

- (b) it is necessary to amend the trust deed within a certain time in order to comply with that requirement; and
- (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 5
- (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.
- (3) The deed amending the trust deed— 15
- (a) has effect despite there being no consent or agreement of the NBDT or any other person; and
- (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 20
- (c) applies despite any defect in its form or mode of execution.
- (4) **Subsection (3)** applies despite there being no power of variation in the trust deed ~~or~~, and despite anything to the contrary in the trust deed or ~~other~~ any enactment, rule of law, or agreement. 25

Compare: 1989 No 157 s 157ZD

*Protection from liability and indemnity*

- 79 Protection from liability for Bank, etc** 30
- (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)**.
- (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. 35

- (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, (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
- (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. 15
- (3) The indemnity conferred by **subsection (1)** extends to legal costs incurred in defending a proceeding.
- (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. 20

Compare: 1989 No 157 s 179A

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### *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

- (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

- (1A) Any amendment to or revocation of the following exemption notices granted under section 157G of the Reserve Bank of New Zealand Act 1989 must be treated as being an amendment to or revocation of a class exemption, and therefore be treated as a regulation for the purposes of the Acts and Regulations Publications Act 1989: 5
- (a) Deposit Takers (Charitable and Religious Organisations) Exemption Notice 2010:
  - (b) Deposit Takers (Credit Ratings Minimum Threshold) Exemption Notice 2009: 10
  - (c) Deposit Takers (Non-trustee Entities Risk Management) Exemption Notice 2009.
- (1B) Any amendment to or revocation of any other exemption granted under section 157G of the Reserve Bank of New Zealand Act 1989 need not be treated as a regulation for the purposes of the Acts and Regulations Publications Act 1989. 15
- (2) A reference in an exemption granted under section 157G of the Reserve Bank of New Zealand Act 1989 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. 20

Compare: 2011 No 6 s 54

- 88A** Transitional references in Reserve Bank of New Zealand Act 1989 25
- Until the end of the transition period referred to in **section 87**, the following provisions of the Reserve Bank of New Zealand Act 1989 (all of which are amended by **Schedule 2 of this Act**) must be read as if the references in them to a licensed NBDT were references to an NBDT: 30
- (a) section 46(1)(b):
  - (b) section 49(2)(h)(iii):
  - (c) section 50(2)(d)(iii):
  - (d) section 53(3)(f)(iii):
  - (e) section 58(b). 35

*FMA to consult with Bank before recommending  
statutory management of NBDT*

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

- (1) This section amends the Corporations (Investigation and Management) Act 1989. 5
- (2) Section 8(3) is amended by inserting “, non-bank deposit taker licensed under the **Non-bank Deposit Takers Act 2011**,” after “licensed insurer”.

*Amendments to requirements to apply  
as registered financial service provider  
Consequential and other amendments to  
Financial Service Providers (Registration and  
Dispute Resolution) Act 2008* 10

**90 Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008** 15

- (1) This section amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
- (1A) Section 5 is amended by repealing paragraph (b) and substituting the following paragraph: 20
- “(b) being a licensed NBDT, as defined in the **Non-bank Deposit Takers Act 2011**.”
- (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	<b>Non-bank Deposit Takers Act 2011</b>
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*Consequential amendments and revocations*

**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**. 30
- (2) Other enactments are consequentially amended in the manner set out in **Schedule 3**.

**92** **Consequential revocation of regulations**

The following regulations are revoked:

- (a) Deposit Takers (In Receivership or Liquidation) Exemption Notice 2009 (SR 2009/299):
  - (b) Deposit Takers (Persons Declared Not to be Deposit Takers) Regulations 2011 (SR 2011/359). 5
-

**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.

Where material is incorporated by reference in regulations, the version of the material incorporated that has legal effect as part of the regulations (the **relevant version**) at any particular time (the **relevant time**) is,— 20

- (a) if the regulations do not specify a particular version of the material, the version of the material that is current at the relevant time; and 25
- (b) if the regulations specify a particular version of the material, that specified version, regardless of whether that version has been amended or replaced since the regulations were made. 30

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

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 35

- part of the regulations from the date of its expiry or revocation; and
- (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. 5
- 3A Application of clauses 4 to 7 to New Zealand material**
- (1) In this clause, New Zealand material means any material incorporated by reference—
- (a) that is material made or issued in New Zealand, under the authority of an Act; and 10
- (b) the relevant version of which is available at all reasonable times—
- (i) on a publicly available Internet site (unless it is unavailable for copyright reasons); and 15
- (ii) in printed form, either free or at no more than a reasonable cost.
- (2) **Clauses 4 and 5** do not apply to New Zealand material.
- (3) **Clauses 6 and 7** do not prevail over any other enactment that applies, or dissapplies, the enactments referred to in those clauses to New Zealand material. 20
- 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 25
- (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. 30
- 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 35

- free of charge at the head office of the Bank and at any other places that the Governor determines are appropriate; and
- (b) must make printed copies of the material available for ~~purchase at a reasonable price~~ either free or at no more than a reasonable cost; and 5
- (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— 10
- (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 15
- (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 printed copies of the relevant version of the material ~~can be purchased~~ are available either free or at no more than a reasonable cost, and the location of the place or places at which they can be ~~purchased~~obtained; and 20
- (v) if ~~copies of the material are~~ the material is 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. 25
- (2) A failure to comply with this clause does not invalidate regulations that incorporate material by reference. 30
- 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. 35

**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. 5
  - (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:~~

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

Subsection (2): repeal and substitute:

“(2) The Governor has the authority, in the performance of those functions, to act in relation to all matters that are not required, by any Act referred to in subsection (1), to be dealt with by the Board.” 15

**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 47**

Subsection (1): add “or the **Non-bank Deposit Takers Act 2011**”.

Subsection (4): add “or the **Non-bank Deposit Takers Act 2011**”.

**Section 49(2)(h)(iii)** 25

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**.”

5

**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**”.

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**Section 58(b)**

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

**Section 66G(2)**

Paragraph (e): insert “or under the **Non-bank Deposit Takers Act 2011**” after “under this Act”.

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**Section 68B(1)**

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

**Section 81AA(3)**

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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):

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

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**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”.

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”. 5

**Part 5D**

Repeal.

**Schedule 3**

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Repeal.

**Schedule 4**

Repeal.

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<b>Schedule 3</b>	<b>s 91(2)</b>
<b>Consequential amendments to other enactments</b>	
<b>Part 1</b>	
Amendments to other Acts	5
<b>Financial Advisers Act 2008 (2008 No 91)</b>	
Section 5: definition of <b>approved rating agency</b> : omit “Reserve Bank of New Zealand Act 1989” and substitute “ <b>Non-bank Deposit Takers Act 2011</b> ”.	
<b>Financial Service Providers (Registration and Dispute Resolution) Act 2008 (2008 No 97)</b>	
Section 5: repeal paragraph (b) and substitute:	10
“(b) acting as an NBDT, as defined in the <b>Non-bank Deposit Takers Act 2011</b> .”	
<b>Local Government Borrowing Act 2011 (2011 No 77)</b>	
Heading above section 7 and section 7: repeal and substitute:	15
<i>“Application of Non-bank Deposit Takers Act <b>2011</b>”</i>	
“ <u>7 Funding Agency not a non-bank deposit taker</u>	
<u>The Funding Agency is not an NBDT (a non-bank deposit taker) for the purposes of the Non-bank Deposit Takers Act <b>2011</b>.”</u>	20
<b>Search and Surveillance Act 2012 (2012 No 24)</b>	
After section 285, insert:	
<i>“Amendments to Non-bank Deposit Takers Act <b>2011</b>”</i>	25
<b>“285A Amendments to Non-bank Deposit Takers Act 2011</b>	
“(1) This section amends the Non-bank Deposit Takers Act <b>2011</b> .”	
“(2) <b>Section 51</b> is amended by repealing <b>subsections (2) and (3)</b> and substituting the following subsections:	30
““(2) ) <u>An issuing officer (within the meaning of section 3(1) of the Search and Surveillance Act 2012) may issue a warrant to a person appointed under <b>section 50(1)(b)</b> in relation to</u>	

Part 1—*continued***Search and Surveillance Act 2012 (2012 No 24)**—*continued*

a place if the issuing officer, on an application made by the Bank in the manner provided in subpart 3 of Part 4 of that Act, is satisfied that there are reasonable grounds—

“(a) to suspect that a person is committing or has committed an offence under this Act; and

5

“(b) to believe that a search will find evidential material at the place.

“(3) The provisions of Part 4 of the Search and Surveillance Act 2012 (except for sections 118 and 119) apply.

“(4) This section is subject to subpart 7 of Part 4 of the Search and Surveillance Act 2012.

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“(3) **Section 52(1)(b)** is amended by omitting ‘; and’.

“(4) **Section 52(1)(c)** is repealed.

“(5) **Section 52(6)(b)** is repealed.

“(6) **Section 52(6)(c)** is amended by omitting ‘or a search warrant issued under **section 51**’.

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“(7) **Section 79** is amended by repealing **subsection (3)** and substituting the following subsection:

“(3) This section and **section 80** are subject to subpart 7 of Part 4 of the Search and Surveillance Act 2012.’ ”

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**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**”.

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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:

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

## 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**”. 5

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**”. 10

Definition of **Act** in regulation 3(1): repeal and substitute:

“**Act** means the **Non-bank Deposit Takers Act 2011**”.

Regulation 3(1): insert in their appropriate alphabetical order: 15

“**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 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”. 20

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

Definition of **direct credit substitute** in regulation 3(1): omit “member of the borrowing group” in each place where it appears and substitute in each case “guaranteeing subsidiary”. 25

Definition of **forward asset purchase** in regulation 3(1): omit “member of the borrowing group” in each place where it appears and substitute in each case “guaranteeing subsidiary”. 30

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”.

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

Regulation 4: repeal. 35

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

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

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

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

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”.

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”.

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

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

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

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

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**”.

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

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**Non-bank Deposit Takers Bill**

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Part 2—*continued*

**Deposit Takers (Liquidity Requirements) Regulations 2010 (SR 2010/351)—*continued***

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.**”

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**Legislative history**

3 August 2011  
10 August 2011

Introduction (Bill 312–1)  
First reading and referral to Finance and  
Expenditure Committee

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