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David Hargreaves
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By email: dta@rbnz.govt.nz

Dear David

Deposit Takers Bill Exposure Draft Submission

I refer to the Deposit Takers Bill Exposure Draft: Explanatory Notes dated 6 December 2021 (**ED**) and provide McGrathNicol's submissions in the table annexed and marked "A". The table sets out the page number and the corresponding commentary from the ED, together with our comments.

We would be happy to discuss our submissions further if you have any questions or comments generally. I can be contacted on s9(2)(a) OIA

Yours sincerely

Kare Johnstone
Partner

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14	**In the current draft of the Bill, all resolution powers are provided to the Reserve Bank, but the Reserve Bank is able to delegate them to a 'resolution manager'. This contrasts with the RBNZ Act 1989 statutory management regime where powers are assigned to the statutory manager (albeit with some key powers only able to be exercised by them with the permission of the Reserve Bank or the Minister…).** **In practice, it is likely to only be practical for the day-to-day management (e.g., administration of thousands of customers and other contracts, employment relations and health and safety obligations) of the Deposit Taker (DT) in resolution to be conducted by a resolution manager. An uncomfortable result of the 'delegation' model is that the Reserve Bank could need to devote substantial time to monitoring this day-to-day management, given the responsibility of the Reserve Bank and its Board for matters that the Board delegates.**	We consider it appropriate for the Reserve Bank to take into account the following matters, which we have split out under Independence, practical, accountability and other. **Independence** Key Attribute 2.5 of the Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions* states that resolution authorities should have operational independence consistent with their statutory responsibilities. We consider that there could be risk to the perceived independence of the Reserve Bank being the Resolution Manager (rather than those powers being vested directly in an independent resolution manager) for a number of reasons: 1. A key principle of independence would be the separation of the resolution management functions from the functions of the Reserve Bank as the Prudential Supervisor of the DT. Having a separate, independent resolution manager in control of day-to-day operational managers would assist in the maintenance and market perception of that independence; 2. The Reserve Bank will be the key decision maker in the DT entering resolution management and thus any issues or concerns around the appointment process ought to be held separate to the day-to-day operations of the DT in resolution; 3. In the event there are any concerns about prior conduct or regulatory intervention as a result of the resolution process, it would be best for the Reserve Bank to be independent to the day-to-day operations of the resolution management; and 4. In order for the Reserve Bank to maintain its overall supervisory powers and control of the process it should remain independent of the day-to-day management of the DT in resolution management.

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	It may be more practicable for responsibility for this day-to-day management power to reside with the resolution manager. While the Reserve Bank would retain an ability to direct the resolution manager (and would be responsible for the outcomes resulting from those directions) on actions critical to its statutory purpose, the Reserve Bank would be more insulated from the day-to-day running of the failed entity. We are interested in any feedback on this issue.	**Practical** 1. New Zealand has a regime of licensed insolvency practitioners (**LIPs**) that are experienced in dealing with the day-to-day operations of businesses in crisis and urgently attending to multiple operational matters such as employment issues (including, but not limited, to dealing with a large number of employees across numerous locations and jurisdictions), health and safety, infrastructure and IT issues, and negotiating revised arrangements with multiple suppliers for ongoing supply and key contracts for services. LIPs are subject to a code of conduct, minimum professional standards, and a regulatory board to deal with any underperformance in exercising their powers. 2. It is impractical for the Reserve Bank to allocate its resources to attending to such operational matters where its resources would be best spent in ultimately supervising (and directing where appropriate) the overall outcome and direction of the resolution process. 3. It would be further impractical for the Reserve Bank to allocate its resources on such day-to-day operational matters, in the event that more than one DT enters resolution management (for example, in the context of a broader financial crisis). 4. LIPs are experienced in implementing robust processes to receive and admit creditor claims. This process is complex. It can involve multiple parties, often many offshore, and can be time consuming. Such a process would take additional resources for the Reserve Bank to manage (including an appropriate information and technology system). Accordingly, it may be more appropriate for the process of claims and payments, including those under the Deposit Compensation Scheme, to be managed by a LIP. 5. Given the complexity surrounding a resolution process, ultimately due to the nature of the deposit taker and the potential size and systemic risk associated with a collapse, it would be appropriate for an Advisory Committee (or similar) to be implemented either prior or immediately after the resolution. We would expect the advisory committee to include a representative of the Reserve Bank and Treasury, together with the resolution manager a deposit taker/industry expert, lawyer, and any other potentially appropriate parties (e.g., a valuer or other specialist relevant to the deposit taker in resolution). The Reserve Bank may wish to consider if this is something it wishes to include as part of the DT Act or regulations, or it may be something that can be set up prior to or immediately after resolution (note such a committee is common practice for LIPs to enter into on an informal basis for large complex insolvencies). In the event such a committee is set up, the indemnity provisions should be extended to include the advisory committee.

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		Accountability ▪ We agree that under a delegation model, as discussed at paragraph 30 of the Reserve Bank and Treasury Joint Report, the Reserve Bank board would be accountable for the exercise of delegated powers by the resolution manager. In practice, this may lead to delay or paralysis as decisions by the delegated resolution manager are subject to review (and scrutiny as to whether they are within the scope of their delegated authority). ▪ In our view, it is more appropriate for the role to be separated (for reasons set out above and below) as separation of the role of the Reserve Bank and the Resolution Manager provides for personal accountability for the Resolution Manager, while enabling the Reserve Bank to focus on its Supervisory role and the ultimate outcome of the resolution. Our preferred approach would be for the Resolution Manager to be separate to the Reserve Bank with the duties being set as part of the appointment by the Reserve Bank (rather than by delegation). **Other matters** ▪ The Reserve Bank can issue directions, which could include reporting obligations on the Resolution Manager to ensure it has sufficient oversight (and to obtain more control if and as and when considered appropriate) rather than day-to-day responsibility for day-to-day operational tasks. ▪ Many operational issues that are dealt with by LIPs may impact a number of operational matters and when dealing with one matter the LIP needs to take into account the potential impact on other matters at the same time and more often than not at short notice. In crisis situations, decisions need to be made with clear authority and quickly. ▪ For example, when and if required, LIPs are experienced in carefully and respectfully implementing redundancies. It may be appropriate to have a separation between the Supervisor and the Resolution Manager in respect of redundancies required to be made as a result of a DT entering resolution (note as part of the appointment there could be a consultation requirement in respect of a large number (quantum to be determined) of redundancies noting the public interest and potential impact on the economy). ▪ In the event the actions and conduct of the Resolution Manager are required to be reviewed by the Court, it would be appropriate for the role of the Resolution Manager to be kept separate from the Reserve Bank.

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		▪ In addition, rather than the Reserve Bank approving all sale or disposition transactions (s255) an agreement with the Resolution Manager (or direction) could be in place so that the prior approval is obtained by the Reserve Bank for transactions at and above a certain value. ▪ A key point for consideration for a Deposit Taker in resolution is communication to stakeholders, Public Relations and media. LIPs are experienced in dealing with multiple stakeholders across various jurisdictions on a day-to-day basis. For example, dealing with depositor queries would be best placed with a LIP that already has systems in place to quickly implement rather than the Reserve Bank. Further, LIPs are experienced with managing Public Relations and media and identifying the appropriate parties to manage Public Relations and media. This would be something we would expect to be done in consultation with the Reserve Bank (and Treasury).
15	**The moratorium in the Bill is time-limited to 12 months but may be extended for up to a further 12 months an indefinite number of times. Do you think the moratorium should be able to be extended an indefinite number of times?**	We agree that this is appropriate to provide more time in the event the resolution period is required to be longer than 12 months (which could be quite possible for a large deposit taker). In light of our comments above, the Reserve Bank should consider if it is appropriate to extend the ability of the extension of the moratorium to also lie with the Resolution Manager (noting that any extension by the Resolution Manager could be agreed with the Reserve Bank in advance, as either part of the DT Act, or through directions).
15	**The moratorium also applies to "resolution termination rights". This automatically applies for the duration of the resolution regardless of whether the rest of the moratorium ends sooner. Do you think the moratorium is too far-reaching?**	We consider it to beneficial and of assistance for there to be suspension and termination rights during the resolution period.

16	**Do you think liquidation and resolution are adequate to manage failing smaller, non-systemic licensed deposit takers (e.g., credit unions)? Should the proposed regime be augmented by a liquidation regime, which is more specifically designed for smaller deposit takers, such as the UK Modified Liquidation regime?**	In our view, the resolution process, which provides for extensive 'emergency' powers, is more appropriate for a large deposit taker, where there is greater potential for systemic risk following failure. If one large deposit taker enters resolution, there is the possibility that others may follow. Accordingly, in our view, there should be another tool for smaller deposit takers, such as receivership and/or liquidation. Where there is no secured debt (on which an out-of-court appointment could be made) provision in the DT Act would be made for the ability to apply to the High Court for an urgent receivership (see, for example, s523(1)(h) FMCA) or liquidation (commencing first with an interim liquidation appointment until such time that the liquidation application is heard). The order appointing the receivers/interim liquidators/liquidators would clearly set out the powers and duties of the appointed party. Note the ultimate purpose of an interim liquidation is to preserve the assets pending the Court's determination whether the company should be placed into liquidation. This may make a resolution process more challenging and accordingly there is merit in the Court explicitly setting out the powers, including the ability to transfer eligible deposits as provided for under the UK Modified Liquidation regime. The UK Modified Liquidation regime is a useful tool, particularly for smaller deposit takers where full resolution may not be appropriate. This is on the basis that the usual tools are available, including the relevant powers provided under the Receiverships Act 1993 and the Companies Act 1993 (and any other relevant Act). The Reserve Bank will be able to continue to have control over the process by issuing the Receivers, Interim Liquidators and/or Liquidator's directions. Note also that the person appointed would also be a LIP and an officer of the Court and consequently subject to oversight. Another area for consideration is whether the Depositor Compensation Scheme should be 'one size fits all' – noting that depositors take a higher risk placing funds with a deposit taker with a lower credit rating.

17	**The Bill provides for a merits review on the basis that persons should generally be entitled to challenge decisions that affect significant rights and interests. However, resolutions themselves can be protracted, and a NCWO determination will generally only be made after a resolution has completed. Officials are concerned that broad NCWO appeal rights could result in significant costs, delays, and uncertainty due to multiple appeals and protracted court proceedings. An alternative option to mitigate these issues, cold be limiting appeal rights to assessing whether the NCWO valuer applied the law correctly and focusing on providing greater certainty on the NCWO process through regulations.**	While a review process is important, in line with our observations above regarding independence, we agree that regulations should be implemented to assist the valuer in the valuation process but also to assess whether the law was applied (but noting a valuation is an arbitrary process in itself so the regulations would need to be flexible enough to allow the valuer to provide his/her judgement). The regulations may also wish to consider the appropriateness of a LIP being part of the review process given their expertise.
21	**Annex A: implementation of Deposit Compensation Scheme** **This Annex lists the regulations and standards to be developed to implement the DCS. We are interested in the industry's views on some practical matters related to implementation, and welcome feedback.**	Whether there is a need for additional powers and duties for liquidators (and/or receivers/Resolution Managers) will better addressed when further detail has been provided on the DCS, which hasn't yet been fully developed. However, if any additional powers are considered appropriate, these should extend to a Receiver and Resolution Manager.

General comments

In addition to the above, we make the following general comments in respect of the Deposit Takers Bill.

- We question if the definition of deposit taker is intended to capture all businesses that borrow and lend money (i.e. small finance companies that are currently not captured under the Non-Bank Deposit Takers Act or have an exemption).
- Given the complexity of the resolution process it would be appropriate to have more than one resolution manager. There should be at least two resolution managers and there could be up to say four. Often urgent decisions are required to be made with little or no notice and it will be important that there a several resolution managers with the authority to make day-to-day decisions quickly.
- Under s179 and s179A of the Reserve Bank of New Zealand Act 1989 (**RBNZ Act**) protection from liability and a Crown indemnity is provided to (among others) statutory managers of a registered bank (or an associated person of a registered bank), officers, employees, or directors of the Reserve Bank. Similar provisions are set out ss230 and 231 under the Insurance (Prudential Supervision) Act 2010 (**IPSA**) and to a lesser extent s63 of the Corporations (Investigations and Management) Act 1989. The relevant acts will need to be extended to include protection for a Resolution Manager (and potentially valuer and Advisory Committee).
- s215 – Bank's right of subrogation – there does not appear to be any notice requirement for the Bank regarding subrogation (or amount/calculation).
- We are uncertain if the Reserve Bank is considering allocating a different levy to reflect the different credit risks attached to the different deposit takers.
- We are uncertain if there is, or should be, a time period for payments to be made under the Deposit Compensation Scheme.
- We look forward to reviewing the additional drafting (for example s242 and s243 – additional liquidation duties and powers) and draft regulations when these are available.