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Secretariat
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NON-BANK DEPOSIT TAKERS BILL – FOODSTUFFS (WELLINGTON) CO-OPERATIVE SOCIETY LIMITED

Introduction

- 1 We write on behalf of Foodstuffs (Wellington) Co-operative Society Limited (*Foodstuffs*) in relation to the Non-Bank Deposit Takers Bill (the *Bill*). Foodstuffs welcomes the opportunity to make this submission to the Finance and Expenditure Committee (the *Committee*).

Foodstuffs – organisational aims, membership, structure

- 2 Foodstuffs is an industrial and provident society operating as a grocery wholesaler under a co-operative business model supporting the New World and Pak 'n Save supermarket operations and other smaller retail grocery operations (including Four Square).
- 3 Foodstuffs is owned by its members with whom it conducts trading activities in accordance with its Rules.

Submission

General position on the Bill

- 4 Foodstuffs generally supports the Bill and its objectives as it is intended to apply to finance companies and similar entities that are part of the financial system.
- 5 Under the current regime, there are two main limbs to be fulfilled to be a “deposit taker” (*NBDT*) under the Reserve Bank of New Zealand Act 1989 (*RBNZ Act*) – offering debt securities to the public in New Zealand and carrying on business of borrowing and lending money, or providing financial services, or both.¹
- 6 The Reserve Bank (the *Bank*) currently treats Foodstuffs as an NBDT because:
 - 6.1 Foodstuffs is arguably offering securities to the public, even though the parties to whom securities are offered are members of Foodstuffs. This is a grey area of securities law which Foodstuffs is hoping will be clarified by the Financial Markets Conduct Bill with the effect that Foodstuffs would no longer be treated as offering securities to the public; and

¹ Refer to section 157C of the RBNZ Act.

- 6.2 the Bank takes the view that Foodstuffs carries on the business of lending money. Foodstuffs has a different view but has agreed to accommodate the Bank's view on this point which, again, is a grey area of the New Zealand commercial regulatory regime.
- 7 The end result of this is that Foodstuffs has co-operated with the Bank in this regard and is currently operating under the Deposit Takers (Foodstuffs (Wellington) Co-operative Society Limited) Exemption Notice 2011.
- 8 Foodstuffs notes that the introduction of the two new regimes in the Non-Bank Deposit Takers Act 2011 (the *New Act*) and the proposed Financial Markets Conduct Act may create timing issues and some uncertainty. In this context:
- 8.1 the concept of an "offer of securities to the public" currently in the Securities Act 1978 (*Securities Act*) will cease to apply under the Financial Markets Conduct Bill when enacted, while the Bill still retains that wording;
- 8.2 the offer of securities is a key element of the NBDT definition so it is important that the securities regime and the New Act are aligned;
- 8.3 if the New Act comes into force before the Financial Markets Conduct Bill is enacted (which, we understand, is the current expectation) there may be some uncertainty around the application/interpretation of these concepts. Foodstuffs notes that the New Act may need to be revised at the time the proposed Financial Markets Conduct Act comes into force.
- 9 Foodstuffs anticipates that the Committee and Parliament will address these issues at the relevant time.

Detailed comments on clauses

- 10 We set out in the Appendix certain specific amendments proposed to clause 5 in the Bill.
- 11 In the context of Foodstuffs, the following changes are important:
- 11.1 *Maintaining the link with the "public offer" concept under securities law:* a person should not continue to be treated as an NBDT if it no longer has any obligations under the Securities Act for one reason or the other. For example, if parties to whom securities are offered cease to be members of the public under the Securities Act, there is no justification in making them continue to be subject to the NBDT regime purely because those securities remain unpaid. The changes proposed to clause 5(1)(d) address this point.
- 11.2 *Clarifying the meaning of "carrying on the business":* the concept of carrying on the business set out in clause 5(1)(a)(ii) of the Bill (which is also currently in section 157C(1)(a) of the RBNZ Act) is too vague. This creates significant uncertainty and, unfortunately, appears to inadvertently capture entities that were clearly not intended to be subject to this regime in the first place. The introduction of new subsections (3) and (4) address this point.
- 12 The Appendix contains further reasoning on Foodstuffs' proposed changes to the Bill.

General

- 13 If you have any questions, please contact the writers.
- 14 Foodstuffs would be happy to meet with Parliamentary officials to discuss the matters raised in this submission.

Yours faithfully



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APPENDIX

Clause Number	Clause heading	Submission
Clause 5	NBDT defined	<p>Background</p> <ul style="list-style-type: none"> • The amendments below have been suggested for the following reasons: <ul style="list-style-type: none"> ➤ Linking the definition of NBDT with the Securities Act public offer concept is key ➤ The “deposit taker”/“NBDT” definition has always been linked to the Securities Act “public offer” test. Foodstuffs proposes that, if the relevant offer of debt securities no longer constitutes an offer of debt securities to the public in New Zealand under the Securities Act, a person should not continue to be treated as an NBDT. This connection is vital. ➤ For example, if a person/issuer previously offered debt securities to the “public” in New Zealand but those offerees subsequently fall outside the meaning of “public” under the Securities Act, the issuer will generally cease to have disclosure obligations to those offerees. Similarly, there is no reason why such a person/issuer should continue to be treated as an NBDT under this regime if it ceases to be an offeror of securities to the public, regardless of whether those securities remain unpaid – once there is no longer a “public” offering, there is no reason why a person should remain an NBDT if a new person/issuer that does not undertake public offerings would not come within the ambit of the regime at all. ➤ It is also important that, to continue to be treated as an NBDT once a person has ceased offering debt securities to the public, that person must also have the obligation to repay such outstanding/unpaid debt securities. For instance, if there has been a full and final effective legal defeasance of debt to a different entity and that new entity has also taken on (among other things) the obligation to repay the original issuer’s debt securities, there is no sensible reason why the original issuer should continue to be treated as an NBDT. The new entity will be an NBDT in respect of those “assumed” debt securities – the original issuer ceases to play any further role in terms of offering debt securities to the public in New Zealand. ➤ The meaning of “carrying on the business” must be clarified ➤ New subsections (3) and (4) have been proposed to address this vague concept in clause 5(1)(a)(ii) (which mirrors the concept that is currently in the RBNZ Act). We have adapted the wording that is currently in sections 13(1) and (3) of the Financial Advisers Act 2008 (‘Exemption for incidental service’) as that wording is helpful in clarifying this concept. ➤ Apart from the definition in section 332 of the Companies Act 1993 (which relates to overseas companies) the term “carrying on business” is not defined in New Zealand legislation. Some cases have

Clause Number	Clause heading	Submission
		<p>addressed the concept, but none of them assists interpretation in the context of the RBNZ Act, because the cases are primarily focussed on whether an entity is carrying on business <i>within</i> a particular jurisdiction or is carrying on a particular business (e.g. the business of a motor vehicle dealer in terms of the Motor Vehicle Dealers Act 1975).</p> <ul style="list-style-type: none"> ➤ In the context of the Bill (and also currently Part 5D of the RBNZ Act), the concept of carrying on business must involve the following components: <ul style="list-style-type: none"> (a) a series of regular activities of a common kind (as opposed to an isolated or occasional transaction); (b) the activities must be carried on with a view to a profit (This is the notion of a “business”); (c) while the business need not be the only or the primary activity carried on by the relevant enterprise, it nevertheless must be a separate and identifiable business which is materially more than an occasional activity or an activity which can reasonably be regarded as “part and parcel” of the enterprise’s core business. ➤ In light of what we say above: <ul style="list-style-type: none"> (i) Foodstuffs is clearly not carrying on the business of borrowing and lending money or providing financial services; (ii) rather, Foodstuffs carries on the essentially non-financial business of a co-operative grocery wholesaler; (iii) accordingly, Foodstuffs should not be captured within the definition of “NBDT” in the Bill (and, indeed, should not be treated as a “deposit taker” as defined in section 157C of the RBNZ Act); and (iv) in any event it does not achieve the policy objectives of the NBDT regime for Foodstuffs to be subject to the regime. <p>Specific amendments</p> <ul style="list-style-type: none"> • Clause 5(1) should be amended as marked: <ul style="list-style-type: none"> “(1) In this Act, NBDT means any of the following: <ul style="list-style-type: none"> (a) a person that— <ul style="list-style-type: none"> (i) offers debt securities to the public in New Zealand; and (ii) carries on the business of borrowing and lending money, or

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		<p>providing financial services, or both:</p> <p>(b) a person, or a member of a class of persons (including any person or class of person identified in subsection (2)(a) to (e)), that is declared by regulations to be an NBDT for the purposes of this Act:</p> <p>(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:</p> <p>(d) a person that,—</p> <p>(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</p> <p>(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</p> <p><u>(iii) after this Act comes into force, any of those debt securities that are still debt securities offered to the public in New Zealand by that person remain unpaid.</u></p> <ul style="list-style-type: none"> • New clauses 5(3) and (4) should be inserted as follows: <ul style="list-style-type: none"> <u>“(3) For the purposes of subsection (1)(a)(ii), a person does not carry on the business of borrowing and lending money or providing financial services (or both) if such borrowing and lending or provision of financial services is provided only:</u> <ul style="list-style-type: none"> <u>(a) as an incidental part of another business that is not otherwise, or does not have, as its principal activity, the borrowing and lending of money or provision of financial services (or both); and</u> <u>(b) to that person’s members or close business associates.</u> <u>(4) In this section, an activity or service is incidental to another business if it is carried on to facilitate the carrying on of another business, or is ancillary to another business.”</u>