The Treasury

Reserve Bank Act Review Phase 2 Consultation 3 Submission Information Release

February 2021

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[23] 9(2)(a) - to protect the privacy of natural persons, including deceased people

[25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information

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From: Victor Kuipers [TSY]
Sent: Tuesday, 8 September 2020 8:59 AM
To: @Reserve Bank Act Review – Phase 2
Subject: Notes from stakeholder engagement: Bell Gully (David Craig)

All

Here are the notes from the stakeholder engagement meeting that we held with David Craig from Bell Gully last week.

Date:	3 September 2020
Organisation	Bell Gully
Stakeholders Name	David Craig
Format	Meeting at Bell Gully
Review Team members	Victor Kuipers, Chris Hunt Also attending: Kerry Beaumont (RBNZ), Ashley Tomlinson (RBNZ), Stephen Revill (Treasury), Amir Mehta (Treasury)
Summary of submissions	
Include?	Yes
In confidence	No
Attributable?	Yes
Written submission?	No (this meeting constitutes Bell Gully's submission)

Topic	**Summary**
Crisis management	**Background** • David's team works with many overseas clients, usually wholesale investors, and including derivatives-related products.

- Bell Gully, in explaining NZ's insolvency regime, and in particular statutory management, helps clients 'rate' NZ as a place for transacting (i.e. whether to transact at all, and pricing).

7.1: Conditions for placing a deposit taker into resolution

- Favours a non-viability test that is purely based on financial viability indicators
- Non-viability proposal (c) is too broad and sets the bar unnecessarily low to trigger resolution. A failure to meet licensing requirements that does not affect financial viability should be dealt with using non-resolution tools.
- Agrees that guidance issued by the Resolution Authority would help in mitigating concerns about the use of non-financial viability indicators, but also points out that guidance does not have the force of law and therefore does not provide the same level of comfort to parties transacting with a deposit taker as would a strictly defined financial test.

7.2 Liabilities that would be subject to statutory bail-in

- Favours the UK approach (a negative list) as being more simple, although it would be important to understand what the negative list would carve out from the scope of bail-in.
- The substance of the outcome, however, is of greater concern than the approach taken to get there.
- Including derivatives in the scope of bail-in would be of concern to international banks.
- The understanding that the actual amount of a derivative that could be bailed in would be the net close-out amount less any posted collateral is broadly correct.
- It is important for derivative counterparties to be able to have immediate access to collateral (hence the 2019 Derivatives Margin Act), although international counterparties should be comfortable with stays that align with international norms, such as a 48-hour stay on the exercise of early termination rights or secured creditor enforcement rights. A number of Bell Gully clients that are international banks have raised concerns with the prospect of a regulator being able to extend a short term stay — even if only provided certain solvency conditions are satisfied.
- Aim for consistency in approach, to the extent possible, on stays across legislation, eg, between the FMI Bill, the 2019 Derivatives Margin Act and the Deposit Takers legislation.
- Contractual recognition of (1) in the derivatives context, powers to stay the exercise of early termination rights and secured creditor enforcement rights, and (2) in the context of bail-inable instruments, the power to bail in is essential for foreign law-governed contracts and should be mandated in legislation.
- Would like to see a class exemption for deposit takers from the FMCA convertible instruments disclosure requirements that may be triggered by bail-in requirements imposed under the new regime (or, for that

matter, under foreign law). An instrument should not be treated as a standard convertible instrument under the FMCA if the conversion can only arise from the resolution authority triggering bail-in exercised under a statutory power. It is impossible for the issuer to give meaningful disclosure of the risk associated with this type of bail-in or of the nature of the instrument to be issued on 'conversion' (to meet the FMCA disclosure requirements), given that the timing/outcome of the bail-in will be in the hands of the resolution authority. Also, the wholesale markets do not consider these bail-inable instruments as truly convertible instruments (e.g., instruments that convert in accordance with privately negotiated commercial terms). It is accepted that the FMA is likely to want to impose some form of standard disclosure requirements on bail-inable instruments. The FMA will be familiar with this issue – see the Rabobank exemption (2017).

- No strong views on the retrospectivity of the scope of bail-in – retrospective application might be more simple and would not be the end of the world (this would not be the first instance of legislation affecting the risks underlying financial instruments already on issue). Not retrospectively applying the scope of bail-in could invite avoidance through the design and uptake of instruments that did not meet the criteria for bail-in. On balance, prefers retrospective application.

7.5 Application to deposit takers of CIMA statutory management

- Agrees that the existing application of two statutory management regimes to deposit takers is not well understood internationally.
- The assumption by overseas parties is that, if a registered bank were ever to be placed under statutory management, it would only ever be under the RBNZ Act, not CIMA.
- Supports removing deposit takers from the scope of CIMA statutory management.
- It is inconceivable that, regardless of any theoretical gap that removal from CIMA statutory management might create, there could be a situation where the absence of the CIMA statutory management option would leave authorities without the necessary tools to act in the public interest.

Application of the national security and public order statutory management provisions of the Overseas Investment Act to deposit takers

- There should not be a situation where meeting the criteria for authorisation/licensing is not sufficient to avert the deployment of statutory management under the Overseas Investment Act. If there is a circumstance where national security or public order interests are at stake, these should be able to be dealt with through the normal authorisation/licensing mechanisms.

Victor