

9 May 2024

Reserve Bank of New Zealand – Te Pūtea Matua

By email: dta@rbnz.govt.nz

Feedback on policy proposals for regulations under the Deposit Takers Act 2023

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Reserve Bank’s *Depositor Compensation Scheme Regulations* consultation paper (**Consultation Paper**), which seeks feedback on policy proposals for regulations which would be needed to bring the Depositor Compensation Scheme (**DCS**) into force.

1.2 This submission has been prepared with input from the Law Society’s Professional Standards Team, and Civil Litigation & Tribunals Committee.¹ It provides feedback on the policy proposals which relate to:

- (a) The time bar for requesting a reassessment of a levy payment (Chapter 2 of the Consultation Paper); and
- (b) The treatment of “relevant arrangements” which allow deposits to be held in the name of a depositor on behalf of another person (discussed in Chapter 4).

2 Time bar for reassessment

2.1 The Reserve Bank has proposed that deposit takers should be allowed to submit information which impacts the calculation of a paid levy, and to receive a refund (or, in the case of an underpayment, be liable for the shortfall). The Consultation Paper seeks feedback on whether:²

- (a) A time bar is necessary to limit such reassessments, and
- (b) If so, if four years is an appropriate length of time.

Is a time bar necessary?

2.2 The Law Society believes a time bar is necessary, for a number of reasons:

- (a) Even if recalculations are seldom likely to be necessary, the possibility cannot be excluded, and a time bar is an appropriate means of providing an ‘outer limit’ to the uncertainty the potential need for adjustment provides.

¹ More information about these committees can be found on the Law Society’s website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

² Consultation questions 1 and 2 on page 28 of the Consultation Paper.

- (b) There are numerous examples of time bars and limitation provisions across New Zealand law – these give expression to the general principle that, at a certain point in time, the interests of justice in correcting errors and redressing grievances must yield to the need for people to have certainty about their legal affairs. It also recognises the fact that it becomes harder to correct errors as time passes (for example, where information is lost, or where an individual’s recollection of a matter fades).
- (c) Time bars place a burden on potential applicants for relief (or those who would rely on the ability to obtain a reassessment) to exercise due care in conducting their affairs and obtaining relief within a reasonable period. It is appropriate to place that burden on the potential applicant as the party best-placed to identify relevant issues and take action.³

What is an appropriate length of time?

- 2.3 The law establishes different limitation periods for different types of action. In some cases, the period reflects the importance of the issue at hand being juxtaposed with difficulties in the claimant being reasonably able to discover the issue, and the need to permit respondents certainty as to their affairs after a reasonable period.⁴ There is nothing to suggest these (sometimes competing) principles cannot be applied in respect of the DCS, as they have been in the numerous other areas of the law where limitation defences apply.
- 2.4 The Consultation Paper refers to the four-year time bar that generally applies in respect of tax matters,⁵ and considers this to be an appropriate analogy on the basis that the calculation of levies is likely to be approximately as complex as those in tax matters.
- 2.5 We agree this is an appropriate analogy, reflecting the likelihood of error, and the difficulty of detecting that error through reasonable diligence. We assume the DCS will give rise to disputes comparable in their complexity to ordinary tax disputes (concerning the interpretation of tax law and its application to settled facts), to which the four-year time bar referred to in the Consultation Paper would apply. Differing time bars apply to other tax matters (such as more blatant cases of evasion or non-compliance), but those issues appear unlikely to apply with the DCS. This supports the appropriateness of a four-year time bar.
- 2.6 It is also worth noting that the proposed four-year period is longer than the limitation period for defamation claims (2 years),⁶ and for applications under the Fair Trading Act 1986 (3 years).⁷ The shorter periods for these claims and applications recognise the broad reach of these areas of the law, which justifies a particularly short period to avoid

³ Where exceptions or longer periods are provided, these generally concern cases of fraud (where it is appropriate to give the potential claimant longer to act on a claim that has been concealed from them) – see, for example, the provisions regarding fraudulent concealment of a cause of action in s 48 of the Limitation Act 2010, and s 107A(2) of the Tax Administration Act 1994.

⁴ For example, for building cases, a ten-year limitation period applies (see Building Act 2004, s 393). This is longer than the general six-year period which applies to most money claims under s 11(1) of the Limitation Act 2010.

⁵ At page 25.

⁶ Limitation Act, s 15.

⁷ Section 43A.

creating unacceptable uncertainty for potential defendants. Similar concerns do not appear, based on our reading of the information in the Consultation Paper, to arise in respect of the DCS.

3 Treating lawyers' trust accounts as 'relevant arrangements'

3.1 The Reserve Bank has proposed specifying, through regulations, that lawyers' trust accounts come within the meaning of 'relevant arrangements' in the Deposit Takers Act 2023 (Act).⁸

3.2 The Law Society supports the making of regulations to clarify that lawyers' trust accounts are to be treated as 'relevant arrangements'. We also agree it is appropriate to consider the principles listed in the Consultation Paper when assessing whether it is appropriate to make regulations to this effect.⁹

3.3 We are also pleased to see the Reserve Bank has confirmed lawyers are not 'deposit takers' for the purposes of the Act, and these regulations will not place any further regulatory or financial burdens on lawyers (beyond existing requirements).¹⁰ We welcome and support any measures which do not place unnecessary compliance burdens on lawyers, and hope the regulations will be drafted with this in mind.

Implementation challenges and the scale of accounts covered

3.4 The Consultation Paper seeks feedback about possible challenges to implementation, and the likely scale of accounts impacted by the proposed changes.¹¹ If these new regulatory requirements align with those which already apply to lawyers (i.e., client record keeping), we do not anticipate there will be any practical challenges to implementing the changes relating to the treatment of lawyers' trust accounts. In terms of scale, there are currently approximately 1,280 law firms and sole practitioners with trust accounts which would be covered by the proposed regulations.

Proposal to make payments into 'like' accounts

3.5 The Reserve Bank has proposed that payouts for relevant arrangements should be paid to the account holder, rather than to the individual on whose behalf the money is held.¹² In relation to lawyers' trust accounts, we understand the effect of this proposal would be that compensation payments are made to the lawyer who has the relevant trust account, who would then pay the compensation sum to the relevant client. We support this proposal, and agree with the Reserve Bank's rationale for the proposal – i.e., to ensure there are no unintended consequences from payments being released from a 'relevant arrangement' account (for example, if there are conditions attached to the funds).¹³ Lawyers will often hold funds subject to conditions which prevent immediate disbursement (for example, in the context of conveyancing transactions, or where funds

⁸ We note the Consultation Paper refers to lawyers' "client account arrangements". These effectively refer to lawyers' trust accounts (as practitioners who receive money on behalf of any person are required to ensure the money is paid promptly into a New Zealand trust account – see s 110 of the Lawyers and Conveyancers Act 2006).

⁹ Consultation Paper, page 39.

¹⁰ Consultation Paper, page 43. 1

¹¹ Question 4 on page 45.

¹² Consultation paper, page 43.

¹³ Consultation Paper, page 43.

are held subject to an undertaking in a contentious matter, pending the resolution of a dispute).

4 Next steps

- 4.1 We would be happy to answer any questions, or to discuss this feedback if that would assist. Please feel free to get in touch via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā



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