

## PROTECTION OF DEPOSITORS BILL

### EXPLANATORY NOTE

THE main purpose of this Bill is to ensure that persons inviting the public to deposit money with them at interest, or at a premium, or for any consideration in money or money's worth, must comply with requirements substantially the same as those that must be complied with by companies that invite such deposits. To that end the provisions of the Bill have been adapted mainly from those of sections 48A and 95A to 95D of the Companies Act, as inserted by sections 3 and 5 of the Companies Amendment Act 1966.

*Clause 1* relates to the Short Title and commencement of the Bill, which is to come into force on 1 January 1969.

*Clause 2* is the interpretation clause. "Deposit" is confined to a loan of money at interest, or repayable at a premium, or repayable with any consideration in money or money's worth.

*Clause 3: Subclause (1)* provides that *clauses 2 to 10* of the Bill are not to apply to invitations by any body corporate, or by any association of persons registered under the Friendly Societies Act 1909.

*Subclause (2)* however provides that the said clauses may be applied by Order in Council to friendly societies.

*Clause 4: Subclause (1)* provides that a person is not to accept deposits in response to an invitation to the public, whether issued before or after the commencement of the new Act, or to issue an invitation to any depositors to renew or vary the terms of a deposit made in response to an invitation to the public, unless—

- (a) An eligible body corporate is appointed by deed as trustee for the depositors; and
- (b) The trustee has accepted appointment and executed the trust deed; and
- (c) The trustee is satisfied that the invitation is consistent with the terms of the deposits and the trust deed; and
- (d) The borrower has filed a copy of the trust deed, and a signed copy of the invitation, with the Registrar of Companies.

*Subclause (2)* sets out the kinds of body corporate eligible for appointment as trustee.

*Subclauses (3) and (4)* deal with the approval by the Minister of certain kinds of body corporate for the purposes of *subclause (2)*.

*Subclause (5)* forbids the acceptance of appointment by a body corporate if the borrower is a director of it or of its holding company (if any) or is the beneficial owner of 10 percent or more of the issued shares of the trustee or holding company.

*Subclause (6)* requires that there shall be a continuing trustee.

*Subclause (7)*: The effect of this subclause is that the copies of the trust deed and invitation filed with the Registrar are open to inspection at the Companies Office.

*Subclause (8)* creates offences.

*Clause 5*: The borrower is to submit audited accounts relating to his business, assets, and liabilities to the trustee as required by the trustee.

*Clause 6*: The borrower is to allow the trustee to inspect the accounting and other records relating to his business and his assets and liabilities; to give the trustee such information relating to the records as it requires; and to summon a meeting of depositors when requested to do so by the trustee, or by persons holding not less than one-tenth of the total amount of the deposits, for the purpose of considering accounts and giving directions to the trustee.

*Clause 7*: The trustee is to have the same duties as those of a trustee for debenture holders under section 95D of the Companies Act.

*Clause 8* is in the same terms as those of section 48A of the Companies Act, with necessary modifications.

*Subclause (1)* sets out the statements that must be made in an invitation to the public.

*Subclause (2)*: Where the deposits are not to be secured by a charge on the borrower's assets, references in any invitation or advertisement to any documents to be issued evidencing the deposits must include the word "unsecured", and must not use the word "debentures" or the word "registered".

*Subclause (3)* imposes restrictions on the use in invitations or advertisements of the terms "mortgage" or "registered mortgage" in relation to such documents. If those terms are used, there must be a registered or registrable first mortgage given to the trustee over land owned by the borrower, securing repayment of the amount of the deposits. That amount, and any other liabilities secured by the mortgage and ranking *pari passu* with the liability to repay the deposits, must not exceed 60 percent of the borrower's interest in the land as shown in a copy of a valuation, by a competent valuer, of the borrower's interest in the land.

*Subclause (4)*: A deposit is not to be accepted unless it is accompanied by a form of application or offer signed by the depositor and supplied to him with an invitation dated not more than 6 months earlier.

*Subclauses (5) and (6)* make, in relation to documents actually issued as evidence of deposits, the same provisions as to terminology as are made by *subclauses (2) and (3)*.

*Subclause (7)* provides that the clause will not apply to a deposit if it is shown that it was not made in response to an invitation or advertisement issued to the public.

*Subclause (8)* creates offences.

*Clause 9* imposes the same criminal liability for misstatements in invitations or advertisements as exists under sections 54 (1) and 56 of the Companies Act 1955 in relation to misstatements in company prospectuses.

*Clause 10* empowers the Minister to grant exemptions from any of the foregoing provisions.

*Clause 11* authorises the application to bodies corporate (other than local authorities, public bodies, banks, trustee savings banks, and companies), by Order in Council, of those sections of the Companies Act described in *subclause (2)*. The effect of such an Order in Council would be that any body corporate to which the order applies would have to comply with those provisions, in the same way as companies, if it invites deposits from the public. The provisions mentioned are those on which this Bill is based.

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*Hon. Mr Hanan*

## PROTECTION OF DEPOSITORS

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### ANALYSIS

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### A BILL INTITULED

**An Act to regulate the issue of invitations to the public to deposit money with any person, and generally to make provision for the protection of depositors**

5 BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. **Short Title and commencement**—(1) This Act may be cited as the Protection of Depositors Act 1968.

10 (2) This Act shall come into force on the first day of January, nineteen hundred and sixty-nine.

2. **Interpretation**—In this Act, unless the context otherwise requires,—

15 “Advertisement” means an advertisement designed only to make the public aware of an invitation or opportunity to deposit money with any person:

“Borrower” means any person who accepts, or holds himself out as willing to accept, any money by way of deposit in response to an invitation issued to the public to deposit money with him:

“Deposit” means a loan of money at interest, or repayable at a premium or repayable with any consideration in money or money’s worth; and references to the deposit of money shall be construed accordingly: 5

“Depositor” means a person entitled, or prospectively entitled, to repayment of a deposit, whether made by him or not: 10

“Issued”, in relation to any invitation or advertisement, includes published, circulated, distributed, or disseminated by any means whatsoever; and references to the issue of any invitation or advertisement have a corresponding meaning: 15

“Minister” means the Minister of Justice.

**3. Application of this Act**—(1) Subject to subsection (2) of this section, sections 2 to 10 of this Act shall not apply to the issue of any invitation or advertisement, or the acceptance of deposits of money, by or on behalf of— 20

(a) Any body corporate; or

(b) Any association of persons registered under the Friendly Societies Act 1909.

(2) The Governor-General may from time to time, by Order in Council, make regulations applying all or any of the provisions of sections 2 to 10 of this Act to any association of persons registered under the Friendly Societies Act 1909, with such modifications (if any) as are prescribed in the regulations. 30

**4. Trustee for depositors**—(1) No person shall accept a deposit of money from any other person in response to an invitation to the public, whether issued before or after the commencement of this Act, or issue or cause to be issued any invitation to any depositors to renew or vary the terms of any deposit made in response to an invitation to the public, unless— 35

(a) Provision has been made in a deed for the appointment of a trustee for the depositors, being a body corporate eligible for appointment as such under subsection (2) of this section; and 40

(b) Such a body corporate as aforesaid has accepted appointment as the trustee and has executed the trust deed; and

5 (c) The trustee is satisfied that the invitation does not contain any matter that is inconsistent with the terms and conditions of the deposits or with the terms of the trust deed; and

10 (d) The borrower has filed a copy of the trust deed, and a copy of the invitation signed by the borrower, with the Registrar of Companies.

(2) No person shall accept appointment as trustee for the purposes of this section except a body corporate of any of the following kinds, namely:

15 (a) A trustee corporation within the meaning of the Trustee Act 1956:

(b) A bank within the meaning of the Banking Act 1908:

20 (c) A body corporate carrying on in New Zealand any class of insurance business, being a body corporate, or a body corporate of a specified class, for the time being approved in writing by the Minister for the purposes of this section, either generally or in respect of any particular invitation:

25 (d) A body corporate approved in writing by the Minister for the purposes of this section, either generally or in respect of any particular invitation:

30 (e) A company (in this paragraph referred to as the subsidiary) the whole of whose issued shares are held beneficially by a body corporate or bodies corporate of any of the foregoing kinds (in this paragraph referred to as the holding company), if—

(i) The holding company is liable for all liabilities incurred or to be incurred by the subsidiary as trustee for the depositors; or

35 (ii) The holding company has subscribed for and beneficially holds shares in the subsidiary in respect of which shares there is a liability of not less than four hundred thousand dollars (or its equivalent in the currency of the country or state in which the subsidiary is incorporated) which has not been called up and which the subsidiary has resolved by special resolution shall not be capable of being called up except in the event and for the purposes of a winding up of the subsidiary.

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(3) The Minister may at any time, in writing, revoke any approval given by him of any body corporate for the purposes of paragraph (c) or paragraph (d) of subsection (2) of this section; but in any such case the revocation shall not affect any appointment of that body corporate as trustee before the date of the revocation, or the powers, duties, or obligations of the trustee under or by virtue of that appointment. 5

(4) Notice of any approval given by the Minister as aforesaid, and of the revocation of any such approval, shall be published in the *Gazette*. 10

(5) No body corporate shall accept appointment or act as a trustee in respect of any invitation to which this section applies, and no person shall accept any deposit or issue or cause to be issued any invitation to which this section applies, if the borrower is a director of the body corporate or, in the case of a company, is a director of any holding company of that company or is the beneficial owner of ten percent or more of the issued shares of that company or of any such holding company. 15

(6) Notwithstanding anything to the contrary in the trust deed, the trustee shall not, without the consent of the Supreme Court or a Judge thereof, be discharged or retire from the trust until another trustee eligible for appointment as such under this section has been appointed to and taken office in accordance with the provisions of the trust deed or of the Trustee Act 1956. 20 25

(7) Section 9 of the Companies Act 1955 (which relates to inspection, production, and evidence of documents kept by the Registrar) shall extend and apply, so far as it is applicable and with the necessary modifications, to the documents filed with the Registrar of Companies pursuant to paragraph (d) of subsection (1) of this section. 30

(8) If any person or body corporate contravenes any provision of this section, the person or body corporate, and every director or officer of the body corporate who knowingly and wilfully authorises or permits the contravention, commits an offence and shall be liable on summary conviction to a fine not exceeding one thousand dollars. 35

**5. Borrower to submit accounts to trustee for depositors—**  
The borrower shall, at such times and in such form and manner, and to such extent, as the trustee for the depositors may require, furnish to the trustee accounts relating to his business and his assets and liabilities, audited by an auditor approved by the trustee. 40

**6. Right of trustee for depositors to obtain information, etc.—**(1) The borrower shall from time to time—

- 5 (a) At the request in writing of the trustee for the depositors, make available for its inspection the whole of the accounting and other records of the borrower relating to his business and his assets and liabilities:
- (b) Give to the trustee such information as it requires with respect to all matters relating to such records:
- 10 (c) At the request in writing of the trustee, or of persons holding not less than one-tenth of the total amount of deposits for the time being held by the borrower, summon a meeting of the depositors for the purpose of considering the last available accounts and records relating to his business and his assets and liabilities, and of giving directions to the trustee in relation to  
15 the exercise of its powers.

(2) Every meeting summoned pursuant to paragraph (c) of subsection (1) of this section shall be summoned by sending  
20 by post a notice, specifying the time and place of the meeting, to every depositor at his last known address not later than fourteen days before the date of the proposed meeting. The meeting shall be held under the chairmanship of a person nominated by the trustee or such other person as may be appointed in that behalf by the depositors present at the  
25 meeting.

**7. Duties of trustee for depositors—**(1) The trustee for the depositors shall exercise reasonable diligence to ascertain whether or not the borrower has committed any breach of the terms of the trust deed or of the terms or conditions of the  
30 deposits, and, except where it is satisfied that the breach will not materially prejudice the security (if any) of the deposits or the interests of the depositors, shall do all such things as it is empowered to do to cause the borrower to remedy any breach of those terms or conditions.

35 (2) The trustee for the depositors shall exercise reasonable diligence to ascertain whether or not the assets of the borrower that are or may be available, whether by way of security or otherwise, are sufficient or likely to be sufficient to discharge the amounts of the deposits as they become due.

40 (3) If at any time, after due inquiry, the trustee is of the opinion that such assets as aforesaid are insufficient or likely to be insufficient to discharge the amounts of the deposits as they become due, the trustee, having regard to any other powers or remedies available to it, under the trust deed or



any enactment or rule of law, for the protection of the interests of the depositors, and to the availability (by way of security or otherwise) of any assets of any person who has guaranteed or agreed to guarantee the repayment of the amounts of the deposits, and to the possible effects on the borrower's affairs of any application to the Supreme Court or a Judge thereof under this subsection, and to all other relevant circumstances, may in its discretion apply to the Supreme Court or a Judge thereof (hereafter in this section referred to as the Court) for an order under subsection (4) of this section. 5 10

(4) On any such application the Court in its discretion, after giving the borrower an opportunity of being heard, and having regard to the rights of all creditors of the borrower, may by order give such directions as the Court thinks necessary to protect the interests of the depositors, the borrower, or the public, whether by way of staying any action or proceeding by or against the borrower, restraining the payment by him of any money to any depositors or to any class of depositors, appointing a receiver of such of his property as constitutes the security (if any) for the deposits, or otherwise. 15 20

(5) The Court may at any time rescind any such order or vary it as the Court thinks fit.

(6) The trustee's duties and powers under this section shall not limit any duties, obligations, or powers imposed or conferred on it by the trust deed or by the terms and conditions of the deposits or by law. 25

(7) Subsections (1) and (2) of section 96 of the Companies Act 1955 (which relate to the liability of trustees for debenture holders) shall extend and apply, so far as they are applicable and with all necessary modifications, to any provision in any trust deed to which section 4 of this Act applies, whether or not security is given for the deposits; and in determining, for the purposes of the application of those subsections as aforesaid, the degree of care and diligence required of the trustee regard shall be had to the provisions of this section as well as to the provisions of the trust deed. 30 35

(8) The trustee may rely upon any certificate or report given or statement made by any person who is solicitor to or auditor of the borrower, if it has reasonable grounds for believing that the person was competent to give the certificate or report or to make the statement. 40

**8. Invitation to deposit money with a person—**(1) In any invitation (other than an advertisement) issued to the public to deposit money with any person, in whatever form it is issued, there shall be included—

5 (a) A statement that neither the repayment of the amounts of the deposits nor the payment of interest or of any premium thereon or other consideration therefor is guaranteed by the trustee for the depositors:

10 (b) A statement of the total amount of deposits that are being sought:

(c) A statement as to whether or not the borrower reserves the right to accept or retain any amount exceeding the amount referred to in paragraph (b) of this subsection and, if he does, the limit, if any, on the right so reserved expressed as a sum of money.

15 (2) Where any such invitation, or any advertisement relating to any such invitation, is issued, and the deposits to which it relates are not to be secured by a charge or charges on the borrower's assets or any of them, any statement in the invitation or advertisement relating to documents to be issued evidencing such deposits shall refer to those documents as unsecured deposit notes or unsecured notes, or by some other description that includes the word "unsecured", and shall not—

20 (a) Refer to the documents as debentures; or

25 (b) Refer to them by any description that includes the word "registered".

(3) In any such invitation or advertisement, no statement relating to documents to be issued evidencing deposits shall refer to those documents as mortgage debentures or registered mortgage debentures, or by any other description that includes the word "mortgage" or the term "registered mortgage", unless—

30 (a) The repayment of all money deposited with the borrower in response to the invitation is secured by a first mortgage given to the trustee for the depositors over land owned by the borrower; and

35 (b) The mortgage has been registered, or is a registrable mortgage that has been lodged for registration in accordance with the law in force relating to the registration of mortgages of land in the place where the land is situated; and

40 (c) The aggregate amount of such money and of all other liabilities, if any, secured by the mortgage and ranking *pari passu* with the liability to repay such money does not exceed sixty percent of the value of the borrower's interest in the land, as shown in the copy of the valuation included in the invitation; and

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(d) There is included in the invitation a copy of a written valuation of the borrower's interest in the land made not more than six months before the date of the invitation by a person competent and qualified to make the valuation in the place where the land is situated, being a person who is not an employee of the borrower. 5

(4) Subject to subsection (7) of this section, no person shall accept a deposit of money from any other person unless—

(a) The deposit is accompanied by a form of application or offer signed by that other person; and 10

(b) The form was supplied to that other person with an invitation which is dated and which otherwise complies with the requirements of this Act; and

(c) The date of the invitation so supplied was a date within the period of six months immediately preceding the date on which the form of application or offer was so supplied. 15

(5) Subject as aforesaid, where any person accepts any deposit of money from any other person, and the repayment of the money is not to be secured by a charge on the borrower's assets or any of them, the borrower shall issue to the depositor as evidence thereof a document acknowledging the borrower's indebtedness in respect of the deposit. The document shall be described on its face as an unsecured deposit note or an unsecured note, or shall bear on its face some other description that includes the word "unsecured", and shall not— 20 25

(a) Be described in any part of it as a debenture; or

(b) Bear on any part of it the word "registered".

(6) No document issued by a borrower evidencing any deposit with him, being a deposit made in response to any such invitation or advertisement, shall be described in any part of it as a mortgage debenture or registered mortgage debenture, or have in any part of it any other description that includes the word "mortgage" or the term "registered mortgage", unless the provisions of paragraphs (a) to (d) of subsection (3) of this section have been complied with. 30 35

(7) This section shall not apply to any deposit with a person if it is shown that the deposit was not made in response to an invitation or advertisement issued to the public. 40

(8) Every person commits an offence and is liable on summary conviction to a fine not exceeding one thousand dollars who—

(a) Issues any invitation or advertisement or document in contravention of any provision of this section; or 45

- (b) Acts in contravention of or fails to comply in any respect with any provision of this section; or
- (c) Is knowingly a party to any such issue or any such contravention or non-compliance as aforesaid.

5     **9. Criminal liability for misstatements in invitations or advertisements**—(1) Where an invitation or advertisement to the public to deposit money with any person issued after the commencement of this Act includes any untrue statement, any person who authorised the issue of the invitation or advertise-  
10 ment commits an offence and shall be liable—

- (a) On conviction on indictment, to imprisonment for a term not exceeding two years or a fine not exceeding one thousand dollars, or both; or
- 15 (b) On summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding two hundred dollars, or both—

unless he proves either that the statement was immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the invitation or advertisement, believe that  
20 the statement was true.

(2) For the purposes of this section—

- (a) A statement included in an invitation or advertisement shall be deemed to be untrue if it is misleading in the form and context in which it is included; and
- 25 (b) A statement shall be deemed to be included in an invitation or advertisement if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

30     **10. Power of Minister to grant exemptions**—(1) The Minister may from time to time, by notice in the *Gazette*, exempt any person from the application of any of the provisions of sections 4 to 8 of this Act.

(2) Any such exemption may be granted—

- 35 (a) In respect of such transactions or classes of transactions as the Minister may determine, or in respect of any specified transaction:
- (b) Wholly or partly and either unconditionally or subject to such conditions as the Minister thinks fit.

40 (3) In like manner, any exemption granted under this section may at any time be revoked by the Minister, and any condition subject to which any such exemption is granted may from time to time be revoked, varied, or added to by the Minister.

**11. Power to apply certain provisions of Companies Act 1955 to certain bodies corporate**—The Governor-General may from time to time, by Order in Council, make regulations applying to any body corporate (not being a local authority within the meaning of the Local Authorities Loans Act 1956, a public body, a bank within the meaning of the Banking Act 1908, a trustee savings bank within the meaning of the Trustee Savings Banks Act 1948, or a company within the meaning of the Companies Act 1955), with such modifications (if any) as are prescribed in the regulations, all or any of the following provisions of the Companies Act 1955, namely:

- (a) Sections 48A and 48B (which were enacted by sections 3 and 4 of the Companies Amendment Act 1966 and relate to invitations and advertisements to the public to deposit or lend money):
- (b) Sections 53, 54, and 56 (which relate to liability for misstatements in prospectuses):
- (c) Sections 95A to 95D (which were enacted by section 5 of the Companies Amendment Act 1966 and relate to trustees for debenture holders).