

# **BANK (RECOVERY AND RESOLUTION) BILL 2020**

## **EXPLANATORY NOTES**

*These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Mr W C Shimmins, MHK.*

### **INTRODUCTION**

1. These explanatory notes relate to the *Bank (Recovery and Resolution) Bill 2020* (the "**Bill**"). The Bill is promoted by the Treasury in association with the Isle of Man Financial Services Authority (the "**FSA**"). The notes have been prepared by the FSA in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.
3. The Bill has been subject to public consultation and has been updated to take account of comments raised.
4. An Impact Assessment of the Bill has been prepared.
5. In the opinion of the Member moving the Bill, the provisions of the Bill are compatible with the Convention rights within the meaning of the Human Rights Act 2001.
6. If approved, the Act is expected to increase the administrative burden on the FSA, albeit some or all of the incremental operational costs incurred may be recovered from the banking industry. No additional burden is anticipated for Government.

### **BACKGROUND**

7. This Bill, which is promoted by the Treasury in association with the FSA, establishes a comprehensive legal framework, in line with relevant international standards, which will allow a failing bank to be either resolved or wound-up in an orderly fashion, without losses falling upon the taxpayer.
8. The purpose of the Bill is to provide a framework for recovery and resolution of failing banks in the Isle of Man and for connected purposes.
9. It is intended that the Bill will come into operation as soon as possible after Royal Assent is granted.

### **STRUCTURE OF THE BILL**

10. The Bill has 171 clauses. There are 14 Parts and one Schedule as follows -
11. **Part 1** of the Bill (clauses 1 to 5) contains preliminary matters – principally commencement and interpretation provisions.

12. **Part 2** of the Bill (clauses 6 to 15) explains the Resolution Authority ('Authority') for the Island.
13. **Part 3** of the Bill (clauses 16 to 24) addresses requirements on banks for recovery planning.
14. **Part 4** of the Bill (clauses 25 to 36) outlines resolution planning and the Authority's role in this.
15. **Part 5** of the Bill (clauses 37 to 40) provides for a resolution fund to be established.
16. **Part 6** of the Bill (clauses 41 to 56) addresses administrative provisions relating to bank resolution.
17. **Part 7** of the Bill (clauses 57 to 71) provides for the valuation of a failing bank's assets and liabilities.
18. **Part 8** of the Bill (clauses 72 to 121) describes the various resolution tools and how they may be used.
19. **Part 9** of the Bill (clauses 122 to 124) enables government financial assistance.
20. **Part 10** of the Bill (clauses 125 to 147) outlines general resolution powers and how they may be used.
21. **Part 11** of the Bill (clauses 148 to 150) provides that foreign resolution actions may be recognised.
22. **Part 12** of the Bill (clause 151) covers processes after a resolution action.
23. **Part 13** of the Bill (clauses 152 to 167) addresses the bank winding up procedure.
24. **Part 14** of the Bill (clauses 168 to 171) contains miscellaneous provisions, such as appeals and secondary legislation; and
25. **The Schedule** contains consequential amendments to the Preferential Payments Act 1908.

## **COMMENTRY ON CLAUSES**

### **Part 1 - Preliminary**

**Clause 1 and 2** provide for the short title and commencement of the 'Bank (Recovery and Resolution) Bill 2020' and allow transitional provisions.

**Clause 3** defines terms in the Bill.

**Clause 4** defines the term 'bank' and provides that the Treasury may by order exclude certain classes of institution from that definition.

**Clause 5** specifies the scope of the Bill and thus to which 'banks' the Bill applies.

## **Part 2 – The Authority**

**Clause 6** states that the resolution authority (the "**Authority**") for the Isle of Man is the FSA. It requires the FSA to make regulations prescribing how its functions as a resolution authority will be kept operationally separate from its functions as a regulatory supervisor.

**Clause 7** explains that the Authority's functions under the Financial Services Act 2008 are in addition to its functions under the Bill. It also provides for the Authority to exchange relevant information with the Manager of the Depositors' Compensation Scheme (the "**DCS**") or the Treasury, as they may have common interests.

**Clause 8** requires the Authority to have regard to both the recovery and resolution planning processes and to review recovery plans. It also enables the Authority to prepare resolution plans.

**Clause 9** requires a separation of functions between staff undertaking the Authority's functions versus the FSA's functions.

**Clause 10** requires the Authority to seek agreement to resolution plans from entities' 'home' resolution authorities overseas.

**Clause 11** enables the Authority to enter into agreements regarding resolution plans with other bodies that are responsible for the supervision or resolution of banks.

**Clause 12** addresses funding of the Authority's operations. It requires any levy that the Authority may impose on banks to be prescribed by the Authority by order.

**Clause 13** requires that the Authority is provided with the resources that it needs to carry out its role effectively.

**Clause 14** enables the Authority to delegate any of its functions under this Bill.

**Clause 15** limits the Authority's liability in respect of its functions under this Act, by reference to section 33 of the Financial Services Act 2008.

## **Part 3 – Recovery Planning**

**Clause 16** enables the Authority to require banks to prepare recovery plans for its consideration and to update those plans regularly. It also enables the Authority to take action against a bank that fails to comply with a direction imposed in connection with this requirement.

**Clause 17** requires the Authority to identify any matters in a recovery plan that may adversely impact the resolvability of the bank and requires the Authority to send recovery plans to relevant regulatory supervisors and resolution authorities.

**Clause 18** requires a bank's recovery plan to be consistent with that for its group, where it is part of a group outside the Island. In addition, the clause permits group-wide recovery plans to be applied to a bank in the Island where these are appropriate.

**Clause 19** requires that recovery plans address a range of stress scenarios and that banks establish and monitor a framework of indicators for identifying when action should be taken. Decisions by a bank in this respect are required to be notified to the Authority, otherwise action for a breach may result. The clause also states that public financial support must not be anticipated.

**Clause 20** requires the Authority to review recovery plans against specified suitability criteria and to take banks' structures, finances and risk profiles into consideration. If a plan impacts on a group entity elsewhere, that impact must also be considered.

**Clause 21** specifies that recovery plans are confidential.

**Clause 22** addresses action the Authority must take, and a bank's obligations, if the Authority determines that a recovery plan is inadequate or deficient. The clause also enables the Authority to direct a bank to make specific changes to an inadequate recovery plan and enables the Authority to take action against the bank if such a direction is not complied with.

**Clause 23** enables the Authority to direct a bank to take various actions connected with its recovery plan. These actions relate to risk profile, capital, strategy and structure, funding and governance. Should a bank fail to comply with such a direction, action for a breach may result.

**Clause 24** enables the Authority to make regulations relating to recovery planning, subject to Tynwald approval.

#### **Part 4 – Resolution Planning**

**Clause 25** requires the Authority to draw up a resolution plan for each bank incorporated in the Isle of Man and share it with the bank concerned. Such banks may be required to assist with the plans, which must be proportionate to each bank's systemic importance. The Authority must consult on the draft plans with relevant resolution authorities and regulators in other jurisdictions. The resolution plans are required to outline the resolution actions that the Authority would take in certain situations. The Treasury may make regulations relating to resolution planning, which are subject to affirmative Tynwald procedure.

**Clause 26** requires the Authority to discuss a bank's resolution plans with its home resolution authority if the bank's home jurisdiction is outside the Island. The Authority must consider how a bank group's plans impact on its Isle of Man business and must inform the home resolution authority if it disagrees with resolution plans for the bank in the Island. As in clause 19, public financial support must not be anticipated.

**Clause 27** enables the Authority to require banks to maintain specified levels of authorised capital, which must relate to the resolution plan for each bank. The Authority may take action against a bank that has inadequate authorised capital levels after a notice period.

**Clause 28** enables the Authority to direct a bank to take measures in respect of stability or winding-up of that bank.

**Clause 29** requires the Authority to consider the economic situation in any jurisdiction in which an Island-incorporated bank group operates and the impact of preparing or implementing a resolution plan on the group entities in that jurisdiction.

**Clause 30** requires the Authority to assess the resolvability of each Isle of Man-incorporated bank, excluding consideration of any public financial support. Banks will be considered resolvable if they may be resolved via the application of stabilisation tools or resolution powers without significant adverse effect on the Island's financial system, or liquidated.

**Clause 31** specifies requirements for the resolvability assessment, including group-wide considerations and identification of any material impediments. Such impediments must be notified by the Authority to both the bank and relevant resolution authorities and the bank must propose corrective measures or it may be sanctioned for non-compliance.

**Clause 32** further addresses impediments to resolvability and enables the Authority to require various changes, including to: a bank's intra-group financing agreements; limits on a bank's exposures; changes to a bank's activities; and variations to a bank's legal or operational structures. The Authority may take action for non-compliance if a bank fails to propose a suitable plan.

**Clause 33** limits the Authority's discretion in respect of alternative measures it may propose to address resolvability, which are required to be fair, non-discriminatory, justifiable in the public interest and to take account of the potential impact on other jurisdictions. The clause links to resolution objectives and principles elsewhere in the Bill.

**Clause 34** requires resolution plans to include notification to resolution authorities in other relevant jurisdictions, as well as employee bodies where appropriate.

**Clause 35** requires the Authority to review resolution plans at least annually and following any material events. Resolution plans are required to be treated as confidential.

**Clause 36** enables the Authority to set a minimum requirement for own funds and eligible liabilities ("**MREL**") for each bank incorporated in the Island. A bank must meet its MREL continuously or risk sanctions for non-compliance.

## **Part 5 – Bank Resolution Fund**

**Clause 37** establishes a Bank Resolution Fund (the "**Fund**") and describes what monies are to be paid into and withdrawn from that Fund. It enables the Authority to obtain funds from banks in specified circumstances and provides some timescales for payments. The clause also addresses the Authority's powers to borrow, invest the Fund's assets and take out insurance policies. The Authority is required to seek to recover sums paid out, initially from the recipient bank and afterwards from other banks over a period of 10 years. Shareholders and creditors are only provided with a right of redress against the bank in resolution. The clause limits payment out of the Fund to a maximum of £60 million, which may be amended by the Treasury by order, subject to affirmative Tynwald procedure.

**Clause 38** requires the Authority to control, manage and administer the Fund in accordance with this Act and any regulations made by the Treasury under this section. Such regulations are subject to Tynwald approval. The section does not limit the Authority's general powers of management, either under this Act, or under the Financial Services Act 2008.

**Clause 39** limits the Authority's use of the Fund to matters necessary for the use of stabilisation tools for: purchasing or guaranteeing assets; making contributions to a bridge bank; contributing to a bank in resolution; or a combination of these purposes. The clause prohibits use of the Fund for absorbing losses of a failing or failed bank in normal circumstances.

**Clause 40** requires that funding may only be provided from the Fund when this is temporarily necessary to protect the Island's financial stability, to achieve the resolution objectives and the Authority has been unable to raise the funds from private sources.

## **Part 6 – Administrative Provisions**

**Clause 41** permits the Authority to take resolution action irrespective of whether it has used early intervention powers described in clause 42.

**Clause 42** enables the Authority to take early intervention action if a bank infringes, or is likely to infringe, specified financial requirements. The early intervention actions include: requiring implementation of elements of a recovery plan or other action plan; requiring changes to a bank's management; convening a shareholders' meeting; changes to a bank's legal structure; and requiring a bank to contact potential purchasers to prepare for resolution of the bank. The Authority must set deadlines for completion of any such early intervention measures.

**Clause 43** requires the Authority to have regard to the Act's resolution objectives and to choose the most appropriate tools and powers for the circumstances.

**Clause 44** states the resolution objectives, which are: to ensure continuity of banking services and critical functions; to protect and enhance financial stability and public confidence in this stability; to protect public funds; and to protect depositors and clients' assets.

**Clause 45** permits the Authority to take resolution action only if a bank is not viable, which means that it is irretrievably failing, or likely to fail, and that the use of stabilisation tools is in the public interest.

**Clause 46** explains 'failing or likely to fail'. This includes that: a bank has incurred losses that deplete a significant amount of its own funds; its liabilities exceed its assets; and it cannot pay its debts as they fall due. The clause also excludes certain circumstances where the provision of extraordinary public financial support to a bank does not indicate it is 'failing or likely to fail'.

**Clause 47** requires the Authority always to consider winding-up a bank before it applies any stabilisation tools. However, the stabilisation tool may be used to achieve the

resolution objectives if it is in the public interest and it is preferable to the winding-up procedure. Stabilisation tools and the winding-up procedure together constitute resolution tools.

**Clause 48** enables the resolution conditions to be considered differently for an entity in the Island against its other group entities.

**Clause 49** requires the Authority to try to ensure that resolution action is taken in line with ten specified principles. These include that shareholders must bear first losses followed by the bank's creditors; most deposits must be protected; costs must be minimised; and the bank's management must assist towards the resolution but will generally be replaced in their roles. In addition, resolution tools should be used before public funding is provided and financing of the resolution should not be from the general revenue of the Island.

**Clause 50** requires the Authority to follow measures in the resolution plans unless alternative actions would achieve the resolution objectives more quickly. If a resolution action would cause loss to creditors, the Authority must convert capital instruments contemporaneously with the application of the resolution tool.

**Clause 51** enables the Authority to apply any combination of resolution tools, except that the asset separation tool must not be individually. Also, when certain tools are used for a part transfer, a residual bank must be wound up within a reasonable timeframe.

**Clause 52** describes how the Authority may recover its reasonable expenses.

**Clause 53** addresses actions in systemic crises and permits the Authority to use stabilisation tools to obtain funding, subject to shareholders and other specified parties having made a satisfactory contribution to loss absorption and recapitalisation. Satisfactory contribution is defined and may be varied by order of the Treasury, subject to Tynwald's affirmative procedure.

**Clause 54** imposes an obligation on the FSA following the acquisition of a bank by another party. Where a new ownership level requires regulatory notification, the FSA is required to assess this promptly such that resolution objectives are not compromised. The clause also describes the legal status during any intervening period and requires certain actions by the FSA.

**Clause 55** obliges the Authority to consider any competition law in the Island.

**Clause 56** enables the FSA to apply to the High Court for the appointment of a business manager in accordance with the Financial Services Act 2008.

## **Part 7 – Valuation**

**Clause 57** requires the Authority to ensure that a bank's assets and liabilities are valued before resolution or other actions are taken.

**Clause 58** describes the objectives and purpose of pre-resolution valuation, which include determining: whether resolution conditions are met and on what basis resolution tools

are to be used; the extent of write down or conversion; and decisions on transfer of tools of ownership.

**Clause 59** imposes duties on a valuer when carrying out a pre-resolution valuation. The valuer must make prudent assumptions, disregard potential public funding, and take account of both the Authority's expenses and the Fund's fees and interest charges. A pre-resolution valuation must be supplemented by certain financial information and estimates of the bank, including a report on its financial position, an estimate of sums due to creditors and shareholders and the anticipated potential cost to the DCS. A link to clause 70 enables the Treasury to set standards for a valuation.

**Clause 60** enables the Authority to cause a provisional valuation to be carried out of a bank's assets and liabilities in urgent situations, before a pre-resolution valuation can be undertaken. A provisional valuation may enable a resolution decision. Valuation standards may be set by the Treasury.

**Clause 61** explains that the objective and purpose of a provisional valuation are the same as those of a pre-resolution valuation, but that it must also allow for justified additional losses.

**Clause 62** requires the Authority to cause a definitive valuation to be carried out by an independent valuer as soon as possible after a provisional valuation has been carried out under clause 60.

**Clause 63** describes the purposes of a definitive valuation, which are to reflect the full value of any losses in a bank's accounting records and to enable the Authority to determine whether additional consideration may be payable by a purchaser etc and whether any restatement of liabilities made by a resolution instrument must be varied.

**Clause 64** requires that a definitive valuation and difference of treatment valuation must be distinct from each other.

**Clause 65** provides that a person who is involved in a provisional valuation is not automatically prevented from being appointed as an independent valuer.

**Clause 66** requires the Authority to arrange for an independent person to carry out a difference of treatment valuation promptly after resolution actions, to discover whether shareholders and creditors were disadvantaged by the bank not entering insolvency proceedings.

**Clause 67** describes the purpose of the difference of treatment valuation, assumptions to be made and matters that it must identify.

**Clause 68** requires the valuer to be independent from any 'public authority'. It also enables the Treasury to set technical standards for valuations by order, subject to Tynwald's affirmative procedure.

**Clause 69** provides that an independent valuer may do anything necessary or desirable in connection with his functions.

**Clause 70** enables the Treasury to set standards for valuations.

**Clause 71** enables the Treasury to specify an independent valuer's eligibility criteria by order, subject to Tynwald's affirmative procedure.

## **Part 8 – Resolution Tools**

**Clause 72** enables the Authority to use the sale of business tool for a bank that meets the resolution conditions. This tool enables the transfer of assets, rights, liabilities and shares of the bank in resolution.

**Clause 73** enables the Authority to use the sale of business tool without the consent of shareholders or other third parties except the purchaser. Such a sale need not observe procedural requirements outside this Act, but nevertheless reasonable effort must be made to secure commercial terms.

**Clause 74** addresses the general principle that costs of resolution must be recovered from the bank in resolution and requires that net proceeds of a transfer must benefit shareholders or the bank in resolution depending on the circumstances. The clause also enables the Authority to make multiple transfers of assets, rights, liabilities and shares.

**Clause 75** enables the Authority to transfer assets, rights, liabilities and shares back to the bank in resolution or the original shareholders, subject to the purchaser's agreement.

**Clause 76** relates to banking business acquired by a purchaser under the sale of business tool. The clause provides that such banking business will continue as it was prior to the transfer, with the parties able to exercise specified rights accordingly. The clause also requires a purchaser to seek a deposit taking licence in the Island if it does not already hold one and permits temporary membership of associated banking bodies.

**Clause 77** clarifies that a bank's shareholders, creditors and other third parties whose assets, rights and liabilities are not transferred to a purchaser, have no rights over the assets, rights and liabilities that are transferred.

**Clause 78** requires the Authority to market the assets, rights, liabilities or shares of a bank that the Authority intends to transfer. Marketing must be carried out according to specified criteria.

**Clause 79** requires that marketing is fair for prospective purchasers, but that particular prospective purchasers may be solicited and publication of certain information may be delayed.

**Clause 80** enables the sale of business tool to be applied without marketing the bank if the resolution objectives may otherwise be compromised.

**Clause 81** requires that a bank in resolution is liquidated within an appropriate timeframe if a private sector purchaser has acquired the bank through the sale of business tool.

**Clause 82** describes the bridge bank tool.

**Clause 83** enables the Authority to use the bridge bank tool without the consent of shareholders or other third parties except the bridge bank itself. This transfer of

assets, rights, liabilities or shares to one or more purchasers need not observe procedural requirements outside this Act. The clause also provides that use of the bail-in tool to provide capital for the bridge bank must not interfere with the ability of the Authority to control the bridge bank.

**Clause 84** requires that the bridge bank must operate as a viable going concern, so that it may be marketed as such in future.

**Clause 85** addresses the general principle that the Authority may recover reasonable expenses connected with resolution and requires that consideration paid by a bridge bank must benefit shareholders or the bank in resolution depending on the circumstances. The clause also enables the Authority to make multiple transfers of assets, rights, liabilities and shares.

**Clause 86** enables the Authority to transfer assets, rights, liabilities and shares back from the bridge bank to the bank in resolution or the original shareholders or to a third party. The clause also enables the Authority to make subsequent transfers of assets, rights, liabilities or shares from the bridge bank in defined circumstances.

**Clause 87** relates to banking business acquired by a bridge bank under the bridge bank tool. The clause provides that such banking business will continue as it was prior to the transfer, with the parties able to exercise specified rights accordingly.

**Clause 88** requires the bridge bank to continue to exercise the rights of membership and access to various banking infrastructure systems. Where the bridge bank does not meet the membership or participation requirements to so do, the Authority may permit the bridge bank to exercise said rights of membership and access for a period not exceeding 24 months.

**Clause 89** clarifies that a bank's shareholders, creditors and other third parties whose assets, rights and liabilities are not transferred to a bridge bank, have no rights over the assets, rights and liabilities that are transferred. The clause further provides that the bridge bank and its management do not have any duty or responsibility to the shareholders and creditors of the bank in resolution.

**Clause 90** requires that the bridge bank must be operated in compliance with various matters which the Authority must approve and that it must obtain a licence to undertake deposit-taking business in the Island, within a six month period.

**Clause 91** describes how the bridge bank must be operated with a view to its ultimate sale to one or more private sector purchasers. The clause further specifies various circumstances under which the Authority must decide that a bridge bank is no longer a bridge bank.

**Clause 92** describes the process to be observed by the Authority when seeking to sell the bridge bank or its assets, rights or liabilities and sets a two year time period after which the operations of the bridge bank should ordinarily be terminated.

**Clause 93** permits the Authority to extend the time period for termination of a bridge bank's operations under certain conditions.

**Clause 94** requires that a bridge bank be wound-up following the sale of all or substantially all of its assets, rights and liabilities and describes how any proceeds generated as a result should be applied.

**Clause 95** introduces the asset separation tool and specifies that this tool may only be used in conjunction with other stabilisation tools.

**Clause 96** describes the objectives of an asset management vehicle and specifies the aspects where approval by the Authority is required as to how the asset management vehicle is constituted and operated.

**Clause 97** specifies the conditions necessary for the use of an asset management vehicle and sets out how any consideration paid by an asset management vehicle in respect of assets, rights and liabilities it acquires, should be applied.

**Clause 98** sets out the Authority's power to give effect to the asset separation tool, and to effect transfers of business under the tool, without the consent of the shareholders of the bank in resolution or any other party.

**Clause 99** enables the Authority to transfer assets, rights or liabilities back from an asset management vehicle bank to the bank in resolution. The clause also enables the Authority to make subsequent transfers of assets, rights or liabilities back from an asset management vehicle in defined circumstances.

**Clause 100** provides that transfers between the bank in resolution and an asset management vehicle are subject to specified resolution safeguards. The clause further provides that an asset management vehicle and its management do not have any duty or responsibility towards the shareholders or creditors of the bank in resolution.

**Clause 101** introduces the bail-in tool and sets out the purposes for which it may be applied by the Authority.

**Clause 102** further sets out the conditions under which the Authority may apply the bail-in tool to banks within the scope of the Act.

**Clause 103** sets out the scope of the bail-in tool and documents the categories of liabilities to which the bail-in tool may not be applied.

**Clause 104** sets out the Authority's discretionary power under certain circumstances to exclude, wholly or partly, certain liabilities from bail-in.

**Clause 105** provides that, where exclusions from bail-in have resulted in losses which have not been fully passed on to other creditors, the Authority may make a contribution to the bank in resolution from the Fund. Any such contribution may only be considered after minimum levels of losses have already been absorbed by shareholders and creditors.

**Clause 106** sets out the factors which the Authority must consider in exercising its discretionary power to exclude, wholly or partly, certain liabilities from bail-in.

**Clause 107** clarifies the calculations that the Authority must undertake in determining the financial amount of write-down and conversion of eligible liabilities that is required.

The clause further provides for a write-up mechanism, should the level of write-down subsequently prove to be excessive.

**Clause 108** sets out the actions to be taken in respect of shareholders when applying the bail-in tool or the write down or conversion power.

**Clause 109** sets out the sequence under which the write down or conversion power must be applied by the Authority, to various classes of capital instruments and eligible liabilities.

**Clause 110** clarifies that any losses must be imposed equally between each class of capital instruments and eligible liabilities. The clause further permits that eligible liabilities which have been exempted from bail-in under clause 103 or 104(1) may be treated more favourably than other liabilities of the same rank in liquidation proceedings.

**Clause 111** requires the Authority to ensure that the principal amounts of certain capital and subordinated debt instruments are written down or converted, before applying the write down or conversion power in the sequence set out in clause 109.

**Clause 112** sets out certain conditions which apply when applying the write-down or conversion power.

**Clause 113** requires that appropriate methodologies and principles must be utilised by the Authority in determining the value of liabilities arising from derivative contracts.

**Clause 114** permits the Authority to apply different conversion rates to different classes of capital instruments when using the write down or conversion power.

**Clause 115** establishes the requirement for a business reorganisation plan to be submitted by the management of a bank, where the bail-in tool has been used.

**Clause 116** sets out the minimum required contents of a business reorganisation plan.

**Clause 117** requires the Authority to assess a business reorganisation plan and to advise bank management of its acceptability or otherwise, within one month.

**Clause 118** details the requirement for the management of the bank to submit an amended business reorganisation plan, within 2 weeks of being notified of a requirement to so do by the Authority, and the arrangements thereafter.

**Clause 119** sets out some ancillary provisions in relation to the exercise of the write down or conversion power by the Authority.

**Clause 120** sets out the effects of a partial reduction of a liability, through the use of the write down or conversion power by the Authority.

**Clause 121** permits the Authority to require a bank incorporated in the Island, to include a contractual term in certain contracts, recognising that the liability concerned may be subjected to bail-in.

## **Part 9 – Government Financial Assistance**

**Clause 122** introduces a provision for extraordinary public financial support to a failed or failing bank by the Authority, acting in agreement and under the direction of the Treasury.

**Clause 123** clarifies that the government financial assistance tool is a last resort and may only be considered, having assessed and exploited the other stabilisation tools to the maximum extent.

**Clause 124** specifies the restrictive conditions under which the government financial support tool may be exercised.

## **Part 10 – General Resolution Powers**

**Clause 125** sets out how the Authority is enabled to utilise the write down or conversion power.

**Clause 126** describes how the write down or conversion power must be exercised.

**Clause 127** sets out the circumstances and timing under which the Authority must exercise the write down or conversion power to relevant capital instruments of a failed or failing bank.

**Clause 128** sets out the sequence under which the Authority must apply the write down or conversion power to various classes of capital instruments.

**Clause 129** sets out the effects and consequences of using the write down or conversion power.

**Clause 130** sets out factors which shall be disregarded in determining whether a default event provision applies under a contract to which a bank in resolution is a party.

**Clause 131** sets out provisions which may be made within a resolution instrument or share transfer order, such that the resolution instrument or share transfer order's existence may also be disregarded in determining whether a default provision applies under a contract to which a bank in resolution is a party.

**Clause 132** requires the Authority, where a bank is a group entity, to have regard to the international effects of the exercise of resolution powers on the wider banking group and seek to minimise the effects on financial stability in other jurisdictions when so doing.

**Clause 133** prohibits the Authority from carrying out any action that would be likely to contravene an international obligation of the United Kingdom or the Island and specifies the nature of an international obligations notice that may be served on the Authority for the purpose of ascertaining any such likely contravention.

**Clause 134** requires the Authority to carry out an assessment on new shareholders of a bank or the transferee of its business in a timely manner that does not delay the

application of a stabilisation tool. The clause further requires the FSA to consider an application for a licence pursuant to the use of a stabilisation tool, in a timely manner.

**Clause 135** sets out restrictions on the commencement of normal insolvency proceedings against a bank which meets the resolution conditions or in respect of which a stabilisation tool has been used.

**Clause 136** details the wide range of powers which the Authority has and which it may reasonably require in order to apply the resolution tools to banks which meet the resolution conditions.

**Clause 137** sets out the requirements for a bank in resolution, or any member of its group, to provide continuing operational services to any transferee, in order that the business so transferred may be operated effectively.

**Clause 138** establishes certain requirements to ensure that shareholders and creditors of a bank in resolution are left no worse off financially than they would have been in the event that a bank was wound-up rather than subjected to the use of a stabilisation tool.

**Clause 139** establishes that a shareholder or creditor who is determined to have incurred greater losses due to the application of a stabilisation tool as opposed to a winding-up of the bank in resolution, may make a claim for compensation to the Fund.

**Clause 140** indicates the conditions under which certain protections apply to specific actions which may be taken by the Authority.

**Clause 141** details the various arrangements which are protected in dealing with a failed or failing bank.

**Clause 142** sets out the details of the protections which are afforded to the various arrangements specified in clause 141.

**Clause 143** clarifies that the operation of payment and settlement systems is unaffected by any decision of the Authority to either transfer some of the assets, rights or liabilities of a bank in resolution to another entity or to cancel or amend the terms of a contract to which a bank in resolution is a party.

**Clause 144** allows the Authority to apply to the Court for the determination of any question arising in relation to the taking of a resolution action.

**Clause 145** requires the Authority to ensure the prompt publication of an order by which a resolution action is taken and the required means of such publication.

**Clause 146** requires the management of a bank to notify the Authority without delay if it considers that the bank is failing or likely to fail, as defined within clause 46 of the Bill. The clause also sets out the parties which the Authority must notify if it determines that a bank meets the resolution conditions.

**Clause 147** specifies the actions the Authority must take should it be notified that a bank is failing or likely to fail.

## **Part 11 – Recognition of Foreign Resolution Actions**

**Clause 148** describes the procedures the Authority must follow if it is notified of a foreign resolution action in respect of a bank.

**Clause 149** provides that when the Authority makes an order recognising all or part of a foreign resolution action, the foreign resolution action shall produce the same legal effects in the Island as it would have produced had it been made under Manx law. The clause further permits the Authority to exercise a stabilisation tool or power for the purpose of supporting a recognised foreign resolution action.

**Clause 150** sets out the scope of a recognition order and the resultant obligations on the Authority in relation to communicating its decision in respect of a foreign resolution action.

## **Part 12 – Post Resolution Action**

**Clause 151** sets out the arrangements under which the Authority must provide a report with respect to any resolution action undertaken, within 12 months of the conclusion of that action.

## **Part 13 – Bank Winding-up Procedure**

**Clause 152** specifies who may apply for a bank winding-up order and the requirements for such an application.

**Clause 153** clarifies that the provisions of the Companies Acts 1931 to 2004 and the Companies Act 2006 have effect in relation to a bank, subject to certain provisions in this clause applying.

**Clause 154** establishes three objectives for a bank liquidator in a bank winding-up. In order of priority, these objectives are - i) to work with the DCS to ensure eligible deposits are transferred to another provider or receive the appropriate compensation payment; ii) where part of a bank's business is sold or transferred, to work with the purchaser or transferee to ensure the continued supply of services to ensure that business can be operated effectively; and iii) to wind-up the affairs of the bank for the benefit of its creditors as a whole.

**Clause 155** describes the grounds upon which an application for a bank winding-up order may be made to the Court.

**Clause 156** sets out certain notification requirements in relation to applying for a bank winding-up order and provides for certain parties to be entitled to be heard at proceedings for the granting of a bank winding-up order.

**Clause 157** restricts the right to take any proceedings in bankruptcy against a bank, other than under the provisions of this Part of the Bill. The Bill also provides that the Court must consult the Authority before it makes a decision on the application of a bank, or any shareholder or creditor of a bank, for the winding up of that bank.

**Clause 158** establishes the powers which may be granted to a bank liquidator in a bank winding-up.

**Clause 159** sets out the general effects of a bank winding-up order, which include the necessary provision of continued service to any transferee to which part of a bank's business is transferred.

**Clause 160** requires that a Bank Liquidation Committee (the "Committee") be established to oversee the exercise of functions by the bank liquidator.

**Clause 161** sets out the arrangements under which the bank liquidator reports to the Committee.

**Clause 162** details the recommendations that the Committee must make to the bank liquidator in pursuit of objective 1 and / or 2, as described in clause 154 of the Bill.

**Clause 163** specifies additional duties of a bank liquidator, particularly in relation to the satisfaction of objective 1 and / or 2, as described in clause 154 of the Bill.

**Clause 164** sets out the additional duties of the Committee to oversee the work of the bank liquidator generally and in considering whether objective 1 and / or 2, as described in clause 154 of the Bill, have been achieved.

**Clause 165** provides for the cessation of the Committee upon certain events occurring and permits the formation of a committee of inspection thereafter. The clause also provides that, should a committee of inspection be formed, the FSA will have certain rights to receive information from and to make representation to, that committee.

**Clause 166** provides that any person aggrieved by the actions of the Committee, may apply to the Court. The clause also details circumstances under which the bank liquidator may apply to the Court.

**Clause 167** permits the processing of sensitive personal data by a bank liquidator and the disclosure of that data to various specified parties.

**Clause 168** provides that the Authority must not be treated as or deemed to be a director (shadow or *de facto*) of a bank.

**Clause 169** permits the Authority, after consultation with the Treasury, to make regulations for the better carrying out of functions under this Act.

**Clause 170** sets out the arrangements in respect of civil penalties which will apply under this Act.

**Clause 171** sets out the arrangements for appeals to the Court, in respect of actions taken by the Authority or any other person exercising a function under this Act, by an aggrieved person. These appeal rights differ according to the action which has been taken and do not suspend the effects of certain actions in the interim.

## **The Schedule**

**The Schedule** addresses changes which are required to the Preferential Payments Act 1908 (the "**PPA**") in order to reflect the new arrangements which this Act will introduce. The main amendments specify a 'super-preference' in relation to any expenses incurred in relation to the taking of a resolution action in respect of a bank, including the preferential recovery of any monies expended from the Fund. In addition, the current arrangements for depositor preference have been amended, to give the highest priority to depositor claims that have been vested in the DCS in the Island, or in an equivalent scheme in another jurisdiction where an Isle of Man incorporated bank has a branch operation. Eligible deposits, up to the amount of DCS compensation limits, but which are not vested in the DCS or equivalent scheme, are prioritised thereafter. The existing priority of certain claims per Sections 3 (a) to (i) of the PPA remains unchanged, but thereafter new categories of priority are introduced in respect of deposit amounts which are above the limits of DCS compensation, and liabilities which are exempted from bail-in. Collectively these changes to the creditor hierarchy of banks serve to ensure that depositors derive the maximum benefit from the proceeds of any future bank liquidation and also serve to minimise the possibility of compensation claims by shareholders and creditors on the Fund by creditors under clause 139.