



**FINANCIAL MARKETS CONDUCT BILL
SUBMISSION ON EXPOSURE DRAFT
ASB BANK LIMITED**

Clause Number	Clause heading	Submission
Part 1	Preliminary provisions	
Clause 6	Definition of “advertisement”	See our submission in relation to clause 75.
Clause 6	Definition of “investment manager”	<p>We submit that this definition should be amended to make it clear that the manager of a registered scheme (Scheme A) that invests in another registered scheme or other managed investment scheme (Scheme B) does not contract the investment of Scheme A’s property to Scheme B or the manager of Scheme B for the purposes of this definition.</p> <p>We submit this because the definition should only apply where Scheme A enters into an individual contracted investment management arrangement and not where it invests in another vehicle.</p>
Clause 6	Definition of “market service”	We submit that sub-clause (d) – relating to DIMS custodians – should be deleted from this definition. This definition is relevant to who must be licensed under Part 6. We submit this because there is no requirement for DIMS custodians to be licensed.
Clause 9(2)(c) and (d)	Definition of managed investment scheme and of financial benefit – provisions relating to insurance contracts	<p>We submit that the exclusions for insurance contracts should be shifted to clause 8, so that they become exclusions from the definition of “financial products” rather than exclusions from the definition of “managed investment scheme”. We submit this because:</p> <p>(a) Insurance products are generally offered on an individual basis rather than under a “scheme”.</p> <p>(b) This would resolve any uncertainty as to whether insurance contracts might be considered to be “debt securities”, i.e. on the basis that they involve money that is “otherwise owing” by the insurer.</p>
Clause 9(2)(d)	Definition of managed investment scheme and of financial benefit – provisions relating to insurance contracts	<p>We submit that clause 9(2)(d) should be amended to read:</p> <p>“[a scheme under which each scheme participant receives financial benefits][Note: this wording would need to be changed if the previous submission is accepted] consisting of only contracts of insurance, whether or not paragraph (c)(i) and (ii)</p>

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Clause 10(2)(c)	Definition of “issued and issuer” – provisions relating to further investment	<p>apply, if the contract was entered into before the date on which this section comes into force <u>or results from a renewal to, or increase of, such a contract.</u>”</p> <p>We submit this to cover the possibility that some “legacy” insurance policies may be structured in such a way that the payment of further premiums amounts or increases in cover amount to a renewal. We believe that these amendments are required to avoid potentially significant compliance costs and disruption in relation existing legacy contracts of insurance.</p> <p>Clause 10(2)(c) contains an important provision to the effect that further contributions to a KiwiSaver or superannuation scheme do not give rise to the issue of a financial product. This means that initial disclosure need not be repeated in relation to those further contributions i.e. if the PDS is subsequently updated. Clauses 10(2)(a), 10(5) and 35 are also potentially relevant to this matter.</p> <p>We submit that this provision should be extended to include further investments by existing investors in any registered scheme. We submit this because it is not appropriate to perpetuate the current distinction between, for example, KiwiSaver/superannuation schemes on the one hand and unit trusts on the other. From the perspective of the policy underlying this exemption, we believe that such schemes should generally be viewed as analogous.</p> <p>Further points in relation to this submission are as follows:</p> <ul style="list-style-type: none"> (a) It is possible that this is the effect of clause 10(5) in any event. To avoid uncertainty, the scope of clause 10(5) should be clarified. (b) Subject to the application of regulations under clause 35(c), clause 35 is unlikely to provide relief because the issue of providing further disclosure to existing investors principally arises where a PDS has been updated, i.e. in circumstances where the condition in clause 35(a) is unlikely to be satisfied. (c) We recognise that there may potentially be some circumstances in which further disclosure may be appropriate from a policy perspective. However we think that, in most cases, the position of KiwiSaver/superannuation schemes and other registered schemes will be analogous in this context. We therefore submit that the appropriate method of dealing with the minority of circumstances where further disclosure is appropriate is for the FMA to have an ability to disapply the exemption in relation to specific registered schemes (or specific types of registered schemes).

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Part 3 and schedules 1 and 2	Disclosure of offers of financial products	
Clause 35	Certain situations in which clause 34 does not need to be complied with	<p>We submit that clause 35(a) should be amended to read:</p> <p style="padding-left: 40px;">“if A has already been given a PDS (for the same or a different offer) that contains all of the <u>material</u> information that the first-mentioned PDS would be required to contain;”</p> <p>We also submit that clause 35 should expressly include a provision dovetailing the requirements for PDSs to be given to investors under the FMCA with the process for the distribution of PDSs by the IRD or by an employer (as applicable) to default KiwiSaver members and employer selected members under the KiwiSaver Act 2006. In addition, if it is intended that section 220 of the KiwiSaver Act be repealed, we submit that a provision mirroring section 220(2) and (3) of the KiwiSaver Act 2006 should be included in the FMCA.</p> <p>We also submit that the prescribed circumstances under clause 35(c) should appropriately accommodate telephone applications and on-line applications. We would be happy to work with you to develop appropriate regulations in relation to these matters.</p>

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Clause 38	Right to withdraw and have money returned	<p>We submit that clause 38 should be amended so that, in the OTC derivatives context:</p> <p>(a) The “return” of the product should be a right to terminate all outstanding rights and obligations in relation to the terminated transaction.</p> <p>(b) The repayment of “relevant money” should refer to the net amount paid between the parties in relation to the terminated transaction (including, if applicable, a negative amount which, therefore, would be an amount payable <i>by</i> an investor), together with any net collateral and any other related property delivered between the parties.</p> <p>The effect of these submissions would be to restore the two parties to the financial position they were in prior to entry into the terminated transactions. We believe that this is what clause 38(1) seeks to achieve.</p>
Clause 39	Disclosure of material information and content of PDS and register entry	<p>We note that clause 39(1)(a) states that all material information relating to a regulated offer must be contained in either or both of the PDS and the register entry (if any). Also clause 39(2) could be read to imply that the starting point for disclosure of material information is the PDS.</p> <p>On this basis, subject to restrictions relating to PDS content contained in regulations, issuers may be inclined to include non-crucial material information in a PDS i.e. from a risk management perspective. The liability regime in the FMCA does not appear to have been structured to remove the incentive to do this. If this is against the policy intent underpinning the PDS document, then the regulations will need to contain appropriate restrictions on PDS content requirements.</p>
Clause 40	Meaning of material information in this Part	<p>We submit that Option B is likely to be more appropriate than Option A, particularly in the context of managed investment schemes and derivatives. The concept of “demand” in Option A is difficult to apply in the context of these products where, unlike an equity IPO for example, supply is essentially unlimited and pricing is essentially determined by the value of underlying assets rather than demand for the product.</p> <p>We note that it is difficult to consider the definition in circumstances where the PDS content requirements to which it will relate have not been finalised. We would like the opportunity to consider the definition further once these content requirements are finalised.</p> <p>In any event, in relation to limb (b) of Option B, we submit that the references to an “offeror” should be deleted. We do not think that information about an offeror is “material information” to an investor that should be required to be disclosed. The appropriate focus of disclosure is on the financial product and the issuer of that product.</p>
Clause 41	Consent of person to whom statement	<p>Clause 41 should be amended to permit statements to be included without consent if they are generally publicly available. For example, publicly made statements by officials such as</p>

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	attributed	members of the Government or the Retirement Commissioner.
Clauses 51 to 54	PDS supplements	<p>We note that the FMCA contains provisions for PDSs to be updated by way of supplement. This is qualified by the ability for regulations to prohibit the use of supplements in prescribed circumstances (clause 51(2)).</p> <p>We understand that a prohibition may apply in relation to PDSs that must meet relatively short prescribed length requirements. In practice, this may well apply to PDSs for managed investment schemes such as KiwiSaver.</p> <p>As we have previously submitted, the need to update investment statements (rather than use an alternative method, such as supplements) has been a significant issue for continuous issuers under the current regime. This has given rise to costs, inconvenience and wastage not commensurate with the benefits to investors.</p> <p>Accordingly, we consider it essential that the FMCA contains an efficient and effective method of updating PDSs. Some comments in relation to this are as follows:</p> <ul style="list-style-type: none"> (a) Replacing PDSs for the purposes of update can be very costly and inefficient, i.e. because of the wastage of existing PDSs and the costs and delays in reprinting the entire document. Under the FMCA regime, the magnitude of this issue will depend on the content requirements of PDSs i.e. the extent to which the disclosures become out of date and the degree of future proofing that can be embedded within the PDS. (b) The use of supplements is potentially an improvement on the need to replace PDSs because it may only be necessary to produce and print a short additional document, rather than the entire PDS. However, supplements may not be the ideal answer due to the possibility of numerous supplements and the confusion associated with amending specific disclosures by way of a separate document. We understand that this has become an issue in Australia. Again, the magnitude of this issue will depend on the content requirements for PDSs for the reasons outlined above. (c) In some specific cases, it may be appropriate to use alternative means of updating, such as including a reference in a PDS to the issuer's website or register entry and the possibility that updated information may be contained on that website or register entry. We understand that this approach is taken in certain circumstances in Australia.

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		<p>In the light of this, we submit as follows:</p> <ul style="list-style-type: none"> (a) The currently proposed supplement regime should be maintained. (b) Additional infrastructure be included under which the FMA may specify other methods by which updates may be made in specified circumstances e.g. by way of website or register entry reference. <p>We believe that this will provide a flexible regime that is capable of adopting efficient and effective updating processes that are appropriate in the light of the specific matters that need to be updated. As mentioned, a flexible regime is necessary, given that the PDS content requirements are not yet finalised.</p>
Clause 55	Consents needed for lodgement	<p>Clause 55 requires that the consent of every director of the issuer be given before a PDS (or supplement or replacement) is lodged. The manner of consent will be specified in regulations.</p> <p>Clauses 462 (relating to who is liable for disclosure defects) and 465 (setting out the due diligence defences) are also relevant to the involvement of a director of an issuer.</p> <p>We submit that the personal involvement of directors of the issuer should not automatically be required in relation to PDSs for managed investment schemes and derivatives. We submit this because:</p> <ul style="list-style-type: none"> (a) Many managed investment schemes are offered by large financial institutions that offer a large range of these products. <ul style="list-style-type: none"> This in turn will give rise to a large number of PDSs and register entries for review, especially taking account of the fact that most of such products are offered on a continuous basis. The requirements for directors to have personal involvement in reviewing this documentation are likely to be onerous. At the very least, the directors will be distracted from governance and strategic activities. The magnitude of the review, and the liability associated with it, may also deter directors from accepting appointment. (b) It is also fair to say that, in technical areas such as managed investment schemes and derivatives, the directors will often place reliance on product specialists within their organisations. They may not have the level of detailed knowledge in relation to a large number of products that the directors might be expected to have in relation to a company making an equity offer. So long as the directors place reliance on appropriate persons and establish and supervise appropriate processes, we believe that this is commercially sensible and realistic.

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		<p>(c) We understand that personal director involvement is not typically required in Australia in relation to derivatives and unquoted managed investment schemes.</p> <p>We believe that an appropriate regime for managed investment schemes and derivatives could be achieved by expressly allowing directors to place reliance on appropriate internal product specialists in relation to those products. This could potentially be achieved by enhancing the general defences contained in clause 466 of the FMCA.</p> <p>The requirement in clause 55 for director consent should be removed.</p> <p>Qualifications could be included to ensure that only reasonable reliance provides the relevant defence.</p> <p>This approach would not relieve directors of liability in circumstances where they are actually involved in the production of the disclosure documents e.g. in the case of a niche owner-operated issuer without numerous products and access to product specialists. In these circumstances, the directors would remain personally involved on the basis that they would not place reliance on such specialists.</p> <p>We appreciate that this is a change to the current and proposed approach of some significance. We would be very happy to work with you to explore it in more detail.</p> <p>See also our submission in relation to clause 431.</p>
Clause 69	Prohibition of offers in course of unsolicited meetings or communications in certain circumstances	<p>Clause 69(3)(c) contains an exception from the prohibition where an offer is made to a client by an authorised financial adviser or a QFE adviser through whom the client has acquired or disposed of financial products in the last 12 months.</p> <p>We submit that this should be extended to include:</p> <p>(a) Advisers employed by, or contracted to, the same organisation as the original AFA.</p> <p>(b) Advisers covered by the same QFE as the original QFE adviser.</p> <p>We submit this because ASB's business model is such that clients are clients of ASB rather than a particular adviser, and may be serviced by more than one ASB related adviser. To avoid significant disruption to this business model, it is essential that the exclusion in clause 69(3)(c) is extended as submitted.</p>

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Clause 75	Advertising and publicity after PDS is lodged	<p>We submit that clause 75 should be removed. We submit this for the following reasons:</p> <ul style="list-style-type: none"> (a) The principles based advertising regime set out in Part 2 of the FMCA should be sufficient to protect the interests of investors. Also, the requirement for investors to be given a PDS before they make an application for an investment means that very little is achieved by requiring advertisements to contain the prescribed language contemplated in clause 75. (b) Achieving compliance with this clause will be time consuming and costly, especially in the context of continuously issued managed investment schemes and derivatives. As previously mentioned, financial institutions often offer large numbers of these products as part of their core business. This means that there are numerous publications that contain a reference of one sort or another to these products and each would need to be assessed to determine whether the mandatory content is required. Under the current Securities Act 1978, this is a significant compliance exercise and sometimes leads to conservative issuers including mandatory content that is not apt in the context of the particular publication. <p>We do not consider that these costs are justified by the benefits associated with the mandatory content.</p>
Clause 35 of Schedule 1	Meaning of “large”	<p>We make the following submissions in relation to this provision:</p> <ul style="list-style-type: none"> (a) We submit that the calculation of “total assets” should relate to net assets i.e. after deducting any borrowings. We consider that this is a better assessment of a person’s true financial position. (b) If this submission is adopted, consideration will be required as to whether the test is applied to all controlled entities or just those chosen by the person. The latter approach would potentially provide an opportunity for manipulating the outcome through locating assets in one entity and borrowings in another. (c) We submit that the \$10 million threshold is too high. We submit that the appropriate level is \$5 million of net assets.

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Clause 37(1)(c) of Schedule 1	Need for authorised financial adviser to sign written confirmation	<p>We submit that clause 37(1)(c) of Schedule 1 should be amended to read:</p> <p style="padding-left: 40px;"><u>“an authorised financial adviser or a QFE adviser signs a written confirmation of the certification in accordance with clause 39, provided that a QFE adviser may only sign a written confirmation if the transaction or class of transactions involves a derivative or derivatives.”</u></p> <p>We submit this because:</p> <p>(a) ASB provides its derivative products through its QFE (i.e. by QFE advisers) rather than through AFAs. The certifications under clause 37(2) and 37(3) would be more appropriately provided by one of these QFE advisers.</p> <p>(b) The clause as currently drafted is much narrower than the equivalent section in the Financial Advisers Act 2008 (section 5D(1)(c)), which permits a financial adviser, a QFE or a broker to sign a written acceptance of an eligible investor certification.</p>
Part 4 and schedule 3	Governance of financial products	
Clause 109(1)	Need to register managed investment scheme for regulated offer of managed investment product	<p>Clause 109(1) requires a managed investment scheme to be registered if there is a regulated offer in relation to that scheme or a person will “accept further contributions if there has been a regulated offer” in relation to the scheme.</p> <p>Relevantly, “regulated offer” is defined (clause 26(1)) to mean an offer that requires disclosure under Part 3 of the FMCA. As currently drafted, this would appear to exclude schemes where there has been an offer under the Securities Act 1978 but no offer under the FMCA.</p> <p>We submit that the application of the MIS registration requirements to schemes that are closed to new members (meaning that there is no “regulated offer”) should be clarified. A particular context in which this arises is in relation to “legacy” superannuation schemes operated by financial institutions. Some of these legacy superannuation schemes continue to receive ongoing contributions from existing members.</p> <p>ASB has a number of such schemes that, for one reason or another, it has not proved possible or appropriate to terminate or wind up. These schemes range in size from quite large (e.g. over \$300 million in FUM and over 17,000 members) to very small (e.g. less than \$4 million in FUM and less than 50 members).</p> <p>We understand that it is not intended that legacy superannuation schemes of this sort will be automatically exempted from the governance requirements of the FMCA. Assuming that this is correct, then we submit that it is important that the FMCA contains sufficient flexibility to apply appropriate governance requirements on a risk based basis, taking account of the costs associated with compliance (which are likely to be passed on to members).</p>

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		<p>In particular, we submit that:</p> <ul style="list-style-type: none"> (a) Flexibility be built into the “restricted scheme” provisions in clause 114 to potentially accommodate some legacy superannuation schemes. Note that many legacy superannuation schemes will not meet the criteria currently set out in clause 114(1)(b). (b) Exclusions should be included in Part 4 of Schedule 1 for legacy superannuation schemes that fall under specified thresholds relating to FUM and numbers of members. We would be happy to work with you in relation to the appropriate threshold levels.
Clause 113(1)(b)	Additional initial and ongoing registration requirements for superannuation schemes	<p>We note that, to be eligible for registration as a superannuation scheme, the purpose of the scheme must be to provide retirement benefits directly or indirectly to individuals. This is different from the current requirement under section 2A(1) of the Superannuation Schemes Act 1989 that a superannuation scheme means:</p> <p style="padding-left: 40px;">“any trust established by its trust deed principally for the purpose of providing retirement benefits to beneficiaries who are natural persons or paying benefits to persons who are trustees of a registered superannuation scheme or a KiwiSaver scheme.”</p> <p>We submit that existing registered superannuation schemes should be able to register as superannuation schemes under the FMCA, regardless of whether they meet the requirement in clause 113(1)(b). We submit this because existing schemes may operate on the basis that they are able to rely on certain legislative provisions applicable to superannuation schemes (such as provisions in the Human Rights Act 1993) and may face issues if this were to cease to be the case. The grandfathering could be limited so that it continues only so long as the relevant schemes do not change their existing purposes.</p>
Clause 113(2)	Additional initial and ongoing registration requirements for superannuation schemes	<p>We note that this provision will restrict entry to a superannuation scheme to persons meeting the New Zealand residency or citizenship requirements. We understand that this may be included in order to address concerns relating to QROPS.</p> <p>We submit that this restriction should be amended so that it does not prevent non-residents/citizens who are existing members of a scheme from transferring to another scheme. We also submit that consideration should be given as to whether this provision may adversely affect legitimate innovation in the superannuation industry.</p>
Clause 117(1)(f)	Contents of governing document for registered scheme - fees	<p>We submit that this clause should be amended to read as follows:</p> <p style="padding-left: 40px;">“the fees that can be paid out of scheme property to any manager, investment manager, administration manager, supervisor, or custodian (<u>or the manner in which those fees are to be determined</u>), and any rights of those persons to be indemnified out of scheme property (and any other matters required by Section 118)”.</p>

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Clause 118(1)	Limits on permitted exemptions and indemnities	<p>We submit that clause 118(1) should be amended to permit exemptions from liability and indemnities in favour of investment managers to be contained in the contract between the manager and the investment manager (so long as the governing documents contain a power permitting such an indemnity).</p> <p>We submit this because:</p> <ul style="list-style-type: none"> (a) We interpret the definition of “governing document” to not include an investment management contract (although this is not completely clear). (b) An investment manager appointed by the manager will not typically be a party to a trust deed or other governing document, and so it is not appropriate for them to be indemnified in such a document.
Clause 121(2)	Changes to governing document	<p>We submit that the supervisor or the FMA should be able to consent to an amendment to, or replacement of, a governing document in the following additional circumstances:</p> <ul style="list-style-type: none"> (a) If the supervisor or FMA is satisfied that the amendment is made to correct a manifest error or is of a formal or technical nature. (b) If scheme participants are given at least 30 days’ prior written notice of the amendment or replacement and those scheme participants have the ability to withdraw or transfer their investment from the scheme at net asset value without penalty during that 30 day period. In the context of schemes of this type, we consider that this approach should replace the provisions for amendments to be approved by special resolution of scheme participants (see our submission below in relation to clause 139). <p>We submit this because these circumstances reflect common practice in relation to unit trusts and, we submit, achieve the correct balance between the protection of investors and the need for schemes (which are often long term investment vehicles) to adapt over time.</p> <p>We consider that supervisors are likely to adopt a conservative approach to whether an amendment or replacement will have a material adverse effect on scheme participants, meaning that investor meetings will often be required. We do not believe that the costs and inconvenience of holding such meetings would be justified in the circumstances suggested.</p>
Clause 121(2)(a)(ii)	Changes to governing document – adverse effect on scheme participants	<p>We submit that this provision should be amended to read as follows:</p> <p style="padding-left: 40px;">“The supervisor or the FMA is satisfied that the amendment or replacement does not have a material adverse effect on scheme participants <u>viewed as a group.</u>”</p>

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		<p>We submit this because it should be clear that the supervisor/FMA need not consider the position of each individual scheme participant.</p>
Clause 121(3)(a)	Changes to governing document	<p>We submit that this clause should be amended to read:</p> <p style="padding-left: 40px;"><u>“a special resolution of the scheme participants or the class of scheme participants that is or may be adversely affected by the amendment or replacement”.</u></p> <p>We submit this because some amendments may be relevant to only certain participants in a scheme. This might particularly be the case in the context of a KiwiSaver scheme or superannuation scheme that contains a number of investment options, i.e. where a change is proposed in relation to only one of those investment options.</p> <p>In these circumstances, it should be open to the manager to seek a special resolution of the affected scheme participants only.</p> <p>We also submit that this special resolution facility should not apply in relation to managed investment schemes where the investors have the ability to redeem or transfer their investments at net asset value without penalty. See our submission below in relation to clause 139.</p>
Clause 122(1)(a)	Power to make FMA and court-approved changes to governing documents – FMA consent	<p>We submit that this clause be amended to read:</p> <p style="padding-left: 40px;"><u>“with the FMA’s consent if the FMA is satisfied that the amendment or replacement is necessary or desirable to enable, or in connection with enabling, the governing document to comply with section 117 to 119 or any other enactment.”</u></p> <p>We submit this because we consider that it is desirable to provide greater flexibility to make consequential changes that may not strictly meet the “necessary to enable” test. The requirement for FMA consent provides an appropriate constraint on this broader power.</p> <p>See section 63(2) of the KiwiSaver Amendment Act 2011.</p>
Clause 122(1)	Power to make FMA and court-approved changes to governing documents	<p>We submit that the introductory wording to this clause should be amended to read as follows:</p> <p style="padding-left: 40px;"><u>“A manager of a registered scheme may amend or replace the governing document (despite anything to the contrary in the governing document or in any enactment, rule of law, or agreement, including anything relating to the consent of any person or organisation to the making of amendments to the governing document) ...”</u></p> <p>We submit this because this broader authorisation will provide greater comfort that the required amendments may be made and reduce compliance issues in seeking to confirm this.</p>

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		See section 63(1)(a) of the KiwiSaver Amendment Act 2011.
Clause 128(1)(b)(ii)	Functions of supervisor – supervision of financial position of the manager	<p>We submit that the words “the manager and” should be deleted from this provision.</p> <p>We submit this because while the ASB Group is highly financially sound, we do not consider that it is appropriate or necessary for the supervisor to supervise the financial position of the manager, as opposed to the scheme itself. The ability of the scheme to meet its obligations is the key point from the perspective of investors.</p> <p>The supervisor should be able to rely on the licensing process in relation to the general capacity of the manager.</p> <p>A consequential amendment would be required to clause 134.</p>
Clause 134(2)(b)	Power of supervisor to engage expert	<p>We submit that this provision should be amended to read as follows:</p> <p style="text-align: center;">“The fees and expenses of the expert, which must be reasonable in the circumstances, must be paid by the <u>scheme</u>.”</p> <p>In our previous submission, we have suggested that the supervisor should not have a supervisory function in relation to the manager itself.</p>
Clause 136(2)	Custodian holds scheme property on trust – separate property	We are unclear as to whether this provision prevents a custodian from pooling property held on behalf of more than one client and, if so, whether this will adversely affect the operation of custodians.
		<p>We submit that MED should consult with custodians on this matter. It is essential to the efficient operation of managed investment schemes that custodial functions can operate effectively and properly.</p> <p>Any pooling must, of course, be predicated on the custodian keeping a separate record of the property held on behalf of each client.</p>
Clause 139	Meetings of scheme participants	<p>We submit that the provisions relating to meetings of scheme participants should not apply in relation to managed investment schemes where the investors are able to redeem or transfer their investments at net asset value without penalty (Redeemable Managed Investment Schemes). We submit this because we do not believe that meetings are necessary or appropriate to protect the interests of scheme participants in these circumstances.</p> <p>In the context of disaffected investors, we consider that meetings have significant disadvantages when compared with the redemption or transfer of investment by the disaffected investors. Meetings are costly to convene (particularly in the context of very large schemes such as a number of KiwiSaver schemes). They also potentially result in a voting</p>

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		<p>majority enforcing an outcome which could potentially impact on those who do not vote and/or an unwilling minority.</p> <p>In saying this, we have considered the principal purposes of meetings under the FMCA. These are as follows:</p> <ul style="list-style-type: none"> (a) To approve amendments to, or replacements of, the governing documents under clause 121(2). As submitted above in relation to clause 121(2), in the context of Redeemable Managed Investment Schemes, we believe that this approval requirement should be replaced with a 30 day advanced notice requirement. (b) To give directions to the supervisor under clause 129(1)(e). Given the duties of the supervisor, and the oversight of the FMA, we do not believe that this power is required in the context of Redeemable Managed Investment Schemes. (c) To remove the manager of the scheme under clause 160 or the supervisor under clause 168. As submitted below in relation to clause 160, we do not believe that scheme participants should have the ability to remove the manager in the context of Redeemable Managed Investment Schemes. Similarly, if scheme participants are unhappy with the performance of the supervisor of a Redeemable Managed Investment Scheme, we believe that they are adequately protected by being able to redeem or transfer their investment. (d) To approve related party transactions. See our submission on clause 151(3)(a)(ii) below.
Clause 143(1)	SIPO – consultation with supervisor	<p>We submit that this clause should be changed to read:</p> <p style="padding-left: 40px;">“The manager of a registered scheme may amend or replace a statement of investment policy and objectives only after giving <u>prior written notice to the supervisor.</u>”</p> <p>Clause 143(2) should then be deleted.</p> <p>We submit this because the current “consultation with the supervisor” requirement is not appropriate. This implies that the supervisor is expected to provide input in relation to the proposed change. This is not consistent with the role or expertise of the supervisor.</p> <p>We agree that it is appropriate and necessary for the supervisor to have knowledge of the content of SIPOs. This will enable them to perform their supervisory function and also raise any concerns regarding the SIPO (only likely in extreme cases).</p> <p>A requirement to provide advanced notice of any change or replacement to a SIPO should be sufficient to achieve these objectives, without the uncertainty associated with a “consultation”</p>

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		obligation.
Clause 145	Action that must be taken on limit breaks	<p>We submit that considerable care must be taken in determining the prescribed circumstances and the prescribed manner for reporting limit breaks to the supervisor or to the FMA. In particular, consideration should be given to materiality thresholds and excluding inadvertent limit breaks (such as those occurring due to market movements) that are corrected in an appropriate manner.</p> <p>We would be happy to work with you in relation to the practicalities of this reporting regime.</p>
Clause 146	Action that must be taken on pricing errors and failure to comply with pricing methodologies	<p>We submit that considerable care must be taken in determining the prescribed circumstances and the prescribed manner for reporting pricing issues to the supervisor or to the FMA. In particular, consideration should be given to materiality thresholds and excluding inadvertent pricing issues that are corrected in an appropriate manner.</p> <p>We would be happy to work with you in relation to the practicalities of this reporting regime.</p>
Clause 151(3)(a)(i)	General prohibition on transactions giving related party benefits	<p>We submit that clause 151(3)(a)(i) should be amended to read:</p> <p style="padding-left: 40px;">“the supervisor considers that the transaction or transactions are in the best interests of the scheme participants <u>viewed as a group</u>”.</p>
Clause 151(3)(a)(ii)	General prohibition on transactions giving related party benefits	<p>We submit that this provision be amended to read:</p> <p style="padding-left: 40px;">“The transaction is approved by, or contingent on, approval by, a special resolution of <u>the class of scheme participants affected or potentially affected by the transaction</u>”.</p> <p>We submit this because of reasoning similar to the reasoning set out in relation to clause 121(3)(a) above.</p> <p>We also submit that this special resolution facility should not apply in relation to managed investment schemes where the investors have the ability to redeem or transfer their investments at net asset value without penalty. See our submission above in relation to clause 139.</p>
Clause 152	Certain related party benefits permitted without supervisor consent	<p>We submit that a new exempted category should be added to cover appropriately regulated Australian managed investment schemes.</p>
Clause 153	Additional restriction on transactions of restricted scheme	<p>We submit that clause 153 should contain a provision to the effect that the restriction will not apply in prescribed circumstances. We make this submission in connection with our submission in relation to clause 109(1) to the effect that certain “legacy” superannuation schemes should be treated as “restricted schemes”.</p> <p>If that submission is accepted, then “restricted scheme” status may be extended to certain</p>

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		<p>superannuation schemes that are offered by financial institutions on a retail basis (rather than employer-sponsored or industry superannuation schemes and the like). We do not consider that clause 153 is appropriate for these types of schemes. However, in this regard they may appropriately be treated as registered schemes, subject to the prohibitions similar to those contained in clauses 150-152.</p> <p>Similarly, “restricted scheme” status may also be obtained by some employer-sponsored superannuation schemes operated by financial institutions for their staff. Clause 153 should not prevent such a scheme from obtaining services from the sponsoring institution (e.g. banking services) on an arms length basis.</p>
Clause 160	Removal of manager of registered scheme	<p>We submit that clauses 160(1)(a) (removal at direction of supervisor) and (b) (removal by special resolution of scheme participants) should not apply in relation to managed investment schemes where the investment is readily redeemable or transferable at net asset value without penalty. This would apply to most unit trusts and KiwiSaver schemes.</p>
		<p>We submit this because managers typically invest very significant amounts of money to establish, market and maintain managed investment schemes. They do this on the basis that they will recover those costs and earn a commercial return over the long term (perhaps decades).</p> <p>For this reason security of tenure is an important component in encouraging managers to establish managed investment schemes and we believe that provisions that jeopardise that security should therefore be very limited. In particular, they should not be capable of being exploited by commercial competitors.</p> <p>We believe that the above provisions may be removed without adversely affecting investors in circumstances where they may redeem or transfer their investment at net asset value without penalty. This response by investors is preferable to the removal of the manager because it enables investors to make an individual decision rather than a supervisor or voting majority enforcing an outcome which could potentially impact on those who do not vote and/or an unwilling minority.</p> <p>We distinguish schemes where investments are redeemable or transferable at net asset value without penalty from “closed end” schemes where investors are locked in.</p>
Clause 189	Issuers must keep registers of regulated products	<p>We submit that derivatives should be exempt from the register requirements in clause 189. We submit this because derivatives are structured as individual personal transactions, rather than transactions as part of a broader scheme or arrangement. Accordingly, we do not see any policy reason for maintaining a register in relation to derivatives.</p>

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Part 6	Licensing and other regulation of market services	
Clause 370	When provider of market services must be licensed	We submit that amendments should be made to the Financial Advisers Act 2008 to make it clear that individuals providing a financial adviser service or broking service in connection with a regulated offer of derivatives by a person licensed as a derivatives issuer under Part 6 of the FMCA is exempted from the requirements of FAA. This is necessary to avoid dual compliance obligations in relation to the licensed derivatives issuer.
Clause 413	Changes to client agreement	We submit that this provision should be amended to read as follows: "An amendment to or replacement of a client agreement has no effect if made without the written consent of the retail investor <u>or otherwise in accordance with the terms of the client agreement.</u> "
		<p>DIMS</p> <p>We submit this in relation to DIMS because we currently have client agreements relating to our DIMS service with many clients. From time to time, we may need to make a generic amendment to all of these client agreements.</p> <p>In these circumstances, we would make the amendment in accordance with the provisions of the client agreement by way of notice to the clients, but without requiring their individualised written consent. To do otherwise would be entirely impracticable.</p> <p>Our ability to amend client agreements in this way is fully disclosed to our clients. If considered appropriate, this can be a prescribed requirement in relation to any disclosure statement required under clause 404 of the FMCA.</p> <p>Derivatives</p> <p>We submit this in relation to derivatives because the relationship between a derivatives issuer and its clients is different from broader schemes or arrangements.</p> <p>For transactional-based products, the bank has the ability to amend the provisions of the terms and conditions by way of notice, without requiring individualised consent.</p> <p>This applies immediately (on the effective date at the end of the notice period) in relation to products repayable on demand, but only to subsequent transactions entered into by the client after the effective date for products that are not repayable on demand or able to be terminated at will.</p> <p>This allows the client to decide whether it wishes to continue to enter into transactions with the bank on the basis of the amended terms and conditions but ensures any existing</p>

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		<p>transactions that cannot be terminated remain on the terms and conditions existing as at the date of the transaction.</p> <p>We submit that because a client can determine which derivatives issuer to use on a transaction by transaction basis, this is the appropriate way to amend client agreements for derivatives. To require agreement from all clients before an amendment could be made would otherwise be impractical.</p>
Subpart 6 of Part 6	Provision of discretionary investment management services (DIMS)	<p>As a general comment, we support the proposal to regulate class DIMS and, at the election of the provider, personalised DIMS under the FMCA. As a significant provider of DIMS, we will be happy to work with you as the details of the FMCA regime are developed. Some comments on points of detail are set out below.</p>
Clause 421	Action that must be taken on limit breaks	<p>We submit that considerable care must be taken in determining the prescribed circumstances and the prescribed manner for reporting DIMS limit breaks to the FMA. While we understand that this general requirement is designed to mirror the reporting requirements for managed investment schemes under clause 145, it is necessary to properly recognise relevant differences between DIMS and managed investment schemes.</p> <p>A key difference is that DIMS are operated under individual contracts rather than as a single scheme. Even in the context of a class DIMS, where common limits apply to a number of clients, the actual make up of the assets can differ for each client because of, for example, the point in time at which the client joined the DIMS service.</p> <p>This can mean that a limit break can apply in relation to some clients but not others. The reporting regime will need to ensure that the FMA does not receive large quantities of reports relating to immaterial individual circumstances that do not justify the attention of the FMA from an investor protection perspective.</p> <p>We would be happy to work with you in relation to the practicalities of this reporting regime.</p> <p>We also submit that the reporting regime should be limited to class DIMS and not apply to personalised DIMS that the provider chooses to have regulated under the FMCA.</p>
Clause 424	Certain related party benefits permitted	<p>See our comments above in relation to clause 152.</p>
Clause 426(1)	Requirement for custodian	<p>We submit that this provision should be amended to read as follows:</p> <p style="text-align: center;">“A DIMS licensee must ensure that the investor property is held by a person who meets the custodianship requirements <u>specified in subsection (2).</u>”</p>
Clause 426(2)(b)	Requirement for custodian	<p>We submit that it should not be necessary for a DIMS custodian to be independent of the DIMS licensee.</p>

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		<p>We submit this because this requirement is inconsistent with some market practice, would cause cost and disruption to implement and would not deliver any meaningful protection to DIMS clients. In further detail:</p> <ul style="list-style-type: none"> (a) ASB operates an in-house custodian for certain of its DIMS services. This reflects the fact that the custodial arrangement is a central component of any DIMS offering and, as such, is a component we wish to offer and control. (b) To migrate to an independent custodian would involve significant cost and disruption. (c) Engaging an independent custodian would also be likely to involve additional ongoing costs, which would need to be passed on to the DIMS clients. (d) Unlike the supervisor/custodian of a managed investment scheme, a DIMS custodian operates on a “bare trust” basis. The custodian simply follows the instructions of the provider and does not provide any supervision of any sort. Given this, no additional protection is provided to investors by having an independent custodian. The position of managed investment schemes and DIMS is not analogous in this regard.
Clause 426(3)	Requirement for custodian – joint and several liability	<p>We submit that clause 426(3) should be amended to read as follows:</p> <p style="padding-left: 40px;">“The DIMS licensee is jointly and severally liable with any custodian for the holding in accordance with this sub part of the investor property covered by the authority granted to the DIMS licensee.”</p> <p>We submit this to make it clear that the liability of the DIMS licensee is limited to property for which the DIMS licensee has responsibility i.e. does not extend to property held by the custodian under arrangements with other DIMS licensees or beneficiaries.</p>
Part 7	Enforcement and liability	
Clause 431	Meaning of contravene	<p>The accessory liability provisions in this clause are in standard form, as reflected in various enactments. In the context of managed investment schemes and derivatives, we submit that it is essential for parties associated with an issuer to be able to understand and manage their liability in relation to disclosure defects. This requires careful consideration of clause 431.</p> <p>This submission reflects the current position in relation to “promoter” status under the Securities Act 1978. There is no bright line for identifying whether a person is a promoter and this causes considerable uncertainty. Given the seriousness of the liability provisions under the Securities Act, this is highly undesirable and should be corrected in the FMCA.</p> <p>Further, the approach to this needs to reflect the specific characteristics of continuously issuing managed investment schemes and derivatives. These characteristics are identified</p>

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		<p>above in our submission in relation to clause 55 and include:</p> <ul style="list-style-type: none"> (a) The fact that large financial institutions often offer a large range of managed investment schemes and derivatives. (b) The fact that the technical nature of managed investment schemes and derivatives are such that potentially liable parties will often place a high degree of reliance on product specialists within their organisations. (c) The approach taken in Australia. <p>In relation to clause 55, we submit that directors of an issuer should be able to place reliance on appropriate internal product specialists in relation to managed investment schemes and derivatives. We consider that other potentially liable parties under clause 431 should also be able to do so.</p> <p>We would be very happy to work with you to explore the appropriate mechanism for achieving this in more detail.</p> <p>We also submit that the clause 431 should be clarified to make it clear that a person will not be liable by reason merely of being involved in offer processes. Liability should only attach where a person is directly involved in the contravention and is aware that the relevant conduct is a contravention of the FMCA.</p> <p>We submit this because, due to the broad language used in clause 431 (e.g. clause 431(e)), liability for defective disclosure in a PDS will potentially be imposed on a wide range of persons involved in an offer, for example, lead managers and professional advisers. We submit that the imposition of liability on such persons is not appropriate given that lead managers and professional advisers have a limited role in the preparation of an offer document and have limited knowledge of the business of the issuer. Imposing liability on these types of person would potentially lead to increased transaction costs for issuers.</p>
Clause 432	Directors also treated as contravening in certain circumstances	<p>We submit that clause 432 is unnecessary in the light of (a) the existing accessory liability provisions under clause 431 and (b) the specific provisions elsewhere in the draft bill imposing direct liability on directors for certain types of contraventions. We note that while other enactments have provisions which are similar to either clause 431 or clause 432, we are unaware of any statute which contains both.</p> <p>There is also a risk that clause 432 would undercut the extension to the due diligence defence which we propose above (please refer to our submissions in relation to clause 55). If the MED agrees with our submission that it may be appropriate for directors to place reasonable on the analysis of product specialists, we note that clause 432 (as presently drafted) may undermine the value of our proposed extension to the due diligence defence.</p>

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		Accordingly, we submit that clause 432 should be removed.
Clause 463	Person treated as suffering loss or damage in case of defective disclosure	<p>Clause 463 provides that if a person has invested in financial products containing a materially adverse statement or omission which breaches the disclosure provisions, then that person must be treated as having suffered loss or damage because of the contravention unless it is proved that the decline in value was caused by a matter other than the relevant statement, omission, or circumstance.</p> <p>Clause 463 therefore creates a rebuttable presumption of loss. In our view, this is unnecessary, inconsistent with normal civil law principles, and has the potential to cause injustice. We submit that the provision should be removed.</p>
Clause 430 and 473	Part 6 licence provisions and General provisions relating to offences	<p>We note that the levels at which fines and penalties have been set have been increased across the board from the Securities Act 1978. In particular, we submit that, in some cases, the levels at which fines or penalties (as applicable) are currently set seem disproportionately high compared to the nature of the offences involved.</p> <p>For example, under clause 430(2), failure to have a client agreement may give rise to a pecuniary penalty of \$5 million. This seems excessive. In addition, the penalties or fines imposed are higher than equivalent offences under other enactments. For example, a DIMS licensee may be subject to a pecuniary penalty of \$600,000 under clause 430(3) of the FMCA. This is double the maximum pecuniary penalty of \$300,000 that may be imposed on an entity for a breach of the DIMS regime under the Financial Advisers Act (see Part 4).</p> <p>We submit that the level of fine or penalty for each specific contravention should be carefully considered and be calculated in a manner commensurate with the seriousness of the offence.</p>
Part 9 and schedule 4	Miscellaneous provisions	
Subpart 10 of Part 9	Transitional provisions	<p>Managed investment schemes are generally continuously issued and many financial institutions operate a large number of such schemes. Migrating these schemes on to the FMCA regime will involve considerable work, including producing revised disclosure documents and amending existing governing documents.</p> <p>We submit that a transitional period of at least two years will be required for this to be achieved in an orderly way. We submit that transitional provisions along the lines of those contained in the KiwiSaver Amendment Act 2011 would be appropriate in this context.</p>