FINANCIAL MARKETS CONDUCT BILL
SUBMISSION ON EXPOSURE DRAFT

BELL GULLY

Introductory comments

This submission is made by Bell Gully.

Bell Gully has extensive expertise in relation to New Zealand's financial markets, fund management industry and securities laws. We regularly advise issuers, promoters and arrangers on securities offerings across a broad range of equity, debt and collective investment scheme products. We have also been involved in numerous regulatory inquiries and court proceedings involving securities law matters.

We agree with the approach proposed by the exposure draft of the Financial Markets Conduct Bill (the **Bill**) of a single piece of legislation which will govern offers of financial products in New Zealand. In our view, the Bill will achieve its stated main purposes and it represents a significant improvement on existing securities legislation.

Submissions

We have focussed our comments on those clauses of the Bill which we consider particularly relevant to our areas of expertise and have limited our submissions to provisions of the Bill which we believe require further consideration or amendment before the Bill is introduced to the House. In order to limit the length of this submission, we have not noted provisions of the Bill on which we have no comment at this stage.

Bell Gully has also been involved in preparing submissions on the Bill for the International Swaps and Derivatives Association, Inc (**ISDA**). To limit the length of our submissions, we have chosen not to replicate those submissions as part of Bell Gully's own submissions but, to the extent that those submissions address issues not expressly addressed in our submissions, Bell Gully supports the views of ISDA in its submissions on the Bill.

Our submissions are set out in the prescribed table below.

We look forward to working with you on the continued development of the Bill and, in particular, the regulations which are to be made under this Bill. Please do not hesitate to contact Glenn Joblin, Mark Todd or Ralph Simpson at any time. Glenn, Mark and Ralph's contact details are as follows:

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Clause Number	Clause heading	Submission
Part 1	**Preliminary provisions**	
6	Interpretation	*Advertisement* The term "*public*" is used in paragraph (a) of the definition "*advertisement*". It is not clear who is intended to be referred to in this context. Is it the case that the communication will be to "*retail investors*" (as defined in clause 32 of Schedule 1 of the Bill)? We submit that it would assist issuers if some guidance was provided on the application of the "*advertisement*" provisions to information available on a website, particularly in relation to the extent to which parts of a website that do not relate to an offer of a financial product are deemed to be part of the advertisement. *Derivatives* We support ISDA's submissions on clause 6 (relating to the definition of: "*derivatives issuer*", "*investor*" and "*market services*"). *Investment manager* 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. We also 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. *Prescribed* The term "*prescribed*", which is used throughout the Bill, is not defined. This results in some unnecessary ambiguity. We assume that the definition would provide for both prescription by regulations made under the Act as well as prescription by the FMA as follows. *Security* We submit that the concepts of an investment or management of financial risk should also apply to paragraph (b) of this definition. *Voting Product* We submit that the inclusion of convertible financial products (paragraph (b)) is not appropriate in the context of the meaning of "*associated*" in clause 11.
7	Meaning of financial product	Bell Gully supports ISDA's submissions on clause 7.

Clause Number	Clause heading	Submission
8	Definitions relating to kinds of financial products	*Debt Security* Refer to our comment above in relation to the definition of "*Security*". We submit that the definition of "*Debt Security*" should exclude products that do not generate a return for subscribers as proposed in the MED Discussion Paper in June 2010. This is to ensure that products such as gift vouchers or gift cards where purchasers can obtain their money back at their request will not be defined as a "*debt security*". In our view, the exclusion for offers of financial products for no consideration (clause 11(1) of Schedule 1) will not necessarily achieve this outcome. The term "*deposited*" has a broad meaning and it might be useful to define that term in the Bill. *Derivative* The definition of "*derivative*" could include sale and purchase agreements for shares where there is an earn-out aspect to the consideration. These contracts should be excluded from the definition. Bell Gully also supports ISDA's submissions on the definitions of "*derivative*" and "*equity security*" in clause 8.
10	Definitions of issued and issuer	Bell Gully supports ISDA's submissions on clause 10. 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. 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.
12	Miscellaneous interpretation provisions relating to statements and information	Clause 12(1) provides a particular circumstance in which a statement or other information is deemed to be false or misleading. It is stated in an inclusive manner. We submit that it would be preferable to have an exhaustive definition of the circumstances in which a statement or other information is false or misleading. We see no reason to depart from the approach in section 55(a) of the Securities Act 1978. Clause 12(2)(c) provides that a statement or other information which is "*referred to*" in the PDS, register entry, document or communication is deemed to be included in such PDS, register entry, document or communication. We submit that this concept should be deleted. We agree that information incorporated by reference should be within the scope of clause 12(2)(c).

Clause Number	Clause heading	Submission
Part 2	**Misleading or deceptive conduct or false or misleading representations**	
16	Misleading or deceptive conduct generally	We submit that, to avoid any doubt as to the intended general scope of clause 16 and to ensure consistency with the other clauses in Part 2, we suggest that the words "*offer, supply or promotion, or possible offer, supply or promotion*" be used in clause 16(b).
19	False or misleading representations	We submit that, insofar as clause 19(a) is intended to be closely modelled on section 13(a) of the Fair Trading Act 1986, the word "*style*" could be included after "*composition*". In addition, insofar as clause 19(b) is intended to be closely modelled on section 13(b) of the Fair Trading Act 1986, the words "*(including as to a particular trade, qualification or skill)*" could be added after "*characteristics*".
21	Limited application of Part in relation to newspapers, magazines, broadcasting, etc	We note that the terms "*newspaper*", "*magazine*" and "*broadcasting*" are not defined in this clause (or elsewhere in the Bill). The provision on which this clause is modelled (section 15 of the Fair Trading Act 1986) defines: (a) "*newspaper*" as having the meaning given to that term by section 2 of the Films, Videos, and Publications Classification Act 1993; and (b) "*broadcasting*" as having the same meaning as in section 2 of the Broadcasting Act 1976. Depending on the intended scope of this clause, similar definitions could be adopted. Otherwise, these terms can be kept general. A definition of "*magazine*" is perhaps unnecessary. In relation to the definition of "*relevant person*" in clause 21(3) in the case of a news media or financial market commentary Internet site (in clause 21(3)(b)), the phrase "*the person that controls the content of the Internet site*" is not defined and may be ambiguous. While presumably the person that controls the content will be the registrant of the Internet site (e.g. news media company), in some circumstances the host of the website might also be said to exercise "*control*" over the content of the Internet site. We submit that the meaning of the phrase should be clarified depending on the intended scope of this clause.
Part 3	**Disclosure offers of financial products**	
25	Sale offers that need disclosure	There are a small number of references to offers for sale in Schedule 1 (clauses 12(4) and 17(2) for example). We submit that those references may not be required or clause 25 may need adjustment to take account of those references.

Clause Number	Clause heading	Submission
28	Treatment of offers of options over financial products	We submit that the treatment of options over financial products be regulated in a manner which is both efficient from an issuer's perspective and which provides investors with information required by them to make a fully informed investment decision at all relevant times. We agree with the approach proposed in clause 28(1)(a). We disagree with the approach proposed in clause 28(1)(b). In our view, the disclosure requirements of the Bill should not apply to the grant of an option without an offer of an option (such as an option issued for nil consideration). In order for the exclusion in clause 11(2) of Schedule 1 to apply, no consideration may be provided for the exercise of the option. We submit the approach in note 2 of section 702 of the Corporations Act 2001 is preferable. It would still be necessary to comply with the disclosure requirements in relation to the offer of the underlying financial products (i.e. when the option is able to be exercised).
29	Treatment of offers of convertible financial products	It is not clear why the Bill proposes to treat convertible securities in a manner different to options. We submit that the approach proposed in clause 29 in relation to convertible financial products will create practical difficulties for issuers unless it is supported by exemptions which are practical from the perspective of an issuer. It would impose an onerous burden to require an issuer to keep the PDS up-to-date in the case of convertible financial products which are able to be converted over a long period. We support the approach of requiring ongoing targeted disclosures to holders of convertible securities.
30	Treatment of offers of renewals and variations	We submit that clause 30 should be deleted given the exemption granted in clause 21 of Schedule 1 with respect to a renewal or variation of the terms or conditions of a financial product.
32	PDS must be prepared and lodged	Clause 32(1) imposes obligations on an issuer of a financial product, including an obligation to prepare a PDS for a regulated offer. We query whether this obligation should also fall on the "*offeror*" in the case of a transfer of financial products.
33	Purpose of PDS	Clause 33 refers to a "*prudent by non-expert person*". We query whether this provision should adopt the same language as in Option B of clause 40 (a person who commonly invests in financial products).

Clause Number	Clause heading	Submission
35	Certain situations in which clause 34 does not need to be complied with	We submit that the words "*whether by the issuer, offeror or otherwise*" should be added in clause 35(a) to make it clear that issuers can rely on brokers or financial advisers providing PDSs to their clients where reasonable to do so (given paragraph (b)). We also submit that a further exception should be added equivalent to section 1012D(2) of the Corporations Act 2001 as follows: "*if A already holds financial products of the same kind as the financial products on offer and the person who makes the offer believes on reasonable grounds that A has received, or knows that they have access to, all of the information that the first-mentioned PDS would be required to contain, through information provided as a result of continuous disclosure obligations or through annual reports or other shareholder communications.*"
36	PDS treated as having been given if application form that is used was included in, or accompanied by, PDS	We submit that it would be preferable to give some guidance on what would constitute "*reasonable grounds*" for the purposes of clause 36(b). Typically, an application form contains a confirmation by the applicant that he or she has received and read the offer document.
38	Right to withdraw and have money returned	Bell Gully supports ISDA's submissions on clause 38.
39	Disclosure of material information and content of PDS and register entry	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). In addition, clause 39(2) could be read to imply that the starting point for disclosure of material information is the PDS. 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 Bill 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. The issuer must comply with certain obligations as at the date on which a certificate of lodgement is given. In order for an issuer to meet these obligations, it will be essential that a certificate of lodgement is given on the same date on which the PDS is lodged with the Registrar. Clause 39(1)(b)(iv) requires that the PDS is dated the date that it is lodged with the Registrar. It should not be necessary to impose this requirement given that the issuer must ensure that the disclosure requirements are met as at the date on which a certificate of lodgement is given.

Clause Number	Clause heading	Submission
40	Meaning of material information in this Part	We submit that option B is the more appropriate test for the meaning of "*material information*". It reflects the principle established by the Courts in terms of what is "*material*" and it is consistent with the approach taken in section 677 of the Corporations Act 2001. We submit that clause 40(b) is likely to be confusing without some guidance from the FMA. The test for determining what is "*material information*" could be determined solely according to clause 40(a). If a matter relates to financial products or issuers generally, and it would influence a person's decision to invest, then it should be disclosed in the PDS (even though it might be generic in nature). We appreciate that disclosure requirements under regulations should ensure that irrelevant or generic information should not be encouraged. However, we submit this is best dealt with through the regulations which govern the content of the PDS, rather than a general qualification to the meaning of "*material information*".
41	Consent of person to whom statement attributed	We submit that the scope of statements referred to in clause 41(1) is too broad considering the absence of specific exemptions from this general rule. Consideration should be given to excluding from the application of this provision any statement or information which is publicly available (provided that the PDS or register entry includes reference to where the original statement or information is available). There are likely to be other exemptions which are required in order to make the requirement to obtain consent workable (as per class orders which have been granted under the Australian Corporations Act 2001). We also submit that consideration should be given to limiting the application of clause 41(1) to statements which contain "*material information*" within the scope of clause 40. We also submit that clause 41(1)(a) should add the words *"... in writing..."* after *"... consented to..."*. This is consistent with the obligation under clause 41(1)(c) for the issuer to keep a copy of the consent.
42	PDS must be worded and presented in clear, concise, and effective manner	The concept "*clear, concise and effective*" is not defined in the Bill. We submit that clear guidance on what this concept requires of issuers will need to be provided in regulations or practice notes issued by the FMA.
46	Waiting period after lodgement before processing applications for financial products	We submit that clause 46(2) should be amended to require the FMA to give any notice prior to expiry of the period of five working days referred to in clause 46(1).

Clause Number	Clause heading	Submission
51	When supplementary document or replacement PDS may be lodged	The Bill contains provisions for PDSs to be updated by way of supplement. This is an improvement on the current position in relation to updates to an investment statement. However, we submit that consideration should also be given to allowing the FMA to prescribe alternative means (such as making information available on an issuer's website) in appropriate circumstances. We believe it should be possible to provide an efficient regime for issuers without prejudicing the interests of investors. We also submit that a listed issuer should be able to announce a matter which would require amendment to a PDS to the NZX rather than have to provide a supplementary PDS to all applicants and potential investors. We cannot comment on clause 51(2) as the prescribed circumstances are not specified. We submit that those circumstances should be specified in the Bill.
52	Supplementary document	We submit that an issuer's obligations to provide applicants with a supplementary document or replacement PDS should be clarified in the Bill. It appears that it is the intention that an issuer must comply with section 62(1)(b) once it issues a supplementary or replacement PDS in order to correct a deficiency or change the terms of an offer prior to allotment. Refer to our comments in relation to clause 62.
55	Consents needed for lodgement	We submit that the Bill should specify each class of "*prescribed person*" who must give their consent to lodgement of a product disclosure statement. 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. 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. 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: (a) many managed investment schemes are offered by large financial institutions that offer a large range of these products. 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 is 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;

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		(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; and (c) we understand that personal director involvement is not typically required in Australia in relation to derivatives and unquoted managed investment schemes. 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 Bill. We submit that the requirement in clause 55 for director consent should be removed. Qualifications could be included to ensure that only reasonable reliance provides the relevant defence. 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.
56	Issuer must keep copy of consent	We submit that clause 56(1) should specify the period of time that the issuer must continue to hold a copy of the consent.
61	Application of clause 62	We submit that clause 61(4)(b) should follow an objective test that is similar to the concept in option B in clause 40 (i.e. by adding reference to persons "*who commonly invest in financial products*"). In addition, we submit that: (a) the matter must be *"... materially adverse to the financial products that are the subject of the regulated offer."*; and (b) it should be expressly provided that the circumstance must have arisen "*on or prior to the date of allotment of the financial product that is the subject of the regulated offer*". The comments above also apply to the equivalent provisions in clause 61(5).

Clause Number	Clause heading	Submission
62	Choices open to offeror	Clause 62(1)(b)(ii) provides that an issuer must give each applicant one month to confirm whether or not it still wishes to acquire the financial products. We submit that this provision requires further consideration. Fixed period offers are generally for a 2-3 week period. In our view, it would significantly extend the period of an offer if applicants will have one month to confirm their application. We submit that a period of 14 days should be adequate. We also submit that it is onerous to require issuers to refund monies if they receive no response from an applicant. In our view, funds should only be repaid if an applicant elects to withdraw his or her application. The comments above also apply to clause 62(1)(c)(iii).
63	Misleading or deceptive statements, omissions, and new matters requiring disclosure	We submit that an offence under clause 63(1) should be limited to any statement that is misleading or deceptive in a "*material particular*" or an omission of "*material information*". That approach would be consistent with clause 12(1)(b).
64	Persons who must inform offeror about disclosure deficiencies	We submit that it is not appropriate to give an underwriter the same obligations to notify the offeror as a director or officer of the offeror. Underwriters are generally reliant on the offeror for accurate disclosure. We also submit that a person who has given his or her consent to the inclusion of their name in a PDS should only be obliged to notify the offeror with respect to matters relating to particular statements in the PDS made by such persons.
71	Advertising or publicity for regulated offers	Clause 71(1)(a) uses the term "*advertise*". It may be preferable to use the defined term "*advertisement*". We submit that clause 71(1)(b) is too broad. In particular: (a) it is not clear what is meant by an "*indirect*" reference to an offer or intended offer; (b) clause 71(b)(ii) should read "*is reasonably likely to induce persons to apply for financial products to which the communication relates*", as this provision could prohibit general communications by a company with its shareholders (as the exceptions in clause 76 are very limited in this regard). Alternatively, consideration might be given to using the wording in the definition of "*advertisement*", which is "*for the purpose of promoting the offer or intended offer*". The communication should have some link with the financial product.
72	Indirect references to offer and inducements to apply	We submit that clause 72 should be considered further. Paragraphs (a), (b) and (c) appear to have different influences on considering whether a statement is restricted or not. In our view, clause 72 should be amended so that if the statement relates generally to the affairs of the issuer or offeror and does not mention the offer or intended offer of financial products, then it is permitted, consistent with our proposed amendment to clause 71(b)(ii).

Clause Number	Clause heading	Submission
73	Distribution of PDS	We submit that clause 73(1) should also refer to distribution of any document on the register of offers of financial products.
74	Advertising and publicity before PDS is lodged	We submit that this provision should be limited to "*advertisement*" and not include "*publication*", since "*advertisement*" is a defined term, but publication is not and the concept of "*publication*" is too broad. We appreciate that this wording is consistent with the wording in section 734 of the Corporations Act 2001, but that Act does not have a definition of "*advertisement*". If the intention is to refer to clause 71 statements, then this should be made clear in this clause or in the definition of "*advertisement*" or "*publication*". We also submit that the first part of clause 74(1) could be amended to state: "*Before the PDS is lodged, an advertisement in relation to an offer or intended offer or a publication within the scope of section 71(1)(b) may be distributed...*". We also submit that clause 74 should include the exception for securities of the same class as securities that are currently quoted, as contained in section 734(5)(a) of the Corporations Act 2001. In our view, consideration should be given to deleting some of the prescribed disclosures in clause 74(1). It will be difficult to provide all of the prescribed information in a prominent form within an advertisement. In clause 74(1)(h)(i), reference to "*terms and conditions*" should be added after the reference to "*rights or privileges*". Our experience is that issuers often wish to include brief information about their products and present brands and logos as part of a pre-offer advertisement. The Securities Commission has in the past granted exemptions from section 5(2CA) of the Securities Act 1978 to enable such conduct (refer to the Securities Act (Goodman Fielder New Zealand Limited) Exemption Notice 2010). We submit this flexibility should be available to issuers under clause 74(1)(b). We also submit that clause 74(1)(h)(v) should also refer to the "*total dollar face value*" (to cater for debt securities with a principal amount).
75	Advertising and publicity after PDS is lodged	Refer to our comments on clauses 71 and 74 in relation to references to an "*advertisement*" or a "*publication*". Clause 75(2) provides that a statement required under clause 75 must be "*reasonably prominent*". This imposes an onerous obligation unless an advertisement is large in its appearance. The information specified in clause 75(1)(c) is not essential and that requirement could be deleted.

Clause Number	Clause heading	Submission
76	General exceptions	We submit that it should be expressly clear that clause 76 overrides clauses 74 and 75. Refer to our comments on clauses 71 and 74 in relation to references to "*advertisement*" or "*publication*". If clause 71(b)(ii) and clause 74 are amended as suggested above, then the current wording of clause 76(a) is appropriate. If clause 71(b)(ii) and clause 74 are not amended as suggested above, then the words in clause 76(a) "*relates to an offer of the financial products*" should be deleted, as even with this exception, listed issuers would still be prohibited from general pre-offer statements which promote their business or entity under clause 74. We submit that clause 76(b) should also incorporate "*any statement made at a meeting*" (such as a chairman's address) and extend to any meeting of security holders other than a general meeting of shareholders (such as debt security holders). We also submit that clause 76(d) is too restrictive. It would require the report to include the same information made available in a PDS. It should be sufficient for the report to include information that is not materially inconsistent with the information contained in the PDS.
77	No advertising or publicity for offers covered by exclusion for small offers and small schemes	We submit that the use of the word "*advertise*" could be confusing, since the defined term "*advertisement*" can be interpreted to include advertising provided to one person only. We assume that this provision is intended to restrict general advertisements for small offers or small schemes, so the wording should make clear that "*a person must not advertise to the public in general, or publish a statement that directly or indirectly refers to ...*". In our view, the restrictions on advertising for small offers or small schemes should be reconsidered. Refer to our comments on clause 12 of Part 1 of Schedule 1. The Bill should remove impediments to small companies raising capital (subject to limits on the number of investors and the amount of capital raised).
79	Sending of draft PDS	We submit that clause 79 is too narrow in only referring to distribution of a draft PDS. This provision should be expanded to include a general exclusion from clauses 71, 74 and 77 in the case of: (a) roadshow presentations for the purpose of pre-offer marketing, provided that such presentations are made only to wholesale investors or licensed financial advisers; and (b) market research conducted by the offeror or a licensed financial adviser (investment bank) on behalf of the offeror for the purpose of ascertaining demand for the intended offer. This is consistent with ASIC class orders CO 00/175 (pre-prospectus roadshow presentations) and CO 00/176 (pre-prospectus market research).

Clause Number	Clause heading	Submission
80	Duty to notify relevant matters and provide certain documents and information to Registrar	It is not clear what would constitute a "*prescribed change*" (refer to clauses 80(1)(a) and 80(2)(a)).
Part 4	**Governance of financial products**	
94	Changes to trust deed	We submit that clause 94(2)(a)(i) should also provide for approvals to be given by classes of holders of a debt security in certain circumstances where an amendment affects a particular group of holders of a debt security only. Provisions of this nature are common in trust deeds for debt securities. We also submit that the term "*generally*" should be added at the end of clause 94(2)(a)(ii). That term is usually included in an amendment provision of a debt security trust deed and ensures that the trustee need not consider the position of each individual security holder. Our experience is that trust deeds for debt securities typically allow a trustee to authorise an amendment if it will not be "*materially prejudicial to the interests of holders of [the security] generally*". We query why the Bill does not adopt that test in clause 94(2)(a)(ii).
Clause 109	Need to register managed investment scheme for regulated offer of managed investment product	We submit that the application of the MIS registration requirements to schemes that are closed to new members 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. We understand that it is not intended that legacy superannuation schemes of this sort will be automatically exempted from the governance requirements of the Bill. Assuming that this is correct, then we submit that it is important that the Bill contains sufficient flexibility to apply appropriate governance requirements on a risk based basis, taking account of the costs associated with compliance.
Clause 113	Additional initial and ongoing registration requirements for superannuation schemes	We understand that not all existing superannuation schemes would meet the requirements of clause 113. We submit that existing registered superannuation schemes should be able to register as superannuation schemes under the Bill, regardless of whether they meet the more restrictive requirement in clause 113, in particular, clause 113(1)(b).

Clause Number	Clause heading	Submission
Clause 118	Limits on permitted exemptions and indemnities	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). We submit this because: (a) we interpret the definition of "governing document" to not include an investment management contract (although this is not completely clear); and (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	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: (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; or (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). 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. 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.
Clause 121(2)(a)(ii)	Changes to governing document – adverse effect on scheme participants	We submit that should be amended to read as follows: *"The supervisor or the FMA is satisfied that the amendment or replacement does not have a material adverse effect on scheme participants viewed as a group."* We submit this because it should be clear that the supervisor/FMA need not consider the position of each individual scheme participant.

Clause Number	Clause heading	Submission
Clause 121(3)(a)	Changes to governing document	We submit that this provision should be amended to read: "*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*". 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. In these circumstances, it should be open to the manager to seek a special resolution of the affected scheme participants only. 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.
Clause 122(1)(a)	Power to make FMA and court-approved changes to governing documents	We submit that the introductory wording to this clause should be amended to read as follows: "*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) ...*" 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. 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	We submit that the words "*the manager and*" should be deleted from this provision. 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. The supervisor should be able to rely on the licensing process in relation to the general capacity of the manager. A consequential amendment would be required to clause 134.

Clause Number	Clause heading	Submission
Clause 139	Meetings of scheme participants	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. We submit this because we do not believe that meetings are necessary or appropriate to protect the interests of scheme participants in these circumstances. 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 majority enforcing an outcome which could potentially impact on those who do not vote and/or an unwilling minority.
Clause 143(1)	SIPO – consultation with supervisor	We submit that this clause should be changed to read: "*The manager of a registered scheme may amend or replace a statement of investment policy and objectives only after giving prior written notice to the supervisor.*" Clause 143(2) should then be deleted. 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. 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). 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" obligation.
Clause 151(3)(a)(i)	General prohibition on transactions giving related party benefits	We submit that clause 151(3)(a)(i) should be amended to read: "*the supervisor considers that the transaction or transactions are in the best interests of the scheme participants viewed as a group*".
Clause 151(3)(a)(ii)	General prohibition on transactions giving related party benefits	We submit that this provision be amended to read: "*The transaction is approved by, or contingent on, approval by, a special resolution of the class of scheme participants affected or potentially affected by the transaction*". We submit this because of reasoning similar to the reasoning set out in relation to clause 121(3)(a) above. 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.

Clause Number	Clause heading	Submission
Clause 160	Removal of manager of registered scheme	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). 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. We submit this because we understand managers typically invest very significant amounts of money to establish market and maintain managed investment schemes.
191	Audit of registers	We submit that clause 191(2)(b)(i) should only apply if the FMA believes that the breach is material to security holders. If the breach was inadvertent or minor then causing concern at a security holder meeting seems inappropriate. This would ensure that a similar regime is applied as that for debt securities set out in clause 191(b)(ii) where there is not an immediate obligation to notify debt security holders (although the supervisor may, in the case of a material breach, determine such action should be taken in accordance with the supervisor's general duties).
193	Public inspection of register	Clause 193 should include the right for an issuer to charge a prescribed fee for inspection by persons other than existing security holders.
208	Part 4 governance provisions	We question why clauses 98 and 99 (duties applying to supervisor of debt security), clauses 125 to 127 (duties applying to managers, investment managers, and directors and senior managers of managers) and clauses 129 to 130 (duties applying to supervisors of registered schemes) are not subject to the higher civil remedy regime contained in clause 208(2).
Part 5	**Dealing in financial products on markets**	
211	Meaning of material information	We submit that the reference in clause 211(1)(a) to "*price*" is appropriate and should not be changed to "*value*" as this will result in a more subjective test.
212	Meaning of generally available to the market	We submit that clause 212 should provide additional guidance around broker reports which are readily obtainable but only if you are a client of the relevant broker. Information in these reports has been complied from publicly available information and the broker's expertise. Given the number of these reports which are produced, their treatment should be addressed in this clause.
218	Prohibition of insider conduct	We submit that clause 218 should not deal with private treaty transactions involving securities as this would be unworkable. The proposed clause 16 gives adequate protection for private treaty transactions.

Clause Number	Clause heading	Submission
220	Information insider must not disclose inside information	We submit that the references to "*hold*" in clauses 220(1)(b) and (2)(b) should be retained. In this scenario there has been no loss incurred by a third party or gain by the holder of the securities that has caused a loss to a third party. It is the same principles that apply to the removal of the reference to "*hold*" in clause 220 (1)(a). The concept of "*hold*" is not included in the equivalent provisions in the Corporations Act 2001.
221	Information insider must not advise or encourage trading	Refer to our comments in relation to clause 220.
226	Exceptions in respect of underwriting agreements	We submit that clause 226 should also cover the subsequent on-sale of securities by an underwriter. Generally, underwriters do not intend to hold long term securities which they may be required to subscribe for under an underwriting agreement.
230	Exceptions from clause 219 for takeovers	We submit that an additional exception, drafted in a similar manner as that provided for takeovers, needs to be included in relation to the acquisition of shares by way of a scheme of arrangement under the Companies Act 1993.
231	Exceptions from clauses 220 and 221 for takeovers	We submit that the exceptions need to apply to not only the "*prospective offeror*" but also prospective shareholders of the prospective offeror.
235	Inside information obtained by independent research and analysis	We submit that this defence should be retained as it is potentially broader than clause 212(1)(c).
236	Equal information	We submit that this exception has negligible practical application. It will be unlikely for a party to know if the other party has equal information without potentially being involved in tipping that other party if it does not have the same information. Because of this risk, we do not believe that this exception is necessary.
246	Defence	We submit that the test of "*proper purpose*" is a better measure than "*legitimate reason*", however we question the additional requirement of the trading to be in compliance with "*accepted market practices*". This requirement narrows the breadth of the defence and we believe that a trade that is for a proper purpose should be covered by the defence notwithstanding that it may not be accepted market practice.
271	Public inspection of register	We submit that a definition of "*inspection period*" needs to be included in the Bill.
278	Directors and senior managers of listed issuers must disclose relevant interests and dealings in relevant interests	We submit that the exemptions referred to in paragraph 116 of the MED request for submissions and commentary (August 2011) should be included in the Bill.

Clause Number	Clause heading	Submission
286	Public inspection of interests register	We submit that a definition of "*inspection period*" needs to be included in the Bill as this term is currently not defined and an issuer should be entitled to charge a prescribed fee for inspection by a person other than a holder of financial products issued by the issuer.
290	What is financial product market	We submit that the clause heading should be "*What is a financial product market*". The word "*regularly*" adds uncertainty to clause 290(1). It should be deleted. Clause 293 will deal with the matter of frequency of trading. Clause 290(2) should include an additional exception for issuers that are willing to match intending acquirors of financial products of that issuer with intending disposers of financial products of that issuer. A suggested subclause is: *(b) an issuer matching persons who wish to acquire financial products of that issuer with persons who wish to dispose of financial products of that issuer (whether at a specified price or otherwise);* We expect that other exemptions will be required to accommodate existing facilities that are not, in substance, markets.
291	Need for financial product market licence	We submit that the minimum size threshold proposed is very low. While market participants will be able to offer more evidence-based quantitative recommendations, we would expect there is scope to increase the threshold and still protect confidence in New Zealand's financial markets. An alternative to increasing the thresholds in the Bill would be to prescribe class exemptions so that small facilities will be able to avoid the expense of seeking an individual exemption. We also submit that clause 291(a) should be clarified by replacing the words "*that covers*" with "*to operate*".
292	Prohibitions on holding out	We submit that clause 292(c) should be clarified by replacing the word "*market*" with the words "*financial product market*".

Clause Number	Clause heading	Submission
293	Exemptions	The MED commentary to the exposure draft states, in respect of exemptions from licensing of a financial product market that: *Facilities will be automatically exempt unless they breach both the size and number of transactions thresholds. This is to prevent a licence or exemption being required as a result of a single large transaction, or for facilities that are used for only very small transactions.* However, the exemption as drafted in clause 293 requires both the 100 transactions and $2 million aggregate value threshold to be satisfied. We submit that the exemption should apply if "*either*" subclause (i) "*or*" (ii) is satisfied. Clause 293(a)(ii) refers to the "*aggregate value of financial products acquired*". The term "*value*" has many potential meanings. In this case (where there is a market), we suggest that clause 293(a)(ii) instead be: (ii) *the aggregate value (based on the traded price, to the extent known) of the financial products acquired under those transactions was of a value less than $[ ] million; or* We also submit that clause 293(b) is redundant as exemptions for wholesale markets would be covered under clause 293(c). Bell Gully supports ISDA's submissions on clause 293.
294	When financial product market taken to be operated in New Zealand	We submit that clause 294(1)(a) should be clarified by replacing the words "*body corporate*" with the word "*entity*". It is not clear what constitutes promotion to investors in New Zealand for the purposes of clause 294(1)(c). For example, we are unsure whether it would include offshore advertising, particularly online.
295	General obligations in respect of licensed markets	We submit that a condition of all licences should be that no director, manager or controlling owner ceases to meet the application requirements under clause 297(c) or clause 298(1)(d), as applicable, and therefore this condition should be included as an obligation under clause 295.
296	Application for licence	We submit that clause 296(1) should be clarified by replacing the word "*for*" with the words "*to operate*". Rather than referring to "*a reasonable time*", we submit that clause 296(3) should refer to "*a prescribed time*".

Clause Number	Clause heading	Submission
298	When licence may be issued for overseas-regulated market	We submit that the words "*, after receiving an application under **section 296**,*" should be added after the first reference to the word "*Minister*". We also submit that clause 298(1)(c) should be deleted. It is overly broad and ill-defined, amounting to a power of compulsion. Conditions can be imposed on the licence if necessary and the limited information sharing provisions of clauses 337 and 340 apply. Clause 298(1)(d) should be recast so that directors, senior managers and controlling owners will be assessed on the s14(2) Financial Service Providers (Registration and Dispute Resolution) Act 2008 criteria or equivalent foreign provisions.
299	Conditions of licence	Clause 299 does not provide a general power of the Minister to impose conditions on issue of a license (compare with section 796A of the Corporations Act 2001. We submit that clause 299(1)(a) should be clarified by replacing the words "*financial product market*" with the words "*financial product markets*". We also submit that clause 299(1)(b) should be clarified by replacing the words "*that are adequate*" with the words "*that may be used by the financial product markets covered by the licence*".
302	Licence may cover subsidiaries	Where a licence authorises subsidiaries to operate a financial products market, we submit that the subsidiary should be treated as holding a financial product market licence for the purpose of the Bill. We also submit that clause 302(2) should be amended to include the words "*the subsidiary will be deemed to hold a financial product market licence*".
303	FMA must maintain list of licensed markets on Internet site	We submit that clause 303(2)(e) should be clarified by replacing the words "*the market rules*" with the words "*a reference to the market rules*".
304	Variation of conditions	We submit that clause 304(2)(a) should be amended by replacing the figure "*1*" with the word "*either*". We also submit that clause 304(4) should be amended by replacing the words "*required by the FMA*" with the words "*reasonably required by the FMA*". Clause 304(5) should be clarified by adding the words "*or include any new conditions*" at the end of that subclause.
305	Minister may suspend or cancel licence	We submit that clause 305(e)(ii) should be clarified by replacing the words "*the Minister is no longer satisfied as required by **section 298(1)(b)***" with the words "*the Minister would not be satisfied with the matters set out in **section 298(1)(b)** if an application were to be issued at that time*".
311	When market rules have effect	We submit that clause 311 should be amended by replacing the words "*part of a market rule*" with the words "*change to a market rule*".

Clause Number	Clause heading	Submission
312	Approval process for proposed market rules and rule changes	We submit that clause 312(4) should be amended by deleting the first reference to the word "*rule*".
313	Approval of proposed market rules and changes	We submit that clauses 313(1)(a)(i) and 313(1)(b)(i) should be amended by inserting the words "*stated in sections 209 and 289*".
314	Notice of decision on rules	We submit that clause 314(3) should be amended by inserting the words "*and on an Internet site maintained by or on behalf of the FMA*" after the word "*Gazette*".
315	Power of FMA to request changes to market rules on certain matters	We submit that clause 315(1) should be amended by inserting the words "*stated in sections 209 and 289*" after the words "*purposes of this Part*".
316	Overseas-regulated markets must give notice of market rules and rule changes to FMA	We submit that clause 316(a) should be amended by replacing the words "*on the issue of the licence*" with the words "*at the time of application under section 296*". We also submit that clause 316(b) should be amended by inserting the words "*together with the date on which the change was made and an explanation of the purpose of the change*" at the end of that subclause.
325	Minister may vary, suspend, or cancel licence	We note that the Minister will have a power to vary, suspend or cancel a licence at any time where it could instead give a direction to a licensed market operator. We query whether the Minister ought first to issue such a direction (which is binding on the licensed market operator).
333	Regulations modifying subpart for licensed markets	We submit that clause 333(1)(b) is not consistent with the apparent position contained in clauses 248 and 313(1)(b) that a financial product market need not impose continuous disclosure obligations on its market participants (subject to FMA approval of its listing rules). Clause 333(1)(b) suggests that alternative disclosure obligations need to be prescribed in order to be adopted.
344	FMA may give directions to licensed market operators	We submit that the power to suspend trading of financial products should be related to one or more issuers to be specified by the FMA. Clause 344(2)(a) should be amended by the insertion of the words "*of one or more participants*" at the end of that provision.
345	Grounds for continuous disclosure direction	We submit that the term "*appropriate*" continuous disclosure needs to be defined by reference to the purposes noted in clause 345(2)(a). We suggest that: (a) clause 345(2)(a) should be amended by inserting the words "*stated in section 209*" after the words "*purpose of this Part*"; and; (b) clauses 345(2)(a) and (b) be merged. Suggested language is set out below. *(a) having regard to the purpose of this Part stated in section 209 (and the main and additional purposes of the Act stated in* ***sections 3 and 4****) and any other matters it considers relevant, is satisfied that 1 of the following grounds applies:*

Clause Number	Clause heading	Submission
		(i) a listed issuer has contravened a continuous disclosure obligation or a term or condition of a continuous disclosure exemption; or *(ii) a determination by a licensed market operator to which **section 342** applies does not achieve appropriate continuous disclosure by a listed issuer of material information that is not generally available to the market; or* *(iii) the licensed market operator's administration of the continuous disclosure provisions of its listing rules does not achieve appropriate continuous disclosure by a listed issuer of material information that is not generally available to the market;*
355	Transfer of specified financial products by transfer	We submit that the definition of "*authorised transaction*" need not refer to "*sale, gift or other disposition*" as the term "*dispose of*" is to be defined. By implication, the current wording of "*authorised transaction*" may suggest that gifting or similar transfers are not within the meaning of the term "*dispose of*".
Part 6	**Licensing and other regulation of market services**	
413	Changes to client agreement	Bell Gully supports ISDA's submissions on clause 413.
Clause 426(1)	Requirement for custodian	We submit that this provision should be amended to read as follows: "*A DIMS licensee must ensure that the investor property is held by a person who meets the custodianship requirements specified in subsection (2).*"
Part 7	**Enforcement and liability**	
431	Meaning of contravene	Clause 431 is based on section 729 of the Corporations Act 2001 and will extend the categories of persons who will be potentially liable for any defective disclosure in a PDS or a register entry. The approach proposed in the Bill is a significant change from the current position under the Securities Act 1978. We are not aware of any particular policy reason for adopting the Australian approach. In our view, an issuer and its directors should be primarily responsible for accurate disclosure to investors. The broad language in clause 431 (particularly clause 431(e)) will expose lead managers and professional advisers to potential liability. We submit that this approach should be given further consideration as it fails to recognise the limited role that those parties play in an offer process and their limited knowledge of the business of the issuer. In our view, it should be made clear that a person will not be liable for any defective disclosure by reason merely of being involved in the preparation of a PDS or a register entry as an adviser. In the case of clause 431(e) of the Bill,

Clause Number	Clause heading	Submission
		liability should only be imposed on third parties where they are knowingly involved in the contravention and they are aware that the relevant conduct is a contravention of the Bill. Other New Zealand statutes have similar sections to 431 and 432 but we are not aware of any statute that has both of them. It is not clear how they work together. Clause 432 could clarify, expand or replace clause 431 in relation to directors' liability for corporate conduct. It appears that the intention is for only clause 432 to apply to directors' liability arising from corporate conduct. That interpretation is necessary for clause 432(2) to be effective, because even if liability were not created by clause 432(1), it would almost certainly be created by clause 431. If this is the correct intention, we recommend expressly excluding directors' liability for corporate conduct from clause 431.
432	Directors also treated as contravening in certain circumstances	Refer to comments above in clause 431.
436	FMA may make interim stop order pending exercise of powers	These two sections both address the circumstance where the FMA considers it is desirable to issue an urgent stop order (among other orders, in the case of clause 443). It is not clear how they work together. For example, if the FMA considers there is a clear breach of clause 34 which requires its urgent intervention, it appears to have a choice between orders under clause 436 (which would only be temporary) or clause 443 (which would be permanent, notwithstanding that the FMA has not followed the due process provisions of clause 442). If clause 443 remains in the Act, we submit that it should only apply in circumstances where an interim order is not available. More generally, we consider that the interim order mechanism is more fair and logical than the abridgment of due process in clause 443. We submit that clause 443 be removed and that the FMA be granted a general power to grant interim orders for five working days, to allow it to comply with clause 442.
442	FMA must follow steps before making orders	This section applies to any orders the FMA wishes to make, not only those in part 7. We recommend putting this section in a more prominent place, or referring to it in the other parts of the Bill which empower the FMA to make orders.
443	FMA may shorten steps for specified orders	Refer to comments above in clause 436.
454	Purpose and effect of declarations of contravention	If the purpose of clause 454(1) is to limit the application of clause 454(2) to applications for compensation orders or clause 467 orders, we submit that it would be better achieved by including those restrictions in clause 454(2) and deleting clause 454(1). If clause 454(2) is intended to apply in cases other than to applications for compensation orders or clause 467 orders, this should be made clear.

Clause Number	Clause heading	Submission
458	Guidance for court on how to determine gains made or losses avoided for purposes of maximum amount	Sections 458(1) and (2) set out how to calculate "*gain made*" or "*loss avoided*" for the purpose of clause 457. Clause 458(3) then provides that the Court is not limited by clause 458(1) and (2) and may calculate the sum any other way. It is possible that clause 458(3)(a) was intended to refer to situations other than the calculation in clause 457 (i.e., for the purposes of clause 457, clause 458(3)(b) applies, but for other purposes the Court can assess gain made or loss avoided some other way). If this is the intention, clause 458(3) should be clarified to reflect this. However, our preference would be for the clause to be deleted. The possibility of other, undefined means of calculating gain made or loss avoided will introduce unnecessary uncertainty to the calculation. Clause 458(3)(a) and (b) are disjunctive. The Court could rely on clause 458(3)(a) to conclude that the amount of gain made or loss avoided was less than the amount calculated in accordance with clause 458(2). While we agree that this is the necessary corollary of clause 458(3)(a), it appears to render clause 458(3)(b) redundant.
462	Terms of compensatory orders	An underwriter (but not a sub-underwriter) who is named in a PDS or register entry (with their consent) can be held liable under a compensatory order. We doubt that such approach will advance the main purposes of the Bill. An underwriter has a limited role in the preparation of a PDS. In our view, an underwriter should only be liable if it has acted in contravention of the Bill (subject to our comments above in relation to clause 431) or in the circumstances referred to in clause 462(4)(b)(v).
463	Person treated as suffering loss or damage in case of defective disclosure	We submit that this reversal of the burden of proof is unprincipled and should be removed. The section does more than just reverse the burden of proof. It establishes a rebuttable presumption that all of a reduction in value is attributable to the contravention. In circumstances where it is difficult to establish the cause of share price movements (which is often the case), there is a likelihood of this section creating real injustice.
464	Application of defences	It is not clear why this clause does not refer to clause 409 along with the other defective disclosure provisions.

Clause Number	Clause heading	Submission
473	General provision relating to offences	As currently drafted, the Bill requires the reader to undertake substantial cross-referencing to identify the classification of offences. For example: (a) Tier one infringement offences appear to be offences against clauses 270 or 271 (see clause 273); clauses 285(1), 285(3) and 287 (see clause 288); clause 489 and possibly others; (b) Tier two offences appear to be offences against clause 187; clause 344 (see clause 353); clause 482; clause 446(2) and possibly others; (c) Tier 3 offences appear to be offences against clause 34 (see clause 37); clauses 83, 409 and clause 25 of Schedule 1 (see clause 479); clauses 219 to 221 (see clause 222); clause 240 (see clause 242); clause 243 (see clause 247) and possibly others; and (d) Tier 4 offences appear to be offences against clause 63 (see clause 478). This issue is particularly evident in Part 7 Subpart 4 which refers to the consequences of the various tiers of offences, but without clearly setting out what these tiers are. The definition section of the Bill simply defines each tier of offence as "*an offence identified in this Act as being a tier [x] offence (see section [x] for the consequences)*". We submit that it would assist in interpreting Part 7 (and indeed the Bill as a whole), if the definition section set out a definition of each tier of offence. For example, "*a tier [x] offence is an offence against any of the following provisions [list these]*'.
474	Infringement offences	Clause 474 provides that a person who is alleged to have committed a Tier 1 infringement offence may be proceeded with summarily under the Summary Proceedings Act 1957, or be served with an infringement notice pursuant to clause 475. We submit that the parameters of this power (including the power to impose a fine) are not clear in the absence of a definition of what "*Tier 1 infringement offences*" are. Clause 474(2) provides that an individual guilty of an infringement offence on summary conviction is liable to a fine not exceeding $50,000. A Tier one infringement offence includes for example, a failure to keep a register for disclosures of substantial holdings or interests, or to make that register publicly available (see clauses 272 and 288). It is submitted that $50,000 is too high a penalty for these types of offences. By way of comparison, section 60(1)(d) of the Securities Act 1978 states that every person who without reasonable excuse fails to comply with the requirements to keep a register of securities and to make that register open for inspection, commits an offence and is liable on summary conviction to fine not exceeding $5,000. It is submitted that clause 474(2) should be amended so that the maximum fine is $10,000.

Clause Number	Clause heading	Submission
478	Offence of knowingly or recklessly contravening prohibition on further offers where defective disclosure in PDS or register entry	Refer to comments above in clause 473.
479	Offence of knowingly or recklessly contravening other provisions relating to defective disclosure	Refer to comments above in clause 473.
480	When court may make management banning orders	The wording in clause 480(5)(b) covers "*shadow directors*" and is taken from section 126 of the Companies Act 1993 (with minor modifications). However, it is submitted that as modified, clause 480(5)(b)(iii) is difficult to read. The following edit is suggested to that subsection: "*a person who exercises or who is entitled to exercise or who controls or is entitled to control the exercise of powers which, apart from the constitution of the entity, or the rules or other documents constituting or defining the constitution of the entity, would fall to be exercised by the board or other governing body of the entity*"
481	Terms of management banning orders	Pursuant to clause 481, a management banning order may be imposed permanently. This is in contrast to section 60B of the Securities Act 1978 which provides that a management banning order may be for a maximum of 10 years (the wording in section 60B is otherwise almost identical to section 481). Clause 481 is also in contrast to section 382 of the Companies Act 1993 which provides that those convicted of offences in relation to the promotion, formation or management of a company, or of certain offences under the Companies Act, or of crimes involving dishonesty as defined in section 2(1) of the Crimes Act 1961: "*shall not, during the period of 5 years after the conviction or the judgment, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company, unless that person first obtains the leave of the Court which may be given on such terms and conditions as the Court thinks fit.*" (See similar provision in section 60E of the Securities Act 1978). It is submitted that a permanent management ban under clause 481 is a harsh remedy. We submit that the availability of a permanent banning order should be limited to circumstances where the person has been convicted of a serious Tier 3 or 4 offence.

Clause Number	Clause heading	Submission
487	Interim orders	This section, and the proceeding clauses 485 to 486, are almost identical to sections 60G to I of the Securities Act 1978. However, there is one significant departure. Clause 487(2) states that the Court must not require the FMA, as a condition of making an interim order, to give an undertaking as to damages. By contrast, section 60I of the Securities Act 1978 provides: "*The Court must not require the applicant or any other person, as a condition of granting an interim order under this section, to give an undertaking as to damages.*" It is submitted that there is no justification why the FMA should not be required to give an undertaking as to damages, yet other applicants under clause 485 may be so required. It is submitted that section 487(2) should be amended to read: "*The Court must not require an applicant, as a condition of making an interim order, to give an undertaking as to damages.*" Clause 487(3) should be deleted accordingly.
497	Persons entitled to appear before court	It is submitted that reference to "*any relevant market operator*" in clause 497(e) is too wide and could potentially allow proceedings to be opened up to any other market players, whether or not they are affected by the application (depending on what view the court takes of the word "*relevant*"). This could increase the cost and complexity of proceedings, and potentially encourage applications by parties not generally affected by the matter at issue. Similar provisions in other enactments are not so widely drafted. For example, section 44V of the Takeovers Act 1993 restricts relevant people entitled to appear before the court to the applicant, the Takeovers Panel, the code company and securities holders in the code company, the relevant exchange, persons alleged to have suffered loss or damage due to the alleged beach of the Act or Code, persons who have made offers to acquire the code company, persons directed to be given notice of the application, and other people only with leave of the court. It is submitted that clause 497(e) be deleted and clause 497(g) be amended to so that it is clear that other market operators must have an interest in the application and be granted leave by the court in order to be heard. Clause 497(e) could read: "*with the leave of the court, any other person, including any licensed market operator that the court deems to have a relevant interest in, or to be affected by, the application.*
Part 8	**Regulations and exemptions**	
512	FMA may designate financial products and offers	Bell Gully supports ISDA's submissions on clause 512.

Clause Number	Clause heading	Submission
Part 9	**Miscellaneous provisions**	
548	New clause 138A inserted 321 138A Offence for serious breaches of certain duties	We agree with the introduction of a knowledge element for the proposed new offence. We question the justification for criminalising knowing breaches of the duty to act in good faith and in the best interests of the company. We submit that the proposed new offence should be limited to knowing breaches of section 135 of the Companies Act 1993.
582	Authorised dealers treated as holding market services licence	We submit that authorised dealers should be issued a provisional licence rather than being "*treated as holding*" a licence.
583	FMA may exercise powers in respect of licences	We note the intention to approve existing registered and authorised securities exchanges and to enable unlicensed markets to become licensed under the Bill. We expect this could follow the provisional licensing regime adopted under the Insurance (Prudential Supervision) Act 2010.
Subpart 10 of Part 9	Transitional provisions	Consideration will need to be given to a workable transitional period and transitional provisions given that the transfer to compliance with the regulatory regime of the Bill will require considerable work, particularly for managed investment schemes.
Schedule 1	**Provisions relating to when disclosure is required and exclusions**	
2	Part subject to FMA's power to require disclosure	We submit that the exclusions in Part 1 of Schedule 1 should not be subject to a declaration by the FMA that an offer requires disclosure. This approach will add uncertainty. In our view, the focus should be on ensuring that the classes of exclusions are appropriate after consultation on the Bill with market participants. We query how it is intended that the disclosure regime will apply to offers of financial products issued by amalgamation or scheme of arrangement. We submit that specific exclusions should be included for underwriters and securities issued under a takeover offer. We also submit that there should be an exception for rights issues comparable with the exception under the Corporations Act 2001.
3	Offer to wholesale investor	We do not understand the purpose of the reference to a "*prescribed transaction*" in clause 3(3).
4	Offers to close business associates	We submit that the reference to "*5%*" in clause 4(2)(b) is too low and should be increased to "*10%*".
5	Offers to relatives	We query why clause 4(3) is necessary. In our view, it will be difficult to apply this provision with sufficient certainty, as an assessment of the nature of the professional or business relationship with the offeror will need to be made. We also query why clauses 5(2)(a) and (b) are necessary given the close business associates exception (clause 4).

Clause Number	Clause heading	Submission
8	Offers under employee share purchase schemes	We submit that paragraph (a) should be amended to read "*the offer is made as part of the remuneration arrangements for the employee or is otherwise made in connection with or as a result of the employment of the employee...*". The reason for this is that in many instances the terms of the employee share scheme specifically state that they are not part of the contractual arrangements with the employee, so as to permit the employer to change the terms of the scheme unilaterally. The amended language proposed by us will ensure that the scheme is offered to employees purely because they are employees and connected with their employment relationship. We submit that clause 8 be amended to cover a wider range of securities that may be issued under an employee share purchase scheme. We submit this because we note that clause 8 is limited to an offer of "equity securities". This is narrower than the exemptions currently available for employee share purchase schemes under certain Securities Act class exemption notices. See for example the definition of "specified security" in clause 4(1) of the Securities Act (Overseas Employee Share Purchase Schemes) Exemption Notice 2002. The effect is that certain employee share purchase schemes which are structured to offer interests in a scheme or trust rather than shares in the issuer would not be able to take advantage of clause 8.
9	Offers to persons under control also do not need disclosure	We submit that the term "*controlled*" should be defined.
11	Offers of financial products for no consideration	We submit that this clause needs to address the ability to issue uncalled shares and make a call in the future. This is analogous with an obligation to make contributions to a registered scheme referred to in clause 11(3)(b). This clause could be amended to state: "*impose a liability to the issuer or a registered scheme on the product holder (for example, an obligation to make contributions or pay a call).*" We agree with the proposal to exclude offers of financial products for no consideration. Refer also to our comments in relation to the definition of "*Security*" and "*Debt security*". We disagree that both paragraphs (a) and (b) of clause 11(2) should apply in order for the exemption to apply. The offers for the issue or transfer of the option and the exercise of the option should be treated separately. We query if an equivalent exception for convertible securities should be added to clause 11(2).

Clause Number	Clause heading	Submission
12	Small offers	We submit that the $2 million threshold is too low and should be increased to $5 million. We also submit that the exception for small offers should not be limited to a "*personal offer*". In our view, the key aspects of this exception are the 20 investor limit and dollar value limit and it should not matter who the offer is promoted to. It is important for the Bill to promote capital raisings by small companies. In addition, we believe that it will be difficult for issuers to apply the test for a "*personal offer*" with any real degree of certainty.
14	Offers of controlling interest where there are 5 or fewer investors	We submit that clause 14(c) should be amended to state: "*in the circumstances, the persons who acquire equity securities under the offer are in a position to obtain from the offeror the information that will enable those persons to assess:* *(i) the merits of the offer; and* *(ii) the adequacy of any information provided by the offeror and any person involved in the offer,* *whether or not such information is actually sought by such persons.*" We query why this exclusion for share sale transactions would not apply when a person is acquiring less than 50% of the shares (e.g. in a joint venture arrangement). We submit that there should be a specific exclusion for a sale of shares to a single purchaser.
17	Offers of derivatives where derivatives issuer not involved	Clause 17(2) relates to an offer of a derivative for sale and provides an exclusion from disclosure requirements for certain derivatives offered for sale. We query whether this provision is necessary given clause 27(2) of Schedule 1.
19	Offers by the Crown, local authorities etc	We submit that a definition of the Crown should be included in the Bill to be clear on the application of the Bill to entities such as state owned enterprises or other Crown entities.
26	Regulations may prevent exclusions from applying in inappropriate circumstances	Refer to our comments on clause 2 of Part 1 of Schedule 1. We submit that it will be undesirable to overlay the provisions of Schedule 1 of the Bill with exclusions or modifications under regulations.
28	Sale where financial products issued with view to original subscriber dealing with products	We submit that this clause needs to specifically deal with the sale of financial products by underwriters of placements which have not been a regulated offer, and exclude such transactions from the application of clause 28. As noted above, underwriters do not generally intend to hold long term securities which they may be required to subscribe for under an underwriting agreement. Accordingly, if an issuer enters into an underwriting agreement in relation to an offer, it could be argued that they had to a view to the underwriter (as the original subscriber) dealing with the financial products. The application of this clause to underwriting arrangements should be clarified.
29	Sale where issuer advises, encourages, or knowingly assists the offeror	Bell Gully supports ISDA's submissions on clause 29, Schedule 1.

Clause Number	Clause heading	Submission
31	Sale amounting to indirect off-market sale by controller	See our submissions on clause 28 in relation to underwriting arrangements. The same issue needs to be addressed in this clause.
33	Investment businesses	We submit that the term "*principal business*" requires further clarification. An alternative measure such as "*an entity whose sole (or a majority of) its business consists of*" could be adopted, or, if you wanted to be more specific, it could be measured as a specific percentage of gross revenue.
34	Investment activity criteria	We submit that the 10 year period in clause 34(1)(e) is too long and should be reduced to 5 years. A period of 10 years could mean that the relevant person does not have sufficient recent market experience to evaluate the relevant offer. We have concerns about the exclusion provided in clause 34. We doubt that any assessment based on a prescribed number of transactions is appropriate. In our view, it is possible to manipulate the application of clauses 34(1)(b) and (c). We have the following other comments: (a) we are uncertain of what "*relevant time*" refers to in clause 34(1)(a) and other parts of this clause; (b) we are uncertain whether clause 34(1)(d) only applies to a corporate entity; and (c) we query how clauses 34(2)(a) and (b) would be applied if trustees have changed.
35	Meaning of large	We submit that clause 35(1)(b) should be amended by amending the phrase "*total turnover*" to "*total gross revenue*". Clause 35(1)(a) is limited to the "*control*" of assets. We query if it should also apply to "*owned*" assets. We submit that the thresholds referred to in clause 35(1) should apply on an aggregate basis to the person and its related body corporate (so that the test is applied on a group basis). We query whether this provision should include an exclusion for all listed companies (as per the term "*professional investor*" under the Corporations Act 2001).
37	Eligible investors	We query what the reference to a "*class of transactions*" in clause 37(1) is intended to capture. We doubt that the approach of an authorised financial adviser providing a confirmation of the eligible investor's certification is workable. It will be difficult for an adviser to provide the confirmations specified in clause 37. We submit that a better approach is to require the issuer/offeror to provide each eligible investor with a prescribed disclosure statement so that the investor understands the consequences of the certification.

Clause Number	Clause heading	Submission
38	Offeror or other relevant person may not rely on certificate if they knew, or had reasonable grounds to believe, that certificate is incorrect	We submit that this clause should be clear as to whether the offeror or other relevant person has to make any enquiries in relation to the matters specified in clause 38. As currently drafted, this clause is unclear as to what positive actions (if any) the offeror or other relevant person must take or whether it is only relevant if they are put on notice. This lack of clarity will erode the benefit of clause 37.
41	Offeror or other relevant person may not rely on certificate if they knew, or had reasonable grounds to believe, that certificate is incorrect	For consistency with the wording in clause 38 of Schedule 1, we submit that clause 41 should be amended by adding the word "*any*" so that it refers to "*or any other transaction*" rather than "*or other transaction*".
43	Offences relating to certificates	We submit that clause 43(3) needs to be amended to state: "*Every person commits an offence who incites, counsels or procures any person to give a certificate under section 37 or 40 that such persons knows is false or misleading in a material particular.*"
44	Meaning of control in this schedule	We query what is intended to be referred to as "*operating policies*".