

**Submission to the Ministry of
Economic Development**

**Financial Markets Conduct Bill
Exposure Draft**

fisher funds 

August 2011

Comments on Exposure Draft

Clause Number	Clause heading	Submission
General		
	Overuse of "prescribed".	It is clear that the Bill is incomplete without the accompanying regulations. The overuse of the word "prescribed" makes many provisions meaningless and while we understand the urgency in trying to get the Bill into the house, the current drafting makes it difficult to understand and even more difficult to provide meaningful feedback. An example is section 80(2) "In this section, prescribed change, in respect of regulated products,- (a) means a prescribed change that is relevant...." As a result of the incomplete drafting of the regulations, in many places it is difficult to understand the application or meaning of the clauses presented.
Part 1	Preliminary provisions	
Clauses 8&9	Definition of managed investment scheme	<p>The definition of managed investment product and managed investment scheme appear to be duplicated and could create unnecessary confusion.</p> <p>The definition of managed investment scheme would encompass a wide range of collective investment vehicles (not limited to tradition superannuation "scheme's") including unit trusts, group investment funds, property syndicates, and Cash PIE's. All managed investment schemes that are offered to investors are also managed investment products, unless they are debt or equity securities. However, a product such as a Term PIE would fit the definition of managed investment scheme and has all the characteristics of a debt security. Given the Bill is focussed on substance over form, it would appear that a Term PIE could be both a managed investment scheme and a debt security, however it would not be a managed investment product.</p> <p>The deliberate exclusion of discretionary investment management services from the definition of a managed investment scheme is inappropriate. In substance, someone operating a discretionary investment management service is providing an equivalent service to a fund manager offering a managed investment product. The exclusion of DIMS from the definition of managed investment scheme means that many of the duties that fund managers have would not apply to those operating a DIMS. For example, the duties to report serious problems in cl 173 would not apply. In practice the FAA protects investors only to the extent of the advice given and does not deal with the implementation of that advice. A managed investment scheme will need to have a supervisor who will, amongst other things, ensure that all investors in a particular product are treated fairly. It is unclear how the Bill provides those same protections for an investor in a DIMS. What prevents the operator of the DIMS from allocating trades to some investors on a preferred basis over other investors receiving the same service? Fund managers will be required to report unit pricing errors, but there is nothing requiring operators of DIMS to report system errors or calculation errors that could have an equivalent impact.</p> <p>In substance, the only difference between a DIMS and a MIS is that MIS's pool assets (although often pooling</p>

Clause Number	Clause heading	Submission
		<p>does occur within DIMS custodial platforms also). Pooling occurs as a matter of efficiency and convenience and should not be the basis for whether investors receive greater protection or not.</p> <p>We agree with the principle applied in the Bill that if someone separate to the investor is managing the investors' money, the Bill applies to them. Including the concept of pooling is unnecessary and over time it is likely that computer systems will progress to a point that product providers could offer an individual account style product which is in substance a managed investment scheme but avoids critical safeguards in the Bill because it technically does not pool investor assets.</p>
Clause 10	Definition of issued and issuer	<p>10 (1) [defn of "issued"] should be amended to remove the words "otherwise made available" and replace them with "the right or interest is established". The words "made available" could be misconstrued to apply to offers of securities that have not been issued but merely advertised or offered.</p> <p>10(2) MED has sought comment on the definition of "issuer" in respect of a derivative contract. The options presented in 72a) and b) of the Request for Submissions and Commentary, seem to be most appropriate to clarify the issuer of derivative. In practical terms both of these options are the same. The party that the investor will have a legal relationship with and be liable for margin to is the party the investor is dealing with. They may not know that the "intermediary" enters into a back to back contract to effect the transaction. However, we believe it would be appropriate for disclosures to be required so the investor can assess the risk of the underlying issuer as well as the intermediary. If the intermediary fails, the investor should have recourse to the underlying issuer and should be in a position to satisfy themselves of the credit worthiness of that party.</p> <p>10(2)(c) These definitions should be widened to include any further investments into a managed investment scheme, rather than limiting the application to KiwiSaver or deposit products. For example, it is common for investors in managed funds to invest regularly through direct debits or further lump sums. This may be partly dealt with in 10(2)(5) but it is unclear whether that provision relates to partly paid shares etc or whether it also applies to voluntary further investments in managed investment schemes. Typically, self employed and unemployed people will make further contributions to KiwiSaver that are not automatic deductions – we see this as being no different to a further investment into an existing managed fund. However, current definitions imply that nothing would be "issued" if the money went to a KiwiSaver scheme but would be "issued" if the same money went to a managed fund.</p>
Part 2	Misleading or deceptive conduct or false or misleading representations	
		No comment
Part 3 and schedules 1 and 2	Disclosure offers of financial products	

Clause Number	Clause heading	Submission
Part 3 Clause 29	Treatment of offers of convertible financial products	Where options or warrants are issued to existing holders of the underlying financial product, we do not believe this should be treated as a new offer of the underlying financial product. However we do believe that option or warrant holders should have rights to receive the same information that the owners of the underlying financial product receive. As an example, if existing shareholders in a public company receive listed options (at no cost) to buy further shares at a later date, the full disclosures for the underlying listed shares should not be required either at the time the options are issued or at the time they are exercised. However, option holders should be entitled to receive the same information that shareholders receive for the life of the option as this forms part of their decision to exercise their option. The option itself should be subject to initial disclosure (PDS) but not ongoing disclosure in its own right. A disclosure exclusion could be provided on a similar basis to that provided for a Dividend Reinvestment Plan in clause 10 of Schedule 1.
Schedule 1, clause 16	Counting of Scheme Participants	<p>In determining whether a scheme is small and exempt from disclosure, (1)(b) States that "For the purposes of counting the number of scheme participants in a managed investment scheme ... a managed investment product held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if the beneficiary is presently entitled to a share of the trust or the income of the trust estate or the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee".</p> <p>In practice this definition is likely to be impractical and unhelpful as the disclosure obligations are on the issuer and it is unlikely that the issuer will be aware of the present entitlements of any beneficiary or whether the individual partly controls the trustee.</p>
Schedule 1, clause 18	Exclusion for Registered Banks	We see no reason why category 2 products or debt securities issued by a registered bank should be excluded from disclosure. The purpose of a PDS is to "... provide certain information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial product." An investor would require disclosure to enable them to choose between bank and non-bank financial products. A PDS will be the standard format for comparing financial products and should apply to all of them.
Schedule 1, clause 19	Exclusion for Crown, Local Authorities, etc	We see no reason for excluding local authorities or the Crown from disclosure. In principle, the PDS provides information to help investors decide on whether to invest. It's unclear why that would be different simply because of the issuer involved.
Schedule 1, clause 25	Misleading or deceptive statements and omissions	A test of materiality should be introduced to determine whether the false disclosure was reasonably likely to affect an investor's decision to invest. For example, if there was a typo in a PDS about the issuers address, it is unlikely to impact the decision made by the investor but could be used to claim against the issuer in any default. That would seem inappropriate.
Part 3 Clause 40	Meaning of Material Information	<p>Two options are presented for the definition of material information: A) and B);</p> <p>"(A) a reasonable person would expect, if it were publicly disclosed, to have a material effect on the demand for the financial products on offer;"</p> <p>"(B) a reasonable person would expect would, or would be likely to, influence persons who commonly invest in financial products in deciding whether to acquire the financial products on offer;"</p> <p>We believe a modified version of A would be most appropriate. There is value in linking the test of material information to the target audience (retail investors) and the purpose of disclosing the material information. For</p>

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		<p>example, KiwiSaver growth funds invest predominantly in shares. People who commonly invest in financial products (Option B) understand this. However, we believe it is important to explicitly state that fact for retail investors. The danger with Option B is that the extent of information that could be required to satisfy an “expert” could be confusing and meaningless for a retail investor. We deliberately use different language for our retail communications to ensure that investors understand the critical elements of the offer rather than focussing heavily on technical detail, which an expert, such as an asset consultant may require. For example, historical tracking error, portfolio attribution and information ratios may influence an expert but are not useful for a retail investor.</p>
Part 3 Clause 41	Consent of person to whom statement attributed	<p>We believe the requirement to gain the consent of any statement attributed to a particular person in a PDS etc to be unreasonable in certain circumstances. For example:</p> <ol style="list-style-type: none"> 1. if a rating agency has rated a product, or if the types of securities within an MIS are rated, then it is impractical to seek consent of the rating agency for each disclosure document; 2. if the Prime Minister announces a proposal to change KiwiSaver contribution rates in future, while that may be material information for potential members, it is unlikely that the Prime Minister will provide written consent. 3. If a research house has published return information about a particular financial product that could be useful to investors, the issuer should not be required to seek consent. <p>The potential liability for “experts” in the Bill means that it is unlikely those experts would provide consent as there is no upside for them – unless of course they are paid for their statement which would seem counter to the intent of the provision. Consent should not be required for including statements or information from other parties that is publicly available before registering the PDS or disclosure document.</p> <p>We also believe that consent should not be required and liability should be limited in relation to any expert statements required by legislation (e.g. required statements by the auditor). The impact of requiring consent will merely increase costs to the industry and investors. The same point applies if liability is not limited.</p>
Part 3 Clause 55	Consent needed for lodgement	<p>Clause 55 requires that the consent of each prescribed person and each director must be obtained before lodgement of a PDS, supplementary document, or replacement PDS. We believe that the obligations on directors of managed investment schemes should be different to those of a debt or equity issue. Directors have an obligation to govern the entity and control the capital structure of a company. Where funding is being raised for the entity itself, it makes good sense to have each director consent and sign a PDS. However, corporate capital raising is a major and infrequent event for a company. By contrast an MIS that is a continuous issuer may have 100’s of financial products and the PDS and supplementary documents are more akin to operational business contracts. They are very important documents, but it is perhaps unreasonable to expect directors to have an intimate understanding of all the technical detail of each and every product and how changes to markets, regulations, and operational processes affect the offering documents. Professional managers, supervisors and regulators are in place to ensure compliance. The directors should be responsible for making sure that systems</p>

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		and processes are in place to ensure the issuer is compliant with the Act (as with any other law) but it is the function of management to ensure the detail is correct. Any two directors should be able to sign offer documents on behalf of the issuer and the issuer should be liable for misstatements, not the directors personally. The Companies Act and recent case law already provide adequate duties on directors that will protect investors and provide recourse if they have not met appropriate governance standards.
Part 3 Clause 57	Publication of lodgement	Clause 57 states that a PDS can only be removed from the Issuers website on or after expiry of the PDS. The Bill is unclear on whether a PDS will expire for a continuous issuer (logically it should not). If the PDS of a continuous issuer does not have an expiry date, the current drafting would require an issuer to retain the original PDS and every supplementary or replacement PDS ever issued on the website. We doubt that is intended and we believe it would be confusing for investors to see multiple historic PDS documents. We believe that the website should be required to show the latest registered PDS and any supplementary documents but if a replacement PDS is lodged, it should not be a requirement to continue to show the original PDS.
Part 3 Clauses 61 & 62	Applications where condition referred to in PDS is not met	<p>Clauses 61(2) and 62(1)(b) together require that [61(2)9a] if a PDS states that the financial products will not be issued or transferred unless applications for a minimum number of the financial products are received; then [62(b)] the money must be repaid or a further PDS must be provided and the applicant must be given one month to decide whether they want to go ahead.</p> <p>We recognise that these provisions are targeted at capital raising offers where raising a minimum amount may be critical for the particular transaction envisaged. However, there could be unintended negative consequences for continuous issuers. Many managed fund investment statements currently state that there is a minimum investment amount for an individual application (this does not apply in aggregate). For example, many Fisher Funds products have a minimum application amount of \$2,000. However, we regularly have investors seeking to invest less than that with a view to building their investment over time. We would not want to discourage investors from making a start on their savings with a small amount. However, it is commercially necessary to have some level of minimum investment to avoid the investment of uneconomic amounts. At present we assess the merits of any investment under the disclosed minimum on a case by case basis. We believe that continuous issuers (or minimums for individual investments) should be specifically excluded from these provisions.</p>
Part 3 clauses 69 and 70	Prohibition of offers in course of unsolicited meetings	These provisions will be problematic for a continuous issuer as drafted. Clause 69(3)(b) (stating an AFA can call or email in respect of listed securities) should not be limited to "quoted" financial products. For example, as a fund manager we have many clients in growth focussed unit trusts. The majority of our clients have not come through any adviser but have made their investment decision themselves. When markets are volatile or uncertain we will contact our clients by telephone or email to keep them informed of what's happening in markets and may send them details of a more conservative investment option for them if they are concerned about equity markets. This is a proactive service (unsolicited by the client) which is extremely valuable for the client and for us in maintaining good relations. As most of our clients have not received advice from an AFA or QFE adviser, we would be prohibited from providing this valuable service to clients. Further, many of our clients invest with us for a very long time. It is common for someone to invest and then not make a further investment for years. These sections would dramatically impair our ability to service clients.

Clause Number	Clause heading	Submission
		<p>The provisions also become practically unreasonable with regard to promoting new products by email. As drafted it would seem to prohibit a fund manager from sending an email to its clients which invites them to invest in a new product. We send a monthly newsletter to our clients and believe that while the advertising provisions should apply the clause 69 provisions should not.</p> <p>We are also unclear how these provisions relate to KiwiSaver. The provisions of clause 70 providing the right to repayment, seems to be a direct contradiction of the KiwiSaver Act limitations on KiwiSaver members withdrawing contributions before retirement. We can envisage situations where people who sign up to KiwiSaver but change their mind soon after seek to claim that the offer to join the scheme was unsolicited, to allow them to exit the scheme.</p> <p>In addition, as a QFE we make quality control calls to clients to ensure our nominated representatives have acted appropriately in dealing with the client. It is common for a client to ask questions about our other products on those calls. The Bill suggests that we can't talk about our other products (a deemed "offer") on that call as it was originally unsolicited and the person making the call is not (by necessity) the QFE Adviser who advised the client.</p> <p>Further, if one of our clients or potential clients asks us to call a spouse, friend or colleague about one of our products, the Bill would prevent us from doing so. That would result in a serious degradation of service and experience for investors.</p> <p>While we understand and support the principle of avoiding the "hard sell" for retail investors by going door to door or working through a phone book and pushing them into a particular product on the phone, these provisions have far wider implications. Provided the contact is made by people who are authorised to advise on particular products (who under the Code must put the interests of the client first) and that a PDS is provided before any investment is made (to ensure they understand the product), removing the ability to pro-actively contact people would seriously impair the ability of the industry to achieve the best outcome for clients and grow the financial services industry. This would be contrary to government claims to develop New Zealand's capital markets.</p> <p>In respect of the requirements to repay investors, we think it is unreasonable to expect directors to repay [cl 70(3)(b)].</p>
Part 3 clause 80	Duty to notify relevant matters...	80(2) the definition of "prescribed change" is circular and provides no information about what sort of change would be included. We can therefore, not comment on the other provisions (for example, whether the 5 day notification requirement is reasonable or practical).
Part 3 clause 82	Information to be made publicly available	This clause should clarify what is considered made "publicly available". On the register? On the issuers website?
Part 3 clause 84	Part 3 offer obligations	84(3)(a) Typo. "need" should be "needed".
Part 4 and schedule 3	Governance of financial products	

Clause Number	Clause heading	Submission
Part 4 clause 109	Need to Register MIS...	<p>We agree with the Ministry's view that all Managed Investment Schemes should be required to publicly file IFRS compliant audited financial statements as this is a critical control to ensure the assets exist and are appropriately valued. This requirement should apply whether or not it is a retail or wholesale offer. In both cases it is important for investors to have confidence that the assets they proportionally own in the relevant scheme are not only held by an independent custodian but that the existence and value of those assets are separately confirmed by an auditor. Where a retail fund invests solely in a wholesale fund it would seem illogical to have full audited IFRS compliant financial statements for the retail fund if the information being relied upon from the wholesale fund did not meet the same criteria.</p> <p>What is less clear is why the issuer itself would continue to be required to publicly file financial statements under the Financial Reporting Act. Obviously where a debt security is involved the securities issued are part of the issuer's balance sheet. However, for a MIS, the issuer has no access to the assets of the investor (they are held by a separate custodian) and the financial position of the issuer has no bearing on investors' assets or the ability to fully repay them. Requiring the issuer of a MIS (or product) presents an unnecessary compliance cost that adds no value.</p>
Part 4 clause 116	Change to registration as particular type of registered scheme	The FMA should be required to provide notification to the manager if it believes the scheme no longer meets the registration requirements and should provide an opportunity for the manager to correct any non-compliance before being de-registered.
Part 4 clause 117 & 118	Contents of governing document	<p>Where there are legislated requirements for the operation of a scheme such as KiwiSaver, there should not be a requirement to repeat these in the trust deed. The Government has made many changes to KiwiSaver since its inception and the compliance cost of changing the PDS <i>and</i> the trust deed is an unnecessary overhead. The trust deed should be deemed to include these by reference to the relevant legislation (e.g. KiwiSaver Act and KiwiSaver Rules). The PDS does need to include details of the current requirements.</p> <p>In respect of Clause 117 (1)(f) (fees and costs to be disclosed in trust deed) we believe the language on fees should show the maximum management fee, and the types of costs that can be charged to the scheme (including the costs of any underlying funds). However, changing trust deeds is a difficult and expensive process with clause 121 providing extremely limited circumstances where amendments can be made without a special resolution of investors. That would be expensive and should be a cost of participants to avoid conflicts between imposing an obligation on managers to act in the interests of investors, yet making it so difficult to amend a product that it is simply not commercially viable to do so. If a manager wished to reduce fees or if specific costs change, this should not be cause for amending the trust deed with the need for trustee and/or member consent (though it would likely require amendment of the PDS – which is a more efficient process).</p> <p>Clause 118(1)(b) should also include reference to section 124 to include the responsibility for administration of the scheme (which managers should be entitled to be reimbursed for costs in relation to – including the costs for example of FMA required notifications to investors).</p>
Part 4 clause 125, 126 &	General duties of manager	While we agree with the principle behind the obligations presented, we think it is important to make it clear in clause 125 that the manager's duties are to all investors in a particular product rather than any individual

Clause Number	Clause heading	Submission
126A		<p>investor. There are situations where acting in the interests of one investor would not be in the interests of other investors.</p> <p>It is also hard to imagine what "improper" is likely to cover in 126A. If a portfolio manager personally acquires a stock that they have researched but did not make it into the portfolio, would that be considered "improper"? Perhaps the use of the word "abuse" rather than "improper" would help. To some extent the requirement to act in the interests of investors (clause 125) covers this and that provision could simply be extended to include senior managers and directors.</p>
Part 4 clause 134(1)(a)	Power of supervisor to engage expert	We do not think it is relevant for the supervisor to have the right to determine the financial position of the manager in respect of an MIS. No investor assets are held by the manager of an MIS and the supervisor already has wide powers to seek information to fulfil their duties.
Part 4 clause 134(2)(b)	Power of supervisor to engage expert	<p>It is unreasonable to provide power to a supervisor to appoint an expert (in extremely broad circumstances) at the cost of the manager. In principle, the supervisor would be acting in the interests of investors in appointing an expert, so investors would be receiving any benefit (and should pay). In reality, supervisors are conservative and take extensive steps to limit their own potential for liability so typically use legal advisers and other experts more than they should need to. Where experts are being used to support the core functions of the supervisor or for the protection of the supervisor, any cost should be borne by the supervisor, not the manager or investors. For example, it is nonsensical that the supervisor is responsible for holding scheme assets in safe custody (cl 135), yet the supervisor can employ an expert to "determine whether the scheme property is being held in accordance with custodial arrangements" at the cost of the manager.</p> <p>Unless there is reasonable grounds to believe that the manager is either not performing its functions or is in breach of their duties, the supervisor should be able to appoint experts at their own cost to assist them in performing their functions or where they are satisfied there is direct benefit for investors at the cost of the scheme. A supervisor will be paid a fair fee for being an expert in performing their monitoring functions and should have whatever skills are needed to perform that function.</p>
Part 4 clause 145 (1)(b)	Action that must be taken on limit breaks	<p>There should be a materiality test for any limit break to avoid compliance costs. For example, if the SIPO states that a fund may hold a maximum of 20% of assets in cash and a portfolio company is taken over or if a large capital inflow is received into the fund that temporarily pushes cash to 20.2% for a day, we do not believe there is value in reporting this.</p> <p>Perhaps reporting should only be required if any limit is breached for 5 consecutive business days would be useful.</p>
Part 4 clause 146(1)(b)	Action that must be taken on unit pricing errors etc	There should also be subject to a materiality test for any unit pricing errors to avoid compliance costs. We'd suggest say an error of more than 0.1% should be reported.

Clause Number	Clause heading	Submission
Part 4 clause 158	Transfers from KiwiSaver Scheme	<p>The information required to be provided to the new scheme in cl 158(2) would be insufficient to support any transfer. At a minimum the information required by s56(3) of the KiwiSaver Act should be included, namely:</p> <ul style="list-style-type: none"> • The amount of the members accumulation (i.e. how much money each members has) • Details of any withdrawal for first home purchase; • Contribution holidays applying to each member; • Crown contributions received <p>Plus:</p> <ul style="list-style-type: none"> • A breakdown of amounts by contribution type • The PIE tax rate elected by the member • Copies of original application forms and identification details (so the new provider can check signatures for any withdrawals and so they can meet Customer Due Diligence obligations under AML/CFT legislation).
Part 4 clause 158	Removal of manager	<p>We do not believe the supervisor should have the power to remove the manager without the approval of scheme participants. Nor do we believe it is appropriate for the supervisor to be able to remove the manager without consultation, prior notice or opportunity for the manager to rectify any breach.</p> <p>Instead, the supervisor should be able to suspend the manager and call a meeting of scheme participants to consider the removal of the manager.</p>
Part 4 clause 173	Duty to report serious problems	<p>This clause is entirely relevant for debt securities where the financial position of the issuer will determine likely repayment of investors' money. However, we believe the same provisions are less relevant in respect of a MIS where investors' assets are held by an independent custodian.</p> <p>We also expect that there could be relatively minor breaches of issuer obligations that are not intended to be caught by this clause because there is no materiality or risk threshold. For example if information is provided at the request of the supervisor under clause 132 but is signed by one director and a senior manager (instead of the required two directors), we doubt that is intended to be a "serious" problem. We suggest including a threshold such as "... if the person has reasonable grounds to believe that any of the following has arisen <u>and there is a significant risk that the interests of holders will be materially prejudiced</u>, in relation to a relevant financial product:"</p> <p>We also believe that sub-section 2 should be expanded to include a responsibility to report any improper use of scheme assets by the custodian. It should be clear that the reporting obligation is direct to the FMA if the custodian is a related party of the supervisor.</p>
Part 4 clause 176		Typo in second line – "schemes" should be "scheme"
Part 4 clause 178	Duty of supervisor to report serious financial problems	We see no reason why the solvency of the manager of an MIS is a critical disclosure. Clause 178(1)(a) should be amended to include the words "in the case of a debt security" at the start of the paragraph.
Part 4 clause 178		Typo in 181(1)(c) remove the word "is" in the first line.
Part 4 clause	Court power to order	It is not clear why Clause 184(1)(a) which says the Court may require the scheme to be wound up if the manager

Clause Number	Clause heading	Submission
184	winding up of scheme	is insolvent, is necessary in relation to a Managed Investment Scheme where participants assets are held independently and separately from those of the manager.
Part 4 clause 190(2)	Contents of Registers	<p>We do not believe there should be a prohibition on recording any trust on the register. We appreciate that the trustees of the trust must be recorded on the register as the legal owner, however it is common to also make reference to the name of the trust on the register, which may also be used for mailing purposes. For example, Jack Smith and Jill Smith may be the trustee of the Smith Family Trust. Commonly, Jack Smith and Jill Smith would be the registered holders but the Smith Family Trust would also be noted on the register so that correspondence could be mailed to the Smith Family Trust. This does not alter the legal title to the security.</p> <p>We suggest that the language be changed to require trustees to be recorded as the register holder of a trust rather than prohibiting recording of a trust relationship.</p>
Part 4 clause 191 (1)	Audit of registers	As a matter of practicality, we wonder whether the timeframe for auditing the register should be changed from once a year (which presumably means at least every 12 months, rather than in each calendar year) to "at least within 15 months of the previous audit". Typically the register is audited as part of the annual audit process. As worded, technical breaches could occur where the audit occurs later than it did the previous year and hence does not fall within the one year timeframe. It would seem unduly harsh to have committed a "tier 1 infringement offence" and be subject to a \$50,000 fine for conducting the audit one week later than the previous year.
Part 4 clause 192	Issuer must notify Registrar of registers	It is common for managed funds and KiwiSaver schemes to use an outsourced registry provider. In those cases the register will practically be kept and maintained by the outsource provider. Typically the manager will have a copy of the register, say monthly, and participants can access the register through the manager. It would be more effective to require the PDS to state who maintains the register and who to contact in relation to the register.
Part 4 clause 193	Public inspection of Register	We question why it is appropriate that a managed investment product register would be subject to public inspection but a retail superannuation scheme would not. That seems incongruent with the substance over form objective of the Bill. In substance, retail superannuation schemes typically differ from retail managed funds only because of their lock-in provisions. In the case of managed investment products, we believe the same provisions as KiwiSaver should apply - i.e. be available to the supervisor, but not the public. This is practically a much stronger protection against registers being used as a marketing database.
Part 5	Dealing in financial products on markets	
Part 5 clause 211	Meaning of material information	Using different definitions of "Material Information" in Parts 4 and 5 is dangerous and could cause confusion. We suggest changing the terminology in Part 4 to "Pertinent Information" or a similar phrase that differentiates the two tests.
Part 5 clause 235	Inside Information obtained by independent research	The Ministry has sought views on whether it should be a defence where inside information is obtained as part of independent research (but not from the issuer). In our view, it is important that this defence is retained.

Clause Number	Clause heading	Submission
	and analysis	Practically, when conducting research on a particular company, analysts will obtain non-public information as part of their research – that is a core part of their function. At times it is extremely difficult to determine whether the information is “material” or not and often by the time you can make a materiality assessment it is too late – you are an information insider. Given the very harsh penalties involved it would be a significant commercial disincentive to participation in capital markets if genuine independent research was too dangerous for analysts to conduct.
Part 5 clause 278	Directors and senior managers to disclose relevant interests	The Ministry has sought views on whether directors and senior managers should have longer than the proposed 5 days to notify the market in respect of transaction which they have not made an active decision in relation to (e.g. DRP’s and employee share purchase plans). We consider a longer reporting period to be appropriate where transactions are mechanical (such as in the case of a DRP). Early reporting of such transactions is unlikely to provide valuable information to the market and will merely result in many disclosures which will detract from focus on more important disclosures.
Part 5 clause 355(2)	Transfer of specified financial products	We believe the prohibition on imposing a liability on the transferee may have unintended consequences for managed investment products with exit fees. We can envisage a transfer of units from one party to another being used instead of a redemption as a tool to avoid an exit fee. None of Fisher Funds products have an exit fee.
Part 6	Licensing and other regulation of market services	
Part 6 clause 370(1)	When provider of market services must be licensed	Any custodian of managed investment products should also be licensed. The custodian will hold retail client assets and be responsible for safekeeping. Including provisions similar to those provided in Subpart 7, dealing with client assets for derivative issuers would be useful.
Part 6 clause 370(3)	When provider of market services must be licensed	The provisions in relation to DIMS could become confusing with coverage in both the FAA and the Bill. A person operating a DIMS should not be exempt from 370(c) merely because they are an AFA. In our view, a DIMS service is essentially the same as a managed investment product. We have concerns about the “light” regulatory and monitoring regime applying to DIMS services. With modern technology, a fund manager could restructure their managed funds business to be a DIMS and avoid many of the protections provided for retail investors (and the fund manager would save on compliance costs). The current Bill provides strong incentives to take that action.
Part 6 clause 379	Notice of decision	It would be useful to have a maximum time in which the FMA must give notice of its decision whether or not issue a licence.
Part 6 clause 389	When FMA may cancel license	We question whether an insolvency event of the issuer of a managed investment product (where all client assets are protected by the supervisor and / or custodian) is appropriate. Since insolvency events include contingent liabilities, we can envisage some fund managers facing temporary technical insolvency without that having any impact on retail investors.
Part 7	Enforcement and liability	
Part 7 clause 462	Terms of compensatory orders	We do not believe the directors of the issuer of a managed investment product should be personally responsible for defective disclosures. The role of a director is to ensure strong governance systems are in place for the

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		company and to help ensure compliance is achieved, they can't be expected to examine every disclosure in each PDS, disclosure statement and register entry in respect of every financial product and then ensure it remains current and true every day. It is entirely appropriate for the issuer itself to be responsible for any inadequate disclosures but it's unreasonable to expect directors to be responsible for such matters. We do not believe the defences are adequate in clause 466(5) as the onus of proof is on the director (guilty until proven innocent).
Part 8	Regulations and exemptions	
Part 9 and schedule 4	Miscellaneous provisions	