

Submission

FINANCIAL MARKETS CONDUCT

Exposure draft bill

Maori Trustee

September 2011

This submission is provided by the Māori Trustee, a statutory corporate sole, constituted pursuant to the Māori Trustee Act 1953.

The Māori Trustee is available to meet with officials to discuss this submission.

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Clause Number	Clause heading	Submission
Part 1	Preliminary provisions	
Clause 6	Interpretation	<p>In order to support the exclusion under Schedule 1 recommended by the Maori Trustee, an additional defined term 'statutory officer' should be added.</p> <p>We suggest that the definition for statutory officer follows s.5 of the Financial Advisers Act 2008:</p> <p>statutory officer means a person –</p> <ul style="list-style-type: none"> (a) holding or performing the duties of an office established by an enactment; or (b) performing duties expressly conferred on that person by virtue of his or her office by an enactment; or (c) holding office as the chief executive of a Crown organisation <p>Alternatively, if the preference is not to include a definition of statutory officer the Māori Trustee recommends that a definition of Crown be included in the Bill which is sufficiently broad to include the Māori Trustee.</p>
Schedule 1 Parts 1, 3, and 4	Disclosure Exclusions and exclusions from governance or supervision requirements for debt securities and managed investment schemes	
		<p>The Māori Trustee Act 1953 ('Act') provides for the establishment, and operation, of a Common Fund into which moneys held on trust for any person or persons (which is otherwise not required to be deposited into a Special Investment Account) must be deposited. The Act, and associated regulations, impose obligations on the Māori Trustee in relation to how the Common Fund is administered.</p> <p>The Common Fund does not constitute a debt security offering or comprise 'contributions' by beneficiaries on whose behalf the Fund is held. Rather, it reflects funds administered by the Māori Trustee by virtue of its office. Authority for the manner in which the Common Fund is invested is conferred by statute, not by the beneficiaries for whom the Fund is administered. The Māori Trustee's core purpose is to manage Māori land as taonga tuku iho, and the money held in the Common Fund is merely</p>

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		<p>incidental to discharging that statutory function.</p> <p>As a consequence, the Māori Trustee does not consider the Common Fund to be a managed investment scheme (as defined in the Bill), or reflect the operation of a discretionary investment management service (as defined in the Financial Advisers Act 2008). Nevertheless, the Māori Trustee recommends that Schedule 1 Parts 1, 3 and 4 of the Bill be amended to include an express exemption for, amongst other entities, statutory officers (as defined above) from disclosure requirements and from debt security and managed investment schemes supervision requirements, and from discretionary investment management services licensing requirements.</p> <p>The Māori Trustee is concerned to avoid any uncertainty should the definition of managed investment scheme or discretionary investment management service subsequently change. The grounds upon which the Māori Trustee considers an express exemption to be appropriate are as follows:</p> <p>1 The Common Fund is a statutory creation and forms part of the Māori Trustee's own account and the manner in which the Māori Trustee must administer it is prescribed by statute. In particular, the Act and associated regulations prescribe:</p> <ul style="list-style-type: none"> • the type of investments the Māori Trustee may make with money in the Common Fund; • that all money invested in the Common Fund is to be held in that fund; • that all income (including realised capital losses and gains) from investments in the Common Fund must be paid into the Common Fund; • how and when the Māori Trustee must calculate distributable income, pay it and report to account holders in relation to it; and • how the Māori Trustee is to report to account holders with respect to distributable income (i.e. amounts earned and paid from the Common Fund). <p>Accordingly, in administering the Common Fund, the Māori Trustee is discharging a statutory duty which the legislature has specifically imposed upon it. The legislative framework under which the Common Fund is administered provides adequate protection for beneficiaries. The Māori Trustee does not believe this protection will be enhanced by making the Māori</p>

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		<p>Trustee subject to the Bill's regime.</p> <p>2 Beneficiaries of the Common Fund have no power to direct the Māori Trustee to administer the Fund in any particular way, or otherwise deal with their respective beneficial interests. The Māori Trustee is already under statutory obligations to report to beneficiaries. Requiring the Māori Trustee to comply with disclosure obligations under the Bill in a manner consistent with disclosures required for managed investment schemes or discretionary investment management services will not add value, and will not generally be feasible in the context of the Māori Trustee's operations. Of the money held on behalf of individual beneficiaries, two thirds of the 130,000 accounts hold less than \$10.</p> <p>3 The supervisory model is designed to add an extra layer of protection to investors who have limited recourse against scheme managers in the event that loss is suffered. However, in administering the Common Fund, the Māori Trustee is holding the Fund in a trustee capacity which gives rise to certain fiduciary and statutory duties. The Māori Trustee is accountable for its operations under the Act. In the event that the Māori Trustee was to breach those duties, beneficiaries of the Fund would have recourse against the Māori Trustee under the existing legislative framework and general law principles relating to trustees. In addition, the Common Fund has a statutory Crown guarantee.</p> <p>4 Similar exemptions to that being proposed already exist in other legislation of a similar nature. In particular, the proposed exemption under the Bill would be consistent with that recently granted to statutory officers in the Financial Advisers Act 2008.</p>