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Dear David

Financial Markets Conduct Bill Submission on Exposure Draft

Please find attached a submission on behalf of Westpac New Zealand Limited, Westpac Banking Corporation and BT Funds Management (NZ) Limited ("Westpac") in respect of the Financial Markets Conduct Bill Exposure Draft ("the Exposure Draft"). References to clauses in this letter are references to clauses of the Exposure Draft.

Broadly, Westpac supports the proposed consolidation of elements of the current regulatory framework of New Zealand's financial markets into a single piece of legislation to be supervised by the Financial Markets Authority ("FMA"). For the most part, the Exposure Draft is a successful consolidation of the existing legislation, particularly given the truncated time frame in which it was prepared.

However, there are five key areas which raise substantial concerns for Westpac:

- the obligations and associated liabilities imposed on directors;
- the need for the new regime to recognise that any changes to governance structures and new regulations for certain existing managed investment schemes will involve substantial costs for investors and few demonstrable benefits;
- the need for issuers and schemes to transition to the new regime seamlessly and at the minimum cost possible;
- the significant increase in pecuniary penalties and criminal sanctions and the impact of the liability regime; and
- the proposed inclusion of licences for discretionary investment management services ("DIMS") across both the Financial Advisers Act 2008 ("FAA") and the eventual Financial Markets Conduct Act.

Director's Obligations

The approach taken in the Exposure Draft will create a disincentive for quality candidates to accept directorships on the boards of financial institutions in New Zealand, due to:

- the obligations imposed on directors under clause 55, particularly in relation to product disclosure statements ("PDS") for derivatives and managed investment schemes; and
- the significant liability imposed on individual directors in connection with the PDS for the abovementioned products.

Director consent should not be required for the issuance of a PDS in respect of derivatives and managed investment schemes. Instead, directors should be responsible for ensuring that there are reasonable due diligence and verification processes in place for each PDS. Requiring directors to scrutinise each PDS (of which an organisation like Westpac will have vast numbers), all supplementary documents and any replacement PDS adds very little to the due diligence process and decreases the amount of time that can be spent by the Board on overall governance and strategy. The administration burden imposed on directors acts to both stifle innovation and product modification due to the demands on the time of each director. These disadvantages are not off-set by an increase in investor protection for products of this nature.

Westpac recommends that New Zealand adopts a similar regime to Australia where a PDS for a managed investment product need only be consented to by directors if the product is to be traded on a financial market (section 1015B of the Australian Corporations Act 2001).

As noted below, Westpac has also very real concerns with the proposed personal liability regime for directors. Consistently with the position under Australian law (section 1022B of the Corporations Act) a director should only be liable for a contravention if the director was involved in that contravention.

Recognition of legacy schemes and restricted schemes

The costs involved in transitioning to the new regime for certain managed investment schemes may not be in the best interests of scheme participants. For example, the changes to be imposed on legacy superannuation schemes and employer sponsored superannuation schemes will involve increased costs being passed on to members. The related party provisions imposed on restricted schemes also appear to be overly restrictive. In addition, the new regime also appears to envisage that group investment funds will no longer be a permitted fund structure. This proposal is inconsistent with an objective of promoting flexibility and innovation in fund structures (within a set of common governance requirements) and does not recognise the successful and long-term group investment funds which currently exist.

Transition

For those issuers and schemes that will transition to the new regime, Westpac believes that greater consideration is required to make the transition seamless and cost-effective. A transitional period of up to two years is required. Further, the current provisions of the Exposure Draft which would (if enacted) require a PDS to be sent to existing investors, and a waiting period to apply to the first PDS of a continuous issuer, require amendment.

Liability Regime

Westpac has four key concerns with the liability regime as set out in the Exposure Draft:

- the significant uplift in pecuniary penalties for individuals from a current maximum of \$500,000 under the Securities Act 1978 to a maximum of \$1,000,000 as proposed in the Exposure Draft is not warranted or justified;

- penalties for Part 2 contraventions are disproportionately high compared to other regulated industry sectors and businesses governed by the Fair Trading Act regime;
- the significant increase in the number of civil remedy and Tier 1 criminal provisions for technical, non-material and "compliance" type breaches is unduly punitive; and
- the imposition of strict liability and removal of knowledge and material prejudice requirements for certain offences is not justified.

These changes to the liability regime create an unduly high level of risk and will negatively impact the willingness of experienced individuals to take up directorships. This has the potential to reduce the quality of governance in the New Zealand financial sector, to the detriment of investors.

Dual Licensing of DIMS

The Exposure Draft contains an incomplete regime for licensing providers of DIMS followed by notes explaining the proposed licensing regime and the intended overlap with the eventual Financial Markets Conduct Act and the FAA. Westpac submits that financial service licences should not be split across these two Acts. Providers of DIMS should be licensed in accordance with the FAA (particularly as the Exposure Draft indicates the FAA is to be amended to reflect the substantive requirements of licensees under that Act). A split of the type contemplated by the Exposure Draft is both confusing for the public and market participants and may well encourage regulatory arbitrage in the event of differential obligations and liabilities imposed on DIMS providers.

Westpac's other submissions focus on identifying key drafting and technical changes to avoid unnecessary compliance costs, duplication of existing regulation, or unforeseen impacts in keeping with the purposes of the reforms. The short time for submissions does mean that not all potential impacts and drafting issues may have been identified.

Yours faithfully



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