

WESTPAC BANKING CORPORATION,
WESTPAC NEW ZEALAND LIMITED AND
BT FUNDS MANAGEMENT (NZ) LIMITED

Submission to Ministry of Economic
Development
Financial Markets Conduct Bill Draft for
Consultation

6 September 2011

1. INTRODUCTION

1.1. This submission on the *Financial Markets Conduct Bill Draft for Consultation* is made on behalf of Westpac New Zealand Limited, Westpac Banking Corporation and BT Funds Management (NZ) Limited.

1.2. Enquiries on this submission can be addressed to:

Loretta DeSourdy
Head of Regulatory Affairs
Westpac New Zealand Limited
PO Box 691
Wellington

Phone: (04) 498 1294

Email: loretta_desourdy@westpac.co.nz

2. DEFINITIONS

2.1. In this submission, unless context otherwise requires:

"BT Funds" means BT Funds Management (NZ) Limited.

"Explanatory Note" means the explanatory note to the FMCB.

"Corporations Act" means the Australian Corporations Act 2001.

"FAA" means the Financial Advisers Act 2008.

"FMCB" means the Financial Markets Conduct Bill Draft for Consultation.

"FRA" means the Financial Reporting Act 1993.

"FSPA" means the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

"FTA" means the Fair Trading Act 1986.

"GIF" means Group Investment Funds

"ISDA" means International Swaps and Derivatives Association, Inc. Master Agreement.

"MED" means the Ministry of Economic Development.

"PIE" means cash and term portfolio investment entities as defined by regulations under the FAA.

"QFE" means qualifying financial entity.

"RBNZ" means the Reserve Bank of New Zealand.

"RBNZ Act" means the Reserve Bank Act of New Zealand 1989.

"Request for Submissions" means the request for submissions and commentary released by the Ministry of Economic Development in relation to the FMCB.

"SA" means the Securities Act 1978.

"SMA" means the Securities Markets Act 1988.

"WBC" means Westpac Banking Corporation (an Australian incorporated company).

"Westpac" means WBC, WNZL and all of their respective subsidiaries.

"WNZL" means Westpac New Zealand Limited.

Other capitalised terms have the meanings given to them in the FMCB.

Clause Number	Clause heading	Submission
Part 1	Preliminary provisions	
6	Interpretation	<p>(a) The definition of "<i>advertisement</i>" refers to a communication made to "<i>the public or a section of the public</i>". The FMCB gives no guidelines on these terms. The definition should provide for communication to any person, unless an exclusion under Part 1 of Schedule 1 applies.</p> <p>(b) The definition of "<i>insolvent</i>" should include guidance as to the valuation of contingent liabilities, such as is provided in section 4(4) of the Companies Act 1993.</p> <p>(c) The definition of "<i>custodian</i>" in subclause (b) should state "<i>(whether or not appointed by that client)</i>".</p> <p>(d) The use of "<i>or</i>" in clauses 6(3)(a) and 6(3)(b) in the definition of redeemable share can be interpreted as meaning that a share or product may be redeemable in only one of the circumstances set out in clause 6(3)(a) (and not more than one) and for consideration determined under only one (and not more than one) of the alternatives in clause 6(3)(b). These clauses should be revised accordingly.</p> <p>(e) The definition of "<i>special resolution</i>" needs clarification in the context of debt securities. The FMCB does not contain a definition of "<i>value</i>" for the purposes of the definition. The definition should refer to the "<i>nominal amount</i>" of the debt securities. This is consistent with the approach to meetings of debt security holders under the Securities Regulations 2009 (clause 3(1) of Schedule 15).</p>
7	Meaning of financial product	<p>In respect of paragraphs 45-52 of the Request for Submissions, Westpac agrees that an exemption from the Gambling Act 2003 is required, and should be as broad as possible and exclude all derivatives; that is, Option A. This appears to be similar to the position adopted in Australia.</p>
8(1)	Definitions relating to kinds of financial products	<p>(a) Redeemable managed investment products should be expressly excluded from the definition of "<i>debt security</i>".</p> <p>(b) It is currently unclear whether spot trades are caught by the proposed definition of "<i>derivative</i>". This should be clarified by providing an explicit carve-out from the definition. This could be addressed by a new paragraph (e).</p> <p>(c) In respect of paragraph (d) of the definition of "<i>derivative</i>": <ul style="list-style-type: none"> ▪ As drafted it only applies to "<i>tangible property</i>". This is not defined in the FMCB. The absence of a definition will lead to </p>

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		<p>uncertainty as to what constitutes tangible property. In addition, retaining the references to "<i>tangible</i>" will likely exclude property such as emissions units from the carve out even though transactions including such assets may be physically settled. If an agreement provides for physical settlement of any type of property it should be excluded from the definition of derivative. The distinction between physically settled tangible property and physically settled intangible property should be removed.</p> <ul style="list-style-type: none"> ▪ Many physically settled derivative contracts provide for some element of set-off. The restrictions as to set-off in paragraphs (d)(ii) and (iii) should be removed. For example, emissions forwards conducted under ISDA documentation often provide for the parties to set-off buying and selling obligations under transactions which are due to settle on the same date.
10(1)	Definitions of issued and issuer	<p>(a) As the definition of "<i>equity security</i>" in clause 8 refers only to shares in a company, industrial and provident society and building society, clause 10(1)(b)(ii) should not refer to "<i>or other entity to which the security relates</i>".</p> <p>(b) Clause 10(1)(b)(i) defines "<i>issuer</i>" for the purposes of a debt security as the person "<i>liable to repay money or pay interest under the security (other than as guarantor)</i>". This definition should be clarified to provide certainty that the definition of "<i>issuer</i>" does not include any other persons who may be contingently liable to pay any amount in respect of such securities. For example, directors (by virtue of clause 62).</p> <p>(c) It will be important to understand the scope of clause 10(2)(c)(iii). Accordingly, MED should give early guidance as to the anticipated nature of "<i>prescribed deposit products</i>".</p>
10(2)		<p>Westpac supports the approach in clauses 10(2)(a) and 10(2)(c) as concerns KiwiSaver and superannuation schemes. It appears that clause 10(2)(a) may not be required in light of clause 10(2)(c).</p> <p>Certain unit trusts and group investment funds should also be treated in the same manner as KiwiSaver and superannuation schemes as further investments in the product may be made on an ongoing basis much as they are in KiwiSaver schemes. These products may be recognised as prescribed schemes and to accommodate this, the word "<i>member</i>" in section 10(2)(c) should be changed to "<i>scheme participant</i>" and the words "<i>or investment</i>" should be added after the word "<i>contribution</i>".</p>

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12(2)(c)	Miscellaneous interpretation provisions relating to statements and information	Paragraph (2)(c) appears to provide that where only part of a document is referred to in an offer document all information in that document is deemed to be included in the offer document. The provision should be amended so that only the statement referred to in the offer document or the relevant clauses incorporated by reference into the offer document should be deemed to be included in the offer document.
Part 2	Misleading or deceptive conduct or false or misleading representations	
16, 17 and 21	Misleading and deceptive conduct generally; misleading conduct in relation to financial products; limited application of Part in relation to newspapers, magazines, broadcasting, etc	The term " <i>public</i> " is used in these sections. If it is to be used, the FMA should provide guidance as to its meaning. The jurisprudence under the FTA, where the term " <i>public</i> " is used, would provide a sensible starting point. It is important to ensure misleading and deceptive conduct is consistently regulated across all industry sectors.
17 and 18	Misleading conduct in relation to financial products/financial services	The word " <i>any</i> " should be inserted before " <i>financial products</i> " and " <i>financial services</i> " in clauses 17 and 18 respectively.
23	Territorial scope of Part	<p>Clause 23 provides that Part 2 "<i>applies to ... conduct outside New Zealand ... to the extent that that conduct relates to dealings in financial products, or the provision of a financial service, that occurs (in part or otherwise) within New Zealand</i>".</p> <p>Clause 6(1) defines "<i>dealing in financial products</i>" as being inclusive of "<i>anything that is preparatory to, or related to, any dealings in financial products ...</i>".</p> <p>WBC and WNZL (through a New Zealand incorporated subsidiary) undertake offshore offers and issuances of financial products. All offers and issues are made outside of New Zealand, but preparatory work may be undertaken in New Zealand and proceeds of the issuances are on-lent to WBC/WNZL. On this basis, the offshore offers and issues would be subject to Part 2. This is unnecessary.</p> <p>Part 2 should only be applicable if the offer or issue of financial products, or provision of a financial service, occurs in New Zealand.</p>
Part 3 and Schedules 1 and 2	Disclosure of offers of financial products	
34, 35, 36 and 37	PDS must be given if offer requires disclosure; certain situations in which section 34 does not need	Each of these clauses refers to a " <i>person who makes the offer</i> ". For consistency with the definition of " <i>offeror</i> " set out in clause 6, it is important that these clauses identify precisely where an obligation sits. The clauses should

Clause Number	Clause heading	Submission
	to be complied with; PDS treated as having been given if application form that is used was included in, or accompanied by, PDS; offence to knowingly or recklessly contravene section 34	refer to the "offeror".
35	Certain situations in which section 34 does not need to be complied with	<p>Clause 35(a) should also apply if the new PDS contains different information, provided that information is not materially adverse to an investor.</p> <p>Consideration must also be given to the transition to the regime under the FMCB by existing funds (such as unit trusts) pursuant to which investors make ongoing/regular contributions. Clause 10(2)(c) addresses this issue for KiwiSaver and superannuation schemes, but other managed investment schemes would (as the FMCB is currently drafted) need to provide a PDS to all scheme participants on enactment of the FMCB, even though those scheme participants will have received an investment statement under the SA. Similarly, where an investor has received a disclosure document for derivatives which complies with the Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007, it should not be necessary to provide a further PDS to that investor. Accordingly, clause 35 should apply to not just the prior receipt of a PDS by an investor, but the prior receipt of an investment statement or disclosure document (as applicable) pursuant to and compliant with predecessor legislation.</p>
36	PDS treated as having been given if application form that is used was included in, or accompanied by, PDS	This clause should clarify that an application may be completed electronically, where the person making the application has downloaded an electronic version of the PDS. This would facilitate the making of electronic offers, which is also consistent with the developing trend of making other corporate documentation available electronically. No material prejudice to investors should result.
38, 62, 66, 70	Right to withdraw and have money returned; Choices open to offeror; How offeror must deal with applications on expiry; Financial products offered in course of unsolicited meeting or communications may be returned and refund obtained	<p>These clauses in the FMCB reflect the director liability currently set out in sections 37A(7) and 37(6) of the SA. However, under the SA a director has a defence where the default in the repayment was not due to any misconduct or negligence on the part of that director. In the absence of such a defence, a director who believes on reasonable grounds that repayment has been undertaken could be found liable for the entire amount. This is unduly punitive.</p> <p>Furthermore, directors may be liable under these clauses even where they were not a party to the underlying contravention. There should not be joint and several liability for directors where a breach has occurred without their knowledge or consent.</p> <p>Accordingly, these clauses should specify that the joint</p>

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		and several liability only extends to directors who were involved in the underlying contravention and, in respect of those directors, should import the defences set out in the SA.
39	Disclosure of material information and content of PDS and register entry	Clause 39(1) creates an obligation on an issuer " <i>as at the date on which a certificate of lodgement is given</i> ". This is not a matter over which an issuer has any control. The obligation should exist at the time of submission of the PDS for lodgement.
40	Meaning of material information in this Part	<p>The definition of materiality is a critical definition given its importance in the liability provisions. There should also be consistency with clause 33 (purpose).</p> <p>The "<i>option B</i>" proposal put forward by MED is the most appropriate of the available options. However, this option should refer to information that would "<i>significantly influence</i>" persons. The existing threshold is too low.</p>
41	Consent of person to whom statement attributed	<p>At present, this clause captures statements that are a matter of public record, such as the Government's budget announcements in relation to KiwiSaver schemes. Where the statement is already on the public record, consent does not add to investor protection, but does add to issuers' costs of compliance. These statements will still be subject to the prohibition against being misleading or deceptive.</p> <p>Accordingly, this clause should include an exception in relation to references to statements that are of public record, and which are properly attributed.</p>
42	PDS must be worded and presented in clear, concise and effective manner	<p>There is a considerable risk of subjective interpretation or hindsight bias with the use of the phrase "<i>effective manner</i>".</p> <p>This clause would achieve the same outcome by use of the objective phrase "<i>reasonably clear and concise</i>" (if required at all).</p>
49	Waiting period does not usually apply to continuous issue PDSs	At present, this clause will require the first PDS issued by all managed investment schemes to be subject to the clause 46 waiting period, as the PDS will not fall within the definition of " <i>continuous issue PDS</i> ", even where such a document relates to a scheme currently issued under a prospectus. Clause 49 should accommodate the first PDS issued by continuous issuers of an existing scheme.
55	Consents needed for lodgement	<p>The requirement for director consent to the issue of a PDS under clause 55 and the potential liabilities attributable to directors is not appropriate for derivatives and managed investment schemes for the following reasons:</p> <ul style="list-style-type: none"> ▪ it is out of alignment with other jurisdictions, and is not consistent with the role of directors, which is to focus on overall strategy and governance; ▪ it will inhibit the ability of financial institutions to attract quality directors;

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		<ul style="list-style-type: none"> ▪ it stifles the ability to launch new products or modify existing products; ▪ it does not improve investor protection; and ▪ both derivative issuers and managers of managed investment schemes are required to be licensed. <p>Under section 1015B of the Corporations Act, a PDS for a managed investment product need only be lodged with ASIC with the consent of directors if the financial product will be traded on a financial market. The same regime should be adopted in the FMCB and director consent should not be required for derivatives and unquoted managed investment schemes.</p> <p>WBC, WNZL and BT Funds are focussed on the attraction and retention of quality directors who are responsible for the key issues of strategic direction and overall governance. Given the number of financial products issued by WBC, WNZL and BT Funds, directors will be required to spend an undue amount of time reviewing PDSs, supplementary documents and PDS replacements, and providing consents under clause 55. This will both reduce the time spent on governance and strategy, and reduce the number of persons who are willing to take up such a directorship.</p> <p>During its current term the New Zealand Government has adopted the objective of New Zealand becoming a financial hub for the development of financial products (such as managed funds). It is important that the regime in New Zealand, and in particular the requirements on directors in connection with the offer documents for financial products, is consistent with other competing jurisdictions. Requirements of the nature of clause 55 limit growth and innovation in the financial products markets, as any growth or product modification becomes limited by demands upon the individual time of each issuer's directors.</p>
		<p>The liability imposed on directors for a PDS is not appropriate for managed investments schemes and derivatives. Directors should be responsible for ensuring that there are reasonable due diligence and verification processes in place for each PDS. Individual scrutiny and consideration of each PDS by each director of an issuer for products of this nature does not add value to the due diligence process and is of little real benefit to investors, particularly for organisations such as Westpac where it is management that have the deeper knowledge of these products.</p>
63	Misleading or deceptive statements, omissions, and new matters requiring disclosure	<p>This clause does not contain a materiality threshold. As a result, liability may arise pursuant to this clause for a non-material omission of information from the PDS. This is particularly problematic in the context of civil liability where there is no materiality requirement for contraventions of civil remedy provisions.</p> <p>This clause (and others identified in this submission)</p>

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		should incorporate a requirement of materiality so that there cannot be a contravention of the clause for an immaterial breach.
64	Persons who must inform offeror about disclosure deficiencies	Directors should not be named in a PDS. This is not the position in Australia and, in the case of a continuous issuer, will cause a PDS to quickly become out of date. The PDS should be required to include a reference to where director details can be found. Clause 64(2)(d) refers to " <i>underwriters</i> ". This term is also used elsewhere in the FMCB, and should be defined.
65	Expiry	A continuous issue PDS should not have an expiry date. Clause 63 provides sufficient protection for investors by indirectly requiring the document to be updated.
69	Prohibition of offers in course of unsolicited meetings or communications in certain circumstances	The condition in clause 69(3) should be amended. It is sufficient that the person is receiving advice from an authorised financial adviser, QFE adviser or member of a QFE group. There are already restrictions in the FAA which should be sufficient to provide an appropriate level of consumer protection, consistent with the purposes of the securities legislation.
71	Advertising or publicity for regulated offers	It is unclear why clause 71(1)(b) uses the wording from the existing SA definition of " <i>advertisement</i> " when the definition of advertisement in the new FMCB is limited to a communication for the purposes of promoting the offer. Clause 71 should be modified to use the FMCB definition of advertisement. In that event clause 72 would not be required.
76	General exceptions	If a listed issuer determines that it should make an announcement " <i>to the market</i> ", the exception set out in clause 76(a) should apply, without qualification. The exception in clause 76(d) is based on the equivalent exception in section 734(7)(c) of the Corporations Act. Commentators have noted that it is difficult to understand the purpose of this exception in Australia. Section 734(7)(e) of the Corporations Act permits the distribution of a report concerning the securities of an issuer that is published by a person other than the person offering the securities, a director, a person with an interest in the success of the offer of securities, or someone acting by arrangement with the issuer. This exemption allows " <i>independent reports</i> " that refer to a proposed offer of securities to be published prior to lodgement of a disclosure document. These " <i>independent reports</i> " do not have to be based on publicly available information. However, this exception is subject to a " <i>not for reward</i> " qualification. An equivalent exception in order to facilitate the preparation of research reports in the context of an offering should be included in the FMCB.
82	Information to be made publicly available	Given the extensive disclosure obligations already placed on registered banks, consideration should be given to

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		tailoring the application of the obligations in clause 82 to such entities.
83	Defective ongoing disclosure	Please refer to the submissions on clause 63. In addition, it is not clear how this clause will operate in respect of the register. Information that has been submitted to the register and has subsequently become misleading due to the passage of time, should not be captured by this clause if it is clear that more recent information supersedes it.
Clause 4, Schedule 1	Offers to close business associates	A clause matching clause 5(2)(c), Schedule 1 should be included here.
Clause 7, Schedule 1	Offers of financial products through DIMS licensee	<p>Clause 7 of Schedule 1 is drafted too broadly. As drafted, the clause will create an incentive for issuers to issue through a DIMS licensee so that they are not required to disclose in accordance with Part 3 of the FMCB. Issuers should be subject to the usual disclosure requirements when issuing to a DIMS licensee, except that the DIMS licensee should not be required to pass such disclosure on to investors, but should only be required to maintain a record of such disclosure, and to make investors aware of where such disclosure may be reviewed.</p> <p>Furthermore, clause 7 should also apply to advisers offering DIMS in accordance with the FAA, and who are not DIMS licensees for the purposes of the FMCB.</p>
Clause 8, Schedule 1	Offers under employee share purchase schemes	<p>It should not be necessary for an employee share purchase scheme offer to be separate from any other offer of equity securities by the issuer in order for this clause to apply.</p> <p>It appears that the policy behind the provision in clause 8 is to ensure that the offers under this clause are only made as part of the remuneration package of employees and are not otherwise used as capital raising tools by an issuer. The conditions of the clause should be revised, however, to ensure that other contemporaneous capital raisings will not invalidate an issuer's reliance on this exemption.</p> <p>Furthermore, the definition of "<i>specified employee</i>" excludes close business associates of the issuer (e.g. senior managers). Whilst offers could be made under clause 4 to those persons, it is not apparent why they could not be brought within an employee share scheme.</p>
Clause 18, Schedule 1	Offers of category 2 products or debt securities by registered banks	The exclusion for cash and term PIEs issued by registered banks should adopt the drafting used in the Financial Advisers (Definitions, Voluntary Authorisation, Prescribed Entities, and Exemptions) Regulations 2011. This drafting recognises the circumstances of issuers such as BT Funds, which is the manager of those PIEs and a related company of WNZL and WBC which are both registered banks. The PIEs managed by BT Funds

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		invest in deposits with WNZL, however BT Funds is a subsidiary of WBC, not a subsidiary of WNZL.
Clause 24, Schedule 1	Disclosure and other requirements	<p>The effect of clause 24(1)(j) is such that registered banks may be required to produce disclosure documents and comply with the prescribed conditions.</p> <p>Registered banks should not have obligations under clause 24, as they are already subject to regular reporting obligations under the RBNZ Act. Accordingly, potential investors can access the relevant bank's key information summaries and general disclosure statements to obtain material information regarding the banking group.</p> <p>Further, standard banking products are generally well understood by customers such that additional disclosure obligations under the FMCB are not required.</p>
Clause 28, Schedule 1	Sale where financial products issued with view to original subscriber dealing with products	<p>Clause 28 of the FMCB requires compliance with the disclosure regime in Part 3 in relation to previously allotted securities in certain circumstances.</p> <p>More specifically, clause 28 of Schedule 1 requires disclosure if the issuer issued the financial products "<i>with a view</i>" to the original subscriber dealing with the products (i.e. on selling them et cetera) and the offer of products is made within 12 months after the date on which the financial products were issued.</p> <p>Clause 28(3) then creates a presumption that financial products were issued with the view referred to, if there are reasonable grounds for concluding that the products were issued with that view (whether or not there may have been other reasons or purposes for the issue).</p> <p>The words "<i>with a view to</i>" do not appear to have been considered by the New Zealand Courts in the context of a securities allotment. There is significant uncertainty in interpreting this wording, which is also used under the SA.</p> <p>The difficulties with the interpretation of this phrase are made worse by clause 28(3), which suggests that it is sufficient if the "<i>view</i>" is but one of many reasons or purposes for the issue.</p> <p>Clause 28 should only operate where the purpose of the issue and then resale (rather than simply an issue) is to attempt to avoid the disclosure requirements of the FMCB.</p> <p>In addition, a shorter six month period would be appropriate under clause 28.</p> <p>It is noted that in 1972 the Securities Exchange Commission adopted rule 144 under the Securities Act of 1933 to provide a safe harbour from the definition of "<i>underwriter</i>" in section 2(11) of the Securities Act of 1933 (which uses "<i>the with a view to</i>" wording) to assist security holders in determining whether the section 4(1) exemption (which relates to transactions by a person other than an issuer, underwriter or dealer) is available for their resale of securities. See <i>Securities Exchange</i></p>

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		<p><i>Commission Release No. 33-8869.</i> Rule 144 is instructive in this regard.</p> <p>In the release referred to, the Securities Exchange Commission stated that it believed that a six month holding period for securities of reporting issuers provided a reasonable indication that the investor has assumed the economic risk of investment in the securities to be resold under rule 144. Correspondingly, shortening the holding period to six months would increase the liquidity of privately sold securities, and decrease the cost of capital for reporting issuers, while still being consistent with investor protection. The same rationale is applicable in the current context and is provided in support of this submission, particularly in the context of quoted securities or where the issuer otherwise provides information on at least a half-yearly basis. Six months is also the period currently referred to under the SA.</p>
Clause 34 Schedule 1	Investment activity criteria	<p>The "<i>investment activity criteria</i>" in clauses 34 (b) and (e) of Schedule 1 have been set at a level which may in some circumstances capture unsophisticated investors who would not qualify as "<i>eligible</i>" under either the FAA or fall within current exemptions under the SA. Consideration should be given to revising these provisions to ensure the FMCB provides adequate consumer protection.</p>
Clause 37 Schedule 1	Eligible investors	<p>This clause (which relates to self certification of an eligible investor) requires an authorised financial adviser to sign a written confirmation of the certification in accordance with clause 39.</p> <p>Correspondingly, section 5D of the FAA requires a "<i>financial adviser, a QFE or broker</i>" to sign a written acceptance of the certification in accordance with section 5E of the FAA.</p> <p>The persons who can sign the written confirmation of the certification under clause 37 and section 5D should be aligned.</p> <p>In practice, it is likely that the relevant investors will wish to deal with one adviser. No material prejudice will result to an investor as a result of the use of the expanded category of persons who could accept or confirm the certification under section 5D(1)(c) of the FAA given the controls required by that section.</p> <p>It would also assist to provide the option to harmonise the certification requirements across the two Acts. Although different wording is used in the two provisions, there is a common theme of an acknowledgment of a level of knowledge, understanding of potential risks and merits, and the investor's information requirements.</p>
Part 4 and Schedule 3	Governance of financial products	
109(2)	Need to register managed investment scheme for	Westpac agrees with MED's tentative conclusion in its Request for Submissions that all registered managed

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	regulated offer of managed investment product	investment schemes should be required to publicly file audited financial statements under the FRA.
110	Application for registration	<p>Clauses 110(2)(c) and (e) should allow for restricted schemes, which will not have a licensed supervisor, by removing the requirements for consent/certification by the supervisor for such schemes.</p> <p>The FMCB will have a significant impact on any superannuation schemes which do not qualify as restricted schemes, and therefore will need to meet the requirements for a licensed manager and licensed supervisor.</p> <p>The impact of these requirements, and the associated costs, may in many cases cause the trustee to incur significant restructuring costs or wind-up these schemes. Such actions may not be in the interests of investors.</p> <p>A proposal by MED to treat "<i>legacy</i>" schemes as "<i>restricted</i>" schemes does not fully address the compliance costs raised in this submission given that trust deed amendments and additional fees would still be required to enable a licensed independent trustee introduced.</p>
113	Additional initial and ongoing registration requirements for superannuation schemes	The requirements specified in clauses 113(1)(c) and 113(2) prevent New Zealand companies from offering their employees a superannuation benefit where those employees are overseas citizens working in New Zealand. Exemptions need to be included to prevent an overly restrictive regime.
114	Additional ongoing registration requirements for restricted scheme	<p>(a) Clause 114(1)(d)(iii) is difficult to follow. It reads that: <i>"Its trustees must include at least 1 licensed independent trustee... who is a trustee or a director of the sole corporate trustee for the scheme..."</i></p> <p>The clause should be revised to clarify that either a trustee of the scheme, or a director of the sole corporate trustee of the scheme, must be independent and licensed.</p> <p>(b) The reference to "<i>is not a promoter</i>" in clause 114(2)(b) should be deleted.</p>
117	Contents of governing document for registered scheme	<p>(a) Many scheme offer documents set out such matters as transfer rules, the rules applying to contributions payable, and fees payable to managers and others. Clause 117, and in particular the frameworks or methodologies developed under clause 117(3), should allow the practice to continue.</p> <p>(b) Clause 117(1)(c) should allow for the governing document to provide for the manner of calculation of contributions payable. Because these matters are subject to change, the disclosure that is presently required will result in frequent</p>

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		<p>amendments to the governing document. This will increase the cost of the scheme to investors without increasing investor protection.</p> <p>(c) Many governing documents specify a maximum fee payable to a manager or trustee, with disclosure in the offer documents of the actual fee currently being charged. This practice should be able to continue.</p> <p>(d) Similarly, it would be unusual for the fees of an investment manager, an administration manager or custodian to be set out in the governing document, as is suggested by clause 117(f). These fees are normally specified in contracts with these parties.</p> <p>(e) The ambit of clause 117(j) is uncertain and too broad. As an example, the clause would appear to require all terms of any investment management, administration management or custody agreement to be set out in the governing document. If there is a need for such a "catch all" provision, it should refer to other matters prescribed by regulations.</p>
118	Limits on permitted exemptions and indemnities	This clause should include administration managers as well as investment managers.
121	Changes to governing document	<p>(a) Clause 121(2)(b) requires supervisors to certify that, where an amendment has not been approved by a special resolution of scheme participants, it is satisfied that the amendment does not have a material adverse effect on scheme participants. This certification obligation may make it more difficult for amendments to be made, as supervisors may be concerned about liability arising where, notwithstanding their view, the amendment does in the future have a material adverse effect on scheme participants. If this occurs, issuers will be forced to seek special resolutions for amendments. This provision should be clarified to provide that no liability will attach to the supervisor where it forms this view having taken appropriate advice.</p> <p>(b) Clause 121(2)(a)(ii) should be amended by adding the words "<i>generally</i>" after the words "<i>scheme participants</i>". This will clarify that the supervisor does not need to consider the effect on individuals, but rather the impact on scheme participants as a group.</p> <p>(c) A new subclause (iii) should be added to clause 121(2)(a), which permits amendments required to a governing document to comply with the requirements of any applicable legislation or to reflect changes to generally accepted accounting practice.</p> <p>(d) Similar amendments may be useful in respect of</p>

Clause Number	Clause heading	Submission
		clause 94.
125	General duties applying in exercise of manager's functions	<p>Clause 125(2) is unnecessary as the duties and liabilities of both the manager and the supervisor are clearly specified in the FMCB.</p> <p>The clause is also subject to the criticism that it draws an artificial distinction between the duties of a manager appointed pursuant to a trust deed, and the duties of a manager appointed pursuant to the terms of another form of governing document.</p>
126	Duty of manager and investment manager to comply with relevant professional standard of care	It is unclear why an investment manager is named in this clause, but an administration manager is not.
126A	Duties of directors and senior managers of manager	Westpac supports the policy rationale for clause 126A. However, given the breadth of the clause, and the lack of certainty as to the term " <i>improper</i> ", it would be appropriate for the clause to provide that it does not restrict the holding, or trading, by directors or senior managers of financial products which may also be held or traded by the registered scheme, provided this is not to the detriment of the scheme, and provided the director or senior manager acts with the consent of (or within rules set by) the manager.
127	Contracting out of management functions	Clause 127(2)(b) should be deleted. If a manager contracts out its functions as a manager (whether to an investment manager or an administration manager), then the manager should be deemed to have fulfilled its obligations to investors if it acts in accordance with the provisions of clause 127(2)(a).
128	Functions of supervisor	Clause 128(1)(b)(ii) provides for the supervisor to supervise the financial position of the manager to ascertain that it is adequate. It is an unnecessary cost and compliance measure in relation to managed investment schemes. The attention of the supervisor is more properly directed towards the performance by the manager of its functions and obligations in respect of the scheme.
132	Duty of manager to provide requested information and reports to supervisor	The requirement for reports and information to be signed by directors of the manager is an unnecessary procedural step and should be removed. There are clear provisions in the Companies Act 1993 permitting the delegation of duties and responsibilities by the Board of directors of an issuer to management. There is nothing so particular and unique as to reports to be provided to the supervisor under clause 132 as to prevent or prohibit delegation in this respect.
133	Manager must report contravention or possible contravention of issuer obligations	An issuer should only be required to report actual contraventions, rather than possible contraventions. This aligns with the requirement found in the Corporations Act.

Clause Number	Clause heading	Submission
134	Power of supervisor to engage expert	The supervisor acts for the benefit of investors and the scheme. It should be a presumption of the FMCB that the costs of the supervisor (and any expert engaged by the supervisor) should be a cost met by the scheme, rather than the manager as is provided in clause 134(2). The cost should only be met by the manager in circumstances where the manager is in default of obligations under the governing document.
135	Requirement to have supervisor or other independent person as custodian	If there is a supervisor for a scheme, being a person independent of the manager, then that supervisor should be entitled to appoint a custodian in accordance with clause 135(4)(a), even if that person is associated with the manager. This would be a decision taken by the supervisor after appropriate due diligence, having regard to its duties to investors, and the nature of the scheme and the particular assets of the scheme. It should not be necessary for a restricted scheme to appoint an external custodian. These schemes are often small, and the costs of such an external custodian are unnecessarily burdensome on such a scheme.
136	Custodian holds scheme property on trust	The word " <i>participants</i> " should be deleted from the end of clause 136(1). The property will be held on behalf of the overall scheme, in accordance with the governing documents, rather than for scheme participants themselves.
141	Manager and associated persons cannot vote if interested in resolution	This clause should not distinguish between quoted, and unquoted, managed investment products, with respect to the right to vote on resolutions to remove and appoint a new manager. In each case, if the manager, or associated persons, has invested in the scheme, and therefore holds an economic interest in the scheme, the manager or the associated person should have the right to vote. If this is of concern to MED, it should be mandatory for this right to vote to be disclosed prominently in the PDS.
143	Changes to statement of investment policy and objectives	Clause 143(1) should be deleted. Any proposed changes to the statement of investment policy and objectives should require prior notice to the supervisor, but not necessarily consultation. Whether or not consultation is required should be driven by the supervisor.
144	Lodging of statement of investment policy and objectives and changes to statement	Clause 144 should be deleted and provision made in the regulations for the relevant information to be included in the PDS. Each PDS should include a summary of the statement of investment policy and objectives, and of the ability for changes to be made to that statement. This will ensure investors receive the information that is relevant to them, in a format which is understandable and accessible, without requiring lodging of a statement of investment policy and objectives.
145	Action that must be taken on limit breaks	A breach of the statement of investment policy and objectives, if that breach is material, should be referred to the supervisor. Materiality should be determined by the

Clause Number	Clause heading	Submission
		<p>supervisor depending on the nature of the scheme. Whether the supervisor is required to report such a breach to the FMA should be left to the discretion of the supervisor, having regard to such matters as the nature of the breach, whether there is a pattern of breaches, and whether the breach, in a particular instance, was remedied. As such, clause 145(3) should be deleted.</p>
146	Action that must be taken on pricing errors and failure to comply with pricing methodologies	<p>The requirement to report material pricing errors or non-compliance is potentially onerous and complex with significant commercial and compliance impacts. The provision contemplates that the FMA would create "<i>frameworks or methodologies</i>" under which it will be determine whether a pricing error is "<i>material</i>". This will be a highly specialised task and require industry consultation. There is significant uncertainty as to what "<i>material</i>" could mean in relation to different types of schemes. The FMCB should give some structure to the considerations of the FMA in developing the "<i>frameworks or methodologies</i>". Clause 146(3) appears unnecessary in light of the general obligations and duties applicable to the supervisor role.</p>
152	Certain related party benefits permitted without supervisor consent	<p>Clause 152(b) should be extended to an investment in a managed investment scheme regulated in accordance with the laws of another suitable jurisdiction, such as Australia. Clause 152 should also extend to transactions where the relevant transaction, and its key terms, have been adequately disclosed in the PDS for the scheme.</p>
153	Additional restrictions on transactions of restricted scheme	<p>Transactions of the nature described in clause 152 (including as described in these submissions) should be available to restricted schemes. The restrictions in clause 153 will be problematic for restricted schemes, particularly those that relate to investments in related parties (such as clause 153(a)). As an example, the Westpac Staff Superannuation Scheme currently invests in various schemes managed by BT Funds, and would seek to retain such investments.</p>
154	Application of scheme participant transfer rules	<p>Clause 154(3) should be deleted, and the appropriate provisions of the KiwiSaver Act 2006 should be incorporated in the FMCB.</p> <p>For the purposes of clauses 154 to 157, the term "<i>section of a KiwiSaver scheme or superannuation scheme</i>" should be clarified. Schemes may build into their terms movement between different investment funds within a scheme (for example, as the age of an investor changes), and such movements should not be subject to these requirements.</p>
160	Removal of manager of registered scheme	<p>There should be no statutory rights of termination of a manager except where the manager has committed a material, unremedied, breach of the governing documents. Clauses 160(a) and (b) raise the following issues:</p> <p>(a) Investment in a scheme is voluntary. Equally, the</p>

Clause Number	Clause heading	Submission
		<p>primary sanction for poor performance of a scheme is withdrawal by scheme participants. There is no need for the broad rights provided in these subclauses for schemes that offer minimum withdrawal rights or the ability to transfer between schemes (such as KiwiSaver schemes).</p> <p>(b) The subclauses allow for a manager to be removed without cause. In that respect, the subclauses fail to reflect the significant cost often incurred by managers in developing financial products and investment strategies. They also fail to reflect the impact the termination of management rights may have on a manager, and its employees, and contractors.</p>
172 - 183	Intervention in debt securities and registered schemes	<p>Clause 86(1)(b) provides that subpart 4 only applies to regulated offers of debt securities. However, this reference to a "<i>regulated offer of debt securities</i>" is not replicated in subpart 4. It would be helpful to replicate the reference to "<i>regulated offers</i>" here so there is no uncertainty as when subpart 4 applies. For example, it should be clear that the FMA's powers under clause 181 only apply to "<i>regulated offers</i>".</p>
189	Issuers must keep registers of regulated products	<p>Issuers are required to keep a register of regulated products and all financial products that are of the same class as those regulated products of which it is the issuer. "<i>Class</i>" has not been defined in the FMCB. Financial products should be of the same "<i>class</i>" if they are same type of financial product and have identical rights, privileges, limitations and conditions.</p> <p>There should not be any obligation to have a register for derivatives issued/sold as principal. There is no need for a register in these circumstances, as the rights of counterparties to the derivatives do not need to be exercised together (unlike equity and debt securities, for example) and so that information does not need to be centralised. Clause 193(2)(b) exempts public inspection of a derivatives register. However, clause 193(3)(b) allows individuals to see that part of a derivatives register that applies to them. This is unnecessary where both parties are contracting as principal and know the terms of their contractual relationship. Given the number of derivatives Westpac will enter into as issuer, requiring issuers to maintain such a register will add a compliance burden with no real benefit for investors.</p>
193	Public inspection of register	<p>Clause 193(2) should be extended to other managed investment schemes with the exception of quoted unit trusts.</p>
197	Issuer to send confirmation of financial products	<p>Many managed investment schemes, such as group investment funds and unit trusts, allow investors to make ongoing contributions at their discretion. It is not practical for an issuer to provide a confirmation document every time a contribution is made. The continuous reporting obligations to be applied to managed investment</p>

Clause Number	Clause heading	Submission
		<p>schemes are expected to provide investors with appropriate confirmation of their investments on a regular basis, and this clause should be amended to reflect this by excluding managed investment schemes from clause 197.</p> <p>The requirement to send a confirmation document on a transfer of a derivative product is not necessary for over the counter derivatives. Generally, derivative products do not permit unilateral transfers and therefore both counterparties are required to agree to any transfer when one is proposed. Therefore, all parties will be aware that a transfer has occurred.</p>
Part 5	Dealing in financial products on markets	
220	Information insider must not disclose inside information	Clause 220 should permit disclosures to persons that will trade, or advise or encourage others to trade or hold, where the defence under clause 238 applies.
273 and 288	Offences relating to substantial holdings and interests registers	The " <i>reasonable excuse</i> " defence to a contravention of these register obligations should be retained (see section 35E(2) of the SMA).
354(2)	Financial products to which this subpart applies	Clause 354(2) should be extended to other managed investment schemes with the exception of quoted unit trusts.
Part 6	Licensing and other regulation of market services	
377	When license must be issued	Clause 377(c) contemplates regulations prescribing requirements for an applicant's directors and senior managers. Where the applicant is a registered bank, the existing directors and senior managers of the registered bank should be deemed acceptable for the purposes of this clause. The conditions of registration for registered banks generally require the RBNZ to assess the fitness of potential directors and certain executives before licensing. Replacement directors and executives of registered banks are only able to take up their position once the RBNZ confirms that it does not object to their appointment after assessing their fitness.
383 to 387	Conditions of license	<p>An overly broad discretion has been granted to the FMA to impose conditions on licenses. The discretion, and the circumstances in which it will be applied, should be detailed in regulations which industry participants have a reasonable opportunity to consider and comment upon. The current drafting introduces unacceptable uncertainty into what a licensee may expect from the licensing process under the FMCB.</p> <p>At a minimum, the substantive provisions of Part 6 of the FMCB should:</p> <ul style="list-style-type: none"> ▪ set out the core duties and obligations that pertain to specific classes of licence. Matters such as prudential requirements which at present only

Clause Number	Clause heading	Submission
		<p>appear in clauses 503(1)(a)(i) and (2)(b)(ii) need substantive provisions to establish their scope and clear exclusions to avoid unnecessary application to entities such as registered banks which are already subject to prudential requirements; and</p> <ul style="list-style-type: none"> ▪ distinguish regulatory obligations from conditions. Under the Corporations Act "<i>conditions</i>" are specific requirements on individual licensees defined as "<i>...a condition or restriction to which the licence is subject, or will be subject, as the case requires.</i>"
392	Licensee must deliver regular reports to FMA	The FMCB does not give any indication on the scope or regularity of the proposed reporting. Where the licensee is a registered bank or member of a QFE group additional reporting in addition to that required by the RBNZ Act and the FAA may not be necessary, or should be exempt, given the regular reporting obligations imposed on registered banks/QFEs by those Acts.
393	Licensee must report certain matters	Clause 393 does not contain any definition or guidance as to what constitutes a " <i>material</i> " change in circumstance. Given the obligations placed on licensees to monitor for such events and the powers given to the FMA where it determines a material change in circumstance has or is likely to occur (see clause 395), it is important to have clarity around what constitutes a " <i>material change in circumstance</i> ". This clause and the related provisions which refer to a " <i>material change in circumstance</i> " should be amended to refer to " <i>a material change in circumstance which has, or is likely to have, a material adverse effect on the licensee's ability to comply with its market services licensee obligations.</i> "
395	FMA's powers in case of breach of market services licensee obligation, material change, etc	<p>(a) In the circumstances set out in clause 395(1)(d), the only power the FMA should be entitled to exercise is the power to require the licensee to submit an action plan under subclause (2)(b). It would not be appropriate for the FMA to censure or give directions to a licensee when a breach has not yet occurred.</p> <p>(b) Clauses 395(1)(b) and (d) focus on the occurrence, or likely occurrence, of a "<i>material change of circumstances</i>". Furthermore, clause 398(a)(iii) provides that the action plan must show the steps being taken to mitigate or avoid "<i>any adverse effects or changes arising, or likely to arise, from the material change of circumstances</i>". This provision does not reconcile with clauses 395(1)(b) and (d), which refer to a material change occurring or being likely to occur, while clause 398(a)(iii) focuses on the consequences of the material change in circumstances. This could be reconciled if these clauses only came into force in the circumstances described in the submission relating to clause 393, above.</p>

Clause Number	Clause heading	Submission
401	Directions	See the submission in relation to clause 395, above.
408	Disclosure statement	<p>A DIMS licensee must provide a disclosure statement to a client before investment authority is granted. The information required in a disclosure statement is set out in clause 408 of the FMCB. It is critically important that industry participants be given adequate time to consider, and comment upon, the information to be included in a disclosure statement, and how any liability regime will operate for a DIMS licensee. In relation to this:</p> <ul style="list-style-type: none"> ▪ the details of the key matters to be disclosed could be specified from a list in a manner similar to section 23(2) of the FAA; and ▪ where matters to be disclosed are identical to disclosure statements required under other legislation, those matters should only be required to be disclosed once in the document. This could also be extended to disclosures under other legislation if the prescribed information is identical.
409	Misleading or deceptive statements and omissions	The requirement that a disclosure statement must not include a statement or omission that is " <i>materially adverse from the point of view of the retail investor</i> " should not be included where no definition of, or guidance on, the meaning of " <i>materially adverse</i> " is provided for these purposes.
412	Requirement to have client agreement	<p>Clause 412 does not stipulate when the client agreement needs to be in place by and what will be covered by the client agreement. This should be clarified.</p> <p>In addition, the definition of "<i>client agreement</i>" should be clarified. In some circumstances, such as where a derivative is entered into pursuant to an ISDA, that agreement clearly sets out the nature of the legal relationship between the parties and each party's rights and obligations. It would seem unnecessary for more to be required.</p>
413	Changes to client agreement	<p>This clause requires the written consent of the client before a client agreement can be amended. The client agreement for any DIMS provided through Westpac is distributed to several thousand customers on standard terms. It is not possible to provide this service without an ability to apply standard unilateral variation provisions. In such cases, all that should be required is written notice of the proposed amendment, with a reasonable notice period applying before the proposed amendments become effective.</p> <p>It is impossible to foresee the types of changes which may be required over a span of such a service. In commercial contracts unilateral variation clauses ensure that contracts can be kept up to date with applicable laws, regulations and market practice. Without such provisions it is not possible to provide clients with a standardised product or service.</p>

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415	Meaning of provider of discretionary investment management services and related terms	A definition of " <i>investment mandate</i> " is not yet included in section 12 of the FAA, and nor does it appear to be included in the amendments to the FAA proposed in Part 9, subpart 5 of the FMCB. The definitions in clause 415(2) need to be amended accordingly.
416	DIMS licensee's duties	Clause 416(c)(i) should be amended to clarify that the duty of the DIMS licensee is to act in the best interests of the relevant class of investors. This could be achieved by including " <i>class of</i> " immediately prior to " <i>investors</i> " in the clause.
417	Duties of directors and senior managers of DIMS licensee	Please see Westpac's submissions in relation to clause 126A.
424	Certain related party benefits permitted	Clause 424(b) should be extended to investments in regulated schemes in Australia.
426 (and 11(1))	Requirements for custodian (and meaning of "associated")	A DIMS licensee must ensure that the investment property is held by a custodian who is not " <i>associated</i> " with the DIMS licensee. A custodian will, by the very nature of the service offered, potentially be associated with a DIMS licensee under the definition of " <i>associated</i> " set out in clause 11(1) - for example they will be accustomed to acting in accordance with the wishes of the DIMS licensee. A modified definition of " <i>associated</i> " should apply for the purposes of clause 426.
426(3)	Requirement for custodian	Clause 426(3) provides that a DIMS licensee is jointly and severally liable with any custodian for the holding of the investor property in accordance with subpart 6 of the FMCB. Clause 426(3) should not apply where the custodian has been appointed in accordance with the requirements of the FMCB.
428 and 429	Application of regulations made under this subpart; regulations regulating the holding and application of investor funds and property by derivatives issuers	<p>Clause 428 contemplates that regulations made under clause 429 will apply to both regulated and unregulated offers and whether or not the derivatives issuer is licensed.</p> <p>Clause 429 contemplates regulations relating to (among other things):</p> <ul style="list-style-type: none"> ▪ the carrying on of the business of acting as a derivatives issuer (clause 429(a)). It is difficult to know what is contemplated here, however, where the derivatives issuer is a registered bank any further regulation under this clause should be carefully considered in light of the existing regulatory requirements imposed on registered banks under the RBNZ Act; ▪ the receipt of money and property from investors by derivatives issuers and the application of that money and property (clauses 429(b)-(e)). Such provisions will not be appropriate in circumstances where the derivatives issuer is acting as principal and receives the investor's money/property in that capacity in respect of amounts payable under the

Clause Number	Clause heading	Submission
		<p>contract. Such provisions would also not be necessary where money/property is transferred to the derivatives issuer via an English law Credit Support Annex as legal title passes to the derivatives issuer in those circumstances. Accordingly, it would be contrary to the terms of the contractual relationship to require the derivatives issuer to hold such funds in separate investor accounts, for example.</p>
Part 7	Enforcement and liability	
Part 7	Enforcement and liability - general	<p>Overarching concerns with liability regime</p> <p>Westpac has four key concerns with the liability regime under the FMBC:</p> <ul style="list-style-type: none"> (a) The significant uplift in pecuniary penalties for individuals from a current maximum of \$500,000 under the SA to a minimum of \$1,000,000 under the FMBC is not warranted or justified. (b) Penalties for Part 2 contraventions are disproportionately high compared to other regulated industry sectors and businesses governed by the FTA regime. (c) The significant increase in the number of civil remedy and Tier 1 criminal provisions for technical, non-material breaches is unduly punitive. (d) The imposition of strict liability and removal of knowledge and material prejudice requirements for offences is not justified. <p>Onerous commercial implications</p> <p>Westpac's opposition to the way the liability is framed is illustrated by the points set out below:</p> <ul style="list-style-type: none"> (a) It is not appropriate to make directors personally liable unless they have direct knowledge or involvement in the contravention. As noted in Westpac's submissions on clause 55, the potential level of liability attributable to directors personally will stifle efficiency and innovation in the financial markets in New Zealand. (b) The lack of a knowledge requirement in many of these provisions and the absence of a materiality threshold (such as that previously set out in section 55C of the SA and section 42T(1)(c) of the SMA) means that issuers are at risk of litigation for a technical, non-material breach of the civil remedy provisions and/or criminal liability for any of the Tier 1 infringement provisions. (c) Although the infringement notice regime is intended to be similar to an (expensive) "<i>speeding ticket</i>", the ramifications for participants in international markets, particularly the USA, may be significant. (d) Litigation or an infringement notice under clause

Clause Number	Clause heading	Submission
		<p>474 may be required to be disclosed in due diligence for offshore capital fundraising programmes. This could put registered banks at risk of being unable to raise funds from offshore markets which is a disproportionate risk when the negligible impact on investors of a non-material breach is considered.</p> <p>Submissions on liability regime generally</p> <p>Accordingly:</p> <p>(a) Pecuniary penalties and criminal sanctions must be reduced to align with penalties and sanctions that apply to other regulated industry sectors.</p> <p>(b) For similar reasons, strict liability should apply to only a very limited number of offences.</p> <p>(c) The civil remedy and tier 1 criminal liabilities provisions should be revised so that they apply either only when the contravention is material or when the relevant person knew of the contravention in line with Westpac's submissions on clauses 55, 63, 462, 465 and 466.</p> <p>(d) At a minimum, the Court should have regard to the state of mind of the person(s) involved in the contravention when determining a penalty at the request of the FMA.</p> <p>(e) The time limits for applying for civil remedies under section 57E of the SA should be retained. There is no obvious justification for removing these timeframes.</p>
431	Meaning of contravene	The word " <i>includes</i> " in clause 431 should be replaced with the word " <i>means</i> " to provide an exhaustive (not inclusive) meaning for the term.
433	When FMA may make stop orders	<p>(a) The following amendments will ensure that a materiality threshold applies to all circumstances where the FMA may make stop orders:</p> <ul style="list-style-type: none"> ▪ insert the word "<i>material</i>" before the word "<i>error</i>" in clauses 433(a)(ii) and (f)(iii); ▪ insert the word "<i>materially</i>" before the word "<i>inconsistent</i>" in clauses 433(f)(ii); ▪ insert the phrase "<i>that is material to the offer of financial products to which it relates to</i>" to the end of clauses 433(a)(ii) and (f)(ii) and (iii); and ▪ insert the phrase "<i>in a way that is material to the relevant offer of financial products</i>" to the end of clauses 433(a)(iii) and (f)(iv). <p>(b) The words "<i>or regulations</i>" should be inserted after the word "Act" in s433(f)(iv) for consistency.</p>
436	FMA may make interim stop order pending exercise of powers	It is likely that an interim stop order of the kind contemplated in this clause (and the stigma that could attach to it) would have the effect of stopping any offer on a permanent basis. Under the current regime, that power

Clause Number	Clause heading	Submission
		<p>is reserved to the Court, and offerors have the benefit of all the usual procedural and substantive protections respondents to urgent interim injunctions have (apart from an undertaking as to damages). Those protections include the right to be put on notice and to be heard in all but the most urgent situations. No equivalent rights exist under clause 436 until after the interim stop order has been made.</p> <p>There is no obvious reason to deprive offerors of their existing rights to natural justice.</p> <p>The impact of this clause is exacerbated by the length of the "<i>interim</i>" period that is contemplated - potentially up to 30 working days. This time period is excessive and would likely prejudice any ability to resuscitate an offer subject to an interim stop order.</p> <p>The FMA's power to make any interim stop order should be:</p> <ul style="list-style-type: none"> ▪ limited to an interim period of no more than five working days; and ▪ only exercisable on reasonable notice with a right for the offeror to be heard (at least orally).
430, 438, 452 and 457	Part 6 licence provisions; when FMA may make direction orders; what are civil remedy provisions; maximum amount of pecuniary penalty	The various civil remedy provisions are referred to in list form in Part 7 of the FCMB. However, the lists relating to each Part of the FCMB are set out at the end of the relevant Part. There appears to be some inconsistency between these clauses. It would greatly increase the usability of the liability provisions if those lists were centralised in Part 7.
442	FMA must follow steps before making orders	See the submission on clause 436 above in relation to clause 442(2)(c).
456	When court may make pecuniary penalty orders	The existing requirement (in section 427 of the SMA) that the Court first be satisfied the contravention will materially prejudice or damage or be otherwise serious before it makes a pecuniary penalty order should be retained.
459	Considerations for Court in determining pecuniary penalty	In line with the submissions above, at a minimum, clause 459 should expressly require the Court to have regard to the state of mind of the person(s) involved in the contravention when determining a penalty.
462	Terms of compensatory orders	<p>This clause seeks to impose a new and unduly burdensome liability on underwriters.</p> <p>Underwriter liability was not referred to in any consultation documents or other commentary in relation to the FMCB. No policy basis for this significant change has therefore been identified.</p> <p>In the New Zealand context, in underwriting offers, and (if called upon) subscribing for financial products, underwriters rely on offer documents, and do not take responsibility for them.</p> <p>A concept of "<i>underwriter liability</i>" is fundamentally inconsistent with this role. It is a notion imported from other jurisdictions, where an underwriter plays a different</p>

Clause Number	Clause heading	Submission
		<p>role - a role where the underwriter assumes responsibility for the offer documents, due diligence and the success of the offer.</p> <p>If that role is to be imported to New Zealand, consultation with industry participants is required. If underwriters are required to assume liability for PDS contraventions, the cost of offers will rise - there will be more personnel, and more advisers, involved in due diligence and PDS preparation, and as the risks of underwriting increase, so will underwriting fees.</p> <p>This may impact on capital raisings in New Zealand, and certainly on the availability of underwriting (for example, from major shareholders).</p> <p>In the event underwriter liability is imposed, then:</p> <ul style="list-style-type: none"> ▪ a definition of "<i>underwriter</i>" is required; ▪ clause 462(5) should not apply. An underwriter should only be responsible for its own contraventions; and ▪ liability should be several - it is not uncommon for there to be more than one underwriter and the current drafting imposes liability on a joint and several basis. <p>There should be reduced limitation periods, for example three years.</p>
463	Person treated as suffering loss or damage in case of defective disclosure	<p>The objective of this clause (as stated in Request for Submissions at paragraph 37) is for investors not to have to prove actual reliance on a defective PDS or register entry and to create a new rebuttable presumption that "<i>materially adverse misstatements have caused a product's loss in value</i>".</p> <p>Such a significant departure from existing law (as set out in the FTA and the current securities regime) is not justified.</p> <p>As drafted, this clause has the (undesirable) potential to open the floodgates to multiple actions in New Zealand because investors are not required to provide evidence of reliance or loss.</p> <p>Based on the current wording, an issuer could not argue that an investor did not rely on the misstatement or that the misstatement did not cause the loss or damage. If it is determined that a reversal of the onus of proof is justified at a policy level, issuers should not be deprived of the ability to answer a case against them by raising these arguments which relate to loss or damage generally, as opposed to being limited to arguments over the (potentially artificial) concept of a decline in value.</p> <p>The approach taken in this clause can be contrasted with the new Australian consumer law regime, which does not go so far as to remove the burden on a consumer to prove any form of loss or even any connection between the breach and the loss (for example, see the Competition and Consumer Act 2010 (<i>Australia</i>)),</p>

Clause Number	Clause heading	Submission
		Schedule 2, s137(3) which deems the supply of service to be the cause of loss or damage once a consumer establishes (1) loss; and (2) that " <i>but for</i> " the breach they would not have purchased the services).
462, 465 and 466	Terms of compensatory orders; due diligence defence; general defences	<p>Westpac refers to its submissions on clause 55.</p> <p>(a) Consistent with those submissions, clauses 462, 465 and 466 unfairly and unnecessarily expose directors of issuers/offers to liability and impose an increased burden on those directors, particularly in circumstances where the issuers/offers offer and issue financial products as part of their ordinary business.</p> <p>Under the Corporations Act individual director consent is not required for the lodgement of a PDS for derivatives or unquoted managed investment products.</p> <p>In addition, under clause 1022B of the Corporations Act, a director is only personally liable for a defective PDS if it can be established that the director:</p> <ul style="list-style-type: none"> ▪ was involved in the preparation of the PDS; ▪ directly or indirectly caused the PDS to be defective; or ▪ contributed to the PDS being defective. <p>This regime should be reflected in the FMCB.</p> <p>(b) In addition:</p> <ul style="list-style-type: none"> ▪ clauses 465(1)(b) and 465(2)(b) should be deleted, or revised so as to make it clear that they do not require individual director review of the relevant document; and ▪ clause 466(1) should be altered to permit reasonable reliance on employees and agents. <p>These revisions are required to ensure the FMCB is consistent with clause 138 of the Companies Act 1993.</p> <p>(c) Finally, the defences set out in clauses 465 and 466 should be available as a defence to:</p> <ul style="list-style-type: none"> ▪ declarations of contravention under clause 453; ▪ pecuniary penalty orders under clause 456; ▪ other civil remedy orders under clause 467; and ▪ contraventions of clause 409.
478	Offence of knowingly or recklessly contravening prohibition on further offers where defective disclosure in PDS or register entry	Indirect accessory liability under clauses 431(e) and (f) for a contravention should not be a tier 4 criminal offence unless there is actual knowledge.

Clause Number	Clause heading	Submission
Part 8	Regulations and exemptions	
503	Regulations for the purposes of Part 6 (market services)	Please refer to the submissions in relation to Part 6.
512(1)(d)	FMA may designate financial products and offers	The FMA should not have the ability to declare that an offer, which would not otherwise require disclosure under Part 3 because of an exclusion under Part 1 of Schedule 1, requires disclosure. This is will create significant uncertainty for issuers as until the relevant financial product is issued (see clause 514(a)), there will potentially be a risk that notwithstanding that an exemption applies, the FMA will declare the offer does require disclosure.
515	FMA may make interim orders pending exercise of powers	Please refer to the submission relating to clause 436.
Part 9 and schedule 4	Miscellaneous provisions	
553	New section 5A substituted	If the intention is for the FMCB to be a complete scheme in relation to misleading and deceptive conduct in financial markets then clause 553 must completely override the application of the FTA wherever the FMCB creates obligations relating to misleading or deceptive conduct or false or misleading representations and not just in Part 2. Clause 553 should be redrafted as follows: <i>"Misleading or deceptive conduct or false or misleading representations Conduct that contravenes Part 2-any Part of the Financial Markets Conduct Act 2011 does not contravene any of sections 9 to 13 of the Fair Trading Act"</i> .
554	Principal Act Amended	Extensive notes are included in subpart 5 of Part 9 of the FMCB in relation to licensing for providers of DIMS, explaining the proposed licensing regime and the intended overlap with the FMCB and the FAA. It is not clear why financial service licences should be split across these two Acts and why there is not simply a requirement that a provider of a DIMS be licensed in accordance with the FAA (particularly as that Act is to be amended to reflect the substantive requirements of licensees under the Act). In addition, this seems to ignore that some DIMS licensees may have obligations under the FAA. A split of the type currently contemplated by the FMCB will encourage regulatory arbitrage. In addition, Westpac has significant reservations about the requirement for another form of licence to operate its businesses in New Zealand. WBC and/or WNZL are currently licensed by the RBNZ in respect of their banking activities and the submitters have also formed a QFE group under the FAA in respect of their financial advisory services. In Australia, only one licence is required to

Clause Number	Clause heading	Submission
		perform those - and other - functions. Westpac requests that further thought be put into reconciling these regimes and what, conceptually, it is that each of the various regimes seek to achieve and whether they could, in the case of registered banks at least, be amalgamated.
555	Interpretation	The definition of " <i>promoter</i> " is not required in the FAA and can now be deleted.
570	Amendments to Trustee Company Act 1967 and Public Trust Act 2001	<p>Clause 570 foreshadows amendments to the Trustee Companies Act 1967 and the Public Trust Act 2001. It appears that these amendments are designed to restrict the use of GIFs to the internal management of estates and assets in a trustee company's possession and to prevent the making of a regulated offer of a managed investment product in a GIF.</p> <p>Restricting the use of GIFs in this manner appears to be contrary to the underlying intention of the FMCB (as reflected in clause 108) to provide a common set of governance requirements for all managed investment schemes, irrespective of their legal form. It also appears contrary to the "<i>additional purposes</i>" in clauses (4)(c) and (d), which are to avoid unnecessary governance costs and to promote innovation and flexibility in the financial markets. Externally managed GIFs in particular should remain available for use as investment vehicles in their current form.</p> <p>There are issues relating to the implications of these changes for existing GIFs. In particular, unless provision is made allowing those GIFs already in existence to continue in their current form, considerable cost will be incurred in the restructuring or the winding up of these GIFs, with no apparent benefit for investors. This is relevant to WNZL as BT Funds currently offers a GIF known as the Westpac Mortgage Investment Fund ("BT Funds GIF"). The BT Funds GIF is primarily invested in first mortgages over residential property in New Zealand, was established in 2005 and currently has over 5,600 unitholders. The New Zealand Guardian Trust Company Limited is trustee of the BT Funds GIF. As at 30 June 2011, the total net assets of the Fund were \$365 million.</p>
574	Issuer may elect to comply with former enactments instead of this Act if prospectus registered within 6 months of commencement	<p>MED engagement with issuers is required to fully assess the required transition period. Managed investment schemes that currently have a prospectus and investment statement are likely to require a period of at least 18 months (from the date the regulations pertaining to the PDS and register are finalised) during which they can continue to issuer under a prospectus and investment statement.</p> <p>In addition, the transitional provisions should address timeframes within which client agreements are required to be in place under clause 412 in respect of existing clients, if such agreements require any changes in order to comply with the FCMB.</p>

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582	Authorised dealers treated as holding market services licence	The transitional provisions in relation to authorised futures dealers are helpful, but there appears to be a gap in the transitional regime. The Authorised Futures Dealers Notice (No. 3) 2007 only authorises registered bank in relation to "futures contracts". Section 37(2) of the SMA excludes certain contracts from the definition of futures contracts (such as, currency swaps and interest rate swaps with registered banks). The transitional provisions at clause 582 should be extended to cover contracts referred to in section 37(2) of the SMA.