ANZ National Bank Limited Submission on the Financial Markets (Regulators and KiwiSaver) Bill 211-1 2010

1. Introduction

1.1 ANZ National Bank Ltd ("ANZ New Zealand") is the largest financial institution in New Zealand. ANZ New Zealand comprises brands including ANZ, The National Bank of New Zealand, UDC Finance, OnePath, EFTPOS, Direct Broking Ltd and Bonus Bonds.

1.2 ANZ New Zealand offers a full suite of financial products and services that will fall under the new Financial Markets Authority (**FMA**), including investment products, term deposits, managed funds, KiwiSaver, on call accounts, personal banking, institutional banking, financial advisory and wealth management services.

1.3 ANZ New Zealand supports the intent of the Financial Markets (Regulators and KiwiSaver) Bill (**the Bill**) and the establishment of the FMA. We acknowledge the steps being taken by successive governments and the Ministry of Economic Development to restore confidence in New Zealand's capital markets through the review and consolidation of securities regulation and enforcement.

1.4 ANZ New Zealand considers that securities regulation should deliver appropriate consumer protection, whilst at the same time offering effective and efficient markets operation.

1.5 ANZ New Zealand supports the need for reform and believes that it should be undertaken in a measured fashion with adequate consultation with market participants, to ensure that the changes support the objectives rather than undermine them.

2. Executive Summary

2.1 ANZ New Zealand supports the establishment of the FMA and its objectives. In particular, we agree with the Government that there is value for market participants in having a consolidated regulator.

2.2 ANZ New Zealand agrees with the Capital Market Development (**CMD**) Taskforce Report that the role of government regulation in respect of capital markets should be to provide, "regulatory settings that produce the best choices and outcomes for investors and issuers, and an environment that encourages capital markets and growth".[1]

2.3 For the most part, ANZ New Zealand believes that the Bill goes a considerable way towards the achievement of the above objective.

2.4 ANZ New Zealand considers however that, to be effective in providing the optimum outcomes for investors and issuers, the Bill's proposed market regulation changes need to be more tightly co-ordinated with the wider reforms currently being contemplated to securities laws and consumer laws. If this is not done potentially many of the benefits of consolidation will be lost.

2.5 ANZ New Zealand is also concerned that in some key areas the changes being contemplated by the Bill will not in fact produce, "the best choices and outcomes for

[1] Report of the Capital Market Development Taskforce, December 2009, p9.

investors and issuers, and an environment that encourages capital markets and growth".[2] Indeed if not altered, the proposed changes could have a detrimental effect.

2.6 The first concern is the proposal to give the FMA the right to take court action and control proceedings on behalf of others, without their consent. This potentially may not meet the needs or positions of individual investors and effectively imposes an "opt out" regime whereby people must either act or forego their rights. ANZ New Zealand believes an "opt in" provision, where the FMA must seek the consent of those on whose behalf it wishes to act is more appropriate.

2.7 ANZ New Zealand is also concerned at the proposals in the Bill to subject directors in the financial services industry to a different, and potentially harsher, regime than that imposed on directors in other sectors.

2.8 ANZ New Zealand believes that the proposed inconsistency in the directors' policing regime is unnecessary, given existing regulation around all directors' liability. It is also inappropriate, at least in the case of registered banks, given the oversight on directors already in place from the Reserve Bank of New Zealand. ANZ New Zealand also believes this proposal may inhibit people from becoming directors in the financial sector. This would be unfortunate, especially as the CMD Report specifically identified that many New Zealand businesses already "lack high-quality governance".[3]

2.9 ANZ New Zealand believes giving the Minister the power to request an FMA inquiry and report on any matter relating to financial markets and participants is contrary to conventional governance controls. The power may compromise the independence of the FMA and could open the Minister to accusations of political interference in commercial matters.

2.10 ANZ New Zealand believes an industry levy to fund the FMA's operations cannot be justified as it is inconsistent with how other regulators are resourced.

2.11 ANZ New Zealand supports the ability of the FMA to investigate matters appropriately. However we are concerned that the proposed FMA search powers will extend to all possible contraventions of all financial markets statutes. We do not believe such powers are required for all such legislation as most investigations can be conducted through conventional means for example. In addition the proposed powers need to take account of the right to privacy and commercial sensitivity considerations.

2.12 Overall, ANZ New Zealand supports the suggested changes to the prospectus regime and KiwiSaver schemes. However, we are concerned that the new "notice and pause" prospectus registration system, which we support in principle, is unworkable for continuous issuers. We suggest either that the FMA should be empowered to continue with the existing process until the implementation of the new securities legislation, or that a class exemption be given for continuously issued securities.

3. FMA Objectives (Part 2 of the Bill)

3.1 ANZ New Zealand supports the Bill, the establishment of the FMA and its main objective of promoting fair, efficient, and transparent financial markets (cl8). However, we are concerned that the Bill makes some fundamental changes to the regulatory landscape in the absence of sufficient time being taken to ensure these changes are properly co-ordinated with other major finance sector reforms. For example, we question whether it

[2] Report of the Capital Market Development Taskforce, December 2009, p9.
[3] Report of the Capital Market Development Taskforce, December 2009, pp68-69.

is appropriate for the FMA changes to be considered ahead of and not in conjunction with the major changes planned for both securities law and consumer law.

3.2 In support of this point, we note the view expressed in the CMD Taskforce Report that, "[a]dministrative responsibility for policies that impact on capital markets is distributed across a number of agencies" and that, "[t]his situation gives rise to the potential for uncoordinated, and at times contradictory action by government".[4] We believe that to be effective regulatory changes need to be considered collectively and thought through, with all options identified and evaluated and the parameters of each regulator's powers clearly articulated. For this process to be meaningful there also needs to be full consultation with stakeholders across the entire range of financial markets and consumer law reforms.

3.3 If this is not done, ANZ New Zealand is concerned that regulators will remain vulnerable to accusations of oversight, duplication and error. The legislation they are trying to administer will continue to be revisited and amended, stymieing enforcement agencies and leaving financial markets participants and consumers in a state of confusion and uncertainty.

3.4 In short, ANZ New Zealand believes strongly that unless a more considered process is followed with all the proposed reforms, they are unlikely to deliver the best outcomes for investors or issuers, or to achieve the regulatory cost efficiency and investor confidence gains sought by the CMD Taskforce.

3.5 We also believe that the FMA's proposed search powers should be considered alongside, rather than ahead of, the recent changes to the Search and Surveillance Bill.

4. FMA Structure (Part 2 of the Bill)

4.1 We see real value for both market participants and investors in having a consolidated regulator and regulation for the financial sector. This provides clarity and offers seamless regulatory coverage, hopefully removing the risks of gaps and duplication. To that end, we think it would be helpful if the Bill made it clear that the FMA is the appropriate regulator for the financial markets sector, covering all financial services and products, including for example financial advertising (except perhaps in unusual circumstances which need to be clearly articulated).

4.2 In addition, it would be useful to specify that there should only be liability for conduct under the Fair Trading Act 1986 if such conduct would also be in contravention of financial markets legislation – as defined in the Bill (akin to s63A of the Securities Act 1978 and s5A of the Fair Trading Act 1986). This would assist in the alignment of general consumer and financial markets laws and ensure that specialist financial regulation governs the financial sector. The suggested specification as to liability will also result in more efficient and effective determinations and outcomes. This will be of benefit to financial markets participants and regulators

5. FMA Inquiry Powers (Part 2, Clause 20 of the Bill)

5.1 ANZ New Zealand believes that clause 20 is potentially an issue as it allows the Minister of Commerce to request the FMA to inquire into and report on any matter relating to financial markets and financial market participants.

5.2 Giving the responsible Minister these powers is highly unusual in terms of a Ministerial relationship with an independent Crown Entity like the FMA. Such entities are legally

[4] Report of the Capital Market Development Taskforce, December 2009, pp9-10.

separate from the Crown and are meant, quite deliberately, to operate at arms length from the responsible or shareholding Minister(s).[5]

5.3 ANZ New Zealand strongly suggests these powers be reconsidered. Requiring the FMA to act at the direction of the Minister could be seen to compromise the FMA's independence and credibility alike. It might also open the Minister to accusations of political interference in the FMA's affairs and its investigations.

6. FMA Search Powers (Clause 29, Part 3 of the Bill)

6.1 Clause 29 gives the FMA powers to enter and search premises and seize documents and electronic data if there are reasonable grounds to believe that a person has engaged in conduct that is, or may be, in contravention of any financial markets legislation, and the search will produce evidential material.

6.2 This is a fundamental change from the status quo. The search powers currently available to the Commerce Commission are only in respect of the Commerce Act 1986 and are traditionally used to investigate the serious and covert offence of price fixing. The Commerce Commission has never had these powers to investigate matters such as Fair Trading Act breaches.

6.3 By contrast, the proposed FMA search powers will extend to *all* possible contraventions of *all* financial markets legislation, including both deliberate and inadvertent conduct, and both civil and criminal matters (such legislation is listed in schedule 1 and includes the Companies Act 1993, the Financial Advisers Act 2008, the Unit Trusts Act 1960 as well as the Securities Act 1978). This would allow the FMA to conduct a search to investigate an allegedly misleading advertisement for example. It is not clear why such powers are needed for all such legislation, nor why such investigations cannot be conducted effectively through conventional mechanisms, such as information requests and interviews.

6.4 ANZ New Zealand supports the ability of the FMA to investigate matters fully, which we believe it could do, and meet the Bill's intended objectives, by utilising the Securities Commission's current powers. However, the power to search another person's private property is fundamentally intrusive and needs to be balanced against that person's right to privacy and commercial sensitivity concerns. Search powers are controversial and must be properly debated to ensure they are not over reaching, especially in relation to non-criminal matters. For example, it is not clear how privileged information would be identified and protected during a search. The need for caution is reflected in the Search and Surveillance Bill. This has been rewritten to scale back the expanded search powers originally given to regulators regarding that Bill's business-related search, surveillance and seizure provisions.

7. FMA Civil Litigation Powers (Sub-part 3 of the Bill)

7.1 Clause 34 would allow the FMA to exercise a person's right to bring civil proceedings (or take over existing proceedings) under any financial markets legislation and any other "proceedings seeking damages or other relief for fraud, negligence, default breach of duty, or other misconduct" if the FMA considers it in the public interest to do so. This is a fundamental change from the status quo. In principle ANZ New Zealand supports the ability of the FMA to take action on behalf of others. But we believe it is in the interests of all financial markets participants that this is a considered process with appropriate checks and balances.

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[5] See s7 of the Crown Entities Act 2004.

7.2 Our first concern is that those investors, on whose behalf the power is being exercised, are not disadvantaged and can retain some control over the proceedings. We note the FMA can act on another's behalf unless they object, or, if they object, with a court order. It need not obtain their consent. This effectively imposes an "opt out" regime, whereby people must act or forgo their rights. We note that in the United Kingdom proposed opt out provisions proved controversial and were dropped from their Financial Markets Act this year before the Act was passed.

(a) Requiring further attention is the lack of control such persons may have over the proceedings. The Bill gives the FMA discretion over whether to consider their interests and ranks them below other considerations. Sub-clause 34(3) simply says that in exercising this power the FMA "may take into account" their interests and those of shareholders. Sub-clause 34(4) then lists other mandatory considerations, effectively giving the latter priority. For example the FMA could take action against the directors of a company, without the agreement of shareholders, and could decide to place the shareholders' interests below other concerns.

(b) In addition the underlying claimants, who have not opted into the proceedings, can be required to contribute to the costs of the claim and may be bound by any settlement reached, even though they have not actively agreed to the FMA acting on their behalf and may not benefit from the outcome.

(c) To address this, ANZ New Zealand thinks an opt-in regime, whereby the FMA must seek the consent of those on whose behalf it wishes to act, is preferable. Alternatively, the FMA should be required to seek the consent/certification of the High Court prior to commencing such actions. We would also suggest that the interests of the underlying claimant(s) should be a mandatory consideration, at least to be balanced with other factors by the FMA.

7.3 Our second concern is that this power imposes an additional layer of enforcement upon the directors of financial services providers. It effectively makes them subject to a different regime and potentially different and higher standards from directors in other sectors. This creates an inconsistent approach to governance.

(a) A potential negative side effect may be to deter people with the appropriate credentials from the directorships of financial services providers. This risk has been acknowledged by the Ministry of Economic Development.[6] Further those who do take up the challenge may act in an unduly cautious and risk adverse fashion, stifling necessary growth and innovation in the financial markets.

(b) In addition, placing an extra level of enforcement on financial services directors does not take into account that, at least in the case of registered banks, directors and senior managers are already subject to higher standards of oversight and approval with respect to their duties and obligations, from the Reserve Bank of New Zealand.

7.4 Lastly, imposing additional obligations on directors could well undermine New Zealand's high ranking in terms of the "ease of doing business". [7]

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[6] See the Regulatory Impact Statement "A Power for the FMA to Exercise an Investors Right of Action" prepared by the Ministry of Economic Development in 2010 (undated).

[7] The Report of the Capital Markets Development Taskforce, December 2009, p12.

8. FMA Power to Levy (Part 4 of the Bill)

8.1 Clause 63 provides for a levy to be raised from participants in the financial markets to part fund the FMA.

8.2 ANZ New Zealand believes an industry levy to fund the FMA's operations cannot be justified as it is inconsistent with how other regulators are resourced.

9. Notice and Pause Prospectus Regime (Part 5 of the Bill)

9.1 The Bill introduces a new "notice and pause" system for prospectuses. We support this, provided that it is practical to apply it to continuously issued securities. For ANZ New Zealand this includes: unit trusts, superannuation schemes (including KiwiSaver) and debt securities.

9.2 Clause 97 allows the FMA to consider whether a prospectus complies with the Securities Act and Regulations and whether it is false or misleading for up to five to 10 days after registration (the **Consideration Period**). No allotments may be made or subscriptions received under that prospectus during the Consideration Period (cl97 of the Bill, new s43D of the Securities Act 1978).

9.3 ANZ New Zealand would typically receive multiple subscriptions from new or existing customers during this Consideration Period. For example, direct debits, automatic payments, payments from the IRD for KiwiSaver etc. It is not be feasible to stop these. Accordingly, under the new regime we would need to register a second renewed prospectus (**Renewed Prospectus**) at least 10 days before the first existing prospectus (**Existing Prospectus**) expires so that subscriptions could continue without interruption.

9.4 This means there could be two 'live' prospectuses for a single product during the Consideration Period. If that is intended, the Bill should confirm that. This somewhat odd possibility raises the following issues:

(a) Having two registered prospectuses would be very confusing for investors. They may not know which prospectus to refer to and rely on. This complexity is illustrated by the requirement on issuers to include a website statement about the registration of the Renewed Prospectus promptly after receiving a registration certificate (cl97 of the Bill, new s43B of the Securities Act 1978). Under the proposed regime the website statement would need to explain that an Existing Prospectus is currently in force but, that there is also a Renewed Prospectus which will take effect shortly at the end of the Consideration Period.

(b) Having two prospectuses may require two investment statements. Most products need an investment statement and it must not be inconsistent with the relevant registered prospectus (s38F of the Securities Act 1978). On the basis of the two prospectus scenario, the existing investment statement would continue to be distributed during the Consideration Period. Then when the Renewed Prospectus comes into force a new investment statement would have to be created and distributed. Again this will be very confusing for investors and the issuer's staff and will cause administrative problems in terms of managing stock, printing deadlines etc.

(c) We question whether it is appropriate to implement this significant change at this time when prospectuses and investment statements may well be replaced by single product disclosure statements (**PDS**) (the Ministry of Economic Development's preferred option in the Review of Securities Law Discussion Paper).

While we support a Consideration Period, it would be simpler and more efficient to wait for the introduction of a PDS regime before commencing this and make just one not two sets of changes.

(d) The notice and pause system will also cause delays in the registration of memorandum of amendments to a prospectus (**MOAs**). MOAs are generally used to make small changes to an Existing Prospectus, for example to reflect legislative developments. Currently MOAs can be registered swiftly and it is common not to submit a MOA for pre-registration review at the Companies Office for vanilla changes. The new system will add up to 10 days to a process which currently occurs without delay. For material changes this could result in a continuous issuer not being able to allot or accept subscriptions during the Consideration Period.

9.5 We have identified two alternatives to the current proposal:

(a) We appreciate that the pre-registration approval process cannot remain with the Companies Office, but suggest that the existing registration process be moved to the FMA until the implementation of new securities legislation.

(b) If Option 9.5(a) above is not acceptable, perhaps a class exemption from the Consideration Period could be given for continuously issued securities. We note that the FMA already has the power to waive the Consideration Period in particular cases (cl97 of the Bill, new s43E(2)(b) of the Securities Act 1978). Preferably such an exemption would be included in the Bill for certainty. Alternatively it could be granted by way of a Class Exemption Notice.

10. Register of Securities (Clause 98, Part 4 of the Bill)

10.1 ANZ New Zealand encourages the implementation of a securities register to provide additional information for investors.

10.2 We note that an issuer must promptly notify the Registrar of any relevant changes to register information and that this includes a change to any promoters (cl98 of the Bill, new s43Q (1)(a) of the Securities Act 1978). This could inadvertently create an expectation that a promoter change must also trigger an immediate prospectus amendment. Currently a prospectus amendment would only occur if the promoter change resulted in the prospectus being materially misleading (in breach of s37A(1)(b) of the Securities Act 1978). Otherwise, the list of promoters would be updated in the next scheduled prospectus renewal. To avoid an additional administrative burden for immaterial changes, we would like to preserve the current practice and ask that the Bill clarifies this.

11. KiwiSaver Changes (Part 7 of the Bill)

11.1 We support the proposals to align KiwiSaver schemes with unit trusts from a structural perspective, however it would make sense to introduce these changes when the new securities legislation takes effect in 2012. This would ensure that a consistent approach is taken to all collective investment schemes. It would also enable an orderly transition to the new regime and clarify the role of trustees (after the Securities Trustees and Statutory Supervisors Bill has come into effect and trustee licensing requirements are apparent).

11.2 We have also identified the following areas of ambiguity which require further clarity;

(a) The Bill allows the Manager to appoint an administration manager and/or an investment manager to undertake some of the scheme's functions (cl173 of the Bill, new s116D of the KiwiSaver Act 2006). Presumably this express authority does not prevent the manager from delegating other scheme functions, if permitted by the trust deed?

(b) The Bill requires the Manager to act in the best interests of the scheme's members when performing their functions (cl206 of the Bill, new KiwiSaver rule 1C). However, some trust deed powers are designed to operate for the benefit of the manager and the trustee, rather than members e.g. the power to charge fees and recover expenses. It should be clarified which powers need, and need not, be exercised in the best interests of members.

(c) There is uncertainty regarding the scope of the trustee's role now that it has a supervisory element. For example, the trustee must 'approve' the audited annual accounts for a KiwiSaver scheme (cl177 of the Bill, new s120 of the KiwiSaver Act 2006). But it is not clear what this 'approval' entails. In addition, one of the trustee's broad functions is to 'supervise the manager's performance' (cl206 of the Bill, new KiwiSaver rule 1B). This has the potential to go beyond supervision and require the trustee to fully assess all of the manager's current activities. This could create an undue burden and cost on the trustee. It may also be inappropriate for a trustee to be 'second guessing' a fund manager's specialist activities, where the trustee will generally not have this expertise.

11.3 ANZ New Zealand asks that the following matters be considered in respect of the proposed KiwiSaver changes:

(a) The Bill does not contain any express provision permitting trustees to continue the practice of holding assets through a nominee. This could create difficulties for funds that invest in foreign securities. Some countries only permit their securities to be held by locally registered entities. A New Zealand trustee will often not be registered offshore and so will use a bare nominee to meet this requirement (which does not compromise the interests of investors). To provide certainty we suggest that this be expressly permitted.

(b) The new disclosure document requirements will add significant costs to the schemes (which are likely to be passed on to investors), even though the disclosures will not materially benefit investors. Instead of amending disclosure documents we suggest that a cover note or an insert be included with them, giving a simplified explanation of the structural changes to KiwiSaver schemes, and what this means for investors.

(c) There must be sufficient transition time to implement the required changes, including a window allowing schemes to move to the new arrangements. ANZ New Zealand suggests that the implementation of the new securities laws would be an appropriate transition date.

(d) Steps should also be taken to ensure that trustees are not inadvertently treated as "promoters" on the basis that they were originally "instrumental" in the formulation of the relevant schemes. We understand this is not the Bill's intention.

(e) Care needs to be taken to ensure that the Financial Reporting Act 1993 responsibilities are satisfactorily transferred from the trustee to the manager.

12. Appearing before the Select Committee

12.1 ANZ New Zealand would be grateful for the opportunity to appear before the Select Committee in support of our submission.