SUBMISSION

TO THE

COMMERCE SELECT COMMITTEE

ON THE

Financial Markets (Regulators and KiwiSaver) Bill

10 November 2010

Introduction

1. This Submission is from Trustee Corporations Association of New Zealand Inc ("TCA"). We are available to meet with the Commerce Committee to discuss our Submission. We can be contacted at:

   Trustee Corporations Association of New Zealand Inc
   Level 12
   City Chambers
   Cnr Johnson & Featherston Streets
   PO Box 2382
   WELLINGTON 6140

   Ph: 04 499 6791
   Attention: David Brown Douglas

2. TCA is a long established voluntary association to which all Trustee Corporations belong. The members of the TCA are Public Trust and each of the Trustee Corporations authorised under the Trustee Companies Act 1967 to act as Corporate Trustee for financial products – being Trustees Executors Limited, The New Zealand Guardian Trust Company Limited, New Zealand Permanent Trust Limited (wholly owned by Public Trust) and Perpetual Trust Limited. Covenant Trustee Company Limited, although not authorised under the Trustee Companies Act 1967, is an associate member of the TCA.

3. TCA members also provide prudential supervision of a wide range of investment products and financial arrangements in a number of ways and at various levels. In certain instances, fund managers must appoint a Corporate Trustee to meet regulatory requirements before they can offer a financial product to the market.

4. Where a Corporate Trustee has been appointed in relation to a financial product, investors can take comfort from the fact that a competent, independent and professional organisation is there to supervise their interests. As at 30 June 2010, Corporate Trust funds under supervision by TCA members exceeded $159b.

5. TCA maintains relationships with government ministries, regulatory bodies and financial sector groups. TCA sets minimum standards as practice guidelines for the performance of Corporate Trustees – standards for integrity, competence, financial capacity, internal controls, powers and duties, standards for conflict of interest management and for reports from scheme operators.

6. Trustee Corporations also often associated with drawing up wills and handling estates, a service know as Personal Trusts. TCA contends that its members are uniquely qualified to fill this important role which requires independence, experience, professionalism and above all a focus on investor and beneficiary protection.

7. TCA appreciates this opportunity to comment on the Bill.

TCA's General Comments

8. TCA is supportive of the intent behind the Financial Markets (Regulators and KiwiSaver) Bill ("Bill").

9. The establishment of the Financial Markets Authority ("FMA") as a consolidated market conduct regulator will assist in restoring investor confidence in the capital markets by bringing together regulatory functions that are currently fragmented across a number of different organisations. The appropriate exercise of its broad powers will be important in establishing the FMA's credibility in this role.

10. TCA welcomes the changes brought about in the Bill regarding the duties and obligations of KiwiSaver Trustees and Managers to investors, the enhanced reporting requirements and the move to a regime where the KiwiSaver fund manager is the issuer under the Securities Act 1978. While it is acknowledged that the changes are not proposed to apply to 'restricted' KiwiSaver Schemes or non KiwiSaver Schemes, TCA advocates such Trustees should be brought within the Trustee supervisory model as part of the wider review of securities law.

11. In this regard, TCA particularly supports the formal recognition of the separation of the functions of fund manager and Trustee in relation to non-restricted KiwiSaver Schemes. This will mandate what is already considered best practice in the sector and the model that is almost universally deployed elsewhere in the world. It will also bring the regime for KiwiSaver Schemes structures in line with that for unit trusts resulting in regulatory consistency between those types of collective investment vehicles.

TCA's submission

Licensing of restricted KiwiSaver and Superannuation Trustees

12. TCA submitted, at the time the Committee was considering the Securities Trustees and Statutory Supervisors Bill ("STSS Bill"), that every Trustee which supervises the issue of securities to the public should be fit and proper and licensed, so as to ensure that investors have the benefit of a suitable frontline regulator regularly monitoring compliance with governing documents and the investor protection provisions contained therein. We remain firmly of this view.

13. We note the proposal in the explanatory note to the Bill, that after the STSS Bill is passed into law, the Bill will be amended so as to bring Trustees of non-restricted KiwiSaver Schemes within the STSS Bill's licensing regime. However, Trustees of restricted KiwiSaver Schemes and Superannuation Schemes, such as standalone employer sponsored schemes, industry based schemes and schemes under Master Trusts offered by financial institutions, currently fall outside the scope of this proposed amendment and so will not be subject to licensing.

14. We strongly argue that Trustees of restricted KiwiSaver Schemes and Superannuation Schemes should be brought within the licensing regime. We note that the Committee supported bringing retirement villages within the ambit of the STSS Bill's licensing regime on the basis that a person with an interest in a retirement village should not be

subject to a lower level of protection than an investor in a security. TCA welcomes that move and suggests that it follows logically that Trustees of restricted KiwiSaver Schemes and Superannuation Schemes should also come within that licensing regime. We see no good reason why investors in those kinds of schemes should receive a lower level of protection than investors in other kinds of investment and savings products.

15. For the avoidance of doubt, while we strongly support bringing restricted KiwiSaver Schemes within the ambit of the STSS Bill's licensing regime, we do not suggest that they should be subject to the new requirements, to be brought in by clause 173 of the Bill, requiring separation of the Manager and Trustee functions. We acknowledge that restricted KiwiSaver Schemes and Superannuation Schemes are of a different nature to non-restricted KiwiSaver Schemes. The Bill recognises these differences by imposing different requirements for restricted KiwiSaver Schemes, such as the ability to have more than one Trustee.

16. Many restricted KiwiSaver Schemes and Superannuation Schemes have a number of individual Trustees representing different interests. These might include union appointed representatives, employee elected representatives, employer appointed representatives, as well as independent Trustees. Unlike the single Trustee model for non-restricted KiwiSaver Schemes, the skill sets of some of these Trustees may not extend to the professional management of assets. The current licensing regime proposed by the STSS Bill can be applied in an appropriate way recognising the strengths of the model.

17. In our view, licenses should be available for Trustees of Superannuation Schemes and restricted KiwiSaver Schemes as an unincorporated body. The individual Trustees act together to make decisions relating to the scheme and it is therefore appropriate that they be licensed as a group, rather than as individuals. We note that this approach is consistent with the registration requirements under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

18. As a consequence of group licensing, the test applied by the Securities Commission/FMA under clause 15(1) in deciding whether to grant a license, namely 'whether the applicant is capable of effectively performing the functions of Trustee or statutory supervisor in respect of the securities covered by the license', should be determined by reference to the Trustees as a group, rather than as individuals.

19. Clause 15(3) of the STSS Bill sets out various criteria to which the Commission/FMA must have regard when assessing an applicant's capability to effectively perform the functions of Trustee under clause 15(1). These include an assessment of the applicant's experience, skills, and qualifications and governance structure, and whether it has proper procedures in place to ensure compliance with licensing conditions and the issuer's compliance with the issuer's legal obligations. We consider that these criteria are an appropriate lens through which to assess restricted KiwiSaver and Superannuation Scheme Trustees' suitability for licensing but suggest that these criteria are addressed in a different manner than for other applicants. As a example they could be addressed as follows:

    (i) *Appropriate experience, skills, qualifications and governance structure*: It is unrealistic to expect that the Trustees have all of the necessary skill sets to

manage the scheme themselves. It is therefore important that the Trustee body can demonstrate that appropriate outsourcing arrangements have been entered into to ensure that the investment and administration functions of the scheme are conducted in a professional and businesslike manner. This would include, for example, demonstrating investment management and administration agreements were in place with reputable providers. We suggest that there should also be a requirement for the Trustee board to have at least two professional independent Trustees with appropriate experience, skills and qualifications within its membership.

(ii) *The applicant's procedures for ensuring that it complies with its licensing obligations and the issuer complies with its legal obligations*: Again, it is unlikely that the Trustees will have the necessary skill sets themselves. Accordingly, compliance would need to be demonstrated by showing that appropriate professional advice had been taken to ensure that robust processes dealing with these matters were in place. The appointment of at least two independent professional Trustees should assist in this regard.

(iii) *Independence of Trustee and issuer.* In the case of restricted KiwiSaver Schemes and Superannuation Schemes the Trustees are the issuer. The requirement for independence therefore does not make sense for these bodies and, in our view, should not apply.

20. Clause 173 of the Bill will introduce a new section 116B to the KiwiSaver Act 2006 restricting the number of Trustees for a non-restricted KiwiSaver Scheme to one. However, there is currently no requirement that the Trustee be a body corporate. Theoretically, this means a natural person could be appointed as Trustee of a non-restricted KiwiSaver Scheme. In our view, this is inappropriate. We submit this should be remedied by adding "that is a body corporate" to the end of the new section 116B(2) in clause 173 of the Bill.

Post-registration allotment moratorium and continuous issuers updating their prospectuses

Problem definition

21. The Bill amends the Securities Act 1978 to provide a new regime for the filing and review of prospectuses and amendments to prospectuses. Under the new sections inserted by clause 97 of the Bill:

(i) the Registrar of Financial Service Providers will be responsible for registering a prospectus or an amendment to a prospectus, and can only review whether a prospectus or amendment is in the correct form and the proper fees are paid (new ss42-43A); and

(ii) the FMA will be responsible for reviewing the substance of the prospectus or amendment for compliance with the Securities Act and its regulations, for false or misleading information, or for material omissions (new s43C).

22. Immediately after the Registrar registers a new prospectus or an amendment to a prospectus, there is a moratorium of five working days during which the issuer cannot allot any securities under the offer of securities that the prospectus or amendment

relates to ("allotment moratorium"; new s43D). During the allotment moratorium the FMA can review the substance of any prospectus before securities can be sold to the public. The FMA could take no action, lift the moratorium earlier, extend the moratorium to up to 10 working days, or exercise any of its other powers to protect investors.

23. This post-registration allotment moratorium creates a problem for issuers which are continuously issuing securities ("continuous issuers"). To explain:

    (i) A continuous issuer must continually update its prospectus so that the prospectus continues to comply with the Securities Act and its regulations, ensuring that the issuer can continue to allot securities. For example, the financial statements contained in prospectuses may need to be updated every six to nine months (existing s37A(1)(c)).

    (ii) If the issuer takes action to file a completely new prospectus for an offer of securities then, once the new prospectus is registered, it becomes the prospectus relating to the offer. This is consistent with the principle of an offer of securities having only one registered prospectus. Because that offer now has a newly registered prospectus, then under new section 43D(1) the issuer cannot allot securities under that offer during the allotment moratorium.

    (iii) Similarly, if a continuous issuer takes action to amend its prospectus relating to an offer of securities then, under new section 43D(2), once the amendment to the prospectus is registered, the issuer cannot allot securities under that offer during the allotment moratorium.

    (iv) Accordingly, a continuous issuer will have to pause trading, in most cases for 5 working days, every time that it updates its prospectus. This is the cases even when an issuer is updating its prospectus more than 10 working days before its prospectus would have become out of date under the Act and its regulations, meaning that, but for the update, it could have kept trading.

24. This problem will affect all continuous issuers.

25. The TCA welcomes the proposals for more intensive review of the substance of prospectuses and supports this role begin given to the FMA. The TCA also agrees that it is best for the Registrar to continue to have the role of registering a prospectus, and supports a post-registration allotment moratorium to allow the FMA to best perform its role, before securities can be sold to the public. However, the discussion of the allotment moratorium in the relevant Cabinet paper[1] and Regulatory Impact Statement (RIS)[2] do not appear to have considered the problem that the allotment moratorium creates for continuous issuers.

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1 "Creating a Financial Markets Authority and Improving KiwiSaver Governance and Reporting" (April 2010), page 23, paras 119-122. Available from http://www.med.govt.nz/templates/Page____45025.aspx

2 "Financial Sector Regulatory Agencies", pages 33-34.
Available from http://www.med.govt.nz/templates/Page____45025.aspx

26. The new regime for reviewing prospectuses and the associated post-registration allotment moratorium is based on the regime used in Australia. [3] However, continuous issuers in Australia do not have to update their registered prospectuses as often as continuous issuers in New Zealand. [4] In Australia the information in prospectuses that goes out of date most quickly, such as financial statements, can be filed with the Australian Securities & Investments Commission ("ASIC"), rather than being included in the prospectus itself. In such cases, the prospectus must state that this information is not found in the prospectus but is available from the ASIC. This allows issuers to file up to date information with the ASIC as required, without having to register an amendment to the prospectus itself (or register a new prospectus) and without being subject to the allotment moratorium.

Submission

27. The TCA submits that continuous issuers should not be subject to an allotment moratorium each time they update their registered prospectus. As currently drafted the Bill creates an unhelpful disincentive for continuous issuers to update their prospectuses, which could mean that investors do not have the most up to date information.

28. To resolve this problem, the Bill could amend the Securities Act to allow continuous issuers to update information as is done in Australia, without having to register an amendment to their prospectus (or registering a new prospectus) and without being subject to the allotment moratorium.

29. Alternatively, the new section 43D of the Securities Act could be amended to allow an issuer to continue to allot securities under the prospectus that was in place before an amendment or replacement prospectus was registered. It could also provide that, once the allotment moratorium is lifted, the previous prospectus can no longer be used. This would allow an issuer with an existing registered prospectus that is more than 10 working days from becoming out of date to continue to use that prospectus after it registers an amendment or replacement prospectus, and before the allotment moratorium is lifted. If the existing registered prospectus became out of date during the allotment moratorium for the amendment or replacement prospectus, then the existing provisions of the Securities Act and its regulations would operate to penalise the issuer if it continued to allot securities. If our submission on this point is accepted, we would be happy to provide input on such an amendment.

KiwiSaver Scheme financial hardship provisions

30. Under clauses 10 and 11 of Schedule 1 of the KiwiSaver Act 2006 a member may apply to the Trustee(s) to withdraw their accumulation on the grounds of significant financial hardship.

31. KiwiSaver is a long term savings vehicle. Over time, KiwiSaver will become more important as a way for New Zealanders to save for retirement. It is important that the integrity of the KiwiSaver regime, as a means of achieving this purpose, is not compromised.

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[3] Corporations Act 2001 (Aus), s727(3)

[4] Corporations Act 2001 (Aus), ss710-713.

32. In TCA's members' experience, the financial hardship provisions, excluding those relating to serious illness or permanent disability, have the potential to undermine KiwiSaver as a long term savings vehicle. Allowing the discretionary withdrawal of investments for reasons other than for serious illness or permanent disability is highly unusual in the context of the wider superannuation industry. The volume of hardship applications result in significant administrative time being wasted, adding to the costs of the scheme. We therefore submit that the hardship provisions, other than those relating to serious illness or permanent disability, should be removed.

33. TCA also has concerns about consistency in the approach to hardship applications. There are currently some 50 different KiwiSaver Schemes and therefore 50 different ways in which hardship applications are determined. This is leading to members 'shopping around' and transferring to those providers who have a reputation for being a 'soft touch'. In some instances, two partners, each belonging to a different scheme, will make hardship applications with the result that one partner's application is approved and the other denied. In TCA's view, this problem will only get worse as members' balances grow.

34. It makes sense to have consistency across schemes. The Inland Revenue Department already carries out a centralised determination function in relation to applications for contribution holidays. We submit that it would be sensible and consistent in the context of this function for it to take on the role of determining hardship applications. This could easily be achieved in the legislation by replacing the word 'Trustee' with the word 'Commissioner' in every place that it appears in clauses 10 to 13 of Schedule 1 of the KiwiSaver Act.

35. In the event that the Committee does not accept the submission that the Inland Revenue Department should take on the role of determining hardship applications, we submit that this responsibility should be transferred to the Manager. While this option does not have the attractiveness of consistency across all KiwiSaver Schemes, it would be consistent with the transfer of the various other responsibilities to the Manager as proposed in the Bill.

Bringing the restricted KiwiSaver Scheme structure closer to that for unit trusts

36. Clauses 172 and 173 of the Bill (amongst others) will formalise the structural separation of the Trustee and Manager in relation to non-restricted KiwiSaver Schemes. We welcome this move towards adopting the unit trust structural model for KiwiSaver and suggest three further matters to bring the KiwiSaver closer in line with that model.

Independence

37. Under the unit trust model, it is a requirement pursuant to sections 3 and 6C of the Unit Trusts Act 1960 that there be independence as between the Manager and Trustee. There is currently no such requirement proposed in the Bill for Managers and Trustees of KiwiSaver Schemes. In order to bring the structural model for KiwiSaver Schemes into line with that for unit trusts and to ensure that the proper operation of the Trustee model, we would suggest that an independence requirement analogous to that for unit trusts should be considered for non-restricted KiwiSaver Schemes.

38. Some TCA members leverage their experience in financial stewardship by offering back office functions to fund managers. Trustees are in a unique position to offer back office services such as unit pricing, fund accounting and registry functions because they hold, either directly or through a nominee, the assets of the scheme. Due to the efficiencies that such arrangements introduce and the fact that they in no way compromise the independence of the Trustee, we submit that any requirement for independence should be drafted in such a manner as to allow these types of arrangement to continue. We note that the independence requirements for unit trusts relate, by reference to income tax legislation (specifically, subparts YB and YC of the Income Tax Act 2007), to common ownership or control levels in the Trustee and Manager. We submit that this is the appropriate test of independence to adopt in respect of non-restricted KiwiSaver Schemes.

Manager to be party to Trust Deed

39. Although it is standard market practice in non-restricted KiwiSaver Schemes for the management function to be carried out by a separate manager, the Manager is often not party to the Trust Deed. Instead, the Trust Deed will provide that the Trustee has the power to appoint a Manager and the Manager will be appointed under a separate contract. As currently drafted, the Bill appears to allow this type of arrangement to continue because there is no explicit requirement for the Manager to be party to the Trust Deed and the 'Manager' will be defined as 'a person designated or appointed as Manager of the scheme under the Trust Deed' pursuant to clause 165 of the Bill.

40. This type of arrangement is at odds with the unit trust model. Under section 2 of the Unit Trusts Act 1960 'manager' means 'the company in which is vested the powers and function of the manager of a unit trust under this Act'. The vesting of management powers occurs under the Trust Deed, to which the manager must be a party under section 5 of that Act. We suggest that a similar definition of manager is more appropriate for non-restricted KiwiSaver Schemes proposed under the Bill and that it should also be a requirement that the Manager is party to the Trust Deed. This would also remove any uncertainty as to the enforceability of the Trust Deed against the Manager or the liability of the Manager to members. It would also be consistent with proposals under the Securities Act review for managers of collective investment schemes to act in the best interest of their investors.

Vesting of property in nominees, custodians

41. Clause 173 of the Bill introduces a new section 116B(2) into the KiwiSaver Act 2006 which will require that the property of the KiwiSaver Scheme is vested in the Trustee. There is currently no express provision, as there is for unit trusts, clarifying that the property may be vested in a nominee of the Trustee, or a custodian. This creates uncertainty as to whether non-restricted KiwiSaver Scheme Trustees can utilise nominees or custodians to hold assets.

42. As the Committee will appreciate, an inability to hold assets through nominees or custodians has the potential to create hurdles for the efficient administration of a KiwiSaver Scheme. For example, it may prevent the use of custodians to hold assets notwithstanding the fact these types of arrangements are standard practice in the funds management and Trustee industries. The use of nominees also allows the Trustee to keep the assets of one scheme separate from the assets of another scheme. We therefore suggest that consideration be afforded to the inclusion of an

express provision in the Bill clarifying that KiwiSaver Scheme assets may be vested in a nominee or custodian in the same manner as provided for unit trusts in sections 6 to 6C of the Unit Trusts Act 1960.

Transitional provisions for KiwiSaver offering documentation and deeming provisions for KiwiSaver Trust Deeds

43. The change in the identity of the issuer from the Trustee to the Manager for non-restricted KiwiSaver Schemes will necessitate that offering documents, namely prospectuses and investment statements be updated to reflect this change. The Bill does not currently address the potential problems for issuers and regulators that would arise if the entire volume of current KiwiSaver offering documentation needed to be updated from a specific date that remains unknown.

44. To mitigate these potential problems we submit that a transitional period should be introduced. We suggest two options:

    (i) A transitional period ending nine months after the coming into force of the Bill. We expect that most Managers would choose to update documentation to coincide with the next prospectus roll over which should be within this period; or

    (ii) A transitional period individual for each scheme ending on the later of nine months after the coming into force of the Bill and the next prospectus expiry date.

45. These options would retain sufficient flexibility that if, for example, a KiwiSaver Scheme was undergoing a restructuring, updated documents could be prepared at any time before the expiry of the current prospectus. This flexibility is necessary to ensure the implementation of a smooth transition to the new structural model and minimal cost and disruption to KiwiSaver offerings

46. TCA is also conscious that the proposed change in structure for non-restricted KiwiSaver Schemes may, unless carefully managed, be seen to necessitate amendments to every Trust Deed so as to bring their provisions in line with the new regime. For example, the proposed statutory definition of the relationship and responsibilities as between the Manager and Trustee may impact on existing liability and indemnity clauses. If there is, or there is perceived to be, a requirement to amend every such instrument as a consequence of the proposed changes, this would require a significant outlay of resources in the form of management time and professional advice. The adverse cost impacts that would be passed on to KiwiSaver members would be undesirable and should, if possible, be avoided.

47. Many KiwiSaver Trust Deeds are in similar form. We suggest that the one approach may be to identify those provisions that require modification. These matters, once identified, could be set out in Regulation, accompanied by a provision in the KiwiSaver act deeming these prescribed matters to be included in all restricted KiwiSaver Scheme Trust Deeds and overriding any existing provisions to the extent they are inconsistent. If our submission on this point is accepted, we would be happy to provide input on the matters to be included in such a Regulation.

48. Clause 215 of the Bill provides an overriding power for the parties to amend a Trust Deed in order to ensure that the Trust Deed complies with the requirements of the KiwiSaver Act 2006 as amended by the Bill. Any such amendments must be approved by the FMA and, once approved, those amendments will be treated as having been authorised for all purposes including in accordance with any requirements in the Trust Deed. We submit that this power to make explicit amendments should be expanded so as to encompass any changes to the Trust Deed that may need to be made consequent on other changes that are made to ensure compliance with the new KiwiSaver regime. As noted above, these might include liability and indemnity provisions that have to be adapted in light of the changing roles of the Trustee and Manager.

49. Clause 177 of the Bill adds a new section 119A to the KiwiSaver Act 2006 which would require unanimous member consent to certain Trust Deed amendments. We submit that it would be appropriate for any amendments made for the purposes set out in clause 215(1) of the Bill, namely, to bring the Trust Deed to compliance with the KiwiSaver Act 2006 as amended by the Bill to be explicitly exempt from any requirement for unanimous consent under that section.

Consequential changes to the Financial Reporting Act

50. The Bill clarify that it will be the responsibility of the Manager of a non-restricted KiwiSaver Schemes to offer and issue interests in the Scheme. This will make the Manager the 'issuer' for the purposes of the Financial Reporting Act 1993 and therefore responsible for the preparation, audit and registration of financial statements for the Scheme.

51. We note that because of the particular wording in the definition of 'issuer' in the Financial Reporting Act, Trustees of non-restricted KiwiSaver Schemes will not necessarily cease to be 'issuers' of their respective schemes as a result of this change. This could result in a duplication of the reporting responsibilities between the Manager and the Trustee.

52. 'Issuer' is defined as including 'every person who has… allotted securities pursuant to an offer for which… an investment statement of prospectus, or both, was required under [the Securities Act]' where those securities are still on issue. Even after the Bill passes, the Trustee will continue to be a person who has, albeit in the past, allotted securities under prospectus/investment statement. These securities continue to be on issue after the change.

53. The Trustee could therefore technically be construed as continuing to be an 'issuer' for Financial Reporting Act purposes and therefore under financial reporting obligations in respect of the KiwiSaver Scheme despite the Manager having taken on this role. The redundant duplication of financial reporting obligations between the Trustee and the Manager is clearly not the intent of the Bill.

54. We therefore submit that the concept of 'issuer' in the Financial Reporting Act should be aligned with the concept of 'issuer' in the Securities Act. This could be achieved by including a consequential amendment to the Financial Reporting Act in the Bill that explicitly carves out entities that are not 'issuers' under the Securities Act from the Financial Reporting Act definition of 'issuer'.

55. This proposed amendment would also clarify the current confusion about whether Trustees of externally managed Group Investment Funds are required to sign accounts. Externally managed GIFs have a similar problem to that outlined above for non-restricted KiwiSaver Schemes. The Trustee might technically be construed to be the 'issuer' of the GIF even though the external Manager is the entity that offers and allots interests in the GIF and prepares the offering documentation. Confusion exists about whether, in addition to the external Manager signing the GIF's accounts, the Trustee also has to sign those accounts. The suggested amendment would clarify the position.

Requirement for the Trustee to 'approve' annual accounts

56. Clause 177 of the Bill will introduce a replacement section 120 of the KiwiSaver Act (which relates to accounts). This replacement section transfers most of the accounting obligations for non-restricted KiwiSaver Schemes to the Manager. However, under section 120(d) the accounts are still required to be approved by the Trustee.

57. We have some concerns about the requirement. Under a unit trust structure, the Trustee is not required to approve the accounts. In any event, we question what it would mean in practice to 'approve' accounts and whether it would serve any meaningful purpose. The Trustees cannot be required to verify the information in the accounts. The audit process is becoming more and more unhelpful as auditors have moved towards a practice of only giving negative assurances. In any event, following the other amendments in the Bill, Trustees of non-restricted KiwiSaver Schemes will no longer receive the monthly audit reports. As a consequence, Trustees will not be in a position to be able to 'approve' the accounts as contemplated by the new section 120(d).

58. We therefore submit that clause 177 of the Bill be amended to remove subsection (d) of the replacement section 120 of the KiwiSaver Act.

Definition of 'promoter' in the Securities Act

59. As noted above, the Bill will clarify that the Manager of a non-restricted KiwiSaver Scheme is responsible for offering and issuing interests in the Scheme. Even though this function is transferred to the Manager, it is not clear that the Trustee will cease to be a 'promoter' of the Scheme for the purposes of the Securities Act 1978 because it will have offered and issued interests in the Scheme in the past. We therefore submit that Part 1 of Schedule 6 of the Bill (which deals with amendments to Acts consequential on the changes to KiwiSaver) be amended by inserting the following under the heading Securities Act 1978 (1978 No 3):

> 'Definition of **promoter** in section 2: add:
>
> "(d) in relation to a KiwiSaver scheme (but not a restricted KiwiSaver scheme) does not include the person who has been appointed as 'Trustee' of the scheme (as that term is defined in the KiwiSaver Act 2006)'"

FMA's power to exercise right of action

60. We note that it is proposed that the FMA will have the broad power to exercise another person's right of action where it considers this to be in the public interest. While we agree in principle that the FMA should have the power to take another person's action, we record our view that the use of that power should be subject to such checks and balances as to ensure its limited and proper use.

61. The proposed power has been well publicised and, unless brought into force with appropriate caveats, may result in an unrealistic public expectation that the FMA will exercise it in any case where there is a significant loss to investors. It is not difficult to imagine the pressure that might be brought to bear on the FMA to exercise that power against all available parties following a large failure, even where there has clearly been no misfeasance on the behalf of one of those parties. The cost, inconvenience and, most significantly, reputational damage involved in defending an unmeritorious claim brought by the regulator could potentially have severe implications for that person's ability to continue business. We therefore submit that it would be appropriate for the FMA to be required to obtain the leave of the Court to take another person's right of action in every case, not just where the person objects.

62. We also note that the Securities Trustees and Statutory Supervisors Bill will be in force by the time the FMA is established. As Committee members will be aware, that Bill will bring in a licensing and supervision regime for Trustees and statutory supervisors with the FMA as regulator. In this role, the FMA will have a range of direct enforcement options against Trustees and statutory supervisors. These will include powers to remove Trustees, cancel licences and direct Trustees to take action. We submit that where the FMA seeks to exercise another person's right of action against a Trustee, the criteria that the Court should take into account before granting leave should include that the FMA has exhausted all enforcement options under that legislation.

Periodic reporting

63. We note that it is proposed that there be a new power to make Regulations prescribing periodic disclosure for issuers and that it is anticipated that this will be first used to require non-restricted KiwiSaver Schemes to report returns, fees, and asset allocations on a quarterly basis. We also note that the FMA will have the power, after consulting with key stakeholders, to issue notices prescribing the frameworks and methodologies to be adopted in making those disclosures.

64. As the peak industry body representing the frontline regulators of securities offerings and non-restricted KiwiSaver Schemes, TCA looks forward to the opportunity to make submissions on both Regulations prescribing periodic disclosure and notices issued by the FMA prescribing frameworks and methodologies by which such disclosure are to be made.

65. We would be pleased to meet with the Select Committee to discuss any of our above comments in further detail.

Trustee Corporations Association of New Zealand Inc
10 November 2010