WESTPAC NEW ZEALAND LIMITED

Submission on the Financial Markets (Regulators and KiwiSaver) Bill

10 November 2010

Table of Contents

1. INTRODUCTION 3
2. ESTABLISHMENT OF THE FINANCIAL MARKETS AUTHORITY 4
    - FMA should be the sole regulator of financial markets and securities matters 4
    - FMA to immediately be given additional powers to increase market certainty 5
3. GENERAL INFORMATION-GATHERING AND ENFORCEMENT POWERS 5
    - Power to obtain information, documents and evidence 5
    - Power to enter and search 6
    - Subpart 3 - FMA may exercise person's right of action 7
4. MISCELLANEOUS PROVISIONS 12
    - Levy of financial markets participants 12
5. SECURITIES ACT 1978 AMENDMENTS 12
    - Prospectus registration and review procedure 12
    - Regular Reporting Requirements 16
    - Exemption granting powers 16
6. KIWISAVER ACT 2006 AMENDMENTS 16
    - Amendment to respective roles of manager and trustee of KiwiSaver schemes 16

1. INTRODUCTION

1.1 This is a submission on behalf of Westpac New Zealand Limited ("Westpac") in respect of the Financial Markets (Regulators and KiwiSaver) Bill ("Bill").

1.2 Broadly, Westpac supports the principles contained in the Bill and In particular, the proposed consolidation of elements of the current regulatory framework of New Zealand's financial markets into the Financial Markets Authority ("FMA").

1.3 Westpac has submissions to make on particular proposals and for convenience, they are divided into sections relating to the separate parts of the Bill.

1.4 Key issues raised by Westpac are:

(a) the FMA should not be given the power to bring civil actions based upon private rights. The broad extension of the regulator's powers represents a fundamental change to New Zealand's corporate law and should not be introduced on an ad hoc basis. Instead, such powers should only be introduced in the context of a full review of New Zealand's corporate law framework. While the power appears to originate from the Australian Securities & Investments Commission Act 2001 ("ASIC Act") it is considerably broader. It provides the FMA with enforcement powers in relation to matters which are not strictly related to financial markets legislation, for which a regulator is not an appropriate plaintiff and without the express consent of individuals in whom the right to bring such actions otherwise vests;

(b) the proposal that following registration of a prospectus (or any memorandum of amendments) there be a mandatory period of five days during which no allotments may be made and no applications or subscription money accepted will be unworkable for continuous issuers and in particular collective investment schemes; and

(c) further amendments to the KiwiSaver Act are necessary in order to make the proposed amendments more effective.

1.5 Westpac has also responded to the Ministry of Economic Development's recent discussion document entitled "*Review of Securities Law*" ("Discussion Document"). Westpac's submissions on the Bill complement the submissions it made on the Discussion Document. A copy of that submission is attached.

1.6 Enquiries on this submission can be addressed to:

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2. ESTABLISHMENT OF THE FINANCIAL MARKETS AUTHORITY

FMA should be the sole regulator of financial markets and securities matters

2.1 Westpac strongly supports the establishment of the FMA as the authoritative regulatory body in New Zealand's financial markets. Financial markets are inherently complex and accordingly a specialist regulator will provide financial market participants with certainty and clarity regarding the approach to, and expected outcome of, issues handled by the FMA. The overall efficiency and quality of the financial markets should improve under the regulation by the FMA.

2.2 Consequently, it is unnecessary and inefficient to have more than one regime with two regulators having jurisdiction over the same matters. Having one specialist regulator is likely to ensure a consistent approach. It will also provide certainty to the market and reduce compliance costs.

2.3 Accordingly, financial markets products and services should be excluded from the ambit of the false and misleading conduct provisions of the Fair Trading Act 1986 once the FMA is established. The FMA will be enforcing securities law and the financial advisers' regime, both of which deal with misleading and deceptive conduct in relation to securities and other financial products and services. Consequently, there appears to be no reason for the Commerce Commission to have a role in regulating New Zealand's financial markets

2.4 The establishment of the FMA is an appropriate time to make this change. The FMA's enforcement division will need to be adequately resourced so that it will be able to take actions without reliance on Commerce Commission resources.

2.5 If the Fair Trading Act 1986 is not amended to exclude financial markets products and services from its ambit, the enforcement powers in respect of breaches of that Act which relate to financial products and services should be reserved exclusively to the FMA.

FMA to immediately be given additional powers to increase market certainty

2.6 As stated in its submission on the Discussion Document, Westpac supports proposals to give the new market regulator powers to improve certainty for market participants. These include:

(a) the power to "*call-in*" products as being securities for the purposes of securities legislation;

(b) the power for the regulator to issue "*no-action*" letters in respect of products or practices it has reviewed and found to be compliant with securities law;

(c) the power to make binding rulings in respect of proposed product offerings;

(d) the power to validate offers as not void; and

(e) the power to grant retrospective exemptions.

3. GENERAL INFORMATION-GATHERING AND ENFORCEMENT POWERS

Power to obtain information, documents and evidence

3.1 In principle, Westpac supports giving the FMA the powers necessary to obtain information and documents to undertake its role.

3.2 However, confidential and commercially sensitive information or documents obtained by the FMA under Clause 25 must be adequately protected. Accordingly:

(a) information obtained by the FMA should be presumed to be confidential information and, for the purposes of the Official Information Act 1982 ("OIA"), should be deemed by default to be information that, if disclosed, would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information; and

(b) where, in the circumstances of the particular case, other considerations render it desirable, in the public interest, to make information available (despite that information being commercially prejudicial for the purposes of the OIA), the entity from which the information was obtained should, at a minimum, be given advance notice of an application under that Act of the release of the information and sufficient opportunity to consider and, if appropriate, oppose the request.

3.3 Financial institutions have contractual and statutory obligations of confidentiality to their clients and may incur liability to customers for breaches of confidentiality if documents, information or other material are supplied to the

FMA pursuant to a request. The Bill should clarify that disclosure to the FMA pursuant to a statutory request under the FMA Act would not breach the provisions of any confidentiality agreement nor result in any liability to any person complying with such a request.

3.4 Given the large scale of information that may be required to respond to requests, there is the potential for irrelevant confidential or commercially sensitive information to be inadvertently provided to the FMA as part of a disclosure request. Any information provided that was not directly relevant to the purpose of the request should be treated as confidential by the FMA and should not be available for:

(a) public release (including pursuant to a request under the OIA);

(b) release to another law enforcement or regulatory agency under Clause 30; or

(c) release to an overseas regulator under Clause 31.

Power to enter and search

3.5 Westpac supports the proposal in Clause 29(3) that applications for search and seizure must be determined by a Judge of the District or High Court, as is the case under Section 157ZM of the Reserve Bank of New Zealand Act 1989 ("Reserve Bank Act"). This is contrasted with the approach taken under Section 98A of the Commerce Act 1986, whereby more junior judicial officers, such as Registrars and Community Magistrates, are empowered to grant warrants to the Commerce Commission. As the power to obtain warrants under securities legislation could give rise to significant commercial sensitivity and privacy concerns it is appropriate that it be exercised with leave of a Judge.

3.6 Westpac also supports the test in Clauses 29(1) and 29(3) that are applied before a warrant is issued. This is broadly consistent with the equivalent threshold under Section 98A(2) of the Commerce Act 1986. The power to enter and search premises is a serious one and as such appropriate controls are necessary. The Bill requires a reasonable belief that a search will find evidential material at the premises in addition to the need for a reasonable suspicion of contravening conduct.

3.7 This is preferable to the less onerous test under Section 157ZM of the Reserve Bank Act 1989 which only requires that a Judge be satisfied that there is reasonable cause to believe that a deposit-taker has committed an offence under the relevant part of that Act.

3.8 Given the potential for disruption, unnecessary and unwarranted damage to an entity's reputation, and disclosure of confidential and commercially sensitive documents, this distinction is appropriate. The comments in paragraphs 3.1 to 3.4 above in respect of the treatment of information obtained under a search warrant also apply to the power to search premises.

Subpart 3 - FMA may exercise person's right of action

3.9 Westpac strongly opposes the proposal to confer upon the FMA a new power to commence and control a person's private civil rights of action on that person's behalf, or to take over proceedings that have already commenced, because the FMA determines it is in the public interest to do so.

3.10 In summary, the primary concerns with the provisions in subpart 3 of Part 3 are as follows:

(a) as a third party, the FMA should not be given the power to bring civil actions based upon private rights and particularly when the person in whom the right to bring such actions otherwise vests objects (and particularly given the presumption that this person will bear the costs of such actions). By way of contrast, the Australian Securities and Investments Commission ("ASIC") cannot exercise such rights unless the person who has the right to bring the action expressly consents;

(b) the proposed enforcement power in subpart 3 has been justified on the basis that it is needed for investors who would otherwise be unable to take action (either because it is not financially viable for them or because they did not have legal standing to do so). However, the drafting goes significantly beyond that and enables the FMA to take into account the interests of the financial markets in general. This provides the FMA with enforcement powers in relation to matters which are not strictly related to financial markets legislation and for which a regulator is not an appropriate plaintiff. For example, the enforcement power could be used to enforce directors' duties under the Companies Act 1993 or to make a claim for breach of contract;

(c) this broad extension of the regulator's powers would represent a fundamental change to corporate law in New Zealand, and as such should only be introduced after a comprehensive review of New Zealand's corporate law framework (including, for example, the Companies Act 1993 and the provisions under that Act for derivative actions), not through an ad-hoc approach which only amends select pieces of legislation. In contrast ASIC already oversees the Corporations Act 2001 and has all the related powers;

(d) the use and effectiveness of Section 50 of the Australian Securities and Investments Commission Act 2001 ("ASIC Act") has been very limited, and the exercise of the power has resulted in practical difficulties and costs. Whilst lessons can be learnt from the Australian regulatory approach, it is not appropriate to copy and arguably broaden, Australian legislation without giving full consideration to its effectiveness in Australia and its potential impact in New Zealand;

(e) the proposed enforcement power would give rise to additional litigation risk. This will increase the cost of doing business because it will expand the scope for proceedings to be brought by regulators in circumstances where private entities would ordinarily have elected to take no action;

(f) this power is unnecessary given the wide range of other powers that are already proposed to be conferred upon the FMA under the Bill. These include, the existing powers of the Securities Commission to apply to the Court for compensatory orders and civil remedy orders for the benefit of persons that have suffered loss (as well as any additional powers to be given to the FMA following the outcome of consultations under the Review of Securities Law; and

(g) a preferable approach to regulation of financial markets is preventative, rather than curative. Therefore, Westpac supports proposals to improve the securities regulation regime as a whole. If the FMA uses these increased powers this will prevent issues arising, as opposed to attempting to bring claims after the event - which in most cases will be at a time when the infringers are impecunious and the recovery opportunity is long gone.

If the power is to be retained its scope should be narrowed significantly.

Clause 34 - FMA may exercise a person's right of action

3.11 The wording of Clause 34(1) has similarities to Section 50 of the ASIC Act. However, the drafting in subpart 3 is significantly broader than Section 50:

(a) Clause 34(1) provides that an action can result from "*an inquiry or investigation*" carried out by the FMA. Whilst Section 9(1)(d) states that one of the functions of the FMA is to "*to monitor, and conduct inquiries and investigations into any matter relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct that involves dealings in securities*":

(i) the term "*investigation*" is not defined in the Bill, the Securities Act 1978 or the Securities Markets Act 1988 (Section 97 of the Financial Advisers Act 2008 does refer to investigations of a complaint about an authorised financial adviser); and

(ii) the term "*inquiry*" is only used in Clause 20 of the Bill which provides that inquiries can only be instigated at the request of a Minister.

Tying the power to take action to undefined terms creates significant uncertainty about the circumstances in which action would be taken. In contrast, the ASIC Act allows proceedings as the result of "*an investigation or from a record of an examination (being an investigation or examination conducted under this Part")*. Part 3 of the ASIC Act clearly sets out the process by which ASIC will conduct investigations and examinations and requires formal reporting or recording of their outcomes. ASIC is likely to take action under Section 50 at the conclusion of the investigations and examinations under Section 50, whereas the drafting of Clause 34(1) may leave it open for the FMA to take action at any time.

The Bill should therefore be amended to specifically define what processes of the FMA will be permitted to give rise to the use of the powers in this Section and at what point in those processes the FMA can consider taking action.

(b) Clause 34(1)(b) expressly empowers the FMA to take over specified proceedings that have been commenced by a person. Section 50 does not provide for a similar power. Such a power is not consistent with a key justification for the legislation; i.e. that actions will be commenced by the FMA where the affected party would not have otherwise taken action (either because it is not financially viable for them or because they did not have legal standing to do so);

(c) Clause 34(2)(a) defines specified proceedings broadly to include civil proceedings (within the meaning of Section 2 of the Judicature Act 1908) under any financial markets legislation and provides that the Court may award "*damages or other relief*". Section 50 in contrast, empowers ASIC to bring only defined classes of proceedings for defined remedies. ASIC is not, for example, expressly granted the power to seek injunctive relief or account of profits; and

(d) Section 50 enables ASIC to begin or carry on proceedings in connection with the recovery of property of the claimant. This is not expressly provided for in Clause 34 and given the stated aim of the Bill, perhaps it should be.

Impact of the "public interest" test in Clause 34

3.12 The effect of Clauses 34(3) and 34(4) is that the FMA is required first to have regard to the public interest factors in Clause 34(4), before taking into account the persons listed in Clause 34(3). Given the proposed new power grants the FMA the right to take an action on a person's behalf, the interests of that person should take priority to the wider "*public interest*".

3.13 Clause 34(3) could also be amended to allow the FMA to take into account the interests of all persons who have suffered loss as a result of the potential claim, including those expressly listed in Clause 34(3).

3.14 The "*public*" interest qualifier in Clause 34(4) should be defined by a more restricted set of parameters to determine when this power should properly be exercised, rather than relying on the FMA's determination of when bringing an action is in the "*public interest*".

3.15 In determining what is in the "*public interest*" ASIC must consider:

(a) the regulatory effect of successfully bringing an action;

(b) the strength of the cause of action and the ability to identify plaintiffs and obtain consent to bring proceedings;

(c) whether shareholders in a company are able to bring a claim;

(d) the ability of the defendants to pay the damages sought; and

(e) the prospects of winning.

3.16 By contrast, the factors set out in Clause 34(4) that the FMA "*must"* take into account, relate to its broad enforcement objectives.

3.17 In particular, the requirement for the FMA to take into account its objectives, the likely effect of the proceedings on financial markets participants, whether the proceedings are of commercial significance or importance and any other matters it considers relevant, change the nature of the power from that of one enabling individuals to take action, to one which is more akin to a statutory enforcement power. The FMA already has such powers and it is not appropriate to use individuals' rights of action as a means of promoting the objectives of the FMA rather than solely for private interests.

3.18 This changes the nature of the proposed enforcement power from the exercise of a private right of action for the benefit of plaintiffs, to a broader ability to use private rights for a public purpose. If the proposed power in subpart 3 is included, the FMA should be required to consider factors more consistent with those that ASIC is required to take into account.

3.19 In addition, before bringing a claim, the FMA should be required to consider whether person A (or those on whose behalf the action is taken), have access to funding, representative actions or an alternative regulatory action.

Clause 36 – High Court may grant leave

3.20 Under Section 50, ASIC is required to obtain the express written consent of an individual before they can cause a proceeding to begin or continue. If, for example, an individual cannot be located, ASIC cannot act. Equally, if an individual objects, ASIC cannot act. The, FMA, however, will have much broader powers and can operate on a "*deemed consent*" basis (subject to the leave of the Court).

3.21 It has been suggested by the Ministry of Economic Development that the proposed new powers in subpart 3 were consulted on during the Discussion Document process. This is not the case. [check with Laura] The relevant question in the Discussion Document asked "*What are the pros and cons of the Authority being able to cause civil proceedings to be begun in a similar manner to ASIC's power in Section 50 of the Australian Securities and Investments Commission Act 2001"*? The proposed new powers go significantly further than Section 50 and erode the rights of individuals. This should require proper and full consultation.

3.22 Further, the High Court should only be entitled to grant leave in relation to a company, where it is satisfied that:

(a) the company has not provided its consent as a result of the fact that the potential defendants of the action (or their associates) are in control of the company, and

(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or shareholders (this is consistent with the test for derivative actions in Section 165 of the Companies Act 1993).

Clause 38 - Costs of proceedings to be met by person

3.23 Clause 38 should be removed from the Bill. Unlike the Australian legislation Clause 38 sheets the costs of proceedings to individuals notwithstanding that these individuals may not wish proceedings to be commenced or continued. The presumption is that these individuals will pay even though they may be in no position to do so. The heavy and prescriptive involvement of the Court in the exercise of the proposed powers is likely to make any proceedings lengthy and highly expensive.

3.24 Clause 38 effectively creates a presumption that costs will be borne by the affected persons. The Bill does not contain any guidance as to when it would be fair and reasonable for a person to bear the costs.

Clause 39 - Powers of High Court for proceedings exercising person's right of action

3.25 As to the specific provisions in Clause 39:

(a) Clause 39(1)(a) – this provision is unnecessary as the FMA already has the power to conduct proceedings under Clause 34(1)(a);

(b) Clause 39(1)(b) – this provision is unnecessary as the Court already has the power to give directions for the conduct of proceedings under the High Court Rules;

(c) Clause 39(1)(c) – this is an unusually coercive power that could require a plaintiff, even against its will or interests, to assist the FMA in prosecuting a private action on their behalf;

(d) Clause 39(1)(d) – it is unusual to require payment of damages directly to creditors of person A. It is not clear how the rights of secured creditors would be affected. It is also not appropriate to have payments made directly to shareholders of a plaintiff. This is a significant change to corporate law as shareholders do not normally have a direct right of action to receive damages payable to a company (solvency and company law distribution issues would need to be considered); and

(e) Clauses 39(2) and 39(3) – it is not clear what interim relief is contemplated by this provision. Ordinarily, if interim relief is appropriate the Court has the power to grant it. It is also not clear what, if any, extension of existing rights is contemplated by this provision.

Clause 40 - Representative actions

3.26 It is not clear why this provision is considered necessary. First, the Court has the power to grant orders for representative actions under the High Court

Rules. Secondly, as the FMA would have the power under the Bill to act in the names of all such plaintiffs in any event, a representative action would appear unnecessary. Section 50 does not contain an equivalent provision which suggests that Australian legislators considered it unnecessary.

Clause 41 - Proceedings must not be settled, compromised, or discontinued without approval

3.27 Unlike the ASIC Act, the FMA is not required to advise or obtain the consent of the person whose right of action the FMA is exercising when it settles, compromises or discontinues a proceeding it has commenced. This is not appropriate given the FMA may well compromise the rights of those persons.

4. MISCELLANEOUS PROVISIONS

Levy of financial markets participants

4.1 Westpac agrees that the FMA should be adequately resourced so that it can carry out the primary objective stated in Clause 10 of promoting fair, efficient and transparent markets. Financial markets will benefit from the FMA's success in fulfilling that objective. However, any potential levies should be applied to financial markets participants fairly and reasonably – not targeted at those participants who are in a better position to afford a levy.

4.2 Once a model for allocating levies between market participants has been decided market participants should be given a reasonable period to provide feedback on the proposal.

4.3 There may be some cross over in the rationale for, and application of, the levy under the Bill and the levy under Section 153 of the Financial Advisers Act 2008. Part 3 of Schedule 4 amends Section 153 of the Financial Advisers Act 2008 so that the levy under that Act is for the purpose of funding the costs of the FMA arising from the performance of any or all of the functions under that Act. Consideration needs to be given to ensuring that market participants do not pay for the same service twice.

5. SECURITIES ACT 1978 AMENDMENTS

Prospectus registration and review procedure

5.1 Proposed new Section 43D of the Securities Act (in Clause 97) will be unworkable for continuous issuers and in particular collective investment schemes. New Section 43D provides that any prospectus (or any memorandum of amendments) that is registered under the Securities Act 1978 will have a mandatory period of five days during which no allotments may be made and no applications or subscription money may be accepted ("the Consideration Period"). During the Consideration Period, the FMA will have the ability to consider whether a prospectus or memorandum of amendments complies with the Securities Act 1978 and regulations and whether it is false or

misleading in a material particular. The FMA may extend the Consideration Period for a further five days.

5.2 Westpac strongly disagrees with the application of a Consideration Period to continuous issuers and in particular collective investment schemes. If a process by which prospectuses for continuous issuers can be reviewed prior to allotment of securities under that prospectus is thought to be desirable, the appropriate solution is to retain the ability for such issuers to obtain a pre-registration review of prospectuses. Further consideration of the mechanism by which the FMA would be empowered to review disclosure documents for collective investment schemes should be undertaken as part of the Securities Law Review. Westpac does not object to the Consideration Period being implemented for other issues of securities (e.g. initial public offerings and rights issues) provided that an express exception is included in respect of continuous issuers (and in particular collective investment schemes).

5.3 A Consideration Period that resulted in an issuer being suspended from allotting securities for a period of time would be highly problematic for issuers of securities in collective investment schemes for the following reasons:

(a) any temporary suspension of allotments to a collective investment scheme will have a significant negative impact upon the confidence of both investors in that product and investors generally, particularly as the duration of suspension cannot be certain;

(b) the suspension of allotments is administratively difficult and in some cases outside the control of the issuer. For example, KiwiSaver schemes would be unable to suspend the allotment of securities to new members who are automatically enrolled under the KiwiSaver Act 2006 ("KiwiSaver Act");

(c) for some collective investment schemes that offer fixed term investments, many investors opt for their investment to be automatically reinvested upon maturity with further units allotted accordingly. Under the proposed regime, the automatic reinvestment upon investment maturity would not be possible during any Consideration Period. This will be inconvenient and potentially confusing for investors;

(d) many investors choose to make regular investments in a collective investment scheme by way of a direct debit or automatic payment initiated or paid on an agreed regular frequency (for example fortnightly or monthly). Under the proposed regime, issuers would be unable to initiate any direct debit or receive any automatic payments during the Consideration Period. Issuers will be required to give advance notice to all affected regular investors and will require direction from such investors as to how to proceed with respect to the payment. In addition to being both confusing and inconvenient for investors such a process would impose a costly additional administrative burden on issuers; and

(e) in practice the Consideration Period could effectively extend beyond 10 days. For example if there are changes required to a prospectus as a

result of the FMA's review, the issuer would be required to cancel and reregister the prospectus, or to file an amended document – presumably thereby restarting the Consideration Period. Such a scenario would also give rise to additional complications for the updating, printing and distribution of the investment statement in light of the requirement to ensure consistency between the prospectus and investment statement. Updates to documents required during or immediately after the Consideration Period would involve significant costs that are likely to be passed on to investors.

5.4 The proposal for a Consideration Period can be contrasted with the current regime. Currently, the life cycle of a prospectus is governed by Section 37 of the Securities Act 1978. A prospectus that contains a statement of financial position expires nine months after the date of that statement of financial position. The life of a prospectus may be extended for a further nine months if the directors of the issuer complete and register a certificate in respect of that prospectus under Section 37A(1A) of the Securities Act 1978. This means that continuous issuers of securities (including for example collective investment schemes) are required to annually re-register prospectuses.

5.5 At present, the usual procedure is for issuers to submit a draft of a new prospectus to the Companies Office for review prior to submission of that document for registration (referred to as a "*pre-registration review*"). Although not enshrined in legislation, this approach provides an extremely useful way for issuers to flush out and resolve potential issues with an offer of securities prior to registration of the document. The Companies Office has put a bookings system into place to enable orderly review of prospectuses under the pre registration process. This system should be continued by the FMA instead of having a Consideration Period.

5.6 In the case of a memorandum of amendments to a prospectus it is notable that these often need to occur swiftly and as such it will often be a necessity for these documents to be registered with the Companies Office without pre-registration review.

5.7 The Australian regime appears to have been used as a basis for the proposal to introduce a Consideration Period. However, the regime governing offer documents for collective investment schemes in New Zealand is not the same as that in Australia. In Australia, issuers of collective investment schemes are not required to register offer documents. Rather they simply file a notice advising ASIC that they have a current product disclosure statement in use. As such, collective investment schemes in Australia are not subject to a process equivalent to the proposed Consideration Period. Consequently, this approach does not work in the New Zealand regulatory environment.

5.8 Although not provided for in the drafting of the Bill, an option that has been discussed is that issuers of a collective investment scheme could perhaps continue to allot securities during a Consideration Period provided that an existing prospectus has not expired (i.e. there would be two registered prospectuses for a time). Westpac does not support this approach as it would also be highly problematic for the following reasons:

(a) it is important that investors clearly understand what offer document (and thus what terms) apply to their investment both at the time they invest and on an ongoing basis. While it may be technically possible to incorporate amendments to allow for issuers of collective investment schemes to continue to issue securities during the Consideration Period by utilising an existing prospectus (provided that prospectus has not expired under the Securities Act 1978), such an approach would create a great deal of uncertainty for investors as two different prospectuses would be publicly available for the same investment. This will be exacerbated by any references to the current prospectus in the investment statement and the requirement for the issuer to include a statement on its website about the registration of a new prospectus. Any proposal that has the potential to confuse investors as to which prospectus is applicable to their investments and to which prospectus the investment statement relates is undesirable. This will also unduly increase risk for directors, as the proposal could lead to complaints from investors on the basis that they were relying on the new prospectus as opposed to the current version;

(b) registration of a prospectus usually requires the production of a new investment statement in order to comply with the requirement in the Securities Act 1978 for consistency between prospectuses and investment statements. The concerns outlined in paragraph 5.3(e) above, regarding additional complications for updating, printing and distributing an investment statement and the additional costs involved, remain relevant under a dual prospectus approach; and

(c) a dual prospectus approach would almost certainly be unworkable in the case of a memorandum of amendments to a prospectus. As mentioned earlier, the registration of a memorandum of amendments can occur swiftly and may be registered with the Companies Office without pre-registration review. For material changes to an offer, the application of the Consideration Period to a memorandum of amendments is likely to result in the issuer of the collective investment scheme being unable to allot securities for a period of at least ten days.

5.9 It is important to note that the FMA has powers that may be used at any time to both protect investors and take appropriate action against issuers. For example, under Clause 97, in respect of the proposed Section 43E of the Securities Act, the FMA will have the power at any time to prohibit the allotment of securities, or cancel the registration of a prospectus, in a number of circumstances. The FMA also has a further power to make an interim order prohibiting the allotment of securities under a prospectus where the FMA is considering whether it may exercise its power under the proposed Section 43K of the Securities Act 1978. Given these powers, the proposed Consideration Period appears to provide little additional benefit.

5.10 Clause 97, in respect of the proposed Section 43B of the Securities Act 1978, obliges the issuer to give public notification of the fact of registration of a new prospectus or of an instrument amending a prospectus on its internet site. This Clause should be amended to permit issuers to make that disclosure on a

related company's website where that website is used by the issuer to market and distribute the collective investment scheme.

Regular Reporting Requirements

5.11 The proposals in Clause 104, regarding periodic disclosure of certain information relating to publicly issued securities, should not be implemented until the outcome of the public consultation under the Discussion Document is known. These proposals constitute a fundamental change to securities law disclosure principles. The public would be better served if they were introduced as part of a complete package of changes after public consultation rather than partially introducing them now.

Exemption granting powers

5.12 Westpac supports the proposal in Clause 127 to continue the existing exemptions to the Securities Act 1978 granted by the Securities Commission. It also supports the continued ability of the FMA to grant exemptions after consideration of the criteria detailed in Clause 120(2). Any proposal to review the scope or application of existing exemptions should be delayed until the proposals relating to new securities law in the Discussion Document are introduced.

6. KIWISAVER ACT 2006 AMENDMENTS

Amendment to respective roles of manager and trustee of KiwiSaver schemes

6.1 Westpac supports the proposal to amend the KiwiSaver Act to provide that the manager, rather than the trustee, of a KiwiSaver scheme is the issuer for the purposes of the Securities Act 1978.

6.2 Various functions and obligations are imposed upon the manager including, under Clause 206 (amending Clause 1C of Schedule 1 of the KiwiSaver Act), an obligation to act in the best interests of members of the scheme. The imposition of a duty to act in the best interests of investors is sensible and reasonable if it is made clear that:

(a) it does not fetter trust deed powers that are designed to operate for the benefit of the manager or the trustee, for example a fund manager's ability to charge a fee for acting and a trustee's right of indemnity from trust assets; and

(b) in assessing what is in the best interests of investors, regard is to be had to the best interests of investors as a whole, rather than each individual investor.

6.3 It is always possible that any individual decision by a fund manager, whilst in the best interests of investors as a whole, may negatively impact on an individual investor. In addition, certain trust deed powers are designed to

operate for the benefit of the manager and trustee (for example, those that allow fees to be taken) and these need not be exercised in the best interests of members.

6.4 Clause 215 provides that parties to a trust deed may make any amendments to the trust deed that are necessary or desirable in order to ensure that the trust deed complies with the requirements of the KiwiSaver Act (as amended by the Bill). There appears to be a close nexus in the drafting of Clause 215 between the amendments and compliance with the amended legislation such that it would appear necessary to examine each amendment in isolation and assess whether that particular amendment is necessary or desirable in order to ensure compliance. It is possible that some amendments will not, when viewed in isolation, be necessary or desirable in order to ensure compliance. However, those overall amendments are likely to be appropriate in light of the scheme restructure. For example, it may be desirable to alter the provisions relating to the scope of liability of the parties and the circumstances in which parties are indemnified out of the assets of the scheme to ensure they are appropriately matched to obligations and duties under a trust deed.

6.5 Therefore, the wording in the Bill should be broadened slightly, to clarify that such amendments are permitted. For example, Clause 215 (1) could be amended to read as follows:

> *The parties to the trust deed may make any amendments to the trust deed that are necessary or desirable to ensure that the trust deed complies with the requirements of the principal Act as amended by this Act or that are necessary or desirable as a result of those amendments.*

6.6 Clauses 174 and 206 (to the extent that Clause 206 amends Clause 1B of Schedule 1 of the KiwiSaver Act) provide that the trustee of a scheme is required to exercise the care, diligence and skill required of a trustee by Sections 13B and 13C of the Trustee Act 1956. These provisions of the Trustee Act 1956 relate to the ability of trustees to invest. The proposed application of these tests under the Bill should be clarified given that it is the manager of a KiwiSaver scheme, and not the trustee, that is empowered by the Bill to invest on behalf of the scheme.

6.7 Clause 173 provides that the investments and property of a KiwiSaver scheme must be vested in the trustees. Market practice in New Zealand is for a nominee of the trustee to hold assets. Accordingly, the Bill should be amended to expressly provide that nominees of trustees may hold investments and property of KiwiSaver schemes.

6.8 Clause 177 (amending Section 120 of the KiwiSaver Act) provides that the trustees of a KiwiSaver scheme are required to "*approve*" the audited accounts for the scheme. The requirements for satisfying the obligation to approve audited accounts should be clarified so that the process that must take place is clear to both issuers and trustees. Westpac submits that the trustee's role in respect of audited accounts should be limited to ensuring that audited accounts have been prepared.

6.9 Clause 177 of the Bill (proposed Section 122(1)(a) of the KiwiSaver Act) provides for members' rights to information and refers to each member being given the annual report of the trustees. In light of the change in issuer, this should now refer to the annual report of the manager.

6.10 Clause 206(1) amends Schedule 1 of the KiwiSaver Act by repealing and substituting Clause 1 of that Schedule. The requirement on the trustee to "*supervise*" the manager's performance arguably means that the trustee has the ability to direct or control the manager in relation to the functions allocated to the manager. This ability to direct or control is likely to give rise to legal responsibility on the part of the trustee for those functions. This is inconsistent with a separation of manager and trustee roles and responsibilities. A requirement for the trustee to "*monitor*" the performance of the manager is more reflective of this separation. As such, the proposed new Clause 1B(1)(a) should be altered so that the function of the trustee is to "*monitor*" the manager's performance rather than "*supervise*" that performance.

Administration managers and investment managers

6.11 Clause 173 (amending Section 116D of the KiwiSaver Act) expressly authorises a scheme manager to appoint an administration manager and an investment manager to undertake some or all administrative or investment functions of the scheme. The Bill should clarify that the manager may also delegate functions other than administrative and investment functions.

Transfer provisions

6.12 Clause 177 makes changes to the provisions of the KiwiSaver Act relating to compulsory transfers. It is not clear whether such transfers constitute an offer of securities to the public for the purposes of the Securities Act 1978. The wording of Clause 177 should be amended to clarify that compulsory transfers do not constitute offers of securities to the public.

6.13 Clause 177 (proposed Sections 119D, 119F, 119H and 119I of the KiwiSaver Act) places various obligations in respect of transfer on the trustee. In light of the change in issuer, these obligations should now apply to the manager.

Consequential amendments

6.14 Clause 208 provides for amendments to certain enactments listed in Schedule 6. Various additional amendments will need to be considered under the Securities Act 1978, the Securities Regulations 2009 and the Financial Reporting Act 1993, in light of the change of issuer. These amendments include:

(a) Schedule 6 of the Securities Regulations 2009 sets out the prospectus requirements for superannuation schemes and applies to KiwiSaver schemes with all necessary modifications pursuant to Section 118 of the KiwiSaver Act. The Schedule requires the following consequential amendments:

(i) there should be a requirement to disclose the directors of the manager but not the trustee;

(ii) the disclosure required in respect of character (bankruptcy, dishonesty, solvency etc) should apply to the directors of the manager instead of the trustee;

(iii) the statement in respect of whether there have been any material or adverse changes during the period between the date of the latest financial statements referred to in the prospectus and the specified date should be required from the manager instead of the trustees; and

(iv) there should be a requirement to disclose the name and address of the manager of the scheme;

(b) Clause 3(5) of Schedule 13 of the Securities Regulations 2009, which sets outs certain information to be included in investment statements, requires updating to reflect the change in issuer;

(c) the definitions of "*administration manager*" and "*investment manager*" in the Securities Regulations 2009 in respect of superannuation schemes require amendment as they are imported from the Superannuation Schemes Act 1989 and are unlikely to be appropriate for KiwiSaver schemes given they recognise trustee appointments; and

(d) ensuring that the requirements of the Financial Reporting Act 1993 in respect of KiwiSaver schemes are satisfactorily transferred from trustee to manager. In particular, a consequential amendment is required to ensure that the trustee of a KiwiSaver scheme ceases to be the issuer for the purposes of the Financial Transactions Reporting Act 1993.

Review of reallocation of obligations required

6.15 A thorough review of the KiwiSaver Act and the KiwiSaver Rules contained in Schedule 1 of that Act is required to ensure that all necessary consequential changes are made to reflect the change in issuer. In particular, the following changes are required:

(a) amendments to Section 129 of the KiwiSaver Act in relation to matters relating to trust deed amendments to change the obligations from trustee to manager;

(b) the Bill proposes to amend Clause 2 of Schedule 1 of the KiwiSaver Act by inserting "*the manager of the scheme*" as paragraph (ab). The Schedule will retain the reference to administration manager and investment manager and the inclusion of these parties may need to be revisited depending on the revised definitions of administration manager and investment manager and the nature of any fee for services supplied by such parties (i.e. in some cases they will be paid out of the manager fee);

(c) amendments to withdrawal and transfer provisions in Clauses 8, 9, 10, 12, 14 and 16 of the KiwiSaver Act and Schedule 1 to that Act to change trustee payment and approval obligations to those of the manager; and

(d) amendments to Sections 122 and 123 of the KiwiSaver Act to transfer the obligation to issue annual reports and give certain statements and certifications from the trustee to the manager;

(e) amendments to Sections 125 and 125A of the KiwiSaver Act to transfer the obligation to issue both annual returns to the FMA and annual statements to members from the trustee to the manager;

(f) amendments to Section 201 of the KiwiSaver Act to ensure that the protections granted to the trustee under that section are extended to the manager; and

(g) the Bill should expressly provide that trustees will not be "*promoters*" due to the fact that they were originally instrumental in the formulation of KiwiSaver schemes.

Transitional provisions

6.16 To ensure a robust and workable transition the transitional provisions, currently contained in Clauses 209 to 216, should also:

(a) allow for a transitional window of at least one year to implement the required changes. A substantial amount of work will be required to implement the change in issuer including identifying and addressing the practical implications of the change, amending trust deeds and disclosure and marketing documents, and communicating changes to members;

(b) expressly provide that there is no requirement to send new investment statements to investors to notify them of the changes. This is of critical importance to ensure that issuers have clarity around disclosure obligations and that disclosure is made in a manner that is practical, meaningful and cost effective for members; and

(c) expressly allow updates required to investment statements to recognise the change in issuer to be done by way of a supplement to an investment statement. This will avoid a costly reprint of investment statements and the potential wastage of existing investment statements.