

DRAFT FOR CONSULTATION

Financial Markets Conduct Bill

Government Bill

Explanatory note

General policy statement

Regulatory impact statement

[To come]

Clause by clause analysis

Note: Set out below is only a brief summary of the Bill. It is intended that more extensive explanatory material will be included in the Bill for introduction.

Clause 1 is the Title clause.

Clause 2 is the commencement clause. Most of the provisions come into force on a date appointed by Order in Council. The reason for the deferred commencement is that regulations need to be made to give effect to some parts of the Bill (for example, to prescribe requirements for the new product disclosure statements).

Part 1

Preliminary provisions

Part 1—

- specifies the purposes of the Bill. The main purposes are consistent with the main objective of the Financial Markets Authority (the **FMA**) (to promote and facilitate the development of fair, efficient, and transparent financial markets) and the key FMA function of promoting the confident and informed participation of businesses, investors, and consumers in the financial markets:
- defines various terms used in the Bill, including financial product (equity securities, debt securities, managed investment products, and derivatives):
- provides that the Bill binds the Crown:
- provides for the Bill to have effect despite anything to the contrary in any other enactment or in any agreement, deed, application, product disclosure statement (**PDS**), or advertisement.

Part 2

Misleading or deceptive conduct or false or misleading representations

Part 2 provides for various prohibitions against misleading or deceptive conduct, and false or misleading representations, in connection with dealings in financial products and the supply of financial services.

The provisions are based on equivalent provisions in the Fair Trading Act 1986, but have been customised for the financial markets context. The Fair Trading Act 1986 is amended to provide that conduct that contravenes *Part 2* of this Bill does not contravene any of sections 9 to 13 of that Act.

Part 3

Disclosure of offers of financial products

Part 3 and the associated *Schedule 1* replace Part 2 of the Securities Act 1978.

The Part—

- provides that an offer of financial products for issue requires disclosure to an investor under this Part unless an exclusion under *Part 1 of Schedule 1* applies. *Schedule 1* contains, for example, exclusions for offers to wholesale investors, relatives of the offeror or of a director of the offeror, or close business associates, and an exclusion for small offers:
- provides that an offer of financial products for sale requires disclosure to an investor under this Part only if disclosure is required under *Part 2 of Schedule 1*. The requirements are generally aimed at preventing avoidance of the main rules of disclosure for offers of financial products for issue:
- requires a PDS to be prepared for regulated offers (offers where at least some of the investors must be given disclosure). The purpose of the PDS is to provide key information to investors to help them make investment decisions. Other material information relating to the regulated offer must be contained in a register entry for the offer (the **register entry**) on the register of offers of financial products. Requirements relating to the form and content of PDSs will be prescribed in regulations and will be customised for different situations (for example, different kinds of financial products):
- provides that if an offer to a particular person requires disclosure, the person must generally be given a PDS before an application is made to acquire the financial products. The Part provides for exceptions to this rule:
- provides for the lodgement of the PDS with the Registrar of Financial Service Providers (the **Registrar**):
- provides that a regulated offer of debt securities or managed investment products needs to comply with the governance requirements under *Part 4*:
- provides restrictions where conditions specified in the PDS are not satisfied or disclosure under the PDS or register entry is defective in some way (for example, where the PDS is misleading or deceptive or information has been omitted). A breach of the restrictions may result in an offence and a claim for compensation from a person who has suffered loss or damage:
- requires money for financial products to be held in trust:

- prohibits offers of financial products in the course of unsolicited meetings or communications in certain circumstances:
- regulates advertising and publicity in connection with offers of financial products:
- provides for 3 forms of ongoing disclosure by issuers as follows:
 - a duty to notify the Registrar of relevant changes so as to keep the register of offers of financial products up to date:
 - a duty to disclose information to particular investors (on request or in the prescribed circumstances):
 - a duty to make information publicly available in the prescribed circumstances.

Part 4

Governance of financial products

This Part contains the following main governance requirements:

- *subpart 2* requires there to be a trust deed for regulated offers of debt securities and a licensed supervisor who is the trustee under that trust deed. The subpart also—
 - regulates the content of trust deeds (including allowing for terms to be implied into them) and amendments to trust deeds:
 - provides for the functions, powers, and duties of the supervisor, the duties of the issuer in relation to reporting to the supervisor, and for changes to the supervisor:
 - provides a statutory right for meetings of holders of the debt securities to be called and held:
- *subpart 3* requires, for regulated offers of managed investment products, the managed investment scheme to be registered. The intention is for this subpart to provide a common set of governance requirements for all managed investment schemes, irrespective of their legal form. The current law regulating the management of these schemes is in the Securities Act 1978, the Unit Trusts Act 1960, the Superannuation Schemes Act 1989, and Part 4 of the KiwiSaver Act 2006 (which will largely be consequentially repealed). This subpart

accordingly provides for the registration of managed investment schemes as follows:

- schemes must meet specified registration requirements. All schemes must have a separate and independent licensed manager and licensed supervisor (except in the case of a restricted scheme), an independent custodian (who must be the supervisor or another appointed nominee), and a governing document and name that comply with the subpart. A scheme may also, if it meets the relevant additional eligibility criteria, register as a particular type of scheme. These types are KiwiSaver schemes, superannuation schemes, and restricted schemes. Other types may be prescribed by regulations:
- the content of governing documents and how governing documents may be amended are regulated:
- there is a statutory right for meetings of scheme participants to be called and held:
- the role of the manager is set out, including the manager's duties owed to scheme participants and specific obligations that apply in managing the scheme (for example, to have a registered statement of investment policy and objectives):
- the functions, powers, and duties of the supervisor and the duties of the issuer in relation to reporting to the supervisor are set out:
- related party transactions are generally prohibited except with supervisor consent or if they come within exceptions for arms' length transactions or investments in other schemes:
- requirements are prescribed as to the custody of the scheme property, including as to who may be a custodian and for the scheme property to be held on trust for scheme participants:
- changes to the manager are provided for, including how the manager may be removed and provision for temporary manager appointments and transfers of responsibilities in this case:

- changes to the supervisor are provided for:
- how a scheme's registration may be cancelled is provided for:
- specific provisions facilitating and enabling interventions in relation to regulated offers of debt securities or registered schemes are contained in *subpart 4*. Many of these duties apply currently and are being consolidated in this Bill as follows:
 - duties for the auditor, investment manager, administration manager, and custodian to report on breaches by issuers, and specific reporting duties for supervisors, are set out (with protections applying to those disclosures). The FMA may also direct the supervisor to act:
 - the supervisor or, in certain circumstances, the FMA are able to apply to court for certain orders to remedy scheme problems:
 - court powers to appoint new managers, provide for manager powers, deal with changes in managers, and order the winding up of schemes are set out:
- *subparts 5 and 6* contain certain ongoing duties for issuers of regulated products as follows:
 - to keep registers of financial products:
 - to send confirmations of financial products to product holders:
 - to keep proper accounting records and ensure that financial statements are audited by a qualified auditor:
- *subpart 7* sets out the Part 4 governance provisions, which are all the provisions that have civil remedy consequences under *Part 7*.

Part 5

Dealing in financial products on markets

Part 5 replaces various parts of the Securities Markets Act 1988 and the Securities Transfer Act 1991.

The Part—

- prohibits insider trading by providing that an information insider of a listed issuer or in relation to quoted derivatives may

not do certain things (including trading in the quoted financial products of the issuer or in the quoted derivatives, disclosing the insider information to enable trading, and advising or encouraging trading in or holding those products):

- prohibits market manipulation (for example, knowingly disseminating information that is materially false or misleading where the information is likely to induce a person to trade the financial products of a listed issuer or to have an effect on the price of those products):
- provides for listed issuers to comply with the continuous disclosure provisions of the listing rules of the relevant licensed market:
- provides for the disclosure of interests of substantial product holders in listed issuers:
- provides for the disclosure of relevant interests by directors and senior managers of listed issuers:
- prohibits certain unlicensed financial product markets being operated in New Zealand:
- provides for licensing of those markets:
- provides for the making of regulations that may adjust the licensing provisions applying to licensed markets, and the insider trading, market manipulation, or disclosure duties applying to issuers and other persons transacting in those markets:
- provides for the transfer of certain financial products:
- provides for the regulation of unsolicited offers to purchase financial products off-market.

Part 6

Licensing and other regulation of market services

Part 6—

- provides for the licensing of certain market services. Those persons who act as a manager of a registered scheme, a provider of a discretionary investment management service, a derivatives issuer under regulated offers, or an independent trustee of a restricted scheme must be licensed. Providers of prescribed intermediary services may be licensed, but it

is not mandatory. In relation to discretionary investment management services,—

- discretionary investment management services under the Bill have the same definition as that currently in the Financial Advisers Act 2008 (the **FAA**). In essence, this service is the business of managing person's investments under an investment authority. It differs from a managed investment scheme in that each investor individually holds the underlying financial product, rather than an interest in a scheme that invests in those products:
- this Bill will apply to persons who carry on this business unless those persons are financial advisers providing discretionary investment management services under the FAA or are exempted under that Act (*see* also the amendments proposed to the FAA in connection with this service). The FMA will also have the power to require persons currently licensed under the FAA or exempt under that Act to be licensed under this Bill:
- requires service disclosure statements to be provided to retail investors by licensed providers of discretionary investment management services and (if regulations apply) licensed providers of prescribed intermediary services:
- requires licensed providers of discretionary investment management services, licensed derivatives issuers, and licensed providers of prescribed intermediary services to provide those services to retail investors under a client agreement. Regulations may be made requiring client agreements to deal with certain matters or implying terms into those client agreements:
- provides additional conduct obligations to apply to the providers of discretionary investment management services who are licensed under the Bill (and to custodians under those services). The additional conduct obligations imposed in this Bill include a professional standard of care, duties of a fiduciary nature, requirements for an agreed investment mandate that makes it clear what are the limits (and reporting on breaks of those limits), prohibitions on related party transactions, and requirements for custodians holding investor property on behalf of a retail investor under the service.

Part 7

Enforcement and liability

Part 7—

- provides for the FMA to make certain enforcement orders, including—
 - stop orders that prohibit offers, issues, sales, or transfers of financial products or the distribution of PDSs or certain communications (for example, advertisements). A stop order can be made if, for example, a PDS or an advertisement is likely to deceive, mislead, or confuse with respect to a material matter or disclosure does not comply with the Bill or the regulations. The FMA can make an interim stop order while it considers exercising its powers:
 - direction orders that direct a person to comply with certain requirements of the Bill and require a person to take reasonable steps to comply with those requirements and to avoid or mitigate any actual or potential adverse effects of a contravention:
- provides for the High Court to make certain orders and exercise certain powers, including—
 - granting injunctions restraining a person from contravening the Bill:
 - making orders or giving directions that the FMA can make or give:
 - making management banning orders. Previously these bans were for up to 10 years. Now the bans can be permanent or for a period specified by the court:
 - making orders to protect the interests of aggrieved persons in the case of financial markets investigations, criminal or civil proceedings involving the contravention of financial markets legislation, or civil proceedings involving the offer, issue, transfer, supply, or use of financial products or financial services:
- provides for various civil remedies in respect of contraventions of various key provisions of the Bill (including disclosure obligations). These remedies include—

- a declaration of contravention made by the High Court (which can be relied on by any person when applying for a civil remedy):
- a pecuniary penalty. There are 2 tiers of pecuniary penalty. The first tier provides for a penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and \$1 million in the case of an individual or \$5 million in any other case. The second tier provides for a penalty not exceeding \$200,000 in the case of an individual or \$600,000 in any other case:
- compensatory orders. These orders may require a person to pay to an aggrieved person the amount of loss or damage suffered by the person:
- other civil remedy provisions, including restraining the exercise of rights attaching to financial products, restraining the issue or transfer of financial products, and directing the disposal of financial products:
- provides for offences. There are 4 tiers of offences as follows:
 - tier 1 infringement offences. If these offences are proceeded with by the issue of an infringement notice, the infringement fee is set by regulations (but must not exceed \$20,000). If these offences are proceeded with summarily, the maximum fine is \$50,000. A conviction may not be entered for these contraventions:
 - tier 2 offences. These offences have a maximum penalty, in the case of an individual, of imprisonment for a term not exceeding 3 years, a fine not exceeding \$200,000, or both. In any other case, the maximum penalty is a fine not exceeding \$600,000:
 - tier 3 offences. These offences have a maximum penalty, in the case of an individual, of imprisonment for a term not exceeding 5 years, a fine not exceeding \$500,000, or both. In any other case, the maximum penalty is a fine not exceeding \$2,500,000:
 - tier 4 offences. These offences have a maximum penalty, in the case of an individual, of imprisonment for a term not exceeding 10 years, a fine not exceeding

\$1 million, or both. In any other case, the maximum penalty is a fine not exceeding \$5 million.

- provides for prohibitions on indemnities or insurance for directors, employees, or auditors of issuers and offerors.

Part 8

Regulations and exemptions

Part 8—

- provides for regulations to be made for the purposes of the Act. Different matters may be prescribed in respect of different kinds or classes of financial products, services, persons, or other circumstances. The regulations may, for example, prescribe—
 - the information that must or must not be contained in PDSs and register entries:
 - requirements relating to the layout or method of presentation of PDSs (including length):
 - the manner of making documents, information, or other matters available under ongoing disclosure obligations:
 - eligibility criteria for market services licences and matters relating to conditions of those licences:
 - procedures, requirements, and other matters for any register kept under the Bill:
 - transitional matters:
- provides for the FMA to grant exemptions from the substantive parts of the Bill. The FMA can exercise the power only if the exemption is necessary or desirable in order to promote the purposes of the Bill and the exemption is not broader than is reasonably necessary:
- provides the FMA with a power to designate financial products and offers and to make certain other declarations. The FMA can exercise the power only if the designation is necessary or desirable in order to promote the purposes of the Bill (after having regard to such matters as the economic substance of a particular security). For example, the FMA can—

- declare that a financial product of a particular kind is to become a financial product of a different kind or is no longer to be considered to be a financial product; or
- declare that a security that would not otherwise be a financial product is a financial product of a particular kind; or
- declare that an offer that would not otherwise require disclosure does require disclosure:
- declare that exemptions from certain obligations do not apply (this power is similar to the power under section 48C of the Securities Markets Act 1988):
- provides for the FMA to issue frameworks and methodologies relating to various matters (for example, how information to be made publicly available is to be presented, calculated, or prepared):
- contains general provisions relating to notices and other instruments issued by the FMA. These instruments are disallowable under the Regulations (Disallowance) Act 1989. Instruments that are of general application and apply to a class of persons or transactions are regulations for the purposes of the Acts and Regulations Publication Act 1989:
- contains provisions to enable recognition and application regimes to be implemented that allow offers of financial products to be made in New Zealand in accordance with the laws of designated countries and to extend the territorial scope of this Bill so that offers of financial products may be made in designated countries in accordance with New Zealand law.

Part 9

Miscellaneous provisions

Part 9—

- provides for appeals to the High Court from certain FMA licensing decisions. It also provides for appeals to the High Court on a question of law from certain other decisions of the FMA (for example, in relation to the FMA's enforcement powers):

- repeals the Securities Act 1978, the Securities Markets Act 1988, the Unit Trusts Act 1960, the Superannuation Schemes Act 1989, and the Securities Transfer Act 1991:
 - makes various amendments to other enactments. These include amendments to the Companies Act 1991 to provide for offences in relation to serious breaches of certain directors' duties (the duty of directors to act in good faith and in best interests of company and the duty relating to reckless trading):
 - includes various transitional provisions.
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Hon Simon Power

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Financial Markets Conduct Act 2011.

2 Commencement

- (1) Subparts 1 and 6 of Part 8 come into force on the day after the date on which this Act receives the Royal assent.
- (2) The rest of this Act comes into force on a date appointed by the Governor-General by Order in Council; and 1 or more orders may be made bringing different provisions into force on different dates.
- (3) To the extent that it is not previously brought into force under subsection (1) or (2), the rest of this Act comes into force on [date].

**Part 1
Preliminary provisions***Purposes***3 Main purposes**

The main purposes of this Act are to—

- (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
- (b) promote and facilitate the development of fair, efficient, and transparent financial markets.

4 Additional purposes

This Act has the following additional purposes:

- (a) to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services:
- (b) to ensure that appropriate governance arrangements apply to financial products and market services that allow for effective monitoring and reduce governance risks:
- (c) to avoid unnecessary compliance costs:
- (d) to promote innovation and flexibility in the financial markets.

*Overview***5 Overview**

- (1) In this Act,—
- (a) this Part deals with preliminary matters, including specifying the purposes of this Act and interpretation:
 - (b) Part 2 prohibits misleading or deceptive conduct, and false or misleading representations, in connection with financial products and financial services:
 - (c) Part 3 provides for—
 - (i) disclosure to investors in relation to certain offers of financial products (Schedule 1 contains provisions relating to when disclosure is required, including exclusions):
 - (ii) advertisements and other publicity for those offers:
 - (iii) ongoing disclosure to investors:
 - (d) Part 4 provides for—
 - (i) the governance of debt securities (including the need for a trust deed and a supervisor):
 - (ii) the registration of managed investment schemes:
 - (iii) the powers of intervention to enable the supervision of debt securities and managed investment schemes by a licensed supervisor or the FMA:
 - (iv) ongoing duties of issuers of all regulated products (for example, to maintain registers of regulated products and keep proper accounting records):
 - (v) duties of persons associated with regulated products to make protected disclosures:
 - (e) Part 5 provides for matters relating to dealing in financial products on markets, including—
 - (i) prohibiting insider trading and market manipulation:
 - (ii) providing for continuous disclosure by listed issuers:
 - (iii) providing for the disclosure of interests of substantial product holders in listed issuers and the disclosure of relevant interests by directors and senior managers of listed issuers:

- (iv) providing for the licensing of markets for trading financial products:
- (v) providing for the transfer of financial products:
- (vi) the making of regulations setting rules for unsolicited offers to purchase financial products off-licensed markets:
- (f) Part 6 regulates certain financial market services, including—
 - (i) the licensing of certain financial market service providers (for example, managers of registered schemes, certain issuers of derivatives, and providers of intermediary services):
 - (ii) providing for disclosure obligations and obligations in respect of client agreements in connection with some of those financial market services:
 - (iii) imposing other conduct obligations on licensees providing discretionary investment management services and on their custodians:
 - (iv) providing for the making of regulations regulating the holding and application of investor funds and property by issuers of derivatives:
- (g) Part 7 provides for enforcement and liability matters, including—
 - (i) providing the FMA and the High Court with certain powers to avoid, remedy, or mitigate any actual or likely adverse effects of contraventions of this Act:
 - (ii) the imposition of civil remedies (including pecuniary penalty orders and compensation orders):
 - (iii) offences:
- (h) Part 8 provides for regulations and exemptions, including powers to prescribe matters relating to the form and content of product disclosure statements, and powers for the FMA to designate financial products and offers, and to grant exemptions, where this is necessary or desirable in order to promote the purposes of this Act:
- (i) Part 9 provides for—
 - (i) appeals from the FMA's decisions:

- (ii) the repeal of the Securities Act 1978, the Securities Markets Act 1988, and certain other enactments, and for consequential amendments:
 - (iii) transitional provisions:
 - (iv) various miscellaneous matters.
- (2) This section is only a guide to the general scheme and effect of this Act.

Interpretation

6 Interpretation

- (1) In this Act, unless the context otherwise requires,—

acquire—

- (a) includes obtain by buying, subscribing, taking an assignment of, or entering into the relevant legal relationship; and
- (b) includes agree to acquire

administration manager, in relation to a registered scheme, means a person to whom a manager of the scheme has contracted some or all of the administration of the scheme

advertisement,—

- (a) in relation to an offer, or intended offer, of financial products, means any form of communication made to the public or a section of the public for the purpose of promoting the offer or intended offer:
- (b) in relation to the supply of financial services, means any form of communication made to the public or a section of the public for the purpose of promoting the supply of the services

agreement includes any contract, arrangement, or understanding

alternative disclosure obligation means any provision of regulations made under section 333 that is stated by those regulations to be an alternative disclosure obligation

associated person or **associated** has the meaning set out in section 11(1)

audio or visual service means an audio or visual service provided to users of the service by means of telecommunications

authorised financial adviser has the same meaning as in section 5 of the Financial Advisers Act 2008

becomes subject to an insolvency event has the meaning set out in subsection (2)

building society has the same meaning as in section 2(1) of the Building Societies Act 1965

business includes any profession, trade, or undertaking, whether or not carried on with the intention of making a pecuniary profit

broadcaster has the same meaning as in section 2(1) of the Broadcasting Act 1989

broadcasting has the same meaning as in section 2(1) of the Broadcasting Act 1989

category 2 product has the same meaning as in section 5 of the Financial Advisers Act 2008

civil remedy order has the meaning set out in section 451

civil remedy provision has the meaning set out in section 452

company means a company, or an overseas company, within the meaning of section 2(1) of the Companies Act 1993

conduct in relation to a takeover offer means conduct following the public announcement by a person of an intention to make an offer (being an offer that is regulated by the takeovers code), whether or not the offer has already begun and whether or not the offer proceeds, and includes conduct incidental or preliminary to a takeover that is regulated by the takeovers code

continuous disclosure exemption means an exemption or a waiver of a continuous disclosure provision or provisions of the listing rules of the licensed market

continuous disclosure obligation means section 248 and any listing rules with which that section requires compliance

continuous disclosure provisions has the meaning set out in section 249

continuous issue PDS means a PDS that—

- (a) relates to financial products that the issuer, in the ordinary course of its business, continuously offers for subscription; and
- (b) is not the first PDS to be lodged in respect of that class of financial products

contravene has the meaning set out in sections 431 and 432

controlling owner, in relation to any person, has the meaning set out in section 4 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (applied to that person as if it were a financial service provider even if it is not)

convertible note has the same meaning as in section YA 1 of the Income Tax Act 2007

court means, in relation to any matter, the court before which the matter is to be determined

custodian means,—

- (a) in relation to a registered scheme, the supervisor of the scheme (if the supervisor holds some or all of the scheme property) or other person to whom the supervisor or manager of the scheme has contracted the holding of some or all of the scheme property;
- (b) in relation to a discretionary investment management service provided by a DIMS licensee, the person holding investor property on behalf of a retail investor under that service

dealing in financial products—

- (a) means any of the following:
 - (i) acquiring or disposing of financial products; or
 - (ii) offering financial products for issue or sale and issuing and transferring financial products; or
 - (iii) underwriting financial products; or
 - (iv) anything that is preparatory to, or related to, any dealings in financial products (for example, giving financial advice), unless an exception applies to those dealings under this Act; and
- (b) does not include dealings exempted by the regulations

debt security has the meaning set out in section 8

derivative has the meaning set out in section 8

derivatives issuer means a person that is in the business of offering derivatives

DIMS licensee means a person that is licensed under Part 6 and whose licence covers acting as a provider of a discretionary investment management service

direction order means an order under section 438

director means,—

- (a) in relation to a company, any person occupying the position of a director of the company by whatever name called;
- (b) in relation to a partnership (other than a limited partnership), any partner;
- (c) in relation to a limited partnership, any general partner;
- (d) in relation to a body corporate or unincorporate, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company;
- (e) in relation to any other person, that person

disclosure document means any of the following:

- (a) a PDS;
- (b) a disclosure document under clause 24 of Schedule 1;
- (c) documents, information, or other matters made available under subpart 4 of Part 3;
- (d) a disclosure statement under subpart 4 of Part 6

discretionary investment management service has the meaning set out in section 415

dispose of—

- (a) includes dispose of by issuing, selling, transferring, withdrawing from, or terminating; and
- (b) includes agree to dispose of; and
- (c) in relation to a derivative, includes discharging obligations under the derivative

distribute includes—

- (a) make available, publish, and circulate; and
- (b) communicate by letter, newspaper, an Internet site, broadcasting, an audio or visual service, sound record-

ing, television, film, video, or any form of electronic or other means of communication

document has the same meaning as in section 4 of the Evidence Act 2006

employee share purchase scheme means a scheme established by an entity under which employees or directors of the entity or of any of its subsidiaries may acquire equity securities issued by the entity

engaging in conduct means doing or refusing to do an act, and includes—

- (a) omitting to do an act; or
- (b) making it known that an act will or will not be done

entity means any of the following:

- (a) a company or other body corporate;
- (b) a corporation sole;
- (c) in the case of a trust that has—
 - (i) only 1 trustee, the trustee acting in his, her, or its capacity as trustee;
 - (ii) more than 1 trustee, the trustees acting jointly in their capacity as trustees;
- (d) an unincorporated body (including a partnership)

equity security has the meaning set out in section 8

exemption means, in Part 7, in respect of an obligation or provision, an exemption granted by or under this Act from that obligation or provision (for example, a continuous disclosure obligation exemption is an exemption from a continuous disclosure obligation), and a reference to a person contravening or complying with an exemption is a reference to a person who relies, or purports to rely, on the exemption contravening or complying with a term or condition of that exemption

exhibiting films to the public means to exhibit to the public films within the meaning of section 2 of the Films, Videos, and Publications Classification Act 1993

financial markets—

- (a) means the financial markets in New Zealand; and
- (b) includes—
 - (i) markets in New Zealand for the provision of financial services; and

(ii) the capital markets in New Zealand

financial markets legislation means the Acts listed in Schedule 1 of the Financial Markets Authority Act 2011 and the enactments made under those Acts

financial markets participant has the same meaning as in section 4 of the Financial Markets Authority Act 2011

financial product has the meaning set out in section 7

financial product market licence means a licence issued under subpart 7 of Part 5

financial product market has the meaning set out in section 290

financial service—

- (a) has the same meaning as in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008; but
- (b) does not include any class or classes of services declared by the regulations not to be financial services for the purposes of this Act

FMA means the Financial Markets Authority established by Part 2 of the Financial Markets Authority Act 2011

generally available to the market has the meaning set out in section 212

governing document—

- (a) means (in the case of a debt security) a trust deed:
- (b) means (in the case of a managed investment scheme) the 1 or more deeds, agreements, or instruments that constitute or govern the activities of the scheme (for example, a partnership agreement or a trust deed):
- (c) includes (in each case)—
 - (i) any amendments to a document referred to in paragraph (a) or (b):
 - (ii) any document that, under the terms of a document referred to in paragraph (a) or (b), forms part of or determines the meaning of any term of that document

give in relation to a document, information, or other matter, includes give by electronic or other means that enables the

recipient to readily store the matter in a permanent and legible form

in the business of, in relation to any service or other activity, means carrying on a business of that type (whether or not the business is the person's only business or the person's principal business)

independent trustee, in relation to a restricted scheme, means the trustee, or director of a sole corporate trustee, who is the licensed independent trustee for the purposes of the restricted scheme

industrial and provident society means a society registered under the Industrial and Provident Societies Act 1908

information insider has the meaning set out in section 213

infringement fee, in relation to a tier 1 infringement offence, means the amount prescribed by the regulations as the infringement fee for the offence

infringement notice means a notice issued under section 475

inside information has the meaning set out in section 213

insolvent means that,—

- (a) in relation to an issuer of a debt security or a managed investment product,—
 - (i) the issuer is unable to pay the issuer's debts as they become due in the normal course of business; or
 - (ii) the value of the issuer's assets is less than the value of the issuer's liabilities, including contingent liabilities
- (b) in relation to a registered scheme,—
 - (i) the funds in the scheme are not sufficient to enable debts in respect of the scheme to be paid as they become due in the normal course of business; or
 - (ii) the value of the assets in the scheme is less than the value of the liabilities in respect of the scheme, including contingent liabilities

inspection period means the period commencing on the third working day after the day on which notice of intention to in-

spect is served on the issuer by the person concerned and ending with the eighth working day after the day of service

investment authority has the meaning set out in section 415

investment manager means, in relation to a registered scheme, a person to whom a manager of the scheme has contracted the investment of some or all of the scheme property

investment mandate has the meaning set out in section 415

investor includes—

- (a) a person to whom an offer of financial products is made; and
- (b) a person who acquires, or may acquire, a financial product

issued and **issuer** have the meanings set out in section 10

issuer obligation means an obligation imposed on the issuer of a financial product by or under any of the following:

- (a) a governing document that relates to the financial product;
- (b) the terms of any regulated offer of the financial product;
- (c) a court order relating to the financial product;
- (d) this Act;
- (e) the KiwiSaver Act 2006;
- (f) Part 5D of the Reserve Bank of New Zealand Act 1989

KiwiSaver scheme means a scheme that is registered on the register of managed investment schemes as a KiwiSaver scheme

licence means a licence under this Act or, in relation to a supervisor, the Statutory Supervisors Act 2011 and **licensed** means having a licence under this Act or, in relation to a supervisor, the Statutory Supervisors Act 2011

licensed market means a financial product market that is licensed under Part 5

licensed market obligation means an obligation imposed on a licensed market operator in respect of a licensed market by or under any of the following:

- (a) a condition of the licence;
- (b) section 295 (general obligations in respect of licensed market):

- (c) section 315 (power to request changes to market rules):
- (d) sections 319, 322, 323, and 324 (monitoring obligations)

licensed market operator means—

- (a) a person who is authorised to operate a licensed market under a financial product market licence:
- (b) any subsidiary of that person who is authorised, and is operating the market, under the licence

licensed market services has the meaning set out in section 372

listed issuer means—

- (a) a person who is a party to a listing agreement with a licensed market operator in relation to a licensed market (and includes a licensed market operator that has financial products quoted on its own licensed market):
- (b) a person to whom paragraph (a) previously applied, in respect of any action or event or circumstance to which this Act applied at that time

local authority has the meaning set out in section 5(1) of the Local Government Act 2002

managed investment product has the meaning set out in section 8

managed investment scheme has the meaning set out in section 9

manager means,—

- (a) in relation to a registered scheme (other than a restricted scheme), the person designated or appointed as the manager of the scheme:
- (b) in relation to a restricted scheme, the persons designated or appointed as trustees of the scheme or, if only 1 person is designated or appointed as a trustee of the scheme, that person:
- (c) in relation to a registered scheme if there is no person to whom paragraph (a) or (b) applies, a person occupying the position of, and carrying out any of the functions of, the manager set out in section 124

market service means any of the following:

- (a) acting as a manager of a registered scheme (other than a restricted scheme):
- (b) acting as an independent trustee of a restricted scheme:
- (c) acting as a provider of a discretionary investment management service:
- (d) acting as a custodian for a discretionary investment management service provided by a DIMS licensee:
- (e) acting as a derivatives issuer:
- (f) acting as a provider of prescribed intermediary services

market services licence means a licence issued under Part 6

market services licensee obligation means an obligation imposed on a licensee by or under any of the following:

- (a) a condition of the licence:
- (b) this Act:
- (c) the terms of the offer of a financial product or the provision of a market service:
- (d) a court order made in connection with the offer of a financial product or the provision of a market service:
- (e) in the case of a manager or an independent trustee of a registered scheme,—
 - (i) a governing document:
 - (ii) the KiwiSaver Act 2006

Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

money includes money's worth (except in the definition of debt security)

non-quoted financial products means financial products that are not quoted

offer includes—

- (a) inviting applications for the issue of financial products:
- (b) inviting applications to purchase financial products

offeror, in relation to an offer of financial products, means the issuer or other person who has the capacity, or who agrees, to issue or transfer the financial products if the offer is accepted

Part 2 misleading or deceptive conduct provision means any of sections 16 to 19

Part 3 offer provision means any of the provisions specified in section 84(2) or (3) and any regulations with which those provisions require compliance

Part 4 governance provision means any of the provisions specified in section 208(2) or (3) and any regulations with which those provisions require compliance

Part 5 market provision means—

- (a) any of the provisions specified in section 368(2) or (3); and
- (b) any regulations with which the provisions referred to in paragraph (a) require compliance; and
- (c) any listing rules with which section 248 requires compliance

Part 6 licence provision means—

- (a) any of the provisions specified in section 430(2) or (3); and
- (b) any condition imposed on a market service licence by the regulations that is stated by those regulations to be a Part 6 licence provision

participant means, in relation to a licensed market, a person authorised by the licensed market operator to participate in that market

person includes any entity

prescribed intermediary services means services of a kind that are prescribed for the purposes of this definition and involve a person acting as an intermediary in relation to a particular kind of financial product or financial service

product disclosure statement or **PDS**, in relation to a regulated offer, means a product disclosure statement for the offer

product holder, in relation to a financial product, means—

- (a) in the case of a financial product to which section 189 does not apply, the holder of the financial product; or
- (b) in the case of any other financial product, the person who is registered as the holder of the product in a register kept under subpart 5 of Part 4

provider of a discretionary investment management service has the meaning set out in section 415

QFE or **qualifying financial entity** has the same meaning as in section 5 of the Financial Advisers Act 2008

qualified auditor has the meaning set out in section 206

quoted, in relation to—

- (a) financial products of a listed issuer, means financial products of the issuer that are approved for trading on a licensed market (and, for the avoidance of doubt, financial products do not cease to be quoted merely because trading in those products is suspended):
- (b) derivatives, means derivatives that are approved for trading on a licensed market (and, for the avoidance of doubt, derivatives do not cease to be quoted merely because trading in those products is suspended)

redeemable has the meaning set out in subsection (3)

register entry, in relation to a regulated offer, means the entry for the offer in the register of offers of financial products

register of managed investment schemes means the register of managed investment schemes kept under Schedule 2

register of offers of financial products means the register of offers of financial products kept under Schedule 2

registered bank has the same meaning as in section 2(1) of the Reserve Bank of New Zealand Act 1989

registered scheme means a managed investment scheme that is registered on the register of managed investment schemes

Registrar means the Registrar of Financial Service Providers appointed under section 35 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008

regulated offer has the meaning set out in section 26

regulated product has the meaning set out in section 26

regulations means regulations in force under this Act

related body corporate has the meaning set out in section 11(2)

related party benefit—

- (a) in relation to a registered scheme, has the meaning set out in section 150

- (b) in relation to a DIMS licensee, has the meaning set out in section 422

relative has the meaning set out in clause 5(2) of Schedule 1

relevant event means an event that results in a person having to disclose matters under sections 253 to 256

relevant money, in relation to financial products, means the money paid—

- (a) to acquire the financial products; or
- (b) on account of those financial products before those products are issued or transferred; or
- (c) as a further contribution or a further deposit as referred to in section 10(2)(c)

reporting period has the meaning set out in section 319

Reserve Bank means the Reserve Bank of New Zealand

restricted scheme means a scheme that is registered on the register of managed investment schemes as a KiwiSaver scheme or a superannuation scheme that is a restricted scheme

retail investor has the meaning set out in clause 32 of Schedule 1

retirement scheme has the meaning set out in section 109

Schedule 3 scheme a scheme that, under Schedule 3, is approved as a Schedule 3 scheme

scheme property or **property of the scheme**, in relation to a registered scheme, means the property to which the registered scheme relates, including—

- (a) contributions of money to the scheme; and
- (b) money borrowed or raised for the purposes of the scheme; and
- (c) financial products or other property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a) or (b)
- (d) income and property derived, directly or indirectly, from contributions, money, or property referred to in paragraphs (a) to (c)

security—

- (a) means an arrangement or a facility that has, or is intended to have, the effect of a person making an investment or managing a financial risk; and
- (b) includes—
 - (i) a financial product; and
 - (ii) any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person; but
- (c) does not include any interest or right that is declared by regulations not to be a security for the purposes of this Act

senior manager, in relation to a person (A), means a person who is not a director but occupies a position that allows the person to exercise significant influence over the management or administration of A (for example, a chief executive or a chief financial officer)

special resolution, in relation to product holders, means a resolution approved by product holders holding no less than 75% of the value of the debt securities or managed investment products held by those persons who are entitled to vote on a special resolution and voting (in person, by proxy, or by electronic vote)

stop order means an order under section 433

subscribe includes purchase and contribute to, whether by way of cash or otherwise

subsidiary has the meaning set out in section 5 of the Companies Act 1993

superannuation scheme means a scheme that is registered on the register of managed investment schemes as a superannuation scheme

supervisor means a person appointed as a supervisor in relation to a debt security or managed investment scheme for the purposes of any financial markets legislation

takeovers code means the takeovers code in force under the Takeovers Act 1993

tier 1 infringement offence means an offence identified in this Act as being a tier 1 infringement offence (*see* sections 474 to 477 for the consequences)

tier 2 offence means an offence identified in this Act as being a tier 2 offence (*see* section 473(2) for the consequences)

tier 3 offence means an offence identified in this Act as being a tier 3 offence (*see* section 473(3) for the consequences)

tier 4 offence means an offence identified in this Act as being a tier 4 offence (*see* section 473(4) for the consequences)

trade,—

- (a) in Part 2, means any trade, business, industry, profession, occupation, activity of commerce, or undertaking;
- (b) in subpart 2 of Part 5,—
 - (i) means acquire or dispose of; but
 - (ii) does not include acquire, or dispose of, by inheritance or gift

trading day means, in relation to a licensed market, a day on which the market is open for the trading of financial products

underlying, in relation to a derivative, means the underlying asset, rate, index, commodity, or other thing referred to in paragraph (a)(ii) of the definition of derivative in section 8 in respect of that derivative

unsolicited offer has the meaning set out in section 364(1)

unsolicited offer provision means any provision of any regulations made under section 365 that is stated by those regulations to be an unsolicited offer provision

voting product, in relation to a body,—

- (a) means a financial product of the body that confers a right to vote at meetings of members or shareholders (whether or not there is any restriction or limitation on the number of votes that may be cast by or on behalf of the holder of the product); and
- (b) includes a financial product that is convertible into a financial product of the kind referred to in paragraph (a); but
- (c) does not include a financial product that confers only a right to vote that, under the conditions attached to the

product, is exercisable only in 1 or more of the following circumstances:

- (i) during a period in which a dividend (or part of a dividend) in respect of the product is in arrears:
- (ii) on a proposal to reduce the capital of the body:
- (iii) on a proposal that affects rights attached to the product:
- (iv) on a proposal to put the body into liquidation:
- (v) on a proposal for the disposal of the whole or a material part of the property, business, and undertaking of the body:
- (vi) during the liquidation of the body.

- (2) In this Act, a person **becomes subject to an insolvency event** on the date on which, and (if specified) the time at which,—
- (a) a liquidator is appointed in respect of a liquidation under Part 16 of the Companies Act 1993 or under any other Act; or
 - (b) an administrator is appointed in respect of a voluntary administration under Part 15A of the Companies Act 1993; or
 - (c) a receiver is appointed in relation to the whole or substantially the whole of the assets and undertaking of the person; or
 - (d) a liquidator is appointed in respect of a liquidation of an overseas company under section 342 of the Companies Act 1993; or
 - (e) a statutory manager is appointed in respect of a statutory management under Part 3 of the Corporations (Investigation and Management) Act 1989 or any other enactment; or
 - (f) a person is appointed in respect of, or another event occurs that indicates the start of, a process in New Zealand or in any other country in which the company or other body corporate was incorporated, created, or established that is similar to any of those set out in paragraphs (a) to (e).
- (3) In this Act, a share in an entity or a managed investment product in a scheme is **redeemable** if—

- (a) the constitution, or rules or other documents constituting or defining the constitution, of the entity, the governing documents of the scheme, or the terms of issue of the share or product makes provision for the redemption of the share or product by the entity or the manager of the scheme—
 - (i) at the option of the entity or manager; or
 - (ii) at the option of the holder of the share or product; or
 - (iii) on a date specified in those documents or in those terms; and
- (b) that redemption is for a consideration that is—
 - (i) specified; or
 - (ii) to be calculated by reference to a formula; or
 - (iii) required to be fixed by a suitably qualified person who is not associated with or interested in the entity or manager of the scheme.

7 Meaning of financial product

- (1) In this Act, unless the context otherwise requires, **financial product** means—
 - (a) a debt security; or
 - (b) an equity security; or
 - (c) a managed investment product; or
 - (d) a derivative.
- (2) If an interest or a right is declared by regulations not to be a security for the purposes of this Act, the interest or right is not a financial product for the purposes of this Act.

See MED's note to submitters.

8 Definitions relating to kinds of financial products

- (1) In this Act, unless the context otherwise requires, (subject to subsection (2)(a) and (b))—
 - debt security**—
 - (a) means a right to be repaid money or paid interest on money that is, or is to be, deposited with, lent to, or otherwise owing by, any person; and
 - (b) includes—

- (i) a security commonly referred to in the financial markets as a debenture, bond, or note; and
 - (ii) a convertible note; and
 - (iii) a redeemable share in an entity; but
- (c) does not include—
- (i) a share in a company registered under the Co-operative Companies Act 1996 that is issued or transferred to a transacting shareholder (within the meaning of section 4 of that Act) and that is, or may become, subject to the right of a transacting shareholder to surrender the share under section 20 of that Act; or
 - (ii) a derivative of the kind referred to in paragraph (b) of the definition of that term

derivative—

- (a) means an agreement in relation to which the following conditions are satisfied:
 - (i) under the agreement, a party to the agreement must, or may be required to, provide at some future time consideration of a particular kind or kinds to another person; and
 - (ii) the amount of the consideration, or the value of the agreement, is ultimately determined, derived from, or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, 1 or more of the following:
 - (A) an asset;
 - (B) a rate (including an interest rate or exchange rate);
 - (C) an index;
 - (D) a commodity; and
- (b) includes a transaction that is currently, or in the future becomes, recurrently entered into in the financial markets and is commonly referred to in those markets as—
 - (i) a futures agreement or forward; or

- (ii) an option (other than an option to acquire an equity security, a debt security, or a managed investment product by way of issue); or
- (iii) a swap agreement; or
- (iv) a contract for difference; or
- (v) a cap, collar, floor, or spread; but
- (c) does not include—
 - (i) an agreement for the future provision of services;
 - (ii) a debt security, an equity security, or a managed investment product; and
- (d) does not include an agreement in relation to which the following subparagraphs are satisfied:
 - (i) a party has, or may have, an obligation to buy, and another party has, or may have, an obligation to sell, tangible property (other than New Zealand or foreign currency) at a price and on a date in the future; and
 - (ii) the agreement does not permit the seller's obligations to be wholly settled by cash, or by set-off between the parties, rather than by delivery of the property; and
 - (iii) neither usual market practice, nor the rules of a market, permits the seller's obligations to be closed out by the matching up of the agreement with another agreement of the same kind under which the seller has offsetting obligations to buy

equity security—

- (a) means—
 - (i) a share in a company; and
 - (ii) a share in an industrial and provident society; and
 - (iii) a share in a building society; but
- (b) does not include a debt security

managed investment product—

- (a) means a right to participate in, or receive, financial benefits from a managed investment scheme, whether the right is actual, prospective, or contingent and whether it is enforceable or not (*see* section 9); but
- (b) does not include an equity security or a debt security.

- (2) A financial product of a particular kind referred to in subsection (1)—
- (a) includes—
 - (i) a security declared to be a financial product of that kind under subpart 3 of Part 8; or
 - (ii) a right attaching to, or a legal or an equitable interest in, a financial product of that kind; or
 - (iii) an option to acquire, by way of issue, a financial product of that kind; but
 - (b) does not include—
 - (i) a security that is declared under subpart 3 of Part 8 to be a financial product of a different kind;
 - (ii) a security that is declared under subpart 3 of Part 8 not to be a financial product.
- (3) Paragraph (d) of the definition of **derivative** in subsection (1) applies only to the extent that the agreement deals with the purchase and sale referred to in that paragraph.
- (4) An agreement under which one party has an obligation to buy, and the other has an obligation to sell, property is not a derivative merely because the agreement provides for the consideration to be varied by reference to a general inflation index (for example, the consumers price index-all groups published by Statistics New Zealand).
- (5) Subsection (4) is subject to subsection (2)(a).

9 Definition of managed investment scheme and of financial benefit

- (1) In this Act, unless the context otherwise requires,—
- financial benefit** means capital, earnings, or other financial returns
- managed investment scheme** means a scheme to which both of the following apply:
- (a) the purpose or effect of the scheme is to enable persons taking part in the scheme (**scheme participants**) to contribute money to the scheme as consideration to acquire rights to financial benefits produced principally by the efforts of another person under the scheme; and

- (b) the scheme participants do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

See MED's note to submitters.

- (2) However, a managed investment scheme does not include—
 - Scheme only involves management of direct interests in underlying property*
 - (a) a scheme under which the scheme participant takes part in the scheme only by holding 1 or more interests in property if—
 - (i) it is an interest in separately identifiable or traceable property; and
 - (ii) the scheme participant either holds both the legal and beneficial interest in the property or the legal interest in the property is held on a bare trust for the scheme participant; and
 - (iii) the value of the interest is not substantially dependent on contributions being made by other scheme participants or the use of other scheme participants' contributions:
 - Discretionary investment management services*
 - (b) a discretionary investment management service provided by a DIMS licensee or another person permitted to provide that service under sections 17 to 20 of the Financial Advisers Act 2008:
 - Insurance contracts*
 - (c) a scheme under which each scheme participant receives financial benefits consisting of only contracts of insurance—
 - (i) for the payment of money on the happening of a contingency that is not dependent on the continuance of human life; and
 - (ii) that do not, and never will, have a value on their cancellation or surrender that is greater than the sum of the premiums paid under the scheme:
 - (d) a scheme under which each scheme participant receives financial benefits consisting of only contracts of insurance, whether or not paragraph (c)(i) and (ii) apply, if

the contract was entered into before the date on which this section comes into force.

See MED's note to submitters.

10 Definitions of issued and issuer

- (1) In this Act, unless the context otherwise requires,—
- (a) a financial product is **issued** to a person when it is first issued, granted, or otherwise made available to a person (subject to subsection (2)):
 - (b) **issuer** means, in relation to—
 - (i) a debt security, the person that is liable to repay money or pay interest under the security (other than as a guarantor):
 - (ii) an equity security, the company, industrial and provident society, building society, or other entity to which the security relates:
 - (iii) a managed investment product, the manager of the managed investment scheme to which the product relates:
 - (iv) a derivative, the derivatives issuer that offered to issue the derivative.
- (2) Despite subsection (1)(a),—
- (a) a managed investment product that is an interest in a superannuation scheme or KiwiSaver scheme is issued to a person when the person becomes a member of the scheme:
 - (b) a derivative is issued to a person when the person enters into the legal relationship that constitutes the derivative:
 - (c) none of the following are taken to give rise to the issue of a financial product to a person (**A**):
 - (i) A making a further contribution to a superannuation scheme, a KiwiSaver scheme, or other prescribed scheme of which A is already a member:
 - (ii) an employer of A or any other person making a further contribution, for the benefit of A, to a superannuation scheme, a KiwiSaver scheme, or other prescribed scheme of which A is already a member:

- (iii) A making a further deposit into a prescribed deposit product:
 - (iv) A engaging in conduct specified in regulations made for the purposes of this subparagraph in relation to a financial product already held by A.
- (3) Despite subsection (1)(b), if a debt security is offered for the purposes of a managed investment scheme, the manager of the scheme is the issuer for the purposes of this Act.
- (4) In this Act, a person ceases to be an issuer in relation to financial products when those products are cancelled, redeemed, or forfeited, or all of the obligations owing under those products have been discharged.
- (5) If the terms of a financial product require or allow the person acquiring the product to pay separate amounts of money at different times, each of those payments must, for the purposes of this Act, be treated as payment for the same financial product as each of those other payments.

See MED's note to submitters.

11 Meaning of associated person and related body corporate

- (1) In this Act, unless the context otherwise requires, a person (**A**) is **associated** with, or an **associated person** of, another person (**B**) if—
 - (a) A is a body corporate and B has the power, directly or indirectly, to exercise, or control the exercise of, the rights to vote attaching to 25% or more of the voting products of the body corporate:
 - (b) A and B are relatives or related bodies corporate:
 - (c) A and B are partners to whom the Partnership Act 1908 applies:
 - (d) A is a director or senior manager of B:
 - (e) A and B are acting jointly or in concert:
 - (f) A acts, or is accustomed to act, in accordance with the wishes of B:
 - (g) A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B:
 - (h) A and B are bodies corporate that consist substantially of the same members or shareholders or that are under the control of the same persons:

- (i) there is another person to which A and B are both associated.
- (2) In this Act, unless the context otherwise requires, a body corporate (A) is a **related body corporate** of another body corporate (B) if—
 - (a) B is A's holding company or subsidiary within the meaning of section 5 of the Companies Act 1993; or
 - (b) more than half of A's voting products (other than voting products that carry no right to participate beyond a specified amount in a distribution of either profits or capital) are held by B and bodies corporate that are related to B (whether directly or indirectly, but other than in a fiduciary capacity); or
 - (c) more than half of the voting products (other than voting products that carry no right to participate beyond a specified amount in a distribution of either profits or capital) of each of A and B are held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
 - (d) the businesses of A and B have been so carried on that the separate business of each body corporate, or a substantial part of that business, is not readily identifiable; or
 - (e) there is another body corporate to which A and B are both related.

12 Miscellaneous interpretation provisions relating to statements and information

- (1) In this Act, a reference to a statement or other information that is false or misleading includes a reference to a statement or information that is false or misleading by reason of—
 - (a) the form or context in which the statement or information is made, published, or provided; or
 - (b) the omission of any other information that is material in the form and context in which it is made, published, or provided.
- (2) In this Act, a statement or other information must be treated as being included in a PDS, a register entry, or any other document or communication provided under this Act if it—

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- (a) is contained in the PDS, register entry, document, or communication (as the case may be); or
 - (b) appears on the face of the PDS, register entry, document, or communication (as the case may be); or
 - (c) is contained in any financial statements, report, or other document that accompanies, or is incorporated by reference or referred to in, or distributed with, the PDS, register entry, document, or communication (as the case may be).
- (3) If this Act or the regulations require information or any other matter to be contained or included in a PDS, register entry, document, or communication, the information or other matter may be incorporated by reference only if this is authorised by the regulations.

13 Status of examples

- (1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions.
- (2) If an example and a provision to which it relates are inconsistent, the provision prevails.

Act binds the Crown

14 Act binds the Crown

This Act binds the Crown.

General application provision

15 Application of Act

- (1) The provisions of this Act have effect despite anything to the contrary in any other enactment or in any agreement, deed, application, disclosure document, or advertisement.
- (2) A provision of an agreement or a deed is void if it provides that a party to the agreement or deed is—
 - (a) required or bound to waive compliance with any requirement of this Act; or
 - (b) taken to have notice of any agreement, document, or matter not specifically referred to in the relevant disclosure document (if any).

- (3) Nothing in this section or in any other provision of this Act limits the Illegal Contracts Act 1970.

Part 2

Misleading or deceptive conduct or false or misleading representations

16 Misleading or deceptive conduct generally

A person must not, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to—

- (a) any dealings in financial products; or
- (b) the supply of a financial service.

Compare: 1986 No 121 s 9; 1988 No 234 s 13

17 Misleading conduct in relation to financial products

A person must not, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of financial products.

Compare: 1986 No 121 s 10

18 Misleading conduct in relation to financial services

A person must not, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of financial services.

Compare: 1986 No 121 s 11

19 False or misleading representations

A person must not, in trade, in connection with the offer or supply of financial products or financial services, the possible offer or supply of those products or services, or the promotion by any means of the issue, transfer, supply, or use of those products or services, make a false or misleading representation—

- (a) that the products or services are of a particular kind, standard, quality, quantity, value, grade, or composition, or have had a particular history; or
- (b) that the products or services are offered, issued, transferred, or supplied by a particular person, by a person

- who has particular characteristics, or by a person who is of a particular kind; or
- (c) that a particular person has agreed to acquire the products or services; or
 - (d) that the products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
 - (e) that a person has any sponsorship, approval, endorsement, or affiliation; or
 - (f) with respect to the price of the products or services; or
 - (g) concerning the need for the products or services; or
 - (h) concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993.

Compare: 1986 No 121 s 13

20 Certain conduct does not contravene this Part

- (1) Conduct that contravenes section 63, 83, or 409 or clause 25 of Schedule 1 does not contravene this Part.
- (2) For the purpose of this section, conduct contravenes section 63, 83, or 409 or clause 25 of Schedule 1 even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

Compare: Australian Securities and Investments Commission Act 2001 ss 12DA(1A), 12DB(2) (Aust)

21 Limited application of Part in relation to newspapers, magazines, broadcasting, etc

- (1) Nothing in this Part applies to the publication of any information or matter in a newspaper or magazine, or on a news media or financial market commentary Internet site, by the relevant person, not being—
 - (a) the publication of an advertisement; or
 - (b) the publication of any information or matter relating to the offer or supply, or possible offer or supply, of financial products or financial services or the promotion

of the issue, transfer, or supply of financial products or financial services by—

- (i) the relevant person or, if the relevant person is a body corporate, by a related body corporate; or
 - (ii) a person who is a party to any agreement with the relevant person relating to the content, nature, or tenor of the information or matter.
- (2) Nothing in this Part applies to the broadcasting or exhibiting of any information or matter by the relevant person, not being—
- (a) the broadcasting or exhibiting of an advertisement; or
 - (b) the broadcasting or exhibiting of any information or matter relating to the offer or supply, or possible offer or supply, of financial products or financial services or the promotion of the issue, transfer, or supply of financial products or financial services by—
 - (i) the relevant person or, if the relevant person is a body corporate, by a related body corporate; or
 - (ii) a person who is a party to any agreement with the relevant person relating to the content, nature, or tenor of the information or matter.
- (3) In this section,—
- exhibiting** means—
- (a) exhibiting by means of an audio or visual service; or
 - (b) exhibiting films to the public
- relevant person** means, in relation to—
- (a) a newspaper or magazine, the proprietor of the newspaper or magazine;
 - (b) a news media or financial market commentary Internet site, the person that controls the content of the Internet site;
 - (c) broadcasting, the broadcaster;
 - (d) an audio or visual service, the person who controls the content of the audio or visual service;
 - (e) exhibiting films to the public, the person that exhibits the films.

Compare: 1986 No 121 s 15

22 Other exceptions

- (1) This Part does not apply to conduct in relation to a takeover offer for financial products under the takeovers code or to conduct under that offer to the extent that the conduct is regulated by the code, the Takeovers Act 1993, or an exemption granted under that Act.
- (2) This Part does not apply to conduct in relation to the acquisition or redemption by a company of its shares under the Companies Act 1993 to the extent that the conduct is regulated by that Act.

Compare: 1988 No 234 ss 14, 15

23 Territorial scope of Part

This Part applies to—

- (a) conduct in New Zealand; and
- (b) conduct outside New Zealand by any person resident, incorporated, or carrying on business in New Zealand to the extent that that conduct relates to dealings in financial products, or the provision of a financial service, that occurs (in part or otherwise) within New Zealand.

Compare: 1988 No 234 s 18

Part 3**Disclosure of offers of financial products****Subpart 1—Application****24 Issue offers that need disclosure**

An offer of financial products for issue requires disclosure to an investor under this Part unless an exclusion under Part 1 of Schedule 1 applies.

Compare: Corporations Act 2001 s 706 (Aust)

25 Sale offers that need disclosure

An offer of financial products for sale requires disclosure to an investor under this Part only if disclosure is required under Part 2 of Schedule 1.

Compare: Corporations Act 2001 s 707(1) (Aust)

26 Meaning of regulated offer and of regulated product

- (1) In this Act, **regulated offer** means an offer of financial products to 1 or more persons where the offer to at least 1 of those persons requires disclosure under this Part (regardless of whether or not an exclusion under Schedule 1 applies to an offer to 1 or more other persons).

Example

ABC Limited makes an offer of its ordinary shares to 100 investors.

Of those investors, 5 are wholesale investors, 15 are relatives of directors of ABC Limited, and 20 are close business associates of ABC Limited. Exclusions under Schedule 1 apply and accordingly the offers to these investors do not require disclosure under this Part.

However, none of the exclusions in Schedule 1 apply to the remaining 60 investors. The offer to each of these investors requires disclosure. This means that a product disclosure statement must be given to each of the 60 investors under section 34 (subject to section 35).

The offer of ABC Limited's ordinary shares, as a whole, is a regulated offer because at least some of the offers to investors require disclosure.

Some obligations under this Act apply to the regulated offer as a whole. These obligations apply to all of the investors even if the offers to some of those persons do not require disclosure. For example, all subscriptions for the shares must be held in trust under section 67 (even if the subscription is paid by a wholesale investor, a relative, or a close business associate) and registers of financial products kept under subpart 5 of Part 4 relate to products held by all product holders.

- (2) In this Act, **regulated product** means—
- (a) a financial product offered under a regulated offer; or
 - (b) a managed investment product in a registered scheme (whether or not there has been a regulated offer).

27 Regulated offers that need to meet additional governance requirements

- (1) A regulated offer of debt securities needs to meet the governing document and supervisor requirements under subpart 2 of Part 4 unless an exclusion under Part 3 of Schedule 1 applies.

- (2) A regulated offer of managed investment products needs to meet the registration requirements under subpart 3 of Part 4 unless an exclusion under Part 4 of Schedule 1 applies.

28 Treatment of offers of options over financial products

- (1) For the purposes of this Part,—
- (a) an offer of an option over financial products must not be taken to be an offer of the underlying financial products; and
 - (b) the grant of an option without an offer of the option must be taken to be an offer of the option; and
 - (c) an offer to grant an option must be taken to be an offer to issue the option.
- (2) *See* clause 11 of Schedule 1 for an exclusion in relation to options.

Compare: Corporations Act 2001 s 702 (Aust)

See MED's note to submitters.

29 Treatment of offers of convertible financial products

For the purposes of this Part, an offer of a financial product of an issuer that will be converted, or is or will become convertible, into another financial product of the issuer must be taken to be an offer of the financial product that is issued and of the financial product it converts into.

See MED's note to submitters.

30 Treatment of offers of renewals and variations

- (1) For the purposes of this Part, an offer of a renewal or variation of the terms or conditions of a financial product made by the issuer must be taken to be an offer of the financial product as renewed or varied.
- (2) A change to the terms or conditions of a financial product is not a variation for the purposes of this section if the change is made in accordance with the terms or conditions of the financial product (for example, if the issuer exercises a power under the terms or conditions to change an interest rate).

- (3) See clause 21 of Schedule 1 for an exclusion in relation to renewals and variations (but limited disclosure may be required under clause 24 of that schedule).

31 Territorial scope of Part

- (1) This Part applies to offers of financial products in New Zealand, regardless of—
- (a) where any resulting issue or transfer occurs;
 - (b) where the issuer or offeror is resident, incorporated, or carries on business.
- (2) For the purposes of this Part, financial products are offered in New Zealand if an offer of the financial products is received by a person in New Zealand, unless the offeror demonstrates that it took all reasonable steps to ensure that persons in New Zealand (other than persons referred to in subsection (3)) may not accept the offer.
- (3) In applying subsection (2), offers made to persons to whom disclosure under this Part is not required must be disregarded.
- (4) The territorial scope of this Part may be further extended under subpart 6 of Part 8.

Compare: 1978 No 103 s 7

Subpart 2—Procedure for making offers

Product disclosure statement must be prepared and lodged

32 PDS must be prepared and lodged

- (1) A person must not make a regulated offer, or distribute an application form for a regulated offer, unless the issuer of the financial products has—
- (a) prepared a product disclosure statement (**PDS**) for the offer; and
 - (b) lodged the PDS with the Registrar; and
 - (c) supplied to the Registrar all of the information and documents that the register entry is required to contain.
- (2) A person who contravenes subsection (1) commits a tier 3 offence if the person knows that, or is reckless as to whether, the offer is a regulated offer.

Compare: Corporations Act 2001 ss 709(1), 718, 727(1) (Aust)

33 Purpose of PDS

The purpose of a PDS is to provide certain information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial products.

See MED's note to submitters.

*Disclosure to investors***34 PDS must be given if offer requires disclosure**

- (1) A person who makes an offer of financial products to a person to whom disclosure under this Part is required (**A**) must ensure that a PDS for the offer is given to A before an application is made by, or on behalf of, A to acquire the financial products.
- (2) *See* sections 24 and 25 and Schedule 1, which contain provisions relating to when an offer of financial products to a person requires disclosure under this Part.

35 Certain situations in which section 34 does not need to be complied with

A person who makes an offer of financial products to a person (**A**) does not have to give a PDS to A under section 34—

- (a) if A has already been given a PDS (for the same or a different offer) that contains all of the information that the first-mentioned PDS would be required to contain; or
- (b) if the person who makes the offer believes on reasonable grounds that paragraph (a) applies; or
- (c) in any other prescribed circumstances.

Compare: Corporations Act 2001 s 1012D(1) (Aust)

36 PDS treated as having been given if application form that is used was included in, or accompanied by, PDS

A person who makes an offer of financial products to a person (**A**) must be treated as having complied with section 34 if the person—

- (a) issues or transfers the financial products to A in response to an application form; and
- (b) has reasonable grounds to believe that—

- (i) the application form was included in, or accompanied by, the PDS when the form was distributed by or on behalf of the person; or
- (ii) the form was copied, or directly derived, by the person making the application from a form referred to in subparagraph (i).

37 Offence to knowingly or recklessly contravene section 34

A person who makes an offer of financial products to a person (A) commits a tier 3 offence if the person—

- (a) contravenes section 34; and
- (b) knows that, or is reckless as to whether, the offer of financial products to A requires disclosure under this Part.

38 Right to withdraw and have money returned

- (1) If a person makes an offer of financial products to a person (A) and contravenes section 34, A has the right to return the financial products and to have the relevant money repaid.
- (2) A right referred to in subsection (1) is exercisable by written notice given to the offeror within the earlier of—
 - (a) 6 months after A knows, or ought reasonably to know, that section 34 has been contravened; or
 - (b) 12 months after the financial products are issued or transferred to A.
- (3) If a notice is given under subsection (2),—
 - (a) the offeror must repay the relevant money as soon as practicable; and
 - (b) if the offeror does not repay the relevant money within 1 month after the notice is given, the offeror and the directors of the offeror are jointly and severally liable to repay the relevant money together with interest at a prescribed rate from the date on which the notice was given.
- (4) This section does not limit any other liability that a person may have for a contravention of section 34.

Content and presentation of product disclosure statements

39 Disclosure of material information and content of PDS and register entry

- (1) An issuer that prepares, or is required to prepare, a PDS must ensure that, as at the date on which a certificate of lodgement is given under clause 14 of Schedule 2,—
 - (a) all material information relating to the regulated offer is contained in either or both of the following:
 - (i) the PDS;
 - (ii) the register entry (if any); and
 - (b) the PDS—
 - (i) contains all of the information that it is required to contain by the regulations; and
 - (ii) is accompanied by all the documents that the regulations require it to be accompanied by; and
 - (iii) complies with all other requirements of the regulations relating to the content of the PDS; and
 - (iv) is dated with the date that it is lodged with the Registrar; and
 - (v) if applicable, specifies its expiry date (*see* section 65) and states that no financial products will be issued or sold on the basis of the PDS after the expiry date; and
 - (vi) complies with section 41 (consent of person to whom statement attributed); and
 - (c) the register entry (if any)—
 - (i) contains all of the information and documents that it is required to contain by the regulations; and
 - (ii) complies with all other requirements of the regulations relating to the content of the register entry; and
 - (iii) complies with section 41 (consent of person to whom statement attributed).
- (2) If any material information relating to a regulated offer is not contained in the PDS, the issuer of the financial products must ensure that the information is contained in the register entry (if any).

- (3) Subsection (1)(a) and (2) do not apply in the prescribed circumstances (which may include, for example, certain offers to existing product holders or certain situations in which information about an offer is available by means of a continuous disclosure obligation).

40 Meaning of material information in this Part

In this Part, unless the context otherwise requires, **material information**, in relation to a regulated offer, means information that—

Option A starts

- (a) a reasonable person would expect, if it were publicly disclosed, to have a material effect on the demand for the financial products on offer; and

Option A ends

Option B starts

- (a) a reasonable person would expect would, or would be likely to, influence persons who commonly invest in financial products in deciding whether to acquire the financial products on offer; and

Option B ends

- (b) relates to the particular financial products on offer or the particular issuer or offeror, rather than to financial products generally, issuers generally, or offerors generally.

See MED's note to submitters

Compare: Corporations Act 2001 ss 674, 677, 710, 1013E (Aust)

41 Consent of person to whom statement attributed

- (1) An issuer that prepares, or is required to prepare, a PDS must ensure that the PDS, and the register entry, include a statement by a person, or a statement said in the PDS, or register entry, to be based on a statement by a person, only if—
- (a) the person has consented to the statement being included in the PDS or register entry in the form and context in which it is included; and
- (b) the PDS or register entry states that the person has given the consent; and

- (c) the person has not withdrawn the consent before the PDS is lodged with the Registrar.
- (2) The issuer must keep a copy of the consent.
Compare: Corporations Act 2001 ss 716, 735(1) (Aust)

42 PDS must be worded and presented in clear, concise, and effective manner

- (1) An issuer that prepares, or is required to prepare, a PDS must ensure that the information in the PDS is worded and presented in a clear, concise, and effective manner.
- (2) This section is not a civil remedy provision for the purposes of subpart 3 of Part 7 (but *see* subpart 1 of Part 7, which allows the FMA to make a stop order if a PDS does not comply with this section).
Compare: Corporations Act 2001 s 715A (Aust)

43 PDS must comply with prescribed requirements relating to form and presentation

An issuer that prepares, or is required to prepare, a PDS must ensure that the PDS complies with all requirements of the regulations relating to the form and presentation of the statement.

Other provisions relating to lodging of PDS and other documents

44 Supply of prescribed information and documents

- (1) An issuer that lodges a PDS or other document under this Part must supply the prescribed information and documents to the Registrar when the PDS or document is lodged.
- (2) An issuer who contravenes this section commits a tier 1 infringement offence.

45 Registrar must notify FMA of lodgement of PDS

- (1) The Registrar must, immediately after a PDS is lodged, notify the FMA of the lodgement for the purpose of allowing the FMA an opportunity to consider the PDS and any governing documents.

- (2) The nature and extent of the consideration (if any) that the FMA gives to a PDS or governing document are at the FMA's discretion.

Compare: 1978 No 103 s 43C(1), (3)

46 Waiting period after lodgement before processing applications for financial products

- (1) A person must not accept an application for, or issue or transfer, financial products offered under a regulated offer until the period of 5 working days after lodgement of the PDS has ended.
- (2) The FMA may extend the period by notice in writing to the offeror.
- (3) The period as extended must end no later than 10 working days after lodgement of the PDS.
- (4) The FMA must give a copy of the notice under subsection (2) to the Registrar.
- (5) A person who contravenes subsection (1) commits a tier 1 infringement offence.
- (6) This section does not prevent an issuer or offeror from receiving applications for financial products or money during the period that applies under this section.

Compare: 1978 No 103 s 43D; Corporations Act 2001 s 727(3) (Aust)

47 Waiting period restriction does not prevent offeror from acting under another PDS

If section 46 applies to a PDS that relates to a particular offer of financial products but another PDS also relates to the offer of those products, that section does not prevent a person from accepting applications for, or issuing or transferring, financial products in reliance upon the other PDS.

48 FMA may remove restrictions if its consideration is complete or consideration or further consideration is unnecessary

- (1) This section applies if the FMA is satisfied that—
- (a) its consideration of a PDS and any governing document is complete; or

- (b) consideration or further consideration of a PDS and any governing document is, in the circumstances, unnecessary.
- (2) The FMA may give notice to the offeror that—
 - (a) the period that applies under section 46 ends at a particular time specified by the FMA (being an earlier time than that provided for under that section); or
 - (b) section 46 does not apply in respect of the PDS.
- (3) Nothing in this section limits subpart 2 of Part 8 (which allows the FMA to grant exemptions in respect of compliance with section 46).

Compare: 1978 No 103 s 43E

49 Waiting period does not usually apply to continuous issue PDSs

- (1) Section 46 applies to a continuous issue PDS only if it is of a class that is prescribed by the FMA in a notice under this section.
- (2) The FMA may issue a notice that prescribes the class or classes of continuous issue PDSs to which section 46 applies.
- (3) The FMA must, before issuing a notice in respect of a class of continuous issue PDSs, be satisfied that it is in the public interest for the FMA to have an opportunity to consider those statements before any person accepts applications for, or issues or transfers, financial products offered under those statements (for example, that in the circumstances, a particular risk relates to a particular class of offerors or financial products).
- (4) Subpart 5 of Part 8 (general provisions relating to FMA instruments) applies to a notice under this section.

Compare: 1978 No 103 s 43EA

50 No guarantee or representation as to compliance

- (1) Nothing done or omitted to be done under this Act by the Registrar or the FMA guarantees or represents that—
 - (a) a PDS, register entry, or governing document—
 - (i) complies with this Act and the regulations:

- (ii) does not contain any material misdescription or error or any material matter that is not clearly legible:
 - (iii) is not misleading or deceptive:
- (b) the FMA has considered a PDS, register entry, or governing document with a view to determining whether it—
 - (i) complies with this Act and the regulations:
 - (ii) contains any material misdescription or error or any material matter that is not clearly legible:
 - (iii) is misleading or deceptive.
- (2) This section does not limit section 22 of the Financial Markets Authority Act 2011 (which provides protection from liability for the FMA and its members and employees).
Compare: 1978 No 103 s 43M

51 When supplementary document or replacement PDS may be lodged

- (1) An issuer that lodges a PDS may lodge a supplementary document or replacement PDS with the Registrar to—
 - (a) correct a misleading or deceptive statement in the PDS; or
 - (b) correct an omission from the PDS of information it is required to contain by this Act or the regulations; or
 - (c) correct the PDS because is not worded and presented in a clear, concise, and effective manner; or
 - (d) update, or add to, the information contained in the PDS.
- (2) However, a supplementary document must not be lodged with the Registrar in the prescribed circumstances.
Compare: Corporations Act 2001 s 1014A (Aust)

52 Supplementary document

- (1) If a supplementary document is lodged with the Registrar, the PDS together with the supplementary document is taken to be the PDS for the purposes of the application of this Act to events that occur after the lodgement.
- (2) The issuer must ensure that, at the beginning of a supplementary document, there is—
 - (a) a statement that it is a supplementary document; and

- (b) an identification of the PDS that it supplements; and
 - (c) an identification of all previous supplementary documents lodged with the Registrar in relation to the regulated offer; and
 - (d) a statement that it is to be read together with the PDS that it supplements and the previous supplementary documents.
- (3) The supplementary document must be dated with the date on which it is lodged with the Registrar.

Compare: Corporations Act 2001 s 719(2), (4) (Aust)

53 Replacement PDS

- (1) If a replacement PDS is lodged with the Registrar, the PDS is taken to be the replacement PDS for the purposes of the application of this Act to events that occur after the lodgement.
- (2) The issuer must ensure that, at the beginning of a replacement PDS, there is—
- (a) a statement that it is a replacement PDS; and
 - (b) an identification of the PDS that it replaces.
- (3) The replacement PDS must be dated with the date on which it is lodged with the Registrar.

Compare: Corporations Act 2001 s 719(3), (5) (Aust)

54 Registrar must notify FMA of lodgement of supplementary document or replacement PDS

- (1) The Registrar must, immediately after a supplementary document or replacement PDS is lodged, notify the FMA of the lodgement for the purpose of allowing the FMA an opportunity to consider the supplementary document or replacement PDS.
- (2) The nature and extent of the consideration (if any) that the FMA gives to a supplementary document or replacement PDS is at the FMA's discretion.
- (3) Section 46 does not apply to the lodgement of a supplementary document or replacement PDS.

Compare: 1978 No 103 s 43C(1), (3)

55 Consents needed for lodgement

- (1) An issuer must ensure, before the issuer lodges a PDS, supplementary document, or replacement PDS, that the consent of each of the following is given to the lodgement:
 - (a) every director of the issuer; and
 - (b) every other prescribed person.
- (2) The consent must be given in the prescribed manner.
Compare: Corporations Act 2001 s 720 (Aust)

56 Issuer must keep copy of consent

- (1) The issuer must keep a copy of the consent referred to in section 55.
- (2) An issuer who contravenes subsection (1) commits a tier 1 infringement offence.
Compare: Corporations Act 2001 s 735(1) (Aust)

57 Publication of lodgement

- (1) If a PDS, supplementary document, or replacement PDS is lodged by an issuer under this Part, the issuer must, within 5 working days after it receives the certificate of lodgement from the Registrar, ensure that an Internet site maintained by or on behalf of the issuer—
 - (a) contains a reasonably prominent statement—
 - (i) to the effect that the PDS, supplementary document, or replacement PDS has been lodged; and
 - (ii) describing where and how a copy of the PDS, supplementary document, or replacement PDS can be obtained; or
 - (b) contains a reasonably prominent link to such a statement.
- (2) The statement or link referred to in subsection (1) may be removed from the Internet site maintained by or on behalf of the issuer on or after the expiry date of the PDS.

*Amending register entry***58 When register entry may be amended**

An issuer of financial products offered under a regulated offer may give notice to the Registrar to amend the register entry in order to—

- (a) correct a misleading or deceptive statement in the register entry; or
- (b) correct an omission from the register entry of information it is required to contain by this Act or the regulations; or
- (c) update, or add to, the information contained in the register entry.

*Conditions referred to in PDS***59 Minimum subscription condition must be fulfilled before issue or transfer**

- (1) This section applies if a PDS states that the financial products will not be issued or transferred unless—
 - (a) applications for a minimum number of the financial products are received; or
 - (b) a minimum amount is raised.
- (2) A person must not issue or transfer any of the financial products under the regulated offer until the condition referred to in subsection (1) is satisfied.
- (3) For the purpose of working out whether a condition referred to in this section or section 61(2)(a) has been satisfied, a person who has agreed to take financial products as an underwriter is taken to have applied for those products.

Compare: Corporations Act 2001 s 723(2) (Aust)

60 Issue or transfer void if quotation condition not fulfilled

- (1) This section applies if—
 - (a) a PDS states or implies that the financial products are to be quoted on a financial market (whether in New Zealand or elsewhere); and
 - (b) either—

- (i) an application for the admission of the products to quotation is not made within 7 days after the date of the PDS; or
 - (ii) the products are not admitted to quotation within 3 months after the date of the PDS.
- (2) An issue or a transfer of financial products under the regulated offer is void.
- (3) The offeror must deal under section 62 with the application for financial products that relates to the issue or transfer referred to in subsection (2).

Compare: Corporations Act 2001 s 723(3) (Aust)

Dealing with applications where condition referred to in PDS is not met or disclosure is defective

61 Application of section 62

- (1) An offeror must, if any of subsections (2) to (5) apply, deal under section 62 with any applications for the financial products offered under the regulated offer that have not resulted in an issue or a transfer of the products.
- (2) This subsection applies if—
 - (a) a PDS states that the financial products will not be issued or transferred unless—
 - (i) applications for a minimum number of the financial products are received; or
 - (ii) a minimum amount is raised; and
 - (b) the condition referred to in paragraph (a) is not satisfied within 4 months after the date of the PDS.
- (3) This subsection applies if—
 - (a) a PDS states or implies that the financial products are to be quoted on a financial market (whether in New Zealand or elsewhere); and
 - (b) either—
 - (i) an application for the admission of the products to quotation is not made within 7 days after the date of the PDS; or
 - (ii) the products are not admitted to quotation within 3 months after the date of the PDS.

- (4) This subsection applies if—
- (a) the issuer or offeror or both becomes aware—
 - (i) that a statement in the PDS is misleading or deceptive or is likely to mislead or deceive; or
 - (ii) that there is an omission from the PDS of information required to be contained in the PDS by this Act or the regulations; or
 - (iii) of a circumstance that has arisen since the PDS was lodged that would have been required by this Act or the regulations to be disclosed or otherwise contained in the PDS if it had arisen before the PDS was lodged; and
 - (b) the matter referred to in paragraph (a) is materially adverse from the point of view of an investor.
- (5) This subsection applies if—
- (a) the issuer or offeror or both becomes aware—
 - (i) that a statement in the register entry is misleading or deceptive or is likely to mislead or deceive; or
 - (ii) that there is an omission from the register entry of information required to be contained in the register entry by this Act or the regulations; or
 - (iii) of a circumstance that has arisen since the PDS was lodged that would have been required by this Act or the regulations to be disclosed or otherwise contained in the register entry if it had arisen before the PDS was lodged; and
 - (b) the matter referred to in paragraph (a) is materially adverse from the point of view of an investor.

Compare: Corporations Act 2001 s 724(1) (Aust)

62 Choices open to offeror

- (1) If this section applies, the offeror must do 1 of the following in respect of each applicant:
- (a) repay the money received from the applicant in respect of the application for financial products; or
 - (b) in the case of section 60 or 61(2), (3), or (4), give to the applicant—

- (i) a supplementary document or replacement PDS that corrects the deficiency or changes the terms of offer; and
 - (ii) 1 month to confirm whether or not the applicant still wants to acquire the financial products; or
- (c) in the case of section 61(5),—
 - (i) amend the register entry to correct the deficiency; and
 - (ii) give notice in the prescribed manner to the applicant that the register entry has been amended; and
 - (iii) give to the applicant 1 month to confirm whether or not the applicant still wants to acquire the financial products.
- (2) If an applicant does not confirm that he, she, or it still wants to acquire the financial products within 1 month after being given the opportunity to do so under subsection (1)(b)(ii) or (c)(iii), the offeror must repay the money received from the applicant in respect of the application for financial products as soon as practicable.
- (3) If the offeror does not repay the money within 1 month after being required to do so under subsection (2), the offeror and the directors of the offeror are jointly and severally liable to repay the money together with interest at a prescribed rate from the expiry of that 1 month period.
- (4) An offeror must, when acting under this section, comply with the prescribed requirements (if any).

Compare: Corporations Act 2001 s 724(2) (Aust)

Prohibition of further offers where defective disclosure in PDS or register entry

63 Misleading or deceptive statements, omissions, and new matters requiring disclosure

- (1) A person must not continue to offer financial products under a regulated offer if there is—
 - (a) a statement in the PDS, any application form that accompanies the PDS, or the register entry that is misleading or deceptive or is likely to mislead or deceive; or

- (b) an omission from the PDS, or the register entry, of information that is required to be contained in the PDS, or the register entry, by this Act or the regulations; or
 - (c) a circumstance that has arisen since the PDS was lodged that would have been required by this Act or the regulations to be disclosed or otherwise contained in the PDS, or the register entry, if it had arisen before the PDS was lodged.
- (2) For the purposes of this section, a person is taken to make a statement that is misleading about a future matter (including the doing of, or refusing to do, an act) if the person does not have reasonable grounds for making the statement.
 - (3) Subsection (2) does not limit the meaning of a reference to a misleading statement.
 - (4) *See* section 478 (offence to knowingly or recklessly contravene this section) and sections 463 to 466 (which provide for special rules in relation to compensation for a contravention of this section).

Compare: Corporations Act 2001 s 728 (Aust)

64 Persons who must inform offeror about disclosure deficiencies

- (1) A person referred to in subsection (2) must notify the offeror in writing as soon as practicable if the person becomes aware during the application period that—
 - (a) a material statement in the PDS, or the register entry, is misleading or deceptive or is likely to mislead or deceive; or
 - (b) there is a material omission from the PDS, or the register entry, of information that is required to be contained in the PDS, or the register entry, by this Act or the regulations; or
 - (c) there is a material circumstance that has arisen since the PDS was lodged that would have been required by this Act or the regulations to be disclosed or otherwise contained in the PDS, or the register entry, if it had arisen before the PDS was lodged.
- (2) The persons are—
 - (a) each director of the offeror:

- (b) each person named in the PDS or register entry with the person's consent as a proposed director of the offeror:
 - (c) the issuer (if the offeror is not the issuer):
 - (d) an underwriter (but not a sub-underwriter) to the issue or sale who is named in the PDS or register entry with the underwriter's consent:
 - (e) a person referred to in section 41 who has consented as referred to in that section.
- (3) In subsection (1), **application period** means the period in which applications for financial products under the PDS may be made.

Compare: Corporations Act 2001 s 730 (Aust)

Expiry

65 Expiry

- (1) A PDS must, if required by the regulations, specify its expiry date.
- (2) The expiry date must not be later than the end of the prescribed period (if any).
- (3) The expiry date of a replacement PDS must be the same as that of the original PDS it replaces.

Compare: Corporations Act 2001 s 711(6) (Aust)

66 How offeror must deal with applications on expiry

- (1) If a PDS passes its expiry date, the offeror must deal with applications for the financial products offered under the regulated offer in accordance with subsections (2) and (3).
- (2) If an application is received on or before the expiry date, the offeror may issue or transfer financial products to the applicant.
- (3) If an application is received after the expiry date, the offeror must do 1 of the following:
 - (a) repay the money received from the applicant in respect of the application; or
 - (b) give the applicant—
 - (i) a new PDS (unless a PDS did not need to be given to the applicant under section 34); and

- (ii) 1 month to confirm whether or not the applicant still wants to acquire the financial products.
- (4) If an applicant does not confirm that he, she, or it still wants to acquire the financial products within 1 month after being given the opportunity to do so under subsection (3), the offeror must repay the money received from the applicant in respect of the application for financial products as soon as practicable.
- (5) If the offeror does not repay the money within 1 month after being required to do so under subsection (4), the offeror and the directors of the offeror are jointly and severally liable to repay the money together with interest at a prescribed rate from the expiry of that 1 month period.
- (6) An offeror must, when acting under this section, comply with the prescribed requirements (if any).

Compare: Corporations Act 2001 s 725 (Aust)

Money for financial products must be held in trust

67 Money for financial products must be held in trust

- (1) This section applies to money paid to an issuer or offeror of regulated products if the money is paid by a person (A)—
 - (a) to acquire the financial products; or
 - (b) on account of those financial products before those products are issued or transferred; or
 - (c) as a further contribution or a further deposit as referred to in section 10(2)(c).
- (2) The issuer or offeror must hold the money in trust for A until—
 - (a) the financial products are issued or transferred; or
 - (b) the money is otherwise applied for the purpose for which it was paid (for example, to increase the extent of A's interest in a scheme or deposit or to pay a fee); or
 - (c) the money is repaid to A; or
 - (d) the money is applied in accordance with A's instructions.
- (3) The issuer or offeror must—
 - (a) deal with the money, while it is held in trust, in the prescribed manner; and

- (b) if the money needs to be repaid, repay the money as soon as practicable.

Compare: Corporations Act 2001 ss 722, 1017E (Aust)

Other prohibitions and restrictions

68 Offering financial products in entity that does not exist

- (1) A person must not offer financial products of an entity that has not been formed or does not exist if the offer would be a regulated offer if the entity did exist.
- (2) Subsection (1) applies even if it is proposed to form or incorporate the entity.
- (3) A person who contravenes this section commits a tier 2 offence if the person knows that the entity has not been formed or does not exist.

Compare: Corporations Act 2001 s 726 (Aust)

69 Prohibition of offers in course of unsolicited meetings or communications in certain circumstances

- (1) A person must not offer financial products for issue or sale in the course of, or because of, an unsolicited—
- (a) meeting with another person; or
- (b) telephone call or electronic communication to another person.
- (2) In this section, **meeting** includes a meeting held by means of audio, audio and visual, or electronic communication where the participants can simultaneously communicate with each other throughout the meeting.
- (3) Subsection (1) does not prohibit an offer of financial products if—
- (a) the offer does not require disclosure under this Part because of clause 3 of Schedule 1 (wholesale investors); or
- (b) the offer is an offer of quoted financial products made by a telephone call or electronic communication by a person who, under the Financial Advisers Act 2008, is permitted to give financial advice in respect of those products (including as a result of an exemption by or under that Act); or

- (c) the offer is made to a client by an authorised financial adviser or a QFE adviser through whom the client has acquired or disposed of financial products in the last 12 months; or
 - (d) the offer is made under an employee share purchase scheme; or
 - (e) the offer is made in the prescribed circumstances.
- (4) A person who contravenes this section commits a tier 1 infringement offence.

Compare: Corporations Act 2001 s 736 (Aust)

70 Financial products offered in course of unsolicited meeting or communications may be returned and refund obtained

- (1) If financial products are issued or transferred to a person as a result of an offer that contravenes section 69, the person has the right to return the products and to have the relevant money repaid.
- (2) A right referred to in subsection (1) is exercisable by written notice given to the offeror within 1 month after the date of the issue or transfer.
- (3) If a notice is given under subsection (2),—
- (a) the offeror must repay the relevant money as soon as practicable; and
 - (b) if the offeror does not repay the relevant money within 1 month after the notice is given, the offeror and the directors of the offeror are jointly and severally liable to repay the relevant money together with interest at a prescribed rate from the date on which the notice was given.
- (4) This section does not limit any other liability that a person may have for a contravention of section 69.

Compare: Corporations Act 2001 s 738 (Aust)

Subpart 3—Advertising and publicity

71 Advertising or publicity for regulated offers

- (1) If an offer, or intended offer, of financial products is or will be a regulated offer, a person must not, except in accordance with any of sections 73 to 76,—
- (a) advertise the offer or intended offer; or
 - (b) publish a statement that—
 - (i) directly or indirectly refers to the offer or intended offer; or
 - (ii) is reasonably likely to induce persons to apply for the financial products.
- (2) Subsection (1) applies only if the advertisement or publication referred to in subsection (1)(a) or (b) is authorised or instigated by, or on behalf of, the issuer, the offeror, or an associated person of the issuer or offeror.
- (3) Subsection (1)(b) does not apply to statements published after the end of the period during which applications for financial products under the offer may be made.

Compare: Corporations Act 2001 s 734(2), (2A) (Aust)

72 Indirect references to offer and inducements to apply

In deciding whether a statement indirectly refers to an offer, or intended offer, of financial products, or is reasonably likely to induce persons to apply for financial products, the following must be taken into account:

- (a) whether the statement forms part of the normal advertising of an issuer's or offeror's goods or services and is genuinely directed at maintaining its existing customers, or attracting new customers, for those goods or services;
- (b) whether the statement communicates information that materially relates to the affairs of the issuer or offeror;
- (c) whether the statement is likely to encourage investment decisions being made on the basis of the statement rather than on the basis of information contained in a PDS.

Compare: Corporations Act 2001 s 734(3) (Aust)

73 Distribution of PDS

- (1) A person may distribute a PDS that has been lodged with the Registrar.
- (2) Subsection (1) does not apply if a stop order or an interim stop order is in force in relation to the offer.

Compare: Corporations Act 2001 s 734(4) (Aust)

74 Advertising and publicity before PDS is lodged

- (1) Before the PDS is lodged, an advertisement or a publication may be distributed if it includes a statement that—
 - (a) identifies,—
 - (i) if the financial products are likely to be offered by way of issue, the issuer of the products; and
 - (ii) if the financial products are likely to be offered pursuant to sale offers to which section 25 applies, the issuer of the products and the offeror of the products; and
 - (b) a PDS for the offer will be made available when the financial products are offered; and
 - (c) indicates when, where, and how the PDS is expected to be made available; and
 - (d) a person should consider the PDS in deciding whether to acquire the financial products; and
 - (e) no money is currently being sought; and
 - (f) applications to acquire the financial products are currently not being accepted; and
 - (g) if the offeror wishes, specifies that the offeror is seeking preliminary indications of interest and, in this case, also specifies—
 - (i) how indications of interest may be made; and
 - (ii) that no indication of interest will involve an obligation or a commitment of any kind; and
 - (h) contains no other information, except any or all of the following:
 - (i) a description of the financial products intended to be offered, including a brief description of any rights or privileges to be attached to the products;
 - (ii) a description of the issuer or scheme to which the financial products will relate;

- (iii) a description of the reasons for the intended offer;
 - (iv) the rate or rates of interest (if any) that may be earned by holding the financial products intended to be offered;
 - (v) the total number of financial products intended to be offered;
 - (vi) a statement of the intended use of the subscriptions;
 - (vii) the terms of the intended offer;
 - (viii) a description of the class of persons to whom it is intended the offer will be made;
 - (ix) any other prescribed information.
- (2) A statement required under subsection (1)(a) to (f) and (g)(ii) must be reasonably prominent.
- Compare: 1978 No 103 s 5(2CA); Corporations Act 2001 s 734(5) (Aust)

75 Advertising and publicity after PDS is lodged

- (1) After the PDS is lodged, an advertisement or a publication may be distributed if it—
- (a) includes a statement that identifies,—
 - (i) if the financial products are likely to be offered by way of issue, the issuer of the products; and
 - (ii) if the financial products are likely to be offered pursuant to sale offers to which section 25 applies, the issuer of the products and the offeror of the products; and
 - (b) includes a statement that indicates that the PDS for the offer is available and where and how it can be obtained; and
 - (c) includes a statement that a person should consider the PDS in deciding whether to acquire the financial products; and
 - (d) does not contain any information, sound, image, or other matter that is inconsistent with the PDS, or register entry, for the offer to which it relates.
- (2) A statement required under this section must be reasonably prominent.
- Compare: Corporations Act 2001 s 734(6)

76 General exceptions

An advertisement or a publication may be distributed if it—

- (a) relates to an offer of the financial products of a listed issuer and consists of a notice or report by the issuer, or 1 of its directors or employees, about the issuer's affairs to the relevant licensed market operator; or
- (b) consists solely of a notice or report of a general meeting of the issuer; or
- (c) consists solely of a document or information that is required by law to be provided or made available (for example, an annual report of a company), whether directly or as a condition of carrying out any activity or as a condition of an exemption from any enactment;
- (d) consists solely of a report about the issuer that is published by the issuer and—
 - (i) does not contain information that materially relates to the affairs of the issuer, other than information previously made available in a PDS that has been lodged, in a report, in a document, or in information referred to in paragraph (a) to (c); and
 - (ii) does not refer (whether directly or indirectly) to an offer of the financial products.

Compare: Corporations Act 2001 s 734(7) (Aust)

77 No advertising or publicity for offers covered by exclusion for small offers and small schemes

A person must not advertise, or publish a statement that directly or indirectly refers to, an offer or intended offer of financial products that would be a regulated offer but for clause 12 and 15 in Schedule 1 (small offers and small schemes).

Compare: Corporations Act 2001 s 734(1) (Aust)

78 Defence for publishers

A person does not contravene section 71 or 77 by publishing an advertisement or a statement if the person proves that—

- (a) the person published the advertisement or statement in the ordinary course of the business of—
 - (i) publishing a newspaper or magazine; or

- (ii) maintaining a news media or financial market commentary Internet site; or
 - (iii) broadcasting; or
 - (iv) exhibiting by means of an audio or visual service or exhibiting films to the public; and
- (b) the person did not know and had no reason to believe that the publication of the advertisement or statement would amount to a contravention of section 71 or 77.

Compare: Corporations Act 2001 s 734(8) (Aust)

79 Sending of draft PDS

A person does not contravene section 71 or 77 by sending a draft PDS for financial products to a person if an offer of the products to the person would not require disclosure because of an exclusion in clause 3 of Schedule 1 (wholesale investors).

Subpart 4—Ongoing disclosure and updating of registers

Duty to update register of offers of financial products and register of managed investment schemes

80 Duty to notify relevant matters and provide certain documents and information to Registrar

- (1) An issuer of regulated products must—
- (a) notify the Registrar of a prescribed change within 5 working days of becoming aware of the change; and
 - (b) provide to the Registrar a copy of any documents, information, and other matters made, or to be made, publicly available under section 82 before the date that is 5 working days after that material is made available under that section.
- (2) In this section, **prescribed change**, in respect of regulated products,—
- (a) means a prescribed change that is relevant to the issuer, any offeror of those products, the regulated products, or any registered scheme to which those products relate; but

- (b) does not include a change in respect of which the FMA is required to notify the Registrar (for example, an order made under subpart 1 of Part 7).
- (3) A person who contravenes subsection (1) commits a tier 1 infringement offence.
Compare: 1978 No 103 s 43Q

Disclosure to particular persons

81 Information to be made available to investors or other prescribed persons

- (1) Every issuer of regulated products must, at the request of a prescribed person or at the prescribed times or on the occurrence of the prescribed events, make available to a prescribed person the documents, information, and other matters that are required to be made available under this section by the regulations.
- (2) The documents, information, and other matters must be made available in the prescribed manner.
- (3) A person who contravenes this section commits a tier 1 infringement offence.

Public disclosure

82 Information to be made publicly available

Every issuer of regulated products must, at the prescribed times or on the occurrence of the prescribed events and otherwise in the prescribed manner, make publicly available the documents, information, and other matters that are required to be made publicly available by the regulations.

Compare: 1978 No 103 s 54C

Defective ongoing disclosure

83 Defective ongoing disclosure

- (1) An issuer must not provide information to the Registrar, or make available documents, information, and other matters, under this subpart (the **material**) if there is—
 - (a) a statement in the material is misleading or deceptive or is likely to mislead or deceive; or

- (b) an omission from the material of information that is required to be contained in the material by this Act or the regulations.
- (2) For the purposes of this section, a person is taken to make a statement that is misleading about a future matter (including the doing of, or refusing to do, an act) if the person does not have reasonable grounds for making the statement.
- (3) Subsection (2) does not limit the meaning of a reference to a misleading statement.
- (4) This section does not limit sections 80 to 82.
- (5) *See* section 479 (offence to knowingly or recklessly contravene this section) and sections 463 to 466 (which provide for special rules in relation to compensation for a contravention of this section).

Subpart 5—Civil liability for certain contraventions of this Part

84 Part 3 offer obligations

- (1) All of the provisions specified in subsections (2) and (3) are Part 3 offer provisions.
- (2) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and \$1 million in the case of an individual or \$5 million in any other case:
 - (a) section 32 (PDS must be prepared and lodged for a regulated offer):
 - (b) section 34 (PDS must be given to person to whom disclosure is required):
 - (c) section 39 (disclosure of material information and content of PDS and register entry):
 - (d) section 43 (PDS must comply with prescribed requirements relating to form and presentation):
 - (e) section 46 (waiting period restriction):
 - (f) section 59 (minimum subscription condition must be fulfilled before issue or transfer):

- (g) section 62 (choices open to offeror if condition in PDS not met or defective disclosure):
 - (h) section 63 (misleading or deceptive statements, omissions, and new matters requiring disclosure):
 - (i) section 67(2) (money for financial products must be held in trust):
 - (j) section 71 (advertising or publicity for regulated offers):
 - (k) section 77 (no advertising or publicity for small offers or small schemes)
 - (l) sections 82 and 83 (ongoing disclosure).
- (3) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding \$200,000 in the case of an individual or \$600,000 in any other case:
- (a) section 55 (consents need for lodgement):
 - (b) section 57 (publication of lodgement):
 - (c) section 64 (certain persons must inform offeror about disclosure deficiencies):
 - (d) section 66 (dealing with applications on expiry):
 - (e) section 67(3) (money for financial products must be dealt with in prescribed manner and repaid as soon as practicable if required):
 - (f) section 68 (offering financial products in entity that does not exist):
 - (g) section 69 (prohibition of offers in course of unsolicited meetings or communications).

Part 4

Governance of financial products

Subpart 1—Application and overview

85 Part applies to all regulated products

This Part applies to—

- (a) financial products offered under a regulated offer; and
- (b) managed investment products in a registered scheme (whether or not there has been a regulated offer).

86 Regulated offers of debt securities need governing document and supervisor

- (1) In this Part,—
 - (a) subpart 2 contains requirements for a governing document, supervisor, and other related issuer and supervisor obligations for a regulated offer of debt securities; and
 - (b) subpart 4 provides for interventions in regulated offers of debt securities (in addition to the powers in Part 7).
- (2) This section is only a guide to the general scheme and effect of subparts 2 and 4.

87 Regulated offers of managed investment products need to be in registered scheme

- (1) In this Part,—
 - (a) subpart 3 contains the requirement that the managed investment scheme be registered for a regulated offer of managed investment products, and regulates registered schemes; and
 - (b) subpart 4 provides for interventions in registered schemes (in addition to the powers in Part 7).
- (2) This section is only a guide to the general scheme and effect of subparts 3 and 4.

88 All regulated products have other accountability requirements under this Part

- (1) In this Part, the following subparts relate to all regulated products:
 - (a) subpart 5 contains requirements for the issuer to keep registers of the regulated products; and
 - (b) subpart 6 contains accounting record-keeping and auditing requirements for the issuer.
- (2) This section is only a guide to the general scheme and effect of subparts 5 and 6.

Subpart 2—Governance of offers of debt securities

89 Need for governing document and supervisor for regulated offer of debt security

- (1) A person must not make a regulated offer of a debt security unless—
 - (a) there is a trust deed for the debt security that complies with sections 90 to 92 and is lodged with the Registrar at or before the time that the PDS is lodged; and
 - (b) there is a licensed supervisor—
 - (i) who is designated or appointed as the trustee under the trust deed for the debt security (or under the Statutory Supervisors Act 2011); and
 - (ii) whose licence covers supervision of the debt security.
- (2) A reference in this subpart to a trust deed is a reference to the trust deed required by this section.

Compare: 1978 No 103 s 33(2)

Governing document requirements

90 Contents of trust deed for debt securities

- (1) A trust deed for a debt security must provide that the following are held in trust by the supervisor for the benefit of the holders of the debt security:
 - (a) the right to enforce the issuer's duty to repay; and
 - (b) any charge or security for repayment; and
 - (c) the right to enforce any other duties that the issuer, any guarantor, and any other person have under—
 - (i) the terms of the debt security; or
 - (ii) the provisions of the trust deed or this Act in relation to the debt security.
- (2) The trust deed is treated as containing any provision that is implied into it by or under this Act.
- (3) The trust deed must also provide adequately for all of the matters required to be contained in it by section 91 and the regulations.
- (4) The trust deed must provide for the contents required by this section in accordance with the frameworks or methodologies

specified in a notice issued by the FMA under subpart 4 of Part 8.

Compare: Corporations Act 2001 s 283AB (Aust)

91 Limits on permitted exemptions and indemnities

- (1) If a supervisor of a debt security has any rights to be exempted from liability for, or indemnified in relation to, the performance of the supervisor's licensee obligations (as defined in section 4 of the Statutory Supervisors Act 2011), those rights—
 - (a) must be set out in the trust deed for the debt security; and
 - (b) must be available only in relation to the proper performance of the duties under sections 98 and 99.

- (2) No other agreement has any effect to the extent that it purports to confer a right of a kind set out in subsection (1).

Compare: Corporations Act 2001 s 283DB (Aust), 1978 No 103 s 62

92 Trust deed must be legally enforceable

A trust deed for a debt security must be contained in 1 or more documents that are legally enforceable as between the supervisor, the issuer of the debt security, and the product holders.

93 Effect of trust deed

A trust deed for a debt security has no effect to the extent that it contravenes, or is inconsistent with, this Act, the regulations, or any term implied into it by this Act or the regulations.

94 Changes to trust deed

- (1) An amendment or replacement of a trust deed for a debt security has no effect unless made with the consent of the supervisor of the debt security under this section.
- (2) The supervisor must not consent to an amendment to, or replacement of, the trust deed unless—
 - (a) either—
 - (i) the amendment or replacement is approved by, or is contingent on approval by, a special resolution of the holders of the debt security; or

- (ii) the supervisor is satisfied that the amendment or replacement does not have a material adverse effect on the holders of the debt security; and
- (b) the supervisor certifies to that effect and certifies, or obtains a certificate from a solicitor, that the trust deed, as amended or replaced, will comply with sections 90 to 92.

95 Power to make FMA-approved changes to trust deeds

- (1) An issuer may amend or replace a trust deed for a debt security (despite there being no power to do so under the trust deed) with the FMA's consent if the FMA is satisfied that it is necessary to enable the trust deed to comply with this subpart or any other enactment.
- (2) An amendment or replacement made under this section must be treated for all purposes as if it were made in accordance with the trust deed.

96 Lodging of changes to trust deed

- (1) Within 5 working days of the amendment to or replacement of a trust deed for a debt security, the issuer must ensure that notice of the amendment or replacement, and a copy of the certificate for the amendment or replacement (if any), is lodged with the Registrar.
- (2) A person who contravenes this section commits a tier 1 infringement offence.

Role of supervisor

97 Functions of supervisor

- (1) The supervisor of a debt security is responsible for the following functions:
 - (a) to act on behalf of the holders of the debt security in relation to—
 - (i) the issuer of the debt security; and
 - (ii) any matter connected to the trust deed for the debt security or the terms of the regulated offer; and
 - (iii) any contravention or alleged contravention of the issuer obligations; and

- (iv) any contravention or alleged contravention of this Act by any other person in connection with the debt security, the trust deed, or the terms of the regulated offer; and
 - (b) to supervise the issuer's performance—
 - (i) of its issuer obligations; and
 - (ii) to ascertain whether the assets of the issuer and of each guarantor that are or may be available, whether by way of security or otherwise, are sufficient or likely to be sufficient to discharge the amounts of the debt securities as they become due; and
 - (c) to perform or exercise any other functions, duties, and powers conferred or imposed on the supervisor by or under this Act, the Statutory Supervisors Act 2011, or the governing document.
- (2) The supervisor must not delegate any of its functions under subsection (1) (except as expressly permitted by this Act).

98 General duties applying in exercise of supervisor's functions

- (1) The supervisor of a debt security must—
- (a) act honestly in acting as a supervisor; and
 - (b) in exercising its powers and performing its duties as a supervisor, act in the best interests of the holders of the debt security; and
 - (c) exercise reasonable diligence in carrying out its functions as a supervisor; and
 - (d) do all the things it has the power to do to cause any contravention referred to in section 97(1)(a) to be remedied (unless it is satisfied that the contravention will not materially prejudice the security of the debt securities or the interests of holders of the debt security); and
 - (e) act in accordance with any direction given by a special resolution of the holders of the debt security that is not inconsistent with any enactment or the trust deed in relation to—

- (i) seeking a remedy to a contravention referred to in section 97(1)(a); and
 - (ii) any other matter connected with the supervisor's functions.
- (2) The supervisor is not liable for anything done, or omitted to be done, in giving effect to a direction to it by holders of the debt security.

Compare: SR 2009/230 Schedule 15 cl 1

99 Duty of supervisor to comply with professional standard of care

The supervisor of a debt security must, in exercising its powers and performing its duties as a supervisor, exercise the care, diligence, and skill that a prudent person engaged in the business of acting as a licensed supervisor would exercise in the same circumstances.

100 Duty of issuer to provide regular reports to supervisor

The issuer of a debt security must, at the prescribed times or on the occurrence of the prescribed events and otherwise in the prescribed manner, prepare and provide to the supervisor reports that contain the documents, information, or other matters that are required to be provided by the regulations.

Compare: SR 2009/230 Schedule 15 cl 4

101 Duty of issuer to provide requested information and reports to supervisor

- (1) If requested by the supervisor of a debt security (or a person authorised by the supervisor to exercise its powers under this section), the issuer must—
 - (a) make available to the supervisor (or other authorised person) all documents and records relating to the issuer; and
 - (b) provide the supervisor (or other authorised person) with any other reports or information required by the supervisor (or other authorised person).
- (2) Reports or information required under subclause (1)(b) may—

- (a) be about any matter relevant to the performance of the supervisor's functions;
 - (b) include forward-looking reports.
- (3) The reports or information must be—
- (a) provided within the time (which must be reasonable in the circumstances) specified by the supervisor; and
 - (b) signed by at least 2 directors on behalf of the board of the issuer or, if the issuer has only 1 director, by that director.

Compare: SR 2009/230 Schedule 15 cls 2(2), 5(3)

102 Issuer must report contravention or possible contravention of issuer obligations

If an issuer has reasonable grounds to believe that it has contravened, or may have contravened, any of its issuer obligations in a material respect, the issuer must, as soon as practicable,—

- (a) report the contravention or possible contravention to the supervisor; and
- (b) advise the supervisor of the steps (if any) that the issuer has taken or intends to take in light of the breach or possible contravention and the date by which the steps were taken or are to be taken.

103 Power of supervisor to engage expert

- (1) The supervisor of a debt security is entitled to engage an expert (for example, an auditor, investigating accountant, valuer, or actuary) if the supervisor considers, on reasonable grounds, that it requires the assistance of the expert to assist the supervisor to—
- (a) determine the financial position of the issuer; or
 - (b) review the business, operation, or management systems, or the governance, of the issuer.
- (2) If the supervisor engages an expert under this section,—
- (a) the issuer must provide reasonable assistance to the expert to allow the expert to provide the assistance; and
 - (b) the fees and expenses of the expert, which must be reasonable in the circumstances, must be paid by the issuer.

Compare: SR 2009/230 Schedule 15 cl 11

*Meetings of product holders***104 Meetings of product holders**

- (1) A meeting of a class of holders of debt securities must be called by the issuer on the written request of—
 - (a) the supervisor; or
 - (b) holders of the debt securities that value together no less than 10% of the value of the debt securities on issue in that class; or
 - (c) a person who is authorised by the trust deed or by the regulations to call the meeting.
- (2) The proceedings at the meeting are governed by the regulations (if any) and the trust deed (if there are no regulations or to the extent that the trust deed is not inconsistent with the regulations).

Compare: 2009/237 Schedule 15 cl 3(1)

105 Power of supervisor to attend meetings and appoint chair

- (1) The supervisor of a debt security is entitled to receive all notices of, and other communications relating to, any meeting of the holders of the debt securities that any holder is entitled to receive.
- (2) The supervisor of a debt security (or any person appointed by the supervisor to exercise its powers under this section) is entitled to—
 - (a) attend a meeting of the holders of the debt securities; and
 - (b) be heard at a meeting of the holders of the debt securities on any part of the business of the meeting that concerns the supervisor's functions or the holders for whom the supervisor is acting; and
 - (c) appoint the chairperson of the meeting if the meeting was called by holders of the debt securities or the supervisor.

Compare: SR 2009/237 Schedule 15 cl 3(3)

*Change of supervisor***106 Change of supervisor**

- (1) The supervisor of a debt security ceases to hold that appointment (subject to subsection (2)) if the supervisor—
 - (a) is removed by the FMA under the Statutory Supervisors Act 2011; or
 - (b) is removed by a special resolution of the holders of the debt security; or
 - (c) is removed or resigns in accordance with the trust deed.
- (2) No issuer of a debt security may remove a supervisor without the FMA's consent (even if permitted to do so by the trust deed).

107 Lodging of notice of change of supervisor

- (1) Within 5 working days of a change to the supervisor of a debt security under section 106, the issuer must ensure that notice of the change is lodged with the Registrar.
- (2) A person who contravenes this section commits a tier 1 infringement offence.

Subpart 3—Registration of managed investment scheme**108 Overview**

- (1) This subpart—
 - (a) requires registered schemes, irrespective of legal form, to meet key common governance and reporting requirements; and
 - (b) provides for the manager and independent supervisor of a registered scheme to owe statutory duties of care to investors; and
 - (c) provides for the custodianship of scheme property of a registered scheme to be independent from the manager.
- (2) This section is only a guide to the general scheme and effect of this subpart.

*Need to register***109 Need to register managed investment scheme for regulated offer of managed investment product**

- (1) A person must not make a regulated offer of a managed investment product, or accept further contributions if there has been a regulated offer of a managed investment product, unless the managed investment scheme is registered.
- (2) However, a managed investment scheme may be registered even if there is no regulated offer of a managed investment product in the scheme but, in this case, the managed investment products in the scheme are regulated products and the following sections (without limitation) apply:
 - (a) section 67 (money for financial products must be held in trust):
 - (b) sections 81, 82, and 83 (ongoing disclosure requirements):
 - (c) subpart 5 (registers that must be kept by issuers of all regulated products):
 - (d) subpart 6 (accounting records and audit of financial statements).

See MED's note to submitters on the proposed application of the Financial Reporting Act 1993 to registered schemes.

- (3) A scheme that is approved as a Schedule 3 scheme under Schedule 3 may not be registered under this subpart.
- (4) For the purposes of any enactment, a reference to a retirement scheme means (unless the enactment provides otherwise) any of the following schemes:
 - (a) a registered scheme that is a KiwiSaver scheme or a superannuation scheme:
 - (b) a Schedule 3 scheme.

Compare: 1960 No 99 s 8, 1978 No 103 s 33(3)

*Registration***110 Application for registration**

- (1) A person may apply to the Registrar for registration of a managed investment scheme.
- (2) The application must—

- (a) be made in the prescribed manner; and
 - (b) contain the prescribed information; and
 - (c) be accompanied by the written consent to the registration of the licensed manager and licensed supervisor of the scheme (or the proposed licensed manager and licensed supervisor); and
 - (d) contain a copy of the governing document for the scheme; and
 - (e) contain a certificate from the licensed manager and licensed supervisor (or proposed licensed manager and licensed supervisor) of the scheme to the effect that the scheme complies with the registration requirements for all schemes under section 111; and
 - (f) if the application is for registration as a particular type of scheme under sections 112 to 115,—
 - (i) state that fact; and
 - (ii) comply with any additional prescribed requirements for applications for that type of registration; and
 - (iii) contain a certificate from the FMA that it is satisfied that the scheme complies with any additional registration requirements for that type of scheme under those sections.
- (3) The Registrar must register a managed investment scheme if satisfied that the application meets the requirements of this section (subject to clause 7 of Schedule 2).

111 Initial and ongoing registration requirements for all managed investment schemes

- (1) Every registered scheme must meet the following registration requirements:
- (a) it must not have a name that is misleading or offensive or the use of which would contravene an enactment; and
 - (b) its governing document must comply with sections 117 to 119; and
 - (c) it must have a licensed manager designated or appointed under the governing document (or this Act) whose licence covers management of the scheme; and

- (d) it must have a licensed supervisor designated or appointed under the governing document (or the Statutory Supervisors Act 2011) whose licence covers supervision of the scheme; and
 - (e) the manager and the supervisor of the scheme must not be the same or associated persons; and
 - (f) the scheme property must be held by the supervisor or another person who meets the external custodianship requirements in section 135 (to the extent that it is not held directly by the scheme participants).
- (2) However, subsection (1)(c) to (e) do not apply to a restricted scheme.

Compare: 1960 No 99, ss 3(1), 3(4), 2006 No 40 ss 116F, 116G

112 Additional initial and ongoing registration requirements for KiwiSaver schemes

- (1) Every KiwiSaver scheme must meet the following registration requirements in addition to those in section 111:
- (a) it must be a trust established and governed by a trust deed that is interpreted and administered in accordance with New Zealand law; and
 - (b) its purpose must be to provide retirement benefits directly or indirectly to individuals; and
 - (c) it must restrict participation, in its conditions of entry of scheme participants and in the way those conditions are applied, to persons who meet the New Zealand criteria set out in subsection (2); and
 - (d) it must restrict redemptions or withdrawals, under the trust deed and in the way the trust deed is applied, to those permitted under the KiwiSaver scheme rules under the KiwiSaver Act 2006;
 - (e) it must be a scheme under which contributions are allocated to scheme participants on an individual basis; and
 - (f) the benefits provided by the scheme must be fully funded as they accrue; and
 - (g) its manager must have at least 1 director who is a New Zealand resident; and
 - (h) the FMA must be satisfied that the fees charged in accordance with any information provided in the applica-

tion will comply with clause 2 of the KiwiSaver scheme rules under the KiwiSaver Act 2006.

- (2) The New Zealand criteria are that the person, at the time of becoming a participant,—
- (a) is, or normally is, living in New Zealand, or is an employee of the State services (within the meaning of the State Sector Act 1988) who is—
 - (i) serving outside New Zealand; and
 - (ii) employed on New Zealand terms and conditions; and
 - (iii) serving in a jurisdiction where offers of superannuation scheme membership are lawful; and
 - (b) is a New Zealand citizen or is entitled, in terms of the Immigration Act 2009, to be in New Zealand indefinitely.
- (3) If the KiwiSaver scheme is a restricted scheme,—
- (a) subsection (1)(g) does not apply; but
 - (b) at least 1 of the trustees or 1 of the directors of the corporate trustee of the scheme must be a New Zealand resident.

Compare: 2006 No 40 s 116

113 Additional initial and ongoing registration requirements for superannuation schemes

- (1) Every superannuation scheme must meet the following registration requirements in addition to those in section 111:
- (a) it must be a trust established and governed by a trust deed that is interpreted and administered in accordance with New Zealand law; and
 - (b) its purpose must be to provide retirement benefits directly or indirectly to individuals; and
 - (c) it must restrict participation, in its conditions of entry of scheme participants and in the way those conditions are applied, to persons who meet the New Zealand criteria set out in subsection (2); and
 - (d) it must restrict redemptions or withdrawals, under the trust deed and in the way that the trust deed is applied, to redemptions or withdrawals for retirement purposes

- except in defined circumstances (for example, financial hardship or ceasing employment); and
- (e) it must not be registered as a KiwiSaver scheme.
- (2) The New Zealand criteria are that the person, at the time of becoming a participant,—
- (a) is, or normally is, living in New Zealand, or is an employee of the State services (within the meaning of the State Sector Act 1988) who is—
 - (i) serving outside New Zealand; and
 - (ii) employed on New Zealand terms and conditions; and
 - (iii) serving in a jurisdiction where offers of superannuation scheme membership are lawful; and
 - (b) is a New Zealand citizen or is entitled, in terms of the Immigration Act 2009, to be in New Zealand indefinitely.

Compare: 1989 No 10 ss 2A, 3(1)

114 Additional ongoing registration requirements for restricted scheme

- (1) Every restricted scheme registered under subpart 10 of Part 9 must meet the following registration requirements in addition to those in section 111:
- (a) it must be a KiwiSaver scheme or a superannuation scheme; and
 - (b) it must restrict participation in the scheme, in its conditions of entry of scheme participants and in the way in which those conditions are applied, to 1 or more of the following classes of persons:
 - (i) persons who are employed by a particular employer;
 - (ii) persons who are employed by a related body corporate of a particular employer;
 - (iii) persons who belong to a particular profession, calling, trade, or occupation;
 - (iv) persons who belong to a particular association, society, or other body with a definable community of interest:

- (v) persons who are immediate family members of, or wholly or partially financially dependent on, a person in 1 or more of the classes of persons described in subparagraphs (i) to (iv); and
 - (c) the conditions of entry of scheme participants, or the way in which those conditions have been applied, must not have been changed, without the FMA's consent, since the date of its registration under subpart 10 of Part 9 in a way that expands or is likely to expand, the classes of people who may become scheme participants; and
 - (d) its trustees must include at least 1 licensed independent trustee—
 - (i) whose licence covers the scheme; and
 - (ii) who is a trustee or a director of the sole corporate trustee for the scheme; and
 - (iii) who is independent under subsection (2); and
 - (e) the trustees of the scheme must be designated or appointed to manage the scheme under the governing document (or this Act).
- (2) In this section,—
- immediate family member**, in relation to a person, means the person's spouse, civil union partner, de facto partner, parent, child, step-parent, or stepchild
- independent** means a person that—
- (a) is not a related body corporate of any other trustee of the restricted scheme; and
 - (b) is not a promoter, an employer who provides access to the scheme for its employees, an administration manager, or an investment manager of the restricted scheme (or a related body corporate of any of them); and
 - (c) is not a director of, shareholder in, or employee of any person referred to in paragraph (a) or (b); and
 - (d) is not a scheme participant; and
 - (e) is not a representative in any capacity of an organisation (such as a trade union) that represents the interests of 1 or more scheme participants; and

- (f) is not a representative in any capacity of an organisation that represents the interests of 1 or more employer contributors to the scheme; and
- (g) is not a corporate trustee if none of its directors are independent under this definition.

Compare: 2006 No 40 s 116A

115 Additional prescribed registration requirements for other particular prescribed types of schemes

A scheme of a particular type of registered scheme specified in the regulations must meet the prescribed registration requirements for that scheme (if any) in addition to those in section 111.

116 Changes to registration as particular type of registered scheme

- (1) The FMA may direct the removal of the registration of a registered scheme as a particular type of scheme—
 - (a) on giving 20 working days' notice to the manager of the scheme, if the FMA is satisfied that the scheme no longer meets the registration requirements for that type of scheme under sections 112 to 115; or
 - (b) on the written request of the manager of the scheme, if the supervisor certifies that—
 - (i) the removal has been approved by a special resolution of the scheme participants; or
 - (ii) there is no material adverse effect to scheme participants from the removal.
- (2) The FMA may direct that a registered scheme be registered as a particular type of scheme on the written request of the manager of the scheme if the FMA is satisfied that the scheme meets the registration requirements for that type of scheme under sections 112 to 115.
- (3) The FMA must not direct a removal under subsection (1)(a), in relation to the removal of a registration as a restricted scheme, before the expiry of 6 months after its determination (unless the manager consents to an earlier date).

- (4) The manager of a registered scheme must, as soon as practicable after being notified of a determination under this section, notify the scheme participants of the determination.

Compare: 2006 No 40 s 168A

Governing document requirements

117 Contents of governing document for registered scheme

- (1) The governing document for a registered scheme must provide adequately for all of the following matters under the scheme:
- (a) whether or not managed investment products are transferable or redeemable and the rules applying to acquiring or disposing of the managed investment products; and
 - (b) the rules applying to becoming a scheme participant or withdrawing from participation in the scheme (if there are any rules); and
 - (c) the contributions payable and the rules applying to changing the contributions payable; and
 - (d) the methodology and other rules applying to asset valuations and pricing; and
 - (e) the rules applying to the determination and payment of financial benefits to scheme participants; and
 - (f) the fees that can be paid out of scheme property to any manager, investment manager, administration manager, supervisor, or custodian, and any rights of any of those persons to be indemnified out of scheme property (and any other matters required by section 118); and
 - (g) the appointment and removal of the supervisor (unless none is required under this Part); and
 - (h) the appointment and removal of the manager; and
 - (i) the winding up of the scheme; and
 - (j) any other matters (other than the matters contained in the statement of investment policy and objectives) that materially affect—
 - (i) the management and operation of the scheme;
 - (ii) the rights and duties of scheme participants in the scheme;
 - (iii) the powers, rights, and duties of the manager and the supervisor of the scheme.

- (2) The governing document is treated as containing any provision that is implied into it by or under this Act.
- (3) The governing document must provide for the contents of the document that are required by this section in accordance with the frameworks or methodologies specified in a notice issued by the FMA under subpart 4 of Part 8.

Compare: 1989 No 10 s 7, 2006 No 40 s 119

118 Limits on permitted exemptions and indemnities

- (1) If a manager, supervisor, or investment manager of a registered scheme has any rights to be exempted from liability for, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to, the performance of the manager's issuer obligations, the supervisor's licensee obligations (as defined in section 4 of the Statutory Supervisors Act 2011), or the investment manager's contracted functions, those rights—
 - (a) must be set out in the scheme's governing document; and
 - (b) must be available only in relation to the proper performance of the duties under sections 125 and 126 or sections 129 and 130.
- (2) No other agreement has any effect to the extent that it purports to confer a right of a kind set out in subsection (1).

Compare: Corporations Act 2001 ss 601GA(2) (Aust), 1960 No 99 s 24(2), 1978 No 103 s 62, 2006 No 40 s 116J(1)

119 Governing document must be legally enforceable

A governing document for a registered scheme must be contained in 1 or more documents that are legally enforceable as between the supervisor, the manager, and the scheme participants.

Compare: Corporations Act 2001 ss 601GB (Aust)

120 Effect of governing document

A governing document for a registered scheme has no effect to the extent that it contravenes, or is inconsistent with, this Act, the regulations, or any term implied into it by this Act or the regulations.

121 Changes to governing document

- (1) An amendment to or replacement of a governing document has no effect unless made with the consent of the supervisor or, if there is no supervisor, the FMA.
- (2) The supervisor or the FMA must not consent to an amendment to, or replacement of, the governing document unless—
 - (a) either—
 - (i) the amendment or replacement is approved by, or contingent on approval by, scheme participants; or
 - (ii) the supervisor or the FMA is satisfied that the amendment or replacement does not have a material adverse effect on scheme participants; and
 - (b) in the case of the supervisor, the supervisor certifies to that effect and certifies, or obtains a certificate from a solicitor, that the governing document, as amended or replaced, will comply with sections 117 to 119.
- (3) The approval of scheme participants for the purposes of subsection (2)(a) must be the approval of—
 - (a) a special resolution of the scheme participants; or
 - (b) in the case of a defined benefit scheme, the written consent of all scheme participants who would be adversely affected by the amendment or replacement.

Compare: 1989 No 10 ss 9, 12, 2006 No 40 ss 119A, 129, 129A

122 Power to make FMA and court-approved changes to governing documents

- (1) A manager of a registered scheme may amend or replace the governing document (despite there being no power to do so under the governing document)—
 - (a) with the FMA's consent if the FMA is satisfied that the amendment or replacement is necessary to enable the governing document to comply with section 117 to 119 or any other enactment; or
 - (b) with the court's consent, in the case of a defined benefit scheme, if—
 - (i) the amendment or replacement would otherwise require the consent of all the scheme participants who would be adversely affected by it; and

- (ii) the court considers that it is in the interests of the scheme participants as a whole.
- (2) An amendment or replacement made under this section must be treated for all purposes as if it were made in accordance with the governing document.

123 Lodging of changes to governing document

- (1) Within 5 working days of the amendment to or replacement of a governing document, the manager of a registered scheme must ensure that notice of the amendment or replacement, and a copy of the certificate for the amendment or replacement (if any), is lodged with the Registrar.
- (2) A person who contravenes this section commits a tier 1 infringement offence.

Role of manager

124 Management and administration functions of manager

The manager of a registered scheme is responsible for performing the following functions:

- (a) offering the managed investment products; and
- (b) issuing the managed investment products; and
- (c) managing the scheme property and investments; and
- (d) administering the scheme.

Compare: 1960 No 99 s 3(2)(a) and (b), 2006 No 40 s 116B(1)

125 General duties applying in exercise of manager's functions

- (1) A manager of a registered scheme must—
 - (a) act honestly in acting as a manager; and
 - (b) carry out the functions of a manager in accordance with the governing document, the statement of investment policy and objectives, and all other issuer obligations; and
 - (c) in exercising any powers or performing any duties as a manager,—
 - (i) act in the best interests of the scheme participants; and
 - (ii) treat the scheme participants equitably; and

- (d) not make use of information acquired through being the manager in order to—
 - (i) gain an improper advantage for itself or any other person; or
 - (ii) cause detriment to the scheme participants.

See MED's note to submitters.

- (2) If the registered scheme is established under a trust deed, the manager is treated as being a trustee of the trust and has the same duties and liability in the exercise of its functions as manager as it would if it exercised those functions as a trustee (except to the extent those duties are altered by or are inconsistent with this Act).

Compare: Corporations Act 2001 ss 601FC (Aust), 1960 No 99 ss 3(2)(c), 12(1)(c), 24(1), SR 2009/137 Schedule 15 cl 3(1)

126 Duty of manager and investment manager to comply with relevant professional standard of care

- (1) A professional manager of a registered scheme must, in exercising any power or performing any duties, exercise the care, diligence, and skill that a prudent person engaged in that profession would exercise in the same circumstances.
- (2) In this section, a **professional manager** is—
 - (a) a manager of a registered scheme (other than a restricted scheme):
 - (b) an investment manager of a registered scheme:
 - (c) a licensed independent trustee of a restricted scheme:
 - (d) any other trustee of a restricted scheme whose profession is acting as a trustee or investing money on behalf of others.
- (3) A trustee of a restricted scheme who is not a professional manager must, in exercising any power or performing any duties, exercise the care, diligence, and skill that a prudent person of business would exercise in the same circumstances.

Compare: 1960 No 99 ss 3(2)(c), 24(1), 2006 No 40 s 117, SR 2009/137 Schedule 15 cl 3(3)

126A Duties of directors and senior managers of manager

A director or senior manager of a manager of a registered scheme must—

- (a) not make use of information acquired through being the director or senior manager of the manager in order to—
 - (i) gain an improper advantage for himself or herself or any other person; or
 - (ii) cause detriment to the scheme participants; and
- (b) not make improper use of the position as a director or senior manager of the manager to gain, directly or indirectly, an advantage for himself or herself or any other person or to cause detriment to the scheme participants.

Compare: Corporations Act 2001 s 601FE (Aust), 1960 No 99 s 26

127 Contracting out of management functions

- (1) A manager may, unless prohibited by the governing document, contract out to 1 or more persons (whether or not the person or persons hold a market services licence under this Act covering management of the scheme) some or all of its functions as a manager.
- (2) However,—
 - (a) the manager must take all reasonable steps to—
 - (i) ensure that those functions are performed in the same manner, and are subject to the same duties and restrictions, as if the manager were performing them directly, and
 - (ii) monitor the performance of those functions; and
 - (b) the contracting out does not affect the liability of the manager for the performance of those functions.

Role of supervisor

128 Functions of supervisor

- (1) The supervisor of a registered scheme is responsible for the following functions:
 - (a) to act on behalf of the scheme participants in relation to—
 - (i) the manager; and
 - (ii) any matter connected to the governing document or the terms of the regulated offer; and
 - (iii) any breach or alleged breach of the issuer obligations; and

- (iv) any breach or alleged breach of this Act by any other person in connection with the registered scheme, the governing document, or the terms of the regulated offer; and
 - (b) to supervise—
 - (i) the performance by the manager of its functions and its issuer obligations; and
 - (ii) the financial position of the manager and the scheme in respect of the managed investment product to ascertain that it is adequate; and
 - (c) to hold the scheme property, or ensure that the scheme property is held, in accordance with sections 135 to 137; and
 - (d) to perform or exercise any other functions, powers, and duties conferred or imposed on the supervisor by or under this Act, the Statutory Supervisors Act 2011, and the governing document.
- (2) The supervisor must not delegate its functions under subsection (1) (except as expressly permitted by section 135 in relation to its function under subsection (1)(c) and otherwise by this Act).

Compare: 2006 No 40 s 116D(3) and (4)

129 General duties applying in exercise of supervisor's functions

- (1) The supervisor of a registered scheme must—
- (a) act honestly in acting as a supervisor; and
 - (b) in exercising its power and performing its duties as a supervisor, act in the best interests of the scheme participants; and
 - (c) exercise reasonable diligence in carrying out its functions as a supervisor; and
 - (d) do all the things it has the power to do to cause any breach referred to in section 128(1)(a) to be remedied (unless it is satisfied that the breach will not materially prejudice the security of the managed investment product or the interests of scheme participants); and
 - (e) act in accordance with any direction given by a special resolution of the scheme participants that is not incon-

sistent with any enactment or the governing document in relation to—

- (i) seeking a remedy to a breach referred to in section 128(1)(a); and
 - (ii) any other matter connected with its functions.
- (2) The supervisor is not liable for anything done, or omitted to be done, in giving effect to a direction to it by scheme participants.
- (3) If the registered scheme is established under a trust deed, the supervisor is treated as being a trustee of the trust and has the same duties and liability in the exercise of its functions as supervisor as it would if it exercised those functions as a trustee (except to the extent those duties are altered by or are inconsistent with this Act).

Compare: 1960 No 99 s 18(2)-(4), SR 2009/230 Schedule 17 cl 1

130 Duty of supervisor to comply with professional standard of care

The supervisor of a registered scheme must, in exercising its powers and performing its duties as a supervisor, exercise the care, diligence, and skill that a prudent person engaged in the business of acting as a licensed supervisor would exercise in the same circumstances.

131 Duty of manager to provide regular reports to supervisor

The manager of a registered scheme must, at the prescribed times or on the occurrence of the prescribed events and otherwise in the prescribed manner, prepare and provide to the supervisor reports that contain the documents, information, or other matters that are required to be provided by the regulations.

132 Duty of manager to provide requested information and reports to supervisor

- (1) If requested by the supervisor of a registered scheme (or a person authorised by the supervisor to exercise its powers under this section), the issuer must—
- (a) make available to the supervisor (or other authorised person) all documents and records relating to the

- scheme (including those held by an investment manager or administration manager); and
- (b) provide the supervisor (or other authorised person) with any other reports or information required by the supervisor (or other authorised person).
- (2) Reports or information required under subclause (1)(b) may—
- (a) be about any matter relevant to the performance of the supervisor's functions;
 - (b) include forward-looking reports.
- (3) The reports or information must be—
- (a) provided within the time (which must be reasonable in the circumstances) specified by the supervisor; and
 - (b) signed by at least 2 directors on behalf of the board of the manager or, if the manager has only 1 director, by that director.

Compare: 1960 No 99 s 12(1)(b), SR 2009/230 Schedule 17 cl 2

133 Manager must report contravention or possible contravention of issuer obligations

If a manager of a registered scheme has reasonable grounds to believe that it has contravened, or may have contravened, any of its issuer obligations in a material respect, the manager must, as soon as practicable,—

- (a) report the contravention or possible contravention to the supervisor; and
- (b) advise the supervisor of the steps (if any) that the manager has taken or intends to take in light of the contravention or possible contravention and the date by which the steps were taken or are to be taken.

134 Power of supervisor to engage expert

- (1) The supervisor of a registered scheme is entitled to engage an expert (for example, an auditor, investigating accountant, valuer, or actuary) if the supervisor considers, on reasonable grounds, that it requires the assistance of the expert to assist the supervisor to—
- (a) determine the financial position of the manager or the scheme; or

- (b) to determine whether the scheme property is being held in accordance with the custodial arrangements; or
 - (c) review the business, operation, or management systems, or the governance, of the manager.
- (2) If the supervisor engages an expert under this section,—
- (a) the manager must provide reasonable assistance to the expert to allow the expert to provide the assistance; and
 - (b) the fees and expenses of the expert, which must be reasonable in the circumstances, must be paid by the manager.

Compare: SR 2009/230 Schedule 15 cl 11

Custodianship of scheme property

135 Requirement to have supervisor or other independent person as custodian

- (1) The supervisor of a registered scheme (**A**) must hold the scheme property or, if authorised by the governing document, contract the holding of the scheme property to another person who meets the external custodianship requirements (**B**).
- (2) If there is no supervisor for the scheme (for example, in the case of a restricted scheme), the manager of a registered scheme (**A**) must contract the holding of the scheme property to another person who meets the external custodianship requirements (**B**).
- (3) **B** may, if authorised in writing by **A**, in turn contract the holding of the scheme property to another person who meets the external custodianship requirements.
- (4) To meet the external custodianship requirements, a person must—
 - (a) be a body corporate that **A** or (if **B** contracted the custodian) **B** believes, on reasonable grounds, to be appropriate to hold, and safeguard, the scheme property; and
 - (b) not be the same person as, or be associated with, the manager.
- (5) If a person contracts the holding of the scheme property to another person (**the nominee**) under this section, the person contracting out that function—
 - (a) must take all reasonable steps to—

- (i) ensure that the function is performed by the nominee in the same manner and subject to the same duties and restrictions as if that person were performing it directly; and
 - (ii) monitor the performance of that function; and
- (b) is jointly and severally liable with the nominee (and any other person who has contracted out the function) for the performance of that function in accordance with paragraph (a).
- (6) This section does not apply to the extent that scheme property is held directly by the scheme participants.

Compare: 1960 No 99 ss 3(3), 6–6C, 2006 No 40 ss 116G, 116H, 116I

136 Custodian holds scheme property on trust

- (1) The custodian for a registered scheme (whether the supervisor or another nominee under section 135) holds the scheme property on trust for the scheme participants.
- (2) The custodian for a registered scheme must ensure that the scheme property is held separate from other property of the custodian or of any other person involved in operating the registered scheme.
- (3) Scheme property—
 - (a) is not available for the payment of the debts of any other creditor of the custodian; and
 - (b) is not liable to be attached or taken in execution under the order or process of any court at the instance of another creditor of the custodian.
- (4) Nothing in this section takes away or affects any lawful lien or claim that a custodian who holds scheme property has against the scheme property.

137 Custodian must keep records of scheme property

- (1) The custodian for a registered scheme must keep, or ensure that there are kept, records that—
 - (a) identify the scheme property; and
 - (b) show the date when the scheme property was received; and

- (c) if the scheme property has been disposed of, show where the scheme property was disposed of and to whom.
- (2) The custodian for a registered scheme must also keep all other prescribed records.
- (3) The custodian for a registered scheme must keep the records required by this section, or ensure that they are kept, in a manner that enables those records to be conveniently inspected by the manager and the supervisor and conveniently and properly audited.

138 Duty of supervisor to refuse to act on wrongful directions

- (1) The supervisor of a registered scheme must refuse, and must direct any other custodian to refuse, to act on a direction of the manager that relates to the acquisition or disposal of scheme property if the supervisor considers that the proposed acquisition or disposal would be—
 - (a) in breach of the scheme’s governing document, statement of investment policy and objectives, or any enactment; or
 - (b) manifestly not in the best interests of the scheme participants.
- (2) If the supervisor refuses, or directs any other custodian to refuse, to act on a direction of the manager, the supervisor must notify the manager and the FMA in writing of that fact and the supervisor’s reasons for refusing to do so.
- (3) A supervisor of a registered scheme, and any other custodian of the scheme, is not liable to the scheme participants or the manager for refusing, or directing any other custodian to refuse, to act on a direction of the manager in accordance with this section.

Compare: 1960 No 99 s 12(1)(c)

*Meetings of scheme participants***139 Meetings of scheme participants**

- (1) A meeting of a class of scheme participants must be called by the manager of the registered scheme on the written request of—

- (a) the supervisor; or
 - (b) scheme participants holding managed investment products that value together no less than 10% of the value of the managed investment products on issue in that class; or
 - (c) a person who is authorised by the governing document or by the regulations to call the meeting.
- (2) The proceedings at the meeting are governed by the regulations (if any) and the governing document (if there are no regulations or to the extent that the governing document is not inconsistent with any regulations).

Compare: 1960 No 99 ss 12(1)(d), 18(1)

140 Power of supervisor to attend meetings and appoint chair

- (1) The supervisor of a registered scheme is entitled to receive all notices of, and other communications relating to, any meeting of the scheme participants that any scheme participant is entitled to receive.
- (2) The supervisor of a registered scheme (or any person authorised by the supervisor to exercise its powers under this section) is entitled to—
- (a) attend a meeting of the scheme participants; and
 - (b) be heard at a meeting of the scheme participants on any part of the business of the meeting that concerns the supervisor’s duties or the scheme participants for whom the supervisor is acting; and
 - (c) appoint the chairperson of the meeting if the meeting was called by scheme participants or the supervisor.

Compare: 1960 No 99 s 18(1), SR 2009/137 Schedule 16 cl 2(1), 2(2)

141 Manager and associated persons cannot vote if interested in resolution

- (1) The manager of a registered scheme and its associated persons are not entitled to vote their interest on a resolution at a meeting of scheme participants if they have an interest in the resolution or matter other than as a scheme participant.
- (2) However,—
- (a) if the managed investment products in the registered scheme are quoted, the manager and its associated per-

sons are entitled to vote their interest on resolutions to remove the manager and appoint a new manager:

- (b) the manager or its associated persons may vote as proxies if the proxy appointment specifies the way they are to vote on the resolution and they vote that way.

Compare: Corporations Act 2001 ss 253A(2), 253E (Aust)

Management of scheme

142 Requirement for statement of investment policy and objectives

- (1) A manager of a registered scheme must ensure that there is a statement of investment policy and objectives that covers the investment policy and objectives of the scheme and provides adequately for the following matters:
 - (a) the limits on the nature or type of investments that may be made; and
 - (b) the limits on the proportion of each type of asset invested in; and
 - (c) what methodology is used for developing, amending, and measuring the investment strategy.
- (2) The statement must provide for the matters set out in this section in accordance with the frameworks or methodologies specified in a notice issued by the FMA under subpart 4 of Part 8 that apply to it.

143 Changes to statement of investment policy and objectives

- (1) The manager of a registered scheme may amend or replace a statement of investment policy and objectives only after consultation with the supervisor.
- (2) The manager must give notice to the supervisor of any changes made to the statement of investment policy and objectives as soon as practicable after making the change.
- (3) This section does not apply to a restricted scheme.

144 Lodging of statement of investment policy and objectives and changes to statement

- (1) The manager of a registered scheme must lodge the statement of investment policy and objectives, and any changes to it, with the Registrar.
- (2) The manager must lodge any change to the statement of investment policy and objectives within 5 working days of the change taking effect.
- (3) A person who contravenes this section commits a tier 1 infringement offence.

145 Action that must be taken on limit breaks

- (1) This section applies to a registered scheme if, under the scheme's statement of investment policy and objectives, there is a breach of the limits on either of the following (a **limit break**):
 - (a) the nature or type of investments that may be made; or
 - (b) the proportion of each type of assets that may be invested in.
- (2) If this section applies, the manager of the registered scheme must report the limit break to the supervisor or to the FMA (if there is no supervisor) in the prescribed circumstances and in the prescribed manner.
- (3) The supervisor of the registered scheme must report a limit break to the FMA in the prescribed circumstances and in the prescribed manner.

146 Action that must be taken on pricing errors and failure to comply with pricing methodologies

- (1) This section applies to a registered scheme if—
 - (a) the managed investment products under the scheme are transferable or redeemable; and
 - (b) either—
 - (i) an error occurs in calculating the price at which the managed investment products are transferred or redeemed; or
 - (ii) there is a failure to comply with the methodology for pricing the managed investment products as

set out in the governing document or any notice issued by the FMA under subpart 4 of Part 8 (the FMA's power to specify frameworks or methodologies).

- (2) If this section applies, the manager must, if the pricing error or non-compliance is material,—
 - (a) correct the pricing error or non-compliance; and
 - (b) report the pricing error or non-compliance to the supervisor (or to the FMA if there is no supervisor); and
 - (c) take the prescribed steps to remedy the pricing error or non-compliance.
- (3) The supervisor must report pricing errors or non-compliances that have been notified to it under this section to the FMA in the prescribed circumstances and in the prescribed manner.
- (4) Whether or not a pricing error or non-compliance is material must be determined in accordance with the frameworks or methodologies specified in a notice issued by the FMA under subpart 4 of Part 8.

147 Actuarial examination of defined benefit scheme or life benefit scheme

- (1) This section applies to a registered scheme that—
 - (a) operates on the principle of unallocated funding (a **defined benefit scheme**); or
 - (b) provides benefits that provide for the payment of money on the happening of a contingency dependent on the termination or continuance of human life, and the risks associated with those benefits are not fully insured with a company engaged in the business of life insurance (a **life benefit scheme**).
- (2) The manager of a defined benefit scheme or a life benefit scheme must ensure that a suitably qualified actuary examines the financial position of the scheme as at dates that are no more than 3 years apart.
- (3) A person who knowingly contravenes subsection (2) commits a tier 2 offence.
- (4) The manager must ensure that—

- (a) the report of the actuary is received no later than 7 months after the date as at which the financial position of the scheme was examined; and
 - (b) a copy of the report is lodged with the Registrar within 20 working days after its receipt by the supervisor.
- (5) A person who contravenes subsection (4)(b) commits a tier 1 infringement offence.
- Compare: 1989 No 10 s 15

148 Power of manager to adjust financial benefits to comply with portfolio investment entity rules

The manager of a registered scheme to which section HM 48 of the Income Tax Act 2007 applies may adjust the financial benefits of scheme participants in the way required by that section.

Compare: 1960 No 99 ss 12A, 22

149 Limits on reversion of scheme property in certain schemes to non-scheme participant contributor

- (1) No part of the scheme property of a KiwiSaver scheme or superannuation scheme may revert to a contributor who is not a scheme participant under the governing document without the prior written consent of the FMA.
- (2) The FMA must not give consent to the reversion of any assets of the scheme to a person under this section unless satisfied that—
 - (a) sufficient assets would remain to support the interests of all of the scheme participants; and
 - (b) the reversion is fair and equitable to the scheme participants, taking into account the manner in which the scheme acquired those assets.

Compare: 1989 No 10 s 10, 2006 No 40 ss129B, 130

Related party transactions

150 Definition of related party benefits

- (1) In this section, a **related party benefit**, in relation to a registered scheme, is a benefit—

- (a) that is either given out of scheme property or creates an exposure to loss for scheme property; and
 - (b) that is given to, or received by, a related party of the scheme.
- (2) A **related party** of the scheme is any of the following persons:
- (a) any of the following persons (a **scheme-connected person**):
 - (i) for a registered scheme (other than a restricted scheme), the manager of the scheme;
 - (ii) for a restricted scheme, a trustee or any contributor of the scheme who is not a scheme participant (other than the Crown):
 - (b) an associated person of a scheme-connected person.

Compare: Corporations Act 2001 ss 601LA-601LE (Aust)

151 General prohibition on transactions giving related party benefits

- (1) A manager of a registered scheme (or any person acting on behalf of the manager) must not enter into a transaction that provides for a related party benefit to be given.
- (2) However, subsection (1) does not apply to a transaction or series of transactions if—
 - (a) the manager notifies the supervisor of the transaction or transactions, including the related party benefits given under the transaction or transactions, and the key terms of the transaction or transactions; and
 - (b) either—
 - (i) the manager obtains the supervisor’s consent to the transaction or transactions; or
 - (ii) section 152 applies to the transaction or transactions or all related party benefits to be given.
- (3) The supervisor must not consent to a transaction or transactions under this section unless—
 - (a) either—
 - (i) the supervisor considers that the transaction or transactions are in the best interests of the scheme participants; or

- (ii) the transaction is approved by, or contingent on approval by, a special resolution of the scheme participants; and
 - (b) the supervisor certifies to that effect.
- (4) However, a failure to comply with this section does not affect the validity of any transaction (subject to any court order under Part 7).

Compare: Corporations Act 2001 ss 601LA-601LE (Aust)

152 Certain related party benefits permitted without supervisor consent

Consent from a supervisor is not required under section 151 for—

Arm's-length terms

- (a) a benefit that is given on terms that—
 - (i) would be reasonable in the circumstances if the parties were connected or related only by the transaction in question, each acting independently, and each acting in its own best interests; or
 - (ii) are less favourable to the related party than the terms referred to in subparagraph (i):

Transactions in other registered schemes

- (b) an acquisition or a disposal of a managed investment product in another registered scheme:

Other prescribed benefits or transactions

- (c) a prescribed benefit or transaction.

Compare: Corporations Act 2001 ss 601LA-601LE (Aust)

153 Additional restrictions on transactions of restricted scheme

The trustees of a restricted scheme must ensure that the restricted scheme does not—

- (a) have more than 5% of the scheme property in investments related to or managed by a related party of the scheme (as defined in section 150) or a scheme participant; or

- (b) lend money or provide financial assistance out of scheme property to a related party of the scheme (as defined in section 150) or a scheme participant.

Compare: 2006 No 40 s 117A

*Scheme participant transfer rules for KiwiSaver
and superannuation schemes*

154 Application of scheme participant transfer rules

- (1) Sections 155 to 158 apply to either of the following types of transfer (a **transfer**):
 - (a) the transfer of a scheme participant from 1 KiwiSaver scheme or superannuation scheme to another KiwiSaver scheme or superannuation scheme:
 - (b) the transfer of a scheme participant from 1 section of a KiwiSaver scheme or superannuation scheme to another section of the same scheme.
- (2) In sections 155 to 158, unless the context otherwise requires,—
 - (b) a person proposed to be transferred is a **proposed transferee**:
 - (c) the scheme, or section of the scheme, from which the person is proposed to be transferred is the **old scheme**:
 - (d) the scheme, or section of the scheme, into which the person is proposed to be transferred is the **new scheme**.
- (3) Those sections do not apply to transfers to which subpart 3 of Part 2 of the KiwiSaver Act 2006 applies.

Compare: 1989 No 10 s9B, 2006 No 40 ss 119B, 119D(6)

155 Methods of transfer of scheme participants to another scheme or another section of scheme

- (1) No scheme participant may be transferred from 1 registered scheme to another registered scheme, or to another section of the same scheme, except in accordance with this section.
- (2) A scheme participant may be transferred, if authorised by a governing document,—
 - (a) with the scheme participant’s written consent (which must be obtained in accordance with section 156, if that section applies); or

- (b) in accordance with the FMA's consent under section 157.
- (3) However, the FMA may permit a transfer to occur under subsection (2)(a) without the scheme participant's consent, if the FMA is satisfied that—
 - (a) the manager of the old scheme has taken all reasonable steps to contact all of the relevant scheme participants, but has not been able to do so; and
 - (b) the proposed action is not unreasonable in relation to the best interests of any of those scheme participants who have not been contacted.
- (4) No scheme participant may be transferred from a KiwiSaver scheme into another scheme that is not a KiwiSaver scheme under this section.

Compare: 1989 No 10 ss 9B, 9BAA(1), 9BA, 2006 No 40 ss 119C, 119G(1), 119I

156 Transfer of substantial numbers of scheme participants with scheme participant consent

- (1) This section applies to a transfer (whether at the same time or over an extended period) of all, or a substantial number, of the scheme participants from an old scheme to a new scheme.
- (2) The manager of the old scheme and of the new scheme must, in each case, consult the scheme's supervisor (if any) on the proposed transfer and give notice of the proposed transfer in accordance with this section.
- (3) The notice must—
 - (a) be given to every scheme participant of the old scheme and the new scheme, other than scheme participants who, in the opinion of the FMA, are not likely to be affected by the proposed transfer; and
 - (b) set out—
 - (i) the proposal and its implications for the proposed transferees; and
 - (ii) the date of the proposed transfer; and
 - (iii) the date on which the proposed transferees' written consent must be received by the manager or the trustees; and

- (iv) the fact that the notice has also been sent to the FMA; and
 - (c) be given at least 1 month before the date on which, under the notice, the proposed transferees' written consent must be received by the manager.
- (4) Giving notice under this section does not derogate from the need to comply with any other requirement of the KiwiSaver Act 2006 (in relation to a KiwiSaver scheme).

Compare: 1989 No 10 s9B, 2006 No 40 s 119D

157 Transfer with FMA consent

- (1) The FMA may consent to a transfer if the FMA is satisfied that—
- (a) the terms and conditions of the new scheme are no less favourable to the proposed transferees than the terms and conditions of the old scheme; and
 - (b) the transfer is otherwise reasonable in all the circumstances (including having regard to the value of the assets transferred from the old scheme to the new scheme); and
 - (c) the person applying for the transfer is the manager of the old or new scheme, a relevant employer, or another person who the FMA considers has an appropriate interest in the transfer; and
 - (d) the applicant has given notice to every proposed transferee that—
 - (i) the applicant has applied for the FMA's consent to transfer the person without their written consent; and
 - (ii) the person may make submissions to the FMA about the transfer.
- (2) The FMA must have regard to any submissions received by proposed transferees before deciding whether or not to give its consent.
- (3) The FMA may give its consent subject to any terms and conditions that the FMA sets out in the written notice of consent.
- (4) The transfer must be carried out in accordance with those terms and conditions.

Compare: 1989 No 10 s9BAA, 2006 No 40 ss 119G, 119H

158 Transfers from KiwiSaver scheme

- (1) This section applies to an old scheme if it was a KiwiSaver scheme.
- (2) The provider of the old scheme must give the following information to the provider of the new scheme in respect of a scheme participant that transfers under sections 155 to 158 (A):
 - (a) A's name, address, and date of birth; and
 - (b) A's tax file number; and
 - (c) the date on which A first became a member of a KiwiSaver scheme; and
 - (d) if A is an employee,—
 - (i) the name and address of each of A's employers; and
 - (ii) the rate at which A intends each of those employers to make deductions of contributions from his or her salary or wages; and
 - (e) the name, address, and tax file number of both the provider and the old scheme; and
 - (f) any other information that the Commissioner requires the provider of the old scheme to give to the provider of the new scheme.
- (3) In this section, **provider** has the meaning set out in section 5 of the KiwiSaver Act 2006.

Compare: 2006 No 40 s 119F

*Change of manager***159 Application of sections 160 to 167**

Sections 160 to 167 apply to—

- (a) the manager of a registered scheme (other than a restricted scheme); or
- (b) each of the trustees of a restricted scheme.

160 Removal of manager of registered scheme

- (1) A manager of a registered scheme ceases to hold that office if removed—

- (a) by written direction of the supervisor after the supervisor certifies that it is in the best interests of scheme participants that the manager be removed; or
 - (b) by a special resolution of the scheme participants; or
 - (c) by the court under section 183; or
 - (d) otherwise in accordance with the governing document.
- (2) Subsection (1)(a) does not apply to a restricted scheme.
Compare: 1960 No 99 s 19

161 Supervisor or FMA may make temporary appointment

- (1) This section applies if a registered scheme does not, for any reason, have a manager.
- (2) The supervisor or the FMA must appoint a person (the **temporary manager**) to fill the vacancy in the manager's office until a substitute appointment may be made under the governing document.
- (3) That person must be—
- (a) if the appointment is by the supervisor, a person who meets the requirements in section 111(1)(c) and (e);
 - (b) if the appointment is by the FMA, a person who the FMA considers appropriate (but need not be a person who meets the requirements in section 111(1)(c) and (e)).
- (4) However, the FMA may act under this section only if—
- (a) it is satisfied that the supervisor has had a reasonable opportunity to act under this section but has not done so; or
 - (b) it is satisfied that it is necessary as a matter for urgency for the FMA to do so and it is not reasonably practicable to wait for the supervisor to do so; or
 - (c) the supervisor requests the FMA to act; or
 - (d) there is no supervisor.
- (5) If the FMA appoints a person who does not meet the requirements of section 111(1)(c) and (e), that person does not contravene section 370, and the scheme does not fail to meet those registration requirements, as a result of that appointment.
Compare: 1960 No 99 s 23

162 Term, powers, and duties of temporary manager

- (1) A temporary manager may hold the appointment until a substitute manager is appointed—
 - (a) under the governing document; or
 - (b) otherwise under this Act.
- (2) The temporary manager has all of the powers and duties of the manager of the registered scheme that are conferred or imposed by the governing document or by law.
- (3) However, the FMA may, in the prescribed manner, amend a governing document, in so far as it applies to an FMA appointee, if—
 - (a) the supervisor (if any) consents; and
 - (b) the FMA is satisfied that the change will have no material adverse effect on the interests of scheme participants.
- (4) An amendment made under this section must be treated for all purposes as if it were made in accordance with the governing document.
- (5) Section 123 (lodging of changes to governing document) applies to an amendment to the governing document under this section.

163 FMA's costs must be reimbursed from scheme

- (1) The FMA's costs and expenses incurred in connection with the FMA appointee holding the appointment must be reimbursed from the registered scheme.
- (2) An amount payable under subsection (1) is recoverable by the FMA in any court of competent jurisdiction as a debt due to the FMA.

164 Supervisor or FMA must take reasonable steps to arrange for new appointment

- (1) The supervisor of a registered scheme or the FMA (if there is no supervisor) must, in the prescribed manner (if any), take all reasonable steps to secure, in accordance with the governing document, the appointment of a person as a permanent manager in place of the temporary manager.
- (2) The temporary manager may be appointed to continue to hold the office as a permanent manager, but in this case—

- (a) if the person was an FMA appointee, the person ceases to be an FMA appointee; and
- (b) must meet the requirements in section 111(1)(c) and (e).

165 Former manager must hand over records and give reasonable assistance

- (1) If the person who holds an appointment as a manager of a registered scheme changes, the person who previously held the appointment (the **former manager**) must,—
 - (a) as soon as is reasonably practicable, give the person that currently holds the appointment (the **current manager**) all of the information or documents held or controlled by the former manager that are reasonably necessary to allow the current manager to hold the office; and
 - (b) give the current manager all reasonable assistance to facilitate the change.
- (2) The former manager may withhold the information or documents, or retain a copy of the information or documents,—
 - (a) with the FMA's written consent; or
 - (b) otherwise in the prescribed circumstances.
- (3) If a temporary manager has been appointed to an office, for the purposes of this section, **former manager** includes the person who held the office immediately before the temporary manager and **current manager** includes the person who held the office immediately after the temporary manager.

166 Statutory novation of rights, obligations, and liabilities of former manager

- (1) If the manager of a registered scheme changes, the rights, obligations, and liabilities of the former manager in relation to the scheme become the rights, obligations, and liabilities of the new manager.
- (2) Despite subsection (1), the following rights, obligations, and liabilities remain rights, obligations, and liabilities of the former manager:
 - (a) any right of the former manager to be paid fees for the performance of its functions, or to be indemnified for

- expenses it incurred, before it ceased to be the manager of the scheme; and
- (b) any right, obligation, or liability that the former manager had as a scheme participant; and
 - (c) any liability for which the former manager could not have been indemnified out of the scheme property if it had remained the scheme's manager.
- (3) This section is subject to any order of the court under section 183.

167 Lodging of notice of changes to manager

- (1) Within 5 working days of a change to the manager of a registered scheme, the new manager must ensure that notice of the change is lodged with the Registrar.
- (2) A person who contravenes this section commits a tier 1 infringement offence.

Change of supervisor

168 Change of supervisor

- (1) The supervisor of a registered scheme ceases to hold that appointment (subject to subsection (2)) if the supervisor—
 - (a) is removed by the FMA if it is satisfied that the manager and the supervisor no longer meet the requirements in section 111(1)(e) (registration requirements); or
 - (b) is removed by the FMA under the Statutory Supervisors Act 2011; or
 - (c) is removed by a special resolution of the scheme participants; or
 - (d) is removed or resigns in accordance with the governing document.
- (2) No manager of a registered scheme may remove a supervisor without the FMA's consent (even if permitted to do so by the governing document).

Compare: 2006 No 40 s 116E(2)

169 Lodging of notice of change of supervisor

- (1) Within 5 working days of a change to the supervisor of a registered scheme, the manager must ensure that notice of the change is lodged with the Registrar.
- (2) A person who contravenes this section commits a tier 1 infringement offence.

*Cancellation of registration***170 Cancellation of registration**

- (1) The FMA may direct that the registration of a registered scheme be cancelled—
 - (a) on giving 20 working days' notice to the manager of the scheme, if satisfied on reasonable grounds that the scheme no longer meets the registration requirements under section 111; or
 - (b) on giving 20 working days' notice to the manager of the scheme, if the FMA has reasonable cause to believe that the scheme has no scheme participants; or
 - (c) on the written request of the manager of the scheme (subject to subsection (3)), if the supervisor certifies, or the trustees of a restricted scheme certify, that—
 - (i) the removal has been approved by a special resolution of the scheme participants; or
 - (ii) there is no material adverse effect to scheme participants from the removal; or
 - (d) if the scheme has been wound up or dissolved or has otherwise ceased to exist.
- (2) The manager of a registered scheme must, as soon as practicable after being notified of a direction under this section, notify the scheme participants in writing of the direction.
- (3) The FMA may, instead of removing a scheme's registration on the request of the manager under this section, exercise its rights to apply for an order winding up the scheme under section 184 (power to order winding up).

Compare: 1989 No 10 s 19, 2006 No 40 s 168

171 Registrar must remove scheme from register on cancellation of registration

- (1) On the cancellation of the registration of a scheme under section 170, the Registrar must remove it from the register of managed investment schemes.
- (2) The cancellation must be treated as taking effect on the date on which the scheme is removed from the register.
- (3) The Registrar must give notice of the cancellation of registration, as soon as practicable after the registration of the scheme is cancelled, to—
 - (a) the manager of the scheme; and
 - (b) the Commissioner of Inland Revenue (in the case of a KiwiSaver scheme).

Compare: 2006 No 40 s 170

Subpart 4—Intervention in debt securities or registered schemes*Provisions assisting supervisor or FMA to intervene***172 Duty of auditor to report to supervisor**

- (1) This section applies to the auditor of an issuer of debt securities or managed investment products.
- (2) If the auditor provides the issuer, any of the issuer's members or shareholders, or any of the holders of the products referred to in subsection (1) with any report, financial statement, certificate, or other document required by an Act or a trust deed relating to the financial products or scheme, the auditor must, as soon as practicable, send a copy to the supervisor of the debt securities or registered scheme.
- (3) If, in the performance of the auditor's duties, the auditor becomes aware of a matter that, in the auditor's opinion, is relevant to the exercise or performance of the powers or duties of the supervisor of the debt securities or registered scheme, the auditor must, within 7 working days of becoming aware of the matter, send—
 - (a) a written report on the matter to the issuer; and
 - (b) a copy of the report to the supervisor.

- (4) The auditor must, from time to time, at the request of the supervisor, provide the supervisor with any information relating to the issuer—
 - (a) that the supervisor requests; and
 - (b) that is within the auditor’s knowledge; and
 - (c) that is, in the auditor’s opinion, relevant to the exercise or performance of the powers or duties of the supervisor.
- (5) Section 188 (protected disclosure) applies to a disclosure in good faith under this section.
- (6) This section does not limit the duties or liability of an issuer or a supervisor.

Compare: 1978 No 103 s 50

173 Duty of investment manager, administration manager, and custodian to report serious problems

- (1) This section applies to an investment manager, an administration manager, or a custodian of a registered scheme.
- (2) A person to whom this section applies must take the steps set out in section 174 if the person has reasonable grounds to believe that any of the following has arisen in relation to a relevant financial product (a **serious problem**):
 - (a) the issuer of the relevant financial product has breached, or is likely to breach, an issuer obligation; or
 - (b) the issuer or scheme is, or it is likely the issuer or scheme will be, insolvent; or
 - (c) the financial position of the scheme or issuer or the security of benefits or the management of the scheme or issuer is otherwise inadequate; or
 - (d) the supervisor of the registered scheme has breached, or is likely to breach, any of the supervisor’s licensee obligations (as defined in section 4 of the Statutory Supervisors Act 2011).

Compare: 2006 No 40 s 191

174 What person must do if duty to report serious problem applies

- (1) If section 173 applies, the person to whom that section applies must, as soon as practicable,—

- (a) report the serious problem to the supervisor or (if there is no supervisor or the serious problem concerns a breach or likely breach of an obligation by the supervisor) the FMA; and
 - (b) disclose to the supervisor or FMA (as applicable under paragraph (a)) all information relevant to the serious problem that is in the possession or control of the relevant person and was obtained in the course of, or in connection with, the performance of functions as that relevant person.
- (2) Section 188 (protected disclosure) applies to a disclosure in good faith under this section.
- (3) For the avoidance of doubt, section 173 and this section do not require a relevant person to carry out functions additional to those functions that the person would ordinarily carry out in the course of holding the person's office (other than as expressly required by subsection (1)).

Compare: 2006 No 40 s 191(2), (4)

175 Protections extend to volunteers of supporting information for other protected disclosures

- (1) This section applies to an employee of the person in respect of whom any other protected disclosure is made under this Act (A).
- (2) A disclosure of information under this section qualifies for protection under this subpart if the person—
- (a) provides information, in support of another protected disclosure made by another person, to—
 - (i) the supervisor or FMA (whomever receives the other protected disclosure); or
 - (ii) the person who made the disclosure; and
 - (b) is an employee of A; and
 - (c) makes the disclosure in good faith; and
 - (d) wishes to provide the supporting information so that serious wrongdoing can be investigated.
- (3) However, a person does not volunteer supporting information if the person provides the supporting information only after being—

- (a) required to do so under any enactment, rule of law, or agreement for the purposes of the investigation; or
 - (b) approached during the course of the investigation by, or on behalf of, the FMA or any other person investigating the matter.
- (4) Section 188 (protected disclosure) applies to a disclosure that qualifies for protection under subsection (2).

176 FMA may require supervisor to attest as to issuer's compliance with issuer obligations

- (1) The FMA may require a supervisor of a debt security or a registered schemes to attest to the FMA, at a time and in a manner specified by the FMA, as to whether the supervisor is satisfied that the issuer has not breached an issuer obligation in a material respect.
- (2) If the FMA requires a supervisor to attest to the FMA under this section, the supervisor must either—
- (a) provide that attestation; or
 - (b) if unable to attest to the FMA as required, report the reason, including the details of any breach or suspected breach and, if applicable the report under section 177.
- (3) Section 188 (protected disclosure) applies to a report under this section.

Compare: 2011 No 10 s 45

177 Duty of supervisors to report breach or possible breach of issuer obligations to FMA

- (1) If a supervisor of a debt security or registered scheme has reasonable grounds to believe that an issuer has breached, may have breached, or is likely to breach an issuer obligation in a material respect, the supervisor must, as soon as practicable,—
- (a) report the breach or possible breach to the FMA; and
 - (b) advise the FMA of the steps (if any) that the supervisor intends to take in respect of the breach or possible breach and the date by which the steps are to be taken.
- (2) Section 188 (protected disclosure) applies to a report under this section.

Compare: 2011 No 10 s 46

178 Duty of supervisor to report serious financial problems to FMA

- (1) This section applies if a supervisor of a debt security or registered scheme becomes aware, in the course of or in connection with the performance of its functions as supervisor, of information on the basis of which it could reasonably form the opinion that—
 - (a) the issuer is, or it is likely that the issuer will be, insolvent; or
 - (b) in the case of a managed investment product, the registered scheme is, or it is likely that the registered scheme will be, insolvent.
- (2) The supervisor must, as soon as practicable,—
 - (a) disclose to the FMA all information relevant to that matter that is in the possession or under the control of the supervisor and that was obtained in the course of, or in connection with, the performance of its functions as supervisor; and
 - (b) advise the FMA of the steps (if any) that the supervisor intends to take in respect of that matter and the date by which the steps are to be taken.
- (3) Section 188 (protected disclosure) applies to a report under this section.

Compare: 2011 No 10 s 47

179 FMA's powers in case of failure by supervisor to take action to avoid material prejudice

- (1) The FMA may exercise a power under subsection (2) if it is satisfied that—
 - (a) there is a significant risk that the interests of holders of a debt security or managed investment product will be materially prejudiced; and
 - (b) either—
 - (i) the supervisor of the debt securities or registered scheme is aware of that risk and has had a reasonable opportunity to take action to eliminate or reduce the risk but has not done so; or

- (ii) action is urgently required to eliminate or reduce the risk and it is not reasonably practicable to wait for the supervisor to do so.
- (2) The FMA may, by written notice to the supervisor and otherwise in the prescribed manner, give a direction to the supervisor.

Compare: 2011 No 10 s 49(1), (2)

180 FMA's directions to supervisor

- (1) If the notice under section 179 gives a direction to the supervisor, the notice must specify—
 - (a) the step or steps that the supervisor must take to in relation to the issuer or the issue (or both); and
 - (b) the date by which each step will be taken.
- (2) The supervisor must comply with the direction (*see* subpart 3 of Part 7, which provides for civil remedies for a contravention of this duty).
- (3) A supervisor who refuses or fails, without reasonable excuse, to comply with the direction commits a tier 2 offence.

Compare: 2011 No 10 s 49(3)-(5)

Powers to obtain court orders to intervene

181 Power of supervisor or FMA to apply for order to remedy problems

- (1) A supervisor of a debt security or a registered scheme, or the FMA, may apply for an order under section 182 if it is satisfied that—
 - (a) the issuer and any guarantor of the financial product are unlikely to be able to pay all money owing in respect of the financial product when it becomes due; or
 - (b) the issuer or, in the case of a registered scheme, the scheme is insolvent; or
 - (c) in the case of a registered scheme, the scheme is no longer meets the registration requirements, or the requirements for registration as a particular type of scheme, under sections 111 to 115:

- (d) there is a significant risk that the interests of product holders will be materially prejudiced for any other reason; or
 - (e) the provisions of a governing document are no longer adequate to give proper protection to product holders.
- (2) However, the FMA may apply for the order only if it is satisfied that—
- (a) the supervisor has had a reasonable opportunity to apply for the order but has not done so; or
 - (b) it is necessary as a matter of urgency for the FMA to do so and it is not reasonably practicable to wait for the supervisor to do so; or
 - (c) there is no supervisor.

Compare: 1960 No 99 s 19A, 1978 No 103 s 49, 2006 No 40 s 116K(1), (2), 2011 No 10 s 50(1)-(3)

182 Court orders to remedy problems

- (1) The court may, on application by a supervisor or the FMA and after giving the issuer and any other person that the court thinks fit the opportunity to be heard, make 1 or more of the orders listed in subsection (2).
- (2) The orders may—
- (a) amend the provisions of the governing document:
 - (b) impose restrictions on the activities of the issuer (including restrictions on advertising) that the court thinks are necessary to protect the interests of product holders:
 - (c) direct that no offers, issues, sales, or transfers of debt securities or managed investment products specified in the order be made while the order is in force:
 - (d) direct that an issuer must not accept further contributions or deposits in respect of debt securities or managed investment products specified in the order while the order is in force:
 - (e) direct the issuer or the supervisor to convene a meeting of product holders (and give any other directions it thinks fit relating to the conduct of that meeting) for the purpose of—
 - (i) having placed before the product holders by the supervisor the information or proposal that the

- court, the supervisor, or the FMA thinks necessary or appropriate relating to their interests; and
- (ii) obtaining the opinions or directions of product holders:
 - (f) give directions in relation to the conduct of any meeting convened in accordance with paragraph (e):
 - (g) stay any civil actions or civil proceedings before the court by or against the supervisor, the issuer, or any guarantor of the financial products:
 - (h) restrain the payment of money by the custodian, the issuer, or any guarantor of the financial products to product holders or a class of product holders or restrain the transfer of scheme property by the custodian:
 - (i) appoint a receiver or manager of the property that constitutes the security (if any) for the financial products (with any powers that the court orders):
 - (j) give any other directions that the court considers necessary to protect the interests of product holders, any guarantor of the financial products, or the public.
- (3) The court may vary or cancel an order made under this section.
 - (4) In exercising its powers under this section, the court must have regard to the interests of all creditors of the issuer (in the case of a debt security) and all creditors in respect of the registered scheme (in the case of a managed investment product).
- Compare: 1960 No 99 s 19A, 1978 No 103 s 49, 2006 No 40 s 116K(3)-(6), 2011 No 10 s 50(4)-(7)

183 Power of court to appoint new manager, provide for manager powers, and deal with changes of managers

- (1) The court may, on the application of the supervisor, the FMA, or a scheme participant, make an order to—
 - (a) appoint a new manager of a registered scheme (with any powers that the court orders) if there is no manager or in substitution for an existing manager:
 - (b) confer an additional power on the manager of a registered scheme (either generally or specifically) to facilitate a transaction or type of transaction that the court considers to be in the best interests of the scheme par-

- participants, and provide for the exercise of that additional power:
- (c) direct that section 166 not apply in whole or in part and also that if an agreement has been entered into between a manager of a registered scheme that has been removed and any other person,—
 - (i) vary the agreement or any collateral agreement as specified in the order and, if the court thinks fit, declare the agreement to have had effect as so varied on and after a date before the order was made, as specified in the order:
 - (ii) cancel the agreement and, if the court thinks fit, declare the cancellation to have had effect on and after a date before the order was made, as specified in the order:
 - (d) amend the governing document to provide for a new or temporary appointment of a manager of a registered scheme (whether the appointment is by a court order or under the governing document or this Act) or otherwise in connection with another order made under this section.
- (2) The court may under this section (without limiting subsection (1)) appoint a new manager in substitution for a manager who—
- (a) has been held by the court to have contravened any issuer obligation; or
 - (b) is insolvent.
- (3) A manager appointed by the court under this section has all of the powers and duties of the manager of the registered scheme that are conferred or imposed by the governing document or by law.

Compare: 1960 No 99 s 22

184 Court power to order winding up of scheme

- (1) The court may, on the application of the FMA or a supervisor, direct that a registered scheme must be wound up if it is satisfied that—
- (a) the manager or the scheme is insolvent; or

- (b) the manager has persistently or seriously failed to comply with this Act or any other financial markets legislation; or
 - (c) no permanent manager has been appointed under the governing document or this Act; or
 - (d) no supervisor has been appointed under the governing document or the Statutory Supervisors Act 2011 (if required under this Part); or
 - (e) it is just and equitable that the scheme be wound up.
- (2) However, the FMA may apply for an order to wind up a scheme only if it is satisfied that—
- (a) the supervisor has had a reasonable opportunity to do so but has not done so; or
 - (b) it is necessary as a matter of urgency for the FMA to do so rather than wait for the supervisor to do so; or
 - (c) there is no supervisor.
- (3) The court may give any other directions that it thinks fit for the purpose of facilitating the winding up (and, if there is any conflict between those directions and the provisions of the governing document, those directions prevail).

185 Initial steps in winding up of registered scheme

- (1) If a registered scheme is to be wound up, the supervisor or (in the case of a restricted scheme) the trustees must, within 10 working days after a winding-up resolution or an order by the court that the scheme be wound up is made,—
- (a) lodge a copy of any order or resolution with the FMA; and
 - (b) in the case of a KiwiSaver scheme,—
 - (i) lodge a copy of any order or resolution with the Commissioner of Inland Revenue; and
 - (ii) give notice to the Commissioner of Inland Revenue of the name, tax file number, and address of each member of the registered scheme.
- (2) Sections 50 to 52 of the KiwiSaver Act 2006 set out the effect of notice to the Commissioner of Inland Revenue in relation to members of a KiwiSaver scheme, and subpart 3 of Part 2 of the KiwiSaver Act 2006 relates to the transfer of members' interests to another KiwiSaver scheme.

- (3) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 2006 No 40 s 173

186 Winding up report

- (1) The person who was the supervisor of the relevant registered scheme or, in the case of a restricted scheme, the persons who were the trustees immediately before the scheme was wound up—
- (a) must, within 4 months of the date on which the winding up takes effect, ensure that final financial statements of the scheme, showing the financial position of the scheme as at the date on which the winding up takes effect, are prepared and audited; and
 - (b) must, within 20 working days after the final financial statements have been audited, ensure that—
 - (i) a copy of those financial statements is sent to the FMA and to every person who was a scheme participant immediately before it was wound up; and
 - (ii) the FMA and the scheme participants are advised in writing as to the manner in which the remaining assets (if any) of the scheme are to be distributed; and
 - (c) must inform the FMA of the date on which the distribution of the assets is completed.
- (2) The FMA may, by giving notice to the relevant person, extend the time period within which a person must comply with any of the requirements set out in this section.
- (3) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1989 No 10 s 21(1), (1A), 2006 No 40 ss 174, 175

Miscellaneous

187 Offence of false or misleading statements to supervisors

Every person commits a tier 2 offence who, in relation to a document or information required to be supplied to a supervisor by or under this Act,—

- (a) makes, or authorises the making of a statement in it that is false or misleading in a material particular knowing it to be false or misleading; or
- (b) omits, or authorises the omission from it of, any matter knowing that the omission makes the document false or misleading in a material particular.

188 Protection for relevant person in respect of disclosure under this subpart

- (1) No civil, criminal, or disciplinary proceedings may be brought against a relevant person by reason of the person having made a protected disclosure.
- (2) No person may terminate the appointment of a relevant person by reason of the relevant person having made a protected disclosure.
- (3) No tribunal, body, or authority that has jurisdiction in respect of the professional conduct of a relevant person may make an order against, or do any act in relation to, the relevant person by reason of the relevant person having made a protected disclosure.
- (4) In this section, **protected disclosure** means a disclosure of information to which this section applies under this subpart.
Compare: 1978 No 103 s 50C, 2006 No 40 s 192, 2011 No 10 s 48

**Subpart 5—Registers that must be kept by
issuers of all regulated products**

189 Issuers must keep registers of regulated products

- (1) Every issuer of regulated products must keep in New Zealand—
 - (a) a register of those regulated products and of all financial products that are of the same class as those regulated products of which it is the issuer; and
 - (b) a register of other financial products of which it is the issuer that is required to be kept by the regulations.
- (2) However, subsection (1) does not apply—
 - (a) to financial products of a prescribed class; or
 - (b) otherwise in the prescribed circumstances.
- (3) A register kept under this subpart may be—

- (a) an electronic register; or
 - (b) kept in any other reasonable manner that the issuer thinks fit.
- (4) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 51(1)

190 Contents of registers

- (1) Every register kept for the purposes of this subpart must contain, in respect of every financial product entered in it,—
- (a) the name and address of the holder; and
 - (b) the date on which the product was issued or transferred to the holder, as the case may be; and
 - (c) the nature of the product; and
 - (d) the amount of the product (if any); and
 - (e) the due date of the product (if any); and
 - (f) all other prescribed particulars (if any).
- (2) No notice of any trust, expressed, implied, or constructive, may be entered on a register kept under this subpart.
- (3) Every register kept under this subpart is prima facie evidence of the matters required by this Act to be entered in it.
- (4) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 51(2) to (5)

191 Audit of registers

- (1) Every issuer of regulated products must ensure that every register kept by it under this subpart is audited at least once a year by a qualified auditor.
- (2) If the auditor considers at any time that this subpart is not being complied with, the auditor must, as soon as practicable,—
- (a) advise the issuer and the FMA; and
 - (b) advise,—
 - (i) in the case of equity securities, the security holders at their next meeting;
 - (ii) in the case of debt securities or managed investment products, the supervisor.

- (3) A person who contravenes subsection (1) commits a tier 1 infringement offence.

Compare: 1978 No 103 s 51(6), (8)

192 Issuer must notify Registrar of registers

- (1) Every issuer of regulated products must send a notice to the Registrar of the place where its registers under this subpart are kept and of any change in that place.
- (2) The notice must be sent within 10 working days of the register being established or of the change in place (as the case may be).
- (3) This section does not apply to an issuer that is a company if the registers of the company are kept at its registered office.
- (4) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 51(9), (10)

193 Public inspection of register

- (1) The registers kept under this subpart must be available for inspection in the manner prescribed in section 194 by a person who serves on the issuer written notice of intention to inspect.
- (2) Subsection (1) does not apply—
- (a) to a register of managed investment products in respect of a superannuation scheme or KiwiSaver scheme:
 - (b) to a register of derivatives:
 - (c) in the prescribed circumstances.
- (3) However,—
- (a) a register of managed investment products in respect of a superannuation scheme or KiwiSaver scheme must be available for inspection in the manner prescribed in section 194 by the supervisor if the supervisor serves on the issuer written notice of intention to inspect:
 - (b) the part of a register of derivatives that concerns derivatives entered into by a particular person must be available for inspection in the manner prescribed in section 194 by the person if the person serves written notice on the issuer of intention to inspect.

- (4) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 52

194 Manner of inspection

A register kept under this subpart must be available for inspection at the place at which the register is kept between the hours of 9 am and 5 pm on each working day during the inspection period.

Compare: 1993 No 105 s 217

195 Copies of documents

- (1) A person may require a copy of, or an extract from, a register that is available for inspection by the person under section 193 to be sent to the person—
- (a) within 5 working days after the person has made a written request for the copy or extract to the issuer; and
 - (b) if the person has paid the prescribed fee (if any).
- (2) The issuer must comply with the request (subject to subsections (3) and (4)).
- (3) A person who makes a request under subsection (1) must include in the request a statement of the person's reasons for the request (including the intended use of the copy of, or extract from, the register), and the issuer may, if it thinks fit, provide a copy of that statement to the FMA.
- (4) If the issuer provides a copy of the statement to the FMA before the expiry of the 5 working day period referred to in subsection (1)(a),—
- (a) the period within which the request may be complied with is 10 working days after the person made the request (rather than 5 working days); and
 - (b) the issuer does not have to comply with the request at all if the FMA, within that 10 working day period, gives a written notice to the issuer that it is not required to comply.
- (5) An issuer who contravenes this section commits a tier 1 infringement offence.

Compare: 1993 No 105 s 218

196 Restriction on use of information in registers

- (1) A person must not—
- (a) use information about a person obtained from a register kept under this subpart to contact or send material to that person; or
 - (b) disclose information of that kind knowing that the information is likely to be used to contact or send material to the person.

Example

An example of using information to send material to a person is putting a person's name and address on a mailing list for advertising material.

- (2) Subsection (1) does not apply if the use or disclosure of the information is—
- (a) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to those interests; or
 - (b) approved by the issuer that keeps the register.
- (3) A person must not—
- (a) use information obtained from a register kept under this subpart for any prescribed purpose; or
 - (b) disclose information of that kind knowing that the information is likely to be used for any such purpose.

Compare: Corporations Act 2001 s 177 (Aust)

197 Issuer to send confirmation of financial products

- (1) Every issuer of a regulated product must send to the product holder either the product or a confirmation document within 1 month of the issue, or receipt by or on behalf of the issuer of a registrable transfer, of the product.
- (2) In this section, **confirmation document** means a document that properly evidences the nature, terms, and conditions of the financial product and the name of the product holder.
- (3) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 54(1), (4)

198 Requirement for confirmation document does not apply in certain circumstances

- (1) Section 197 does not apply in respect of financial products that are approved for transfer under, or in accordance with the rules of, a system that does not require a certificate for the transfer of the products.
- (2) In this section, **system** means—
 - (a) a system approved under section 359;
 - (b) a designated settlement system (as defined in section 156M(1) of the Reserve Bank of New Zealand Act 1989).

Compare: 1978 No 103 s 54(3), (4)

199 Certain provisions prevail over Companies Act 1993

If a provision of sections 193 to 198 is inconsistent with a provision in the Companies Act 1993, the provision in sections 193 to 198 prevails.

Subpart 6—Accounting records and audit of financial statements*Accounting records***200 Issuer must keep proper accounting records**

Every issuer of regulated products must ensure that there are kept at all times accounting records that—

- (a) correctly record and explain the transactions,—
 - (i) in the case of an issuer of equity securities, debt securities, or derivatives, of the issuer; and
 - (ii) in the case of an issuer of managed investment products, of the registered scheme; and
- (b) will at any time enable the financial position of the issuer or scheme, as the case may be, to be determined with reasonable accuracy; and
- (c) will enable the issuer to ensure that the financial statements of the issuer or scheme, as the case may be, comply with the Financial Reporting Act 1993 and any prescribed requirements; and

- (d) will enable the financial statements of the issuer or scheme, as the case may be, to be readily and properly audited.

Compare: 1978 No 103 s 53

201 Place where accounting records to be kept

- (1) Accounting records required by this subpart must be kept—
 - (a) at the registered office of the issuer (if any); or
 - (b) at another place that the directors of the issuer think fit.
- (2) The accounting records may be kept at a place outside New Zealand only if there is sent to, and kept at a place in, New Zealand documents in respect of the business dealt with in those accounting records that—
 - (a) disclose with reasonable accuracy the financial position of the business at intervals not exceeding 6 months; and
 - (b) will enable the preparation in accordance with the Financial Reporting Act 1993 of the financial statements of the issuer or scheme and of any other document annexed to any of those statements that gives information that is required by any enactment.

Compare: 1978 No 103 s 53A

202 Accounting records to be in English

- (1) Accounting records required by this subpart and the documents in respect of the business dealt with in those accounting records referred to in section 201 must be kept—
 - (a) in written form and in English; or
 - (b) in a form or manner in which they are easily accessible and convertible into written form in English.
- (2) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 53B

203 Period for which accounting records to be kept

- (1) Accounting records kept under this subpart, or copies of them, must be retained by the issuer for a period of at least 7 years after the later of—
 - (a) the date the records are made; and

- (b) the date of completion of the transaction to which the records relate.
- (2) Nothing in this section limits any other requirement under an enactment to keep accounting records for a particular time.
Compare: 1978 No 103 s 53C

204 Inspection of accounting records

- (1) Every issuer must make the accounting records required to be kept under this subpart and the documents in respect of the business dealt with in those accounting records referred to in section 201 available, in written form in English at all reasonable times for inspection without charge, to—
 - (a) the directors of the issuer; and
 - (b) any supervisor in respect of the financial products; and
 - (c) any other persons authorised or permitted to inspect the accounting records of the issuer or scheme.
- (2) A person who contravenes this section commits a tier 1 infringement offence.
Compare: 1978 No 103 s 53D

Audit requirement

205 Financial statements to be audited

- (1) Every issuer of regulated products that are equity securities, debt securities, or derivatives must ensure that its financial statements are audited at least once a year by a qualified auditor.
- (2) Every issuer of regulated products that are managed investment products must ensure that the financial statements for the scheme to which the products relate are audited at least once a year by a qualified auditor.
Compare: 1978 No 103 s 53E

206 Meaning of qualified auditor

- (1) For the purposes of this Act, **qualified auditor** means—
 - (a) a licensed auditor; or
 - (b) a registered audit firm; or

- (c) in the case of an issuer that is a public entity under the Public Audit Act 2001, the Auditor-General or any other person who may act as the auditor under that Act.
- (2) In this section, **licensed auditor** and **registered audit firm** have the same meanings as in section 6(1) of the Auditor Regulation Act 2011.
- (3) The appointment of a registered audit firm by the firm name to be the qualified auditor for the purposes of this Act is deemed to be the appointment of all the partners in the firm, from time to time, who are licensed auditors.
- (4) None of the following persons is qualified for appointment as the qualified auditor of an issuer of financial products:
 - (a) the issuer, or a director, an officer, or an employee of the issuer:
 - (b) a person who is a partner, or in the employment, of a person specified in paragraph (a):
 - (c) a body corporate.
- (5) A person is not qualified for appointment as the qualified auditor of an issuer of financial products if the person is, by virtue of subsection (4), disqualified for appointment as auditor of a person that is the issuer's subsidiary or holding company or a subsidiary of the issuer's holding company, or would be so disqualified if that person were a company.

Compare: 1978 No 103 s 2C

Miscellaneous

207 Application of other Acts not affected

Nothing in this subpart limits the Companies Act 1993 or any other enactment.

Compare: 1978 No 103 s 53F

Subpart 7—Civil liability for certain contraventions of this Part

208 Part 4 governance provisions

- (1) All of the provisions specified in subsections (2) and (3) are Part 4 governance provisions.

- (2) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and \$1 million in the case of an individual or \$5 million in any other case:
- (a) section 89 (need for governing document and supervisor for regulated offer of debt security):
 - (b) section 109 (need to register managed investment scheme for regulated offer of managed investment product)
 - (c) sections 135 to 137 (requirements relating to custodianship of scheme property):
 - (c) section 200 (issuer must keep proper accounting records):
 - (d) section 205 (financial statements to be audited).
- (3) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding \$200,000 in the case of an individual or \$600,000 in any other case:
- (a) section 94(2) (changes to trust deed):
 - (b) sections 98 and 99 (duties applying to supervisor of debt security):
 - (c) sections 100 to 102 and 103(2) (duties on issuer to provide various reports, information, and assistance):
 - (d) section 116(4) (manager must notify scheme participants of determination):
 - (e) sections 117 to 119 (contents of governing document for registered scheme)
 - (f) section 121(2) (changes to governing document):
 - (g) sections 125 to 127 (duties applying to manager, investment manager, and directors and senior managers of manager):
 - (h) sections 129 and 130 (duties applying to supervisor of registered scheme):
 - (i) sections 131 to 133 and 134(2) (duties on issuer to provide various reports, information, and assistance):
 - (j) section 138 (duty on supervisor to refuse to act on wrongful directions):

- (k) sections 142 and 143 (requirements relating to statement of investment policy and objectives):
- (l) sections 145 to 147 (actions that must be taken on limit breaks, pricing errors, and other non-compliances, and requirements for actuarial examinations):
- (m) section 149 (limits on reversion of scheme property in certain schemes to non-scheme participant contributor):
- (n) section 151 (general prohibition on related party transactions):
- (o) section 153 (additional restrictions on transactions of restricted schemes):
- (p) sections 155, 156, and 158 (scheme participants transfer rules):
- (q) section 165 (former manager must hand over records and give reasonable assistance):
- (r) sections 172 to 174, 176 to 178, and 180 (duties to report problems):
- (s) section 196 (restriction on use of information in registers):
- (t) sections 201 and 203 (place where, and period for which, accounting records to be kept).

Part 5

Dealing in financial products on markets

Subpart 1—Purposes, overview, and interpretation

209 Additional purposes of Part

This Part has the following additional purposes for financial product markets:

- (a) to promote fair, orderly, and transparent financial product markets:
- (b) to provide an appropriate level of protection for investors, having regard to the risks to investors arising in the relevant financial product market:
- (c) to encourage a diversity of financial product markets to take account of the differing needs and objectives of issuers and investors.

210 Overview

- (1) In this Part,—
 - (a) this subpart contains the additional purposes of this Part and interpretation provisions:
 - (b) subpart 2 prohibits insider trading on licensed markets:
 - (c) subpart 3 prohibits market manipulation on licensed markets (including a general prohibition on false and misleading conduct in relation to any dealings in quoted financial products):
 - (d) subpart 4 requires listed issuers to comply with the continuous disclosure provisions of listing rules of a licensed market:
 - (e) subpart 5 requires substantial product holders in listed issuers to disclose their interests:
 - (f) subpart 6 requires directors and senior managers of listed issuers to disclose their interests and dealings in quoted financial products of or connected to the listed issuer:
 - (g) subpart 7 provides for the licensing of financial product markets, the approval of market rules of licensed markets, the ability to impose a control limit on licensed market operators, the ability to make regulations modifying this subpart for particular markets:
 - (h) subpart 8 contains requirements applying in the operation of a licensed market:
 - (i) subpart 9 provides for the transfer of transferrable financial products:
 - (j) subpart 10 regulates the making of unsolicited offers to purchase financial products off-market.
- (2) Provisions of this Part may be disapplied or modified in relation to a licensed market (and any issuers listed on that licensed market) under regulations made under section 333.
- (3) This section is a guide only to the general scheme and effect of this Part.

*Material information and generally available
to the market*

211 Meaning of material information

- (1) In this Part, unless the context otherwise requires, **material information**, in relation to a listed issuer, is information that—
- (a) a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial products of the listed issuer; and
 - (b) relates to particular financial products, a particular listed issuer, or particular listed issuers, rather than to financial products generally or listed issuers generally.
- (2) In this Part, unless the context otherwise requires, **material information**, in relation to quoted derivatives, is information that—
- (a) a reasonable person would expect, if it were generally available to the market, to have a material effect on the value of the derivatives; and
 - (b) relates to the particular derivatives, rather than to derivatives generally.

Compare: 1988 No 234 ss 3, 3A

See MED's note to submitters.

212 Meaning of generally available to the market

- (1) In this Part, unless the context otherwise requires, information is **generally available to the market**—
- (a) if—
 - (i) it is information that has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in relevant financial products; and
 - (ii) since it was made known, a reasonable period for it to be disseminated among those persons has expired; or
 - (b) if it is likely that persons who commonly invest in relevant financial products can readily obtain the information (whether by observation, use of expertise, purchase from other persons, or any other means); or

- (c) if it is information that consists of deductions, conclusions, or inferences made or drawn from either or both of the kinds of information referred to in paragraphs (a) and (b).
- (2) In this section, **relevant financial products** means financial products of a kind the price or (in the case of derivatives) the value of which might reasonably be expected to be affected by the information.
- (3) Information that is notified in accordance with a continuous disclosure obligation is generally available to the market under subsection (1)(a) immediately on it being made available to participants in a licensed market (without limiting how quickly the reasonable period of dissemination in subsection (1)(a)(ii) may be satisfied in other cases).

Compare: 1988 No 234 s 4

Insider conduct

213 Meaning of information insider, inside information, and adviser

- (1) In this Part, a person is an **information insider** of a listed issuer if that person—
 - (a) has material information relating to the listed issuer that is not generally available to the market; and
 - (b) knows or ought reasonably to know that the information is material information; and
 - (c) knows or ought reasonably to know that the information is not generally available to the market.
- (2) A listed issuer may be an information insider of itself.
- (3) In this Part, a person is an **information insider** in relation to quoted derivatives if that person—
 - (a) has material information relating to any of the following that is not generally available to the market:
 - (i) the derivatives;
 - (ii) the underlying;
 - (iii) the issuer of a financial product underlying the derivatives; and
 - (b) knows or ought reasonably to know that the information is material information; and

- (c) knows or ought reasonably to know that the information is not generally available to the market.
- (4) In this Part, **inside information** means—
 - (a) the information in respect of which a person is an information insider of the listed issuer in question; or
 - (b) in the case of derivatives, the information in respect of which a person is an information insider in relation to the derivatives in question.
- (5) In this Part, **adviser** means an adviser acting in a professional capacity (for example, a lawyer, an accountant, or a financial adviser).

Compare: 1988 No 234 ss 8A, 8B, 11E

Relevant interests

214 Relevant interests in financial products (basic rule)

- (1) A person has a **relevant interest** in a financial product if the person—
 - (a) is a registered holder of the product; or
 - (b) is a beneficial owner of the product; or
 - (c) has the power to exercise, or to control the exercise of, a right to vote attached to the product; or
 - (d) has the power to acquire or dispose of, or to control the acquisition or disposal of, the product.
- (2) Subsection (1) applies regardless of whether the power or control is express or implied, direct or indirect, legally enforceable or not, related to a particular financial product or not, exercisable presently or in the future, or exercisable alone or jointly with another person or persons (but a power to cast merely 1 of many votes is not, in itself, a joint power of this kind).
- (3) Subsection (1) applies regardless of whether or not the power or control is or can be made subject to restraint or restriction or is exercisable only on the fulfilment of a condition.
- (4) If 2 or more persons can jointly exercise a power, each of those persons is taken to have the power.

Compare: 1988 No 234 s 5

215 Extension of basic rule to powers or controls exercisable through trust, agreement, etc

- (1) A person has a power or control referred to in section 214 if the power or control is, or may at any time be, exercised under, by virtue of, by means of, or as a result of a revocation or breach of, a trust, or agreement (or any combination of them).
- (2) Subsection (1) applies regardless of whether or not the trust, or agreement is legally enforceable or whether or not the person is a party to it.

Compare: 1988 No 234 s 5A

216 Extension of basic rule to interests held by other persons under control or acting jointly

A person (A) has the relevant interests in financial products that another person (B) has if—

- (a) B or B's directors are accustomed or under an obligation (whether legally enforceable or not) to act in accordance with A's directions, instructions, or wishes in relation to a power or control referred to in section 214; or
- (b) A has the power to exercise, or control the exercise of, the right to vote attached to 20% or more of the voting products of B; or
- (c) A has the power to acquire or dispose of, or to control the acquisition or disposal of, 20% or more of the voting products of B; or
- (d) A and B are related bodies corporate; or
- (e) A and B have an agreement to act in concert in relation to a power or control referred to in section 214.

Compare: 1988 No 234 s 5B(1)

217 Situations not giving rise to relevant interests

- (1) A person (A) does not have a relevant interest in financial products under sections 214 to 216 merely because—
 - (a) the ordinary business of A consists of, or includes, the lending of money or the provision of financial services, or both, and A has the relevant interest only as security given for the purposes of a transaction entered into in the ordinary course of the business of A; or

- (b) A is authorised to undertake trading activities on a licensed market and A acts for another person to acquire or dispose of those products on behalf of that person in the ordinary course of A's business of carrying out those trading activities; or
 - (c) A has been authorised by resolution of the directors or other governing body of a body corporate to act as its representative at a particular meeting of members, or class of members, of a listed issuer, and a copy of the resolution is deposited with the listed issuer before the meeting; or
 - (d) A is appointed as a proxy to vote at a particular meeting of members, or of a class of members, of the listed issuer and the instrument of A's appointment is deposited with the listed issuer before the meeting; or
 - (e) A is a bare trustee of a trust to which the products are subject; or
 - (f) A is a director of a body corporate and the body corporate has a relevant interest in the products; or
 - (g) A is a member of a body corporate and the body corporate's constitution gives the member pre-emptive rights on the transfer of the products, if all members have pre-emptive rights on the same terms.
- (2) Subsection (1)(a) to (g) do not apply to a person if the person is currently declared by the FMA, by notice under section 512(1)(f), as being a person that is not exempt under any of those paragraphs.
- (3) For the purposes of subsection (1)(e), a trustee may be a bare trustee even if he or she is entitled as a trustee to be remunerated out of the income or property of the trust.

Compare: 1988 No 234 s 6

Subpart 2—Insider trading

Insider conduct prohibited

218 Prohibition of insider conduct

- (1) A person must not do any of the things set out in any of section 219(1), 220(1), or 221(1) if the person is an information insider of the listed issuer.

- (2) A person must not do any of the things set out in any of section 219(2), 220(2), or 221(2) if the person is an information insider in relation to quoted derivatives.

Compare: 1988 No 234 s 8

See MED's note to submitters.

219 Information insider must not trade

- (1) An information insider of a listed issuer must not trade quoted financial products of the listed issuer.
- (2) An information insider in relation to quoted derivatives must not trade the derivatives.

Compare: 1988 No 234 s 8C

220 Information insider must not disclose inside information

- (1) An information insider (**A**) of a listed issuer must not directly or indirectly disclose inside information to another person (**B**) if A knows or ought reasonably to know or believes that B will, or is likely to,—
- (a) trade quoted financial products of the listed issuer; or
 - (b) advise or encourage another person (**C**) to trade or hold those products.

See MED's note to submitters.

- (2) An information insider (**A**) in relation to quoted derivatives must not directly or indirectly disclose inside information to another person (**B**) if A knows or ought reasonably to know or believes that B will, or is likely to,—
- (a) trade the derivatives; or
 - (b) advise or encourage another person (**C**) to trade or hold those derivatives.

Compare: 1988 No 234 s 8D

221 Information insider must not advise or encourage trading

- (1) An information insider (**A**) of a listed issuer must not—
- (a) advise or encourage another person (**B**) to trade or hold quoted financial products of the listed issuer;
 - (b) advise or encourage B to advise or encourage another person (**C**) to trade or hold those financial products.

- (2) An information insider (A) in relation to quoted derivatives must not—
- (a) advise or encourage another person (B) to trade or hold the derivatives;
 - (b) advise or encourage B to advise or encourage another person (C) to trade or hold those derivatives.

Compare: 1988 No 234 s 8E

222 Criminal liability for insider conduct

A person who contravenes any of sections 219 to 221 commits a tier 3 offence if the person knows—

- (a) that the information is material information; and
- (b) that the information is not generally available to the market; and
- (c) in the case of a contravention of section 220, of any of the matters set out in section 220(1)(a) or (b) or (2)(a) or (b).

Compare: 1988 No 234 s 8F

When prohibition on insider conduct does not apply

223 Exception for trading required by enactment

Section 219 does not apply to trading in financial products that is required by an enactment.

Compare: 1988 No 234 s 9

224 Exception for disclosure required by enactment

Section 220 does not apply to disclosure that is required by an enactment.

Compare: 1988 No 234 s 9A

225 Exception for disclosure in connection with preparing PDS or disclosure document

Section 220 does not apply to disclosure that is necessary, in connection with an offer of financial products for sale, in order to assist in the preparation of a PDS, a register entry, or a disclosure document under clause 24 of Schedule 1 for that offer.

See MED's note to submitters.**226 Exceptions in respect of underwriting agreements**

- (1) Section 219 does not apply to the acquisition of the financial products of a listed issuer under an underwriting or a sub-underwriting agreement.
- (2) Section 220 does not apply if the inside information is disclosed to a person for the sole purpose of negotiating an underwriting or a sub-underwriting agreement with that person in respect of the financial products in question.
- (3) Section 221 does not apply if the advice or encouragement is given for the sole purpose of persuading the person to whom it is given to enter into an underwriting or a sub-underwriting agreement in respect of the financial products in question.

Compare: 1988 No 234 s 9B

227 Exception in case of knowledge of person's own intentions or activities

- (1) A person (**A**) does not contravene section 219(1) merely because A trades the financial products with the knowledge that A proposes to enter into, or has previously entered into, 1 or more transactions or agreements in relation to the financial products or the listed issuer or the listed issuer's business activities.
- (2) A person (**B**) does not contravene section 221(1) merely because B advises or encourages A to trade or hold financial products when B has knowledge acquired in the course of acting as A's adviser that A proposes to enter into, or has previously entered into, 1 or more transactions or agreements in relation to the financial products or the listed issuer or the listed issuer's business activities.

Compare: 1988 No 234 s 9C

228 Exception in case of knowledge in relation to derivatives

- (1) A person (**A**) does not contravene section 219(2) merely because A trades in derivatives with knowledge of A's own past, current, or proposed—

- (a) transactions or agreements concerning those or any other derivatives; or
 - (b) business activities, transactions, or agreements concerning the underlying.
- (2) If a person (**B**) advises or encourages A to trade or hold derivatives, B does not contravene section 221(2) merely because B has knowledge, acquired in the course of acting as A's adviser, of A's past, current, or proposed—
- (a) transactions or agreements concerning derivatives; or
 - (b) business activities, transactions, or agreements concerning the underlying.

Compare: SR 2010/354 r 3

229 Exception for agent executing trading instruction only

Section 219 does not apply in the case of a person (**A**) if,—

- (a) in trading the financial products, A was acting on behalf of another person (**B**); and
- (b) A traded the financial products on B's specific instruction; and
- (c) before trading, A did not disclose inside information to B; and
- (d) A did not advise or encourage B to instruct A to trade.

Compare: 1988 No 234 s 9D

230 Exceptions from section 219 for takeovers

- (1) Section 219 does not apply to—
- (a) trading that results from a takeover offer under the takeovers code; or
 - (b) trading in compliance with regulations made under section 502(1)(a); or
 - (c) entering into an agreement to acquire or dispose of financial products at a fixed price under a future takeover offer that complies with the takeovers code; or
 - (d) the acquisition or disposal of financial products in performance of an agreement to acquire or dispose of those financial products at a fixed price under a future takeover offer that complies with the takeovers code.
- (2) For the purposes of this section and section 231, if an exemption has been granted under section 45 of the Takeovers Act

1993 in relation to a takeover offer and the offer is made in accordance with the terms and conditions of the exemption and the applicable provisions of the takeovers code from which there is no exemption, the offer must be taken to—

- (a) be a takeover offer under the takeovers code; and
- (b) comply with the takeovers code.

Compare: 1988 No 234 s 9E(1)

231 Exceptions from sections 220 and 221 for takeovers

- (1) Section 220 does not apply to the following conduct:
 - (a) disclosure of inside information to a prospective offeror or its advisers under a prospective takeover offer under the takeovers code;
 - (b) disclosure of inside information to encourage competing bona fide offers to be made in competition with a takeover offer under the takeovers code;
 - (c) disclosure of inside information by a prospective offeror or its advisers under a prospective takeover offer under the takeovers code for the purpose of forming a consortium to make a takeover offer;
 - (d) disclosure of inside information to an independent adviser to enable that adviser to make a report required by the takeovers code.
- (2) Subsection (1)(a) to (c) are subject to the conditions that—
 - (a) the recipient of the information is bound by a confidentiality agreement in respect of the information; and
 - (b) the purpose of the conduct is to enable or encourage the recipient to make a takeover offer or to participate in a takeover offer.
- (3) Section 221 does not apply to advice or encouragement—
 - (a) by the directors of a company that is the target company under a takeover offer under the takeovers code, to the extent that the advice or encouragement is given to the company's shareholders and relates to trading or holding their financial products; or
 - (b) by a prospective offeror under a prospective takeover offer under the takeovers code for the purpose of forming a consortium to make a takeover offer.

- (4) A person (A) does not contravene section 220 or 221 merely because A, in relation to a takeover offer or prospective takeover offer under the takeovers code, discloses inside information to another person (B) or advises B to trade or hold financial products of the listed issuer when A has that inside information, or is an information insider, only through acting as B's adviser in relation to the takeover offer or prospective takeover offer.

Compare: 1988 No 234 s 9E(2)–(5)

232 Exception for redemption of managed investment products

Section 219 does not apply to the redemption of managed investment products in a managed investment scheme if the redemption price is calculated by reference to the underlying value of the assets of the scheme.

Compare: 1988 No 234 s 9F

233 Exception for Reserve Bank

Section 219 does not apply to trading by the Reserve Bank in financial products issued by the Reserve Bank or by the Crown.

Compare: 1988 No 234 s 9G

Affirmative defences

234 Absence of knowledge of trading

In any proceeding against a person (A) for contravention of section 219, it is a defence if A proves that A did not know, and could not reasonably be expected to know, that A traded the financial products.

Compare: 1988 No 234 s 10

235 Inside information obtained by independent research and analysis

- (1) In any proceeding against a person (A) for contravention of section 219 or 220, it is a defence if A proves that the inside information was obtained by research and analysis, and was

not obtained directly or indirectly from the listed issuer concerned.

- (2) In any proceeding against a person (A) for contravention of section 221, it is a defence if A proves that A encouraged or advised on the basis of inside information that was obtained by research and analysis and was not obtained directly or indirectly from the listed issuer concerned.
- (3) In subsections (1) and (2), **research** means planned investigation undertaken to gain new knowledge and understanding.

Compare: 1988 No 234 s 10A

See MED's note to submitters.

236 Equal information

- (1) In any proceeding against a person (A) for contravention of section 219, it is a defence if A proves that the opposite party to the transaction knew, or ought reasonably to have known, the same inside information as A.
- (2) In any proceeding against a person (A) for contravention of section 220, it is a defence if A proves that the other person knew, or ought reasonably to have known, the same inside information as A before it was disclosed.
- (3) In any proceeding against a person (A) for contravening section 220 or 221 by disclosing inside information to another person (B) or by advising or encouraging B to trade or hold quoted financial products, it is a defence if A proves that A has that inside information, or is an information insider, only through acting as B's adviser in relation to trading or holding those financial products.

Compare: 1988 No 234 s 10B

237 Options and trading plans

- (1) In any proceeding against a person (A) for contravention of section 219, it is a defence if A proves that—
 - (a) A traded the financial products under a fixed trading plan or under options with a fixed exercise price; and
 - (b) A entered into the trading plan, or acquired the options, as the case may be,—
 - (i) before A obtained the inside information; and

- (ii) without any intent to evade section 219.
- (2) A **fixed trading plan** is a trading plan—
 - (a) that—
 - (i) is fixed for a period of time; and
 - (ii) gives the investor no right to withdraw before the end of that period; and
 - (iii) is not subject to any influence by the investor as to trading decisions after the plan has begun; or
 - (b) that is an employee share purchase scheme that comes within paragraph (a) except that the plan may be earlier terminated, and the investor may withdraw, on the termination of the investor's employment or appointment.

Compare: 1988 No 234 s 10C

238 Chinese wall defence

- (1) In any proceeding against a person (**A**) for contravention of any of sections 219 to 221, it is a defence if **A** proves that—
 - (a) arrangements existed that could reasonably be expected to ensure that no individual who took part in the active decision received, or had access to, the inside information or was influenced, in relation to that decision, by an individual who had the information; and
 - (b) no individual who took part in the active decision received, or had access to, the inside information or was influenced, in relation to that decision, by an individual who had the information; and
 - (c) every individual who had the information and every individual who took part in the active decision acted in accordance with the arrangements referred to in paragraph (a).
- (2) In subsection (1), **active decision** means the decision to trade the financial products or disclose the inside information or advise or encourage, as the case may be.

Compare: 1988 No 234 s 10D

Subpart 3—Market manipulation

239 Misleading or deceptive conduct generally in dealings in quoted financial products

- (1) A person must not engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to any dealings in quoted financial products.
- (2) Subsection (1) applies regardless of whether or not the dealings are in trade.

Compare: 1986 No 121 s 9; 1988 No 234 s 13

240 False or misleading statement or information

A person must not make a statement or disseminate information if—

- (a) a material aspect of the statement or information is false or the statement or information is materially misleading; and
- (b) the person knows or ought reasonably to know that a material aspect of the statement or information is false or that the statement or information is materially misleading; and
- (c) the statement or information is likely to—
 - (i) induce a person to trade in quoted financial products; or
 - (ii) have the effect of increasing, reducing, maintaining, or stabilising the price for trading in those financial products; or
 - (iii) in the case of quoted derivatives, have the effect of increasing, reducing, maintaining, or stabilising the value of those derivatives; or
 - (iv) induce a person to exercise a voting right attached to a quoted financial product in a particular way, or to abstain from exercising such a right.

Compare: 1988 No 234 s 11

241 Exception for takeovers

Sections 239 and 240 do not apply to conduct in relation to a takeover offer for financial products under the takeovers code

or to conduct under that offer to the extent that the conduct is regulated by the code or the Takeovers Act 1993.

Compare: 1988 No 234 s 14

242 Criminal liability for false or misleading statement or information

A person who contravenes section 240 commits a tier 3 offence if the person knows that the statement or information is false in a material aspect or is materially misleading.

Compare: 1988 No 234 s 11A

243 False or misleading appearance of trading

A person must not do, or omit to do, anything if—

- (a) the act or omission will have, or is likely to have, the effect of creating, or causing the creation of, a false or misleading appearance—
 - (i) with respect to the extent of active trading in quoted financial products; or
 - (ii) with respect to the supply of, demand for, price for trading in, or value of those financial products; and
- (b) the person knows or ought reasonably to know that the person's act or omission will, or is likely to have, that effect.

Compare: 1988 No 234 s 11B

244 Exception for short selling and crossings

- (1) Short selling and crossings under the business rules of a licensed market do not contravene section 239, 240, or 243 merely by reason of being short selling or crossings.
- (2) In this section,—

crossing, in relation to a transaction in financial products, means a transaction where a person acts as—

 - (a) buyer and seller for that transaction in an agency capacity; or
 - (b) buyer or seller on one side of that transaction in an agency capacity and as a principal on the other side

short selling means a sale of any financial product where, at the time of the sale,—

- (a) the seller does not have a presently exercisable and unconditional right to vest the financial product in the buyer except where the buyer has a conditional agreement to acquire that right before the date required to settle the sale; or
- (b) the financial product being sold has been borrowed and the seller has a presently exercisable and unconditional right to vest the product in the buyer.

Compare: SR 2007/373 rr 19, 20

245 Persons treated as contravening false or misleading appearance of trading prohibition

- (1) A person (**A**) must be treated as contravening section 243 if A is directly or indirectly a party to trading in the quoted financial products of a listed issuer from which no change in beneficial ownership results.
- (2) Subsection (1) does not apply if A proves that—
 - (a) in trading the financial products A was acting on behalf of another person; and
 - (b) A did not know, and ought not reasonably to have known, when trading the financial products that no change in beneficial ownership would result.
- (3) A person (**A**) must be treated as contravening section 243 if—
 - (a) A has made an offer to trade the financial products of a listed issuer; and
 - (b) either A or, to A's knowledge, an associated person of A has made or proposes to make an opposite offer (the **opposite offer**) to trade financial products of the listed issuer; and
 - (c) the opposite offer substantially matches A's offer as to the number and price of the financial products.
- (4) This section is subject to section 246.

Compare: 1988 No 234 s 11C(1), (2), (4)

246 Defence

It is a defence in any proceeding against A for a contravention of section 243, if A proves that the trading in financial products occurred, or the offer to trade was made, in conformity with accepted market practices and for a proper purpose.

Example

The trustees of the ABC Family Trust hold financial products on trust.

New trustees have been appointed to replace the original trustees. The financial products are transferred to the new trustees in connection with the appointment.

No change in the beneficial ownership results (see section 245(1)). However, there is no contravention of section 243 because the transfer was in conformity with accepted market practices and for a proper purpose.

Compare: 1988 No 234 s 11C(3), (4)

247 Criminal liability for false or misleading appearance of trading

A person who contravenes section 243 commits a tier 3 offence if the person knows that the act or omission will have, or is likely to have, the effect of creating, or causing the creation of, a false or misleading appearance—

- (a) with respect to the extent of active trading in the financial products of a listed issuer; or
- (b) with respect to the supply of, demand for, price for trading in, or value of those products.

Compare: 1988 No 234 s 11D

Subpart 4—Continuous disclosure**248 Listed issuers must disclose in accordance with listing rules if continuous disclosure listing rules apply**

- (1) A listed issuer must notify information in accordance with the continuous disclosure provisions of the listing rules for the licensed market if—
 - (a) the listed issuer is a party to a listing agreement with the licensed market operator; and

- (b) the listed issuer has information that those continuous disclosure provisions require it to notify; and
 - (c) the information is material information that is not generally available to the market.
- (2) Subsection (1) does not affect or limit the situations in which action can be taken (other than under this Act) for a failure to comply with provisions of the listing rules for a licensed market.

Compare: 1988 No 234 s 19B

249 What are continuous disclosure provisions

For the purposes of this Act, **continuous disclosure provisions** means provisions that require a listed issuer that is a party to a listing agreement with a licensed market operator to notify information about events or matters as they arise for the purpose of that information being made available to participants in the licensed market.

Compare: 1988 No 234 s 19D

250 No contravention of continuous disclosure provisions by person who takes reasonable steps to ensure listed issuer complies

A person (A) does not, in relation to the contravention by a listed issuer of a continuous disclosure obligation or a term or condition of a continuous disclosure exemption, contravene that obligation or term or condition if A proves that—

- (a) A took all steps (if any) that were reasonable in the circumstances to ensure that the listed issuer complied with the obligation or term or condition; and
- (b) after doing so, A believed on reasonable grounds that the listed issuer was complying with the obligation or term or condition.

Compare: 1988 No 234 s 19PA

Subpart 5—Disclosure of interests of substantial product holders in listed issuers

251 Purpose of subpart

- (1) The purpose of this subpart is to promote an informed market, and to deter insider conduct, market manipulation, and secret dealings in potential takeover bids, by ensuring that participants in financial product markets have access to information concerning the identity and trading activities of persons who are, or may at any time be, entitled to control or influence the exercise of significant voting rights in a listed issuer.
- (2) This section does not limit any of sections 3, 4, or 209.

252 Meaning of substantial product holder, substantial holding, and percentage

- (1) A person is a **substantial product holder** in a listed issuer for the purposes of this Act if that person has a substantial holding in that listed issuer.
- (2) A person has a **substantial holding** in a listed issuer for the purposes of this Act if the person has a relevant interest in quoted voting products that comprise 5% or more of a class of quoted voting products of the listed issuer.
- (3) A person has a separate substantial holding for the purposes of this Act for each class in respect of which the person has a substantial holding under subsection (2).
- (4) The percentage of financial products that a person has in a class, for the purposes of this subpart, is calculated as follows:

$$\left(\frac{\text{number held}}{\text{total}} \right) \times 100$$

where—

number held is the number of financial products, in that class, in which the person has a relevant interest

total is the total number of financial products in that class.

Compare: 1988 No 234 s 21

253 Persons must disclose if begin to have substantial holding

- (1) A person who begins to have a substantial holding (or another substantial holding for another class) in a listed issuer must disclose that fact in accordance with sections 257 and 258.
- (2) The disclosure must be given as soon as the person knows, or ought to know, that the person has the substantial holding.

Compare: 1988 No 234 s 22

254 Substantial product holders must disclose if subsequent movement of 1% or more in holdings

- (1) A substantial product holder in a listed issuer must disclose, in accordance with sections 257 and 258, any movement of 1% or more in the substantial holding.
- (2) There is a movement of 1% or more in a substantial holding if—
 - (a) there is a change in the number of financial products held by the substantial product holder (where **number held** has the same meaning as in section 252(4)); and
 - (b) the percentage worked out using the formula in section 252(4) increases or decreases by 1 or more percentage points from the percentage last disclosed under this sub-part in relation to the substantial holding.
- (3) The disclosure must be given as soon as the person knows, or ought to know, that that movement has occurred.

Compare: 1988 No 234 s 23

255 Substantial product holders must disclose if subsequent changes in nature of relevant interests

- (1) A substantial product holder in a listed issuer must disclose, in accordance with sections 257 and 258, any change in the nature of any relevant interest in the substantial holding.
- (2) The disclosure must be given as soon as the person knows, or ought to know, of the change.

Compare: 1988 No 234 s 24

256 Persons must disclose if cease to have substantial holding

- (1) A person who ceases to have a substantial holding (or any of the person's substantial holdings) in a listed issuer must disclose that fact in accordance with sections 257 and 258.
- (2) The disclosure must be given as soon as the person knows, or ought to know, that the person has ceased to have a substantial holding.

Compare: 1988 No 234 s 25

257 What disclosure required

- (1) A person must disclose the matters required to be disclosed under any of sections 253 to 256 or section 266 to—
 - (a) the listed issuer; and
 - (b) every operator of a licensed market by which the financial products of the listed issuer are quoted.
- (2) The person must also disclose, in the prescribed manner, any further matters relating to those matters, the relevant event, or the substantial holding that are required by the regulations.
- (3) The disclosure must also be accompanied by, or have annexed, any prescribed information or documents.

Compare: 1988 No 234 s 26

258 Form and method of disclosure

A person must give the disclosure in the prescribed manner.

Compare: 1988 No 234 s 27

259 Listed issuer must give acknowledgement of disclosure

Every listed issuer must, at the request of a person by whom disclosure is given to it under this subpart, give to the person an acknowledgement of the disclosure in the prescribed manner.

Compare: 1988 No 234 s 28

260 How to ascertain total financial products in class for purposes of disclosure

- (1) For the purposes of this subpart, a person may assume that the total number of financial products of a listed issuer in a class most recently published by the following methods is correct:

- (a) in a document published by a listed issuer and distributed to the holders of that class of products; or
 - (b) on an Internet site maintained by the relevant licensed market operator.
- (2) Subsection (1) does not apply if that person knows that number is not correct.
- Compare: 1988 No 234 s 29

261 Exemption for persons with interest in other substantial product holders who comply

A person (**A**) need not comply with any of sections 253 to 256 in relation to a substantial holding in a listed issuer if—

- (a) another person (**B**) is required to comply, and does comply, with that section in relation to the same listed issuer; and
- (b) A has that substantial holding merely for 1 or more of the following reasons:
 - (i) A has a power to exercise, or control the exercise of, the right to vote attached to 20% or more of the voting products of B (*see* section 216(b));
 - (ii) A has a power to acquire or dispose of, or control the acquisition or disposition of, 20% or more of the voting products of B (*see* section 216(c));
 - (iii) A and B are related bodies corporate (*see* section 216(d)).

Compare: 1988 No 234 s 30

262 Exemption for corporate trustees and nominee companies

- (1) A person (**A**) need not comply with any of sections 253 to 256 in relation to 1 or more substantial holdings in 1 or more listed issuers if—
- (a) A has that substantial holding merely because A acts for another person in the ordinary course of business as a corporate trustee or a nominee company; and
 - (b) A has opted in to this exemption by written notice to the FMA (and not withdrawn the notice by further written notice to the FMA).

- (2) Subsection (1) does not apply if A is currently declared by the FMA, by notice under section 512(1)(f), as being a person that is not exempt under this section.

Compare: 1988 No 234 s 31

263 Conditions of exemption for corporate trustees and nominee companies

- (1) A person (A) to whom section 262(1) applies must—
- (a) keep under continuing review the transactions of all persons for whom A holds, in A's name, quoted voting products; and
 - (b) inform the listed issuer of the financial products and the operator of the licensed market by which those products are quoted if section 253 or 256 applies to any of those persons; and
 - (c) inform that operator if A exercises, or proposes to exercise, in A's own right any voting rights in respect of 5% or more of a class of quoted voting products of a listed issuer.
- (2) Every person who contravenes subsection (1) commits a tier 1 infringement offence.

Compare: 1988 No 234 s 32

264 Exemption for persons under control or acting jointly with corporate trustees and nominee companies

- (1) A person (A) need not comply with any of sections 253 to 256 in relation to 1 or more substantial holdings in 1 or more listed issuers if A has the substantial holding merely because A has, under section 216, the relevant interests in financial products that a corporate trustee or a nominee company that is exempt in relation to that substantial holding under section 262 has.
- (2) Subsection (1) does not apply if A is currently declared by the FMA, by notice under section 512(1)(f), as being a person that is not exempt under this section.

Compare: 1988 No 234 s 32A

265 Extended time for disclosure for trustees, executors, and administrators

If a person is required to comply with section 253, 254, or 256 merely because the person is the trustee of a testamentary trust or the executor or administrator of the estate of a deceased person,—

- (a) the time limit for disclosure in that section does not apply; and
- (b) the disclosure must instead be given before the expiry of 14 days after the grant of administration under the Administration Act 1969.

Compare: 1988 No 234 s 33

266 FMA may require persons to disclose to market relevant interests and powers to get relevant interests

- (1) The FMA may, by written notice given after having regard to the purpose of this subpart, require a person to disclose all (or any class of)—
 - (a) relevant interests that the person has in financial products of a listed issuer; or
 - (b) powers that the person has or may at any time have to acquire a relevant interest in financial products of a listed issuer.
- (2) Subsection (1) applies regardless of whether the financial products referred to in subsection (1)(a) and (b) are voting products or not, are quoted or non-quoted, or are issued or yet to be issued.
- (3) The person must disclose the information required under subsection (1) in accordance with sections 257 and 258 as soon as the person receives the notice.
- (4) Whether or not a person has a power referred to in subsection (1)(b) must be determined in the same way as sections 214 to 217 determine whether or not a person has a relevant interest (and for this purpose every reference in those sections to a relevant interest must be read as including a reference to a power to acquire a relevant interest).

Compare: 1988 No 234 s 34

267 Listed issuer may require registered holder to disclose relevant interests to it

- (1) A listed issuer may, by written notice, require a person who is registered as the holder of quoted voting products in the listed issuer to disclose—
 - (a) the name and address of every person who has a relevant interest in those financial products and the nature of that interest; and
 - (b) to the extent that that registered holder is unable to supply any of that information in relation to a person having a relevant interest in those financial products, other particulars that will, or are likely to, assist in identifying that person and the nature of the interest.
- (2) The registered holder must disclose the information in writing to the listed issuer as soon as practicable after the holder receives the notice.

Compare: 1988 No 234 s 35

268 Listed issuer may require person who has relevant interest to disclose information to it

- (1) A listed issuer may, by written notice, require a person who the listed issuer believes has, or may have, a relevant interest in quoted voting products in the listed issuer to disclose the information the listed issuer specifies for the purpose of assisting the listed issuer to ascertain who is, or may be, a substantial product holder in the listed issuer.
- (2) The relevant interest holder must disclose that information in writing to the listed issuer as soon as practicable after the holder receives the notice.

Compare: 1988 No 234 s 35A

269 Form and method of notice requiring disclosure

The notice requiring disclosure under section 266, 267, or 268 must be given in the prescribed manner (if any).

Compare: 1988 No 234 s 35B

*Register and publication of substantial holdings***270 Listed issuers must maintain register of disclosures of substantial holdings**

- (1) A listed issuer must keep a register for the disclosures given to it under this subpart (and must include a disclosure in the register on receiving it).
- (2) Subsection (1) does not apply to disclosures made under section 267 or 268 that do not reveal a substantial holding.
- (3) The disclosures must be kept in the register in alphabetical order and with a chronological index.
- (4) The register must be kept at—
 - (a) the registered office of the listed issuer; or
 - (b) any other place in New Zealand of which notice is given in accordance with subsection (5).
- (5) If the register is not kept at the listed issuer's registered office, or the place at which it is kept is changed, the listed issuer must give written notice to the Registrar of Companies of the place at which it is kept within 10 working days of its first being kept elsewhere or its being moved.
- (6) This section and section 271 do not limit the Companies Act 1993 or any other enactment.

Compare: 1988 No 234 s 35C

271 Public inspection of register

A register required under section 270 must be available for inspection, by a person who serves on the listed issuer a written notice of an intention to inspect, at the place at which the register is kept between the hours of 9 am and 5 pm on each working day during the inspection period.

272 Copies of documents

A person may require a copy of, or an extract from, a register required under section 270 to be sent to the person—

- (a) within 5 working days after the person has made a request in writing for the copy or extract; and
- (b) if the person has paid a prescribed fee.

273 Offences relating to substantial holdings register

- (1) Every person who contravenes section 270 or 271 commits a tier 1 infringement offence.
- (2) If a listed issuer fails to provide a copy of, or an extract from, a register kept under section 270 in accordance with a request under section 272, the issuer commits a tier 1 infringement offence.

Compare: 1988 No 234 s 35E

274 Listed issuers must publish information on substantial holdings

- (1) Every listed issuer must, in accordance with this section, send out a notice stating—
 - (a) the names of all persons who, according to the register kept under section 270, are substantial product holders in the listed issuer at the record date; and
 - (b) the number and class of quoted voting products of the listed issuer that, according to the register, form part of each substantial holding in the listed issuer at the record date; and
 - (c) the total number in each of those classes at the record date.
- (2) The notice must be sent,—
 - (a) for listed issuers that are companies (other than overseas companies within the meaning of the Companies Act 1993), to each shareholder with or in—
 - (i) the annual report sent under section 209 of the Companies Act 1993; or
 - (ii) the notice sent under that section; and
 - (b) for every other listed issuer, to every holder of its quoted voting products not later than 30 June in each year.
- (3) The **record date** is a date stated in the notice that is not earlier than 3 months before the notice is sent.
- (4) A listed issuer that contravenes this section commits a tier 1 infringement offence.

Compare: 1988 No 234 ss 35F, 35H

275 No liability for publication of substantial holdings

No listed issuer is liable for any false or misleading information published under section 274 if the information was derived by the issuer under this subpart and the issuer did not know that the information was false or misleading.

Compare: 1988 No 234 s 35I

276 Notice under this subpart not to affect incorporation of listed issuer or constitute notice of trust

- (1) Nothing in, or done under, this subpart—
 - (a) affects the incorporation of a listed issuer; or
 - (b) limits section 92, 93, or 94 of the Companies Act 1993.
- (2) A listed issuer is not, by virtue of anything done for the purposes of this subpart, affected with notice of, or put on inquiry as to, the rights of any person in relation to any financial products.

Compare: 1988 No 234 s 35J

**Subpart 6—Disclosure of relevant interests
in quoted financial products by directors and
senior managers of listed issuers**

277 Purpose of subpart

- (1) The purpose of this subpart is to promote good corporate governance, and to deter and assist in the monitoring of insider conduct and market manipulation, by—
 - (a) ensuring that information about directors' and senior managers' trading activities in listed issuers is available to participants in financial products markets; and
 - (b) enabling the dates of trades to be checked against the dates at which material information became generally available to the market.
- (2) This section does not limit any of sections 3, 4, or 209.

278 Directors and senior managers of listed issuers must disclose relevant interests and dealings in relevant interests

- (1) A director or senior manager of a listed issuer who has a relevant interest in a quoted financial product of the listed issuer

or a related body corporate must disclose that fact, in accordance with sections 280 and 281, within 5 trading days of this section becoming applicable as a result of—

- (a) the listing of the listed issuer; or
- (b) the person's appointment as a director or senior manager.

- (2) A director or senior manager of a listed issuer who acquires or disposes of a relevant interest in a quoted financial product of the listed issuer or a related body corporate must disclose that fact, in accordance with sections 280 and 281, within 5 trading days of the acquisition or disposal.
- (3) This section does not apply to quoted derivatives.
- (4) This section is subject to sections 280 to 284.

Compare: 1988 No 234 s 19T

See MED's note to submitters.

279 Disclosure of relevant interests and dealings in relevant interests in relation to quoted derivatives

- (1) A director or senior manager of a listed issuer who has a relevant interest in a specified derivative must disclose that fact, in accordance with sections 280 and 281, within 5 trading days of this section becoming applicable as a result of—
 - (a) the listing of the listed issuer; or
 - (b) the person's appointment as a director or senior manager.
- (2) A director or senior manager of a listed issuer who acquires or disposes of a relevant interest in a specified derivative must disclose that fact, in accordance with sections 280 and 281, within 5 trading days of the acquisition or disposal.
- (3) In this section and section 284, **specified derivative**, in relation to a director or senior manager of a listed issuer, means a quoted derivative where the underlying is a financial product of the listed issuer or a related body corporate.
- (4) This section is subject to sections 280 to 284.

280 What disclosure required

- (1) The director or senior manager must disclose the relevant interest, acquisition, or disposal—

- (a) to the licensed market operator with which the listed issuer is a party to a listing agreement; and
 - (b) in the interests register of the listed issuer kept under this subpart.
- (2) The director or senior manager must also disclose, in the prescribed manner, any further matters relating to the relevant interest, acquisition, or disposal required by the regulations.
- Compare: 1988 No 234 s 19U

281 Form and method of disclosure

The director or senior manager must disclose the relevant interest, acquisition, or disposal in the prescribed manner.

Compare: 1988 No 234 s 19V

282 Disclosure obligation applies for 6 months after ceasing to hold office

A person is treated as being a director or senior manager for the purposes of this subpart for 6 months after that person ceases to be a director or senior manager, and must continue to comply with this subpart for that period.

Compare: 1988 No 234 s 19W

283 Exemption for directors or senior manager who disclose substantial holdings

A director or senior manager who has, or who acquires or disposes of, a relevant interest in a quoted financial product does not have to disclose that fact under section 278 if—

- (a) the director or senior manager must make a disclosure under section 253, 254, or 256 in relation to a substantial holding in the listed issuer of the financial product to which the relevant interest relates or related; and
- (b) the disclosure under that section concerns the same relevant interest; and
- (c) the director or senior manager discloses in accordance with that section; and
- (d) it is stated in the disclosure made in accordance with that section that the director or senior manager is a director or senior manager of the listed issuer.

Compare: SR 2003/382 r 21

284 Exemption for overseas listed issuers

- (1) A director or senior manager of an overseas listed issuer who has, or who acquires or disposes of, a relevant interest in a quoted financial product of that overseas listed issuer does not have to disclose that fact under section 278.
- (2) A director or senior manager of an overseas listed issuer who has, or who acquires or disposes of, a relevant interest in a specified derivative does not have to disclose that fact under section 279 if the underlying is a financial product of the overseas listed issuer.
- (3) A director or senior manager of an overseas listed issuer who has, or who acquires or disposes of, a relevant interest in a quoted financial product of a related body corporate of that overseas listed issuer does not have to disclose that fact under section 278 unless—
 - (a) the director or senior manager is also a director or senior manager of the related body corporate; and
 - (b) the related body corporate is a listed issuer, but not an overseas listed issuer.
- (4) A director or senior manager of an overseas listed issuer who has, or who acquires or disposes of, a relevant interest in a specified derivative does not have to disclose that fact under section 279 if the underlying is a financial product of a related body corporate of the overseas listed issuer unless—
 - (a) the director or senior manager is also a director or senior manager of the related body corporate; and
 - (b) the related body corporate is a listed issuer, but not an overseas listed issuer.
- (5) In this section, **overseas listed issuer** means a listed issuer—
 - (a) whose financial products are also quoted with a securities exchange that—
 - (i) is not a licensed market; and
 - (ii) has primary jurisdiction for the listing requirements for the listed issuer and the quotation of its financial products; and
 - (b) in relation to whom no licensed market (other than a market licensed under section 298) has primary juris-

diction for the listing requirements for the listed issuer and the quotation of its financial products.

Compare: SR 2004/105 cl 12

285 Listed issuer must keep interests register

- (1) A listed issuer must keep an interests register for disclosures made to it under this subpart.
- (2) The interests register must be kept at—
 - (a) the registered office of the listed issuer; or
 - (b) any other place in New Zealand of which notice is given in accordance with subsection (3).
- (3) If the interests register is not kept at the listed issuer's registered office, or the place at which it is kept is changed, the listed issuer must give written notice to the Registrar of Companies of the place at which it is kept within 10 working days of its first being kept elsewhere or of its being moved.
- (4) The interests register may be the same interests register as that kept under section 189(1)(c) of the Companies Act 1993.
- (5) This section and sections 286 and 287 do not limit the Companies Act 1993.

Compare: 1988 No 234 s 19Z

286 Public inspection of interests register

An interests register must be available for inspection, by a person who serves on the listed issuer a written notice of an intention to inspect, at the place at which the register is kept between the hours of 9 am and 5 pm on each working day during the inspection period.

287 Copies of documents

A person may require a copy of, or an extract from, an interests register to be sent to the person—

- (a) within 5 working days after the person has made a request in writing for the copy or extract; and
- (b) if the person has paid a prescribed fee.

288 Offences relating to interests register

- (1) A person who contravenes section 285(1) or (3) commits a tier 1 infringement offence.
- (2) If a listed issuer fails to provide a copy of, or an extract from, an interests register in accordance with a request under section 287, the issuer commits a tier 1 infringement offence.

Compare: 1988 No 234 s 19ZF

**Subpart 7—Licensing of markets for trading
financial products****289 Principles guiding exercise of powers under this subpart**

- (1) The Minister and the FMA must have regard to the following matters in the exercise of powers under this subpart:
 - (a) the purposes of this Part (in addition to the main and additional purposes of this Act set out in sections 3 and 4):
 - (b) the following matters (if relevant):
 - (i) the nature of the activities conducted, or proposed to be conducted, on the market; and
 - (ii) the size, or proposed size, of the market; and
 - (iii) the nature of the financial products dealt with, or proposed to be dealt with, on the market; and
 - (iv) the persons who participate in, or are likely to participate in, the market (either directly or by using the services of participants); and
 - (v) the technology used, or proposed to be used, in the operation of the market:
 - (c) in relation to an application for a licence under section 298, or another power under this subpart relating to a market licensed under that section, the matters set out in that section.
- (2) The Minister or the FMA must, in applying subsection (1), determine the weight to be given to each of the purposes and other matters referred to in that subsection or section 298.
- (3) Subsection (1) does not limit the matters to which the Minister or the FMA may have regard.

*Need for financial product market licence***290 What is financial product market**

- (1) For the purposes of this Act, a **financial product market** is a facility by means of which—
- (a) offers to acquire or dispose of financial products are regularly made or accepted; or
 - (b) offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in—
 - (i) the making of offers to acquire or dispose of financial products; or
 - (ii) the acceptance of offers of that kind.
- (2) However, subsection (1) does not apply to the extent that the facility constitutes—
- (a) a person making or accepting offers or invitations to acquire or dispose of financial products on the person's own behalf or on behalf of 1 party to the transaction only (for example, a continuous issuer of financial products);
 - (b) a service that is covered by a market services licence;
 - (c) any other conduct of a kind prescribed by the regulations.
- (3) Subsection (2)(a) does not apply if the conduct of a person is declared by the FMA, by notice under section 512(1)(f), as being conduct that is not exempt under that paragraph.

Compare: Corporations Act 2001 s 767A (Aust)

291 Need for financial product market licence

A person must not operate, or hold out that the person operates, a financial product market in New Zealand, unless—

- (a) the person has a licence that covers that market under this Part; or
- (b) the market is exempt from this subpart under section 293.

Compare: Corporations Act 2001 s 791A (Aust)

See MED's note to submitters.

292 Prohibitions on holding out

A person must not, if it is not the case, hold out that—

- (a) the person has a financial product market licence; or
- (b) the operation of a financial product market in New Zealand is authorised by a financial product market licence; or
- (c) a market is exempt from this Part; or
- (d) that the person is a participant in a licensed market.

Compare: Corporations Act 2001 s 791B (Aust)

293 Exemptions

A financial product market is exempt from this subpart if—

- (a) both of the following are satisfied in relation to the market (assessed in accordance with the frameworks or methodologies specified in a notice issued by the FMA under subpart 4 of Part 8):
 - (i) the transactions on the market in the most recently completed financial year for the market operator did not exceed [100 transactions]; and
 - (ii) the aggregate value of the financial products acquired under those transactions were of a value of less than [\$2 million]; or
- (b) it is a prescribed wholesale market; or
- (c) it is a prescribed exempt market.

294 When financial product market taken to be operated in New Zealand

- (1) For the purposes of this subpart, a financial product market is taken to be operated in New Zealand if—
 - (a) it is operated by a body corporate that is incorporated or registered in New Zealand; or
 - (b) all, or a significant part of, the facility for the financial product market is located in New Zealand; or
 - (c) the financial product market is promoted to (but not merely accessible by) investors in New Zealand.
- (2) Subsection (1) does not limit the circumstances in which a financial product market is operated in New Zealand for the purposes of this subpart.

Compare: Corporations Act 2001 s 791D (Aust)

*General obligations of licensed market operator***295 General obligations in respect of licensed markets**

A licensed market operator must,—

- (a) to the extent that it is reasonably practicable, do all things necessary to ensure that each of its licensed markets is a fair, orderly, and transparent market; and
- (b) have adequate arrangements for operating its licensed markets, including arrangements—
 - (i) for notifying disclosures made to it under subparts 4, 5, and 6 and under an alternative disclosure obligation; and
 - (ii) for handling conflicts between the commercial interests of the licensed market operator and the need for the licensed market operator to ensure that the markets operate in the way referred to in paragraph (a); and
 - (iii) for monitoring the conduct of participants on or in relation to the markets; and
 - (iv) for enforcing compliance with the relevant market rules (for example, by having a sufficiently independent adjudicative body to adjudicate on contraventions of market rules that are referred to it); and
- (c) have sufficient resources (including financial, technological, and human resources) to operate its licensed markets properly.

Compare: 1988 No 234 s 36Y, Corporations Act 2001 s 792A (Aust)

*Issue of licence***296 Application for licence**

- (1) A person may apply for a licence for a financial product market in the manner that is specified by the FMA.
- (2) The applicant must provide to the FMA or the Minister the information that is required by the FMA or the Minister to assist in determining the application (for example, the draft market rules).
- (3) The FMA must, within a reasonable time, give the application to the Minister with advice about the application.

297 When licence may be issued

The Minister, after receiving an application under section 296, may issue a financial product market licence, by written notice to the applicant, if the Minister is satisfied that—

- (a) the applicant is capable of operating a financial product market in accordance with the general obligations under section 295 (having regard to the proposed conditions of the licence); and
- (b) there is no reason to believe that the applicant will not comply with the licensed market operator obligations that will apply if the licence is granted; and
- (c) the applicant is a body corporate and—
 - (i) is registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008; or
 - (ii) complies with section 13(a) of that Act.

Compare: Corporations Act 2001 s 795B(1) (Aust)

298 When licence may be issued for overseas-regulated market

- (1) If an applicant is authorised to operate a financial product market in an overseas jurisdiction in which its principal place of business is located, the Minister may issue a licence authorising the applicant to operate the same market in New Zealand, by written notice to the applicant, if the Minister is satisfied that—
 - (a) there is no reason to believe that the applicant will not comply with the licensed market operator obligations that will apply if the licence is granted; and
 - (b) the operation of the market in that jurisdiction is subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of investor protection and market integrity they achieve, to the requirements and supervision to which financial product markets are subject under this Act in relation to those matters; and
 - (c) the applicant undertakes to co-operate with the FMA by sharing information and in other appropriate ways; and

- (d) no director, senior manager, or controlling owner of the applicant—
 - (i) would be disqualified under section 14(2) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (if the applicant were a provider to which that Act applied); or
 - (ii) has been disqualified from managing a body corporate under the laws of any other jurisdiction.
- (2) In considering an application for a licence under this section or exercising another power under this subpart in relation to a market licensed under this section, the Minister must have regard to the following matters (in addition to the matters in section 289):
 - (a) the criteria that the licensed market operator or applicant satisfied to obtain an authorisation to operate the same market in the overseas jurisdiction in which its principal place of business is located; and
 - (b) the obligations they must continue to satisfy to keep the authorisation; and
 - (c) the level of supervision to which the operation of the market in that jurisdiction is subject; and
 - (d) whether adequate arrangements exist for co-operation between the FMA and the authority that is responsible for that supervision.
- (3) Nothing in this section prevents the Minister from issuing a licence under section 297 to an applicant that is authorised to operate a financial product market in an overseas jurisdiction.
Compare: Corporations Act 2001 s 795B(2) (Aust)

299 Conditions of licence

- (1) A financial product market licence is subject to the following conditions:
 - (a) a condition that the licensed market operator may, under the licence, operate only the financial product market covered by the licence (as described in the licence); and
 - (b) a condition that specifies the type of clearing and settlement arrangements that are adequate; and
 - (c) a condition that specifies the arrangements for enforcing breaches of the market rules; and

- (d) any other conditions imposed by the Minister under subsection (2) or section 304.
- (2) Those conditions must be imposed by the Minister on issue (and may be varied only under section 304).
- (3) The licensed market operator must comply with the conditions of the licence.

Compare: Corporations Act 2001 s 796A (Aust)

300 Procedural requirements

- (1) The Minister must not refuse to issue a licence, or include conditions that are materially more restrictive than those requested in the application, unless—
 - (a) the Minister gives the applicant no less than 10 working days' written notice of the following matters before he or she exercises the power:
 - (i) that the Minister may refuse to issue the licence or may include conditions that are materially more restrictive than those requested in the application; and
 - (ii) the reasons why he or she may do so; and
 - (b) the Minister gives the applicant or the applicant's representative an opportunity to make written submissions on the matter within that notice period.
- (2) The FMA must give written notice of the Minister's decision under section 297 or 298 to—
 - (a) the applicant; and
 - (b) every other prescribed person.

301 Licence may cover more than 1 financial product market

- (1) The same financial product market licence may cover 2 or more financial product markets.
- (2) In that case,—
 - (a) a reference in this Act to the financial product market to which a licence covers is taken instead to be a reference to each of those financial product markets severally; and
 - (b) the decision to add another financial product market to a licence must be made on the same basis as a decision to issue a licence; and

- (c) a financial product market licence may be varied, suspended, or cancelled in respect of 1 of those markets only, as if each of those markets was separately licensed.

302 Licence may cover subsidiaries

- (1) A financial product market licence may authorise subsidiaries of the licensed market operator to operate the financial product market covered by the licence.
- (2) In that case, a reference to the licensed market operator in this Act is a reference to the licensed market operator and any subsidiary of it that is operating the market under the licence.

303 FMA must maintain list of licensed markets on Internet site

- (1) The FMA must maintain a list of licensed markets on its Internet site.
- (2) The list must include, for each licensed market,—
 - (a) the financial product market that the licence covers; and
 - (b) the name of the licensed market operator; and
 - (c) when the licence was issued; and
 - (d) the conditions of the licence; and
 - (e) the market rules for the financial product market that have been approved under this subpart (but the list need not incorporate them); and
 - (f) if it is a market to which regulations apply under section 333, which regulations apply to it; and
 - (g) if the licence is issued under section 298, that it is an overseas-regulated market for the purposes of this Act; and
 - (h) the subsidiaries authorised to operate the financial product market (if any); and
 - (i) if the licence has been suspended or cancelled, that fact and the date on which that action took effect.
- (3) The FMA must update the list if it becomes aware that there is a change, or error, in the information on the list (for example, the approval of the market rules or a change in the name of the licensed market operator).

*Changes to licences***304 Variation of conditions**

- (1) The Minister may, on his or her own initiative under subsection (2) or on the application of a licensed market operator, vary the conditions of the licence at any time after the licence is issued by written notice to the licensed market operator.
- (2) The Minister may vary the conditions of the licence on his or her own initiative only—
 - (a) in 1 of the following circumstances:
 - (i) if there is a significant change in market circumstances that the Minister is satisfied makes it necessary to vary the conditions, having regard to the licensed market operator obligations and the matters referred to in section 289; or
 - (ii) in accordance with section 325; and
 - (b) after following the procedure set out in section 306(1).
- (3) A licensed market operator may apply, in the manner that is specified by the FMA, for the Minister to vary the conditions of the licence.
- (4) A licensed market operator must provide to the FMA or the Minister the information that is required by the FMA or the Minister to assist it in determining the application.
- (5) For the purposes of this subpart, **vary**, in relation to the conditions of licence, includes to vary, revoke, add to, or substitute any of those conditions.

305 Minister may suspend or cancel licence

- The Minister may, by written notice to the licensed market operator, suspend (for a specified period or until a specified condition is met) or cancel a licence—
- (a) if the licensed market operator, by written notice, requests the Minister to do so; or
 - (b) if the Minister is satisfied, on reasonable grounds, that the licensed market operator has ceased to carry on the business of operating the financial product market; or
 - (c) if the licensed market operator has become subject to an insolvency event; or
 - (d) in accordance with section 325; or

- (e) in the case of a licence issued under section 298 (overseas-regulated markets), if—
 - (i) the licensed market operator ceases to be authorised to operate a financial product market in the overseas jurisdiction in which the licensed market operator’s principal place of business is located; or
 - (ii) there is a change to the regulatory regime applying in relation to the market to which the licence relates in the jurisdiction in which the licensed market operator’s principal place of business is located and, because of that change, the Minister is no longer satisfied as required by section 298(1)(b).

Compare: Corporations Act 2001 s 797B (Aust)

306 Procedure for varying of conditions or suspension or cancellation of licence

- (1) The Minister must not vary the conditions of the licence on his or her own initiative under section 304(1), refuse an application for a variation under section 304, or cancel or suspend a licence under section 305 unless—
 - (a) the Minister gives the licensed market operator no less than 10 working days’ written notice of the following matters before he or she exercises the power:
 - (i) that the Minister may exercise the power; and
 - (ii) the reasons why he or she may exercise the power; and
 - (b) the Minister gives the licensed market operator or the licensed market operator’s representative an opportunity to make written submissions on the matter within that notice period.
- (2) The FMA must give written notice of the Minister’s decision under section 304 or 305 to—
 - (a) the licensed market operator; and
 - (b) every other prescribed person.

307 Effect of suspension

- (1) A person whose financial product market licence is suspended is taken not to hold that licence while it is suspended.
- (2) However, the Minister may specify in the written notice to the licensed market operator that subsection (1) does not apply for specified purposes.

Compare: Corporations Act 2001 s 797D (Aust)

308 Variation or revocation of suspension

The Minister may at any time vary or revoke a suspension of a financial product market licence by giving written notice to the licensed market operator.

Compare: Corporations Act 2001 s 797E (Aust)

*Approval of contractual market rules***309 Licensed markets must be operated under market rules that comply with this subpart**

- (1) A licensed market operator must not operate a licensed market except in accordance with market rules for that market that—
 - (a) include the required matters set out in section 310; and
 - (b) have effect under section 311.
- (2) This section and sections 310 to 314 do not apply to a licensed market that is licensed under section 298 (over-seas-regulated markets).

Compare: 1988 No 234 s 36G

310 Required matters for market rules

- (1) Market rules for a financial product market for trading equity securities, debt securities, or managed investment products must include listing rules and business rules (by whatever name called and however they are imposed).
- (2) Market rules for a financial product market for trading derivatives must include business rules.
- (3) Listing rules must include rules that—
 - (a) relate to the approval of persons for the purpose of enabling financial products issued by those persons to be traded on the market; and

- (b) require those persons to be party to a listing agreement with the licensed market operator and that relate to the entry into, and revocation of, those listing agreements; and
 - (c) relate to the governance of those persons; and
 - (d) relate to the conduct or activities of those persons in relation to that market or to financial products traded on that market; and
 - (e) relate to the monitoring and enforcement of those rules.
- (4) Business rules must include rules that—
- (a) relate to the authorisation of persons to undertake trading activities on, or otherwise participate in, the market; and
 - (b) relate to the conduct or activities of those persons in relation to the market; and
 - (c) govern the conduct of business on the market; and
 - (d) relate to the monitoring and enforcement of those rules.

Compare: 1988 No 234 s 36H

311 When market rules have effect

A market rule, or part of a market rule, for a licensed market has no effect, either in contract or for the purposes of section 309, until it has been approved under section 313.

312 Approval process for proposed market rules and rule changes

- (1) If a person applies for the approval of any proposed market rules or proposed rule change by the FMA, the FMA must, within the approval period,—
 - (a) approve the market rules or rule change; or
 - (b) extend the approval period; or
 - (c) decline to approve the rule change.
- (2) An application under this section must be made in the manner specified by the FMA.
- (3) The approval period is 40 working days, or (if extended under subsection (1)(b)) 60 working days, after the FMA receives the application.

- (4) The revision by the applicant for rule approval of the new rules or rule change during the approval period in response to comments by the FMA, and the resubmittal of the new rules or rule change, does not result in the commencement of a new approval period under this section.

Compare: 1988 No 234 s 36K

313 Approval of proposed market rules and changes

- (1) The FMA must approve the proposed market rules or rule change provided to it under section 312 unless the FMA is satisfied that—
- (a) it is not in the public interest to do so after having had regard to—
 - (i) the purposes of this Part (and the main and additional purposes of the Act stated in sections 3 and 4); and
 - (ii) the consistency of the rules or the rule change with the obligations under section 295; or
 - (b) (if subpart 4 would apply to the rules once approved) the rules, or the rules as changed, for the financial product market will not provide appropriate continuous disclosure by listed issuers of material information that is not generally available to the market, after having regard to—
 - (i) the purposes of this Part (and the main and additional purposes of the Act stated in sections 3 and 4); and
 - (ii) any other matters that the FMA considers relevant.
- (2) The FMA must, in considering whether to approve proposed market rules for a new market, take into account any previously approved market rules that the applicant proposes to also apply to the relevant market.

Compare: 1988 No 234 s 36L

314 Notice of decision on rules

- (1) The FMA must give written notice of its decision under section 313 to—
- (a) the applicant for approval; and

- (b) every other prescribed person.
- (2) If the FMA extends the approval period under section 312 or declines to approve the rules, the written notice under subsection (1) must include a statement of the FMA's reasons for exercising the power.
- (3) If the FMA approves the proposed market rules or rule change, the FMA must also publish a notice in the *Gazette* identifying the market rules approved under section 313 (but need not incorporate them).
- (4) The notice in the *Gazette* is a regulation for the purposes of the Regulations (Disallowance) Act 1989 (but not for the purposes of the Acts and Regulations Publication Act 1989).

315 Power of FMA to request changes to market rules on certain matters

- (1) The FMA may, if it considers it necessary or desirable to promote any of the purposes of this Part or the meeting of any of the licensed market obligations, request a licensed market operator to prepare a draft change to the market rules for any of its licensed markets on a specified matter.
- (2) The FMA may make a request under subsection (1) by written notice to the licensed market operator and only—
 - (a) after carrying out a review under section 320(1) or (2); or
 - (b) if it believes on reasonable grounds that it is urgent to do so at any other time.
- (3) The licensed market operator must, as soon as practicable but, in any case, before the expiry of 60 working days after receiving the written notice (or any further time allowed by the FMA), do either or both of the following things:
 - (a) provide a proposed change to the FMA under section 312 that addresses the requested matter:
 - (b) provide the FMA with a written report that—
 - (i) identifies any requested matter or matters that have not been addressed by a proposed change; and
 - (ii) explains why the licensed market operator has not done so; and

- (iii) suggests alternative ways (if any) by which the matter or matters are being or may be dealt with; and
 - (iv) sets out if, when, and how the licensed market operator proposes to provide for the matter or matters (if at all).
- (4) This section does not allow the FMA to request a draft market rule or change on a matter that is not within the matters set out in section 310.

Compare: 1988 No 234 s 36M

316 Overseas-regulated markets must give notice of market rules and rule changes to FMA

A licensed market operator of a market licensed under section 298 must—

- (a) provide the market rules of the licensed market to the FMA on the issue of the licence; and
- (b) as soon as practicable after any changes are made to those rules, provide the rule change to the FMA.

Compare: Corporations Act 2001 s 793D (Aust)

317 Market rules must be available for public inspection

- (1) A licensed market operator must ensure that a copy of the market rules for each of its licensed markets is—
 - (a) available for public inspection, free of charge and during normal office hours, at the head office of that licensed market operator; and
 - (b) published on an Internet site maintained by, or on behalf of, the licensed market operator at all reasonable times.
- (2) A licensed market operator that fails to comply with subsection (1) commits a tier 1 infringement offence.

Compare: 1988 No 234 s 36Q

318 Application of Acts relating to regulations to contractual market rules

To avoid doubt, market rules are not regulations for the purposes of the Regulations (Disallowance) Act 1989 and the

Acts and Regulations Publication Act 1989 or for any other purpose.

Compare: 1988 No 234 s 36R

Monitoring of licensed market obligations

319 Licensed market operator must give report on compliance with licensed market obligations to FMA

- (1) A licensed market operator must, within 3 months after the end of its reporting period, give a report to the FMA and the Minister on the extent to which it has complied with its licensed market obligations in the preceding reporting period.
- (2) The report must contain, or be accompanied by, the information (if any) in relation to the licensed market operator's performance against its licensed market obligations specified by the FMA before the commencement of the relevant reporting period.
- (3) The **reporting period** for the purposes of this subpart is the financial year of the licensed market operator or any longer reporting period set in the conditions of the licence.

Compare: 1988 No 234 s 36YA

320 FMA to carry out licensed market obligations reviews

- (1) The FMA may, at any time, carry out a review of how well a licensed market operator is meeting any or all of its licensed market obligations.
- (2) The FMA must carry out a review of how well a licensed market operator is meeting all of its licensed market obligations at least once in respect of each reporting period of the licensed market operator.
- (3) The FMA—
 - (a) may, in carrying out the review, take into account the most recent report and other information provided under section 319 and any other information it considers appropriate; and
 - (b) must, after carrying out the review, provide a draft written report on its review to the licensed market operator and take into account any submissions made by the li-

censed market operator within the reasonable period for submissions specified by the FMA.

- (4) The FMA must not carry out a review of a designated settlement system (within the meaning of section 156M(1) of the Reserve Bank of New Zealand Act 1989) of a licensed market operator under this section (but nothing in this subsection prevents a review under that Act being carried out in conjunction with a review under this section).

Compare: 1988 No 234 s 36YB

321 FMA must make written report on licensed market obligations review

- (1) The FMA must give a written report on a review under section 320 to the Minister and the licensed market operator—
- (a) as soon as practicable after carrying out the review; and
 - (b) in any case, within 3 months after the licensed market operator has provided its report to the FMA under section 319.
- (2) The FMA must also publish the written report on the review on an Internet site maintained by or on behalf of the FMA.
- (3) However, the FMA may, in publishing the written report of its review, omit from the published report any information for which it considers there would be a good reason for withholding under the Official Information Act 1982 if a request for that information were made under that Act.

Compare: 1988 No 234 s 36YC

322 FMA may require licensed market operator to submit action plan on failure to meet licensed market obligations

- (1) If the FMA considers, after carrying out a review under section 320(1) or (2), that a licensed market operator has failed or is failing to meet any 1 or more of its licensed market obligations, it may, by written notice, require the licensed market operator to submit an action plan to the FMA.
- (2) The notice must—
- (a) set out the details of the failure; and
 - (b) specify the date by which the action plan must be submitted to the FMA.

- (3) The licensed market operator must, as soon as practicable but in any case before the date specified by the FMA, do either or both of the following things:
- (a) provide an action plan that addresses the failure and specifies—
 - (i) the actions that the licensed market operator proposes to take to remedy the failure or to avoid any further failure; and
 - (ii) the timetable for taking those actions:
 - (b) provide the FMA with a written report that—
 - (i) identifies any matter that has not been addressed by an action plan; and
 - (ii) explains why the licensed market operator does not consider that matter to be a failure or gives any other reasons why the licensed market operator has not provided an action plan on the matter.

Compare: 1988 No 234 s 36YD

323 Approval, amendment, or rejection of action plan

- (1) If a licensed market operator submits an action plan, the FMA may—
- (a) approve the action plan; or
 - (b) require the licensed market operator to amend the action plan and resubmit it to the FMA by a specified date for approval or rejection; or
 - (c) reject the action plan.
- (2) If the FMA requires the licensed market operator to amend an action plan provided to the FMA, the licensed market operator must do either or both of the following things:
- (a) provide an amended action plan that addresses the matter required to be amended:
 - (b) provide the FMA with a written report that—
 - (i) identifies any matter that has not been addressed by an amendment to the action plan first provided; and
 - (ii) explains why the licensed market operator does not consider that the matter needs amending or gives any other reasons why the licensed mar-

ket operator has not provided an amendment addressing the matter.

- (3) If the FMA approves the action plan (whether as first provided or after amendment), the licensed market operator must comply with the action plan.
- (4) An action plan that has been approved by the FMA may be varied at any time by agreement between the licensed market operator and the FMA.

Compare: 1988 No 234 s 36YE

324 Minister may give licensed market obligations direction to licensed market operator

- (1) The Minister may, after having regard to any advice of the FMA, give a written direction to a licensed market operator if—
 - (a) the Minister considers that the licensed market operator has failed or is failing to meet any 1 or more of its licensed market obligations; and
 - (b) any of the following has occurred:
 - (i) the licensed market operator has not provided an action plan when required under section 322; or
 - (ii) the licensed market operator has not provided an amended action plan when required under section 323; or
 - (iii) the FMA has rejected a licensed market operator's action plan; or
 - (iv) the licensed market operator has not complied with an approved action plan.
- (2) The direction may specify—
 - (a) the actions that the licensed market operator must take to remedy any failure or to avoid any further failure to meet any 1 or more of its licensed market obligations; and
 - (b) the timetable for taking those actions.
- (3) The licensed market operator must comply with the direction.

Compare: 1988 No 234 s 36YF

325 Minister may vary, suspend, or cancel licence

- (1) If the Minister could give a direction under section 324, the Minister may also vary the conditions of the licence, by written notice to the licensed market operator, (following the procedure set out in section 306).
- (2) If the Minister could give a direction under section 324 and the Minister is satisfied that the licensed market operator no longer meets the requirements referred to in section 297 or 298, the Minister may also, by written notice to the licensed market operator, suspend or cancel the licence (following the procedure set out in section 306).

*Control limits on licensed market operators***326 Power to impose control limits on licensed market operators**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations imposing, altering, or revoking a control limit (which is the highest percentage of voting rights in the body corporate that may be held or controlled by any person) for a body corporate that—
 - (a) is, or may be, a licensed market operator; or
 - (b) is a holding company of a body corporate referred to in paragraph (a).
- (2) A control limit does not apply to a body corporate before its licence, or its subsidiary's licence, as a licensed market operator takes effect.
- (3) The Minister must not make a recommendation for the purposes of subsection (1) unless he or she has consulted the body corporate and is satisfied that it is in the public interest to make the recommendation.
- (4) For the purposes of this section and the rest of this subpart,—
control, in relation to a voting right, means having, directly or indirectly, effective control of the voting right
voting right means a currently exercisable right to cast a vote at meetings of members or shareholders of a body corporate,

not being a right to vote that is exercisable only in 1 or more of the following circumstances:

- (a) during a period in which a payment or distribution (or part of a payment or distribution) in respect of the financial product that confers the voting right is in arrears or some other default exists;
- (b) on a proposal that affects rights attached to the financial product that confers the voting right;
- (c) during the liquidation of the body corporate;
- (d) in respect of a special, immaterial, or remote matter that is inconsequential to control of the body corporate.

Compare: 1988 No 234 s 36S

327 Control limit not to be exceeded

- (1) No person may hold or control voting rights in a body corporate that exceed any control limit for that body corporate that applies under regulations made under section 326, except in accordance with an approval under section 329.
- (2) For the purposes of this section, voting rights held or controlled by an associated person of a person must be treated as voting rights held or controlled by that person.
- (3) Subsection (1) does not apply to any voting rights in a body corporate held or controlled by a person to the extent that those rights were held or controlled by that person before the control limit was imposed or decreased, as the case may be.

Compare: 1988 No 234 s 36T

328 Effect of exceeding control limit

- (1) Every person who contravenes section 327—
 - (a) must take the steps that are necessary to ensure that the person is no longer in contravention of that section at the end of 60 working days after the date of first contravention; and
 - (b) must not exercise or control the exercise of any voting rights that exceed the control limit while he or she contravenes that section.
- (2) An exercise of voting rights by or under the control of a person in contravention of subsection (1)(b) is of no effect, and must

be disregarded by the person responsible for counting the votes concerned.

Compare: 1988 No 234 s 36U

329 Application for approval to exceed control limit

- (1) A person may apply to the FMA for approval for any person or class of persons to exceed a control limit for a body corporate that applies under regulations made under section 326.
- (2) The FMA must, within a reasonable time, give the application to the Minister with advice about the application.
- (3) The Governor-General may, by Order in Council made on the recommendation of the Minister, approve an application under subsection (1) and specify the terms and conditions (if any) applying to the approval.
- (4) The Minister may not make a recommendation for the purposes of subsection (3) unless,—
 - (a) if the body corporate is not the applicant or 1 of the applicants for the approval, he or she has consulted the body corporate on the application at least 20 working days before making the recommendation; and
 - (b) he or she is satisfied that it is in the public interest to make the recommendation.
- (5) An approval granted under subsection (3)—
 - (a) may have retrospective effect; but
 - (b) is of no effect if any term or condition of the approval has not been complied with.
- (6) An approval granted under subsection (3) is for the purposes of the control limit only, and not for the purposes of any other enactment.

Compare: 1988 No 234 s 36V

330 Revocation or amendment of approval

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister,—
 - (a) revoke an approval granted under section 329; or
 - (b) vary, revoke, or suspend any term or condition of such an approval.

- (2) The Minister may not make a recommendation for the purposes of subsection (1) unless—
- (a) he or she has consulted the person to whom the approval was granted and the body corporate concerned; and
 - (b) he or she is satisfied that it is in the public interest to make the recommendation.

Compare: 1988 No 234 s 36W

*Other provisions relating to licensing of
financial product markets*

331 FMA may give advice to Minister

- (1) The FMA may give advice to the Minister in relation to any matter in respect of which the Minister has a discretion under this subpart or any other matter concerning financial product markets.
- (2) If the Minister has delegated a function or power to the FMA under this subpart, any obligation under this subpart for the FMA to give advice to the Minister, or for the Minister to have regard to the advice of the FMA, in connection with that matter does not apply.

332 Delegation of Minister’s licensing functions and powers to FMA

- (1) The Minister may, either generally or particularly, delegate to the FMA all or any of the Minister’s functions or powers under this subpart in connection with the licensing of financial product markets.
- (2) A delegation under this section must be in writing.
- (3) The FMA must not delegate any functions or powers delegated to it under this section except in accordance with the terms of the delegation.
- (4) The power of the Minister to delegate under this section—
 - (a) is subject to any prohibitions, restrictions, or conditions contained in any other Act in relation to the delegation of the Minister’s functions or powers; but
 - (b) does not limit any power of delegation conferred on the Minister by any other Act.

- (5) The FMA may perform or exercise any functions or powers delegated to it under this section in the same manner and with the same effect as if they had been conferred on the FMA directly (subject to any restrictions or conditions imposed under the delegation).
- (6) If the FMA purports to act under a delegation under this section, the FMA must, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.
- (7) No delegation affects or prevents the performance or exercise of any function or power by the Minister or affects the responsibility of the Minister for the actions of a person acting under the delegation.

333 Regulations modifying subpart for licensed markets

- (1) The Governor-General may, on the recommendation of the Minister in accordance with subsection (3), make regulations for any 1 or more of the following purposes:
 - (a) providing that any 1 or more of the provisions in subparts 2 to 8 of this Part (including any definitions in this Act as they apply in the relevant provisions, but excluding the obligations in section 295) do not apply in respect of a licensed market or class of licensed markets (and accordingly do not apply in relation to any issuers listed or financial products quoted on those markets):
 - (b) providing for replacement or modified provisions to apply in respect of the licensed market or class of licensed markets (for example, instead of having continuous disclosure provisions in the listing rules and requiring listed issuers to comply with those provisions, having periodic or event-based disclosure or some other way of dealing with any information asymmetries in the market):
 - (c) stating which provisions of the regulations are Part 5 market provisions for the purposes of this Act (*see* Part 7 in which Part 5 market provisions are specified to be civil remedy provisions), including which provisions are alternative disclosure obligations for the purposes of section 295:

- (d) providing that a financial product market must not be treated as a licensed market for the purposes of any other specified enactment.
- (2) Any regulation made under subsection (1) must specify the licensed market or class of licensed market to which they apply.
- (3) The Minister must, in relation to a recommendation under this section,—
 - (a) have regard to the matters set out in section 289; and
 - (b) be satisfied, in relation to any recommendation relating to subsection (1)(a) or (1)(d) that the extent to which the regulations disapply any enactment to a licensed market is not broader than is reasonably necessary to address the matters that gave rise to the regulations.

Subpart 8—Operation of licensed markets

334 Licensed market operator must notify FMA of disciplinary actions and suspected contraventions

- (1) A licensed market operator must notify the FMA, in accordance with sections 335 and 336, if—
 - (a) the operator takes any disciplinary action against a participant in the licensed market:
 - (b) the operator knows or suspects that a person has committed, is committing, or is likely to commit a significant contravention of—
 - (i) the market rules; or
 - (ii) this Act, the Takeovers Act 1993, or any enactment made under either of those Acts.
- (2) The FMA must notify the licensed market operator of its decision to take, or not to take, any action in relation to a notification under subsection (1)(b)(ii).

Compare: 1988 No 234 s 36ZD

335 When notification required

The licensed market operator must give the notice under section 334 immediately after taking the disciplinary action or

knowing or suspecting the person has committed, is committing, or is likely to commit the significant contravention.

Compare: 1988 No 234 s 36ZE

336 Details and method of notification

- (1) The notice under section 334 must include—
 - (a) the person's name and contact details; and
 - (b) if it relates to a disciplinary action, the grounds for, nature of, and reasons for the action taken; and
 - (c) if it relates to a known or suspected contravention, the facts supporting the licensed market operator's view and the obligation to which the known or suspected contravention relates; and
 - (d) any other information required by the regulations or by the FMA under section 340.
- (2) The licensed market operator must give the notice in the form and by the method required by the regulations (if any).

Compare: 1988 No 234 s 36ZF

337 Licensed market operator must ensure FMA has access to real-time trading and other information

- (1) A licensed market operator must, if requested by the FMA, give to the FMA the information that is necessary to enable the FMA to carry out real-time surveillance of the operation of the licensed market.
- (2) The FMA must pay all reasonable costs of the licensed market operator in providing the information under this section.

Compare: 1988 No 234 s 36ZFA

338 Licensed market operator must give FMA material information given to market participants

- (1) If a licensed market operator makes material information available to participants, or any class of participants, in a licensed market, the licensed market operator must also give that information to the FMA in accordance with this section.
- (2) The licensed market operator must give that information to the FMA immediately after giving it to the participants.

- (3) The licensed market operator must give that information to the FMA in the same form and by the same method as it gives that information to the participants.

Compare: 1988 No 234 ss 36ZG, 36ZH, 36ZI

339 Waiver of notification and disclosure obligations

- (1) Sections 334 to 338 do not apply to the extent that the FMA—
- (a) waives its entitlement to any notice or information or class or classes of notices or information; or
 - (b) agrees with the licensed market operator a different time, form, or method of notification or disclosure.

- (2) A waiver or an agreement under this section must be in writing.

Compare: 1988 No 234 s 36ZJ

340 Licensed market operator must give FMA or Takeovers Panel other information and assistance on request

- (1) A licensed market operator must give to the FMA or the Takeovers Panel (or any person authorised by the FMA or the Takeovers Panel) information, assistance, and access to the licensed market operator's facilities if the FMA or the Takeovers Panel reasonably requests it in order to carry out its functions.
- (2) The FMA or the Takeovers Panel must require that information, assistance, or access by notice in writing to the licensed market operator.

Compare: 1988 No 234 s 36ZK

341 Power to disclose further information

- (1) A licensed market operator may provide to the FMA any information that the licensed market operator considers may assist the FMA in the performance of the FMA's functions.
- (2) A licensed market operator may provide to the Takeovers Panel any information that the licensed market operator considers may assist the Takeovers Panel in the performance of its functions.

Compare: 1988 No 234 s 36ZL

342 Licensed market operator must give notice and have regard to submissions on continuous disclosure determinations

- (1) This section and section 343 apply to a determination by a licensed market operator if—
 - (a) the determination exempts from, waives, or determines the meaning of a continuous disclosure provision of its listing rules for a licensed market (or varies or revokes a determination of that kind); and
 - (b) that continuous disclosure provision relates to material information that is not generally available to the market.
- (2) The licensed market operator must—
 - (a) give the FMA no less than 2 trading days' written notice before making the determination of—
 - (i) the proposed terms of the determination; and
 - (ii) the reasons for the proposed determination; and
 - (b) have regard to any written submissions made to it by the FMA within that notice period; and
 - (c) must, as soon as is reasonably practicable after making the determination, give written notice to the FMA of—
 - (i) the terms of the determination; and
 - (ii) the reasons for the determination.
- (3) A failure to comply with this section or section 343 does not affect the validity of a determination.

Compare: 1988 No 234 s 36ZM

343 Limited notice and submissions for urgent determinations

If the licensed market operator thinks it is necessary or desirable in the public interest for a determination to be made more urgently than section 342(2) permits,—

- (a) it may give less than 2 trading days' notice before it makes the determination, and the notice and submissions may be oral rather than written; but
- (b) it must include in that notice the reasons for acting urgently and must otherwise comply with that subsection.

Compare: 1988 No 234 s 36ZN

344 FMA may give directions to licensed market operators

- (1) The FMA may give a direction under subsection (2) in accordance with sections 345 to 349 in relation to a licensed market.
- (2) The FMA may, for up to 15 trading days,—
 - (a) direct a licensed market operator to suspend trading of quoted financial products or a class of quoted financial products; or
 - (b) give the licensed market operator any other direction in relation to that trading; or
 - (c) direct a licensed market operator to suspend participation by a participant or class of participants in the licensed market.
- (3) For the avoidance of doubt, the FMA may not use its power to direct the licensed market operator to amend the market rules or to direct the licensed market operator on the making of a determination on the market rules.
- (4) The direction is subject to appeal only in accordance with section 545.

Compare: 1988 No 234 s 36ZO

345 Grounds for continuous disclosure direction

- (1) A direction on the grounds in this section is a continuous disclosure direction.
- (2) A direction may be given under section 344 in accordance with sections 347 to 349 if the FMA—
 - (a) has regard to the purpose of this Part (and the main and additional purposes of the Act stated in sections 3 and 4) and any other matters it considers relevant; and
 - (b) is satisfied that 1 of the following grounds applies:
 - (i) a listed issuer has contravened a continuous disclosure obligation or a term or condition of a continuous disclosure exemption; or
 - (ii) a determination by a licensed market operator to which section 342 applies does not achieve appropriate continuous disclosure by a listed issuer of material information that is not generally available to the market; or

- (iii) the licensed market operator's administration of the continuous disclosure provisions of its listing rules does not achieve appropriate continuous disclosure by a listed issuer of material information that is not generally available to the market; and
- (c) is also satisfied that the direction is necessary or desirable in the public interest to protect people who are trading the quoted financial products or the class of quoted financial products and that there is no more appropriate course of action to address the situation.

Compare: 1988 No 234 s 36ZP

346 Grounds for other directions

A direction may also be given under section 344 in accordance with sections 347 to 349 if the FMA is satisfied that—

- (a) the direction is necessary in the public interest to protect people who are trading the quoted financial products, or the class of quoted financial products, of 1 or more listed issuers; but
- (b) it is not a matter relating to continuous disclosure.

Compare: 1988 No 234 s 36ZQ

347 Notice, opportunity for licensed market operator to act, and submissions before FMA gives directions

- (1) A direction may be given under section 344 only if—
 - (a) the FMA has given written notice to the licensed market operator and listed issuer or issuers concerned of—
 - (i) its opinion that the requirements of section 345 or 346 are satisfied; and
 - (ii) the proposed terms of the direction; and
 - (iii) the reasons for its opinion; and
 - (b) after receiving the FMA's notice, the licensed market operator does not take, within the reasonable period stated in the notice,—
 - (i) in the case of a proposed direction to suspend trading of the quoted financial products, action to prevent that trading; or

- (ii) in any other case, any other action that, in the FMA's view, is adequate to address the situation raised in the notice; and
 - (c) the FMA has had regard to any written submissions made to it by the licensed market operator and the listed issuer or issuers concerned within that notice period; and
 - (d) the FMA still considers that it is appropriate to give the direction to the licensed market operator.
- (2) A reasonable period in subsection (1)(b) is, in the case of a continuous disclosure direction, 2 trading days (or any longer time the FMA wishes to allow) and, in the case of any other direction, any longer time that is reasonable in the circumstances.

Compare: 1988 No 234 s 36ZR

348 Limited notice and submissions for urgent continuous disclosure directions

If the FMA thinks it is necessary or desirable in the public interest for a continuous disclosure direction to be made more urgently than section 347 permits,—

- (a) it may give less than 2 trading days' notice before it gives the direction, and the notice and submissions may be oral rather than written; but
- (b) it must include in that notice the reasons for acting urgently and must otherwise comply with that section.

Compare: 1988 No 234 s 36ZS

349 Notice and opportunity to be heard and represented after FMA gives direction

If a direction is given under section 344, the FMA—

- (a) must, as soon as is reasonably practicable, give written notice to the licensed market operator and listed issuer or issuers (if any) concerned of—
 - (i) its opinion that the requirements of section 345 or 346 are satisfied; and
 - (ii) the terms of the direction; and
 - (iii) the reasons for its opinion; and

- (b) must, after the direction is given, give each of those persons or the person's representative an opportunity to make written submissions and to be heard on the matter; and
- (c) may also give notice to any other person of the matters in paragraph (a).

Compare: 1988 No 234 s 36ZT

350 Effect of directions to licensed market operator

- (1) A direction under section 344 has effect for the period specified in it (which may be a period of up to 15 working days) and, during that period, the licensed market operator must comply with the direction and must not allow any trading that is contrary to the direction to take place.
- (2) If the FMA considers that the direction should have effect for a period longer than 15 working days, it may apply to the court for, and the court may make, an order that the licensed market operator comply with the direction for the period that the court thinks fit.

Compare: 1988 No 234 s 36ZU

351 Provisions as to directions

- (1) The FMA may vary a direction under section 344 in the same way as it may make that direction.
- (2) The FMA may revoke a direction under section 344 by giving written notice to the licensed market operator.

Compare: 1988 No 234 s 36ZV

352 Contracting out of or modification of continuous disclosure process requirements

- (1) The FMA and a licensed market operator may, by agreement in writing, contract out of, or modify, any of the requirements of sections 342, 343, and 347 to 349.
- (2) For that purpose, the licensed market operator may agree to waive or modify obligations under those sections that are owed to listed issuers listed on the relevant licensed market.

Compare: 1988 No 234 s 36ZW

353 Offence for failing to comply with direction

A licensed market operator commits a tier 2 offence if it refuses or fails, without reasonable excuse, to comply with a direction under section 344.

Compare: 1988 No 234 s 36ZX

Subpart 9—Transfer of transferrable financial products**354 Financial products to which this subpart applies**

- (1) This subpart applies to financial products if—
 - (a) the financial products are transferrable; and
 - (b) the names of the holders of the products are entered in a register kept under this Act or otherwise kept in New Zealand.
- (2) However, this subpart does not apply to—
 - (a) interests in a superannuation scheme or KiwiSaver scheme;
 - (b) derivatives;
 - (c) financial products of a prescribed kind.
- (3) In this subpart, **specified financial product** means a financial product to which this subpart applies.

*Transfer of specified financial products using prescribed forms***355 Transfer of specified financial products by transfer**

- (1) Specified financial products disposed of in an authorised transaction may be transferred by means of a products transfer that—
 - (a) either—
 - (i) is in the form prescribed for the purposes of this section; or
 - (ii) contains the prescribed information; and
 - (b) is duly completed; and
 - (c) is executed, in New Zealand, by the transferor (whether or not it is also executed by the transferee).
- (2) However, subsection (1) does not apply if the specified financial products impose a liability to the issuer on the transferee.

- (3) In this subpart, **authorised transaction** means a sale, gift, or other disposition of financial products in which each of the parties is, or is acting through the agency of, any of the following persons (who are acting in the ordinary course of business):
- (a) a person authorised to undertake trading activities on a licensed market:
 - (b) a solicitor (as defined in section 6 of the Lawyers and Conveyancers Act 2006) in practice on his or her own account:
 - (c) a chartered accountant (within the meaning of section 19 of the New Zealand Institute of Chartered Accountants Act 1996):
 - (d) a trustee corporation (as defined in section 2 of the Trustee Act 1956):
 - (e) a registered bank:
 - (f) a person prescribed for the purposes of this definition.
- Compare: 1991 No 119 s 3

356 Transfer of specified financial products by products transfer and brokers transfer

- (1) Specified financial products sold in a licensed market transaction may be transferred by means of—
- (a) a products transfer that—
 - (i) either is in the form prescribed for the purposes of this paragraph or contains the prescribed information; and
 - (ii) is duly completed; and
 - (iii) is executed, in New Zealand, by the transferor (whether or not it is also executed by the transferee); and
 - (iv) specifies financial products that include the financial products sold; and
 - (b) a brokers transfer that—
 - (i) either is in the form prescribed for the purposes of this paragraph or contains the prescribed information; and
 - (ii) is duly completed; and
 - (iii) specifies the financial products sold.

- (2) Subsection (1) applies whether or not the specified financial products impose a liability to the issuer on the transferee.
- (3) In this subpart, **licensed market transaction** means a sale and purchase of financial products in which each of the parties is, or is acting through the agency of, a person authorised to undertake trading activities on a licensed market who is acting in the ordinary course of that business.

Compare: 1991 No 119 s 4

357 Products transfer does not need to be witnessed

- (1) The execution of a products transfer for the purposes of section 355 or 356(1)(a) does not need to be witnessed.
- (2) Subsection (1) does not affect any enactment, rule of law, constitution, deed, or agreement, regulating the execution of documents by companies or other bodies corporate or by any particular company or body corporate.

Compare: 1991 No 119 s 5

358 Transfers to be instruments of transfer for purposes of other enactments and instruments

For the purposes of any enactment, constitution, deed, or agreement, that relates to the transfer of financial products or to instruments of transfer of financial products,—

- (a) a products transfer to which section 355 applies must be treated as being an instrument of transfer of the financial products specified in the products transfer:
- (b) a products transfer to which section 356 applies and a brokers transfer together must be treated as being an instrument of transfer of the financial products specified in both transfers.

Compare: 1991 No 119 s 6(1)

Transfer of specified financial products by electronic means

359 Approval of electronic transfer system

- (1) The Governor-General may, on the advice of the Minister given in accordance with a recommendation of the FMA, by Order in Council, approve a system or systems that is or that

are wholly or partly electronic for the transfer of specified financial products.

- (2) A system of transfer may be approved under this section by reference to the name of the system or any name by which it is commonly known.
- (3) A system of transfer may be approved under this section whether or not it also involves the use of a procedure or part of a procedure for the transfer of financial products that is authorised under this Act or otherwise.
- (4) The FMA must not make a recommendation under subsection (1) unless the FMA has consulted the persons or representatives of the persons that the FMA considers will be substantially affected by the Order in Council.
- (5) A failure to comply with subsection (4) does not affect the validity of an Order in Council made under this section.

Compare: 1991 No 119 s 7(1)–(3), (6)–(8)

360 Specified financial products may be transferred under approved system

- (1) Specified financial products disposed of, whether in an authorised transaction or licensed market transaction or otherwise, may be transferred in accordance with a system of transfer that is approved under section 359.
- (2) Subsection (1) applies whether or not the specified financial products impose a liability to the issuer on the transferee.

Compare: 1991 No 119 s 7(5)

361 Minor technical modifications to system

Modifications of a minor technical nature may, from time to time, be made to a system of transfer approved by an Order in Council made under section 359 and, in any such case, the system incorporating those modifications must be treated as having been approved by the order.

Compare: 1991 No 119 s 7(4)

*Registration may not be refused***362 Registration may not be refused on ground that financial products have been transferred under this subpart**

- (1) If financial products have been transferred in accordance with section 355, 356, or 360, no person may refuse to register the transfer on the ground that the financial products have been so transferred or that the financial products have not been transferred by other means.
- (2) Nothing in this section affects any right a person has to refuse to register a transfer of securities on any other ground.

Compare: 1991 No 119 s 8

363 Effect of this Act on other enactments

- (1) This subpart has effect despite anything to the contrary in any enactment, rule of law, constitution, deed, or agreement (but subject to any order made under this Act).
- (2) Nothing in this subpart affects the validity of any means of transferring financial products other than under this subpart.
- (3) Sections 35, 39(1), and 84 of the Companies Act 1993 must be read subject to the provisions of this subpart.

Compare: 1991 No 119 s 9

Subpart 10—Unsolicited offers to purchase financial products off-market**364 Definitions relating to unsolicited offer regulations and related provisions**

- (1) For the purposes of this Act, an **unsolicited offer** means an offer to which all of the following apply:
 - (a) the offer is to acquire a financial product, to acquire a power to dispose of a financial product, or to acquire another interest in or right attaching to a financial product, made by a person (**A**) to another person (**B**) (whether the acquisition is by A or an associated person of A):
 - (b) the offer is unsolicited by B:
 - (c) the offer is not made on a licensed market:
 - (d) the offer is within the class or classes of unsolicited offers to which the regulations apply:

- (e) the offer is not a takeover offer for a financial product under the takeovers code or an acquisition or a redemption by a company of its shares under the Companies Act 1993.
- (2) For the purposes of this section, sections 365, 366, and 367, and any regulations made under section 365,—
- (b) an **offer** made by A includes an invitation or a proposal for A (or an associated person of A) to make an offer:
 - (c) regulations may define or clarify the meaning of unsolicited.

Compare: 1988 No 234 s 48DA

365 Regulations concerning unsolicited offers

- (1) The Governor-General may, on the recommendation of the Minister in accordance with subsection (3), make regulations setting out the rules applying to unsolicited offers for any or all of the purposes set out in subsection (2).
- (2) The purposes are—
- (a) ensuring offerees are fully informed of—
 - (i) the current market price of a quoted financial product or, for a non-quoted financial product, a fair estimate of the value of the financial product and the basis for making that estimate; and
 - (ii) the material terms of the offer and their effect; and
 - (iii) any warnings issued by the FMA (if ordered by the FMA to be contained in or to accompany offer documents); and
 - (iv) their rights and remedies under the regulations:
 - (b) ensuring that notice of an unsolicited offer to product holders is given to the relevant listed issuer or issuer and the FMA:
 - (c) ensuring that no agreement to transfer may bind offerees for a minimum period for the purpose of enabling offerees to consider, and reconsider, any decision to accept an offer:
 - (d) requiring that there is to be a minimum or maximum offer period, or both:
 - (e) setting out any other rules applying to unsolicited offers.

- (3) In formulating recommendations to make regulations under this section, the Minister must—
- (a) have regard to the objective of preventing unfair practices in the making of unsolicited offers; and
 - (b) consult with the FMA.

Compare: 1988 No 234 s 48DB

366 Specific provisions for regulations concerning unsolicited offers

The regulations made under section 365 may, without limiting that section,—

- (a) define the class or classes of unsolicited offers and financial products to which the regulations apply;
- (b) prescribe requirements in relation to unsolicited offers and the making of those offers, including requirements as to the form and content of those offers, variations of those offers, the updating and resending of offer documents or other corrective statements, and the implication of terms into the offer or any resulting agreement;
- (c) prescribe the information, statements, certificates, or other documents that must be supplied to offerees, the relevant listed issuer or issuer, and the FMA;
- (d) provide for any duties or functions of the FMA in connection with the rules applying to unsolicited offers;
- (e) state which obligations are unsolicited offer provisions for the purposes of this Act;
- (f) provide for the exercise of a right to withdraw a notification of a decision to accept an unsolicited offer, a right to refuse to complete a transfer, or any other right or remedy of offerees, and any consequences and obligations that apply in those cases;
- (g) provide for any powers of, and requirements on, listed issuers, issuers, or their agents in connection with transfers under an unsolicited offer and provide for protections from liability for those persons, persons administering a register of financial products, and other persons for the purposes of section 367;
- (h) provide for the regulations to—

- (i) extend to or in respect of any conduct of an associated person of an offeror and any conduct that, in substance or effect, constitutes an unsolicited offer:
 - (ii) prohibit contracting out of the regulations and include any other provision or provisions designed to prevent avoidance of the regulations (for example, prohibiting persons inviting others to make an offer to sell a financial product in circumstances in which, if the invitation were an offer to acquire the financial product, it would be an unsolicited offer to which the regulations applied):
- (i) provide for transitional matters.

Compare: 1988 No 234 s 48DC

367 Protection from liability in connection with unsolicited offer provisions

- (1) This section applies to any person who—
 - (a) is stated by regulations made under section 365 to be a protected person for the purposes of this section; and
 - (b) is not in contravention of an unsolicited offer provision or exemption.
- (2) A person to whom this section applies is not liable for any act done or omitted to be done by that person in good faith if the act or omission is—
 - (a) required by an unsolicited offer order made by the FMA; or
 - (b) required by an order made by the High Court under Part 7 in connection with a contravention of an unsolicited offer provision or exemption; or
 - (c) stated by regulations made under section 365 to be a protected act or omission for the purposes of this section.

Compare: 1988 No 234 s 47AA

Subpart 11—Civil liability for certain contraventions of this Part

368 Part 5 market provisions

- (1) All of the provisions specified in subsections (2) and (3) are Part 5 market provisions.
- (2) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and \$1 million in the case of an individual or \$5 million in any other case:
 - (a) sections 218 to 221 (insider conduct prohibited):
 - (b) sections 239, 240, and 243 (market manipulation):
 - (c) section 248 (continuous disclosure):
 - (d) section 291 (need for financial product market licence):
 - (e) section 292 (prohibition on holding out).
- (3) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding \$200,000 in the case of an individual or \$600,000 in any other case:
 - (a) sections 253 to 256 and sections 266 to 268 (substantial holding disclosure obligations):
 - (b) sections 278 and 279 (directors' and senior managers' disclosure obligations):
 - (c) section 309 (licensed markets must be operated under markets rules that comply with subpart):
 - (d) section 316 (overseas-regulated markets must give notice of market rules and rule changes to FMA):
 - (e) section 324 (Minister may give licensed market obligations direction to licensed market operator):
 - (f) section 328(1)(a) (effect of exceeding control limit):
 - (g) sections 334, 337, 338, 340, 342, and 344 (requirements applying in operation of licensed market):
 - (h) unsolicited offer provisions imposed under section 365.

Part 6

Licensing and other regulation of market services

369 Overview

- (1) This Part provides for the licensing of market services and regulates the provision of market services by licensees and other persons as follows:
 - (a) subpart 1 determines which market service providers must be licensed, and which other providers of markets services may be licensed:
 - (b) the issue of those licences, their conditions, and their expiry or cancellation is dealt with in subpart 2:
 - (c) subpart 3 provides for the monitoring and enforcement of those licences:
 - (d) subpart 4 requires licensees to give disclosure on certain market services when provided to retail investors:
 - (e) subpart 5 contains requirements for licensees to provide certain market services to retail investors under client agreements:
 - (f) subpart 6 regulates the provision of discretionary investment management services by a licensee under its licence and the provision of custodial services under that service by a custodian:
 - (g) subpart 7 provides for the making of regulations on the holding and application of investors' funds and property by derivatives issuers (whether or not they are licensed or are making regulated offers of derivatives):
 - (h) subpart 8 identifies the civil remedy provisions under this Part.
- (2) This section is a guide only to the general scheme and effect of this Part.

Subpart 1—Key provisions

370 When provider of market services must be licensed

- (1) A person must not provide any of the following market services without holding a market services licence that covers that service:

-
- (a) acting as a manager of a registered scheme (other than a restricted scheme):
 - (b) acting as an independent trustee of a restricted scheme:
 - (c) acting as a provider of a discretionary investment management service (*see* subpart 6):
 - (d) acting as a derivatives issuer in respect of a regulated offer of derivatives.
- (2) Subsection (1) does not apply to the extent that the person—
- (a) acts as the operator of a designated settlement system (within the meaning of Part 5C of the Reserve Bank of New Zealand Act 1989):
 - (b) carries out activities that are covered by a financial product market licence:
 - (c) carries out activities as a participant in a licensed market, or in another prescribed overseas market, in the prescribed circumstances.
- (3) Subsection (1)(c) does not apply (unless a declaration applies under subpart 3 of Part 8) to the extent that—
- (a) the person is permitted to provide the discretionary investment management service by sections 17 to 20 of the Financial Advisers Act 2008; or
 - (b) the discretionary investment management service would not be a financial adviser service for the purposes of the Financial Advisers Act 2008 as a result of an exemption under section 13, 14, or 148 of that Act or the regulations applying under that Act.

Example

An authorised financial adviser may provide a personalised service that is a discretionary investment management service under section 18 of the Financial Advisers Act 2008 and need not be a DIMS licensee.

A registered person (whether an entity or an individual) may provide a discretionary investment management services of any type to a wholesale client under section 20 of the Financial Advisers Act 2008 and need not be a DIMS licensee.

A lawyer providing a discretionary investment management service in the ordinary course of a business of that kind is not, under section 14 of the Financial Advisers Act 2008, providing a financial adviser service for the purposes of that Act. That exemption applies to the prohibition in this section also.

371 When providers of other market services may be licensed

- (1) In addition, a person may hold a market services licence to act as a provider of prescribed intermediary services (for example, a person-to-person lending intermediary if prescribed by regulations).
- (2) *See* clause 6 of Schedule 1 for exclusions for offers through licensed intermediaries).

372 Meaning of licensed market services

In this Act, **licensed market services** are those market services—

- (a) that are required to be licensed under this Part; or
- (b) for which a person holds a licence under this Part (whether or not required to do so).

373 Prohibitions on holding out

- (1) A person must not hold out that the person holds a market services licence if that is not the case.
- (2) A person must not hold out that the person holds a market services licence that covers that service if that is not the case.

Subpart 2—Issue of licences, conditions,
and duration

374 Principles guiding the exercise of FMA powers

In exercising a power under this subpart, the FMA must be guided by the following principles:

- (a) exercising the power must be necessary or desirable in order to promote the main purposes of this Act as specified in section 3 or the additional purposes specified in section 4; and
- (b) in exercising the power, the FMA should not unnecessarily restrict the licensing of persons.

Issue of licences

375 FMA may issue licence

The FMA may issue a licence in accordance with this subpart.

376 Application for licence

- (1) A person may apply for a licence in the manner that is specified by the FMA.
- (2) The application may be for a licence to cover 1 or more market services (or 1 or more classes of services, if the FMA specifies, on its Internet site, classes into which a market service is divided).
- (3) An applicant must provide to the FMA the information that is required by the FMA to assist it in determining the application.

377 When licence must be issued

The FMA must, after receiving an application under section 376, issue a licence that covers a market service or the class of market service to which the application relates if the FMA is satisfied that—

- (a) the applicant is a fit and proper person to hold the licence; and
- (b) the application meets the eligibility criteria (if any) that are prescribed by the regulations for licences for that service; and
- (c) the applicant's directors, senior managers, and proposed directors and senior managers satisfy the requirements that are prescribed by the regulations for licences for that service (if any); and
- (d) the applicant is capable of effectively performing that service (having regard to the proposed conditions of licence); and
- (e) there is no reason to believe that the applicant will not comply with the market services licensee obligations; and
- (f) the applicant—
 - (i) is registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008; or
 - (ii) complies with section 13(a) and (b) of that Act.

378 Procedural requirements

- (1) The FMA must, before making a decision under section 377,—

- (a) have regard to the prescribed matters; and
 - (b) consult with all prescribed persons or classes of prescribed persons (if any).
- (2) The FMA must not refuse to issue a licence, or include limits or restrictions under section 384(3)(a) that are materially more restrictive than those requested in the application, unless—
 - (a) the FMA gives the applicant no less than 10 working days' written notice of the following matters before it exercises the power:
 - (i) that the FMA may refuse to issue the licence or impose the limits or restrictions; and
 - (ii) the reasons why it may exercise that power; and
 - (b) the FMA gives the applicant or the applicant's representative an opportunity to make written submissions on the matter within that notice period.

379 Notice of decision

- (1) The FMA must give written notice of its decision under section 377 to—
 - (a) the applicant; and
 - (b) every other prescribed person.
- (2) If the FMA refuses to issue a licence or includes limits or restrictions under section 384(3)(a) that are materially more restrictive than those requested in the application, the written notice under subsection (1) must include a statement of the FMA's reasons for exercising the power.

380 Licence must be issued for particular market services

- (1) If the FMA decides to issue a licence, it must ensure that it specifies the particular market services, or class of market services, that it covers.
- (2) The same licence may cover more than 1 type of market services.
- (3) In that case,—
 - (a) a reference in this Act to the market services to which a licence covers is taken instead to be a reference to each of those market services severally; and

- (b) the decision to add another market service or class of market services to a licence must be made on the same basis as a decision to issue a licence; and
- (c) a licence may be varied, suspended, or cancelled in respect of 1 of those market services or classes only, as if each was separately licensed.

381 Licence may cover subsidiaries

- (1) A licence may authorise subsidiaries of the licensee to provide the market service covered by the licence.
- (2) In that case, a reference to the licensee in this Act is a reference to the licensee and any subsidiary providing the market service under the licence.

382 FMA must maintain list of licensees on Internet site

- (1) The FMA must maintain a list of persons that hold a licence on its Internet site.
- (2) The list must include, for each licence,—
 - (a) the name of the licensee; and
 - (b) the market services or class of market services covered by the licence; and
 - (c) the conditions of the licence imposed by the FMA; and
 - (d) the subsidiaries authorised to provide the market services (if any); and
 - (e) any other prescribed information.

*Conditions of licence***383 Conditions of licence**

- (1) The licence is subject to—
 - (a) a condition that the licensee may, under the licence, provide only the market services or class of market services to which the licence relates; and
 - (b) the conditions imposed by the FMA under section 384; and
 - (c) the conditions imposed by regulations (if any).
- (2) The condition in subsection (1)(a) is subject to the limits and restrictions imposed under section 384(3)(a).

- (3) The licensee must comply with the conditions imposed on the licensee's licence.

384 When FMA may impose permitted conditions

- (1) The FMA may, by written notice to the applicant or licensee,—
- (a) impose conditions on the licence when the licence is issued; and
 - (b) vary, revoke, add to, or substitute any conditions of licence imposed under this section at any time after the licence is issued.
- (2) A condition referred to in subsection (1) may only be of a prescribed kind or relate to a prescribed matter (except as set out in subsection (3)).
- (3) A condition referred to in subsection (1) may—
- (a) impose limits or restrictions on the services that are covered by the licence (for example, by reference to particular financial products, issuers, or investors, or classes of financial products, issuers, or investors, or by reference to any other matters):
 - (b) impose conditions relating to the requirements referred to in section 377 (for example, to ensure that those requirements continue to be satisfied and to require verification that those requirements continue to be satisfied):
 - (c) specify the date of expiry of the licence (the **expiry date**).

385 Licensee may apply for variation of conditions

- (1) A licensee may apply, in the manner that is specified by the FMA, for the FMA to exercise a power under section 384(1)(b) (for example, to vary a condition that imposes restrictions on the services that can be provided under the licence).
- (2) A licensee must provide to the FMA the information that is required by the FMA to assist it in determining the application.

386 Procedure for variation of conditions

The FMA must not exercise a power under section 384(1)(b) (except on an application under section 385), or refuse an application for a variation under section 385, unless—

- (a) the FMA gives the licensee no less than 10 working days' written notice of the following matters before it exercises the power:
 - (i) that the FMA may exercise the power; and
 - (ii) the reasons why it may exercise the power; and
- (b) the FMA gives the licensee or the licensee's representative an opportunity to make written submissions on the matter within that notice period.

387 Consequences of contravening conditions

- (1) If a licensee contravenes a condition of its licence, the FMA may exercise a power under subpart 3 (for example, it may require the licensee to submit an action plan).
- (2) Subsection (1) does not limit subpart 3 of Part 7 (which provides for civil remedies that may be imposed in relation to a contravention of a condition imposed by regulations).

*Expiry or cancellation of licences***388 Duration of licence**

- (1) A licence continues in force until the close of its expiry date unless sooner cancelled.
- (2) If a licensee applies for a new licence no later than 2 months before the expiry date of an existing licence that the new licence is intended to supersede, and the application is not disposed of before the expiry date, the existing licence continues in force until the application is disposed of.

389 When FMA may cancel licence

The FMA may cancel a licence—

- (a) if the licensee, by written notice, requests the FMA to do so; or
- (b) if the FMA is satisfied that the licensee has died, has ceased to exist, or has become subject to an insolvency event; or

- (c) in accordance with subpart 3.

390 Effect of expiry or cancellation of licence on appointments

The expiry or cancellation of the licence of a person does not, of itself, terminate an appointment held by the person (but, if the person continues to hold the appointment and does not obtain a licence that covers the appointment, the person may breach section 370).

Subpart 3—Monitoring and enforcement of
licences

391 Meaning of material change of circumstances

In this subpart, **material change of circumstances**, in relation to a licensee, means—

- (a) a change that adversely affects the licensee’s capacity to perform the market services covered by the licence in an effective manner; or
- (b) a change that means that the licensee no longer meets the requirements referred to in section 377.

Reports

392 Licensee must deliver regular reports to FMA

Every licensee must, at the prescribed times or on the occurrence of the prescribed events and otherwise in the prescribed manner, send to the FMA reports that contain the prescribed documents, information, and other matters.

393 Licensee must report certain matters

- (1) Every licensee must ensure that there are in place effective methods for—
- (a) monitoring the licensee’s compliance with its market services licensee obligations; and
- (b) identifying material changes in circumstances.
- (2) Subsection (3) applies if a licensee believes that—
- (a) the licensee has, or may have, breached a market services licensee obligation; or

- (b) a material change of circumstances has occurred, may have occurred, or is likely to occur in relation to the licensee; or
 - (c) the information provided under section 376 or 385 is false or misleading in a material particular.
- (3) The licensee must, as soon as practicable after the licensee forms the belief referred to in subsection (2), send a report containing details of the belief, the licensee's grounds for the belief, and all other prescribed information—
- (a) to the FMA; or
 - (b) if the licensee is a manager of a registered scheme (other than a restricted scheme)—
 - (i) to the FMA and the supervisor, if the report is of a breach or possible breach of a market services licensee obligation imposed by a condition of the licence; or
 - (ii) to the supervisor, if the report is of a breach or possible breach of any other market services licensee obligation.

394 Restriction on section 393

A licensee who is an individual is not required to provide, under section 393, information that would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.

FMA's powers in case of breach of market services licence obligation, material change, etc

395 FMA's powers in case of breach of market services licensee obligation, material change, etc

- (1) The FMA may exercise a power under subsection (2) if it is satisfied that—
- (a) a licensee has breached a market services licensee obligation; or
 - (b) a material change of circumstances has occurred in relation to a licensee; or
 - (c) the information provided under section 376 or 385 by a licensee is false or misleading in a material particular; or

- (d) a licensee is likely to breach a market services licensee obligation or a material change of circumstances is likely to occur in relation to a licensee.
- (2) The FMA may, by written notice to the licensee and otherwise in the prescribed manner, do 1 or more of the following:
 - (a) censure the licensee;
 - (b) require the licensee to submit an action plan to the FMA within the time and in the manner specified by the FMA;
 - (c) give a direction to the licensee.
- (3) The FMA may also, by written notice to the licensee and otherwise in the prescribed manner, cancel the licence of the licensee if it is satisfied that—
 - (a) subsection (1)(a), (b), or (c) apply; and
 - (b) the licensee no longer meets the requirements referred to in section 377.
- (4) Section 384 also provides for the FMA to vary, revoke, add to, or substitute any conditions of licence.

396 Procedure for exercising powers

The FMA must not exercise a power under section 395 unless—

- (a) the FMA gives the licensee no less than 10 working days' written notice of the following matters before it exercises the power:
 - (i) that the FMA may exercise the power; and
 - (ii) the reasons why it may exercise the power; and
- (b) the FMA gives the licensee or the licensee's representative an opportunity to make written submissions on the matter within that notice period.

397 Notice requirements

- (1) The notice under section 395(2) or (3) must—
 - (a) state the FMA's reasons for giving the notice; and
 - (b) in the case of section 395(3), specify the date on which the cancellation takes effect.
- (2) The FMA must give a copy of the notice to every prescribed person.

*Action plan***398 Action plan**

If the notice under section 395 requires the licensee to submit an action plan to the FMA, the licensee must, as soon as practicable but in any case within the time specified by the FMA and otherwise in the manner specified by the FMA, submit to the FMA an action plan that specifies—

- (a) the actions, as the case may be, that the licensee proposes to take to—
 - (i) remedy or avoid the breach or likely breach of the market services licensee obligation; or
 - (ii) avoid any further breach of the market services licensee obligation; or
 - (iii) mitigate or avoid any adverse effects or changes arising, or likely to arise, from the material change of circumstances; or
 - (iv) correct the false or misleading information or mitigate the adverse consequences of providing false or misleading information (or both); and
- (b) the date by which each step will be taken.

399 Approval, amendment, or rejection of action plan

- (1) If a licensee submits an action plan, the FMA may—
 - (a) approve the action plan; or
 - (b) require the licensee to amend the action plan and resubmit it to the FMA by a specified date for approval or rejection; or
 - (c) reject the action plan.
- (2) If the FMA requires the licensee to amend an action plan provided to the FMA, the licensee must, within the time specified by the FMA, provide an amended action plan that addresses the matter required to be amended.
- (3) If the FMA approves the action plan (whether as first provided or after amendment), the licensee must comply with the action plan.
- (4) An action plan that has been approved by the FMA may be varied at any time by agreement between the licensee and the FMA.

400 Consequences of failure to submit action plan, rejection of action plan, or failure to comply with action plan

The FMA may exercise a power under section 395(2)(a) or (c) or (3) if—

- (a) a licensee fails to submit an action plan or amended action plan within the time and in the manner specified by the FMA; or
- (b) the FMA rejects an action plan; or
- (c) the FMA is satisfied that an action plan has not been complied with.

*Directions***401 Directions**

- (1) If the notice under section 395 gives a direction to the licensee, the notice must specify—
 - (a) the actions, as the case may be, that the licensee must take to—
 - (i) remedy or avoid the breach or likely breach of the market services licensee obligation; or
 - (ii) avoid any further breach of the market services licensee obligation; or
 - (iii) mitigate or avoid any adverse effects or changes arising, or likely to arise, from the material change of circumstances; or
 - (iv) correct the false or misleading information or mitigate the adverse consequences of providing false or misleading information (or both); and
 - (b) the date by which each step must be taken.
- (2) The licensee must comply with the direction.

402 Consequences of failure to comply with directions

- (1) A licensee that refuses or fails, without reasonable excuse, to comply with a direction under section 401 commits a tier 2 offence.
- (2) If the FMA is satisfied that a direction under section 401 has not been complied with, the FMA may exercise a power under section 395(2)(a) or (3).

**Subpart 4—Disclosure obligations for
licensees providing market services to retail
investors**

403 Application of subpart

This subpart applies to a licensee who, under the licence,—

- (a) acts as a provider of a discretionary investment management service;
- (b) (if applied by the regulations) acts as a provider of prescribed intermediary services.

404 Licensee must make disclosure before providing service to retail investor

A licensee who provides a market service to a retail investor must ensure that a disclosure statement relating to the service is given to the retail investor, in accordance with this Act and the regulations.

405 Timing and method of disclosure

- (1) The disclosure statement must be provided—
 - (a) in the case of a discretionary investment management service, before the investment authority is granted; or
 - (b) in the case of a prescribed intermediary service, at the prescribed time.
- (2) However, if it is not practicable to comply with subsection (1) by reason of any prescribed circumstance, the licensee must—
 - (a) give the minimum prescribed disclosure in accordance with the regulations; and
 - (b) give the disclosure statement required by this subpart to the retail investor as soon as practicable afterwards.
- (3) The disclosure statement must be provided to the retail investor personally or delivered or sent to the retail investor's last known address or an address (including an electronic address) specified by the investor for that purpose.

407 Purpose of disclosure statement

The purpose of a disclosure under this subpart is to provide certain information that is likely to assist a retail investor to decide—

- (a) whether or not to proceed, or continue to proceed, with the market service by the licensee in question; or
- (b) to change any instruction in relation to the provision of that market service by the licensee.

408 Disclosure statement

- (1) Disclosure under this subpart must be made by 1 or more disclosure statements in accordance with the regulations (and may be combined with other disclosure statements under this Act or the Financial Advisers Act 2008 except in the prescribed circumstances).
- (2) A disclosure statement must—
 - (a) be in writing; and
 - (b) state the date as at which the disclosure statement is prepared; and
 - (c) state the name and contact details of the licensee; and
 - (d) contain all of the information that it is required to contain by the regulations; and
 - (e) be accompanied by all the documents that the regulations require it to be accompanied by; and
 - (f) comply with all other requirements of the regulations relating to the content of the disclosure statement.
- (3) The disclosure statement must comply with all requirements of the regulations relating to the form and presentation of the statement.

409 Misleading or deceptive statements and omissions

- (1) A person must not provide a disclosure statement to a person, or continue to provide a market service to which this subpart applies (until subsection (5) applies), if there is—
 - (a) either—
 - (i) a statement in the disclosure statement that is misleading or deceptive or is likely to mislead or deceive; or

- (ii) an omission from the disclosure statement of information that is required to be contained in the disclosure statement by the regulations; and
 - (b) the statement or omission is materially adverse from the point of view of the retail investor.
- (2) For the purposes of this section, a person is taken to make a statement that is misleading about a future matter (including the doing of, or refusing to do, an act) if the person does not have reasonable grounds for making the statement.
- (3) Subsection (2) does not limit the meaning of a reference to a misleading statement.
- (4) This section does not limit sections 404 to 408.
- (5) If subsection (1) applies, a person may provide a market service to a retail investor after providing the investor with a new disclosure statement that complies with this section.

410 Further prescribed information to be made available

- (1) A licensee who provides a market service to a retail investor must—
 - (a) at the request of the investor or at the prescribed times or on the occurrence of the prescribed events, make available to the investor the documents, information, and other matters that are required to be made available under this section by the regulations; and
 - (b) at the prescribed times or on the occurrence of the prescribed events, make publicly available the documents, information, and other matters that are required to be made publicly available by the regulations.
- (2) The documents, information, and other matters must be made available in the prescribed manner.

Subpart 5—Requirement for licensees to provide service under client agreements

411 Application of subpart

This subpart applies to a licensee who, under the licence,—

- (a) acts as a provider of a discretionary investment management service:
- (b) acts as a derivatives issuer:

- (c) (if applied by the regulations) acts as a provider of prescribed intermediary services.

412 Requirement to have client agreement

- (1) A licensee must provide the market service to a retail investor under a client agreement.
- (2) The client agreement must provide adequately for the matters prescribed by regulations.
- (3) The client agreement is treated as containing any provision that is implied into it by or under this Act.
- (4) The client agreement must be in writing and be contained in 1 or more documents that is legally enforceable as between the retail investor and the licensee.
- (5) The client agreement has no effect to the extent that it contravenes, or is inconsistent with, this Act or any term implied into it by or under this Act.

413 Changes to client agreement

An amendment to or replacement of a client agreement has no effect if made without the written consent of the retail investor.

**Subpart 6—Provision of discretionary
investment management services**

414 Application of subpart

This subpart applies to—

- (a) a licensee who, under the licence, acts as a provider of a discretionary investment management service:
- (b) a person who acts as a custodian of investor property on behalf of a retail investor under a discretionary investment management service provided by a licensee.

415 Meaning of provider of discretionary investment management service and related terms

- (1) In this Act, a person acts as a provider of a discretionary investment management service if the person is in the business of providing a discretionary investment management service in relation to financial products within the meaning of this Act.

- (2) For the purposes of this Act,—
- discretionary investment management service** has the meaning set out in section 12 of the Financial Advisers Act 2008
- investment authority** has the meaning set out in section 12 of the Financial Advisers Act 2008
- investment mandate** has the meaning set out in section 12 of the Financial Advisers Act 2008
- investor property** means a financial product held on behalf of a retail investor, or money or property held for or received from, or on account of, a retail investor in relation to acquiring, holding, or disposing of a financial product
- personalised DIMS** means a discretionary investment management service under which any of the following applies (and **class DIMS** means a discretionary investment management services that is not a personalised DIMS):
- (a) the investment mandate has been tailored to take account of the particular financial situation or goals (or any 1 or more of them) of a named investor or an investor that is otherwise readily identifiable by the provider of the service (rather than merely taking into account the fact that the client comes within a class of persons having predefined characteristics):
 - (b) the person or persons who exercise the investment authority in fact take into account that particular financial situation or those goals in doing so:
 - (c) an investor would, in the circumstances in which the service is provided, reasonably expect that the investment mandate has been tailored, or the investment authority will be exercised, in that way.

Duties of DIMS licensee

416 DIMS licensee’s duties

A DIMS licensee must—

- (a) act honestly in providing a discretionary investment management service; and

- (b) provide the service in accordance with the client agreement, investment mandate, and any subsequent instructions of the retail investor; and
- (c) in exercising any powers or performing any duties as a DIMS licensee,—
 - (i) act in the best interests of the investors using the service and treat those investors equitably (if it is a class DIMS); and
 - (ii) act in the best interests of the particular investor using the service (if it is a personalised DIMS); and
- (d) not make use of information acquired through being the DIMS licensee in order to—
 - (i) gain an improper advantage for itself or any other person; or
 - (ii) cause detriment to the investors using the service.

417 Duties of directors and senior managers of DIMS licensee

A director or senior manager of a DIMS licensee must—

- (a) not make use of information acquired through being the director or senior manager of the DIMS licensee in order to—
 - (i) gain an improper advantage for itself or any other person; or
 - (ii) cause detriment to the investors using the service; and
- (b) not make improper use of the position as a director or senior manager of the DIMS licensee to gain, directly or indirectly, an advantage for himself or herself or any other person or to cause detriment to the investors using the service.

Compare: Corporations Act 2001 s 601FE (Aust)

418 Duty on DIMS licensee to comply with professional standard of care

A DIMS licensee must, in exercising any power of investment or performing any duties in that capacity, exercise the care, diligence, and skill that a prudent person engaged in that profession would exercise in the same circumstances.

419 Limits on permitted exemptions and indemnities

- (1) If a DIMS licensee has any rights to be paid fees by a retail investor for, or to be exempted from or indemnified by a retail investor for liabilities incurred in relation to, the performance of the DIMS licensee's services, those rights—
 - (a) must be set out in the client agreement; and
 - (b) must be available only in relation to the proper performance of the duties under sections 416 and 418.
- (2) No other agreement has any effect to the extent that it purports to confer a right of a kind set out in subsection (1).

Compare: Corporations Act 2001 ss 601GA(2) (Aust)

420 Requirement for agreed investment mandate with retail investor

- (1) A DIMS licensee must provide a discretionary investment management service to a retail investor under an investment mandate that is agreed in writing with the investor.
- (2) The DIMS licensee must ensure that the investment mandate provides adequately for the scope of the investment authority, including the following matters (unless subsection (3) applies):
 - (a) the limits on the nature or type of investments that may be made; and
 - (b) the limits on the proportion of each type of asset invested in; and
 - (c) what methodology is used for developing, amending, and measuring the investment strategy.
- (3) However, if there are no limits on the investment authority, the investment mandate must state that the investment authority is unlimited.
- (4) The investment mandate must provide for the matters set out in this section in accordance with the frameworks or methodologies specified in a notice issued by the FMA under subpart 4 of Part 8, (if any) that apply to it.

421 Action that must be taken on limit breaks

- (1) This section applies to a DIMS licensee if there is a breach of the limits under the investment mandate on either of the following (a **limit break**):
 - (a) the nature or type of investments that may be made; or
 - (b) the proportion of each type of assets that may be invested in.
- (2) If this section applies, the DIMS licensee must report the limit break to the FMA in the prescribed circumstances and in the prescribed manner.

*Related party transactions***422 Definition of related party benefits**

In this section, a **related party benefit**, in relation to a DIMS licensee, is a benefit—

- (a) that is either given out of investor property or creates an exposure to loss for investor property; and
- (b) that is given to, or received by, the DIMS licensee or an associated person of the DIMS licensee.

423 General prohibition on transactions giving related party benefits

- (1) A DIMS licensee (or any person acting on behalf of the DIMS licensee) must not enter into a transaction that provides for a related party benefit to be given.
- (2) However, subsection (1) does not apply to a transaction if section 424 applies to the transaction or all related party benefits given under it.
- (3) A failure to comply with this section does not affect the validity of any transaction (subject to any court order under Part 7).

424 Certain related party benefits permitted

The prohibition in section 423 does not apply to—

Arm's-length terms

- (a) a benefit that is given on terms that—
 - (i) would be reasonable in the circumstances if the parties were connected or related only by the

transaction in question, each acting independently, and each acting in its own best interests;
or

- (ii) are less favourable to the related party than the terms referred to in subparagraph (i):

Transactions in registered schemes

- (b) an acquisition or a disposal of a managed investment product in a registered scheme or other schemes recognised, under the regulations, for this purpose:

Other prescribed benefits or transactions

- (c) a prescribed benefit or transaction.

*Custodial service performed as part of
discretionary investment management service*

425 Application of sections 426 and 427

- (1) Sections 426 and 427 apply to investor property only if the financial products constituting investor property are held on behalf of a retail investor under a discretionary investment management service provided by a DIMS licensee.
- (2) In this subpart, the person holding the investor property is a **custodian**.

426 Requirement for custodian

- (1) A DIMS licensee must ensure that the investor property is held by a person who meets the custodianship requirements.
- (2) A custodian of the investor property must—
 - (a) be a body corporate that the DIMS licensee considers to be appropriate to hold, and safeguard, the scheme property; and
 - (b) not be the same person as, or be associated with, the DIMS licensee (unless the licence permits otherwise).
- (3) The DIMS licensee is jointly and severally liable with any custodian for the holding of the investor property in accordance with this subpart.

427 Certain broker obligations of Financial Advisers Act 2008 apply under this Act

- (1) A custodian under this subpart is a broker for the purposes of Part 3A of the Financial Advisers Act 2008, and sections 77P to 77T of that Act apply in relation to investor property as the same way as they apply to client money and client property under those sections.
- (2) *See* Part 7 which provides for enforcement of this obligation under this Act as a civil remedy provision.

Subpart 7—Holding and application of
investor funds and property by derivatives
issuers

428 Application of regulations made under this subpart

Regulations made under this subpart may apply to a derivatives issuer (whether or not it is licensed and whether or not it makes any regulated offer).

429 Regulations regulating holding and application of investor funds and property by derivatives issuers

The Governor-General may, by Order in Council made on the recommendation of the Minister in accordance with section 508(2) make regulations for the purpose of—

- (a) regulating the carrying on of the business of acting as a derivatives issuer:
- (b) regulating the receipt of money and property from investors by derivatives issuers and the application of that money and property:
- (c) prescribing requirements relating to the deposit of that money and property in separate investors' funds accounts or safe custody:
- (d) specifying the duties and obligations of derivatives issuers in relation to investors' funds accounts including obligations to make payments into those accounts:
- (e) providing for the protection of money deposited into investors' funds accounts and the investment of that money and property deposited in safe custody from claims against derivatives issuers:

- (f) providing for the FMA to carry out functions under the regulations, and its powers and procedures in doing so:
- (g) stating which provisions are Part 6 licence obligations for the purposes of the Act.

Subpart 8—Miscellaneous provisions

Civil liability

430 Part 6 licence provisions

- (1) All of the provisions specified in subsections (2) and (3) are Part 6 licence provisions.
- (2) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding the greatest of the consideration for the relevant transaction, 3 times the amount of the gain made or the loss avoided, and \$1 million in the case of an individual or \$5 million in any other case:
 - (a) section 370 (when must provider of market services be licensed):
 - (b) section 373 (prohibitions on holding out):
 - (c) section 412 (requirement to have client agreement):
 - (d) section 426 (requirement for custodian).
- (3) A contravention of any of the following may give rise to a civil remedy (*see* subpart 3 of Part 7), including a pecuniary penalty not exceeding \$200,000 in the case of an individual or \$600,000 in any other case:
 - (a) section 392 (licensee must deliver regular reports to FMA):
 - (b) section 393 (licensee must report certain matters):
 - (c) section 398 (action plan):
 - (d) section 399 (approval, amendment, or rejection of action plan):
 - (e) section 401 (direction):
 - (f) section 404 (licensee must make disclosure before providing service to retail investor):
 - (g) section 409 (misleading or deceptive statements and omissions):
 - (h) section 410 (further prescribed information to be made available):

- (i) sections 416 to 418 (duties on DIMS licensee and directors and senior managers of DIMS licensee):
- (j) section 420 (requirement for agreed investment mandate with retail investor):
- (k) section 421 (action that must be taken on limit breaks):
- (l) section 423 (general prohibition on transactions giving related party benefits):
- (m) section 427 (certain broker obligations of Financial Advisers Act 2008 apply under this Act):
- (n) those provisions of the regulations made under subpart 7 that are stated by those regulations to be Part 6 licence provisions.

Part 7

Enforcement and liability

431 Meaning of contravene

In this Act, unless the context otherwise requires, **contravene** includes, in relation to a provision, prohibition, obligation, or exemption (a **provision**),—

- (a) a contravention of the provision; or
- (b) an attempt to contravene the provision; or
- (c) aiding, abetting, counselling, or procuring any other person to contravene the provision; or
- (d) inducing, or attempting to induce, any other person, whether by threats or promises or otherwise, to contravene the provision; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention by any other person of the provision; or
- (f) conspiring with any other person to contravene the provision.

432 Directors also treated as contravening in certain circumstances

- (1) If a body corporate contravenes a provision as referred to in section 431(a) to (f), a director of the body corporate also contravenes the provision if it is proved that—

- (a) the act or omission that constituted the contravention took place with the director's authority, permission, or consent; or
 - (b) the director knew or should have known that the contravention was to be or was being committed and failed to take all reasonable steps to prevent or stop it.
- (2) Subsection (1) does not apply if this Act provides otherwise.
 - (3) If a contravention of a provision of this Act is an offence that requires a state of mind to be established, a director of a body corporate that contravenes the provision because of subsection (1) commits the offence only if the director has the state of mind.
 - (4) *See* sections 498 and 499, which attribute the state of mind and conduct of a director to the body corporate in certain circumstances.

Example

A particular provision of this Act is a civil remedy provision. A contravention of the provision is also an offence but only if the contravention occurs with knowledge.

ABC Limited contravenes the provision with director A's consent. Both ABC Limited and director A have contravened the provision and a civil remedy order under subpart 3 may be made against either or both of them (subject to any defences).

In addition, both of them have the required knowledge. Accordingly, both ABC Limited and director A have committed an offence.

Subpart 1—FMA's enforcement powers

Stop orders

433 When FMA may make stop orders

The FMA may make a stop order if it is satisfied that—

- (a) a PDS, register entry, or a disclosure document under clause 24 of Schedule 1, for an offer of financial products—
 - (i) is likely to deceive, mislead, or confuse with regard to any particular that is material to the offer of financial products to which it relates; or

- (ii) contains any material misdescription or error or any material matter that is not clearly legible; or
 - (iii) does not comply with this Act or the regulations;or
- (b) any of sections 32, 34, 39, 42, 43, 46, 59, 60, 62, 66, 68, 69, 71, 77, 370, 373, 404, or clause 24 of Schedule 1 have not been complied with in respect of an offer of financial products or the supply of market services; or
- (c) section 89 (need for governing document and supervisor) has been contravened in respect of an offer of debt securities; or
- (d) section 109 (need to register) has been contravened in respect of an offer of managed investment products; or
- (e) a registered scheme no longer meets the registration requirements in section 111 or the registration requirements for a particular type of scheme under sections 112 to 115; or
- (f) a restricted communication relating to an offer of financial products—
 - (i) is likely to deceive, mislead, or confuse with regard to any particular that is material to the offer; or
 - (ii) is inconsistent with any PDS referred to in it; or
 - (iii) contains any material misdescription or error or any material matter that is not clearly legible; or
 - (iv) does not comply with this Act; or
- (g) disclosure relating to financial products under subpart 4 of Part 3, or a disclosure statement relating to market services required under subpart 4 of Part 6,—
 - (i) is likely to deceive, mislead, or confuse with regard to any particular that is material to the financial products or market services; or
 - (ii) does not comply with this Act or the regulations.

434 Terms of stop order

A stop order may, in relation to the offer, registered scheme, financial products, or market services referred to in section 433,—

- (a) prohibit offers, issues, sales, or transfers of financial products, or the supply of market services, specified in the order from being made while the order is in force;
- (b) prohibit a person from accepting further contributions or deposits in respect of financial products specified in the order while the order is in force;
- (c) prohibit the distribution of—
 - (i) a PDS or any other disclosure document; or
 - (ii) a restricted communication referred to in section 433(f); or
 - (iii) any restricted communication that relates to the offer of financial products specified in the order.

435 Meaning of restricted communication

- (1) In this subpart, **restricted communication** means a form of communication—
 - (a) that—
 - (i) directly or indirectly refers to an offer, or intended offer, of financial products; or
 - (ii) is reasonably likely to induce persons to apply for financial products; or
 - (iii) is reasonably likely to induce persons to make further contributions or deposits referred to in section 10(2)(c); and
 - (b) that is authorised or instigated by, or on behalf of, the offeror, the issuer, or an associated person of the offeror or issuer or prepared with the co-operation of, or by arrangement with, any of those persons; and
 - (c) that is to be, or has been, distributed to a person.
- (2) In this subpart, **restricted communication** includes any advertisement or publication under subpart 3 of Part 3.
- (3) Section 72 applies for the purposes of this section with any necessary modifications.

436 FMA may make interim stop order pending exercise of powers

- (1) The FMA may make an interim order (an **interim stop order**) of the kind referred to in section 434 that is in force for the period referred to in subsection (2) if—

- (a) the FMA is considering, at any time, whether it may exercise a power under section 433; and
 - (b) the FMA considers that making an interim stop order is desirable in the public interest.
- (2) An interim stop order is in force from the time at which it is made until the close of—
 - (a) the date that is 15 working days after the day on which it is made; or
 - (b) a later date specified by the FMA by notice to the issuer, offeror, or service provider to which the order relates.
- (3) For the purposes of subsection (2)(b),—
 - (a) the FMA may specify a later date if the FMA is of the opinion that it is not reasonably practicable for it to complete its consideration as referred to in subsection (1)(a) within the 15-working-day period referred to in subsection (2)(a):
 - (b) the later date must be a date that is no more than 30 working days after the day on which the interim stop order is made.
- (4) The FMA—
 - (a) may act under subsection (1) or (2)(b) without giving the issuer, offeror, or service provider to which the order relates an opportunity to make submissions to, or be heard before, the FMA in respect of the matter (and, accordingly, section 442 does not apply); but
 - (b) must, after acting under subsection (1) or (2)(b), give that issuer, offeror, or service provider or that person's representative an opportunity to make written submissions and to be heard on the matter.
- (5) In this subpart, **service provider** means a person that provides a licensed market service.

Compare: 1978 No 103 s 43K

437 Who stop orders and interim stop orders may apply to

- (1) A stop order or an interim stop order of the kind referred to in—
 - (a) section 434(a) or (b) may apply to any person specified in the order (for example, an issuer, an offeror, or a service provider):

- (b) section 434(c) may apply to 1 or more of an issuer, an offeror, a service provider, or any associated persons of an issuer, an offeror, or a service provider.
- (2) If a stop order or an interim stop order of the kind referred to in section 434(c) extends to associated persons of the issuer, offeror, or service provider, the order may require—
 - (a) all, or any specified class or classes, of the associated persons to comply with the order (including associated persons that may be incorporated or formed after the date of the order); and
 - (b) the issuer, offeror, or service provider to provide a copy of the order to all or any of those associated persons.
- (3) For the purpose of subsection (2), the order is not required to refer to the associated persons by name.

Direction orders

438 When FMA may make direction orders

- (1) The FMA may make a direction order if it is satisfied that, by engaging in any conduct, a person (**the relevant person**) has contravened, or would contravene,—
 - (a) a Part 2 misleading or deceptive conduct provision or exemption:
 - (b) a Part 3 offer provision or exemption:
 - (c) a Part 4 governance provision or exemption:
 - (d) a Part 5 market provision or exemption:
 - (e) a Part 6 licence provision or exemption:
 - (f) an infringement offence provision.
- (2) In this section, an **infringement offence provision** is a provision in respect of which a contravention is a tier 1 infringement offence.

439 Terms of direction orders

A direction order may—

- (a) direct the relevant person to comply with the relevant provision or exemption referred to in section 438 (**the provision or exemption**):
- (b) stipulate any reasonable steps that the relevant person must take in order to comply with the provision or ex-

emption or to avoid or mitigate any actual or potential adverse effects of a contravention, including (without limitation)—

- (i) disclosing, in accordance with the order, information for the purpose of securing compliance with the provision or exemption:
 - (ii) publishing, at the relevant person's own expense and in the manner and at the times specified in the order, corrective statements that are specified in, or are to be determined in accordance with, the order:
 - (iii) complying in accordance with the order with a prohibition or restriction on the making of any statement or the distribution of any document by, or on behalf of, the relevant person for the purpose of preventing a contravention or further contravention of the provision or exemption:
- (c) require the relevant person to report to the FMA within the time specified in the order stating how and when the order will be implemented.

Unsolicited offer orders

440 When FMA may make unsolicited offer orders

The FMA may make an unsolicited offer order if the FMA is satisfied that a person has acted, is acting, or intends to act in contravention of an unsolicited offer provision or exemption.

Compare: 1988 No 234 s 42EA

441 Terms of unsolicited offer orders

- (1) An unsolicited offer order may—
- (a) restrain a person from acquiring a financial product, a power to dispose of a financial product, or an interest in or right attaching to a financial product, as a result of the unsolicited offer:
 - (b) restrain a person from taking any action that is, or that may reasonably be expected to constitute, a contravention of an unsolicited offer provision or exemption:
 - (c) restrain a person from taking specified steps to complete or perform a contract that has been, or may reasonably

- be expected to be, entered into in contravention of an unsolicited offer provision or exemption:
- (d) direct a person not to register the transfer of a financial product:
 - (e) direct a person to disclose information, make corrective statements, or take any other specified steps, at the person's own expense and in the manner and at the times specified in the order, for the purpose of securing compliance with an unsolicited offer provision or exemption.
- (2) An unsolicited offer order may be directed at any person.
Compare: 1988 No 234 s 42EB

Process for FMA's orders

442 FMA must follow steps before making orders

- (1) The FMA may make an order under this Act only if it first takes the following steps:
- (a) gives the person to whom the order is proposed to be directed written notice—
 - (i) that the FMA may make an order under this Act; and
 - (ii) of the reasons why it is considering exercising that power; and
 - (b) also gives that written notice to the relevant licensed market operator, in the case of a direction order for a contravention of a continuous disclosure obligation or exemption; and
 - (c) gives that notice at least 5 working days before the FMA makes the order; and
 - (d) gives each person to whom notice of the order must be given or the person's representative an opportunity to make written submissions and to be heard on the matter within that notice period.
- (2) However,—
- (a) the FMA may shorten these steps in accordance with section 443; and
 - (b) in the case of a stop order under section 434(c), the FMA does not have to give the notice referred to in sub-

section (1)(a) to any associated persons of the issuer, offeror, or service provider; and

- (c) this section does not apply to an interim stop order or an order under section 515.

Compare: 1988 No 234 s 42F

443 FMA may shorten steps for specified orders

If the FMA thinks it necessary or desirable in the public interest for any order to be made more urgently than section 442 permits,—

- (a) it may give less than 5 working days' notice before it makes the order, and the notice and the submissions may be oral rather than written; but
- (b) it must include in that notice the reasons for acting urgently and must otherwise comply with that section.

Compare: 1988 No 234 s 42G

444 FMA must give notice after making orders

- (1) If the FMA makes an order under this Act, the FMA—
 - (a) must, as soon as is reasonably practicable, give written notice to the person to whom the order is directed of—
 - (i) the terms and conditions of the order; and
 - (ii) the reasons for the order; and
 - (iii) any other information the FMA thinks relevant in the circumstances; and
 - (b) must also give that written notice to the Registrar and make the notice available on its Internet site, in the case of a stop order or an interim stop order; and
 - (c) must also give that written notice to the relevant licensed market operator, in the case of a direction order for a contravention of a continuous disclosure obligation or exemption; and
 - (d) may also give notice to any other person of those matters.
- (2) In the case of a stop order of the kind referred to in section 434(c), the FMA does not have to give the notice referred to in subsection (1)(a) to any associated persons of the issuer, offeror, or service provider (but the issuer, offeror, or service provider may be required to do so).

- (3) This section does not apply to an order under section 515.
Compare: 1988 No 234 s 42H

General provisions

445 General provisions on FMA's orders

- (1) The FMA may make an order under this Act on the terms and conditions that the FMA thinks fit.
- (2) The FMA may vary an order in the same way as it may make the order under this Act.
- (3) The FMA may revoke an order or suspend an order on the terms and conditions it thinks fit.
Compare: 1988 No 234 s 42I

446 Consequences of failing to comply with FMA's orders

- (1) If an order made by the FMA under this Act applies to a person, the person must comply with the order (*see* subpart 3 which provides for civil remedies for a contravention of this duty).
- (2) A person who refuses or fails, without reasonable excuse, to comply with an order made by the FMA under this Act commits a tier 2 offence.
Compare: 1988 No 234 s 42J

Subpart 2—High Court's enforcement powers

Injunctions

447 Court may grant injunctions

The court may, on application by the FMA or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of a provision of this Act or the regulations.
Compare: 1988 No 234 s 42K

448 When court may grant injunctions and interim injunctions

- (1) The court may grant an injunction restraining a person from engaging in conduct of a particular kind if—

- (a) it is satisfied that the person has engaged in conduct of that kind; or
 - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind.
- (2) The court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so.
- (3) Subsections (1)(a) and (2) apply whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind.
- (4) Subsections (1)(b) and (2) apply whether or not the person has previously engaged in conduct of that kind or there is an imminent danger of substantial damage to any other person if that person engages in conduct of that kind.

Compare: 1988 No 234 s 42L

449 Undertaking as to damages not required by FMA

- (1) If the FMA applies to the court for the grant of an interim injunction under this subpart, the court must not, as a condition of granting an interim injunction, require the FMA to give an undertaking as to damages.
- (2) In determining the FMA's application for the grant of an interim injunction, the court must not take into account that the FMA is not required to give an undertaking as to damages.

Compare: 1988 No 234 s 42M

Court may make or give FMA orders or directions

450 Court may make or give FMA orders or directions

The court may, on application by any person, make any order, or give any direction, that the FMA may make or give under this Act if the court is satisfied of the same matters that the FMA would need to be satisfied of if the FMA were to exercise that power.

Subpart 3—Civil remedies

Overview of civil remedies

451 Overview of civil remedies

- (1) The following remedies (**civil remedy orders**) are available for a contravention of a civil remedy provision (except if otherwise provided) under this subpart:
 - (a) a declaration of contravention:
 - (b) a pecuniary penalty order (on application by the FMA only):
 - (c) a compensatory order:
 - (d) other civil remedy orders under section 467.
- (2) This section is a guide only to the general scheme and effect of this subpart.

Compare: 1988 No 234 s 42R

452 What are civil remedy provisions

In this subpart, a **civil remedy provision** is—

- (a) a Part 2 misleading or deceptive conduct provision or exemption:
- (b) a Part 3 offer provision or exemption:
- (c) a Part 4 governance provision or exemption:
- (d) a Part 5 market provision or exemption:
- (e) an unsolicited offer provision or exemption:
- (f) a Part 6 licence provision or exemption:
- (g) section 446(1) (failing to comply with FMA's orders).

Compare: 1988 No 234 s 42S

Declarations of contravention and pecuniary penalty orders

453 When court may make declarations of contravention

- (1) The court may, on the application of the FMA or any other person, make a declaration of contravention if it is satisfied that a person has contravened a civil remedy provision.
- (2) The court may also make a declaration of contravention under section 456(1)(b).

454 Purpose and effect of declarations of contravention

- (1) The purpose of a declaration of contravention is to enable an applicant for a compensatory order or other civil remedy order under section 467 to rely on the declaration of contravention in the proceedings for that order, and not be required to prove the contravention.
- (2) Accordingly, a declaration of contravention is conclusive evidence of the matters that must be stated in it under section 455.

Compare: 1988 No 234 s 42U

455 What declarations of contravention must state

A declaration of contravention must state the following:

- (a) the civil remedy provision to which the contravention relates or, if the contravention is of an exemption, both the term or condition contravened and the civil remedy provision to which the exemption relates; and
- (b) the person who engaged in the contravention; and
- (c) the conduct that constituted the contravention and, if a transaction constituted the contravention, the transaction; and
- (d) the issuer and any other offeror to which the conduct related (if relevant).

Compare: 1988 No 234 s 42V

456 When court may make pecuniary penalty orders

- (1) If the FMA applies for a pecuniary penalty order against a person under this Act, the court—
 - (a) must determine whether the person has contravened a civil remedy provision; and
 - (b) must make a declaration of contravention if it is satisfied that the person has contravened a civil remedy provision; and
 - (c) may order the person to pay a pecuniary penalty that the court considers appropriate to the Crown if it is satisfied that the person has contravened a civil remedy provision.

- (2) However, a pecuniary penalty order may not be made for a contravention of section 16 or 239.

Compare: 1988 No 234 s 42T

457 Maximum amount of pecuniary penalty

- (1) The maximum amount of a pecuniary penalty for a contravention of a civil remedy provision referred to in subsection (2) is the greater of—
- (a) the consideration for the transaction that constituted the contravention (if any); or
 - (b) 3 times the amount of the gain made, or the loss avoided, by the person who contravened the prohibition; or
 - (c) \$1 million in the case of a contravention by an individual or \$5 million in any other case.
- (2) The civil remedy provisions to which subsection (1) applies are—
- (a) a Part 2 misleading or deceptive conduct provision;
 - (b) a Part 3 offer provision (other than a provision specified in section 84(3));
 - (c) a Part 4 governance provision (other than a provision specified in section 208(3));
 - (d) a Part 5 market provision (other than a provision specified in section 368(3));
 - (e) a Part 6 licence provision (other than a provision specified in section 430(3));
 - (f) an unsolicited offer provision.
- (3) The maximum amount of a pecuniary penalty for a contravention of any other civil remedy provision is—
- (a) \$200,000 in the case of a contravention by an individual; or
 - (b) \$600,000 in any other case.

Compare: 1988 No 234 s 42W

458 Guidance for court on how to determine gains made or losses avoided for purposes of maximum amount

- (1) For the purposes of section 457(1)(b), a person must be treated as—
- (a) making a gain if the person acquires a financial product for less than its value:

- (b) avoiding a loss if the person disposes of a financial product for more than its value.
- (2) In this case, the gain made or loss avoided is the difference between the consideration paid or received (as the case may be) and the value the financial product would have had at the time of the sale if,—
 - (a) in the case of a contravention of any of sections 219 to 221, the material information had been generally available to the market; or
 - (b) in the case of a contravention of section 240 or 243, the conduct, statement, or information had not been misleading, deceptive, or false; or
 - (c) in any other case, the contravention had not occurred.
- (3) This section does not—
 - (a) limit the circumstances in which the court may find that a person has made a gain or avoided a loss; or
 - (b) prevent the court from finding that the amount of the gain made, or the loss avoided, by a person exceeds an amount calculated under this section.

Compare: 1988 No 234 s 42X

459 Considerations for court in determining pecuniary penalty

In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—

- (a) any purpose stated in this Act that applies to the civil remedy provision; and
- (b) the nature and extent of the contravention; and
- (c) the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand's financial markets because of the contravention; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in contravention, because of the contravention; and
- (e) the circumstances in which the contravention took place; and
- (f) whether or not the person in contravention has previously been found by the court in proceedings under this

Act, or any other enactment, to have engaged in any similar conduct; and

- (g) the relationship of the parties to the transaction constituting the contravention.

Compare: 1988 No 234 s 42Y

460 Court must order that recovery from pecuniary penalty be applied to FMA's actual costs

If the court orders that a person pay a pecuniary penalty, the court must also order that the penalty must be applied first to pay the FMA's actual costs in bringing the proceedings.

Compare: 1988 No 234 s 42Z

Compensatory orders

461 When court may make compensatory orders

- (1) The court may make a compensatory order, on application by the FMA or any other person, if the court is satisfied that—
 - (a) there is a contravention of a civil remedy provision; and
 - (b) a person (the **aggrieved person**) has suffered, or is likely to suffer, loss or damage because of the contravention.
- (2) The court may make a compensatory order whether or not the aggrieved person is a party to the proceedings.

Compare: 1988 No 234 s 42ZA

462 Terms of compensatory orders

- (1) If section 461 applies, the court may make any order it thinks just to compensate an aggrieved person in whole or in part for the loss or damage, or to prevent or reduce the loss or damage, referred to in that section.
- (2) An order under this section may include an order to direct the relevant person to pay to the aggrieved person the amount of the loss or damage (in whole or in part).
- (3) Subsection (2) does not limit subsection (1).
- (4) In this section, **relevant person** means,—
 - (a) the person in contravention; or

- (b) in the case of a contravention of section 63 (defective disclosure in PDS or register entry), any 1 or more of the following:
 - (i) the offeror and every other person who contravened section 63:
 - (ii) each director of the offeror at the time of the contravention:
 - (iii) the issuer:
 - (iv) an underwriter (but not a sub-underwriter) to the issue or sale who is named in the PDS or register entry with the underwriter's consent:
 - (v) if the contravention is caused by the inclusion of a statement in the PDS or register entry (statement A), a person named in the PDS or register entry with the person's consent as having made—
 - (A) statement A; or
 - (B) another statement on which statement A is based; or
- (c) in the case of a contravention of section 83 (defective ongoing disclosure), any 1 or more of the following:
 - (i) the issuer and every other person who contravened section 83:
 - (ii) each director of the issuer at the time of the contravention:
 - (iii) if the contravention is caused by the inclusion of a statement in the document, information, or other matter made available under subpart 4 of Part 3 (statement A), a person named in the document, information, or other matter with the person's consent as having made—
 - (A) statement A; or
 - (B) another statement on which statement A is based; or
- (d) in the case of a contravention of section 409 (defective disclosure statement), any 1 or more of the following:
 - (i) the licensee and every other person who contravened section 409:
 - (ii) each director of the licensee at the time of the contravention:

- (iii) if the contravention is caused by the inclusion of a statement in the disclosure statement (statement A), a person named in the disclosure statement with the person's consent as having made—
 - (A) statement A; or
 - (B) another statement on which statement A is based; or
- (e) in the case of a contravention of clause 25 of Schedule 1 (defective disclosure document), any 1 or more of the following:
 - (i) the person who provides the disclosure document and every other person who contravened clause 25;
 - (ii) each director of the person who provides the disclosure document at the time of the contravention;
 - (iii) if the contravention is caused by the inclusion of a statement in the disclosure document (statement A), a person named in the document with the person's consent as having made—
 - (A) statement A; or
 - (B) another statement on which statement A is based.
- (5) Subsection (4)(b) to (e) apply even if the person did not commit the contravention.
Compare: 1988 No 234 s 42ZB

Special provisions relating to compensation for defective disclosure

463 Person treated as suffering loss or damage in case of defective disclosure

- (1) This section applies if—
 - (a) a person (A)—
 - (i) acquires financial products under an offer that contravenes section 63; or
 - (ii) acquires financial products, or makes further contributions or deposits in respect of financial products, after the issuer of the financial products contravenes section 83; or

- (iii) acquires financial products under an offer where the offeror contravenes clause 25 of Schedule 1 in relation to that offer; and
 - (b) the relevant statement, omission, or circumstance is materially adverse from the point of view of an investor; and
 - (c) the financial products, contributions, or deposits referred to in paragraph (a) have declined in value after the contravention referred to in paragraph (a).
- (2) A must be treated as having suffered loss or damage because of the contravention unless it is proved that the decline in value was caused by a matter other than the relevant statement, omission, or circumstance.
- (3) In this section, the **relevant statement, omission, or circumstance** is, as the case may be,—
 - (a) the statement that is false or misleading or is likely to be false or misleading referred to in section 63(1)(a) or 83(1)(a) or clause 25(1)(a) of Schedule 1; or
 - (b) the omission referred to in section 63(1)(b) or 83(1)(b) or clause 25(1)(b) of Schedule 1; or
 - (c) the circumstance referred to in section 63(1)(c).
- (4) This section does not limit section 462.

464 Application of defences

Sections 465 and 466 apply to a contravention of section 63 or 83 or clause 25 of Schedule 1.

465 Due diligence defence

- (1) A person is not liable under section 462 because of a misleading or deceptive statement in a relevant disclosure if the person proves that the person—
 - (a) made all inquiries that were reasonable in the circumstances; and
 - (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.
- (2) A person is not liable under section 462 because of an omission from a relevant disclosure in relation to a particular matter if the person proves that the person—

- (a) made all inquiries that were reasonable in the circumstances; and
 - (b) after doing so, believed on reasonable grounds that there was no omission from the relevant disclosure in relation to that matter.
- (3) In this section and section 466, **relevant disclosure** means,—
- (a) in the case of section 63, a PDS or register entry;
 - (b) in the case of section 83, the disclosure under subpart 4 of Part 3;
 - (c) in the case of clause 25 of Schedule 1, the disclosure document.

Compare: Corporations Act 2001 s 731 (Aust)

466 General defences

- (1) A person is not liable under section 462 because of a misleading or deceptive statement in, or an omission from, a relevant disclosure if the person proves that the person placed reasonable reliance on information given to the person by,—
- (a) if the person is a body corporate, a person other than a director, an employee, or an agent of the body corporate; or
 - (b) if the person is an individual, a person other than an employee or agent of the individual.
- (2) For the purposes of subsection (1), a person is not the agent of a body corporate or an individual merely because the person performs a particular professional or advisory function for the body corporate or individual.
- (3) Subsection (4) applies to a person who is named in a relevant disclosure as—
- (a) being an underwriter; or
 - (b) making a statement included in the relevant disclosure; or
 - (c) making a statement on the basis of which a statement is included in the relevant disclosure.
- (4) The person is not liable under section 462 because of a misleading or deceptive statement in, or an omission from, a relevant disclosure if the person proves that the person publicly

withdrew the person's consent to being named in the relevant disclosure.

- (5) A person is not liable under section 462 because of a circumstance that has arisen since the PDS was lodged if the person proves that the person was not aware of the matter.

Compare: Corporations Act 2001 s 733 (Aust)

Other civil remedy orders

467 When court may make other civil remedy orders

The court may, on application by the FMA or any other person, make a civil remedy order described in section 468 if the court is satisfied that a person has contravened or intends to contravene a civil remedy provision.

Compare: 1988 No 234 s 42ZE

468 Terms of other civil remedy orders

A civil remedy order under section 467 may—

- (a) direct the person in contravention to refund money or return property to a person who has suffered, or is likely to suffer, loss or damage because of the contravention (the **aggrieved person**):
- (b) if an agreement has been entered into between the person in contravention and the aggrieved person,—
 - (i) vary the agreement or any collateral arrangement as specified in the order and, if the court thinks fit, declare the agreement or arrangement to have had effect as so varied on and after a date before the order was made, as specified in the order:
 - (ii) cancel the agreement and, if the court thinks fit, declare the cancellation to have had effect on and after a date before the order was made, as specified in the order:
 - (iii) require the person in contravention to take any action the court thinks fit to reinstate the parties as near as may be possible to their former positions:
- (c) restrain the exercise of rights attaching to financial products, or the exercise of relevant interests, or declare

an exercise of those rights or relevant interests to be void and of no effect:

- (d) restrain the issue or transfer of financial products or restrain any distribution due in relation to financial products:
- (e) restrain the acquisition or disposal of financial products or of relevant interests or restrain the registration of any transfer of that kind:
- (f) direct the disposal of financial products or of relevant interests (including the person or class of person to which the products or interests must, or must not, be disposed of) and direct the payment of the proceeds of any disposal:
- (g) require financial products to be forfeited and require the issuer to cancel the forfeited financial products:
- (h) cancel an agreement for the acquisition or disposal of financial products or relevant interests.

Compare: 1988 No 234 s 42ZF

Interrelationship of civil remedies

469 More than 1 civil remedy order may be made for same conduct

The court may make a civil remedy order of one kind against a person even though the court has made another civil remedy order of a different kind against the person for the same conduct.

Examples

The court may make a compensatory order and a pecuniary penalty order for the same conduct.

The court may make a civil remedy order requiring forfeiture of financial products and declaring a previous exercise of voting rights attaching to those products to be void.

Compare: 1988 No 234 s 42ZG

470 Only 1 pecuniary penalty order may be made for same conduct

If conduct by a person constitutes a contravention of 2 or more civil remedy provisions, proceedings may be brought against

that person for the contravention of any 1 or more of the provisions, but no person is liable to more than one pecuniary penalty order for the same conduct.

Compare: 1988 No 234 s 42ZH

471 No pecuniary penalty and fine for same conduct

A person cannot be ordered to pay a pecuniary penalty and be liable for a fine under this Act for the same conduct.

Compare: 1978 No 103 s 65F; 1988 No 234 s 43ZC

General

472 Rules of civil procedure and civil standard of proof apply to civil remedies

The proceedings under this subpart are civil proceedings and the usual rules of the court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).

Compare: 1988 No 234 s 42ZI

Subpart 4—Offences

General provision relating to offences

473 General provision relating to offences

- (1) Sections 474 to 477 apply to tier 1 infringement offences.
- (2) A person who commits a tier 2 offence is liable, on summary conviction,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 3 years, a fine not exceeding \$200,000, or both; and
 - (b) in any other case, to a fine not exceeding \$600,000.
- (3) A person who commits a tier 3 offence is liable, on summary conviction,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 5 years, a fine not exceeding \$500,000, or both; and
 - (b) in any other case, to a fine not exceeding \$2,500,000.
- (4) A person who commits a tier 4 offence is liable, on summary conviction,—

- (a) in the case of an individual, to imprisonment for a term not exceeding 10 years, a fine not exceeding \$1 million, or both; and
- (b) in any other case, to a fine not exceeding \$5 million.

Infringement offences

474 Infringement offences

- (1) If a person is alleged to have committed a tier 1 infringement offence, that person may either—
 - (a) be proceeded against summarily for the alleged offence under the Summary Proceedings Act 1957; or
 - (b) be served with an infringement notice as provided in section 475.
- (2) If the person is proceeded against under subsection (1)(a), the person is liable, on being found guilty of, or pleading guilty to, the offence, to a fine not exceeding \$50,000.
- (3) Despite section 21 of the Summary Proceedings Act 1957, leave of a District Court Judge or a Registrar of a court to lay an information is not necessary where the FMA proceeds with a tier 1 infringement offence summarily.

475 Infringement notices

- (1) The FMA may issue an infringement notice to a person if the FMA believes on reasonable grounds that the person is committing, or has committed, a tier 1 infringement offence.
- (2) The FMA may revoke an infringement notice before the infringement fee is paid, or an order for payment of a fine is made or deemed to be made by a court under section 21 of the Summary Proceedings Act 1957.
- (3) An infringement notice is revoked by giving written notice to the person to whom it was issued that the notice is revoked.

476 Procedural requirements for infringement notices

- (1) An infringement notice may be served on a person—
 - (a) by delivering it, or a copy of it, personally to the person who appears to have committed the tier 1 infringement offence; or

- (b) by sending it, or a copy of it, by post, addressed to the person at the person's last known place of residence or business.
- (2) An infringement notice sent under subsection (1)(b) must be treated as having been served on the person on the date it was posted.
- (3) An infringement notice must be in the prescribed form and must contain—
 - (a) details of the alleged tier 1 infringement offence that are sufficient to fairly inform a person of the time, place, and nature of the alleged offence; and
 - (b) the amount of the infringement fee; and
 - (c) an address at which the infringement fee may be paid; and
 - (d) the time within which the infringement fee must be paid; and
 - (e) a summary of the provisions of section 21(10) of the Summary Proceedings Act 1957; and
 - (f) a statement that the person served with the notice has a right to request a hearing; and
 - (g) a statement of what will happen if the person served with the notice does not pay the fee and does not request a hearing; and
 - (h) any other prescribed matters.
- (4) If an infringement notice has been issued, proceedings in respect of the tier 1 infringement offence to which the notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act 1957 and, in that case,—
 - (a) reminder notices may be prescribed; and
 - (b) in all other respects, section 21 of the Summary Proceedings Act 1957 applies with all necessary modifications.
- (5) Reminder notices must contain the prescribed information.

477 Payment of infringement fee

The FMA must pay all infringement fees received into a Crown Bank Account.

Offence of knowingly or recklessly contravening various provisions relating to disclosure

478 Offence of knowingly or recklessly contravening prohibition on further offers where defective disclosure in PDS or register entry

A person who contravenes section 63 commits a tier 4 offence if—

- (a) the person—
 - (i) knows that the statement referred to in section 63(1)(a) is misleading or deceptive or is likely to mislead or deceive; or
 - (ii) knows that information has been omitted as referred to in section 63(1)(b); or
 - (iii) knows of a circumstance of a kind referred to in section 63(1)(c); or
 - (iv) is reckless as to any of the matters referred to in subparagraph (i), (ii), or (iii); and
- (b) the statement referred to in paragraph (a)(i), the omission referred to in paragraph (a)(ii), or the circumstance referred to in paragraph (a)(iii) (as the case may be) is materially adverse from the point of view of an investor.

479 Offence of knowingly or recklessly contravening other provisions relating to defective disclosure

A person who contravenes section 83 or 409 or clause 25 of Schedule 1 commits a tier 3 offence if—

- (a) the person—
 - (i) knows that the statement referred to in section 83(1)(a) or 409(1)(a)(i) or clause 25(1)(a) of Schedule 1 (as the case may be) is misleading or deceptive or is likely to mislead or deceive; or
 - (ii) knows that information has been omitted as referred to in section 83(1)(b) or 409(1)(a)(ii) or clause 25(1)(b) of Schedule 1 (as the case may be); or
 - (iii) is reckless as to any of the matters referred to in subparagraph (i), (ii), or (iii); and

- (b) the statement referred to in paragraph (a)(i), the omission referred to in paragraph (a)(ii), or the circumstance referred to in paragraph (a)(iii) (as the case may be) is materially adverse from the point of view of an investor.

Subpart 5—Management bans

480 When court may make management banning orders

- (1) The court may, on application by an entitled person, make a management banning order against a person (A) if—
 - (a) a pecuniary penalty order has been made against A under this Act; or
 - (b) A has been convicted of an offence under any Act referred to in Part 1 of Schedule 1 of the Financial Markets Authority Act 2011; or
 - (c) A has been convicted of an offence under any Act referred to in Part 2 of Schedule 1 of the Financial Markets Authority Act 2011 (where A is, or has been, a financial markets participant); or
 - (d) A has, while a director of an entity,—
 - (i) persistently contravened any Act specified in Part 1 of Schedule 1 of the Financial Markets Authority Act 2011; or
 - (ii) persistently contravened any Act specified in Part 2 of Schedule 1 of the Financial Markets Authority Act 2011 (where A is, or has been, a financial markets participant); or
 - (iii) if the entity has persistently contravened any of the Acts referred to in paragraph (d)(i) or (ii), persistently failed to take all reasonable steps to obtain compliance with those Acts; or
 - (e) A has been convicted of a crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961 (where A is, or has been, a financial markets participant); or
 - (f) A has been prohibited in an overseas jurisdiction from carrying on activities that the court is satisfied are substantially similar to any of the activities referred to in section 481 in connection with a contravention of any

- law relating to the offering or trading of financial products or the supply of financial services.
- (2) Subsection (1)(d)(iii) applies in respect of the Acts specified in Part 2 of Schedule 1 of the Financial Markets Authority Act 2011 only if the entity is, or has been, a financial markets participant.
- (3) An **entitled person** is—
- (a) the FMA;
 - (b) an entity that—
 - (i) A is a director of at the time of the application; or
 - (ii) A was a director of at the time of the ground that triggers the making of the order under subsection (1);
 - (c) the liquidator of an entity referred to in paragraph (b);
 - (d) a person who is, or has been, a product holder or creditor of an entity referred to in paragraph (b).
- (4) An application under this section may be made in the course of any civil or criminal proceedings or at any other time.
- (5) In this subpart, **director**—
- (a) has the same meaning as in section 6(1); and
 - (b) includes, in relation to an entity,—
 - (i) a person in accordance with whose directions or instructions a person referred to in paragraph (a) may be required or is accustomed to act; and
 - (ii) a person in accordance with whose directions or instructions the board or other governing body of the entity may be required or is accustomed to act; and
 - (iii) a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution, or the rules or other documents constituting or defining the constitution, of the entity, would fall to be exercised by the board or other governing body of the entity; and
 - (iv) a person to whom a power or duty of the board or governing body of the entity has been directly delegated by the board or governing body with that person's consent or acquiescence, or who

exercises the power or duty with the consent or acquiescence of the board or governing body.

Compare: 1978 No 103 s 60A; 1988 No 234 s 43F

481 Terms of management banning orders

A management banning order may, permanently or for a period specified in the order, prohibit or restrict the person (without the leave of the court) from being a director or promoter of, or in any way (whether directly or indirectly) being concerned or taking part in the management of, an entity (other than an overseas company, or other entity, that does not carry on business in New Zealand).

Compare: 1978 No 103 s 60B; 1988 No 234 s 43G

482 Offence of contravening management banning order

An individual who contravenes a management banning order under this subpart commits a tier 2 offence.

Compare: 1978 No 103 s 60C; 1988 No 234 s 43H

483 Only 1 management banning order may be made for same conduct

If conduct by a person constitutes grounds for making an order under any 1 or more of this subpart, section 44F of the Takeovers Act 1993, and section 383 of the Companies Act 1993, proceedings may be brought against that person under any 1 or more of those provisions, but no person is liable to more than 1 order under those provisions for the same conduct.

Compare: 1978 No 103 s 60D; 1988 No 234 s 43J

484 General provisions for banning orders

(1) A Registrar of the court must, as soon as practicable after the making of a management banning order by the court under this subpart,—

- (a) give notice to the Registrar of Companies, the Registrar of Financial Service Providers, and the FMA that the order has been made; and

- (b) give notice in the *Gazette* of the name of the person against whom the order is made and the period or dates for which the ban applies.
 - (2) A person intending to apply for the leave of the court under section 481 must give to the FMA not less than 10 working days' written notice of that person's intention to apply.
 - (3) The FMA, and any other persons that the court thinks fit, may attend and be heard at the hearing of the application.
- Compare: 1978 No 103 s 60F; 1988 No 234 s 43O

**Subpart 6—Orders to protect interests
of aggrieved persons in case of financial
markets investigations or proceedings**

**485 When court may make order to protect interests of
aggrieved persons**

- (1) This section applies if—
 - (a) an investigation is being carried out under the Financial Markets Authority Act 2011 in relation to an act or omission by a person that—
 - (i) constitutes or may constitute a contravention of any Act specified in Part 1 of Schedule 1 of the Financial Markets Authority Act 2011; or
 - (ii) constitutes or may constitute a contravention of any Act specified in Part 2 of Schedule 1 of the Financial Markets Authority Act 2011 (where the person is, or has been, a financial markets participant); or
 - (iii) may result in a prosecution or civil proceedings of the kind referred to in any of paragraphs (b) to (d) being begun against the person; or
 - (b) a prosecution has begun against a person for a contravention of—
 - (i) any Act specified in Part 1 of Schedule 1 of the Financial Markets Authority Act 2011; or
 - (ii) any Act specified in Part 2 of Schedule 1 of the Financial Markets Authority Act 2011 (where the person is, or has been, a financial markets participant); or

- (c) civil proceedings have begun against a person under, or in respect of,—
- (i) any Act specified in Part 1 of Schedule 1 of the Financial Markets Authority Act 2011; or
 - (ii) any Act specified in Part 2 of Schedule 1 of the Financial Markets Authority Act 2011 (where the person is, or has been, a financial markets participant); or
- (d) civil proceedings have begun against a person that, in connection with the offer, issue, transfer, supply, or use of financial products or financial services, seek damages or other relief for fraud, negligence, default, breach of duty, or other misconduct.
- (2) The court may, on application by the FMA or by an aggrieved person, make 1 or more of the orders listed in section 486 if the court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person.
- (3) In this section and section 486,—
- aggrieved person** means any person to whom a relevant person is liable
- associate** means an associated person of the relevant person
- civil proceedings** means proceedings in a court (other than criminal proceedings)
- liable** means liable, or may be or become liable, to pay money (whether in respect of a debt, by way of damages or compensation, or otherwise) or to account for financial products or other property
- relevant person** means a person referred to in subsection (1).

Compare: 1978 No 103 s 60G; 1988 No 234 s 43P

486 What orders may be made

- (1) The orders that may be made under this subpart are—
- (a) an order prohibiting the relevant person from transferring, charging, or otherwise dealing with money, financial products, or other property held or controlled by the relevant person:

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- (b) an order prohibiting a person who is indebted to the relevant person, or to an associate, from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the relevant person or associate:
 - (c) an order prohibiting a person who holds money, financial products, or other property on behalf of the relevant person, or on behalf of an associate, from paying all or any of the money, or transferring, or otherwise parting with possession of, the financial products or other property, to, or to another person at the direction or request of, the person on whose behalf the money, financial products, or other property, is or are held:
 - (d) an order prohibiting the taking or sending out of New Zealand by a person of money of the relevant person or of an associate:
 - (e) an order prohibiting the taking, sending, or transfer by a person of financial products or other property of the relevant person or of an associate from a place in New Zealand to a place outside New Zealand (including the transfer of financial products from a register in New Zealand to a register outside New Zealand):
 - (f) an order requiring the relevant person, or any person holding money, financial products, or other property on behalf of the relevant person or an associate, to pay or transfer money, financial products, or other property to a specified person to be held on trust pending determination of the investigation, prosecution, or civil proceedings referred to in section 485(1):
 - (g) an order appointing,—
 - (i) if the relevant person is an individual, a receiver or trustee, having any powers that the court orders, of the property or of part of the property of that person; or
 - (ii) if the relevant person is a body corporate, a receiver or receiver and manager, having any powers that the court orders, of the property or of part of the property of that person:

- (h) an order removing a person from being a manager of a managed investment scheme to which the investigation, prosecution, or civil proceedings referred to in section 485(1) relates:
 - (i) an order appointing a person as the manager of a managed investment scheme to which the investigation, prosecution, or civil proceedings referred to in section 485(1) relates (with any powers, rights, and obligations that the court orders):
 - (j) if the relevant person is an individual, an order requiring that person to deliver up to the court his or her passport and any other documents that the court thinks fit:
 - (k) if the relevant person is an individual, an order prohibiting that person from leaving New Zealand without the consent of the court.
- (2) A reference in subsection (1)(e) or (g) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example,—
- (a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or
 - (b) in a fiduciary capacity.
- (3) An order may be expressed to operate for a specified period or until the order is discharged by a further order under this section.

Compare: 1978 No 103 s 60H; 1988 No 234 s 43Q

487 Interim orders

- (1) If an application is made to the court for an order under section 485, the court may, if in the opinion of the court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.
- (2) The court must not require the FMA, as a condition of making an interim order, to give an undertaking as to damages.
- (3) In determining the FMA's application for the grant of an interim order, the High Court must not take into account that the FMA is not required to give an undertaking as to damages.

Compare: 1978 No 103 s 60I; 1988 No 234 s 43R

488 Relationship with other law

Nothing in this subpart affects the powers that the court has apart from this subpart.

Compare: 1978 No 103 s 60J; 1988 No 234 s 43S

Subpart 7—Indemnities or insurance for
directors, employees, and auditors of issuers
and offerors

489 General prohibition on indemnities or insurance for directors, employees, and auditors of issuer or offeror

- (1) A specified person must not indemnify, or directly or indirectly effect insurance for, a director, employee, or auditor of the specified person in respect of—
 - (a) liability for any negligence, default, breach of duty, or breach of trust in his or her capacity as a director, employee, or auditor; or
 - (b) costs incurred by that director, employee, or auditor in defending or settling any claim or proceeding relating to that liability.
- (2) In this subpart, **specified person** means—
 - (a) an issuer of financial products offered under a regulated offer; or
 - (b) an offeror of financial products offered under a regulated offer.
- (3) An indemnity given in breach of this section is void.
- (4) This section is subject to sections 490 and 491.
- (5) A person who contravenes this section commits a tier 1 infringement offence.

Compare: 1978 No 103 s 61

490 Permitted indemnities for certain costs of directors, employees, and auditors of issuers or offerors

- (1) A specified person may indemnify a director, employee, or auditor of the specified person for—
 - (a) any costs incurred by him or her in defending or settling a proceeding that relates to liability of a kind referred to in section 489(1)(a) if—

- (i) judgment is given in his or her favour or if he or she is acquitted; or
 - (ii) the proceeding is discontinued; or
 - (b) any costs incurred by him or her in connection with an application under section 489 in which he or she is relieved from liability by the court.
- (2) This section does not limit section 162 of the Companies Act 1993.
- Compare: 1978 No 103 s 61A

491 Permitted insurance for certain liability of directors and employees of issuer or offeror

- (1) A specified person may effect insurance for a director or an employee of the specified person in respect of—
- (a) liability (other than criminal liability) of a kind referred to in section 489(1)(a); or
 - (b) costs incurred by that director or employee in defending or settling any proceeding relating to that liability; or
 - (c) costs incurred by that director or employee in defending any criminal proceedings—
 - (i) that have been brought against the director or employee in relation to any act or omission in his or her capacity as a director or employee; and
 - (ii) in which he or she is acquitted.
- (2) The directors of the specified person who vote in favour of authorising the insurance under subsection (1) must sign a certificate stating that, in their opinion, the cost of effecting the insurance is fair to the specified person.
- (3) The director or employee who is insured is personally liable to the specified person for the cost of effecting insurance if—
- (a) subsection (2) has not been complied with in effecting the insurance; or
 - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (2).
- (4) However, subsection (3) does not apply to the extent that the director or employee proves that the insurance was fair to the specified person at the time the insurance was effected.

- (5) A certificate signed for the purposes of section 162(6) of the Companies Act 1993 is effective also for the purposes of subsection (2); but this section does not limit section 162 of the Companies Act 1993.

Compare: 1978 No 103 s 61B

492 Interpretation for this subpart

In this subpart,—

director includes a former director

effect insurance includes pay, whether directly or indirectly, the costs of the insurance

employee includes a former employee

indemnify includes relieve, exempt, or excuse from liability, whether before or after the liability arises.

Compare: 1978 No 103 s 61C

Subpart 8—Miscellaneous

493 Time for laying information for summary offences

- (1) Any information for an offence against this Act punishable on summary conviction may be laid at any time within 3 years after the date of the offence.
- (2) Subsection (1) applies despite section 14 of, or anything else to the contrary in, the Summary Proceedings Act 1957.

Compare: 1988 No 234 s 43U

494 Jurisdiction of courts in New Zealand

The High Court has exclusive jurisdiction to hear and determine proceedings in New Zealand under this Act, other than proceedings for offences.

Compare: 1978 No 103 s 65A

495 Orders to secure compliance

The court may, for the purpose of securing compliance with any other order it makes under this Act, direct a person to do or refrain from doing a specified act.

Compare: 1978 No 103 s 65C; 1988 No 234 s 43X

496 General provisions as to court's orders

- (1) A court order under this Act may be made on the terms and conditions the court thinks fit.
- (2) The court may revoke, vary, or suspend an order made under this Act on the terms and conditions the court thinks fit.

Compare: 1978 No 103 s 65E; 1988 No 234 s 43Z

497 Persons entitled to appear before court

The following persons are entitled to appear and be heard at the hearing of an application to the court taken under this Act:

- (a) the applicant;
- (b) a relevant issuer;
- (c) a person who is alleged to have suffered, or to be likely to suffer, loss or damage because of an alleged contravention (whether that person or another person makes the allegation);
- (d) the FMA;
- (e) any relevant licensed market operator;
- (f) a person directed to be given notice of the application;
- (g) with the leave of the court, any other person.

Compare: 1988 No 234 s 43ZA

498 State of mind of directors, employees, or agents attributed to body corporate or other principal

- (1) If, in proceedings under this Act in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, employee, or agent of the body corporate, acting within the scope of his or her actual or apparent authority, had that state of mind.
- (2) If, in a proceeding under this Act in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Act applies, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, acting within the scope of his or her actual or apparent authority, had that state of mind.

- (3) In this Act, **state of mind**, in relation to a person, includes the knowledge, intention, opinion, belief, or purpose of the person and the person's reasons for that intention, opinion, belief, or purpose.

Compare: 1986 No 5 s 90(1), (3)

499 Conduct of directors, employees, or agents attributed to body corporate or other principal

- (1) Conduct engaged in on behalf of a body corporate by any of the following must be treated, for the purposes of this Act, to have been engaged in also by the body corporate:
- (a) a director, employee, or agent of the body corporate, acting within the scope of his or her actual or apparent authority;
 - (b) any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, employee, or agent.
- (2) Conduct engaged in on behalf of a person other than a body corporate (**A**) by any of the following must be treated, for the purposes of this Act, to have been engaged in also by **A**:
- (a) an employee or agent of **A** acting within the scope of his or her actual or apparent authority; or
 - (b) any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of **A**, given within the scope of the actual or apparent authority of the employee or agent.

Compare: 1986 No 5 s 90(2), (4)

Part 8

Regulations and exemptions

Subpart 1—Regulations

500 Regulations for purposes of Part 3 (disclosure of offers of financial products)

The Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section

508(2), make regulations for all or any of the following purposes:

Product disclosure statements, register entries, and other matters relating to disclosure

- (a) regulating product disclosure statements and register entries including—
 - (i) prescribing the information that must, or must not, be contained in product disclosure statements or register entries; and
 - (ii) prohibiting or restricting the use in product disclosure statements or register entries of prescribed words, information, sounds, images, graphics, or other matters; and
 - (iii) prescribing requirements as to the layout or method of presentation of product disclosure statements (including the length of a PDS and of parts of a PDS, the size of type used, and when information may be incorporated by reference); and
 - (iv) prescribing circumstances and requirements for the purposes of sections 35(c), 39(3), 51(2), 62(4), 66(6), and 69(3)(e); and
 - (v) prescribing information or documents for the purposes of sections 44 and 74(1)(h)(ix); and
 - (vi) prescribing classes of persons for the purposes of section 55(1)(b) (consents for lodgement); and
 - (vii) prescribing matters for the purposes of section 65 (expiry dates); and
 - (viii) prescribing circumstances in which a register entry is not required for a regulated offer:
- (b) amending any of the dollar amounts specified in Schedule 1 (other than the amounts in clause 12 of that schedule (small offers)) by increasing those amounts:
- (c) providing for the matters referred to in clause 24 of Schedule 1, including prescribing the circumstances in which a disclosure document is required, the period within which the disclosure document must be provided, the information and documents to be contained,

or to accompany, a disclosure document, and the conditions that must be complied with:

Ongoing disclosure and updating of register of offers of financial products

- (d) prescribing changes that must be notified under section 80:
- (e) prescribing the documents, information, and other matters that must be made available under section 81 or 82, the times or events referred to in either of those sections, the persons referred to in section 81, and the manner of making the documents, information, and other matters available (including prescribing the manner in which the documents, information, or matters are to be presented, calculated, or prepared):

Miscellaneous

- (f) prescribing matters in connection with money for financial products that is held in trust:
- (g) prescribing, for the purposes of provisions of Part 3 that require money to be repaid with interest, the rate of interest:
- (h) prescribing matters for the purposes of the definitions of relevant purpose, relevant time, and transactions in clause 32 of Schedule 1:
- (i) prescribing kinds of category 2 products for the purposes of clause 18(c) of Schedule 1.

501 Regulations for purposes of Part 4 (governance of financial products)

- (1) The Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 508(2), make regulations for all or any of the following purposes:

Reporting to supervisor

- (a) prescribing the documents, information, and other matters that must be made available under subpart 2 or 3 of Part 4, the times or events referred to in either of those subparts, and the manner of making the documents, information, and other matters available (includ-

ing prescribing the manner in which the documents, information, or matters are to be presented, calculated, or prepared):

Particular types of schemes

- (b) prescribing, for registrations as particular types of schemes, additional application requirements:
- (c) prescribing other types of registered schemes, and any additional registration requirements applying to those types of schemes:

Contents of governing documents

- (d) prescribing the matters that must be contained in a trust deed for a debt security required for the purposes of Part 4:
- (e) prescribing provisions to be implied in a governing document (*see* subsection (2)):

Meetings of product holders

- (f) authorising a person to call meetings of product holders (whether in general, or at specified times or events or in connection with specified matters):
- (g) prescribing the methods of holding meetings, the quorum, and the other procedure to be followed in calling and conducting meetings of product holders (including providing for electronic voting by product holders) and providing for the making of written resolutions:

Custodians

- (h) prescribing the records that must be kept by a custodian for a registered scheme:

Management of registered scheme

- (i) prescribing matters relating to the reporting of limit breaks and pricing errors and non-compliances with pricing methodologies:
- (j) prescribing the steps that must be taken to remedy or restore the positions of current and former scheme participants and the registered scheme if there is a material pricing error or non-compliance (including whose position needs to be remedied or restored, when, and how, and any related obligations or other matters):

- (k) prescribing benefits or transactions that may be entered into without the consent of a supervisor under section 151 (on terms and conditions, if any):
 - Registers that must be kept by issuers*
 - (l) prescribing matters for the purposes of subpart 5 of Part 4, including—
 - (i) classes of financial products and circumstances for the purposes of section 189(2):
 - (ii) particulars for the purposes of section 190(1)(f):
 - (iii) circumstances for the purposes of section 193(2)(c):
 - (iv) purposes for the purposes of section 196(3)(a):
 - Miscellaneous*
 - (m) prescribing the form of, or information, statements, certificates, or documents that must, or must not, be contained in or attached to, any document or information required to be provided by or under Part 4:
 - (n) prescribing, for the purposes of provisions of Part 4 that require money to be repaid with interest, the rate of interest:
 - (o) requiring any matters prescribed by paragraph (a) to (c) to be provided for in accordance with the frameworks or methodologies specified in a notice issued by the FMA under subpart 4.
- (2) A provision prescribed for the purposes of subsection (1)(e), may, without limitation, do any of the following:
- (a) specify the duties and powers of the supervisor of the debt security or the scheme:
 - (b) specify the duties of the issuer of the debt security or the manager of the scheme.

502 Regulations for purposes of Part 5 (dealing in financial products on markets)

- (1) The Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 508(2), make regulations for all or any of the following purposes:

Insider conduct and market manipulation

- (a) exempting (on terms and conditions, if any) conduct from being—
 - (i) insider conduct, that is conduct that would otherwise fall within section 219, 220, or 221:
 - (ii) market manipulation, that is conduct that would otherwise fall within section 239, 240, or 243:

Substantial holding disclosure

- (b) prescribing further matters relating to a matter, a relevant event, or a substantial holding, that must be disclosed under subpart 5 of Part 5, which may include (without limitation)—
 - (i) the nature of the relevant interests in the substantial holding (including before and after the relevant event in the case of sections 254 and 255):
 - (ii) the number, nominal value (if any), and class of financial products in which the person has or had the substantial holding (including before and after the relevant event in the case of sections 254 and 255):
 - (iii) the date of the relevant event:
 - (iv) the terms and conditions (including consideration) of the transaction giving rise to the relevant event:
 - (v) details as to the circumstances in which the relevant event occurred:
 - (vi) the date of the last disclosure by the person under that subpart in respect of the substantial holding:
 - (vii) information relating to the relevant event or substantial holding and concerning other persons who have made disclosures under that subpart:
- (c) prescribing the documents, certificates, and statements that must accompany or be annexed to those disclosures:
- (d) determining when disclosure of the further matters referred to in paragraph (b) is required (including by requiring disclosure only on request):

- (e) prescribing the form of or for, and the method of, disclosure under that subpart (and of any other acknowledgments or notices required by the subpart) or providing for the relevant licensed market operator to determine that form or method and providing for the way in which it must do so:
- (f) exempting (on terms and conditions, if any) classes of persons, classes of transactions, or classes of relevant interests, substantial holdings, or relevant events from compliance with any provisions of that subpart or regulations made under any of paragraphs (b) to (e):
Directors' and senior managers' disclosure obligations
- (g) prescribing further matters relating to a relevant interest, or acquisition or disposal of a relevant interest, that must be disclosed by directors and senior managers under subpart 6 of Part 5, which may include (without limitation)—
 - (i) the nature of the relevant interest:
 - (ii) the number and class of financial products to which the relevant interest relates or related:
 - (iii) the date of the disclosure obligation becoming applicable, or the date of the acquisition or disposal:
 - (iv) the consideration paid or received for the acquisition or disposal:
 - (v) details as to the circumstances in which the acquisition or disposal occurred:
 - (vi) the date of the last disclosure by the director or senior manager:
- (h) determining when the disclosure in paragraph (g) is required (including by requiring disclosure only on request) and prescribing the form of or for, and the method of, disclosure or providing for the relevant licensed market operator to determine that form or method and for the way in which it must do so:
- (i) exempting (on terms and conditions, if any) classes of persons, classes of transactions, or classes of relevant interests, acquisitions, or disposals from compliance

with any provisions of that subpart or regulations made under paragraph (g) or (h):

Licensed markets

- (j) prescribing conduct that does not constitute a financial product market for the purposes of this Act:
- (k) exempting (on terms and conditions, if any) wholesale markets or other financial product markets from the operation of subpart 7 of Part 5:

Transfer of transferrable financial products

- (l) prescribing matters for the purposes of subpart 8 of Part 5, including—
 - (i) financial products to which that subpart does not apply:
 - (ii) forms for the purposes of that subpart:
 - (iii) information to be included in products transfers or brokers transfers:
 - (iv) persons for the purposes of paragraph (f) of the definition of authorised transaction in section 355(3):

Miscellaneous

- (m) requiring any matter prescribed in regulations under paragraph (j) or (k) to be calculated or determined by reference to the frameworks or methodologies specified in a notice issued by the FMA under subpart 4.
- (2) Before making a recommendation in relation to subsection (1)(j) the Minister must have regard to the matters set out in section 289.

503 Regulations for purposes of Part 6 (market services)

- (1) The Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 508(2), make regulations for all or any of the following purposes:

Issue of licences

- (a) prescribing matters relating to the issue of market services licences, including—
 - (i) eligibility criteria for licences (including requirements relating to competence, qualifications,

and experience, prudential requirements, and requirements relating to the business, operation, or management of an applicant):

- (ii) requirements that the applicant's directors, senior managers, and proposed directors and senior managers must satisfy:
- (iii) matters that the FMA must have regard to:
- (iv) persons or classes of persons with whom the FMA must consult:
- (v) information that must be included on the FMA's Internet site in respect of licences:

Conditions of licences

- (b) prescribing conditions that market services licences are subject to, the kinds of conditions that the FMA may impose on those licences, or matters to which conditions imposed by the FMA may relate, including (without limitation) providing for—
 - (i) conditions that regulate the manner in which licensed market services must be carried out under the licence:
 - (ii) conditions that impose prudential requirements on licensees or otherwise regulate the business, operation, or management of licensees (for example, requirements to have a credit rating or to maintain a minimum amount of capital, requirements relating to margins, or requirements relating to the receipt of money and property from clients):
- (c) stating whether a condition imposed on a market service licence by the regulations is a Part 6 licence obligation:

Reporting

- (d) prescribing matters relating to reports or other disclosure under subpart 3 of Part 6, including the times and events referred to in that subpart and the documents, information, or other matters that must be contained in the reports (including prescribing the manner in which the documents, information, or matters are to be presented, calculated, or prepared):

Disclosure obligations for licensees providing market services to retail investors

- (e) prescribing the information that must, or must not, be contained in disclosure statements for the purposes of subpart 4 of Part 6 (including prescribing the manner in which the documents, information, or matters are to be presented, calculated, or prepared):
- (f) prohibiting or restricting the use in those disclosure statements of prescribed words, information, sounds, images, graphics, or other matters:
- (g) prescribing requirements as to the form, layout, or method of presentation of those disclosure statements (including the length of the whole or any part of the statement, the size of type used, and when information may be incorporated by reference); and
- (h) determining when disclosure is required under that subpart (including by requiring disclosure only on request) and what minimum disclosure must be given:
- (i) regulating the combining of disclosure statements:

Requirement for licensees to provide certain market services under client agreements

- (j) prescribing the matters that must be contained in a client agreement required for the purposes of subpart 5 of Part 6:
- (k) prescribing provisions to be implied in a client agreement (*see* subsection (2)):

Provision of discretionary investment management services

- (l) prescribing matters relating to the reporting of limit breaks:

Miscellaneous

- (m) prescribing persons or classes of persons to whom notices under Part 6 must be given:
- (n) prescribing the circumstances referred to in section 405(2) or 408(1):
- (o) prescribing the benefits or transactions for the purpose of section 424.

- (2) A provision prescribed for the purposes of subsection (1)(j), may, without limitation, specify the duties of the licensee under the client agreement.

504 Other regulations

- (1) The Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with section 508(2), make regulations for all or any of the following purposes:

Definitions

- (a) providing for matters relating to terms defined in this Act, including—
- (i) exempting dealing from being dealings in financial products for the purposes of this Act:
 - (ii) declaring classes of services not to be financial services for the purposes of this Act:
 - (iii) prescribing services for the purposes of the definition of prescribed intermediary services:
 - (iv) declaring interests or rights not to be securities for the purposes of this Act:
 - (v) prescribing kinds of schemes and deposit products for the purposes of section 10(2)(c) and specifying conduct for the purposes of section 10(2)(c)(iv) (definitions relating to issue and issuer):

Schedule 3 schemes

- (b) prescribing the documents, information, and other matters that must be made prepared and provided under clause 6 of Schedule 3, the times or events referred to in that clause, and the manner of providing the documents, information, and other matters (including prescribing the manner in which the documents, information, or matters are to be presented, calculated, or prepared):

Registers

- (c) prescribing procedures, requirements, and other matters, not inconsistent with this Act, for any register kept under this Act, including matters that relate to—

- (i) the operation of the register:
- (ii) the form of the register:
- (iii) the information or documents to be contained in the register:
- (iv) access to the register:
- (v) search criteria for the register:
- (vi) circumstances in which amendments must be made to the register:

Enforcement

- (d) setting the infringement fee for each tier 1 infringement offence, which must not exceed \$20,000:
- (e) prescribing information to be included in infringement notices and reminder notices:

Fees and charges

- (f) prescribing fees and charges payable in respect of any matter under this Act or the manner in which fees and charges may be calculated:

Transitionals, savings, and orderly implementation of Act

- (g) providing that, subject to any conditions stated in the regulations, transitional or savings provisions prescribed by the regulations that relate to the implementation of this Act (in addition to any other transitional provisions in this Act) apply during the whole or any part of the transitional implementation period ending on [date]:
- (h) providing that, subject to any conditions stated in the regulations, specified provisions of this Act (including definitions), or provisions of other enactments amended or repealed by this Act, do not apply, or apply with modifications or additions, or both, during the whole or any part of the transitional implementation period ending on [date]:

General

- (i) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

- (2) The Minister must not recommend the making of regulations subsection (1)(g) or (h) unless the Minister is satisfied that the regulations—
 - (a) are necessary or desirable for the orderly implementation of this Act; and
 - (b) are consistent with the purposes of this Act.
- (3) Subsections (1)(g) and (h) and (2) to (4) are repealed on the close of [date].
- (4) Any regulations made under subsection (1)(g) and (h) that are in force on [date] are revoked on the close of that day.

505 Provisions relating to fees and charges

- (1) Regulations may authorise a person to whom a fee or charge is payable to refund or waive, in whole or in part and on any conditions that may be prescribed, payment of the fee or charge in relation to any person or class of persons.
- (2) A person to whom a prescribed fee or charge is payable may refuse to perform a function or exercise a power until the prescribed fee or charge is paid.
- (3) Any fee, charge, or other amount payable to a person under this Act is recoverable by the person in any court of competent jurisdiction as a debt due to the person.
- (4) This subpart does not limit section 67 of the Financial Markets Authority Act 2011.

506 Supplementary empowering provision

For the purposes of this Act, the power for regulations made to prescribe the manner in which a thing is done includes the power to—

- (a) prescribe when, where, and how the thing must be done;
- (b) prescribe the form that must be used in connection with doing the thing;
- (c) prescribe what information or other evidence or documents must be provided in connection with the thing;
- (d) prescribe requirements with which information, evidence, or documents that are provided in connection with the thing must comply:

- (e) prescribe that fees or charges must be paid in connection with doing the thing.

507 Regulations or exemptions may require compliance with generally accepted accounting practice, financial reporting standards, or FMA frameworks or methodologies

- (1) Regulations, or exemptions granted by the FMA, may require any person, class of persons, information, or class of information to comply with any of the following:
 - (a) generally accepted accounting practice either generally or in specified circumstances;
 - (b) a financial reporting standard;
 - (c) a notice issued under subpart 4.
- (2) Regulations or those exemptions may require compliance with generally accepted accounting practice, a financial reporting standard, or a notice issued under subpart 4—
 - (a) in whole or in part; and
 - (b) with modifications, additions, or variations specified in the regulations.
- (3) In this section,—
financial reporting standard has the same meaning as in section 2(1) of the Financial Reporting Act 1993
generally accepted accounting practice has the same meaning as in section 3 of the Financial Reporting Act 1993.

508 Miscellaneous provisions relating to regulations

- (1) Different matters may be prescribed, prohibited, restricted, specified, or required under the regulations in respect of different kinds or classes of financial products, services, persons, or other circumstances.
- (2) The Minister must consult with the FMA before making a recommendation under this subpart.

Subpart 2—Exemptions

509 FMA may grant exemptions

- (1) The FMA may, on the terms and conditions (if any) that it thinks fit, exempt any person or class of persons or any trans-

action or class of transactions from compliance with any provision or provisions of—

- (a) Parts 2 to 6; or
 - (b) any regulations.
- (2) Nothing in subpart 6 or 7 limits subsection (1).
- (3) Subpart 5 (general provision relating to FMA instruments) applies to an exemption granted under this section.

510 Restriction on FMA’s exemption power

The FMA must not grant an exemption under this subpart unless it is satisfied that—

- (a) granting the exemption is necessary or desirable in order to promote the main purposes of this Act as specified in section 3 or any of the additional purposes specified in section 4; and
- (b) the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption.

511 Exemption in force for not more than 5 years

An exemption granted under this subpart may continue in force for not more than 5 years (and at the close of the date that is 5 years after the exemption first comes into force, the exemption must be treated as having been revoked unless it is sooner revoked or expires).

Subpart 3—FMA’s designation power

512 FMA may designate financial products and offers

- (1) The FMA may—
- (a) declare that a security that would not otherwise be a financial product is a financial product of a particular kind;
 - (b) declare that a financial product is, or is to become, a financial product of a particular kind (whether or not it was previously a financial product of a different kind):

Example

A share is normally an equity security.

Example—*continued*

However, a particular type of share may have terms that mean that, in substance, the share is similar to a debt security.

The FMA may declare that a share of that kind is a debt security.

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- (c) declare that a security that would otherwise be a financial product of a particular kind is not a financial product:
 - (d) declare that an offer of financial products that would not otherwise require disclosure under Part 3 because of an exclusion under Part 1 of Schedule 1 does require disclosure under Part 3:

Example

A small offer is generally excluded from requiring disclosure (see clause 12 in Schedule 1).

However, an offer of a particular kind may involve significant risks for investors that may otherwise be undisclosed to investors.

The FMA may declare that disclosure under Part 3 is required despite the exclusion.

-
- (e) declare that the exception in section 370(3) does not apply to a person or class of persons (and, accordingly, those persons must be licensed under this Act to act as a provider of a discretionary investment management service):
 - (f) declare a person, service, or conduct as being not exempt under section 217(1)(a) to (g) (in relation to either subpart 5 or 6 of Part 5), under section 262 or 264 or 290.
- (2) A declaration may specify terms and conditions relating to—
- (a) the circumstances in which the declaration applies, including (without limitation) by reference to an issuer, a class of issuers, an offeror, a class of offerors, an offer, or a class of offers:
 - (b) transitional matters.

-
- (3) Nothing in this section prevents the FMA from granting an exemption under subpart 2 that applies to a financial product that is the subject of a declaration under this section.

Example

The FMA declares that a particular type of share (which would otherwise be an equity security) is to be a debt security. However, some of the regulatory requirements that relate to debt securities are inappropriate in respect of these shares. Accordingly, the FMA grants an exemption (on terms and conditions) from those requirements in order to customise the regulatory requirements that will apply.

- (4) Subpart 5 (general provision relating to FMA instruments) applies to a declaration under this section.

513 Procedural requirements

- (1) The FMA must not make a declaration under this subpart unless—
- (a) it is satisfied that the declaration is necessary or desirable in order to promote the main purposes of this Act specified in section 3 or any of the additional purposes specified in section 4; and
 - (b) in the case of section 512(1)(a) to (d), it has had regard to the economic substance of the relevant security; and
 - (c) it has consulted the persons or representatives of the persons that the FMA considers will be substantially affected by the declaration.
- (2) A failure to comply with subsection (1)(c) does not affect the validity of the declaration.

514 Transitional matters

A declaration under this subpart—

- (a) does not apply to financial products issued or transferred before the commencement of the declaration; and
- (b) applies subject to any terms and conditions of the declaration relating to transitional matters.

515 FMA may make interim orders pending exercise of powers

- (1) The FMA may make an interim order that no offers, issues, sales, or transfers of securities specified in the order may be made while the interim order is in force if—
 - (a) the FMA is considering, at any time, whether it may exercise a power under this subpart in respect of those securities; and
 - (b) the FMA considers that making an interim order is desirable in the public interest.
- (2) An order under subsection (1)—
 - (a) must specify the offeror or offerors to whom the order applies; and
 - (b) may require—
 - (i) all, or any specified class or classes, of the associated persons of the offeror or offerors to comply with the order (including associated persons that may be incorporated or formed after the date of the order); and
 - (ii) an offeror to provide a copy of the order to all or any of those associated persons.
- (3) For the purpose of subsection (2), the order is not required to refer to the associated persons by name.
- (4) The FMA—
 - (a) may act under subsection (1) or section 516(1)(b) without giving an offeror to which the order relates an opportunity to make submissions to, or be heard before, the FMA in respect of the matter; but
 - (b) must, after acting under subsection (1) or section 516(1)(b), give that offeror or that offeror's representative an opportunity to make written submissions and to be heard on the matter.
- (5) The FMA must, immediately after making the order, notify each of the following that the order has been made and the reasons for the order:
 - (a) each offeror to which the order relates;
 - (b) the Registrar if the order relates to a regulated offer.

516 Period in which interim order is in force

- (1) An interim order under section 515 is in force from the time at which it is made until the close of—
 - (a) the date that is 15 working days after the day on which it is made; or
 - (b) a later date specified by the FMA by notice to the offeror to which the order relates.
- (2) For the purposes of subsection (1)(b),—
 - (a) the FMA may specify a later date if the FMA is of the opinion that it is not reasonably practicable for it to complete its consideration as referred to in section 515(1)(a) within the 15-working-day period referred to in subsection (1)(a):
 - (b) the later date must be a date that is no more than 30 working days after the day on which the interim order is made.

Subpart 4—Frameworks or methodologies**517 FMA may specify frameworks or methodologies**

- (1) The FMA may issue a notice that specifies frameworks or methodologies relating to—
 - (a) the manner in which documents, information, or other matters that are to be made available under subpart 4 of Part 3 are to be presented, calculated, or prepared:
 - (b) the eligibility criteria for the issue of market services licences:
 - (c) the conditions that may be imposed on market services licences:
 - (d) any regulations that may be made under section 501(1)(a) to (c):
 - (e) any other matter that, by this Act, is required or permitted to be presented, calculated, prepared, or determined in accordance with frameworks or methodologies prescribed under this subpart.
- (2) A notice issued under this subpart applies only to the extent provided for in this Act or the regulations.
- (3) A notice issued by the FMA—

- (a) may specify different matters and requirements in respect of different kinds or classes of financial products, services, persons, or other circumstances:
 - (b) must not specify matters and requirements that are inconsistent with any regulations.
- (4) Subpart 5 (general provisions relating to FMA instruments) applies to a notice issued under this section.
Compare: 1978 No 103 s 54D

518 Consultation

- (1) The FMA must not issue a notice under this subpart unless the FMA has consulted the persons or representatives of the persons that the FMA considers will be substantially affected by the issue of the notice.
- (2) A failure to comply with subsection (1) does not affect the validity of the notice.
Compare: 1978 No 103 s 54E

Subpart 5—General provisions relating to certain FMA instruments

519 Application of subpart

This subpart applies to the following instruments:

- (a) notices issued under section 49:
- (b) exemptions granted under subpart 2:
- (c) declarations made under subpart 3:
- (d) notices issued under subpart 4.

520 Status and publication of instruments

- (1) An instrument to which this subpart applies is a regulation for the purposes of the Regulations (Disallowance) Act 1989.
- (2) The following instruments are regulations for the purposes of the Acts and Regulations Publication Act 1989:
 - (a) a notice issued under section 49:
 - (b) a class exemption:
 - (c) a class declaration.
- (3) An instrument to which this subpart applies that is not referred to in subsection (2) must, as soon as practicable after it is made, be—

- (a) published on an Internet site maintained by or on behalf of the FMA; and
 - (b) notified in the *Gazette*; and
 - (c) made available in printed form for purchase on request by members of the public.
- (4) A notification in the *Gazette* for the purpose of subsection (3)(b) does not have to include the text of the instrument.
- (5) The FMA's reasons for making an instrument (including why the instrument is appropriate) must be published together with the instrument.
- (6) In this subpart—
- class declaration—**
- (a) means a declaration under subpart 3 that is of general application and that applies to a class of persons or a class of transactions; but
 - (b) does not include a declaration under that subpart in relation to financial products issued or offered by a particular person or persons associated with a particular person
- class exemption—**
- (a) means an exemption granted under subpart 2 that is of general application and that applies to a class of persons or a class of transactions; but
 - (b) does not include an exemption granted under that subpart in relation to—
 - (i) a particular person or transaction; or
 - (ii) persons associated with, or transactions involving, a particular person.

521 Variation and revocation

The FMA may vary or revoke an instrument to which this subpart applies in the same way as it may make the instrument.

Subpart 6—Recognition and application regimes

522 Purpose of this subpart

The purpose of this subpart is to enable recognition and application regimes to be implemented that—

- (a) provide for exemptions from Parts 3 and 4 and the regulations so that issuers may offer financial products in New Zealand in accordance with the securities laws of designated countries:
- (b) extend the territorial scope of Parts 3 and 4 and the regulations so that offerors may offer financial products in designated countries in accordance with New Zealand laws, and investors in those countries may rely on and enforce those laws:
- (c) provide for enforcement in New Zealand of fines and pecuniary penalties imposed for breaches of securities laws of designated countries.

Compare: 1978 No 103 s 71

523 Definition of country in this subpart

In this subpart, **country** includes a state, a territory, a country, or a group of countries in respect of which a single securities law, or set of laws, is in force.

Compare: 1978 No 103 s 72

Exemption from Parts 3 and 4 and regulations for New Zealand offers under recognition regime

524 Exemption from Parts 3 and 4 and regulations for New Zealand offers under recognition regime

- (1) A provision of Parts 3 and 4 or the regulations does not apply to a financial product offered to a person in New Zealand if—
 - (a) a recognition regime set out in regulations made under section 525 applies to the product; and
 - (b) the recognition regime provides an exemption from that provision for the product; and
 - (c) the offeror of the product has opted into the recognition regime; and
 - (d) any other preconditions of the recognition regime are met.
- (2) For the purposes of subsection (1), an offeror opts into a recognition regime in respect of a product by notifying the Registrar—

- (a) that an offer of the financial product is to be made under the recognition regime; and
 - (b) of the full name and address in New Zealand of 1 or more persons resident or incorporated in New Zealand who are authorised to accept service in New Zealand at that address of documents on behalf of the offeror.
- (3) The Registrar must send a copy of the notification to the FMA.
Compare: 1978 No 103 s 73

525 Power to exempt from Parts 3 and 4 and regulations under recognition regime

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations, for the purpose of implementing a recognition regime for a designated country, that provide for—
- (a) exemptions from provisions of Parts 3 and 4 and the regulations; and
 - (b) the other matters set out in section 526.
- (2) The Minister may recommend making an Order in Council under this section only—
- (a) if he or she is satisfied that it is in the public interest after having regard to—
 - (i) the securities laws of the designated country; and
 - (ii) the interests of New Zealand investors; and
 - (b) after consulting with the FMA.

Compare: 1978 No 103 s 74

526 Matters that must be stated in regulations implementing recognition regime

- (1) The regulations made under section 525 must state—
- (a) the country to which the recognition regime applies; and
 - (b) the classes of financial products to which the recognition regime applies (whether by reference to type of issuer, offeror, offer, or any other matter); and
 - (c) the exemptions from provisions of Parts 3 and 4 and the regulations for those products; and
 - (d) the preconditions that must be met for the recognition regime to apply, for example (without limitation), requiring specified information relating to the offer or fi-

- financial products to be provided to the FMA or Registrar; and
- (e) the terms and conditions that must be complied with under the recognition regime, for example (without limitation), requiring—
 - (i) the offer of the financial products to be made in accordance with specified provisions of the designated country's laws:
 - (ii) warnings to be given to investors so as to inform them that the offer of the financial products is regulated under the designated country's laws and that New Zealand laws relating to the offer of financial products do not apply to the offer:
 - (iii) specified information relating to the offer or financial products to be provided to the FMA or Registrar.
- (2) Regulations may provide different exemptions, preconditions, and terms and conditions for different classes of financial products, offers, persons, or circumstances.

Compare: 1978 No 103 s 75

527 Offence for breach of regulations implementing recognition regime

If there is a contravention, in respect of a financial product, of a term or condition that must be complied with under a recognition regime, each of the following persons commits a tier 1 infringement offence:

- (a) the offeror of the financial product; and
- (b) every person who is a director of the offeror at the time of the contravention; and
- (c) every promoter of the financial product; and
- (d) every person who has authorised himself or herself to be named and is named in any advertisement relating to the financial product as a director of the offeror or as having agreed to become a director either immediately or after an interval of time.

Compare: 1978 No 103 s 76

Extension of Parts 3 and 4 and regulations to overseas offers under application regime

528 Extension of Parts 3 and 4 and regulations to overseas offers under application regime

A provision of Parts 3 and 4 or the regulations applies to a financial product that is offered to a person outside New Zealand if—

- (a) an application regime set out in regulations made under section 529 applies to the financial product; and
- (b) the application regime applies that provision to the financial product; and
- (c) any other preconditions of the application regime are met.

Compare: 1978 No 103 s 77

529 Power to extend Parts 3 and 4 and regulations under application regime

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations, for the purpose of implementing an application regime for a designated country, that provide for—
 - (a) the application of provisions of Parts 3 and 4 and the regulations to financial products offered to persons in that country; and
 - (b) the other matters set out in section 530.
- (2) The Minister may recommend making an Order in Council under this section only—
 - (a) if he or she is satisfied that it is appropriate for New Zealand laws to apply to financial products offered to persons in the designated country as set out in the proposed application regime; and
 - (b) after consulting with the FMA.

Compare: 1978 No 103 s 78

530 Matters that must be stated in regulations implementing application regime

- (1) The regulations made under section 529 must state—
 - (a) the country to which the application regime applies; and

- (b) the classes of financial products to which the application regime applies (whether by reference to type of issuer, offeror, offer, or any other matter); and
 - (c) the provisions of Part 3 and 4 and the regulations that apply to those financial products; and
 - (d) whether or not, or the extent to which, exemptions from those provisions granted by the FMA under this Act may also apply for those financial products; and
 - (e) the preconditions (if any) that must be met for the application regime to apply; and
 - (f) the terms and conditions (if any) that must be complied with under the application regime.
- (2) The regulations may provide different applications of provisions, preconditions, and terms and conditions for different classes of financial products, offers, persons, or circumstances.
Compare: 1978 No 103 s 79

Subpart 7—Enforcement of overseas pecuniary penalties under application regime

531 Enforcement of overseas pecuniary penalties under application regime

This subpart applies to a judgment given by a court under a provision of the law of another country if—

- (a) an application regime set out in regulations made under section 532 applies this subpart to that provision of the law of that country; and
- (b) the judgment requires payment of a penalty; and
- (c) any other preconditions of the application regime are met.

Compare: 1978 No 103 s 80

532 Power to enforce overseas penalties under application regime

The Governor-General may, by Order in Council made on the recommendation of the Minister, for the purpose of implementing an application regime for a designated country, make regulations that provide for—

- (a) the application of this subpart to provisions of the securities laws of that country under or in respect of which a penalty may be imposed; and
- (b) the preconditions of the application regime (if any).

Compare: 1978 No 103 s 81

533 Interpretation

In this subpart, unless the context otherwise requires,—

court of rendition, in relation to a judgment, means the court by which the judgment was given

enforcement, in relation to a judgment, includes execution of a judgment

judgment includes an order

penalty means a fine or other pecuniary penalty (whether criminal or civil)

place of rendition, in relation to a judgment, means the country in which the court of rendition is established

registered judgment means a judgment that is registered under section 534.

Compare: 1978 No 103 s 82

534 Registration of judgment

The High Court must register a judgment to which this subpart applies under section 531 as a civil judgment debt if an application is made to it in accordance with regulations made under section 541.

Compare: 1978 No 103 s 83

535 Effect of registration

- (1) A registered judgment has the same force and effect, and may give rise to the same proceedings by way of enforcement, as if the judgment had been given by the High Court.
- (2) Subsection (1) is subject to sections 536 and 537.

Compare: 1978 No 103 s 84

536 Enforceability of registered judgment

A registered judgment is capable of being enforced in or by the High Court only if, and to the extent that, at the time when the

proceeding for enforcement is or is to be taken, the judgment is capable of being enforced in or by—

- (a) the court of rendition; or
- (b) a court in the place of rendition.

Compare: 1978 No 103 s 84

537 Stay may be granted

- (1) The High Court may, on application by a person against whom the registered judgment has been given, order that proceedings in the High Court to enforce the judgment—
 - (a) not be commenced until a specified time; or
 - (b) be stayed for a specified period.
- (2) The order—
 - (a) must be made subject to conditions that,—
 - (i) within the period specified in the order, the person make and prosecute an appropriate application for relief in respect of the registered judgment; and
 - (ii) the application be prosecuted in an expeditious manner; and
 - (b) may be made subject to other conditions, including as to the giving of security, that the High Court thinks fit.
- (3) For the purposes of subsection (2)(a)(i), an **appropriate application for relief** is an application to set aside, vary, or appeal against the registered judgment that is made to a court or tribunal that has jurisdiction under the law in force in the place of rendition to grant the application.

Compare: 1978 No 103 s 86

538 Costs

- (1) The following are recoverable in proceedings by way of enforcement of a registered judgment:
 - (a) the reasonable costs and expenses of, and incidental to, obtaining and lodging the copy of the judgment; and
 - (b) the costs and expenses reasonably incurred in attempting to execute the judgment in the court of rendition.
- (2) The entitlement of a person to, and the liability of a person for, the costs or expenses of, and incidental to, those proceedings

are the same as they are in proceedings by way of enforcement of—

- (a) a similar judgment given by the High Court; or
- (b) if there is no such similar judgment, the most closely analogous judgment given by the High Court.

Compare: 1978 No 103 s 87

539 Interest

Interest on the amount of a registered judgment—

- (a) is payable at the same rate or rates and in respect of the same period or periods as would be applicable in the court of rendition; and
- (b) is recoverable to the extent that the judgment creditor satisfies the High Court as to the amount of the interest.

Compare: 1978 No 103 s 88

540 Rules of private international law not to apply

If a judgment is registered in the High Court under this subpart, the courts of New Zealand must not, merely because of the operation of a rule of private international law, refuse to permit proceedings by way of enforcement of the registered judgment to be taken or continued.

Compare: 1978 No 103 s 89

541 Other regulations for registration of judgments under application regime

The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations providing for the registration of judgments under this subpart, including (without limitation) providing for—

- (a) the verification requirements for those judgments:
- (b) the registration and service of facsimiles of those judgments:
- (c) the service of notice of registration of those judgments:
- (d) other requirements for the way in which those judgments may be registered (for example, the currency of registrations and the registration of partly satisfied judgments).

Compare: 1978 No 103 s 90

Subpart 8—Miscellaneous

542 Breach of exemption conditions

The breach of a term or condition of an exemption provided by regulations made under this Act or by notice under subpart 2 is a breach of the obligation for which the exemption applies (unless the regulations or notice otherwise provide).

Compare: 1988 No 234 s 49E

543 Regulations or exemptions in respect of specified overseas jurisdictions

(1) Exemptions made under regulations made under subpart 1, or granted under subpart 2, may extend to all, or classes of, persons, transactions, or other matters in relation to specified overseas jurisdictions.

(2) Subsection (1) does not limit subparts 1 and 2.

Compare: 1988 No 234 s 49F

Part 9

Miscellaneous provisions

Subpart 1—Appeals

544 Appeals of market service licence decisions

A person may appeal to the court against a decision of the FMA under Part 6 to—

- (a) decline to issue a licence to the person; or
- (b) impose conditions on the person's licence or proposed licence or to vary, revoke, add to, or substitute any conditions on the person's licence; or
- (c) decline an application to vary the conditions of the person's licence; or
- (d) to exercise a power under section 395 or 399 (which relates to the FMA's powers in the case of breaches, etc).

545 Appeals against other decisions of FMA on questions of law only

An aggrieved person that considers that any of the following decisions of the FMA is wrong in law may appeal to the court against the decision on a question of law only:

- (a) a refusal to give a certificate under section 110(2)(f)(iii) (certificate that the FMA is satisfied that a scheme complies with certain requirements):
- (b) a decision under section 116 (direction to change a registration):
- (c) a decision under section 168(1)(a) (removal of a supervisor of registered scheme):
- (d) a decision under section 170 (cancellation of the registration of a scheme):
- (e) a decision under section 180 (direction to the supervisor):
- (f) a decision under section 344 (direction to a licensed market operator):
- (g) a decision under subpart 1 of Part 7 (FMA's enforcement powers).

Compare: 1988 No 234 s 47A

Subpart 2—Repeals

546 Repeals

The following enactments are repealed:

- (a) the Securities Act 1978 (1978 No 103):
- (b) the Securities Markets Act 1988 (1988 No 234):
- (c) the Unit Trusts Act 1960 (1960 No 99):
- (d) the Superannuation Schemes Act 1989 (1989 No 10):
- (e) the Securities Transfer Act 1991 (1991 No 119).

Subpart 3—Amendments to Companies Act 1993

547 Principal Act amended

This subpart amends the Companies Act 1993.

548 New section 138A inserted

The following section is inserted after section 138:

“138A Offence for serious breaches of certain duties

- “(1) Every director of a company who does an act, or omits to do an act, in breach of the duty in section 131 (duty of directors to act in good faith and in best interests of the company) commits an

offence if he or she knows that the act or omission is seriously detrimental to the interests of the company.

“(2) Every director of a company who does an act, or omits to do an act, in breach of the duty in section 135 (reckless trading) commits an offence if he or she knows that the act or omission will result in serious loss to the company’s creditors.

“(3) A person who commits an offence under this section is liable on conviction to the penalties set out in section 373(4).”

Note to submitters

This proposed amendment may not appear in this Bill on introduction. Instead it may be included in another Bill.

549 Penalty for failure to comply with Act

Section 373(4) is amended by inserting the following paragraph before paragraph (a):

“(aa) section 138A (which relates to breaching certain directors’ duties):”.

550 Court may disqualify directors

Section 383(1) is amended by omitting “for such period not exceeding 10 years as may be specified in the order” and substituting “permanently or for a period specified in the order”.

551 Registrar or FMA may prohibit persons from managing companies

Section 385(3) is amended by omitting “5 years” and substituting “10 years”.

Subpart 4—Amendments to Fair Trading
Act 1986

552 Principal Act amended

This subpart amends the Fair Trading Act 1986.

553 New section 5A substituted

Section 5A is repealed and the following section substituted:

“5A Contraventions of financial markets misleading or deceptive conduct or false representation provisions do not contravene sections 9 to 13

Conduct that contravenes Part 2 of the Financial Markets Conduct Act 2011 does not contravene any of sections 9 to 13.”

Subpart 5—Amendments to Financial
Advisers Act 2008

554 Principal Act amended

This subpart amends the Financial Advisers Act 2008.

Note to submitters

Amendments to the Financial Advisers Act 2008 are proposed to implement the changes relating to discretionary investment management services (**DIMS**). DIMS may range from a personalised service provided by a financial adviser (where, instead of giving advice, they decide which products to acquire on your behalf) to a service that is more in the nature of investment services provided by fund managers. It is proposed that there be 2 ways to provide DIMS: either under a licence under the FMCA or as a financial adviser permitted to do so under the FAA. There are the following changes proposed however:

(1) If the DIMS investment mandate is set for a class of investors (and not personalised) and the investment mandate covers any category 1 products, DIMS of this kind will no longer be able to be provided under the FAA. Instead the provider must be licensed as a DIMS licensee under the FMCA (see Part 6 of the Bill). However, other types of DIMS may continue to be provided under the FAA as follows:

- personalised DIMS where the investment mandate is unlimited or covers category 1 products may continue to be provided to retail clients by AFAs and (if the category 1 products under the investment mandate are limited to QFE products) QFE advisers:
- personalised DIMS where the investment mandate covers only category 2 products may continue to be provided by the persons currently listed in section 18(1)(c):
- class DIMS for retail clients where the investment mandate covers only category 2 products may continue to be provided under the FAA by the persons currently listed in section 19 of the FAA:

Note to submitters—*continued*

- DIMS for wholesale clients may continue to be provided by the persons currently listed in section 20 of the FAA.
- note that DIMS licensees will be exempted from being caught by the FAA for the DIMS under section 14 of the FAA. A corresponding exemption from the FMCA is proposed for those permitted to provide DIMS under the FAA.
- while the definition of **discretionary investment management service** will be unchanged, it will be supplemented with a definition of **investment authority** (the authority granted under the service) and **investment mandate** (the scope of that authority) to assist in implementing these changes:
 - it will be clarified what is a personalised service and what is a class service in the context of a discretionary investment management service (see the proposed definitions set out in subpart 6 of Part 6 of this Bill):
 - persons who are currently exempt under the FAA will continue to be exempt from licensing of discretionary investment management services under this Bill:
 - the FMA's designation power under the Bill would however allow it to require a person to be licensed under the Bill either by cutting back an exemption or by requiring someone providing DIMS under the FAA to instead do so under the Bill:
 - (2) service disclosure obligations will apply under the FAA to financial advisers providing personalised DIMS to retail clients similar to those proposed for DIMS licensees under the FMCA as follows:
 - the content of the service disclosure will be set out in regulations. Disclosure statements will be able to be combined with existing disclosure statements:
 - disclosure will need to be provided before the client gives the financial adviser an investment authority to provide the DIMS and (if there has been a material change) before that investment authority is exercised:
 - it is not proposed to include any ongoing reporting obligations (unless the original disclosure is out of date):
 - (3) there will be new conduct obligations for financial advisers providing DIMS that are additional to those applying to other financial adviser services. The main proposals are as follows:
 - if DIMS is provided to a retail client, the financial adviser must have an investment mandate agreed with the client

Note to submitters—*continued*

that clearly provides whether the mandate is unlimited or how it is limited (however, no regulated client agreement or reporting on limit breaks is proposed as will apply to DIMS licensees under the Bill):

- additional duties of a fiduciary nature will apply to a financial adviser who provides DIMS (whether the DIMS is provided to retail clients or wholesale clients). These duties are very similar to those proposed for DIMS licensees under the Bill:
- these additional duties will be duties to act honestly, to provide the DIMS in accordance with the investment mandate and any subsequent instructions, to act in the best interests of the client (if a personalised service) or in the best interests of the clients of a class service and treat those clients equitably, and to comply with a professional standard of care in providing the DIMS (this is a higher standard of care than that applying currently to other financial adviser services under section 33 of the FAA):
- there will be also be duties not to make use of information acquired through providing the DIMS, or make improper use of their position as a provider of DIMS to gain an improper advantage or cause detriment to a client. However it is not proposed to include specific restrictions on related party transactions as will apply to DIMS licensees under the Bill:
- there will be an obligation on a financial adviser who provides DIMS under which financial products are held on behalf of the retail client. In this case, the financial products must be held by a separate body corporate that is a broker to which Part 3A of the FAA applies (which includes trust account obligations for brokers):

(4) the FAA will be extended to cover financial advice on whether to obtain or withdraw from a DIMS service (in the same way as it applies to advice on acquiring or disposing of a financial product). It will be treated as financial advice on a category 1 product if the DIMS investment mandate is unlimited or covers any category 1 product. It will be treated as financial advice on a category 2 product if the DIMS investment mandate is limited to category 2 products.

In addition, there are other consequential changes required to the FAA. The more substantive changes are set out below.

555 Interpretation

- (1) Section 5 is amended by inserting the following definitions in their appropriate alphabetical order:

“**FMCA financial product** means each of the following within the meaning of the Financial Markets Conduct Act 2011:

- “(a) an equity security:
- “(b) a debt security:
- “(c) a managed investment product:
- “(d) a derivative

“**issuer** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011

“**offeror** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011

“**product disclosure statement** or **PDS** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011

“**promoter** means, in relation to a FMCA financial product, a person who is instrumental in the formulation of a plan or programme pursuant to which the product is offered”.

- (2) The definition of **category 1 product** in section 5 is repealed and the following definition substituted:

“**category 1 product** means a FMCA financial product (other than a product that is a category 2 product)”.

556 Who are wholesale clients

- (1) Section 5C(1)(c) is repealed.
- (2) Section 5C(1)(f) and (g) are repealed and the following paragraphs substituted:

“(f) a person who is a wholesale investor within the meaning of clause 3(2) of Schedule 1 of the Financial Markets Conduct Act 2011:

“(g) a person who is, in relation to an offer of financial products, a wholesale investor within the meaning of clause 3(3) of Schedule 1 of the Financial Markets Conduct Act 2011 if the service relates to that offer or to financial products that have been subscribed for by that person under that offer:

“(ga) a person who is, in relation to an offer of financial products, a close business associate of the offeror, or a relative of the offeror or a director of the offeror, within the meaning of clauses 4 and 5 of Schedule 1 of the Financial Markets Conduct Act 2011 if the service relates to that offer or to financial products that have been subscribed for by that person under that offer:”.

- (3) Section 5C(3) is repealed.

557 Other exemptions

- (1) Section 14(1)(m) and (n) are repealed and the following paragraph substituted:

“(m) any form of communication made by or on behalf of an issuer or offeror that is contained in, or given in connection with, an offer of FMCA financial products that is not a regulated offer (within the meaning of the Financial Markets Conduct Act 2011):”.

- (2) Section 14(1)(o)(i) is repealed and the following subparagraph substituted:

“(i) a product disclosure statement, a disclosure document under clause 24 of Schedule 1 of the Financial Markets Conduct Act 2011, information from a register entry (with the meaning of that Act), a document or information under subpart 4 of Part 3 of that Act, or an advertisement or publication referred to in section 71 of that Act:”.

558 Other exemptions

Section 77C(1)(d) is repealed and the following paragraph substituted:

“(i) a person providing a relevant service in the course of acting as a derivatives issuer under a licence under Part 6 of the Financial Markets Conduct Act 2011:”.

Subpart 6—Financial Markets Authority
Act 2011

559 Principal Act amended

This subpart amends the Financial Markets Authority Act 2011.

560 Interpretation

- (1) Section 4 is amended by repealing the definition of **dealings in securities** and substituting the following definition:
“**dealings in financial products** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011”.
- (2) Section 4 is amended by inserting the following definitions in their appropriate alphabetical order:
“**financial products** has the same meaning as in section 7 of the Financial Markets Conduct Act 2011
“**issuer** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011
“**offeror** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011
“**regulated offer** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011
“**regulated product** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011”.
- (3) The definition of **financial markets participant** in section 4 is amended by repealing paragraph (b)(i) to (iii) and substituting:
 - “(i) a person who participates in a regulated offer as an issuer or offeror:
 - “(ii) a person who participates in an offer of financial products as an issuer or offeror and who is required to give a disclosure document under clause 24 of Schedule 1 of that Act:
 - “(iii) a person who acts, in respect of regulated products, as a supervisor, a manager, an investment manager, an administration manager, a custodian, or a qualified auditor (within the meaning of those terms in section 6(1) of the Financial Markets Conduct Act 2011):

- “(iv) a listed issuer (within the meaning of section 6(1) of the Financial Markets Conduct Act 2011):”.
- (4) The definition of **financial markets participant** in section 4 is amended by repealing paragraph (c)(i) and substituting:
- “(i) a body corporate that is related to a person referred to in paragraph (a) or (b) (within the meaning of section 11(2) of the Financial Markets Conduct Act 2011); or ”.
- (5) Section 4 is amended by repealing the definition of **securities**.

561 FMA’s functions

Section 9(1)(a) is amended by adding:

- “(v) stating whether or not, or in what circumstances, the FMA intends to take or not take action over a particular state of affairs or particular conduct (for example, to give a person some level of certainty that the FMA will take no further action in relation to a matter):”.

562 FMA may exercise person’s right of action

- (1) Section 34(3) is amended by repealing paragraph (c) and substituting:
- “(c) if person A is an issuer, any product holders of financial products issued by person A (within the meaning of those terms in the Financial Markets Conduct Act 2011).”
- (2) Section 34(4) is repealed.

563 FMA may accept undertakings

Section 46 is amended by inserting the following subsection after subsection (1):

- “(1A) An undertaking may be given in connection with the FMA making a statement under section 9(1)(a)(v) (but this subsection does not limit subsection (1)).”

564 New section 46A inserted

The following section is inserted after section 46:

“46A Undertaking may include requirements as to compensation or penalties

- “(1) An undertaking under section 46 may include—
- “(a) an undertaking to pay compensation to any person or otherwise to take action to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention or possible contravention of any provision of the financial markets legislation:
 - “(b) an undertaking to pay to the FMA an amount in lieu of a pecuniary penalty.
- “(2) The FMA must ensure that each amount paid under subsection (1)(b) is paid into a Crown Bank Account (after deducting the FMA’s actual costs incurred in connection with the matter).
- “(3) If an undertaking referred to in subsection (1)(b) is given, the FMA must give notice of that undertaking on its Internet site (whether or not it gives notification of other undertakings given in relation to the same matter).
- “(4) This section does not limit section 46.”

565 New heading and section 48A inserted

The following heading and section are inserted after section 48:

“Power to appear and be heard and adduce evidence

“48A FMA may appear and be heard and adduce evidence

- “(1) The FMA is entitled to appear and be heard in any specified proceedings.
- “(2) The FMA has the right to adduce evidence and the right to cross-examine witnesses if the FMA appears under this section, unless the specified proceedings are by way of appeal.
- “(3) The rights referred to in this section apply whether or not the FMA was a party to the specified proceedings at any earlier stage in the proceedings.
- “(4) In this section, **specified proceedings** means any of the following kinds of proceedings:
- “(a) civil or criminal proceedings under, or in respect of, any financial markets legislation:

“(b) civil proceedings that, in connection with the offer, issue, transfer, supply, or use of financial products or financial services, seek damages or other relief for fraud, negligence, default, breach of duty, or other misconduct.”

566 FMA may require its warning to be disclosed

(1) Section 49(1) is amended by repealing paragraph (b) and substituting:

“(b) in the case of a relevant person that is an issuer or offeror, ensure that every disclosure document of the kind that is specified in the order and that is distributed by or on behalf of the issuer or offeror contains a copy of the warning in a prominent position or is accompanied by a copy of the warning:

“(ba) in the case of a relevant person that is a person to which subpart 4 of Part 6 of the Financial Markets Conduct Act 2011 applies, ensure that every disclosure statement under that subpart of the kind that is specified in the order and that is distributed by or on behalf of the relevant person contains a copy of the warning in a prominent position or is accompanied by a copy of the warning:

“(bb) ensure that every restricted communication of the kind that is specified in the order and that is distributed by or on behalf of the relevant person or any of those associated persons contains a copy of the warning in a prominent position or is accompanied by a copy of the warning.”.

(2) Section 49(7)(a)(ii) is amended by omitting “securities” and substituting “financial products”.

(3) Section 49(7)(b) is repealed and the following paragraph substituted:

“(b) a **disclosure document** means any of the following:

“(i) a product disclosure statement:

“(ii) a register entry:

“(iii) a disclosure document under clause 24 of Schedule 1 of the Financial Markets Conduct Act 2011:

“(iv) a document made available under subpart 4 of Part 3 of that Act:”.

- (4) Section 49(7)(c) is amended by omitting “securities” and substituting “financial products”.
- (5) Section 49(7) is amended by repealing paragraph (d) and substituting:
- “(d) **product disclosure statement, offer, restricted communication, register entry, associated person, and distributed** have the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011.”

567 Schedule 1 amended

Part 1 of Schedule 1 is repealed and the following Part substituted:

“Part 1

“Auditor Regulation Act 2011

“Financial Markets Authority Act 2011

“Financial Markets Conduct Act 2011

“Financial Advisers Act 2008

“Financial Service Providers (Registration and Dispute Resolution) Act 2008

“Parts 4 and 5 and Schedules 1 and 2 of the KiwiSaver Act 2006

“Statutory Supervisors Act 2011”.

Subpart 7—Amendments to KiwiSaver Act 2006

568 Principal Act amended

This subpart amends the KiwiSaver Act 2006.

Note of proposed amendments

It is proposed that all KiwiSaver schemes will reregister on the new managed investment schemes register under this Bill and that Part 4 of this Bill will contain the governance obligations currently in Part 4 of the KiwiSaver Act 2006. The current manager will be reregistered as the new manager and the trustee will be reregistered as the supervisor. For restricted schemes, the trustees of the scheme will be the manager of the scheme. However, statutory fiduciary obligations will continue to apply to both the manager and the supervisor under the Bill. Consequently, it

Note of proposed amendments—*continued*

is proposed to repeal all of Part 4 of the KiwiSaver Act 2006 except for the following sections:

- sections 126 and 127 (implying the KiwiSaver scheme rules):
- sections 128A to 128D (relating to tax credits):
- subpart 6 (relating to appointment of default providers):
- section 186(1)(a) and (b) and (2) (which provides for a right of appeal of certain decisions of the FMA that will remain under the KiwiSaver Act 2006):
- sections 188 and 189 (providing for the FMA to share information with the Commissioner of Inland Revenue):
- sections 189B and 189C (relating to fee increases and unreasonable fees):
- section 194 (annual report by FMA on KiwiSaver Act):
- section 195 (which relates to unclaimed money):
- section 196 (which provides that a member's interest in a KiwiSaver scheme is not assignable), but with amendments so that it applies except as expressly provided in this Act also:
- section 197 (offence for failing to provide information) to the extent it is still needed:
- sections 203 and 204 (which provide for the application of the Financial Transactions Reporting Act 1996).

In relation to Part 5 of the KiwiSaver Act 2006, the following sections are not to be repealed:

- section 205 (no Crown guarantee of KiwiSaver):
- sections 207 and 208 (dealing with disclosures to and holding of information by the Commissioner of Inland Revenue):
- sections 212 and 213 (relating to disputes under Parts 2 and 3):
- sections 214 and 215 (penalties for failure to provide tax information):
- sections 217 to 219 and 220B (relating to giving of notices and other information):
- miscellaneous provisions in sections 221 to 237 (except that consequential amendments are needed to the regulation-making powers).

Schedule 1 of the KiwiSaver Act 2006 contains the KiwiSaver scheme rules. Most of those will remain in Schedule 1. However, clauses 1A to 1E will be repealed as their effect is now to be covered by Part 4 of the Bill.

Note of proposed amendments—*continued*

It is also proposed to apply some rules in the KiwiSaver Act 2006 to complying superannuation funds (for example, powers in relation to unreasonable fees).

In addition, there will be other consequential amendments needed (eg, to definitions) to reflect the fact that KiwiSaver schemes are now registered under the FMCA and for consistency of terms (eg, references to trustees will generally be replaced with references to supervisors).

Subpart 8—Amendments to Securities Trustees and Statutory Supervisors Act 2011

569 Principal Act amended

This subpart amends the Securities Trustees and Statutory Supervisors Act 2011.

Note of amendments

The Securities Trustees and Statutory Supervisors Act 2011 continues to regulate the licensing of supervisors of retirement villages under the Retirement Villages Act 2003 and supervisors of regulated offers of debt securities and registered schemes under the Bill. However, a number of amendments are proposed to update it in line with the Bill as follows:

- the Act is to be renamed the Statutory Supervisors Act 2011 in line with the change in terminology from **securities** to **financial products** under the Bill and the generic use of the term “supervisor” to cover trustees and other persons acting in this capacity, and consequential changes to terminology will be made throughout:
- terms will be updated, and made consistent across the 2 Acts where appropriate — eg, the term **governing document** in the Statutory Supervisors Act 2011 will have the same meaning as in the Bill, but also cover a deed of supervision under the Retirement Villages Act 2003:
- the licensing provisions in Part 2 will be largely unchanged in substance, but need updating to cover registered schemes instead of participatory securities, unit trusts, or KiwiSaver trustees. It is also proposed that section 22 be amended to give the FMA wider powers to appoint a temporary supervisor if there is a vacancy for any reason:

Note of amendments—*continued*

- Part 3 of the Statutory Supervisors Act 2011 is now covered by subpart 4 of Part 4 of the Bill and accordingly will be repealed.

Subpart 9—Amendments to other
enactments

570 Amendments to Trustee Companies Act 1967 and Public Trust Act 2001

Note of amendments

New sections are to be inserted into the Trustee Companies Act 1967 and the Public Trust Act 2001 to—

- (a) restrict the use of Group Investment Funds to the internal management of estates and assets in the trustee company's or Public Trust's possession in the ordinary course of its business as a trustee; and
- (b) prevent the making of a regulated offer of a managed investment product in a Group Investment Fund.

571 Amendments to other enactments

The enactments specified in Schedule 4 are amended in the manner indicated in that schedule.

Subpart 10—Transitional provisions

Offers of financial products

572 Act applies to offer unless former enactments continue to apply

- (1) This Act applies to an offer of financial products unless the former enactments apply in accordance with this subpart.
- (2) In this subpart,—

1978 Act means the Securities Act 1978

6-month date means the date that is 6 months after the commencement of this section

former enactments means each of the following (as in force immediately before the commencement of this section):

- (a) the 1978 Act:

- (b) the Securities Regulations 2009;
 - (c) exemptions granted under the 1978 Act (to the extent that those exemptions apply to the relevant offer of securities).
- (3) In this subpart, **issuer**, **prospectus**, **registered prospectus**, and **securities** have the same meanings as in the 1978 Act.

573 Former enactments continue to apply if prospectus registered before commencement

If securities are offered in a prospectus that is registered under the 1978 Act before the commencement of this section, the former enactments continue to apply to the offer of those securities under that prospectus (as if the former enactments were still in force).

574 Issuer may elect to comply with former enactments instead of this Act if prospectus registered within 6 months of commencement

- (1) Despite the repeal of the 1978 Act, an issuer of securities may register a prospectus in respect of the securities in accordance with the former enactments on or before the 6-month date.
- (2) If securities are offered in a prospectus that is registered under subsection (1), the former enactments apply to the offer of those securities under that prospectus only if the issuer makes an election under subsection (3).
- (3) For the purposes of subsection (2), an issuer may elect for the former enactments to apply to an offer of securities by including a statement in the prospectus to the effect that the Securities Act 1978 applies to the offer.
- (4) The statement referred to in subsection (3) may include additional information about an applicable exemption granted under section 70B of the 1978 Act that is necessary to ensure that the statement is not misleading.

575 Former enactments apply if no prospectus is required unless issuer elects otherwise

- (1) If, under the 1978 Act or an exemption granted under that Act, no registered prospectus is required for an offer of securities,

the former enactments apply to any offer of those securities that is made before the close of the 6-month date unless the issuer makes an election, under subsection (2), for this Act to apply.

- (2) For the purposes of subsection (1), an issuer may elect for this Act to apply to an offer of securities made after a particular date by—
 - (a) giving to the FMA, before that date, a notice to the effect that this Act applies to the offer of the securities made after that date; and
 - (b) including a copy of that notice on an Internet site maintained by, or on behalf of, the issuer at all reasonable times during the period between that date and the earlier of the close of the offer or the close of the 6-month date.

576 Transitional provisions that apply after 6 month date

If, before the close of the 6-month date, the former enactments apply to an offer of securities in a prospectus, those securities may continue to be offered and allotted under that prospectus and, for that purpose, the former enactments continue to apply as if they had not been repealed or revoked.

577 This Act and 1978 Act are (on transitional basis) alternative means of compliance

- (1) If, in accordance with sections 572 to 576,—
 - (a) this Act applies to an offer of securities, the former enactments do not apply to the offer:
 - (b) the former enactments apply to an offer of securities, this Act does not apply to the offer.
- (2) Subsection (1) is subject to subsection (3).
- (3) The following provisions apply regardless of whether this Act or the former enactments apply to an offer of securities:
 - (a) [to come]

578 All offers and allotments under old law must cease within 2 years of commencement

Despite sections 572 to 577, no offer or allotment of securities may be made under the former enactments after the date that is 2 years after the commencement of this section.

579 FMA may continue to perform and exercise functions, duties, and powers

If the former enactments continue to apply to an offer of securities, the FMA may continue to perform and exercise all of its functions, duties, and powers conferred or imposed on it by or under the former enactments as if those enactments had not been repealed or revoked (for example, it may grant an exemption under section 70B of the 1978 Act).

580 Transitional and application provisions subject to exemption

Sections 572 to 579 are subject to—

- (a) any regulations made under section 504:
- (b) any exemption granted under subpart 2 of Part 8.

Repealed enactments continue to be financial markets legislation

581 Repealed enactments continue to be financial markets legislation

Every enactment that is repealed or revoked by this Act and that was, immediately before the commencement of this section, financial markets legislation within the meaning of section 4 of the Financial Markets Authority Act 2011 must be treated as continuing to be financial markets legislation within the meaning of that Act.

Licensing of financial product markets

581A Transition process for licensed markets

Note to submitters

It is proposed that existing registered and authorised securities markets be treated as licensed financial product markets under the Bill, with a transition process to convert existing registrations and authorisations into licences. The Bill will also include a transition process to enable currently unlicensed markets to become licensed under the Act.

*Market services licences***582 Authorised dealers treated as holding market services licence**

- (1) Every person who, immediately before the commencement of this section, is authorised or approved to carry on the business of dealing in futures contracts under section 38 of the Securities Markets Act 1988 must be treated as holding, on and from the commencement of this section, a licence issued under subpart 2 of Part 6.
- (2) The licence under subsection (1) must be treated as—
 - (a) covering the same service that is authorised or approved under section 38 of the Securities Markets Act 1988;
 - (b) subject to the conditions, limitations, or restrictions that, immediately before the commencement of this section, were imposed by or under the Securities Markets Act 1988 on the authorisation or approval;
 - (c) expiring on the earlier of—
 - (i) the date that the licence is cancelled; or
 - (ii) the date that is 2 years after the commencement of this section.

583 FMA may exercise powers in respect of licences

- (1) Nothing in section 582 prevents the FMA from exercising—
 - (a) a power to vary, revoke, add to, or substitute any of the conditions of a licence referred to in that section; or
 - (b) any other powers under this Act in respect of the licence.
- (2) A licence referred to in section 582 may be subject to the conditions prescribed by the regulations.

*Approval of electronic transfer systems
continues*

584 Approval of electronic transfer systems continues

An Order in Council made under section 7 of the Securities Transfer Act 1991 that is in force immediately before the repeal of that Act continues in force as if it had been made under section 359 (and may be amended or revoked as if it had been made under that section).

*Reregistration of existing unit trusts,
superannuation schemes, KiwiSaver schemes,
and participatory schemes*

585 Reregistration process for existing schemes

Note to submitters

It is proposed that there will be a reregistration process for existing schemes.

Subpart 11—Miscellaneous provisions

586 Saving of liability under general law

Nothing in this Act limits or diminishes any liability that any person may incur under any rule of law or enactment other than this Act.

Compare: 1978 No 103 s 65

Schedule 1 ss 24, 25, 27
**Provisions relating to when disclosure is
 required and exclusions**

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Part 1

Disclosure exclusions for offers of financial products for issue or sale

1 Overview In this Part—

Part 1—*continued*

- (a) clauses 3 to 11 specify that offers to particular persons do not require disclosure under Part 3 (although disclosure to other persons may be required):
- (b) clauses 12 to 22 specify that certain offers as a whole do not require disclosure under Part 3, whether as a result of the nature of the offer (for example, a small offer) or the nature of the issuer (for example, an offer by the Crown):
- (c) clauses 23 to 26 provide for limited disclosure and other requirements, and for restrictions, in relation to the exclusions.

2 Part subject to FMA’s power to require disclosure

This Part is subject to a declaration under section 512(1)(d) (FMA’s power to declare that offer requires disclosure).

Exclusion in relation to wholesale investors

3 Offer to wholesale investor

- (1) An offer of financial products to a wholesale investor does not require disclosure under Part 3.
- (2) A person is a **wholesale investor** if—
 - (a) the person is an investment business (*see* clause 33); or
 - (b) the person meets the investment activity criteria specified in clause 34; or
 - (c) the person is large (*see* clause 35); or
 - (d) the person is a government agency (*see* clause 36).
- (3) A person is also a **wholesale investor**, in relation to an offer of financial products (or other prescribed transaction), if—
 - (a) the person is an eligible investor (*see* clause 37); or
 - (b) in relation to an offer of financial products for issue or sale,—
 - (i) the minimum amount payable by the person on acceptance of the offer is at least \$500,000; or
 - (ii) the amount payable by the person on acceptance of the offer plus the amounts previously paid by

Part 1—*continued*

the person for financial products of the issuer of the same class that are held by the person add up to at least \$500,000.

- (4) In calculating the amount payable, or paid, for financial products for the purposes of subclause (3)(b), any amount payable, or paid, must be disregarded to the extent to which it is to be paid, or was paid, out of money lent by the offeror or any associated person of the offeror.

Exclusion for persons in close relationship

4 Offers to close business associates

- (1) An offer of financial products to a close business associate of the offeror does not require disclosure under Part 3.
- (2) A person (A) is a close business associate of the offeror if—
- (a) A is a director or senior manager of the offeror or of a related body corporate of the offeror; or
 - (b) A holds or controls 5% or more of the voting products of the offeror; or
 - (c) A holds or controls 20% or more of the voting products of a related body corporate of the offeror; or
 - (d) A is a partner of the offeror or of a director of the offeror (under the Partnership Act 1908); or
 - (e) A is a spouse, civil union partner, or de facto partner of a person who is a close business associate of the offeror under any of paragraphs (a) to (d) or subclause (3); or
 - (f) A is a child, parent, brother, or sister of a person who is a close business associate of the offeror under any of paragraphs (a) to (e) or subclause (3) (whether or not by a step relationship).
- (3) A person (A) is also a close business associate of the offeror, in relation to an offer of financial products, if A has a close professional or business relationship with the offeror, or a director or senior manager of the offeror, that allows A to obtain the information that will enable A to assess—
- (a) the merits of the offer; and

Part 1—*continued*

- (b) the adequacy of any information provided by the offeror and any other person involved in the offer.
- (4) In this clause, **control**, in relation to a voting product, means having, directly or indirectly, effective control of the voting rights attached to the product.

5 Offers to relatives

- (1) An offer of financial products to a relative of the offeror or of a director of the offeror does not require disclosure under Part 3.
- (2) In this clause, **relative**, in relation to a person (**A**), means any of the following:
 - (a) A's spouse, civil union partner, or de facto partner (**B**):
 - (b) a grandparent, parent, child, grandchild, brother, sister, nephew, niece, uncle, aunt, or first cousin of A or B, whether or not by a step relationship:
 - (c) a trustee of a trust under which a relative of A (under paragraph (a) or (b)) is a beneficiary who—
 - (i) is presently entitled to a share of the trust estate or of the income of the trust estate; or
 - (ii) is, individually or together with other beneficiaries, in a position to control the trustee.

Exclusion for offers through licensed intermediaries and DIMS licensees

6 Offers of financial products through intermediaries

- (1) An offer of financial products to a person (**A**) does not require disclosure under Part 3 if—
 - (a) the offer is through a licensed intermediary; and
 - (b) the prescribed intermediary services provided to A by the licensed intermediary in relation to the offer are covered by the market services licence held by the licensed intermediary.
- (2) In this clause, **licensed intermediary** means a person who holds a market services licence that covers prescribed intermediary services.

Part 1—*continued***7 Offers of financial products through DIMS licensee**

An offer of financial products to a person (A) does not require disclosure under Part 3 if—

- (a) the offer is through a DIMS licensee; and
- (b) the DIMS licensee decides whether to acquire the financial products on behalf of A in the course of providing a discretionary investment management service to A.

Exclusion for employee share purchase schemes

8 Offers under employee share purchase schemes

(1) An offer of equity securities to a specified employee under an employee share purchase scheme does not require disclosure under Part 3 if—

- (a) the offer is made as part of the remuneration arrangements for the employee, and is separate from any other offer of equity securities by the issuer; and
- (b) raising funds for the issuer is not the primary purpose of the offer; and
- (c) the total number of equity securities issued or transferred under all of the issuer's employee share purchase schemes to specified employees in any 12-month period does not exceed,—
 - (i) in the case of an offer of voting products, 10% of the voting products of the issuer as at the start of the 12-month period;
 - (ii) in the case of any other offer of equity securities, 10% of the equity securities of the issuer that are of the same class as at the start of the 12-month period.

(2) In this clause, **specified employee**—

- (a) means an employee of the issuer of the equity securities or of any of its subsidiaries; but
- (b) does not include an employee who is a close business associate of the issuer (for example, a senior manager).

Part 1—*continued*

Exclusion for persons under control

- 9 Offers to persons under control also do not need disclosure**
If, under any of clauses 3 to 8, an offer of financial products to a person (A) would not require disclosure under Part 3, an offer of financial products to a person controlled by A does not require disclosure under Part 3.

Dividend reinvestment plan

- 10 Offers of financial products under dividend reinvestment plan**
- (1) An offer of specified financial products to a person (A) under a dividend reinvestment plan does not require disclosure under Part 3 if—
- (a) A already holds financial products of the issuer that are the same class as the specified financial products, on terms that—
 - (i) entitle A to subscribe for those products by applying all or any specified part of any dividends declared by the issuer and payable to A; or
 - (ii) require the issuer to issue those products to A as fully paid financial products in consideration only for A foregoing the right to receive all or any specified part of any dividends declared by the issuer and otherwise payable to A; and
 - (b) the dividend reinvestment plan contains provisions requiring that,—
 - (i) at the time the price of the specified financial products is set, the issuer has no information that is not publicly available that would, or would be likely to, have a material adverse effect on the realisable price of the financial products if the information were publicly available; and
 - (ii) the right to subscribe for, or require the issuer to issue, specified financial products is offered to all holders of financial products of the issuer of the same class, other than product holders who are

Part 1—*continued*

resident outside New Zealand and who are excluded by the issuer to avoid a risk of breaching the laws of the relevant overseas country; and

- (iii) every product holder to whom the right is offered is given a reasonable opportunity to accept it; and
- (iv) the specified financial products issued to a product holder are issued on the terms disclosed to the holder; and
- (v) the specified financial products issued to a product holder are subject to the same rights as the financial products issued to all holders of financial products of the same class who agree to receive the financial products.

- (2) In this clause,—

dividend means,—

- (a) in relation to equity securities, a dividend within the meaning of the Companies Act 1993; and
- (b) in relation to managed investment products, a distribution of the financial benefits of the scheme to a holder of the product

specified financial products means—

- (a) equity securities in a company;
- (b) managed investment products.

Financial products for no consideration

11 Offers of financial products for no consideration

- (1) An offer of financial products (other than options or other financial products to which this clause does not apply) does not require disclosure under Part 3 if no consideration is to be provided for the issue or transfer of the products.
- (2) An offer of an option to a person does not require disclosure under Part 3 if—
 - (a) no consideration is to be provided for the issue or transfer of the option; and
 - (b) no consideration is to be provided for the underlying financial products on the exercise of the option.

Part 1—*continued*

- (3) This clause does not apply if the financial products—
- (a) are interests in a KiwiSaver scheme, a superannuation scheme, or a prescribed scheme; or
 - (b) impose a liability to the issuer or a registered scheme on the product holder (for example, an obligation to make contributions).

Exclusion for small offers

12 Small offers

- (1) Personal offers of financial products do not require disclosure under Part 3 if—
- (a) the financial products are equity securities or debt securities; and
 - (b) none of the offers results in a breach of the 20-investor limit under subclause (2)(a) or (3)(a); and
 - (c) none of the offers results in a breach of the \$2 million limit under subclause (2)(b) or (3)(b).
- (2) An offer by a person to issue financial products—
- (a) results in a breach of the 20-investor limit if it results in the number of persons to whom financial products of the issuer have been issued exceeding 20 in any 12-month period;
 - (b) results in a breach of the \$2 million limit if it results in the amount being raised from the issue of financial products of the issuer exceeding \$2 million in any 12-month period.
- (3) An offer by a person to sell financial products of an issuer—
- (a) results in a breach of the 20-investor limit if it results in the number of persons to whom the person sells financial products of the issuer exceeding 20 in any 12-month period;
 - (b) results in a breach of the \$2 million limit if it results in the amount being raised by the person from selling financial products of the issuer exceeding \$2 million in any 12-month period.

Part 1—*continued*

- (4) Subclause (1) does not apply to an offer for sale to which clause 28 or 31 applies.
- (5) In this clause,—
 - (a) a **personal offer** is one that may only be accepted by the person to whom it is made and is made to a person who is likely to be interested in the offer, having regard to—
 - (i) previous contact between the person making the offer and that person; or
 - (ii) some professional or other connection between the person making the offer and that person; or
 - (iii) statements or actions by that person that indicate that that person is interested in offers of that kind:
 - (b) **financial products of the issuer** means equity securities and debt securities issued by the issuer (regardless of whether or not those products are of the same class or kind as those under offer).

13 Matters relating to calculation

- (1) In calculating issues and sales of the financial products of a body, and the amount raised from issues and sales, for the purposes of clause 12, an issue or sale to a person must be disregarded if the issue or sale results from an offer that—
 - (a) does not require disclosure under Part 3 because of any other exclusion under this schedule; or
 - (b) is not received in New Zealand; or
 - (c) is a regulated offer in relation to which a PDS has been given under section 34.
- (2) In calculating the amount of money raised by the person by issuing financial products, the following must be included:
 - (a) the amount payable for the products at the time when the products are issued:
 - (b) if the products are shares issued partly paid, any amount payable at a future time if a call is made:
 - (c) if the product is an option, any amount payable on the exercise of the option:

Part 1—*continued*

- (d) if the products carry a right to convert the products into other financial products, any amount payable on the exercise of that right.

Exclusion for transfer of controlling interest

14 Offers of controlling interest where there are 5 or fewer investors

An offer of equity securities that comprise more than 50% of the voting products of an entity does not require disclosure under Part 3 if—

- (a) 5 or fewer persons acquire equity securities under the offer; and
- (b) if more than one person acquires equity securities under the offer, those persons are acting jointly or in concert; and
- (c) in the circumstances, the persons who acquire equity securities under the offer are in a position to obtain from the offeror the information that will enable those persons to assess—
 - (i) the merits of the offer; and
 - (ii) the adequacy of any information provided by the offeror and any person involved in the offer.

See MED's note to submitters.

Exclusion for small schemes

15 Exclusion for small schemes

An offer of managed investment products does not require disclosure under Part 3 if the relevant managed investment scheme—

- (a) has 5 or fewer scheme participants (*see* clause 16); and
- (b) is not promoted by a person, or an associate of a person, who is in the business of promoting managed investment schemes.

Part 1—*continued***16 Counting of scheme participants**

- (1) For the purposes of counting the number of scheme participants in a managed investment scheme,—
 - (a) joint holders of a managed investment product count as a single scheme participant; and
 - (b) a managed investment product held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate or the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.
- (2) The FMA may, in writing, determine that the total number of scheme participants in all of the schemes subject to the determination must be counted (as if they were 1 scheme) for the purposes of determining the number of scheme participants of any 1 of those schemes under this Part.
- (3) The FMA must give written notice of the determination to the manager of each of the schemes.

Exclusion for derivatives

17 Offers of derivatives where derivatives issuer not involved

- (1) An offer of a derivative for issue does not require disclosure under Part 3 if the person who offers the derivative is not a derivatives issuer.
- (2) An offer of a derivative for sale does not require disclosure under Part 3 if the derivative was issued by a person who is not a derivatives issuer.

Exclusion for registered banks

18 Offers of category 2 products or debt securities by registered banks

An offer of financial products does not require disclosure under Part 3 if the financial products are—

- (a) category 2 products issued by a registered bank; or
- (b) debt securities issued by a registered bank; or

Part 1—*continued*

- (c) category 2 products of a kind prescribed for the purposes of this paragraph that are issued by a subsidiary of a registered bank.

Exclusion for the Crown, local authorities, etc

19 Offers by the Crown, local authorities, etc

- (1) An offer of financial products does not require disclosure under Part 3 if the issuer of the financial products is—
 - (a) the Crown; or
 - (b) a local authority; or
 - (c) the National Provident Fund Board established by the National Provident Fund Act 1950; or
 - (d) the Reserve Bank; or
 - (e) Housing New Zealand Corporation established by the Housing Corporation Act 1974.
- (2) An offer of an interest in the Government Superannuation Fund does not require disclosure under Part 3.

Retirement villages

20 Offers of interests in retirement villages

An offer of an interest in a retirement village does not require disclosure under Part 3 if the interest is exempted from requiring disclosure by section 107(1) of the Retirement Villages Act 2003.

Renewals or variations

21 Offers of renewals or variations

An offer of a renewal or variation of the terms or conditions of a financial product does not require disclosure under Part 3.

Contributory mortgages

22 Offers of interests in contributory mortgages offered by solicitors

- (1) An offer of an interest in a contributory mortgage by a solicitor does not require disclosure under Part 3 if—

Part 1—*continued*

- (a) the solicitor is not a mortgagor under the mortgage; and
 - (b) the solicitor is not a person to whom or for whose benefit any money is lent in consideration for the mortgage given by the mortgagor; and
 - (c) there are in force—
 - (i) regulations made under section 115 of the Lawyers and Conveyancers Act 2006 (trust accounts); and
 - (ii) rules made under section 96 of that Act (practice rules in relation to nominee companies).
- (2) In this clause,—
- contributory mortgage** means a mortgage of land that—
- (a) secures money owing to a nominee company on behalf of 2 or more persons, whether or not the mortgage originally secured money owing to only 1 person; or
 - (b) has the same priority in respect of the land as another mortgage or mortgages of that land
- solicitor** has the same meaning as in section 6 of the Lawyers and Conveyancers Act 2006.
- (3) For the purposes of the definition of contributory mortgage, money owing to not more than 5 persons as joint tenants must be treated as being owed to 1 person.

Limited disclosure and other requirements

23 Purpose of clauses 24 to 26

The purpose of clauses 24 to 26 is to—

- (a) provide for limited disclosure and conditions to apply where, although PDS disclosure and governance requirements under Part 4 are not necessary, some disclosure and other requirements are necessary or desirable in order to promote the main purposes of this Act specified in section 3 or the additional purposes specified in section 4; and
- (b) prevent an exclusion from applying in inappropriate circumstances (having regard to whether the exclusion may cause significant detriment to retail investors).

Part 1—*continued***24 Disclosure and other requirements**

- (1) This clause applies to a person (**A**) who offers financial products to another person (**B**) without disclosure under Part 3 in reliance upon—
 - (a) clause 6 (offers through licensed intermediaries); or
 - (b) clause 7 (offers through DIMS licensee); or
 - (c) clause 8 (offers under employee share purchase schemes); or
 - (d) clause 10 (offers of financial products under dividend reinvestment plan); or
 - (e) clause 11 (financial products for no consideration);
 - (f) clause 12 (small offers); or
 - (g) clause 14 (offers of controlling interest); or
 - (h) clause 15 (offers for small schemes); or
 - (i) clause 17 (offers of derivatives by person who is not in business of offering derivatives); or
 - (j) clause 18 (offers of category 2 products or debts securities by registered banks); or
 - (k) clause 19 (offers by the Crown, local authorities, etc); or
 - (l) clause 21 (offers of renewals or variations).
- (2) A must ensure that—
 - (a) B is provided with a disclosure document that contains, or is accompanied by, the prescribed information and documents (if any); and
 - (b) all other prescribed conditions (if any) are complied with (for example, restrictions on advertising and publicity or a requirement to keep records).
- (3) A must perform the duty under subclause (2)(a) in the prescribed manner.
- (4) Subclauses (2)(a) and (3) apply only if the regulations require a disclosure document to be provided.
- (5) A contravention of this clause does not prevent the exclusion referred to in subclause (1) from continuing to apply (but may give rise to consequences under Part 7).

Part 1—*continued***25 Misleading or deceptive statements and omissions**

- (1) A person must not provide a disclosure document to a person under clause 24 if there is—
 - (a) a statement in the disclosure document that is misleading or deceptive or is likely to mislead or deceive; or
 - (b) an omission from the disclosure document of information that is required to be contained in the disclosure document by the regulations.
- (2) For the purposes of this section, a person is taken to make a statement that is misleading about a future matter (including the doing of, or refusing to do, an act) if the person does not have reasonable grounds for making the statement.
- (3) Subclause (2) does not limit the meaning of a reference to a misleading statement.
- (4) This clause does not limit section 24(2).
- (5) *See* section 479 (offence to knowingly or recklessly contravene this clause) and sections 463 to 466 (which provide for special rules in relation to compensation for a contravention of this clause).

26 Regulations may prevent exclusions from applying in inappropriate circumstances

- (1) An exclusion under any of clauses 8, 11 to 16, or 21 does not apply—
 - (a) in the circumstances prescribed by regulations made under this clause; or
 - (b) if any additional requirements prescribed by regulations made under this clause are not satisfied.
- (2) The Governor-General may, by Order in Council, on the recommendation of the Minister in accordance with subclause (3), make regulations—
 - (a) prescribing circumstances in which an exclusion referred to in subclause (1) does not apply;
 - (b) prescribing additional requirements that must be satisfied before an exclusion referred to in subclause (1) may apply:

Part 1—*continued*

- (c) prescribing transitional and savings provisions in connection with any regulations made under paragraph (a) or (b).
- (3) The Minister must, before making a recommendation under subclause (2),—
- (a) consult with the FMA; and
 - (b) be satisfied that the regulations are needed in order to prevent an exclusion referred to in subclause (1) from applying in inappropriate circumstances, having regard to whether the exclusion may, in relation to financial products of a particular kind, cause significant detriment to subscribers for those products who are retail investors.

Part 2

Which offers of financial products for sale
require disclosure**27 Application of this Part**

- (1) Clauses 28 to 31 specify when an offer of financial products for sale requires disclosure under Part 3 of this Act.
- (2) However, an offer of financial products for sale does not require such disclosure if an exclusion under Part 1 of this schedule applies to the sale offer.

28 Sale where financial products issued with view to original subscriber dealing with products

- (1) An offer of financial products for sale needs disclosure under Part 3 if—
 - (a) the issuer issued the financial products with a view to the original subscriber dealing with the products; and
 - (b) the offer of the financial products is made within 12 months after the date on which the financial products were issued; and
 - (c) the financial products have not previously been offered for issue or sale under a regulated offer or an offer out-

Part 2—*continued*

side New Zealand under an application regime under subpart 6 of Part 8.

- (2) An offer of financial products for sale to a person outside New Zealand needs disclosure under Part 3 if—
- (a) section 34 (when PDS must be given) applies to the products under section 528; and
 - (b) the issuer issued the financial products with a view to the financial products being offered for sale outside New Zealand in circumstances in which an application regime under subpart 6 of Part 8 would have applied to the products; and
 - (c) the offer of the financial products is within 12 months after the date on which the financial products were issued; and
 - (d) the financial products have not previously been offered for issue or sale under a regulated offer or outside New Zealand under an application regime under subpart 6 of Part 8.
- (3) Financial products must be taken to be issued with the view referred to in subclause (1)(a) or (2)(b) if there are reasonable grounds for concluding that the products were issued with the view (whether or not there may have been other reasons or purposes for the issue).

- (4) In this clause,—

dealing with the products means selling or transferring the financial products, or granting, issuing, or transferring interests in, or options over, the financial products

original subscriber means the person to whom the financial products were issued.

Compare: 1978 No 103 s 6(2), (2AA); Corporations Act 2001 s 707(3), (4) (Aust)

29 Sale where issuer advises, encourages, or knowingly assists the offeror

- (1) An offer of financial products for sale needs disclosure under Part 3 if either—

Part 2—*continued*

- (a) the issuer advises, encourages, or knowingly assists the offeror in connection with the offer of the financial products; or
 - (b) the issuer is the offeror.
- (2) However, subclause (1) does not apply if the offer of the financial products is made only to persons who, at the time of the offer, are holders of financial products of the issuer under terms of the constitution of the issuer that require the offer to be made to those persons.

Compare: 1978 No 103 s 6(2), (3)

30 Off-market sale by controller

An offer of financial products for sale needs disclosure under Part 3 if—

- (a) the offeror controls the issuer; and
- (b) either—
 - (i) the financial products are not quoted; or
 - (ii) although the financial products are quoted, the products are not offered for sale in the ordinary course of trading on a licensed market.

Compare: Corporations Act 2001 s 707(2) (Aust)

31 Sale amounting to indirect off-market sale by controller

- (1) An offer of financial products for sale needs disclosure under Part 3 if—

- (a) the offer of the financial products is within 12 months after the date on which the products were sold by a person who controlled the issuer (the **controller**) at the time of the sale; and
- (b) the controller sold the financial products with a view to the purchaser dealing with the products; and
- (c) at the time of the sale by the controller either—
 - (i) the financial products were not quoted; or
 - (ii) although the financial products were quoted, those products are not offered for sale in the ordinary course of trading on a licensed market; and

Part 2—*continued*

- (d) the controller sold the financial products otherwise than under a regulated offer.
- (2) Financial products must be taken to be sold with the view referred to in subclause (1)(b) if there are reasonable grounds for concluding that the products were sold with the view (whether or not there may have been other reasons or purposes for the sale).
- (3) In this clause,—
- dealing with the products** means selling or transferring the financial products, or granting, issuing, or transferring interests in, or options over, the financial products
- purchaser** means the person to whom the financial products were sold by the controller.

Compare: Corporations Act 2001 s 707(5), (6) (Aust)

Part 3

Exclusions from governance or supervision
requirements for debt securities

No exclusions have been prescribed at this stage. See MED's note to submitters.

Part 4

Exclusions from registration and supervision
requirements for managed investment
schemes

No exclusions have been prescribed at this stage. See MED's note to submitters.

Part 5 Definitions

Definitions relating to wholesale investor and retail investor

32 Meaning of retail investor and definitions of certain other terms

(1) A person is a **retail investor**, in relation to a transaction, if the person is not a wholesale investor in relation to the transaction.

(2) *See clause 3* for the definition of **wholesale investor**.

(3) In this schedule,—

relevant person, in relation to—

(a) an offer of financial products, means the offeror:

(b) a prescribed transaction, means the person prescribed for the purposes of this definition

relevant time, in relation to—

(a) an offer of financial products to a person, means immediately before financial products are issued or transferred to the person under the offer:

(b) a prescribed transaction, means the time prescribed for the purposes of this definition

transaction means—

(a) an offer of financial products for issue or sale; or

(b) any other prescribed transaction involving any dealing in financial products or any supply of market services.

33 Investment businesses

A person is an **investment business** if the person is—

(a) an entity whose principal business consists of 1 or more of the following:

(i) investing in financial products; or

(ii) providing any of the financial services referred to in section 5(a), (d), or (k) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008; or

(b) a registered bank; or

(c) a deposit taker (within the meaning of section 157C of the Reserve Bank of New Zealand Act 1989); or

Part 5—*continued*

- (d) a licensed insurer (within the meaning of section 6 of the Insurance (Prudential Supervision) Act 2010); or
- (e) a manager of a registered scheme, or a discretionary investment management service, that holds a market services licence; or
- (f) a derivatives issuer that holds a market services licence; or
- (g) a QFE or an authorised financial adviser.

34 Investment activity criteria

- (1) A person (A) meets the investment activity criteria for the purposes of clause 3(2)(b) if 2 or more of the following paragraphs apply:
 - (a) A owns, or at any time during the 2-year period before the relevant time has owned, a portfolio of specified financial products of a value of at least \$1 million (in aggregate):
 - (b) A has, during the 2-year period before the relevant time, carried out 10 or more separate transactions to acquire specified financial products where the price under each of those transactions is at least \$20,000 and the person who is disposing of the specified financial products is not an associated person of A:
 - (c) A has, during the 2-year period before the relevant time, carried out 5 or more separate transactions to acquire specified financial products where the price under each of those transactions is at least \$100,000 and the person who is disposing of the specified financial products is not an associated person of A:
 - (d) A has net assets of at least \$2 million as at the last day of A's most recently completed financial year before the relevant time or an annual gross income of at least \$200,000 for each of A's 2 most recently completed financial years before the relevant time:
 - (e) A is an individual who has, within the last 10 years before the relevant time, been employed or engaged in an investment business and has, for at least 1 year during

Part 5—*continued*

that 10-year period, participated to a material extent in the investment decisions made by the investment business.

- (2) For the purposes of—
 - (a) subclause (1)(a), in determining the specified financial products owned by A, the specified financial products owned by an entity controlled by A may be treated as being owned by A;
 - (b) subclause (1)(b) and (c), in determining the transactions carried out by A, transactions carried out by an entity controlled by A may be treated as carried out by A;
 - (c) subclause (1)(d), in determining the net assets or annual gross income of A, the net assets or annual gross income of an entity controlled by A may be included in the net assets or annual gross income of A.
- (3) A particular transaction may be taken into account for the purposes of subclause (1)(b) or (c) but not for the purposes of both of those paragraphs.
- (4) The frameworks and methodologies prescribed by the FMA under subpart 4 of Part 8 for the purposes of this clause (if any) must be complied with when determining whether any of the paragraphs of subclause (1) are satisfied (for example, the frameworks or methodologies may include requirements relating to how net assets or gross income are to be determined, calculated, or valued).
- (5) In this clause, **specified financial products**, in relation to A, means financial products other than—
 - (a) category 2 products;
 - (b) interests in a KiwiSaver scheme or a superannuation scheme;
 - (c) financial products issued by an associated person of A.

35 Meaning of large

- (1) A person is **large** if the person meets at least 1 of the following paragraphs:

Part 5—*continued*

- (a) as at the last day of each of the relevant periods, the total assets (including intangible assets) of the person and the entities controlled by the person exceeded \$10 million:
 - (b) in each of the relevant periods, the total turnover of the person and the entities controlled by the person exceeded \$20 million.
- (2) The frameworks and methodologies prescribed by the FMA under subpart 4 of Part 8 for the purposes of this clause (if any) must be complied with when determining whether either of the paragraphs of subclause (1) is satisfied (for example, the frameworks or methodologies may include requirements relating to how total assets or turnover are to be determined, calculated, or valued).
- (3) In this clause, **relevant periods**, in relation to—
- (a) an offer of financial products to a person, means the 2 most recently completed financial years of the person immediately before financial products are issued or transferred to the person under the offer:
 - (b) a prescribed transaction, means the periods prescribed for the purposes of this definition.

36 Definition of government agency

A **government agency** is any of the following:

- (a) a government department named in Schedule 1 of the State Sector Act 1988:
- (b) a Crown entity under section 7 of the Crown Entities Act 2004:
- (c) a local authority:
- (d) a State enterprise (with the meaning of section 2 of the State-Owned Enterprises Act 1986):
- (e) the Reserve Bank:
- (f) the National Provident Fund (and a company appointed under clause 3(1)(b) of Schedule 4 of the National Provident Fund Restructuring Act 1990).

Part 5—*continued***37 Eligible investors**

- (1) A person (**A**) is an **eligible investor**, in relation to a transaction or class of transactions, if—
 - (a) the person certifies in writing, before the relevant time,—
 - (i) as to the matters specified in subclause (2) or (3) (as the case may be); and
 - (ii) that the person understands the consequences of certifying himself, herself, or itself to be an eligible investor; and
 - (b) the person states in the certificate the grounds for this certification; and
 - (c) an authorised financial adviser signs a written confirmation of the certification in accordance with clause 39.
- (2) In relation to an offer of financial products or any other transaction involving a dealing in financial products (or a class of those transactions), the person must certify that the person has previous experience in acquiring or disposing of financial products that allows the person to assess—
 - (a) the merits and risks of the transaction or class of transactions (including assessing the value of the financial products involved); and
 - (b) the person’s own information needs in relation to the transaction or those transactions; and
 - (c) the adequacy of the information provided by any person involved in the transaction or those transactions.
- (3) In relation to a transaction involving the supply of market services (or a class of those transactions), the person must certify that the person has previous experience in acquiring or disposing of financial products that allows the person to assess—
 - (a) the merits and risks of the transaction or class of transactions; and
 - (b) the merits of the service or services to be provided; and
 - (c) the person’s own information needs in relation to the transaction or those transactions; and
 - (d) the adequacy of the information provided by any person involved in the transaction or those transactions.

Part 5—*continued*

- (4) The certification must specify the transaction or class of transactions to which it applies.

38 Offeror or other relevant person may not rely on certificate if they knew, or had reasonable grounds to believe, that certificate is incorrect

Clause 37 does not apply to an offer of financial products, or any other transaction, if the offeror or other relevant person, before the relevant time,—

- (a) knew that A did not in fact have previous experience of the kind referred to in clause 37(2) or (3) (as the case may be); or
- (b) had reasonable grounds to believe that the certification was incorrect.

39 Confirmation of certification

- (1) An authorised financial adviser must not confirm a certification of a person under clause 37 unless the financial adviser, having considered the person's grounds for the certification,—
- (a) is satisfied that the person has been sufficiently advised of the consequences of the certification; and
- (b) has no reason to believe that the certification is incorrect or that further information or investigation is required as to whether or not the certification is correct.
- (2) The person who confirms the certification of a person may be the financial adviser for the person (but does not need to be).

40 Safe harbour if certificate given

- (1) The purpose of this clause is to provide certainty to an offeror (or other relevant person) that a person is a wholesale investor of the kind referred to in clause 3(2) (subject to clauses 41 and 42).
- (2) A person (A) must be treated as being a wholesale investor if the person—
- (a) certifies in writing, before the relevant time, that the person—

Part 5—*continued*

- (i) is a wholesale investor within the meaning of clause 3(2); and
- (ii) understands the consequences of certifying himself, herself, or itself to be a wholesale investor; and
- (b) states in the certificate—
 - (i) the paragraph in clause 3(2) that is claimed to apply to the person; and
 - (ii) the grounds on which the person claims that the paragraph applies; and
- (c) a copy of the certificate is given to the offeror or other relevant person.

41 Offeror or other relevant person may not rely on certificate if they knew, or had reasonable grounds to believe, that certificate is incorrect

Clause 40(2) does not apply to an offer of financial products or other transaction if the offeror or other relevant person, before the relevant time,—

- (a) knew that A was not in fact a wholesale investor within the meaning of clause 3(2); or
- (b) had reasonable grounds to believe that the certification was incorrect.

Eligible person certificates and safe harbour certificates

42 Other provisions relating to certificates

- (1) A certificate under clause 37 or 40 is effective only if the certificate is—
 - (a) in a separate written document; and
 - (b) in the prescribed form (if any); and
 - (c) contains the prescribed information (if any).
- (2) If a person gives written notice to an offeror or other relevant person that the certificate under clause 37 or 40 is revoked, the relevant person may not rely on the certificate in respect of any subsequent transaction.

Part 5—*continued***43 Offences relating to certificates**

- (1) Every person commits an offence who gives a certificate under clause 37 or 40 knowing that it is false or misleading in a material particular.
- (2) Every person commits an offence who incites, counsels, or procures any person to give a certificate under clause 37 or 40 that is false or misleading in a material particular.
- (3) Every person who commits an offence under this clause is liable, on summary conviction, to a fine not exceeding \$50,000.

Control

44 Meaning of control in this schedule

- (1) In this schedule, unless the context otherwise requires, a person **controls** an entity if the person has the capacity to determine the outcome of decisions about the entity's financial and operating policies.
- (2) In determining whether the person has this capacity,—
 - (a) the practical influence the person can exert (rather than the rights the person can enforce) is the issue to be considered; and
 - (b) any practice or pattern of behaviour affecting the entity's financial or operating policies must be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) The person does not control the entity merely because the person and another person jointly have the capacity to determine the outcome of decisions about the entity's financial and operating policies.

Compare: Corporations Act 2001 s 50AA (Aust)

Schedule 2

s 6

Registers**Contents**

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 Register of offers of financial products
1 Register of offers of financial products

A register called the register of offers of financial products is established.

Compare: 1978 No 103 s 43N

2 Purposes of register

The purposes of the register of offers of financial products are—

- (a) to give public notice of offers of financial products; and
- (b) to enable any person to—
 - (i) obtain information contained in, or concerning, product disclosure statements; and
 - (ii) obtain other information about, or copies of documents relating to, offers of financial products; and
 - (iii) compare information about offers of financial products; and
- (c) to assist any person to decide whether or not to subscribe for financial products under an offer of financial products; and
- (d) to assist any person to perform a financial adviser service (within the meaning of the Financial Advisers Act 2008) or to otherwise comment on an offer of financial products; and
- (e) to assist any person—
 - (i) in the exercise of the person's powers under this Act or any other enactment; or
 - (ii) in the performance of the person's functions or duties under this Act or any other enactment.

Compare: 1978 No 103 s 43O

3 Contents of register

- (1) The register of offers of financial products must contain all of the following information and documents to the extent that the information or documents are relevant, for each regulated offer:
 - (a) the name of the issuer and the issuer's financial service provider number (if any);
 - (b) in the case of a sale offer, the name of the offeror and the offeror's financial service provider number (if any);
 - (c) the name of any supervisor and supervisor's financial service provider number (if any):

- (d) the name of the offer that is specified in the PDS and the offer number given by the Registrar on lodgement of the PDS:
 - (e) the kind of financial product or products being offered (for example, an equity security, a debt security, a managed investment product, or a derivative):
 - (f) the date of the PDS:
 - (g) the status of the PDS (being a status that is determined and described in the prescribed manner):
 - (h) any other prescribed information or documents.
- (2) However, a register entry for a regulated offer is not required in the prescribed circumstances.
- (3) The register must contain any other prescribed information and documents (whether or not relating to a regulated offer).
- (4) In this clause, **financial service provider number**, in relation to a person, is the number given to the person on the person's registration under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Register of managed investment schemes

4 Register of managed investment schemes

A register called the register of managed investment schemes is established.

5 Purposes of register

The purposes of the register of managed investment schemes are—

- (a) to give public notice of the registration of managed investment schemes; and
- (b) to enable any person to—
 - (i) obtain information about, and copies of documents relating to, registered schemes; and
 - (ii) know how to contact the managers and supervisors of registered schemes; and
- (c) to assist any person—
 - (i) in the exercise of the person's powers under this Act or any other enactment; or

- (ii) in the performance of the person's functions or duties under this Act or any other enactment.

6 Contents of register

- (1) The register of managed investment schemes must contain all of the following information and documents, to the extent that the information or documents are relevant, for each scheme:
 - (a) the name of the scheme;
 - (b) what type of scheme it is (if any);
 - (c) the names of each person who is a licensed manager or licensed supervisor of the scheme and an address for service in each case;
 - (d) for a restricted scheme, which person is the licensed independent trustee; and
 - (e) any other prescribed information and documents.
- (2) However, the register of managed investment schemes is not required to contain information or documents in the prescribed circumstances.

7 Registration decisions by FMA

The Registrar must make the appropriate entry in the register of managed investment schemes (or not enter a matter in the register) in accordance with any direction made by the FMA that a scheme be registered or is not entitled to be registered, or otherwise made by the FMA in the exercise of any other discretion under Part 4 relating to, or affecting, the register.

Keeping of registers under this schedule

8 Registrar may keep other registers

The Registrar may keep any other registers that he or she considers necessary for the purposes of this Act.

9 Registers to be kept by Registrar

Each register established under this schedule (the **register**) must be kept by the Registrar in accordance with this schedule and the regulations.

10 Operation of and access to registers

- (1) The register may be—
 - (a) an electronic register; or
 - (b) kept in any other manner that the Registrar thinks fit.
- (2) The register must be operated at all times unless—
 - (a) the Registrar suspends the operation of the register, in whole or in part, in accordance with subclause (3); or
 - (b) otherwise provided in regulations.
- (3) The Registrar may refuse access to the register or otherwise suspend the operation of the register, in whole or in part, if the Registrar considers that it is not practical to provide access to the register.

11 Amendments to registers

- (1) The Registrar may amend the register if—
 - (a) an issuer or the FMA informs the Registrar of information that is different from the information entered on the register; or
 - (b) the Registrar is satisfied at any time that the register contains a typographical error or a mistake, or omits information supplied to the Registrar.
- (2) The Registrar must amend the register if the regulations require the Registrar to do so in circumstances specified by the regulations.

Compare: 1978 No 103 s 43R

12 Search of register

- (1) A person may search the register in accordance with this Act or the regulations.
- (2) The register may be searched only by reference to the contents of the register required by this schedule or any other prescribed criteria.
- (3) A search of the register may be carried out only by the following persons for the following purposes:
 - (a) a person, for a purpose referred to in clause 2 or 5 or, in the case of a register kept under clause 8, a prescribed purpose:

- (b) a person, for the purpose of advising another person in connection with any of the purposes referred to in this clause:
 - (c) an individual, or a person with the consent of the individual, for the purpose of searching for information about that individual.
- (4) A person who searches the register for personal information in breach of this clause must be treated, for the purposes of Part 8 of the Privacy Act 1993, as having breached an information privacy principle under section 66(1)(a)(i) of that Act.
- Compare: 1978 No 103 s 43S

Miscellaneous

13 Lodging or giving documents or otherwise notifying Registrar

- (1) If this Act requires a document or notification to be lodged or given to the Registrar, the document or notification must be lodged or given in the manner specified by the Registrar (who, for example, may specify a form to be used or require notification by electronic means, or may specify any of the matters referred to in section 506(a) to (d)).
- (2) The Registrar may refuse to perform or exercise a function, power, or duty in relation to the document or notification if subclause (1) is not complied with.

14 Certificate of lodgement or registration

- (1) The Registrar must, on the lodgement of a PDS, give a certificate of the lodgement (and the certificate is conclusive evidence that the PDS has been lodged).
- (2) The Registrar must, on the registration of a managed investment scheme, give a certificate of the registration (and the certificate is conclusive evidence that the scheme has been registered).
- (3) The certificate must, in the case of a PDS, specify an offer number for the regulated offer.

Compare: 1978 No 103 s 42(3), (4)

15 When documents are lodged

A document is lodged when—

- (a) the document itself is constituted as part of the register; or
- (b) particulars of the document are entered in the register.

16 Registrar may give notice of lodgement or notification

- (1) If a document or notification is lodged or given to the Registrar under this Act, the Registrar may, in any manner that the Registrar thinks fit, give notice of the lodgement or notification to any person or class of persons or to the public generally.
- (2) The Registrar may, in any manner that the Registrar thinks fit, give notice to any person or class of persons or to the public generally of any changes in the information kept in a register.

17 Certified copy of information on register

- (1) The Registrar must provide a copy, or a certified copy, of any information on a register to any person who applies for it and pays the prescribed fee (if any).
- (2) A certified copy of information on a register purporting to be signed by the Registrar is conclusive evidence for all purposes that the information in the certified copy has been duly entered in the register.

18 Power of Registrar to delegate

- (1) The Registrar may delegate to any person, either generally or particularly, any of the Registrar's functions, duties, and powers under this Act except the power of delegation.
- (2) A delegation—
 - (a) must be in writing; and
 - (b) may be made subject to any restrictions and conditions the Registrar thinks fit; and
 - (c) is revocable at any time, in writing; and
 - (d) does not prevent the performance or exercise of a function, duty, or power by the Registrar.
- (3) A person to whom any functions, duties, or powers are delegated may perform and exercise them in the same manner and

with the same effect as if they had been conferred directly by this Act and not by delegation.

- (4) A person who appears to act under a delegation is presumed to be acting in accordance with its terms in the absence of evidence to the contrary.
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Schedule 3

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Schedule 3 schemes**1 Purpose of schedule**

The purpose of this schedule is to provide for the statutory recognition of single person self-managed superannuation schemes.

2 Approval of Schedule 3 schemes

The FMA may, by written notice to the trustees of a scheme,—

- (a) approve the scheme as a Schedule 3 scheme if it is satisfied it meets the approval criteria set out in clause 3:
- (b) withdraw an approval of the scheme if—
 - (i) it is no longer satisfied that it meets that approval criteria; or
 - (ii) the trustees have contravened the obligations relating to the scheme under this schedule.

3 Criteria for approving Schedule 3 schemes

- (1) A scheme may be approved as a Schedule 3 scheme if—
 - (a) the scheme meets the following requirements:
 - (i) it is a trust established and governed by a trust deed that is interpreted and administered in accordance with New Zealand law; and
 - (ii) its purpose is providing retirement benefits to the scheme participant; and
 - (iii) participation is restricted to persons who meet the New Zealand criteria set out in subclause (2); and
 - (b) the scheme has only 1 scheme participant who is an individual; and
 - (c) the scheme participant is either a trustee, or a director of a sole corporate trustee, of the scheme.
- (2) The New Zealand criteria are that the person, at the time of becoming a participant,—
 - (a) is, or normally is, living in New Zealand, or is an employee of the State services (within the meaning of the State Sector Act 1988) who is—
 - (i) serving outside New Zealand; and

- (ii) employed on New Zealand terms and conditions; and
 - (iii) serving in a jurisdiction where offers of superannuation scheme membership are lawful; and
- (b) is a New Zealand citizens or is entitled, in terms of the Immigration Act 2009, to be in New Zealand indefinitely.

4 Procedure for exercising powers

The FMA must not exercise a power under clause 2(b) unless—

- (a) the FMA gives the trustees no less than 10 working days' written notice of the following matters before it exercises the power:
 - (i) that the FMA may exercise the power; and
 - (ii) the reasons why it may exercise the power; and
- (b) the FMA gives the trustees or the trustee's representative an opportunity to make written submissions on the matter within that notice period.

5 Notice requirements

- (1) The notice under clause 2(b) must—
 - (a) state the FMA's reasons for giving the notice; and
 - (b) specify the date on which the withdrawal of the approval takes effect.
- (2) The FMA must give a copy of the notice to every prescribed person.

6 Reporting obligations for approved Schedule 3 schemes

The trustees of an approved Schedule 3 scheme must—

- (a) if the scheme is a defined benefit scheme within the meaning of section 147(1)(a), comply with that section as if they were the manager of the scheme; and
- (b) at the prescribed times or on the occurrence of the prescribed events and otherwise in the prescribed manner, prepare and provide to the FMA reports that contain the

documents, information, or other matters that are required to be provided by the regulations.

Schedule 4

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Consequential amendments**Note to submitters**

This schedule contains only some of the necessary consequential amendments. Further consequential amendments will be included on introduction.

Part 1

Amendments to Acts

Financial Reporting Act 1993 (1993 No 106)

Paragraph (a) of the Long Title: omit “**issuers of securities to the public**” and substitute “**issuers of financial products**”.

Paragraph (e) of the definition of **director** in section 2(1): omit “(within the meaning of section 2 of the Unit Trusts Act 1960)”.

Section 2(1): insert in their appropriate alphabetical order:

“**equity security** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011

“**financial product** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011

“**registered scheme** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011

“**regulated offer** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2011”.

Definition of **equity security** and **security** in section 2(1): repeal.

Paragraphs (a) and (b) of the definition of **issuer** in section 4(1): repeal and substitute:

“(a) every person who is an issuer of financial products that are, or have been, offered under a regulated offer:

“(b) every person who is a manager of a registered scheme:”.

Paragraph (c) of the definition of **issuer** in section 4(1): repeal and substitute:

“(c) every person who is a party to a listing agreement with an operator of a licensed market (within the meaning of the Financial Markets Conduct Act 2011) and who has issued financial products that are quoted on such a market:

Part 1—*continued***Financial Reporting Act 1993 (1993 No 106)**—*continued*

“(ca) every registered bank (within the meaning of section 2(1) of the Reserve Bank of New Zealand Act 1989):”.

Section 4(2) to (4): repeal and substitute:

- “(2) If an offer of financial products would require disclosure under Part 3 of the Financial Markets Conduct Act 2011 but for an exemption granted by the FMA under that Act, the person who is the issuer of the financial products under the offer must be treated as being an issuer under subsection (1)(a) by virtue of that offer unless the exemption contains a statement that this subsection does not apply.
- “(3) In subsection (1)(a), a reference to financial products must be taken to be a reference to financial products that have not been cancelled, redeemed, forfeited, or in respect of which obligations owing under them have not been discharged.
- “(4) A person who, immediately before the commencement of this subsection, was an issuer under subsection (1)(a) or (b) (as in force before the commencement of this subsection) in relation to securities continues to be an issuer in respect of those securities for the purposes of this Act until—
- “(a) all of those securities are cancelled, redeemed, or forfeited; or
- “(b) all of the obligations owing under those securities have been discharged.
- “(5) Subsection (4) must be treated as applying to a person who makes an offer of securities to which the Securities Act 1978 continues to apply in accordance with sections 572 to 577 of the Financial Markets Conduct Act 2011.”

Section 4A(1)(b): repeal and substitute:

“(b) the conduit issuer raises an amount of money by the issue of financial products under a regulated offer; and”.

Section 9A(1) to (3): repeal and substitute:

- “(1) For the purposes of this Act, a requirement on the directors of an issuer of financial products in relation to a registered scheme to prepare and register financial statements must be construed as including a requirement to prepare and register

Part 1—*continued***Financial Reporting Act 1993 (1993 No 106)**—*continued*

(in addition to financial statements in respect of the issuer itself),—

- “(a) if the liabilities of the issuer and the scheme are not limited to a particular group of assets (a **separate fund**), financial statements in respect of the scheme; or
- “(b) if the liabilities of the issuer or the scheme are limited to a separate fund, financial statements in respect of both the scheme and that fund.

- “(2) If the liability of an issuer that is a life insurance company to satisfy its obligations under any financial products (as distinct from calculating the returns on the products) is limited to a separate fund (whether the fund or the limitation is created by statute or by contract or otherwise), then, for the purposes of this Act, a requirement on the directors of the issuer to prepare and register financial statements must be construed as including a requirement to prepare and register (in addition to financial statements in respect of the issuer itself), financial statements in respect of each such fund.”

Section 15(3): repeal.

Section 18(1A): repeal and substitute:

- “(1A) Any financial statements to which subsection (1) applies and that are required for the purposes of this Act may also contain or be accompanied by financial statements, and any auditor’s report on those statements, that are required for the purposes of a product disclosure statement, or register entry, under the Financial Markets Conduct Act 2011.”

Section 35A(2)(a): repeal and substitute:

- “(a) the exemption would not cause significant detriment to subscribers for the financial products of the issuer in New Zealand, having regard to the financial reporting requirements that must be complied with in relation to the issuer under the law in force in the country where the issuer is incorporated or constituted; and”.

Part 1—*continued***Financial Service Providers (Registration and Dispute Resolution) Act 2008 (2008 No 97)**

Section 5(i) and (ia): repeal and substitute:

- “(i) participating in a regulated offer as the issuer or offeror of the financial products (within the meaning of those terms under section 6(1) of the Financial Markets Conduct Act 2011):
- “(ia) acting in any of the following capacities in respect of regulated products (within the meaning of those terms under section 6(1) of the Financial Markets Conduct Act 2011):
 - “(i) as an issuer:
 - “(ii) as a supervisor:
- “(ib) a licensed market service (within the meaning of section 6(1) of the Financial Markets Conduct Act 2011):
- “(ic) acting as a custodian (within the meaning of section 6(1) of the Financial Markets Conduct Act 2011):
- “(id) acting as a licensed market operator (within the meaning of section 6(1) of the Financial Markets Conduct Act 2011):”.

Section 7(2)(j): repeal and substitute:

- “(j) an employer while providing services to enable employees of the employer to obtain rights or benefits under a superannuation scheme or a KiwiSaver scheme (as defined in section 6(1) of the Financial Markets Conduct Act 2011), being a scheme in which that employer participates for the benefit of its employees:”.

Section 14(2)(b) and (c): omit “Securities Act 1978, the Securities Markets Act 1988” and substitute in each case “Financial Markets Conduct Act 2011”.

Section 48(3): repeal and substitute:

- “(3) However, this obligation does not apply to—
 - “(a) a financial service provider in relation to providing a financial service referred to in section 5(i) or (ia)(i) if providing that service is not its only or principal business; or

Part 1—*continued***Financial Service Providers (Registration and Dispute Resolution) Act 2008 (2008 No 97)**—*continued*

- “(b) a financial service provider in relation to the financial service of acting as a licensed market operator (within the meaning of section 6(1) of the Financial Markets Conduct Act 2011); or
- “(c) a financial service provider (whether generally or in respect of a financial service or class of financial service) if it is exempted from the obligation by or under any other Act or by regulations made under section 79.”

Section 49(2)(b): repeal.

Section 49(2)(d) to (f): repeal and substitute:

- “(d) a related body corporate (within the meaning of section 11(2) of the Financial Markets Conduct Act 2011) of an entity to which paragraph (c) applies:
- “(e) a person who is a wholesale investor within the meaning of clause 3(2) of Schedule 1 of the Financial Markets Conduct Act 2011:
- “(f) a person who is, in relation to an offer of financial products, a wholesale investor within the meaning of clause 3(3) of Schedule 1 of the Financial Markets Conduct Act 2011 if the service relates to that offer or to financial products that have been subscribed for by that person under that offer:
- “(fa) a person who is, in relation to an offer of financial products, a close business associate of the offeror, or a relative of the offeror or a director of the offeror, within the meaning of clauses 4 and 5 of Schedule 1 of the Financial Markets Conduct Act 2011 if the service relates to that offer or to financial products that have been subscribed for by that person under that offer:”.

Definition of **private offer of securities** in section 49(4): repeal.

Schedule 2: add:

Financial Markets Authority	Au-	Persons who hold a market services licence	Financial Markets Conduct Act 2011
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Part 2

Amendments to regulations

To come.