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Part 1	**Preliminary provisions**	
Clause 8	Definitions relating to kinds of financial products	In our review and subsequent discussions with clients and other advisers, there appears to be a great deal of uncertainty surrounding the distinctions between different financial products (for example, where a product could be considered either debt or a managed investment product, it is difficult to ascertain which category it will fall into). Particular concerns around these categorisations include: • cash PIE unit trusts that appear to fall under the debt security definition, but we assume are intended to be regulated as a managed investment scheme; • whether or not the Bill covers all participatory securities that currently have Securities Act 1978 compliance requirements, but which do not appear to come within the definitions of "financial product" or "managed investment scheme". For example, marina schemes, and companies or societies that own communal infrastructure in property developments, where personal privileges or benefits arise in contract, but which do not, necessarily, produce any "financial benefits"; • whether the intention is for interests in a limited partnership to be considered a "managed investment product", rather than an "equity security. In our view, little is to be added by having a supervisor in the limited partnership structure, which is designed to be more akin to a company; • whether member shares of various mutual entities are intended to be treated as debt or equity. Entities such as building societies, credit unions, industrial and provident societies and companies limited by guarantee all have member shares or interests that may be redeemable. Only member shares of companies registered under the Cooperative Companies Act 1996 are specifically stated not to be debt securities; • the scope of the definition of derivative is unclear, particularly in relation to commodities. Commodity derivatives that are settled by physical delivery of the commodity (as opposed to payment of a cash amount based on the value of the underlying at the time of delivery) are generally excluded from the current Securities Markets Act regime, as they fall outside the definition of "futures contract". However the Bill only excludes "tangible" physically settled contracts; it is not clear whether this is intended to include or

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		exclude matters such as electricity and other energy, and emissions units (none of which are "tangible" – see in particular *Electricity Supply Association of New Zealand Inc v Commerce Commission* ((1998) 6 NZBLC 102,555 (High Court) Neazor J). It may be that the approach set out in section 136 of the Crown Entities Act 2004 is more appropriate; • we do not believe that over-the-counter and exchange-traded derivatives are sufficiently similar as to be treated the same. In summary, We believe that over-the-counter derivatives should be treated as a financial product and subject to product disclosure, whereas exchange-traded derivatives should be treated as a "service" and brokers and exchanges for such products should be subject to regulation. See further our comments in relation to Part 6 below; • the definition of managed investment scheme and (particularly) "financial benefits" would appear to exclude managed investment schemes for hedging risk, as opposed to investment. Hedging managed investment schemes may include certain mutual and Islamic finance vehicles; • the exclusions from various financial products are potentially inconsistent. In particular, paragraphs (c) and (d) of the definition of derivative at clause 8, and the definition of managed investment scheme at clause 9 exclude (from certain financial products only) matters such as agreements for the future provision of services, future delivery of certain goods, direct interests in property and insurance contacts. However at least some of these seem applicable to other types of security (particularly debt), while other possible exclusions are not included. It seems that the following might be excluded from the definition of *all* financial products (see section 7 of the Insurance (Prudential Supervision) Act in particular): o a contract of insurance; o a guarantee under which a person agrees to answer to another person for the debt, default, or liability of a third person; o a repayment waiver (within the meaning of section 5 of the Credit Contracts and Consumer Finance Act 2003): o a product or service guarantee or warranty in relation to any goods or services that is given or made by the manufacturer

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		or supplier; o gambling (within the meaning of section 4(1) of the Gambling Act 2003): o an agreement for the future provision of services; and o an agreement for the future provision of goods (other than a physically settled derivative transaction); • related to the previous point, the inclusions from various financial products are confusing. Paragraph (b)(ii) of the definition of debt security at clause 8 includes "convertible notes", however clauses 28 and 29 modify the disclosure requirements (although apparently not the definitions) for options and convertibles; • the assorted definitions appear to use "interest", "right". "right to", "right to participate in", and "[unenforceable] rights to participate in". This causes serious confusion. Following *R v Smith* ([1991] 3 NZLR 740; (1991) 5 NZCLC 67,120, Wylie J) and *DFC Financial Services Ltd (in stat man) v Abel* ([1991] 2 NZLR 619; (1991) 5 NZCLC 67,016, Fisher J): o "interest" is generally held to be restricted to a proprietary or equitable interest, not a mere contractual right; o "right to" involves a mere contractual right; and o "right to participate in" involves (a) some form of sharing of property with others (even if only with the promoter of the scheme); (b) some form of continuing activity, not a one-off event; and (c) the activity is shared by a number of persons, not merely two parties to an arrangement; We are unsure as to the scope of "[unenforceable] rights to participate in", in light of the definition of "right to participate" above. We suggest that you need to review the choice of drafting to carefully determine what is and what is not intended to be captured by the assorted definitions. Although the Financial Markets Authority ("**FMA**") does have the ability to designate/declare a security to be a certain financial product, it would be preferable if the definitions could be made more certain now, whether by way of listing particular products that fall into certain definitions, or by tightening up the definitions. In light of the extreme importance, but inherent difficulty, in formulating these definitions, we suggest that MED consider providing only a very high-level set of definitions in the Bill

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		(perhaps "security" and "financial product"), but leaving the definitions of specific financial products to regulation. We suggest that such regulations should be made with the Bill to give people an opportunity to consider these, however it would enable much more flexibility to correct issues later. As a separate but related matter, we note that some definitions (e.g. "category 2" products) cross refer to other legislation. Our view is that the Bill will be the central piece of financial markets legislation, and that (to the extent possible) the Bill should define the relevant concepts; other subsidiary legislation should then refer to the Bill. In particular, this would ensure that any modifications to the definitions (whether by regulation, designation/declaration, or exemption) flow through to other legislation. For example, if the FMA designates a security as an equity security, and this treatment should flow through to all other legislation (including, for example, the Financial Advisers Act 2008, and non-bank deposit takers regulation).
Part 2	**Misleading or deceptive conduct or false or misleading representations**	
	General	We note that Part 2 of the Bill will make the FMA responsible for all conduct relating to financial products and services (as opposed to the Commerce Commission under the Fair Trading Act 1986). While this seems generally appropriate that one specialist regulator will have responsibility in this area, we suggest that it will be necessary for the FMA and Commerce Commission to put in place some sort of protocol to deal with situations where their responsibilities and areas of interest may overlap. We note, in particular, that the responsibility for credit contracts will need to be clarified.
Clauses 17 and 18	Misleading conduct in relation to financial products/services	It would be helpful to define "the public" if this is to be retained, or this should be linked to the concept of a "retail investor" instead. We suggest that MED adopt the equivalent provision in section 44(4) of the Fair Trading Act as a defence to alleged contraventions of Part 2: "*It is a defence to a prosecution for an offence against section 40 of this Act [contravening Parts 1 to 4 of the Fair Trading Act], or to any other proceedings under this Part of this Act, in relation to a contravention of a provision of this Act committed by the publication of an advertisement, if the defendant proves—* (a) *That the defendant's business is publishing or arranging for*

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		the publication of advertisements; and (b) *That the defendant received the advertisement, or the information contained in the advertisement, as the case may be, in the ordinary course of that business and did not know and had no reason to suspect that the publication of the advertisement or the publication of the advertisement containing that information, as the case may be, would constitute a contravention of the provision*."
Part 3 and schedules 1 and 2	**Disclosure offers of financial products**	
Clause 32	PDS must be prepared and lodged	We generally support the Bill's proposals relating to product disclosure statements ("**PDSs**"). The success of this proposal will, of course, depend on the content of PDSs. It would be useful if MED were able to provide the draft PDS regulations (or even an outline of its current thinking) in the near future to inform debate on the PDS proposal. We support the possibility that different PDS requirement may be prescribed for different types of investments and financial products.
Clauses 34 and 35	Timing of disclosure	The Securities Act requires an investment statement to be given to investors prior to making an investment decision. However certain concessions have been granted for some types of entity, including registered banks and cooperatives. Such concessions typically involve allowing the issuer to receive subscriptions prior to giving an investment statement, provided that the investment statement is given shortly afterwards and the investor has the unconditional right to withdraw the application within the cooling off period. This has the same practical outcome (investors that do not like the implications of the disclosure do not have to invest), but is operationally more straightforward for some businesses. We submit that MED should consider whether a cooling off period would be appropriate for some or all issuers.
Clause 40	Meaning of material information	In our view, Option B is the preferred approach to the definition of "material information". We agree with MED's analysis that Option A could result in a difficult assessment of what information might influence investor demand, and could result in the inclusion of irrelevant and ultimately unhelpful disclosure
Clause 41	Consent of person to whom statement attributed	We understand that the expanded concept of consents that need to be obtained prior to registration of a PDS is designed to ensure that a range of people who are making statements in connection with an offer

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		have consented to the inclusion of those statements. However, we are concerned with the wording "a statement said..to be based on a statement by a person". Current market practise is for the inclusion of a range of publicly available information in prospectuses that could fairly be said to be "based on a statement by a person". For example, market sector data, survey results etc. As long as that information is properly referenced, and available to the public, it has not been considered an "expert statement" requiring consent. The drafting of this clause could require a range of consents to be obtained, from sources that may refuse to provide them. Additionally, the consents must be obtained before the registration of any supplementary or replacement PDS (clause 55). We are concerned that this might unnecessarily delay the prompt registration of correcting information, in the period during which all of the relevant parties are contacted and asked to provide new consents. Finally, we ask what the intention here is with respect to credit ratings agencies. Non-bank deposit takers are required to have a credit rating, and many other issuers choose to obtain one. Historically, while credit ratings agencies have been consulted about the language describing their services in a prospectus, they have not been treated as "experts". In respect of NBDT disclosure, we understand that the Reserve Bank and MED have been working together to develop disclosure rules for NBDT prudential requirements. If credit ratings agencies must now provide consents, we think it is worth clarifying this, and considering the views of the rating agencies in this regard.
Clauses 44 and following	Lodgement process	We note that the FMA is, as a transitional measure, currently continuing to provide a pre-registration review service in respect of prospectuses. It would be useful to understand whether the pre-registration review process is intended to be retained, or whether the intention is for issuers to register the PDS with the attendant uncertainty that it may need to be supplemented or replaced if the FMA has concerns with the level of disclosure. We support retaining the pre-registration process as it provides more certainty for issuers
Clause 49	Waiting period does not usually apply to continuous issue PDSs	We support the retention of this clause the Bill. On our experience, the current regime for continuously allotted securities in the Securities Act is working well.
Clause 62	Choices open to offeror	We support the proposed Australian "cure period" approach. We understand that this approach has worked well in Australia and is an

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		improvement on the Securities Act's void/voidable transactions regime.
Clause 65	PDS Expiry	We submit that the Bill should allow for "evergreen" PDSs. Prospectuses are required to be updated at least every 9 months, however often such updates contain no substantive changes beyond updating references to directors and the most recent financial statements. We believe more detailed matters such as directors and financials will be subject to "register entry" disclosure and therefore the PDS should be able to incorporate these matters by reference. It therefore seems to us that, so long as a PDS is still accurate, then periodic updates are not required.
Clause 69	Prohibition of offers in course of unsolicited meetings or communications in certain circumstances	We believe that the prohibition of unsolicited offers would cause a number of issues for various clients, including financial institutions and cooperatives. Many financial institutions and cooperatives market financial products directly, particularly to businesses – this is permitted under section 35 of the Securities Act. It would seem that this prohibition would significantly impede such business practices. In addition: • a definition of "unsolicited" should be introduced, including guidance as to what standard of consent is required; • the reference to electronic communications in clause 69(1)(b) would appear to overlap with the Unsolicited Electronic Messages Act 2007; • unsolicited paper communications do not appear to be subject to the prohibition. It seems arbitrary that electronic communications should be prohibited when a paper equivalent is not (particularly in light of environmental concerns that mean many businesses are allowing customers to receive all matters electronically; • it seems inconsistent to treat unsolicited communications regarding quoted financial products different to other financial products; and • offers of new financial products to existing clients should be excluded from the prohibition. Requiring institutions to use a financial adviser for market new financial products seems arbitrary. This approach would also seem to be contradictory to the "uninvited direct sales" regime that is currently being proposed as part of the Consumer Law Reform Bill. Finally, we also believe there may be a conflict between these prohibitions and the concept of making a "personal offer", discussed

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		more fully below.
	Advertising generally	Generally, we submit that the advertising regime set out in Subpart 3 of Part 3 needs to be clarified. For example: • it is not clear whether the advertising regime applies to all offers or just regulated offers (the definition of "advertisement" does not refer to regulated offers, and only some clauses in the subpart refer to regulated offers); • the definition of "advertisement" in clause 6 contains several words that are not defined, for example "made to", "public/section of the public" and "promoting"; and • different clauses in the subpart refer (variously) to "advertisement", "publication", "advertise", and "publish a statement". The purpose and effect of using these different terms is not clear. It would also be useful to understand what the likely regulations surrounding advertising are intended to cover (including that for "limited offers"). We are particularly interested in whether or not the existing "Regulation 30" sign-off procedure will be retained. Finally, we suggest that further consideration is given to the treatment of websites under the advertising regime. The advertising regime under the Securities Act applies extends to statements that appear "in association" with securities advertisements. Such statements must be treated as a single advertisement subject to the Securities Act advertising rules. This causes significant practical difficulties for websites; technically every page of a website must be vetted against the Securities Act advertising rules. This typically involves a significant compliance undertaking. We submit that a website should be treated as a single publication rather than "associated" related publications; a single "reasonably prominent" statement on a website that includes the matters referred to in clause 75 should be deemed to comply with the Bill's proposed advertising regime.
Clause 71(2)	Authorised or instigated	Clause 71(2) proposes that a statement something will be considered an advertisement governed by Subpart 3 if it is authorised or instigated by, or on behalf of, the issuer, offeror or any of their "associated persons". We are concerned about the widening of this definition, which will catch communications by parent companies or portfolio investors, and which may be prepared without the knowledge or involvement of the issuer. For example, an investor update from a holding company, which refers to a range of portfolio investments, may make reference to offers of financial products by those companies. The effect of this is difficult to ascertain without understanding whether the intention is to continue the

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		current Regulation 30 certificate practice.
Clause 72	Indirect references to offer and inducements to apply	The factors set out in clause 72 are very helpful and think these limit the concept of regulated advertising appropriately. However, the drafting of clause 72 only provides that these are matters that "must be taken into account". It would be useful to have more certain carve-outs or FMA guidance.
Clause 76	General exceptions	In recent years, some issuers have tried to improve disclosure to investors by preparing additional reports or investor updates over and above the required annual reporting obligations. We are concerned that the effect of clause 76(d) may be to make this more difficult. This form of voluntary disclosure may refer "indirectly" to an offer of financial products.
Clause 78	Defence for publishers	We agree that there should be some type of defence for publishers from the advertising obligations, and support the test in clause 78 of "published in the ordinary course of business" and the publisher "did not know and had no reason to believe that the advertisement would contravene sections 71 or 77". However it seems to us that the list of publishers is unnecessarily narrow – in particular, we are unclear why online publishers are limited to "news media or financial market commentary Internet site[s]". It seems that a defence similar to that in section 44(4) of the Fair Trading Act (see our comments above in relation to Part 2) would also be applicable for publishers of advertisements.
Clauses 80 to 83	Ongoing disclosure	We broadly support greater clarity around information that must be disclosed on an ongoing basis by issuers, particularly where an issuer is not subject to a continuous disclosure obligation. It would also be useful to understand the likely extent of the ongoing disclosure from a compliance cost perspective, and whether ongoing disclosure can be made through a register entry (the intention being that investors have an obligation to monitor changes to information themselves, in the same manner as issuers subject to continuous disclosure rules) or whether some prescribed changes will require information to be sent to investors directly.
Part 4 and schedule 3	**Governance of financial products**	
Clause 90	Contents of trust deed for debt securities	In light of their importance, we recommend this clause should specify the reports provided by the issuer to the supervisor as it is a fundamental plank of supervision.

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Clause 94(2)(b)	Changes to trust deed	Please add "on the basis set out in the certificate"; if it is necessary – as it is sometimes – to disclose the basis on which the confirmation is given; otherwise it may limit unnecessarily the scope for making amendments.
Clause 97(1)(b)(i)	Functions of supervisor	We suggest this clause should read: "to supervise, on the basis of the reports and information available to it under the trust deed and this Act, the issuer's performance of its issuer obligations;". Clause 97(1)(b)(ii) can then be made its own sub-section (c), otherwise the clause would, incorrectly, read: "to supervise the issuer's performance to ascertain whether…"
Clause 109(2)	Need to register managed investment scheme for regulated offer of managed investment product	We submit that the wording "the following sections (without limitation) apply" be clarified: what clauses are not intended to apply to voluntary registered schemes?
Clause 128(1)(b)	Functions of a supervisor	The obligation of the supervisor to supervise under this clause should be restricted to the reports and information available to it under the governing document and this Act, as per clause 97(1)(b)(i) noted above.
Clause 134(1)(c)	Power of a supervisor to engage an expert	This should also extend to the scheme. We suggest "or the scheme" be added at the end of the clause.
Clause 136(2)	Custodian holds scheme property on trust	We submit that the intention by referring to custodians holding scheme property "separate" for the purposes of the clause be clarified.
Clause 145(3)	Action that must be taken on pricing errors and failure to comply with pricing methodologies	We suggest this clause should mirror the obligation in clause 146(3) i.e.; the supervisor should only be required to report a limit break that has been notified to it. We support remedying such a breach, but are not sure what the point of notifying the FMA is. If the manager takes the prescribed steps to remedy the breach, should this not be sufficient?
Clauses 150 -152	Related party transactions	We are broadly supportive of the restrictions on related party benefits under the Bill. In particular, we consider that supervisors should be able to approve "soft dollar" commissions in accordance with the fund's best execution policy (for example, soft dollar commissions may be accepted provided that the execution factors are otherwise identical). Soft dollar commissions such as market research are often of significant benefit to investors in a fund. However we note that there are more onerous related party benefit restrictions for discretionary investment management services ("**DIMS**")

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		licensees under clauses 422 to 424 of the Bill. We consider that DIMS licensees (as for funds) should be able to accept soft dollar commissions in accordance with a best execution policy that is disclosed to investors. We would anticipate that the FMA would review a DIMS licensee's best execution policy as part of the licensing process.
Clause 168(2)	Change of supervisor	We suggest this clause should begin "For the purposes of section 168(1)(d) above, no manager of a registered scheme may remove….". This amendment would make it clear that clause 168(2) only relates to the situations where the governing document provides an ability for the manager to remove a supervisor, and isn't instead some suggestion of a broader power of removal which the manager does not (and should not) have. The same comment can be made in respect of clause 106(2).
Clause 170(2)	Cancellation of registration	The manager's notification obligations under this clause should also include notification to the supervisor.
Clause 173(2)	Duty of investment manager, administration manager and custodian to report serious problems	We suggest the extension of supervisory responsibility to custodians in this clause is not appropriate. A custodian simply holds assets on directions (often as a bare trustee) and often without knowledge of the underlying scheme or other structural arrangement to which the assets relate. The Bill provides sufficient supervisory responsibility to the supervisor and it is not necessary to add an additional layer of supervision. If additional security around the role of the custodian was considered necessary it could be possible to include custodians under the licensing requirements of Part 6 of the Bill.
Clause 177 and 178	Duty of supervisors to report breach or possible breach of issuer obligations/serious financial problem to FMA	We see no issues with the inclusion of the reporting obligations in these clauses, but if they are to be included the corresponding reporting obligations set out in section 11 of the Corporations (Investigation and Management) Act 1989 should be repealed.
Part 5	**Dealing in financial products on markets**	
Clause 214	Relevant interests in financial products (basic rule)	The term "relevant interest" as defined in this clause is used in other parts of the Bill. We therefore suggest that a cross-reference to the definition in this clause in the general definitions clause would be useful.
Clause 222	Criminal liability for insider conduct	The clause refers to "knowing" whereas the equivalent section of the Securities Markets Act 1988 uses the term "actual knowledge". Please clarify whether it is intended to create criminal liability where knowledge can be imputed only. The same issue arises in respect of clauses 242

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		and 247.
Clause 224	Exception for disclosure required by enactment	The words “or the FMA” should be added at the end to reflect the FMA's power to require disclosure, e.g. under a director order pursuant to clause 438. A person who complies with an order of the FMA to disclose should not be in breach of the insider trading prohibitions.
Clause 231	Exceptions from sections 220 and 221 for takeovers	The Bill does not retain the exception from the insider trading provisions for persons who are information insiders (or have inside information) only through acting as a person's adviser in relation to a takeover offer, disclosing information to, or advising or encouraging, that person. This exception is necessary to protect advisers of clients engaging in takeover offers and should be retained.
Clause 245	Persons treated as contravening false or misleading appearance of trade prohibition	It is no longer a defence to the general misleading conduct provision if a person proves that, in trading the securities, he or she was acting on behalf of another person and did not know (and ought not reasonably to have known) that no change in beneficial ownership would result. Proof of this now only excludes the presumption. Please clarify if this is the intention.
Clause 274	Listed issuers must publish information on substantial holdings	In paragraph (1)(c), the words "of quoted voting products" should be added after "total number" to clarify the meaning of this clause.
		The Bill does not replicate the existing exemption from the director and senior manager's disclosure obligations where the director or officer is a transacting shareholder of the company and the interest was acquired, or the interest is being acquired or disposed of, by the director or officer in the ordinary course of business. For some businesses (e.g. in the agricultural sector), owning shares in the relevant co-operative is an essential element of the business and shares are often sold as a necessary part of selling the business. As such, without the exception, a transacting shareholder would be liable for tipping if he or she were to encourage another to buy his or her business. Query what the intention is here
Clause 288	Offences relating to interests register	The reference to clause 285(3) should be a reference to clause 285(2).
Clause 290	What is a financial product market	In our view, the definition of "financial product market" is unnecessarily broad. In addition to capturing platform and portfolio management services (which we discuss further below in relation to Part 6), it seems that the definition could include matters as simple as an "open an

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		account" facility on online banking. We submit that this should be clarified further. In particular, the exemption at clause 290(2)(a) should clarify that financial institutions such as banks can offer, via a "facility" (e.g. a website): • financial products issued by the institution (e.g. deposit products) • financial products promoted, but not issued, by the institution (e.g. managed fund products, cash PIEs); and • third party issued products that are distributed by the institution (e.g. some insurance, personal loan and card products). In our view, there is no mischief from such arrangements and therefore should be excluded from the (very onerous) market licensing regime.
Part 6	**Licensing and other regulation of market services**	
	General	We support the objectives and the framework of the market services licensing regime; in particular, we strongly support the inherent flexibility in the regime, as opposed to (for example), the more prescriptive regime of the Financial Advisers Act. In terms of general comments: • we support the ability to have subsidiaries covered by a single licence. Given that this is discretionary, we suggest that this ability be extended to "related parties" (e.g. sister companies) instead of just subsidiaries to allow for group licensing in appropriate cases (this would be consistent with a joint QFE licence); • we support the proposed remedial actions available to the FMA; • there should be a mechanism for equivalent overseas licences to be recognised in New Zealand; alternatively holders of overseas licences should be subject to a streamlined licensing process in New Zealand; • we query the exclusion of licensing for custodians. This seems to be one of the few major areas where a person can play a significant role in investment and investor monies without a licence. This is something you may wish to consider further; • similar to the previous point, there are also no licensing requirements for others involved in the funds management industry, including administration managers, transfer agents, payment agents, and registrars. This is something that you may wish to

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		consider further – at the very least, you may wish to consider a form of negative licensing or banning power to ensure that persons that are not fit and proper are not able to be involved in these activities; and • we query the need for the FMA to maintain additional lists of licensed providers; we understood that the purposes of the Financial Service Providers Register was to provide the authoritative, single-source for such information,
	DIMS	We support the proposal to remove "class DIMS" from the Financial Advisers Act and subject it to separate, specific regulation. However we suggest that the overlap with the Financial Advisers Act needs to be further considered. In particular, we are aware of a number of firms that provide both a managed fund and a DIMS investment option, with essentially identical underlyings. The choice is largely driven by the personal tax circumstances of the investor. It seems anomalous to us that "advice" regarding the managed fund option would be subject to the full requirements of the Financial Advisers Act, but any "advice" regarding the DIMS option would not be financial advice at all. We submit that a statement comparing the differences between a DIMS and a managed fund investment be excluded from the definition of financial advice.
	Derivatives	As discussed above in relation to the financial product definitions, we submit that regulation of derivatives be separated into exchange-traded and over-the-counter derivatives. The disclosure and issuer licensing regime should apply to over-the-counter derivatives issuers. However, any monies received in the context of an over-the-counter derivatives inevitably involve outright payment (i.e. the issuer does not hold the money in a clients funds capacity). The client funds rules therefore seem anomalous. On the other hand, exchange-traded derivatives brokers should be regulated as for any other broker of financial products. If derivatives broking were included under the Financial Advisers Act, then the trust accounting requirements under that Act would apply automatically. Product disclosure is also less relevant for exchange-traded derivatives due to their secondary market status (as for secondary market trades of securities). We therefore submit that the disclosure and licensing regime in Parts 3 and 6 of the Bill only apply to over-the-counter derivatives. Dealers in exchange-traded derivatives should be treated as brokers under the

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		Financial Advisers Act. As a related point, we note that authorised futures dealers are currently excluded from both the adviser and broker regulation provisions of the FAA. As indicated above, we consider that exchange-traded derivatives brokers should be included in the FAA, but not in the derivative issuer licensing regime. We suggest however that licensed derivatives issuers should be partially excluded from the FAA. The nature of over-the-counter derivatives is such that staff involved in executing derivatives trades will almost invariably become involved in discussions with clients. Such conversations are typically with wholesale or sophisticated clients (i.e. not subject to the full Financial Advisers Act licensing regime), and usually involve discussion of the terms of the particular product or general market conditions (i.e. subject to the exclusions in section 10(3) of the FAA). The exact boundary between financial advice and non-financial advice is not particularly clear. We suggest that any financial advice that is merely incidental to acting as a licensed derivatives issuer be excluded from the scope of the FAA. This would provide derivatives issuers much greater certainty, and avoid to need to have derivatives traders (who are primarily involved in executing trades) become authorised financial advisers due to the possibility of inadvertently straying into giving financial advice. We understand that this is consistent with international regimes – see, for example, schedule 5 of the Hong Kong Securities and Futures Ordinance. To the extent that an employee of a licensed derivatives issuer is primarily giving financial advice (i.e. any advice is not merely incidental to execution services), then that should be treated as financial advice. However merely incidental advice should be excluded.
	Platform and portfolio service providers	In our view, you should introduce another category of licence for platform and portfolio service providers. – i.e. a form of custodial and transacting/broking service that allows clients to buy and sell investments – there are a number of examples in relation to managed funds in particular. Such services currently likely fall with the definition of "market" (see our comments in relation to exchange licensing in Part5 above), and will therefore seek a licence to take advantage of the exemption at clause 290(2)(b). However it is not clear which licence would be appropriate – presumably prescribed intermediary service, but we understand that to

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		relate to matters such as prescribed intermediary services. It seems to us that appropriate regulation for this would involve (in addition to the matters of general application): • custody requirements for client assets; • disclosure (particularly of fees); and • a requirement to have the PDS of the actual issuer available (for primary offers only).
	Overlap between services	We support the approach of "streamlining" applications for QFEs, but suggest that this should be extended to other large non-QFE financial institutions – that is, it should be possible to be licensed for multiple financial services in a single consistent global licence. In our view, large financial institutions will typically mitigate risk rather than aggregate it (i.e. a large institution with multiple operations is likely to be less risky than a smaller, single-purpose institution). Related to this, we suggest that it may be beneficial to allow for a form of "global" or "institution" disclosure. Current disclosure requirements include general bank disclosure, investment statements, bank terms and conditions, and personal and QFE financial adviser disclosure, Under the Bill, PDSs will be required, in addition to DIMS disclosures, and written client agreements. Many clients could face a significant amount of paperwork that would undermine the Bill's aim of concise disclosure. Also regarding overlap between services, we do not consider that it should be necessary for licensed service providers to obtain further licences where they provide another service that is merely ancillary or incidental to the first service. There is an obvious overlap between the Financial Advisers Act and DIMS and derivatives as noted above, however the Financial Advisers Act may also overlap with fund management and platform services. Similarly, we do not consider that a DIMS provider should be obliged to seek a derivatives licence if it (for example) puts in place plain-vanilla FX hedges in relation to international investments.
Part 7	**Enforcement and liability**	
	General	As a general comment, we believe it would be more useful to have all clauses relating to enforcement and liability in one part of the Bill, rather than spread throughout each Part of the Bill.
Clause	Meaning of	The extended definition of "contravene" in this clause appears to extend

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431	contravene	to persons acting as professional advisers to persons who contravene a provision. This may well prejudice the ability to obtain professional advice in situations where professional advice is most needed, and seems inappropriate where advisers are acting solely in a professional capacity. The normal means of recourse against professional advisers for negligent or wrong advice are the appropriate remedies in those circumstances.
Clause 432	Directors also treated as contravening in certain circumstances	It is unclear what standard is imputed by the words "should have known". We suggest that (consistently with the rest of the Bill) the clause should instead refer to "ought to have known" or "ought reasonably to have known", and think the objective standard is more appropriate for criminal liability.
Clause 435	Meaning of restricted communication	We question the intention of introducing a new concept of a "restricted communication". It would be helpful to understand, as discussed above, whether the restrictions around advertising, and the attendant liabilities, are designed to apply only to the advertising of regulated offers. If this is the case, a single definition should be utilised.
Clause 436	FMA may make interim stop order pending exercise of powers	The definition of "service provider" in this clause is used elsewhere in the Part. We submit that this definition should be made more prominent by inclusion of a cross-reference in the definitions clause.
Clause 437	Who stop orders and interim stop orders may apply to	Subclause (2) states that a direction order "may" require the issuer, offeror or service provider to provide a copy of the order to associated persons who are caught by it under clause 434(c). We submit that this should be mandatory to ensure that associated persons are made aware of the order. The same issue arises in respect of clause 444.
Clause 442	FMA must follow steps before making orders	Subclause 1(c) should be amended so that it is clear that the notice referred to in that paragraph is the notice referred to in *both* paragraphs (a) and (b).
Clause 450	Court may make or give FMA orders or directions	The Bill provides that the Court may make "any order or direction" that the FMA may make. This would seem to extend to directions given under other parts of the Bill – e.g. a direction to cancel registration of a registered scheme under clause 170 and directions to licensed market operators under clause 344. Query whether this is the intention, or whether the words "under this Part" should be inserted. If this is the intention, we suggest that this may not be the appropriate place in the Bill to provide for such a wide and general power.
Clause 455	What declarations of contravention must state	It is unclear whether the requirement to state in a declaration of contravention "the person who engaged in the contravention" would include any directors deemed to also contravene the provision under

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		clause 462. This should be clarified.
Clause 457	Maximum amount of pecuniary penalty	The reference to "prohibition" in subclause(1)(b) should be to "civil remedy provision". Subclause (2) refers to "provisions" specified in certain clauses. Those clauses also specify certain exemptions, which we assume should be covered by the reference as well. This should be clarified.
Clause 458	Guidance for court on how to determine gains made or losses avoided for purposes of maximum amount	This clause now applies beyond the insider conduct, market manipulation and unsolicited offer provisions to all other contraventions. However, it is not clear that the calculation based on an acquisition or disposal practically works for other contraventions which may not involve an acquisition or disposal of a financial product. The operation of this clause should be clarified.
Clause 462	Terms of compensatory orders	As a minor matter, we suggest that this clause provide a cross-reference to the concept of consents contained in clause 41.
Clauses 465 and 466	Due diligence defence and General defences	The defences appear to apply only to compensatory orders – as opposed to, for example, pecuniary penalty orders or an offence. We note that the equivalent Australian provision is a defence to the commission of an offence. We would like to understand the rationale for limiting the defence here.
Clause 466	General defences	In subclauses (4) and (5), it is not clear when a person must have withdrawn their consent for the defendant to apply, or at what time the person needs to be unaware of the new circumstances. We suggest clarifying this (as, for example, in section 57 of the Securities Act, which states that consent must be withdrawn before distribution of the advertisement or registered prospectus).
Clause 468	Terms of other civil remedy orders	This clause refers to "relevant interests", which are defined in subpart 1 of Part 5. We submit that a cross-reference to the definition would be useful.
Clause 479	Offence of knowingly or recklessly contravening other provisions relating to defective disclosure	Paragraph (a)(iii) should refer to "subparagraph (i) or (ii)", rather than "subparagraph (i), (ii) or (iii)". Similarly, the reference to "the circumstance referred to in paragraph (a)(iii)" in paragraph (b) should be deleted.
Clause 484	General provisions for banning orders	In subclause (2), the cross-reference should be to clause 480 rather than clause 481.
Clause 490	Permitted indemnities for certain costs of	Subclause (1)(b) refers to "an application under section 489", which appears to be a cross-reference error. Under the Securities Act, this

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	directors, employees, and auditors of issuers or offerors	cross-reference refers to an application for relief, which is not replicated in the Bill.
Part 8	**Regulations and exemptions**	
Clause 514(a)	Transitional matters	We note that clause 514(a) provides that a declaration may not apply retrospectively, which may cause difficulty if the purpose of the declaration is to clarify that something is not governed by the Act.
Clause 570	Amendments	We suggest the transitional provisions applying to Group Investment Funds are unclear. The result appears to make externally managed Group Investment Funds illegal overnight.
Schedule 1	**When disclosure is required**	
Schedule 1		We welcome the increased clarity, and greater number of bright-line tests, encapsulated in Schedule 1. In determining whether disclosure needs to be made to an investor, Schedule 1 requires an assessment as to whether or not the investor is a "retail investor". In assessing this, the issuer/offeror can (in the case of the investment activity criteria) take into account activity from that investor's controlled entities. While we welcome this change, from a practical perspective, an investor may meet the "wholesale" test in Schedule 1 and yet choose to subscribe for financial products through a controlled entity that would not pass the test. For example, an experienced investor may set up a new trust or company to hold shares. That trust or company is the "investor" for the purposes of considering to whom disclosure must be made, and does not pass the test for being a "wholesale investor". We suggest that Schedule 1 be amended to make it clear that an offer to a wholesale investor does not require disclosure even in circumstances where the investor subsequently chooses to acquire or hold the products through a controlled entity.
Clause 6	Licensed Intermediaries	We support the exclusion for offers through licensed intermediaries. However, we submit that there may be some lack of clarity in the peer-to-peer lending sector, where a borrower lists their debt on more than one website, or makes an "offer" in more than one way. It may need to be clarified that the offer is only exempt if it is made solely through a licensed intermediary.
Clause 12	Small Offers	We welcome the inclusion of the carve-out for "small offers" but have concerns that the requirement these be made in the context of a "personal offer" may be inconsistent with the prohibition on unsolicited offers. The small offer regime permits, for example, an offer to be made

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		to someone who has indicated through their actions that they are interested in offers of that kind. However, an approach to such a person may also be an unsolicited offer under clause 69.