

# New Zealand Law Society

## SUBMISSION ON THE FINANCIAL MARKETS (REGULATORS AND KIWISAVER) BILL

- 1 The New Zealand Law Society (Society) appreciates the opportunity to comment on the Financial Markets (Regulators and Kiwisaver) Bill (Bill).
- 2 The Society accepts the primary policy reasons that give rise to the Bill and is not opposed to its principal features, which arise from the recommendations of the Capital Market Development Taskforce, and which establish the Financial Markets Authority (FMA). The FMA reflects a welcome consolidation of potentially duplicative regulatory functions carried out by the Securities Commission, the Government Actuary, and the Registrar of Companies.
- 3 Accordingly, the Society's submissions are generally of a clarifying or technical nature. Nevertheless the Society does suggest the need for further consultation and analysis in relation to:
  - 3.1 the proposals that the FMA has the right to exercise a person's right of action (Part 3, subpart 3); and
  - 3.2 the new registration and vetting process for prospectuses and offer documents (Part 5).
- 4 The Society makes no apology for suggesting that further consultation and analysis is undertaken on these key matters. Creating the best regulatory environment is vitally important to ensure thriving capital markets, which as the Government has recognised are essential for New Zealand's economic growth. Short term expediency should not be preferred where it creates a material risk of institutionalising longer term costs to the economy through hurried legislation.

### **Part 2: Financial Markets Authority**

#### *Objectives and jurisdiction*

- 5 The Society raises no issue in relation to the description of the FMA's main objective in clause 8 of the Bill.
- 6 However, it is critical that the scope of the FMA's role and its jurisdiction are clearly enunciated in the Bill, particularly as one of the objectives of the Bill is to enable a more cohesive and comprehensive regulatory body.

7 In this respect, the Society suggests that clause 9 of the Bill could be improved:

7.1 Clause 9(1)(b)(ii) provides that the FMA's monitoring and investigative powers in respect of certain "non-core" financial markets legislation are limited to situations where it is monitoring or investigating financial market participants.

By its nature, clause 9(1)(b)(ii) creates the potential for a person to challenge the FMA's jurisdiction to investigate it, on the basis that the person is not a financial markets participant (for the purposes of the legislation being enforced). Experience suggests that a defendant would, quite rightly and properly, seek to make such a challenge if there were grounds for it.

While clause 9(2) provides that clause 9(1) is not intended to limit the powers of any other person to enforce those provisions, another regulator can be expected to be naturally reluctant to commence its own investigations where the FMA has asserted jurisdiction (which is being denied).

Due to this potential for a practical disconnect, the Society suggests that this provision requires further discussion and analysis. It might be cured by providing that clause 9(2)(b)(ii) read:

...the Acts referred to in Part 2 of Schedule 1 (and the enactments made under those Acts) to the extent that those Acts or other enactments apply, or otherwise relate, to financial market participants or other persons engaged in conduct that involves dealings in securities.

7.2 The reference in clause 9(3) to the FMA's functions, powers and duties in respect of any legislation not being limited by the fact that some other persons have functions, powers and duties in respect of financial markets legislation, raises the question of whether it is intended that the FMA is to have jurisdiction in relation to matters under the jurisdiction of the Takeovers Panel.

#### *Chairperson's powers in respect of divisions*

8 While the clauses setting out the administrative structure of the FMA appear appropriate, clause 14 does appear to provide the Chairperson with a unilateral degree of power and discretion in relation to establishing divisions to deal with certain matters.

- 9 Administrative convenience necessitates that the FMA be able to act as a division in some cases. However, the Society believes that decisions in relation to establishing divisions and the scope of their jurisdiction should be a matter for the FMA as a whole to determine.
- 10 We suggest that the references to “or chairperson” in clauses 14(1) and 14(2) be deleted.
- Privileges*
- 11 Clause 53 describes the privileges afforded to witnesses and counsel, which are to be those that apply in court.
- 12 The Society believes the privileges against self incrimination should extend to any person with the same interest or involvement in a matter as the person providing information, documents and answers to questions. We are concerned that a regulator can put questions to two or more persons with the same interests or involvement in a matter and then use the answers provided by each of them in criminal proceedings against the other. This is contrary to current legal principle as set out in s12A of the Evidence Act 2006.

### **Part 3: General information-gathering and enforcement powers**

#### ***Subpart 1: General information-gathering and enforcement powers***

- 13 The Society supports, in general terms, the provisions of subpart 1.
- 14 However, the Search and Surveillance Bill is currently before Parliament and the intention of that Bill is to harmonise the search powers of government agencies. The Society has made detailed submissions on that Bill. Accordingly, the Society submits that the Bill should not provide for an alternative regime for the FMA and, rather, the provisions of the Search and Surveillance Bill should apply.
- 15 The Society therefore recommends that clause 29(5) and Schedule 2 of the Bill should be removed.

#### ***Subpart 3 — FMA may exercise person’s right of action***

- 16 Subpart 3 proposes to give the FMA powers, similar to those available to the Australian Securities and Investment Commission, to exercise rights of action or to take over certain “specified” proceedings (fraud, negligence, default, breach of duty, or other misconduct) against a financial markets participant, an auditor acting under the Securities Act 1978, or an expert who has made a statement in a prospectus.

- 17 The exercise by the FMA of such step-in rights will enable the FMA to directly enforce directors' duties. This has, quite fairly, been described as a quantum leap from the existing legislative landscape under the Securities Act 1978 and the Securities Markets Act 1988. Under these enactments the Securities Commission has certain limited powers to bring claims based on non-compliance with the provisions governing the disclosure obligations of a public issuer and certain market conduct provisions (notably insider trading and failure to comply with continuous disclosure obligations).
- 18 There are differing views amongst the legal profession as to whether it is appropriate that such step-in rights should exist at all and, if they do what the scope of those rights should be.
- 19 This issue is one that is being considered as part of the Ministry of Economic Development's current review of securities law and has been fast tracked into this Bill. In addition to there being differing views in the profession as to whether the right should exist at all, there are also differing views as to whether a fast track approach is appropriate.
- 20 Whether fast tracking is appropriate requires a balancing of the risk of a poorly designed policy being enacted against the short-term gains from having the power in place. It is accepted that the magnitude of the changes envisaged is significant. Furthermore, the background material supporting the introduction of the Bill notes that there has been insufficient time in which to conduct a proper cost-benefit analysis.
- 21 The Society submits that the Committee should be cognisant of both the long term ongoing costs and short-term benefits of this fast tracking and give careful consideration as to whether it is appropriate.

#### **Part 5: Amendments to Securities Act 1978**

- 22 The Bill provides for the scope of some statutory exemptions to be limited by regulations. Clause 83 amends section 5 of the Securities Act 1978 (which relates to exemptions), to allow regulations to place restrictions on the exemptions in section 5(1) to ensure that those exemptions do not apply in inappropriate circumstances. The Society suggests that it would be clearer for the proposed new section 5(2) to provide that:

An exemption under subsection (1) does not apply—

- (a) in the ~~prescribed~~ circumstances prescribed by regulations made under this Act; or

- (b) if any additional ~~prescribed~~ requirements prescribed by regulations made under this Act are not satisfied.”

*Vetting and registration of prospectuses and investment statements*

- 23 The Bill proposes a new process for the vetting and registration of prospectuses. The FMA, rather than the Registrar of Companies, will now perform this function. The review process is proposed to occur post-lodgement, with no allocations possible within a consideration (exposure) period.
- 24 The new process raises a number of questions. It is not clear, for example, why a process could not be implemented where a prospectus is lodged and then only registered after the exposure period has elapsed and any amendments required by the FMA as a result of the vetting process have been made. This is preferable to the registering and de-registering process, particularly given that if amendments to an offer document are required, this may create negative public perceptions about that offer.
- 25 In short, the Society believes this process would benefit greatly from greater consultation and analysis as part of the current review of securities law.
- 26 Notwithstanding the submission above, the Society suggests that section 41(1) of the Securities Act should be amended to require that the materials specified in new section 43P(1) be delivered to the Registrar on lodgement/registration.

**Conclusion**

- 27 The Society does not wish to appear in support of this submission. However, the Society is willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.



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President  
10 November 2010