

House of Representatives

Supplementary Order Paper

Tuesday, 5 April 2011

Financial Markets (Regulators and KiwiSaver) Bill

Proposed amendments

Hon Simon Power, in Committee, to move the following amendments:

Clause 2

Subclause (1): to omit this subclause (lines 6 to 9 on page 17) and substitute:

- (1) This Act (apart from **sections 81(3), 92(3), 98, 114, 117(2), and 123(3) to (6)**) comes into force on 1 May 2011.

Subclause (2): to omit “The rest of this Act comes” (line 10 on page 17) and substitute “**Sections 81(3), 92(3), 98, 114, 117(2), and 123(3) to (6)** come”.

Subclause (3): to omit this subclause (lines 14 to 16 on page 17) and substitute:

- (3) To the extent that the provisions referred to in **subsection (2)** are not previously brought into force under that subsection, those provisions come into force on 1 July 2013.

Clause 4

Definition of **financial markets participant**: to add “; but” (line 26 on page 19) and also the following paragraph:

- (d) does not include any class or classes of persons declared by the Governor-General by Order in Council not to be financial markets participants

Clause 47(5)

To insert after “this section” (line 33 on page 46) “and **section 47B**”.

Clause 55

To omit this clause (lines 14 to 35 on page 53) and substitute the following clause:

55 Effect of final decision that exercise of powers under section 25 unlawful

- (1) This section applies in any case where it is declared, in a final decision given in any proceedings in respect of the exercise of any powers conferred by **section 25**, that the exercise of any powers conferred by that section is unlawful.
- (2) If this section applies, to the extent to which the exercise of those powers is declared unlawful, the FMA must ensure that, immediately after the decision of the court is given,—
 - (a) any information obtained as a consequence of the exercise of powers declared to be unlawful and any record of that information are destroyed; and
 - (b) any documents, or extracts from documents, obtained as a consequence of the exercise of powers declared to be unlawful are returned to the person previously having possession of them, or previously having them under his or her control, and any copies of those documents or extracts are destroyed; and
 - (c) any information derived from or based on such information, documents, or extracts is destroyed.
- (3) However, the court may, in the court's discretion, order that any information, record, or copy of any document or extract from a document may, instead of being destroyed, be retained by the FMA subject to any terms and conditions that the court imposes.
- (4) No information, and no documents or extracts from documents, obtained as a consequence of the exercise of any powers declared to be unlawful, and no record of any such information or document,—
 - (a) are admissible as evidence in any civil proceedings unless the court hearing the proceedings in which the evidence is sought to be adduced is satisfied that there was no unfairness in obtaining the evidence;
 - (b) are admissible as evidence in any criminal proceedings if the evidence is excluded under section 30 of the Evidence Act 2006;
 - (c) may otherwise be used in connection with the exercise of any power conferred by this Act or any provision of the financial markets legislation unless the court that declared the exercise of the powers to be unlawful is satisfied that there was no unfairness in obtaining the evidence.

Clause 55A(1)

To omit this subclause (lines 3 to 11 on page 54) and substitute the following subclause:

- (1) This section applies to the following information and documents:
 - (a) information and documents supplied or disclosed to, or obtained by, the FMA under this Act or any financial markets legislation:
 - (b) information and documents supplied or disclosed to, or obtained by, a person authorised under **section 48** (an **authorised person**) under **subpart 1**:
 - (c) information derived from information and documents referred to in **paragraph (a) or (b)**.

Clause 62

To omit this clause (lines 17 to 36 on page 59) and substitute the following clause:

62 Regulations relating to fees, charges, and costs

- (1) The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:
 - (a) requiring the payment to the FMA of fees and charges—
 - (i) by financial markets participants in connection with the performance or exercise by the FMA of any function, power, or duty under this Act or any other enactment:
 - (ii) on an application or request to the FMA to perform or exercise any function, power, or duty under this Act or any other enactment:
 - (b) prescribing the amounts of those fees and charges or the manner in which those fees and charges are to be calculated:
 - (c) authorising the FMA to require payment of any costs incurred by the FMA in connection with an application or request referred to in **paragraph (a)(ii)**.
- (2) Any Order in Council made under **subsection (1)** may authorise the FMA to refund or waive, in whole or in part and on any conditions as may be prescribed, payment of any fee, charge, or cost payable in relation to any person or class of persons.
- (3) The FMA may refuse to perform or exercise a function, power, or duty until the prescribed fee, charge, or cost is paid.
- (4) Any fee, charge, or cost payable to the FMA is recoverable by the FMA in any court of competent jurisdiction as a debt due to the FMA.

Clause 63

Subclause (1A)(b): to omit this paragraph (lines 12 to 14 on page 60) and substitute the following paragraph:

- (b) every other person registered or incorporated, or who makes an application for the registration or incorporation of a person, under an Act referred to in **Part 2 of Schedule 1**.

Subclause (2): to omit “levy” (line 17 on page 60) and substitute “levies”.

Subclause (3): to omit “A levy” (line 18 on page 60) and substitute “Levies”.

Subclause (3): to omit “the levy” (line 19 on page 60) and substitute “the levies”.

Subclause (4): to omit “A levy” (line 26 on page 60) and substitute “Levies”.

Subclause (5)(h): to omit “the levy” (line 8 on page 61) and substitute “a levy”.

Subclause (5): to add the following paragraph (after line 16 on page 61):

- (j) provide for waivers or refunds of the whole or any part of a levy for any case or class of cases.

Subclause (5A): to add “(unless the regulations provide otherwise)” (line 19 on page 61).

Subclause (6): omit “The levy” (line 20 on page 61) and substitute “A levy”.

Clause 64(1A)

To omit “levy” (line 12 on page 62) and substitute “levies”.

Clause 68

Subclause (1): to insert after “enactment” (line 13 on page 65) “(other than this Act)”.

Subclause (3): to omit this subclause (line 25 on page 65) and substitute the following subclause:

- (3) This section—
 - (a) applies unless the context otherwise requires; and
 - (b) is subject to **subpart 3** and **Part 5**.

Clause 74

Subclause (1): to insert after “enactment” (line 3 on page 69) “(other than this Act)”.

Subclause (2): to omit this subclause (line 7 on page 69) and substitute the following subclause:

- (2) This section—
 - (a) applies unless the context otherwise requires; and
 - (b) is subject to **subpart 3** and **section 74A**.

Clause 81

Definition of **register** in *subclause (2)*: to omit this definition (lines 17 to 19 on page 72).

To add the following subclause (after line 3 on page 73):

- (3) Section 2(1) is amended by inserting the following definition in its appropriate alphabetical order:
“**register** means, except in respect of a register kept under section 51, the register of securities offers kept under **sections 43N to 43S**”.

Clause 83(1)

New section 5(2)(a): to omit “**70AB**” (line 13 on page 73) and substitute “**70AAA**”.

New section 5(2)(b): to omit “**70AB**” (line 15 on page 73) and substitute “**70AAA**”.

Clause 96

New section 41(2): to insert after “documents” (line 31 on page 75) “(if any)”.

Clause 97

New section 42(2)(a)(ii): to insert after “contains any” (line 14 on page 76) “material”.

New section 43(2): to insert after “documents” (line 31 on page 76) “(if any)”.

New section 43K(5)(b): to insert after “order is made” (line 14 on page 88) “(being securities to which the investment statement or prospectus relates)”.

Clause 98

New section 43P(1)(l): to omit “by the issuer, a promoter, or both,” (lines 12 and 13 on page 91) and substitute “by or on behalf of the issuer”.

New section 43P: to insert the following subsection after *subsection (1)* (after line 32 on page 91):

- “(1A) However, the register is not required to contain information or documents that are prescribed as being information or documents that are not required to be contained in the register.

New section 43Q(1)(c): to insert after “distributed by” (lines 32 and 33 on page 92) “or on behalf of”.

New section 43Q(3)(a): to omit “**or (2)**” (line 21 on page 93).

New section 43Q(3)(b): to omit “**or (2)**” (line 22 on page 93).

Clause 103

New section 46(2)(a): to insert after “contains any” (line 7 on page 98) “material”.

New section 47(3)(a): to insert after “contains any” (line 29 on page 98) “material”.

Clause 111(1)

New section 60E(1)(a): to omit “either” (line 16 on page 103).

Clause 112

To omit this clause (lines 29 to 33 on page 103) and substitute the following clauses:

- 112 When Court may prohibit payment or transfer of money, securities, or other property**
- (1) Section 60G is amended by repealing subsection (1) and substituting the following subsection:
- “(1) This section applies if—
- “(a) an investigation is being carried out under **Parts 1 to 4** of the **Financial Markets (Regulators and Kiwi-Saver) Act 2010** in relation to an act or omission by a person that—
 - “(i) constitutes or may constitute a contravention of this Act; or
 - “(ii) constitutes or may constitute a contravention of any other financial markets legislation in connection with an offer of securities to the public or securities offered to the public; 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) this Act; or
 - “(ii) any other financial markets legislation in connection with an offer of securities to the public or securities offered to the public; or
 - “(c) civil proceedings have begun against a person under, or in respect of,—
 - “(i) this Act; or
 - “(ii) any other financial markets legislation in connection with an offer of securities to the public or securities offered to the public; or
 - “(d) civil proceedings have begun against a person, being proceedings that, in connection with an offer of securities to the public or securities offered to the public, seek damages or other relief for fraud, negligence, default, breach of duty, or other misconduct.”
- (2) Section 60G(3) is amended by inserting the following definitions in their appropriate alphabetical order:
- “**civil proceedings** means proceedings in a court (other than criminal proceedings)
- “**financial markets legislation** has the same meaning as in **section 4** of the **Financial Markets (Regulators and Kiwi-Saver) Act 2010**”.

- (3) **Section 60G(1)** of the principal Act (as substituted by this section) applies in respect of—
- (a) a contravention, fraud, negligence, default, breach of duty, or other misconduct regardless of whether it was committed before or after the commencement of this section; and
 - (b) a prosecution or proceeding regardless of whether it begins before or after the commencement of this section.

112A What orders may be made

- (1) Section 60H(1) is amended by inserting the following paragraph after paragraph (g):
- “(ga) an order—
 - “(i) removing a person from being a manager of a scheme to which the investigation, prosecution, or proceedings referred to in **section 60G(1)** relates; and
 - “(ii) appointing another person as the manager of the scheme (with any powers that the court orders):”.
- (2) **Section 60H(1)(ga)** of the principal Act (as inserted by this section) applies in respect of—
- (a) a contravention, fraud, negligence, default, breach of duty, or other misconduct regardless of whether it was committed before or after the commencement of this section; and
 - (b) a prosecution or proceeding regardless of whether it begins before or after the commencement of this section.

Clause 115(2)

To omit this subclause (lines 5 to 12 on page 105).

Clause 117(2)

New section 70(1)(ha): to insert the following subparagraph after *subparagraph (iii)* (after line 3 on page 106):

“(iiia) prescribing information and documents for the purposes of **section 43P(1A)**:

Clause 118

Heading to clause 118: to omit “**70AB**” (line 19 on page 106) and substitute “**70AAA**”.

Heading to new section 70AB: to omit “**70AB**” (line 21 on page 106) and substitute “**70AAA**”.

Clause 123

Subclause (2)(c): to omit “**to 43E**” (line 13 on page 110) and substitute “**and 43C**”.

Subclause (4): to omit “referred to in **subsection (1)**” (lines 25 and 26 on page 110) and substitute “registered before the commencement of this subsection”.

Subclause (5)(a): to omit “**subsection (1)** (or is registered in accordance with **section 126**)” (lines 37 and 38 on page 110) and substitute “this subsection”.

Clause 129(2)

To insert the following definition after the definition of **business rules** (after line 4 on page 114):

“**change**, in relation to the market rules for a registered market,
has the meaning set out in **section 36J(2)**”

Definition of **registered exchange**: to omit “means,—” (line 3 on page 115) and substitute “means any of the following:”.

Definition of **registered market**: to omit “means—” (line 10 on page 115) and substitute “means any of the following:”.

Clause 129(2B)

To omit this subclause (lines 22 to 24 on page 115) and substitute the following subclause:

- (2B) Paragraph (a) of the definition of **dealings in securities** in section 2(1) is amended by omitting “the securities of a public issuer” and substituting “securities listed on a registered market”.

Clause 129(3C)

New section 2(5): to insert after “its own registered market” (line 27 on page 116) “, whether or not under a listing agreement”.

Clause 133

New section 36FAB(2): to omit “43B” (line 19 on page 121) and substitute “43B(2)”.

Clause 134

New section 36FA(1): to omit “applying” (line 2 on page 122) and substitute “to apply”.

Heading above new section 36IA: to insert after “*approving*” (line 26 on page 124) “*proposed*”.

Heading to new section 36IA: to insert after “**approving**” (line 28 on page 124) “**proposed**”.

New section 36J(2): to omit “market rules” (line 9 on page 125) and substitute “the market rules for a registered market”.

Heading to new section 36L: to omit “**market rules**” (line 13 on page 126) and substitute “**proposed market rules and changes**”.

New section 36L(2): to insert after “any existing” (line 3 on page 127) “market”.

Heading above new section 36M: to insert after “*request*” (line 5 on page 127) “*changes to*”.

Heading to new section 36M: to insert after “**request**” (line 6 on page 127) “**changes to**”.

New section 36M(1): to omit “draft market rule or draft change” (lines 11 and 12 on page 127) and substitute “draft change to the market rules”.

New section 36M(2)(a): to omit “rule or” (line 23 on page 127).

New section 36M(2)(b)(i): to omit “rule or” (line 27 on page 127).

Clause 138

New section 36YB(2): to omit “of a registered exchange” (lines 35 and 36 on page 132) and substitute “of the registered exchange”.

Clause 140

To insert after “securities” (line 1 on page 137) “market”.

Clause 148

New section 36ZY(2): to omit this subsection (lines 28 to 31 on page 140) and substitute the following subsection:

“(2) The notice must—

“(a) identify the market registered and the person that is authorised to hold the market registration under this section; and

“(b) state the terms and conditions that apply to the person under the authorisation (and may, in those terms (without limitation), add to, modify, or disapply any of the provisions of **subparts 1A and 2**).

Clause 149(2)

New definition of **authorised futures exchange**: to omit “means—” (line 7 on page 142) and substitute “means any of the following:”.

Paragraph (a) of the new definition of **authorised futures exchange**: to omit this paragraph (lines 8 to 10 on page 142) and substitute the following paragraph:

“(a) a person that is authorised to conduct a futures market under subsection (8):

Clause 149(3)

To omit this subclause (lines 19 to 23 on page 142) and substitute the following subclause:

(3) Section 37(8) is amended by omitting “that conducts, or proposes to conduct, a market or exchange in New Zealand for trading in futures contracts to be an authorised futures exchange for the purposes of this Part of this Act” and substituting “to be authorised to conduct 1 or more futures markets in New Zealand”.

Clause 149(4)

New section 37(8AA): to omit this subsection (lines 26 to 29 on page 142) and substitute the following subsection:

- “(8AA) A notice of an authorisation declaration under subsection (8) must—
- “(a) identify the market to which the authorisation applies and the person that is authorised to conduct that market under this section; and
 - “(b) state the terms and conditions that apply to the person under the authorisation (and may, in those terms (without limitation), add to, modify, or disapply any of the provisions of **subparts 1A and 2**).

Clause 149A(2)

New section 37A(2): to omit this subsection (lines 12 and 13 on page 143) and substitute the following subsection:

- “(2) Subsection (1)(a) and (b)(i) do not apply to—
- “(a) an authorised futures exchange; or
 - “(b) a subsidiary of an authorised futures exchange.

Clause 151

New section 42EA: to omit “against a person in accordance with this subpart if the FMA is satisfied that the person” (lines 3 to 5 on page 161) and substitute “in accordance with this subpart if the FMA is satisfied that a person”.

New clauses 152AB and 152AC

To insert after *clause 152A* (after line 33 on page 161) the following clauses:

152AB When Court may grant corrective orders

Section 42N is amended by adding the following paragraph:

- “(e) an unsolicited offer obligation or exemption.”

152AC When Court may make disclosure orders

Section 42P is amended by adding the following paragraph:

- “(d) an unsolicited offer obligation or exemption.”

Clause 152C

To omit “42W(a)” (line 5 on page 162) and substitute “42W(1)”.

Clause 156

New section 47AA: to omit this section (lines 21 to 34 on page 163) and substitute the following section:

“47AA Protection from liability in connection with unsolicited offer obligations

- “(1) This section applies to any person who—

- “(a) is stated by the regulations made under **section 48DB** to be a protected person for the purposes of this section; and
 - “(b) is not in contravention of an unsolicited offer obligation 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 Court under Part 5 in connection with a contravention of an unsolicited offer obligation or exemption; or
 - “(c) stated by the regulations made under **section 48DB** to be a protected act or omission for the purposes of this section.

Clause 158

New section 48DB(2)(a): to insert the following subparagraph after subparagraph (i) (after line 30 on page 167):

- “(ia) the material terms of the offer and their effect; and

New section 48DB(2)(a)(iii): to omit “; and” (lines 34 and 35 on page 167) and substitute “:”.

New section 48DB(2)(b): to omit “; and” (line 38 on page 167) and substitute “:”.

New section 48DC: to insert the following paragraphs after paragraph (c) (after line 27 on page 168):

- “(ca) provide for any duties or functions of the FMA in connection with the rules applying to unsolicited offers:
- “(cb) state which obligations are unsolicited offer obligations for the purposes of this Act:

Clause 160(1)(a)

To omit “amended” (line 22 on page 169) and substitute “substituted”.

Clause 160A

Subclause (1): to omit this subclause (lines 2 to 9 on page 170) and substitute the following subclause:

- (1) In this section,—
existing authorisation means a declaration of authorisation that was in effect under section 37(8) of the principal Act immediately before the date on which this section comes into force

transitional period means, in relation to each existing authorisation, the period commencing on the date on which this section comes into force and ending on the sooner of—

- (a) the revocation or variation of the existing authorisation (whether or not following a review under this section);
- (b) the date of publication of a notice confirming the existing authorisation under **subsection (3)**.

New subclause (1A): to insert the following subclause before subclause (2) (before line 10 on page 170):

- (1A) During the transitional period for each existing authorisation,—
 - (a) the authorised futures exchange under the existing authorisation continues to be an authorised futures exchange under section 37(8) of the principal Act (as amended by this Act); and
 - (b) each futures market operated in New Zealand under the existing authorisation must be treated as being an authorised futures market for the purposes of the principal Act.

Subclause (2): to omit “each authorisation to” (line 10 on page 170) and substitute “each existing authorisation to”.

Subclause (2)(a): to insert after “market” (line 11 on page 170) “or markets”.

Subclause (2)(b)(ii): to add “of the principal Act; and” (line 28 on page 170).

Subclause (2): to add the following paragraph (after line 28 on page 170):

- (c) review any other matters it thinks fit.

Subclause (3): to omit this subclause (lines 29 to 31 on page 170) and substitute the following subclause:

- (3) The FMA must, after completing each review,—
 - (a) vary, revoke, or revoke and replace the existing authorisation under section 37(10) of the principal Act; or
 - (b) publish a notice in the *Gazette* confirming the existing authorisation.

Subclause (4): to omit “6” (line 33 on page 170) and substitute “9”.

Clause 172(6)

New section 116(5): to omit “restricted KiwiSaver schemes” (line 24 on page 175) and substitute “a restricted KiwiSaver scheme”.

Clause 173

New section 116A(1)(a): to omit “comply with” (line 30 on page 175) and substitute “meet the requirements of”.

New section 116F: to omit this section (lines 17 to 27 on page 178) and substitute the following sections:

“116F Requirements for trustees of KiwiSaver schemes other than restricted schemes

- “(1) A KiwiSaver scheme other than a restricted scheme must not have more than 1 trustee.
- “(2) The trustee must be a body corporate that is incorporated in New Zealand.
- “(3) The trustee must supervise the manager’s performance of—
 - “(a) the functions of the manager as set out in **section 116C(1)**; and
 - “(b) any other functions that the manager performs in relation to the scheme under the trust deed or an enactment.
- “(4) The trustee must not delegate the function described in **subsection (3)**.

“116FA Removal of trustees of KiwiSaver schemes other than restricted schemes

- “(1) The trustee of a KiwiSaver scheme other than a restricted scheme must not resign as trustee of the scheme unless—
 - “(a) all functions and duties of the position have been performed; or
 - “(b) the High Court consents.
- “(2) Despite anything to the contrary in the trust deed, a manager must not discharge or remove a trustee unless the manager does so with the approval of the High Court.

“Compare: 1960 No 99 s 10

New section 116G(2): to omit “a scheme” (line 31 on page 178) and substitute “the scheme”.

New section 116I(1): to omit “referred to in **section 116H**” (lines 11 and 12 on page 179) and substitute “of the scheme”.

New section 116J(1): to omit this subsection (lines 27 to 29 on page 179) and substitute the following subsection:

- “(1) If authorised in writing by the trustees, a nominated person may appoint 1 or more nominees in which are vested any of the investments or property of the scheme.

To insert the following sections after *new section 116J* (after line 7 on page 180):

“116K Trust deed or other instrument must not exempt trustees, managers, or investment managers from liability

- “(1) A provision in a trust deed or any other instrument is void to the extent that it would have the effect of exempting or indemnifying a trustee, a manager, or an investment manager from liability for breach of trust in the event of the trustee, manager, or investment manager failing to meet,—

- “(a) in the case of a trustee of a KiwiSaver scheme other than a restricted scheme, the standard of care set out in **clause 1B(b)** of Schedule 1:
 - “(b) in the case of a manager, the standard of care set out in **clauses 1C(1)(b) and 1F(2)** of Schedule 1:
 - “(c) in the case of an investment manager, the standard of care set out in **clause 1F(2)** of Schedule 1:
 - “(d) in the case of a trustee of a restricted KiwiSaver scheme,—
 - “(i) the standard of care set out in **clause 1F(2)** of Schedule 1; or
 - “(ii) the standard of care required of a trustee by law:
 - “(e) in the case of an independent trustee of a restricted KiwiSaver scheme, the standard of care set out in section 117(2)(a).
- “(2) However, the trustees of a restricted KiwiSaver scheme, and the trustee and the manager of any other KiwiSaver scheme, are otherwise entitled to the same indemnities and relief as any trustee (within the meaning of the Trustee Act 1956).
- “Compare: 1960 No 99 s 24

“116L Trustees of KiwiSaver schemes other than restricted schemes may apply to High Court for order relating to scheme

- “(1) This section applies if the trustee of a KiwiSaver scheme other than a restricted scheme is satisfied that—
 - “(a) there is a significant risk that the interests of members of the scheme will be materially prejudiced; or
 - “(b) the provisions of the trust deed are no longer adequate to give proper protection to members.
- “(2) The trustee may apply to the High Court for an order under this section.
- “(3) The court may direct that the application be served on any person that the court thinks fit.
- “(4) On an application, the court, after giving the manager and any other person that the court thinks fit the opportunity to be heard, may make an order that—
 - “(a) amends the provisions of the trust deed of the scheme:
 - “(b) imposes restrictions on the activities of the trustee or the manager (including, in the case of the manager, restrictions on advertising) that the court thinks are necessary to protect the interests of members:
 - “(c) stays any or all civil proceedings before any court by or against the trustee or the manager:

- “(d) restrains the payment under this Act of money by the manager or the trustee to members or a class of members:
 - “(e) restrains the transfer under this Act of a member’s accumulation from one KiwiSaver scheme to another:
 - “(f) removes a person as manager of a scheme and appoints another person as manager of the scheme (with any powers that the court orders):
 - “(g) gives any other directions that the court considers necessary to protect the interests of members, or the public.
- “(5) The court may vary or cancel an order made under this section.
- “(6) In exercising its powers under this section, the court must have regard to the interests of all creditors in respect of the scheme.

Clause 177

New section 119D(2) and (3): to omit these subsections (lines 4 to 16 on page 183).

New section 119D(3A): to omit “If this subsection applies, the manager” (line 17 on page 183) and substitute “The manager of each KiwiSaver scheme affected, other than a restricted scheme,”.

New section 119D(3A)(b): to omit “**subsection (3)(a)**” (line 22 on page 183) and substitute “**subsection (4A)**”.

New section 119D(4): to omit “If this subsection applies, the trustees” (lines 1 to 2 on page 184) and substitute “The trustees of each restricted KiwiSaver scheme affected”.

New section 119D(4)(a): to omit “**subsection (3)(a)**” (lines 5 and 6 on page 184) and substitute “**subsection (4A)**”.

New section 119D: to insert the following subsection after *subsection (4)* (after line 17 on page 184):

- “(4A) The persons who must be notified under **subsections (3A)(b) and (4)(a)** are all members of the scheme other than those members who, in the opinion of the FMA, are not likely to be materially affected by the proposed transfer.

New section 119E(b): to omit “**section 119D(3)(a)**” (line 4 on page 185) and substitute “**section 119D(4A)**”.

Heading above new section 120: to omit this heading (line 15 on page 189).

New section 120: to omit this section (lines 16 to 33 on page 189).

New section 121(2): to omit “a person” (line 12 on page 190) and substitute “the person”.

Clause 180

To insert the following subclause after *subclause (1)* (after line 20 on page 192):

- (1A) Section 125(4) is amended by omitting “trustees of a Kiwi-Saver scheme” and substituting “trustees or the manager (as the case may be)”.

Clause 182

Subclauses (2) and (3): to omit these subclauses (lines 6 to 13 on page 193) and substitute the following subclause:

- (2) Section 126(4) and (5) are repealed.

Clause 183A

To omit this clause (lines 16 to 19 on page 193) and substitute the following clause:

183A Terms relating to members’ tax credits implied into trust deed

Section 128A(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

New clauses 183AB and 183AC

To insert the following clauses after *clause 183A* (after line 19 on page 193):

183AB Terms relating to back-dated validation implied into trust deed

Section 128B(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

183AC Terms relating to lump sum payments by complying superannuation funds

Section 128C(2)(b) is amended by omitting “and by a member,” and substituting “a manager, or a member”.

New clause 183C

To insert the following clause after *clause 183B* (after line 23 on page 193):

183C New section 128E inserted

The following section is inserted after section 128D:

“128E Provisions implied in trust deeds by regulations

A provision implied in a trust deed by regulations made under **section 228(1)(bb)**—

- “(a) does not apply to the extent that it is inconsistent with provisions implied in the trust deed by this Act; but
“(b) applies despite anything else to the contrary in the trust deed; and
“(c) is enforceable by the trustees, the manager, or any member of the scheme, unless the regulations provide otherwise.”

Clause 184

Subclause (1): new section 129(2)(b) and (c): to omit these paragraphs (lines 20 to 24 on page 194) and substitute the following paragraph:

“(b) will not contain a provision that is contrary to those implied in a trust deed by or under this Act (including the KiwiSaver scheme rules).”

Clause 185

New section 129A(2)(a): to omit “by this Act” (lines 3 and 4 on page 195) and substitute “by or under this Act”

New section 129B: to omit “employer a provision” (line 13 on page 195) and substitute “employer, a provision”.

Clause 193

To insert the following subclause before *subclause (1)* (before line 7 on page 197):

(1AA) Section 168(a) is amended by omitting “trustees” and substituting “trustee”.

Clause 195

Subclause (1): to omit “**sections 119A to 119I, 126, 129A, or 129B**” (lines 4 and 5 on page 198) and substitute “or under this Act”.

Clause 196

To omit this clause (lines 12 to 16 on page 198) and substitute the following clause:

196 New section 171 substituted

Section 171 is repealed and the following section substituted:

“171 Implied terms continue to be implied on cancellation of registration

If the registration of a KiwiSaver scheme is cancelled, the KiwiSaver scheme rules and any other provisions implied in a trust deed by or under this Act must continue to be implied in the trust deed of the scheme until the scheme is wound up.”

Clause 198A

Subclause (2): to omit this subclause (lines 30 to 33 on page 198).

Clause 205

To insert the following subclause before *subclause (1)* (before line 20 on page 201):

(1AA) Section 228 is amended by inserting the following paragraphs after paragraph (b):

“(ba) prescribing the information and matters that must be included in the trust deed of a KiwiSaver scheme:

“(bb) subject to **subsection (2)**, prescribing provisions to be implied in the trust deed of a KiwiSaver scheme.”

Subclause (1): new section 228(fa): to omit “the information” (line 22 on page 201) and substitute “information”.

To add the following subclause (after line 33 on page 201):

- (3) Section 228 is amended by adding the following subsection as subsection (2):
- “(2) A provision prescribed for the purposes of **subsection (1)(bb)** may, without limitation, do any of the following:
- “(a) specify the duties and powers of the trustee of the scheme:
- “(b) specify the duties of the manager of the scheme:
- “(c) provide for the trustee of the scheme to have the power, exercisable with the consent of the manager of the scheme (but without requiring the consent of members), to make amendments to the trust deed that do not adversely affect the interests of members.”

Clause 206

Subclause (1): new clauses 1 and 1A: to omit these clauses (lines 4 to 12 on page 202) and substitute the following clause:

1 Application

- (1) The KiwiSaver scheme rules in **clauses 1B to 1E** apply to KiwiSaver schemes other than restricted schemes.
- (2) The KiwiSaver scheme rules in clauses **1F** to 17 apply to all KiwiSaver schemes.

Clause 207

Subclause (3): new clause 11(b) and (c): to omit these paragraphs (lines 13 to 18 on page 207) and substitute the following paragraph:

- (b) does not contain a provision that is contrary to those implied in the trust deed by or under this Act (including the KiwiSaver scheme rules).

Clause 210

Subclause (1): to omit “must” (line 25 on page 209) and substitute “must,”.

Clause 212C

Subclause (1)(a)(i): to omit “**or 212B**” (line 38 on page 212).

Subclause (1)(a)(ii): to omit “**section 212B(2)**” (line 2 on page 213) and substitute “**section 212B**”.

Clause 212E

Paragraph (a): to omit “**or 212B**” (lines 14 and 15 on page 214).

Paragraph (b): to omit “**section 212B(2)(b)**” (line 17 on page 214) and substitute “**section 212B**”.

Paragraph (c): to omit “**section 212B(2)(b)**” (line 19 on page 214) and substitute “**section 212B**”.

Clause 216A

Subclause (4)(a): to omit “an enactment amended by this **Part**” (line 10 on page 216) and substitute “a relevant enactment”.

Subclause (4)(b): to omit “an enactment amended by this **Part**” (lines 13 and 14 on page 216) and substitute “a relevant enactment”.

Clause 227

To add the following subclause (after line 8 on page 218):

- (3) Section 89(2) is consequentially amended by omitting “he or she” and substituting “it”.

Clause 228(d)

To insert after “enactment” (line 26 on page 218) “(other than this Act)”.

To add “(unless the context otherwise requires)” (line 29 on page 218).

Part 1 of Schedule 3

Item relating to *new section 123(6A)* of the Building Societies Act 1965: to insert after “under” (line 15 on page 256) “**Parts 1 to 4** of”.

Item relating to section 196(5) of the Companies Act 1993: to omit this item (line 25 on page 256).

Items relating to sections 197, 241(2)(c), and 250(2) of the Companies Act 1993: to omit these items (line 33 on page 256 to line 6 on page 257) and substitute the following items:

Section 239L(1): insert “the FMA (if the company is a financial markets participant),” after “liquidation,”.

Section 239R(1)(a): insert “the FMA (if the company is a financial markets participant),” after “liquidation,”.

Section 239ACJ(2): insert “the FMA (if the company is a financial markets participant),” after “liquidation,”.

Section 239ACL(2): insert “the FMA (if the company is a financial markets participant),” after “creditor,”.

Section 239ACX(2): insert after paragraph (b):

“(ba) the FMA (if the company is a financial markets participant); or”.

Section 239ADO(4): insert after paragraph (d):

“(da) the FMA (if the company is a financial markets participant); or”.

Section 239ADP(1): repeal and substitute:

“(1) On the application of the Registrar or, if the company is a financial markets participant, the FMA, the court may make any order that it thinks necessary to protect the interests of the company’s creditors while the company is in administration.”

Section 239ADU(2): insert after paragraph (b):

“(ba) if the company is a financial markets participant, the FMA; or”.

Section 241(2)(c): insert after subparagraph (v):

“(va) if the company is a financial markets participant, the FMA; or”.

Section 241(2)(c)(vii): omit “in the case of ” and substitute “if the company is”.

Section 250(2): insert after paragraph (e):

“(ea) if the company is a financial markets participant, the FMA; or”.

Item relating to *new section 258B* of the Companies Act 1993: to omit “**Duty to**” (line 8 on page 257) and substitute “**Registrar may**”.

Items relating to section 11 of the Corporations (Investigation and Management) Act 1989: to omit these items (lines 18 to 21 on page 259).

Item relating to new section 48A(1)(b) of the Fair Trading Act 1986: insert after “duties, under” (lines 22 and 23 on page 262) “**Parts 1 to 4** of”.

Items relating to section 79(2), (4), and (6)(b) of the Financial Advisers Act 2008: to omit these items (line 32 on page 263 to line 2 on page 264).

New items relating to the Financial Advisers Act 2008: to insert the following items before the item relating to section 116 (before line 3 on page 264):

New section 85A: insert after section 85:

“**85A Funding of code committee**

The FMA must fund the code committee.”

New section 113A: insert after section 113:

“**113A Funding of disciplinary committee**

The FMA must fund the disciplinary committee.”

Item relating to *new section 137F(1)(a)* of the Financial Advisers Act 2008: to insert after “under” (line 11 on page 264) “**Parts 1 to 4** of”.

To insert the following item after the item relating to section 137F(1)(a) of the Financial Advisers Act 2008 (after line 15 on page 264):

Section 137O(1)(c) and (d): repeal and substitute:

“(c) gives the person or the person’s representative an opportunity to make written submissions and to be heard on the matter within that notice period.”

Item relating to section 19(1A) of the Industrial and Provident Societies Act 1908: to omit this item (lines 18 to 24 on page 270).

To insert the following items after the item relating to section 36ZO(4) of the Securities Markets Act 1988 (after line 22 on page 277):

Section 36ZT(b): repeal and substitute:

“(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”.

Section 42F(1)(d) to (f): repeal and substitute:

- “(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.”

Part 2 of Schedule 3

New item relating to Securities (Fees) Regulations 1998: to insert the following item after the item relating to regulation 3(2)(a) (after line 16 on page 285):

Regulation 3(2)(c) and (d): revoke.

Item relating to *new regulation 4* of the Securities (Fees) Regulations 1998: to omit *new paragraphs (d) and (e)* (line 30 on page 285 to line 2 on page 286).

Item relating to *new regulation 4* of the Securities Markets (Fees) Regulations 2003: to omit “**decision on approval or new market rules and changes**” from the heading (lines 7 and 8 on page 286) and substitute “**decisions**”.

Item relating to *new regulation 4* of the Securities Markets (Fees) Regulations 2003: to omit *new subclause (2)* (lines 16 to 19 on page 286) and substitute the following subclause:

- “(2) A person must pay the fees set out in regulation 6 and the costs set out in regulations 7 and 8 for the following matters:
 - “(a) for a decision by the FMA on whether or not to approve proposed market rules provided under **section 36F** of the Act:
 - “(b) for a decision by the FMA on whether or not to approve changes to market rules for registered markets provided under **section 36J** of the Act:
 - “(c) for an application for an authorisation to hold a market registration under **section 36ZY** of the Act (which relates to overseas exchanges):
 - “(d) for an application for an authorisation to conduct a futures market under section 37(8) of the Act:
 - “(e) for an application for an authorisation to carry on the business of dealing in futures contracts under section 38(1) of the Act.”

Item relating to *new regulation 8* of the Securities Markets (Fees) Regulations 2003: to omit *new regulation 8* (lines 21 to 28 on page 286) and substitute the following regulation:

“8 Costs of printing and publication

- “(1) For the purposes of regulation 4(2), the FMA may require a person to pay the costs incurred by the FMA in—
 - “(a) the publication in the *Gazette* of a notice of market registration under **section 36F** of the Act:
 - “(b) the publication in the *Gazette* of a notice of a decision to approve changes to market rules provided under **section 36J** of the Act:

- “(c) the publication in the *Gazette* of a notice of an authorisation to hold a market registration under **section 36ZY** of the Act (which relates to overseas exchanges):
 - “(d) the publication in the *Gazette* of a notice of an authorisation to conduct a futures market under section 37(8) of the Act:
 - “(e) the publication in the *Gazette* of a notice of authorisation of a person or class of persons to carry on the business of dealing in futures contracts under section 38(1) of the Act.
- “(2) For the purposes of regulation 5, the FMA may require a person to pay the costs incurred by the FMA in—
- “(a) the printing and publication in the Statutory Regulations series of an exemption notice under section 48 of the Act; and
 - “(b) the publication in the *Gazette* of a notice of an exemption under section 48 of the Act.”

Part 1 of Schedule 6

To insert the following items after the item relating to section 14(4) of the Superannuation Schemes Act 1989 (after line 16 on page 313):

Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Act 2010 (2010 No 109)

New clause 4B of Schedule 1 of the KiwiSaver Act 2006 in section 189(1): omit “trustees” and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14(1) of Schedule 1 of the KiwiSaver Act 2006 in section 189(4): omit “trustees” and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(4): omit “trustees” in the first place where it appears and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

New clause 14(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(4): omit “trustees” in the second place where it appears and substitute “trustees or the manager (as the case may be)”.

New clause 14B(1) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” and substitute “trustees or the manager (as the case may be)”.

New clause 14B(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” in the first place where it appears and substitute “trustees (in the case of a restricted KiwiSaver scheme) or the manager (in the case of any other KiwiSaver scheme)”.

Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Act 2010 (2010 No 109)—continued

New clause 14B(2) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” in the second place where it appears and substitute “trustees or the manager (as the case may be)”.

New clause 14B(3) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” and substitute “trustees or the manager (as the case may be)”.

New clause 14B(4) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” in each place where it appears and substitute in each case “trustees or the manager (as the case may be)”.

New clause 14B(5) of Schedule 1 of the KiwiSaver Act 2006 in section 189(5): omit “trustees” and substitute “trustees or the manager (as the case may be)”.

Part 2 of Schedule 6

To insert the following items after the item relating to regulation 9(2) of the KiwiSaver Regulations 2006 (after line 22 on page 313):

Regulation 9(3): to omit “administration manager” and substitute “provider”.

Regulation 9(3): to omit “administration manager’s” and substitute “provider’s”.

Explanatory note

This Supplementary Order Paper—

- amends the commencement clause so that most provisions come into force on 1 May 2011. The provisions relating to the new register of securities offers will continue to come into force on a date appointed by Order in Council. These provisions will come into force after the arrangements have been made relating to the establishment of the register and regulations have been made relating to the register:
- provides for the definition of financial markets participant to be narrowed by means of an Order in Council that declares persons not to be such participants. This will help to ensure that persons are not inadvertently caught by the definition and that the roles of the various regulators can be clarified:
- replaces *clause 55* (which relates to the effect of a decision that the exercise of powers under *clause 25* is unlawful). The new clause gives the courts a power to allow information and documents to be retained rather than destroyed. In addition, the new clause clarifies the rules relating to the admissibility of evidence:

- extends the confidentiality provisions in *clause 55A* to all information and documents obtained by the Financial Markets Authority (the **FMA**) under the financial markets legislation:
- replaces *clause 62* to allow fees and charges to be prescribed in respect of any applications made to the FMA regardless of whether or not the applicant is a financial markets participant. The clause is also amended to provide for the refund or waiver of fees, charges, and costs. The new clause also allows the FMA to refuse to exercise or perform a function, duty, or power if the prescribed fee or charge is not paid:
- amends *clause 63* to provide for the refund or waiver of levies and to make a number of other drafting changes:
- amends *new sections 42, 46, and 47* of the Securities Act 1978 (*clauses 97 and 103*). These provisions relate to the registration of prospectuses and deeds. The amendments clarify that the Registrar can refuse registration of a document on the ground that a matter is not clearly legible only if the matter is material:
- amends *new section 43P* of the Securities Act 1978 (*clause 98*) to allow regulations to prescribe information or documents that need not be contained in the register of securities offers. This will provide more flexibility to ensure, for example, that information already contained on other public registers is not unnecessarily required to be also contained on the new register:
- replaces *clause 112* (which amends section 60G of the Securities Act 1978). Section 60G currently gives the court a power to prohibit the payment or the transfer of money, securities, or other property in certain circumstances. These circumstances currently relate to investigations of contraventions of the Securities Act 1978 or prosecutions or civil proceedings under that Act. Section 60G is expanded to cover situations where—
 - an FMA investigation is being carried out of a contravention of other financial markets legislation in connection with an offer of securities to the public or securities offered to the public; or
 - an FMA investigation is being carried out that may result in proceedings referred to in the provision being begun; or
 - a prosecution or civil proceedings relating to such a contravention has begun; or
 - civil proceedings have begun against a person, being proceedings that, in connection with an offer of securities to the public or securities offered to the public, seek damages or other relief for fraud, negligence, default, breach of duty, or other misconduct.

In addition, the range of orders that a court can make has been expanded to include removing a person from being a manager of a scheme to which the investigation, prosecution, or proceedings relates and appointing a replacement manager (*new section 60H(1)(ga)*). The new provisions may apply to a contravention, fraud, negligence, default, breach of duty, or other misconduct regardless of whether it was committed before or after

the commencement of the amendments, and to a prosecution or proceeding regardless of whether it begins before or after that commencement:

- in relation to the new provisions governing unsolicited offers—
 - provides for the Court to make corrective orders and disclosure orders in the case of contraventions of unsolicited offer obligations or exemptions (*new clauses 152AB and 152AC*):
 - expressly provides that the regulations setting the rules for unsolicited offers may be made for the purpose of ensuring offerees are fully informed of any material terms of the offer and their effect:
 - enables those regulations to provide for the FMA to carry out duties or functions in connection with those rules (changes in *clause 158* to *new section 48DC* of the Securities Markets Act 1988):
- clarifies how the provisions on authorised futures markets will apply in the transitional period and clarifies the provisions applying to the review of authorised futures exchanges under *clause 160A*. The period in which the FMA must use its best endeavours to complete the review is also extended from 6 to 9 months:
- makes a number of amendments to *Part 7* to align the KiwiSaver Act 2006 with the Securities Trustees and Statutory Supervisors Bill, including—
 - authorising the trustee of a KiwiSaver scheme other than a restricted scheme to apply to the High Court for orders relating to the scheme:
 - clarifying that trustees and managers of KiwiSaver schemes are entitled to the same indemnities and relief as any trustee:
 - providing that trustees, managers, and investment managers cannot be exempted from liability by a trust deed or other instrument for a breach of trust arising from a failure to meet the required standard of care:
 - adding a regulation-making power that will allow regulations to prescribe provisions to be implied into trust deeds:
 - clarifying the status, application, and enforceability of terms implied into trust deeds by the KiwiSaver Act 2006 or by regulations:
- amends the Companies Act 1993 to allow the FMA to make various applications to a court relating to the voluntary administration of a company that is a financial markets participant (in addition to the Registrar of Companies):
- amends the regulations setting the fees under the Securities Markets Act 1988 to provide for the changes to the functions to be carried out by the FMA under that Act:
- makes a number of other minor drafting or technical changes.