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# FMA Enforcement Policy

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## Introduction

One of FMA's key statutory objectives is to promote and facilitate the development of fair, efficient, and transparent financial markets. FMA has committed to being outward-looking and to engaging with market participants, ensuring that they clearly understand their responsibilities, the role and functions of FMA, and our approach to exercising our functions and powers.

This policy sets out FMA's approach to enforcement. It is intended to guide and inform financial market participants. It is also intended to be a living document, and we may revise it from time to time in accordance with our organisational objectives and priorities. It is not exhaustive and is not intended to be legally binding.

In addition to this enforcement policy, FMA intends to issue a model litigant policy that outlines our intended approach to litigation, and a policy on our intended approach to conducting investigations.

## Our priorities for enforcement

FMA is committed to enforcement action which targets conduct that harms or presents the greatest likelihood of harm to the function of open, transparent, efficient capital markets. We will focus our enforcement resources on these matters. This approach allows us to be flexible and able to respond quickly to changing or emerging market conditions and shifting priorities.

We will determine which matters present the greatest harm or likelihood of harm through our surveillance and intelligence activities, information provided by other financial markets regulators in New Zealand and overseas, complaints, tips, or information from other agencies and jurisdictions.

Early priorities are likely to include:

**Compliance with new legislation:** We will actively enforce compliance with new licensing regimes. These include the registration of financial service providers from 31 March 2011 and licensing of financial advisors from 1 July 2011, trustees and statutory supervisors from October 2011, and auditor regulation from 1 July 2012. We will also actively monitor and enforce the boundary between unregulated and regulated activity, particularly in relation to the financial advisers regime.

**KiwiSaver:** Given the special nature to New Zealanders of the KiwiSaver regime, and its systemic importance including its long-term 'lock-in' features, we will act decisively against misconduct in KiwiSaver sales and distribution practices. This includes monitoring entities providing KiwiSaver through "information-only" services.

**Trading conduct:** FMA will work closely with NZX, and actively monitor conduct in traded markets with a view to taking early action should the need arise.

**AML/CFT:** We will move swiftly to monitor policies and procedures that credit and financial institutions use to assess and manage the risks of money laundering and terrorist financing from 30 June 2013 - the date for compliance - given the two-year lead time to achieve compliance.

## **FMA's approach to use of formal functions and powers**

FMA has a wide range of functions and powers to achieve its statutory objectives. FMA is committed to proportionate enforcement action.

In the event of market misconduct, we may intervene on an informal basis or at a low level where such action is proportionate to the misconduct and will achieve an appropriate market outcome. However, FMA is also committed to taking strong action and holding individuals and entities accountable when they break the law and fail to meet the standards that are expected of them.

We intend to use the full toolbox available to us. This includes the use of criminal prosecutions in the case of serious misconduct, exercising a person's right of action when it is in the public interest to do so, and requiring market participants to provide monetary compensation for losses made pursuant to unlawful conduct.

While there has been a recent focus on directorial responsibility in the Courts, FMA will also look to hold senior executives, shadow directors, and advisers accountable where appropriate. We have a range of tools available to us to achieve this, including management banning orders and pecuniary penalty orders for untrue statements made by experts in disclosure documents.

## **Third party accountability**

Many concerns have been raised following the global financial crisis about the role of third parties in market collapses. Third parties include but are not limited to legal advisers, trustees, auditors, and expert advisers on matters such as valuation. Where unlawful market misconduct can fairly be attributed to third parties, FMA will consider pursuit of those parties.

## **Publication of enforcement action**

FMA will publicise enforcement action against financial market participants, unless there are legal or other compelling reasons not to. This approach is intended to maximise the visible deterrence of enforcement activity, and to educate market participants about the behaviour and standards we expect of those operating in our jurisdiction.

## **Intervention earlier in lifecycle**

No regulatory regime can prevent market failure. FMA can not guarantee products or investments and expects that some financial markets products may fail. Where failure follows effective and lawful disclosure and an understanding and acceptance of risk by the investor, and in the absence of unlawful conduct, FMA has no role and will not intervene.

However, FMA will intervene - and intervene earlier in the product lifecycle - to prevent market failure where failure follows misconduct such as misselling, misinformation, or market manipulation. FMA will also intervene where a product is well known and useful but the sales and distribution processes do not meet appropriate regulatory standards.

## **Approach to use of criminal powers**

FMA has powers to bring both civil and criminal actions for misconduct by financial markets participants. FMA is committed to financial markets that work well for both investors and businesses seeking capital. Accordingly, FMA will ensure that criminal sanctions are used appropriately and do not create undue disincentives to participate in the market for businesses or individuals such as directors.

FMA may take criminal action where there is evidence of intentional, reckless, or other serious unlawful conduct. FMA will apply the principles of fairness and proportionality to any decision on whether to pursue civil or criminal actions.

## **Use of section 34 powers**

Section 34 of the FMA Act 2011 is a significant new power, allowing FMA to 'stand in the shoes' of another person's right to take action against a third party. For example, FMA may take an action on behalf of a company against its directors for breach of the directors' duties owed to that company. It may also take the action of an individual against a particular financial markets participant on behalf of that individual. While the inclusion of this power was the subject of many submissions during consultation on the draft legislation, Parliament chose to maintain it to give FMA the ability to pursue actions that for various reasons others may not be able to.

FMA will use these powers consistently with Parliament's intention when the appropriate case presents itself. This is likely to be in a priority area such as a case that involves risk of serious harm to the market, significant loss (or the risk of significant loss), a large number of investors, high product risk (including but not limited to complexity), particular investor vulnerability, or a case involving predatory, prevalent or increasing patterns of misconduct.

## **Settlement policy**

Where a financial markets participant is considering a settlement proposal, we would encourage this to be brought to us early before we have committed to pursuing an enforcement case. A useful settlement proposal would be well developed, include draft

admissions, a detailed and realistic remediation proposal, and reparation where possible.

## **Co-operation**

Openness and co-operation with FMA, in particular where a compliance problem is self-identified and reported, will be important in determining the level of any sanction or whether a sanction is warranted.

## **Co-ordinating enforcement activity with other agencies**

FMA will work closely with other agencies in the pursuit of our enforcement objectives. This is likely to include, but is not limited to, information sharing, co-regulatory investigations, joint proceedings where appropriate, and co-operation in terms of identifying problem areas of the market to focus enforcement activity on.

## **Clarification of the law**

FMA has a statutory responsibility to keep under review the law and practices relating to financial markets. Among other things, this may require FMA to test the boundaries of the law for the overall benefit of all market participants. Accordingly, we may take "grey area" cases in order to provide clarity to the market.

## **Matters FMA is unlikely to enforce**

FMA will not enforce every breach that comes to our attention. These breaches may be cases where enforcement would not be justified in the public interest, are unlikely to further FMA's statutory objective, or where there are opportunities for more effective intervention.

On this basis, FMA is less likely to pursue matters that are one-off, isolated, or minor events relating to technical error or similar issues, unless there are other compelling reasons to do so. We are more likely to respond to such matters in a low level and proportionate manner and to keep the matter and/or the financial market participant under review. FMA is also unlikely to pursue matters that are more appropriately resolved directly by dispute resolution schemes or between private parties as a matter of contract.

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