

**In the High Court of New Zealand
Auckland Registry**

**I Te Kōti Matua o Aotearoa
Tāmaki Makaurau Rohe**

CIV-2024-404-

Under Section 48 of the Financial Markets Authority Act 2011 and Part 21 of the High Court Rules 2016

In the matter of a case stated by the Financial Markets Authority

By **Financial Markets Authority** an Independent Crown Entity under sch 1 of the Crown Entities Act 2004, established under s 9 of the Financial Markets Authority Act 2011 having its offices at Level 2, 1 Grey Street, Wellington, 6011 and Level 5, Ernst & Young Building, 2 Takutai Square, Britomart, Auckland

Applicant

Case stated for the opinion of the Court

18 December 2024

MC.

Solicitors:

S McMullan | D Karl
PO Box 90750, Victoria Street West, Auckland 1142
DX CP24063
T: +64 9 336 7500
Sam.McMullan@mc.co.nz | Danielle.Karl@mc.co.nz

Counsel:

Brian Dickey
Bankside Chambers
Brian.Dickey@bankside.co.nz

Case stated for the opinion of the Court

May it please the Court

1 Introduction

- 1.1 The Financial Markets Authority (**FMA**) requests the Court's opinion under s 48 of the Financial Markets Authority Act 2011 (**FMA Act**) as to who may qualify as an "eligible investor" under cl 41 of sch 1 of the Financial Markets Conduct Act 2013 (**FMC Act** and **eligible investor exclusion**).
- 1.2 The questions of law on which the FMA seeks the Court's opinion are:
- (a) To be valid, does an eligible investor certificate in relation to an offer of financial products need to expressly describe:
 - (i) the previous experience that A has in acquiring or disposing of financial products; and
 - (ii) the aspects of A's experience in acquiring or disposing of financial products which they consider would enable them to assess the matters required by cl 41(2)(a)–(c) for the transaction to which it relates?
 - (b) For an offeror to rely on an eligible investor certificate, or otherwise treat an investor as an eligible investor, in respect of the transaction to which it relates, does the offeror need to be satisfied that:
 - (i) the eligible investor certificate is valid; and/or
 - (ii) in the context of an offer of financial products, based on the grounds stated in the certificate, A could make the assessments requirement by cl 41(2)(a)–(c) in respect of:
 - (A) a financial product of any kind; and
 - (B) the financial products involved in the transaction to which the certificate relates.
 - (c) If the answer is yes to either (b)(i) or (ii), is an offeror permitted to rely on information which is not contained in the eligible investor certificate to undertake either assessment?
 - (d) If an offeror makes an offer of financial products to A in circumstances where it is not permitted to rely on A's eligible investor certificate, is disclosure required to be given to A under Part 3 of the Financial Markets Conduct Act 2013?
- 1.3 The eligible investor exclusion is one of the ways by which, in relation to an offer of financial products, an investor can qualify as a wholesale investor. An offer of

financial products to a wholesale investor does not require disclosure under the FMC Act.¹

1.4 The FMA's functions are set out in s 9 of the Financial Markets Authority Act 2011. Those functions include:

(a) to promote the confident and informed participation of businesses, investors, and consumers in the financial markets, including (without limitation) by (as relevant):²

(i) collecting and disseminating information or research about any matter relating to those markets:

(ii) issuing warnings, reports, or guidelines, or making comments, about any matter relating to those markets, financial markets participants, or other persons engaged in conduct relating to those markets (including in relation to 1 or more particular persons):

...

(iv) providing, or facilitating the provision of, public information and education about any matter relating to those markets:

...

(e) to keep under review the law and practices relating to financial markets, financial markets participants, and other persons engaged in conduct relating to those markets:

1.5 In October 2022, in discharge of its function of issuing reports about matters relating to financial markets, the FMA released a report following a thematic review it undertook into the use of the wholesale investor exclusion (**Thematic Review**) by 23 offerors, including one which is referred to as Offeror A.³ The Thematic Review was undertaken because the FMA had noted an increase in complaints and concerns raised about wholesale offers of financial products indicating increased investor participation in them.

1.6 The Thematic Review found a number of undesirable practices in the market for wholesale offers relating to the eligible investor exclusion, including the treatment of some investors as eligible investors when the requirements of the exclusion were not met.

1.7 The Thematic Review also provided guidance as to who may qualify as an eligible investor. Not every offeror in the market agrees with the FMA as to its interpretation of the eligible investor exclusion, including Offeror A.

¹ Financial Markets Conduct Act 2013, sch 1, cl 3(1).

² Financial Markets Authority Act 2011, s 9(1)(a).

³ The FMA has elected not to name Offeror A in this case stated because that entity does not wish to be involved in the proceeding and has asked that it not be named. Offeror A is a duly incorporated company, registered in New Zealand, and is licensed by the FMA as a managed investment scheme manager.

- 1.8 The FMA considers that, given increased investor participation in wholesale offers of financial products, the practices noted in the Thematic Review, and disagreement about the interpretation of the eligible investor exclusion, the Court's opinion is required for the FMA to discharge its function more effectively and economically in providing guidance to the market in relation to the eligible investor exclusion.
- 1.9 The Court's opinion will assist the FMA to discharge its statutory function to provide guidance to market participants as to when investors may qualify as eligible investors and what obligations an offeror has when considering an application from an investor. It will also be relevant to guidance provided to third-parties who are required to provide written confirmation of eligible investor certificates.
- 1.10 While the questions on which the Court's opinion are sought are of general application, context provided by an example offer and investors is necessary to assist the Court in its understanding of the proper interpretation of the eligible investor exclusion and how it is applied in practice. Offeror A's case is a matter which has been before the FMA and the example provided by one of its wholesale offers and investors who have been treated as eligible investors provides that context. The relevant factual context is set out in Schedules 1 and 2.

2 The legal background

Purposes of the FMC Act

- 2.1 The main purposes of the FMC Act are to:⁴
- (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
 - (b) promote and facilitate the development of fair, efficient, and transparent financial markets.
- 2.2 The FMC Act also has additional purposes, including:⁵
- (a) to provide for timely, accurate and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services; and
 - (b) to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks.
- 2.3 Generally, the FMC Act requires that an offer of financial products for issue be accompanied by disclosure.⁶ Offers which are not made to wholesale investors are commonly called "retail offers". The disclosure required to be given in a retail offer includes a Product Disclosure Statement (**PDS**).⁷ The purpose of a PDS is to provide information that is likely to assist a prudent but non-expert

⁴ Financial Markets Conduct Act 2013, s 3.

⁵ Financial Markets Conduct Act 2013, s 4.

⁶ Financial Markets Conduct Act 2013, s 39.

⁷ Financial Markets Conduct Act 2013, s 50.

person to decide whether or not to acquire the offered financial products.⁸ The information must be worded and presented in a clear, concise, and effective manner”.⁹ The Financial Markets Conduct Regulations 2014 prescribe the content of a PDS.

Wholesale investor exclusion

2.4 An offer of financial products to a wholesale investor is not subject to the general rule requiring disclosure, as set out above.¹⁰

2.5 The term “wholesale investor” is defined in cl 3 of sch 1 of the FMC Act. It provides:

(2) A person is a **wholesale investor** if—

(a) the person is an investment business (see clause 37); or

(b) the person meets the investment activity criteria specified in clause 38; or

(c) the person is large (see clause 39); or

(d) the person is a government agency (see clause 40).

(3) A person is also a **wholesale investor**, in relation to an offer of financial products, if—

(a) the person is an eligible investor (see clause 41);

(b) in relation to an offer of financial products for issue or sale,—

(i) the minimum amount payable by the person on acceptance of the offer is at least \$750,000; or

(ii) the amount payable by the person on acceptance of the offer plus the amounts previously paid by the person for financial products of the issuer of the same class that are held by the person add up to at least \$750,000; or

(iii) it is proposed that the person will acquire the financial products under a bona fide underwriting or sub-underwriting agreement; or

(c) in relation to an offer of a derivative for issue or sale, the notional value of the derivative is at least \$5 million (see clause 49).

⁸ Financial Markets Conduct Act 2013, s 49.

⁹ Financial Markets Conduct Act 2013, s 61(1).

¹⁰ Financial Markets Conduct Act 2013, sch 1, cl 3(1).

Eligible investor

2.6 The eligible investor exclusion is provided for by cl 41 of sch 1 of the FMC Act. That provision provides (as relevant):

(1) A person (A) is an eligible investor, in relation to a relevant transaction or class of relevant transactions, if—

(a) A certifies in writing, before the relevant time,—

(i) as to the matters specified in subclause (2) or (2A) or (3) or (4) (as the case may be); and

(ii) that A understands the consequences of certifying himself, herself, or itself to be an eligible investor; and

(b) A states in the certificate the grounds for this certification; and

(c) a financial adviser, a qualified statutory accountant, or a lawyer signs a written confirmation of the certification in accordance with clause 43.

(2) In relation to an offer of financial products (or a class of those transactions), A must certify that A has previous experience in acquiring or disposing of financial products that allows A to assess—

(a) the merits of the transaction or class of transactions (including assessing the value and the risks of the financial products involved); and

(b) A's own information needs in relation to the transaction or those transactions; and

(c) the adequacy of the information provided by any person involved in the transaction or those transactions.

...

(5) The certification must specify the offer of financial products, market service, or other relevant transaction or class of relevant transactions to which it applies.

...

2.7 Financial products is a defined term by s 7(1) of the FMC Act as follows:

- (a) a debt security;
- (b) an equity security;
- (c) a managed investment product; or
- (d) a derivative.

2.8 Further definitions in relation to the kinds of financial product referred to in s 7 are set out in s 8 of the FMC Act.

2.9 Clause 43 of sch 1 of the FMC Act provides for the confirmation of eligible investor certificates by third parties. It provides:

(1) A financial adviser, a qualified statutory accountant, or a lawyer (A) must not confirm a certification of a person (B) under clause 41 unless A, having considered B’s grounds for the certification,—

(a) is satisfied that B has been sufficiently advised of the consequences of the certification; and

(b) has no reason to believe that the certification is incorrect or that further information or investigation is required as to whether or not the certification is correct.

(2) A may be the financial adviser, qualified statutory accountant, or lawyer of B (but does not need to be).

3 Positions on the questions stated

3.1 In this section, the FMA sets out, in brief terms, its position in respect of the questions stated.

As noted above, Offeror A does not wish to be involved in this case stated. There is also no readily identifiable industry body for the FMA to engage in the absence of Offeror A’s involvement. Therefore, there is, at this stage, no available contradictor. As a result, in the third column below, the FMA sets out, in broad and simple terms, the position it understands to be taken by offerors. The position is intentionally set out in simplistic terms for now, as it is intended only to show to the Court that a contrary position exists giving rise to the need for the Court’s opinion.

Question	FMA’s position	Broad contrary position adopted by offerors
<p>(a) To be valid, does an eligible investor certificate in relation to an offer of financial products need to expressly describe:</p> <p>(i) the previous experience that A has in acquiring or disposing of financial products; and</p> <p>(ii) the aspects of A’s experience in acquiring or disposing of financial products which they consider would enable them to assess the matters required by cl 41(2)(a)–(c) for the transaction to which it relates?</p>	<p>Both (i) and (ii) are required.</p>	<p>Neither (i) nor (ii) is required.</p> <p>A is required only to certify they have experience in acquiring and disposing of financial products (that is, do not need to expressly state what those financial products are).</p>

<p>(b) For an offeror to rely on an eligible investor certificate, or otherwise treat an investor as an eligible investor, in respect of the transaction to which it relates, does the offeror need to be satisfied that:</p> <p>(i) the eligible investor certificate is valid; and/or</p>	Required.	Required.
<p>(ii) in the context of an offer of financial products, based on the grounds stated in the certificate, A could make the assessments requirement by cl 41(2)(a)–(c) in respect of:</p> <p>(A) a financial product of any kind; and</p> <p>(B) the financial products involved in the transaction to which the certificate relates.</p>	Both (A) and (B) are required.	Neither (A) nor (B) is required. An offeror is not required to undertake any inquiries, and is able to rely on the experience of the “accountant, lawyer, or financial advisor who, having considered the grounds for certification, confirmed the certification.
<p>(c) If the answer is yes to either (b)(i) or (ii), is an offeror permitted to rely on information which is not contained in the eligible investor certificate to undertake either assessment?</p>	No.	Yes.
<p>(d) If an offeror makes an offer of financial products to A in circumstances where it is not permitted to rely on A’s eligible investor certificate, is disclosure required to be given to A under Part 3 of the Financial Markets Conduct Act 2013?</p>	Yes.	No.

4 Submissions

- 4.1 The FMA wishes to file submissions in relation to its position, in accordance with timetable orders which the Court will be asked to make by way of a separate memorandum.
- 4.2 It intends to notify entities who may have an interest in its outcome of the fact that this proceeding has been commenced. Those entities, and any contradictor appointed by the Court, may also wish to be heard and file submissions.

Date: 18 December 2024



Margot Gatland
Head of Enforcement, Financial Markets Authority

This case is filed on behalf of the Financial Markets Authority by its solicitor **Sam Stephen McMullan** whose address for service is at the offices of MC, Level 7, 8 Hardinge Street, Auckland 1010.

Documents for service on the Financial Markets Authority may be left at that address for service or may be:

- (a) posted to the Solicitor at PO Box 90750, Victoria Street West, Auckland 1142; or
- (b) left for the Solicitor at a document exchange for direction to DX CP24063; or
- (c) transmitted to the Solicitor by facsimile to +64 9 336 7629; or
- (d) emailed to the solicitor at litigation@mc.co.nz, with a copy sent to sam.mcmullan@mc.co.nz.