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Investigation into certain trading conduct of Goldman Sachs New Zealand Limited

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Purpose of this report

This report concerns an investigation by the Financial Markets Authority (**FMA**) into certain trading conduct of Goldman Sachs New Zealand Limited (**GSJA**). We are publishing the report in line with our functions, which include promoting the confident and informed participation of businesses, investors and consumers in New Zealand markets.¹

The report is intended to educate market participants about the behaviour and standards we expect from those we regulate. It is also intended to provide further insight into how we use the full range of tools available to us to ensure the most appropriate regulatory response to achieve desired regulatory outcomes. This aligns with our strategic mandate of promoting confident and informed participation in New Zealand financial markets.

We became aware of GSJA's trading conduct during our investigation into the trading conduct of Mr Mark Warminger and Milford Asset Management Limited (**Milford**). As has been well publicised, the Warminger investigation led to:

- enforcement action by the FMA against Milford, which was subsequently settled, in relation to the lack of systems and controls in place to enable Milford to effectively monitor its trading activity, specifically in respect of Mr Warminger², and
- enforcement action against Mr Warminger which led to the High Court finding two contraventions of s11B of the Securities Markets Act 1988 (**SMA**)³ and imposing civil pecuniary penalties on Mr Warminger (**Warminger Decision**).⁴

Although we have decided not to pursue enforcement action against GSJA, we consider it important to detail our investigation and its outcome given the high profile nature of the Warminger Decision, and because some of the same trades addressed in the Warminger court proceedings form part of this investigation as well.

It is important to note that the views we have formed, and which are set out in this report, have not been tested in court. Only a court can make findings of fact or law, and this report does not purport to do either. This report instead records the FMA's views on the conduct that was the subject of the investigation and the reasons for our decision not to pursue enforcement action.

¹ The Financial Markets Authority Act 2011 expressly provides that the FMA may issue reports relating to the New Zealand financial markets and financial market participants.

² [Milford Asset Management Limited and FMA Settlement Agreement](#)

³ The SMA is referred to in this report because it was in force when the trading conduct in question took place. It was repealed on 1 December 2014, however, the relevant provisions of the SMA are essentially replicated in the Financial Markets Conduct Act 2013.

⁴ [2017] NZHC 327 and [2017] NZHC 1471

Executive summary

Investigation

We investigated certain trading conduct of GSJA in:

- Fisher & Paykel Healthcare Limited (**FPH**) shares on 27 May 2014, and
- A2 Milk Limited (**ATM**) shares on 9 July 2014.

In both instances, GSJA explained its trading was for the purposes of facilitating potential client orders.

During this investigation, we requested, and received, a significant amount of information from GSJA and other market participants. This included trading data, telephone records, contemporaneous emails and other forms of correspondence. We also conducted interviews with GSJA's former employees and other relevant market participants.

After our investigation, we remained concerned that GSJA's trading conduct may have had the effect of creating a false or misleading appearance of trading in a way that would breach s11B of the SMA. This report summarises our concerns and sets out a summary of the explanations given by GSJA. It also explains what we think the appropriate response is to this conduct and why we will not be taking enforcement action against GSJA.

GSJA has noted its disagreement with our views, to the extent our views are inconsistent with the explanations it has provided.

Regulatory outcomes

While we are not taking enforcement action against GSJA, there are a number of other regulatory actions that we will be taking following this investigation and the Warmingier Decision, including:

- Substantial engagement with fund managers and brokers to ensure lessons have been learnt from the Warmingier Decision, to encourage market participants to objectively assess their existing governance and controls (including relating to documentation and record-keeping), and to ensure brokers' facilitation practices cannot be used to excuse poor trading conduct.
- Working with the NZX to review trading participants' facilitation practices, including conducting spot checks of the trading carried out by individual traders, when necessary.
- Amendments to the NZX Participant Rules by NZX to include requirements for trading participants to maintain voice recordings.

- Consultation with Ministry of Business, Innovation and Employment (**MBIE**) to consider legislative change to allow us to refer matters directly to the NZ Markets Disciplinary Tribunal (**NZMDT**); or enable the creation of another disciplinary tribunal for these purposes.

Investigation outcomes

Scope of the investigation

During our investigation into Mr Mark Warminger's trading conduct, we identified certain trading conduct of GSJA that we considered warranted further investigation. This investigation related to GSJA's trading in:

- FPH on 27 May 2014; and
- ATM on 9 July 2014.

Generally, when we investigate potential trading misconduct, we would expand our investigation to look at other recent trading examples to identify trends or patterns of behaviour. This was our approach in the investigation into Mr Warminger. There we identified multiple instances of possible misconduct - 10 of which were represented in the court proceedings. However, for various reasons, we concluded that approach was not appropriate in this case and we focussed only on the two examples of trading conduct outlined in this report.

The investigation into GSJA's trading conduct was not progressed while the case against Mr Warminger was before the courts. We wanted to ensure each case would be looked at individually and on its own merits. We do not consider, in an anonymous market, the conduct of one independent party should be used to colour or excuse the conduct of another. This was expressed in our case against Mr Warminger. More fundamentally, we wanted to ensure the High Court clarified the interpretation of the law before we proceeded further. At the time we carried out our investigation, GSJA had already ceased operating as a trading participant in the New Zealand market (exiting in March 2016).

In investigating this conduct, we requested, and received, a significant amount of information from GSJA and other market participants. This included trading data, telephone records, contemporaneous emails and other forms of correspondence. We also conducted interviews with former GSJA employees and other relevant market participants.

Facilitation trading

The trades detailed in this report were carried out by GSJA on its facilitation account. GSJA has stated these trades were for the purpose of facilitating client orders. A facilitation account is a principal, or proprietary, trading account of a broker against which client orders can be executed.

Facilitation is a service brokers provide to their clients whereby a broker provides liquidity to its client by executing the client order against its facilitation account. In some cases, a broker will pre-emptively position itself ahead of

receiving an anticipated client order by accumulating stock on its facilitation account to fill an anticipated buy order or short selling⁵ stock ahead of an anticipated sell order.

This is acceptable market practice both in New Zealand and internationally.

Investigation into FPH trading

Factual background

Based on the information obtained during the investigation, we consider the relevant factual background in respect of GSJA's trading in FPH on 27 May 2014 to be as follows:

- On Friday 23 May 2014, before market open at 10:00, FPH reported its full year financial results. This result was generally considered a positive announcement. The research department of GSJA reiterated its existing 'buy recommendation' in its research report on FPH on 23 May 2014. Mr Warminger sold 500,000 FPH shares through GSJA at \$4.20.
- On Monday 26 May 2014, GSJA experienced significant buy side interest from retail clients of JBWere Limited. GSJA provided liquidity for some of this interest by short selling from its facilitation account (resulting in two trades totalling 441,000 shares).
- Throughout the day, GSJA contacted a number of its institutional clients looking for sell side interest. None of those institutional clients indicated interest to GSJA that day.
- On 26 May 2014, GSJA closed the day with a short position in its facilitation account of approximately 463,000 shares.
- On 26 May 2014 FPH closed at \$4.34.
- On Tuesday 27 May 2014, before market open GSJA spoke to Mr Warminger, who indicated he would be a seller of FPH shares. Bloomberg messages between GSJA employees indicate that Mr Warminger was a seller of between 300,000 – 500,000 FPH shares at a price of around \$4.35.
- On 27 May 2014 at 9:46:25 and 9:46:41, GSJA placed two (short) sell orders for a total of 25,000 shares at \$4.32 in the pre-opening session. Those orders decreased the indicative opening price at that time from \$4.34 to \$4.32. Other market participants subsequently entered orders in the pre-opening session, including an order for 23,000 at \$4.31 entered by another party seconds prior to the opening. After the

⁵ Short selling involves the sale of stock that the seller does not currently own. For example, stock can be borrowed, sold and re-purchased at a later date.

automated algorithm/matching process in the opening auction, GSJA participated in the opening trade via a crossing of 4,641 shares and FPH opened at \$4.32.

- Between market open at 10:00 and 10:44:21, GSJA short sold 152,000 FPH shares from its facilitation account at prices of \$4.32 and \$4.33.
- During that period, at 10:42, GSJA emailed Mr Warminger stating “FPH - can buy 500 at 32”, meaning GSJA was willing to buy 500,000 FPH shares at \$4.32.
- Sometime between 10:45 and 10:53, GSJA spoke to Mr Warminger by telephone and agreed that GSJA would buy 300,000 FPH shares from Mr Warminger at \$4.35. The last traded price at this time was \$4.34. For this transaction the buyer was GSJA’s facilitation account.
- At 10:53, GSJA contacted another institutional client by email offering to buy FPH at \$4.35, but no trade occurred.
- At 15:11, GSJA reported a further trade of 300,000 FPH shares at \$4.35. Mr Warminger was the seller and GSJA’s facilitation account was the buyer in that transaction.

Our concern in relation to this factual background has been with the trading that occurred up to and including 10:44:21, in particular we are concerned as to the purpose of that trading.

Explanation provided by GSJA

GSJA has stated that its trading in FPH on 27 May 2014 up to 10.44.21 was pre-emptive facilitation, designed to increase its short position because it believed, having spoken to Mr Warminger before the open, there was likely selling from Mr Warminger and possibly another institutional client which GSJA knew had a position in the stock. In particular, GSJA noted that:

- On 26 May 2014, GSJA facilitated trading in FPH for JBWere. As a result, GSJA’s facilitation account at market close on 26 May 2014 was short 463,519 FPH shares at an average price of \$4.345.
- GSJA was aware, from publicly available information as well as past trades and discussions, that Mr Warminger and another institutional client held positions in FPH shares. Additionally, Mr Warminger had sold 500,000 FPH shares through GSJA on 23 May 2014.
- GSJA’s pre-open orders were entered at 9:46, 14 minutes prior to the open. This gave the market time to react and GSJA’s participation in the opening auction was 15% of volume. These orders were consistent with its stated commercial rationale and, in its view, had no material effect on the opening price.
- Each of the six sell orders entered by GSJA after market open were taken up quickly at prices which were the same as or higher than previous trades on the market.

- The total loss to GSJA on facilitation trading on FPH shares on 26 and 27 May was \$3,488 (but this loss was offset by commissions received, resulting in a small profit).
- GSJA achieved a good outcome for its client, Mr Warminger, by providing certainty of execution for a large volume sell at the client's desired price.
- GSJA uses its facilitation services to meet key institutional client needs as part of its broader offering to its clients. It assists clients to achieve price and volume certainty, which can be important in illiquid markets. As part of a wider client service offering, there may be circumstances in which it is acceptable not to make a trading profit from facilitation, and, in some circumstances, it would be acceptable to make a decision to take a loss on a particular facilitation trade. Facilitation requires a trader to take a view on broader client interest and/or risk associated with closing the facilitated position. This is consistent with internationally recognised market practice for facilitation trading.

Our view

We considered all of the information obtained during the investigation into GSJA's trading conduct. Despite GSJA's explanation, we remain concerned that its trading in FPH up to 10:44:21 on 27 May 2014 may have had the effect of creating, or causing the creation of, a false or misleading appearance as to the price and supply of securities. This is because, in the absence of clear contemporaneous evidence to the contrary, which GSJA has not been able to provide in support of its explanation, we do not consider we can rule out that GSJA's trading conduct on 27 May 2014 was focused on covering a short position, rather than for client facilitation purposes.

We cannot rule out that possibility given the factors outlined below:

- GSJA already had a sizeable short position in FPH. This may be considered a risky position to hold, or increase, in a market in which the price of FPH could reasonably be expected to rise (based on FPH's positive results announcement, GSJA had reiterated its existing 'buy recommendation' and the trading that took place since the announcement).
- On 26 May 2014, GSJA appeared to be struggling to find sell side interest, even after approaching multiple institutional clients. This included Mr Warminger and the other institutional client which GSJA explained it was pre-emptively facilitating.
- GSJA entered an order in the pre-open which lowered the indicative opening price at that time from \$4.34 (the prior day's closing price) to \$4.32. A lower opening price was not in the best interests of any GSJA client wanting to sell FPH. We acknowledge that, subsequent to GSJA's orders, a number of orders were entered in the pre-open which also had an impact on the opening price.

- Immediately after market open, and for the period after (with the exception of one other order), GSJA was the only seller in the market at prices below \$4.34. This makes it difficult for us to accept GSJA could believe Mr Warminger would be a seller at a lower level.
- GSJA dominated market trading from market open until it entered into a transaction with Mr Warminger at 10:54. Therefore, we have doubts about GSJA's explanation that its trading was in line with other market trading at the time.
- GSJA continued to short sell FPH at \$4.33 having not received a response from Mr Warminger and earlier indications being that he would be willing to trade at around the \$4.35 level. From a commercial perspective, we consider that the rationale for these short sales is questionable as GSJA would be incurring a loss on any trades entered into at prices below Mr Warminger's strike price of \$4.35.
- During the Warminger court proceedings, a former GSJA employee stated GSJA entered into a trade with Mr Warminger at \$4.35 because the price of FPH was "running away". This is in our view consistent with GSJA trying to mitigate losses in its facilitation account.
- The price of FPH began to rise soon after GSJA's selling ceased and the trade with Mr Warminger had been agreed. Neither GSJA nor Mr Warminger were active in the market after this time, indicating that GSJA's selling may have been putting downward pressure on the share price.
- GSJA explained that the purpose of its facilitation account is not to make a profit on individual trades and that its commercial objectives may be advanced even if individual facilitated transactions result in a loss. However, discussions with GSJA employees have also indicated it would be undesirable for the facilitation account to consistently make a loss. GSJA has stated it was conscious of the 'burn rate' against each client meaning that they were actively monitoring the losses encountered from facilitating positions for each client.

Investigation into ATM trading

Factual background

Based on the information obtained during the investigation, we consider the following to be the relevant factual background:

- The GSJA facilitation account did not have a position in ATM at the start of the day on 9 July 2014.
- On 9 July 2014 at 13:11, a sell side client communicated to GSJA that it was willing to sell 2 million ATM shares at \$0.70.
- At this time, GSJA communicated to Mr Warminger by email that it had a client who wanted to sell 2 million ATM shares at \$0.70. Mr Warminger indicated he was willing to buy 2 million ATM shares at \$0.68. GSJA also contacted another institutional client to gauge interest.
- GSJA's sell side client subsequently conveyed that if the price was \$0.68, then it wanted to sell 3 million shares. This was communicated to Mr Warminger by email at 13:39. Mr Warminger declined to enter into the transaction, replying by email at 13:46.
- Between 15:34:58 and 15:44:26, GSJA placed two orders to (short) sell a total of 82,536 ATM shares at \$0.68. These orders traded immediately and in full.
- Between 15:46:12 and 15:51:02, GSJA entered 10 (short) sell orders for its facilitation account for small parcels of ATM shares at \$0.68. These orders each alternated with 10 prior buy orders placed by Mr Warminger for equally small values at \$0.69.
- Each of the 10 orders entered by GSJA between 15:46:12 and 15:51:02 traded against an existing buy order of 15,000 shares, entered into the market by ANZ Securities Limited at 9:09:53.
- Each of the 10 orders entered by Mr Warminger between 15:45:56 and 15:51:06 traded against an existing sell order of 50,000 shares entered into the market by Forsyth Barr Limited at 14:42:13.
- At 15:51:10, GSJA entered a (short) sell order for 50,000 ATM shares at \$0.68. This order was completed over three trades, the majority of which was purchased by Mr Warminger.
- At 15:51:35, GSJA entered a (short) sell order for 50,000 ATM shares. This order did not trade.
- At market close GSJA had accumulated a short position of 135,543 shares. GSJA bought shares to cover this position, on market, over the next two days.

Our concern in relation to this factual background has been with all of the trading in ATM undertaken by GSJA on 9 July 2014; in particular we are concerned as to the purpose of that trading.

Explanation provided by GSJA

GSJA has stated that it was trading in ATM on 9 July 2014 in an attempt to accumulate a position (even a smaller position) for the purpose of positioning itself to facilitate an order from the sell side client that GSJA anticipated it might receive.

In particular, GSJA noted that:

- When a broker cannot complete a specific trade for a client on that client's specified terms, it is common that the broker may position themselves to potentially facilitate a smaller volume for the client. This is to attempt to achieve partial execution, with a view to ultimately facilitate the balance of the order over a longer period.
- Beginning at 14:40:44, a series of small buy side bids was observable in the market. This was possibly trading through an algorithmic trading engine. This series of small buy side bids frequently crossed the bid/ask spread to hit the offer. Additionally, each order resulted in executions on the market. It was possible there was a buyer of size behind these small orders who could be positioning to execute a larger trade or execute higher volumes.
- GSJA entered two reasonably sized sell orders (42,536 and 40,000) at 15:34:58 and 15:44:26 respectively, both of which traded in full against existing bids already in the screen at \$0.68.
- The small sell orders entered by GSJA between 15:46 and 15:51, which in turn resulted in small trades, are consistent with a broader strategy to test whether there was more volume behind the small bid orders. Additionally, those orders were in line with market buying in the context of liquidity available at the time.
- At 15:51:10, seeing no new volume of significance appearing in the market, GSJA reverted to a larger order strategy entering an offer of 50,000 shares at \$0.68 which traded with small volume at \$0.68 (4,087), leaving 45,713 shares available on the ask at \$0.68.
- 14 seconds later, at 15:51:24, a bid of 50,000 was placed by Mr Warminger at \$0.69 which matched against the residual ask of GSJA (45,713) at the price of \$0.68. As a result, the price moved to \$0.69.
- 11 seconds later, at 15:51:35, GSJA entered a further ask of 50,000 at \$0.68, however no further trades were executed against this ask for the rest of the day's trading, resulting in the last price traded at \$0.69 being the closing price.

Our view

We considered all of the information obtained during the investigation into GSJA's trading conduct and we remain concerned that GSJA's trading in ATM on 9 July 2014 may have had the effect of creating, or causing the creation of, a false or misleading appearance as to the price and supply of securities. This is because, in the absence of clear contemporaneous evidence to the contrary, which GSJA has not been able to provide in support of its explanation, we do not consider we can rule out that GSJA was trading for the purpose of controlling or influencing the price of ATM, rather than to sell shares for the genuine purpose of facilitating its client.

Our conclusion is based on the following specific factors:

- The sell side client GSJA was in contact with stated he would sell a block of 2 or 3 million shares. In discussions with us, the client indicated he was unlikely to accept order sizes significantly lower than his intended order size and the GSJA trader likely should have known this.
- Mr Warminger had indicated he was a buyer of ATM at a particular volume and price. There is no evidence to suggest GSJA made any further efforts to negotiate with Mr Warminger. We consider that this indicates GSJA was aware that neither its buy side nor its sell side clients were likely to move (or at least move significantly) from their stated positions. It also supports our view that GSJA was aware the sell side client would be unlikely to accept a significantly smaller parcel.
- We do not accept GSJA's argument that the small orders placed between 15:46:12 and 15:51:02 were designed to test whether there was more volume behind the small bid orders that were occurring at \$0.69, entered by Mr Warminger. In particular, this is because:
 - i. Each of these small orders matched with the same existing buy side order (from ANZ Securities Limited) which had been entered pre market open. Additionally, each of Mr Warminger's small orders matched against an existing sell-side order for 50,000 shares which had been entered by Forsyth Barr Limited;
 - ii. We do not consider GSJA had any reason at the time of entering its first order of 500 shares to believe it was trading with an algorithm. There was only one trade of 500 shares in the market at the point that GSJA claims to have determined this. There is nothing unusual about this order of itself. Additionally, the orders entered into the market by both Mr Warminger (and in response by GSJA) were decreasing in size rather than showing any indication of increased volume; and
 - iii. During interviews, former employees of GSJA had no explanation for how they expected volume to be released to market, by trading in the way they were – which was mirroring the trades occurring at \$0.69.

- GSJA only started trading on its facilitation account at 15:34:58, despite negotiations with Mr Warminger concluding unsuccessfully at 13:47. From that time until market close, GSJA only managed to short sell 135,543 shares, which it bought back on market over the next two days.
- Even if GSJA entered the market at 15:34:58 with the intention of building a short position to enable it to buy from its sell side client, we do not consider its trading between 15:46:12 and 15:51:02 reflects that objective.
- Given the lack of liquidity of ATM and the small number of institutional investors active in that security, we consider GSJA was unlikely to find the volume it was seeking by trading on market in the way it did. Our analysis of the three month period, 1 May 2014 to 31 July 2014, shows there were only 4 days in which the on-market daily volume exceeded 2 million shares.

Regulatory response

Despite our concerns about GSJA's trading we have determined not to take enforcement action in this case. We therefore will not be seeking any determination from the courts as to the legitimacy of GSJA's conduct related to the trades which are the subject of this investigation.

We play a critical role in regulating New Zealand's capital markets and financial services. Improving standards of conduct in our secondary markets is an important part of achieving the FMA's overall strategic objectives, outlined in our [Strategic Risk Outlook 2017](#).

However, we need to ensure our regulatory response to any conduct is both proportionate and a suitable use of public resources. This may mean we determine not to take enforcement action in cases where we nonetheless consider there is evidence pointing towards potential misconduct.

The factors we consider when determining whether (and what) action to take are detailed in our [Regulatory Response Guidelines](#) (August 2016). Examples of the factors for consideration include:

- Whether there is a reasonable prospect of success in a court proceeding.
- Whether the incident represents simple negligence, gross negligence, error of judgement, or genuine mistake.
- How prevalent is the offence? Is it being repeated or imitated?
- Will the action modify or stop the behavior of the offender?
- Would the action be disproportionate and the offender be seen as a martyr?

In determining not to pursue enforcement action against GSJA we have primarily considered the following factors. None of these factors in isolation is determinative, and so we have considered them in the round:

- Venning J in the *Financial Markets Authority v Warminger*⁶ required strong evidence to establish a breach of s11B of the SMA. In several instances, Venning J preferred the direct evidence of the defendant over inference drawn by us – unless we could prove that the explanation put forward by the defendant was not plausible. As a broker, GSJA is entitled to trade for the purposes of facilitating client orders. This is a particular feature of being a broker, and is not a trading purpose that can be claimed by any other type of participant in the market. This potential explanation was not available to Mr Warminger, as a fund manager, who was trading on behalf of Milford. While we certainly do not consider this explanation provides a veil of legitimacy over all trading carried out by brokers, we do consider it would lead to an additional evidential hurdle which increases the litigation risk in pursuing this matter.
- In relation to potential breaches of s11B of the SMA, we have limited options in terms of our regulatory response. The potential breach, regardless of particular circumstance or its severity, can be pursued through litigation only. There are no ‘intermediate’ remedies available to us, such as referral to a disciplinary tribunal, which is an option available in other markets.
- The investigation into GSJA involves only two allegations of possible misconduct. We consider a proportionate response for the potential misconduct identified would have been a referral by NZX to the NZMDT, given that GSJA is within the jurisdiction of the NZMDT as an NZX Participant. This course of action was not available in respect of Mr Warminger or Milford, who are not NZX Participants and therefore outside the jurisdiction of NZX. This recommendation was made several times to NZX staff. However, after consideration, NZX determined not to take such action.⁷
- There is significant cost in pursuing litigation, both in terms of financial cost and the cost of internal FMA resource that is applied to such pursuits. This cost would not in itself deter us from taking proceedings where that action would advance our regulatory objectives. However, in circumstances where there is no further advancement of our regulatory objectives, we must consider whether the action is an efficient or effective use of public resources.
- While litigation against GSJA would determine whether there was a failure to meet the standards in the SMA which were in force at the relevant time, we do not think litigation would advance our regulatory objectives beyond those achieved in *Financial Markets Authority v Warminger*. We consider the action taken against Mr Warminger has:

⁶ [2017] NZHC 327.

⁷ NZX determined that the explanations provided by GSJA were plausible and therefore did not pursue GSJA for a breach of the NZX Participant Rules. However, it is the FMA's view that NZX's investigation into this matter was not as robust as it could have been, and therefore the FMA does not consider that NZX had sufficient information available to it in making this determination. The FMA publicly commented on the NZX's performance in relation to this matter in our [NZX Obligations Report 2017](#).

- i. clarified the law and provided important legal precedent for future actions;
 - ii. sent an important denunciation and deterrence message in an area of strategic importance to New Zealand's financial markets; and
 - iii. provided an opportunity to illustrate the type of conduct that the FMA does not condone and set standards in the funds management industry and broader broking community.
- Litigation gives us a platform from which to address the market and draw attention to important matters. However, in this case, we consider any wider educative benefit to be gained from this investigation, beyond that already provided by the Warmingier Decision, can equally be obtained through this written report outlining our concerns and through the further non-enforcement actions we propose to take.

Non-enforcement actions

While the FMA has determined not to take enforcement action in relation to the trading conduct of GSJA, this investigation and the investigation into Mr Warmingier have prompted a number of other actions designed to improve standards of market conduct, including:

- Since the Warmingier case concluded, we have been engaging with fund managers to raise awareness and understanding of the prohibition on market manipulation and the lessons learnt from the Warmingier judgment, and to encourage market participants to objectively assess their existing governance and controls. It is intended that this engagement will extend to brokers. Given the FMA's concerns about the trading conduct of GSJA, the intended engagement with brokers will also cover our expectations around facilitation practices. This will be a focus area for the FMA going forward.
- We will work with NZX to review the facilitation practices of trading participants, including conducting spot checks of the trading carried out by individual traders where considered necessary on a risk-assessed basis.
- Given the lack of any intermediate remedies available to us when considering our regulatory response to market misconduct matters, we will be engaging with MBIE to consider legislative change to allow us to refer matters directly to the NZMDT or create another disciplinary tribunal for this purpose. Even though a power of direct referral to the NZMDT would raise some difficulties, we are disappointed with NZX's lack of use of the NZMDT given the extensive market expertise of its panel members.
- Advocating for the use of voice recording by trading participants. Both the investigation into Mr Warmingier and the investigation into GSJA have highlighted the usefulness of voice recordings in

evidencing the purpose of trading conduct. The lack of such evidence demonstrably hindered our investigation and evidence gathering. This type of evidence would be of benefit to both the FMA and market participants in assisting with a more efficient investigation and resolution of market misconduct matters. Upon our request, NZX has agreed to amend its NZX Participant Rules to include a requirement for trading participants to maintain voice recordings. We are working with NZX to ensure this is implemented as soon as possible. Whilst some participants object to this change, it is entirely standard in many other jurisdictions.