

## **PROSECUTION POLICY**

## Table of contents

Prosecution Policy.....	3
Introduction .....	3
Key Aspects of the Prosecution Guidelines .....	3
Prosecution Decision Making.....	4
Prosecution Process.....	5

# Prosecution Policy

## Introduction

1. Decisions on enforcement action are taken by the Financial Markets Authority (**FMA**) in accordance with its Enforcement Policy. FMA has responsibility to enforce financial markets legislation through criminal prosecutions, civil penalty proceedings, other civil proceedings, enforceable undertakings, and through the use of administrative actions. This prosecution policy (the **Prosecution Policy**) sets out the specific decision-making criteria to be applied when considering criminal prosecution.
2. Decisions on prosecutions must be fair, transparent, consistent and principled. The decision as to whether the FMA will commence a prosecution in any particular case is made by its Board (unless specifically delegated by the Board to an officer or employee of FMA), with advice from the FMA executive and, as appropriate, external legal counsel. FMA makes all such decisions in accordance with FMA's statutory objectives, its Enforcement Policy, and the Solicitor-General's Prosecution Guidelines as at 1 July 2013 (**Prosecution Guidelines**). The Prosecution Guidelines establish the overarching framework within which FMA's prosecution policy has been developed.
3. In determining whether to prosecute in any particular case, FMA will take into account the following matters:
  - The main objective of FMA as set under the Financial Markets Authority Act 2011: to promote and facilitate the development of fair, efficient, and transparent financial markets;
  - The purpose and objectives of the specific financial markets legislation under which prosecution is being considered;
  - Whether civil proceedings or other enforcement action would represent a more appropriate response to the conduct alleged;
  - Resources available to FMA and the Crown and the demand of the proposed prosecution on those resources relative to the public interest in the prosecution proceeding;
  - Any related charges, proceedings or regulatory actions proposed or likely to be proposed by any other agency in relation to the subject matter.

## Key Aspects of the Prosecution Guidelines

4. The purpose of the Prosecution Guidelines are "*to ensure that principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values.*" A fundamental principle established by the guidelines is the need for prosecutorial independence. FMA is required to have the necessary process in place to protect the independence of the initial prosecution decision. FMA's prosecution decision making process is set out in the next section of the Prosecution Policy.
5. The Prosecution Guidelines state that prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the two-stage Test for Prosecution is met. The Test for Prosecution is met if the evidence which can be adduced in Court is

sufficient to provide a reasonable prospect of conviction — the Evidential Test; and Prosecution is required in the public interest — the Public Interest Test.

6. Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner. The two stage test for prosecutions, and the factors that should be taken into account in considering whether the test is met, is more thoroughly set out in the Prosecution Guidelines.

### **Prosecution Decision Making**

7. All prosecutions must be approved by the Board of FMA, except where specifically delegated by the Board.
8. All recommendations regarding whether a prosecution should be undertaken must include:
  - a. A theory of the case;
  - b. An investigation report;
  - c. A view on whether the Evidential Test has been met;
  - d. A view on the prospects of success, and whether the case has precedent value;
  - e. A view on whether the Public Interest Test has been met and in particular how the case addresses the public interest criteria and FMA's regulatory objectives as set out in the Enforcement Policy. The public interest considerations will vary from case to case but include, seriousness of the conduct, extent of detriment or impact to New Zealand's financial markets and is there widespread public interest in the issue;
  - f. How the proposed action meets FMA prioritisation/case selection criteria;
  - g. Estimated cost and impact on staff and litigation resource;
  - h. Whether non-prosecution alternatives are realistic;
  - i. What the relative effect of action is compared to others that may be available and the relative need for action in the subject area (e.g. market manipulation, misleading disclosure, licensing enforcement); and
  - j. An independent legal opinion supporting the recommendation and confirming that a prosecution is in the public interest and the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of conviction.
9. Prosecution recommendations are made in writing and prosecution decisions are recorded in writing with reasons.

## Prosecution Process

10. FMA will endeavour to conduct itself as a model litigant in the conduct of a prosecution in accordance with its Model Litigant Policy. FMA will act with complete propriety, fairly, and in accordance with the comprehensive guidance provided by the Solicitor-General's Prosecution Guidelines. In particular, FMA will:
  - a. Deal with the prosecution promptly and efficiently and without causing unnecessary delays or expense;
  - b. Act consistently and even-handedly in the handling of a prosecution;
  - c. Consider the possibilities for, and initiate where appropriate, alternative means of avoiding or resolving the prosecution;
  - d. Responsibly spend public funds in relation to a prosecution;
  - e. Not seek to take inappropriate advantage of an opponent who lacks resources;
  - f. Not require the other party to prove a matter which FMA knows to be true or seek to take unmeritorious points for tactical reasons;
  - g. Not pursue appeals unless FMA considers that it has reasonable prospects of success and/or the appeal is otherwise justified in the public interest.
11. FMA enforces a wide range of financial markets law including the Crimes Act. In determining which charges should be laid FMA will have regard to the seriousness of the alleged misconduct, public interest criteria and whether any charges are being pursued by any other prosecuting agency. Where another agency has an interest in the matter which is the subject of an FMA prosecution, FMA will consult with and co-ordinate its activities with that agency.
12. Where a decision is made by FMA to commence a prosecution, the charges to be laid will be determined by the Board or its delegate after considering the advice of the Enforcement Team and external counsel. Disclosure to the person charged by FMA is made in accordance with the requirements of the Criminal Disclosure Act 2008. Responsibility for meeting these requirements lies with the FMA investigator and lawyer assigned to the case, under the supervision of the Manager Evidence and Manager Litigation. Appeals from non-Crown prosecutions require the consent of the Solicitor-General and the decision as to whether to seek such consent will be made by the Board in consultation with the Chief Executive and Head of Enforcement. Decisions about appeals from Crown prosecutions will be made by the Solicitor-General following a recommendation from the Crown Solicitor conducting the prosecution.
13. Through regular reviews of each case, the Head of Enforcement and Chief Executive will consider whether it is appropriate to seek a decision from the Board whether to discontinue a prosecution that the Investigative team and/or the Crown Prosecutor establishes no longer meets the test for prosecution.