IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2025-404-14
[2025] NZHC 2723

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 Applicant

Hearing:	1 May 2025
Appearances:	BH Dickey, SS McMullan and M Djurich for the Applicant JE Standage, OM de Pont and HZ Malik for the Prospective First and Second Interveners
Judgment:	18 September 2025

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 18 September 2025 at 3.00pm,
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors: Meredith Connell, Auckland
MinterEllisonRuddWatts, Auckland

To: B Dickey, Auckland

Introduction

[1] The Financial Markets Authority (FMA) has stated a case to this Court, asking the Court to answer four questions about the "eligible investor exclusion" under the Financial Markets Conduct Act 2013 (FMCA).

[2] The FMCA governs, amongst other matters, the offering of financial products to members of the public. Ordinarily, when an offer to invest in financial products is made to the public, the entity making that offer (the "offeror") must provide potential investors with prescribed information about the proposed investment, including its risks.[1] However, if an investor qualifies as an "eligible investor" under the FMCA, then the offeror is not required to provide that person with the information otherwise required to be disclosed.[2] The rationale behind this is that eligible investors are assumed to be "savvy" (my word, not the FMA's) enough to consider the merits and risks of the proposed investment without the prescribed disclosure.

[3] The FMCA contains various provisions which determine whether a person qualifies as an eligible investor. In short, this is through a process of certification, in which the person concerned certifies that they have the required experience to assess the proposed investment, sets out the grounds for their experience, and the certificate is then "confirmed" by either a financial adviser, a qualified statutory accountant, or a lawyer (who I will refer to as "the confirmer").[3] The confirmer must not confirm the proposed investor's certification unless the confirmer is satisfied that the proposed investor has been sufficiently advised of the consequences of the certification, and "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".[4]

[4] The FMA is concerned that eligible investor exclusion is being used in circumstances when it considers it should not be. Examples of eligible investor certificates were put before me which the FMA says on their face demonstrate that the

1 Primarily through a document called a "Product Disclosure Statement". Financial Markets Conduct Act 2013 (FMCA), pt 3.
2 FMCA, sch 1, cl 3(1).
3 Sch 1, cl 41.
4 Sch 1, cl 43(1). The statutory provisions governing the eligible investor certification process are set out at [16] and [18]–[21] below.

person concerned could not have the requisite experience to assess the offer to which the certificate relates. Examples included the certificate simply stating that the person concerned had "previously owned a rental property", or that "we have other investments and one of our investments fell due", and some certificates containing no grounds at all in relation to the person's suggested investment experience.

[5] In this context, the FMA has put the following questions to the Court by way of its case stated:[5]

(a) **Question 1**: 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 person (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) **Question 2**: 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 assessment requirement by cl 41(2)(a)–(c) in respect of:

(A) a financial product of any kind; and

5 The "case stated" procedure is provided for in s 48 of the Financial Markets Authority Act 2011.

(B) the financial products involved in the transaction to which the certificate relates.

(c) **Question 3**: If the answer is yes to either (b)(i) or (ii) of question 2, is an offeror permitted to rely on information which is not contained in the eligible investor certificate to undertake either assessment?

(d) **Question 4**: 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?

[6] In answering these questions, I have been assisted by submissions from the FMA, as well as from Angel Association New Zealand Incorporated (AANZ) and New Zealand Private Capital Association Incorporated (NZPC) (together, the intervenors). I granted the intervenors leave to intervene in this proceeding, given their respective roles in representing companies which rely on eligible investor certificates. AANZ members invest in start-ups, either directly or through small investment funds, and NZPC represents the wider private equity and venture capital industry. The intervenors state that the outcome of this case may be relevant to their members' ability to raise capital for funds and for companies. The intervenors have effectively acted as "contradictor" on the case stated.

[7] To put the parties' submissions in their proper context, I first set out the relevant provisions of the FMCA, and then address the legislative history to those provisions. There is no doubt that when interpreting a statutory provision, recourse may be had to its legislative history.[6] That history can, as in this case, provide useful insight into the policy Parliament was seeking to implement when enacting the statutory provisions in issue.

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6 Burrows and Carter, *Statute Law in New Zealand* (6th Ed, LexisNexis, Wellington, 2021) at 351 and 642–643. See also *Burden v ESR Group (NZ) Limited* [2025] NZSC 18 at [104]; and *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [78]–[81].

The relevant statutory provisions

Purposes of the FMCA

[8] It is useful to start with the purposes of the FMCA. Section 3 sets out two "main purposes" of the FMCA, being to:

> (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.

[9] Section 4 then sets out a number of "additional purposes", being to:

> (a) 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;
>
> (b) ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks;
>
> (c) avoid unnecessary compliance costs; and
>
> (d) promote innovation and flexibility in the financial markets.

The disclosure regime

[10] Pursuant to s 39 of the FMCA, and reflecting the "additional purpose" of the FMCA set out at [9(a)] above, all offers of financial products for issue are to be accompanied by disclosure of that information prescribed by pt 3 of the FMCA, unless an exclusion under pt 1 of sch 1 to the FMCA applies.

[11] As noted earlier, the primary means of providing the required disclosure to prospective investors is through a Product Disclosure Statement (PDS). Part 3 of the FMCA, supplemented by the Financial Markets Conduct Regulations 2014 (the Regulations), sets out the purpose of and what a PDS must contain. Section 49 of the FMCA provides that the purpose of a PDS is to "provide certain information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial products". The information in a PDS must be worded and presented in "a clear, concise, and effective manner".[7]

[12] The FMCA provides various offences for breaching the requirements to provide a PDS. The penalty for an individual ranges with a term of imprisonment not exceeding five years, a fine not exceeding $500,000, or a combination of both.[8] In any other case, the penalty is a fine not exceeding $2.5 million.[9] Offences and penalties such as these reinforce the importance of the disclosure regime under pt 3 of the FMCA. A person who invests in an offer of financial products without receiving the requisite disclosure also has the right to withdraw from the offer and to repayment in specified circumstances.[10]

The wholesale investor regime

[13] One exclusion to the requirement to give disclosure under pt 3 of the FMCA is when an offer is made to "wholesale investors" (with such offers commonly referred to as "wholesale offers").[11] A "wholesale investor" is defined in cl 3 of sch 1 to the FMCA as follows:

> **3 Offer to wholesale investor**
>
> …
>
> (2) A person is a **wholesale investor** if—
>
> (a) the person is an investment business (*see* clause 37); or

7 FMCA, s 61(1).
8 Section 53(2)(a).
9 Section 53(2)(b).
10 Section 54(1)(a) and (2).
11 Section 39 and sch 1, cl 3(1). Offers where no exclusion applies and full pt 3 disclosure must be given are commonly referred to as "retail offers".

(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); or

(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).

…

[14] A person or entity that meets one of the definitions in cl 3(a)–(c) is a wholesale investor. There is no mandated certification process. Nevertheless, there are "safe harbour" provisions pursuant to which certain wholesale investors can provide a "safe harbour" certificate upon which an offeror can rely. Clause 44 provides:

44 Safe harbour if certificate given

(1) The purpose of this clause is to provide certainty (subject to clauses 45 to 46) to—

(a) an offeror (or other relevant person) that a person is a wholesale investor of the kind referred to in clause 3(2); or

(b) a provider (or other relevant person) that a person is a wholesale investor of the kind referred to in clause 36(b)(i) to (iv).

(2) A person (**A**) must be treated as being a wholesale investor as referred to in subclause (1)(a) or (b) (as the case may be) if A—

(a) certifies in writing that A—

(i) is a wholesale investor within the meaning of clause 3(2) or 36(b) (as the case may be); and

(ii) understands the consequences of certifying himself, herself, or itself to be a wholesale investor; and

(b) states in the certificate—

(i) the paragraph in clause 3(2) or the subparagraph in clause 36(b) that is claimed to apply to A; and

(ii) the grounds on which A claims that the paragraph or subparagraph applies; and

(c) gives a copy of the certificate to the offeror, provider, or other relevant person.

(3) A certificate under this clause ceases to be effective for the purposes of subclause (2) on the date that is 2 years after the date on which it was given.

[15] However, cl 45 provides that cl 44(2) does not apply when the offeror knows that the person providing the certificate was "not in fact" a wholesale investor at the time the certificate was given.

[16] Returning to the definition of "wholesale investor", as can be seen from cl 3(3)(a) (set out at [13] above), a person will also be a "wholesale investor" if they are an "eligible investor" by reference to cl 41 of sch 1. Clause 41 is the statutory provision of central relevance to the FMA's case stated. It relevantly provides as follows:

41 Eligible investors

(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.

(2A) In relation to the supply of a financial advice service or a client money or property service (or a class of those services), A must certify that A has previous experience in acquiring or disposing of financial advice products that allows A to assess—

(a) the merits of the service or services to be provided (including assessing their value and the risks involved); and

(b) A's own information needs in relation to the service or services; and

(c) the adequacy of the information provided by any person involved in the service or services.

…

(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.

…

[17] Clause 41 is subject to cl 42, which provides:

42 Offeror may not rely on eligible investor certificate in certain circumstances

(1) Clause 41 does not apply to an offer of financial products, the supply of a market service, or any other relevant transaction if the offeror, provider, or other relevant person, before the relevant time, knew that A did not in fact have previous experience of the kind referred to in clause 41(2), (2A), (3), or (4) (as the case may be).

(2) Clause 41 does not apply to an offer of financial products, the supply of a market service, or any other relevant transaction if the offeror, provider, or other relevant person knew, or had reasonable grounds to believe, that the—

(a) financial adviser, qualified statutory accountant, or lawyer referred to in clause 41(1)(c) was an associated person of the offeror, provider, or other relevant person; or

(b) financial adviser or qualified statutory accountant referred to in clause 41(1)(c) had, within the 2 years immediately before the relevant time, provided professional services to the offeror, provider, or other relevant person, or a related body corporate of the offeror, provider, or relevant person.

(3) Clause 41 does not apply to an offer of financial products, the supply of a market service, or any other relevant transaction if the certificate was given more than 2 years before the relevant time.

[18] Clause 43 addresses an important component of an eligible investor certificate, namely "confirmation" of that certificate. It provides:

43 Confirmation of certification

(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).

[19] Clause 46 relates to both eligible investor certificates under cl 41, and "safe harbour" certificates under cl 44. It provides:

46 Other provisions relating to certificates

(1) A certificate under clause 41 or 44 is effective only if the certificate—

(a) is in a separate written document; and

(b) is in the prescribed form (if any); and

(c) contains the prescribed information (if any); and

(d) is otherwise given in the prescribed manner (if any).

(2) If a person gives written notice to an offeror, provider, or other relevant person that the certificate under clause 41 or 44 is revoked, the offeror, provider, or relevant person may not rely on the certificate in respect of any subsequent offer, service, or transaction.

[20] The Regulations set out certain prescribed information which must be contained in an eligible investor certificate. Clause 47, pt 2, sch 1 of the Regulations provides for a warning statement, in prescribed terms, to be included in an eligible investor certificate:

> **47 Eligible investor certificate**
>
> (1) A certificate under clause 41 of Schedule 1 of the Act must include a warning statement at the front and in a prominent position.
>
> (2) In relation to an offer of financial products (or a class of those transactions), the warning statement must be in the following form:
>
> "**Warning**
> New Zealand law normally requires people who offer financial products to give information to investors before they invest. This information is designed to help investors make an informed decision.
>
> If you give this certificate, the usual rules do not apply to offers of financial products made to you. As a result, you may not receive a complete and balanced set of information. You will also have fewer other legal protections for these investments.
>
> Make sure you understand these consequences.
>
> Ask questions, read all documents carefully, and seek independent financial advice before committing yourself.
>
> **Offence**
> It is an offence to give a certificate knowing that it is false or misleading in a material particular. The offence has a penalty of a fine not exceeding $50,000.
> …

[21] I was advised that currently there are no other regulations prescribing the content of an eligible investor certificate.

[22] Clause 47 in pt 3 of sch 1 to the FMCA provides for offences relating to certificates:

> **47 Offences relating to certificates**
>
> (1) Every person commits an offence who gives a certificate under clause 41 or 44 knowing that it is false or misleading in a material particular.
>
> (2) Every person (**A**) commits an offence who incites, counsels, or procures any person to give a certificate under clause 41 or 44 that A knows is false or misleading in a material particular.

> (3) Every person who commits an offence under this clause is liable, on conviction, to a fine not exceeding $50,000.

[23] Finally, the intervenors emphasise the consequences for offerors if an eligible investor certificate is invalid, or the offeror is otherwise not entitled to rely on such a certificate. They submit that if a single investor is re-classified from wholesale to retail (because the eligible investor certificate is invalid or an offeror is otherwise not permitted to rely on it), then the entire offer would be deemed to be a "regulated offer" as defined in s 41 of the FMCA. They note that the offeror would then be in breach of all disclosure and other obligations associated with regulated offers if the offeror had not complied with them (on the understanding that the offer was not regulated).

[24] The intervenors further submit that private equity funds and venture capital funds (including some smaller vehicles used by angel investor groups) are "managed investment schemes" under s 9 of the FMCA. They advise that such funds are almost always offered as a wholesale offer and are not structured to comply with retail offer requirements. The intervenors accordingly submit that if such a fund was found (even inadvertently) to have made an offer to a single retail investor, the fund would be required to have complied with the full suite of obligations in sub-pt 2 of pt 4 of the FMCA, which requires it, amongst other things, to:

(a) apply for registration of the investment scheme under ss 125 and 126 of the FMCA;

(b) meet initial and ongoing registration requirements, such as the need for:[12]

  (i) a compliant governing document (in accordance with ss 135 – 137);

  (ii) a licensed fund manager (in accordance with ss 142 – 151);

  (iii) a licensed fund supervisor (in accordance with ss 152 – 155);

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12 In accordance with s 127 of the FMCA.

(iv) a compliance statement of investment policy and objectives (in accordance with ss 164 – 166); and

(c) provide every retail investor with a compliant product disclosure statement (in accordance with sub-pt 4 of pt 6 of the FMCA).

[25] The intervenors highlight that the range of obligations that would apply, and that could conceivably be breached if the FMA's approach to the eligible investor regime were to be adopted, carry significant penalties, which can include a pecuniary penalty of up to $600,000 in some cases[13] and up to $5 million in others.[14]

[26] Finally, the intervenors emphasise that sub-pt 3 of pt 8 of the FMCA, which deals with civil liability for contraventions of the FMCA, is clear that "any person", not just the FMA, may apply to the Court for a declaration of contravention against an offeror.[15] They submit that this not only exposes offerors to considerable risk which the eligible investor exemption was set up to avoid, but also has the effect of potentially prejudicing all investors in a transaction or scheme (whether or not they are eligible investors) on the basis that a scheme/transaction they have invested in is at risk of legal action (including, potentially, penalties for the offeror).

Legislative history

[27] I turn now to the legislative history to the FMCA's eligible investor regime. That history is (unsurprisingly) not in dispute, and the following is drawn from the parties' helpful submissions.

[28] The FMA submits that the history of the eligible investor exclusion is "a long but informative one". It says that two key themes arise from this history:

(a) first, that the exemptions provided by the FMCA's predecessor, the Securities Act 1978 (the 1978 Act) were poorly drafted, uncertain and underused; and

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13 For breaches of the provisions set out in s 228(4) of the sub-pt 5 of pt 4 of the FMCA.
14 For breaches of the provisions set out in s 228(2) of the sub-pt 5 of pt 4 of the FMCA.
15 Section 486(1).

(b) second, that exclusions or exemptions are required to permit sophisticated investors to invest in entities without the need for offerors to incur unnecessary compliance costs.

[29] In light of the following review of the cl 41's legislative history, I consider these to be fair points about the history of the eligible investor exemption.

Securities Act 1978 and Securities Amendment Act 2004

[30] As just noted, prior to the enactment of the FMCA, offers of securities were governed by the 1978 Act. Part 2 of the 1978 Act set out various restrictions on the offer and allotment of securities to the public. These restrictions included compliance with certain disclosure obligations, which included providing prospective investors with a document called an "investment statement" or registering a prospectus.

[31] However, there was no broad equivalent to the current eligible investor exclusion until the Securities Amendment Act 2004 ("2004 Amendment Act") came into force on 15 April 2004. This inserted specific exemptions to the disclosure obligations, found in pt 2, into s 5 of the 1978 Act. These exemptions provided for certain types of advertisements (subs 2CA) and securities (subs 2CB). The latter applied to "eligible persons" (as defined by subss 2CC, 2CD, 2CE and 2CF—explained below).

[32] The consequences of non-compliance with these exemptions could be serious for offerors. In the event an offeror accepted a subscription from an investor to whom an exemption did not apply, the whole offer would become a "retail offer" meaning that disclosure was required to be provided to all investors whether an exemption applied to them or not. If it was not provided, the offer was voidable in its entirety.[16]

[33] Following the amendments to the 1978 Act, a person was classified as an "eligible person" if they were:[17]

(a) "wealthy" (subs (2CD));

[16] Securities Act 1978, s 37(1).
[17] Securities Amendment Act 2004, s 7(2).

(b) “experienced in investing money” (subs (2CE)); or

(c) “experienced in the industry or business to which the security relates” (subs (2CE)).

[34] Subsection (2CE) of s 5 of the 1978 Act provided that a person was “experienced” if:

> (a) an independent financial service provider is satisfied on reasonable grounds that the person to whom the offer is made, as a result of having experience of that kind, is able to assess—
>
> (i) the merits of the offer; and
>
> (ii) the value of the security; and
>
> (iii) the risks involved in accepting the offer; and
>
> (iv) that person’s own information needs; and
>
> (v) the adequacy of the information given by the person making the offer; and
>
> (b) the financial service provider gives the person to whom the offer is made, before the security is allotted to the person, a written statement of the financial service provider’s reasons for being satisfied as to those matters; and
>
> (c) the person to whom the offer is made signs a written acknowledgment, before the security is allotted to the person, that the financial service provider has given the person neither an investment statement nor a registered prospectus relating to the security.

[35] The experienced investor regime under the 1978 Act accordingly comprised a third-party certification regime (the third party being an independent financial service provider), combined with self-certification by the proposed investor.

[36] The explanatory note to the Business Law Reform Bill (which resulted in the Amendment Act) stated that the rationale for the inclusion of an exemption for persons who were wealthy and experienced in investing money was that such persons “should have enough experience in investment to evaluate the risks and merits of the

investment without disclosure under Part II of the [1978] Act, should have substantial assets, and should be well placed to bear financial risk".[18]

[37] The select committee which considered the Business Law Reform Bill subsequently stated that the experienced investor exemption was introduced, along with others, because:[19]

> … any one of these criteria is sufficient to ensure that investors are able to make their own financial decisions, for example by seeking professional advice or by using the leverage of the size of their potential investment to seek information from the issuer.

[38] The select committee also stated that the additional element of an independent financial service provider "adds an extra layer of protection for the investor, *and provides certainty for the issuer in deciding whether an individual falls within the exemption*".[20] It also said that the exclusions "will significantly reduce compliance costs and provide easier access to capital by exempting businesses from the requirement to provide disclosure … where offers may only be taken up by the specified class of investor".[21]

[39] The FMA advises that the drafting of the "experienced" sub-category in s 5(2CE) appears to have been "borrowed" from s 708(10) of the Australian Corporations Act 2001 (Cth), which applies to "sophisticated investors". Under the Corporations Act, the financial services licensee responsible for the offer must be satisfied on reasonable grounds that the person to whom the offer is made has previous experience in investing in securities that allows them to access:[22]

(a) the merits of the offer; and

(b) the value of the securities; and

(c) the risks involved in accepting the offer; and

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18 Business Law Reform Bill (56—1) (explanatory note) at 15.
19 Business Law Reform Bill (56—2) (select committee report) at 4.
20 At 4, emphasis added.
21 At 5.
22 Corporations Act 2001 (Cth), s 708(10)(b). See also s 761GA, which defines what a "sophisticated investor" is in respect of financial products and services.

(d) their own information needs; and

(e) the adequacy of the information given by the person making the offer.

[40] The Corporations Act also requires:[23]

(a) the financial services licensee to give the person a written statement of the licensee's reasons for being satisfied as to the above matters before, or at the time when, the offer is made; and

(b) the person to whom the offer is made to sign a written acknowledgement before, or at the time when, the offer is made that the licensee has not given the person a disclosure document in relation to the offer.

Securities (Disclosure) Amendment Act 2009

[41] The Securities (Disclosure) Amendment Act 2009 came into force on 27 July 2009.

[42] Section 7(8) of that Act made one amendment to the "experienced" sub-category in s 5(2CE) of the 1978 Act, replacing subs (c) (set out at [34] above) with the following:

> (c) the person to whom the offer is made signs a written acknowledgment, before the security is allotted to the person that—
>
> (i) the financial service provider has given the person neither an investment statement nor a registered prospectus relating to the security; and
>
> (ii) the person understands that he, she or it will not receive information usually provided by an issuer in respect of an offer of securities to the public including (in particular) an investment statement and a registered prospectus.

[23] Section 708(10)(c) and (d).

[43] The purpose of this amendment was to ensure that the person to whom the offer was made understood that not only had they not received an investment statement or a registered prospectus from the financial service provider (notwithstanding that it was not a requirement for the financial service provider to provide these documents), but also that they would not obtain these documents from the offeror either.[24]

Review of the 1978 Act exemptions

[44] In 2010, the Ministry of Economic Development (Ministry) released a discussion paper on the review of securities law (Discussion Paper).[25] The feedback received from this paper resulted in an exposure draft of the Financial Markets Conduct Bill that was released in August 2011.

[45] In the Discussion Paper, the Ministry observed that:[26]

> For those who do not require the protections of the Securities Act, and for issuers seeking to raise funds from them, the criteria under which people are exempted should be clear. Currently, some criteria are seen as unworkable due to either the extent of the liability imposed for errors, or due to the lack of clarity about what would be required to meet the test set out in the legislation. Greater certainty here would reduce costs for issuers and investors.

[46] The Ministry went on to discuss in some detail the 1978 Act's exemptions and how they might be improved. The Ministry recorded the "general agreement that exemptions should be provided for securities offerings to investors who are able to 'fend for themselves'".[27] In discussing how those exemptions should be drafted, the Ministry discussed three "important principles for the regime", namely:[28]

> - **Certainty**: A central objective of the proposals are (sic) to create certainty. Issuers and investors must be able to know what parts of the law apply and what parts of the law do not apply. To achieve this, the proposals seek to avoid providing exemptions based on subjective judgements by issuers or third parties, and to the extent possible employ bright line tests and objective criteria. This is consistent with securities legislation of foreign jurisdictions and the primacy that financial law places on certainty.

24 Securities Disclosure and Financial Advisers Amendment Bill (13—2) (commentary) at 3.
25 Ministry of Economic Development *Review of Securities Law: Discussion Paper* (June 2010).
26 At 15.
27 At 45.
28 At 45.

- **Simplicity**: Value should be placed on a relatively short, simple list of exemptions.

- **Low cost:** Some cost to issuers and investors is inevitable in deciding whether an exemption applies, gaining the necessary certifications, and so on. The exemptions to the law should keep this cost to a minimum by, first, providing automatic exemptions for categories of investors that should not have to give further consideration to securities law at all (for example, sophisticated institutions). Second, by ensuring that exemptions are simple and clear (as in the points above). And third, by reducing and simplifying as much as possible the steps required to obtain an exemption.

[47] The Ministry considered that an "overarching issue" with s 5 of the 1978 Act (set out at [30]–[31] above) was that it was potentially "too narrow".[29] The Ministry's view was that as a result, some issuers of financial products were advised against obtaining funding from investors who should be able to participate in private offerings, and some investors were prevented from participating in private securities offers when they should not have been.[30]

[48] In considering the 1978 Act's exemptions that did not contain a bright-line test (of which the "experienced" investor exemption was one), the Ministry said the exemptions were "risky to use in all but the most clear-cut of circumstances, as they have uncertain boundaries, while the consequences of mistakes are severe".[31] It observed that "many of the exemptions [including the "experienced" investor exemption] are based on subjective characteristics rather than objective tests. This limits their use to clear-cut situations."[32] In relation to the "experienced" investor exemption itself, the Ministry said:[33]

> [T]his exemption was intended to supplement the "habitual investor" exemption, by allowing non-professional, but nevertheless sophisticated, investors to participate in private offers. A difficulty of this exemption is that the certification must be "on reasonable grounds". Thus issuers may not be able to rely on the certification at face value. The [Ministry's Review of Financial Products and Providers] noted that financial service providers are reluctant to provide certification – probably due to both the risks to their reputation and liability if a court subsequently decided that the investor was not sufficiently sophisticated. Even if a service provider can be found, certification is likely to be costly, as the provider must form an opinion about

29 At 47.
30 At 47.
31 At 47.
32 At 47.
33 At 48.

> the investors' ability to assess the offer, which also requires some analysis of the offer itself. To the best of our knowledge, this exemption is rarely used.

[49] The Ministry noted that the consequences for accidentally including members of the public in a private offer were "severe".[34]

[50] The Ministry therefore made several proposals in respect to the perceived issues with the exemption regime under the 1978 Act. While none directly translate to the eligible investor exemption under the FMCA, elements of that exemption can be seen in a number of the Ministry's proposals.

[51] One of the Ministry's proposals was in relation to "sophisticated investors", which was proposed to replace the (then) existing exemption for persons "who, in the course of and for the purposes of their business, habitually invest money".[35] The Ministry stated that it intended to define this exemption "with reference to objective criteria, and in particular investment activity and implied experience".[36] The Ministry went to say:[37]

> An alternative way to define this category would be a subjective approach. This would provide that persons that have enough knowledge and experience in investing to evaluate the risks and merits of the investment. While such an approach is relatively flexible, the Ministry is concerned that on its own this is too uncertain, as the existing exemptions in this area have shown.

[52] The Ministry also sought feedback on an exemption for investors who had received a recommendation to invest from an independent financial adviser.[38] In comparing this potential exemption to the existing "experienced" investor exemption, the Ministry said:[39]

> As discussed above, there is an existing exemption for offers to people certified by an independent financial service provider as sufficiently experienced that they can assess the offer without a prospectus and investment statement. We understand that this exemption is not used, due to a reluctance on the part of financial service providers to provide certification, and for issuers to accept this certification at face value. The possible exemption may

34 At 48.
35 At 54.
36 At 54.
37 At 54.
38 At 59–60
39 At 60–61.

> also suffer from underuse, but the Ministry considers that it has potential to make a number of improvements on the existing exemption
>
> - Unlike the existing exemption, consideration of the offer is being made on the investor's behalf (the appropriate role for a financial adviser), rather than the adviser having to evaluate both the offer, and the ability of the investor to make their own assessment of the offer.
>
> - We could remove the requirement that the recommendation be made "on reasonable grounds". Thus, the issuer is entitled to place reliance on the fact that a recommendation has been made, and the adviser is generally not liable to the issuer (unless an offer is voided as a result of the adviser not being authorised or not declaring conflicts of interest). Advisers would continue to be liable to investors for negligent advice and for breaches of the Code of Professional Conduct.

[53] The Ministry addressed further potential exemptions and sought feedback on them. It identified a potential exemption pursuant to which "[a]n independent financial service provider or some other third party has certified that the investor is sufficiently sophisticated to protect themselves without the Act."[40] In relation to this proposal, the Ministry said:[41]

> This would be similar to the current exemption for experienced investors, but could be reworked. One option could be to remove the current requirement that the certification is "on reasonable grounds". This would enable issuers to take certification at face value, and protect the certifying party from liability. Another approach would be to remove the requirement that the person conducting the certification be independent of the issuer.

[54] The Ministry also specifically discussed "self-certification vs third party verification". It said:[42]

> In most cases it will be clear to the issuer whether or not an investor fits in a category of exemptions, and there will be minimal benefits to extra certification. For example, it will be clear to an issuer that a fund manager is an investment business, or a large and well known company is a large entity. However, some exceptions rely on private investor information. For example, to verify that an investor is sophisticated, issuers would need to seek evidence from investors about their financial assets, transactions and work histories. Because investors have incentives to falsely claim sophistication, allowance would have to be made to protect issuers and punish investors who provide false information. This process would need to be performed for every sophisticated investor, and every transaction, and would likely be impractical for many issuers and sophisticated investors.

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40 At 63 and 65.
41 At 65.
42 At 66-67.

> The Ministry therefore seeks feedback on whether, as in the United Kingdom, investors should be able to self-certify that they meet the criteria of an exempt investor. An issuer would be entitled to rely on such certification, so that even if an investor was later determined not to be (sic) meet the criteria but had self-certified earlier that were able to, this would not impugn the transaction or create liability for the issuer.
>
> Offences might be required to avoid abuse. … To reduce the extent to which an investor might let themselves be encouraged by the issuer to falsely self-certify, it could also be an offence for an investor to certify themselves if they do not meet the criteria.
>
> Another option is that a third party (perhaps the Authority, or an independent financial adviser) verifies and certifies that an investor satisfies the criteria. Third-party verification would require investors to provide evidence of their financial assets, transactions and work history to the third party. The third party would issue a certificate that could be relied upon by the issuer and subsequent issuers.

Regulatory impact statement and Cabinet paper: Securities law reform

[55] Following submissions received in response to the Discussion Paper, the Ministry prepared a regulatory impact statement which contained its recommendations for reform.[43]

[56] In addition to the exemptions which existed under the 1978 Act, the Ministry recommended that two further exemptions be created for 'small offers' and for employee share schemes.[44] However, it did not propose any further exemptions as it considered that "they would overly narrow the scope of the regulatory regime, which would risk some groups of investors falling within one of the exemptions unintentionally".[45] The Ministry rejected an exemption for investors who had received advice to invest from an independent authorised financial advisor (as it required the financial adviser regime to be "robust", and for advisers to be able to demand appropriate disclosure from issuers). Likewise, the ability to opt out of the disclosure regime under the 1978 Act with a lower degree of sophistication (given a perceived risk that if the criteria was markedly different from those for sophisticated investors under the bright-line exemptions, then there was potential for some to opt out but not be in a position to fully judge the risks of the investment).[46]

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43 Ministry of Economic Development *Review of Securities Law: Regulatory Impact Statement* (February 2011).
44 At 7.
45 At 7.
46 At 11.

[57] The Ministry's recommendations were subsequently put to Cabinet. In his paper to Cabinet, the Minister of Commerce noted that the scope of some of the 1978 Act's exemptions were unclear (leading to harm of both offerors – including by being exposed to risk) and investors (by preventing them from participating in private securities offers),[47] and many were "based on subjective characteristics rather than objective tests" which limited their use.[48] One of the Minister's proposals was the exemption for 'sophisticated investors' discussed at [51] above. While the Ministry had recommended against retaining "principle-based" exemptions and, instead, favoured the adoption of objective definitions, the Minister proposed the following:[49]

> 70 I propose that there be a principle-based definition of 'sophisticated investor' with bright-line safe harbours. The principle-based definition would be (subject to drafting): "A person who has previous experience in investing in securities that allows them to assess the merits of the investment, the value of the securities, the risks involved, their own information needs, and the adequacy of the information provided by the issuer of the security."
>
> 71 The bright-line safe harbours would cover:
>
> - investment businesses;
> - persons who meet certain quantitative investment activity criteria;
> - large entities;
> - certain government entities; and
> - persons investing large amounts over $500,000.

[58] The Minister further said the following in respect of the principle-based definition of 'sophisticated investor':[50]

> 75 Investors who do not qualify under one of the bright-line safe harbours may still take advantage of the principle-based definition of 'sophisticated investor'. *However, in order to ensure that the appropriate set of investors fall within the exemption, I propose that those seeking to take advantage of the principle-based definition be required to have their qualification approved by an Authorised Financial Adviser*.
>
> 76 In the first instance, the issuer (which for these purposes would include providers of non-pooled investment schemes) would be responsible for ensuring that the investors meet any criteria and are sophisticated investors. *The issuer could, however, request that an investor certify in*

47 *Securities Law Reform* Cabinet Paper (February 2011) at 14.
48 At 14.
49 At 15.
50 At 15–16 (emphasis added).

> *writing that they meet any of the safe harbour requirements, or produce an approval from an Authorised Financial Adviser where the investor seeks to rely on the principle-based definition. The issuer would be entitled to rely on the investor's certification, unless the issuer knows that the statement is false*. It would be an offence to encourage a person to self-certify knowing that the certification is false, and for an investor to self-certify knowing that the certification is false.
>
> 77 In assessing whether or not a person is sophisticated, calculations that involve a person's assets, revenues or investments would include relevant related entities (e.g. the same company group). If a person is sophisticated, other relevant related entities would also be exempt (e.g. companies controlled by that person).

[59] The Minister's proposals were agreed to by Cabinet.

Financial Markets Conduct Bill

[60] What became cl 41 of sch 1 of the FMCA was included, in almost its existing form, in the Financial Markets Conduct Bill (as introduced). The explanatory note to the Bill's first reading stated:[51]

> A key change from existing legislation is that there are more bright-line safe harbours for these exclusions and investors will be able to self-certify that they meet these thresholds. In addition, investors who consider that they have the knowledge and experience to assess offers will be able to certify to that and have a professional adviser confirm the certification. *Issuers will be able to rely on these certificates unless they knew or had reasonable grounds to believe that any are incorrect*.

[61] The Ministry's "Official Report Part B" to the Commerce Select Committee of July 2012 included a table of submissions received on the draft Bill, and the official's recommendations in response. In relation to the proposal to have an investor's self-certification confirmed by an independent third party, the Ministry rejected submissions that suggested this was not necessary, stating "[t]he certification … serves the purpose of requiring someone in a regulated occupation to turn their mind to the person's circumstances and provides an opportunity to give advice".[52]

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51 Financial Markets Conduct Bill (342—1) (explanatory note) at 3 (emphasis added).

52 Financial Markets Conduct Bill – Officials' Report Part B: Table of submissions with comments and recommendations (July 2012) at 46.

[62] There had also been a number of submissions on what was then cl 40(1)(b) of sch 1 (which became cl 42 of sch 1 to the FMCA – relating to when an offeror was not permitted to rely on an eligible investor certificate) and cl 41(1)(b) of sch 1 (which became cl 43 of sch 1 – relating to when a confirmer was not permitted to confirm an investor's certification), the Ministry noting that both included a requirement of having "reasonable grounds to believe that the certification was incorrect".[53] The report noted that submitters had stated that "this may prevent advisers from being willing to give confirmation and offerors from relying on certificates".[54] The Ministry officials recommended:[55]

> The test should remain in cl 41(1)(b) [which became cl 43] – advisers should make further enquiries if they have concerns. FMA will provide guidance on the extent of enquiries expected. *Agree to remove 40(1)(b) ... to allow the offeror to rely on certificates unless they have knowledge that the person did not qualify*.

[63] Consistent with the Ministry's recommendation, cl 40 of the Bill (which became cl 42 of sch 1 to the FMCA) was amended at the Select Committee stage to limit the circumstances in which an offeror may not rely on a certificate to when the offeror knew the investor did not in fact have the requisite previous experience. Similar changes were also made to cl 44 (which became cl 45 of sch 1 to the FMCA).

[64] The Bill passed its third reading on 28 August 2013, becoming the FMCA. It received Royal assent on 13 September 2013 and cl 41 of sch 1 came into force on 1 December 2014.[56]

Question 1: The description of matters in cl 41(2)(a)-(c)

[65] It is helpful to set out again the text of question 1:

> **Question 1**: To be valid, does an eligible investor certificate in relation to an offer of financial products need to expressly describe:
>
> (a) the previous experience that a person (A) has in acquiring or disposing of financial products; and

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53 At 46. This was in fact incorrect. Cl 41(1)(b) of the Bill, as introduced, had always been framed as the confirmer not confirming a certificate unless the confirmer had "no reason to believe that the certification is incorrect"; Financial Conduct Markets Bill (342-1).

54 At 46.

55 At 46–47 (emphasis added).

56 Financial Markets Legislation (Phase 2) Commencement Order 2014, cl 2.

(b) 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?

FMA's submissions

[66] The FMA notes that this question arises from the variance of information provided in the selection of eligible investor certificates that were put before me. As noted at [4] above, some provided very little information, or information that on its face would not appear to demonstrate experience in investing in the financial markets, or in some case, no information of an investor's investment experience at all. At the other end of the spectrum, one sample certificate provided quite fulsome information in the following terms:

- I have experience investing in shares, bonds and other securities (listed and unlisted) and understand the risks with investing in different types of financial products.
- I currently hold a diverse portfolio of investments. I perform regular reviews of my own portfolio, with the benefit of advice from relevant professionals where appropriate, and make my own investment decisions in relation to the portfolio.
- In the course of my investment activities I have been exposed to a wide range of investment analysis and commentary and this has helped me build up the knowledge and skills in assessing the value and risks of investing in financial products.
- I currently own units in a commercial property syndicate and have previously bought and sold units in other commercial property syndicates.
- In the course of my investment activities, I have been involved in investor presentations and meetings and through this have gained an appreciation for the risks and opportunities associated with early stage investing.

[67] The FMA emphasises two textual aspects of cl 41 (set out at [16] above) which it says are important in answering question 1. The first of these is that the combined effect of cl 41(1)(a) and (b) is that the eligible investor certificate must "state grounds" as to the criteria in subcl (2), that is, previous experience in acquiring or disposing of financial products to assess the matters in paras (a)–(c) of subcl (2). The second textual matter which the FMA highlights is that cl 41(5) requires that the certification specify the offer of financial products to which it applies. The FMA says that this

demonstrates that the certification is required to have a degree of specificity to it, tailored to the particular transaction contemplated (with the result that an investor can be an "eligible investor" in relation to one transaction but not another).

[68] On this basis, the FMA says that in order to be a valid eligible investor certificate, the certificate must on its face disclose:

(a) At a minimum, previous experience in acquiring or disposing of financial products.

(b) But also, experience which tends to enable the investor to assess the merits of the offer at issue, including the value and the risks of the financial products, their own information needs and the adequacy of any information that is provided to them.

[69] The FMA says that cls 43 and 44 support this position. The text of cl 43 is set out at [18] above. The FMA emphasises that the confirmer must not confirm the certification unless "having considered [the investor's] grounds for the certification" they (among other things) have no reason to believe that the certification is incorrect. The FMA submits that "self-evidently, the relevant confirmer could not fulfil this obligation in the absence of articulated experience in acquiring or disposing of financial products, and reasoning as to how that experience enables the investor to assess the matters required by cl 41(2)(a)–(c)." The FMA also highlights that cl 44, the "safe-harbour" certificate for other (bright-line) categories of wholesale investors, refers to the investor setting out which category of wholesale investor is "claimed" to apply to that investor and the grounds "on which [the investor] claims" that the relevant exemption applies. The FMA says that unlike cl 44, a cl 41 certificate is not concerned with the investor's "claimed" experience, but rather "requires disclosure of grounds sufficient to qualify as an eligible investor".

[70] The FMA submits that a requirement to include explicit and adequate grounds "is the middle ground the drafters of the FMCA adopted between self-certification and the [1978 Act's] third party certification". It says that the legislative history shows that Parliament was not content for investors to purely self-certify. The FMA further

submits that the balance reached ensures a focus on objective rather than subjective measures, in terms of some relevant experience in acquiring or disposing of financial products that is tangibly linked to the actual financial products at issue.

Intervenor's submissions

[71] The intervenors submit that the approach taken by the FMA is inconsistent with the text of cl 41, the broader context of the relevant statutory provisions, and their legislative history.

[72] The intervenors say that the FMA's approach puts a gloss on the text of the relevant provisions which is not justified, and when in combination with the FMA's position under question 2 (namely that in order to rely on a certificate, an offeror needs to be satisfied that, based on the grounds set out in the certificate, the investor could make the assessments required by cl 41(2)), requires the offeror to go behind a confirmed certificate to form a view on whether the investor's stated experience is sufficient. They say that this is contrary to the text of the relevant provisions, and the clear purpose of the provisions, as evident from the legislative history set out at [27]–[64] above. The intervenors say that the eligible investor exclusion was designed to provide offerors with certainty in relation to eligible investor certificates, and to cure the mischief of the previous regime being underused.

[73] The intervenors accordingly say that the FMA's approach does not reflect that the eligible investor certification regime is one of *self*-certification, accompanied by confirmation from a lawyer, financial adviser, or accountant. They say that an offeror is entitled to assume that the confirmer has:

(a) has satisfied themselves that the investor is aware 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 the certification is correct.

[74] The intervenors do not suggest, however, that *any* type of grounds can be included in the certificate and that, assuming all other formal requirements are met, the offeror can rely on the certificate. They say that what is required is a statement of grounds which provide "a basis" for the certification, even a very high-level one—or framed in a slightly different way, that the certificate contains high-level grounds which, on their face, "may" enable the investor to assess the matters prescribed by cl 41(2).

Discussion

[75] Clause 41 is essentially a definition provision. If its requirements are met, then the investor concerned "is" an eligible investor (in relation to a relevant transaction or class of transactions), and the offeror will be entitled to proceed on that basis. The exception to this is if cl 42 applies. If the offeror knows the investor does not "in fact" have previous experience of the kind described in cl 41(2), then the investor will not be an eligible investor and the offeror will not be able to rely on the certificate.

[76] Plainly in order to be a valid certificate for the purposes of cl 41, certain formalities required by the legislation must be met:

(a) the investor must certify in writing prior to the "relevant time"[57] as to each of the three matters set out in cl 41(2);[58]

(b) the investor must certify in writing prior to the relevant time that he or she understand the consequences of certifying him or herself to be an eligible investor;[59]

(c) the investor must state in the certificate the grounds for the certification;[60]

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57 Being immediately before the relevant financial products are issued or transferred to the investor under the offer; FMCA, sch 1, cl 49(1).

58 Schedule 1, cl 41(1)(a)(i).

59 Schedule 1, cl 41(1)(a)(ii).

60 Schedule 1, cl 41(1)(b).

(d) a financial adviser, qualified statutory accountant, or a lawyer must have signed a written confirmation of the certification in accordance with cl 43;[61] and

(e) the certificate must comply with the requirements of cl 46, in terms of being in a separate written document, in the prescribed form (if any), contain the prescribed information (if any), and otherwise given in the prescribed manner (if any). As noted earlier (above at [20]), there is a prescribed warning notice which must be included in an eligible investor certificate, but there is presently no other prescribed content or form.

[77] Requirement (c) above is of course the requirement in issue for the purposes of question 1. For that requirement to be met, do the grounds stated by the investor in the certificate need to expressly describe:[62]

(a) at a minimum, the investor's previous experience in acquiring or disposing of financial products; and

(b) prior experience which tends to enable the investor to assess those matters set out in cl 41(2)?

[78] For the reasons which follow, I do not consider such information (which I will refer to as "sufficient investment experience") must be expressly disclosed by the investor in order for a certificate to be valid.

[79] First, the FMCA's eligible investor certificate regime combines self-certification with the added protection of the confirmation process. While I acknowledge that cl 44 of sch 1 expressly refers to the grounds "claimed" by the investor to mean they meet the relevant safe-harbour criteria, the absence of this term in cl 41 does not suggest that the requirement in sub-cl (1)(b) is fundamentally

61 Schedule 1, cl 41(1)(c).
62 FMA's written submissions, at [4.7].

different.[63] Rather, on its plain text, cl 41(1)(b) simply requires the investor to set out the "grounds for this certification"—namely the basis upon which *the investor* has given the certification. The stated grounds may or may not—in objective terms—disclose sufficient investment experience.

[80] Plainly if the approach to the eligible investor exclusion stopped at this point, this would be an unsatisfactory outcome in terms of an investor setting out any grounds whatsoever for their self-certification and—assuming all the other formalities are met—an offeror being entitled to accept such a certificate at face value.[64] But the legislative approach to the exclusion does not stop there. Importantly, there is the additional step of the investor's (self-) certification being confirmed by either a financial adviser, a qualified statutory accountant, or a lawyer. As the Ministry noted in its official report to the Select Committee (mentioned above at [61]) these are all persons in regulated occupations. Having regard to the legislative history set out at [27]–[64] above, this combination of self-certification *and* the confirmation process was the "middle ground" settled on by the drafters of the FMCA. I accordingly do not agree with the FMA's submission that the "middle ground" was a requirement that the grounds set out in the certificate disclose, on their face, sufficient investment experience.

[81] Second, and turning to the text and statutory context of cl 41 in sch 1, if the FMA's approach were correct, then the confirmation process would largely be redundant.[65] Clause 43(1)(b), in the same sch, envisages the confirmer's role as being to check the self-certification process with reference to the grounds as set out in the certificate.[66] Clause 43 does not envisage the confirmer, at least at this initial stage, having recourse to extraneous matters. If the grounds to be stated in the certificate were required to disclose sufficient investment experience on the part of the investor, then once the confirmer had "considered [the investor's] grounds for the certification",

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63 While not determinative in any way, I note this appeared to be the FMA's view shortly after the FMCA came into effect, stating in written guidance provided in 2015 that "the certificate contains the *subjective opinion of the investor* (not the offeror or the independent advisers)" (emphasis in original).

64 I offered the (somewhat facile) example at the hearing of a certificate which recorded the grounds as being "I used to be a trapeze artist".

65 Being limited to being satisfied that the investor has been sufficiently advised as to the consequences of the certification.

66 Schedule 1, cl 43(1).

the confirmer would never have any reason to believe that the certification was incorrect.

[82] Further, the other important aspect of cl 43(1)(b), namely that, having considered the investor's grounds set out in the certificate, the confirmer has no reason to believe that further information or investigation is required as to whether the certification is correct, would also be redundant. Rather, this aspect of cl 43 expressly envisages that, following the confirmer having considered (only) the grounds set out in the investor's certificate, some further investigation or information might be required as to whether the certification is incorrect. This is consistent with the observations in the officials' report to the Commerce Select Committee referred to at [61] above, which envisaged the confirmer making further enquiries if they had any concerns. It is also consistent with sub-cl (1)(a) envisaging the confirmer discussing the certificate with the investor, given the requirement for the former to be satisfied that the latter has been sufficiently advised of the consequences.

[83] Third, the FMA says that the confirmer could not fulfil their obligations under cl 43 in the absence of articulated experience on the part of the investor in acquiring or disposing of financial products, and the confirmer reasoning as to how that experience enables the investor to assess the matters required by cl 41(2). There are two points to make in relation to this submission:

(a) First, it is important to consider what the confirmer's obligations are under cl 43. They include *not* confirming a certificate unless, having considered the investor's grounds for their certification, they have no reason to believe that the certification is incorrect. If the grounds set out in the certificate trigger the confirmer having a reason to believe that the confirmation is incorrect, then the confirmer can fulfil their obligation under cl 43 by declining to certify the certificate. A certificate which contains grounds which plainly cannot support the investor's self-certification would give rise to such a trigger. The grounds provided by my former trapeze artist (see n 64 above) would be such an example. So too would the grounds set out in some of the sample eligible investor certificates put before me, such as "we have previously owned a rental property", "we have other investments and one of our investments fell due", or certificates where no grounds at all are included.[67] I therefore do not agree that grounds disclosing sufficient investment experience need to be included in the investor's certificate in order for the confirmer to be able to comply with their obligations under cl 43.

(b) Second, the FMA's submission envisages the confirmer considering the grounds stated in the certificate and then reasoning as to how the stated grounds enable the investor to assess the matters required by cl 41(2). That approach comes very close to the confirmer being required to undertake a positive assessment of the grounds set out in the certificate in order to satisfy him or herself that the investor's stated experience *does* enable the investor to assess those requisites. However, such a positive assessment is not required under cl 43, and in formulating the current eligible investor exception, the legislative history confirms that Parliament deliberately took a step back from such "third-party certification". All that is required for confirmation of the investor's (self-) certification is that the confirmer, having regard to the grounds stated in the certificate, has no reason to believe that the certificate is incorrect, or that further information or investigation is required as to whether the certification is incorrect. That is something different to, and a lower threshold than, believing on reasonable grounds that the certification is correct.[68]

[84] Fourth, the FMA's approach would effectively require an offeror, when in receipt of an eligible investor certificate, to carry out an assessment of whether the grounds set out in the certificate disclose sufficient investment experience on the part of the investor. Telescoping forward to question 2(b)(i) ("Does the offeror need to be satisfied that the certificate is valid?"), I agree that an offeror needs to be satisfied that a certificate is valid in order to be able to rely on it. The intervenors take the same

67 The latter would be invalid in any event, as the certificate would not meet the formal requirement of the investor's grounds being stated in the certificate, as required by cl 41(1)(b).

68 See [81] above.

approach. Plainly, the offeror must be satisfied that those formal requirements set out at [76] above are met. But if a certificate's validity also turned on the certificate containing grounds which disclosed sufficient investment experience on the part of the investor, then the offeror would be required to undertake the very type of assessment that the legislative history demonstrates was intentionally removed from the third-party certifier, without there being any express obligation to the same effect placed on the offeror.[69]

[85] Fifth, and allied to the preceding point, the FMA's approach tends to undermine the very concept of self-certification, which is a core part of the eligible investor regime. That this concept is intended to be a serious and solemn process is reinforced by the cl 43 requirement that the confirmer is satisfied that the investor has been sufficiently advised of the consequences of the certification and that, pursuant to cl 47 of sch 1, it is an offence for an investor to knowingly provide a false certificate.

[86] Sixth, cl 41 on its face does not say that the grounds stated by the investor for their certification must disclose sufficient investment experience. However, pursuant to cl 46, further requirements as to the content of eligible investor certificates can be prescribed by regulation. If the current regime is considered to be deficient, then an appropriate course might be to prescribe that further information is to be included in eligible investor certificates.

[87] Finally, it seems that that issue that may have arisen in practice is not so much with the level or content of the grounds set out in some eligible investor certificates, but that certificates containing patently defective grounds (or no grounds at all) are nevertheless being confirmed. On this basis, it is the confirmation process which is falling down. If the confirmation process is not considered sufficient to provide appropriate protection to investors, then it may be that the balance struck in the current legislation needs to be reset. That is of course a matter for Parliament and not for the Court.

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69 See further below, in the discussion of question 2.

[88] The fact that I do not agree with the FMA's suggested approach to the grounds to be set out in an eligible investor certificate does not mean, however, that I accept that *any* grounds, no matter how spurious or plainly deficient on their face, can be included in a certificate and that so long as all other formalities are met the certificate will be valid. The intervenors do not suggest this—quite stark—outcome. Where, however, is the dividing line?

[89] As noted, the intervenors say that all cl 41(1)(b) requires is a statement of grounds which on their face, "may" enable the investor to assess the matters set out in sub-cl (2).

[90] I agree with the intervenors that something more than "any grounds whatsoever" need to be included in an eligible investor certificate in order for it to be valid. This is because I do not ascribe to the drafters of the eligible investor regime an intention that a certificate which, on its face, includes patently deficient grounds but which is nevertheless confirmed will be a valid certificate for the purposes of cl 41.[70]

[91] However, the approach advanced by the intervenors is, in my view, too uncertain—particularly given a key feature of the legislative history to the eligible investor exclusion was that it was intended to provide certainty. Rather, I consider that so long as the certificate includes grounds that are not, on their face, incapable of supporting the investor's certification, the requirement in sub-cl (1)(b) that the investor set out the grounds for their certification will be met. A certificate which includes grounds that are incapable of supporting the investor's certification, but which is nevertheless confirmed, on its face demonstrates that the confirmation process has failed. In those circumstances, it will be evident to an offeror from the face of the certificate that the requirement of sub-cl (1)(c)—namely that the confirmer has signed a written confirmation of the certification "in accordance with clause 43"—has not and cannot be met. That is because on the face of the certificate, the confirmer *must* have had reason to believe the certification was incorrect.[71]

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70 I accordingly agree with the FMA that there is nothing in the legislative history of cl 41 that suggests that an offeror may rely on an "obviously defective certificate".

71 Ms Standage for the intervenors suggested that in such circumstances, the offeror will know that the investor does not in fact have the requisite experience, such that cl 42 will apply and prevent

[92] This approach still leaves "work" for the confirmation process. If the grounds set out in the certificate are not incapable of supporting the certification but are nevertheless pretty "thin", the confirmer, having considered those grounds, may still form the view that there is reason to believe that some further information or investigation is required as to whether or not the certification is incorrect. The confirmer may make such inquiries of the investor and having done so, then be in a position to confirm the certificate. In such circumstances, I agree with the intervenors that an offeror ought to be entitled to proceed on the basis that the confirmer has no reason to believe that the certification is incorrect or that any further information or investigation is required.

[93] I do not consider this approach to be inconsistent with cl 42. Clause 42 is, in my view, predicated on there being a valid eligible investor certificate, but where the investor will nevertheless not be an eligible investor for the purposes of cl 3(3) because the offeror knows that the investor does not in fact have the requisite experience. The approach set out at [91] above means there will not be a valid eligible investor certificate in the first place.

[94] Finally, such an approach would "weed out" certificates such as my trapeze example, and those referred to at [4] above.[72] It is consistent with the purposes of the FMCA, as well as the legislative history to the eligible investor regime, in terms of providing certainty and simplicity. It is also consistent with the deliberate move away from a third-party certification regime to self-certification, albeit with the added protection of confirmation.

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the offeror relying on the certificate. I am not persuaded that is necessarily so. In those circumstances, the offeror will not necessarily know that the investor does not "in fact" have the requisite experience. The offeror will certainly know that the stated grounds are incapable of supporting the certification. But that is something different to knowing that the investor does not in fact have the requisite experience. The text of cl 42 suggests that it pre-supposes a *valid* certificate, but the offeror nevertheless knows, from matters extraneous to the certificate, that the investor does not in fact have the requisite experience.

72 Where, as in some of the certificates put before me, a certificate states no grounds for the certification, the certificate will be invalid for a different reason, namely not meeting the formal requirement of cl 41(1)(b).

Answer to question 1

[95] The answers to questions 1(a)(i) and (ii) are accordingly "no" and "no". Rather, to be a valid eligible investor certificate, the certificate must meet those formal requirements set out at [76] above, and the grounds stated in the certificate must not, on their face, be incapable of supporting the investor's certification.

Question 2

[96] It is helpful to set out question 2 again:[73]

> **Question 2**: 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:
>
> (a) the eligible investor certificate is valid; and/or
>
> (b) in the context of an offer of financial products, based on the grounds stated in the certificate, A could make the assessment requirement by cl 41(2)(a)-(c) in respect of:
>
> (i) a financial product of any kind; and
>
> (ii) the financial products involved in the transaction to which the certificate relates.

[97] Given the discussion of and outcome on question 1 above, I can be briefer in relation to question 2.

[98] Both the FMA and the intervenors agree that the answer to question 2(a) must be "yes". As will be evident from the discussion of question 1, I agree. An offeror must at the very least satisfy itself that the eligible investor certificate presented to it is a valid certificate for the purposes of cl 41. The offeror must also be satisfied that neither of the prohibitions in cl 42(1) and (2) apply.

[99] The FMA and the intervenors take diametrically opposed positions, however, in relation to the answers to question 2(b). The FMA says that the answer to both (b)(i) and (ii) is "yes", while the intervenors say the answer to both is "no".

73 It was agreed at the hearing that the words in question 2 "or otherwise treat an investor as an eligible investor" are redundant, given the only "route" to an investor being an "eligible investor" is through the cl 41 certification and confirmation process.

[100] The FMA says that despite the absence of an express obligation to ensure an investor's grounds are sufficient for the purposes of cl 41(2), the construction of cls 41–43, the investor-protection purposes of the FMCA and the legislative history of cl 41 "all support the proposition that such an obligation exists, and rests with the offeror".

[101] For the reasons which follow, I am unable to accept the FMA's submission.

[102] First and most importantly, cl 41 on its face does not provide for any such positive duty on the offeror. Given the legislative history to cl 41, and the concerns raised in relation to the lack of certainty (and the consequent underuse of the earlier regime), it would be most unusual in my view if the drafters of cl 41, which is framed as a prescriptive code, intended that the offeror must positively satisfy itself of those matters referred to in question 2, but did not expressly set this out in the clause. This is particularly so given those other obligations placed on offerors and confirmers received careful consideration during the development of cl 41 and are expressly set out in the relevant clauses of sch 1, namely:

(a) an offeror not being entitled to rely on an eligible investor certificate if the offeror knew that the investor was not in fact an eligible investor (cl 42(1));

(b) an offeror not being entitled to rely on an eligible investor certificate if the offeror knew or had reasonable grounds to believe either the confirmer was an associated person of the offeror, or had within two years prior to confirming an eligible investor certificate, provided professional services to the offeror (cl 42(2));

(c) the confirmer being satisfied that the investor has been sufficiently advised of the consequences of the certification (cl 43(1)(a));

(d) the confirmer having no reason to believe the certification is incorrect or that further information or investigation is required (cl 43(1)(b)).

[103] Further, the suggested obligation on an offeror is more onerous than the express obligations on the confirmer pursuant to cl 43. This further emphasises why one would expect to see any such substantive obligation expressly set out in a definitional clause such as cl 41.

[104] Second, the imposition of such an (implicit) obligation on the offeror is inconsistent with the scheme of cl 41, which is expressly built around the certifier's *own* certification, with the added protection of the confirmation process.

[105] As noted earlier, it is clear from the scheme of the eligible investor regime that the investor's self-certification is intended to be a solemn, substantive, and important part of that regime. This is evident in the following:

(a) what the investor must certify to (and when) is prescribed in some detail;[74]

(b) a third-party confirmer must be satisfied the investor has been sufficiently advised of the consequences of the certification;[75]

(c) a third-party confirmer must have no reason to believe the certification is incorrect or further information or investigation is needed;[76] and

(d) it is an offence to knowingly provide a false certification.[77]

[106] If a positive — yet unstated — obligation on an offeror to satisfy itself of those matters set out in question 2 overlayed this scheme, then the very fact of certification would be redundant, and the confirmation process largely redundant.[78]

[107] Third, the imposition of such a positive obligation on the offeror is also inconsistent with the deliberate step of removing from cl 42 that cl 41 would not apply in circumstances where the offeror had reasonable grounds to believe that the

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74 Schedule 1, cl 41.
75 Schedule 1, cl 43(1)(a).
76 Schedule 1, cl 43(1)(b).
77 Schedule 1, cl 47.
78 See [81] above.

certification was incorrect. The scheme was deliberately framed such that an offeror could rely on a valid eligible investor certificate so long as it did not know that the investor did not in fact have the requisite investment experience (cl 42(1)), or knew or had reasonable grounds to believe those matters set out in cl 42(2).

[108] Fourth, I do not consider it necessary to read into cl 41 the obligation suggested by the FMA in order for the eligible investor regime to be consistent with the purposes of the FMCA. It is certainly the case that one of the broad themes of the FMCA's purposes is investor protection.[79] But so too is the confident participation of businesses in the financial markets, and to avoid unnecessary compliance costs.[80]

[109] Fifth, and following on from the preceding point, the imposition of an implicit obligation on an offeror as suggested in question 2 is inconsistent with the legislative history of cl 41. It is inherent in this aspect of the FMA's submissions that the legislative history demonstrates that it was intended that under the new regime, *someone* would still have to undertake a positive screening exercise and form a view that the investor could make the necessary assessments. While under the old regime, this positive obligation plainly fell on the third-party certifier,[81] the FMA emphasises that under the current regime, this positive screening obligation no longer falls on the confirmer.[82] The FMA accordingly says that it must therefore form part of the offeror's role. It says that the offeror is the only participant in the process who has sufficient

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79 FMCA, ss 3(a) and 4(b). The adoption of the confirmation process in cl 43 was plainly aimed at investor protection.

80 Sections 3(a) and 4(c).

81 *Black v Lagoon Lodges Properties Ltd* [2014] NZHC 3336, at [30].

82 As an aside, the FMA characterises the confirmation process under cl 43 as ensuring that an investor understands the consequences of certification, and "confirms *the truth* of the information provided in the eligible investor certificate" (FMA's written submissions, at [5.19], emphasis added), or conveys that the "information disclosed in the certificate is accurate" (FMA's written submissions, at [5.25]). I do not consider these aspects of the FMA's submissions accurately record a confirmer's obligations under cl 43(1)(b). Clause 43(1)(b) does not provide that all a confirmer must do is confirm the "truth" of the information contained in the certificate, or confirm that the information contained is "accurate". The obligation is not to confirm a certificate unless the confirmer has no reason to believe "*the certification*" is "*incorrect*". The information (or grounds) contained in the certificate might be quite true and accurate ("I did indeed used to be a trapeze artist, here is the evidence"; "I did indeed have prior experience in x, y and z"), but in those circumstances, the confirmer might still have reason to believe that *the certification* is incorrect – in terms of the stated – and accurate – grounds nevertheless giving rise to a belief on the part of the confirmer that the investor does not have previous experience in acquiring or disposing of financial products that allows the investor to assess those matters at cl 41(2), or that further information or investigation is needed to determine whether or not the certification is correct.

information about the proposed transaction and, in light of the investor's disclosed grounds, can consider whether the matters in cl 41(2) are met.

[110] The difficulty with this is that such an approach is not evident in the legislative history of cl 41 (or, as the FMA accepts, the express text of cl 41). It is certainly correct that those drafting the eligible investor regime deliberately stepped away from the positive third-party certification regime under the 1978 Act. But it does not follow from this that that "work" was simply transferred, implicitly, to the offeror. For example, in discussing the third-party certification process under the 1978 Act, the Ministry identified that a new exemption might be similar to this but "reworked", by removing the requirement that certification is "on reasonable grounds", which would "enable issuers to take certification at face value".[83] There was no suggestion that certification on reasonable grounds would effectively transfer to the offeror. The genesis of the current regime can also be seen in the Ministry's discussion of "self-certification versus third party verification", noting that if self-certification were adopted, "offences might be required to avoid abuse", as in fact transpired under cl 47.[84] Further, and more closely aligned to what emerged in cls 41–43, the Minister's observations in his cabinet paper do not indicate any positive obligation on the offeror as set out in question 2(b). Rather, the Minister described the proposed exemption as being that "[t]he issuer could … request that an investor certify in writing that they meet any of the safe harbour requirements, or produce an approval from an Authorised Financial Adviser where the investor seeks to rely on the principle-based definition. The issuer would be entitled to rely on the investor's certification unless the issuer knows that the statement is false."[85] Finally, and consistent with this, the explanatory note to the Financial Markets Conduct Bill as introduced stated:[86]

> A key change from existing legislation is that there are more bright-line safe harbours for these exclusions and investors will be able to self-certify that they meet these thresholds. *In addition, investors who consider that they have the knowledge and experience to assess offers will be able to certify to that and have a professional adviser confirm the certification. Issuers will be able to rely on these certificates unless they knew or had reasonable grounds to believe that any are incorrect.*

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[83] See [53] above.
[84] See [54] above.
[85] See [58] above.
[86] Financial Markets Conduct Bill (342—1) (explanatory note) at 3 (emphasis added).

[111] There is no hint that the offeror would nevertheless be required to satisfy itself that the investor could make those assessments required by cl 41(2) in order to rely on the certification.[87]

[112] It follows that I do not agree with the FMA's submission that the legislative history to cl 41 demonstrates "the rejection of a self-certification scheme akin to that which applies to safe harbour certificates under cl 44". It is correct that a *solely* self-certification regime (like that for safe harbour certificates) was not adopted.[88] But in my view, the legislative history demonstrates the adoption of a self-certification regime coupled with a confirmation process.

Answer to question 2

[113] The answers to question 2 are accordingly, "yes" to question (2)(b)(i) and "no" to each of questions (2)(b)(ii)(A) and (B).

[114] Standing back, it is evident from the FMA's submissions that it does not consider the current confirmation process, in practice, provides sufficient investor protection. That may or may not be correct. Certainly it appears that the process may have "fallen down" in some instances that were put before me by way of example.[89] As the intervenor's note, however, the case stated procedure is not well-suited to assessing policy matters and concerns. Nor is that the proper role of the Court in any event. If there is a need to "re-balance" the approach to the eligible investor exclusion, or to prescribe further information which must be included in an eligible investor certificate, that is a matter for Parliament and not the Court.

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87 The "reasonable grounds" aspect obviously being removed from cl 42 as enacted.

88 See, for example, the Ministry's concerns regarding a "subjective approach … on its own" at [51] above. See also the officials' report to the Commerce Select Committee, in which officials disagreed with a submission in relation to (then) cl 39(1)(c) of the Bill (which became sch 1, cl 41(1)(c)) that "self-certification should be all that is required". The officials disagreed, noting "this follows the FAA confirmation process".

89 Though I should emphasis this does not amount to any formal finding to this effect, which would be inappropriate in a case stated proceeding such as this, and in light of the parties who have participated in the proceeding.

Question 3 – the ability to rely on information not contained in the eligible investor certificate

[115] Question 3 of the case stated is framed as follows:

> If the answer is yes to either (b)(i) or (ii) of question 2, is an offeror permitted to rely on information which is not contained in the eligible investor certificate to undertake either assessment?

Answer to question 3

[116] It follows from the answers to question 2 that question 3 does not arise for consideration.

[117] For completeness, however, it will be evident from what I have said in relation to question 1 that when determining whether an eligible investor certificate is a valid certificate for the purposes of cl 41, the offeror is confined to what is set out in the certificate itself. This is because the statutory scheme envisages that the only mechanism by which an investor *is* an eligible investor is by way of valid certification under cl 41. Having regard to extraneous matters, at least for the purposes of determining whether a certificate is valid for the purposes of cl 41, would be inconsistent with this, as well as undermining the intended simplicity and certainty offered by the eligible investor regime.

Question 4 – requirement to give disclosure in circumstances where offeror cannot rely on eligible investor certificate

[118] Question 4 reads as follows:

> 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?

[119] At the hearing, the FMA and intervenors agreed that if the words "and A is not otherwise a wholesale investor" are added after the words "A's eligible investor certificate", then the answer to this question would be "yes".

Answer to question 4

[120] I agree with that approach. That is the natural consequence of cl 3(1) of sch 1, which provides that an offer of financial products "to a wholesale investor" does not require disclosure under pt 3 of the FMCA.

Result and costs

[121] The answers to the questioned posed in the case stated are set out for question 1 at [95], for question 2 at [112], for question 3 no answer is required (see [115]–[116]), and question 4 at [119].

[122] It was agreed at the hearing that given the nature of the case stated and the intervenors' role (effectively as contradictor), that costs ought to lie where they fall. I agree and make an order accordingly.

Fitzgerald J