

# Memorandum of Understanding

between

**Financial Markets Authority (FMA)**

and

**New Zealand Institute of Chartered Accountants (NZICA)**

Dated: 5 October 2012

## Background

- A FMA is a Crown entity established under the Financial Markets Authority Act 2011 (FMA Act). Its main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets. It monitors, investigates, and enforces compliance with securities, financial reporting, and company law as they apply to financial markets participants and financial markets. FMA regulates securities exchanges, financial advisers and brokers, futures dealers, trustees and statutory supervisors, and KiwiSaver schemes and other superannuation schemes.
- B NZICA is a body corporate established under the New Zealand Institute of Chartered Accountants Act 1996 (NZICA Act). NZICA's members provide a broad range of services to financial markets participants, including accounting, assurance and advisory services. Under the NZICA Act NZICA's functions include:
- (i) to promote, control and regulate the profession of accountancy by its members; and
  - (ii) to promote quality, expertise, and integrity in the profession of accountancy by its members.
- C FMA and NZICA (each a Party and together the Parties) both have responsibility for the regulation of auditors of issuers under the Auditor Regulation Act 2011 (ARA).

The Parties have agreed to enter into this Memorandum of Understanding (MoU) to record the basis upon which they will endeavour to assist each other in the performance of their respective functions.

**1. Overarching principles of cooperation and coordination**

1.1 The Parties agree that in their dealings with each other as contemplated under this MoU they will :

- (a) act in good faith, and approach issues in a timely, collaborative, open, and transparent manner;
- (b) cooperate in the performance of their respective functions;
- (c) endeavour to keep each other informed, and to exchange information and views, in areas relevant to each other's responsibilities, where appropriate, including through regular meetings;
- (d) coordinate activity in order to enhance efficiency, promote consistency, and avoid unnecessary duplication in the regulation of individuals and firms;
- (e) identify opportunities to operate in a complementary fashion to enhance the efficiency with which they seek to achieve their respective objectives;
- (f) forewarn each other of actions taken or proposed to be taken, where appropriate, and of which the other might reasonably be expected to be advised; and
- (g) maintain an appropriate degree of transparency on principles and practices relating to the performance of their respective functions.

**2. Specific areas of cooperation and coordination**

2.1 In accordance with the overarching principles of cooperation and coordination, but without limiting their general application, the schedules to this MoU set out more specifically how the Parties intend to cooperate and coordinate in relation to particular matters.

2.2 As at the date of this MOU the schedules to this MoU are:

- (a) Schedule 1 – Cooperation and coordination relating to auditor regulation matters
- (b) Schedule 2 – Cooperation and coordination relating to financial advice matters

2.3 To the extent there is any inconsistency between a schedule to this MoU and a clause in the body of the MoU, the clause in the body of the MoU prevails.

**3. Legal Nature of MoU**

3.1 This MoU is intended to be facilitative only and to assist the Parties in the performance of their respective functions, and is not intended to create legally enforceable rights or obligations.

3.2 Without limiting clause 3.1:

- (a) nothing in this MoU limits the exercise by FMA of any of its powers or the performance by FMA of any of its functions under the FMA Act or any other

legislation, or requires FMA to act in a particular manner in the exercise of its powers or the performance of its functions;

- (b) nothing in this MoU limits the exercise by NZICA of any of its powers or the performance by NZICA of any of its functions under the NZICA Act or any other legislation, or requires NZICA to act in a particular manner in the exercise of its powers or the performance of its functions;
- (c) where arrangements between the Parties are specifically governed by a separate contract, including any contract the Parties may enter into from time to time in relation to NZICA carrying out quality review work under the ARA on behalf of FMA, this MoU is not intended to affect matters governed by that other contract.

#### **4. Public statements**

- 4.1 The Parties agree that in general no public comment will be made about matters that are subject to specific cooperation or coordination between the Parties.
- 4.2 If a Party believes that public comment is desirable and appropriate in particular circumstances that are subject to specific cooperation or coordination between the Parties, then it will consult with the other Party prior to making any public comment (to the extent consistent with the proper exercise of its powers and the proper performance of its functions). If the Party making the public statement does not consult the other Party, it will inform the other Party as soon as practicable after making the public comment.
- 4.3 The Parties agree to acknowledge the work of each other in any public comment made about matters that are subject to specific cooperation or coordination between the Parties.
- 4.4 If either Party intends to refer to the other Party, or if FMA intends to refer to a member of NZICA, in any public comment in relation to a specific regulatory matter it will consult with the other Party prior to making that public comment.
- 4.5 Where practicable, and to the extent consistent with the proper exercise of their respective powers and the proper performance of their respective functions, each Party agrees to consult with the other Party on any proposed public statement relating to the regulation of auditors under the ARA.

#### **5. Procedures to facilitate contact on operational matters**

- 5.1 The Parties will establish procedures to facilitate regular contact between each other on routine operational matters and will each appoint a contact person for receiving information, requests, or notifications under this MoU.

#### **6. Review of cooperation and coordination arrangements**

- 6.1 Senior representatives of the Parties will meet at six monthly intervals to review and discuss the operation of this MoU and cooperation and coordination between the Parties.
- 6.2 Either Party may request a review of the operation of this MoU, and any joint initiatives developed in relation to it, at any time outside of the regular review cycle, upon giving

reasonable notice to the other, where that Party identifies a particular issue requiring mutual consideration.

## **7. Confidentiality**

7.1 For the purposes of this MoU "Confidential Information" includes all information relating to any engagement between the Parties pursuant to this MoU and all information provided by a Party in accordance with this MoU, other than information that:

- (a) is in or comes into the public domain through no fault of the relevant Party or any of its officers, employees, agents or contractors;
- (b) was and can be demonstrated to have been, lawfully in the relevant Party's possession or known to the relevant party before its disclosure; or
- (c) is disclosed to the relevant Party by a third party having no obligation of confidence in relation to that information.

7.2 Each Party agrees:

- (a) to keep confidential all Confidential Information; and
- (b) to use the Confidential Information solely for the purposes of performing its functions.

7.3 The Parties will abide by all relevant privacy obligations and legislation and not disclose any personal information which it is not permitted to disclose to the other Party, or which the disclosure of, would amount to a breach of any privacy obligations or legislation or governing rules that apply to that Party.

7.4 Nothing in this MoU will prevent the disclosure of information that is required or permitted to be disclosed by law. Where either Party is required by law to disclose information obtained under this MoU or intends to disclose information obtained under this MoU which it is expressly permitted by statute to disclose in the particular circumstances, the disclosing Party will notify the other Party in writing as soon as practicable.

## **8. Disputes**

8.1 Where there is a disagreement over any matter related to issues in this MoU, the Parties will seek to resolve the issue by negotiation at an operational level. If these negotiations fail, the matters will be referred to the Chief Executive Officers of each party for discussion and resolution.

## **9. Termination**

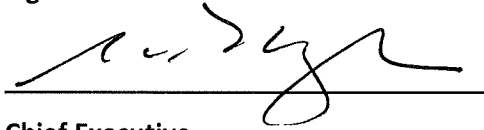
9.1 This MoU will continue in full force and effect unless and until terminated in the following manner:

- (a) by agreement of both Parties; or
- (b) by either Party on not less than 6 months written notice to the other Party.

9.2 Upon termination of this MoU, the Parties must meet, as soon as practicable, to discuss and agree the process by which any joint initiatives or protocols developed under this MoU will be terminated. This includes ensuring, to the maximum extent possible, that their respective interests and objectives and ongoing performance of their respective functions are not prejudiced by such termination beyond the extent of any prejudice necessarily caused by virtue of the termination.

**Execution**

**Signed for and on behalf of the Financial Markets Authority**



**Chief Executive**

Date: 5 October 2012

**Signed for and on behalf of the New Zealand Institute of Chartered Accountants**



**Chief Executive**

Date: 4 October 2012

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**Schedule 1 – Cooperation and Coordination relating to Auditor Regulation Matters**

The Parties acknowledge and, to the extent consistent with the proper exercise of their respective powers and the proper performance of their respective functions, agree as follows:

1. NZICA is primarily responsible for conducting investigations and taking disciplinary action against its members who are licensed auditors.
2. It is implicit in the provisions relating to investigations by FMA in subpart 7 of Part 2 of the ARA that:
  - (a) FMA cannot start an investigation into the conduct of a licensed auditor who is member of an accredited body in respect of an issuer audit if the matter has not first been brought to the attention of the accredited body, and
  - (b) accredited bodies (and not FMA) are primarily responsible for conducting investigations and taking disciplinary action against their members who are licensed auditors.
3. FMA will endeavour to engage with NZICA before starting or taking over an investigation into the conduct of a licensed auditor who is a member of NZICA
4. There may also be circumstances where, pursuant to the provisions of subpart 7 of Part 2 of the ARA, it is desirable for both NZICA and FMA to be seen to be acting together in relation to a particular matter.
5. FMA is otherwise responsible for conducting investigations and taking disciplinary action against overseas auditors and for enforcing the requirements for individuals to be licenced and firms to be registered to conduct issuer audits.
6. NZICA will endeavour to :
  - (a) promptly notify FMA of any matter which NZICA becomes aware of and which may, in NZICA's view, involve non-compliance by a person with the requirements for individuals to be licenced and firms to be registered to conduct issuer audits; and
  - (b) provide FMA with all relevant material information and documents held by NZICA in relation to the matter.
7. Each Party will endeavour to:
  - (a) promptly notify the other Party of any matter it becomes aware of which may, in its view:
    - (i) involve the breach, by an auditor holding a licence issued (or deemed to have been issued) under the ARA by the other Party, of any condition attaching to that licence, or
    - (ii) otherwise affect the eligibility of a person to continue to hold a licence issued (or deemed to have been issued) by that other Party under the ARA,

or the eligibility of an audit firm whose registration was approved by that other Party to continue to be registered; and

- (b) provide the other Party with all relevant material information and documents held by it in relation to the matter.
8. The Party who receives a notification in accordance with this Schedule, will endeavour to promptly acknowledge receipt of the notification and any related information and documents.
  9. Within a reasonable time of receiving a notification in accordance with this Schedule, taking into account the nature of the matter, NZICA will determine what further action it proposes to take and endeavour to inform FMA of that decision (including reasons if the decision is to take no further action).
  10. If FMA receives a notification from NZICA in accordance with this Schedule, FMA will endeavour to inform NZICA about how the matter was dealt with.

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**Schedule 2 – Cooperation and Coordination relating to Financial Advice Matters**

The Parties acknowledge and, to the extent consistent with the proper exercise of their respective powers and the proper performance of their respective functions, agree as follows:

1. FMA regulates financial adviser services under the Financial Advisers Act 2008 (“FAA”) and has a monitoring, investigation, and enforcement role in relation to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (“FSPA”).
2. The exemptions contained in the FAA and FSPA (the “Accounting Business Exemptions”) provide as follows:
  - (a) neither of the following services is a financial adviser service for the purposes of the FAA:
    - (i) a chartered accountant providing a relevant service in the ordinary course of business of a chartered accountant; and
    - (ii) a service provided as an incidental part of another business that is not otherwise a financial service or does not have, as its principal activity, the provision of another financial service (a service being incidental to another business if it is carried on to facilitate the carrying out of another business, or is ancillary to another business); and
  - (b) a chartered accountant providing a service in the ordinary course of business of a chartered accountant is not in the business of providing a financial service for the purpose of the FSPA.
3. NZICA’s rules also govern the provision of financial advice by NZICA’s members (whether or not an Accounting Business Exemption applies).
4. NZICA agrees to produce and provide guidance to its members on the appropriate application of the Accounting Business Exemptions.
5. At the request of NZICA, FMA agrees to review and provide comments to NZICA on guidance published or proposed to be published by NZICA for its members on the appropriate application of the Accounting Business Exemptions.
6. Applicability of an Accounting Business Exemption
  - 6.1 FMA may seek NZICA’s advice as to whether, in NZICA’s view, an Accounting Business Exemption applies in relation to particular services provided by an accountant.
  - 6.2 NZICA will promptly consider any such request, and advise FMA of its view on the applicability of an Accounting Business Exemption as soon as reasonably practicable following receipt of the request.
  - 6.3 FMA is not bound to accept NZICA’s view on the applicability of an Accounting Business Exemption.



6.4 If the Parties agree that an Accounting Business Exemption does not apply in respect of a particular FAA or FSPA compliance matter concerning an NZICA member, the Parties will discuss the extent to which they might cooperate and coordinate in their respective handling of the matter.

7. Referrals

7.1 NZICA will endeavour to :

- (a) promptly notify FMA of any matter which NZICA becomes aware of which, in NZICA's view, may involve non-compliance with the Financial Advisers Act by a member of NZICA where an Accounting Business Exemption does not apply; and
- (b) provide FMA with all relevant material information and documents held by NZICA in relation to the matter.

7.2 FMA will endeavour to:

- (a) promptly notify NZICA of any matter which FMA becomes aware of which, in FMA's view, may involve non-compliance by a member of NZICA with the NZICA's rules relating to the provision of financial adviser services and where an Accounting Business Exemption is likely to apply; and
- (b) provide NZICA with all relevant material information and documents held by FMA in relation to the matter.

8. Complaints to FMA against NZICA members

8.1 FMA will endeavour to notify NZICA if it receives a complaint about a member of NZICA relating to financial advice provided by that person.

9. Sharing information about activity

9.1 The Parties will endeavour to periodically share information about the number and nature of complaints received in relation to financial advice and how various matters have been dealt with.

