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SUBMISSION ON THE FINANCIAL MARKETS CONDUCT AMENDMENT BILL

Thank you for the opportunity to make a submission on the Financial Markets Conduct Amendment Bill (135-1) (**Bill**). These submissions are made by Cygnus Law Ltd (**Cygnus Law**) on its own behalf. Cygnus Law wishes to appear before the committee.

Simon Papa is the director of Cygnus Law. He has over 20 years' experience in corporate and commercial law and has significant experience advising financial services businesses on commercial and compliance matters.

This submission refers to the following regulatory impact statements:

- 9 December 2019 *Regulatory Impact Statement: Regulatory regime to govern the conduct of financial institutions* (**2019 RIS**)
- 13 August 2024 *Regulatory Impact Statement: fit for purpose financial markets conduct regulation* (**2024 RIS**)

Contents

1. SUMMARY OF CYGNUS LAW'S POSITION ON THE BILL

1.1 Cygnus Law supports the proposal in the Bill to:

a Adjust the requirements relating to training, supervising, and monitoring employees to reduce the level of prescription.

b Remove requirements relating to existing legal obligations and regularly reviewing effectiveness of fair conduct programmes.

1.2 Cygnus Law does not support the proposal in the Bill to add further obligations on captured financial institutions by way of:

a Clarifying the requirement to communicate with consumers in a timely, clear, concise, and effective manner to expressly include communicating about the price of services or products.

b Adding a requirement about resolving consumers' complaints in a timely and effective manner.

While Cygnus Law considers both additions have merit in themselves, little evidence has been presented to justify further regulation, on top of the already very extensive regulation introduced via the conduct of financial institutions (**CoFI**) law in the Financial Markets Conduct Act 2013 (**FMC Act**).

1.3 Cygnus Law does not agree with the statement in the 2024 RIS that the "overall intent and framework of the CoFI Act is sound". In our view the CoFI regime is:

a not consistent in many respects with the problems it was implemented to resolve;

b reflects inadequate policy development;

c undermines fundamental market mechanisms; and

d likely to impose costs of implementing and managing the regime across dozens of financial institutions that will be greater than the value of the benefits it will generate.

Having said that, we recognise that the Government has confirmed that it does not intend to seek repeal of the CoFI regime (as proposed by the National Party during the 2023 election campaign). Rather Cygnus Law proposes to make changes via the Bill to address some concerns, as set out in this submission.

1.4 Cygnus Law's key proposed changes to the Bill are as follows (the relevant **Parts** of this submission are noted):

a To address the overly broad ambit of the "fair conduct principle" generally (**Part 3**):

i The fair conduct principle should be limited to the specific requirements in section 446(C)(2) as follows- "The requirement to treat consumers fairly ~~includes~~requires-"

ii Section 446G(1) be amended as follows, to limit the open-ended nature of fair conduct programmes and to reflect that fair conduct programmes already have to comply with dozens of specified requirements in section 446J- "Every financial institution must establish, implement, and maintain an effective fair conduct programme in accordance with section 446J".

iii The word "including" in s446(1)(b) be deleted, and the requirement in sections 446J(1)(b)(iv), (v) and (vi) be removed and implemented in a more targeted way (though Cygnus Law proposes to remove all product design obligations in the FMC Act).

b The FMC Act be amended via the Bill to include the same restriction as unfair contract term law in the Fair Trading Act 1986, which is that terms that "set the upfront price payable under the contract" are not subject to the fair conduct principle. In addition, the Bill should amend the FMC Act to introduce that prohibition more broadly, to prevent further attempts by FMA to regulate prices through other law that was not intended to be used for that purpose. (**Part 4**)

c The FMC Act be amended via the Bill as follows, to acknowledge that fair conduct does not require financial institutions to provide any particular types of products or services (rather, CoFI should regulate the products and services actually provided or planned to be provided) (**Part 5**):

> "446C(4) The fair conduct principle and the requirements of fair conduct programmes do not require financial institutions to provide any particular financial products or services or classes of financial products or services, or to provide them to any particular group or class of consumers."

d With respect to proposed new on-site inspection powers (**Part 6**):

i Proposed section 28B(2)(b), which gives FMA an open-ended power to carry out such inspections without notice, be removed from the Bill.

ii Proposed section 28C be amended as follows, to remove the power for FMA to compel individuals to answer questions, either with or without notice:

> "**28C Person may be required to ~~answer questions or~~ give information** During an on-site inspection, the FMA may require any ~~employee, director, or agent of the financial markets participant~~person to—
> ~~(a) answer questions relating to its records and documents; and~~
> ~~(b)~~ supply all ~~other~~ information or documents that the FMA may reasonably require for the purpose of the inspection but not to answer questions."

iii An equivalent power to section 25(4) of the Financial Markets Conduct Act, that permits FMA to copy documents inspected, be included in the proposed section 28B.

2. COFI REGIME- ORIGINS AND ISSUES

Introduction

2.1 The CoFI regime arose out of the findings of the Australian Royal Commission into the banking industry that was published in February 2019. Following that the FMA and the Reserve Bank carried out a review of the banking and insurance sectors and issued review reports in 2021. The reports did not identify the same issues as those found by the Australian Royal Commission, with the primary finding being that financial institutions had inadequate systems and infrastructure to support compliance. The reports were thematic and qualitative and much of the specific information provided was anecdotal. The reports provided no detailed analysis, for example estimating the costs incurred by consumers as a result of misconduct identified in the reports. The reports did not identify whether some issues could be addressed under current law. The lack of any detailed analysis is confirmed in the 2019 RIS, which states that:

> "This RIS relies on a range of qualitative data to assess the impacts of the proposed options, including previous findings from the FMA/RBNZ reports and report-backs, and anecdotal evidence from public submissions. The sources used did not include much quantitative evidence of the problems identified or quantitative assessments of the costs and benefits of the options."

2.2 The FMA and Reserve Bank reports noted a number of instances of alleged non-compliance. It appears that all of those instances were subsequently the subject of successful enforcement actions by the FMA for breach of existing "fair dealing" obligations in the FMC Act. This highlights that existing law already prohibits the examples of misconduct identified in the

reports. The relevant options paper downplayed the effectiveness of existing law to address the concerns raised but provided no analysis to support that. The law that eventuated, in the form of the CoFI regime, is only loosely connected to the underlying problems it purports to address.

Consumers assumed not to act rationally

2.3 Rather than being developed as a response to the issues identified in the FMA and Reserve Bank reports, in our view it appears that the CoFI law that eventuated was primarily based on a starting point that consumers cannot be trusted to make decisions for themselves. For example, the responsible Minister at the time the CoFI law was being developed is quoted as saying that, in connection with the CoFI law (and the then new financial advice law), "No matter how much you earn, generally New Zealanders aren't very good at managing their money". Another example of this thinking is from the key official responsible for the CoFI reforms, who was quoted as saying:

> "New Zealand's journey represents a wider shift happening all over the world, where countries are moving away from regulation on the assumption of the "rational decision maker" - i.e., the idea that the customer will always choose what is right for them, so long as they are given the right information…. banks and insurers will instead need to prove that they have met a regulator-determined bar, and are actively engaged in ensuring that customers are treated fairly."

2.4 The problem with this "journey" away from assuming that consumers are capable of making rational decisions is that that assumption underpins our entire market economy. The "fairness" principle at the core of the CoFI law attempts to introduce a new paradigm, in place of the assumption that consumers make rational decisions. Under that paradigm financial institutions and the State are, to a significant degree, supposed to understand what consumers want and to direct them to make the right decisions. We have seen no validation of how that approach will result in better outcomes overall, be cost-effective or address the underlying causes of poor financial outcomes including inequality. We are not suggesting that fairness isn't something financial institutions should strive for but, as we note below, these "fairness" standards are being asked to do work that they're not designed for.

Shortcomings in the development of CoFI Law

2.5 Our concerns about the CoFI law are supported by the 2019 RIS. The 2019 RIS noted that:

> "The timing for decisions has been a constraint on the scope for decision making. As noted in Section 1, the Minister of Commerce and Consumer Affairs has directed MBIE to prepare legislation to be introduced by the end of 2019. We think a broad financial conduct regime is required.
> This RIS sets out a high-level framework for a broad conduct regime but the details will need to be fleshed out over time, through regulations and potentially further legislative changes, once there has been opportunity for further policy thinking."

2.6 The RIS also highlighted the risk that the costs of CoFI law may outweigh benefits achieved:

> "Costs of compliance and lack of certainty exceed the benefits of regulation: Moderate impact. A compliance programme requirement increases compliance costs for entities but should enhance certainty and support monitoring and enforcement. To reduce the impact of this risk we also intend to start with a

> relatively small regulated population before considering the inclusion of other financial institutions who offer similar financial products and services."

2.7 This clearly highlights that the CoFI legislation was rushed and that further work was required to develop the regime including through regulations and further legislative changes. No regulations have been prepared except in relation to controls on incentives at financial advice providers. The Bill presents an opportunity to address shortcomings caused by the rushed preparation of the CoFI law and we commend the Government for undertaking this initiative.

Costs of CoFI law may outweigh the benefits

2.8 That very significant costs (direct and indirect) are being imposed on financial institutions by CoFI law are confirmed in the Cabinet Paper on the CoFI bill. The 2019 RIS stated:

> "44.2 Licensing can impose considerable costs on both the regulated entities and the regulator, depending on the licence obligations. These costs may be passed on to customers. In the worst case scenario, additional regulatory may push smaller players out of the market (e.g. small credit unions).
>
> 44.3. Licensing can create barriers to entry for new players. This could have an impact on future opportunities for enhanced competition and the structure of the market."

2.9 There are other significant costs, as noted in the 2019 RIS:

> "The regulator will see a large increase in costs. This will include costs of monitoring and enforcement of the duties, compliance programme obligations and developing guidance."
>
> "Some of the increased costs to regulated parties may be passed on to consumers in the form of higher interest rates, premiums etc. This is likely to be a relatively small amount spread over a large number of customers."

2.10 The likelihood that such costs create a significant barrier to entry into the banking sector, and help to explain the profit margins of the large banks, was identified in the Commerce Commission's 27 August 2024 report on its market study into personal banking services. We consider that the apparent lack of strong opposition from most of the financial institutions subject to the CoFI law indicates that they are able to pass the associated costs on to customers and possibly that they are not unhappy with the creation of further barriers to entry.

2.11 The 2019 RIS dismisses the costs noted as "a relatively small amount spread over a large number of customers". That argument could be made of most regulatory measures but completely misses the point. That is that the cumulative effect of the costs will be significant and will likely lead to a misallocation of resources away from more productive activities and increase barriers to entry, without commensurate benefits being generated.

The problem with "fairness" as an overarching legal standard

2.12 The CoFI regime has an overriding principle that financial institutions treat their customers "fairly" with numerous specific requirements imposed via development of a "fair conduct programme". A conduct licence is required. Cygnus law is not at all suggesting that it is inappropriate to treat customers fairly or that financial institutions should not strive to do so. However, as we note below, "fairness" falls substantially short as a standard to regulate market conduct generally. In that regard we note the recent speech given by the Attorney-General Judith Collins KC in which she noted concerns about vague law making, stating that:

> "Those of us involved in creating the policy underpinning the laws of New Zealand need to ensure the resulting law is precise, clear, and not open to significant debate about its meaning."

Cygnus Law submits that the CoFI law is the epitome of vague law making and the proposals in this submission for changes to the CoFI law are largely focused on introducing greater certainty and removing the ability for officials to use vague "fairness" standards to introduce unintended new obligations.

2.13 The law has for centuries recognised "fairness" and some other moral principles as legal standards. However, use of such standards has operated within fairly tight constraints and often in areas where moral considerations are paramount, for example in family matters. The problem with "fairness" as a legal standard is that it is a moral principle and so inherently subjective. Having said that, New Zealand has fairness standards in other areas of commercial law. In fact, there is an array of conduct law that already significantly governs the conduct of financial institutions. At no time was a gap analysis prepared to identify where the law is lacking. Instead, each financial institution has been told that CoFI law requires them to carry out a gap analysis themselves as part of their implementation of fair conduct programmes.

2.14 Another law that is based on concepts of fairness is the unfair contract term law in the Fair Trading Act 1986. In the case of unfair contract term law the core subject matter of a contract, and the upfront price, are excluded from the scope of that law. That's because that would involve regulating the nature of the products & services themselves, and their prices. Those matters were previously assumed to be best left to the markets, not the law or regulators, on the basis that they are no better (and probably worse) than market participants at efficiently allocating resources within markets. Likewise, to date, financial markets law has generally regulated matters peripheral to the financial products & services themselves, such as disclosure, governance, management capability, business infrastructure and misleading conduct. So the key change introduced by CoFI is the direct regulation of financial products & services. However, there is a large body of evidence in New Zealand and overseas that shows that, in general, direct State regulation of core aspects of markets only produces negative outcomes.

3. PROPOSED AMENDMENTS TO NARROW AND CLARIFY THE COFI REGIME

3.1 As noted in this submission, the fair conduct principle is open-ended, with its exact extent unclear. This submission highlights that FMA intends to use that open-ended law to further support its efforts to regulate prices and the nature of financial products and services that are provided in the market. We propose specific amendments to the CoFI law to address those concerns. In addition, we propose that further fair conduct programme requirements in section 446J(1) of the FMC Act be removed or amended, as noted below.

3.2 Also, we consider that the fair conduct principle itself should have its ambit limited to the specific requirements in section 446(C)(2) as follows:

> "The requirement to treat consumers fairly ~~includes~~<u>requires</u>-

3.3 The requirements in section 446J(1) are already very extensive. To give financial institutions certainty about what the fair conduct programme requirements are, especially for the smaller institutions that don't have the resources required to elucidate their further meaning, we submit that the section 446J requirements should be all of the requirements for a fair conduct programme, rather than minimum requirements. If additional matters need to be added to programmes that can be achieved via prescribing them under regulation 446J(m). For that purpose we submit that:

- section 446G(1) is amended as follows- "Every financial institution must establish, implement, and maintain an effective fair conduct programme in accordance with section 446J"
- The heading of section 446J is amended as follows: "~~Minimum~~ R~~r~~equirements for fair conduct programme".

3.4 The requirements in section 446J(1) set out dozens of matters. Even taking into account the ability to control the ambit based on various factors, including the nature, size and complexity of the business (section 446J(2)), the requirements are onerous overall. The discussion document that proposed those requirement stated:

> "These minimum requirements were based on areas where conduct issues and risks were identified through the FMA and RBNZ conduct and culture reviews, and other evidence of consumer harm."

It is unclear what "other evidence of consumer harm" means. However, the requirements are simply an "everything including the kitchen sink" compliance regulator wish list and go far beyond issues identified in the reviews. In addition, FMA, via its licensing powers, imposes further requirements on financial institutions as a condition of obtaining a conduct licence, including in relation to outsourcing, business continuity and operational resilience, that are completely unrelated to the issues giving rise to the CoFI regime.

3.5 Those factors support removing from CoFI law requirements that are not properly validated. The section 446J(1) requirements impose costs on businesses that are very likely to be greater than the benefits arising from their implementation (a valid conclusion in our view, given the high costs involved in implementing such complex regimes and that there was almost no analysis of the resulting benefits of CoFI law). The costs are particularly significant for smaller financial institutions and will represent a large barrier to entry. As noted, the number of requirements mean that it is very difficult, in practice, for smaller financial institutions to truly right-size their programmes so they're cost effective. So, the section 446J(1) requirements very likely impose significantly greater proportional costs on smaller financial institutions, both existing financial institutions and those trying to enter the market.

3.6 It follows that we support the proposal in the Bill to remove the requirement at section 446J(1)(a). The CoFI law should focus on conduct that is not already addressed by existing law.

3.7 Regulation 446J(1)(b) relates to "designing, and managing the provision of, the financial institution's relevant services and associated products to consumers, including by…". The primary obligations are in sections 446(2)(d) and 446D(1)(a). Issues with product design were not identified in the FMA and Reserve Bank reports so we do not consider there is any basis for including them in the CoFI regime. Given the significant implications of these provisions, we can see no basis for making the lists of requirements a non-exclusive list so we submit that the word "including" in s446(1)(b) be deleted. In Australia product design provisions are governed by a separate part of the Corporations Act, with detailed provisions governing them supported by extensive guidance from ASIC. We don't consider it is appropriate to implement most aspects of such a far-reaching obligation as part of a fair conduct programme regime as subsidiary matters. We submit that the product design provisions be removed entirely. If that submission is not accepted, we propose the changes below.

3.8 We submit that the requirement at regulations 446J(1)(b)(iv), (v) and (vi) be removed, and implemented in a more targeted way. Amongst other matters these require financial institutions to "regularly [review] whether enhancements or improvements in the financial institution's relevant services or associated products should be made available to those consumers (when viewed as a group); and" and "ensuring that any enhancements or

improvements identified under subparagraph (v) are made available within a reasonable time". These are broad, very ambitious and very consequential requirements, which go to the core of products and services provided by financial institutions. We do not consider it is appropriate to implement them as a checklist of matters as part of a fair conduct programme. To monitor and enforce compliance, FMA will have to become involved in determining what products and services should be provided by financial institutions. As noted in the introduction to these submissions, there is no reason to think that the State is capable of effectively making such determinations. If this requirement is to be maintained, it is submitted that it is imposed by a separate regime with greater detail and specificity, which should help to reduce the large costs financial institutions will incur in complying and the risk of regulatory over-reach into areas where the State is unlikely to have expertise to appropriately regulate. We submit that such separate law should be much more focused on particular products of concern, where there is evidence that customer's have, in the past, been treated unfairly.

4. PROPOSED AMENDMENTS TO PREVENT PRICE REGULATION VIA COFI

4.1 The open-ended nature of the CoFI fair conduct principle creates the likelihood that CoFI law will be used to regulate the prices of financial products and services offered by financial institutions, given the actions and statements of FMA to date. Officials and the FMA go to some lengths to avoid referring to "price regulation" and use other terms instead such as "fees and charges materially outweighing benefits to customers" and "fair exchange of value".

4.2 The law already gives FMA an express price regulation role in relation to KiwiSaver provider fees (by law KiwiSaver scheme fees cannot be "unreasonable"). In addition, FMA has fashioned from retail fund manager duties an obligation for managers to set fair fees via guidance. FMA's April 2021 *Managed fund fees and value for money guide* states that:

> "a [fund] member's share of the financial value of investment management must be appropriate for the risk they are taking and the cost they have paid"

Again, this is price regulation except in name.

4.3 There is no evidence that Government officials or FMA have engaged in the kind of policy development required to justify introducing price regulation. Rather, except in the case of KiwiSaver schemes, price regulation is being introduced indirectly through regulatory measures that were not designed or intended to regulate prices. As noted, CoFI law was developed directly in response to the findings of the Australian Royal Commission. However, the issues identified by the Royal Commission were not related to prices. FMA and Reserve Bank's subsequent investigations did not identify concerns about price setting, rather the main issue was failure to implement promised pricing, multi policy discounts in particular.

4.4 Even if concerns about pricing do exist, it does not follow that regulation of prices is an appropriate or effective measure to address such concerns. There is a risk that they could make matters worse which is well-established with respect to rental property price controls. New Zealand moved away from the regulation of prices in most sectors in the 1980s and a specialist regulator, the Commerce Commission, was created to act as a regulator in relation to price regulation, where such regulation still exists. So, it is not even obvious that FMA should or can involve itself in price regulation except in relation to KiwiSaver schemes.

4.5 FMA does have a role with respect to prices including to promote price transparency and comparability. As an example, regulations that have provided for comparability of managed fund fees have played a significant role in identifying and removing unduly high fees.

4.6 Cygnus Law does not consider that FMA should have a role in regulating prices (except in relation to KiwiSaver schemes), however that is described. To the extent that is required, that is an area where the Commerce Commission has expertise and should be given the required mandate. The overall effect of such initiatives is that the State (represented by FMA) and financial institutions will decide what is best for consumers, with consumers only having a peripheral role, undermining basic market precepts.

4.7 Cygnus Law therefore submits that the FMC Act be amended via the Bill to include the same restriction as unfair contract term law in the Fair Trading Act, which is that terms that "set the upfront price payable under the contract" are not subject to the fair conduct principle. In addition, the Bill should amend the FMC Act to introduce that prohibition more broadly, to prevent further attempts by FMA to regulate prices through other law.

5. PROPOSED AMENDMENTS TO PREVENT COFI BEING USED TO MANDATE PRODUCT AVAILABILITY

5.1 As noted in the introduction, the fair conduct principle at the core of the CoFI law attempts to introduce a new paradigm, in place of the assumption that consumers make rational decisions. Under that paradigm financial institutions and the State are, to a significant degree, supposed to understand what consumers want and to direct them to make the right decisions. In that regard, FMA has made it clear that CoFI law empowers FMA to get involved in what financial products and services are provided to consumers. To support that, FMA states that it needs to "[build] the FMA's understanding of consumers' perspectives and experiences across different demographics.". FMA employs a number of economists for that purpose.

5.2 This is exemplified in FMA's "Outcomes-focused regulation" guide released in March 2025. The guide sets out seven "key outcomes" that FMA will use to guide its regulatory endeavours. One of those key outcomes is "improved access to products and services". This is described as "**Our financial markets deliver services and products that meet New Zealanders' needs**".

5.3 This links somewhat to the fair conduct principle of:

> "ensuring that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group)"

In our view that standard should be focused on whether particular goods or services are appropriate for the consumers they are marketed to. It is clear that FMA considers that that standard, and the overarching, and unrestrained, fair conduct principle, gives FMA a broad remit to direct what financial products and services financial institutions must provide including to underserved groups.

5.4 It is obvious that markets rarely, if ever, operate with full efficiency. Cygnus Law absolutely sees merit in considering how consumers can be better served by financial institutions particularly more vulnerable members of society. However, as is the case with price regulation, the RBNZ and FMA review of the banking and insurance sectors did not provide any evidence to support this measure. The current consideration being given by the Council of Financial Regulators to the concept of basic transaction accounts available to a wide range of people is, in our view, the more appropriate approach to considering the issue of availability.

5.5 Accordingly, Cygnus Law considers that the fair conduct principle should include the following, as sub-section 446C(4), to acknowledge that fair conduct does not require financial

institutions to provide any particular types of products or services (rather, CoFI should regulate the products and services actually provided or planned to be provided):

> "446C(4) The fair conduct principle and the requirements of fair conduct programmes do not require financial institutions to provide any particular financial products or services or classes of financial products or services, or to provide them to any particular group or class of consumers."

6. PROPOSED AMENDMENTS TO ENSURE FMA'S ONSITE INSPECTION POWERS ARE FAIR

6.1 Cygnus Law supports proposed section 28B(1) of the FMC Act in the Bill, which gives FMA the power to carry out on-site inspections of financial market participants subject to the amendments proposed in this submission.

6.2 Cygnus Law does not support proposed section 28B(2)(b), which gives FMA an open-ended power to carry out such inspections without notice. The 2024 RIS indicates that concern with respect to potential misuse of the without notice inspection power will be addressed through general controls in law with respect to the use of such powers. However, we do not consider that is sufficient. In the case of *Perpetual Trust Ltd v Financial Markets Authority* [2012] NZHC 2307 the High Court found that FMA in fact used its power under section 25 of the Financial Markets Authority Act (**FMA Act**) to require disclosure of information unreasonably. There appears to be an assumption that that case found that FMA did not have without notice search and seizure powers. That is not correct. Heath J found that:

> "In my view, the nature and extent of the information and documents required by the Authority in its s 25 notice was such that no reasonable recipient could have supplied it "immediately"…. Having said that, in a case where a small number of readily accessible documents are sought, a request for immediate delivery is not likely to be unreasonable."

6.3 So a specific power to carry out onsite inspections without notice is not required. However, incorporating that power without any stated limitations is, in our view, inappropriate. Rather the proposed section 28B should explicitly state that without notice inspections can only be carried out when there is a risk of information being lost or destroyed.

6.4 A further concern with a without notice power is FMA's following power in proposed section 28C :

> "During an on-site inspection, the FMA may require any employee, director, or agent of the financial markets participant to… answer questions relating to its records and documents…".

Those individuals will not have any opportunity to obtain legal advice in relation to such questions, which may incriminate them. We do not consider this is an appropriate power at all. In section 25 of the FMA Act FMA can compel an individual to give evidence but only at a specified time and place and, following *Perpetual Trust Ltd v Financial Markets Authority,* that likely requires that the individual is first provided with reasonable notice.

6.5 Accordingly, we consider it quite inappropriate for FMA to have the power to compel a person to answer questions on a without notice basis. We submit that clause 28C be amended as follows:

> "**28C Person may be required to ~~answer questions or~~ give information**
> During an on-site inspection, the FMA may require any ~~employee, director, or agent of the financial markets participant~~person to~~—~~
> ~~(a) answer questions relating to its records and documents; and~~

~~(b)~~ supply all other information or documents that the FMA may reasonably require for the purpose of the inspection but not to answer questions."

If FMA requires a person to answer questions, it can rely on its section 25 power in the FMA Act.

6.6 The 2024 RIS equates the proposed new search power with a power in sections 132 and 133 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. However, those provisions do not authorise without notice inspections so do not support a power to that effect in the FMC Act. In addition, that section includes some additional provisions in relation to a similar power to compel answers to questions. They are in sub- sections 3 and 4 of section 133, as follows:

> "(3) A person is not required to answer a question asked by an AML/CFT supervisor under this section if the answer would or could incriminate the person.
>
> (4) Before an AML/CFT supervisor requires a person to answer a question, the person must be informed of the right specified in subsection (3)."

6.7 While our preferred amendment is that in paragraph 6.5 above, we propose that, if that amendment is not accepted, the proposed new search powers incorporate those sub-sections. We do not consider that section 133 supports a broad power in the FMC Act to require that questions are answered. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 is inherently a law designed to reduce criminal activity. The FMC Act is instead focused on fostering good conduct in the financial services sector generally.

6.8 Section 25(4) of the FMA Act states, with respect to FMA's power in section 25(1) of the FMA Act:

> "If a document is produced in response to a notice under subsection (1), the FMA, or the person to whom the document is produced, may—
> (a) inspect and make records of that document; and
> (b) take copies of the document or extracts from the document."

We assume section 25(4) is required because, in the absence of such a power, FMA would not have the power to do those things. However, while the proposed section 28B provides FMA with an onsite inspection power including the power to require disclosure of information and documents, there is no power to either make records of them or to take copies or extracts. FMA could seek the right to do that by exercising its rights under section 25 but that would appear contrary to the purpose of the onsite inspection power. Accordingly, we submit that an equivalent power to section 25(4) be included in the proposed section 28B.

Yours sincerely
Cygnus Law Ltd

Simon Papa
Director