New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Ministry of Business, Innovation and Employment
Wellington

By email: financialmarkets@mbie.govt.nz

Tēnā koe,

Feedback on the Capital Markets Reform – Phase Two options

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide the Ministry of Business, Innovation and Employment (**MBIE**) with feedback on its *Capital Markets Reforms: Phase Two* discussion document (**discussion document**). This submission has been prepared with input from the Law Society's Commercial and Business Law Committee.[1]

2 General Comment

2.1 The Law Society's submission focuses on four discrete topics from the discussion document. They are:

(a) **Civil liabilities for directors and issuers**: a potential change in relation to two aspects of civil liabilities for directors and issuers;

(b) **Audit requirements (Catalist and USX):** the concern relating to current audit requirements creating a barrier to participation in the markets;

(c) **Wholesale investor issues**: the Financial Markets Authority's (**FMA**) concern regarding the promotion of wholesale offers to retail investors; and

(d) **Auditor liability**: whether auditors who carry out audits of Financial Markets Conduct (**FMC**) reporting entities should have a limit on their liability for negligence.

3 Civil liabilities for directors and issuers

3.1 In our view, it would be desirable to align New Zealand's liability settings with the corresponding provisions in Australia, for the reasons provided in the discussion document. If New Zealand's settings are seen to be more onerous than in Australia, they

[1] More information about our Commercial and Business Law Committee is available on the Law Society's website: https://www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/commercial-li/.

may risk becoming a disincentive for businesses to list and raise capital in New Zealand (via NZX).

3.2 But whilst we accept that calls for changes to the Financial Markets Conduct Act 2013 (**FMC Act**) liability carry some urgency, we remain wary of piecemeal law reform of directors' liabilities. In our view, this topic would benefit from a holistic review of the policy settings for directors' liabilities in the FMC Act and other legislation.

3.3 We are aware that the Law Commission's review of directors' duties and liabilities under the Companies Act 1993 is currently underway, and that its findings could have an important bearing on directors' liabilities under the FMC Act. It is also worth noting that the Terms of Reference for the Law Commission's review state:[2]

> A broad range of legislation imposes duties on company directors and exposes them to potential liability. The development of this legislation has occurred piecemeal. The duties are framed in a variety of ways and the nature of the liabilities differs. The Law Commission will consider whether, and if so how, directors' statutory duties and liabilities might be approached in a more consistent and principled manner in future legislative reform.

3.4 As a result, our preference would be considering reforms to directors' liabilities under the FMC Act following the completion of the Law Commission's review.

Director liability for continuous disclosure

3.5 In our view, Option B should be explored as a means of achieving better harmonisation with the relevant liability settings in Australia. That is, by amending director liability settings for continuous disclosure, by:

(a) Narrowing the requirements for involvement in a contravention; and

(b) Adjusting the statutory defences available to directors with involvement in an issuer's contravention.

3.6 We agree this would better manage the concerns identified in the discussion document (that settings are out of alignment with those in Australia and represent a disproportionate risk to New Zealand directors (and others)).[3]

3.7 The Law Society supports making changes to the issuer liability settings for continuous disclosure for the same reasons.

Deemed director liability options

3.8 The Law Society considers any reductions in personal liability exposure and compliance costs should seek to achieve alignment with Australia, with the caveat that caution should be exercised to avoid overcorrecting the misalignment and providing investors less protection than in Australia. The corresponding Australian settings should guide the appropriate balance, while retaining sufficient director accountability to incentivise effective oversight of issuers' disclosures and financial reporting.

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2 These Terms of Reference are available here: www.lawcom.govt.nz/our-work/directors-review/tab/terms-of-reference.

3 At page 24.

4 Audit requirements (Catalist and USX)

4.1 The discussion document states that the current audit requirements to list on Catalist may act as a barrier to participation, particularly for smaller issuers.[4] However, it does not offer any evidence of the numbers and types of businesses that find audit requirements a barrier to listing on Catalist or using USX as a trading platform. Without that evidence, we are not persuaded that there is a strong case for reducing audit and assurance requirements or differentiating between the two platforms.

4.2 We acknowledge that there are concerns about the cost and availability of audits. However, audited financial statements are an important source of reliable and verified information for investors, and lower requirements such as 'review engagements' may not be well understood by investors.

4.3 The discussion document also seeks feedback on whether reduced assurance requirements should apply only to USX, or whether similar criteria should also apply to other smaller-market pathways such as Catalist. In our view, differentiating between these pathways without evidence that this would not distort the market would overlook the range of reasons why businesses voluntarily obtain full audits. For example, some growth companies with entirely wholesale investor bases opt in because their boards, investors and other stakeholders value independent assurance of financial information. Further, differentiating between Catalist and USX may have the unintended consequence of encouraging businesses to use a platform for purposes to which it is not well suited (noting a range of platforms currently exist to serve different purposes and audiences).

4.4 In our view, more evidence is needed to indicate that current audit settings should be changed. If a policy decision is made to lower the audit requirements, the Law Society recommends that there should be appropriate safeguards and thresholds to ensure that the lower compliance threshold is restricted to specific areas (such as investor profiles and limits on capital-raising activity). These revised requirements should initially be implemented for a trial period, and be monitored and reviewed for any impacts on investor participation, confidence and trading activity before they are made permanent.

5 Wholesale investor issues

5.1 The Law Society acknowledges that the current wholesale investor regime is relatively permissive by international standards, and that there are concerns about the current self-certification regime being open to misuse.[5] However, we have concerns about changes being made to the regime in response to such concerns when enforcement tools are available to the FMA under the FMC Act to address these concerns more proactively.

5.2 We are also concerned that some of the proposed changes may result in a regime that is out of proportion with the size and nature of New Zealand's economy, and out of step with comparable jurisdictions overseas. Balanced consideration is essential to weighing investor protection against broader economic dynamics. In particular, small-medium enterprises often face constraints accessing traditional bank debt, which highlights the constructive role that private capital can play in bridging growth funding gaps.

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4 At [128].

5 Per *Re Financial Markets Authority* [2025] NZHC 2723.

5.3 Reform of this area requires careful consideration to ensure an appropriate balance is achieved so the compliance burden is not unduly onerous, and the need for private capital to drive business growth is not so stifled that investors are discouraged from entering the New Zealand market. We suggest that care should also be taken to ensure that reform does not reduce the certainty that resulted from the decision in *Re Financial Markets Authority* where introducing a series of new tests would likely reduce some of the benefits of the self-certification regime.

5.4 The Law Society also makes the following comments on the reform proposals set out in the discussion document:

Develop more objective 'experience' definitions for an eligible investor	• Transitioning the eligible investor test to rely exclusively on objective criteria may introduce rigidity into the regime. A strictly objective framework may not be flexible enough to adapt to evolving investment patterns, and could diverge from how wholesale investors are typically assessed in comparable jurisdictions. • Additionally, while recognised memberships (such as angel investment clubs) offer a straightforward pathway to becoming an eligible investor, they currently represent a relatively small segment of the broader wholesale investor market. Because the activity levels and participation within these groups can fluctuate significantly across the economy, they may not serve as a comprehensive benchmark for investor qualification.
Prescribe the content required on eligible investor certificates	• Utilising regulatory guidance (for example, from the FMA) to encourage more detailed content of certificates may offer a more adaptable alternative to strict regulatory prescription. A guidance-led framework can effectively assist investors in understanding their responsibilities and the implications of wholesale offers. • Given the fluid and rapidly evolving nature of economic patterns and market practices, highly prescriptive requirements are likely to be too rigid to work effectively in practice. However, a flexible guidance model would need to rely on robust oversight mechanisms to remain effective and ensure regulators can maintain visibility over the wholesale market activity over time.
Role and consequences under the FMC Act for professional confirmer	• We are concerned that the approach proposed in the discussion document diverges from comparable jurisdictions (particularly in the case of offence provisions) and could have a chilling effect on the willingness of professional confirmers to confirm the contents of an eligible investor certificate. • Anecdotal evidence suggests that, even under current settings, there is a very limited pool and profile of

	professional confirmers who are willing to validate eligible investor certificates. • In our view, liability for non-compliance should remain with the offeror. See also our comments about the use of the FMA's powers under the FMC Act.[6]
Introducing an investment cap for this category	• In our view, it is worth considering the broader market implications of this approach. There is a risk that the proposed approach may introduce unintended consequences. • First, implementing a cap could inadvertently create a perception of reduced regulatory oversight which allows certain investments to operate with less scrutiny. • Second, a lower cap may incentivise issuers to widen their outreach, targeting a larger number of investors at the margins of the wholesale market to meet their funding requirements. • As a result, we consider that relying primarily on a cap to moderate risk may not fully account for complex behavioural shifts in the market.
Duration of eligible investor certificates	• We agree that the current 2-year renewal timeframe imposes a compliance burden and cost that may be disproportionate. In our view, investors are unlikely to lose their knowledge of a particular investment within a short timeframe.
Promotion of wholesale offers	• As advertising broadly shifts to digital platforms, the marketing of financial products naturally follows. The digital medium itself is not inherently problematic, rather, market risks stem from the use of specific promotional techniques – such as emphasising high returns while downplaying risks or failing to clearly identify an offer that is restricted to wholesale investors. • Aligning public advertising frameworks with comparable jurisdictions offers a consistent approach to managing the risks. However, we note that the practical effectiveness of any restrictions will likely be reliant on being supported with active market monitoring for compliance.

5.5 We also encourage officials to consider whether any additional changes to the regulatory regime could enhance the FMA's ability to proactively monitor compliance and respond to instances of non-compliance by exercising its enforcement powers under the FMC Act.

6 Auditor liability

6.1 We agree that the auditor liability regime is at risk of eroding audit quality through market concentration, and becoming a barrier to entry to capital markets activity due to

6 At para 5.1.

cost. A capped liability regime similar to that in Australia may therefore be preferable. As the discussion document notes, this topic was discussed in the Law Commission's 2014 review of Liability settings for multiple defendants (**the Law Commission report**).[7]

6.2 Practically speaking, there is a strong rationale for considering closer alignment with Australia's auditor liability regime. With an increasingly integrated trans-Tasman market for capital raising and large-scale audit work (particularly for FMC reporting entities) regulatory anomalies risk creating unintended consequences, such as forum shopping.

6.3 The Law Society also supports adjustments which focus primarily on FMC reporting entities. This aligns with the scale of risk, the degree of public interest, and the critical role auditors play in maintaining investor confidence in New Zealand's capital markets.

6.4 However, there is a major structural difference between the Australian regime and New Zealand's regime. Australia operates with proportional liability, whereas New Zealand's liability regime is one of joint and several liability. In our view, this could mean that exploring a fee proportional cap on liability may help to reduce the differences between the regimes.

6.5 We note that, while some jurisdictions operate with a mixed model of proportional liability and caps, such a change may prove counterproductive in the relatively small New Zealand market. We recommend that any changes to liability settings be clear so that investors are able to easily understand the distinctions in liability and assurance levels (such as the difference between a review engagement and a full audit).

6.6 If a capped liability framework is to be implemented, we consider it would need to be supported by:

(a) Strict compliance with identified professional and quality management standards; and

(b) Maintenance of professional indemnity insurance appropriate to the scale of the specific audit engagement.

6.7 We also consider auditor liability for fraud, dishonesty, or wilful default should remain uncapped, per the recommendations in the Law Commission report.[8]

6.8 On the question of whether limiting liability might negatively impact audit quality or investor confidence, international precedent suggests this risk is manageable. Jurisdictions such as Australia maintain audit quality not through unlimited liability, but through robust structural checks and balances. These include regulatory oversight (like Australian Securities and Investments Commission inspections), professional disciplinary bodies, and firm-level risk management frameworks. Under these capped or proportionate schemes, auditors remain strictly liable for the share of loss caused by their negligence.

6.9 Conversely, maintaining unlimited liability poses its own structural risks to audit quality by potentially crowding out competition. The current audit framework heavily concentrates FMC reporting entity audits among a small pool of licensed auditors. When combined with expanding regulatory obligations and increasingly complex engagements,

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7 Law Commission *Liability of Multiple Defendants* (NZLC R132, 2014).

8 Law Commission, above n 7 at R16 and 8.44.

this concentration raises long-term sustainability concerns. The associated risks and costs of carrying out audits make it difficult to attract and retain licensed personnel, calling into question whether current audit fees can sustainably reflect the true costs and risks of the work.

6.10 We note that while introducing a capped liability scheme confined to the audit profession in advance of wider legal reform may present some challenges, the Law Commission report explicitly identified FMC-level audits as a warranted exception.[9] In our view, the Commission's rationale—centred on public interest, trans-Tasman market realities, the massive scale of potential liability, and existing quality assurance frameworks—remains highly relevant. These benchmarks could provide a foundational basis for any future legislative adjustments.

7 Next steps

7.1 We hope this feedback is useful. Please feel free to get in touch with Shelly Musgrave, Law Reform and Advocacy Advisor (shelly.musgrave@lawsociety.org.nz) if you have any questions or wish to discuss this feedback further.

Nāku noa, nā

Jesse Savage
Vice President

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9 Law Commission, above n 7 at 8.40 – 8.50.