A review of an aspect of the process for the appointment of KiwiSaver Default Providers for the term starting 1 December 2021

Kristy P McDonald
ONZM QC

22 February 2022

CONTENTS

1. EXECUTIVE SUMMARY

1.1 I have been asked to review whether the disclosure of a potential conflict of interest by the former Chief Executive of the Financial Markets Authority (**FMA**) was appropriately managed in the process for the appointment of KiwiSaver default providers.

1.2 While I have determined that there were shortcomings in the way in which this conflict of interest was managed by the FMA and the Chief Executive, those shortcomings did not have any impact on the FMA advice to the Minister in relation to the appointment process of KiwiSaver default providers in March 2021.

1.3 The FMA's advice in relation to default KiwiSaver providers was limited to advising on whether there were any regulatory compliance issues that may affect the ability of the proposed KiwiSaver fund managers to act as default providers. The substantive evaluation of the merits of the applications that were made for appointment as a default provider was carried out independently of the FMA.

1.4 Maintenance of the law [redacted]

1.5 I have identified four significant shortcomings in the way in which the FMA and the Chief Executive managed the conflict of interest.

(a) *Failure to disclose conflict of interest to Minister*

In 2021, the FMA did not disclose the Chief Executive's conflict of interest in its advice to the Minister or otherwise when engaging with MBIE about risks relating to the default KiwiSaver provider process. It should have done so. This would have allowed the Minister to obtain any assurance that he required in relation to the FMA's management of the conflict of interest before making his decision on the appointment of default KiwiSaver providers. The Minister was denied this opportunity because he was not informed of the conflict of interest.

(b) *The FMA's record keeping in relation to conflict of interest*

The FMA's failure to keep formal records of the arrangements made to manage its Chief Executive's conflict, in relation to matters Maintenance of the law [redacted] and advice to the Minister concerning Booster's possible appointment as a default KiwiSaver provider, contravenes the Public Service Commission's *Conflicts of Interest Model Standards*.

(c) *Management of* Chief Executive *conflict*

While the Chief Executive disclosed a conflict of interest in relation to Booster as part of his initial disclosure in 2014 when he took up his position, Maintenance of the law [redacted] the Chief Executive's conflict of interest was not given the attention required and was not made known to the Chair or Board as early as it should have been.

Maintenance of the law [redacted]

(d) *Adequacy of Conflict Policy*

A Crown entity's conflict of interest policy should adequately reflect the unique position of the Chief Executive. A policy that refers to staff members' conflicts of interest being disclosed to and managed by their manager, without addressing how conflicts of the Chief Executive are to be managed, is not fit for purpose.

The fact that the FMA's policy does not do this might be explained by the fact that guidance on this particular issue is sparse.

It may be that conflict of interest policies of other public service organisations similarly fail to address the unique position of their Chief Executives. That question is outside the scope of my Review.

1.6 The shortcomings I have identified highlight the importance of conflict management of a Chief Executive given the position he or she holds in any organisation, but particularly so in a Crown entity such as the FMA.

1.7 The Chief Executive is the fulcrum between the operational staff of a Crown entity and the governance board of the entity. The staff of the entity are responsible to the Chief Executive and the Chief Executive is responsible to the Board. The Chief Executive has no line manager and, while the FMA conflicts policy provides for oversight and management of conflicts to sit with line managers, that task must naturally fall to the Chair in a case where the Chief Executive has a conflict.

1.8 The FMA plays a critical role in regulating capital markets; it operates in a small, reasonably limited network given New Zealand's size. Inevitably there will be movement across the sector by senior executives, where clients are often well-known. That makes it all the more important that sound and comprehensive polices and protocols are in place and followed, including declaring, updating and managing conflicts of interest.

1.9 Good and effective management of conflicts of interest is particularly important for a Crown regulator. If conflicts are not recognised, acknowledged and managed appropriately, they can quickly undermine the integrity of officials, the organisation's decisions, and public and business confidence in the integrity of the organisation.

1.10 For these reasons, I make the following recommendations as part of my Review.

1 ***The FMA's Conflicts of Interest Policy should be amended to make clear that the requirement in paragraph 23 (notification of subsequent decision makers) applies in the case of Chief Executive or Board member conflicts and to subsequent decision makers who are external to the FMA (such as Ministers).***

2 ***The FMA's Board should be given access to the Chief Executive's interests register.***

3 ***The FMA's Conflicts of Interest Policy should be amended to clarify that the requirement to keep formal records applies to the management of the Chief Executive's conflicts of interest.***

4 ***The FMA should carry out an audit of its compliance with the formal record keeping requirements in the Conflicts of Interest Model Standards and take any remedial steps required (such as training for staff) to ensure compliance in the future.***

5 ***The FMA's Conflicts of Interest Policy should be amended as follows.***

- ***a) The Chief Executive must immediately inform the Chair if he may have an interest in any matter.***
- ***b) If the Chair decides there is no conflict of interest requiring any conflict of interest management steps to be taken, that information must be recorded and provided to the Board.***
- ***c) If the Chair decides there is a conflict of interest requiring conflict of interest management steps to be taken:***
  - ***i. a conflict of interest management plan must be decided and recorded;***
  - ***ii. the conflict of interest management plan should address whether the matter on which the Chief Executive is conflicted is a significant matter requiring oversight by the Board or a Division of the Board;***
  - ***iii. the conflict of interest management plan must be provided to the Board;***
  - ***iv. the conflict of interest management plan must be kept under review.***
- ***d) Consideration should be given as to whether any other amendments are required to make clear that all the requirements of the Conflicts of Interest Policy apply to the Chief Executive, with such adjustments as may be necessary to reflect the involvement of the Chair and the Board in managing these conflicts.***

2. SCOPE OF THE REVIEW

2.1 By letter dated 14 December 2021 the Minister of Commerce and Consumer Affairs, the Hon Dr David Clark (**Minister**), wrote to me,[1]

> … to request your services to carry out a review of an aspect of the process for the appointment of KiwiSaver Default Providers for the term starting 1 December 2021. Under the KiwiSaver Act 2006, providers of KiwiSaver default schemes are appointed by the Minister of Finance and Minister of Commerce and Consumer Affairs (section 132 of the Act).

2.2 The Minister set out the scope of the Review as follows,

> Please review whether the disclosure of a potential conflict of interest by Rob Everett (in relation to Booster) was appropriately managed by the Financial Markets Authority (FMA) in the process for the appointment of KiwiSaver default providers.
>
> I note that the FMA's statutory role in the appointment of KiwiSaver default providers is limited. In determining whether to appoint a manager as a default KiwiSaver provider under section 132, the Ministers must seek the advice of the FMA.
>
> However, I agree with the Attorney-General that it is important to ensure that the FMA appropriately managed the conflict, especially given the FMA's pivotal role in our financial markets and the confidence investors need to have in it properly performing that role.

2.3 The Minister elaborated on the process followed for the appointment of KiwiSaver default providers,

> Ministry officials ran a competitive tender process to inform the Ministers' decision. An independent evaluation panel was appointed to evaluate the proposals, comprising people with a mix of investment, funds management, consumer and government expertise.
>
> The financial soundness of the applicants was considered during the assessment process and financial due diligence was undertaken by PwC on all the selected providers.
>
> A commercial barrister (Peter Castle QC) served as an independent probity advisor for the project, and was engaged throughout the procurement process. He concluded that the RFP process was carried out in accordance with good public sector procurement practice and with due and proper regard for probity principles.
>
> As required by section 132(4), I sought and was provided with advice from the FMA on the appointment decision. The FMA advised that it was not aware of any issues that would affect the ability of any of the six recommended providers to manage KiwiSaver default schemes. Maintenance of the law Maintenance of the law

2.4 I address the FMA's limited role in the default provider appointment process and its effect on my Review in the section immediately below.

2.5 In setting the scope of the Review, the Minister referred to and attached a letter to him from the Attorney-General, the Hon David Parker, dated 7 December 2021.[2] In that letter the Attorney-General referred to articles written by Tim Hunter in the National Business Review relating to Mr Everett's conflict of interest in relation to Booster and to concerns raised about certain practices at Booster. The concerns raised in the media about certain practices at Booster are outside the scope of my Review. However, the Minister has referred to the Attorney-General's letter in setting the scope of my Review, to underscore the importance of ensuring that the FMA appropriately managed Mr Everett's conflict in the process for the appointment of KiwiSaver default providers.

---

1 Letter attached as Appendix 1 to this report.
2 Letter attached as Appendix 2 to this report.

2.6 The categories of documents I have obtained from MBIE and the FMA in carrying out my Review include the following.

(b) MBIE's briefing to Ministers on the appointment of KiwiSaver default providers dated 20 April 2021, with annexures including:
   i. Probity Assurance Report by Peter Castle, Barrister.
   ii. Due Diligence Report by PricewaterhouseCoopers (**PWC**).
   iii. FMA advice under s 132(4) of the KiwiSaver Act.

(c) FMA documents relating to the provision of its advice under s 132(4) of the KiwiSaver Act.

(d) FMA documents on its policies, practices and procedures for the identification, disclosure, and management of conflicts of interest.

(e) FMA documents relating to the identification, disclosure, and management of Mr Everett's conflict of interest in relation to Booster, both generally and on any particular matters concerning Booster.

(f) Maintenance of the law [redacted]

2.7 I have also conducted a number of interviews in carrying out my Review. I am grateful to those interviewed for making themselves available at short notice, to allow me to complete my Review within the timeframe set by the Minister, and for the assistance of MBIE and the FMA for their prompt responses to my requests for documentation.

2.8 My findings in this Review must necessarily be made on the assumption that I have been provided with all relevant documentation in the categories of documents that I requested from MBIE and the FMA.

3. FMA ADVICE UNDER SECTION 132(4) OF THE KIWISAVER ACT

3.1 Section 132 of the KiwiSaver Act provides as follows.

> **132 Appointment of default providers**
>
> (1) The Minister may appoint 1 or more managers for a specified term to provide—
> (a) a default KiwiSaver scheme that is specified in the instrument of appointment; and
> (b) a default investment product of that default KiwiSaver scheme that is specified in the instrument of appointment.
>
> (2) The appointment may be made subject to such terms and conditions as the Minister considers fit.
>
> (3) The instrument of appointment must—
> (a) identify the default KiwiSaver scheme and the default investment product of the scheme:
> (b) state any terms and conditions of the appointment:
> (c) state any prescribed information.
>
> **(4) In determining whether to appoint a manager as a default KiwiSaver provider under this section, the Minister must seek the advice of the FMA.**
>
> (5) A restricted scheme is not eligible to be a default KiwiSaver scheme.
>
> (Emphasis added.)

Nature of the advice

3.2 The KiwiSaver Act is silent on the nature of the advice the Minister must seek from the FMA under s132(4).

3.3 The FMA has taken the view that its advice under s132(4) is limited to whether there are matters concerning the regulatory compliance of any of the proposed default providers that may affect their ability to act as default providers. Broadly speaking they would advise whether there are "fitness and propriety" issues the FMA is aware of as the industry regulator that may mean the appointment of one or more of the proposed default providers is inappropriate.

3.4 On this view, it is not the role of the FMA to provide the Minister with advice on the substantive merits or demerits of the applications nor to provide advice of any kind other than in relation to relevant regulatory compliance issues.

3.5 This approach predates the 2021 default provider appointment process. It was the approach taken by the FMA to the 2014 default provider process.

3.6 Clearly from the material I have reviewed this approach is understood and approved of by MBIE as the government department responsible for managing the default provider appointment process.[3] This was reflected in the 2021 appointment process as follows:

(a) the substantive merits of the applications were reviewed and assessed by an independent evaluation panel appointed by MBIE;
(b) the Financial Due Diligence Report was provided by PWC to MBIE;
(c) the Probity Assurance Report was provided by Peter Castle to MBIE.
(d) emails between MBIE and FMA officials reinforced the limited nature of the advice required to be provided by the FMA and the FMA's advice was limited to regulatory compliance issues accordingly; and
(e) the briefing to Ministers making recommendations on the appointment of the default providers based on this information was made by MBIE.

---

[3] This was discussed between MBIE and the FMA in 2013 in advance of the 2014 default provider appointment process. See email from Privacy of natural persons at MBIE dated 10 December 2013.

3.7 It is not necessary for me to address whether it is correct that the FMA's advisory role under s132(4) of the KiwiSaver Act is limited in this way. I accept there are good arguments in favour of the approach that has been taken. The FMA has the statutory responsibility for monitoring and enforcing the regulatory compliance of KiwiSaver default providers. It may be thought undesirable for the organisation responsible for overseeing the regulatory compliance of KiwiSaver default providers (the FMA) to have provided the substantive advice recommending their appointment.

3.8 In any event, as a matter of fact, the FMA's role in providing advice to the Minister under s132(4) of the KiwiSaver Act in the 2021 appointment process (and previously) was limited to advising on whether there were any regulatory compliance issues that may affect the ability of the proposed KiwiSaver fund managers to act as default providers.[4]

Effect on the Review

3.9 The fact that the substantive evaluation of the applications for appointment as a default provider was carried out independently of the FMA means that no concern arises about Mr Everett's conflict of interest affecting that evaluation. Maintenance of the law [redacted]

Maintenance of the law [redacted]

3.10 Maintenance of the law [redacted]

3.11 Maintenance of the law [redacted]

3.12 Maintenance of the law [redacted]

---

[4] The FMA's letter of advice dated 18 March 2021 is attached as Appendix 3 to this report.

4. FACTUAL SUMMARY

Booster

4.1 Booster describes itself as an independent financial services company based in Wellington. It manages a number of investment funds, including a default KiwiSaver fund, under the auspices of Booster Investment Management Limited.

4.2 Booster Investment Management Limited was known as Grosvenor Investment Management Limited until the company changed its name on 16 September 2016.

4.3 Grosvenor Investment Management Limited was appointed a default KiwiSaver provider in 2014. The FMA's 2014 advice on the proposed default providers, including in relation to Grosvenor, was given on 11 February 2014. As addressed above, the FMA's advice was limited to the question of whether there were any relevant regulatory compliance issues in relation to any of the proposed appointees. None were raised by the FMA in relation to any of the proposed appointees and Grosvenor was subsequently appointed as a default KiwiSaver provider, along with eight other providers, as from 1 July 2014.

The FMA's employment of Mr Everett

4.4 Mr Everett commenced his employment as Chief Executive of the FMA in or about February 2014. There is no suggestion in the materials I have received that Mr Everett had any involvement in the advice that went to the Minister on 11 February 2014.

4.5 As part of the employment process Mr Everett was required to make a conflicts of interest disclosure. Unfortunately, the FMA was not able to locate Mr Everett's disclosure form that he was required to complete at the time of his employment. The FMA did provide me with a copy of Mr Everett's disclosure on his conflicts of interest register held on Datacom which relevantly states:

> My brother in law (Gary Scott) is the CFO at Grosvenor Financial Services Group – a regulated investment manager (now called Booster).

4.6 On the information provided to me it is not possible to be certain precisely when this disclosure was entered into Datacom. Despite this gap in the information, I am satisfied that Mr Everett made the disclosure at the time of his employment in 2014. The initial disclosure was clearly made when Booster was still called Grosvenor (i.e. prior to September 2016). More specifically, in an email Mr Everett sent to Liam Mason (then the FMA's General Counsel) on 29 October 2014, Mr Everett stated that:

> I recorded on our conflicts register when I joined that the CFO at Grosvenor is married to my sister-in-law.

4.7 Privacy of natural persons [redacted]

4.8 Nevertheless, Mr Everett had made disclosure that his brother-in-law was the CFO at Grosvenor (latterly Booster) at the time of his employment, and this interest by itself was sufficient to require careful management of conflict issues by the FMA in its dealings with Grosvenor/Booster.

Maintenance of the law

4.9 Maintenance of the law

4.10 Maintenance of the law

4.11 Maintenance of the law

Maintenance of the law

4.12 Maintenance of the law

4.13 Maintenance of the law

4.14 Maintenance of the law

Maintenance of the law

4.15 Maintenance of the law

[5] Maintenance of the law

Maintenance of the law

Maintenance of the law

4.16 Maintenance of the law

4.17 Maintenance of the law

4.18 Maintenance of the law

4.19 Maintenance of the law

4.20 Maintenance of the law

4.21 Maintenance of the law

[redacted] Maintenance of the law

[redacted] Maintenance of the law

4.22 Maintenance of the law [redacted]

4.23 Maintenance of the law [redacted]

4.24 Maintenance of the law [redacted]

4.25 Maintenance of the law [redacted]

Maintenance of the law [redacted]

4.26 Maintenance of the law [redacted]

4.27 Maintenance of the law [redacted]

4.28 Maintenance of the law [redacted]

4.29 Maintenance of the law [redacted]

Maintenance of the law [redacted]

4.30 Maintenance of the law [redacted]

4.31 Maintenance of the law [redacted]

Maintenance of the law

4.32 Maintenance of the law

Maintenance of the law

4.33 Maintenance of the law

4.34 Maintenance of the law

4.35 Maintenance of the law

4.36 Maintenance of the law

4.37 Maintenance of the law

4.38 Maintenance of the law

Management of Mr Everett's conflict of interest – advice to the Minister

4.39 On 9 March 2021, Mr Mason received a letter from James Hartley, General Manager, Commerce, Communications and Consumers, at MBIE seeking, on behalf of the Minister, the FMA's advice under s132(4) of the KiwiSaver Act in determining whether to appoint a manager as a default KiwiSaver provider. The FMA was provided with the shortlist of proposed appointees as a necessary part of providing this advice. Booster was one of the proposed default providers named on the shortlist.

4.40 The FMA's advice was requested by Friday 19 March 2021. This was an extremely tight timeframe, which I will comment on further below, but needs to be seen in the context where:

(a) the FMA had previously been made aware that the default provider appointment process was under way, including the appointment of an independent evaluation panel to carry out the substantive assessment of the applications received;
(b) the FMA had previously been made aware that its advice under s132(4) would be sought as part of this process; and
(c) it was understood, as between MBIE and the FMA based on the 2014 default provider appointment process, that the FMA's advice was to be limited to to whether there were matters concerning the regulatory compliance of any of the proposed default providers that may affect their ability to act as default providers.

4.41 Mr Mason, as Director of Regulation, was responsible for overseeing the provision of the advice to the Minister. Mr Mason told me that because of the limited nature of the advice, it was not a matter that would normally be elevated above his level as Director of Regulation i.e. to the Chief Executive or the Board. Maintenance of the law [redacted]

4.42 The question that confronted Mr Mason was whether the FMA should refer Maintenance of the law [redacted] in its advice to the Minister. Of particular concern was Maintenance of the law [redacted]

4.43 Mr Mason said that he would have discussed this matter with Mr Everett, but he could not do so because Mr Everett's conflict of interest meant that he was not involved in the FMA's provision of advice on the proposed default providers, Maintenance of the law [redacted]

4.44 Mr Mason instead spoke with Mr Todd about what, if anything, should be disclosed about Maintenance of the law [redacted] in the FMA's advice letter. Mr Mason saw Mr Todd as stepping into the Chief Executive's shoes in this respect, in circumstances where Mr Everett could not be involved. In speaking with Mr Todd, Mr Mason was not making a report to the Board as a whole and Mr Todd confirmed that he did not raise the issue with the Board.

4.45 Mr Todd understood that Mr Everett's conflict of interest was the reason that Mr Mason was speaking with him, but it was not the subject of the discussion. The subject of the discussion was what, if anything, the FMA should say Maintenance of the law [redacted] in its advice to the Minister. Mr Todd's view was that this should be referred to in the advice to the Minister, and the advice that was sent by the FMA on 18 March 2021 (with Mr Mason as the signatory), included the following information concerning Maintenance of the law [redacted]

Maintenance of the law [redacted]

Maintenance of the law [redacted]

4.46 The letter did not advise the Minister that the FMA's Chief Executive had a conflict of interest in relation to Booster, the nature of the conflict, or the steps taken by the FMA to manage the conflict. Mr Todd stated in his interview with me that, looking back on the matter now, this disclosure should have been made to the Minister.

4.47 In fairness to Mr Todd, I note that he was spoken to by Mr Mason about a specific matter relating to the advice – the question of what should be disclosed Maintenance of the law [redacted] – in circumstances where the timeframe already put in place by officials for the provision of the advice was extremely tight.

4.48 Notwithstanding the limited scope of the advice, a statutory requirement to provide advice to a Minister of the Crown on the subject of the appointment of default KiwiSaver providers is a significant matter. I consider the matter of the FMA's advice to the Minister should have been elevated to the Board, or at least a Division of the Board created for that purpose. This was all the more important in circumstances where the Chief Executive had a conflict of interest.

4.49 Further, time should have been requested for this to occur if necessary. A more deliberate process may have assisted in identifying the need to make disclosure of the conflict to the Minister.

4.50 On 9 April 2020, MBIE emailed the FMA with a draft copy of the briefing to go to Ministers on the proposed default provider appointments. On 13 April 2020, there was a short email exchange between FMA and MBIE officials about the draft, including about matters that might be included as part of the section of the briefing addressing risks. The issue of Mr Everett's conflict of interest was not raised in this context either. Mr Mason confirmed that disclosure of Mr Everett's conflict was not made to the Minister, MBIE, or any other interested party outside of the FMA (such as Mr Castle, who was responsible for preparing a probity assurance report in respect of the default prover appointment process), at any point in the default provider appointment process.

4.51 As a result, even though the briefing paper that went to Ministers on 20 April 2020 addressed various areas of risk and included a Probity Assurance Report prepared by Mr Castle, the Minister was not advised that the Chief Executive of the FMA had a conflict of interest in relation to one of the proposed default providers before making his decision based, in part, on advice provided by the FMA.

5. LEGISLATIVE CONTEXT AND GUIDANCE IN RELATION TO CONFLICTS OF INTEREST

Legislation

5.1 The FMA is an independent Crown entity,[8] which is a type of statutory Crown entity under the Crown Entities Act 2004.[9]

5.2 The FMA's Board must consist of not fewer than five, and not more than nine, members.[10] The Board is the governing body of the FMA, with the authority in the FMA's name, to exercise the powers and perform the functions of the FMA.[11] All decisions relating to the operation of the FMA must be made by, or under the authority of, the Board.[12]

5.3 The Board may delegate its functions and powers, other than any functions or powers that are specified as non-delegable, to the Chief-Executive or other employees of the FMA.[13]

5.4 Sections 62 to 72 of the Crown Entities Act contains detailed provisions for the identification, disclosure, and management of conflicts of interest of members of the board of a statutory Crown entity. Members interests, as defined in s 62, must be recorded in an interests register kept by the entity and to the entity's chairperson.[14]

5.5 These provisions apply to the members of the FMA Board, but not to the Chief Executive or other employees of the FMA,[15] even though the Chief Executive and other employees of the FMA may be delegated the functions and powers of the Board (other than those specified as non-delegable). The Crown Entities Act makes no provision for the identification, disclosure, or management of conflicts of interest.

5.6 The lack of statutory provision for conflicts of interest of employees of public organisations, who are responsible for the operational execution of their organisations' functions and powers, is not unique to statutory Crown entities. The Cabinet Manual contains conflict of interest provisions that apply to Ministers of the Crown, including the public disclosure of relevant interests. The Public Service Act 2020, which applies to Chief Executives and other employees of government departments who are responsible to those Ministers, does not contain conflict of interest provisions that apply to Chief Executives and other employees of those departments.

Guidance

5.7 The State Services Commission (now Te Kawa Mataaho Public Service Commission) has published *Conflicts of Interest Model Standards*.[16] Specifically in relation to statutory Crown

---

8 Crown Entities Act, Part 3 of Schedule 1.
9 Crown Entities Act, s 7(1)(a).
10 Financial Markets Authority Act 2011, s 10.
11 Crown Entities Act, s 25(1).
12 Crown Entities Act, s 25(2).
13 Crown Entities Act, s 73.
14 Crown Entities Act, s 64.
15 Crown Entities Act, s 10 (definition of "member") and ss 62 to 72.
16 conflicts-of-interest-model-standards.pdf (publicservice.govt.nz)

entities, the State Services Commission has also published *Resource for Preparation of Governance Manuals*,[17] which includes a chapter on members' interests and conflicts.[18]

5.8 The *Conflicts of Interest Model Standards* state that:

> The main goal of identifying and managing conflicts of interest is to ensure that all operational decisions are made – and are seen to be made – legitimately, justifiably, independently and fairly.

5.9 In relation to senior leaders, the *Conflicts of Interest Model Standards* state:

> Those in senior roles (such as Board members or senior managers) are expected to set an example in identifying and disclosing any interests relevant to their work, given their level of influence on decisions about matters of public significance or value and their higher public profile.

5.10 The *Conflicts of Interest Model Standards* provide more detailed requirements, including the following.

- There are policies and processes in place for disclosing, recording and responding to conflicts of interest. Policies and processes reflect the organisation's particular functions, context and statutory requirements.
- There is a process for managing conflicts of interest which includes what constitutes a conflict, options for managing it (including considering whether or not an individual should continue to be involved with work in the potential area of conflict), who makes decisions, and potential consequences of non-compliance.
- There are clear and documented responsibilities and actions for managers receiving, assessing, managing and monitoring disclosed conflicts of interest.
- There are support mechanisms for assisting managers in reviewing and improving their skills in identifying and avoiding or managing conflicts.
- The arrangements for dealing with conflicts are clearly recorded in formal documents to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed.
- Decision-making processes at all stages can be audited and justified

The position of the Chief Executive

5.11 The *Conflicts of Interest Model Standards* apply to a Chief Executive of a statutory Crown entity – that is clear from the text quoted above in relation to senior leaders. The *Conflicts of Interest Model Standards* do not expressly address the unique position of a Chief Executive in the context of managing conflicts of interest.

5.12 The *Conflicts of Interest Model Standards* emphasise the key role of managers in receiving, assessing, managing and monitoring disclosed conflicts of interest, but the Chief Executive does not have a manager within the operational organisation of a Crown entity. The Chief Executive is, however, responsible to the Board of the entity.

---

[17] The guidance in the Resource Manuals applies to statutory Crown entities: Crown agents, autonomous Crown entities (ACEs) and independent Crown entities (ICEs) and their subsidiaries, excluding District Health Boards (DHBs) and Corporations Sole. Guidance-Statutory-Crown-Entities-Governance-Manuals-March2014_0.pdf (publicservice.govt.nz)

[18] Chapter 7.

5.13 The unique position of a Chief Executive is reflected in the following summary in the *Resource for Preparation of Governance Manuals* referred to above.

> One of the primary purposes of the Crown Entities Act 2004 (CE Act) is "to clarify accountability relationships between Crown entities, their board members, their responsible Ministers on behalf of the Crown, and the House of Representatives" (s. 3 CE Act) in order to assist good governance of the entity.
>
> In simple terms this could be summarised as:
>
> • the responsible Minister is accountable to the House of Representatives;
>
> • the governing board of the entity is responsible to the Minister (usually through the chair), recognising that elements of this will depend on the category of entity concerned;
>
> • the entity's chief executive is responsible to the board; and
>
> • the staff of the entity are responsible to the chief executive.

5.14 This summary shows that the Chief Executive is the fulcrum between the operational staff of a Crown entity and the governance board of the entity. The staff of the entity are responsible to the Chief Executive and the Chief Executive is responsible to the Board.

5.15 A Crown entity's conflict of interest policy should adequately reflect this unique position of the Chief Executive. A policy that refers to staff members' conflicts of interest being disclosed to and managed by their manager, without addressing how conflicts of the Chief Executive are to be managed, is not fit for purpose.

5.16 The *Resource for Preparation of Governance Manuals* is directed at providing guidance for members of Crown entity boards. It contains a detailed discussion of the conflict or interest provisions in the Crown Entities Act that apply to members of boards but does not address staff member conflicts or, specifically, Chief Executive conflicts.

5.17 The *Conflicts of Interest Model Standards* refer to guidance provided by the Office of the Auditor-General, *Managing conflicts of interest: A guide for the public sector*.[19] Most relevantly, for the purposes of this Review, the Auditor-General's guidance says this in relation to the disclosure of a conflict of interest:[20]

> … the matter should be raised and discussed with a relevant person as soon as the potential for a conflict of interest is identified. For most staff, the relevant person will be their manager (or another designated person in the public organisation). For a chief executive, the relevant person might be the board chairperson, responsible Minister, or another senior person in the public organisation. Board members should make a disclosure to the chairperson or deputy chairperson.
>
> There might be an applicable law or internal policy that requires a disclosure to be lodged in a register. It is always wise to record any disclosure in writing anyway.

5.18 In my view, disclosure of Chief Executive conflicts of interest should always be made to the entity's Chair and to the Board. If the matter in respect of which the Chief Executive is conflicted is a significant matter, it should be overseen by the Board or a Committee of the Board (or a Division of the Board in the FMA's case). I elaborate on this below.

---

[19] Managing conflicts of interest: A guide for the public sector (oag.parliament.nz)

[20] *Managing conflicts of interest: A guide for the public sector*, paragraphs 4.12 and 4.13.

6. THE FMA'S POLICIES AND PRACTICE IN THIS CASE

Relevant policies

6.1 The FMA's Conflicts of Interest policy that was in place between January 2020 and August 2021 is attached as Appendix 4 to this report. This period includes the time during which the FMA was required to provide advice to the Minister on the proposed default KiwiSaver providers.

6.2 The FMA's Conflicts of Interest policy that has been in place since August 2021 is attached as Appendix 5.

6.3 Both policies require FMA staff to disclose potential conflicts of interest in the FMA's Interests Register held on Datacom. Both require staff who are concerned that they may have a conflict of interest to raise the matter with their manager and for a record to be kept of how any conflict has been managed. I quote from the policy that was in place at the time the FMA gave its advice on the default provider appointments in 2021 (Appendix 4).

> ***Process for managing conflicts***
>
> 23. Staff who believe they may have an interest in respect of any assigned work must immediately inform his or her manager of the interest, even if he or she has already disclosed the interest on the Interests Register. Staff have the responsibility for ensuring the FMA understands the full nature of any interest.
>
> 24. Where an interest has been identified and disclosed to a manager, the manager must consider the appropriate steps to be taken to adequately avoid or mitigate a Conflict of Interest. Decisions about managing conflicts of interest must be guided by the need for FMA to be respected and trusted to perform its functions with integrity, honesty, transparency, independence, good faith and in a spirit of service to the public.
>
> 25. Where it is not clear if there is a conflict or how a conflict should be managed, the relevant manager should seek advice from the General Counsel or the Head of Policy & Governance.
>
> 26. In general, the appropriate response will be to ensure that Staff do not participate in any work relating to the matter in which a Conflict of Interest has been identified. However there is a range of options for avoiding or mitigating a Conflict of Interest. This includes:
>
> 26.1. imposing additional oversight or review over the relevant person's work in relation to a matter;
>
> 26.2. re-assigning certain tasks or duties to another person;
>
> 26.3. withholding confidential information, or placing restrictions on access to information;
>
> 26.4. transferring the person to another position or project; and
>
> 26.5. relinquishing the private interest from which the Conflict of Interest arises.
>
> 27. Managers must ensure that appropriate and proportionate steps are taken to check whether or not any Staff who might be involved in/receive information in relation to a matter, might be conflicted. Managers may also put in place guidelines and procedures for dealing with conflicts of interest which might arise from the work undertaken by their team. The Policy and Governance team can provide advice on these procedures.
>
> 28. The fact that an interest has been disclosed in the interests register does not satisfy the need to further identify and manage any Conflict of Interest that arises for any Staff.

Recording and reporting requirements

29. Decisions on how to deal with a conflict must be recorded by the relevant manager, including details of the facts, who undertook the assessment and how, and what action was taken (Conflict Mitigation Record).

30. The Conflict Mitigation Record should be saved in Datacom. Managers will need to do this by going to the 'Reportees' page and copying the Record into the 'Risk Mitigation' box for the relevant employee.

Assurance

31. The Interests Register and Conflict Mitigation Records may be accessed and reported to senior managers from time to time to monitor compliance with this policy, to assess potential conflicts of interest and to assess whether mitigations are being applied consistently and appropriately.

32. As noted at paragraph 9 above, Staff will be required to certify their disclosures on a periodic basis (at least annually).

33. Anonymised information regarding compliance with this policy will be reported to ExCo, ARC and the Board on a periodic basis.

6.4 As Chief Executive, Mr Everett did not have a manager to whom he was required to disclose his conflict of interest in the terms expressed in this Conflicts of Interest policy. The policy should have expressly required the Chief Executive to make disclosure to the Chair, and for a plan on how to manage the conflict to be agreed with the Chair, with that information then to be provided to the Board.

6.5 The FMA's Regulatory Delegations Policy requires certain sensitive regulatory matters to be referred to the Board, notwithstanding that the general power to exercise the regulatory function concerned has previously been delegated to the Chief Executive or other FMA employees. The Regulatory Delegations Policy is not to be confused with, and is not a substitute for, a robust conflicts of interest policy. Given the unique position of the Chief Executive, I simply note that a conflict of interest on the part of the Chief Executive is a sensitive matter, the management of which requires oversight by the Board. Maintenance of the law [redacted]

6.6 The requirement that sensitive regulatory matters should be referred to the Board is consistent with my view that matters concerning a conflict of interest on the Chief Executive's part, and how it is to be managed, should be provided to the Board. The Conflicts of Interest Policy should include this requirement.

The FMA's practice in this case

6.7 At the time of his employment Mr Everett disclosed that his brother-in-law was CFO at Booster. This was recorded in the Interests Register held on Datacom. However, neither Mr Todd nor the Board as a whole were given access to this information on the Register. They should have been.

6.8 Maintenance of the law [redacted]

Maintenance of the law [redacted]

6.9 Maintenance of the law [redacted]

Maintenance of the law [redacted]

6.10 In relation to the FMA's 2021 advice to the Minister in relation to KiwiSaver default providers, Mr Everett's conflict of interest was managed as follows:

(a) Mr Everett was to have no involvement in the provision of the advice.
(b) Mr Mason was the senior FMA manager responsible for the provision of the advice. Mr Mason was aware of Mr Everett's conflict.
(c) Mr Mason spoke to Mr Todd about the advice in the absence of Mr Everett (due to his conflict). Mr Todd was aware of Mr Everett's conflict.

6.11 These conflict management steps were not recorded in a Conflict Mitigation Record.[21] Maintenance of the law [redacted] They were not recorded in papers to the Board. The Board (other than Mr Todd as Chair on 17 April 2020) was not made aware of Mr Everett's conflict of interest in relation to Booster prior to media reporting on the matter.

6.12 I have already noted that records in relation to Mr Everett's disclosure of the conflict at the time of his employment are incomplete, although I am satisfied the disclosure was made. The FMA was also unable to provide me with certifications made by Mr Everett in terms of paragraph 32 of the Conflicts of Interest Policy referred to above.

6.13 This reflects a casual approach by the FMA, contrary to the *Conflicts of Interest Model Standards*, towards ensuring that in relation to its most senior employee:

> … arrangements for dealing with conflicts are clearly recorded in formal documents to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed.

Managing Chief Executive conflicts

6.14 I have concluded that the FMA's Conflict of Interest Policy should expressly address the unique position of the Chief Executive and I make recommendations on this below. The fact that the FMA's policy does not do this might be explained by the fact that guidance on this particular issue is sparse. Paragraph 4.12 of the Auditor-General's guidelines, quoted above, contains the only direct reference in the materials referred to in the *Conflicts of Interest Model Standards* on the need for Chief Executives to revert to their Board Chairpersons on conflict of interest issues, and then only briefly.

---

[21] Refer paragraphs 29 and 30 of the FMA's Conflict of Interest Policy.

6.15 It may be that conflict of interest policies of other public service organisations similarly fail to address the unique position of their Chief Executives. That question is outside the scope of my Review.

6.16 In any event, while guidance on the point is sparse, it cannot be suggested that the *Conflicts of Interest Model Standards* do not apply to the Chief Executive of a Crown entity. Those standards were not met in this case in relation to conflict of interest record keeping in particular.

6.17 This is not a mere formality. As the *Conflicts of Interest Model Standards* state, the main goal of conflict identification and management is to:

> … ensure that all operational decisions are made – ***and are seen to be made*** – legitimately, justifiably, independently and fairly. (Emphasis added.)

6.18 The *Conflicts of Interest Model Standards* go on to state that the need to formally record arrangements to deal with conflicts of interest is to:

> … enable the organisation concerned ***to demonstrate***, if necessary, that a specific conflict has been appropriately identified and managed. (Emphasis added.)

6.19 Good management of conflicts of interest should ensure that decisions are not improperly influenced by conflicting interests and should avoid any perception by fair minded observers that decisions may have been improperly influenced by conflicting interests. Formal record keeping is a necessary step for an organisation to be able to demonstrate good management of conflicts of interest.

6.20 Formal record keeping is also the culmination of a process by which the persons concerned are required to identify, and specify, the steps necessary to ensure the conflict of interest is properly managed. That is, formal record keeping is an aid to good conflict management.

6.21 Maintenance of the law [redacted]

6.22 A regulatory agency must meet the highest standards of conflict management to ensure that the regulated sector and the public as a whole can have the utmost confidence in the agency's performance of its functions, powers, and duties. This is certainly true of the FMA which is responsible for the regulation of New Zealand's financial markets. The FMA must conduct itself in a way that ensures all market participants, consumers, and the general public can be satisfied that personal relationships and interests play no part in its regulatory oversight of our financial markets.

6.23 In this context, I am not easily persuaded that the distinction that was put to me is correct and that it is appropriate for a Chief Executive to have involvement of any kind in relation to a market participant in respect of whom the Chief Executive has a conflict of interest. However, it is not necessary for me to resolve this point as part of this Review. Whether the distinction put to me is right or wrong, it is essential that the question of whether a conflict arises on a matter of any kind (and if so, how it should be managed), must be formally recorded. In order to be able to record these matters formally, those involved are first required to decide whether it is appropriate for the Chief Executive to be personally involved in the particular matter and, if so, how the Chief Executive may be involved.

6.24 The involvement of the Chair in this process is essential given that all FMA staff are responsible to the Chief Executive. The Board must be informed in turn, and the Board should intervene if it considers the decisions made by the Chair on whether there is a conflict and, if so, how it should be managed, are incorrect or insufficient.

6.25 A key risk that this process is intended to address is the risk that staff may be perceived as tailoring their views or work on a matter in which their Chief Executive's personal interests are engaged in order to please the Chief Executive.

6.26 One answer to this problem is to keep staff in ignorance of the Chief Executive's conflict. This may be practically impossible where the matter is of a kind in which the Chief Executive would ordinarily be involved but for a conflict. It also means that staff may involve the Chief Executive in communications that the Chief Executive should be excluded from, due to their ignorance of the conflict.

627 The better answer is to have the Chair involved in the management of the conflict of interest and to ensure the Board and relevant staff members are made aware of the conflict management plan that is set to manage the Chief Executive's conflict. This is to provide assurance to those staff members, and to any interested parties and external observers, that a person to whom the Chief Executive is responsible is involved in managing the conflict of interest. Achieving this assurance requires the Chair to be involved in setting the conflict management plan. It also requires consideration, as part of setting the plan, of whether the matter in respect of which the Chief Executive is conflicted is a significant matter that should be overseen by the Board going forward. This oversight, if appropriate, could be carried out by a Committee or Division of the Board rather than the Board as a whole.

6.28 These steps should have been taken in relation to the significant matters addressed in this report: Maintenance of the law [redacted] the FMA's advice to the Minister.

Public disclosure of interests?

6.29 In an article written for the National Business Review that is referred to in the Attorney-General's letter (Appendix 2), Tim Hunter raised as possibilities for discussion whether the FMA should have a publicly disclosed interests register akin to Parliament's Register of Members' Interests or a public disclosure statement each time conflict management is required.

6.30 There are advantages to these proposals, but they would be a significant step that would need to be addressed following a review of the issue as it applies across the public sector as a whole. While conflict management is a matter of acute importance for the FMA, there are many other government departments and entities which also make decisions that affect significant commercial interests.

6.31 The proposals discussed would be a significant extension of the conflict of interest provisions in the Crown Entities Act as it presently stands. I have also looked at the policy of the Australian Securities and Investments Commission (**ASIC**) on *Avoiding Conflicts of Interest and Improper use of Information* as a comparator on this point. That policy does not require public disclosure of the interests of ASIC's staff.

6.32 I recommend changes to the FMA's Conflicts of Interests policy below, but the issue of public disclosure of FMA member and staff interests is a matter that would have to be the subject of a broader review.

KEY FINDINGS AND RECOMMENDATIONS

Management of Mr Everett's conflict of interest in relation to the FMA's advice to the Minister

7.1 Mr Everett's conflict of interest in relation to Booster did not influence the FMA's advice to the Minister in its letter dated 18 March 2021 in relation to default KiwiSaver providers.

7.2 The FMA's advice in relation to default KiwiSaver providers was limited to advising on whether there were any regulatory compliance issues that may affect the ability of the proposed KiwiSaver fund managers to act as default providers. The substantive evaluation of the merits of the applications that were made for appointment as a default provider was carried out independently of the FMA.

7.3 Maintenance of the law [redacted]

7.4 Mr Everett was not involved in the provision by the FMA of its advice to the Minister. This was the correct approach for the FMA to take as a result of Mr Everett's conflict of interest in relation to Booster.

7.5 Maintenance of the law [redacted]

7.6 Maintenance of the law [redacted]

7.7 Maintenance of the law [redacted]

7.8 Maintenance of the law [redacted]

7.9 The FMA did not disclose Mr Everett's conflict of interest in its advice to the Minister or otherwise when engaging with MBIE about risks relating to the default KiwiSaver provider process. It should have done so. This would have allowed the Minister to obtain any assurance that he required in relation to the FMA's management of the conflict of interest before making

his decision on the appointment of default KiwiSaver providers. The Minister was denied this opportunity because he was not informed of the conflict of interest.

7.10 Relevant to this, paragraph 23 of the FMA's current Conflicts of Interest Policy provides that FMA managers should consider and agree with staff follow up actions including:

> notification to subsequent decision makers that a conflict had been raised in relation to a matter, with a summary of how the conflict was dealt with.

7.11 ***Recommendation***

> ***The FMA's Conflicts of Interest Policy should be amended to make clear that the requirement in paragraph 23 (notification of subsequent decision makers) applies in the case of Chief Executive or Board member conflicts and to subsequent decision makers who are external to the FMA (such as Ministers).***

The FMA's record keeping in relation to Mr Everett's conflict of interest

7.12 Mr Everett disclosed that his brother-in-law was CFO at Booster at the time of his employment by the FMA. This was recorded in the Interests Register relating to Mr Everett held on the Datacom Register. However, neither Mr Todd as Chair nor the Board as a whole, were given access to this information on the Register. The formal record kept by the FMA of Mr Everett's conflict of interest was not accessible by those to whom Mr Everett was responsible.

7.13 Maintenance of the law [redacted]

Maintenance of the law [redacted]

7.14 Mr Everett's conflict of interest was managed in the following way in relation to the FMA's 2021 advice to the Minister on default KiwiSaver providers.

(d) Mr Everett was not involved in the provision of the advice.
(e) Mr Mason was the senior FMA manager responsible for the provision of the advice. Mr Mason was aware of Mr Everett's conflict.
(f) Mr Mason spoke to Mr Todd about the advice in the absence of Mr Everett (due to his conflict). Mr Todd was aware of Mr Everett's conflict.

7.15 These conflict management steps were not recorded in a Conflict Mitigation Record.[22] Maintenance of the law Maintenance of the law [redacted] They were not recorded in papers to the Board. The Board (other than the Chair on 17 April 2020) was not made aware of Mr Everett's conflict of interest in relation to Booster prior to media reporting on the matter.

7.16 The FMA's failure to keep formal records of the arrangements made to manage its Chief Executive's conflict, in relation to matters Maintenance of the law and advice to the Minister concerning Booster's possible appointment as a default KiwiSaver

[22] Refer paragraphs 29 and 30 of the FMA's Conflicts of Interest Policy at Appendix 4.

provider, contravenes the Public Service Commission's *Conflicts of Interest Model Standards* which require that:

> … arrangements for dealing with conflicts are clearly recorded in formal documents to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed.

7.17 ***Recommendations***

> ***The FMA's Board should be given access to the Chief Executive's interests register.***
>
> ***The FMA's Conflicts of Interest Policy should be amended to clarify that the requirement to keep formal records applies to the management of the Chief Executive's conflicts of interest.***
>
> ***The FMA should carry out an audit of its compliance with the formal record keeping requirements in the Conflicts of Interest Model Standards and take any remedial steps required (such as training for staff) to ensure compliance in the future.***

The FMA's Conflicts of Interest Policy

7.18 The FMA's Conflicts of Interest Policy does not adequately address the unique position the Chief Executive holds within a statutory Crown entity.

7.19 This is in the context where guidance for Crown entities in relation to Chief Executive conflicts is sparse. However, the requirements of the *Conflicts of Interest Model Standards* apply to Chief Executives as well as to other employees of Crown entities. The FMA's Conflicts of Interest Policy should be amended to better ensure compliance with those standards in relation to conflicts of its Chief Executive.

7.20 The involvement of the Chair in setting the management plan in relation to any Chief Executive conflicts of interest is essential.

7.21 The Board should be aware of any conflicts of interest the Chief Executive has and how those conflicts of interest are being managed, generally through access to the Interests Register, and in relation to particular matters as and when they arise. If the Chief Executive is conflicted in relation to a significant matter, that matter should be overseen by the Board or a Division of the Board.

7.22 ***Recommendations***

The FMA's Conflicts of Interest Policy should be amended as follows.

a) The Chief Executive must immediately inform the Chair if he may have an interest in any matter.

b) If the Chair decides there is no conflict of interest requiring any conflict of interest management steps to be taken, that information must be recorded and provided to the Board.

c) If the Chair decides there is a conflict of interest requiring conflict of interest management steps to be taken:

- ***i. a conflict of interest management plan must be decided and recorded;***
- ***ii. the conflict of interest management plan should address whether the matter on which the Chief Executive is conflicted is a significant matter requiring oversight by the Board or a Division of the Board;***
- ***iii. the conflict of interest management plan must be provided to the Board;***
- ***iv. the conflict of interest management plan must be kept under review.***

d) Consideration should be given as to whether any other amendments are required to make clear that all the requirements of the Conflicts of Interest Policy apply to the Chief Executive, with such adjustments as may be necessary to reflect the involvement of the Chair and the Board in managing these conflicts.

Hon Dr David Clark

MP for Dunedin

Minister of Commerce and Consumer Affairs
Minister for the Digital Economy and Communications
Minister for State Owned Enterprises
Minister of Statistics
Minister Responsible for the Earthquake Commission

14 December 2021

Dear Kristy,

I am writing to request your services to carry out a review of an aspect of the process for the appointment of KiwiSaver Default Providers for the term starting 1 December 2021. Under the KiwiSaver Act 2006, providers of KiwiSaver default schemes are appointed by the Minister of Finance and Minister of Commerce and Consumer Affairs (section 132 of the Act).

The review follows a letter from the Attorney-General, Hon David Parker to me on 7 December 2021 (attached).

Scope of the review

Please review whether the disclosure of a potential conflict of interest by Rob Everett (in relation to Booster) was appropriately managed by the Financial Markets Authority (FMA) in the process for the appointment of KiwiSaver default providers.

I note that the FMA's statutory role in the appointment of KiwiSaver default providers is limited. In determining whether to appoint a manager as a default KiwiSaver provider under section 132, the Ministers must seek the advice of the FMA.

However, I agree with the Attorney-General that it is important to ensure that the FMA appropriately managed the conflict, especially given the FMA's pivotal role in our financial markets and the confidence investors need to have in it properly performing that role.

The FMA is aware of the proposed review and has indicated it will assist you in any way necessary to support your review.

Background – process for appointment of KiwiSaver default providers

Ministry officials ran a competitive tender process to inform the Ministers' decision. An independent evaluation panel was appointed to evaluate the proposals, comprising people with a mix of investment, funds management, consumer and government expertise.

The financial soundness of the applicants was considered during the assessment process and financial due diligence was undertaken by PwC on all the selected providers.

A commercial barrister (Peter Castle QC) served as an independent probity advisor for the project, and was engaged throughout the procurement process. He concluded that the RFP process was carried out in accordance with good public sector procurement practice and with due and proper regard for probity principles.

Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand
+64 4 817 8709 | d.clark@ministers.govt.nz | beehive.govt.nz

As required by section 132(4), I sought and was provided with advice from the FMA on the appointment decision. The FMA advised that it was not aware of any issues that would affect the ability of any of the six recommended providers to manage KiwiSaver default schemes. Maintenance of the law [redacted] That advice is also attached.

Following the appointment of providers by Ministers, MBIE carried out a review of the appointment process, as is standard practice. This included interviews with all eleven parties that submitted as part of the procurement process.

Process for the review

In carrying out the review, I expect you to:

- Follow a process that is fair and is in accordance with the principles of natural justice.
- Maintain confidentiality in accordance with applicable legal requirements.
- Be mindful of commercial sensitivity and the privacy rights of those involved in the process.

Deliverables

The key deliverable is to produce a short report to me by 28 February 2022.

Your report is to address the matters set out above. In the event you consider it may be necessary to consider additional matters please advise me as soon as possible.

Resources

I have asked MBIE to work with you to arrange the terms of your engagement and to ensure you have all the materials and access to key people needed to fulfil this role.

Kind regards,

Hon Dr David Clark

Minister of Commerce and Consumer Affairs

Hon David Parker BCom, LLB
Attorney-General
Minister for the Environment
Minister for Oceans and Fisheries
Minister of Revenue
Associate Minister of Finance

7 December 2021

Hon Dr David Clark
Minister of Commerce and Consumer Affairs
By email: D.Clark@Ministers.govt.nz

Dear David

I wish to draw to your attention issues raised by some recent articles written by Tim Hunter in the National Business Review. You may already be aware of them but on my reading of them they suggest that further investigation may be required, so that you can be reassured there is nothing of concern in the matters raised.

Of course I have not investigated any of this myself, and do not say any of it has substance but the articles, which centre on the disclosure and/or management of conflicts of interest by Financial Markets Authority chief executive Rob Everett, raise a number of matters that I think warrant further inquiry.

Mr Everett took up the role as chief executive FMA in February 2014. It appears undisputed that he had, and disclosed, a family relationship with a reportedly senior person at fund manager and Kiwisaver provider Booster; his wife's sister's husband.

It is reported that the potential conflict was managed by FMA General Counsel. It doesn't seem to me that the Board was made aware of the conflict, however, Maintenance of the law [redacted]

The news articles also cover the revamp by MBIE of default Kiwisaver providers in May 2021 in which Booster – the smallest by far of the providers, with $125m in its default fund, was one of only four default Kiwisaver providers to retain its default status. By contrast, five lost their status – AMP, ANZ, ASB. Fisher Funds and Mercer – while Simplicity and NZX Smartshares were added to the list.

There are obvious benefits in being one of the default providers, because contributions are channelled automatically into those funds if savers do not opt for a specific fund.

FMA general counsel Liam Mason is reported in NBR as saying it was his job to manage conflicts of interest and he was confident Mr Everett was not involved in "matters and decisions involving Booster".

However, while chair Mark Todd knew of the conflict it appears it was not widely known by the board and there seems some uncertainty as to whether decision-making ministers, including yourself, knew of the conflict.

Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand
+64 4 817 8710 | d.parker@ministers.govt.nz | beehive.govt.nz

Free and frank opinions [redacted] whether the practice followed undermines the perception that conflicts of interest were properly managed and that proper disclosures were made to ministers and the board, beyond the chair.

I believe it is important that proper protocols are in place to handle conflicts of interest and their disclosure, especially given FMA's pivotal role in our financial markets and the confidence investors have in them.

Mr Hunter, who is an experienced and respected reporter, editorialises in his article that there are reasons to be surprised that Booster was retained as a default provider, saying: "In my view Booster is a keen user of related party transactions, creative fees and poor disclosure."

(In an earlier article Mr Hunter pointed to the investments Booster Kiwisaver scheme made in the Booster Tahi partnership - worth $52.8m in March this year - and the acquisition of shares in financial adviser Lifetime Group whose directors Allan Yeo and Paul Foley control Booster Tahi and whose company Booster Financial Services is also a Lifetime shareholder.)

He also points to Booster claiming zero fees for an income fund, when in reality, according to the article, it is one of the most expensive in the sector, as well as other matters he takes issue with.

Free and frank opinions [redacted]

It is also a matter of public record that Mr Everett has been appointed as CEO of New Zealand Growth Capital Partners. It would seem desirable, and fair to Mr Everett and New Zealand Growth Capital Partners, for these issues to be promptly considered by someone senior and independent.

In my view you as Minister need to be confident the management of the conflict has been explicit by market regulators and can withstand scrutiny.

Yours sincerely

Hon David Parker
Attorney-General

FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TATAI HOKOHOKO - NEW ZEALAND

WELLINGTON OFFICE
Level 2, 1 Grey Street
Wellington
PO Box 1179, Wellington 6140
PHONE +64 4 472 9830
FAX +64 4 472 8076

18 March 2021

Mr James Hartley
General Manager- Commerce, Communications and Consumers
Ministry of Business, Innovation and Employment
P O Box 1473
Wellington 6011

By email: Dave.Wanden@mbie.govt.nz

Dear James

Thank you for your letter dated 9 March 2021 which provided FMA with the following list of potential KiwiSaver managers who the evaluation panel intend to recommend to Ministers.

BNZ Investments
Booster Investment
BT Funds/Westpac
Kiwi Wealth Ltd
Simplicity NZ Ltd
Smartshares Ltd

I advise that, after due internal consultation, FMA is not aware of any issues that would affect the ability of the above managers to manage KiwiSaver default schemes.

[redacted]
Maintenance of the law

Please contact me if you require any further clarification.

Yours sincerely

Liam Mason
Director of Regulation

FINANCIAL MARKETS AUTHORITY
TE MANA TATAI HOKOHOKO - NEW ZEALAND

CONFLICTS OF INTEREST POLICY

Policy Statement

1. All Staff will have other interests or duties existing from their own financial affairs, relationships; or other role that they have. This policy is focussed on identifying interests or duties outside of the FMA, disclosing them, and managing these interests where they overlap duties or responsibilities to the FMA.

2. As Staff of an independent crown entity and a regulator, we must act honestly and impartially and avoid situations which might compromise our integrity. Staff must not seek to further any external professional or personal interests through their position with the FMA and must identify where conflicts of interest might arise.

3. The aim of the policy is to:

   3.1. support Staff, by providing them with tools to help them manage their conflicts of interests; and

   3.2. ensure that all potential or perceived conflicts of interests are disclosed on the FMA's Staff Interests Register (Datacom) (**Interests Register**), and actual conflicts are managed through an Individual Conflict Mitigation Record.

Related Policies and Guidance

4. Other relevant FMA policies/documents include: the Gifts and Hospitality Received Policy, Code of Conduct for employees, employment agreements (see clauses relating to disclosure of interests) and Protected Disclosures (Whistle-blower) Policy.

5. Staff should seek guidance from their manager, a Tier 2 manager or a Governance team member if they are unclear about how to apply this Policy.

Definitions

6. In this policy:

   6.1. A **Conflict of Interest** is where a Staff member's duties or responsibilities to the FMA could or does overlap with some other interest or duty that the Staff member may have outside of their work for the FMA. A Conflict of Interest can be:

   actual where there is a direct conflict between Staff member's official duties to the FMA and their other interest or duty;
   potential where it is reasonably probable that in future an actual conflict of interest will occur; or

perceived an objective observer might reasonably think that the Staff member can no longer act impartially.

Examples of where interests could arise from:

- owning securities in an entity;
- receiving a gift, hospitality or other benefit from a market participant;
- owing a debt;
- previous employment with a market participant, other entity relevant to the functions of the FMA, or a supplier of goods or services to the FMA
- a professional or legal obligation to someone other than the FMA (for example, being a trustee);
- owning a beneficial interest in a trust;
- being a member of, or otherwise associated with, a club, society or association that has activities relevant to the FMA's functions;
- being an employee, adviser, director or partner of another business or organisation;
- pursuing a business opportunity;
- a spouse, civil union partner, de facto partner, or child or parent of a person who may derive a financial benefit from a decision of the FMA;
- a close relationship with someone who may be personally affected by a decision of the FMA.

6.2. **Staff** includes FMA consultants, contractors, secondees and persons employed on a permanent, fixed term, or casual basis.

Identifying and Disclosing Interests

7. Staff will have other duties, responsibilities, investments or connections outside of their role with the FMA. Staff must disclose these duties, responsibilities, investments or connections including:
   7.1. <u>All investments and transactions</u>:
      a. In New Zealand listed securities (including derivatives traded on authorised futures exchanges);
      b. In overseas publicly traded securities;
      c. In securities of any other entities in which you have a substantial holding[1];
      d. Held in New Zealand issuers of securities (excluding ordinary banking arrangements, for KiwiSaver, see 7.5 below);
   7.2. <u>Any relevant interest[2] in any New Zealand listed security</u>;
   7.3. <u>Any substantial holding in:</u>
      a. any entity in New Zealand;
      b. any overseas entities that provide financial services or offer securities in New Zealand;
   7.4. <u>Previous employers</u> (if with a market participant, other entity relevant to the functions of the FMA, or a supplier of goods or services to the FMA);
   7.5. <u>Their KiwiSaver provider</u> (staff do not need to disclose underlying holdings or transactions)<u>;</u> and
   7.6. <u>Any other interests that could conflict with your duties</u>.

[1] A person has a substantial holding in a listed issuer if the person has a relevant interest in quoted voting products that comprise 5% or more of a class of quoted voting products of the listed issuer, consistent with section 274 of the Financial Markets Conduct Act (FMCA).

[2] 'Relevant interest' has the same meaning as in the FMCA.

These interests may include investments and transactions in financial products, including derivatives and managed investment products.

8. The People and Capability team will enter these initial disclosures into Staff member's **Interests Register** on a Staff member's behalf.

Ongoing obligation to keep interests up to date

9. After the initial entry by the People and Capability team, Staff will have ongoing responsibility to update their interests information with any other interests as and when these arise.

10. To do this, staff should log on to Datacom, go to 'Personal Details' under the Employee heading, click 'edit', and record details in the Interests Register box.

11. The values of holdings do not need to be recorded in the Interests Register. Transactions in listed securities should record the nature of the transaction (buy, sell) and the date.

Staff certification

12. Staff certify their disclosures on a periodic basis (at least annually). Information on Interests Registers will be reported to Tier 2 or Tier 3 managers from time to time to assess potential conflicts of interest and to monitor compliance with this policy.

Managing Conflicts of Interest

Guiding principles for managing conflicts

13. Managing conflicts of interest is important for the reputation of the FMA. Staff who are concerned that a Conflict of Interest may exist in the organisation should raise this with their Manager, General Counsel or the Head of Policy & Governance. Any person who suspects serious misconduct in any affairs of the FMA is encouraged to make use of the FMA's Protected Disclosures Policy.

14. Staff must not engage in any employment or business activity that would conflict with or compromise the performance of their duties for the FMA or the standing of the FMA.

15. With regard to secondary employment:

    15.1. Staff must obtain the approval of their manager before undertaking any secondary work or employment;

    15.2. Approval will not be given if, in the opinion of the manager, the secondary work is, or is reasonably thought, likely to conflict with the Staff member's duties to, or the interests of, the FMA.

16. With regard to other business activities and appointments (such as directorships or trust positions), Staff should raise these with their manager before commencing the activity or appointment to discuss whether this presents any Conflict of Interest and if so, whether this can be managed. If a Conflict of Interest cannot be managed, the business activity or appointment is not to be taken up.

17. Staff must observe the principles of fairness and impartiality in all the FMA work. Preference must not be given to a person with whom Staff are connected over any other person or entity.

18. Staff who have been delegated authority to perform a statutory duty, power or function of the FMA must in exercising the delegated authority comply with the restrictions on decision making set out in the FMA Regulatory Delegations Policy.

19. Staff must not work on any engagement for the FMA where they have a Conflict of Interest or where it might be reasonably perceived by others that they may have a Conflict of Interest.

20. Staff who receive gifts (including hospitality) in the course of work must comply with the FMA's Gifts and Hospitality Received Policy.

21. Staff are required, under the FMA Code of Conduct, to obey the law and comply with all FMA internal policies.

22. Staff are responsible for identifying potential conflicts of interest that may arise in their work, and to manage or avoid these conflicts.

Process for managing conflicts

23. Staff who believe they may have an interest in respect of any assigned work must immediately inform his or her manager of the interest, even if he or she has already disclosed the interest on the Interests Register. Staff have the responsibility for ensuring the FMA understands the full nature of any interest.

24. Where an interest has been identified and disclosed to a manager, the manager must consider the appropriate steps to be taken to adequately avoid or mitigate a Conflict of Interest. Decisions about managing conflicts of interest must be guided by the need for FMA to be respected and trusted to perform its functions with integrity, honesty, transparency, independence, good faith and in a spirit of service to the public.

25. Where it is not clear if there is a conflict or how a conflict should be managed, the relevant manager should seek advice from the General Counsel or the Head of Policy & Governance.

26. In general, the appropriate response will be to ensure that Staff do not participate in any work relating to the matter in which a Conflict of Interest has been identified. However there is a range of options for avoiding or mitigating a Conflict of Interest. This includes:

    26.1. imposing additional oversight or review over the relevant person's work in relation to a matter;

    26.2. re-assigning certain tasks or duties to another person;

    26.3. withholding confidential information, or placing restrictions on access to information;

    26.4. transferring the person to another position or project; and

    26.5. relinquishing the private interest from which the Conflict of Interest arises.

27. Managers must ensure that <u>appropriate and proportionate steps</u> are taken to check whether or not any Staff who might be involved in/receive information in relation to a matter, might be conflicted. Managers may also put in place guidelines and procedures for dealing with conflicts of interest which might arise from the work undertaken by their team. The Policy and Governance team can provide advice on these procedures.

28. The fact that an interest has been disclosed in the interests register does not satisfy the need to further identify and manage any Conflict of Interest that arises for any Staff.

Recording and reporting requirements

29. Decisions on how to deal with a conflict must be recorded by the relevant manager, including details of the facts, who undertook the assessment and how, and what action was taken (**Conflict Mitigation Record**).

30. The Conflict Mitigation Record should be saved in Datacom. Managers will need to do this by going to the 'Reportees' page and copying the Record into the 'Risk Mitigation' box for the relevant employee.

Assurance

31. The Interests Register and Conflict Mitigation Records may be accessed and reported to senior managers from time to time to monitor compliance with this policy, to assess potential conflicts of interest and to assess whether mitigations are being applied consistently and appropriately.

32. As noted at paragraph 9 above, Staff will be required to certify their disclosures on a periodic basis (at least annually).

33. Anonymised information regarding compliance with this policy will be reported to ExCo, ARC and the Board on a periodic basis.

CONFLICT OF INTEREST GUIDANCE

These guidelines supplement FMA's Conflict of Interest policy.

What is a Conflict of Interest?

1. The key test for identifying conflicts of interests is:
   - A Conflict of Interest arises where a person's duties or responsibilities to FMA could be affected by some other interest or duty that the person may have.
   - A person might have other interests or duties existing because of:
   - the person's own financial affairs;
   - a relationship or other role that the person has.

2. Examples where conflicts of interest might arise are where a member of FMA's Staff is:
   - an employee, advisor, director or partner of another business or organisation, or from a previous role or employment;
   - pursuing a business opportunity;
   - a member of a club, society or association;
   - having a professional or legal obligation to someone else (ie being a trustee);
   - owning a beneficial interest in a trust,
   - owning property, including shares, or real property;
   - having received a gift, hospitality or other benefit from someone;
   - owing a debt to someone;
   - being a relative or close friend of someone who has one of these interests (or who would otherwise be personally affected by a decision of FMA.

3. In general interests of relatives include the interests of any relative who lives with the person. Interests of spouses, children and parents should also be considered. For other relatives it will depend on the closeness of the relationship and the degree to which FMA's decision or activity could directly or significantly affect them.

4. Just because a person has an interest outside their work, it does not necessarily follow that they have a Conflict of Interest. The following guidelines should be considered:
   - A Conflict of Interest only occurs if something arises at work that overlaps with the other interest.
   - In instances where a decision is being made and the interested person does not have decision making authority, a Conflict of Interest may not arise.
   - A financial interest which is so remote or insignificant that it cannot reasonably be regarded as likely to influence the person in carrying out duties, can be disregarded.
   - However even where there is no overlapping interest, appearances should be taken into account: what an outside observer might reasonably perceive. It is best to err on the side of openness when deciding whether something should be disclosed. Disclosure may not mean that steps will be required to mitigate the conflict, all that may be required is additional clarification to avoid public misunderstanding.

Dealing with a Conflict of Interest once it has arisen

5. Simply declaring a Conflict of Interest may often not be enough, and FMA will need to carefully consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the Conflict of Interest.

6. In some situations it will be clear the action which should be taken, however in othersome situations will be the subject of discretionary judgements as and when they arise.

7. Withdrawal or exclusion from considering a matter is the most common response. Continuing to be involved in a matter despite having a recognised Conflict of Interest, should be rare. This would only arise where the matter cannot reasonably be dealt with without the person's involvement (for example where all relevant people have a conflict).

Examples

8. The following are illustrative examples:

   Licensing an individual: A member of the licensing team who considers and makes recommendations on whether an applicant should be licensed by the FMA, based on good character criteria, has received a licence application for his/her brother in law. The employee should disclose this to the relevant manager and consider whether or not it is appropriate for the employee to deal with the application. Given the close nature of the relationship and the nature of the decision and possible public perception, it is most likely that the applicant should be assigned to another case officer.

   Investigation of breach of Financial Markets Conduct Act requirements, where shares held in the company: An investigator holds shares in a company which is being investigated for Financial Markets Conduct Act breaches and the investigator has been asked to lead the investigation. At this point the investigation has not been made public. In the event of a prosecution against the company, or the information becoming public, it is likely that this will have an effect on the company's share price. The amount of shares held is small relative to the number of issued shares, but represents a large part of the investigator's investments. The investigator would have general legal obligations not to use any confidential information for his/her own personal gain. [It is likely that the appropriate way to deal with the conflict would be to withdraw the investigator from the investigation, or to ensure that the investigator's work is peer reviewed. In any event FMA may monitor the investigator's transactions in the shares, to ensure that there is no misuse of confidential information]?

   Employee's spouse is a lawyer representing the company being investigated by FMA: Where the employee is involved in the investigation, a Conflict of Interest would arise. In most cases it would be considered inappropriate for the employee to continue to be involved in the investigation. Similarly, where the matter being considered by FMA is an exemption or a licensing application.

   A policy adviser involved in preparing guidance for FMA's website: In general, it will be rare for a policy adviser to have a Conflict of Interest which would involve the adviser not being able to work on general guidance and policy statements for the website. This is because policy work will have implications across industry sectors, rather than for specific people or business interests which the adviser might hold.

   Monitoring staff who wish to provide compliance consultancy services: A new employee in the financial advisers' monitoring team also has a consultancy business which provides compliance services for financial advisers. Since this is in directly the same line of business as the services the employee will provide to FMA, approval should not be given for the employee to continue with this business.

   Banking and other customer relationships: A FMA manager who makes recommendations on Financial Markets Conduct Act exemptions receives an exemption application from a Bank on a technical matter, the manager banks with that Bank. This sort of relationship is considered too remote or insignificant to create a conflict and would not require any disclosure of interest by the manager. Similarly, ordinary customer relationships with insurance companies would not need to be disclosed/treated as potential conflicts.

Entering into contracts on behalf of FMA: An FMA manager is selecting a contractor to provide project services to FMA. The manager has a business relationship (in a private capacity) with one of the contractors who has tendered. The manager has previously used their services and knows the directors of the company well. The risk is that the perception is that the manger's personal connections might allow someone to allege that the decision is tainted by favouritism. FMA might clarify whether or not the relationship is considered a close personal friendship, and may be comfortable that there is no Conflict of Interest, or that any conflict can be dealt with by peer review or oversight of the manager's decision. See also FMA's Procurement and Purchasing Policy.

Employment of relatives: A manager is considering whether or not to employ her sister as one of her direct reports. She suggests that the decision to appoint the person be peer reviewed by a manager in HR. In general appointing someone who is a relative could cause difficulties, even where a fair process has been followed.

FINANCIAL MARKETS AUTHORITY
TE MANA TATAI HOKOHOKO - NEW ZEALAND

CONFLICTS OF INTEREST POLICY

Policy Statement

1. All Staff will have other interests or duties existing from their own financial affairs, relationships; or other role that they have. This policy is focused on identifying interests or duties outside of the FMA, disclosing them, and managing these interests where they overlap with duties or responsibilities to the FMA.

2. As Staff of an independent crown entity and a regulator, we must act honestly and impartially and avoid situations which might compromise our integrity. Staff must not seek to further any external professional or personal interests through their position with the FMA and must identify where conflicts of interest might arise.

3. The aim of the policy is to:
   - support Staff, by providing them with tools to help them manage their conflicts of interests; and
   - ensure that all potential conflicts of interests are disclosed on the FMA's Staff Interests Register (Datacom) (**Interests Register**), and all perceived and actual conflicts are managed through the Conflict of Interest process.

Definitions

4. In this policy:

   - A **Conflict of Interest** is where a Staff member's duties or responsibilities to the FMA could or does overlap with some other interest or duty that the Staff member may have outside of their work for the FMA.

A Conflict of Interest can be:
- **actual** where there is a direct conflict between Staff member's official duties to the FMA and their other interest or duty;
- **potential** where it is reasonably probable that in future an actual conflict of interest will occur; or
- **perceived** an objective observer might reasonably think that the Staff member can no longer act impartially.

A Conflict of Interest can also be:
- **financial**, where someone stands to gain or lose financially from a decision they are asked to make or contribute to;

Owner:	General Counsel		
Doc number:	6500947	Last Modified:	August 2021
Last Review Date:	August 2021	Next Review Date:	August 2023
Approved by:	Chief Executive		

- **non-financial** where someone is not affected financially by a decision but is affected in some other way that might make them biased or appear to be biased; or
- a **conflict of roles** where someone is carrying out duties for two different organisations about the same matter.

- **Regulated Firm** is any firm or business whose activities are (or will be) regulated by the FMA or the Reserve Bank; or a firm who represents or advocates for a Regulated Firm.

- **Staff** includes FMA consultants, contractors, secondees and persons employed on a permanent, fixed term, or casual basis.

Identifying and Disclosing Interests

5. Staff will have other duties, responsibilities, investments or connections outside of their role with the FMA. Staff must disclose these duties, responsibilities, investments or connections including:
   - All investments and transactions:
     a. In New Zealand listed securities (including derivatives traded on authorised futures exchanges);
     b. In overseas publicly traded securities;
     c. In securities of any other entities in which you have a substantial holding[1];
     d. Held in New Zealand issuers of securities (excluding ordinary banking arrangements, for KiwiSaver);
   - Any relevant interest[2] in any New Zealand listed security;
   - Any substantial holding in:
     a. any entity in New Zealand;
     b. any overseas entities that provide financial services or offer securities in New Zealand;
   - Previous employers (if with a Regulated Firm or a supplier of goods or services to the FMA);
   - Subsequent employer (if with a Regulated Firm)
   - Their KiwiSaver provider (staff do not need to disclose underlying holdings or transactions); and
   - Any other interests that could potentially conflict with your duties.

Potential interests may include:
- owning securities in an entity;
- receiving a gift, hospitality or other benefit from a market participant;
- owing a debt;
- investments and transactions in financial products not otherwise covered by 5.1 to 5.3, including derivatives and managed investment products;
- previous employment with a Regulated Firm, or a supplier of goods or services to the FMA;
- subsequent employment with a Regulated Firm;
- a professional or legal obligation to someone other than the FMA (for example, being a trustee);
- owning a beneficial interest in a trust;
- being a member of, or otherwise associated with, a club, society or association that has activities relevant to the FMA's functions;

[1] A person has a substantial holding in a listed issuer if the person has a relevant interest in quoted voting products that comprise 5% or more of a class of quoted voting products of the listed issuer, consistent with section 274 of the Financial Markets Conduct Act (FMCA).
[2] 'Relevant interest' has the same meaning as in the FMCA.

- being an employee, adviser, director or partner of another business or organisation;
- pursuing a business opportunity;
- a spouse, civil union partner, de facto partner, or child or parent of a person who may derive a financial benefit from a decision of the FMA;
- a close relationship with someone who may be personally affected by a decision of the FMA.

6. The People and Capability team will enter these initial disclosures into Staff member's **Interests Register** on a Staff member's behalf.

Ongoing obligation to keep interests up to date

7. After the initial entry by the People and Capability team, Staff will have ongoing responsibility to update their interests information with any other interests as and when these arise. Staff do not need to inform their manager each time they update an interest.

8. To do this, staff should log on to Datacom, go to 'Personal Details' under the Employee heading, click 'edit', and record details in the Interests Register box.

9. Staff will also need to record any trades approved under the Staff Trading Policy in the Interests Register, in accordance with the relevant procedures.

10. Staff should seek advice from the Policy and Governance Team if they are unsure about whether something is an interest and ought to be disclosed.

Managing Conflicts of Interest

Guiding principles and general rules for managing conflicts

11. Managing conflicts of interest is important for the reputation of the FMA. Decisions about managing conflicts of interest must be guided by the need for FMA to be respected and trusted to perform its functions with integrity, impartiality, accountability, trustworthiness, respect and responsiveness.

12. Managing conflicts will also be guided by the general rules set out below, although it's important to note that conflicts will need to be managed on a case by case basis, and the approach will depend on what is appropriate in the specific circumstances.

13. Staff must not work on any engagement for the FMA where they have a Conflict of Interest or where it might be reasonably perceived by others that they may have a Conflict of Interest. However there are circumstances where staff may be able to continue to work on a matter in some capacity, for example:

    - Where their interest is 'in common with the public' i.e. the interest would be substantially the same in degree and kind as held by a large segment of members of the public[3];
    - If the conflict is of lesser significance (in terms of the interest, or the role of the staff member in the matter, or the outcome/impact of the FMA activity they are working on), and another mitigation option is sufficient to manage the matter;

[3] For information on 'interests in common with the public', see: Managing Conflicts of Interest: A Guide for the Public Sector, Office of the Auditor General, June 2020, paragraphs 3.10 and 4.35

- There is limited capacity to allocate the matter to somebody else, or the relevant person is the only person who can advise on the matter. In these circumstances, other mitigation options could be used (a peer review or independent review); or
- Multiple people within a team, or working on a project, have the same or similar conflicts, where a generalised teams based approach may be appropriate.

14. Staff must not engage in any employment or business activity that would conflict with or compromise the performance of their duties for the FMA or the standing of the FMA.

15. Staff must observe the principles of fairness and impartiality in all the FMA work, and must manage the risk of bias or the appearance of bias.

16. Staff are required, under the FMA Code of Conduct, to obey the law and comply with all FMA internal policies.

17. Staff are responsible for identifying potential conflicts of interest that may arise in their work, and to manage or avoid these conflicts. Non-compliance with this Policy may be considered misconduct, and would be handled in accordance with the FMA's Disciplinary Policy.

18. The table below sets out general rules or relevant factors to consider with respect to particular types or conflicts of interest and the extent to which they overlap with staff duties at the FMA.

Type of conflict	**General rules and relevant factors for consideration**
Financial interests	Staff must not work on any matter where they stand to gain financially from the decision or activity. Staff who wish to trade in financial products must do so in accordance with the Staff Trading Policy. A trading request that is approved will result in the staff member acquiring an interest for the purposes of this Policy, and staff must deal with any conflicts that may arise accordingly.
Suppliers of goods or services	When procuring goods and services, Staff must comply with the FMA's Sourcing Policy and Procedures, and Contract Management Policy and Procedures, and must declare any conflicts with potential suppliers.
Receipt of gifts, koha or other items of value	Staff who receive gifts (including hospitality) in the course of work must comply with the FMA's Gifts and Hospitality Received Policy.
Secondary employment, other business activities and appointments	Staff must obtain the approval of their manager before undertaking any secondary work or employment. Approval will not be given if, in the opinion of the manager, the secondary work is, or is reasonably thought, likely to conflict with the Staff member's duties to, or the interests of, the FMA. With regard to other business activities and appointments (such as directorships or trust positions), Staff should raise these with their manager before commencing the activity or appointment to discuss whether this presents any Conflict of Interest and if so, whether this can be managed. If a Conflict of Interest cannot be managed, the business activity or appointment is not to be taken up

Previous employment	Previous employment may give rise to a conflict of interest. Factors indicating that mitigation may be required: • Previous employment was at a Regulated Firm; • The role at the previous organisation overlaps with their duties at the FMA (see 'overlaps' below); • The previous employment was recent (within the last two years); • The staff member has maintained close personal or professional relationships with employees at the previous organisation
Subsequent employment	With regard to subsequent employment with a Regulated Firm, a potential conflict of interest must be recorded in the employee's 'Personal Details' in Datacom by the staff member who must also notify their Tier 2 and Tier 3 manager, as soon as possible and on the same working day as accepting an offer of employment. The staff member will take the actions and assist with the actions to be taken by others to mitigate the potential or actual conflict of interest, noted below in clauses 19 to 28.
Personal relationships	Preference must not be given to a person with whom Staff are connected over any other person or entity. You will be interested in a matter if you are the spouse, civil union partner, de facto partner, child, or parent of a person who may derive a financial benefit from the matter. Other personal relationships, for example, relatives that do not live with you, iwi and hapu, friendships and business acquaintances may give rise to an interest. Factors to consider include: • The closeness of the relationship; • The degree to which the decisions or activities carried out by the FMA could directly or significantly affect the person/people; • Where an FMA decision or activity affects an organisation that a friend, relative or acquaintance works for, consider the nature of their position, their role within the organisation, the size of the organisation and the impact of the decision.
Overlap between staff interests and FMA duties	Factors to consider in determining the extent of an overlap between a Staff interest and FMA work include: • The role of the staff member and their seniority: if they are advising or making a recommendation in a technical capacity, the conflict is less likely to be significant; if they are the regulatory decision maker or on a committee of decision makers, the conflict is more likely to be significant; • The extent and scope of the FMA decision or activity: if it will affect a broad class of persons or the general public it is less likely to be significant, if will it affect an individual or small group of persons, it is more likely to be significant;

	• The nature of the FMA decision or activity: if it involves spending public funds or making a decision to exercise public powers, it is more likely to be significant. Staff who have been delegated authority to perform a statutory duty, power or function of the FMA must in exercising the delegated authority comply with the restrictions on decision making set out in the FMA Regulatory Delegations Policy.

Process for managing conflicts

19. Staff who believe they may have an interest in respect of any assigned work must immediately inform his or her manager of the interest, even if he or she has already disclosed the interest on the Interests Register. Staff have the responsibility for ensuring the FMA understands the full nature of any interest.

20. Where an interest has been identified and disclosed to a manager, the manager must consult with the staff member and:
    - Determine if there is an actual or perceived conflict of interest;
    - Assess the significance of conflict;
    - Consider the appropriate steps to be taken to adequately avoid or mitigate a Conflict of Interest depending on its significance.

21. If the manager determines that there is no conflict of interest or there is a conflict of interest but it is so remote or insignificant that it does not warrant any further steps: the manager must make a record of the discussion with sufficient explanation of the position.

22. If the manager determines that there is a conflict of interest: in general, the appropriate response will be to ensure that Staff do not participate in any work relating to the matter in which a Conflict of Interest has been identified. However there are a range of options for avoiding or mitigating a Conflict of Interest, depending on the circumstances, significance of the conflict, and resource constraints. These include:
    - Disclosure of the conflict with no further action;
    - Consulting with affected parties and agreeing on the Staff member's involvement;
    - Withdrawing from discussions or taking steps to limit influence on decision making powers (for example, providing technical advice instead of making a decision);
    - Informing decision makers of identified conflicts, the significance of them, and how they were dealt with (when the decision maker is not their direct line manager;
    - Imposing additional oversight or review over the relevant person's work in relation to a matter (for example, internal peer review or external independent process review);
    - Re-assigning certain tasks or duties to another person;
    - Withholding confidential information, or placing restrictions on access to information;
    - Transferring the person to another position or project; and
    - Relinquishing the private interest from which the Conflict of Interest arises.

23. Managers should also consider and agree with Staff any additional follow up actions including:
    - Staff restrictions on receipt of or access to information;
    - Escalation of the conflict where appropriate;
    - For any conflicts that pose an organisational risk to the FMA, assessment and escalation in accordance with the FMA's Internal Risk Management Policy;
    - Notification to subsequent decision makers that a conflict had been raised in relation to a matter, with a summary of how the conflict was dealt with.

24. In the case of a potential or actual conflict of interest arising in relation to subsequent employment, the protocol prescribed in **Appendix 1** must be followed.

25. Managers must ensure that appropriate and proportionate steps are taken to check whether or not any Staff who might be involved in/receive information in relation to a matter, might be conflicted.

26. Managers or the FMA may also put in place guidelines, procedures or protocols for dealing with conflicts of interest which might arise from the work undertaken by their team, or in relation to a particular project or matter. These guidelines, procedures or protocols must not be inconsistent with this Policy. The Policy and Governance team can provide advice on team or multiple-person based procedures. Any guidelines, procedures or protocols that have FMA-wide applicability will be appended to this Policy.

27. When making decisions about conflicts, Staff and Managers should:
    - Consider the contents of the Policy, particularly the guiding principles and general rules above, and any procedures or protocols as appended;
    - Refer to the Conflicts of Interest Staff Guidelines (which includes particular assistance for line managers) – see paragraph 41 below;
    - Where it is not clear if there is a conflict or how a conflict should be managed, seek advice from the General Counsel or the Head of Policy & Governance.

28. All conflict of interest decisions must be recorded in accordance with the procedures below.

Escalation and complaints

29. Any conflicts of interest that managers consider may give rise to a risk to the FMA should be escalated to the General Counsel or their Tier 2.

30. If staff are dissatisfied with how their manager has dealt with a conflict, and are unable to resolve this without further discussion, they should escalate their concerns to the General Counsel.

31. Staff who are concerned that a Conflict of Interest may exist in the organisation that has not been dealt with should raise this with their Manager, General Counsel or the Head of Policy & Governance, as appropriate.

32. Any person who suspects serious misconduct in any affairs of the FMA is encouraged to make use of the FMA's Protected Disclosures (Whistle Blower) Policy.

33. If a Staff member receives a complaint from a market participant or member of the public suggesting that there is a conflict of interest at the FMA, this will be considered a complaint about the FMA, and will be handled in accordance with our internal complaints policy.

Recording and reporting requirements

34. Decisions on how to deal with a conflict must be recorded by the relevant manager (**Conflict of Interest Record**). The Conflict of Interest Record should briefly detail the conversation between Staff and Mangers regarding the conflict, including details of the facts, who undertook the assessment and how, and what action was taken. Conflict of Interest Records must be completed even when the decision was that there was no conflict or there was a conflict that was too remote or insignificant to warrant further action.

35. A copy of the Conflict of Interest Record must be sent to People and Capability who will save in the staff member's personnel files, and a copy should be retained by the manager.

36. Key details of the Conflict must be entered in Datacom (these include the conflict identified and the mitigation). Managers will need to do this by going to the 'Reportees' page and copying the Record into the 'Risk Mitigation' box for the relevant employee.

37. A suggested form for the Conflicts of Interest Record and Datacom key details entry are included in the Conflicts of Interest Staff Guidelines.

Monitoring and assurance

38. The Interests Register and Conflict of Interest Records may be accessed and reported to senior managers from time to time to monitor compliance with this policy, including whether:
    - Interests, approved staff trades and potential conflicts are declared;
    - Conflicts of interests are being assessed consistently and appropriately, in accordance with guiding principles and rules; and
    - Mitigations are being complied with by staff, including any staff restrictions on access to information

39. Anonymised information regarding compliance with this policy will be reported to ExCo, ARC and the Board on a periodic basis.

Staff certification

40. Staff will be required to certify on a periodic basis (at least annually):
    - That their disclosures are up to date;
    - That they have raised any interests that may overlap with their work with their manager in accordance with this Policy; and
    - That they have complied with any agreed mitigations or actions for any conflicts that they have raised.

Guidance

41. The FMA has prepared Conflicts of Interest Guidelines to assist staff, available here:
    - **Section 1** provides supplements this Policy, and includes FMA specific illustrative examples to assist on determining if there's a conflict and to assess its significance.
    - **Section 2** provides assistance to line managers and includes a suggested form for a Conflicts of Interest record.
    - **Section 3** sets out where Staff can go for advice, support and further guidance, and refers to related FMA Policies and training opportunities.

Appendix 1

Conflict of Interest – exit protocol

Step	Notification of resignation	Responsible
1	Employee provides notice of resignation, and the start of relevant notice period stated in the employee's individual employment agreement (IEA)	Manager, employee
2	Disclosure of name of new employer made to manager or P&C business partner	Employee to disclose to manager or P&C business partner
3	Manager and GC consider the need for a 'stand-down' period, and manager and P&C negotiate that period pursuant to the Gardening Leave clause in the employee's IEA	Manager, GC
4	Acknowledgement of resignation letter provided to employee from P&C stating obligations during notice and gardening leave period (if any) and confidentiality obligations and post-employment restrictions (if any) after exit	P&C, copy to manager
	Conflict management during notice period	
5	Conflict management meeting- to bring required conflict mitigation actions to the attention of the Employee	Manager/Employee
6	Record potential or actual conflict in the Datacom FMA Conflicts Register	Employee
7	Alert Head of Policy & Governance that a conflict has been registered	Manager
8	Remove employee from attending FMA Board, Division and ExCo Committee and sub-committee meetings where the financial services product or the regulated entity itself is an agenda item or the subject of discussion otherwise raises the prospect of unfair advantage or conflict of interest. To be discussed with the CE/General Counsel and relevant Chair before any attendance agreed to.	Manager
9	Re-assign immediate tasks or duties of the exiting employee to another person if warranted due to an actual or perceived conflict	Manager
10	Manager and General Counsel to consider other workstreams that the employee needs to be removed from	Manager, GC
11	Employee will not access specific information about regulated entity	Employee
12	Employee will recuse themselves from conversations where the financial services product or the regulated entity itself is discussed.	Employee, manager

13	Conflict mitigation recorded in Datacom: - Confirm conflicts register updated - Confirm Head of Policy & Governance alerted - Confirm Committee and sub-committee that employee is removed from - Confirm tasks that have been reassigned - Confirm other impacted workstreams	Manager
14	IT may at the request of the GC investigate access to regulated entity information on FMA systems at a timeframe to be determined as suitable	GC, IT
15	IT may at the request of the GC investigate email traffic from employee's FMA account to employee's personal email account at a timeframe to be determined as suitable	GC, IT
	Conflict management after employee exit	
16	Access to all FMA systems stopped on last day in the workplace	IT
17	Bank authorities and signing powers stopped on last day in the workplace	Finance
18	Future business interactions with FMA staff in the ex-employee's new role to be directed through a single nominated senior FMA employee for a period of 3 months for BAU issues and for a period of 6 months for significant issues. A communication to the new employer may be required to confirm confidentiality and conflict management requirements	Manager, ex-employee
	P&C Leaver Process commenced on acceptance of resignation and in conjunction with this conflict management process	
19	Process covers receipt and acknowledgment of resignation, payroll, reporting, IT, Finance, memberships, asset management, physical security, internal communications, P&C systems, records management and exit interview	P&C

	Communication tree (dependent on seniority of role and level of conflict)	
	1. Board	CE
	2. ExCo	CE
	3. Minister's office (if deemed appropriate by CE)	CE
	4. Public Service Commission (if deemed appropriate by CE)	CE
	5. MBIE (if deemed appropriate by CE)	CE
	6. Directs	Manager
	7. Team	Manager
	8. All Staff	Manager
	9. Other external key stakeholders	Manager
	10. Media (markets)	Director ECIC