ORDER PROHIBITING PUBLICATION EXCEPT IN REDACTED FORM

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-610
[2018] NZHC 691

UNDER	The Judicial Review Procedure Act 2016
IN THE MATTER	of a decision made pursuant to section 59 of the Financial Markets Authority Act 2011
BETWEEN	ANZ BANK NEW ZEALAND LIMITED Applicant
AND	FINANCIAL MARKETS AUTHORITY Respondent

Hearing: 27 November 2017

Counsel: AR Galbraith QC, SM Hunter and VL Heine for applicant
HB Rennie QC and TC Stephens for respondent

Judgment: 17 April 2018

Reissued: 11 May 2018
(Redacted)

JUDGMENT OF FITZGERALD J
[As to application for judicial review]

This judgment was delivered by me on 17 April 2017 at 4 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Chapman Tripp, Wellington (J Upson)
Simpson Grierson, Wellington (J Shackleton and M Webb)

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Introduction and summary

[1] In this proceeding, ANZ Bank New Zealand Limited ("ANZ") challenges the Financial Markets Authority's ("FMA") decision to disclose to third parties documents and information the FMA obtained from ANZ through the exercise of its statutory powers.

[2] In summary, the FMA obtained documents and information from ANZ pursuant to six notices issued under s 25 of the Financial Markets Authority Act 2011 (the "Act").[1] The FMA issued the notices in connection with its inquiry and then investigation into [Company X], and its subsequent inquiry into [Redacted]. The FMA proposes to disclose some of the information it received from ANZ to a [third party] as a proxy representing the interests of [Company X] investors generally (the "Proposed Disclosure").

[3] The FMA says there are three reasons for the Proposed Disclosure:

(a) first, to obtain responses and any additional information from the [Company X] investors to the information received from ANZ;

(b) secondly, to determine the next steps that should occur to enable the [Company X] investors to evaluate the merits of a claim against ANZ and consider their position with respect to any such claim; and

(c) thirdly, to enable the FMA to consider and determine whether to exercise its powers under s 34 of the Act, which permits the FMA, in certain circumstances, to exercise the right of action a party has against a market participant.

[4] Pursuant to s 59 of the Act, the FMA is prohibited from disclosing any information or documents obtained by it pursuant to a s 25 notice, other than in the context of seven prescribed circumstances. The FMA says the Proposed Disclosure

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[1] The full text of s 25 is set out in the schedule at the end of this judgment.

falls within the scope of two of the seven permitted disclosures under s 59, because the Proposed Disclosure is:

(a) for the purposes of, or in connection with, the performance or exercise of any function, power, or duty conferred or imposed on the FMA by the Act (or any other enactment);[2] and/or

(b) to a person who the FMA is satisfied has a "proper interest" in receiving the information which is the subject of the Proposed Disclosure.[3]

[5] ANZ, on the other hand, says the FMA's stated purposes of the Proposed Disclosure fall outside the scope of s 59(3)(c) and (f) and thus disclosure would be unlawful. It accordingly seeks a declaration that the Proposed Disclosure is unlawful, and orders quashing the FMA's decision to disclose and prohibiting the Proposed Disclosure. There is also an associated claim based on breach of confidence, in respect of which similar relief is sought.

[6] For convenience, the key provisions of the Act referred to in this judgment are set out in the attached schedule.

[7] It will be apparent that this proceeding concerns (what is not disputed to be) confidential information and whether there are proper grounds for the FMA to disclose it to third parties. Reference in the hearing and in this judgment to certain facts, and the nature and substance of the information which the FMA proposes to disclose, would likely render ANZ's claims moot. For that reason, orders currently prohibit third parties accessing the court file without further order of the Court. And while the hearing took place in open court (at which members of the media were present), I made orders at the outset of the hearing restricting what could be reported. This judgment is also being issued to the parties prior to being publicly issued, so that appropriate redactions can be made to protect the confidentiality of the information in issue. An unredacted copy of the judgment will remain on the court file.

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2 Financial Markets Authority Act 2011, s 59(3)(c).
3 Section 59(3)(f).

Factual background

[8] [Redacted].

[9] [Redacted].

[10] [Redacted].

[11] [Company X was placed in liquidation. The] liquidators thereafter set about carrying out their investigations, with a view to maximising investors' recoveries. The liquidators took legal advice. Part of that legal advice considered claims [Redacted] against [Company X] and identified that there may also be potential claims against ANZ for participating in those breaches (for example, [Redacted]). However, the effect of the advice to the liquidators was that it was not the liquidators' role to bring such claims against ANZ; rather those types of claim were properly brought by investors or, potentially, by the FMA pursuant to s 34 of the Act.[4]

[12] In parallel to the liquidators' work, the FMA continued its investigation into [Company X]. In this context, it issued four notices to ANZ under s 25 of the Act. The second of these was issued on [date redacted] (the "second notice"). Some of the documents the FMA intends to disclose to the [third party] were provided by ANZ in response to the second notice. The FMA's internal paper supporting the issue of the notice highlights that it was issued in the context of the FMA's concerns that [Company X], [Redacted] and related entities had been or were engaging in conduct that constituted a contravention of [financial markets legislation] [Redacted].

[13] The paper concluded that the information requested under the notice was necessary for the purposes of performing the FMA's functions, powers or duties, namely: inquiring into conduct that may contravene the financial markets legislation; and monitoring a matter relating to the financial markets and financial markets participants.

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4 Section 34 is reproduced in the schedule at the end of this judgment.

[14] [Redacted]. After an initial review of the liquidators' analysis, [Redacted], the FMA opened an inquiry into a potential claim against ANZ [Redacted].

[15] In the context of its inquiry into ANZ, the FMA issued two further s 25 notices to ANZ. The notices were headed [Redacted]. It seems that at the time of receiving the notices, ANZ did not appreciate that it was itself the focus of the inquiry.

[16] The balance of the ANZ information the FMA proposes to disclose to the [third party] was produced by ANZ in response to the first of these two notices, issued on [date redacted] (the "fifth notice" issued by the FMA to ANZ). The FMA's internal paper supporting the issue of the fifth notice stated that the notice was necessary to:

> …obtain further documentation from ANZ to determine whether there has been a breach of the financial markets legislation, and if so, the extent of the breach. **It will also enable FMA to ascertain whether any claims on behalf of investors might lie against ANZ which the FMA may wish to consider pursuing under s 34 of the FMA Act**.
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> (Emphasis added)

[17] The FMA subsequently took legal advice in relation to the information received from ANZ. That advice was considered by the Enforcement Division of the FMA board on 24 November 2015. In January 2016, the FMA's inquiry into ANZ [Redacted] became an investigation.

[18] In February 2016, the FMA wrote to ANZ, outlining its findings from its investigation and the FMA's position that ANZ may be liable to [Company X] investors [Redacted]. The letter also stated that:

> The FMA considers it appropriate to share its findings with [Company X] investors **as any decision about whether a claim is brought will necessarily need to have their input**. We would like to meet with you to discuss our findings and how we see this process operating.
>
> (Emphasis added)

[19] ANZ refuted the FMA's allegations, and its conclusion that a claim might lie against ANZ. It also challenged the FMA's proposal to share its findings with the [Company X] investors.

The FMA's decision to disclose

[20] Following these initial communications, the Enforcement Division of the FMA board met three times to consider the question of disclosure. A "Division Paper" was prepared by FMA staff in advance of each meeting, which was then tabled and discussed at the relevant meeting.[5] The Division's formal decision taken at the third of these meetings, namely to disclose certain information to the [Company X] investors, is the subject of ANZ's application for judicial review. Given the Division's decision was made in the context of and against the backdrop of the prior meetings and recommendations, it is necessary to consider each paper and meeting.

The first Division meeting — 25 May 2016

[21] The first meeting took place on 25 May 2016. A Division Paper dated 25 May 2016 was tabled at the meeting. The paper:

(a) updated the Division on the FMA's recent engagement with ANZ regarding the FMA's inquiries into potential claims against ANZ; and

(b) sought the Division's view on disclosing information gathered by the FMA during its inquiries to the [Company X] investors.

[22] In relation to the latter topic, the paper recommended the Division approve the FMA confirming with ANZ the FMA's intent to share information with the [Company X] investors "for the purposes of enabling them to consider their position with respect to a claim against ANZ."

[23] The meeting minutes record that the Division members identified four possible purposes to the proposed "engagement" with the [Company X] investors, recorded in the minutes as follows:

(a) To *assist* the FMA's on-going investigation;

(b) To allow the investors to decide whether they can take action;

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5 The three Division papers have been produced in evidence in this proceeding. They are heavily redacted, primarily on the basis of legal advice privilege.

(c) To allow the FMA to make a decision as to whether to take action pursuant to section 34 FMA Act; and

(d) To obtain judicial clarity about the operation of s59 FMA Act (and the related exercise of the FMA's statutory powers). It was noted that to the extent the FMA resolves *not* to disclose the material, the investors will likely make an application to compel the exercise of the FMA's powers enabled by s59(f). It was noted that clarifying the law was not a reason to support disclosure in itself, but clarity on the law would be an ancillary benefit of the right to disclose for one or more of the other reasons being challenged.

(Emphasis in original)

[24] The minutes record that there was at that point insufficient information to enable a decision to be made as to whether the FMA would take action pursuant to s 34 of the Act. In this context, the meeting minutes record:

> The decision as to whether the FMA would exercise its powers under s34 would be influenced by whether investors decided to take action and no decision could be made by the FMA until investors decide whether to take action. The key question was to establish whether we could share the information with the investors (as it is their claim).

[25] As can be seen from the above, at least at this stage, the FMA saw the second and third of the three purposes of the Proposed Disclosure as being linked.

[26] The minutes concluded that a further meeting should be called as soon as practical, so that members could decide whether to disclose the material under s 59(3)(f) of the Act.[6]

The second Division meeting — 16 June 2016

[27] The second meeting took place on 16 June 2016. A Division paper dated 10 June 2016 was tabled and considered at the meeting.

[28] The paper focused on the proposed disclosure to [Company X] investors, including what should be disclosed, the purpose of disclosure and the process for disclosure. The paper noted that the following information would be disclosed (if a decision to that effect were taken by the Division):

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6 At that stage, no reference was made to disclosure pursuant to s 59(3)(c).

(a) External legal advice obtained by the FMA in relation to ANZ's potential liability to [Company X] investors;

(b) Information obtained by the FMA from ANZ through the issue of notices under s 25 of the Act and referred to in the external legal advice; and

(c) Internal information held by the FMA, including the FMA's findings based on the information obtained and inquiries undertaken.

[29] The paper went on to recommend that:

> If the Division considers any of the [above] information **should be disclosed**, [the Division should] discuss and determine what may be disclosed and **the purpose of such disclosure, including whether it is for the purpose of**:
>
> (i) Obtaining responses and any additional information from the [Company X] investors to the information received from ANZ; and/or
>
> (ii) Determining the next steps that should occur to enable the [Company X] investors to evaluate the merits of a claim against ANZ and consider their position with respect to any such claim; and/or
>
> (iii) Enabling FMA to consider and determine whether to exercise its powers under section 34 of the FMA Act.
>
> (Emphasis added)

[30] I interpolate to note two points:

(a) First, the above seems to envisage that a decision would first be made that disclosure to the [Company X] investors *should* be made, before determining the purpose of any such disclosure; and

(b) Secondly, the three possible purposes for disclosure are in the same form as the three purposes on which the FMA now relies for making the Proposed Disclosure.

[31] The paper then summarised the FMA's engagement with ANZ on the issue of disclosure and set out a potential disclosure process. In this context, the paper noted

that in accordance with s 59(4) of the Act,[7] confidentiality agreements would need to be secured with [the third party], and that any such agreements:

> …will also include a clause restricting the [third party] from using any of the disclosed information for any purpose **other than considering a potential claim against ANZ and liaising with the FMA**.
>
> (Emphasis added)

[32] The paper concluded that FMA staff remained of the view that there was a proper basis for disclosing the information to [Company X] investors (via the [third party]) under ss 59(3)(c) and (f) of the Act.

[33] The minutes of the Division meeting record that the Division members set out the questions for answering as follows:

(a) Should a disclosure be made;

(b) What is the purpose of such disclosure;

(c) What is the scope of such disclosure; and

(d) How disclosure may be made.

[34] Most of the balance of the minutes is redacted, but they conclude by noting that a further paper had been requested on what information should be disclosed, to whom disclosure should be made and the details of the process for that to occur.

The third Division meeting — 8 July 2016

[35] The third meeting took place on 8 July 2016. A Division paper dated 4 July 2016 was tabled and considered at the meeting.

[36] The paper noted that at the 16 June 2016 meeting, the Division was "minded" to disclose information to [Company X] investors "for the following purposes":

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[7] Section 59(4) provides that the FMA must not disclose any information under s 59(3)(f) (to a person the FMA is satisfied has a proper interest in receiving the information or document) unless the FMA is satisfied that appropriate protections are or will be in place for maintaining the confidentiality of the information or document.

(a) For the purpose of, or in connection with, the performance or exercise of any function, power, or duty conferred on the FMA;[8] and

(b) Disclosure to persons whom the FMA is satisfied have a proper interest in receiving the document or information.[9]

[37] I note that the above are not strictly *purposes* for which the documents are to be disclosed, but rather are *circumstances* in which disclosure is permitted by the Act.[10]

[38] The balance of the paper discussed what information should be disclosed, noting that the minimum amount of material required to meet the purposes of disclosure ought to be disclosed. The paper also noted various categories of documents that should *not* be disclosed, including on the basis that they were not relevant to a potential claim against ANZ. The paper recommended that the advice received by the liquidators and which had been shared with the FMA (see [14] above) not be disclosed, given it contained personal information protected by the Privacy Act 1993; information subject to legal professional privilege over which the liquidators maintained privilege; [Redacted].

[39] The paper accordingly recommended any disclosure to the [third party] be limited to the following:[11]

(a) The external legal advice obtained by the FMA in respect of potential claims against ANZ. The Division paper stated that "this advice is sufficient to allow the recipients to make informed decisions relate [sic] to any potential claim"; and

(b) Underlying or source documents referred to in the external legal advice which had been obtained from ANZ. The paper stated that "in order

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8 Financial Markets Authority Act 2011, s 59(3)(c).
9 Section 59(3)(f).
10 Or as Mr Rennie QC, counsel for the FMA, described them in his submissions, "gateways" to disclosure.
11 This remains the information subject to the Proposed Disclosure.

for the advice to be read in its proper context, we consider it necessary for the documents referred to in the advice to be provided."

[40] The paper stated that the above two categories of documents represent "the minimum amount of material required to meet the purposes of disclosure".

[41] The paper then set out the following process for the Proposed Disclosure:

(a) A meeting would be sought with the [third party], the liquidators and their legal counsel (if any).

(b) Before the meeting, signed confidentiality agreements with [the third party], the liquidators and any legal counsel engaged would be obtained.

(c) At the meeting, the FMA would give a verbal report and summary of a number of matters, including its findings as a result of its inquiries; the external legal advice received about potential claims against ANZ; the FMA's view that there may be claims against ANZ; and the FMA would inform the [third party] that it was prepared to disclose certain documents on the basis appropriate confidentiality protections could be put in place, and then only on a counsel-to-counsel basis with legal representatives engaged by the [Company X] investors and with the liquidators/their legal advisers.

(d) Once satisfied that appropriate confidentiality protections were in place, disclosure to counsel would be made. The paper noted that disclosure to counsel only was "at least initially, with discussion to follow in relation to a wider disclosure of the documents to the [third party]".

[42] The paper also recorded the following:

> We are not in a position to set out the steps that the [third party] would need to take for its decision making process (including the potential scope of any further disclosure that may be required) without engaging with the [third

> party] and any advisers they engage. For this reason the disclosure process recommended … is an initial process only.

[43] The minutes of the third meeting recorded that the Division was satisfied it was appropriate to disclose information under ss 59(3)(c) and (f) for the three purposes set out at [3] above. The Division also agreed that disclosure would be limited to the two categories of documents identified in the Division paper of 4 July 2016, for the reasons set out in that paper. The minutes record that the scope of the Proposed Disclosure "was enough for [Company X] investors to form their own view". In terms of the content of the proposed meeting with the [third party], the minutes recorded the following:

> Members noted that if at the meeting between the FMA and the liquidators and the [third party] the FMA is questioned about whether it will take action under s 34 FMA Act, the FMA would advise [Company X] investors to make their own assessment, and to note that the advice received by the FMA is about *their* claim. Section 34(5) FMA Act is highly prescriptive and sets out clearly the high threshold that the FMA must meet before it takes such action. Moreover, it was noted that the Division has not turned its mind to whether action under s 34 FMA Act will be considered.

[44] Consistent with the last sentence of that extract, the minutes formally noted the Division paper's recommendation to keep open the option of the FMA bringing a claim against ANZ using its powers under s 34.

Factual findings in relation to the FMA's decision-making

[45] On the basis of the above, I am satisfied of the following matters:

(a) First, of the three stated purposes of the Proposed Disclosure, the first purpose ("to obtain responses and any additional information from the [Company X] investors to the information received from ANZ") is a secondary or non-operative purpose only. This purpose is not discussed in any detail or substance in the papers or meeting minutes referred to above, including what information or comments the [Company X] investors (via [the third party]) might be able to provide on the documents to be disclosed.

(b) Secondly, the scope of the information to be disclosed was determined by (and limited to) the recipients' ability to make an informed decision regarding a potential claim against ANZ. This further reinforces that the first purpose of the Proposed Disclosure is a secondary or limited purpose only.

(c) Thirdly, given the above, the second and third purposes are the primary purposes of the Proposed Disclosure, and are linked to each other, for the reasons identified by the FMA and set out at [24] above. In other words, I am not satisfied that, absent the prospect of the FMA bringing a claim against ANZ pursuant to s 34 of the Act, the FMA would have nevertheless decided to make the Proposed Disclosure *solely* for the purpose of enabling the [Company X] investors to evaluate and potentially bring a claim against ANZ.

(d) Fourthly, the FMA has not yet taken a decision on whether to bring a claim against ANZ pursuant to s 34 of the Act.

(e) Finally, there is scope for further disclosure (that is, beyond the present Proposed Disclosure), depending on the steps the [third party] may need to take for its own decision-making process.

Events leading to the commencement of this proceeding

[46] As a consequence of the 8 July 2016 Division meeting, on 13 July 2016, the FMA advised ANZ that it had decided to disclose certain documents received from ANZ to the [Company X] investors, relying on s 59(3)(c) and (f) of the Act. It confirmed the two categories of disclosure identified at [39] above. The FMA also confirmed that the Proposed Disclosure was for the three purposes set out at [3] above. ANZ again objected to the disclosure, stating it would be unlawful.

[47] The parties continued to engage on this issue over several months, but no resolution was reached. In March 2017, the FMA informed ANZ that it would be making the Proposed Disclosure. This prompted ANZ to commence this proceeding.

The parties have agreed that the Proposed Disclosure will only occur after a final court determination permitting the disclosure (or discontinuance of the proceeding by ANZ).

ANZ's pleaded claims

[48] ANZ pleads three causes of action:

(a) First, the Proposed Disclosure is outside the FMA's functions as conferred by the Act, and is inconsistent with the purpose for which the FMA's s 25 powers were granted and is thus unlawful.

(b) Secondly, the Proposed Disclosure is not permitted by s 59(3) of the Act and is thus unlawful.

(c) Thirdly, the Proposed Disclosure is in breach of confidence, given the information is confidential and there is no statutory basis for release.

[49] As will be appreciated, all three causes of action overlap. If, for example, the Proposed Disclosure is permitted by s 59(3) of the Act, then such disclosure could not be said to be outside the FMA's proper functions for the purposes of the first cause of action. Similarly, it could not be said to be in breach of any equitable duty of confidence for the purposes of the third cause of action. Accordingly, ANZ's claims all link to the same fundamental question, namely whether the FMA has a proper purpose or basis upon which to make the Proposed Disclosure.

Submissions

Summary — ANZ's submissions

[50] ANZ submits the primary or driving purpose of the Proposed Disclosure is to allow the [Company X] investors to assess and pursue their own claims against ANZ. ANZ says that s 59(3) does not permit the FMA to disclose documents acquired in the exercise of its public functions to private parties for a private purpose.

[51] ANZ submits that its approach to the proper interpretation and application of s 59(3) of the Act is consistent with leading appellate authorities which have considered

similar issues.[12] ANZ submits this approach has also been applied in similar circumstances by the New Zealand High Court in *The Stepping Stones Nursery Ltd v Attorney-General* ("*Stepping Stones*").[13] Relying in particular on Sir Nicholas Browne-Wilkinson VC's observations in *Marcel v Commissioner of Police of the Metropolis,* ANZ submits that the power of public bodies such the FMA to compulsorily acquire documents for *public* functions necessarily, in the absence of clear statutory words, exclude disclosure of that same information to *private* persons for their *private* purposes.[14]

[52] As noted, ANZ submits the primary purpose of the Proposed Disclosure is to enable [Company X] investors to consider and potentially bring a claim against ANZ. Given the authorities referred to above, and in light of the broad and general words used in s 59(3)(c), ANZ says disclosure for such a private purpose is not permitted. To the extent the FMA relies on s 59(3)(f) of the Act, ANZ submits that the concept of a "proper interest" is to be construed in accordance with its well understood common law meaning, namely a *public* interest defence to a claim of breach of confidentiality. ANZ therefore says the [Company X] investors do not have a "proper interest" in receiving the information, given their only interest is a purely private one.

[53] In terms of the disclosure said to be for the purpose of enabling the FMA to consider whether it will bring a claim against ANZ (pursuant to its powers under s 34), ANZ says, first, that the record of the FMA's decision making shows that the FMA is not currently exercising or considering whether to exercise its s 34 power; and, secondly, the Proposed Disclosure is not reasonably necessary for that purpose in any event. ANZ accepts that when considering its s 34 powers, the FMA must have regard to the likelihood of the proposed plaintiff (referred to in s 34 as "Person A") bringing the proceeding itself. However, Mr Galbraith QC submits on behalf of ANZ that s 59(3) does not envisage the FMA essentially *creating* that likelihood, by disclosing information to Person A which the FMA obtained through the exercise of its statutory powers.

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12 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA); *Johns v Australian Securities Commission* (1993) 178 CLR 408; and *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164.

13 *The Stepping Stones Nursery Ltd v Attorney-General* [2002] 3 NZLR 414 (HC).

14 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA) at 235.

[54] Finally, Mr Galbraith submits that the FMA's integrity in performing its functions would be seriously compromised if the FMA's position on the Proposed Disclosure were correct. This is because there is a "reciprocity" between the FMA's power to obtain information compulsorily under s 25 of the Act, and its power to use or disclose that information under s 59 of the Act, and in particular, s 59(3)(c).

[55] Mr Galbraith submits on the basis of leading authorities,[15] that if disclosure to private persons for private purposes were permitted as a part of the FMA's *own* powers and functions, then it would also be able to collect or acquire information for that same private purpose. Mr Galbraith submits that no-one suggests the FMA ought to be able to obtain information in such circumstances, but that is the logical consequence of the FMA's present stance that it is entitled to disclose the information to the [Company X] investors to enable them to consider and pursue a claim against ANZ. This in turn risks undermining cooperation from market participants, who will be conscious of the risk of the FMA voluntarily passing their documents to private parties for private purposes. ANZ submits such matters further reinforce that ss 59(3)(c) and (f) ought to be more narrowly interpreted than suggested by the FMA.

[56] For completeness, I note two further aspects of ANZ's claim.

[57] First, ANZ's submissions also addressed an alleged deficiency in the FMA's decision-making process (in addition to the decision itself being unlawful), on the basis that the record does not demonstrate that the FMA properly "satisfied" itself that the [Company X] investors have a "proper interest" in the Proposed Disclosure for the purpose of s 59(3)(f). ANZ submits that being "satisfied" is a high threshold, yet the record does not evidence the FMA ever turned its mind to the statutory test prior to making the decision to disclose.

[58] However, as I raised at the hearing (and Mr Galbraith acknowledged), any such alleged deficiency in the FMA's decision-making process is not pleaded as a ground of ANZ's application for judicial review.

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15 See above n 12.

[59] Secondly, ANZ's statement of claim alleges that in making the Proposed Disclosure, the FMA would be acting in breach of s 59 of the Act as it "could not be reasonably satisfied for the purposes of s 59(4) that appropriate protections to maintain confidentiality are or will be in place, given the potential use of the proposed disclosure in private proceedings". This point was not however, developed in ANZ's written or oral submissions.

[60] For these reasons, I do not consider these two aspects of ANZ's submissions or claim any further.

Summary — FMA's submissions

[61] Mr Rennie QC for the FMA submits that ANZ's case is premised on three core propositions which ultimately do not survive scrutiny.

[62] First, ANZ's suggestion that the primary purpose of the Proposed Disclosure is to allow [Company X] investors to assess the merits of a claim against ANZ misrepresents the record of the FMA's decision-making. Mr Rennie submits the record clearly establishes the FMA has not pre-determined whether it will take action against ANZ pursuant to s 34 of the Act, and to assist the FMA's decision-making in that regard is a clear and fundamental purpose of the Proposed Disclosure. Accordingly, the FMA submits that "the s 34 purpose is clearly an operative purpose" of the Proposed Disclosure.

[63] Secondly, the FMA submits ANZ's reliance on the "public/private" divide is misplaced, as the FMA's objectives, powers and functions are not limited to "public" matters. The FMA submits the Act is replete with measures which assist private investors to recover money where they have wrongfully suffered loss. The FMA says that underlying these measures is a precept that the private interests of investors in financial markets are inherently bound up with the FMA's main objective of promoting and facilitating the development of fair, efficient and transparent financial markets, and the FMA's function of promoting confident participation in those markets.

[64] Thirdly, the FMA argues that ANZ's submission that s 59 should be interpreted narrowly does not reflect the proper approach to statutory interpretation in New

Zealand. Rather, s 5 of the Interpretation Act 1999 makes a statute's text and purpose the key drivers of interpretation. In that context, the FMA says that the confidentiality regime in s 59 comprehensively balances the confidentiality, privacy and disclosure interests that are at stake in this case.

[65] In terms of the three stated purposes of the Proposed Disclosure, the FMA submits that the first purpose (to obtain responses and any additional information from the [Company X] investors to the information received from ANZ) is clearly connected to a function of the FMA (being the ongoing conduct of an investigation) and a power of the FMA (namely taking action under s 34).

[66] The FMA submits that the second purpose (to enable [Company X] investors to evaluate the merits of a claim against ANZ), is a permitted disclosure under s 59(3)(c) and (f).

[67] In terms of s 59(3)(c), the FMA submits the Proposed Disclosure is clearly connected with a power of the FMA, namely its consideration of whether to bring a claim against ANZ using its powers under s 34. The FMA further says that the s 34 regime contemplates, authorises and *requires* the FMA to engage with Person A, in the context of the FMA itself coming to a decision as to whether to exercise that power. Mr Rennie submits that disclosure of key information relating to the proposed cause of action must be able to be disclosed to Person A (subject to appropriate confidentiality arrangement being in place), to enable Person A to make a properly informed decision as to whether they will bring the contemplated proceeding. The FMA submits that the engagement process "wouldn't make sense" unless there is some disclosure. As such, it says it is rational and lawful for the FMA to try and assess the [Company X] investors' capacity and propensity to being the claim themselves, on the basis the investors are "adequately informed of the grounds on which their claim might be brought." Ultimately Mr Rennie stated that "the level of disclosure would have to be matched to the ability to get an informed answer from [Person A]".

[68] The FMA submits that the second purpose is also permitted by s 59(3)(f), given the [Company X] investors' interest in the FMA's ongoing investigation and the prospect that the FMA might exercise their causes of action under s 34. The FMA

further submits that [Company X] investors also have a "proper interest" in understanding what happened to their money. Thus disclosure to enable the [Company X] investors to evaluate [Redacted] causes of action is consistent with the policy and objectives of the Act. The FMA submits that "measures by the FMA that assist investors to obtain compensation for loss promotes confidence in participating in the financial markets, and contributing to those markets being fair and efficient."

[69] The FMA further submits that the third purpose of the Proposed Disclosure, namely to enable the FMA to consider and determine whether to exercise its powers under s 34, is "palpably" for the purpose of a power of the FMA under the Act and thus permitted by s 59(3)(c). In this context, the FMA refers to s 34(5) and its obligation to consider the likelihood of Person A commencing proceedings and diligently continuing them, and Person A's right pursuant to s 35(1)(c) to object to the FMA commencing a proceeding under s 34. For the same reasons as set out at [67] above, the FMA says it is rational and lawful for the FMA to consider these matters, and for Person A to make a decision whether or not to object, on the basis of Person A being adequately informed of the basis upon which the claim is to be brought.

[70] Finally, in response to the concerns raised on behalf of ANZ by Mr Galbraith concerning the "reciprocity" point, Mr Rennie submits those issues have already been taken into account by the FMA in what is described as a "finely adjusted" decision to make the Proposed Disclosure. Mr Rennie points in particular to the FMA's detailed consideration of the mechanics and process by which the Proposed Disclosure will be made. He submits that this is accordingly not a case of converting confidential documents to non-confidential documents.

Analysis

Introduction

[71] As noted earlier, ANZ pleads three causes of action, all of which overlap to a significant degree. Given the matters discussed at [49] above, I have found it helpful first to consider ANZ's second cause of action, namely whether the Proposed Disclosure is permitted by either or both of ss 59(3)(c) and (f) of the Act.

[72] My analysis proceeds as follows:

(a) First, I examine the broader context to the statutory scheme regarding confidentiality.

(b) Secondly, I examine the statutory scheme itself.

(c) Thirdly, I address the proper interpretation of ss 59(3(c) and (f).

(d) Fourthly, I address the proposed disclosure against s 59, so interpreted.

(e) Finally, I address any residual matters arising under ANZ's first and third causes of action.

The broader context to the statutory scheme regarding confidentiality

[73] At its core, this is a case of statutory interpretation, concerning the proper interpretation of s 59(3) of the Act.

[74] As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd:*[16]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the duel requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other object of the enactment.
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> (Footnotes omitted)

[75] Section 59 of the Act, as its title confirms, concerns confidentiality of documents and information obtained by the FMA through the exercise of its statutory

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[16] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

powers. As Lord Toulson JSC, writing for the United Kingdom Supreme Court in *Ingenious Media,* observed:[17]

> The duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter. It is a well-established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. The principle is sometimes referred to as the *Marcel* principle, after *Marcel v Comr of Police of the Metropolis* [1992] Ch 225.

[76] The *Marcel* principle reflects the courts' longstanding recognition of a citizen's right of enjoyment of their property and privacy free from intrusion or interference, described as "fundamental human rights".[18] Given this, Sir Nicholas Browne-Wilkinson VC stated in *Marcel* that "search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy".[19]

[77] A similar approach is taken in leading Australian authority. In the Australian High Court's decision in *Johns*, Brennan J stated the following:[20]

> Information is intangible. Once obtained, it can be disseminated or used without being impaired, though dissemination or use may reduce its value or the desire of those who do not have to obtain it. Once disseminated, it can be disseminated more widely. A person to whom information is disclosed in response to an exercise of statutory power is thus in a position to disseminate or to use it in ways which are alien to the purpose for which the power was conferred. But when a power to require disclosure of information is conferred for a particular purpose, the extent of dissemination or use of the information disclosed must itself be limited by the purpose for which the power was conferred. In other word, the purpose for which a power to require disclosure of information is conferred limits the purpose for which the information disclosed can lawfully be disseminated or used.

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17 *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164 at [17].

18 See Sir Nicholas Browne-Wilkinson VC's judgment in *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA) at 234. These principles are reflected in s 21 of the New Zealand Bill of Rights Act 1990. As the Court of Appeal observed in *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [28], corporations as well as human beings have legitimate privacy expectations, citing s 29 of the New Zealand Bill of Rights Act.

19 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA) at 234.

20 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 423, relying on *Marcel* and *Morris v Director of the Serious Fraud Office* [1993] Ch 372 (Ch).

[78] Also in *Johns*, Dawson J referred to the above approach as a "general rule", and that:[21]

> Any other approach in relation to information gleaned under compulsion would encroach further than necessary upon the right of the individual to treat as confidential information in his or her possession.

[79] Finally, McHugh J stated in *Johns* that:[22]

> A statute conferring compulsory powers of examination is strictly construed. It is construed as authorising only those actions which are necessary to give effect to the purpose for which the power is conferred and whatever is reasonably incidental to that purpose.

[80] The approach in New Zealand, however, is not one of a "strict" approach to construction of particular statutes or provisions.[23] Section 5 of the Interpretation Act 1999 makes that clear. McHugh J's observations nevertheless reinforce courts' acceptance that, absent clear wording to the contrary, the purpose for which documents may be compulsorily obtained by a public body will ordinarily limit the purpose for which they can be used and disclosed.

[81] These principles were, as noted at [75], recently reinforced by the Supreme Court's judgment in *Ingenious Media.* As Lord Toulson noted, however, the *Marcel* principle may be overridden by explicit statutory provisions.[24] Thus, in *Ingenious Media* itself, the relevant statutory provisions permitted disclosure of information obtained through the exercise of the statutory powers of Her Majesty's Revenue and Customs ("HMRC") in circumstances broader than only for the purposes of the HMRC's core functions and powers. Nevertheless, Lord Toulson cautioned against the long-established duty of confidentiality owed by public bodies such as HMRC being eroded by "words of the utmost vagueness".[25] For that reason, Lord Toulson adopted and applied the principle of construction known as the "principle of legality",

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21 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 436.

22 At 467, citing *Morris v Director of the Serious Fraud Office* [1993] Ch 372 (Ch).

23 See for example, *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39].

24 *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164 at [18].

25 At [19].

as formulated by Lord Hoffmann in *R v Secretary of State for the Home Office, ex parte Simms*:[26]

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[82] Lord Toulson accordingly construed the key provision in issue in *Ingenious Media* (namely disclosure being permitted "for the purposes of a function of the Revenue and Customs") as permitting disclosure only to the extent "reasonably necessary" for HMRC to fulfil its primary function.[27]

[83] The principle of legality discussed by Lord Toulson has been referred to with approval by the New Zealand Supreme Court. Courts will presume that general words in legislation were intended to be subject to the basic rights of the individual.[28]

The statutory scheme regarding confidentiality

[84] The principles concerning confidentiality discussed in authorities such as *Marcel*, *Johns* and *Ingenious Media* are clearly embodied in the statutory scheme of the Act. In this context:

(a) The FMA's power to compel the production of documents and information is, under s 25(1) of the Act, constrained to what it considers "necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under this Act…".

(b) While the FMA is permitted to disclose information it holds in relation to the performance or exercise of its functions, powers, or duties, to a law enforcement or regulatory agency or an overseas regulator, under s 30(2) of the Act, it may only do so if it is satisfied that appropriate

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26 At [19]; *R v Secretary of State for the Home Office, ex parte Simms* [2000] 2 AC 115 (HL) at 131.
27 *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164 at [23].
28 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26]–[27].

protections are or will be in place for the purpose of maintaining the confidentiality of anything provided (and in particular, information that is personal information within the meaning of the Privacy Act 1993). This is despite anything to the contrary in any contract, deed or document.[29]

(c) Similarly, while the FMA will assist an overseas regulator by utilising its powers under s 25 to obtain documents and information, it may only comply with a request if the FMA is satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of anything provided (and in particular, information that is personal information within the meaning of the Privacy Act 1993).[30]

(d) The FMA may also impose conditions in relation to providing information, documents or evidence to a law enforcement or regulatory agency, or to an overseas regulator, but must, when considering what conditions to impose, have regard to whether conditions are necessary or desirable to protect the privacy of any individual.[31] In addition, conditions may relate to maintaining the confidentiality of anything provided (and in particular, information that is personal information within the meaning of the Privacy Act 1993).[32]

(e) The FMA has a specific power to make confidentiality orders (on its own initiative or on the application of any other person), prohibiting the publication or communication of any information it obtains in connection with an inquiry or investigation under the Act.[33] Wilful contravention of an order is an offence subject to a fine not exceeding $300,000.

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29 Financial Markets Authority Act 2011, s 30(4).
30 Section 32(1)(b).
31 Section 33(2).
32 Section 33(3)(a).
33 Section 44.

(f) The FMA may authorise another person to exercise its powers under s 25(1)(a) to (c) of the Act.[34] If it does so, the person so authorised is subject to strict confidentiality obligations in relation to any documents or information acquired in the course of exercising those powers.[35] Wilful contravention of those obligations is also an offence, liable on conviction to a fine not exceeding $200,000.[36]

(g) As already noted, s 59 itself comprises a comprehensive scheme as to the confidentiality of information disclosed to or obtained by the FMA under the Act. It prohibits the FMA from publishing or disclosing any such information, save for in the prescribed circumstances set out in s 59(3). Those circumstances are as follows:

(i) **Section 59(3)(a)** permits disclosure where the information "is available to the public under any enactment or is otherwise publicly available". The FMA is subject to the Official Information Act 1992 and the Privacy Act 1993. Accordingly this exception will apply if the information is to be disclosed pursuant to either of those Acts. The FMA explains that "typical" good reasons for it to withhold information under the Official Information Act are the maintenance of the law; the privacy of natural persons; trade secrets and unreasonable prejudice to the commercial position of the supplier of the information; and that the information is subject to an obligation of confidence, or is information that any person has been or could be compelled to provide under statutory authority. A similar approach applies in relation to information requested from the FMA under the Privacy Act.

(ii) Under s 44 of the Act, the FMA is able to effectively "suspend" (in the FMA's words) the operation of the Official Information

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34 Section 52.
35 Section 54(1).
36 Section 54(2).

Act and Privacy Act during the course of an inquiry or investigation, by making a confidentiality order.

(iii) **Section 59(3)(b)** permits disclosure of information in statistical or summary form.

(iv) **Section 59(3)(c)** is, as noted, of central relevance in this case. It permits disclosure "for the purposes of, or in connection with, the performance or exercise of any function, power or duty conferred or imposed on the FMA". I address this provision in further detail below.

(v) **Section 59(3)(d) and (e)** concern disclosure to other regulators, or to an overseas regulator pursuant to sub-pt 2 of pt 3 of the Act. Disclosures in these circumstances are discussed at [84](b), (c) and (d) above. As noted, the sections in sub-pt 2 of pt 3 contain their own provisions concerning the protection of confidentiality.[37]

(vi) **Section 59(3)(f)** permits disclosure to a person who the FMA is satisfied has a "proper interest" in receiving the information concerned. This is the other "gateway" for disclosure on which the FMA relies in this case.[38] I consider this particular provision in further detail later in this judgment.

(vii) **Section 59(3)(g)** permits disclosure with the consent of the person to whom the information relates, or to whom it is confidential.

(h) Section 59(4) is also important to the overall scheme, as it prohibits the FMA from disclosing documents or information pursuant to s 59(3)(f) unless it is satisfied appropriate protections are or will be in place for

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37 See ss 30–33.
38 See above n 10.

the purpose of maintaining the confidentiality of anything provided. As noted, disclosures pursuant to ss 30 and 32 (which are indirectly referred to in s 59(3)(d) and (e)) already contain similar provisions to this effect.

(i) Further, s 60 provides that if disclosure is to be made pursuant to s 59(3)(c), (f) or (g), the FMA may impose conditions on such disclosure and, in considering what conditions to impose, it must have regard to whether conditions are necessary or desirable to protect the privacy of any individual. It may impose conditions maintaining the confidentiality of the information to be provided. As s 60 does not apply to disclosures pursuant to s 59(3)(a) and (b), it seems clear that the scheme does not envisage confidentiality concerns arising in respect of those permitted disclosures. Through s 60, together with the provisions of ss 30 and 32, all other permitted disclosures under s 59(3) envisage that conditions maintaining confidentiality *may* be required, and *must* be imposed when disclosing information under s 59(3)(f).

(j) Finally, s 65 provides that no court or other person can compel the FMA (or persons acting on its behalf) to give evidence in any court or similar proceeding of anything coming to its (or his or her) knowledge in connection with the operations of the FMA. Nor is the FMA (or persons acting on its behalf) required to make discovery of or produce a document for inspection if the document was provided or obtained in connection with the operations of the FMA.[39]

[85] Issues concerning privacy and confidentiality are accordingly a core aspect of the Act's provisions regulating the FMA's powers to gather, use and disclose information.

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[39] Other than in the context of certain specified offence proceedings, not relevant for present purposes (see s 65(2)).

Section 34 — history and purpose

[86] Given the FMA's reliance on its power to bring proceedings on behalf of [Company X] investors under s 34 of the Act, it is necessary to traverse the history and purpose of this (relatively new) provision.

[87] The power to bring such claims stems from recommendations made by the Capital Market Development Taskforce ("Taskforce"), established in July 2008 to "develop a blueprint" for New Zealand's capital markets.[40] Part of the Taskforce's recommendations was the establishment of a new regulator of capital markets:[41]

> …with a view to consolidating market functions, building scale and expertise and reducing regulatory gaps – so that enforcement of the law is swift, fair and visible.

[88] In the context of its recommendations on the appropriate regulatory institutions, the Taskforce recommended:[42]

> … that, in order to improve investors' access to redress, the regulator be given the power to seek civil remedies on behalf of investors in the event that duties owed to them are breached (including by fund managers and financial advisers) and where other forms of redress (such as the forthcoming Approved Dispute Resolution Schemes) are inadequate. This includes the ability to initiate and coordinate class actions.

[89] In light of the Taskforce's recommendations, the FMA Establishment Board was created, to govern the operational establishment of the FMA. In the Regulatory Impact Statement prepared on what was to become s 34 of the Act, the following was noted in relation to the Establishment Board's views on the proposed new power:[43]

> A key issue in establishing the FMA is whether it will have the necessary powers to achieve its objective of promoting fair, efficient and transparent markets.
>
> The FMA will have the Securities Commission's current powers to enforce the criminal law. It will also be able to seek civil remedies on behalf of investors under the Securities Act and the Securities Markets Act in certain situations, for example where a prospectus or an investment statement

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40 Capital Market Development Taskforce *Capital Markets Matter: Report of the Capital Market Development Taskforce* (December 2009) ["Taskforce Report"], at 3.

41 At 13.

42 At 88.

43 Ministry of Economic Development *Regulatory Impact Statement: A power for the FMA to exercise an investor's right of action* (14 September 2010) ["Regulatory Impact Statement"] at 2.

> contains an untrue statement or where a person has engaged in misleading or deceptive conduct in relation to any dealing in securities.
>
> There are, however, situations where financial markets participants, auditors and other people regulated by the FMA may have acted in a manner that gives rise to a civil right of action, but the Commission is unable to act. These include cases of negligence, breach of trust and breach of statutory duty (e.g. directors' duties).
>
> It is rarely in the interests of individual investors to act in these cases because of the costs and risks involved or, in the case of debenture holders, because they have limited legal standing. Further, in the case of closely held companies, the company and its shareholders may not have the right incentives to bring action against directors. This is likely to have been the case with a number of finance companies, for example.
>
> A majority of the FMA Establishment Board's members consider that there is a material risk of a mismatch between expectations and powers if the FMA does not have a more general power to take cases on behalf of investors. This has the potential to undermine the credibility of the FMA, especially if important cases arise during the critical establishment period and the FMA is unable to act.

[90] The Regulatory Impact Statement noted that an alternative to the proposed s 34 power was to facilitate private enforcement, by reforming the law and procedures around class actions, and through greater funding of courts and legal aid.[44] The Statement ultimately recommended, however, that a new power be introduced, namely for the FMA, in certain circumstances, to be able to exercise another person's right of action.[45]

[91] The benefits of such a power were recorded as the possibility of greater compliance by financial markets participants involved in public offerings of financial products. Under such a power, civil cases would become possible that were not practical previously.[46] The Regulatory Impact Statement also noted that to require the FMA to be satisfied that taking such action would be in the public interest would guard against risks such as the FMA being looked upon to take action whenever investors lost money. The Statement stated that there was a risk that the FMA's actions might block private settlement and enforcement, which could be mitigated by requiring the FMA to obtain leave of the High Court to bring an action where the relevant investor objected to the FMA doing so, or was already bringing its own claim.

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44 At 1.
45 At 6.
46 At 3.

[92] The explanatory note to the Financial Markets (Regulators and KiwiSaver) Bill 2010 (which later became the Act) also commented on the proposed new power:[47]

> The Bill creates a new power enabling the FMA to exercise a person's civil right of action.
>
> …
>
> The power does not change the duties or liability of any person: its sole effect is to give the FMA standing to take up existing rights of action against certain persons in certain circumstances. **Its primary objective is to promote the public interest rather than to obtain redress for investors, although redress (for example, damages) would often follow if the FMA's action were successful.** The power is similar in scope to that available under section 50 of the Australian Securities and Investments Commission Act 2001 (Aust).
>
> In assessing whether it is in the public interest to take action, the FMA will have to consider certain matters, including the FMA's objective of promoting fair, efficient and transparent markets, the likely effect of proceedings on future conduct, the effective and efficient use of its resources, the significance of the matter **and whether the action would be taken if the FMA did not act.** As a result, it is expected that the FMA will exercise the power infrequently.
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> (Emphasis added)

[93] Commentary to the Bill as reported back from the Commerce Committee recommended a number of changes to the draft power. These included allowing more time for investors to object to the FMA proposing to take action; preventing the FMA from exercising the power over the objection of an individual whose right of action was being exercised; and, after the FMA has commenced or taken over proceedings under its new powers, an obligation on the FMA to consult the person on whose behalf the FMA was taking action.[48]

[94] As is evident from these extracts from the legislative materials, the FMA's s 34 power was modelled on s 50 of the Australian Securities and Investments Commission Act 2001 ("ASIC Act"). Section 50 is more "streamlined" than s 34, and simply confers on the Australian Securities and Investment Commission ("ASIC") the power to bring an action in another's name, subject to being satisfied that to do so is in the public interest. Section 50 does not, for example, expressly specify the matters ASIC is to take into account when considering whether exercising its power would be in the

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47 Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-1) (explanatory note) at 4.

48 Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-2), cl 40A; see s 40 of the Act as enacted.

public interest, in the same way that s 34(5) does. Nevertheless, in *Australian Securities Commission v Deloitte Touche Tohmatsu*, a leading decision on the Australian provision, a Full Court of the Federal Court of Appeal addressed a number of factors it considered relevant to ASIC's (then the Australian Securities Commission's) determination of whether exercising its power under s 50, including:[49]

(a) The nature of the alleged breaches of duty and the strength of the claim;

(b) The proposed remedy to be sought;

(c) The likelihood of the proposed plaintiff bringing the claim;

(d) Whether taking such action would support ASIC's primary objectives as set out in the ASIC Act; and

(e) The broader public effect of the proposed action.

[95] Echoes of many of these factors can be seen in s 34(5) of the Act.

[96] With that background in mind, I now turn to consider whether the Proposed Disclosure is permitted under either or both of ss 59(3)(c) or s 59(3)(f) of the Act.

Is the Proposed Disclosure permitted by s 59(3)(c)?

[97] The full text of s 59 is set out in the schedule to this judgment. The words "for the purposes of … the performance or exercise of any function, power, or duty conferred or imposed on the FMA" in s 59(3)(c) are extremely broad and general terms. On their face, disclosure in any way related to any of the FMA's powers or functions, no matter how tenuous the connection might be, would be permitted under this provision. As Lord Toulson observed in *Ingenious Media* when considering similar statutory wording, this would lead to the protection afforded to individuals by the FMA's duty of confidentiality being significantly eroded by "words of the utmost

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[49] *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 (FCAFC) at 124–127.

vagueness".[50] As noted at [82] above, it was for this reason Lord Toulson concluded that similar wording used in the statute in issue in that case was properly interpreted as permitting disclosure "reasonably necessary" for HMRC's primary functions.

[98] Similarly, the words "in connection with," under their plain meaning, are also of the widest import. As the Court of Appeal confirmed in *Sportzone Motorcycles Ltd (in liq) v Commerce Commission*, that phrase must take its meaning from the relevant statutory context, which can drive a broad or restrictive interpretation.[51] I have set out above the relevant statutory context in this case, and the importance of confidentiality to its overall scheme.

[99] I therefore consider that s 59(3)(c) permits disclosure:

(a) when disclosure is reasonably necessary for the purposes of the performance or exercise of any function, power or duty conferred or imposed on the FMA by the Act or any other enactment; or

(b) where there is a close connection or nexus between the disclosure and the performance or exercise of the FMA's relevant function, power or duty.

[100] I do not consider this approach injects words into the section which do not exist, or otherwise adds an unjustifiable gloss. Rather, given the legislative and broader context discussed above,[52] this approach is, in my view, embodied in the very concept of the disclosure being "for" or "in connection with" the particular power, function or duty. I do not consider Parliament intended disclosure to be permitted so long as there was *some* link or connection to a power, function or duty of the FMA, no matter how tenuous or weak.

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50 *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164 at [19].

51 *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2015] NZCA 78, [2015] 3 NZLR 191 at [52]. See also *IAG New Zealand Ltd v John F Jackson* [2013] NZCA 302 at [24], where Miller J, writing for the Court, noted that "the phrase 'in connection with' plainly requires a nexus between one thing and another, but the nature and closeness of the required connection always depends on context and purpose." Miller J cited a decision of the Federal Court of Appeal as authority for that proposition: *Hadfield v Health Insurance Commission* (1987) 15 FCR 487 (FCA) at 491.

52 See [73]–[95] above.

[101] In this context, therefore, is the Proposed Disclosure reasonably necessary for the purposes of the FMA's decision-making under s 34, or is there a close connection or nexus between the Proposed Disclosure and the FMA's decision-making under s 34? In my view, the answer is "no".

[102] As noted, the FMA submits the Proposed Disclosure is necessary because, under s 34(5), the FMA must have regard to the likelihood of Person A commencing the proceedings and diligently continuing them. The FMA says that for it properly to have regard to these matters, and given it is ultimately Person A's claim, it needs to be able to have an informed dialogue with Person A, which in turn necessitates the Proposed Disclosure. I disagree.

[103] I do not accept it is implicit in having regard to the "likelihood" of Person A commencing the proceedings that the FMA *must* consult with that person and, even if it does, that the FMA is required or permitted to disclose to Person A information obtained through the exercise of its statutory powers. Section 34 does not expressly refer to or require such engagement. Section 35, which provides Person A the right to object to the FMA's intention to bring proceedings under s 34, only requires the FMA to give written notice of the FMA's intention to commence proceedings. Further, the only express duty to consult with Person A arises under s 40, *after* the FMA has made a decision under s 34 and has commenced proceedings. Moreover, the FMA having regard to the "likelihood" of Person A commencing the proceedings, is different to the FMA *knowing* whether Person A *will* (or will not) commence the proceedings (only the latter requiring some form of engagement, in the absence of a public statement on those matters by Person A).

[104] I accept that, in practice, the FMA may wish to engage with Person A, in the context of assessing the likelihood of Person A commencing the proceedings. Mr Galbraith accepted, rightly in my view, that there could be no objection in those circumstances of disclosing the fact the FMA was contemplating bringing proceedings, particularly given s 34(5)(e)'s reference to "the" proceedings, rather than some broader potential claim against the proposed defendant. But it is a significant additional step, in my view, to make disclosure of the type proposed in this case. There is no suggestion, either on the face of s 34, or in any of the commentary on its history

and purpose, that in having regard to the likelihood of Person A commencing the proceedings, disclosure of materials held on a confidential basis is required or envisaged. Had that been envisaged, it might have been expected to be a matter specifically considered in the lead up to s 34's enactment, and expressly addressed in s 34 (or s 59), given the Act's focus on confidentiality of information obtained through the exercise of the FMA's powers.[53]

[105] Further, by giving disclosure such as that proposed in this case, the likelihood of Person A commencing proceedings will no doubt be increased from what would have otherwise been the case. In effect, the disclosure itself will drive, enhance or, at the very least, affect the likelihood of Person A commencing the proceedings. In my view, s 34(5)(e) is aimed at the FMA making an assessment of the likelihood of Person A commencing the proceedings, independent of the FMA's own investigation and the particular information it may have learned as a result. As I raised with Mr Rennie at the hearing, prospective plaintiffs are required every day to form a view on whether to commence proceedings, based on information they then have at their disposal. Disclosure such as that proposed in this case would place Person A in a quite different and indeed privileged position to other litigants making the same sorts of decisions.

[106] I do not consider that result was intended through the requirement that, when considering whether to exercise its powers under s 34, the FMA have regard to the "likelihood" of Person A commencing the proceedings. In addition, the record demonstrates that an operative purpose of the Proposed Disclosure in this case is to enable the [Company X] investors *to form their own view*, with the benefit of the information and documents obtained through the FMA's inquiry, on whether they *will* bring proceedings against ANZ, rather than *the FMA* making its own assessment of the *likelihood* of the [Company X] investors doing so. Section 34 explicitly requires the FMA to make the second of those assessments, but it is silent as to the first.

[107] There are also practical considerations. The FMA has given careful and proper attention to maintaining the confidentiality of the documents and information concerned. It proposes that a condition of the Proposed Disclosure is that [the third

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53 See the discussion of the statutory scheme regarding confidentiality at [84]–[85] above.

party] will be restricted from using any of the disclosed documents and information for any purpose other than considering a potential claim against ANZ and liaising with the FMA. But once [the third party] are in possession or have knowledge of the documents and information, it is unclear how this condition would operate in practice. If, for example, following the Proposed Disclosure, the [Company X] investors did decide to commence proceedings against ANZ, would they be required to ignore the very information on which their decision to bring the claim was based when formulating their statement of claim? Similarly, when formulating requests for discovery, would the categories of documents to be discovered by ANZ need to ignore the information already held by [Company X] investors?

[108] Additionally, the Proposed Disclosure is, at least initially, to be made in a limited form and to a limited class of persons.[54] However, the FMA recognises that it is not aware of what steps the [third party] may need to take for its own decision-making process, including the potential scope of any further disclosure that may be required. For these reasons, the Proposed Disclosure is described in the FMA's papers as "an initial process only". Presumably this envisages that the documents and information may need to be communicated more widely across the [Company X] investor group. How confidentiality would be appropriately maintained in those circumstances is not addressed in the underlying papers. This point, and that addressed in the preceding paragraph, reinforce Brennan J's cautionary observation in *Johns* that given information is intangible, once it has been disclosed it can be disseminated or used in ways which are alien to the underlying purpose for which it was originally obtained.[55]

[109] I am conscious that, if the [Company X] investors were to commence proceedings against ANZ, they may acquire the documents which are the subject of the Proposed Disclosure in any event, through the discovery process. Why then should there be any objection to the same information being disclosed to them now by the FMA?

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54 See [41] above.

55 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 423.

[110] A similar point was considered by the Court of Appeal in *Marcel*.[56] The Court concluded that the police in that case *were* required to disclose the documents in question to the plaintiff in civil proceedings in response to a subpoena, partly on the basis that the person from whom the police had seized the documents would have been required to produce them in response to a subpoena in any event. However:

(a) All members of the Court of Appeal in *Marcel* agreed with Sir Nicholas Browne-Wilkinson VC that it was not within police powers to *voluntarily* disclose information acquired during its investigations to assist a plaintiff in private civil litigation.[57]

(b) In addition, and as noted above, the position under the Act is quite different to that considered by the Court of Appeal in *Marcel*, given s 65 specifically prohibits the FMA from being required to produce documents by way of discovery or otherwise in civil proceedings.

(c) Further, whether the information to be disclosed would be available to Person A (via discovery) if they were to commence proceedings is not certain. That would depend on the scope of the pleadings and thus the matters in issue, which may or may not align with the scope and purpose of the inquiry or investigation in connection with which the information was obtained by the FMA.

(d) Finally, if the documents were to be obtained by Person A through the discovery process, that process would be subject to the Court's control and oversight, including the obligation not to use or disclose the documents for any purpose other than the relevant proceeding.[58] And while in this particular case the FMA proposes to impose conditions on the use to which the information and documents can be put, and to

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56 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA).

57 At 235 per Sir Nicholas Browne-Wilkinson VC; 256 per Dillon LJ; 260 per Nolan LJ; and 263 per Sir Christopher Slade.

58 High Court Rules 2016, r 8.30(4).

maintain confidentiality, there is no requirement under s 59(3)(c) for it to do so.[59]

[111] As will be evident from the above discussion, there are no authorities directly addressing the issue arising on this aspect of ANZ's claim. However, I note that a (somewhat) similar point arose, at least at first instance, in *Australian Securities Commission v Deloitte Touche Tohmatsu*.[60] That case came about following the collapse in 1990 of a group of companies known as "Adsteam". The Australian Securities Commission ("ASC") (now ASIC), conducted an investigation into the collapse. Accounting irregularities were discovered. As a result of its investigation, ASC resolved to commence proceedings in the name of Adsteam under s 50 of the ASIC Act, against Adsteam's former directors and Adsteam's auditors, Deloitte Touche Tohmatsu ("Deloitte"). Those proceedings were commenced, but were stayed pending resolution of Deloitte's application for judicial review of ASC's decision to commence the proceedings.

[112] ASC had engaged with the (new) directors of Adsteam before making its decision to commence the proceedings. Adsteam, through its new directors, opposed ASC commencing the proceedings. The primary ground of Deloitte's application for judicial review was that when considering whether commencing the proceedings was in the public interest, ASC failed to consider the policy of general law that it is a matter for the directors of a wronged company to determine whether proceedings ought to be commenced in its name (referred to in the judgment as "the *Foss v Harbottle* consideration").[61]

[113] At first instance, Lindgren J granted Deloitte's application for judicial review, finding that ASC was bound to take into account the *Foss v Harbottle* consideration when making a decision under s 50.[62] This conclusion was overturned on appeal. The Court of Appeal (unanimously) held there was no justification for importing such a consideration into s 50, given its remedial nature. As noted above, the Court of Appeal

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59 That is because s 59(3)(c) is not subject to s 59(4). Rather, the FMA has the *discretionary* power to impose conditions on disclosure pursuant to s 59(3)(c); see s 60.

60 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 (FCAFC).

61 See *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 (Ch).

62 *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453 (FCA).

also set out a range of matters which it considered to be relevant considerations to be taken into account when making a decision under s 50.[63]

[114] For present purposes, relevant aspects of the decision are Lindgren J's observations at first instance of the consultation between ASC and Adsteam's directors before ASC made its decision under s 50. Adsteam had been asked by ASC for its views on ASC commencing the proceedings in Adsteam's name. Meetings and correspondence had taken place and passed between the parties in this regard. The last two paragraphs of Adsteam's letter to ASC dated 10 March 1994 are of particular relevance. In response to ASC's request for Adsteam's views on ASC commencing the proceedings, Adsteam wrote:[64]

> Up to a point these are preliminary reactions because **ASC officers were not prepared at last Thursday's meeting to disclose to Adsteam the facts which the ASC investigation has apparently established. Adsteam is therefor unable to form its own view as to whether it is in the company's interest to bring civil proceedings.** It is possible that the case against the former directors is strong enough to warrant civil proceedings by Adsteam itself – although this seems highly unlikely, given Adsteam's present position and the company's present interests, and given also that the ASC has apparently concluded that the evidence is not strong enough to initiate criminal proceedings.
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> Adsteam's view is that the decision whether or not civil action should begin in the company's name is a decision for Adsteam in the first instance, and a decision to be taken in the light of the company's interests (not the wider public interest, as you seem to suggest; on our advice it is in the public interest that proceedings should be commenced once it has been determined that it is in the company's interest to commence them).
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> (Emphasis added)

[115] No substantive response was provided by ASC to the matters raised in the penultimate paragraph of the 10 March 1994 letter. Lindgren J described the correspondence by that point as having "led to an an impasse."[65] The Court of Appeal agreed.[66] In its subsequent internal submission paper on whether or not to commence the proceedings, ASC officials noted that "it is apparently unlikely that the current

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63 See [94] above.

64 *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453 (FCA) at 471.

65 At 474.

66 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 (FCAFC) at 125.

board of Adsteam will bring any proceedings itself in respect of the improper conduct", referring, inter alia, to the correspondence of 10 March 1994.[67]

[116] In his decision at first instance, Lindgren J commented on the matters raised in Adsteam's letter of 10 March 1994 in the following terms:[68]

> Neither the officers nor the members [of the ASC] ever grappled with the issue raised by [Adsteam] in the last two paragraphs of its letter dated 10 March. It will be recalled that that letter did two things. First it gave "preliminary reactions" to the ASC officers' request for [Adsteam's] observations on the question whether the proceedings being proposed by ASC officers would cause [Adsteam] commercial problems. Secondly, and in my view more significantly, in the last two paragraphs [Adsteam] volunteered a statement of its own position which was that ASC should provide it with "the facts which the ASC investigation ha[d] apparently established" so the directors could form their own view as to whether it was in the company's interest to bring civil proceedings. The paragraphs made it clear that [Adsteam] desired to have that information in order to enable its directors to assess, no doubt with legal and accounting advice, the strength of [Adsteam's] case. It would hardly be in [Adsteam's] interest to pursue lengthy proceedings against its former directors and auditors, albeit at the cost of ASC, only to fail.

[117] Lindgren J further stated:[69]

> It is clear that the view taken by ASC was that the view expressed by [Adsteam] in the last two paragraphs of its letter dated 10 March were at odds with the terms of s 50 and that the significance of [Adsteam's] letter dated 10 March was to be found only in its submission as to "commercial inconvenience".

[118] His Honour concluded:[70]

> This approach pays too little regard to the fact that the causes of action referred to in s 50(a), like the property referred to in s 50(b), belong to the company or other person referred to in s 50, not to ASC. …
>
> I infer that ASC at no time gave to [Adsteam] an account of the evidence which it had concluded was available from its inspection of the documents and examination of the individuals, enabling [Adsteam] to decide whether or not to commence, or consent to the commencement of proceedings. Nor did ASC ever reveal to [Adsteam] the nature of the accounting or legal advice which it had obtained. ASC could have waived, subject to appropriate constraints, the legal professional privilege attached to the legal advice which it had obtained, in order to enable the directors to be acquainted with the effect of that advice, particularly as to the strength of [Adsteam's] causes of action.

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67 At 109.
68 *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453 (FCA) at 477.
69 At 478.
70 At 478.

> In relation to the accounting advice, [Deloitte] called for production of it on the hearing but it was not produced for the reason that privilege was claimed in respect of it.

[119] The Judge did not consider the evidence satisfactorily explained why ASC did not provide Adsteam the information it requested. His Honour did not specifically address confidentiality, but noted that ASC would have been permitted to disclose ASC's internal report about Adsteam to Adsteam under s 18(3) of the Act. And in terms of documents obtained through its investigation, and a copy of the record of examinations it had conducted, Lindgren J noted that ASC would have been permitted to disclose those to Adsteam under s 25(1) and s 37(7) of the ASIC Act.[71]

[120] In relation to those provisions:

(a) Under s 18(3) of the ASIC Act, if a report or part of a report relates to a person's affairs (in that case, Adsteam), ASC/ASIC may, at that person's request, or of its own motion, give that person a copy of the report.

(b) Section 25(1) provides that ASC/ASIC may give a copy of a written record of an examination of a person conducted in connection with ASC/ASIC's investigation to "a person's lawyer if the lawyer satisfies ASC/ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related." Further, s 25(2) provides that if such a written record is disclosed under s 25(1), the record must not be used or disclosed other than in connection with preparing, beginning or carrying on a proceeding (breach of which is a strict liability offence subject to penalties including imprisonment for three months).

(c) Section 37(7) is again a specific permitted disclosure in defined circumstances, to the effect that where books have been produced to ASC/ASIC, it must permit another person to inspect those books in

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[71] At 478. The wording of the relevant provisions of the Act at the time of the Federal Court of Appeal's judgment continues to apply.

cases where they would have been entitled to inspect them and may permit another person to inspect the books in other circumstances.

[121] Lindgren J accordingly concluded that:[72]

> By not meeting [Adsteam's] request referred to in the penultimate paragraph of [its] letter dated 10 March, ASC deprived itself of the opportunity of giving genuine consideration to the question of whether [Adsteam] was failing to enforce its causes of action for such a reason that ASC was justified doing so in its name without consent. Expressed differently, ASC deprived itself of the opportunity of genuinely considering whether the circumstances were exceptional ones in which, consistently with the policy underlying s 50, it was appropriate for ASC to assume the role of enforcing [Adsteam's] cause of action.

[122] As noted however, Lindgren J's conclusions were overturned on appeal.[73] The Court of Appeal rejected the conclusion that ASC was bound to take into account the *Foss v Harbottle* consideration when making a decision under s 50. It found that the likelihood of Adsteam commencing the proceedings was a relevant consideration in ASC exercising its discretion under s 50. Indeed, the Court stated:[74]

> …it is extremely significant that although, as we have seen, lengthy correspondence was exchanged [between Adsteam and ASC], the directors at no stage suggested that they might resolve to take action against the auditors.

[123] However, neither in this context, nor in any other aspect of the judgment, did the Court of Appeal suggest that ASC's assessment of the likelihood of Adsteam commencing proceedings was deficient because it had not acceded to Adsteam's request to provide the information sought in Adstream's 10 March 1994 letter.

[124] I appreciate the matters I am required to determine on this aspect of ANZ's claim were not directly in issue in *Australian Securities Commission v Deloitte Touche Tohmatsu*. Nevertheless, the matters discussed above reinforce my conclusion that there is nothing implicit in s 34 itself which requires or permits the FMA to disclose to Person A information obtained by the FMA through the exercise of its statutory powers. I therefore conclude the Proposed Disclosure is neither reasonably necessary for the purpose of the FMA's decision-making under s 34, nor is there a sufficiently

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72 *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453 (FCA) at 479.
73 *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 (FCAFC).
74 At 125.

close connection between the Proposed Disclosure and the FMA's decision-making under s 34.

[125] The FMA further submits the Proposed Disclosure is permitted by s 59(3)(c), given a purpose of the Proposed Disclosure is to obtain responses and any additional information from the [Company X] investors to the information received from ANZ (the first purpose). However, I have already found that that purpose was a secondary (non-operative) purpose only.[75] Accordingly, I accept ANZ's submission that if I find the FMA may not release the documents and information for the operative purposes of disclosure (namely the second and third purposes), the decision to disclose cannot be "saved" by a non-operative purpose.[76]

[126] For the reasons set out above, I am satisfied that the material reasons for the FMA's decision to make the Proposed Disclosure were the second and third purposes. In other words, but for the second and third purposes, the decision to make the Proposed Disclosure would not have been made. It is accordingly not necessary to consider the first purpose in any detail.

[127] For completeness, however, I observe that the first purpose appears, with respect, to be somewhat of a makeweight argument. The record of the FMA's decision-making outlined above does not touch on, in any substantive way at least, why the Proposed Disclosure is reasonably necessary for, or even linked to, the first purpose. As stated above (at [45]), the scope of material to be disclosed was not determined by *any* reference to the first purpose, but only by reference to the second (and consequently) the third purposes.[77] Disclosure of confidential material which has been compulsorily acquired through the exercise of the FMA's statutory powers for a purpose unconnected with that material, would thwart the policy and objectives of the Act.

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75 See [45](a) above.

76 In accordance with *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 393-394 per Cooke J; and *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50]–[55]. The FMA did not dispute this approach as a matter of principle.

77 The documents to be disclosed being the FMA's external advice on a potential claim against ANZ and, to enable that advice to read in its proper context, the documents referred to in it. As noted at [40] above, the FMA considers this the minimum material required "allow the recipients to make informed decisions relate (sic) to any potential claim."

[128] If the first purpose *had* been a material reason for the FMA's decision to make the Proposed Disclosure, then a court would ordinarily be hesitant to intervene, given it would be intervening in the exercise of a broadly-expressed power conferred on the FMA in the context of equally broadly-expressed objectives to which that power is directed. So, for example, whether it was reasonably necessary for the purpose of an ongoing FMA investigation to disclose certain confidential information to a third party, would ordinarily be a matter for the FMA, being the body with expertise in the underlying investigation and surrounding subject matter. A court's hesitancy to intervene is of course not without its limits.[78] However, given my finding on the nature of the first purpose as it concerns the FMA's decision to make the Proposed Disclosure, it is not necessary to comment any further on this issue.

[129] I accordingly turn to consider whether the Proposed Disclosure is permitted by s 59(3)(f) of the Act.

Is the Proposed Disclosure permitted by s 59(3)(f)?

[130] This aspect of ANZ's claim turns on the concept of disclosure to a person with a "proper interest". For the reasons outlined above, the interpretation of a broad concept such as a "proper interest" will turn on purpose and context.

[131] The starting point when considering when an interest will be a "proper" interest under s 59(3)(f) of the Act are the purposes of the section and the Act. The relevant purposes are to establish the FMA, state the FMA's main objectives and functions, and provide for the FMA's information gathering powers.[79]

[132] Also relevant are the FMA's objectives and functions. The FMA's "main objective" is to "promote and facilitate the development of fair, efficient, and transparent financial markets".[80]

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78 As explained by the Supreme Court in *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53], a statutory power is subject to limits even if it is conferred in unqualified or broadly framed terms.

79 Financial Markets Authority Act 2011, s 3.

80 Section 8.

[133] The FMA's functions are listed in s 9 of the Act. Relevant for present purposes are the FMA's functions to:

(a) Promote the confident and informed participation of businesses, investors and consumers in the financial markets;[81]

(b) Perform and exercise the functions, powers and duties conferred on it under the financial markets legislation;[82]

(c) Monitor compliance with, investigate conduct that constitutes or may constitute a contravention of certain Acts;[83] and

(d) Monitor, and conduct inquiries and investigations into any matters relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct relating to those markets.[84]

[134] I have already addressed earlier in this judgment the FMA's key information gathering powers under s 25, and its powers and duties in relation to s 34.[85]

[135] There is no doubt the FMA is a public body and that its core objectives and functions are public in nature. Ultimately, its functions, powers and duties are aimed at driving its main *public* objective, namely promoting and facilitating the development of fair, efficient, and transparent financial markets. It is not a primary objective or function of the FMA to drive or promote purely private interests.

[136] A useful example of this public/private divide is found in s 34 itself. As noted above, when consideration was given to including s 34 in the Act, a key issue was whether the FMA, once established, would have the "necessary powers to achieve its objective of promoting fair, efficient and transparent markets".[86] For this reason,

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81 Section 9(1)(a).
82 Section 9(1)(b).
83 Section 9(1)(c).
84 Section 9(1)(d).
85 See [84]–[96] above.
86 Regulatory Impact Statement at 2.

introducing a new power such as that contained in s 34 was seen as a means of "benefit[ing] investor confidence in the regulator and financial markets".[87] It was not seen as serving the (private) purpose of securing redress for investors.

[137] This tension between the FMA's public interests and investors' private interests was highlighted in commentary to the Bill as it passed through the House. Again, as noted earlier, in the Explanatory Note to the Bill, the "primary objective" of the proposed new power was said to be to promote the public interest, rather than to obtain redress for investors (though redress might be a secondary consequence of the promotion of the public interest).[88] It was because of this tension that further amendments were made to the Bill by the Commerce Committee, to "strengthen the rights of individuals".[89]

[138] Ultimately, whether a person has a "proper interest" in receiving information for the purposes of s 59(3)(f) will be fact specific, and will turn on the nature of that person's interest in any given case. It is therefore not helpful to seek to formulate a generic and broad approach to what will and will not amount to a "proper interest" under s 59(3)(f). But given the purposes of the Act, and the FMA's core objectives and functions, coupled with the strict limits on the circumstances in which the FMA is permitted to disclose confidential information obtained through the exercise of its statutory powers, I do not consider disclosure to a person who has a purely *private* interest in receipt of the materials, divorced from any of the public purposes of the Act, or the public objectives and functions of the FMA, would be disclosure to a person with a "proper interest".

[139] Such an approach is consistent with the approach taken in *Marcel*.[90] At first instance and on appeal, the Courts held that disclosure of documents obtained by a *public* body (in that case the police) for *public* purposes could not be voluntarily disclosed to *private* individuals for *private* purposes. A similar conclusion was

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87 At 2.

88 Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-1), Explanatory Notes at 4.

89 Financial Markets (Regulators and KiwiSaver) Bill 2010 (211-2), Explanatory Notes at 4, including the right of Person A to object to the FMA taking a proceeding on their behalf, and including a duty on the FMA to consult with Person A after the FMA had commenced proceedings in Person A's name.

90 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 (CA).

reached by Harrison J in *Stepping Stones*, where his Honour concluded that disclosure of documents obtained by the police was not permitted for the purpose of assisting a private party in civil proceedings against the person from whom the documents had been obtained.[91]

[140] Mr Rennie submits that unlike the entities being considered in *Marcel* and *Stepping Stones* (the police), the FMA's functions extend to facilitating purely private interests, and that the Act is "replete with measures enabling the FMA to assist investors recover money where they have wrongfully suffered loss". Measures referred to by the FMA include:

(a) Acceptance and enforcement of compensation undertakings under s 46A of the Act;

(b) Intervening in civil proceedings in s 48 of the Act;

(c) Obtaining declarations of contravention in ss 486 to 488 of the Financial Markets Conduct Act 2013 ("FMC Act") designed to facilitate claims for compensation by investors;

(d) Obtaining compensatory orders under ss 494 and 495 of the FMC Act for investors who have suffered loss because of a contravention of a civil liability provision;

(e) Obtaining "other civil liability orders" under ss 497 and 498 of the FMC Act for investors who have suffered loss because of a contravention of a civil liability provision;

(f) Obtaining asset preservation orders under ss 522 to 524 of the FMC Act;

(g) Obtaining compensatory orders under s 42 of the Financial Markets Supervisors Act 2011; and

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91 *The Stepping Stones Nursery Ltd v Attorney-General* [2002] 3 NZLR 414 (HC).

(h) The acceptance and enforcement of compensation undertakings under s 82(1) and (2)(c) of the Anti-Money Laundering and Countering of Financing of Terrorism Act 2009.

[141] I accept the functions of the FMA are different to and broader in some respects than the functions of the police. Nevertheless, the above functions and powers of the FMA are ancillary to and for the purpose of achieving the FMA's primary *public* objective set out in s 8 of the Act. Moreover, these examples of the FMA assisting or being involved in securing civil redress are expressly and carefully addressed in the relevant statutes, rather than enabled through general and ultimately vague words. They also involve the FMA itself taking steps or actions to obtain or facilitate that redress.

[142] Turning to the specific bases upon which the FMA says the [Company X] investors have a proper interest in this case, the FMA first says that the investors' interest in receiving the information is "referable to their interest in the FMA's ongoing investigation". I disagree that interest amounts to a "proper interest" for the purposes of s 59(3)(f). In the context of any investigation or inquiry conducted by the FMA, there will be a multitude of parties with an interest in the ongoing investigation or inquiry. If this were a sufficient foundation for disclosure under s 59(3)(f), that would amount to a very significant exception to the FMA's primary obligation not to disclose information obtained as a result of the exercise of its statutory powers. I do not consider Parliament intended such a broad exception through the use of the general words in s 59(3)(f).

[143] The FMA further submits the [Company X] investors have a proper interest in receiving the documents given the prospect the FMA might exercise their cause of action under s 34. However, I have already held that disclosure for the purposes of enabling the FMA to carry out its own decision-making under s 34 of the Act is not a permitted disclosure under s 59(3)(c). Accordingly, I do not consider the [Company X] investors have a "proper interest" in receipt of the information and documents when such disclosure is not reasonably necessary or sufficiently connected with the FMA's own decision-making functions under s 34.

[144] Finally, the FMA says disclosure to enable the [Company X] investors to evaluate [Redacted] causes of action is consistent with the policies and objectives of the Act and accordingly gives the investors a "proper interest" in receipt of the material concerned. It is in this context the FMA relies on what it says is the absence of the sharp public/private divide, as discussed above.

[145] Such disclosure, however, does not involve the FMA *itself* taking action to secure or assist in securing redress for investors, which would be consistent with its primary public objective and functions. A regulator taking steps in appropriate circumstances to seek redress signals the regulator has strength, and in turn drives confidence in the financial markets. That was the very purpose of enacting s 34, which provides the appropriate mechanism for securing investors' access to compensation when to do so would be in the public interest.[92] Conversely, investors' private interests in independently pursuing their own claims are not sufficiently connected or linked to the FMA's public functions and objectives to mean they have a "proper interest" in disclosure for the purposes of s 59(3)(f).

[146] The conclusions reached in the preceding paragraphs are reinforced by the requirement in s 59(4) of the Act that the FMA must not make disclosure under s 59(3)(f) unless it is satisfied appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or documents concerned. As a mechanism to assist investors to *obtain* compensation, the information disclosed would ultimately need to be deployed in the proceedings seeking such compensation. In those circumstances, it is difficult to see how the FMA could be satisfied at the preliminary disclosure stage that the information would remain confidential. The practical issues relating to confidentiality discussed at [107] to [110] above would also be relevant.

[147] I am reinforced in reaching my conclusion by the terms of s 65. It would be unusual for Parliament to prohibit a party who is seeking redress from a market participant in private proceedings from obtaining the information from the FMA through discovery (or the issue of a subpoena), but nonetheless intend the FMA to be

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92 See the history and purpose of s 34 at [86]–[96] above.

able to voluntarily provide the same information to that party for the purpose of assisting it obtain such redress.

[148] There is also a concern that if disclosure to assist a person obtain compensation (in circumstances where the FMA does not itself take steps to obtain such compensation) gave that person a proper interest under s 59(3)(f), this would have a negative effect on market participants' cooperation with the FMA in the conduct of its inquiries and investigations. Section 59 is not limited to information obtained compulsorily by the FMA, but extends to *any* information obtained by the FMA under the Act. This would include information voluntarily provided to the FMA in the course of an inquiry or investigation. A market participant would no doubt be hesitant to voluntarily provide documents and information to the FMA if it understood that, if the FMA considered the information supported a claim by a third party against the market participant, the FMA would be permitted to disclose that information to the third party. Such concerns would also likely drive a strict and "black letter" approach to compliance with statutory notices seeking documents and information. I do not consider Parliament intended such negative outcomes through the permission granted in s 59(3)(f).

[149] For these reasons, I conclude the Proposed Disclosure is not to a person with a proper interest for the purposes of s 59(3)(f).

[150] I now turn to make some brief concluding observations on ANZ's first and third causes of action.

First cause of action

[151] ANZ's first cause of action pleads that the Proposed Disclosure is outside the functions of the FMA as conferred by s 9 of the Act (and supplemented by s 14 Crown Entities Act 2004) and inconsistent with the purpose for which the s 25 powers are conferred.

[152] Section 59 of the Act is a carefully calibrated regime in relation to the confidentiality of information obtained by the FMA, and prescribed circumstances in which that information may be disclosed. Given this, it is difficult to see, and the FMA

did not seek to suggest, that if the Proposed Disclosure was not permitted under s 59(3), it was nevertheless permitted through some broader approach to the FMA's powers and functions.

[153] As I have found the Proposed Disclosure is not permitted by s 59(3), it follows that the Proposed Disclosure is not otherwise permitted by the broader functions of the FMA as conferred by s 9 of the Act.

[154] I do not consider, however, that if the Proposed Disclosure is inconsistent with s 25 of the Act, it is therefore ultra vires and unlawful. This is because the Act goes further than simply specifying that material obtained through the exercise of the FMA's powers under s 25 can only be used or disclosed for the purposes for which it is obtained. Instead, it lists, in s 59(3), seven scenarios in which disclosure is permitted, only one of which could be argued to be the "flip side" of s 25 (namely, s 59(3)(c)). Thus, the mere fact that disclosure of information might be "inconsistent" with the purpose for which the information was obtained would not render that disclosure ultra vires or unlawful, if nevertheless permitted by s 59(3).

[155] In light of these observations, and given my conclusion that the Proposed Disclosure is not permitted by s 59(3), I need not say anything further on this cause of action.

Third cause of action

[156] The third cause of action, breach of confidence, adds little, if anything, to the first two causes of action. Scant attention was given to it in either party's submissions, written or oral.

[157] There is no dispute that the documents and information in question are confidential. ANZ submits that under common law and the Act, the FMA is required to treat ANZ's information as confidential unless it has a statutory basis for release. The FMA does not dispute that. To the extent authority is required as to the position at common law, Lord Toulson stated in *Ingenious Media*:[93]

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[93] *R (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54, [2016] 1 WLR 4164 at [28].

> It is important to emphasise that public bodies are not immune from the ordinary application of the common law, including in this case the law of confidentiality.

[158] I have found that the Proposed Disclosure is not permitted by the terms of the Act. Accordingly, the Proposed Disclosure would be in breach of the FMA's duty of confidence to ANZ.

[159] The relief sought on this (equitable) cause of action is a declaration that the Proposed Disclosure is in breach of confidence and a permanent injunction restraining the FMA from making the Proposed Disclosure. Given the orders I propose to make on the second cause of action (see [161] below), I do not consider it necessary to make these additional orders.

Result and costs

Result

[160] The Proposed Disclosure is not permitted by ss 59(3)(c) or 59(3)(f) of the Act.

[161] There are accordingly orders:

(a) quashing the FMA's decision to make the Proposed Disclosure; and

(b) prohibiting the FMA from making the Proposed Disclosure.

[162] I should emphasise that the above orders are obviously aimed at the FMA's decision to make the Proposed Disclosure only. They do not extend to any future potential disclosure of some or all of the material which is the subject of the Proposed Disclosure for other purposes (for example, disclosure in the context of any consultation under s 40, or in the context of the FMA prosecuting any proceedings against ANZ, were the FMA to exercise its powers under s 34). That is not to signal that disclosure for those or other purposes would necessarily be lawful; whether disclosure for any other purpose is a permitted disclosure under s 59(3) of the Act (or at law) would need to be considered on its own merits.

Costs

[163] Given the result of this proceedings, costs ought to follow the event in the ordinary way, in favour of ANZ.

[164] If the parties are unable to agree on costs, memoranda (no longer than five pages) may be filed; ANZ's memorandum within 15 working days of the date of this judgment, the FMA's within a further five working days. The parties had suggested in an earlier case management memorandum that the proceeding be categorised as a category 3 proceeding for costs purposes. I agree that is appropriate. I flag that I am minded to certify for second counsel, but not third.

_____

Fitzgerald J

Schedule: Key Provisions of the Act

8 FMA's main objective

The FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets.

9 FMA's functions

(1) The FMA's functions are as follows:

(a) to promote the confident and informed participation of businesses, investors, and consumers in the financial markets, including (without limitation) by—

(i) collecting and disseminating information or research about any matter relating to those markets:

(ii) issuing warnings, reports, or guidelines, or making comments, about any matter relating to those markets, financial markets participants, or other persons engaged in conduct relating to those markets (including in relation to 1 or more particular persons):

(iii) providing information about its functions, powers, and duties under this Act and other enactments (including promoting awareness by investors that all investments involve risks and that it is not the role of the FMA to remove those risks):

(iv) providing, or facilitating the provision of, public information and education about any matter relating to those markets:

(v) stating whether or not, or in what circumstances, the FMA intends to take or not take action over a particular state of affairs or particular conduct (for example, to give a person some level of certainty that the FMA will take no further action in relation to a matter):

(b) to perform and exercise the functions, powers, and duties conferred or imposed on it by or under the financial markets legislation and any other enactments:

(c) to monitor compliance with, investigate conduct that constitutes or may constitute a contravention or an involvement in a contravention of, and enforce [the Acts referred to in Schedule 1] …

(d) to monitor, and conduct inquiries and investigations into any matter relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct relating to those markets:

(e) to keep under review the law and practices relating to financial markets, financial markets participants, and other persons engaged in conduct relating to those markets:

…

25 FMA may require person to supply information, produce documents, or give evidence

(1) If the FMA considers it necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under this Act or any provision of the financial markets legislation, the FMA may, by written notice served on any person, require the person—

(a) to supply to the FMA, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or

(b) to produce to the FMA, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice (within the time and in the manner specified in the notice); or

(c) if necessary, to reproduce, or assist in reproducing, in usable form, information recorded or stored in any document or class of documents specified in the notice (within the time and in the manner specified in the notice); or

(d) to appear before the FMA, or a specified person, at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

(2) The FMA may also exercise its powers under subsection (1) for the purposes of complying with the request of an overseas regulator under section 31 or otherwise co-operating with an overseas regulator.

(3) Information supplied in response to a notice under subsection (1)(a) must be—

(a) given in writing; and

(b) signed in the manner specified in the notice.

(4) If a document is produced in response to a notice under subsection (1), the FMA, or the person to whom the document is produced, may—

(a) inspect and make records of that document; and

(b) take copies of the document or extracts from the document.

(5) In this section and sections 26 and 27, *specified person* means—

(a) a member or an employee of the FMA; or

(b) another person to whom the board of the FMA has delegated the power to receive the relevant evidence (being a person that the FMA is satisfied is suitably qualified or trained, or is a member of a class of persons who are suitably qualified or trained, to exercise the power).

(6) Subpart 5 contains miscellaneous provisions relating to the powers in this subpart.

34 FMA may exercise person's right of action

(1) If, as a result of an inquiry or investigation carried out by the FMA, the FMA considers that it is in the public interest for it to do so, the FMA may, in accordance with this subpart,—

(a) exercise the right of action that a person (**person A**) has against a person who is or has been a financial markets participant by commencing and controlling specified proceedings against the person who is or has been a financial markets participant; or

(b) take over specified proceedings that have been commenced by a person (**person A**) against a person who is or has been a financial markets participant for the purpose of continuing the proceedings.

(2) In this subpart, *specified proceedings* means any of the following kinds of proceedings:

(a) proceedings under, or in respect of, any financial markets legislation (other than criminal proceedings):

(b) proceedings seeking damages or other relief for a contravention, an involvement in a contravention, fraud, negligence, breach of duty, or other misconduct, committed in connection with a matter to which the inquiry or investigation referred to in subsection (1) related.

(3) In exercising a power under this section, the FMA must act in the public interest, but (subject to that duty) may take into account the interests of—

(a) person A; and

(b) the shareholders, members, and creditors of person A; and

(c) if person A is an issuer, any product holders of financial products issued by person A.

(4) [Repealed]

(5) The FMA must, when considering whether exercising a power under this section is in the public interest, have regard to—

(a) its main objective under section 8; and

(b) the likely effect of the proceedings on the future conduct of financial markets participants in connection with the financial markets; and

(c) whether exercising the powers is an efficient and effective use of the FMA's resources; and

(d) the extent to which the proceedings involve matters of general commercial significance or importance to the financial markets; and

(e) the likelihood of person A commencing the proceedings (if those proceedings have not yet been commenced) and diligently continuing the proceedings; and

(f) any other matters it considers relevant.

59 Confidentiality of information and documents

(1) This section applies to the following information and documents:

(a) information and documents supplied or disclosed to, or obtained by, the FMA under this Act or any financial markets legislation:

(b) information and documents supplied or disclosed to, or obtained by, a person authorised under section 52 (an *authorised person*) under subpart 1:

(c) information derived from information and documents referred to in paragraph (a) or (b).

…

(3) The FMA must not publish or disclose, or direct an authorised person to publish or disclose, any information or document to which this section applies unless—

(a) the information or document is available to the public under any enactment or is otherwise publicly available; or

(b) the information is in a statistical or summary form; or

(c) the publication or disclosure of the information or document is for the purposes of, or in connection with, the performance or exercise of any function, power, or duty conferred or imposed on the FMA by this Act or any other enactment; or

(d) the publication or disclosure of the information or document is to a law enforcement or regulatory agency under subpart 2; or

(e) the publication or disclosure of the information or document is to an overseas regulator under subpart 2 or otherwise for the purpose of assisting the FMA to co-operate with an overseas regulator; or

(f) the publication or disclosure of the information or document is to a person who the FMA is satisfied has a proper interest in receiving the information or document; or

(g) the publication or disclosure of the information or document is with the consent of the person to whom the information or document relates or of the person to whom the information or document is confidential.

(4) The FMA must not publish or disclose, or direct an authorised person to publish or disclose, any information or document under subsection (3)(f) unless the FMA is satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or document (in particular, information that is personal information within the meaning of the Privacy Act 1993).

60 Conditions relating to publication or disclosure of information or documents

(1) The FMA may, by written notice to a person to whom any information or document is published or disclosed under section 59(3)(c), (f), or (g), impose any conditions in relation to the publication, disclosure, or use of the information or document by the person.

(2) The FMA must, in considering what conditions to impose, have regard to whether conditions are necessary or desirable in order to protect the privacy of any individual.

(3) Conditions imposed under subsection (1) may include, without limitation, conditions relating to—

(a) maintaining the confidentiality of anything provided (in particular, information that is personal information within the meaning of the Privacy Act 1993):

(b) the storing of, the use of, or access to anything provided:

(c) the copying, returning, or disposing of copies of documents provided.

(4) A person who refuses or fails, without reasonable excuse, to comply with any conditions commits an offence and is liable on conviction to a fine not exceeding $200,000.

65 Limitation on disclosure of information obtained in FMA's operations

(1) No court or other person may require a member or an employee of the FMA, any delegate of the FMA, any expert appointed by the FMA, any person authorised under section 52, or any other person present at a meeting of the FMA to—

(a) give evidence in court or in any proceedings of a judicial nature of anything coming to his or her knowledge in connection with the operations of the FMA; or

(b) make discovery of a document or produce a document for inspection in court or in any proceedings of a judicial nature if the document was provided or obtained in connection with the operations of the FMA.

(2) Subsection (1) does not apply to—

(a) proceedings in respect of the falsity of any testimony; or

(b) proceedings to which the FMA is a party (including where the FMA is acting under subpart 3); or

(c) proceedings in respect of—

(i) an offence under section 51 or 61; or

(ii) an offence against section 78, 78A(1), 105, 105A, or 105B of the Crimes Act 1961; or

(iii) the offence of conspiring to commit an offence against any of those sections of the Crimes Act 1961; or

(iv) the offence of attempting to commit an offence against any of those sections of the Crimes Act 1961.

(3) This section does not limit the application of the Official Information Act 1982.