

# The Financial Markets Conduct Act 2013

- what it means for Waikato business

Thomas Gibbons



# Lombard Finance directors, 2012



# Bridgecorp directors, 2012



# Carol Braithwaite, 2012



# My Background

- Director at McCaw Lewis
- A range of securities law work as part of commercial, property, and syndication matters – so equity, debt, and participatory offers
- Co-author of *Financial Markets Conduct Regulation: A Practitioner's Guide* and *Morison's Securities Law*
- Lecturer in Corporate Securities & Finance Law, University of Waikato, 2010 and 2012
- Strong interests in Waikato business and governance

# Outline

- What I will (briefly) cover today
  - How the FMCA differs from prior law
  - The scope of the Act and its exemptions
  - Director liability issues
  - The transition period
  - Other issues, such as crowdfunding and property development, and what these changes mean for the Waikato

# Outline

- What I won't do:
  - Cover absolutely everything about the law
    - 600 sections, then 600 regulations
  - Oversimplify (there is some jargon)
  - Undersimplify (there is some jargon)
  - Be able to answer every specific question

# How the FMCA differs from prior law

- “Once in a generation rewrite”
- Move from Securities Act 1978 (and related legislation) to Financial Markets Conduct Act 2013
- Subject still called securities law or securities regulation
- Or - **capital raising**



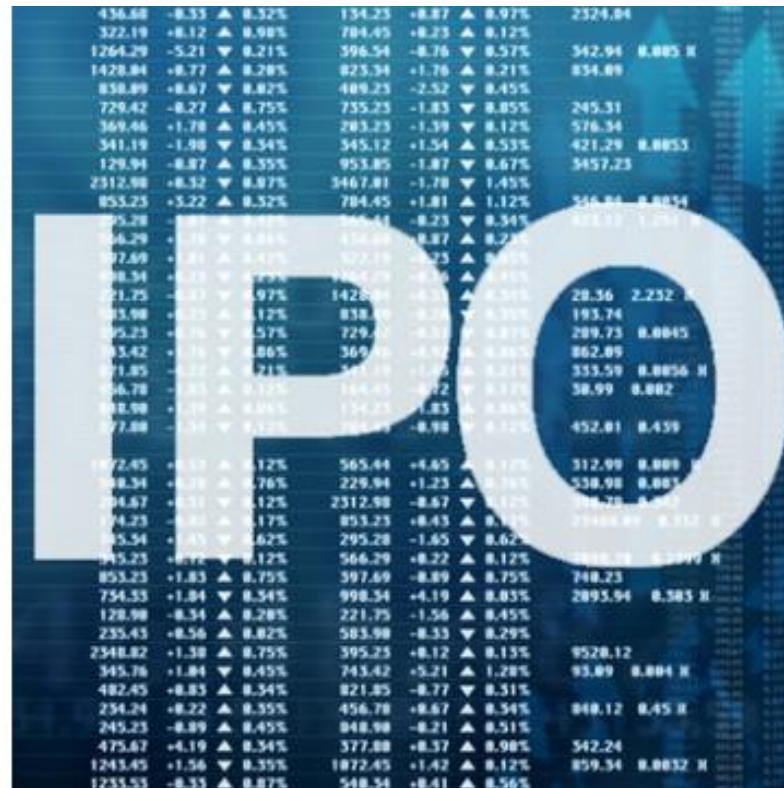
# Capital raising: an example

- You have an idea for an agribusiness app that ...
- You need to raise money to develop that app to ...
- How will you raise this money? ...

# Capital raising: an example

- **How will you raise this money? ...**
  - Loan?
    - Bank or parents?
  - By getting family and friends to put in \$x each?
  - By finding a rich mentor or angel to put his/her money in?
    - Loan or share of profits?
  - A grant for technology development?
  - By putting up an advertisement asking for investors to put in \$x each?
    - In the newspaper or on facebook?

# Xero Plans IPO in 2015, Valued at \$2.7 Billion







# How the FMCA differs from prior law

- Context of Reform
  - Securities Act 1978
  - Passed in light of *Securitibank* issues
  - Set up Securities Commission
  - Regulated “offers of securities to the public”

# How the FMCA differs from prior law

- Securities Act 1978:
  - Offer
  - Securities
  - Public

# How the FMCA differs from prior law

- Securities Act 1978:
  - **Offer** (anything vaguely like an offer)
  - **Securities** (equity, debt, participatory)
  - **Public** (the public, sections thereof, with exemptions, but not “persons selected otherwise”)



# How the FMCA differs from prior law

- The FMCA regulates offers of “financial products”, being:
  - Equity securities (eg, shares in a company)
  - Debt securities (eg, bank deposits)
  - Managed investment products (share benefits from work of another)
  - Derivatives

# How the FMCA differs from prior law

- Securities Act 1978 provided for prospectus and investment statement
- FMCA provides for product disclosure statement (PDS)
  - Designed to be simpler and easier for average investor
- “Clear, concise and effective disclosure”

# How the FMCA differs from prior law

- Searchable online register of offers, issuers, schemes and managers
  - Contains material information not included in the PDS
  - Allows issuers to manage information about their offers and fulfil compliance obligations
  - Source of supporting information for investors

# How the FMCA differs from prior law

- Purpose
  - Securities Act 1978 purpose was investor protection
  - FMCA purposes more broad, including the facilitation of capital markets and confident investing
- FMCA has a range of material about governance of KiwiSaver schemes, superannuation, etc - not covered here

# The scope of the FMCA and its exemptions

- Exemptions under Securities Act 1978:
  - Relatives and close business associates
  - Principal business the investment of money
  - Habitually invest money as part of their business
  - Required to invest \$500,000 or more
  - Certified as wealthy
  - Certified as experienced in investing money
  - Certified as experienced in the relevant industry

# The scope of the FMCA and its exemptions

- Exemptions under FMCA:
  - Wholesale investors
  - Close business associates and relatives
  - Licensed intermediaries and DIMS licensees
  - Employee share purchase schemes
  - “Small offers”
  - Controlling interests
  - “Small schemes”
  - Retirement villages

# The scope of the FMCA and its exemptions

- Exemptions under FMCA:



- **Wholesale investor**

- An investment business, large, or investing \$750k plus

- **Close business associates and relatives**

- More defined than in Securities Act 1978

- **Employee share purchase schemes**

- Not for primary purpose of raising capital, up to 10% of shares in co per annum

# The scope of the FMCA and its exemptions

- Exemptions under FMCA:
  - **Small offer**
    - *Personal* offer
    - Up to 20 investors and \$2m per annum
    - Restriction on advertising
  - **Controlling interests**
    - Eg, selling more than 50% of shares
  - **Small [managed investment] scheme**



# The scope of the FMCA and its exemptions

- Exemptions under FMCA:
  - **Small offer**
    - Significant potential for start-ups
    - *Personal offer* – previous contact, connection, conduct, or wealth



# The scope of the FMCA and its exemptions

- More emphasis on clear, bright line tests
- More opportunities for small offers
- Revisit any current exemptions within the transition period

# Director liability issues

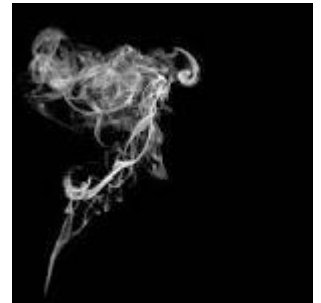


# Director liability issues

- Securities Act 1978:
  - Criminal offences – strict liability for directors
  - Sir Douglas Graham convicted of false statement in a prospectus, with no dishonesty or intent
- Financial Markets Conduct Act 2013
  - Serious criminal offences no longer strict liability
  - May still be conviction for a guilty mind
  - New infringement offence regime for low level breaches

# Director liability issues

- No criminal liability for honest mistakes
- But what the FMCA gives, Companies Act Amendments take away, with new criminal liabilities for breach of duties
- Avoid the “smoking gun” email
  - *“Don’t worry what the lawyers say, WE are the directors”*



# Director liability issues

LIABILITY	SECURITIES ACT 1978	FMCA
Criminal Liability	Strict liability (with defences). 5 years imprisonment. Fine of up to \$300k plus \$10k per day.	Guilty mind (knowledge/recklessness). 10 years imprisonment. Fine of up to \$1M or \$5M.
Infringement Notices	N/A.	FMA may issue for minor offences – fine of up to \$50k.
Civil Liability	Strict liability. \$500k or \$5M penalty.	Strict liability. \$200k/\$600k or \$1M/\$5M penalty.
Liability for management	Directors and 'promoters'.	Those 'involved in a contravention'.

# Director liability issues

- Note: Increasing trend of *management*, as well as directors, expressly having potential liability under statute

# The transition period

- Key dates
  - 13 September 2013
  - 1 April 2014
  - 1 December 2014
  - 1 December 2015
  - 1 December 2016



# The transition period

- Key dates
  - 13 September 2013 - enactment
  - 1 April 2014 – Phase 1
    - General fair dealing provisions
  - 1 December 2014
    - Disclosure regime
    - Governance and accountability
    - Financial products markets
    - Licensing requirements
    - Regulations

# The transition period

- Key dates
  - 1 December 2014 - 1 December 2016
    - New regulated offers can run under old (SA) or new (FMCA)
    - New unregulated offers can run under old exemptions or new exemptions
  - FMA likes the idea of people starting early and consulting as necessary

# The transition period

- Key dates



# The transition period

- Example:
  - Smith runs an investment syndicate, relying on various exemptions under the Securities Act
  - Smith can continue to operate under these exemptions from 1 December 2014 to 30 November 2016, but from 1 December 2016, must comply with the new law



# Other issues

- Crowdfunding
  - Currently 4 licensed providers, both for charities and business ideas
    - FMCA regulates equity crowdfunding (exempting up to \$2m pa), not reward-based crowdfunding
    - FMCA also regulates peer-to-peer lending – loans up to \$2m pa – through licensed providers (1)
    - Both make it easier to get \$ from the public

# Other issues

- Crowdfunding

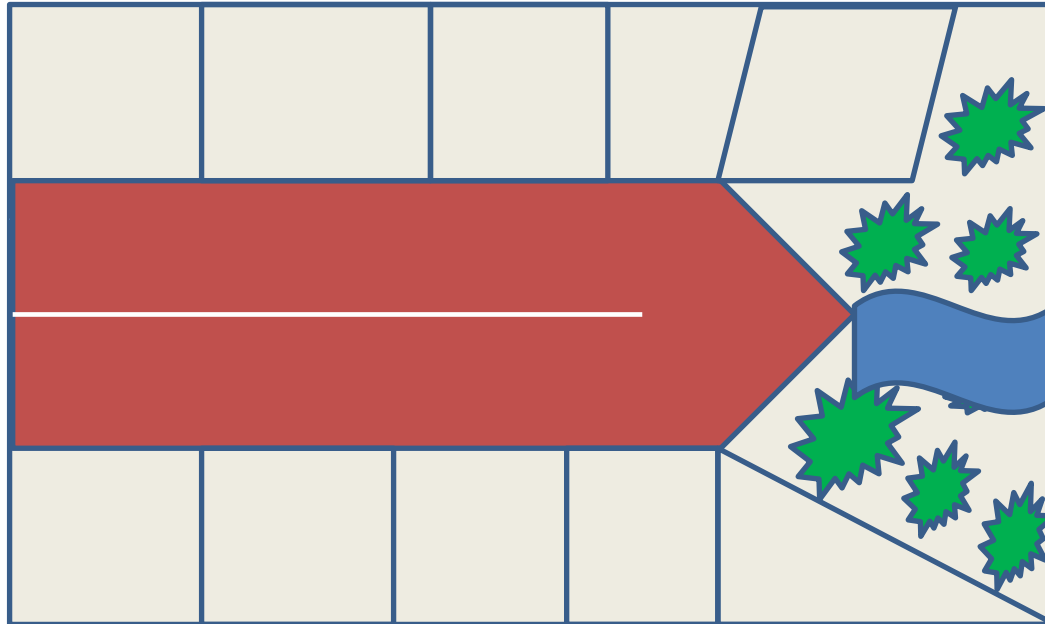
- Overseas

- “Fraudfunding”
    - Link to angel investment?
    - Funding for sandwiches?
    - <http://www.techhive.com/article/2451282/you-say-potato-i-say-crowdfunding-man-turns-to-kickstarter-to-fund-his-salad.html>



# Other issues

- Shared facilities in subdivisions



# Other issues

- Shared facilities in subdivisions
- Securities Act (Real Property Developments) Exemption Notice 2007
  - Which replaced a 1999 Exemption
- Uncertainties – eg shared road vs shared infrastructure vs shared recreation area
- No longer regulated by FMCA



# Other issues

- Proportionate ownership property syndicates
  - Previously, Securities Act (Real Property Proportionate Ownership Schemes) Exemption Notice 2002
  - Expired 2012 and not renewed
  - Full prospectus and investment statement required
- No specific exemption in FMCA
- No indication of regulatory exemption
- Follow FMCA, with benefit of transition period
- ...

# Other issues

- Charities
  - Securities Act 1978: Exemption for debt securities issued by charitable and religious organisations
    - Eg, deposits (with any provision for a return)
  - FMCA: No equivalent exemption (as yet)

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# Other issues

- Charities example
  - Charity bond fundraising for:
    - Theatre upgrade
    - Term investment with promise of return (not just donation)



# What comes next? A personal view

- We need NZ to move towards business investment, not just property
- The FMCA is more enabling for private investment
- We need people to put together the opportunities

# What comes next? A personal view

- We need a “Waikato Inc” or “WaikCapital” approach to business development
- We need these opportunities to be available and communicated to average investors
- But - we also need to be appropriately suspicious of opportunities that arise



# 5 points to take away

- The FMCA is more enabling for private investment than its predecessor
- But - it has significant complexities
- Directors need to be clear on the scope and application of the FMCA
- There are a range of exemptions, which are mostly clearer than they were
- What the FMCA means for Waikato business is up to you
- ...



  
McCaw Lewis  
LAWYERS



# Further comments

- Thank you to Nikhil Ullal and Laura Monahan of McCaw Lewis for their assistance
- Please contact us for further information  
[mccawlewis.co.nz](http://mccawlewis.co.nz)
- *The content of this presentation is of a general nature. It should not be treated as legal or financial advice.*

**Any Questions?**

