



## Financial Markets Conduct (Communal Facilities in Real Property Developments) Designation Notice 2016

Pursuant to section 562 of the Financial Markets Conduct Act 2013, the Financial Markets Authority, having complied with the requirements set out in section 563 of that Act, gives the following notice.

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### Notice

#### 1 Title

This notice is the Financial Markets Conduct (Communal Facilities in Real Property Developments) Designation Notice 2016.

#### 2 Commencement

This notice comes into force on 28 October 2016.

#### 3 Interpretation

(1) In this notice, unless the context otherwise requires,—

**Act** means the Financial Markets Conduct Act 2013

**communal facilities** means, in respect of a development, the following facilities:

- (a) any land or any right over, or interest in, land within the development designated for use by specified persons:
- (b) buildings, goods, fixtures, fittings, plant, equipment, and other amenities within the development designated for use by specified persons:
- (c) utilities

**completion** means, in respect of a development, the time when—

- (a) all of the physical works in connection with the development have been completed; and
- (b) all relevant computer registers for developed properties in the development have been issued or created; and
- (c) all required code compliance certificates for the development have been issued under the Building Act 2004

**computer register** means—

- (a) a computer register within the meaning of section 4 of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002; or
- (b) a certificate of title issued under the Land Transfer Act 1952 or the Unit Titles Act 2010

**developed property** means a property within a development for which a computer register has been or will be issued or created, as part of the process of development,—

- (a) for an estate in fee simple or a leasehold estate under the Land Transfer Act 1952; or
- (b) for a stratum estate under the Unit Titles Act 2010

**development** means a real property development undertaken within 1 or more areas of land

**owner** means, in relation to a developed property, a registered proprietor of a fee simple, leasehold, or stratum estate in a developed property

**Regulations** means the Financial Markets Conduct Regulations 2014

**specified persons** means owners or occupiers of developed properties, invitees, or certain classes of those persons

**utilities** means, in respect of a development, the following utilities and services:

- (a) access over any roading within the development (including public or private access roads connecting to any highway, road, or access way):
- (b) gas and drainage reticulation connecting 1 or more developed properties to any gas supply, sewage treatment plant, or disposal system:
- (c) waste water and storm water disposal systems:
- (d) service lines connecting 1 or more developed properties to appropriate supply networks:
- (e) domestic and irrigation water supply reticulation connecting 1 or more developed properties to any water supply system (including storage tanks and treatment facilities):

- (f) any other utilities or services ancillary to the use of developed properties or the development by specified persons.
- (2) In this notice, unless the context otherwise requires, a reference to a company **managing** communal facilities in a development is a reference to the company owning, leasing, licensing, maintaining, administering, or operating the communal facilities and includes the following:
- (a) issuing licences to shareholders of the company that confer rights on those shareholders to use the communal facilities, and administering and enforcing those licences in accordance with the constitution of the company:
  - (b) owning, leasing, licensing, maintaining, administering, or operating land outside of the development if the company is required to own, lease, license, maintain, administer, or operate that land in accordance with a resource consent for the development:
  - (c) managing and administering the company and administering and enforcing the constitution of the company:
  - (d) administering and enforcing a scheme for the regulation and control of matters relating to the use, repair, decoration, and landscaping of, and provision of services to, developed properties:
  - (e) providing and maintaining services, utilities, facilities, and benefits to developed properties or for the development:
  - (f) any activities incidental to those activities referred to in the rest of this subclause that the company considers are beneficial for shareholders of the company.
- (3) Any term or expression that is defined in the Act or the Regulations and used, but not defined, in this notice has the same meaning as in the Act or the Regulations.

#### 4 Designation

Shares to which this notice applies are declared not to be a financial product for the purposes of the Act.

#### 5 Application

This notice applies to shares in a company only if—

- (a) the company—
  - (i) manages, in whole or in part, communal facilities in a development; or
  - (ii) will manage, in whole or in part, communal facilities in a development on completion of the development; and

- (b) the company's constitution prohibits the company from carrying on any activities other than managing communal facilities in the development; and
- (c) the company's constitution prohibits the company from carrying on trading activities or a business for profit unless both of the following requirements are met:
  - (i) the trading activities or business for profit are incidental activities as referred to in clause 3(2)(f);
  - (ii) the purpose of carrying on the trading activities or business for profit is to offset the costs of managing the communal facilities (and is not to pay shareholders a financial return in the form of a dividend or other distribution); and
- (d) the company's constitution provides that—
  - (i) shares in the company may only be issued or transferred to a person if that person enters into an agreement to purchase a developed property in the development to which the communal facilities relate; and
  - (ii) following completion of the development, only an owner of a developed property may be a shareholder of the company; and
  - (iii) every owner of a developed property is entitled to be a shareholder of the company.

Dated at Auckland this 21st day of October 2016.

Nick Kynoch,  
General Counsel.

### **Statement of reasons**

This notice comes into force on 28 October 2016. It declares that shares in certain companies that manage communal facilities in real property developments are not financial products for the purposes of the Financial Markets Conduct Act 2013 (the **Act**). The notice applies to shares in companies that meet the requirements set out in the notice. The requirements relate to the activities and constitution of the company and to who its shareholders can be. The effect of shares in a company not being financial products for the purposes of the Act is that—

- initial and ongoing disclosure and governance requirements under the Act do not apply:

- the company is not, by reason only of the shares, required to comply with financial reporting obligations under Part 7 of the Act as an FMC reporting entity (although financial reporting obligations may apply under other laws such as the Companies Act 1993):
- fair dealing obligations under Part 2 of the Act do not apply to the shares.

This notice is related to the Financial Markets Conduct (Communal Facilities in Real Property Developments) Exemption Notice 2016, which provides an exemption from certain requirements of the Act for existing shares in companies that manage communal facilities in real property developments.

The Financial Markets Authority (the **FMA**), after complying with the requirements set out in section 563 of the Act, considers it appropriate to grant the designation because—

- the notice is necessary or desirable to promote and facilitate the development of fair, efficient, and transparent financial markets because it—
  - prevents the regulation by financial markets law of activities that are not financial product investments or financial markets activities and thereby removes unnecessary compliance burdens:
  - prevents confusion for investors and developers resulting from financial markets law applying when they sell or purchase real property in circumstances where they do not reasonably expect it to apply:
  - avoids the potential for unfairness if interests in companies that manage communal facilities are regulated by financial markets law but interests in incorporated societies that perform exactly the same function are not:
  - avoids resources being diverted from regulation of core financial markets activities to the detriment of the financial markets overall:
- the notice is necessary or desirable to avoid unnecessary compliance costs because companies will not be required to comply with financial markets obligations (and incur the costs of doing so) when the relevant conduct is more appropriately and effectively governed by other regulatory regimes:
- having had regard to the economic substance of shares in companies that manage communal property in real property developments, the FMA does not consider that the shares are financial products in economic substance because—
  - the shares are offered as ancillary features in real estate transactions and are not financial product investments or a means to manage a financial risk. The underlying intent of the shares is to provide a mechanism for use and enjoyment of communal facilities attached to property and attribute cost rather than generate return or manage financial risk. The shares will be tied to ownership of a particular piece of real property and will not be traded or offered to persons who do not have an interest in that specific real property. Shares will not provide any return independently of the associated real estate:

- the risks of acquiring the shares are bound up with practical activities associated with the management of real property, rather than financial markets risks:
- the FMA does not consider that shares in companies set up to manage costs in real property are part of the same market as financial products. Consumers of other financial products could not, and would not, choose to switch and acquire shares in a communal facilities company if the terms on which other financial products were offered became less desirable. Also, businesses that offer other financial products would not seek to offer interests in a communal facilities company as something for customers to invest in.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 27 October 2016.

This notice is administered by the Financial Markets Authority.