

Submission

to the

Financial Markets Authority

on the

FMA Corporate Governance Handbook

8 December 2017

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following seventeen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - China Construction Bank
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the Financial Markets Authority (**FMA**) on its Consultation Paper: Updated Corporate Governance Handbook (**Consultation Paper**) and commends the work that has gone into developing the Consultation Paper.
4. If you would like to discuss any aspect of the submission further, please contact:

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Responses to the Consultation Paper questions

5. NZBA supports FMA's approach to updating the Corporate Governance Handbook (**Handbook**) by shifting the focus away from listed companies in order to avoid overlap and potential confusion with NZX's Corporate Governance Code.

6. NZBA sets out its responses to the questions set out in the Consultation Paper as follows:

Question 1: Do you agree with our overall approach to move our focus away from listed issuers?

Where possible, NZBA advocates that Handbook should align with the recently published NZX Corporate Governance Code to ensure a consistent corporate governance approach.

Question 2: Is more guidance needed for companies seeking to grow and possibly raise capital and/or list in the future - if yes, in what areas would guidance be useful (please give examples of the additional guidance you think should be added)?

We have no comments on this question.

Question 3: Do you have any feedback on the structure or presentation of the document? Is there anything we could improve about the way it has been written, or communicated, to better assist directors and executives to apply the corporate governance principles?

NZBA believes that the Handbook would benefit from the inclusion of additional guidance in respect of personal director liability, and notes that detail of the relevant legislative and regulatory regimes that govern and impact on director liability would also be useful for directors.

Question 4: In most areas we have made very few changes to the substantive guidance. Are there any specific areas where we should include more guidance or commentary?

FMA commentary on Principle 5 (at page 23) states that as part of shareholder transparency 'total remuneration and a full breakdown of any other benefits and incentives paid to directors' [should be disclosed]. This breakdown should include 'short-term and long-term term incentives.'

NZBA notes that that information is already provided by members on an aggregated basis as part of their registered bank disclosure statement obligations. It is expected that this would be sufficient for the purposes of the Handbook.

Question 5: Are there any areas where we are out of step with guidelines that your Company/Board follows, or any other areas of ambiguity in the handbook?

NZBA considers that the following areas of the Handbook are out of step with industry practice:

Principle 2 'Board composition and performance':

- NZBA notes the following changes from the 2014 version of the Handbook, which we consider are out of step with industry practice:
 - The 2014 Handbook included a recommendation that the chairperson of the board of a publicly owned entity should be independent. In the Handbook, that recommendation seems to apply in respect of the board of any entity.
 - The recommendation that every issuer's board should have an appropriate balance of executive and non-executive directors, and include directors who meet formal criteria for independence, has been strengthened in the commentary on Principle 2 of the Handbook.
- NZBA agrees that for main boards it is appropriate to have a balance of both independent and non-independent directors and an independent chair. However, NZBA notes that a number of its members have wholly owned subsidiaries included in their governance structures, which are typically constitutionally permitted to act in

the best interests of their holding company, and are not perceived to be publicly accountable due to their role in financial markets. In NZBA's view, for these entities, an independent chair and a balance of independent and non-independent directors is not necessary to ensure that directors act in accordance with their duties.

- Similarly, we acknowledge that certain issuers of unlisted securities (notably, managers of registered managed investment schemes under the Financial Markets Conduct Act) owe duties to act in the best interests of investors. However, NZBA considers that including independent directors on these boards is also not always necessary, provided that the issuer is able to demonstrate that directors have sufficient independence of mind to be able to perform their role appropriately. There are a number of ways in which an issuer could demonstrate this short of appointing independent directors. Examples include:
 - ensuring newly appointed directors receive appropriate training on their role and the importance of acting independently and in the best interests of the company; and
 - ensuring director representation from a range of functions across the wider organisation – for example, the board could include directors from an independent risk function, as well as other directors with a separate reporting line from those with profit and loss accountability for the relevant issuer.
- Finally, the FMA commentary on Principle 2 refers to companies that are 'perceived to be publicly accountable due to their role in the financial markets', and suggests that all such entities should be building towards a majority of non-executive directors, and a minimum of one third of independent directors. The introduction to the Handbook also suggests that all companies providing financial services should be treated as being accountable to the New Zealand public. NZBA notes those comments differ significantly from section 461K of the Financial Markets Conduct Act, which specifies a more limited list of financial service providers as having a higher level of public accountability for financial reporting purposes. Accordingly, NZBA submits that the Handbook should align with the legislation in this respect.

Principle 5 'Remuneration':

- As currently drafted, the FMA commentary on Principle 5 could be read as suggesting that disclosure in respect of remuneration policies, and total remuneration and its components, is required for all entities. In the 2014 Handbook it is clearer that this recommendation is limited to publicly owned companies.
- Accordingly, NZBA considers that this section should be amended to reflect the different considerations applicable to wholly owned subsidiaries and other closely held companies. In these instances, the entity will not have a wide number of shareholders, and, in any case, shareholders will usually have direct access to the relevant information. Requiring disclosure for closely held companies may unnecessarily impinge on directors' rights to privacy in circumstances where there is little or no public benefit in providing access to that information.

Principle 8 'Shareholder relations and stakeholder interests':

- In the 2014 Handbook, the guidelines to this principle make it clear that it is relevant only to widely held entities. We consider that this emphasis should be retained in the Handbook. In our view, recommendations such as maintaining a shareholder relations type website and encouraging shareholders to take part in annual and special meetings are irrelevant for closely held companies. Shareholders in closely held companies will have other options for obtaining information, for example the company may appoint directors, or the CEO/CFO could be contacted.

Question 6: Are there any cost implications or other barriers to adopting the revised guidelines?

NZBA considers that Principle 2 (ie the requirement to have independent directors) could introduce significant additional costs and administration. We also note that in a small market like New Zealand, the pool of appropriately qualified independent directors is likely to be shallow, which will represent a significant barrier to broad adoption of the revised guidelines relating to board composition.