The FMA safety net has limits when it comes to wholesale investor groups

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Wholesale investors are investors which meet certain qualifying criteria exempting them

from legal protections otherwise mandatory for retail investors under the *Financial Markets Conduct Act 2013* (FMCA).

The case, *Lindeman Investment Ltd v Financial Markets Authority*, centred around whether the FMA owed a duty of care to these investors. This decision provides clarity regarding investor protections and regulatory accountability in New Zealand's financial markets.

Background

The minority investors held units in the Du Val Mortgage Fund. In December 2022, investors were contacted about an "equity swap" converting their units to shares in a new company, Du Val Property Group. Around this time, the FMA had been engaging with Du Val about its promotional materials and governance practices over concerns the swap was misleading and deceptive.

In March 2023, the FMA issued public warnings and a media release. Du Val responded with an information memorandum in December 2023, which the FMA later found to omit critical information. A formal notice was issued by the FMA in April 2024 which prompted Du Val to voluntarily release a supplementary circular with the necessary information.

The claims made by *Lindeman* alleged that the FMA failed to perform their duties to exercise reasonable skill and care across various interactions they had with Du Val, effectively endorsing the equity swap and failing to give the investors warning about their concerns, leading to substantial investment losses.

Decision

On 11 July 2025, Justice Greg Blanchard ruled in favour of the FMA's application to strike out the negligence claims. This decision was centred on Blanchard J's findings that:

- the FMA did not owe a common law duty of care to minority shareholders when dealing with Du Val's directors and that, if it did, this would effectively create an "insurance scheme" for investors at substantial cost to the taxpayer. Imposing such a potential liability would disincentivise the FMA from becoming 'involved' in the affairs of issuers, contrary to it performing its functions.
- the proximity between the FMA and the minority investors was insufficient to establish a duty of care. The FMA's dealings were all with Du Val or the public, not the

wholesale investors. He considered that the FMA performed their duties by providing both direct warnings to Du Val and issuing public notice of Du Val's breaches on multiple occasions.

Takeaways

This decision distinguishes the need for ongoing regulatory oversight by the FMA with existing investor protections, offering clarity on the extent of the relationship between the FMA and wholesale investors.

The two key takeaways from this case are:

- Investors relying on the FMCAs wholesale investor exemption are not entitled to the same regulatory safeguards as other categories of investor. They are presumed to have greater financial acumen and are expected to manage their investments with minimal reliance on the FMA. This is a fundamental aspect of how the exemption operates and underscores the need for thorough due diligence by wholesale investors who should then make informed, independent investment decisions.
- The FMA operates in the public interest, not the interest of individual or minority investors. Wholesale investors need to prudently monitor publications and warnings themselves. The FMA does not expressly owe them a 'duty of care' for the reasons set out in this case.

Wholesale investors have been attributed with a heightened degree of experience and expertise, meaning they are able to acquire financial products which may not otherwise be offered due to the compliance burden of making offers to retail investors. While this is an important component of the investment regime, in this case, the High Court has made it clear that the FMA's role is to act in the public interest rather than protect specific investor groups looking for redress should an investment not go to plan.