

# Commercial Services Quarterly

SPRING 2004

Bell Gully





**Welcome to the Spring edition of *Commercial Quarterly*, Bell Gully's digest of current commercial law issues that may impact your business and trading operations.**

Each quarter, we will summarise recent issues and preview upcoming developments under the following headings:

- [In the courts](#)
- [In the journals](#)
- [Legislation/In Parliament](#)
- [Recent developments](#)
- [Bell Gully news](#)
- [Useful Web links](#)

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*Disclaimer: this publication is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters dealt with in this publication.*

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## In the courts

### [Professional body fined over contravention of Commerce Act](#)

The High Court agreed with the Commerce Commission that the Ophthalmological Society of New Zealand Incorporated contravened section 27 of the Commerce Act 1986 by entering into an arrangement or understanding with the purpose or likely effect of substantially lessening competition in the market for the supply of cataract surgery in Southland.

### [Small company penalised for attempted resale price maintenance](#)

The High Court has approved a settlement of \$60,000 negotiated over a breach of the Commerce Act 1986 for prohibited resale price maintenance by a supplier.

### [Mobile phone campaigns breached the Door to Door Sales Act and the Fair Trading Act](#)

The High Court determined that a telephone company's marketing campaign breached both the Door to Door Sales Act and the Fair Trading Act because customers were not adequately notified of their right to a "cooling off period" and the campaign included "false or misleading conduct or misrepresentations".

### [Privy Council determines that Carter Holt did not engage in predatory pricing](#)

The Privy Council's decision in Carter Holt Harvey Building Products Limited v Commerce Commission acknowledges that businesses may respond to competition in a market where they hold a dominant position by decreasing prices, provided they do not engage in price cutting and later recoup losses by increasing prices.

### [Decision that pre-emption rights triggered on change in trustees overturned](#)

In the Winter 2004 issue of *Commercial Quarterly*, we summarised a High Court decision that a change of shareholder trustees triggered rights of pre-emption for other shareholders. The Court of Appeal has subsequently overturned this decision.

### [When shareholders expectations are not met, when and how will a court intervene?](#)

When shareholders of a listed company determined that the management of the company was not in their best interests, they unsuccessfully sought an order under section 174 of the Companies Act 1993 requiring the company to purchase their shares.

### [A fiduciary relationship can exist between parties without a finally concluded joint venture agreement](#)

The Court of Appeal determined that an informal commercial relationship between property developers constituted a joint venture arrangement giving rise to fiduciary obligations.

### [Trustees fail to escape liability on basis of no personal liability, no consideration and not every party signed](#)

In a case heard recently in the High Court, it was decided that trustees who had given an indemnity could not escape liability under that indemnity.

### [When is a company insolvent?](#)

The New South Wales Supreme Court has summarised principles from accepted authorities on the question of whether a company is insolvent at a given time.

### [Payments made by insolvent companies – what is in the ordinary course of business?](#)

The High Court considered the question of whether a payment made by an insolvent company was in the ordinary course of business and determined that, in this case, it was.

### [Payment by personal cheque not acceptable](#)

The Court of Appeal has agreed with the High Court that a payment made by personal cheque is not acceptable payment until it has cleared.

## In the courts

### Professional body fined over contravention of Commerce Act

*The High Court agreed with the Commerce Commission that the Ophthalmological Society of New Zealand Incorporated (the **Society**) contravened section 27 of the Commerce Act 1986 (the **Act**) by entering into an arrangement or understanding with the purpose or likely effect of substantially lessening competition in the market for the supply of cataract surgery in Southland.*

The case<sup>1</sup> concerned an arrangement or understanding arrived at between several members of the Society to prevent Australian ophthalmologists from being contracted to perform cataract surgery on an urgent basis to clear a waiting list of patients in Southland.

The arrangement revolved around the exclusion of Australian ophthalmologists from performing surgery in Southland without the approval of the sole resident ophthalmologist in Southland, who, in concert with other New Zealand ophthalmologists, would continue to enjoy exclusivity in that area.

Important findings in this case included:

#### **Society bound by its agents**

Under the Act, an Incorporated Society may be liable if any of its servants or agents enter into a prohibited arrangement within the scope of their actual or apparent authority. In this case, the actions of the President of the Society, and perhaps also the Executive Vice-President, were sufficient to bind the Society.

#### **Motivation not sufficient**

The Society disputed the arrangement on the grounds that the conduct of the ophthalmologists in question was merely parallel individual conduct motivated by medical concern for patient welfare.

The court determined that there were insufficient grounds for the relevant members of the Society to base any claim that patient safety might be jeopardised by Australian ophthalmologists performing the surgery.

#### **Objective test under section 27**

The Court rejected the Society's argument that a common reason or motivation toward the same end was required, noting that to accept this approach would be to import a subjective element into the objective test of purpose under section 27 of the Act.

#### **Society's conduct reduced competition**

The Court was satisfied that, had it not been for the conduct of the Society, competition in the market would have been enhanced.

#### **Penalties and costs**

The court imposed a penalty of \$100,000 on the Society and of \$25,000 and \$5,000 against two individual ophthalmologists involved in the case. An award of costs of \$467,870 was imposed against the defendants collectively.

<sup>1</sup> *Commerce Commission v Ophthalmological Society of New Zealand Incorporated and Ors* (2004) 10 TCLR 994

## In the courts

### Small company penalised for attempted resale price maintenance

*The High Court has approved a settlement of \$60,000 negotiated over a breach of sections 37(3)(b) and 37(d)(ii) of the Commerce Act 1986 (the **Act**) for prohibited resale price maintenance by a supplier.*

The case<sup>1</sup> involved a supplier of dive equipment, the management of which was anxious to ensure that its products were not on-sold by the distributors at less than a certain level.

Distributors were supplied with two catalogues, one containing the recommended retail prices for the products and the other containing a standard formula for calculating those prices. The supplier also made certain marketing initiatives available to distributors who predominantly carried their product.

It came to the supplier's attention that one of its distributors had discounted its product on several occasions. The supplier's managing director phoned the distributor to make it aware of its position against such practices and attempted to discourage any "bartering ... on price". The distributor was excluded from the supplier's dealer's conference and soon afterwards had its distributorship terminated on grounds that it was selling competing product.

The Commerce Commission investigated and an agreement was reached with the supplier as to the form of a declaration and a penalty of \$60,000 to resolve the matter. The parties sought the court's approval of the settlement, which was granted.

The court, in reviewing the severity of the breach and the appropriate level of penalty, considered the following aggravating factors:

- The conduct had the potential to fix minimum prices and thus remove competition, benefiting merchants over customers.
- Resale price maintenance is by its nature difficult to detect, meaning that deterrence demands a penalty heavy enough to reflect this fact.
- The conduct was undertaken by senior management.
- The supplier had the means to meet the level of penalty arrived at between the parties, which represented the approximate equivalent of the total annual value of product supplied to the discounting distributor.

Against these, the Court considered these mitigating considerations:

- The conduct was not systemic and the supplier was a small company operating in a highly competitive environment.
- The supplier had an unblemished record under the Act, co-operated in the investigation and proceeding, settled early and implemented compliance training.

<sup>1</sup> *Commerce Commission v Aquanaut Pty Ltd* (HC, Auckland, CIV-2002-404-001562, 18 Jun 04, Williams J)

## In the courts

### Mobile phone campaigns breached the Door to Door Sales Act and the Fair Trading Act

*The High Court determined that a telephone company's marketing campaign breached both the Door to Door Sales Act and the Fair Trading Act because customers were not adequately notified of their right to a "cooling off period" and, as a result of that breach, the campaign included "false or misleading conduct or misrepresentations".*

In this case<sup>1</sup>, a mobile phone company carried out a marketing campaign involving unsolicited telephone "cold calls". Subject to a credit check, those who gave a positive response were sent a phone, together with the company's standard terms. The terms included a contract term of 24 months, with cancellation only permitted on payment of early disconnection charges.

#### Door to Door Sales Act

The first question for the court was whether the Door to Door Sales Act 1967 (the **Act**) applied. The answer turned on the definition of "appropriate trade premises" because the Act only applies to agreements entered into at places other than "appropriate trade premises". The company argued that the agreements were concluded over the phone and were therefore made at appropriate trade premises, namely the call centre.

The Court found that the wording of the company's scripted sales pitch and instructions, the information contained in the courier package containing the mobile phone, a letter to the recipient, a packing slip and the enclosed contract all showed that the contract was not formed at the time of the telephone conversation, but when the customer received the courier package and broke the seal on the box containing the mobile phone. The time of breaking the seal and becoming informed of the consequences was the time at which the customer would first be aware of the binding agreement with the company.

The effect of the finding that the agreement was formed at the customer's residence triggered the application of the Act which requires that customers have been informed of their right to a 'cooling-off' period of seven days after the agreement is made in which they can cancel the agreement and return the mobile phone.

In situations where the Act has not been complied with by the initial giving of such information to the customer, as was found to be the case here, the customer is entitled to a further period of one month in which to cancel and return the mobile phone.

#### Fair Trading Act

The court determined that omission of the necessary cancellation statement and notice constituted misleading conduct under the Fair Trading Act 1986. The statements made were also found to be misleading conduct/ representations because the breach of the Act meant that customers had other rights of which they were not informed.

<sup>1</sup> *Commerce Commission v Telecom Mobile Limited* [2004] 8 NZBLC 101,572 (High Court, Wellington, 23 June 2004)

## In the courts

### Privy Council determines that Carter Holt did not engage in predatory pricing

*The Privy Council's decision in Carter Holt Harvey Building Products Group Limited v Commerce Commission<sup>1</sup> acknowledges that businesses may respond to competition in a market where they hold a dominant position by decreasing prices, provided they do not engage in price cutting and later recoup losses by increasing prices.*

By a 3:2 majority the Privy Council recently overturned both High Court<sup>2</sup> and Court of Appeal<sup>3</sup> decisions that Carter Holt Harvey Building Products Group Limited had, in 1994, used its dominant position in the South Island building insulation materials market in contravention of section 36 of the Commerce Act 1986 (the **Act**).

Section 36 of the Act prohibits use of a dominant position in a market for the purpose of restricting entry into a market, preventing or deterring any person from engaging in competitive conduct in a market or eliminating any person from a market.

#### Background

In the early 1990s, a division of Carter Holt Harvey faced competition from the introduction of wool insulation by another New Zealand producer and the entry into the insulation market by a subsidiary of an Australian company.

This increased competition meant that the division's flag ship product, Pink Batts, was losing market share in the Nelson insulation market. As a response the division introduced a new wool/polyester blend insulation product, designed to compete with the other New Zealand producer's wool insulation product.

The introduction initially had very little effect on the other New Zealand producer's market share because the new product was priced at a premium. To overcome this, the Carter Holt Harvey division introduced a time-limited "2-for-1" offer.

#### High Court and Court of Appeal decisions

The Commerce Commission viewed the "2-for-1" offer as a predatory pricing strategy with the purpose of preventing or eliminating the other New Zealand producer from engaging in competitive conduct. The High Court agreed with the Commission and fined Carter Holt \$525,000, which was upheld by the Court of Appeal.

#### Privy Council decision

The sole issue before the Privy Council was whether Carter Holt Harvey's division had used its dominant position for an anti-competitive purpose. The High Court's findings that it was in a dominant position in the South Island building insulation materials market and that the "2-for-1" offer was introduced for the purpose of preventing or deterring the other New Zealand producer from competing in, or eliminating them from, the market were not in dispute.

The Privy Council emphasised the need to apply the counterfactual test to determine whether a dominant firm has used its position of dominance. The counterfactual test for section 36 cases requires a court to consider "*whether a hypothetical firm which was not in a dominant position but was otherwise similarly placed could rationally have acted as the dominant firm did*"<sup>4</sup>. In the Privy Council's view, the High Court and the Court of Appeal had failed to apply the test adequately in this case.

The Privy Council determined that a dominant company is able to cut prices provided that it does not use its position of dominance to engage in price-cutting with a view to recouping its losses by later raising its prices without fear of reprisals afterwards.

As there was no evidence that the Carter Holt Harvey division introduced the "2-for-1" offer with the view of increasing its prices at a later date, its offer was merely a response to competition in a market which it dominated, and was not the use of its dominant position for a purpose that was anti-competitive.

The Privy Council's decision effectively aligns New Zealand competition law with that of Australia as outlined by the High Court of Australia in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission*<sup>5</sup>.

<sup>1</sup> [2004] UKPC 37 (PC)

<sup>2</sup> *Commerce Commission v Carter Holt Harvey Building Products Group Limited* [2000] 9 TCLR 535 (HC)

<sup>3</sup> *Carter Holt Harvey Building Products Group Limited v Commerce Commission* [2001] 10 TCLR 247 (CA)

<sup>4</sup> *Carter Holt Harvey Building Products Group Limited v Commerce Commission* [2004] UKPC 37 at 49 (PC)

<sup>5</sup> [2003] 195 ALR 609

## In the courts

### Decision that pre-emption rights triggered on change in trustees overturned

*In the Winter 2004 issue of [Commercial Quarterly](#), we summarised a decision in which the High Court decided that a change of shareholder trustees triggered rights of pre-emption for other shareholders. The Court of Appeal has subsequently overturned this decision<sup>1</sup>.*

The company in question was an unlisted company with two shareholders, one of which was a family trust whose shares were registered in the names of the trustees.

The company's constitution required shareholders intending to transfer shares to give a transfer notice in writing to the Board, or the Board could give such a notice if the shareholder had failed to do so, following which all specified shares had to be offered to the other shareholders.

The trustees applied for a declaration by the High Court that the pre-emptive rights in the constitution did not apply when there was a change of trustees, but no change in the beneficial ownership of the shares, arguing that the constitution's requirement for notice was confined to proposed transfers by way of sale and not transfers from one trustee to another for nominal consideration.

The court considered the likely attitude of the affected parties to the question of application of the pre-emption clause and decided that the constitution could only be interpreted in such a way that the affected parties would not have agreed to the wording of the constitution had it been intended to operate to trigger rights of pre-emption upon non-beneficial changes in share ownership.

The absence of a carve-out in the constitution on this point was interpreted to reflect the obviousness that mere changes in trustees were not caught. The court was influenced by what it viewed as an absence of authority for the opposing inference and by the reasoning that a 'transfer' in this context refers to a transfer of both the *beneficial and legal* interest in a share.

Broadly, this decision returns the law on trustee shareholders and constitutions containing pre-emptive rights to the *status quo* prior to the decision of the High Court.

<sup>1</sup> *Ord v Calan Healthcare Properties Limited* (CA 31/04 / CA 165/04, Glazebrook, Hammond, Young)

## In the courts

### When shareholders expectations are not met, when and how will a court intervene?

*When shareholders of a listed company determined that the management of the company was not in their best interests, they unsuccessfully sought an order under section 174 of the Companies Act 1993 (the **Act**) requiring the company to purchase their shares.*

In this case<sup>1</sup> the Court of Appeal examined the application of section 174, with a focus on 'oppression', shareholders' expectations and the particular ambit of these concepts in a listed company context.

The case involved a dispute among the shareholders of a listed property company. Certain minority shareholders (the **minority**) alleged that the management of the affairs of the company by the majority shareholder was adverse to their interests and that the stated management policy of the company, "long-term capital growth with aggressive management", was reaping the opposite result.

Specifically, it was claimed that the company's policies were eroding shareholder wealth, had led to inappropriate income for the majority shareholder, and that the majority shareholder had unfairly used its voting power to prevent a liquidation, which was not in the best interests of all of the shareholders.

The order sought by the minority was for the company to purchase its shares at the claimed net asset value (**NAV**). Importantly, the claimed NAV was 118 percent greater than the sum paid for the minority's shares two years earlier and was higher than the quoted NZX share price at the time of the action.

The Court of Appeal upheld the High Court's decision that no relief be granted to the minority. In making its determination, the court canvassed a wide range of authorities from various jurisdictions on the general subject of minority oppression and prejudice. From this survey, it emphasised that:

- poor management, without bad faith or self-interest, cannot amount to oppression;
- second-guessing of management strategy by itself is not the province of courts; and
- section 174 is not the appropriate course for the facilitation of a shareholder exit from a company motivated by a strategic disagreement.

The court considered shareholders' expectations and the proper balance between its discretion to fulfil these expectations and the need for legal certainty. In determining where the proper bounds of shareholders' reasonable expectations should fall, the court acknowledged the primacy of the constitution and agreements forming the basis of the relationship between a company and its shareholders. Despite this emphasis, the court observed that consideration of reasonable expectations could arise, though not determinatively, in a listed company setting.

On considerations unique to listed companies, the Court observed that section 174:

- is not limited by virtue only of a company's listed status and the added layer of shareholder protection provided by the listing rules;
- should not unnecessarily be read down given that similar provisions in other common law jurisdictions had proven both commercially beneficial and judicially workable; and

- should not, as a rule, be lightly interpreted at variance with the treatment of similar provisions elsewhere in the common law, where listed companies are not specially exempt.

Other interesting observations of the Court were that section 174 is not solely concerned with conduct that:

- accords with the constitution, as this may yet give rise to inappropriate prejudice;
- involves a lack of good faith; or
- treats shareholders unequally.

<sup>1</sup> *Latimer Holdings Ltd & Anor v SEA Holdings NZ Ltd* (CA, 15/09/2004; Glazebrook, Hammond and O'Regan JJ, CA 214/03)

## In the courts

### **A fiduciary relationship can exist between parties without a finally concluded joint venture agreement**

*The Court of Appeal determined that an informal commercial relationship between property developers constituted a joint venture arrangement giving rise to fiduciary obligations.*

The case<sup>1</sup> involved two parties (the **joint venture parties**) agreeing in 1996 to work together as property developers. A development was completed with a third party under the arrangement. An opportunity then arose in 1997 in respect of a Dunedin property. The joint venture parties began to discuss the opportunity in detail and gave extensive consideration to the development late in 1998.

In July 2000, following approaches by one and then both of the joint venture parties, a tenant was secured. In the period between those approaches and the securing of the tenant, one of the joint venture parties had decided to exclude the other in favour of involving other investors in the project. That party confirmed its agreement with the tenant and completed the project.

As a result, the excluded party brought proceedings against the other joint venture party claiming, among other things, that their commercial relationship was a joint venture relationship giving rise to fiduciary obligations. This claim became the central focus of the case.

In the High Court, it was decided that a fiduciary relationship had existed during the relevant period and that the contracting party had therefore wrongfully excluded the other party from the project, resulting in the excluded party being entitled to \$495,000 in damages.

The Court of Appeal upheld the High Court's finding that a fiduciary relationship existed, noting that where there was a commercial joint enterprise in respect of which a joint venture agreement had not yet been entered into did not rule out a claim that a fiduciary relationship existed.

The Court discussed the following factors that pointed to the existence of a fiduciary relationship in this case:

- the project was not a one-off dealing between the joint venture parties;
- both joint venture parties had skills or resources to contribute to the project;
- each of them made the contributions they understood comprised their part in the deal;
- but for those contributions, the project would not have reached a point where it could have been concluded; and
- it was common ground that the relationship was one of confidence, independently actionable.

The Court determined that these factors meant that a duty of loyalty existed between the joint venture parties with the result that "*there could be no presumptive hijacking*" of the transaction and that the relationship could not be discontinued without good faith efforts to reach agreement.

<sup>1</sup> *Chirnside v Fay* (Court of Appeal, CA 34/03, 29 June 2004, Anderson P, McGrath J and Hammond J)

## In the courts

### Trustees fail to escape liability on basis of no personal liability, no consideration and not every party signed

*In a case heard recently in the High Court at Auckland, the court decided that trustees who had given an indemnity could not escape liability under that indemnity.*

The case<sup>1</sup> involved a home bond given by NZHB for deposits due under certain agreements for sale and purchase. The trustees signed an indemnity in favour of NZHB, under which they agreed to indemnify NZHB for any losses it incurred in relation to the home bonds.

When NZHB claimed against the trustees personally for amounts of unpaid deposits, the trustees argued that they weren't liable because:

- as trustees, they were not personally liable;
- the indemnity wasn't enforceable because it was not signed by every party to it; and
- the document was not a deed, so for lack of consideration it was not enforceable.

The court decided that:

- The document was a deed. Justice Baragwanath noted that while calling a document a "deed" is a "powerful pointer", it is not conclusive.
- The document did not need to be signed by all of the parties. Justice Baragwanath noted that the law provides that guarantors are only liable under a guarantee if all parties sign because the guarantors only agree to be liable if all of the others are liable. However, express words can refute this general principle. In this case, the deed provided that any purchaser or covenantor who signed the document was bound whether or not any other purchaser or covenantor signed.
- The trustees were personally liable because the words "as trustee of [ ] Trust" do not automatically mean that the trustee is not personally liable. The liability of a trustee must be clearly limited by express provision in the document.

<sup>1</sup> *NZHB Holdings Limited v Bartells & Ors* (Baragwanath J, High Court, Auckland 10/06/2004)

## In the courts

### When is a company insolvent?

**The New South Wales Supreme Court<sup>1</sup> has summarised principles from accepted authorities on the question of whether a company is insolvent at a given time.**

While the references are made in an Australian context, the principles are also applicable in New Zealand. The principles are:

- Whether a company is insolvent is a question of fact to be ascertained by consideration of the company's financial position taken as a whole.
- Considering the financial position taken as a whole, a court must have regard to commercial realities in considering what resources are available to meet the company's liabilities as they fall due (including whether resources other than cash are realisable by sale or borrowing and when such realisations are achievable).
- If considering whether a company's lack of liquidity is temporary or permanent, the court should have regard to the commercial reality that, under normal circumstances, creditors will not always insist on payment strictly in accordance with their terms of trade. However, this does not necessarily mean that the company can treat trade creditors as a cash or credit resource which can be taken into account in determining solvency.
- In assessing solvency, a court will assume that a contract debt is payable at the time stipulated in the contract unless there is evidence of an agreed extension of time, conduct giving rise to an estoppel or a well-established course of conduct whereby debts are paid at a later time.

<sup>1</sup> In *White Constructions (ACT) Pty Limited (In Liquidation) v White and Others* [2004] NSWSC 71

## In the courts

### Payments made by insolvent companies – what is in the ordinary course of business?

*The High Court considered the question of whether a payment made by an insolvent company was in the ordinary course of business and determined that it was - in this case.*

The case<sup>1</sup> involved a company that made a payment on 28 September 1998 for invoices rendered in August 1998. The payment was made 13 days before the company ceased trading and four days before it was placed in receivership by resolution of its shareholders.

Considering whether the payment should be set aside, the court took into account:

- whether the company was able to pay its debts as at 28 September 1998 – the court determined that it was not; and
- whether the payment enabled the payee to receive more towards satisfaction of its debts than it would otherwise have received in liquidation – the court determined that it did.

The court then considered whether the payment was in the ordinary course of business of the company. The court found that the payment was made according to an arrangement agreed between the parties at the outset of their relationship and was no different to the payment made the previous month. Accordingly, the payment was in the ordinary course of business of the company and, as such, should not be set aside.

<sup>1</sup> *Re Wienk Industries Limited, Wiri Wholesale Timber Company Limited* (Associate Judge Lang, High Court, CIV 2003-404-816, 17 September 2004)

## In the courts

### Payment by personal cheque not acceptable

*The Court of Appeal has agreed with the High Court that a payment made by personal cheque is not acceptable payment until it has cleared.*

This case<sup>1</sup> involved the sale of farm property. The sale and purchase agreement required the purchaser to pay a deposit and included a specific clause precluding the vendor from cancelling the agreement for non-payment of the deposit without first giving the purchaser three working days' notice of intention to cancel and the purchaser failing within that time to pay. The agreement did not record a method for payment of the deposit.

When the vendor issued notice of its intention to cancel the agreements for non-payment, the purchaser paid the deposit by personal cheque into the vendor's solicitor's trust account. After the notice expired, the vendor rejected the payment and purported to cancel the agreements, arguing that the purchaser's personal cheque was not legal tender.

The purchaser argued that there was no requirement in the agreement for sale and purchase, in the vendor's notice, or as a matter of commercial practice, for the deposit to be paid by bank cheque.

The High Court decided that the vendor was entitled to payment in cleared funds before expiry of the notice period. It was incompatible with the terms of the agreement that the vendors should have to wait beyond that period until a cheque was cleared, and there was no possibility that the purchaser's personal cheque would be cleared within the notice period.

The Court of Appeal agreed with the High Court, noting that not only was payment by personal cheque not payment in cleared funds, but such payment would only constitute proper payment under an agreement for sale and purchase if the recipient had earlier agreed to payment being made by personal cheque or had accepted the personal cheque without objection.

<sup>1</sup> *Otago Station Estates Limited v Parker* (CA 158/03, 10 June 2004)

## In the journals

### [What's yours is mine: attachment of security interests to third party assets](#)

This article considers the case of *Graham v Portacom New Zealand Limited*, summarised in the Winter 2004 issue of *Commercial Quarterly*.

### [Misleading or deceptive statements in offer documents](#)

The Federal Court of Australia found that a document can be misleading or deceptive even though each statement in it is literally true.

### [Insolvency law](#)

A recent discussion paper on insolvency law reform proposed the licensing of insolvency practitioners. In support of the proposed licensing regime, the author of this article discusses certain issues that he considers cause problems with the current system.

### [Care to be taken with clauses added to standard contracts](#)

In a recent case, the court considered the effect of a clause added to a standard Video Ezy franchise agreement. The court concluded that the additional clause created inconsistencies with other standard terms and as a result, the court refused to grant the injunction sought due to the uncertain interpretation of the contract.

### [Factoring – still chasing commercial respectability](#)

As part of a special report on trade finance and factoring, this article explains factoring and invoice discounting and distinguishes the different ways in which they work and are described.

### [Early adopters for global financial reporting standards](#)

One of the first articles of what commentators expect to become a deluge as the adoption date for International Financial Reporting Standards draws near, this article reports Telecom's intention to adopt the standards, starting with its 2005-2006 financial year, noting that it will stop amortising goodwill, leading to a prima facie increase in its reported earnings.

## In the journals

### What's yours is mine: attachment of security interests to third party assets

**Mike Gedye, *New Zealand Business Law Quarterly*, Volume 10 Number 3 September 2004**

*This article considers the case of Graham v Portacom New Zealand Limited, which was summarised in the Winter 2004 issue of [Commercial Quarterly](#).*

In his article, Mike Gedye demonstrates his support for the decision, noting:

- The common law principle of *nemo dat* (which basically says that you can only give as good an interest in property as you have) has been substantially affected by the Personal Property Securities Act 1999 (the **PPSA**) and simply does not apply in the context of priority competitions that are regulated by the PPSA.
- Security agreements need not be changed to cover assets not owned by the debtor – the re-characterisation of notions of ownership in the PPSA is sufficient (although Mr Gedye does set out some suggested wording covering property in which the debtor has rights but does not own).
- One of the objectives of the PPSA was to increase commercial certainty in secured lending by implementing clear priority rules even though these may sometimes produce unfair results.

## In the journals

### Misleading or deceptive statements in offer documents

**Alex Eastwood, *Australian Corporate News* – Issue 11, 16 June 2004**

*The Federal Court of Australia found that a document can be misleading or deceptive even though each statement in it is literally true.*

In the case<sup>1</sup>, the court noted that:

- readers of a document expect that important information will be at the beginning and that any other information that qualifies important information will also be disclosed prominently and at the beginning;
- using cross-referencing techniques such as “refer to section x for further details” or “see payment terms” is not recommended;
- price and terms of payment are of pre-eminent importance to an investor; and
- statements that investors should consult independent advisors do not help the authors of the document if the overall impression created upon a reading of the document is that it seems to be “straight forward”.

In New Zealand, there is potential civil liability under section 56 of the Securities Act 1978 (the **Act**) and potential criminal liability under section 58 of the Act for mis-statements in advertisements or registered prospectuses.

In addition, if statements in an offer of securities are misleading or deceptive, a civil remedy may be available to investors against the persons responsible for those statements under section 9 of the Fair Trading Act, which provides:

*“No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”.*

Although the court was no doubt influenced by the finding that, in this case, the document had been intentionally designed to mislead offerees so as to maximise uninformed acceptances, the conclusions reached nevertheless seem sensible. Those conclusions would be likely to be followed by a New Zealand court, even in cases where the cause of the misleading or deceptive content was due to inadvertence rather than, as seems to have been the case here, a deliberate attempt to mislead.

<sup>1</sup> *National Exchange Pty Limited v ASIC* (2004) 22 ACLC 609

## In the journals

### Insolvency law

**Rusty Donnell, *Journal of Banking and Financial Services*, August/September 2004**

*A recent discussion paper on insolvency law reform proposed the licensing of insolvency practitioners. In support of the proposed licensing regime, the author discusses certain issues that he considers cause problems with the current system:*

- inadequate reporting to creditors;
- failure or refusal to hold meetings of creditors;
- failure to undertake independent reviews of directors' actions, management of the company and voidable transactions; and
- ignorance of the pari passu rules.

## In the journals

### Care to be taken with clauses added to standard contracts

#### CCH: New Zealand Business Law Guide 27 July 2004: Report Summary No 154

*In a recent case, the court considered the effect of a clause added to a standard Video Ezy franchise agreement. The court concluded that the additional clause created inconsistencies with other standard terms and as a result, the court refused to grant the injunction sought due to the uncertain interpretation of the contract.*

In the case<sup>1</sup>, the franchisees ran a Video Ezy store under an arrangement set out in a standard Video Ezy franchise agreement. During negotiation of that agreement, the parties agreed, in addition to the standard terms, that if the franchisees wished to sell their business to a third party, they must first offer it to the franchisor.

A dispute arose when the franchise agreement was terminated and the franchisees decided to sell their business. This dispute resulted in Video Ezy seeking an injunction restraining the franchisees from, among other things, operating any business similar to Video Ezy, or from using their new name, @Ezi-Vu.

The Court declined to grant the injunction on the grounds that the additional clause created too many inconsistencies within the franchise agreement. The resulting uncertainty of the contract meant that injunctive relief was not appropriate and a full trial was required.

<sup>1</sup> *Video Ezy International (NZ) Ltd v Cameron* (2004) 8 NZBLC 101,550

## In the journals

### **Factoring – still chasing commercial respectability**

**Anthony Davies, *The Independent*, 21 July 2004**

*As part of a special report on trade finance and factoring, this article explains factoring and invoice discounting and distinguishes the different ways in which they work and are described.*

Mr Davies also contrasts the level and nature of factoring arrangements overseas with local factoring arrangements, and includes a useful glossary setting out the differences between:

- full service factoring;
- co-operation factoring;
- invoice discounting;
- recourse factoring; and
- non-recourse factoring.

## In the journals

### Early adopters for global financial reporting standards

**Gareth Vaughan, *The Independent*, 11 August 2004**

*One of the first articles of what commentators expect to become a deluge as the adoption date for International Financial Reporting Standards (IFRS) draws near. This article reports Telecom's intention to adopt the standards starting with its 2005-2006 financial year, noting that it will stop amortising goodwill, leading to a prima facie increase in its reported earnings.*

Sue Newberry, a senior lecturer in financial accounting at Canterbury University, has suggested that the conversion to IFRS will provide "a convenient black hole for some arrangements, especially where there are multiple subsidiaries, joint ventures and associate companies". Ms Newberry expects any company, "especially one like Telecom that is quite aggressive with its business arrangements and financial reporting practices" to take advantage of the opportunity.

## Legislation/In Parliament

### Government to review regulation of financial intermediaries

On 8 November, the Government appointed a task force to review the regulation of financial intermediaries in New Zealand. The role of the task force is to assess the existing regulatory framework for financial intermediaries (such as share brokers, mortgage brokers, insurance brokers and financial advisers) and to recommend options for reform.

### Disclosure by finance companies – discussion paper released

The Securities Commission has released a discussion paper setting out its preliminary views about required disclosure standards for finance companies under the Securities Act 1978 and the Securities Regulations 1983.

### Trans-Tasman harmonisation

The Governments of New Zealand and Australia have increased efforts to try to create a trans-Tasman business environment in which New Zealand and Australian companies can enjoy a kind of “common citizenship”.

## Legislation/In Parliament

### Government to review regulation of financial intermediaries

#### Appointment of task force

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#### The Government's securities law reform programme

The task force's review is part of the final stage of the Government's four-stage securities law reform programme. The first three stages are:

- the enactment of a Takeovers Code;
- the enactment of a Securities Markets and Institutions Bill (dealing with matters such as insider trading, continuous disclosure by issuers and the supervision of securities and futures exchanges); and
- the enactment of a Securities Trading Law Reform Bill (dealing with matters such as market manipulation and the application of securities trading laws to specific financial products and entities).

The first two stages have been completed. The third stage is expected to result in the introduction of a Bill into Parliament by the end of this year.

#### What should we expect?

While it is far too early to try to predict the regulatory model that will result from this review, it is unlikely that this industry would become less regulated than it is now. Currently, the regulation of financial intermediaries in New Zealand could best be described as piecemeal, light-handed, disclosure-based and largely self-regulated. In particular, with few exceptions, there is no requirement for financial intermediaries in New Zealand to be licensed.

This is in complete contrast to the comprehensive and more uniform regulatory regime in Australia under the Financial Services Reform Act. While few market participants in New Zealand would wish to see the Australian model adopted here in its entirety, the Government has indicated that compatibility with Australia is important.

Given the stated intention of the governments of both countries to work towards a single economic market, it would come as no surprise to see a new regulatory regime in New Zealand that is a compromise between the current model and the Australian FSRA.

The case for more regulation of financial intermediaries in New Zealand can only have strengthened with the collapse in early September of Access Brokerage Limited, a discount share broker.

#### Timing

The Government expects the task force to report back with its recommendations within six months and anticipates announcing its decisions on reform by the middle of next year.

## Legislation/In Parliament

### Disclosure by finance companies – discussion paper released

*The Securities Commission has released a discussion paper setting out its preliminary views about required disclosure standards for finance companies under the Securities Act 1978 and the Securities Regulations 1983.*

The Securities Commission deals with complaints and enquiries from members of the public who have concerns about the practices of finance companies. An increase in the number and profile of finance companies has seen a corresponding increase in the number of complaints.

The discussion paper comes as a result of the increase of complaints to the Securities Commission and its review of the debt security disclosure documents of 30 finance companies.

In order to comply with the Securities Act and the Securities Regulations, disclosure documents must not mislead investors. The Securities Commission reports in its discussion document that, while it has seen some disclosure documents that provide a lot of useful information, it has seen some that do not.

It has accordingly taken the view that some finance companies are not meeting the minimum legislative requirements, and that these finance companies will need to make changes to comply with the legislation in future.

The discussion document covers the following issues that are most closely related to the complaints it has received:

- risk disclosure, principal risks, related party lending, the use of rating information and company activities;
- ranking of securities, including prior ranking claims;
- early termination rights and charges;
- inconsistent information; and
- advertising.

The closing date for submissions on the discussion document was 25 October. Following consideration of the submissions, the Securities Commission will publish a report setting out guidelines on its expectations for disclosure by finance companies.

The Securities Commission has stated its intention to carry out reviews of finance companies' offer documents in future, and to take enforcement action where appropriate.

A copy of the discussion paper is available on the Securities Commission's website at [www.sec-com.govt.nz](http://www.sec-com.govt.nz) under the heading "Publications".

## Legislation/In Parliament

### Trans-Tasman harmonisation

*The Governments of New Zealand and Australia have increased efforts to try to create a trans-Tasman business environment in which New Zealand and Australian companies can enjoy a kind of "common citizenship".*

This entails, among other things:

- unrestricted movement of goods, services, labour and capital within the market under a low cost regulatory regime;
- mutually recognised standards;
- a requirement for compliance with a single set of rules and regulations; and
- mutually agreed enforcement mechanisms.

The New Zealand Government has formed a team of ministers to pursue these objectives.

Work in the business law area is focussed on the following specific issues:

#### **Mutual recognition of securities offerings**

In a discussion paper released in May by New Zealand Commerce Minister Margaret Wilson and Ross Cameron, Australian Parliamentary Secretary to the Treasurer, a regime was proposed allowing issuers to offer securities in Australia and New Zealand using the same offer documents and structure.

At present, the policy goals underlying the securities laws of New Zealand and Australia are basically the same, but there are differences in the details of the legislation.

Under the proposed new regime, an issuer would be allowed to extend an offer that is being made lawfully in one country (the home jurisdiction) to investors in the other country (the host jurisdiction) without being required to comply with most of the substantive requirements of the host jurisdiction's fundraising laws, so long as entry requirements were met.

If implemented, this would cut down on compliance costs that are currently incurred when an offeror extends an offer to the other jurisdiction.

For a copy of the discussion paper, entitled *Trans Tasman mutual recognition of offers of securities and managed investment scheme interests*, visit [www.treasury.gov.au/](http://www.treasury.gov.au/).

#### **Trans-Tasman accounting standards**

In January, an accounting standards advisory group was established to investigate ways of reducing costs and improving efficiency through a single set of accounting standards. The group has subsequently met in May and August. The group aims to achieve a single set of accounting standards for Australia and New Zealand so that entities conducting business on both sides of the Tasman will not need to produce additional reports or reformulate records, and so that financial statements produced in one country will be able to be interpreted in the other country.

## Competition policy

The Productivity Commission has reported to the Ministers on its findings on long term competition issues, such as co-ordination of authorisation processes, joint decision making on trans-Tasman competition and fair trading matters.

The key points that come out of the report are:

- Australia's and New Zealand's competition and consumer protection regimes are already highly harmonised, particularly by international standards. Consequently, the regimes are not generally hindering businesses operating in the Australasian market. However, there are some limitations in the scope of the regimes to deal with competition and consumer protection matters having Australasian dimensions.
- Radical reform is not warranted. There are currently relatively few competition and consumer protection matters having Australasian dimensions. Radical solutions, such as full integration, would have high implementation costs, change the operation of existing national regimes and deliver only small benefits.
- Modest changes are likely to be the best way forward, including:
  - providing for the investigative powers of regulators to be used to assist the regulator in the other country; and
  - enhancing the information sharing powers between regulators.
- Safeguards should be included to ensure that shared confidential information can remain protected from disclosure.

There is scope for the regulators to engage in greater cooperation, including in operations, enforcement and research.

## Cross-border insolvency

As reported in the Winter 2004 issue of *Commercial Quarterly*, the New Zealand Government is conducting a major review of insolvency laws. A draft of the Insolvency Law Reform Bill has been released, with the bill expected to be ready for introduction into Parliament early next year.

## Banking regulation

The New Zealand Government is also working on options for mutual recognition and harmonisation in prudential regulation of New Zealand's banking systems with a view to enhancing the efficiency and soundness of the banking systems in both Australia and New Zealand.

## Recent developments

### [Commerce Commission will use search warrants to detect anti-competitive behaviour](#)

The recent admission that an employee of the former Tranz Rail destroyed emails and possibly documents relating to the subject of a Commerce Commission investigation into anti-competitive conduct by the company is likely to justify the Commission's use of search warrants after an earlier reversal for the Commission in the Court of Appeal.

### [Update on the review of the Financial Reporting Act](#)

As reported in the Winter 2004 issue of *Commercial Quarterly*, a discussion document was released to establish who should be subject to financial reporting requirements. Submissions on the first discussion document are now closed, with feedback on the proposed three-tier structure generally positive.

## Recent developments

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The Commerce Commission's initial investigation centred around allegations against Tranz Rail of anti-competitive conduct in the provision of ferry services between the North and South Islands in 1999 and 2000.

During its investigation, the Commission sought and used a search warrant to uncover certain information relating to the investigation. The validity of the search warrant was subsequently challenged by Tranz Rail, upheld by the High Court and then appealed to the Court of Appeal.

The 2002 decision of the Court of Appeal reversed the High Court's judgment, found the search warrant employed by the Commission invalid and declared the documents seized under it to be beyond the scope of the Commission's investigation. The Commission was unable to show adequate grounds for the warrant and was criticised by the Court of Appeal for its generality and lack of disclosure in the search warrant process.

The Commerce Commission was unable to establish that Tranz Rail had exploited a dominant position in the market by using targeted low prices, had substantially lessened competition in the market or that it had entered into an arrangement with the effect or purpose of substantially lessening competition in the market.

The recent findings of the Commission and confirmation by Tranz Rail that one of its employees had directed the destruction of emails relating to the ferry service negotiations under Commission investigation has drawn a response from the Commission.

While roundly condemning any destruction of information pertaining to its investigations it has also indicated its preparedness to continue to employ search warrants where necessary and to use the instance of Tranz Rail information destruction as an example when applying for warrants in future.

<sup>1</sup> *Tranz Rail Ltd v District Court at Wellington & Anor* [2002] 3 NZLR 780 (CA)

## Recent developments

### Update on the review of the Financial Reporting Act

*As reported in the Winter 2004 issue of [Commercial Quarterly](#), a discussion document was released to establish who should be subject to financial reporting requirements. Submissions on the first discussion document are now closed, with feedback on the proposed three-tier structure generally positive. However, concerns were raised over the costs outweighing the benefits in tier two.*

The proposed financial reporting framework is shown in a structure diagram available on the Ministry of Economic Development website at [www.med.govt.nz](http://www.med.govt.nz) – select “Business Policy and Law” and then click on the link titled “company law and other law related to corporate governance”.

Ministry of Economic Development officials are now looking at the applicability of tier two and certain other aspects of the proposal, including the appropriateness of separate reporting regimes for the private and non-profit sectors.

Commerce Minister Margaret Wilson has announced that a revised proposal will be set out in a second discussion document planned for release later this year. Following release of that discussion document, a Bill is expected to be introduced into the House by the middle of next year.

Ms Wilson has stated that this will not affect those entities seeking to adopt International Financial Reporting Standards (**IFRS**) from 2005, noting that the current framework is sufficiently flexible to enable early adoption. Ms Wilson has also indicated that there will be a suitable transition period and that some entities will not be required to produce reports until 2009.

## Bell Gully news

### [Bell Gully "stands out from the pack" says \*Asia Law Profiles\*](#)

Bell Gully is "acknowledged by its peers for its excellent work in the broadest range of practice areas," according to the new edition of *Asia Law Profiles 2005*.

### [Confidentiality agreements during M&As](#)

In order to assist corporate counsel in giving confidentiality agreements during M&As a meaningful, but cost-effective review, Bell Gully has developed a confidentiality agreement checklist tailored specifically for the intending purchaser in an M&A project.

### [Public private partnerships: practical and policy problems](#)

In his paper, *Private Financing of Public Assets: Practical and Policy Problems*, prepared for the New Zealand Council for Infrastructure Development, Bell Gully's Robert Lonergan considers the practical and policy issues relevant to the use of PPP, and particularly whether the use of private sector finance to fund public assets provides value for money.

### [RMA to be patched up before Christmas](#)

Proposed changes to the Resource Management Act ('RMA') just announced by Associate Minister for the Environment David Benson-Pope will be welcomed by both resource consent applicants and submitters alike.

## Bell Gully news

### **Bell Gully "stands out from the pack" says *Asia Law Profiles***

*Bell Gully is "acknowledged by its peers for its excellent work in the broadest range of practice areas," according to the new edition of Asia Law Profiles 2005.*

The independent publication reviews the legal environment and law firms in Asia's main markets, and is published annually by Asia Law & Practice, a subsidiary of Euromoney Institutional Investor plc.

### Confidentiality agreements during M&As

*In the early stages of most M&A deals, either the supervising merchant bankers or the vendor will typically require each potential purchaser to enter into a confidentiality agreement.*

In order to assist corporate counsel in giving confidentiality agreements a meaningful, but cost-effective review, Bell Gully has developed a confidentiality agreement checklist tailored specifically for the intending purchaser in an M&A project.

This checklist highlights issues regularly encountered when reviewing confidentiality agreements, and is available on the Bell Gully website at [www.bellgully.com](http://www.bellgully.com), under "Expertise" and then "Mergers and Acquisitions".

Potential purchasers may be required to enter into a confidentiality agreement before receiving the information memorandum or other introductory material.

In practice, potential purchasers are presented with a confidentiality agreement even before they have decided that the acquisition opportunity is of genuine interest and merits the commitment of real time and money.

In these circumstances, it is tempting to enter into the confidentiality agreement without first having it reviewed by external legal advisers.

Corporate counsel should be aware that confidentiality agreements can contain relatively onerous provisions.

Increasingly, agreements seek to place personal liability on the recipients of confidential information, or deal with matters such as exclusivity in negotiations, terms and conditions of the bid process and/or reliance on information.

If any issues of particular concern arise, the best approach is always to take specific legal advice. For further information please contact Chris Turner ([chris.turner@bellgully.com](mailto:chris.turner@bellgully.com)), James Doolan ([james.doolan@bellgully.com](mailto:james.doolan@bellgully.com)) or your usual Bell Gully adviser.

### Public private partnerships: practical and policy problems

*Using private finance to fund public assets is a key feature of "public private partnerships", or PPP. However the fact that a public asset may be privately financed means that new practical and policy issues need to be considered.*

In his paper, *Private Financing of Public Assets: Practical and Policy Problems*, prepared for the New Zealand Council for Infrastructure Development, Robert Lonergan considers the practical and policy issues relevant to the use of PPP, and particularly whether the use of private sector finance to fund public assets provides value for money.

This first part of the paper sets out the background to the private financing of public infrastructure in the United Kingdom, which is, in international terms, the most developed PPP market.

The second part looks at value-for-money issues and whether the use of private financing offers "a good deal for the public purse".

Robert considers whether private financing can overcome constraints on public expenditure, the relative costs of public and private sector finance, and practical limitations to the use of private financing.

The final part of the paper looks at particular policy and political challenges in a New Zealand context, and the merits of other forms of funding (such as the use of "infrastructure bonds") to address New Zealand's infrastructure needs.

The paper is available online at [www.bellgully.com](http://www.bellgully.com), under "Expertise", then "Construction and Projects".

## Bell Gully news

### RMA to be patched up before Christmas

*The Benson-Pope band-aid to dress the RMA's minor ailments is out of the medicine cabinet and ready for application, but major surgery has been postponed for the foreseeable future.*

Proposed changes to the Resource Management Act (the **RMA**) announced by Associate Minister for the Environment David Benson-Pope will be welcomed by both resource consent applicants and submitters alike.

The Associate Minister plans to implement these changes through the introduction of a bill before Christmas.

Aware of the interest in this issue and possible implications of these changes, Bell Gully's Resource Management and Environment Team will keep clients informed of progress and ensure that all clients have an opportunity to have their say in the upcoming select committee process.

#### Proposed changes

The changes include:

At local authority level:

- Training and accreditation for council hearing committee members;
- Inquisitorial-style council hearings;
- Recognition of investment in existing infrastructure and developments;

In the Environment Court:

- Environment Court hearings to focus on matters in contention;
- Resource consent notification disputes to be heard by the Environment Court;

At central government level:

- Development of national policy statements; and
- Improving access to ministerial call-in powers.

#### At local authority level

Changes proposed to regional and district council hearing processes will result in a more robust assessment and decision-making process for resource consent applications, which might in turn decrease the number of frivolous and vexatious appeals to the Environment Court.

- **Training and accreditation for council hearing committee members**

Chairpersons of council hearing committees will undertake mandatory training and accreditation on hearing procedures, statutory interpretation and how to assess and test evidence. It appears that the proposed training and accreditation process will be voluntary for committee members assisting chairpersons.

Consistency in the competency of and process followed by council committees across both regional and district council jurisdictions will be a welcome relief for all resource consent applicants and submitters who may have endured less-than-acceptable performance from a hearing committee in

the past. Of course, perhaps council officers reporting and making recommendations to those committees should also undertake the same training.

- **Inquisitorial-style council hearings**

In an attempt to refine the issues that might end up in the Environment Court on appeal, compulsory attendance at pre-hearing meetings and the prior submission of written briefs of evidence to the council hearing committee are proposed.

While the green sector may perceive the latter proposal as raising the cost of public participation in the RMA resource consent process, resource consent applicants and serious submitters will agree that both proposals help to clarify legitimate issues at an early stage and places the responsibility for producing credible expert evidence on those who raise the issue.

- **Recognition of investment in existing infrastructure and developments**

Renewing soon-to-expire resource consents will have a more certain outcome with the introduction of a requirement that councils recognise existing investment as one of the factors to be considered in the decision-making exercise.

This is a very important and welcome criteria in the decision-making process for existing industrial and commercial activities which, over the passage of time, may no longer make it on to the "in" list but which still perform a vital role in the economy.

## **In the Environment Court**

Increasing the legal sophistication of the hearing process at regional and district council level is intended to lighten the load on the Environment Court by improving the efficiency and timeframes of the appeal process.

- **Environment Court hearings to focus on matters in contention**

In order to reduce the number of matters that have to be completely re-heard through a de novo hearing on appeal, a suite of provisions have been proposed which will confirm the Court's role as an appeal authority and give the Court powers to order independent expert evidence, define issues for appeal at an early stage, and to have regard to the regional or district council's decision in the first instance.

Many of the provisions will simply codify the tracking system of case management developed by the Environment Court over the last two years.

- **Resource consent notification disputes to be heard by the Environment Court**

The proposed ability to consider and issue a declaration on whether a resource consent application should have been notified by a regional or district council represents a significant expansion to the Environment Court's jurisdiction.

The removal of the expensive and intensive High Court function that currently reviews council decisions to process resource consent applications on a non-notified basis will be a welcome change for both applicants, interested parties and respondent councils.

However, Parliament intends only to give the Environment Court this power of judicial review once the existing backlog of cases has reduced to "acceptable" levels, and this is a concern.

The review of council notification decisions is prone to abuse by trade competitors, and it is expensive for both resource consent applicants and respondent councils to defend non-notification decisions through the High Court.

The sooner the notification issue can be reviewed by the Environment Court, the sooner parties will be able to save time and money in obtaining a decision.

## At central government level

Attempts to improve central government's role in RMA processes are anticipated through amendments to strengthen and broaden existing provisions dealing with national policy statements and standards and ministerial call-in powers for large or complex projects.

- **Development of national policy statements**

Proposed amendments to the RMA finally signal a central government commitment to the development of national policy statements and standards for infrastructure including energy, telecommunications, transport, water and wastewater.

While ministries and departments have always had the power under the RMA to undertake these tasks, allocations of human and financial resources have not been supportive. The new provisions may signal a change in central government's commitment to assist local government in identifying environmental "bottom lines" and ideal standards when assessing the effects of activities proposed in resource consent applications.

- **Improving access to ministerial call-in powers**

While the Project Aqua saga concluded in an expensive and disappointing outcome for Meridian Energy, it did prove to be a fundamental test of the call-in powers of the Minister for the Environment.

Large and complex projects, particularly those associated with essential network utilities such as road networks, wastewater treatment facilities and electricity schemes, typically require authorisation and protection through a suite of planning tools.

Tools include the designation of land in a district plan to guarantee ownership through compulsory acquisition, resource consents under both district and regional plans, and sometimes plan changes to signal a community's long-term commitment to and provision for a project.

The Minister's powers to call-in projects have, accordingly, been extended beyond resource consent applications to also include plan change applications, notices of requirement to designate land and issue heritage orders.

## Advice and information

Bell Gully's Resource Management and Environment Team can advise on all areas of resource management law, including applications and appeals under the Resource Management Act. Contact any of the team for more information.

### Auckland

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## Useful Web links

### New Zealand government

- [Inland Revenue Department \[www.ird.govt.nz\]](http://www.ird.govt.nz)
- [Ministry of Economic Development \[www.med.govt.nz\]](http://www.med.govt.nz)
- [Ministry of Foreign Affairs and Trade \[www.mfat.govt.nz\]](http://www.mfat.govt.nz)
- [Ministry of Labour \[www.dol.govt.nz\]](http://www.dol.govt.nz)
- [New Zealand Government \[www.govt.nz\]](http://www.govt.nz)
- [NZ Government E-Commerce Information \[www.ecommerce.govt.nz\]](http://www.ecommerce.govt.nz)
- [NZ Treasury \[www.treasury.govt.nz\]](http://www.treasury.govt.nz)
- [New Zealand Trade and Enterprise \[www.nzte.govt.nz\]](http://www.nzte.govt.nz)
- [Office of the Clerk of the House of Representatives \[www.clerk.parliament.govt.nz\]](http://www.clerk.parliament.govt.nz)
- [Parliamentary Counsel Office \[www.pco.parliament.govt.nz\]](http://www.pco.parliament.govt.nz)
- [Statistics New Zealand \[www.stats.govt.nz\]](http://www.stats.govt.nz)

### New Zealand regulatory agencies and organisations

- [Commerce Commission \[www.comcom.govt.nz\]](http://www.comcom.govt.nz)
- [The Companies Office \[www.companies.govt.nz\]](http://www.companies.govt.nz)
- [NZ Law Commission \[www.lawcom.govt.nz\]](http://www.lawcom.govt.nz)
- [Office of the Ombudsmen \[www.ombudsmen.govt.nz\]](http://www.ombudsmen.govt.nz)
- [Securities Commission \[www.sec-com.govt.nz\]](http://www.sec-com.govt.nz)
- [Takeovers Panel \[www.takeovers.govt.nz\]](http://www.takeovers.govt.nz)
- [NZ Stock Exchange \[www.nzx.com\]](http://www.nzx.com)

### New Zealand commercial sites

- [CLANZ \[www.clanz.org\]](http://www.clanz.org)
- [Institute of Chartered Accountants \[www.icanz.co.nz\]](http://www.icanz.co.nz)
- [Institute of Directors in New Zealand \[www.iod.govt.nz\]](http://www.iod.govt.nz)
- [NZ Bankers' Association \[www.nzba.org.nz\]](http://www.nzba.org.nz)
- [NZ Business Roundtable \[www.nzbr.org.nz\]](http://www.nzbr.org.nz)
- [NZ Institute of Economic Research \[www.nzier.org.nz\]](http://www.nzier.org.nz)

### Australian sites

- [Australian Financial Markets Association \[www.afma.com.au\]](http://www.afma.com.au)
- [Australian Securities and Investment Commission \[www.asic.gov.au\]](http://www.asic.gov.au)
- [Australian Stock Exchange \[www.asx.com.au\]](http://www.asx.com.au)

### International sites

- [NASDAQ \[www.nasdaq.com\]](http://www.nasdaq.com)
- [New York Stock Exchange \[www.nyse.com\]](http://www.nyse.com)
- [United States Securities and Exchange Commission \[www.sec.gov\]](http://www.sec.gov)