Bell Gully

02

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spring 2003

In this issue

Securities Act non-compliance
The legislators step in.

What is the Reserve Bank's role?
On the prudential supervision of banks

Contracting with trustees
A recent case serves as a reminder to ensure that the basic rules for contracting with trustees are followed.

Updates
Updates to articles first published in the Winter 2003 edition of *Financial Services Quarterly*.

Welcome to the second issue of *Financial Services Quarterly*, a review of current legal issues in the financial sector from Bell Gully.

Each quarter, we summarise recent issues and preview upcoming developments.

* In the courts
* In the journals
* Legislation/In Parliament
* Recent developments
* Bell Gully news
* Useful Web links

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In the courts

Are late payments outside the ordinary course of business and therefore voidable on insolvency?

The fact that a payment is not made on time does not render that payment "outside the ordinary course of business" in determining if it is voidable on insolvency.

What happens when you fail to contract with all of the trustees of a trust?

An obligation incurred by one trustee and not authorised by the other trustees is not binding on the trust. A reminder of the basic rules for contracting with trustees is set out after this case summary.

Insider trading – no need for wilful or fraudulent conduct

Simple possession of inside information in connection with the sale or purchase of shares is enough to trigger liability under the Securities Markets Act 1988 – wilful or fraudulent conduct is not necessary.

Letters of credit and fraud – when can a bank avoid paying?

An English case confirms that a bank does not have to pay under a letter of credit if there is fraud on the part of the payee.

Employees' dishonesty and lack of good faith can be very costly

When a bank employee dishonestly assisted a husband in re-directing his wife's funds, the bank was ordered to reimburse the wife.

Is "reasonable care to obtain the best possible price" at a mortgagee sale taken where the purchaser is associated with the mortgagee?

The Privy Council has decided that a mortgagee sale by a lender to a purchaser associated with the lender was not a breach of the lender's duty to obtain the best price.

What is unconscionable conduct in the context of transactions between family members?

The Supreme Court of Victoria has decided that to establish unconscionable conduct, the claimant must have special disadvantages and the other party must take advantage by unfair means.

Should a parent-child relationship be treated in the same way as a husband-wife relationship in the context of a guarantee?

Australian courts decide that the protection traditionally given to a wife who guarantees her husband's debts does not extend to parents and children.

UPDATE: Are your guarantees enforceable?

An appeal against the decision in Alma Daphne Lee v Damesh Holdings (summarised in the Winter 2003 edition of Financial Services Quarterly) was heard in the Court of Appeal on 30 September.

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In the courts

Are late payments outside the ordinary course of business and therefore voidable on insolvency?

Under section 292 of the Companies Act, a liquidator can set aside certain payments made by an insolvent company other than "in the ordinary course of business". This phrase is one of the most heavily litigated phrases in the Companies Act. The decision in this case was that the mere fact that a payment is not made on time does not render that payment "outside the ordinary course of business".

In this case[1], equipment was leased from a third party who received two payments from a company that subsequently went into liquidation. The payments were made after their due date and following a request from the third party. The liquidator claimed that because the payments were made late, they were outside the ordinary course of business and therefore voidable.

Previous case law has held that payments that are made on a later date than the due date for payment can be voidable if the payments are made following a threat by the creditor to take action or to repossess goods. However, in this case, the court found that the mere fact that the payments were made later than required did not mean that they were outside the ordinary course of business.

The court noted that to find otherwise would mean that any creditor who asked to be paid and was paid, in a situation where there are no specific threats, was being paid outside the ordinary course of business.

1. *BOP Freight Distribution (1999) Limited (In liq), Re: TR Group Ltd v Blanchett & Anor* (M Faire HC, Hamilton M161-02, CIV2003-419-000300, 15 May 2003)

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In the courts

Contracting with all trustees

A recent case serves as a reminder to ensure that the basic rules for contracting with trustees are followed

A bank issued a letter of credit (**LC**) on behalf of a trust. Under the terms of issue, the trust was required to reimburse the bank for any amounts paid under the LC. The documentation was only signed by one of three trustees.

When the bank sought to exercise its right of reimbursement, the court found that the trust was not liable to pay because the transaction was not authorised by all of the trustees.

The trustees were not deemed to have knowledge of the LC because correspondence was addressed to the trust and not to each individual trustee.

In this case, the LC secured facilities granted by another bank to a company that was 25 per cent owned by the trust.

When the facility was not paid, a call was made under the LC. In turn, the issuing bank called on the trust to reimburse it, pursuant to certain security documents signed by the trustees prior to issue of the LC.

The trustees denied liability to pay and the bank sued the trustees under the following causes of action:

- *Breach of contract*

  The bank claimed that the one trustee who arranged the LC did so as the delegate of all of the trustees pursuant to a trustee certificate signed previously.

  The court rejected the claim, noting that the certificate did no more than warrant that, if the trustees unanimously agreed to incur a liability to the bank, then all necessary resolutions and approvals would be attended to.

  The bank also claimed that all of the trustees were aware of the LC and had failed to notify the bank that it had been arranged without their consent.

  The court also rejected this claim, noting that, as all correspondence from the issuing bank was addressed to the trust and not to each individual trustee, the other trustees did not have knowledge of the LC.

  In addition, the bank claimed that the signing trustee warranted to it in the general terms and conditions that he had the power to enter into obligations on behalf of the trust.

The court decided that the bank could rely on the warranty because the trustee not only held himself out as having the necessary authority by course of conduct, but he also positively reinforced that position to the bank.

- *Unjust enrichment*

  The bank claimed that, as the trust held 25 per cent of the shares in the borrowing company, the trust was enriched by the payment under the LC.

  The court was satisfied that the trust was enriched by the amount by which its liability under a separate guarantee to the receiving bank was reduced, that the benefit was clearly at the expense of the issuing bank and that it would be unjust for the trustees to retain that benefit.

- *Guarantee*

  The bank also claimed that two of the trustees were liable to pay the amount claimed pursuant to guarantees previously executed by them in relation to facilities provided to the trust, including future obligations.

  The court rejected this claim, finding that the consent of all of the trustees would be required before the guarantees could be relied upon.

- *Misleading and deceptive conduct*

  The court decided that, as the signing trustee acted "in trade," his conduct was misleading and deceptive for the purposes of section 9 of the Fair Trading Act.

Basic rules for contracting with trustees
• A trust is not a legal entity – it is made up of trustees who must deal with trust property for the benefit of the beneficiaries of the trust.
• Trustees contract in their own personal names, not in the name of the trust. • You must therefore contract with the trustees, and not the trust. • The name of each trustee (and not just the name of the trust) must be recorded in each document. • Each trustee must sign personally.
• The powers of the trustees are set out in the trust deed (and, to a lesser extent, in the Trustee Act). • You must examine the trust deed to ensure the transaction is within the powers of the trustees and not a breach of the trust.
• Trustees are personally liable under contracts they enter into as trustees unless their liability is expressly limited. • It is usual for "professional" or "independent" trustees to have their liability limited to the assets of the trust, unless they act negligently or fraudulently or otherwise in breach of trust.
• Trustees are usually entitled to be indemnified out of trust assets for their authorised actions.
• Ensure the trustees are precluded from retiring without your consent, and that new trustees may not be appointed without becoming liable under the relevant documents.

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In the courts

Insider trading – no need for wilful or fraudulent conduct

The decision in a recent Court of Appeal case demonstrates that, contrary to common assumptions, liability under insider trading provisions of the Securities Markets Act 1988 can arise without any element of deception, fraud or fault.

In this case[1], it was argued that a director of both Southern Petroleum Limited and Petrocorp Exploration Limited had obtained inside information that there were good mining prospects in an area where Southern Petroleum had certain prospecting licences.

It was alleged that the director either encouraged shareholders of Petrocorp to purchase shares in Southern Petroleum or gave the information to that company knowing that it intended to buy.

In order to determine whether an arguable case existed, the Court of Appeal had to look at whether possession of inside information and conduct giving rise to insider trading liability have to be linked.

In doing so, the Court interpreted section 9 of the Securities Markets Act 1988 as providing that an insider with inside information about a public issuer who advises someone to buy or sell a company's shares will be liable for "tipping", even if the recipient of the information does not act on it.

Accordingly, there does not have to be a causal link between the possession of inside information and the acquisition of shares in a company.

Market participants should be aware that insider trading does not require any element of wilful or fraudulent conduct. All that is required to trigger liability is having inside information in connection with a purchase or sale of shares.

1. *Haylock v Southern Petroleum NL* [2003] 2 NZLR 175

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In the courts

Letters of credit and fraud – when can a bank avoid paying?

An English case has confirmed that a bank does not have to pay under a letter of credit where there is fraud on the part of the payee.

In this case,[1] the bank (which was incorporated in the Czech Republic) issued letters of credit at the request of an import/export company incorporated in Austria. The letters of credit were issued in favour of SR and related to purported sales by SR of large quantities of agricultural products of Russian or Ukrainian origin. If a sale was made, SR could seek payment under the letter of credit by presenting copies of the relevant invoices and related documents.

SR made a claim for payment under a letter of credit. The bank refused payment and alleged there was no genuine underlying sale and that the invoice and lists of goods presented to it were a sham.

The defendants denied any dishonesty.

The court found in favour of the bank, holding that the invoices were a sham - no more than pieces of paper brought into existence for the purposes of raising finance. As such, the bank was justified in refusing payment.

As noted in the Winter 2003 edition of *Financial Services Quarterly*, it seems that the existence of fraud is the only exception to the general rule that a bank cannot avoid paying under a letter of credit.

1. *Komercni Banka A.S. v Stone and Rolls Limited and Another* Q.B. (Com. Ct.) 383 Lloyd's Law Reports [2003] Vol. 1 631-632

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In the courts

Employees' dishonesty and lack of good faith can be very costly

When a bank employee dishonestly assisted a husband in re-directing his wife's funds, the bank was liable to reimburse the wife.

This case[1] stems from a record win of two billion drachmas in the Greek lottery.

The claimant had won the lottery and asked her husband set up a bank account to pay the money into for her benefit.

The husband in fact placed the money in an account that stood as security for the operation of his foreign exchange margin account. The wife discovered the mistake when she entered into correspondence with the bank in anticipation of her deposit account maturing. The bank had difficulty working out to what her enquiries related and, by the time they realised, the money had gone.

The bank denied that it ever had knowledge of the wife's interest in the money and alleged that the husband's conduct precluded her from claiming an interest in it.

The court found in favour of the wife by reason of dishonest assistance in breach of trust (or knowing receipt). The court found that the bank manager involved in setting up the foreign exchange account had deliberately ignored the reference to the wife as the stated beneficiary of the funds and this dishonesty and lack of good faith infected the subsequent conduct of the bank manager in using the account as security for the husband's margin account.

1. *Papamichael v National Westminster Bank Plc and Another* Q.B. (Com. Ct.) 341 Lloyd's Law Reports [2003] Vol. 1 632-634

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In the courts

Is "reasonable care to obtain the best possible price" at a mortgagee sale taken where the purchaser is associated with the mortgagee?

The Privy Council has decided that a mortgagee sale by a lender to a purchaser associated with the lender was not a breach of the lender's duty to obtain the best price.

This case[1] considered a lender's duty under section 103A of the Property Law Act 1952, which requires lenders who are exercising a power of sale of mortgaged property to take reasonable care to obtain the best price reasonably obtainable at the time of sale.

In this case, two lenders took first and second ranking mortgages over 200 acres of apple orchards as security for their loans of $8m and $13m. The apple market subsequently declined and the borrower became financially unstable. Its secured debts over the land exceeded $21m and the land was valued at $13.5m.

The first mortgagee identified a potential purchaser, which was a partnership involving the family of a director and major shareholder of the first mortgagee. Negotiations took place between the borrower, the first and second mortgagees, and the purchaser, resulting in an agreement in principle for sale of the apple orchards on terms that involved the purchaser paying to the first mortgagee $8.1m and to the second mortgagee $5.25m, in each case in full satisfaction of its secured debt.

In dismissing the claim for breach of section 103A, the Privy Council held that:

- the claim ignores the fact that the duty in section 103A is a duty owed to the mortgagor, and that the mortgagor is entitled to agree with the mortgagee the terms on which the mortgagee sells;
- section 103A does not produce a duty, breach of which is actionable without proof of damage - the borrower failed to show either that the sale price was below market value or that another method of sale would have produced a better result;
- the steps taken by a mortgagee to obtain the best price under section 103A must be considered commercially - the issue is a commercial one, to be viewed in practical commercial terms - if a side benefit additional to the stated price is being obtained, that is part of the commercial context against which the question whether reasonable steps have been taken to obtain the best price must be examined;
- there is no general rule that a company in which a mortgagee is interested cannot purchase the mortgaged property at a mortgagee sale; and

- having agreed to the borrower's sale proposals, the mortgagee did not come under any additional duties because the purchaser was associated with the mortgagee.

1. *Newport Farm Limited v Damesh Holdings Limited* (PC, Appeal No 40 of 2002, 7 July 2003)

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In the courts

What is unconscionable conduct in the context of transactions between family members?

The Supreme Court of Victoria found that, to establish unconscionable conduct, the claimant must have been in a position of special disadvantage and the other party had to have taken advantage of that position by unfair means.

In this case[1], an elderly woman failed in her appeal to have a guarantee and security granted by her set aside on the basis of unconscionable conduct by her son and the lender.

The lender had, contrary to its usual policy, allowed the woman's son to deliver, and to explain the terms of, the documents to her without insisting that she obtain independent legal advice.

Together with a company controlled by her son, the woman entered into a contract to buy some land and to build a home for her son's family and a unit for herself.

The woman was unsuccessful in selling her house to a third party and so she ended up selling it to a trustee company (which she and her son were directors of) of a trust for which she was principal beneficiary.

The trustee company borrowed a construction loan from the lender, which was guaranteed by the woman and her son personally but when the woman's unit was completed, additional funds where required to complete the project and so further funds were advanced to the trustee company. In addition to the personal guarantees, a mortgage was given over the new unit.

In both instances, the lender had no direct contact with the woman. In each case, her son brought the documents to her for signing, explained their terms to her and, in relation to the first loan, suggested she get independent legal advice. He also assured her on both occasions that he would meet the loan repayments.

Subsequently, the relationship between the woman and her son broke down, and she instructed her lawyers to sever the joint tenancy in respect of the property. Her son stopped making payments on the first loan and the woman sought to have the guarantee and security set aside on the grounds that the lender and her son had acted unconscionably towards her.

The woman claimed that:

- her son and the lender had exploited or improperly taken advantage of her emotional attachment to her son; and
- the various transactions were of no future benefit to her, which was relevant to the issue of her disadvantage and whether her son and the bank had acted unconscionably.

The court dismissed the appeal, noting that:

- at least two matters have to be established to obtain relief for unconscionable conduct - the person must have been in a position of special disadvantage and the other party must have taken advantage of that position by unfair means;
- the concept of special disability or disadvantage is concerned with circumstances that seriously affect a person's ability to decide whether a transaction is in their best interests;
- while the woman relied on her son for advice on commercial matters and was emotionally tied to him and his family, these facts alone did not put her in a position of disability - she was not mentally impaired and she understood the relevant aspects of the transaction and entered into them voluntarily;
- the woman received benefits from the transactions; and
- it would be unreasonable to expect lenders to deal with each transaction giving a benefit to a child on the assumption that it was, or might in some undefined circumstances, be held to be unconscionable.

1. *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (This case is discussed in the *Australian Banking and Finance Law Bulletin* (2003) 19(1)).

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In the courts

Should a parent-child relationship be treated in the same way as a husband-wife relationship in the context of a guarantee?

In a recent Australian case, the Court of Appeal decided that the protection given to wives who guaranteed their husband's debts could not be extended to parents who have guaranteed their children's debts, as parents do not normally rely unquestioningly on their children's judgment.

In this case[1], the court was referred to a case in which the court said it would intervene when a wife guarantees her husband's debts, when the husband has failed adequately to explain the transaction to her and the transaction is for his benefit and not hers[2].

The principles behind this were based on the need to protect married women from transactions that were of no benefit to them and that were entered into at the request of their husbands relying on the special trust and confidence in the marital relationship. The court held that this protection could not be extended to parents who have guaranteed their children's debts, as parents do not normally rely unquestioningly on their children's judgment.

The court noted that the relationship of parent and child is not of such a character that any potential lender who is aware that the borrower is a child or the partner of a child of the guarantor must, by reason of that fact alone, be taken to have appreciated that the guarantor may not receive sufficient explanation of the transaction's purport and effect from the borrower.

The distinction made by the court is that parents are not misled by the special trust and confidence they have in their children, rather their desire to help can make it difficult for them to say no. The court refused to provide protection for this.

This case is interesting for two reasons.

First, the notion that married women need special protection from their husbands' business transactions is still given merit.

And secondly, it is consistent with the New Zealand case of *Alma Daphne Lee v Damesh Holdings Limited*[3] which is currently on appeal.

We will have to wait for the outcome of the re-hearing of the New Zealand case to determine what course of action will need to be taken in relation to guarantees of this nature in New Zealand.

1. *Watt v State Bank of NSW* [2003] ACTCA 7 (13 March 2003)
2. *Yerkey v Jones* (1939) 63 CLR 649
3. *Alma Daphne Lee v Damesh Holdings Limited* (High Court) Unreported 14 April 2003

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In the courts

UPDATE: Are your guarantees enforceable?

An appeal against the decision in Alma Daphne Lee v Damesh Holdings*, which was summarised in the Winter 2003 edition of* Financial Services Quarterly*, was heard in the Court of Appeal on 30 September.*

The High Court decision rubber stamped common market practice in New Zealand – i.e lenders' requirement that guarantors be advised independently from the borrower.

The Court of Appeal decided that the High Court case proceeded on narrow and inappropriate pleadings and that accordingly:

- the judgment should be set aside;
- the matter should be remitted to the High Court to enable the pleadings to be reviewed; and
- the case should be set down for further hearing on the revised pleadings.

We will update you on progress with this case in future editions of *Financial Services Quarterly* as it is likely to be the definitive case in New Zealand in terms of dealing with guarantors.

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In the journals

MED report on bank lending practices to SMEs
No obvious signs of inefficiency but the MED proposes initiatives to improve SMEs' access to capital

Unlawful financial assistance – where do you draw the line?
An English decision on the payment of the acquirer's professional fees by the target company is likely to apply to similar transactions under the Companies Act in New Zealand.

Directors' and officers' liability insurance
Insurance offers cover from liabilities arising from company duties.

Where several guarantors are intended, but not all sign
Australian decisions suggest a guarantee may be unenforceable if several guarantors are contemplated - but not all of them sign.

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In the journals

Ministry of Economic Development's Report on Bank Lending Practices to Small and Medium Sized Enterprises

*This report sets out the Ministry of Economic Development's(MED) findings from a study of bank lending practices to small and medium-sized enterprises (**SME**s). The practices are described and reviewed from an economic efficiency perspective, which is defined in the report as maximising New Zealand's long-run rate of economic growth.*

Lending practices

Based on interviews with, and information obtained from, ANZ, ASB, BNZ, HSBC, National Bank, TSB Bank and Westpac, the Ministry of Economic Development noted that:

- all of the banks regard the SME sector as an important part of their portfolio, perceive growth opportunities and consider the market for this sector to be competitive;
- the facilities offered to SME customers are broadly comparable across the banks and, with two main exceptions (outlined below), the banks look to lend across the whole SME sector;
- in general, the policies, procedures and processes employed by the banks all derive from international practice, but modifications to parent company policies and procedures are made to suit New Zealand conditions - New Zealand banks are at the same level, or only slightly behind, offshore counterparts (notably Australia) in terms of their application of best practice technologies; and
- New Zealand has yet to utilise credit scoring as a tool for assessing risk in the SME sector to the extent that it is used in other jurisdictions, which may reflect the relative size of the New Zealand market.

Efficiency of lending practices

The MED found no signs of inefficiency in the market for lending to SMEs. This was based on the following findings:

- interest rates charged to SMEs appeared to be competitive when assessed alongside charges to larger businesses and compared against international comparisons;
- there is evidence from research undertaken by a bank and the MED indicating that access to finance is not a major issue for this sector; and
- all banks have policies and procedures for assessing risk in cost efficient ways.

However, there are two sectors of the SME market where access to bank lending is an issue. These are start-up SMEs and SMEs that have intellectual property as their main asset. Theory and evidence suggests that bank lending to these types of SMEs is not the most appropriate form of finance. Other forms, including equity or venture capital, are better suited to their needs.

While there are no obvious signs of inefficiency within this report, the MED has identified the following aspects of the market where there is potential for further enhancing the efficiency of the market:

- a mechanism for sharing information between the banks - although this has been attempted unsuccessfully in the past, the MED recommends a further study into the reasons for this failure and ways to address any impediments to information sharing; and
- publication of more information on aspects of lending to SMEs (as in the UK and Australia).

The banks have suggested a range of initiatives aimed at improving SME access to capital. These options involve various forms of tax incentive, government grant or guarantee. However, evidence from overseas suggests that such schemes do not always achieve intended results and more work would need to be undertaken on the design, purpose and evaluation of such initiatives before their introduction could be justified.

The report can be read at www.med.govt.nz/irdev/ind_dev/lending-practices/index.html]

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In the journals

Unlawful financial assistance – where do you draw the line?

Butterworths Journal of International Banking and Financial Law – May 2003

The English Court of Appeal recently decided that the payment of an acquirer's professional fees by a subsidiary of a target company was unlawful financial assistance for the acquisition of the target company's shares in breach of the Companies Act 1985.

The analysis in this decision[1] is likely to apply to a similar transaction under the relevant provisions of the New Zealand Companies Act.

Therefore it is important to carefully consider all aspects of any transaction involving the acquisition of shares and to seek legal advice if you're not sure if there is or may be financial assistance.

This case reinforces the broad scope of the financial assistance prohibitions. Although it is usually a reasonably straightforward process to approve financial assistance under the New Zealand Companies Act, failure to do so can have significant consequences for borrowers and lenders.

1. *Chaston v SWP Group plc* [2002] EWCA Civ 1999

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In the journals

Directors' and officers' liability insurance

Australian Corporate News, Issue 13, 16 July 2003

This article looks at directors' and officers' insurance in Australia.

The purpose of directors' and officers' insurance is to insure directors and officers against liabilities arising from carrying out their duties to the company.

The New Zealand position is broadly similar to the Australian position described in this article. The Companies Act 1993 allows companies to choose to provide insurance for the liability of a director for any act or omission in that person's capacity as director, or for costs incurred in proceedings relating to such liability (not including criminal liability).

The insurance must be taken out according to the procedure in section 162 of the Companies Act, which generally requires express authorisation in the constitution and the prior approval of the board. Directors of a company without a constitution are not able to take out such insurance.

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In the journals

Where several guarantors are intended but not all sign

Journal of Banking and Finance Law and Practice, Vol 14, September 2003

Recent decisions in NSW and Queensland serve as reminders that in Australia, a guarantee may be unenforceable if several guarantors are contemplated but not all of them sign.

The rationale for the Courts' interference in each case was that each guarantor has an interest in there being other guarantors so that there may be more contributors.

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Legislation/In Parliament

Securities Act non-compliance – the legislators step in

In an unusual move, legislation is proposed to provide a mechanism to retrospectively correct past non-compliance with the Securities Act.

The Reserve Bank of New Zealand Amendment Act 2003

Amendments to the Reserve Bank of New Zealand Act 1989 aim to promote and maintain financial stability and to avoid damage to the financial system that could be caused by failure of a registered bank.

Reform of securities trading legislation

The Government has announced proposals to further strengthen New Zealand's securities trading legislation.

Companies Act amendment will help to define what constitutes a "Major Transaction"

The Business Law Reform Bill will amend section 129 of the Companies Act 1993 on Major Transactions.

Reforms to reduce double taxation of "triangular" trans-Tasman investments

Legislation is likely to be passed by the end of the year, to come into effect retrospectively from April this year.

Motor Vehicle Sales Act to replace Motor Vehicle Dealers Act and to amend the PPSA

Changes will extend the current protection under the PPSA for purchasers of cars from licensed motor vehicle dealers to "on behalf" sales.

Electronic Transactions Act

The Electronic Transactions Act, which gives legal effect to a information in electronic form, comes into full force on 21 November.

UPDATE: Insolvency law reform – a summary

Draft legislation to implement the outcome of the insolvency law review is now unlikely to be released until mid-November.

UPDATE: Business law reform – what is it trying to achieve?

The Business Law Reform Bill had its first reading on 24 June 2003 and a report on submissions is due at the end of the year.

UPDATE: Consumer Credit law reform

The new legislation has been passed with a number of significant changes since the Winter 2003 issue of *Financial Services Quarterly*.

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Legislation/In Parliament

Securities Act non-compliance – the legislators step in

Earlier this year, it came to light that certain Australian Registered Managed Investment Schemes had breached the Securities Act when offering their units to New Zealand investors. It seems that quite a few Schemes may be affected and that the amount of money involved could be several hundreds of millions.

In an unusual move, legislation is proposed to provide a mechanism to retrospectively correct such past non-compliance by Australian based fund managers[1]. It is likely that, in taking this step, legislators have been influenced by the disproportionate consequences that would otherwise flow from a largely technical breach.

What happened?

These Australian Schemes were operating under a Securities Act Exemption Notice that enabled them to offer in New Zealand using an Australian prospectus rather than a New Zealand prospectus. The Exemption Notice contains conditions requiring the Schemes to lodge certain documents with the Companies Office e.g. copies of the Australian prospectus and the Scheme's constitution.

It appears that some Schemes failed to keep these filings up to date. Arguably, it is necessary to lodge updated documents as soon as the original documents are amended and this did not always occur.

What did this mean?

Because the application of the Exemption Notice was expressed to be conditional on these documents being lodged, the failure to meet this requirement meant the Exemption Notice did not apply. Therefore, the Schemes were required to comply in full with New Zealand securities laws, including producing a New Zealand prospectus.

A failure to produce a New Zealand prospectus when one is required has very significant implications. Any securities allotted are treated as invalid and the issuer is required to refund any moneys received.

This is an automatic consequence regardless of the fact that few (if any) investors would conduct a Companies Office search for the documents in question. Investors wishing to see these documents would be much more likely to request them from the Scheme and so would not normally have been prejudiced by the non-compliance.

The position is exacerbated by recent performance in the capital markets. Many investors have suffered losses and so the prospect of a return of their original investment is attractive.

The proposed legislation

Legislation has been proposed to provide a mechanism for validating these invalid securities. If the legislation is passed, Schemes will be able to apply to the High Court to have the securities validated. The Court is likely to validate unless the investor can demonstrate that he/she has been prejudiced by the non-compliance.

Please contact Mark Todd at mark.todd@bellgully.com if you have any queries.

[1.] *A Supplementary Order Paper to the Business Law Reform Bill*, which will amend the Securities Act, was announced by Commerce Minister Lianne Dalziel on 16 October 2003.

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Legislation/In Parliament

The Reserve Bank of New Zealand Amendment Act 2003

This new legislation, which amends the Reserve Bank of New Zealand Act 1989, came into force on 20 August 2003.

Registration and supervision of banks; payment systems

The existing legislation deals with the registration of banks and the prudential supervision of registered banks. It aims to promote and maintain financial stability and to avoid significant damage to the financial system that could be caused by failure of a registered bank.

The new legislation introduces the following principal changes:

- The Reserve Bank must now consider a wider range of matters when determining an application for registered bank status and when carrying out its supervisory role - for example, the suitability for their positions of the directors and senior managers of the applicant.
- A person who intends to acquire a "significant influence" in a New Zealand incorporated registered bank (or to increase the level of their significant influence) must first obtain the Reserve Bank's consent. Significant influence means an ownership stake of more than 10 per cent or the ability to appoint 25 per cent or more of the board of directors of the registered bank. The Reserve Bank can, in giving its consent, specify the level of significant influence that may be acquired and impose any terms or conditions that it thinks fit.
- The Reserve Bank can now require registered banks to provide information about their sister companies. According to the Reserve Bank, this provision recognises that there are implicit and explicit links between sister companies and that difficulties in one can lead to difficulties in another.

The new legislation gives the Reserve Bank the ability to require an operator of a payment system to supply information on the payment system, require an audit of information and publish or disclose that information to, among others, someone with a proper interest in receiving the information.

Use of the word "bank" and its derivatives

In order to ensure that non-bank financial institutions do not pass themselves off as registered banks and mislead the public, the existing legislation restricts use of the words "bank", "banker" and "banking" (each a "**restricted word**") in their name or title.

The new legislation extends these restrictions to close off a number of loopholes and anomalies in the existing legislation.

Use of a restricted word is limited to registered banks and persons authorised by the Reserve Bank to use the word. In particular, the amendments clarify that a registered bank may not, without Reserve Bank authorisation, use a restricted word in respect of a unit trust of which the registered bank is a trustee or manager within the meaning of the Unit Trusts Act 1960.

Changes to governance

The new legislation makes a few changes to the Reserve Bank's governance arrangements, including the following:

- The Governor no longer chairs the Bank's board of directors. The chair is now required to be a non-executive director appointed by the non-executive directors. This change removes the potential conflict of interest created where the Governor chaired the committee assessing his own performance.
- The Bank's Deputy Governor ceases to be a board member, although the Governor remains a member.

According to the Reserve Bank, the new legislation is intended to enhance the Board's ability to monitor the Reserve Bank's performance and to increase the directors' accountability for the performance of their duties. It is not intended to affect the role of the board of directors or the role of the Governor in managing the Reserve Bank.

The Board's primary task remains monitoring the performance of the Governor and the Reserve Bank on behalf of the Minister of Finance and the Board is required to issue an annual report assessing the Governor's and Reserve Bank's performance.

The Governor continues to be responsible for all Reserve Bank decisions, including setting monetary policy.

Designated payment systems

The new legislation also provides for finality of payments settled through a "designated payment system". A designated payment system is a payment system that is designated as such by the Governor General by Order in Council.

In basic terms, a settlement that is effected under the rules of a designated payment system cannot be reversed, repaid, recovered or set aside unless the settlement occurs more than 24 hours after the insolvency of a participant or the counterparty had knowledge of that insolvency.

If the rules of a designated payment system provide for netting, any netting under those rules are valid and enforceable despite any law to the contrary. However, this does not prevent the operation of any enactment or rule of law (including, without limitation, the voidable transactions provisions of the Companies Act 1993) in relation to an *underlying* transaction.

One of the principal reasons for the introduction of the designated payment system legislation is to facilitate the inclusion of the New Zealand dollar into the foreign exchange system operated by CLS Bank International.

A more detailed description of the amending legislation can be viewed on the Reserve Bank's website at www.rbnz.govt.nz.

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Legislation/In Parliament

Reform of securities trading legislation

In July, the Government announced proposals to further strengthen New Zealand's securities trading legislation, following on from the Takeovers Code in 2001 and the legislation resulting from the Securities Markets and Institutions Bill 2002[1].

The next step is a Securities Trading Law Review, designed to increase the efficiency of the law on the trading of securities and futures on registered securities exchanges and authorised future exchanges.

The Government will introduce:

- a new insider trading regime, which moves the focus from breaching fiduciary duty to preventing the negative market impact of using inside information;
- measures prohibiting market manipulation, including banning misleading or deceptive conduct relating to securities;
- amendments to strengthen investment adviser law and enforcement;
- tougher penalties and remedies for breach of securities trading law, introducing criminal and civil penalties;
- small changes to improve the substantial security holder regime; and
- changes to the application of securities trading law to improve the application of the law to certain financial products and entities.

The bill is currently being drafted and targeted consultation will be carried out later this year before it is introduced to Parliament, probably in the first half of next year.

1. Media statement from Hon Lianne Dalziel, Minister of Commerce 24.07.03, referred to in *Capital Letter*, 24 July, 2003

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Legislation/In Parliament

Companies Act amendment will help to define what constitutes a "Major Transaction"

When the Business Law Reform Bill, referred to in the Winter 2003 edition of Financial Services Quarterly becomes law, it will amend section 129 of the Companies Act 1993, which relates to Major Transactions.

A new subsection (2B) will outline what steps directors should take when assessing the value of any contingent liability for the purposes of this section.

The directors:

- must have regard to all circumstances that the directors know, or ought to know, affect, or may affect, the value of the contingent liability;
- may rely on estimates of the contingent liability that are reasonable in the circumstances;
- may take account of:
- the likelihood of the contingency occurring; and
- any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

This is an important amendment in the context of group financings where subsidiaries often guarantee liabilities incurred by a parent which are well in excess of the subsidiary's total asset value. In the absence of any guidance in the section, the prudent approach has been to value contingent liabilities at their full face value. This resulted in most guarantees given by subsidiaries in group financings constituting a major transaction. This change suggests that there is now scope for directors to "value down" a guarantee if the specified criteria are satisfied.

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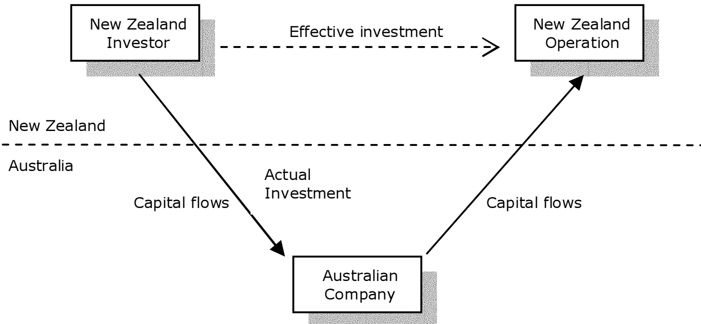
Legislation/In Parliament

Reforms to reduce double taxation of "triangular" trans-Tasman investments

The Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill was introduced in June. It contains proposed reforms targeted at the reduction of the double taxation of "triangular" trans-Tasman investments.

From a New Zealand tax resident investor's perspective, "triangular investment" describes the situation where a New Zealand resident invests in an Australian company that earns income in New Zealand. This situation is represented in the diagram below:



Currently, no imputation credits are generated in respect of New Zealand tax paid by the Australian company and franking credits generated in Australia cannot be utilised by New Zealand resident shareholders.

Tax is imposed once at the company level and again on the distribution of profits to New Zealand resident shareholders, resulting in a position of double taxation of the New Zealand profits.

The proposed reforms will allow an Australian resident company to maintain a New Zealand imputation credit account and collect imputation credits for income tax paid in New Zealand.

A limitation of the proposed reform is that Australian franking credits and New Zealand imputation credits generated by the company must be distributed to both New Zealand and Australian resident shareholders in proportion to their shareholding in the company. However, a New Zealand shareholder will still not be able to benefit from the Australian franking credits.

Legislation is likely to be passed before the end of the year. Once enacted, the changes will apply retrospectively from 1 April 2003 with distribution of credits permitted on or after the later of 1 October 2003 and 30 days after a company provides notice of its election to maintain an imputation credit account to the New Zealand Inland Revenue Department.

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Legislation/In Parliament

Motor Vehicle Sales Act to replace Motor Vehicle Dealers Act and to amend the PPSA

Most provisions of The Motor Vehicle Sales Act 2003 are due to come into force in December. The Act reforms the law governing motor vehicle traders and replaces the Motor Vehicle Dealers Act 1975[1].

Consequential amendments to the Personal Property Securities Act 1999 (the **PPSA**) include:

- Part 6 of the PPSA deals with the disposition of motor vehicles by licensed motor vehicle dealers (**LMVD**). Section 58 provides that, where a motor vehicle that is subject to a security interest is sold by an LMVD to a customer, the customer takes the vehicle free of any security interest of which it was unaware. The Motor Vehicle Sales Act will amend section 58 so that it will extend to sales by dealers acting as agent for the seller.
- Section 59 of the PPSA will be amended so that a secured party may also seek reimbursement from a motor vehicle trader where its security interest is extinguished in a sale where the dealer acted as agent for the seller.
- However, the Motor Vehicle Dealers Fidelity Fund has not been retained, which leaves at risk secured parties whose security interests have been extinguished, particularly if the relevant motor vehicle trader is insolvent.

Note that whereas the Motor Vehicle Dealers Act implied a condition in contracts of sale of motor vehicles that the seller was the "true owner" of the vehicle, the Motor Vehicle Sales Act does not contain any provisions relating to title. As a result, consumers will have to rely on section 5 of the Consumer Guarantees Act 1993 for a guarantee as to title.

1. Referred to in *The New Zealand Law Journal*, June 2003, p 213

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Legislation/In Parliament

Electronic Transactions Act

The Electronic Transactions Act 2002, which gives legal effect to information in electronic form and sets default rules governing the time and place of despatch and receipt of electronic information, comes into force on 21 November 2003. Regulations under the Act also came into force on the same day.

The Act sets out certain equivalents to paper-based legal requirements, such as a necessity for writing, a signature, or the retention of documents, to be met by using electronic technology that is functionally equivalent to those paper-based requirements.

Importantly, nobody is required to use, provide or accept information in electronic form unless they have consented to do so. Generally, a person may consent to use, provide, or accept information in an electronic form subject to conditions regarding the form of the information or the means by which the information is produced, sent, received, processed, stored, or displayed, and consent may be inferred from a person's conduct.

However, in certain circumstances, including for the purposes of disclosure under the Credit Contracts Act, express consent (a positive indication of consent that is specific to the matter consented to) is required.

The regulations set out conditions that must be complied with if certain steps are taken electronically (for example, giving written notice or making disclosure) and specify when, for the purposes of the Credit Contracts Act, disclosure by electronic means is treated as having been made.

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Legislation/In Parliament

UPDATE: Insolvency law reform – a summary

Draft legislation to implement the outcome of the insolvency law review was expected to be released in mid-2003 for public consultation.

However, the Ministry of Economic Development does not now expect the draft legislation to be released until mid-November. We will update you on progress in the Summer 2004 edition of *Financial Services Quarterly*.

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Legislation/In Parliament

UPDATE: Business law reform – what is it trying to achieve?

The Business Law Reform Bill had its first reading on 24 June

The closing date for submissions was 7 August and a report on the submissions is due on 23 December.

We will update you on progress with the Bill in future editions of *Financial Services Quarterly*.

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Legislation/In Parliament

UPDATE: Consumer Credit law reform

In the Winter 2003 edition of the Financial Services Quarterly, we summarised the proposed changes to New Zealand's credit contracts laws.

Since then, there have been a number of significant changes to this new legislation, which was passed on 14 October as the Credit Contracts and Consumer Finance Act 2003.

How will the new law change the existing regime?

The Select Committee made a number of changes to the Bill, most notably the addition of hardship review provisions and the inclusion of provisions governing residential buy-back transactions.

The fundamental aspects of the Act are:

- New disclosure rules for consumer credit contracts, consumer leases and residential buy-back transactions.
- Introduction of a statutory "free look" period, which gives consumers a short period during which they may choose to opt out of a contract.
- Abandonment of the finance rate, or any other comparative rates relating to the cost of credit.
- Removal of disclosure requirements for credit provided to commercial (non-domestic) borrowers.
- Rules for interest rate calculation, fees, payments and early repayments in relation to consumer credit contracts.
- Introduction of hardship provisions, which will allow a debtor to apply to a creditor to change the terms of a consumer credit contract on grounds of hardship.
- This will be limited to "genuine hardship" including illness, injury, loss of employment or the end of a relationship.
- No application may be made if the debtor has defaulted on a payment, caused a credit limit to be exceeded, or the hardship was reasonably foreseeable at the time the contract was entered into.
- Protection for debtors against oppressive terms and conduct under credit contracts, consumer leases and residential buy-back transactions.
- Commerce Commission powers of supervision and public enforcement.

Note that the Act can apply to credit contracts that are governed by foreign law. By comparison, the existing regime only applies to New Zealand law governed credit contracts.

How will the changes impact lenders?

Changes will need to be made to consumer credit procedures, including:

- Revision of credit accounting software and systems to reflect the new interest calculation and payment limitation requirements.
- Revision of credit documentation to accommodate both the debtors' rights conferred by the legislation and the limitations on creditors' rights.
- Revision of disclosure documentation to accommodate the new disclosure requirements.
- Revision of disclosure procedures (including obtaining consent for the delivery of electronic and web-based disclosure).
- Determining whether to elect transition of existing contracts to the new regime. Creditors can elect that existing contracts be governed by the new law or the old law, but for all new credit contracts, the new law will apply.
- Implementation of procedures to assess hardship claims.
- Establishment of comprehensive compliance programs to mitigate damages and provide statutory defences.

When do the changes take effect?

While some provisions relating to buy-back transactions are already in force, most of the new legislation will not apply until 1 April 2005. Regulations are expected to be made in the next few months, with a discussion document as to their content due to be released early in November 2003.

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Recent developments

What is the Reserve Bank's role in relation to prudential supervision of banks?

Reserve Bank Governor Dr Alan Bollard has discussed the Bank's regulation and supervision goals and processes.

Corporate governance in New Zealand: consultation on issues and principles

At the request of the Minister of Commerce, the Securities Commission is developing an agreed set of corporate governance principles for New Zealand.

Financial Sector Assessment Program

New Zealand is to participate in a voluntary assessment under the Financial Sector Assessment Program, a joint IMF and World Bank effort to promote the soundness of financial systems in member countries.

UPDATE: Changes to stamp duty legislation in Australia

As reported in the Winter 2003 edition of *Financial Services Quarterly*, recent changes to stamp duty legislation in Australia may affect the way that Australian and trans-Tasman facilities are structured.

UPDATE: Disclosure obligations for directors and officers

The directors' and officers' disclosure obligations mentioned in the Winter 2003 edition of *Financial Services Quarterly* have yet to come into force.

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Recent developments

What is the Reserve Bank's role in relation to prudential supervision of banks?

In a recent New Zealand Herald *article*[1]*, Governor of the Reserve Bank Dr Alan Bollard discussed the Reserve Bank's broader banking regulation and supervision goals and processes.*

Registration and supervision regime

Dr Bollard considers that there are three main ways in which the Reserve Bank implements its registration and supervision regime:

- *Self regulation*

Responsibility for risk management is placed on each bank's board and senior management as this is where risks are best identified and dealt with. This is achieved through compulsory disclosures and director attestations as to the bank's financial position, capital adequacy and risk management, complemented by an external audit.

- *Disclosure*

Because banks rely on public confidence, the Reserve Bank requires disclosures that ensure the public has access to relevant information about the health of New Zealand banks, including their credit ratings.

- *Capital adequacy and other specific rules*

Specific prudential requirements, including minimum capital ratios, limits on credit exposures and some corporate governance rules.

Reserve Bank consent now required to purchase a significant stake in a New Zealand bank

A regular consultation regime is in place, with powers to obtain information, give directions and, where necessary, appoint a statutory manager or de-register a bank. Dr Bollard accepts that experience around the world indicates that no country is immune from banking failures and notes that the Reserve Bank must be prepared to deal with a bank failure in order to avoid significant damage to the financial system.

Under the Reserve Bank of New Zealand Amendment Act, prospective purchasers of 10 per cent or more of a registered bank are required to obtain the written consent of the Reserve Bank. Significantly, the Reserve Bank has the power to impose conditions on any consent granted and it has recently been developing its policy in this regard. It has considered the following factors:

- In order to ensure additional strength from a local board of directors and greater certainty about location of assets and liabilities, implementing a requirement that systemically important banks must be locally incorporated.

- A systemically important bank must be able to operate as a going concern if its parent, or another of its service providers, fails. The Reserve Bank is working on how best to achieve a situation where the board or a statutory manager will have access to sufficient management resources to be able to operate the bank independently in this situation. It may be that director attestations, third-party independent reviews and disclosure requirements will achieve this.

- Investigating ways of ensuring that taxpayers' funds are not resorted to in the event that a systemically important bank makes large losses and exhausts its capital – one option includes "haircutting" its creditors (including depositors).

- Ways of reducing the probability of failure by further enhancing the strength of New Zealand banks – one option noted would be to impose higher capital requirements.

The concerns reflect the fact that all but two of New Zealand's registered banks are owned offshore and, in the event of a failure, the Reserve Bank may have little ability to influence a restructuring process (for example, if the information systems for the bank are managed offshore).

The Australian Banking Act provides that, if an Australian incorporated bank fails, its assets must be allocated to the bank's deposit liabilities in Australia in priority to all other liabilities. Dr Bollard notes that this could put a New Zealand depositor at such a bank, or at a New Zealand branch of the bank, in a less favourable position. The Reserve Bank is managing this issue in the following ways:

- Systemically important banks must be locally incorporated.

- Investigation of an "enhanced branch" structure, that might replicate the protections provided by local incorporation.

- Discussions with Australian officials concerning the relatively recent closer integration of Australia and New Zealand's financial sectors and the implications for each country's regulatory frameworks. Dr Bollard considers that there is a possibility that a more integrated trans-Tasman approach to banking supervision and crisis management may emerge, but notes that, in the meantime, the Reserve Bank is continuing to progress New Zealand's own options.

1. *The New Zealand Herald*, 2 October 2003

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Recent developments

Corporate governance in New Zealand: consultation on issues and principles

At the request of the Minister of Commerce, the Securities Commission is developing an agreed set of corporate governance principles for New Zealand.

As a result, the Securities Commission is trying to find out the level of consensus in the New Zealand business community around norms or expected standards of behaviour for corporate governance.

The Securities Commission points out that this exercise is not aimed at reducing the rate of corporate failure, nor will it necessarily result in an increase in ethical behaviour.

However, a set of principles that New Zealand businesses support will, in its view, contribute to better corporate governance.

The nine core areas of corporate governance that will be examined are:

- Ethical conduct – including the use of codes of ethics.
- Board composition and performance – including the role and definition of independent directors and the issues of certification/accreditation.
- Board committees – including composition of committees.
- Reporting and disclosure – including quarterly reporting and certification of financial statements.
- Remuneration – of executives and directors.
- Risk management – including levels of disclosure.
- Auditors – including rotation and oversight.
- Shareholder relations – including institutional shareholders and public reporting.
- Stakeholder interests – addressing the interests of stakeholders.

The level of consensus around these issues will be used to develop principles to reflect the business community's position.

The Securities Commission considers corporate governance policies and practices in New Zealand to be, by and large, of a good standard.

The Commission hopes that, after this consultation, the resulting principles will be useful for all types of entity, including co-operatives and state-owned enterprises.

The Securities Commission is encouraging those in the business community to take part in this process by completing a questionnaire, which is available on its website *www.sec-com.govt.nz/publications/documents/ corporate-governance/index.shtml*. The deadline for submissions is 5pm on Friday, 7 November 2003.

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Recent developments

Financial Sector Assessment Program

*New Zealand will participate in a voluntary assessment under the Financial Sector Assessment Program (**FSAP**)[1], a joint International Monetary Fund and World Bank effort introduced in May 1999 to promote the soundness of financial systems in member countries.*

The FSAP aims to:

- identify the strengths and weaknesses of member countries' financial systems;
- look at the management of key systems;
- ascertain development and technical needs;
- determine how risks are managed; and
- help prioritise policy responses.

Financial System Stability Assessments for those countries that have already undertaken an assessment are available at the IMF website at *www.imf.org*.

Commentators have noted that the assessment will be the most comprehensive external assessment of the New Zealand financial sector ever undertaken, involving the identification of areas where our regulatory arrangements differ from international standards or where there may be gaps in the supervisory framework.

1. *The National Business Review*, 26 September 2003, page 56

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Recent developments

UPDATE: Changes to stamp duty legislation in Australia

As reported in the Winter 2003 edition of Financial Services Quarterly, *recent changes to stamp duty legislation in Australia may affect the way that Australian and trans-Tasman facilities are structured.*

Prior to the State Revenue Legislation Amendment Act 2003 (NSW), which became law in July, secured loan facilities in New South Wales tended to be structured as subscriptions for debentures.

This was to take advantage of a concession relating to ad valorem mortgage duty which was available to the extent that repayment of advances was secured by the issue of debentures (formerly contained in section 226 of the Duties Act 1997 (NSW)).

The new legislation removed the concession with effect from 24 June 2003, which means that it no longer applies to mortgages executed, and debentures subscribed for, on or after 24 June 2003.

Further advances made on or after 24 June which are secured by a mortgage executed before that date will now also attract duty in certain circumstances.

As such, lenders and borrowers who have existing secured loan facilities governed by New South Wales law should review their position before any further advances are made.

Further amendments are expected to be made to New South Wales' stamp duty legislation to introduce anti-avoidance measures relating to the acquisition of interests in land.

We will update you on the proposed amendments in future editions of *Financial Services Quarterly*.

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Recent developments

UPDATE: Disclosure obligations for directors and officers

The directors' and officers' disclosure obligations referred to in the Winter 2003 edition of Financial Services Quarterly *are not yet in force.*

These provisions will come into force by Order in Council once regulations on the form and detail of disclosure and possible exemptions from the regime have been drafted and publicly consulted.

It was anticipated that the regulations would be in force by October 2003 but they are now not expected until early next year.

We will update you on the progress of these regulations in future editions of *Financial Services Quarterly*.

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Bell Gully news

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Money laundering control in New Zealand

Launch of the NZAX

Credit derivatives, netting and ISDA documentation

UPDATE: New Zealand court orders share forfeiture in equity swap case

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A useful list of public, exchange and other holidays for 2003 and 2004

Need more information?

For more information on any of the cases, articles and features in *Financial Services Quarterly*, please email rachel.gowing@bellgully.com or call Rachel on 64 9 916 8825.

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Bell Gully news

Bell Gully tops international legal rankings

Bell Gully has been confirmed as New Zealand's leading commercial law firm by recent rankings in three international legal directories, with excellent results for the banking and finance team.

In *Global Counsel 3000*, Bell Gully received more "leading firm" rankings for areas of expertise and more recommended lawyers than any other New Zealand law firm.

Our banking and finance team was ranked as a "leading" area of expertise – the highest ranking awarded – and three partners were "recommended" by the directory.

Backing up the result, *IFLR 1000* awarded the firm four "top tier" rankings in the key practice areas of banking and finance, M&A, project finance, and insolvency and restructuring, and four banking and finance partners were named as "leading lawyers".

Bell Gully also scored more partner listings than any other New Zealand law firm in the recently published *Who's Who Legal*, an international guide to business lawyers.

Twelve Bell Gully partners were listed in this year's edition, with two banking and finance partners amongst those listed.

"These are great results from three of the world's most respected legal directories," said Matthew Cockram, Bell Gully chairman. "They confirm Bell Gully's strength across the key areas of commercial law."

Global Counsel 3000 is published annually by London's Practical Law Company, and is compiled through independent research, client references and peer review.

IFLR 1000 is produced annually by *International Financial Law Review*, and is published by the *Euromoney Legal Media Group*.

Who's Who Legal is published annually by London-based Law Business Research. This year's edition lists some 3,000 lawyers in 96 jurisdictions, chosen through independent research, peer review and client feedback.

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Bell Gully news

Money laundering control in New Zealand

Money laundering legislation and controls are examined by Bell Gully's David Craig and Daniel Wong in the new guide, A Practitioner's Guide to International Money Laundering Law and Regulation*.*

A Practitioner's Guide to International Money Laundering Law and Regulation is a new publication bringing together a wealth of expertise to examine global regulatory developments. Bell Gully contributed to the New Zealand chapter in the publication.

In over 25 chapters, it covers, amongst other areas; the US and UK response; "know your customer" issues; investigations; terrorist financing; and EU directives.

In addition, the law and regulation in over 40 territories is summarised.

With contributions from many of the leading experts and advisers, this book will assist those working in the financial sector who need to be up to speed with current initiatives.

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Bell Gully news

Launch of the NZAX

With the launch of the New Zealand Alternative Market (NZAX) imminent, Bell Gully has prepared a number of articles explaining the structure of the new market and what clients should do to prepare for a listing.

Bell Gully has been involved in developing the NZAX Listing Rules and is currently advising on some of the new market's first listings.

With our expertise in capital raisings, main board listings and exchange compliance procedures, we are ideally placed to advise on all aspects of an NZAX listing.

NZAX articles are available under Resources on the Bell Gully website.

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Bell Gully news

Credit derivatives, netting and ISDA documentation

Financial Services partner David Craig presented a paper at the recent Banking and Financial Services Law and Practice Conference entitled "Credit derivatives, netting and ISDA documentation: recent developments in New Zealand".

Among other things, the paper examines the use of credit derivatives in New Zealand and considers the applicability of the Personal Property Securities Act to netting, credit support and repo documentation.

Contact Rachel Gowing for a copy of the paper (contact details below).

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Bell Gully news

UPDATE: New Zealand court orders share forfeiture in equity swap case

As reported in the Winter 2003 edition of Financial Services Quarterly, *earlier this year the New Zealand High Court ordered the forfeiture of 12 million shares in Rubicon Limited owned by Perry Corporation.*

The case was appealed and was heard in the Court of Appeal on 3 June. The judgment is pending and we will update you on its progress in the Summer 2004 edition of *Financial Services Quarterly*.

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Bell Gully news

Public holidays

Bell Gully has compiled a compendium of holidays for New Zealand and the main trading markets

A PDF of public holidays 2003/2004, exchange trading calendars 2003/2004, New Zealand courts holidays 2003/2004 and last posting dates for Christmas 2003 can be downloaded from *Financial Services Quarterly* online at *www.bellgully.com*.

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Bell Gully news

Off the shelf: news and publications from Bell Gully

All available at www.bellgully.com/publications/index.html

Corporate and Securities

Regulator Report

Business Law Reform Bill 2003: Proposed changes
18 September 2003

NZAX: Lose the listing fear
September 2003

New Zealand Stock Exchange finalises new corporate governance regime
15 August 2003

Listing on the NZAX: The importance of planning and preparation
1 August 2003

NZAX market targets small-cap companies
28 July 2003

Tax and GST

IRD "sniff test" for large corporates
September 2003

Technology

Communications, technology and media update
July 2003

Commercial Property

Leasing issues update
September 2003

Leasing issues update
July 2003

Construction and Projects

Land Transport Management Bill: improved by select committee - but is it enough?
October 2003

Building legislation offers little extra consumer protection
The New Zealand Herald, October 2003

Leaky homes prompt repeal of Building Act
September 2003

Employment

Pass the hash pipe - the rights of "disabled" workers
The Independent, 1 October 2003

Missing in action - dismissing an employee for absenteeism
The Independent, 17 September 2003

The myth of "work life balance"
The Independent, 3 September 2003

Workplace medical testing: What can you ask of your employees?
August 2003

Environment/Resource Management

Tendering for climate change projects: key issues
October 2003

Keep an eye on hazardous substances rule changes
September 2003

Resource Management Amendment Act 2003: reducing costs, strengthening standards
August 2003

Intellectual Property

New Act brings significant changes to New Zealand trade mark law
August 2003

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Useful Web links

New Zealand Government

New Zealand Government [www.govt.nz]
NZ Government E-Commerce Information [www.ecommerce.govt.nz]
Office of the Clerk of the House of Representatives [www.clerk.parliament.govt.nz]
Parliamentary Counsel Office [www.pco.parliament.govt.nz]
Ministry of Economic Development [www.med.govt.nz]
Ministry of Foreign Affairs and Trade [www.mfat.govt.nz]
NZ Treasury [www.treasury.govt.nz]

New Zealand financial agencies and organisations

The Companies Office [www.comcom.govt.nz]
Export Credit Office [www.treasury.govt.nz/exportcreditoffice]
Inland Revenue Department [www.ird.govt.nz]
NZ Law Commission [www.lawcom.govt.nz]
Office of the Banking Ombudsman [www.bankombudsman.org.nz]
Office of Insurance and Savings Ombudsman [www.iombudsman.org.nz]
Office of the Privacy Commissioner [www.privacy.org.nz]
Personal Property Securities Register [www.ppsr.govt.nz]
Reserve Bank of New Zealand [www.rbnz.govt.nz]
Securities Commission [www.sec-com.govt.nz]
Takeovers Panel [www.takeovers.govt.nz]

New Zealand commercial sites

CLANZ [www.clanz.org]
Institute of Chartered Accountants [www.icanz.co.nz]
NZ Bankers' Association [www.nzba.org.nz]
NZ Business Roundtable [www.nzbr.org.nz]
NZ Institute of Economic Research {www.nzier.org.nz]
NZ Stock Exchange [www.nzse.co.nz]

Australian Government

Banking Ombudsman [www.abio.org.au]
National Office for the Information Economy [www.ogo.gov.au]

Australian commercial sites

Australian Financial Markets Association [www.afma.com.au]
Australian Securities and Investment Commission [www.asic.com.au]
Australian Stock Exchange [www.asx.com.au]

International sites

Bank for International Settlements [www.bis.org]
Global Banking Law Database [www.gbld.org]
International Monetary Fund [www.imf.org]
International Swaps and Derivatives Association [www.isda.org]
NASDAQ [www.nasdaq.com]
New York Stock Exchange [www.nyse.com]
United States Securities and Exchange Commission [www.sec.gov]
World Bank [www.worldbank.org]

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