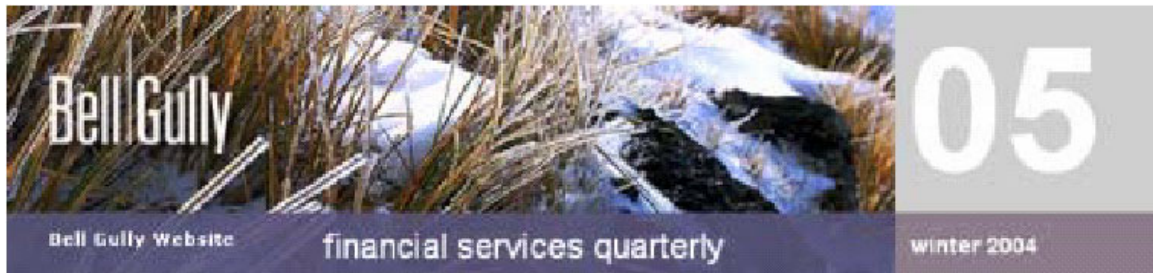


Financial Services Quarterly

WINTER 2004

Bell Gully





Welcome to the winter 2004 issue of *Financial Services Quarterly*, a review of current legal issues in the financial sector.

Each quarter, we summarise recent issues and preview upcoming developments under these headings:

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

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In the courts

Creditors can overturn the effect of matrimonial property agreements

A recent case confirms that matrimonial property agreements designed to defeat creditors may have little effect against those creditors.

Does a debenture holder owe a duty of care to unsecured creditors?

The High Court has considered the nature of the duty of care, if any, owed by debenture holders to unsecured creditors.

Both account holders liable where only one drew amounts in excess of the overdraft limit

The English Court of Appeal has decided that, where a joint bank account exists, an agreed overdraft limit does not expressly oblige the bank to decline any further borrowings by one account holder without reference to the other.

What does "bank or other financial institution" mean for an assignment clause?

A corporation in the business of buying and selling financial services did not fall within the description of "banks or other financial institutions" for the purposes of the assignment provision of a loan facility agreement.

Notice of intention to sell only required for mortgagor, not borrower

The protection given to mortgagors by section 90 of the Property Law Act 1952 does not apply to a borrower that did not give security over its property.

When is a transaction not in the ordinary course of business?

The High Court at Hamilton decided that because the relevant payment was only made by the company in response to the abnormal financial difficulties it found itself in, it was voidable on application of the liquidator and was ordered to be returned.

In the courts

Creditors can overturn the effect of matrimonial property agreements

A recent case heard in the High Court at Auckland confirms that matrimonial property agreements designed to defeat creditors may have little effect against those creditors.

In this case¹, a husband and wife entered into a matrimonial property agreement, and implemented a transfer of assets from the husband to the wife at a time when the husband was indebted on an unsecured basis to six creditors.

Following the husband's bankruptcy, the creditors sought to have the matrimonial property agreement made void pursuant to section 47 of the Property (Relationships) Act 1976.

In summary, section 47 provides that if a matrimonial property agreement has the intention to, or has the effect of, defeating creditors, it is void against such creditors during the period of two years from the date of the agreement.

The issue in this case was whether the reference to two years meant that action had to be brought within that time, or whether a party bringing an action had to qualify as a creditor within that time.

The court preferred the second interpretation, with the result that in this case, the six creditors, but not the Official Assignee, qualified.

The court decided that:

- the matrimonial property agreement had the effect of defeating creditors;
- the agreement was therefore void against the six creditor plaintiffs; and
- judgment should be entered in favour of the six creditors against the wife in the amount claimed.

¹ *Felton v Ors v Johnson and Anor*, High Court, Auckland, CIV-1997-404-000182, 12 February 2004, GJ Venning J

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In the courts

Does a debenture holder owe a duty of care to unsecured creditors?

In this case, the High Court considered the nature of the duty of care, if any, owed by debenture holders to unsecured creditors.

After a company defaulted on its loan obligations, the lender appointed joint receivers over the assets of the company under a first ranking debenture. The assets of the company were insufficient for the receivers to satisfy debts owed to unsecured creditors.

Prior to the completion of the receivership, two of the company's unsecured creditors, owed a combined value of \$85,000 in debts, assigned their debts to a debt collection company for \$1 each. The debt collectors then issued a proceeding against both the receivers and the lender. The claim alleged a breach of a duty, both to it as assignee and to the unsecured creditors, and sought recovery of the full amount of the debt.

The debt collectors claimed that the lender owed a duty to:

- act in good faith and/or care when making a decision to appoint receivers; and
- take reasonable steps to protect the interests of the unsecured creditors and their assignees upon learning of actions by the receivers that, as it was alleged here, constituted abuse of powers and bad faith.

The High Court rejected these claims and added that if any such duty existed it was owed to the company or its liquidator, not to unsecured creditors or its assignees.

¹ *Impact Collections Ltd v Bank of New Zealand* (2004) 9 NZCLC 263,497



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In the courts

Both account holders liable where only one drew amounts in excess of the overdraft limit

The English Court of Appeal has decided that where a joint bank account exists, an agreed overdraft limit does not expressly oblige the bank to decline any further borrowings by one account holder without reference to the other.

In this case¹, Mr and Mrs Fielding opened a joint account and the bank agreed to a \$200,000 overdraft. When Mr Fielding was subsequently declared bankrupt, the balance on the overdraft had reached \$3 million. The bank commenced proceedings seeking recovery of that sum from Mrs Fielding.

Mrs Fielding argued that:

- the balance on the overdraft represented borrowings made by her husband that she did not authorise and of which she was not aware; and
- because the bank had granted a specific facility of \$200,000 on their joint account, it was not authorised to allow borrowings above that limit by Mr Fielding alone.

The Court of Appeal determined that the bank was clearly authorised to grant credit by honouring cheques drawn on the joint account by either Mr or Mrs Fielding and Mr and Mrs Fielding were jointly and severally liable to the bank for the resulting overdrawn balance.

The court also decided that it was impossible to conclude that the overdraft facility had the effect of restricting the bank's authority under its mandate so that it no longer had the authority, which it would otherwise have had, to allow borrowing in excess of the \$200,000 limit.

The court concluded that while the facility obliged the bank to allow borrowings on the joint account up to the agreed limit of \$200,000, it did not expressly oblige it to decline any further borrowings by one account holder without reference to the other.

¹ *Royal Bank of Scotland plc v Fielding* [2004] EWCA Civ 64



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In the courts

What does "bank or other financial institution" mean for an assignment clause?

In this case, the English High Court concluded that a corporation in the business of buying and selling financial services did not fall within the description of "banks or other financial institutions" for the purposes of the assignment provision of a loan facility agreement.

The borrower entered into a US\$40 million loan agreement providing that a bank could assign its rights, benefits and obligations to an "assignee", which was defined as "a bank or other financial institution".

Some of the syndicate banks subsequently assigned their interests to Argo, an "unregistered collective investment scheme" whose objective is "to achieve above average return on a risk adjusted basis by actively trading and investing in securities and other commercial instruments". When the borrower defaulted, Argo sought summary judgement against it.

The borrower argued that the definition of "assignee" was intended to encompass banks and other institutions akin to banks, a substantial proportion of whose business involved the making of loans, which did not include Argo.

Argo claimed that there was no limitation on the class of persons to whom a participation could be assigned and the phrase "bank or other financial institutions" was simply a convenient way of describing a likely group of candidates.

Agreeing with the borrower, the English High Court determined that Argo could not establish a good arguable case that it was a legitimate assignee under the terms of the agreement.

¹ *Argo Fund Limited v Essar Steel Limited* [2004] EWHC 128 (Comm)



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Notice of intention to sell only required for mortgagor, not borrower

The Court of Appeal has decided that the protection given to mortgagors by section 90 of the Property Law Act 1952 does not apply to a borrower that does not give security over its property.

In this case¹, the lender advanced a loan to Mr Lee and Mr Savill, and mortgages were given as security by four others.

When the borrowers defaulted, the lender called up the loan and obtained summary judgment against the borrowers. On appeal, the borrowers argued that because, other than payment of the principal sum, they were complying with the terms of the loan, the lender was precluded from calling it up by section 90 of the Property Law Act 1952, which requires the lender to give three months' notice of its intention to do so.

Section 90 provides that if a mortgagor defaults in the repayment of the principal sum but performs and observes the other covenants in the mortgage, the mortgagee cannot call up the loan without first giving the necessary notice.

The Court of Appeal decided that the protection in section 90 did not apply to the borrowers as the term "mortgagor" did not cover a borrower that did not give security over its land. The court also noted that, in any event, because the borrowers had failed to pay default interest, they were not otherwise complying with the terms of the loan, and so would not have had the benefit of section 90 even if they had given security over their land.

¹ *Savill v Damesh Holdings Limited*, Court of Appeal, 24 February 2004, CA120/03



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When is a transaction not in the ordinary course of business?

In another case¹ on whether a transaction should be set aside as voidable, the High Court at Hamilton decided that because the relevant payment was only made by the company in response to the abnormal financial difficulties it found itself in, it was voidable on application of the liquidator and was ordered to be returned.

Four days before the shareholders resolved to appoint a liquidator, Waikato Dive Centre paid to its lessor arrears of rental amounting to almost \$40,000. The payment was made as a condition to the lessor agreeing that the Dive Centre could assign its lease.

The court decided that it was clear that the payment was only made because the lessor was able to withhold consent to assignment of the lease, and so the payment was not made in the ordinary course of business.

The significance of whether the payment was made in the ordinary course of business is that in terms of section 292 of the Companies Act 1993, even where the primary grounds for voidability are met, the transaction will still not be voidable if the payment was made in the ordinary course of business.

¹ *Takanini Rentors Limited v Waikato Dive Centre Limited*, High Court, Hamilton, CIV 2003-419-1637



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In the journals

Shedding more light on finance advisers

A focus on what the author describes as "*a two part regulatory crack down on investment advisers*".

Duties of care of security trustees and security agents

This article considers the pros and cons of the two respective arrangements, preferring security trust arrangements over security agency arrangements.

Payment on demand

A consideration of where a bank's duty lies in repaying a customer when a demand for funds is made. In particular, it reviews the Court of Appeal decision of *US International Marketing Limited v National Bank of New Zealand Limited*, summarised in the Summer 2004 issue of *Financial Services Quarterly*.

Private offers of securities

This article considers the Court of Appeal case of *Lawrence v Registrar of Companies*, which is described as a significant milestone in the interpretation of the Securities Act 1978.

Garcia: a further extension?

A consideration of the decision in a recent case that again tests the courts' willingness to extend the wives' equity principles beyond the narrow boundaries of legal husband and wife relationships.

Who bears the cost of fraud?

In response to the rising use of credit and debit cards in New Zealand - and resultant rise in complaints of fraud - New Zealand's Banking Ombudsman has called for an overhaul of the industry's self-regulated rules.

In the journals

Shedding more light on finance advisers

Anthony Davies, *The Independent*, 19 May 2004

This article focuses on what the author describes as "a two part regulatory crack down on investment advisers".

The two parts consist of:

- a tougher disclosure regime under the Investment Advisers (Disclosure) Act 1996 (the **Act**) (a bill to amend the Act is due to be introduced into Parliament by the end of the year); and
- the introduction of a more hands-on regulatory regime for investment advisers (the reform has been on the Government's agenda for some time, but is now one of the key recommendations in a report completed by an IMF Financial Sector Assessment Programme task force).

Currently, investment advisers must disclose whether they have been:

- convicted of a crime of dishonesty;
- adjudicated bankrupt; or
- banned from managing or acting as a director of a company,

in the last five years.

The proposed law change will also require investment advisers to disclose:

- their qualifications;
- their experience; and
- any ties or remuneration/sales quota arrangements with fund managers.

The proposed changes do not go as far as English or Australian proposals to require disclosure of benefits such as bonuses, holidays, conferences, etc that investment advisers receive from fund managers. However, the Act does require disclosure of "*remuneration that is reasonably likely to influence the adviser in giving the advice*".

In any event, the Securities Commission can only act on complaints received, as it does not have the resources to police New Zealand's estimated 1,500 investment advisers.



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In the journals

Duties of care of security trustees and security agents

Bruce Taylor, *Australian Banking and Finance Law Bulletin*, May 2004

This article considers the pros and cons of the two respective arrangements, preferring security trust arrangements over security agency arrangements.

In the second in a series of three articles, the author favours security trust arrangements because although an agency agreement may be expressed to include future lenders, no actual, express or implied authority has been conferred by any substitute lender at that time. For a future lender to ratify the agent's entry into the security documentation, the following must apply:

- the actions of the agent must have been made on behalf of the principal - that is, the security agent must not have been purporting to act for itself;
- the future lender must be ascertainable;
- the future lender must have been in existence at the time the security documentation was entered into; and
- the future lender must have been capable of entering into the contract.

Whether or not these requirements are satisfied would be a matter of fact in any given circumstances. The author argues that whereas security agency arrangements require a formal amendment every time there is a substitution of lenders, trust arrangements do not require beneficiaries (i.e. the lenders) to be identified at the time of creation of the trust, thus providing greater flexibility.

We note that it is common practice in the New Zealand market to set up an agency and trustee arrangement, whereby the agent acts as agent and as security trustee for the lenders.



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In the journals

Payment on demand

Palitha de Silva, *The New Zealand Law Journal*, April 2004

This article examines where a bank's duty lies in repaying a customer when a demand for funds is made. In particular, it reviews the Court of Appeal decision of US International Marketing Limited v National Bank of New Zealand Limited¹, summarised in the Summer 2004 issue of Financial Services Quarterly.

Generally a bank has an implied, if not express, contractual duty to repay when a customer makes a demand for funds. However, this duty is not an absolute one and exceptions include:

- insufficient funds/past an agreed overdraft limit; or
- legal bar to payment including:
 - conditions imposed by a court (for example, funds claimed in liquidation or bankruptcy of the customer); and
 - if the bank fears that it would become liable as a constructive trustee if it honours the customer's demand for payment.

However, in this case, the bank's fear that it would become liable as constructive trustee did not overcome its liability to pay on demand.

¹ CA 144/02, 28 October 2003



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In the journals

Private offers of securities

Andrew Beck, *Company & Securities Law Bulletin*, April 2004

This article considers the Court of Appeal case of Lawrence v Registrar of Companies¹, which is described as a significant milestone in the interpretation of the Securities Act 1978. The case relates to section 3 of the Securities Act 1978, and, in particular, the question of who is a member of the public for the purposes of an offer of securities.

The author suggests that the court's reasoning in the case (summarised below) is the clearest expression to date of the policy reasons behind the protections offered by the Securities Act.

Mr Lawrence was the sole director and shareholder of Canterbury Asset Management Limited (**Canterbury**), a company that offered investments in a residential subdivision and an apartment complex without a prospectus or an investment statement. Mr Lawrence was charged with making offers to the public and allotting securities to the public without a prospectus, in breach of section 59 of the Securities Act.

There were 106 investors, none of whom were professional investors. The investors were initially involved in the projects through an association with Mr Condliffe, a bank employee who later became an investment adviser and the investors became his clients. When Mr Condliffe was later employed by Canterbury, he introduced the investors to Canterbury.

Mr Lawrence argued that there was no offer to the public.

The Court of Appeal decided that:

- The Securities Act's general policy of protecting the public does not demand either a wide or a narrow approach to construction - it is a question of construing the section in its context - by analogy to the other exceptions.
- There is a class of investors who are able to manage their own interests, and to insist on a prospectus for such investors would be a waste of time.
- The underlying policy of the professional investors exemption in the Securities Act is that the costs of protection outweigh the benefits where the target investors are capable of looking after their own interests.

The court concluded that the fact that the investors were introduced by Mr Condliffe could not exclude them from being selected as members of the public - that is akin to being an existing client of the firm and analogous to the position of existing security holders who are not excluded by virtue of section 3(3).

¹(2003)9 NZCLC 263,277

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In the journals

Garcia: a further extension?

James Wing, *Australian Banking and Finance Law Bulletin*, Vol. 19 No. 9

You may recall a summary in the last issue of Financial Services Quarterly of an article concerning the extension of the rule in Garcia¹ to other types of relationships. This article considers the decision in a recent case² that again shows the courts' willingness to extend the wives' equity principles beyond the narrow boundaries of legal husband and wife relationships.

The rule in *Garcia* is that a wife who guarantees the debts of her husband and gains no real benefit from entering into the transaction can have the guarantee set aside if she did not fully understand the agreement.

In this case, Mr Alirezai moved to Australia from Iran in 1978. He became friends with Mr Salek, who supported and advised Mr Alirezai during the 1980s, and loaned him \$50,000 after he separated from his wife.

In 1991, Mr Alirezai agreed to put up the title deeds to his land as security for a bank guarantee to support Mr Salek's exporting company.

When he relinquished the title deeds to his land, Mr Alirezai consulted his solicitor and signed an acknowledgement stating "*despite the misgivings of my solicitors I do intend to execute the Bill of Mortgage*".

In 1995, Mr Salek's lender requested Mr Alirezai's approval to increase the overdraft. Mr Alirezai refused and asked that his title deeds be returned.

Mr Salek's company subsequently defaulted and the lender issued proceedings against Mr Alirezai.

Dismissing Mr Alirezai's appeal from the lower court, the Court of Appeal observed "*a close friendship between borrower and surety based on shared cultural and religious values does not in itself require a banker to do more than what was done here, namely, ensure the surety obtains independent legal advice on the transactions*".

The Court of Appeal noted, however, that *Garcia* can be extended to other relationships, with the comment "*I do not understand Garcia to necessarily limit appropriate equitable relief to marriage or marriage-like relationships...relationships of sufficient trust and confidence in which one party could abuse that trust and confidence so as to invoke equitable relief for transactions entered into by the other are not a closed category; they could, for example, arise in some parent-child relationships or perhaps in the relationship between a disabled person and carer; many other potential examples can be envisaged*".

¹ *Garcia v National Australia Bank* [1998] 194 CLR 395

² *ANZ Banking Group Limited v Alirezai* [2004] QCA 6 (6 Feb 2004)



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In the journals

Who bears the cost of fraud?

Liz Brown, *Journal of Banking and Financial Services*, April/May 2004

In response to the rising use of credit and debit cards in New Zealand - and a resultant rise in complaints of fraud - New Zealand's Banking Ombudsman has called for an overhaul of the industry's self-regulated rules.

In this article, Liz Brown considers who should bear losses arising through use of cards and PINs.

The article sets out a summary of the applicable codes, from the original EFT Code of Practice drawn up in 1987, to the most recently revised Code of Banking Practice (2002), noting that compliance is voluntary.

Ms Brown also refers to the increasing number of complaints to the Ombudsman about cards, and suggests two helpful measures:

- an increased level of customer education about card and PIN security to reduce the opportunities for card fraud; and
- to take the opportunity, in the next code review (due before December 2005) to review the rules about unauthorised transactions with a view to answering the following questions:
 - Do the rules provide fair allocation between banks and their customers of the risk of loss through unauthorised transactions?
 - What can be done to resolve the evidential difficulties, so that in any given case there is a reasonable degree of certainty about the allocation of liability?



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Legislation/In Parliament

Review of tax rules for banks proposed

Finance Minister Dr Michael Cullen has advised that the Government is reviewing the taxation paid by banks and may tighten the rules.

Preferential creditors' priority amounts increased

The Status of Redundancy Bill has been divided into two Acts, both now in force, that give increased priority amounts to employees over unsecured creditors in insolvency scenarios.

Review of Securities Act 1978

Substantive work on the review of the Securities Act 1978 is expected to be undertaken after the review of securities trading law.

Financial Reporting Act discussion document released

With a move towards International Reporting Standards imminent and with a desire to reduce trans-Tasman impediments to business, the first part of a two-part review of the Financial Reporting Act has been released.

PPSR fees reduced

The Personal Property Securities Amendment Regulations 2004 have reduced fees relating to use of the Personal Property Securities Register.

Companies Office filing fees reduced

The Companies Act 1993 Amendment Regulations 2004 have reduced filing fees.

UPDATE: Consumer credit law reform - what do you need to do?

With the exception of the provisions relating to buy-back transactions, which are already in force, the Credit Contracts and Consumer Finance Act 2003 comes into force in April next year. This update lets you know what creditors should be doing to comply with the new legislation.

UPDATE: Reform of securities trading legislation

A Securities Trading Law Reform Bill is expected to be introduced to the House of Representatives in October.

Legislation/In Parliament

Review of tax rules for banks proposed

Finance Minister Dr Michael Cullen has advised that the Government is reviewing the taxation paid by banks and may tighten the rules.

According to Dr Cullen "the stimulus for the review has been the fact that the strong upward trend in banks' accounting profits has not been matched by the growth in their taxable profits and hence tax paid" and "any weaknesses in current tax rules applying to banks may be included in the taxation bill to be introduced later this year".



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Legislation/In Parliament

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The Status of Redundancy Bill has been divided into two Acts, both now in force, that give increased priority amounts to employees over unsecured creditors in insolvency scenarios.

- The Insolvency Amendment Act 2004 increases priority for unpaid wages, holiday pay, redundancy pay, personal grievance awards, student loan repayments and child support payments from \$6,000 to \$15,000 ahead of payments to unsecured creditors.
- The Companies Amendment Act 2004 increases priority for unpaid wages, holiday pay, redundancy pay and personal grievance awards from \$6,000 to \$15,000 ahead of payments to unsecured creditors.



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Legislation/In Parliament

Review of Securities Act 1978

Substantive work on the review of the Securities Act 1978 is expected to be undertaken after the review of securities trading law, and will consider:

- possible changes to the regulation of securities offerings;
- whether there should be licensing of financial intermediaries;
- the provisions relating to contributory mortgages; and
- any other issues that are necessary to achieve a consistent and cohesive package of securities laws.



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With a move towards International Reporting Standards imminent and with a desire to reduce trans-Tasman impediments to business, the first part of a two-part review of the Financial Reporting Act has been released.

The discussion document aims to establish who should be subject to financial reporting requirements, and is divided into four parts:

- A discussion of which entities should be required to comply with the financial reporting requirements, including possible exemptions from the full requirements where unjustified.
- A discussion of the requirements for audit and filing of financial reports.
- A consideration of entity neutrality and the possibility of having one set of financial reporting standards with universal application to all entity types.
- A consideration of sector neutrality and the application of financial reporting standards outside the profit-seeking corporate sphere to governmental agencies and other "public benefit" entities.



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Legislation/In Parliament

PPSR fees reduced

The Personal Property Securities Amendment Regulations 2004 have reduced the following fees relating to use of the Personal Property Securities Register:

- Registering a financing statement now costs \$3.00 (reduced from \$5.00).
- Searching the PPSR by financing statement number now costs \$1.00 (reduced from \$1.50).
- Searching the PPSR by all other criteria now also costs \$1.00 (reduced from \$3.00).



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Legislation/In Parliament

Companies Office filing fees reduced

The Companies Act 1993 Amendment Regulations 2004 have reduced the following fees:

- There is no fee to register an electronic annual return (though the \$30.00 fee for filing by other means is retained).
- The fee for inspecting documents by electronic means has been reduced from \$2.00 to \$1.00 (though the \$10.00 fee for inspection by other means is retained).



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Legislation/In Parliament

UPDATE: Consumer credit law reform - what do you need to do?

*With the exception of the provisions relating to buy-back transactions, which are already in force, the Credit Contracts and Consumer Finance Act 2003 (the **Act**) comes into force in April next year.*

If you enter into credit contracts with natural persons, primarily for personal, domestic or household purposes, you have eight months to ensure that you are compliant with the provisions of the Act. In particular, you will need to consider:

- What documentation you are currently using, and what changes are necessary to comply with the Act (to take into account borrowers' additional rights and limitations on creditors' rights).
- How and when your current disclosure documentation is generated, and in what form, and what changes will be necessary to comply with the new disclosure regime under the Act.
- Whether your accounting software will be satisfactory when applied to the new regime, or whether changes will be necessary to take into account the new fee and interest calculation and pre-payment requirements.
- Establishing compliance programmes to ensure defences to any claims can be backed up to the extent possible.
- Establishing procedures for assessing hardship applications.
- Whether calculation and allocation of fees and costs should be revised in light of the Act, and putting in place guidelines for such calculations.



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UPDATE: Reform of securities trading legislation

A Securities Trading Law Reform Bill is expected to be introduced to the House of Representatives in October.

We reported on the reform of securities trading legislation in the Autumn 2004 issue of *Financial Services Quarterly*.



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Recent developments

IMF finds New Zealand's banking system efficient and adequately supervised

The IMF Financial Sector Assessment Programme undertook a Financial System Stability Assessment in both New Zealand and Australia in November last year.

IFRS now free for use in New Zealand

Commerce Minister Margaret Wilson has announced that the Accounting Standards Committee Foundation has agreed to allow free use of International Financial Reporting Standards in New Zealand.

Proposal for mutual recognition of securities offers

A joint discussion paper on the trans-Tasman mutual recognition of offers of securities and managed investment scheme interests has been released.

Tips for searching the PPSR

The Ministry of Economic Development has published a series of tips on how to get the best results when searching the Personal Property Securities Register.

Recent developments

IMF finds New Zealand's banking system efficient and adequately supervised

The IMF Financial Sector Assessment Programme (FSAP) undertook a Financial System Stability Assessment in both New Zealand and Australia in November last year and found, in New Zealand:

- There is a profitable and well-functioning financial system operating in a framework of well-developed financial markets.
- The approach to banking regulation is based on disclosure and market discipline, enjoying limited prudential requirements. However, the Reserve Bank of New Zealand would benefit from increased real-time knowledge of potential stress in the banking system.
- If a financial crisis were to occur, the absence of a depositor-protection mandate, along with foreign ownership of all systemically important banks, would pose unique challenges for the Reserve Bank of New Zealand.
- Recent reforms in the securities regulation and the restructuring of the New Zealand Exchange have strengthened the securities regulatory framework.

Finance Minister Dr Michael Cullen has indicated that a number of suggestions to enhance banking supervision are being considered by the Reserve Bank.

For more information, visit the IMF website at www.imf.org.

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Recent developments

IFRS now free for use in New Zealand

Commerce Minister Margaret Wilson has announced that the Accounting Standards Committee Foundation has agreed to allow free use of International Financial Reporting Standards (IFRS) in New Zealand.

New Zealand entities will be required to report in accordance with the IFRS from 1 January 2007, with optional compliance from the beginning of next year.

Ms Wilson has said that *"adopting IFRS will ensure New Zealand is perceived as complying with international best practice and provides an important signal to the investment community that New Zealand has efficient and effective capital markets"*.

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Recent developments

Proposal for mutual recognition of securities offers

Commerce Minister Margaret Wilson has released a joint discussion paper on the trans-Tasman mutual recognition of offers of securities and managed investment scheme interests with Ross Cameron, the Australian Parliamentary Secretary to the Treasurer.

The proposal is to allow issuers to offer securities in both Australia and New Zealand, using the same offer documents and offer structure, by removing regulatory barriers to trans-Tasman securities offerings.

The proposal is part of a move towards greater co-ordination of business law between Australia and New Zealand with a view to achieving a more integrated financial market.

A copy of the discussion paper can be downloaded from the Ministry of Economic Development website at www.med.govt.nz.

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Recent developments

Tips for searching the PPSR

The Ministry of Economic Development has published a series of tips on how to get the best results when searching the Personal Property Securities Register.

The tips are broken down into "Debtor Organisation", "Debtor Person" and "Motor Vehicle" searches, and suggest where abbreviations and use of the "wildcard" are appropriate.

The tips also clarify that "Debtor Organisation" and "Debtor Person" searches are "and" searches - meaning that a search will look for securities that exactly match **all** the search criteria entered, whereas "Motor Vehicle" searches are "or" searches - meaning that a search will look for securities that match **any** of the search criteria entered.

For more information on searching the PPSR, visit the PPSR website at www.ppsr.govt.nz.



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Bell Gully news

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Bell Gully is the highest ranked New Zealand law firm in each of Thomson Financial's Australasian M&A legal adviser league tables for the first half of 2004.

Changes to New Zealand's corporate governance regime

Corporate governance in New Zealand has undergone some significant changes in recent times. These include the recent corporate governance-related changes to the NZX Listing Rules and the corporate governance principles and guidelines released by the Securities Commission.

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Charities Bill introduces new compliance regime

The new Charities Bill, currently before Parliament, marks the beginning of a new era for charitable organisations in New Zealand, imposing greater compliance obligations on all charitable entities.

How to commercialise your innovations

The best way to make money from the intellectual property in your ideas or your employees' ideas is not always obvious, but Bell Gully has produced a new guide to the process, called *Commercialisation of Innovation*.

Off the shelf

Other useful articles and publications from Bell Gully

Bell Gully news

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Bell Gully is the highest ranked New Zealand law firm in each of Thomson Financial's Australasian M&A legal adviser league tables for the first half of 2004.

During this period, the firm advised on completed deals worth US\$2.186 billion.

Bell Gully was the highest ranked New Zealand firm in the completed and announced rankings of deals with any Australia/New Zealand involvement and in the completed and announced rankings of deals with an Australian or New Zealand target.

"It's a great six-month result - made possible by our clients," said Bell Gully chairman Matthew Cockram. "Some of our most valued and longstanding clients feature on our first-half deal list.

"We appreciate their long-term relationship with Bell Gully and thank them for making us the top New Zealand firm in these league tables."

Thomson Financial compiles details of all deals worth over US\$30 million and publishes a league table of legal advisers twice each year.

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Bell Gully news

Changes to New Zealand's corporate governance regime

Corporate governance in New Zealand has undergone some significant changes in recent times. These include the recent corporate governance-related changes to the NZX Listing Rules and the corporate governance principles and guidelines released by the Securities Commission. This article summarises the key changes in these areas.

Corporate governance amendments to the NZX Listing Rules

After consultation with listed issuers and other interested parties, NZX adopted a Corporate Governance Best Practice Code (**Code**) and several governance-related amendments to the NZX Listing Rules. The amendments to the NZX Listing Rules focus, primarily, on ensuring the independence of the board and audit committee of listed issuers. Compliance with the amended rules is mandatory.

The Code sets out best practice for various corporate governance matters including the composition and operation of board committees, director remuneration and codes of ethics.

Although compliance with the Code is not mandatory, a listed issuer is required to disclose in its annual report whether the corporate governance principles adopted by it differ materially from those set out in the Code.

The amendments to the NZX Listing Rules and the adoption of the Code are effective from the later of 29 October 2004 or the date which is 12 months after the date of the listed issuer's 2003 annual meeting.

Principles and guidelines of the Securities Commission

In June 2003, the Minister of Commerce asked the Securities Commission to develop corporate governance principles for New Zealand. In February 2004, after an extensive public consultation process, the Securities Commission released the following principles:

1. **Ethical standards.** Directors should observe and foster high ethical standards.
2. **Board composition and performance.** There should be a balance of independence, skills, knowledge, experience and perspectives among directors.
3. **Board committees.** The board should use committees where this would enhance the board's effectiveness in key areas, while retaining board responsibility.
4. **Reporting and disclosure.** Demand integrity both in financial reporting and in the timeliness and balance of disclosures relating to the entity's affairs.
5. **Remuneration.** Remuneration of directors and executives should be transparent, fair and reasonable.
6. **Risk management.** Regularly verify that the entity has appropriate processes that identify and manage potential and relevant risks.
7. **Auditors.** Ensure the quality and independence of the external audit process.
8. **Shareholder relations.** Foster constructive relationships with shareholders that encourage them to engage with the entity.

9. **Stakeholder interests.** Respect the interests of stakeholders within the context of the entity's ownership type and its fundamental purpose.

As with the Code, compliance with the principles developed by the Securities Commission is not mandatory. Entities are expected to disclose in their annual report (or, for entities that do not distribute annual reports, some other appropriate alternative) whether and how they have complied with the principles.

Entities to which the principles apply

The Securities Commission intends that the identified corporate governance principles will apply to all entities that have economic impact in New Zealand or are accountable to the public.

This includes "listed issuers, other issuers, state-owned enterprises, community trusts and public sector entities". The reference to "other issuers" would seem to include widely-held private companies, Crown-owned entities and local authorities. The principles will therefore apply to most, if not all, substantial businesses in New Zealand.

The Securities Commission's discussion document acknowledges that not all nine corporate governance principles will apply in their entirety to all types of entities.

In particular, the Securities Commission noted that public sector organisations should observe the principles to the fullest extent they reasonably can and only depart from them where they are subject to competing statutory or public policy requirements.

Compliance with the principles

The principles are intended to be high-level objectives which entities should aim to achieve. In respect of each principle, the Securities Commission has identified certain guidelines which set out structures and processes that can be adopted by entities in order to comply with the principles.

The guidelines are suggested ways of achieving each principle. It will not be necessary for an entity to comply with, and report against, each of the guidelines if the relevant corporate governance principle can be achieved in other ways. This approach recognises that different types of entities and businesses can take different approaches to achieving good corporate governance.

Each entity therefore has the flexibility to explain in its annual report the procedures adopted by it to meet the principles and justify why departures from the specified corporate governance standards are appropriate to that entity and its operations.

Status of the principles

One concern raised by several interested parties through the consultation process was what would be done with the principles once they were developed. Several dual listed companies are currently complying with either the corporate governance principles set out in the ASX Principles of Good Corporate Governance or the US Sarbanes-Oxley Act of 2002 as well as the new corporate governance regime adopted by NZX. There was a concern that any further rules would increase compliance costs with no real improvement in corporate governance practices.

The Securities Commission has sought to address this concern. The Commission states that the principles do not impose any new legal obligations on issuers - the NZX Listing Rules already require a listed issuer to include a statement of its corporate governance policies in its annual report.

Listed issuers that have high standards of corporate governance are likely to already address all the areas covered by the principles. Where a listed issuer's existing disclosure does not address all the areas covered by the principles, that issuer should then consider adopting and reporting on the relevant principles.

The Securities Commission also recognises that formal corporate governance reporting will be new for smaller unlisted entities. Although it may take some time for such entities to achieve and report against all the principles, the Commission's view is that such entities should report to their investors and stakeholders on progress made towards observing each principle.

The Securities Commission has stated that it will continue to "focus strongly" on corporate governance in its enforcement work and will comment or take other action where it finds examples of poor governance. The Commission does not state how it proposes to enforce the principles and it is not clear whether the relevant companies and securities legislation is to be amended to give the Commission specific powers of enforcement.

Regulation of auditors

In the United States, the Sarbanes-Oxley Act of 2002 provides for the establishment of the Public Company Accounting Oversight Board. The PCAOB is an independent body whose function is to oversee the manner in which both US and non-US accounting firms audit issuers whose securities are listed in the US.

The Securities Commission's report states that it considers the independent oversight of auditors would contribute to confidence in audit quality and auditor independence, and that it will recommend to the Government that a similar oversight body should be established in New Zealand.

Governance initiatives relating to Crown entities

The Public Finance (State Sector Management) Bill was recently introduced into Parliament. The Bill, when passed into law later this year, will create a new Crown Entities Act, which aims to:

- improve governance and accountability of Crown entities; and
- create more uniformity between Crown entities that operate in a similar way.

The Bill contains detailed provisions for the appointment and removal of board members of Crown entities.

The Bill imposes various collective and individual duties on board members, although not all of these duties will apply to Crown entity companies. Collective duties include the duty to act consistently with the entity's objectives, functions, statement of intent and output agreement, the duty to perform functions efficiently and effectively, and the duty to operate in a financially responsible manner.

Individual duties include the duty to act in good faith, exercise the care, diligence and skill of a reasonable person, not to disclose or make use of certain information and to act with honesty and integrity. The Bill also makes Crown entity board members subject to reasonably strict conflict of interest requirements.



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Bell Gully news

Do your employment policies comply?

When employers invest considerable time and effort on their business assets, surely their employees should expect the same level of attention.

It's more than just good management practice. Complying with well drafted employment policies and systems can greatly reduce the risk of breaches of the law, and can prevent expensive and time-consuming litigation and settlements.

Such compliance is even more relevant today as government regulations proliferate, and enforcement agencies and courts have proved unsympathetic to those employers unable to maintain compliance.

This article explains the legislation with which New Zealand employment practices should comply and reviews the steps an employer should take to review, revise and implement best practice.

Legislation: the employment framework

New Zealand employment relations are governed by statute and common law.

The principal statute is the Employment Relations Act 2000, which regulates employment relationships and problem-solving mechanisms.

Other major acts and associated regulations and codes of practice include the Health and Safety in Employment Act 1992, Holidays Act 2003, Parental Leave in Employment Act 1987, Human Rights Act 1993 and Privacy Act 1993.

We will briefly outline the major points of each piece of legislation below, and then turn to consider the benefits of establishing clear employment policies.

Employment Relations Act 2000

The Employment Relations Act provides that parties to an employment relationship must deal with each other in good faith and must not, whether directly or indirectly, do anything to mislead or deceive each other, or do anything that is likely to mislead or deceive each other.

An employee is defined in the Act as a person employed by an employer to do any work for hire or reward and includes a person intending to work.

The Act requires certain terms of the relationship be set out in writing – an employment agreement – which, as a bare minimum, must include:

- The names of the employee and the employer concerned;
- A description of the work to be performed by the employee;
- An indication where the employee is to perform the work;
- An indication of the arrangements for the times that the employee is to work;
- The wages or salary payable to the employee; and
- A plain language explanation of the services available for resolution of employment relationship problems, including a reference to the 90 days within which a personal grievance must be raised.

Health & Safety in Employment Act 1992

The Act imposes comprehensive and robust duties on employers and employees to ensure a safe workplace. It also contains specific duties for employers in relation to hazard identification and management, provision of information, training, and supervision.

The Act covers all employment situations including volunteers, persons receiving on the job training or work experience, loaned employees, and work performed by employees on aircraft or ships.

The Act recognises the need for particular standards in different industries by allowing for development and introduction of codes of practice (which provide specific safety standards and policies). There is also a general requirement on employers to provide opportunities for employees to participate in health and safety issues in the workplace through participation schemes.

Holidays Act 2003

The Holidays Act provides an employee with a minimum entitlement to leave and holiday pay. The Act also requires employers to inform employees of their entitlements.

Employees are entitled to three weeks' annual leave on pay. The Act also provides the formula to calculate the rate of holiday pay.

In addition, employees are entitled to 11 public holidays per year. An employee who works on a public holiday is entitled to an alternative day off (if that day would otherwise be a working day for that employee) and payment of time plus one half for the hours actually worked.

After six months' continuous employment, an employee is entitled to both sick and bereavement leave. This leave is paid at the employee's relevant daily rate. The Act requires employers to maintain records of employees' entitlements and pay.

The Act also requires employers to update their employment agreements for compliance when they are next renegotiated or before 1 April 2005.

Parental Leave and Employment Protection Act 1987

Employees who have been employed by the same employer for at least an average of 10 hours per week for 12 months before the expected date of birth are entitled to protection under the Act.

New Zealand also operates a statutory paid parental leave scheme for eligible employees.

The Act was amended in 2002 to provide additional protection and entitlements. Further amendments are expected later this year.

Human Rights Act 1993

This primary legislation on discrimination applies to employers, and prohibits discrimination on any of the following grounds:

- Sex, including pregnancy and childbirth
- Marital status
- Religious belief
- Ethical belief
- Colour

- Race
- Ethnic or national origins
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation.

It is unlawful for an employer to discriminate on these grounds in areas of recruitment, terms and conditions of employment, dismissal, and resignation.

Privacy Act 1993

The Privacy Act recognises an individual's interest in having some measure of control over information about themselves. The Act places strict obligations on employers for the collection, storage and use of personal information held by the organisation.

Defining risks

Once aware of the legislative requirements, an assessment of your risks and liability should begin with a review of personnel policies and documents.

This review should check whether the legally required documents are in place, whether the documents breach any legislation and whether they give rise to potential employment liabilities. The following documents should be reviewed:

- Employment application forms
- Pre-employment tests
- Employment agreements
- Payroll records
- Employee handbooks
- Health and safety policy
- Harassment policy

Performance appraisals. Establishing clear policy and setting the tone

Documenting policy is a key element of risk management. It provides a framework for an effective compliance programme, and enables the organisation to monitor and assess the programme's performance.

Any policy should:

- be presented in plain language;
- be readily available to management, staff and other stakeholders; and

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- contain a commitment to assess the policy against pre-determined objectives, assessment criteria and compliance.

Any policy must have the full support of the organisation, including the board, the chief executive and senior management.

Full support does not mean lip service. It means all types of support given by those in a position of authority who expect something to be done.

Like any type of change, policies will not succeed if management is not fully and visibly committed.

Informing and educating employees

All members of an organisation need to be informed of its policies and receive relevant training to ensure they are aware of both the policies and their compliance obligations.

Procedures also need to be established to ensure that new employees receive relevant education. Learning tools should be developed, such as policies and procedures manuals.

Policies and procedures are useless if they are left on a shelf, becoming less relevant by the minute. They should be regularly monitored and reviewed to ensure that they are performing effectively and constantly revised.

Employees should establish robust feedback systems and analyse any compliance failure. Also, it helps to establish formal procedures for monitoring and reviewing compliance, and also to set compliance objectives against which compliance can be measured.

Taking your compliance a step further

The benefits of achieving best practice

Policy manuals and checklists do not, by themselves, constitute an effective system, but a sound and comprehensible manual is essential.

The existence and purpose of an organisation's employment relations policies and staff obligations should be communicated and publicised in such a way that they are widely understood and are a normal part of everyday organisational practice.

Best practice can be achieved by:

- early identification of potential areas of deficiency;
- developing strategies and policies to prevent issues and risks before they arise; and
- management and staff working together to find "unique" solutions that allow the business to grow and employees to achieve their personal goals.

Being a good employer

Many organisations believe that being a good employer is about working with employees to provide a safe and healthy environment where hazards are recognised and eliminated where possible, where employment opportunities are equal and fair, support is available for all employees if required, and benefits are offered that enhance employee welfare.

This can be achieved by:

- providing and promoting a safe and healthy work environment;
- ensuring all employees are aware of the strategies and policies that are in place to provide and promote workplace welfare; and
- encouraging managers and staff to recognise workplace hazards and ensure these are managed to minimise risks.

Conclusion

Legal compliance programmes are management procedures designed to ensure compliance so that employers comply with or reduce or remove the risk of not meeting legal standards.

Regular employee training and review of HR policies is essential.

Advice and information

Bell Gully's Employment Team can advise you on all types of issues, including reviewing your employment policies and practices to check for compliance. Contact the team at the numbers below for more information.

Auckland

Rob Towner
Partner
Tel: 09 916 8902
Email: rob.towner@bellgully.com

Christine Meechan
Partner
Tel: 09 916 8927
Email: christine.meechan@bellgully.com

Jennifer Mills
Senior Associate
Tel: 09 916 8733
Email: jennifer.mills@bellgully.com

Anthony Drake
Senior Associate
Tel: 09 916 8875
Email: anthony.drake@bellgully.com

Wellington

Andrew Scott-Howman
Partner
Tel: 04 915 6820
Email: andrew.scott-howman@bellgully.com

Michelle Banfield
Solicitor
Tel: 04 915 6740
Email: michelle.banfield@bellgully.com



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Bell Gully news

Time limits - more for IRD but less for you

New tax legislation currently before Parliament proposes significant changes to the time limits for refunds of overpaid tax and GST, plus changes to the four-year statute bar on increases to tax assessments. This article discusses the potential impact of these proposals.

The Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill (the Bill) introduces these new rules as part of wider changes to the disputes resolution process. The Bill also deals with a number of other issues (including the treatment of venture capital, sale and leaseback arrangements for intangibles, and various other matters).

As the Bill was only recently introduced, it is difficult to predict when it will be passed. When it is, the changes in respect of income tax refunds and statute barring will apply from the 2004/2005 income year and the changes in respect of GST refunds will apply for return periods starting on or after 1 April 2005.

Eight-year limit on refunds to be slashed

Under the current rules, you have eight years to claim a refund of excess income tax and there is no time limit for claiming for GST credits.

The Bill proposes a four-year time limit on claims for a refund of either income tax or GST. The Commissioner would have the ability to extend this period to eight years but only in cases of "a clear mistake or simple oversight".

The reasons given for this change include:

- government being exposed to a "significant but unquantifiable revenue risk from large, backdated refund claims";
- providing certainty for taxpayers;
- an inconsistency with the four-year statute bar on the Commissioner's ability to increase a tax assessment.

The Bill also proposes changes to the four-year statute bar, and this is discussed in more detail below. The effect of the changes to the statute bar is that the four-year time limit on the Commissioner increasing assessments is likely to apply in fewer situations.

Given this, it is questionable whether restricting the refund period to four years can be justified on the basis of consistency with the statute bar period. It seems unfair to be out of time for a refund of overpaid tax, yet the Commissioner has unlimited time to increase the amount of tax you have to pay in an increasing number of situations.

It also remains to be seen what the Commissioner will consider to be "a clear mistake or simple oversight" allowing an extension of the four-year refund period. Judging by his apparent reluctance to decrease assessments outside of the disputes resolution process under the current rules (in section 113 of the Tax Administration Act 1994) to ensure correctness, one expects he will take a restrictive view.

GST- A refund, yes, but don't delay claiming it

Currently, if you pay GST and don't claim it back at the first available opportunity (which clearly is what you should be aiming to do) then there is nothing to stop you claiming the refund later.

Some taxpayers don't get around to claiming their GST credits for some time. Some simply don't have the tax invoices they need and take a while getting these, some are a little disorganised and others are unsure about their entitlement to a refund – some still believe that GST on non-deductible capital expenditure is also not recoverable!

Irrespective of the reason for not claiming the refund as soon as possible, and given that (with some limited exceptions) GST is not meant to be a cost to business, if people are happy to wait to claim the credit, that is to Government's advantage and that should be the end of the story.

However, under proposed changes unless your delay is because you were waiting for a tax invoice or because of some clear mistake or oversight, then welcome to the world of NOPAs, NORs and SOPs.

These are all acronyms for formal processes that you will need to go through to claim a refund of the GST you paid and left with Inland Revenue for longer than necessary on an interest-free basis. The less cynical of us would be grateful for Government's proposal to extend to two years (rather than the current two months) the period in which these processes would need to be commenced.

While it is understandable that Government would like to be able to close its books at some stage, one would have thought it could make a reasonable estimate on the size of any unclaimed refund and make provision for this without denying taxpayers their refunds.

Statute bar – a rare commodity?

Currently, a four-year time limit, or statute bar, is imposed on the Commissioner's ability to increase an assessment for income tax.

This four-year statute bar does not apply where the Commissioner is of the opinion that a tax return is:

- a. Fraudulent or wilfully misleading; or
- b. Does not mention gross income of a particular nature or derived from a particular source.

The Bill proposes to amend the position to require that any omission of income must be material before the Commissioner can extend the four-year period. More importantly, the Bill also provides that the statute bar will not apply if you provide a return of income that "materially overstates the amount of a deduction that is allowed".

Justification for extending the four-year limit on reassessments for overstated deductions is that, in the past, taxpayers would file full information on deductions claimed in their returns. This information would then be audited by Inland Revenue. It is said that this is no longer the case, since taxpayers must now self-assess their income tax liability.

We believe that the information provided by taxpayers is generally little different from what was provided in the past. As a matter of practice, we expect that a copy of the financial statements should be provided with the income tax return.

The difficulty for taxpayers is that the new exception to the four-year statute bar is not based on disclosure, unlike the exception applying to omission of income. You can disclose the deductions claimed, but this will not prevent the Commissioner from extending the four-year period if he considers that those deductions are materially overstated.

We believe there is a real risk that these changes will mean the statute bar could no longer apply in most – if not all – cases where the issue is one of deductibility. For taxpayers, this will create the very thing that changes to the disputes resolution process are meant to reduce – uncertainty.

Submissions

Bell Gully proposes making submissions to Government. We would welcome your thoughts and comments. Please contact our tax team (see below) if you have any views you would like to have included or if you would like to add your name to the list of people supporting the submissions.

Auckland

Neils Campbell

Phone: 64 9 916 8944

Email: [Neils Campbell](mailto:Neils.Campbell@bellgully.com)

Joanne Hodge

Phone: 64 9 916 8942

Email: joanne.hodge@bellgully.com

David Simcock

Phone: 64 9 916 8945

Email: david.simcock@bellgully.com

Willy Sussman

Phone: 64 9 916 8952

Email: willy.sussman@bellgully.com

John Bassett

Phone: 64 9 916 8946

Email: john.bassett@bellgully.com

Bevan Miles

Phone: 64 9 916 8709

Email: bevan.miles@bellgully.com

Wellington

Graeme Smail

Phone: 64 4 915 6995

Email: graeme.smail@bellgully.com

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Bell Gully news

Charities Bill introduces new compliance regime

The new Charities Bill, currently before Parliament, marks the beginning of a new era for charitable organisations in New Zealand, imposing greater compliance obligations on all charitable entities.

The Select Committee is due to report back to Parliament by the end of September, with the view to having the Bill enacted before the end of the year. Initially only the parts of the Bill related to the establishment of the Commission will take effect, with other parts to take effect at a later date in one or more stages. The reason for this 'staggered start' is that it gives the fledgling Commission time to develop the necessary systems to operate effectively.

This article outlines key issues based on the current form of the Bill.

The Charities Bill: headlines and impact

- Retains the current definition of charity.
- Establishes a Charities Commission to oversee charitable entities.
- Denies any tax relief unless charities are registered with the Commission.
- Makes information on all registered charitable entities accessible to the public.
- Requires every charitable entity to complete an annual return.
- Retains the link to the Income Tax Act to determine tax exempt and donee status.
- Gives the Commission the power to investigate and/or de-register a charitable entity.
- Gives the District Court jurisdiction to hear appeals against Commission decisions.

What is a "charity"?

Although the Bill contains a new definition of "charitable purpose", it does not alter the current understanding of what is a charitable purpose, which incorporates the traditional four heads of charity:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; and
- Other purposes beneficial to society.

The Bill also restates the concessions enacted in 2003 that broadened the traditional public benefit test to include descendants from a common ancestor.

It is likely that any entity that currently satisfies the charity requirements will continue to do so under the Bill.

Entity

The Bill defines "entity" as "any society, institution, or trustees of a trust", covering all of the standard means of forming a charitable entity, particularly those of incorporated societies and charitable trusts.

Charitable entities and approved donees

The Bill continues current practice in distinguishing between entities that apply to be exempt from income tax – charitable entities – and those that only seek to be approved as donees so that donors can receive a rebate for tax purposes.

The vast majority of entities apply to be granted both charitable entity and approved donee status.

It is worth noting that donee organisations will be subject to almost identical regulations as charitable entities.

New requirements to register

Entities must comply with prescribed criteria in order to register as a charitable entity.

The entity must be established for charitable purposes, it must have an appropriate name and all officers of the entity must be "qualified" in accordance with the Bill. A "qualified" officer is defined as a person not disqualified for various reasons listed in the Bill.

Trustees of a trust must be treated as complying with these requirements if they have a binding ruling from Inland Revenue under section CB 4(1)(c) or (e) of the Income Tax Act 1994 (as opposed to the informal letter of compliance that most charitable entities receive from Inland Revenue at present) or if the income derived by the trustees is for charitable purposes under section 24B of the Maori Trust Boards Act 1955.

Registration compulsory to claim tax relief

An explanatory note to the Bill says that: "Registration with the Commission will be voluntary and will not alter a charity's legal status." However, unless an entity is registered with the Commission no tax relief will be available.

The Bill does not exempt entities that have tax exempt status under the current regime. Therefore, if an existing charitable entity fails to register with the Commission, it will lose its tax exempt status.

Commentary to the Bill notes that entities with current charitable approval from Inland Revenue will be thoroughly reviewed before being approved by the Commission.

In practice, the Commission may accept all existing charities for registration and then review the position when annual returns are filed (see the 'Must Report Annually' section below).

New Charities Commission

The proposed Charities Commission is designed to provide an administrative centre for the activities of charities.

Its role and function will be similar to those of the Registrar of Companies and the Companies Office in relation to companies.

Powers of the Commission

The Commission has powers to investigate charitable entities, gather information and, ultimately, remove an entity from the register.

Inquiries

The Commission's powers allow it to investigate the activities of a charitable entity. It will also be able to investigate matters of management, results and outcomes, and the "value, condition, management, and application of the property and income belonging to the charitable entity".

This clearly envisages some type of broad audit power, allowing the Commission to investigate an entity's distributions or expenditures.

Warning notices

The Commission can issue a warning notice saying why it believes the entity is failing to meet its obligations as a charity and what actions it is expected to take to rectify the situation.

If the entity does not take corrective action, the Commission can publish the warning notice (with such a publication generally being immune from defamation actions).

Removal from the register

The Commission can remove a charitable entity from the register where:

- The entity is no longer qualified for registration;
- There has been significant or persistent failure by the entity to meet its obligations under the Act;
- There has been significant or persistent failure by any one or more of the officers of the entity to meet their obligations under the Act;
- A person has been engaged in a "serious wrongdoing" in connection with the entity; or
- The entity itself has requested that it be removed.

Deregistration can be backdated in certain circumstances, including when an entity "is affected by a tax avoidance arrangement".

This could include entities that innocently invest in a seemingly legitimate scheme that itself invests in a broader tax avoidance arrangement.

Appeals against Commission decisions

An entity may appeal to the District Court against the Commission's decision to decline registration or to remove it from the register. Currently all court proceedings relating to charitable entities are matters for the High Court.

Information now public

The Commission will be required to put registered entities on a public register of charitable entities and allocate identification numbers. This seems similar to the database of information currently compiled by the Companies Office.

Members of the public will be able to search charitable entities by name, registration number, the name of an officer or other prescribed criteria. A website or other electronic solution therefore seems the most likely option.

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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Must report annually

Charitable entities will be required to complete annual returns within four months of their balance date. These will need to be signed by two or more officers.

The structure and content of annual returns will be prescribed by the Governor General at a later date.

The Commission will use an annual return to consider whether the charitable entity continues to qualify for registration, so it is likely that some sort of financial information will be required.

Must continue to meet tax requirements

Charitable entities will need to ensure that they continue to satisfy all the requirements under section CB 4(1) of the Income Tax Act – and only if these are met will they continue to qualify for tax exempt status.

So, while non-registration means no tax exemption or donee status, registration does not guarantee tax exemption or donee status.

Conclusion

The Bill imposes extra administrative costs on any charitable entity.

However, provided the entity complies with the registration requirements and keeps accurate financial information and records, it is unlikely that these costs will be substantially different.

A key issue for some charitable entities will be the public availability of information.

Charitable entities will not be able to guard founding documents or the names and details of officers.

Advice and information

Please contact our [Tax Team](#) if you would like further advice on the potential impact of the Bill.

Auckland

Neils Campbell

Phone: 64 9 916 8944

Email: [Neils.Campbell](mailto:Neils.Campbell@bellgully.com)

Joanne Hodge

Phone: 64 9 916 8942

Email: joanne.hodge@bellgully.com

David Simcock

Phone: 64 9 916 8945

Email: david.simcock@bellgully.com

Willy Sussman

Phone: 64 9 916 8952

Email: willy.sussman@bellgully.com

John Bassett

Phone: 64 9 916 8946

Email: john.bassett@bellgully.com

Bevan Miles

Phone: 64 9 916 8709

Email: bevan.miles@bellgully.com

Wellington

Graeme Smail

Phone: 64 4 915 6995

Email: graeme.smail@bellgully.com



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The processes followed by those who have made real money from their ideas provides invaluable guidance on how to achieve the same result.

The guide follows a "lifecycle" model, starting with the idea itself before moving through the various stages of commercialising your idea, to an eventual exit strategy.

Helpful ideas, references and contacts for growing an IP-based business are set out in each chapter.

The guide covers:
The idea
Protect the idea
Sell out...or start?
Set up your company
Grow the business
Reap the rewards

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Useful Web links

New Zealand government

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

New Zealand financial agencies and organisations

- The Companies Office [www.companies.govt.nz]
- Export Credit Office [www.treasury.govt.nz/exportcreditoffice]
- 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 Exchange [www.nzx.com]

Australian government sites

- 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.gov.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]