





**Welcome to the Spring 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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## Special section

### **Consumer credit law reform: *What do you need to do?***

*The Act will soon become effective*

With the exception of the buy-back transactions provisions, which are already in force, the provisions of the Credit Contracts and Consumer Finance Act 2003 (the **Act**) take effect on 1 April next year.

The Act deals mainly with credit contracts with natural persons, primarily for personal, domestic or household purposes (**consumer credit contracts**). However, the oppression provisions apply to all credit contracts.

If you enter into consumer credit contracts, you have less than five months to ensure that your documents and procedures comply with the Act. We understand that there are still a significant number of financiers who have not yet taken steps to do so.

For a summary of the issues you will need to take into account, please read the article in the Winter 2004 issue of *Financial Services Quarterly* (available online at [www.bellgully.com](http://www.bellgully.com)).

#### **Credit Contracts and Consumer Finance Regulations 2004 and Credit Contracts and Consumer Finance Amendment Regulations 2004**

Effective 1 April 2005, new regulations made under the Act, which were very recently amended by amendment regulations, specify:

##### **Publication of information**

- Alternative requirements allowing for changes to interest rates or fees or charges payable by a debtor to be published by:
  - public display of the information at the creditor's place of business; and
  - advertisement in certain daily newspapers; and
  - posting the information on the creditor's website.

##### **Calculation of reasonable estimate of creditor's loss if interest rate fixed for part of term**

- A formula for determining a reasonable estimate of a creditor's loss arising from full prepayment of a fixed rate contract.

##### **Calculation of proportionate premium rebates**

- A formula for determining the proportionate rebate of the premium paid under a consumer credit insurance contract.

##### **Calculation of loss on full prepayment**

- A formula for calculating a reasonable estimate of a creditor's loss on full prepayment where the interest rate is fixed for the whole term.
- A formula for calculating a reasonable estimate of a creditor's loss on full prepayment where the interest rate is fixed for part of the term.

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### Model disclosure statements

- two forms of model disclosure statements – one for use with revolving credit contracts and one for use with non-revolving credit contracts;
- terms and conditions for use of model disclosure statements; and
- certain assumptions that may be used or applied when disclosing information under the Act.



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## International Financial Reporting Standards

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

As reported in the Winter 2004 issue of *Financial Services Quarterly*, a discussion document was released to establish who should be subject to financial reporting requirements.

Submissions on the first discussion document are now closed, with feedback on the proposed three tier structure generally positive. However, concerns were raised over the costs outweighing the benefits in tier two.

A Ministry of Economic Development structure diagram setting out the proposed financial reporting framework is available online at [www.med.govt.nz/](http://www.med.govt.nz/).

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

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

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

### **Article: "Early adopters for global financial reporting standards"**

Gareth Vaughan, *The Independent*, 11 August 2004

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

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



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## In the courts

### Mortgagees liable for GST on sales of mortgaged property

A Privy Council decision has confirmed that, if a mortgagee sells property (in relation to which the mortgagor would have been liable for GST had it sold the property), then the mortgagee has to pay the GST to the IRD in priority to all amounts due to it and other charge-holders.

### What you don't know can't hurt you

A recent decision of the High Court has proven that a bank's lack of knowledge of a customer's financial difficulties can help it in a liquidation situation.

### Absolute assignments vs assignments by way of security - implications for assignors and assignees

The High Court considered whether a lessor that assigned its rights under a lease could sue the lessee for non-payment of rent, and determined that it could, if the assignment was by way of security, and not absolute.

### When the rule in Clayton's case isn't fair

The High Court recently decided that application of the *pari passu* rule of distribution was fairer in the circumstances than the rule in Clayton's case.

### Is forbearance to sue valuable consideration when determining whether to set aside a charge as voidable?

A case heard in the High Court determined that forbearance to sue by a creditor is not valuable consideration that can prevent a charge in favour of that creditor being set aside as voidable under the Companies Act 1993.

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

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

### A second guarantee given by the same person covers debts already incurred, not just new debts

Where a second guarantee recording liability for a higher amount was given, an English court decided that it guaranteed debts incurred both before and after the guarantee was given.

### When is a company insolvent?

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

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

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

### Payment by personal cheque not acceptable

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

## In the courts

### Mortgagees liable for GST on sales of mortgaged property

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Most mortgagees selling mortgaged property had accepted that they were personally liable for GST on sales – irrespective of whether the property was sold above or below the amount that was secured.

This practice was called into question in 2002 when the High Court decided<sup>2</sup> that the Commissioner had to take his place in the queue behind secured creditors. The High Court said that the primary question is:

*“... whether, on sale by the first mortgagee of land of a mortgagor registered under the Goods and Services [Tax] Act 1985, the Commissioner is entitled to payment of GST out of the proceeds of sale ahead of the debt and expenses of the second mortgagee...the answer is no.”*

On appeal, the Court of Appeal found for the Commissioner – that is that the mortgagee is obliged to pay GST to the IRD irrespective of whether the sale generated a surplus. The matter was appealed to the Privy Council and judgment was delivered on 26 July.

The Privy Council dismissed the appeal saying that *“although a sale by a mortgagee is deemed to be a supply in the course of a taxable activity carried on by the mortgagor, it is the mortgagee who must pay the tax”*.

The effect of this decision is that if a mortgagee sells a property, and GST would have been payable had the mortgagor sold, the mortgagee is liable to pay the GST to the IRD irrespective of the amount raised from the sale. It is clearly now critical that the terms of sale adequately deal with this issue as the mortgagee no longer has priority over the IRD.

This is a substantial change from the High Court decision, in which the court had interpreted this obligation to pay the Commissioner as if it was qualified by the words *“if there is any money left over after paying off any charges on the property”*. The Court of Appeal rejected this and the Privy Council endorsed that rejection.

The Privy Council also confirmed that, in terms of section 104 of the Land Transfer Act 1952 (which regulates the application of the proceeds of sale arising on a sale by a mortgagee), payment of the GST is an *“expense occasioned by the sale”* and the mortgagee *“is therefore entitled to deduct it from the proceeds before payment of his own debt and is accountable to subsequent encumbrances only for the balance”*.

<sup>1</sup> *Edgewater Motel Limited v Commissioner of Inland Revenue* [2004] UKPC 44

<sup>2</sup> *In Edgewater Motel Ltd & Ors v Commissioner of Inland Revenue* (2002) 20 NZTC 17,713

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## In the courts

### What you don't know can't hurt you

*A recent decision of the High Court at Hamilton has proven that a bank's lack of knowledge of a customer's financial difficulties can help it in a liquidation situation.*

In this case<sup>1</sup>, the liquidator submitted that payments into the company's bank account, which were made at a time when the company was unable to pay its debts, were not in the ordinary course of business and should therefore be set aside.

The court decided that, looking at the payments from a commercial perspective, they were not abnormal. Evidence given by the company's personal banker and the relationship manager proved that the bank had no knowledge of the company's precarious financial position, or of any intention on the bank's part to accept payments outside of the ordinary course of business.

The court ordered that the payments were not to be set aside under section 292 of the Companies Act 1993.

Bell Gully Senior Associate Murray Tingey appeared for the bank.

<sup>1</sup> *Thompson v ASB Bank Limited* (Associate Judge Faire, High Court, Hamilton, CIV-2004-419-357, 2 August 2004)



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## In the courts

### Absolute assignments vs assignments by way of security - implications for assignors and assignees

*The High Court considered whether a lessor that assigned its rights under a lease could sue the lessee for non-payment of rent, and determined that it could, if the assignment was by way of security, and not absolute.*

In this case<sup>1</sup>, the lessee had failed to pay rental and other amounts due under the lease and the lessor claimed the outstanding amounts from the guarantor. The guarantor had received notice of assignment of the lessor's rights under the lease to Bank of New Zealand, and claimed that, because the lessor had assigned its rights, only Bank of New Zealand, or the lessor together with Bank of New Zealand, had the right to make such a claim.

In considering whether the assignment was absolute - in which case the lessor would not have the right to sue the guarantor, or whether the assignment was by way of security only - in which case the lessor would retain the right to sue the guarantor, the court took into account all of the terms of the contract of assignment.

The court considered that the assignment provision of the contract in this case could, on its own, be taken to create a legal assignment, but that it was qualified by the other provisions of the contract - in particular:

- the right of Bank of New Zealand to exercise the rights of the lessor, including the right to collect rental, which the court determined it would not need if the assignment was absolute, and was, in any event, at the election of Bank of New Zealand; and
- the terms of the notice of assignment given to the lessor, which specified that amounts payable to the lessor should, upon direction of Bank of New Zealand, be paid to Bank of New Zealand.

The court concluded that in this case, because the assignment document preserved the right of the lessor to receive rental and other amounts, the assignment was by way of security only, and the lessor was therefore entitled to sue the guarantor for non-payment of amounts due.

The court noted that it is not necessary to give notice of an assignment under section 130 of the Property Law Act 1952 if the assignment is by way of security only. However, the fact that notice is given will not render the assignment absolute if the contract and the terms of the notice provide otherwise. Master Lang commented that *"it is good commercial practice to give notice under section 130 so as to ensure that the lessee was aware, at the outset, of the existence of the assignment and of its consequences"*.

In general terms, this case reflects commercial practice – the important issue for lenders (and borrowers) is to understand whether your assignment documents operate as an absolute assignment or simply by way of security as different rights and remedies accrue under each option.

<sup>1</sup> *Otway & Ors v Head* (2004) 5 NZ ConvC 193, 987



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## In the courts

### When the rule in Clayton's case isn't fair

*The High Court at Auckland recently decided that application of the pari passu rule of distribution was fairer in the circumstances than the rule in Clayton's case.*

This case<sup>1</sup> concerned an application by statutory managers of a number of entities for directions as to the method for distribution of realised assets.

300 or so investors had contributed a total of around \$29 million to an investment scheme. The managers had accepted proofs of debt totalling around \$14.4 million and held \$4.9 million for distribution. On the question of tracing, only three of the investors could show that their funds had not been disbursed to other investors or otherwise withdrawn.

The court considered that the availability of "group tracing" was illogical and arbitrary. The investors' intention was to participate in a global unit trust type of investment and the rule in Clayton's case (basically, that the first amounts paid in are the first amounts paid out) would result in 13 investors being paid in full with the rest receiving only about 13 per cent of their investment.

The court decided that application of the rule in Clayton's case would contradict the investors' intention and concluded that the fairest method for the greatest number of investors was pari passu distribution.

Bell Gully Senior Associate Murray Tingey appeared for the applicants.

<sup>1</sup> *Re International Investment Unit Trust* (Williams J, High Court, Auckland, CIV-2004-404-1868, 6 August 2004)



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## In the courts

### Is forbearance to sue valuable consideration when determining whether to set aside a charge as voidable?

*A case heard in the High Court at Wellington determined that forbearance to sue by a creditor is not valuable consideration that can prevent a charge in favour of that creditor being set aside as voidable under section 293(1)(a) of the Companies Act 1993.*

The case<sup>1</sup> concerned certain ship mortgages given in favour of an existing lender who had not made any fresh advances to the borrower.

The liquidator applied to have a charge granted in favour of the lender set aside as a voidable charge given the insolvency of the borrower.

The court determined that:

- “valuable consideration” has to have real and substantial value;
- where a company is, or is nearly, insolvent at a time when it grants a charge, it is usually evident that it received little, if any, value from the creditor’s agreement to delay repayment of an existing unsecured debt;
- there are three obstacles when seeking to rely on forbearance to sue as valuable consideration:
  - it is necessary to show that the forbearance has a real worth to the debtor in the circumstances;
  - the forbearance must be quantified to show that it has a value that corresponds to the value of the security; and
  - the charge must secure new consideration – the forbearance, and not merely the existing debt.

In this case, the real reason the ship mortgages were granted was because the borrower was unable to raise finance from another source and the lender wished to avoid disclosure to the shareholders of the borrower’s indebtedness to him. Neither of these considerations were adequate for the purposes of section 293.

<sup>1</sup> *Re Seafresh New Zealand Limited* (Miller J, High Court, Wellington, CIV 2002-485-1331, 3 August 2004)

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## In the courts

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

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

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

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

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

The court decided that:

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

The basic rules for contracting with trustees were set out in the Spring 2003 issue of *Financial Services Quarterly*.

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

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## In the courts

### A second guarantee given by the same person covers debts already incurred, not just new debts

*Where a second guarantee recording liability for a higher amount was given, an English court decided that it guaranteed debts incurred both before and after the guarantee was given.*

In this case<sup>1</sup>, the guarantor was a director of the debtor company. In September 1998, the guarantor signed a guarantee of payment by the debtor company for all trade goods supplied by the creditor. The guarantee recorded that his liability was in respect of the whole debt but limited to £75,000.

By September 1999, the debtor company owed £143,000, and the guarantor gave a further guarantee on the same terms as the original guarantee, but recording that his liability was limited to £150,000.

When in May 2000 the debtor company went into receivership, it owed £111,883, most of which related to goods supplied prior to execution of the second guarantee. When a claim was made by the creditor under the second guarantee, the guarantor argued that:

- the guarantee was only for amounts relating to goods supplied after the date of that guarantee; and
- the guarantee should be construed strictly - i.e. the words "[the creditor] may supply" could only refer to the future and not to amounts owing for goods already supplied.

The court decided that:

- the guarantee was intended by both parties to extend, and did extend, to the whole of the trading both before and after execution; and
- a reasonable person informed of the background would see no commercial sense in increasing the limit of the guarantee and yet limiting it only to future sales.

<sup>1</sup> *Egan v Static Control Components (Europe) Limited* [2004] EWCA Civ 392



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### When is a company insolvent?

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

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

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

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

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## In the courts

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

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

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

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

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

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

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

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## In the courts

### Payment by personal cheque not acceptable

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

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

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

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

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

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

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

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## In the journals

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

This article considers the case of *Graham v Portacom New Zealand Limited*, which was summarised in the Autumn 2004 issue of *Financial Services Quarterly*.

Misleading or deceptive statements in offer documents

This article is about a case in which the Federal Court of Australia found that a document can be misleading or deceptive even though each statement in it is literally true.

Insolvency law

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

Is a ship mortgage inherently different from a mortgage over land?

This article discusses whether the duty owed by a mortgagee to a mortgagor is any different when dealing with mortgaged land and mortgaged property that is a ship, and concludes that it is not.

Factoring – still chasing commercial respectability

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

## In the journals

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

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

*This article considers the case of Graham v Portacom New Zealand Limited<sup>1</sup>, which was summarised in the Autumn 2004 issue of Financial Services Quarterly.*

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

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

<sup>1</sup> [2004] 2 NZLR 528



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## In the journals

### Misleading or deceptive statements in offer documents

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

*This article considers a case<sup>1</sup> in which the Federal Court of Australia found that a document can be misleading or deceptive even though each statement in it is literally true. In the case, the court noted that:*

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

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

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

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

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

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

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## In the journals

### Insolvency law

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

*This article considers the merits of licensing of insolvency practitioners proposed by a recent discussion paper on insolvency law reform. In support of the proposed licensing regime, the author discusses the following issues that he considers cause problems with the current system:*

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



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## In the journals

### Is a ship mortgage inherently different from a mortgage over land?

Sukhinder Panesar, *International Company and Commercial Law Review*, Volume 15, Issue 8, August 2004

*This article considers whether the duty owed by a mortgagee to a mortgagor is any different when dealing with mortgaged land and mortgaged property that is a ship, and concludes that it is not.*

While this article is written from an English perspective, the issues raised and conclusion reached are applicable in a New Zealand context.

It is settled law that a mortgagee that exercises its power of sale owes a duty of care to the mortgagor to act in good faith and to take reasonable care to obtain the best price obtainable. A court will not hold a sale of mortgaged land to be improper unless it is proved that the mortgagee acted in bad faith and, as a consequence, failed to obtain the best price.

The onus is on the mortgagor to prove bad faith. If it can't, the fact that sale proceeds may be lower than if the property was sold at a different time does not matter.



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## In the journals

### Factoring – still chasing commercial respectability

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

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

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

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



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## Legislation/In Parliament

### Goods and Services Tax law to change

Two significant GST changes that will affect your financing business come into effect in January 2005.

### Significant reform of New Zealand's insolvency laws proposed

The Ministry of Economic Development has released a draft Insolvency Law Reform Bill introducing a new insolvency regime – voluntary administration.

### Disclosure by finance companies – discussion paper released

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

### Government to review regulation of financial intermediaries

On 26 August, the Government announced its intention to appoint a task force to review the regulation of financial intermediaries in New Zealand. The role of the task force will be to assess the existing regulatory framework for financial intermediaries (such as share brokers, mortgage brokers, insurance brokers and financial advisers) and to recommend options for reform.

### New tax rules for foreign owned banks

Revenue Minister Michael Cullen has announced the Government's intention to introduce legislation to ensure foreign owned banks operating in New Zealand pay enough tax on their New Zealand income.

### Mutual recognition of securities offerings

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

### Supervision of overseas owned banks essential

The Reserve Bank of New Zealand has announced that it is seeking to reinvigorate the regulatory arrangements for New Zealand's banking system because, even though all the main banks in New Zealand are overseas owned, it still needs to be vigilant about its banking supervision role.

### Trans-Tasman banking integration progress

Finance Minister Michael Cullen and Commerce Minister Margaret Wilson have announced that work has commenced on the regulation of major financial institutions. The work will be carried out as a combined effort of officials from the Treasury, the Reserve Bank of New Zealand and the Ministry of Economic Development.

## Legislation/In Parliament

### Goods and Services Tax law to change

*Two significant GST changes that will affect your financing business come into effect in January 2005.*

The first amendment provides an opportunity for you to recover more GST on your costs, as it allows GST to be recovered on costs associated with providing finance to businesses. Although there will be some compliance costs, we expect that the benefits will generally greatly outweigh these costs.

The second will impose a new GST cost if certain payments are made to overseas service providers. This amendment may require you to pay GST directly to Inland Revenue in addition to the payment you make to an overseas service provider. For borrowers, a typical example might be management fees paid to an overseas associate. In the past, such fees have not been subject to GST but this will no longer be the case.

All new and existing contracts need to be reviewed to ensure that they cater properly for these changes. There are also transitional rules that will affect contracts that span the 1 January implementation date.

We will circulate shortly to all readers of *Financial Services Quarterly* a more detailed description of the changes, how they will affect borrowers and lenders, and what you need to do before 1 January to ensure that you are adequately prepared.

If you have any queries, you should contact:

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## Legislation/In Parliament

# Significant reform of New Zealand's insolvency laws proposed

*The Ministry of Economic Development has released a draft Insolvency Law Reform Bill introducing a new insolvency regime – voluntary administration.*

### Background

In April this year, the Ministry of Economic Development (**MED**) released a draft Insolvency Law Reform Bill (the **Bill**) and a discussion document relating to that Bill. These two documents are the result of a general review of insolvency law that began in 1999.

Most of the policy decisions surrounding the reform have already been made by the Government and have been publicised. The MED's intention in circulating the Bill is, therefore, not to re-open the policy debate. Rather, its intention is to get feedback on the detail of the proposed legislation. Also, while the Government's intention was not to fundamentally change New Zealand's insolvency law, the proposed legislation certainly goes beyond minor amendments.

### Two parts to the Bill

Very broadly, the Bill is in two parts. The first part is a complete re-write of the Insolvency Act 1967, which governs the bankruptcy of individuals. The second part makes a number of changes to the various insolvency regimes applicable to companies, as set out in the Companies Act 1993 (the **Companies Act**). It also introduces a new insolvency regime – voluntary administration.

This article deals solely with the new voluntary administration regime, on the basis that it is likely to be the aspect of the Bill of most interest to corporates in New Zealand and financial institutions that deal with New Zealand companies.

### Voluntary administration

#### Background

Currently, the only rehabilitative insolvency regime for viable companies is the compromise regime in Part XIV of the Companies Act. For a number of reasons (including, in particular, the need to obtain creditor consent), this has proved to be a difficult regime to apply in practice.

The Government's view is that there should be an alternative regime that encourages business rehabilitation. In keeping with the continuing harmonisation of trans-Tasman business laws, the Government has settled on the voluntary administration model adopted by Australia in 1992.

The existing corporate insolvency regimes (compromises, liquidation, receivership and statutory management) will remain. No doubt, some will be disappointed by the retention of statutory management. Even though it has been used sparingly since its introduction 15 years ago, the fact that it exists on the statute books, and the fact that it is able to extinguish the most fundamental of creditor's rights, has made it (and, to a degree, New Zealand) unpopular with financial institutions.

#### Commencement of administration

The administration of a company begins when an administrator is appointed by:

- board resolution; or

*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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- a liquidator; or
- a chargeholder having a charge over all, or substantially all, of the company's property where that charge has become enforceable; or
- the High Court, on the application of a creditor, a liquidator or the Registrar of Companies.

### Consequences of administration

The appointment of an administrator has three main consequences. First, it vests control of the company's business in the administrator. Secondly, it triggers obligations on the administrator to hold various creditors' meetings to try to seek a consensus on the future of the company. Thirdly, it imposes a stay on certain creditor actions (similar to the moratorium imposed in a statutory management). This third aspect is outlined further below. While a company remains in administration, in the absence of administrator consent or a court order:

- a transaction or dealing that affects the company's property is void;
- a person may not enforce a charge over the company's property (subject to the exceptions referred to below);
- the owner or lessor of property occupied or used by the company may not repossess that property (unless repossession began prior to the commencement of the administration); and
- court proceedings against the company may not begin or continue.

Furthermore, in the absence of a court order, a person may not enforce a guarantee given in respect of the company's liabilities by a director or their spouse or relative.

The general prohibition on the exercise of secured creditor rights does not apply to:

- a chargeholder having a charge over all, or substantially all, of the company's property who begins enforcing the charge no later than the tenth working day after the commencement of the administration; or
- any chargeholder that begins enforcing its charge prior to the commencement of the administration.

### End of administration

Administration is intended to be a relatively short-term measure that (by and large) freezes the company's financial position while the administrator and the creditors negotiate the company's future. The Bill prescribes a tight timetable for that negotiation process, which may be as short as 20 working days.

The administration of a company ends either when the negotiations have been successful (in which case, a "deed of company arrangement" is entered into) or when the statutory timeframe expires without resolution. Other steps, such as the appointment of a liquidator, can also end an administration.

### Significance for financial institutions

The Bill is only a draft at present. However, given the work and the consultation that has taken place over the last five years, there are unlikely to be many significant changes prior to the Bill's enactment. Based on the current form of the Bill, here are a few thoughts for lenders to consider:

- Financial institutions will need to check their standard form documentation to ensure that, if their borrower/counterparty is put into administration, an event of default arises. This will extend to existing documentation as well as documentation for new lending.
- Financial institutions that typically take “all assets” security will need to ensure that their internal systems allow them to make enforcement decisions within the 10 working day “decision period”. They should also ensure that they are notified of a company’s administration as soon as possible after it begins.
- Financial institutions that typically take security over only certain assets of their borrower/counterparty will need to appreciate that they are at a relative disadvantage to “all assets” secured creditors. Given the stay on their rights during administration, the Bill encourages enforcement action to be taken earlier than might otherwise be the case.
- Unsecured creditors will need to understand that the administration process may compromise their position in a number of respects. For example, if a company in administration borrows money, the liability for repayment of that debt has priority over the company’s existing unsecured creditors. Also, if a deed of company arrangement is approved by the requisite creditors (a majority in number and value of those voting), it will bind all creditors.
- The administration regime does not, in contrast to the liquidation and statutory management regimes, expressly confirm the enforceability of netting agreements. This will be of concern not just to derivative counterparties but also to financiers who have set-off agreements in place with borrowers.



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## Legislation/In Parliament

### Disclosure by finance companies – discussion paper released

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

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

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

In order to comply with the Securities Act and the Securities Regulations, disclosure documents must not mislead investors. The Securities Commission reports in its discussion document that, while it has seen some disclosure documents that provide a lot of useful information, it has seen some that do not. It has accordingly taken the view that some finance companies are not meeting the minimum legislative requirements, and that these finance companies will need to make changes to comply with the legislation in future.

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

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

Submissions closed on 25 October. Following consideration of the submissions, the Securities Commission will publish a report setting out guidelines on its expectations for disclosure by finance companies.

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

A copy of the discussion paper is available on the Securities Commission's website at <http://www.sec-com.govt.nz/publications/documents/disclosure/index.shtml>.

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## Legislation/In Parliament

# Government to review regulation of financial intermediaries

### *Appointment of task force*

On 26 August, the Government announced its intention to appoint a task force to review the regulation of financial intermediaries in New Zealand. The role of the task force will be to assess the existing regulatory framework for financial intermediaries (such as share brokers, mortgage brokers, insurance brokers and financial advisers) and to recommend options for reform.

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

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

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

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

### **What could we expect?**

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

This is in complete contrast to the comprehensive and more uniform regulatory regime in Australia under the Financial Services Reform Act. While few market participants in New Zealand would wish to see the Australian model adopted here in its entirety, the Government has indicated that compatibility with Australia is important. Given the stated intention of the governments of both countries to work towards a single economic market, it would come as no surprise to see a new regulatory regime in New Zealand that is a compromise between the current model and the Australian FSRA.

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

### **Timing**

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



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## Legislation/In Parliament

### New tax rules for foreign owned banks

*Revenue Minister Michael Cullen has announced the Government's intention to introduce legislation to ensure foreign owned banks operating in New Zealand pay enough tax on their New Zealand income.*

In connection with the proposal, Dr Cullen has said:

- *"The New Zealand tax payments of foreign owned banks have not appeared to reflect their reported profits in recent times ... I am advised that they are using certain features of our tax rules to pay less tax in New Zealand".*
- *"If banks want full interest deductions for tax purposes, they will also be required to have enough capital in New Zealand to fully fund their offshore investments".*

In developing the proposals, the Government has consulted with the banking industry to address their concerns.

The legislation, expected to be included in a taxation bill to be introduced later this year, will ensure foreign owned banks are carefully monitored to ensure that they pay a level of tax appropriate to their New Zealand operations, with an expected increase of \$360 million per annum.



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### Mutual recognition of securities offerings

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

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

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

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

A copy of the discussion paper, entitled Trans Tasman mutual recognition of offers of securities and managed investment scheme interests, is available on the Treasury website at [www.treasury.gov.au](http://www.treasury.gov.au).



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## Legislation/In Parliament

### Supervision of overseas owned banks essential

*The Reserve Bank of New Zealand has announced that it is seeking to reinvigorate the regulatory arrangements for New Zealand's banking system because, even though all the main banks in New Zealand are overseas owned, it still needs to be vigilant about its banking supervision role.*

Speaking at the Trans-Tasman Business Circle in Sydney, Reserve Bank Governor Dr Alan Bollard advised that the Reserve Bank of New Zealand would be seeking to work more closely with the Australian Prudential Regulation Authority on how best the two organisations can coordinate their efforts to address both day-to-day prudential supervision and crisis management.

Dr Bollard stated that the reason systemically important banks in New Zealand are required to be incorporated locally, and are required to maintain the capacity to function on a stand alone basis, is that New Zealand authorities must be able to supervise the banking system and to respond quickly, decisively and effectively to a banking crisis.

Noting that the New Zealand banking system consists of predominantly Australian-owned banks, Dr Bollard identified an opportunity to develop arrangements for the supervision of trans-Tasman banks that would be a world class model of cross-border banking supervision.

Dr Bollard reiterated his message in a presentation to a US Federal Reserve conference on bank insolvency in Chicago, including a discussion of the ways foreign and domestic regulatory authorities can better co-operate and co-ordinate their actions, including in the case of Australia and New Zealand.



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## Legislation/In Parliament

### Trans-Tasman banking integration progress

*Finance Minister Michael Cullen and Commerce Minister Margaret Wilson have announced that work has commenced on the regulation of major financial institutions. The work will be carried out as a combined effort of officials from the Treasury, the Reserve Bank of New Zealand and the Ministry of Economic Development.*

Dr Cullen has said that following completion of the work, the results of which are expected to be reported back to him early next year, a decision will be made on whether further integration with Australia would improve New Zealand's economic growth and performance.

For more information, go to [www.treasury.govt.nz](http://www.treasury.govt.nz).



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## Recent developments

Bank complaints have dropped dramatically

Complaints to the Banking Ombudsman in the first five months of this year are down 20 per cent from the equivalent period last year.

After Enron – statement on sound practices related to structured finance activities

In response to the involvement of financial institutions in recent corporate scandals, the main United States financial regulators have proposed a joint statement on complex structured finance activities of financial institutions under their jurisdiction.

## Recent developments

### Bank complaints have dropped dramatically

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Banking Ombudsman, Liz Brown, has confirmed a "massive decline" of 38 per cent in investigations commenced.

Ms Brown considers that the following factors have contributed to the decline in complaints and investigations:

- generally favourable economic conditions, including full employment and rising property prices;
- a period of stability in the banking industry;
- a "settling down" of operational and organisational changes of the past five or six years;
- an increased awareness of:
  - the differing needs of individual customers;
  - the importance of personal contact; and
  - the importance of a non-adversarial, non-judgmental approach to customers with problems.

Ms Brown also said that *"those banks that have restructured and put more resource into their internal complaints process are those that have contributed most to the reduction in cases that require investigation..."*.



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## Recent developments

### After Enron – statement on sound practices related to structured finance activities

*In response to the involvement of financial institutions in recent corporate scandals, the main United States financial regulators have proposed a joint statement on complex structured finance activities of financial institutions under their jurisdiction.*

In the statement, the regulators express concern that financial institutions do not have systems and policies for screening out inappropriate products and transactions and for identifying and monitoring all of the risks involved. It is suggested that, at a minimum, a financial institution should have the following, which were neglected in transactions such as those that brought about the downfall of Enron:

- standard procedures for approving all structured finance transactions, involving review by senior executives;
- systems to identify and evaluate new products to determine whether they fall within the structured finance category;
- an evaluation of legal and reputational risks;
- policies to ensure that the corporate client is making adequate public disclosure of its structured finance transactions;
- adequate documentation and a policy of document retention;
- regular reporting to senior management of structured financing activities;
- monitoring of activities by independent professionals;
- monitoring by internal auditors to ensure activities are carried out according to the institution's policies; and
- training of employees in all of the above.

**Source:** news section of *International Company and Commercial Law Review* [2004] N-80 – submission by James A. Fanto, Brooklyn Law School



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## Bell Gully news

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

Confidentiality agreements during M&As

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

Public private partnerships: practical and policy problems

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

RMA to be patched up before Christmas

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

Off the shelf

Other useful articles and publications from Bell Gully

## Bell Gully news

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

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



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## Confidentiality agreements during M&As

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

In order to assist corporate counsel in giving confidentiality agreements a meaningful, but cost-effective review, Bell Gully has developed a confidentiality agreement checklist (available as a PDF at [www.bellgully.com](http://www.bellgully.com)) tailored specifically for the intending purchaser in an M&A project.

This checklist highlights issues regularly encountered when reviewing confidentiality agreements.

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

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

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

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

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

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



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## Bell Gully news

### Public private partnerships: practical and policy problems

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

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

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

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

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

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

The full paper is available online in PDF format at [www.bellgully.com](http://www.bellgully.com).



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## Bell Gully news

### RMA to be patched up before Christmas

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

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

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

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

#### Proposed changes

The changes include:

At local authority level:

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

In the Environment Court:

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

At central government level:

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

#### At local authority level

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

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

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

Consistency in the competency of and process followed by council committees across both regional and district council jurisdictions will be a welcome relief for all resource consent applicants and submitters who may have endured less-than-acceptable performance from a hearing committee in the past. Of course, perhaps council officers reporting and making recommendations to those committees should also undertake the same training.

- **Inquisitorial-style council hearings**

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

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

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

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

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

### **In the Environment Court**

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

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

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

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

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

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

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

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

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

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

## At central government level

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

- **Development of national policy statements**

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

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

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

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

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

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

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

## Advice and information

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

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### Need more information?

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

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## Useful Web links

### New Zealand government

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

### New Zealand financial agencies and organisations

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

### New Zealand commercial sites

- [CLANZ \[www.clanz.org\]](http://www.clanz.org)
- [Institute of Chartered Accountants \[www.icanz.co.nz\]](http://www.icanz.co.nz)
- [NZ Bankers' Association \[www.nzba.org.nz\]](http://www.nzba.org.nz)
- [NZ Business Roundtable \[www.nzbr.org.nz\]](http://www.nzbr.org.nz)
- [NZ Institute of Economic Research \[www.nzier.org.nz\]](http://www.nzier.org.nz)
- [NZ Exchange \[www.nzx.com\]](http://www.nzx.com)

### Australian government sites

- [Banking Ombudsman \[www.abio.org.au\]](http://www.abio.org.au)
- [National Office for the Information Economy \[www.ogo.gov.au\]](http://www.ogo.gov.au)

### Australian commercial sites

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

### International sites

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