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Welcome to the Spring 2007 issue of Commercial Quarterly, Bell Gully's digest of current corporate and commercial law issues.

Each quarter we preview upcoming developments and summarise recent cases, articles and legislation of interest under the following headings:

- Commercial business law
- Company law
- Securities and capital markets
- Competition and consumer law
- Intellectual property and information technology
- Utilities and resources

In this issue, feature articles include:

- Best, reasonable and all reasonable endeavours: what are you agreeing to do?
- Giving notice of an amalgamation to secured creditors: every man and his dog?
- Shareholder claims against insolvent companies: does *Sons of Gwalia* have implications for New Zealand?
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COMMERCIAL BUSINESS LAW

Best, reasonable and all reasonable endeavours: what are you agreeing to do?

Three recent overseas decisions have shed some light on the meaning of the terms “best endeavours”, “reasonable endeavours” and “all reasonable endeavours”. Each of these terms is used regularly to qualify parties’ obligations in commercial agreements, but without necessarily any clear understanding by the party of the extent to which he or she has committed to achieving the desired result. In this article we review the recent cases and offer some practical guidance for negotiating levels of “endeavours” obligations.

New Insolvency Act comes into force

The Insolvency Act 2006 came into force on 3 December, replacing the Insolvency Act 1967.

Changes to the PPSA and a new look for the PPSR website

The Personal Property Securities Amendment Act 2007 came into force on 19 September. In addition a new look Personal Property Securities Register website is scheduled for launch later this year.

Best, reasonable and all reasonable endeavours: what are you agreeing to do?

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The question of whether to use “best endeavours”, “reasonable endeavours” or “all reasonable endeavours” (and in more recent times, “reasonable commercial endeavours”) can be a difficult one for contracting parties. It is generally accepted that “best endeavours” is a higher obligation than “reasonable endeavours”, but what do they actually require you to do?

The courts have yet to resolve this question, but recent judicial consideration of these terms in England and Australia goes some way to clarifying the scope and the extent of what the different endeavour obligations entail.

AN OVERVIEW OF THE ENDEAVOUR OBLIGATIONS

Reasonable endeavours

Reasonable endeavours is traditionally thought of as requiring a party to take one reasonable action in a given situation, to achieve a particular aim, but not to exhaust all of them. In the words of one judge “put simply” it is a requirement to have “an honest try”. Cases have indicated that a reasonable endeavours obligation allows a party to justify not taking a particular action if that action disadvantages the party under the obligation. It allows the party to balance the weight of the obligation against all relevant commercial considerations including the costs of, and the uncertainties and practicalities relating to, compliance with the obligation.

Best endeavours

The standard set for a best endeavours obligation is more onerous “but well short of an absolute obligation or guarantee”. Generally the courts have interpreted this obligation to require the party to do all they can reasonably do in the circumstances to achieve the contractual objective. This, however does not require the party “to go beyond the bounds of reason” and certainly “not to the point of ruin”. A best endeavours obligation is still based on the concept of reasonableness. For instance, cases have indicated that a best endeavours obligation can require a party to expend costs and take the risk of success or failure, but only where there is reasonable chance of success and subject to other financial considerations. One of the more helpful accounts of what best endeavours entails is from a 1980 English court of appeal case in which the court explained the requirement as an obligation to take “steps which a prudent, determined and reasonable [person], acting in his own interests and desiring to achieve that result, would take.”¹

All reasonable endeavours

There is ongoing debate around the obligations required by the phrase “all reasonable endeavours”. In earlier cases “all reasonable endeavours” has been treated as falling somewhere between the previous two forms of endeavours, “implying something more than reasonable endeavours, but less than best endeavours”.² As a result it is commonly used by negotiating parties as the compromise position. Recent English and Australian authorities (noted below) however suggest that there may be no relevant

¹ IBM United Kingdom v Rockware Glass Limited [1980] F.S.R. 335

² UBH (Mechanical Services) Ltd v Standard Life Assurance Co, (Unreported) The Times, November 13, 1986

difference between an obligation to use best endeavours and an obligation to use all reasonable endeavours since they both require a party to do all they reasonably can in the circumstances to achieve the contractual objective.

THE CASES

Yewbelle v London Green Developments

The scope of what “all reasonable endeavours” might entail was recently considered by the English courts in *Yewbelle v London Green Developments*.³ The vendor in a property sale agreement had agreed to use “all reasonable endeavours” to enter into a planning agreement with a local planning authority that would allow for the redevelopment of the site (in the agreed form) as a condition of the sale proceeding.

However, soon after the agreement for sale had been entered into the authority’s requirements in respect of the proposed planning agreement changed, affecting the transaction adversely. Moreover, it turned out that a small parcel of land at one corner of the site, which the parties had assumed was owned by the authority, turned out to belong to an entirely independent company. Faced with these difficulties the vendor decided to end its negotiations with the local authority and terminate the sale and purchase agreement. One of the questions raised was whether the vendor was entitled to terminate the sale and purchase agreement if it had failed to use “all reasonable endeavours” to fulfil the contractual objective.

On the evidence, the judge in the first instance concluded that the vendor had not fulfilled this obligation. The judge agreed that while an obligation to use all reasonable endeavours did not require the vendor to sacrifice its own commercial interests, the obligation did require the vendor:

“to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted... subject to the qualification that account must be taken of events as they unfold, including extraordinary events.”

In the court’s opinion, the vendor’s negotiations with the local authority had not been taken to a point where there was no chance of the authority reaching an agreement with the vendor in substantially the same form as required by the sale and purchase agreement.

The appeal court agreed with the judge that the negotiations with the authority may have been able to be taken further on the points addressed, but held that the judge had reached the wrong conclusion by not taking into account the overriding problem of the effect the discovery of the third party land had on the transaction. On this aspect the court noted that the requirement to use all reasonable endeavours did not include the vendor laying out significant funds such as would have been required to attempt to buy in the land itself (or pay out to the third party for becoming a party to the planning agreement). It also could not require the vendor to adapt the proposed development so as to fit on the site without the third party land as this would be inconsistent with the contract.

Accordingly, since it was the vendor's obligation to do whatever was needed to be done by way of reasonable endeavours to achieve the result, without any reference to the purchaser, there was nothing further, in the court’s view, that the vendor should have done that it had not done.

Rhodia International v Huntsman

In another recent English case, *Rhodia International v Huntsman*⁴, Rhodia had agreed to sell its European chemical business to a recently incorporated subsidiary of Huntsman. As is common in sales of businesses, the sale and purchase agreement recognised that an absolute obligation could not be imposed on the assignment of the contracts of the business that required the consent of third parties. Instead, the parties agreed to use their respective “reasonable endeavours” to obtain third party consent to the assignment or novation of such contracts to the purchaser. It was also a term of the sale agreement that Huntsman was to provide a direct covenant to any third party (where reasonably required) guaranteeing the performance of the contract if that was required by the third party as a condition of the consent being granted.

³ *Yewbelle Ltd v London Green Developments Ltd & Anor* [2007] EWCA Civ 475 (23 May 2007)

⁴ *Rhodia International Holdings Limited & Another v Huntsman International LLC* [2007] EWHC 292 (comm)

One of the key contracts to be transferred was an energy supply contract that Rhodia was a party to with a third party, Cogen. Pending consent to the novation of this contract, Huntsman's subsidiary took over operation of the supply contract and the associated power plant at the business' site as Rhodia's agent. As part of the novation process, Cogen raised concerns over the financial position of Huntsman's subsidiary and sought a parent guarantee from Huntsman. Huntsman refused to give the guarantee and the novation did not take place. Later Huntsman made the decision to close the power plant and gave notice to Rhodia that the supply contract was to be excluded from the sale and purchase of the business. However, by this stage Cogen had commenced proceedings against Rhodia for the non-payment of invoices under the supply contract and Cogen, in turn, issued proceedings against Huntsman for failing to exercise "reasonable endeavours" to secure consent to the transfer.

The case is notable because the court was asked to consider whether there was any distinction to be drawn between the terms "reasonable endeavours" and "best endeavours". On this point, although the judge's comments were said outside the scope of the decision reached, the judge agreed that an obligation to use reasonable endeavours was less stringent than an obligation to use best endeavours. In his view:

"As a matter of language and business common sense...one would surely conclude that they did not [mean the same thing]. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours..."

The judge also agreed with the analysis of the "all reasonable endeavours" requirement adopted by the court in *Yewbelle*, subject to a further qualification that where the contract specified certain steps which have to be taken as part of the exercise of reasonable endeavours, those steps would have to be taken, even if that could, on one view, be said to be sacrificing a party's commercial interests.

In this case, where there was a mandatory requirement on Huntsman to provide a direct covenant, it was not a defence for Huntsman to say that in giving the guarantee it would be sacrificing its own commercial interests and be going beyond the requirements of a reasonable endeavours obligation.

Waters Lane & Anor v Sweeney & Ors

A similar position on the interpretation of these terms was recently reached in the New South Wales Court of the Appeal. In *Waters Lane v Sweeney*⁵ the court was required to consider the meaning of an "all reasonable endeavours" obligation contained in a Heads of Agreement for a property development proposal. Under the Heads of Agreement Waters Lane (as the developer) was to use "all reasonable endeavours" to satisfy certain conditions which related to the re-zoning of the property and the granting of a development consent by a specified date.

In order to determine the question of whether Waters Lane had used "all reasonable endeavours" to satisfy the conditions, the court adopted a test previously applied in a case dealing with a best endeavours obligation, namely that:

"an obligation to use 'best endeavours' does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more."

In the court's opinion this was directly applicable to the obligation to use all reasonable endeavours on the facts and noted that "if this means that there is no relevant difference between the standard constituted by the expression "all reasonable endeavours" and that constituted by the expression "best endeavours" then so be it." The court did not however make any final conclusion on that possibility.

⁵ [2007] NSWCA 200

COMMENT

Although these cases do not offer any conclusive statements on the use of “endeavour” obligations, they do provide some clarity on the current position likely to be taken by the courts.

An obligation to use “best endeavours” places a party under a stricter obligation than one to use “reasonable endeavours”. However, the interpretation of each of these terms will ultimately depend on the surrounding wording, clauses and the contractual setting of the agreement. It is also worth bearing in mind that each of the cases referred to above indicates that none of the endeavours clauses can be used to require a party to fulfil an obligation that would be “beyond the bounds of reason”.

Of course, the best way to avoid the uncertainty inherent in the use of the endeavour obligations is to specifically state what steps will and will not fall within the scope of the undertaking. As in the *Rhodia* case, where the contract specifies particular steps to be part of the obligation those steps will have to be taken even if it could be argued that to do so might involve sacrificing that party’s own commercial interests.

Some of the more common steps to consider incorporating as part of the endeavours obligation may include:

- whether the party should have to incur any costs or expenditure (beyond a stated amount) in carrying out the obligation;
- if the approval of a government authority is required, and the approval procedure also provides for appeal to a higher authority, whether the party is required to pursue the appeal process in the event that approval is not given;
- whether the party is required to continue with its “endeavours” where the party considers to do so would be pointless;
- whether the party is required to provide a parent guarantee to secure the consent of a third party; and
- whether the party may take into account its own commercial interests.

Finally, both the English and Australian authorities infer that there is no middle ground between the terms “best endeavours” and “all reasonable endeavours” and this will need to be kept in mind when drafting or negotiating the different standards of qualification to be applied to a contractual obligation.

New Insolvency Act comes into force

The Insolvency Act 2006 came into force on 3 December, replacing the Insolvency Act 1967.

The changes made by the new Act include:

- A new alternative to bankruptcy. Consumer-type debtors can seek entry into the No Asset Procedure (NAP) if they have no assets of any realisable value, no means of repaying their creditors, debts of between \$1,000 and \$40,000, have not been bankrupt or entered the NAP before, and have no trust involvement.
- Responsibility for administration of the Summary Instalment Order (SIO) regime is transferred from the District Court to the Official Assignee. SIOs give debtors with the means to pay their creditors a time frame to do so in order to avoid bankruptcy. The debt threshold for SIOs is increased to \$40,000, with the period for repayment capable of being extended to five years under special circumstances.
- Responsibility for receipt of debtor petitions for bankruptcy is transferred to the Official Assignee.
- Entry into bankruptcy, NAP or SIO requires debtors to submit a Statement of Affairs with the application, which can be completed either manually or electronically.
- Where a bankruptcy is initiated by a creditor's petition, discharge will occur three years after receipt by the Official Assignee of a satisfactory Statement of Affairs.

Changes to the PPSA and a new look for the PPSR website

The Personal Property Securities Amendment Act 2007 came into force on 19 September. In addition a new look Personal Property Securities Register website is scheduled for launch later this year.

The changes made by the Personal Property Securities Amendment Act 2007:

- specifically allow use of a job title (as opposed to a person's name) for the contact person of a debtor or a secured party, in each case where it is in an organisation;
- include job title as part of the searchable criteria on the Personal Property Securities Register; and
- extend the list of those who can search the database to include the Registrar for any purpose related to the Registrar's functions, duties and powers.

The Ministry of Economic Development is promising that its new Personal Property Securities Register website (expected to be launched later this year) will add value to the New Zealand business community by better serving the consumer sector and providing clear and up-to-date information to all.

The website address will remain www.ppsr.govt.nz and no changes will be made to any of the on-line processes available on the site.

COMPANY LAW

Giving notice of an amalgamation to secured creditors: every man and his dog?

Under the Companies Act 1993, companies planning to amalgamate must give notice of their proposed amalgamation to their “secured creditors”. In this article, Bell Gully senior associate Louise Hill considers who is a “secured creditor” for the purposes of giving such notice in light of the recent decision of the Court of Appeal in *Dunphy and Shephard v Sleepyhead Manufacturing Company Ltd* and the backdrop of the Personal Property Securities Act 1999 (PPSA).

New bill to improve “practical operations” of the minority buy-out regime

The Government has taken up recommendations made by the Law Commission in 2001 to improve the effectiveness of the minority buy-out provisions in the Companies Act 1993.

Shareholder claims against insolvent companies: does Sons of Gwalia have implications for New Zealand?

New Zealand's increasingly robust investor protection legislation may be good news for some aggrieved shareholders, but in this article Bell Gully senior associate Tim Clarke outlines why, based on overseas experience, it could also result in a slower, more complicated liquidation process and diluted returns for unsecured creditors.

An update on recent amendments to the Companies Act

A summary of amendments made to the Companies Act in September and November includes changes for overseas companies; a new requirement for liquidating a company which has been removed from the register; and the long awaited reform of the Companies Act's insolvency provisions.

No duplicate filing obligations for companies carrying on business in New Zealand and Australia

The New Zealand and Australian Governments have enacted legislation to remove duplicate filing obligations for companies carrying on business in both New Zealand and Australia.

Companies Office releases online voluntary administration service

Administrators are able to notify the Registrar of Companies of their appointment and manage their portfolios using the administration, receivership and liquidation service online.

Delay of mandatory adoption of IFRS

The Accounting Standards Review Board has resolved that companies that satisfy certain criteria are permitted to continue to apply the existing New Zealand Financial Reporting Standards until further notice.

Giving notice of an amalgamation to secured creditors: every man and his dog?

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REQUIREMENT FOR NOTICE OF AMALGAMATION

Companies Act

Under section 221(4) of the Companies Act 1993 (the Companies Act), the board of each amalgamating company must, not less than 20 working days before the amalgamation is proposed to take effect, send a copy of the amalgamation proposal to every secured creditor of that company. A "secured creditor" is defined in the Companies Act as "a person entitled to a charge on or over property owned by that company". This definition has not changed since the enactment of the Companies Act in 1993. In 1993, a person who was entitled to a charge on or over property owned by that company was a person who was entitled to a floating charge or fixed charge. However, the concepts of floating and fixed charges are no longer applicable as a result of the enactment of the Personal Properties Securities Act 1999 (PPSA) and this raises the difficult question of how "secured creditor" should be interpreted in the PPSA era.

Security interests under the PPSA

The PPSA introduced a new regime in relation to security interests in personal property. In particular, the PPSA provides for the creation and enforceability of security interests in personal property and the determination of priority between security interests in the same personal property.

Security interests are registered on the Personal Property Securities Register (PPSR). It is not only traditional floating and fixed charge type interests that are registered on the PPSR. Persons supplying goods under a retention of title arrangement will also register their interest in the goods on the PPSR, as will (or should) people who have leased assets to the company for more than one year.

Who is a "secured creditor"?

The central issue is whether all persons who have registered security interests on the PPSR may be regarded as "secured creditors" and thus require notice of an amalgamation proposal under section 221(4) of the Companies Act. Has the enactment of the PPSA altered the meaning of the words "a person entitled to a charge on or over property owned by that company"?

SLEEPYHEAD CASE AND ITS RAMIFICATIONS

The facts

In the recent Court of Appeal decision of *Dunphy and Shephard v Sleepyhead Manufacturing Company Ltd* (the Sleepyhead case) the court considered whether Sleepyhead was a "secured creditor" for the purposes of the Companies Act. The facts of the case are that Sleepyhead supplied beds to King Robb Ltd (King Robb) on the basis that Sleepyhead retained title until King Robb paid for the beds. There was no formal agreement between the parties relating to the supply of beds. The terms of sale, including the retention of title, were set out on the reverse of Sleepyhead's invoices. King Robb never signed and returned the invoices, as directed (and as required under the PPSA for the security interest to be enforceable against third parties). Sleepyhead registered a financing statement in respect of its security interest in the beds on the PPSR. Subsequently, King Robb went into liquidation and Sleepyhead sought to enforce its security interest against King Robb's liquidators.

Guidance for enforcement of security interests

The Sleepyhead case established important principles for lawyers dealing with the PPSA, in particular around the consideration of priority of security interests and the ability of a company to enforce its retention of title arrangements against liquidators. The court held that a liquidator acts as agent of the company, and is not a “third party” when considering enforceability of an unsigned security interest under section 36 of the PPSA. The Court of Appeal also held that Sleepyhead could not enforce its security interest in the goods supplied to King Robb against the BNZ, which had a general security interest over the assets of the company, as the BNZ was a third party and thus an unsigned security arrangement is not enforceable against it, but that the security interest was enforceable against the liquidators, who were treated as agents of the company, and not third parties. Sleepyhead was therefore entitled to the residual proceeds of sale of the goods supplied to the company after the BNZ’s claim had been satisfied.

Application of Sleepyhead case to definition of “secured creditor”

The Sleepyhead case also has importance in the context of considering the definition of “secured creditor” under the Companies Act (which as described above is relevant in the case of amalgamations). As part of the Sleepyhead decision, the Court of Appeal considered whether or not Sleepyhead’s security interest amounted to a “charge” as defined in the Companies Act. Under the Companies Act “charge” is defined as “a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 313”. The court concluded that Sleepyhead’s interest did amount to a charge and that Sleepyhead was a “secured creditor” for the purposes of the Companies Act.

The court stated that “in pre-Personal Property Securities Act (PPSA) terms, the goods supplied by Sleepyhead would not have been “owned” by King Robb, they would have been wholly outside the liquidation because title remained with Sleepyhead. Now that the PPSA governs the method by which creditors obtain security, “owned” must be read in a manner that is consistent with the PPSA, which means that King Robb’s interest in the goods must be treated as sufficient for them to be “owned” by King Robb for the purposes of this definition. As Sleepyhead has a security interest which has attached for the purpose of enforcing its rights against King Robb (and its liquidators), it is entitled to claim payment in priority to unsecured creditors. Its security interest is, therefore, a “charge” and Sleepyhead is a “secured creditor” as defined in section 2(1) of the Companies Act”.

The analysis of the court suggests that the PPSA has affected consideration of whether or not a company “owns” assets. Prior to enactment of the PPSA, a company would not have been considered to own goods that had been supplied to it under a retention of title arrangement and which had not yet been paid for. The supplier retains title to the goods until paid for, and so they remain owned by the supplier, rather than the company. The Sleepyhead decision suggests that these goods are now to be considered as assets of the company, rather than the supplier, with the supplier taking a security interest in the assets. A similar analysis can be applied to assets supplied under a finance lease arrangement. Previously, assets such as photocopiers or faxes that are commonly supplied under a finance lease arrangement would be considered to be owned by the supplier until they have been paid for by the company. However, under the PPSA regime, and applying the analysis of the court in Sleepyhead, it may be thought that these assets are now assets of the company and the supplier merely takes a security interest in the goods.

APPLICATION OF SLEEPYHEAD CASE AND PPSA TO AMALGAMATIONS

On a literal reading of the court’s decision in the Sleepyhead case and applying that decision to amalgamations, one could consider that notice of amalgamation must be given to all persons who have registered a security interest on the PPSA. We do not think that this is the correct application of the Sleepyhead decision.

The Sleepyhead decision is about priority of interests under the PPSA. It is not about amalgamations. We do not think that the court intended that its comments on the interpretation of “secured creditor” in the context of considering priority of interests in a liquidation situation would be applied to amalgamations. Such an application would mean that a company must give notice to all persons with interests registered on the PPSR. This would often be impractical and an unnecessary burden on an amalgamating company - some companies can have thousands of interests registered on the PPSR.

The Sleepyhead case involves consideration of competing interests between creditors of a company. The PPSA is a regime designed primarily for the creation and enforceability of security interests in personal property and the determination of priority between security interests in the same personal property. Persons register their interest in an asset on the PPSA in order to “give notice to the world” of that interest. In an amalgamation, the notice regime requires the company to give notice to its creditors. This is a relationship between the company and its creditors; the company will know who its secured creditors are. It is not necessary to link the notice regime with those persons who are registered on the PPSR as this will capture persons not intended to be given notice under the wording of the Companies Act.

The regime that existed prior to enactment of the PPSA was that a company that was intending to amalgamate must give notice to all persons with a charge over assets of the company, meaning persons with a fixed or floating charge over assets that were (in pre-PPSA terms) owned by the company. This would not encapsulate persons who had leased assets to the company, as the company did not own those assets. Nor would it apply to persons who had supplied goods to the company on the basis of a retention of title arrangement, as prior to payment for those goods the company did not own those goods (and post payment the supplier was not entitled to charge over the assets).

CALL FOR LEGISLATIVE REFORM

Parliament cannot have intended to significantly change the application of this provision by enactment of the PPSA so that all persons who had registered security interests over the PPSA would be entitled to notice of amalgamation. It would be useful, however, for Parliament to clarify that this was their intention. We think that it may be useful to have a separate definition for those persons to whom notice must be given, rather than using the “secured creditor” definition. This class of persons would be those persons who are entitled to a security interest over assets of the company which are owned by the company or to which the company has title, and for the avoidance of doubt does not include assets supplied under a retention of title arrangement which have not yet been paid for by the company or assets leased to the company.

New bill to improve “practical operations” of the minority buy-out regime

The Government has taken up recommendations made by the Law Commission in 2001 to improve the effectiveness of the minority buy-out provisions in the Companies Act 1993.

On 7 November 2007 the Government introduced the Companies (Minority Buy-out Rights) Amendment Bill 2007 to ensure that the minority buy-out regime “functions efficiently, cost effectively, and appropriately”. The bill is a belated response to the Law Commission Report (number 74 Minority Buy-Outs) released in August 2001.

The bill is yet to have its first reading and submissions on the bill have not been called for at this stage, although earlier in the year the Ministry of Economic Development did undertake a limited consultation exercise presumably with a view to confirming that the recommendations made in the Law Commission’s 2001 report are still relevant six years on.

BACKGROUND

New Zealand’s minority buy-out regime (set out in sections 110 to 115 of the Companies Act 1993) is loosely based on “appraisal rights” provisions found in some North American jurisdictions. It was included in the 1993 revision of the Companies Act on the recommendation of the Law Commission as a solution to the problem of dissenting shareholders being locked into companies that have made “unanticipated alterations to corporate contracts that change the risk of, or unexpected return from, an investment”.

It allows shareholders to require the company buy their shares for a “fair and reasonable” price (provided strict procedures are followed) when the shareholder has unsuccessfully opposed a special resolution that:

- alters a company’s constitution in a way that imposes or removes a restriction on the company’s activities; or
- approves a major transaction (under section 129 of the Companies Act); or
- approves an amalgamation proposal.

To date there has been relatively little use made of the regime and this is thought to be partly a result of the uncertainty surrounding the mechanisms for establishing a “fair and reasonable” price. The first time the minority buy-out provisions came before the court in *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd*⁶ Justice Doogue noted that, in his opinion, the provisions lacked detail and were “substantially flawed”. He called for the provisions to be “urgently reconsidered”. It was this judgment which led to the Law Commission undertaking its review of the minority buy-out regime in 2001.

PROPOSED AMENDMENTS

Establishing a “fair” price

The main focus of the proposed amendments set out in the bill involves providing a statutory framework for calculating a fair price for the dissenting shareholder’s shares. The present regime goes out of its way not to provide any basis for determining price other than to stipulate that the price to be paid must be “fair and reasonable”, the rationale being that it was desirable to avoid having an overly prescriptive regime. However, in practice this “laissez faire” approach has made it extremely difficult for the company and the stakeholder to reach consensus over what is “fair and reasonable” and there have been calls for greater certainty of the valuation process. The key areas which have been highlighted as requiring some form of statutory guidance include:

⁶ [2000] 3 NZLR 727

- fixing a valuation date;
- providing guidance on whether the value should take into account the value effect (if any) of the resolution that triggered the buy-out rights; and
- stipulating whether the value should take into account any minority discount that the market would generally apply to the shareholder's stake.

Valuation date

The lack of a specified valuation date was one of the criticisms made by Justice Doogue in the *Natural Gas Corporation* case, noting that:

“it is impossible to see how the company could ever make a truly fair and reasonable assessment of price when there are no indicia within the [Act] as to the date at which the assessment is to be made.”

In the bill, the Government has adopted the Law Commission's recommendation by fixing the date at the point the company gives the dissenting shareholder notice under section 111(2)(e) that it will purchase the dissenter's shares (namely, within 20 working days of the company receiving the buy-out notice). This is seen as the most appropriate date given that it is technically the date on which the contract to buy-back the shares comes into existence.

Valuation technique

Pro-rata valuation

As well as providing for a valuation date, the proposed amendments address the valuation technique to be applied. First, the bill prescribes that the price must be an “honest estimate” in place of the current “fair and reasonable price” wording of the value of the shares. Second, the Government has opted to follow the Law Commission's recommendations and base the valuation on the entire class of shares split pro-rata among the shareholders (after the effect of the triggering event has been accounted for – see below). This approach prevents the application of a minority discount to the dissenting shares and is likely to be the most contentious aspect of the proposed amendments. Indeed, the Law Commission noted in its 2001 Report that this proposal did not command the support of all those consulted on its recommendations.

In our view it is unfortunate that the Government has decided to adopt this approach. There is a strong argument that the value should incorporate any discount that is ordinarily incorporated in the market's valuation of the shareholder's stake. The purpose of the minority buy-out provisions is not to enhance the value of the dissenting shareholder's stake but, rather, to allow the shareholder to exit at a fair price unaffected by the transaction to which the shareholder objects. That should not, therefore, require any enhancement of value above the value for which the shareholder could ordinarily have sold its shares were it not for the transaction that is subject to the resolution. A different test may be appropriate where the transaction in question is in effect a compulsory acquisition of the dissenting shareholder's shares, but where the transaction involves no element of compulsory acquisition then, in our view, the value should reflect the true market value of the particular stake in issue.

Of particular note is the effect the adoption of a pro-rata valuation requirement may have on publicly listed companies in so far as it opens up further possibilities for shareholders of publicly listed companies to take advantage of extraordinary arbitrage opportunities. Even under the existing provisions it has been recognised that the Act creates artificial incentives for shareholders in publicly listed companies to “game” minority buy-out regime by voting against proposals and thereby maintaining the option either to require the company to purchase their shares if the market share price falls or to hold the shares if the price rises. This concern is particularly acute under the New Zealand regime which provides for minority buy-out rights to be triggered by major transactions.

Price to exclude the effect of the “triggering event”

On a less controversial note, the valuation technique proposed also attempts to insulate the dissenting shareholders from the effects of the event giving rise to the minority buy-out being triggered.

Arguably one way of insulating the minority shareholder from the triggering event would have been to set the valuation date immediately prior to the date of the special resolution approving the event (or the corporate action to which it relates), but as the Commission points out in its report, this would not

adequately prevent a shareholder from being prejudiced from a fall in the value of the shares where, for instance, the event was already known to the market prior to the resolution being passed. Instead the Government has opted to take the approach put forward by the Law Commission and provide for the value to exclude any “fluctuation (whether positive or negative) in the class value that has occurred (whether before or after the resolution was passed) that the board reasonably considers was due to, or in expectation of, the event proposed or authorised by the resolution.”

However, where the shareholders are being bought out in the event of an amalgamation under section 221 of the Act, the amendments provide for the valuer to take the benefits of the amalgamation into account when assessing fair value. To do otherwise would be preventing shareholders who were being squeezed out of participating in the amalgamation from sharing in any benefit of the amalgamation to the company.

Some procedural improvements

In addition to the proposed valuation amendments, the bill also adopts the Law Commission’s recommendations on each of the following key features.

Notice of rights

Under the bill the company will be required to give shareholders notice of their buy-out entitlements in every case to which the buy-out regime applies.

Details of calculations

Under the present regime the company must give the shareholder notice of the price, but it has no obligation to advise the shareholder of the basis on which the share price was nominated. Under the amended provisions the notice must include details of how the overall price and any adjustments to the price were calculated. This provides more transparency to the pricing mechanism and while it may leave the company more open to attack, it may also serve to reassure shareholders that an acceptable price has been reached.

Arbitration

If a shareholder rejects the company’s buy-out offer, the current regime provides for the value of the shares to be determined by arbitration. The bill, in a new section 112A, goes one step further and also provides for the arbitrator to determine the remedies available to the shareholder in the event the arbitrator’s determination differs from the company’s valuation.

The key change is directed at avoiding strategic delays in using arbitrators to resolve value disputes. Under the new provisions, where the provisional price paid is less than the price determined by the arbitrator, the arbitrator will have the power to recognise the time value of the money and allow damages for loss (whether foreseeable or not) attributable to the shortfall in the provisional payment. It is also hoped that this provision will be a deterrent to setting an inadequate price at the outset.

The bill also makes it clear that the arbitrator has an express power to require the unsuccessful party to pay costs to the successful party (including the arbitrator’s fee and expert witness fees) by stating that clause 6 of Schedule 2 of the Arbitration Act 1996 may not be excluded from the arbitration agreement.

Timing of transfer of shares

The current wording of the Act is silent on whether the shares are to be transferred on payment of the provisional price, or following the completion of arbitration and the establishment of the final price. Under the proposed amendments a new section 112C provides for both legal and beneficial title to pass only after the price is ascertained and paid in full. However, any purported disposition by the shareholder between payment of the provisional price and completion is of no effect under the new provisions.

Comments

It is generally accepted that there is an urgent need for reform of the Companies Act minority buy-out regime. However, it is unlikely that the bill in its current form will receive sufficient support to come through the parliamentary process without changes being made to it. Many consider that although there is a need to provide more detail in the buy-out regime, some of the Law Commission’s recommendations adopted in the bill are too far in favour of the dissenting shareholder. There are also those who have a number of other views on the current buy-out regime which are not addressed in the bill.

We will keep you informed of the progress of the bill and would be happy to assist with any submissions you may want to make on the bill during the select committee stage. For further information, please contact your usual Bell Gully adviser.

To access a copy of the Companies (Minority Buy-out Rights) Amendment Bill 2007, visit www.parliament.nz

To access a copy of the Law Commission's 2001 Minority Buy-out Report visit www.lawcom.govt.nz

Shareholder claims against insolvent companies: does *Sons of Gwalia* have implications for New Zealand?

New Zealand's increasingly robust investor protection legislation may be good news for some aggrieved shareholders, but in this article Bell Gully senior associate Tim Clarke outlines why, based on overseas experience, it could also result in a slower, more complicated liquidation process and diluted returns for unsecured creditors.

A recent decision of the High Court of Australia has brought into focus some important issues about the status of shareholders who have claims against insolvent companies.

Background

One of the basic distinctions between an equity investment and a debt investment in a limited liability company is that:

- shareholders participate in the upside potential of the company (through dividends or capital gain) and their exposure to downside risk is limited to the extent of his or her investment in the company's shares; and
- lenders receive a return on their capital contained in the contract governing the debt, subject to the downside risk of losing their principal.

In the event of the company being liquidated, shareholders rank behind creditors in the distribution of the company's assets and are therefore likely to lose some or all of their equity investment. Nevertheless, a person who holds shares in a company may also be a creditor in respect of that company. For example, a shareholder may prove in the liquidation as a creditor where that person brings a claim:

- for recovery of a bona fide loan to the company;
- for remuneration as an employee or independent contractor;
- for breach of a supply contract for the cost of goods sold to the company.

In these examples, the ability to bring a claim does not depend upon the claimant being a shareholder or relate to their shareholding.

The position is less clear cut, however, where a shareholder makes a claim against the company for losses incurred in acquiring shares in the company. The principal objection is that a damages claim for the purchase price of the shares is inconsistent with the shareholder's obligation to contribute capital to the company. As a result, the assets of the company will be depleted to the prejudice of other unsecured creditors.

This issue has assumed some prominence in the context of securities and consumer protection legislation creating statutory remedies for shareholders who either subscribe for securities or acquire previously allotted securities in the secondary market. Under such legislation, shareholders who suffer loss resulting from the company's non-compliance with the regulatory regime may have claims against the company and, to that extent, are contingent creditors as well as shareholders.

Sons of Gwalia case

In Australia, the *Sons of Gwalia* litigation⁷ concerned an application by the administrators of a mining company (Sons of Gwalia Limited) for a declaration that an aggrieved shareholder did not have a provable claim against the company as a creditor in the proposed deed of company arrangement for the purposes of the company's voluntary administration. The claimant, Mr Margaretic, had bought 20,000 shares in the company. Approximately one week later, the company was put into voluntary administration. Mr Margaretic presented a claim to the administrators that the company had failed to

⁷ *Sons of Gwalia Ltd v Margaretic* (2005)55 ACSR 365; *Sons of Gwalia Ltd v Margaretic* (2006) 149,56 ACSR 585; *Sons of Gwalia Ltd v Margaretic* [2007] HCA 7

disclose that its reserves of gold were insufficient to meet its contractual obligations in terms of on-going delivery contracts. On that basis, Mr Margaretic claimed an entitlement to the difference between the purchase price of his shares and the true value of the shares, which he alleged was nil.

Mr Margaretic claimed that Sons of Gwalia had engaged in misleading and deceptive conduct and breached its disclosure obligations under Australian consumer and investor protection statutes.

The administrators of Sons of Gwalia, Ferrier Hodgson, considered that Mr Margaretic's claim ought to be postponed on the basis of section 563A of the Corporations Act, which provides:

"Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims by, persons otherwise than as members of the company have been satisfied."

The preliminary question of whether Mr Margaretic's claim arose "otherwise than as a member" of the company for the purposes of section 563A was heard at first instance in the Federal Court of Australia. Justice Emmett concluded that the claim arose from the consumer protection legislation rather than from his membership in the company. Accordingly, section 563A did not operate to postpone Mr Margaretic's claim who therefore ranked with other unsecured creditors in the course of the administration.

The administrators appealed to the Full Federal Court, which dismissed the appeal. As in the court below, the Full Federal Court concluded that Mr Margaretic's claim arose from statutory causes of action, as opposed to being conferred by virtue of his membership in the company. Accordingly, the claim did not engage section 563A and could therefore be admitted to proof in the course of the administration.

The administrators appealed to the High Court of Australia, which dismissed the appeal by a majority of six to one. The majority, in separate judgments, rejected the suggestion that the Corporations Act (Cth) embodies a general policy of "members come last" in corporate insolvency and concluded that the expression in section 563A "in the capacity as a member" suggested that shareholders may have claims in a capacity otherwise than as members. Section 563A therefore simply operated to subordinate claims by shareholders qua shareholders, such as a debt owed to a member by way of dividend.

The decision has caused considerable concern in Australia and the Australian Corporations and Markets Advisory Committee (CAMAC) is currently considering the implications of this decision and has called for submissions on law reform options.

Implications of Sons of Gwalia for New Zealand

The Companies Act 1993 does not contain a counterpart to section 563A of the Corporations Act, so there is no equivalent statutory basis in New Zealand for subordinating claims for debts due to shareholders to debts owed to other creditors.

Under New Zealand's statutory framework, a person who acquires publicly listed securities in circumstances where the company has breached its continuous disclosure obligations by failing to disclose materially price sensitive information may have a claim against that company. Therefore, that person might qualify as an unsecured contingent creditor (i.e., that person's claim would not be subordinated to the claims of other creditors in the event of liquidation).

An aggrieved investor would have a number of bases for lodging a claim with the liquidator based on a breach of a publicly listed company's continuous disclosure obligations:

- First, one source of the continuous disclosure obligations for listed companies is the contract between New Zealand Exchange Limited (NZX) and each listed company. Rule 2.1 of the NZX Listing Rules provides that the provisions of the Rules (which form the contractual basis of the relationship between a listed company and NZX) are "enforceable against each issuer for the benefit of every person who is or was a holder of Quoted Securities of that issuer in the period in which the issuer is or was listed, and the Contracts (Privity) Act 1982 shall apply accordingly".
- Secondly, any person may bring an application under the new section 19M of the Securities Markets Act 1988 for a compensatory order against a public issuer that has contravened its continuous disclosure obligations. Under that provision, the court has a very broad power to make compensatory orders.

- Thirdly, a claim may be brought for misleading or deceptive conduct in trade under the Fair Trading Act 1986⁸.
- Fourthly, an aggrieved shareholder may be able to bring a claim at common law for the tort of deceit or for negligent misstatement.

Owing to the potential difficulties in establishing tortious claims for deceit or negligent misstatement, it is likely that many aggrieved shareholders would prefer the more broadly based statutory and contractual avenues for redress under the Securities Markets Act, the Fair Trading Act, and the NZX Listing Rules. This accords with the overseas experience where claims under investor protection legislation tend to be more frequent than common law claims.

Since a New Zealand court is unlikely to create a distinction between shareholders who have a claim as a subscriber of shares and those who have a claim as a transferee of previously allotted shares, it is also likely that a subscriber would qualify as contingent creditors on the following bases:

- the Securities Act 1978;
- pre-contractual misrepresentations that induced the shareholder to subscribe for the shares;
- the tort of deceit; and
- the tort of negligent misstatement.

Where such claims are brought against a company by a body of aggrieved shareholders, there may be significant implications for the liquidation process:

- *Complexity.* The assessment of claims under either the continuous disclosure obligations by transferees of shares or by subscribers for shares have the potential to create substantial costs and delay for liquidators (and a corresponding diminution in the funds available for distribution to creditors and shareholders).

Evaluating the materiality of information is notoriously complex and requires expert evidence on the hypothetical price implications of releasing information to the market at a particular time. Moreover, information that is not released through the market but has been ascertained, for example, by broker analysts or major shareholders may have been impounded into the price of securities by virtue of trading activity, notwithstanding the absence of disclosure through the market.⁹

Accordingly, in many cases, it will be appropriate and necessary for the liquidator to refer the matter to the court for a decision on the claim under section 307 of the Companies Act.

- *Dilution of recovery.* By elevating their position to contingent creditors, aggrieved shareholders will swell the number of creditors, with the result that other unsecured creditors are likely to have their returns diluted. While secured creditors will not be prejudiced by the increased number of unsecured creditors, the implications for unsecured creditors (such as trade creditors) could be very serious, especially in the context of large shareholder claims.
- *Voting.* Shareholders who elevate their position to contingent creditors will enjoy voting rights in the course of liquidation. This entails some risk that shareholder claimants may affect voting outcomes to the detriment of other creditors, who may have diverging interests. In the context of very large shareholder claims, there is a material risk of shareholders “swamping” the vote.
- *Lending strategies.* There is potential for this result to have an impact on the debt capital markets and the lending strategies of lenders in an effort to mitigate the impact of the decision.

⁸ Note however that when new section 5A of the Fair Trading Amendment Act 2006 is implemented, the Fair Trading Act will not be able to be used to establish liability for a person's conduct if that conduct is already regulated under the Securities Act 1978 or the Securities Markets Act 1988 and the person would not be liable for such conduct under the relevant provisions in those Acts.

⁹ See Harris and Hargovan “*Sons of Gwalia: Navigating the line between membership and creditor rights in corporate insolvencies*” (2007) 25 C&SLJ 7 at 28.

Future implications

Under New Zealand's statutory regime, a shareholder's claim against a company would not be subordinated to the claims of other creditors in the course of liquidation. Therefore, in terms of pure legal doctrine, *Sons of Gwalia* does not raise substantial implications for the approach of a New Zealand court.

However, *Sons of Gwalia* does raise significant concerns about the implications of shareholders elevating their position in the course of liquidation. In this practical sense, *Sons of Gwalia* is highly relevant from a New Zealand perspective.

In the context of increasingly robust investor and consumer protection legislation, it is likely that more claims will be brought by aggrieved shareholders against companies in liquidation. Based on the overseas experience, it appears that this improvement in the position of misled shareholders will be accompanied by a corresponding increase in the delay and complexity of the liquidation process and a dilution of the funds available to unsecured creditors.

This article is based on a paper Tim Clarke presented at the annual Corporate Insolvency Conference in October and has been adapted with the assistance of Jesse Wilson. To view the paper in full visit our website for the publication "Investor protection for shareholders might come at a cost" or click [here](#).

An update on recent amendments to the Companies Act

A summary of the implementation of amendments made to the Companies Act in September and November includes changes for overseas companies; a new requirement for liquidating a company which has been removed from the register; and the long awaited reform of the Companies Act's insolvency provisions.

Overseas Companies

On 1 September 2007, amendments to the Companies Act 1993 (the Act) came into force that:

- allow the Registrar to approve the use of different forms for the purposes of Part 18 of the Act (Overseas companies obligations - use of name, change of constitution, file annual return and comply with Financial Reporting Act 1993, notification of cessation to carrying on business in New Zealand – see new section 332A); and
- exempt an overseas company from the requirement to give information or a document to the Registrar if that company is incorporated in a prescribed jurisdiction, the information or document is held by the Registrar in that jurisdiction and the information or document is within a prescribed class.

Liquidation not possible if company removed from register

The Companies Amendment Act 2007 came into force on 19 September. This repealed section 327 of the Companies Act 1993 which allowed, in effect, the liquidation (by order of the High Court) of assets remaining in the name of a company that had been removed from the register. Such assets were deemed to revert from Crown ownership to allow this to take place.

This means that a company will now have to be restored to the register before it can be put into liquidation and this will require an application to the Registrar under section 328 or to the High Court under section 329.

Re-vamped insolvency regime

Amendments to the Companies Act and the Companies (Voluntary Administration) Regulations 2007 came into force on 1 November 2007, resulting in the long awaited introduction of the voluntary administration regime, new phoenix company provisions, significant amendments to the voidable transaction regime and new liquidator reporting requirements. The regulations prescribe the provisions that are deemed to be included in all deeds of company arrangements (unless specifically excluded) along with a form for the administrator's six-monthly report.

Phoenix company provisions

Under the new phoenix company provisions, a person who was a director of a company placed in liquidation (because it was unable to pay its debts) is prohibited within the preceding five years from incorporating a new company under a former name or a similar name to that of the failed company. The person must have been a director within 12 months from the commencement of the liquidation. Penalties for breaching these provisions are up to five years imprisonment or a fine not exceeding \$200,000.

Voluntary Administration regime

The introduction of voluntary administration (VA) will impact on those who deal with companies facing financial uncertainty, particularly financial institutions and secured creditors.

The objective of the VA scheme is to provide an alternative rehabilitative model to maximise the prospects of a company's continuing existence. If rehabilitation is not possible, it will provide an

alternative to immediate liquidation where it is considered that VA will provide a better return for creditors.

In general terms, the process of VA is as follows:

- Administration commences on the appointment of the administrator, who may be appointed by the board of directors, a secured creditor who has a charge over all or substantially all of the company's property, a liquidator or the courts (on application by a creditor or the Registrar of Companies).
- The company's directors' powers are suspended, and the administrator controls the business, property, and affairs of the company.
- A moratorium is imposed on creditors taking any action against the company, or an owner or lessor of property occupied or used by the company seeking to repossess the property, unless the creditor, owner, or lessor has commenced an enforcement action prior to the administration commencing.
- A secured creditor may not enforce a charge over the company's property unless the secured creditor holds a charge over all or substantially all of the company's property and the creditor takes enforcement action within the first 10 working days of being notified of the appointment of the administrator.
- Without the administrator's consent or a court order, a transaction or dealing that affects the company's property is void, a person may not commence or continue court proceedings against the company, shareholders cannot transfer any shares, and rights and liabilities of shareholders cannot be changed.
- A lender may not enforce a guarantee in respect of the company's liabilities given by a director or their spouse or relative (without a court order).
- A creditors' meeting must be called shortly after the commencement of the administration at which the creditors will decide whether to appoint a creditors' committee and, if so, to appoint its members and decide whether to replace the administrator.
- A "Watershed Meeting" must then be called by the administrator who is required to recommend to the company whether:
 - a deed of company arrangement (DOCA) should be entered into (and the details of the proposed DOCA decided);
 - the administration be terminated; or
 - the company be placed into liquidation.
- The creditors then vote on whether to accept the administrator's recommendation or to approve an alternative option.
- If a DOCA is approved, it will bind all unsecured creditors, all secured creditors who voted for it, all owners or lessors of the property who voted for it, the company, its directors and shareholders, and the deed administrator.
- If a DOCA is approved, the administrator is replaced by a deed administrator (who is often the original administrator), who then takes over the management of the company.
- While a DOCA is in force, no person bound by it may seek to liquidate the company, issue or continue court proceedings against the company or commence or continue enforcement action against company assets.

The administration ends when:

- the time period for a Watershed Meeting expires without such a meeting taking place;
- the creditors vote against a DOCA at a Watershed Meeting;
- a DOCA is executed; or
- the court orders otherwise.

The alternative options to the VA scheme remain unchanged. They include compromises with creditors, court approved arrangements, amalgamations or compromises, receivership and liquidation. The VA scheme has clear advantages for companies over these existing alternatives, although it is not known to what extent the VA scheme will be preferred in New Zealand.

For further information on the voluntary administration scheme refer to a paper presented by Bell Gully partner Murray Tingey at the Auckland District Law Society's credit law conference in Auckland on 12 November. This paper summarises the scheme and covers key factors for companies to consider before taking the Voluntary Administration route, including criteria, implications for different stakeholders, issues relating to deed of company arrangements and procedural aspects. Click [here](#) to view this paper visit

Companies Office releases online voluntary administration service

Administrators are able to notify the Registrar of Companies of their appointment and manage their portfolios using the administration, receivership and liquidation service online.

The Companies Office has announced the introduction of a new online service for voluntary administration.

Using the online service, administrators can give notice of their appointment and manage their portfolios.

For more information about the service, go to www.companies.govt.nz.

Duplicate filing obligations for companies carrying on business in New Zealand and Australia

The New Zealand and Australian governments have enacted legislation to remove duplicate filing obligations for companies carrying on business in both New Zealand and Australia.

The amendments, which came into force on 1 September 2007, mean that both the New Zealand Companies Office and the Australian Securities & Investments Commission can now receive information relating to companies operating on both sides of the Tasman and through a data exchange. This will reduce the cost and time of doing business.

The New Zealand Companies Office now also offers an online service to enable Australian incorporated companies intending to carry on business in New Zealand to register as an overseas company in New Zealand. This service is easier, quicker and more cost-effective than the manual process. This service can be accessed via the form the company option at www.companies.govt.nz.

Delay of mandatory adoption of IFRS

The Accounting Standards Review Board has resolved that companies that satisfy certain criteria are permitted to continue to apply the existing New Zealand Financial Reporting Standards until further notice.

The Board has resolved that companies satisfying all of the following criteria are permitted to continue to apply the existing New Zealand Financial Reporting Standards and are therefore not required to apply NZ IFRS for periods beginning after 1 January 2007, until further notice. The criteria are :

- the company is not an issuer (as defined in the Financial Reporting Act 1993 (the Act));
- the company is not required by section 19 of the Act to file its financial statements with the Registrar of Companies; and
- the company is not large (as defined in the Act).

To date, NZ IFRS has been adopted by large issuers, subsidiaries of overseas companies that are complying with IFRS and the public sector. The applicability to small entities has generated a lot of international debate and in New Zealand the Minister of Commerce has announced that a government review of the financial reporting requirements for small to medium sized companies will commence in mid-2008.

The Board has therefore decided to delay mandatory adoption pending the outcome of the review.

SECURITIES AND CAPITAL MARKETS

Government announces commencement date for new securities law

Cabinet has finally approved the regulations giving effect to the remaining changes to the securities law made when the Securities Legislation Bill was passed in October 2006. Market participants have been told they have three months to prepare for the implementation of the new law on 29 February 2008.

Considering going public and a sharemarket listing? A guide to navigating the process

Bell Gully corporate partner Andrew Brown has authored a guide for those considering a sharemarket listing. The guide sets out the work typically required for an IPO and the subsequent listing on the NZSX.

New powers for trustees of finance companies

The law has been changed to strengthen the position of trustees of finance companies. The changes, which came into force in September, are intended to assist trustees in performing their supervisory roles in the interests of investors.

Securities Act class exemption review complete

The Securities Commission has completed its five-yearly review of class exemptions from the Securities Act.

Financial Reporting Programme - Cycle 5

The Securities Commission has reviewed financial reports prepared in accordance with NZ IFRS and under previous NZ GAAP.

Government announces commencement date for new securities law

Cabinet has finally approved the regulations giving effect to the remaining changes to the securities law made when the Securities Legislation Bill was passed in October 2006. Market participants have been told they have three months to prepare for the implementation of the new law on 29 February 2008.

Most of the amendments to the Securities Act and Takeovers Act made under the omnibus Securities Legislation Bill came into effect after it was passed in October 2006. However, four key components of the new securities law have been kept on hold pending the approval of regulations. These include new law on market manipulation, new disclosure requirements for investment advisers, changes to the insider trading law, and some minor changes to the substantial security holders' disclosure regime. All of these changes are set out in the Securities Markets Amendment Act 2006 and its accompanying regulations (see below). Some outstanding provisions in the Securities Amendment Act 2006, the Takeovers Amendment Act 2006 and the Fair Trading Amendment Act 2006 (which have been dependent on the implementation of the Securities Markets Amendment Act) will also come into effect on 29 February 2008.

The regulations which were enacted by Order in Council on 3 December are:

- the Securities Markets (Substantial Security Holders) Regulations 2007 which prescribe the form, delivery method and specific disclosure required for disclosures by substantial security holders under the Securities Markets Act 1988 (the Act) and related matters;
- the Securities Markets (Market Manipulation) Regulations 2007 which exempt two categories of securities market conduct from the Act namely, market stabilisation following the first offer of securities for sale to the public, and short selling and crossings; and
- the Securities Markets (Investment Advisers and Brokers) Regulations 2007 which:
 - contain five exemptions relating to aspects of disclosure;
 - for advice on specific investments, increase the scope of disclosure by requiring disclosure of the dollar amount, or a percentage formula, of fees and remuneration;
 - prescribe standards of clarity and prominence in setting out information in a disclosure statement; and
 - define meaning of the term *bank term deposit*.

For commentary on the securities law amendments, refer to the following articles and papers prepared by Bell Gully on this topic:

- “Securities Legislation Bill completes the parliamentary process” in the [Spring 2006 Commercial Quarterly](#), which provides an overview of the regulatory process leading up to the passage of the bill and a summary of the key changes;
- “Update on regulations for new securities law” in the [Summer 2007 Commercial Quarterly](#);
- “Expanded liability under the continuous disclosure regime” in the [Winter 2007 Commercial Quarterly](#); and
- A paper on “[The New Insider Trading Laws](#)” presented by Bell Gully senior associate, Jenny Cooper, to the Securities Legislation and Capital Markets Update conference held in Auckland in September 2007.

The Securities Commission is preparing a Guide to the New Securities Law 2008 which will explain the changes made to the Securities Act 1978 and the Securities Markets Act 1988. The Commission has stated that the Guide will be available electronically from its new securities law website (www.newsecuritieslaw.govt.nz) before the end of the year.

Considering going public and a sharemarket listing? A guide to navigating the process

A public offer of securities provides access to a large number of potential investors and, done correctly, is an effective way of raising capital.

There are numerous considerations before going public and Bell Gully corporate partner Andrew Brown has authored a guide for those considering a sharemarket listing.

The guide sets out the work typically required for an initial public offer of securities and the subsequent listing on the NZSX. It offers a timeline outlining the various steps involved in a straightforward offer and listing, along with an estimate of likely costs.

To read the guide, [click here](#).

New powers for trustees of finance companies

The law has been changed to strengthen the position of trustees of finance companies. The changes, which came into force in September, are intended to assist trustees in performing their supervisory roles in the interests of investors.

Many of the changes were already set out in the Trustee Corporations Association guidelines and in some trust deeds, but some deeds did not contain all of the powers that trustees needed. The Securities Commission met with all finance company trustees before proposing the changes.

The Securities Commission's acting Chairman stated that "it is important that trustees have up-to-date and reliable information about the companies they supervise". The changes have been made to ensure that all trust deeds provide trustees with robust powers to get the information they need to carry out their duties in investors' interests.

Summary of changes

Finance companies must:

- provide the trustee with regular reports about the issuer's financial position;
- regularly certify compliance with the trust deed;
- keep the trustee informed on matters relevant to the trustee's duties;
- have the borrowing group's half-yearly financial statements audited (unless this requirement is waived by the trustee, in which case they must be reviewed);
- copy to the trustee the borrowing group's annual and half-yearly financial statements;
- consult the trustee on the appointment of auditors and advise the trustee if an auditor declines appointment or reappointment or resigns; and
- include specific conditions in the terms of appointment of auditors, giving the auditors responsibilities to the trustee.

The trustee will have power to:

- appoint an independent auditor; and
- appoint an expert to assist the trustee to determine the true financial position of an issuer.

The changes automatically become part of all finance company trust deeds (including existing deeds).

Securities Act class exemption review complete

The Securities Commission has completed its five-yearly review of class exemptions from the Securities Act.

Most exemptions were renewed on substantially the same terms, but more substantive changes were made to the following exemptions:

- Securities Act (Building Societies) Exemption Notice 2002;
- Securities Act (Contributory Mortgage Brokers) Exemption Notice 1983; and
- Securities Act (Oversees Employment Share Purchase Schemes) Exemption Notice 2002.

In addition, the Commission created a new class exemption for public offerings made by companies listed on, or applying to be listed on markets operated by New Zealand Exchange Limited.

The Commission is also working on changes to its class exemptions on residential property developments, real property proportionate ownership schemes, and rights, options and convertible securities.

For more information on the review and on the changes, click [here](#).

Financial Reporting Programme – Cycle 5

The Securities Commission has reviewed financial reports prepared in accordance with NZ IFRS and under previous NZ GAAP.

The review included 12 financial statements prepared in accordance with NZ IFRS and 28 prepared under previous NZ GAAP.

Key issues identified included:

- presenting the correction of prior period errors as transition adjustments;
- incorrect labelling of comparatives; and
- the treatment of GST in the preparation of the cash flow statement.

The Commission has reported its pleasure with the cooperation from issuers and their willingness to improve the quality of their financial reporting.

COMPETITION AND CONSUMER LAW

Local Loop Unbundling process completed

The process of unbundling Telecom's local loop was completed last month when the Commerce Commission published its Final Determination setting out the standard terms for connection to Telecom's local copper loop. This determination sets both the price and non-price terms. In this article, Bell Gully senior associate David Blacktop provides some insight on the determination process and the likely impact the final decision will have on the industry and end users.

Supreme Court dismisses Unison Networks' attempt to have price thresholds set aside

The Supreme Court has rejected Unison Networks Limited's claim that the Commerce Commission's price path thresholds for electricity lines businesses are unlawful. In this article, Bell Gully solicitor Jane Petersen outlines the basis for this decision and considers the future impact of the Government's proposed changes for Part 4A of the Commerce Act on electricity lines businesses.

Microsoft bows out after nine year battle

Bell Gully solicitor Jane Petersen comments on the European Commission's landmark Microsoft decision handed down in September.

Local Loop Unbundling process completed

The process of unbundling Telecom's local loop was completed last month when the Commerce Commission published its Final Determination setting out the standard terms for connection to Telecom's local copper loop. This determination sets both the price and non-price terms. In this article, Bell Gully senior associate David Blacktop provides some insight on the determination process and the likely impact the final decision will have on the industry and end users.

Standard terms approach appears to be an improved process

There is no question that local loop unbundling was a major regulatory step for New Zealand. However, the standard terms determination process was also a testing ground for the new "standard terms determination" model introduced into the Telecommunications Act concurrently with the amendments to allow local loop unbundling. The standard terms process is, in essence, a multilateral process with the end goal of allowing access seekers to quickly access the local loop by simply relying on standard terms.

Previously, the Telecommunications Act relied on the Commission essentially taking the role of an arbitrator in bilateral disputes. This process was criticised on the grounds that:

- when combined with the obligation of parties to make reasonable attempts to negotiate, it created ample opportunity for infrastructure owners to game the system by drawing out negotiations preventing new entrants getting to market; and
- access seekers were not simply able to rely on previous processes, which again when coupled with a requirement to negotiate, led to accusations of gaming.

While, as with any adjudicative process undertaken, interested parties in the LLU determination will no doubt have some concerns about aspects of the final decision, the introduction of the standard terms process itself appears to have been a success.

The standard terms process was introduced into the Telecommunications Act at the same time as the amendments unbundling the local loop. This occurred in December 2006 and the fact we have a standard terms determination in place and Telecom has launched a website for access seekers (www.ucll.co.nz/n6,2.html) indicates the improvement this process has made.

Price of access

An access seeker has to pay two prices in order to be able to offer services to residential customers over Telecom's local loop. The first is a connection charge and the second is the monthly rental cost. These costs are similar in concept to the costs users pay Telecom for use of their services – when I connect my phone I pay Telecom an on-off fee to connect me and then pay a monthly rental charge each month.

From an entry perspective, the key price is the monthly charge. The Telecommunications Act requires that this price is set initially by assessing the charges paid in other countries (the so-called benchmarking approach). The final price will be set on the basis of what is known as TSLRIC (total system long run incremental cost) which is a cost based pricing methodology. Determining TSLRIC is a more time and data intensive process and the initial pricing process is designed to be a bit more quick and dirty.

Accordingly, the Commerce Commission selected a "peer group" bundle of comparable jurisdictions and calculated that median NZ\$ price charged in those countries was \$24.29. The Commission then conducted an econometric analysis to test the validity of that number.

Different prices for urban and non-urban areas

What this \$24.29 means is that this is the average price that should be charged by Telecom per month. However, the Commission proposed in its draft decision that a different price should be charged for urban and non-urban areas. This was because the costs of serving urban areas is lower than serving non-urban

areas. If one cost were set for both areas it would provide incentives leading to over investment in non-urban areas and under-investment in urban areas.

There was broad consensus from the economic experts involved that setting separate prices for urban and non-urban areas was appropriate. This is unsurprising as it is more likely to reflect the underlying costs of providing services. While it might be thought that this process would expose rural customers, it appears more appropriate for those concerns to be dealt with via social welfare initiatives (such as the TSO) rather than undermining the very incentives for competition and the benefits that LLU is designed to create.

Accordingly, the Commission set the monthly rental fee for urban exchange at \$19.84 and for a non-urban exchange at \$36.63. This was an increase from the draft prices which were \$16.49 per month in urban areas, and \$32.20 per month in non-urban areas.

Impact of differing prices for urban and non-urban prices

The Commission has specified that urban areas are exchanges in: Auckland, Wellington, Whangarei, Te Awamutu, Wanganui, Tauranga, Rotorua, Paraparaumu, Palmerston North, New Plymouth, Nelson, Hawkes Bay, Invercargill, Hibiscus Coast, Hamilton, Gisborne, and Dunedin. Accordingly, the Commission has not taken an overly narrow approach to what amounts to an urban area, although some areas such as Wairarapa and the West Coast of the South Island are excluded.

Where does this leave non-urban customers? Well, Telecom advertises on its website a homeline as costing \$43.60 a month (including GST) with the exception of Wellington and Christchurch city and most suburbs where the cost is \$36. The difference between \$43.60 and \$36.63 is not nearly as great as the difference between \$43.60 and \$19.84. It seems likely that this will (all else being equal) make it less likely that LLU will occur in non-urban markets. Of course, all else is not equal – already Telecom charges lower prices in areas where TelstraClear has a fixed line network.

When can we switch?

The final determination includes an implementation plan for implementing LLU. The roll-out phase is 15 months and includes:

- a 13 week soft launch period to test and refine the service; and
- a 10 month period during which Telecom is required to meet certain roll-out performance objectives relating to the service.

Telecom will be required to roll-out LLU to 15 exchanges every three months during the implementation phase meaning at the end of 15 months, Telecom will have rolled out LLU to 75 exchanges throughout New Zealand. While Telecom will be required to meet its service obligations during this period, it will not be exposed to performance penalties if it fails to do so.

Will LLU work?

LLU applies only to Telecom's copper local loop. Telecom has announced plans to invest NZ\$1.4b in a fibre network based in roadside cabinets. Various access seekers have raised concerns that that investment undermines the business case for investing in LLU. While that might be correct, the counter argument might be that when viewed more dynamically, LLU has provided the spur for Telecom to invest in fibre – which is likely to be of benefit to New Zealand. Should similar problems arise in relation to Telecom's fibre network, recent history would suggest a regulatory response would be forthcoming. One would hope that Telecom would have priced this in to its fibre roll out business case.

Supreme Court dismisses Unison Networks' attempt to have price thresholds set aside

The Supreme Court has rejected Unison Networks Limited's claim that the Commerce Commission's price path thresholds for electricity lines businesses are unlawful. In this article, Bell Gully solicitor Jane Petersen outlines the basis for this decision and considers the future impact of the Government's proposed changes for Part 4A of the Commerce Act on electricity lines businesses.

Thresholds regime

Part 4A of the Commerce Act 1986 (the Act), which came into effect in 2001, requires the Commerce Commission (the Commission) to implement a targeted control regime for the regulation of the 29 electricity lines businesses in New Zealand that operate as regional monopolies. As part of that control regime, the Commission is required to set "thresholds" against which to judge the price and service performance of the lines businesses in order to determine whether price control is necessary. If a lines company breaches the relevant threshold, then the Commission must assess whether that company should be placed under price control.

In 2003, the Commission set its initial threshold, which provided that lines businesses were to not to make any price increases for a period of 20 months. The second (revised) threshold came in 2004. Under that threshold the Commission allowed price movements within a stipulated price path.

Unison Networks Limited's (Unison) is an owner of large electricity lines businesses and had been identified by the Commission as a candidate for control.

Unison's appeal

Unison's case centred on its claim that both the 2003 and 2004 thresholds used by the Commission were unlawful and invalid.

The Court of Appeal had previously decided that the first (2003) threshold was indeed unlawful, but that the second was lawful. However, the Court of Appeal had refused to grant Unison relief against the unlawfulness of the first threshold, and the Supreme Court case centres¹⁰ on Unison's claim against that judgment. In the Supreme Court, the Commission supported the Court of Appeal's judgment, and also maintained that the Court of Appeal was wrong to find that the first threshold was set in breach of the Act.

Unison's argument was twofold, namely that:

- the Commission had set the thresholds for an improper purpose; and
- the Commission had misconstrued the requirements of the legislation and had consequently applied the wrong legal test in setting the thresholds.

In terms of the first argument, the Supreme Court held there was no suggestion of any improper purpose on the part of the Commission. The Supreme Court noted that any limit on the scope of the Commission's power to set thresholds simply requires that thresholds must accord with the proper administration of the price control regime.

The Supreme Court also rejected Unison's second argument. As the court noted, the Act contemplates that the Commission will exercise judgement in devising thresholds that will contribute to the administration of the price control regime. This judgment, the Supreme Court observed, could have been lawfully addressed in one of two ways, either:

¹⁰ *Unison Networks Limited v The Commerce Commission* [2007] NZSC 74.

- the Commission could have set thresholds that ascertained those companies operating inefficiently and restricted the prices they could each charge by imposing control; or
- the Commission could have set prices based on information it had available for the industry as a whole, fine-tuning them through resetting as it became better informed.

Having adopted the latter (or indeed, either) approach, the Supreme Court found that the Commission was not in breach of the Act.

Unison's appeal was dismissed and it has been ordered to pay costs of \$25,000.

Proposed changes to electricity lines regime

The Minister of Commerce has recommended certain amendments to the current Parts 4 (controlled goods and services) and 4A of the Commerce Act. The proposed amendments to 4A relate to concerns about the lack certainty for electricity lines businesses and what some consider to be a fairly weak accountability regime for the Commerce Commission as regulator.

First, it is proposed to replace the threshold regime within Part 4A with a "default/customised price-quality path" regime. This would require the Commission to specify a default price-quality path for the sector (similar to the setting of thresholds), which would provide an ex-ante, time bound opportunity for an individual firm to seek a customised path. It is also proposed that 100% trust-owned electricity lines businesses would be subject to lighter handed regulation such as in regard to information disclosure. The Ministry's view is that the incentives of trusts to charge excessive prices is low and their relatively small size would mean that the cost of heavier handed regulation may outweigh the benefits of such regulation.

A second proposed amendment relates to a merits review system for Commission decisions on input methodologies. This would occur by way of appeal to the High Court for a rehearing. There is a general perception that the current accountability regime for the Commission is weak, as judicial review applies solely to questions of law and process, and not the substance of the decision. It is thought that consideration of appeals by the High Court would minimise the risk of further appeals and the difficulties of managing conflict of interest issues.

In terms of the Supreme Court's decision in relation to Unison, provided that future price-quality paths are set in accordance with a proper purpose and in accordance with the Commission's statutory powers, they will be lawful and binding on electricity lines businesses. Until such time as the 4A amendments come into force, the current threshold remains in effect.

Microsoft bows out after nine year battle

Bell Gully solicitor Jane Petersen comments on the European Commission's landmark Microsoft decision handed down in September.

Microsoft has given up its battle with the European Commission (the EC), having made the decision not to pursue any further right of appeal against the EC in the competition law proceedings that have carried on for nine years. According to the EC, and in simple terms, the outcome of the case means that in future prices will be lower and customers will have more choice.

In 2004, at the culmination of an investigation that began back in 1998, the EC imposed a €497 million fine on Microsoft for abusing its "dominant position" in breach of Article 82 of the EC Treaty. In September 2007, the European Court of First Instance upheld that decision, agreeing that Microsoft had acted anti-competitively in tying Windows and Windows Media Player, and in refusing to supply interoperability information to other (competing) providers. Microsoft had the option to appeal the court's decision to the European Court of Justice but has elected not to do so. Instead, Microsoft has agreed to dramatically reduce its patent and inoperability licensing fees, and will be required to pay the fine the EC imposed in 2004, as well as a subsequent fine of €280 million issued last year for non-compliance with the 2004 decision. And, it might not end there for Microsoft – the EC has said that it will now rule "as soon as possible" on whether, and how much, to fine Microsoft for its failure to comply with a ruling from March this year that it had overcharged for information.

The EC's decision has been described as a landmark ruling, and most agree that the court's decision will have significant ramifications. At a press conference announcing the changes Microsoft will have to make in order to comply with the ruling, a European competition commissioner made the comment that:

"Put together, these changes in Microsoft's business practices, in particular towards open source software developers, will profoundly affect the software industry. The repercussions of these changes will start now and will continue for years to come."

Despite its apparent victory over the colossal American corporate, the EC has been careful to avoid characterising the outcome of the case as such. The court's decision has also been subject to some criticism from its US counterpart, the Department of Justice, which has alleged that the European Court has favoured "competitors" over "competition". However, such criticisms are not thought to have deterred the Commission, with commentators speculating that the case will have implications for a number of other US companies that are known to be on the EC's radar.

INTELLECTUAL PROPERTY AND INFORMATION TECHNOLOGY

The song is a steal at \$12,000

The recording industry's first major win of its kind against an individual in the fight against music piracy in the US has attracted global attention. In this article, Bell Gully senior associate Heidi Leslie looks at the case some say is a further warning that individuals breaking the law on home computers may face tougher action.

Time for a check-up on internet risk

As aggrieved parties flex their court muscles globally - and New Zealand's own laws tighten –Bell Gully senior associate Heidi Leslie discusses why it may be time for New Zealand business to tackle the risk of staff emails, text messages and even blogs.

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A single mother in small town Minnesota has just been ordered to pay a whopping US\$222,000 (NZ\$291,000) for breaching copyright over the download of 24 songs in a case that is being watched by industry and authorities globally.

The decision is being seen as a landmark one in the global recording industry's drive to combat online music sharing - not just by big-time music pirates but individuals at home - and it's particularly notable by the size of the damages - US\$9250 (NZ\$12,000) for each tune.

In the first lawsuit of its kind to go to trial, the Recording Industry Association of America (RIAA) has been successful in its case against Jammie Thomas (30) who has been ordered by a jury to pay the US\$222,000 in damages for breaching the US Copyright Act. Jammie committed the breach by "making available" music by the likes of Aerosmith and Gun'N'Roses online.

Just this week she lodged an appeal against the size of the damages but not the jury decision itself - reinforcing the potential ramifications for other would-be file sharers.

However, even if her appeal is successful, Jammie likely faces damages of at least \$18,000. The United States Copyright Act allows for claims of "statutory damages" rather than actual damages and these can range from a minimum of US\$750 to a maximum of US\$30,000 per infringement "as the court considers just". The RIAA elected to recover statutory damages and, in this case, the jury went for an amount in the bottom third of the range, awarding damages of \$9,250 per song or \$222,000 for all 24 songs.

Could this happen in New Zealand?

New Zealand's Copyright Act doesn't set out statutory minimum or maximum damages but it does allow for civil court action to be taken where damages must be proven. This means that standard common law considerations of loss and contribution would be used to determine the level of damages.

As a result, damages in New Zealand could in theory exceed \$30,000 per infringement but in practice this is unlikely, especially when the infringer is an individual like Jammie Thomas who didn't profit from her actions, rather than someone engaged in a large piracy operation for profit.

The Sione's Wedding case is a good example. Earlier this year Freddie Junior Higgins was found guilty of stealing a pre-production copy of the movie Sione's Wedding and distributing it. The New Zealand Federation Against Copyright Theft said at the time that South Pacific Pictures estimated that the pirated copies of the film cost the company \$300,000 in lost box office returns and \$200,000 in DVD sales. However, it appears that South Pacific Pictures didn't sue for damages. Higgins did not walk away without paying for his crime - he was sentenced to 300 hours of community service for theft under the Crimes Act and for distribution of copies under the Copyright Act.

Whether the Jammie Thomas case sets off a chain of large awards for damages overseas will be watched with interest - as will the outcome of her appeal.

This article was first published in the Dominion Post, 18 October 2007

Time for a check-up on internet risk

As aggrieved parties flex their court muscles globally - and New Zealand's own laws tighten –Bell Gully senior associate Heidi Leslie discusses why it may be time for New Zealand business to tackle the risk of staff emails, text messages and even blogs.

A high profile case involving Australia's Channel Seven and just last month one involving UK football club Sheffield Wednesday add to the growing body of cases where momentary electronic folly can have lasting consequences. Add to that New Zealand's new anti-spam laws, there has never been a better time for companies to check their own house is in order on this front. Having a strong, clear electronic messages policy and educating staff about it may go some way to stopping employees from sending out emails or texts or writing blogs that may put employers at risk of legal action. Once the policies are in place, they need to change as the use of technology changes.

US company Whole Foods Market Inc. was caught on the hop last week when its chief executive made some postings on external internet forums. In reaction, Whole Foods changed its code of practice to stop employees from making postings about the business of Whole Foods or its competitors on external internet forums not sponsored by Whole Foods. While companies will always need to react to circumstances as they arise, some risks are known and should be accounted for in a good internet and email policy. The following are some key risks that should be covered off.

Evidence

Electronic messages can be introduced in evidence in litigation. The recent high profile Australian case of Seven Network Limited v News Limited is one example of how employee emails were used as evidence to the detriment of the company. The C7 pay TV operation, owned by Seven Network Ltd (Channel Seven), was shut down in 2002 after failing to secure the Australian rules football and rugby league pay television rights. Subsequently, Channel Seven brought a case against News Limited and others claiming that a bid made by them for the AFL rights constituted anti-competitive conduct under the Trade Practices Act 1974 (Australia). Several damning emails written by employees were used in evidence against Channel Seven in proving they failed to make their best offer for the AFL rights when they became available. One email in particular stated: "I would actually like to walk away from the AFL. I do want to retain an action...for abuse of market power...providing that we have a reasonable case."

Unsolicited electronic messages

Companies can now be held liable for unsolicited electronic messages sent or posted by their employees. Some companies think this is just an issue for their marketing department or other departments that send out mass emails. However, individual emails that are "unsolicited" breach the Act as well.

Disclosure of information

While disclosing confidential information is a risk for companies even if they don't use computers, access to email and chat rooms at work tends to accelerate the ability to disseminate information. Electronic messages discussing an employer's confidential information including business, strategy or financial information, may have sweeping and detrimental consequences for the employer including:

- the potential invalidation of pending patents;
- if the company is publicly traded, the manipulation of the share price; and
- the undermining of the company's position by tipping off competitors about plans the company has on a larger scale.

Defamation claims

Defamation claims are a growing threat to employers as a result of the increased popularity of employee blogs. An employer may be liable for an employee's defamatory private blog on topics that fall within the

scope of the staff member's employment or within the employee's actual or apparent authority. Even if a staff member's statements are outside the scope of employment, an employer may still face a defamation suit if the blogging employee is the supervisor of the defamed individual or the employee's blog references the employer. The chances of an innocent employer being a defendant in defamation claims has increased because bloggers often blog anonymously, leaving the employer as the only readily identifiable entity that an action can be brought against. People who feel they have been defamed on the internet are becoming more aggressive about suing parties who might have been involved in making or publishing the remarks. Earlier this year, Google was sued in defamation for failing to remove from its search engine links to published material. Last month the chairman, chief executive and five directors of UK football club Sheffield Wednesday won a High Court ruling forcing the owner of a website to reveal the identities of disgruntled fans who made anonymous internet postings containing abusive remarks about club management.

Harassment claims

An employer may also be subject to liability for harassment claims based on employee blogging. For example, in the American case of *Blakey v. Continental Airlines*, a pilot filed a hostile work environment claim against Continental Airlines after derogatory comments about her were posted on a pilots' electronic bulletin board. The court ruled that Continental Airlines had a duty to take effective measures to stop co-employee harassment when it knew or had reason to know that the harassment was taking place in the workplace.

What should employers do?

A good place to start is reviewing your company's electronic messages policy and checking that it is up-to-date by ensuring that:

- employees are aware of their obligations under the Unsolicited Electronic Messages Act 2007;
- the policy does not relate just to emails, but to all electronic messages;
- wherever possible, employees are to make it clear that views expressed in electronic messages are their personal views and not those of their employer, and opinion only and not fact;
- blogs are included in the policy (even blogs that may be written outside of work in an employee's own time). The benefit of adopting policies addressing private blogs is that it puts employees on notice of the standards of conduct that apply to all blog postings associated with the employee or the employer; and
- employees are reminded of their confidentiality obligations.

The policies should be provided to employees when they join the company and regular reminders are also worthwhile.

UTILITIES AND RESOURCES

New Zealand's Emissions Trading Scheme - how will it work and what are the implications for business?

New mechanisms to combat climate change mean the cost of carbon has now become a commercial reality for New Zealand business. This article reviews the Government's recently outlined Emissions Trading Scheme which, although will only directly impact on a relatively small number of entities, will have economy-wide repercussions.

Meeting the energy challenge - the New Zealand Energy Strategy to 2050

In October the Government released the final version of its Energy Strategy which sets out a long-term framework for addressing the main challenges New Zealand faces, namely the reduction of greenhouse gas emissions to tackle climate change and the security of energy supply. In this update we set out some of the key Government policy initiatives set out in the Energy Strategy designed to achieve those two aims.

New regulations on distributed generation for New Zealand electricity sector

New regulations governing the connection of distributed generation to lines company networks came into effect on 30 August 2007.

New Zealand's Emissions Trading Scheme – how will it work and what are the implications for business?

New mechanisms to combat climate change mean the cost of carbon has now become a commercial reality for New Zealand business. This article reviews the Government's recently outlined Emissions Trading Scheme which although will only directly impact on a relatively small number of entities, will have economy-wide repercussions.

In September this year, the Government announced the framework for a domestic emissions trading scheme in New Zealand. The scheme will be a “cap and trade” system which covers all greenhouse gases (CO₂, CH₄, N₂O, HFCs, PFCs and SF₆) and will eventually include all major sectors (i.e. forestry, transport, stationary energy, industrial processes, agriculture and waste). Participants in the scheme (discussed below) will have an obligation to hold and surrender emission units that match the emissions levels for which they are responsible. It is intended that the scheme be economy-wide by 2013, and although the scheme will only directly impact a small number of entities, it will have economy-wide repercussions.

The objective of the scheme is to operate as a “least cost” option for reducing emissions. Those that can reduce their emissions most cost-effectively will benefit by earning or being given emission units which they can sell on to those who will have more difficulty reducing emissions. In many cases, the cost of greenhouse gas emissions will ultimately be shared by consumers as participants in many sectors are likely to pass on the cost of compliance.

HOW WILL THE EMISSIONS TRADING SCHEME WORK?

Participants

The New Zealand Emissions Trading Scheme (NZ ETS) will include three types of participants:

1. Businesses who will be “points of obligation”, will be required to surrender emission units, and whose participation in the NZ ETS will be mandatory.
2. Those that receive freely allocated emission units or receive emission units for eligible afforestation.
3. Those that participate in trading activities to take advantage of the market opportunities that may arise.

Units and allocation

Allocation of NZUs will be through a combination of gifting and auctioning of units, depending on how different sectors and participants will be affected by the introduction of the NZ ETS and whether they can pass costs through to consumers (as discussed below). The Government has decided to freely allocate units initially in those sectors that will have difficulty passing on the cost of compliance. Sectors such as fossil fuel providers and electricity generators who can pass on cost increases to consumers will have to purchase credits to meet their obligations.

Given that the Government has stated that each New Zealand emission unit (NZU) will be backed by a Kyoto Unit, the total number of NZUs available is likely to be capped at an amount equivalent to New Zealand's global cap on emissions set under the Kyoto Protocol.

Staged entry into the scheme

The forestry sector will be the first sector to enter the NZ ETS, with obligations beginning on 1 January 2008. However the first compliance period (the period for which emissions obligations and emissions will be measured) will not end until 31 December 2009. From 1 January 2009 the liquid fossil fuels sector (mainly transport) will have obligations and the compliance period will end on 31 December 2009,

coinciding with compliance for forestry. It is the Government's intention that these first two sectors in the NZ ETS will trade between themselves (especially given that some forest owners will have an excess of units if they have received a free allocation of NZUs and have no immediate intention to deforest).

Entry of other sectors into the scheme is as follows:

| | |
|--|----------------|
| Stationary energy (including coal, natural gas and geothermal) | 1 January 2010 |
| Industrial process (non-energy) emissions | 1 January 2010 |
| Agriculture (includes farming and horticulture) | 1 January 2013 |
| Waste | 1 January 2013 |

THE REALITY NOW FOR BUSINESS

While details of the scheme are still being digested, there are some clear key implications arising that could impact your business.

Business with "obligations"

Under the scheme, certain businesses will carry specific obligations. The Government has yet to confirm which entities will have what is known as "points of obligation" but when identified these businesses will have an obligation to surrender NZUs, to cover their direct emissions or emissions associated with their product. We do know that for economic efficiency reasons, a point of obligation will generally be an entity at the upstream point of the sector (e.g. fuel companies as compared to motorists). It is anticipated that there will be just over 200 points of obligation in total (plus any foresters who opt in to the scheme) - a relatively small number who will be obliged to participate in the NZ ETS.

These businesses with obligations can expect to be allocated NZUs. The Government has indicated that in many sectors it will freely allocate NZUs to them. However, where an entity with obligations under the scheme is capable of passing on the cost of carbon, such as electricity generators and fuel companies, then the Government will not freely allocate NZUs to them as it would result in their having a windfall gain. The Government has applied the principle that where carbon costs can be passed through or on, NZUs will be auctioned rather than freely given.

The wider business impact

While many businesses will have no obligations under the NZ ETS, the scheme's financial ramifications go beyond those with specific obligations. The cost of carbon arising from the NZ ETS will affect all businesses as the costs flow down and through the economy. For example, we may expect to see an increase in transport and energy costs, and in the costs of products arising from industrial processes.

The costs for a business with NZ ETS obligations will depend on the extent to which it is able to reduce or offset its emissions, so reducing the cost of having to hold NZUs. Entities which try to straight pass on the entire cost of NZUs, which they are originally required to hold, may face resistance from their customers. Consumers will no doubt want to know whether the business or organisation could have reasonably mitigated their unavoidable carbon costs in other ways rather than passing them on.

Credits grow on post-1989 trees

The Government has made a stark change in its position on the forestry sector. No longer will the Government be refusing to part with carbon credits associated with post-1989 forests but instead will now freely allocate NZUs for an increase in carbon stocks after 2008 to foresters who own post-1989 forests and who opt to join the NZ ETS. Providing credits to foresters will contribute significantly to the trading volume and liquidity of the NZ ETS. The Government has also specifically ensured that the timing of including the forestry and transport sectors into the NZ ETS is aimed to encourage trading between the two.

Although opting into the NZ ETS may result in a post-1989 forest owner making a significant financial gain, there will be liabilities associated with being a "point of obligation" in the forestry sector, in

particular when it comes to deforestation or decreases in carbon stocks caused by fire or storm damage etc. Foresters will need to consider the scale of their activities and their long-term plans when considering the benefits and implications of being a point of obligation in the NZ ETS, particularly in comparison to benefits arising from opting into the Afforestation Grant Scheme. This scheme encourages forest plantings by people who do not want to join NZ ETS. The Government would retain the credits and liabilities of these forests, but landowners would receive a grant for the initial planting of unforested land.

Wide market carbon trading

Businesses without obligations under the NZ ETS can choose to join the trading of NZUs. Our experience with the European Union emissions trading scheme suggests that there would be wide market participation in New Zealand. We expect to see traders such as banks, entities with offset projects, and potential points of obligation such as electricity generators, enter the market relatively early on to capitalise on the opportunities including:

- potential points of obligation acquiring NZUs during the early stages of the scheme in order to hold NZUs for future surrender obligations – for example, if they consider the price for NZUs will rise over time as it did in the EU; and
- businesses who carry the passed on cost of carbon and who will be looking to profit through their trading activities to offset those costs.

We have already seen significant interest from foreign players in acquiring emissions units from offset projects in New Zealand and expect that they will also be interested in acquiring NZUs (backed by Kyoto-compliant units) through the NZ ETS. The Government envisages that the NZ ETS will be able to link internationally with other emissions trading schemes.

Growing investment in offset projects

A significant amount of investment by New Zealand entities is expected to be generated in carbon offset projects, including renewable energy resources such as wind farms and landfill gas projects, or projects to capture or reduce carbon emissions. Although the NZ ETS will act as the primary incentive to invest in these projects, incentives also arise under the Government's Sustainable Land Management and Climate Change Plan of Action. The recently released New Zealand Energy Strategy provides for contestable funds to support deployment of marine-based electricity generation and low carbon technologies, and further incentives are also anticipated under the soon to be released National Energy Efficiency and Conservation Strategy.

We also expect to see New Zealand entities with obligations under the NZ ETS investing in offset projects or acquiring Kyoto-compliant units arising from offset projects overseas to help meet their surrender obligations.

Similarly businesses to whom the costs of carbon are passed are likely to look to do the same in order to make a profit by trading units to offset those costs.

Is carbon neutrality still a worthwhile investment?

For some entities the new scheme may mean that the incentive to become certified carbon neutral falls away. Those meeting the direct or indirect costs of carbon arising from the NZ ETS and also paying for non Kyoto-compliant units in order to be certified carbon neutral, will in effect be paying twice for its carbon footprint. Where this is the case, those businesses will need to consider carefully the benefits of being certified carbon neutral against the increased financial costs they are facing. For some entities, such as those battling against the concept of food miles, certified carbon neutrality may make financial sense, but for others it may simply be a financial drain.

Detailed information on the Government's climate change solutions and the impending NZ ETS can be found at www.climatechange.govt.nz.

Update

Since this article was written, the Climate Change (Emissions Trading and Renewable Preference) Bill was tabled in Parliament on 4 December. Part 1 of the bill amends the Climate Change Response Act 2002 to introduce the NZETS.

Climate Change Practice

Bell Gully is advising the Government on legal issues involved in the design and implementation of the NZ ETS. In 2000 we advised the Government on the potential legal framework for an emissions trading scheme, and its drafting of the emissions trading aspects of the Climate Change Response Act. Bell Gully has also been advising business over the last decade on climate change matters, including advising on New Zealand's first transaction on the Chicago Climate Exchange, the sale of emissions units from New Zealand projects under the Kyoto Protocol, offset projects including wind farms and contracts dealing with the passing of carbon costs in the energy sector.

For more information, contact practice group leader [Simon Watt](#)

Meeting the energy challenge – the New Zealand Energy Strategy to 2050

In October 2007, the Government released the final version of its Energy Strategy which sets out a long-term framework for addressing the main challenges New Zealand faces, namely the reduction of greenhouse gas emissions to tackle climate change and the security of energy supply. In this update we set out some of the key Government policy initiatives set out in the Energy Strategy designed to achieve those two aims.

We do not set out in detail all of the matters discussed in the New Zealand Energy Strategy (NZES) since it generally follows the goals and initiatives proposed in the draft strategy released in December 2006. (For a review of the draft strategy please refer to the article [“Draft New Zealand Energy Strategy released on 11 December 2006”](#) in the Summer 2007 Commercial Quarterly). However, this is not to say that the Government ignored the 331 submissions it received on the draft strategy. In the Cabinet paper on the final NZES, the Minister of Energy, David Parker, notes that the NZES vision had been amended to better recognise:

- the importance of both energy supply and demand aspects;
- the role of appropriately regulated markets in delivering security and competitive prices;
- the role of an economy-wide Emissions Trading System in reducing emissions;
- that measures to promote energy efficiency and renewables should be cost-effective;
- that the local environmental impacts of energy generation and transmission should be managed, particularly in the case of renewables; and
- the need to support consumers (both households and businesses) through the transition to emission pricing.

Overview

The development of the NZES has been a whole-of-government process and it is linked to Government’s policies on economic development; sustainability; climate change; carbon neutrality; transport; resource management; and research, science and technology. In particular it is designed to work alongside:

- the New Zealand Energy Efficiency and Conservation Strategy (NZECS) released at the same time as the NZES which sets out the Government’s policies, objectives, targets and means for energy efficiency, energy conservation and the use of renewable energy; and
- the New Zealand Transport Strategy (currently being updated by the Government).

The final NZES has retained the structure of the draft strategy and is divided in to two main parts. The first part sets out the Government’s vision for a sustainable energy system and the key actions which are proposed to meet this goal. Part two details the various initiatives the Government proposes to follow both now and in the future. Overall the NZES focuses on seven areas, with proposed actions in each area. These are:

- providing clear direction on the future of New Zealand’s energy system;
- utilising markets and focused regulation to deliver energy services at competitive prices;
- reducing greenhouse gas emissions;
- maximising the contribution of cost-effective renewable energy resources while safeguarding the environment;
- promoting early adoption of environmentally sustainable energy technologies; and
- supporting consumers through the transition.

Strategic direction for the energy sector

One of the main aims of the NZES is to encourage capital investment in the energy sector by providing clear priorities for the sector. To this end, the Government has based the NZES on two guiding principles, namely:

- investment should occur in energy efficiency measures where this is cheaper than the long-term costs of building extra generation capacity, including environmental costs; and
- for the foreseeable future it is preferable that all new electricity generation be renewable, except to the extent necessary to maintain security of supply. Indeed the NZES states that “there should not be a need for any new baseload fossil fuel generation investment for the next ten years”.

The Government expects all generators, including state owned enterprises (which generate around two-thirds of New Zealand’s electricity) , to take this view into account when considering new generation investments. It is hoped that this will deliver a more diverse energy base, and one less reliant on imported or locally sourced fossil fuels. In particular the NZES predicts a huge increase in wind generation.

The NZES acknowledges that locally sourced gas will continue to be important for New Zealand’s energy security. Concerns have been voiced that the NZES will have an adverse effect on the exploration for gas and, possibly, oil.

Strategic direction for the transport sector

For the transport sector, the key areas identified for action are:

- using renewable fuels, such as electricity and biofuels;
- significantly increasing vehicle efficiency;
- using more efficient modes of transport, including much more public transport; and
- using travel demand management through smarter planning – including the promotion of walking and cycling.

Quantitative targets given

The NZES specifies certain targets to be reached, including:

- working towards having 90% renewable electricity generation by 2025 (based on delivered electricity in an average hydrological year). This would be a significant advance on the current proportion of 70%. The Government is of the view that this target is achievable using current technology and New Zealand’s own resources, and notes that it did not prescribe a 100% renewable target because of security of supply and cost;
- halving domestic transport emissions per capita by 2040; and
- encouraging the use of alternative transport fuels over the next five years.

Regulatory Framework

Of course without details the NZES risks failure of achieving its vision. To support the objectives set out in the NZES, the Government has focused on providing the “right economic framework, through an efficient market, effective infrastructure and supportive regulation”. The immediate measures noted in the NZES include:

- the establishment of the New Zealand Emissions Trading Scheme (ETS) which is seen by the Government as being a core building block for the transformation of the economy. Under the ETS, the electricity sector will face the costs of greenhouse gas emissions from 2010. Electricity generated from fossil fuels will cost more to produce and thereby improve the viability of renewable alternatives. The Government has since introduced the Climate Change (Emissions Trading and Renewable Preference) Bill to establish the ETS. (For details of the framework of the ETS released in September see the article “[New Zealand’s Emissions Trading Scheme – how will it work and what are the implications for business?](#)” in this issue of Commercial Quarterly);

- greater guidance to be given under the Resource Management Act (RMA). Initially this will be through two National Policy Statements under the RMA (expected to be released in 2008) and two National Environmental Standards on electricity transmission to provide guidance to local authorities when they're considering electricity transmission and renewable energy projects. The Government has also indicated that it expects more projects will be called-in (following the call-in of Transpower's North Island grid proposal) in the future under the existing provisions of the RMA and the Ministry for the Environment will be providing guidance on the use of the call-in power;
- the introduction of distributed generation regulations to process connection applications on a more fair and consistent basis;
- revision of the Government's policy statements on the governance of the gas and electricity sectors to reflect the policy directions set out in the NZES, and consideration is being given to regulatory options through the Electricity Act to limit new coal, oil or gas-fired power stations over the next ten years so that private sector power companies do not get a competitive advantage over state owned electricity generators. Since the release of the NZSE the Government has taken this a step further with the inclusion of a 10-year ban on almost all new fossil fuel generation as part of the legislation to set up the ETS (the Climate Change (Emissions Trading and Renewable Preference) Bill). The ban applies to new baseload thermal electricity generation above 10 megawatts that uses more than 20% oil, coal or gas as its fuel source, although there will be scope for exemptions to be made by the Minister of Energy on the recommendation of the Electricity Commission for specific fossil-fuelled generation proposals that address concerns over security of supply. The moratorium applies equally to all generators, whether state-owned or private. The ban will take effect through the inclusion of a new Part 6A to the Electricity Act 1992;
- reducing the limitations on investments by lines companies through amendments to the Electricity Industry Reform Act 1998 to increase supply-side competitiveness and renewable generation investment. The Government has since introduced the Electricity Industry Reform Bill;
- the introduction of a Biofuels Sale Obligation from 1 April 2008 to ensure biofuels are introduced into the New Zealand fuels market;
- the review of the regulatory control provisions in the Commerce Act (which is currently underway) relating to electricity lines businesses and Transpower with a view to increasing energy efficiency initiatives;
- the review of section 62 of the Electricity Act 1992 for lines companies' supply obligations post-2013. (For details on this review see the article "[New regulations on distributed generation for New Zealand electricity sector](#)" in this issue of Commercial Quarterly); and
- the amendment of the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004 to take into account regional climate variations that have an impact on heating costs.

The details of the Government's programmes for encouraging the use of renewable energy are set out in the NZEECS through a range of policies and practical measures.

Monitoring and assessment

The Ministry of Economic Development is responsible for preparing an annual report on the progress of the NZES objectives and the implementation of the NZEECS for the Minister of Energy. The first interim progress report will cover October 2007 to June 2008.

To access a copy of the NZES visit the Ministry of Economic Development's website or click [here](#).

To access a copy of the NZEECS visit the Energy and Efficiency Conservation Authority's website or click [here](#).

To access a copy of the Climate Change (Emissions Trading and Renewable Preference) Bill click [here](#).

To access a copy of the Electricity Industry Reform Bill click [here](#).

New regulations on distributed generation for New Zealand electricity sector

New regulations governing the connection of distributed generation to lines company networks came into effect on 30 August 2007.

Distributed generation is electricity generation that is physically located within an existing lines company network and which therefore does not export electricity directly into the national grid. It can range from small photovoltaic arrays on house tops to larger wind, hydro or gas powered installations.

The Electricity Governance (Connection of Distributed Generation) Regulations 2007 (the DG regulations) were made under the Electricity Act 1992 and provide mandatory processes, and default terms and pricing principles when a generator of electricity within an existing lines company network seeks to connect to that network for the purposes of exporting electricity.

Various forms of DG regulations have been contemplated since 2003. The major points to note in the final regulations are:

- The DG regulations provide a process which must be followed where an embedded generator applies for connection to a distributor's network. This process requires distributors to connect a generator if required to do so by the DG regulations. Distributors cannot contract out of these mandatory approval provisions.
- If the distributor and generator cannot agree separate contractual terms, the DG regulations specify terms (the regulated terms) that govern the connection agreement between the parties. The regulated terms are therefore a mandatory baseline against which connection negotiations between distributors and generators will take place.
- A distributor and a generator may enter into an agreement outside regulated terms, by mutual agreement.
- The DG regulations contain "pricing principles" which apply in the circumstances where the connection is made on the basis of the regulated terms. These principles among other things, require that, unless agreed otherwise, connection charges in respect of distributed generation must not exceed the incremental costs of providing connection services to the distributed generation. The connection charges are to be calculated net of transmission and distribution costs, which an efficient service provider would be able to avoid as a result of the connection of the distributed generation (i.e., avoided cost methodology).
- The DG regulations provide a default set of dispute resolution rules which apply to breaches of the regulated terms or of the DG regulations.
- Distributors must use, in respect of all generators, the same reasonable efforts in processing applications for connection of distributed generation (irrespective of a distributor's direct or indirect interests in the generation).
- The DG regulations provides certain timeframes for the approval of applications and the connection of distributed generation. Distributors are required to report to the Electricity Commission on an annual basis in relation to their compliance with these timings.

Regardless of whether distributors are currently engaged in negotiating distributed generation connection, each distributor from 30 August 2007 is required to make publicly available (free of charge) from both office and internet site the following:

- application forms for connection of distributed generation¹¹;
- the distributor's connection and operation standards (including, a congestion management policy, emergency response policy and the distributor's safety standards); and

¹¹ The application forms must specify the information (including any supporting documents) that must be provided with an application

- a copy of the regulated terms, together with an explanation of how the regulated terms will apply if:
 - approval to connect distributed generation is granted; and
 - the distributor and the generator do not enter into a connection contract outside the regulated terms;
- a statement of the policies, rules, or conditions under which distributed generation is, or may be, curtailed or interrupted from time to time in order to ensure that the distributor's other connection and operation standards are met; and
- the application fees specified by the distributor in respect of applications for connection of distributed generation.

It is therefore important for all lines companies to ensure that their current policies and application forms are updated and published to reflect the new requirements of the DG regulations.

BELL GULLY NEWS

New Zealand climate change legal team ranked among best in world

Bell Gully has been named as one of just 12 law firms globally who are leaders in providing advice on climate change. Wellington-based partner Simon Watt has also been named one of the top 10 climate change lawyers in the world by UK-based researchers Chambers Global.

Global research places Bell Gully as market leader

A guide to the world's leading business lawyers has again ranked Bell Gully a clear leader overall among Zealand law firms. Chambers Global Guide is produced by UK legal publisher Chambers and Partners after independent research and interviews with lawyers and clients. The 2008 edition sees Bell Gully awarded top tier rankings in seven major practice areas and 28 of its partners and a senior associate singled out for their expertise - far ahead of other major New Zealand firms.

Bell Gully advises on Opus public share offering

Bell Gully has advised on the initial public offering of shares in infrastructure consulting group Opus International. The offer of 22 million existing shares and seven million new shares opened to the public on 8 October and the company listed on the NZSX on 30 October. New Zealand-based Opus International, a subsidiary of Malaysia's Opus International Group, provides asset development and asset management consulting services for infrastructure in the fields of engineering, architecture, planning and property management.

Corporate lawyer rejoins Bell Gully team

Amon Nunns has returned to Bell Gully Wellington after three years as a corporate finance lawyer in New York and London. Bell Gully's new senior associate has been with major firm Cravath, Swaine & Moore LLP since 2004 where his work principally involved acting for major investment banks in the issuance and sale of debt and equity securities and acting for private equity firms in the management of mergers and acquisitions.

America's Cup delivers lawyer back to Bell Gully

An America's Cup syndicate lawyer has returned to practice in New Zealand with Bell Gully. Senior associate Gillian Williams left Bell Gully three years ago to join BMW Oracle Racing in Valencia as a legal adviser. A keen racing sailor who did an Olympic campaign in the Europe dinghy, Gillian was involved in advising on diverse legal aspects of the BMW Oracle challenge including agreements and contracts, the tax and immigration aspects of locating the team in Spain, and America's Cup rules compliance and disputes.

For further details and more news visit: <http://www.bellgully.com/>

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]
- Ministry of Labour [www.dol.govt.nz]
- New Zealand Government [www.govt.nz]
- NZ Government E-Commerce Information [www.ecommerce.govt.nz]
- NZ Treasury [www.treasury.govt.nz]
- New Zealand Trade and Enterprise [www.nzte.govt.nz]
- Office of the Clerk of the House of Representatives [www.clerk.parliament.govt.nz]
- Parliamentary Counsel Office [www.pco.parliament.govt.nz]
- Statistics New Zealand [www.stats.govt.nz]

New Zealand regulatory agencies and organisations

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

New Zealand commercial sites

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

Australian 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

- NASDAQ [www.nasdaq.com]
- New York Stock Exchange [www.nyse.com]
- United States Securities and Exchange Commission [www.sec.gov]

AUCKLAND VERO CENTRE, 48 SHORTLAND STREET
PO BOX 4199, AUCKLAND 1140, NEW ZEALAND, DX CP20509
TEL 64 9 916 8800 FAX 64 9 916 8801

WELLINGTON HP TOWER, 171 FEATHERSTON STREET
PO BOX 1291, WELLINGTON 6140, NEW ZEALAND, DX SX11164
TEL 64 4 473 7777 FAX 64 4 473 3845

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