



**BELL GULLY**

# Financial Services Quarterly

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WINTER 2008

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Welcome to the Winter 2008 issue of *Financial Services Quarterly*, a review of current legal issues in the financial sector.

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

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

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

## In the courts

### **Consumer credit test case provides guidance on fees**

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### **Lender has no duty to borrower in relation to a quantity surveyor appointed by a lender**

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### **Solicitors undertakings are assignable**

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### **Discharge of mortgage not breach of guarantor's rights**

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### **Condition precedent to give guarantee insufficient**

Where a loan agreement required a separate guarantee as a condition precedent, failure to obtain a separate guarantee meant that no guarantee was given.

## Legislation/In Parliament

### **Key aspects of the Financial Advisers Bill still under consideration**

The Finance and Expenditure Committee has recently released its second interim report on the Financial Advisers Bill and has called for a further round of public submissions on its latest proposals. In this article, Bell Gully partner Haydn Wong re-looks at the main aims and expectations of the Bill as introduced last year and outlines the current changes under consideration.

### **Trans-Tasman mutual recognition of securities offerings – about to become a reality**

After falling into abeyance for the last two years, there has been a sudden flurry of activity towards an agreement between the New Zealand and Australian governments for the mutual recognition of securities offerings in the two countries.

## Recent developments

### **Finance companies forum announcement**

Following its April enquiry into listed companies, NZX Regulation held a forum to consult on issues related to market disclosure on 28 May.

### **Capital markets development taskforce announced**

Commerce Minister Lianne Dalziel has launched a taskforce that will see the government working together with the private sector to develop capital markets in New Zealand.

### **Derivatives guide**

Bell Gully banking and finance partners David Craig and Jonathan Ross have updated a guide on legal issues relating to derivatives activity in New Zealand.

### **eDealing update**

An update on progress with electronic dealings of land instruments.

## In the courts

### Consumer credit test case provides guidance on fees

*The dismissal of charges against a finance company in a test case over loan fees should bring greater clarity for an industry that is increasingly under the watch of New Zealand regulators.*

The Commerce Commission prosecuted a large New Zealand lender to low-income borrowers in the first case of its type under the Credit Contracts and Consumer Finance Act 2003 (the **CCCFA**). Not surprisingly, many industry participants were interested in the outcome.

The Auckland District Court<sup>1</sup> has dismissed charges that the lender breached the CCCFA by charging excessive fees to borrowers who repaid loans early.

The decision provides helpful guidance that lenders are not obliged to use the regulatory formula to calculate their early repayment fees, and may use an alternative approach if that is more appropriate to the structure of their business. However, the decision also reinforces the need for lenders to be able to show that their fees are calculated on actual estimated costs and losses, and are not simply arbitrary.

The Commission has announced its intention to appeal the District Court decision.

#### **The prosecution**

The Commerce Commission's prosecution related to the lender's prepayment fees. The lender was charged with offences over the fees it charged on 50 fixed-rate fixed-term loans that were fully repaid before their contractual date for repayment.

#### **CCCFA's provisions**

The CCCFA specifies that a fee charged by creditors on early repayment of a consumer loan must not exceed a reasonable estimate of a creditor's loss from early payment. The loss may be calculated using either the "safe harbour" formula set out in the regulations, or "*an appropriate procedure set out in the consumer credit contract for calculating that loss*". Prepayment fees calculated using the safe harbour formula are deemed to be reasonable.

The safe harbour formula calculates the loss as the present value of the difference between the interest payments the creditor was expecting under the original contract and those that it can obtain by re-lending the repaid funds at prevailing interest rates. The formula assumes that the creditor can mitigate its loss by re-lending the repaid funds. If interest rates have not fallen since the original loan was made, then the creditor is considered to have suffered no loss.

Many lenders have chosen not to use the safe harbour formula because it does not capture their actual losses on prepayment, such as marketing and broker commission costs. Nor does it reflect the fact that, in many cases, re-lending is unrelated to prepayment. Until now, the Commission has taken the narrow view that any formula that results in a higher calculation of loss than the safe harbour formula is likely to be "unreasonable" and to breach the CCCFA.

#### **The Commission's case**

The lender's prepayment fee was calculated on the basis of the difference between the rate charged on the loan and the 90 day bill rate, plus a margin of 1.9%, for a 90 day period. The Commission alleged that this resulted in an unreasonable estimate of the lender's loss because the formula:

- imposed an arbitrary 90 day interest period that did not relate to the time taken to re-lend funds;
- had no regard to changes in prevailing interest rates and therefore no regard to a variation in the rate at which funds would be re-lent; and

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<sup>1</sup> *Commerce Commission v Avanti Finance Limited* Auckland District Court 10 June 2008

- did not take into account mitigation of loss by re-lending prepaid funds.

The Commission argued that the formula captured three months of future profit in a situation where the creditor had use of the prepaid funds, no risk associated with those funds, and offered no service to the prepaying debtor. The safe harbour formula would not have allowed the lender to claim a prepayment fee because interest rates had increased over the relevant period.

### **The lender's defence**

The lender argued that its loss was the unearned interest on the loan over the remainder of the loan term, less the amount saved by repaying the prepaid funds into its bank, plus the administrative costs incurred on early termination (which the lender did not charge a separate fee for). The lender's formula was intended to estimate that loss of margin. In fact, according to the lender's expert witness, the company's actual loss was greater than the amount of its prepayment fee on all but one of the 50 loans.

The lender contended that the safe harbour formula was inappropriate for its business because subsequent lending would occur regardless of any prepayment. The lender had maintained a significant unused bank facility during the relevant period, meaning that it had excess lending capacity. This capacity meant prepayment created no further opportunity to re-lend the prepaid funds.

### **The judgment**

The judge found that a creditor's loss is the gain the creditor would have made if the contract had run its course and was not prepaid, subject to the creditor's obligation to mitigate its loss. In this case, the judge said that prepayment did not create new lending opportunities for the company, but merely reduced its borrowings. The court agreed with the lender that the safe harbour formula did not reflect its actual loss because there was no link in the lender's business between prepayment and subsequent re-lending. The judge commented that the legislation does not stipulate how the lender should run its company or source its funds and the court was satisfied that the lender's formula was a reasonable estimate of its loss, and so dismissed the charges.

This decision is welcome recognition that the safe harbour formula is not always the right way for creditors to calculate loss from prepayments and that they have the freedom to adopt a formula that reflects their business model.

## What exactly is owed to a vendor PMSI holder when the purchaser goes into receivership?

*In this case, the High Court determined how to calculate what was owed to a vendor PMSI holder ahead of a general security holder after receivers were appointed.*

This case<sup>1</sup> was summarised in the Autumn 2006 issue of *Financial Services Quarterly* in the context of whether or not an overly broad financing statement was misleading. The determination was that it was not and that the vendor, who had a purchase money security interest (a **PMSI**), had priority over the bank, which had a subsequent ranking general security interest.

This hearing, in the High Court at Auckland, was about how the amount payable to the vendor PMSI holder ahead of the general security holder should be calculated. The case was brought by the receivers who argued that the onus was on the vendor to identify the goods it had supplied and for which it had not been paid, which was impossible, and that, therefore, the security was worthless.

The receivers argued that the party seeking to enforce a security interest must be the party to establish what property was subject to that security, citing a pre-Personal Property Securities Act (**PPSA**) decision<sup>2</sup>. The judge did not consider that the PPSA had made a material change requiring the general approach of that pre-PPSA decision to be distinguished.

The arrangement was a standard vendor-purchaser retention of title relationship where the purchaser paid rounded amounts as and when it could. The purchaser was generally in arrears, both before the PMSI was perfected by registration on the Personal Property Securities Register, and for the six months between registration and appointment of the receivers. The judge determined that it was appropriate to infer that oldest debts (i.e. for stock supplied first) would be paid first, the default position based on *Clayton's case*<sup>3</sup>.

The receivers argued that, if this usual presumption was applied, there would need to be a "ruling off" of the indebtedness as it existed on the date of registration of the PMSI so that all payments made by the purchaser after that date were applied to indebtedness incurred after that date.

An analogy was made with section 293 of the Companies Act 1993. Section 293 provides that a charge over any property of a company is voidable by a liquidator if the charge was given within one year of the liquidation and, at the time the charge was given, the company was unable to pay its debts. However, subsection (4) provides that this rule does not apply to charges securing the unpaid purchase price of property. Subsection (5) goes on to provide that, for the purposes of subsection (4), where a charge was given within one year before liquidation, all payments received by the guarantee of the charge (in this case, the vendor) after it was given are deemed to have been appropriated towards payment of property sold on or after giving the charge. The court decided that, in the absence of the retention of title arrangement, sub-clause (5) would have applied. The retention of title arrangement meant that the property in question was owned by the vendor, and not the purchaser, so could not apply to the purchaser.

However, the court conceded that post-PPSA jurisprudence has acknowledged the need for symmetry between the PPSA and the Companies Act. Specifically, the Court of Appeal<sup>4</sup> recognised the need to treat property in possession of the purchaser, but subject to retention of title by the seller, as "owned" by the purchaser for the purposes of the PPSA. On this basis, the court decided that the analogy with section 293 of the Companies Act was valid and agreed with the "ruling off" requested by the receivers.

The amount owed to the vendor was therefore calculated as the cost of sales to the purchaser in the period following registration of the PMSI, less amounts paid by the purchaser to the vendor during that period.

The judge noted that the outcome was potentially detrimental to PMSI holders. This is because its application would mean that, if a purchaser becomes insolvent within one year of a PMSI being perfected,

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<sup>1</sup> *Re Service Foods Manawatu Limited (in receivership and liquidation): New Zealand Associated Refrigerated Food Distributors Limited v Simpson and Walton* High Court, Wellington, CIV 2007-485-1563, 24 April 2008

<sup>2</sup> *Geal Investments Limited v Ivil Hotels* (1992) 4 NZBLC 102,899

<sup>3</sup> *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572

<sup>4</sup> in *Dunphy v Sleepyhead Manufacturing Co Limited* [2007] NZCA 241

amounts owing at the time of perfection of the PMSI could only be recovered after full payment of amounts owing after perfection of the PMSI.

## Suppliers beware: take the extra step and register your security interest

*Two recent High Court decisions highlight the importance for suppliers to ensure that they have a registered security interest in goods supplied to customers but not paid for.*

It is common practice for suppliers to try to secure payment for goods supplied to a customer by including either a retention of title clause or a more general security interest in their terms of trade or supply agreements. However, without taking the extra step to perfect those security interests by registering a financing statement on the Personal Property Securities Register (the **PPSR**), the supplier will not be afforded any protection against non-payment where there are other creditors with competing registered security interests over the same goods.

In two recent High Court cases involving suppliers caught up in the receivership and subsequent liquidation of EXFTX Limited - formerly Feltex Carpets Limited, neither supplier had registered financial statements on the PPSR. In order to avoid being merely an unsecured creditor for the amounts owed to them, they had to argue that their respective arrangements did not fall under the Personal Property Securities Act 1999 (the **PPSA**) regime. Both were unsuccessful.

Had these suppliers taken full advantage of the PPSA regime by registering a purchase money security interest (a **PMSI**), they would have had what is known as a "super-priority" over all other secured parties, including both of Feltex's banks' general security interests.

### ***Segard Masurel (NZ) Ltd v Nicol***<sup>1</sup>

Segard routinely supplied wool to Feltex under the terms of a supply agreement. The supply agreement provided that "*payment will be made in cash on delivery on the contractual date of delivery, or actual received date if delivery has been delayed, or receipt of invoice if invoice not received until after delivery date.*" In the weeks leading up to Feltex being placed in receivership, Segard provided three batches of wool for which payment was not made on delivery. However, Segard had allowed the wool to remain on Feltex's premises after receiving an undertaking that the wool would be stored separately and not touched until payment was made.

When Feltex was placed in liquidation, Segard applied for summary judgment in the District Court for the outstanding amount of the invoices on the ground that, since payment was not received at the time of delivery, title had not passed to Feltex and the goods were being held on trust for Segard until payment was made.

The District Court found that Segard had unconditionally appropriated title in the wool to Feltex on delivery and that Segard was simply an unsecured creditor of Feltex.

As an unsecured creditor, Segard didn't have an interest in the wool and its claim was defeated by the perfected security interests of the two banks, both of which had registered financing statements on the PPSR.

The District Court also held that, if title had not passed to Feltex on delivery of the wool, in any event the supply agreement would have been a conditional sale agreement which would have been caught by the PPSA, but at least Segard would have been a secured creditor.

When Segard appealed to the High Court, it upheld the District Court's findings on both grounds.

On the question of whether Segard had unconditionally appropriated title in the wool to Feltex on delivery, the court noted that:

- there was no express retention of title clause in the supply agreement;
- the supply agreement contemplated that payment could be made after delivery of the wool where an invoice was not received on the delivery date; and

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<sup>1</sup> 12 February 2008 High Court, Auckland, CIV 2007-404-003603

- factual evidence indicated that, as was the case regarding the outstanding invoices, Segard did not usually insist that payment occur at the time of delivery.

As such, under the Sales of Goods Act, Segard was deemed to have unconditionally appropriated the wool to the contract and title in the wool passed to Feltex on delivery.

On the second issue, the High Court agreed with Segard that it was not necessary as a matter of business efficacy to imply a retention of title term into the supply agreement where Segard chose not to exercise its right to insist on payment at the time of delivery. However, the court did not agree with Segard that the supply agreement was simply an agreement for cash on delivery, rather than a conditional sale agreement.

In the High Court's view, by failing to insist on payment on delivery, Segard was effectively granting credit when the goods were delivered without payment. Further, in order for this part of Segard's argument to succeed, the court noted that it must be assumed that title in the wool had been retained by an implied term to that effect. Accordingly, there was an agreement to sell, subject to retention of title, and the transaction therefore fell within section 17(3) of the PPSA and was a security interest under the PPSA.

### ***JS Brooksbank & Co (Australasia) Limited v EXFTX Limited (in receivership and liquidation)***<sup>1</sup>

In the second case, JS Brooksbank (**JSB**) also supplied wool to Feltex.

The parties entered into a supply agreement that included a security interest in the form of a retention of title clause. If JSB had perfected its security interest by registering it on the PPSR, it would have amounted to a PMSI and had priority over Feltex's other secured creditors.

JSB did not do this and instead tried to protect its position by requiring payment before delivery. The supply agreement provided that delivery of wool was only to be made on receipt of cleared funds and that upon receipt of notification of cleared funds, unconditional ownership of wool would pass to Feltex. Wool brokers were therefore only authorised to release the wool to Feltex on receipt from JSB of a buyer delivery order.

Subsequently, an employee of Feltex mistakenly wrote to wool brokers requesting that they release wool owned by JSB to Feltex when payment had not yet been made. Brokers then released wool to Feltex without JSB's authority.

JSB applied for judgment against Feltex, claiming that Feltex had deliberately requested delivery of the wool disregarding JSB's right to possession and that Feltex's subsequent failure to return the wool, which had been set aside on JSB's request, amounted to conversion.

Feltex opposed the application on the basis the JSB had an unperfected security interest in the wool, which was subject to the perfected security interest of Feltex's bank lenders.

JSB contended that Feltex's affirmative defence was not relevant given that JSB had no security interest in the goods because Feltex had no right to an interest in the wool until payment had been received under the terms of the supply agreement.

The court disagreed with JSB's submission that no security interest had been created in the wool, stating that, where goods have been delivered to the customer without receipt of payment for such goods, and where the supplier has retained title in such goods, then a security interest arises under the PPSA. The court determined that it is irrelevant whether possession has passed to the customer by mistake or by agreement and it affirmed that conditional sale agreements, including an agreement to sell subject to retention of title, are expressly included within the definition of a security interest in the PPSA.

The court noted that, although an element of consensus is necessary for the creation of a security interest, such consensus is only required in relation to the transaction pursuant to which the security interest arises (in this case, the supply agreement containing a retention of title clause) and not in the circumstances under which possession was transferred from one party to another.

Therefore, the court held that JSB had a security interest in the wool supplied to Feltex under the PPSA. However, the failure to register a financing statement in respect of that security interest meant that JSB

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<sup>1</sup> [2008] NZBLC 102, 113

lost the “super-priority” it would otherwise have enjoyed due to its retention of title in the wool and, accordingly, the bank’s claim over Feltex’s assets took priority.

The court dismissed the claim for conversion as, while JSB itself did not intend to deliver the wool, JSB’s agents voluntarily delivered the wool to Feltex and a voluntary transfer of possession from the agent of the supplier to the buyer is a lawful transfer and cannot amount to conversion. There was no fraud or deliberate deception involved on the facts.

#### **Practical implications**

Both of these cases serve as reminders that, where a supplier has any concerns over payment being made for goods, it is imperative that steps are taken up-front to avoid later disappointment. In particular:

- supply agreements and/or terms of trade should be reviewed to ensure that they include a security interest that is consistent with the PPSA and is appropriate for the supply arrangements;
- as priority between competing security interests is now determined under the PPSA, suppliers should ensure that they perfect their security interests by registering a financing statement on the PPSR within the applicable time frame. Failure to do so could result in their security interests being defeated by perfected security interests in respect of the same goods; and
- suppliers must ensure that the information provided in the financing statement is accurate. If a registration is “seriously misleading” because of an error or omission in a financing statement, priority of the supplier’s security interest may be compromised.

## Obtain CCCFA declarations at earliest opportunity

*The Court of Appeal decided that acceptance of a loan offer comprised the credit contract, and not execution of the formal loan agreement. This meant that declarations that the loan was for investment purposes should have been obtained at the time of acceptance of the offer.*

In this case<sup>1</sup>, a couple completed an application form attached to a loan offer from a lender. The loan was to fund a subdivision of their property. An acceptance fee was paid and, a month later, the couple completed declarations confirming that the loan was to be used primarily for business or investment purposes. Another month later, they signed the loan and security documentation and completed further declarations on similar terms.

In the Court of Appeal, the couple claimed that the loan was in fact for non-business purposes and that, accordingly, the agreement was a consumer credit contract in terms of the Credit Contracts and Consumer Finance Act (the **Act**). If that was the case, the lender would be prohibited from enforcing the loan because proper disclosure had not been made as required by the Act.

The lender maintained that the contract was not a consumer credit contract, that the contract was the formal loan agreement, and that the couple's declarations had been given before that was signed. Therefore, the presumption in section 13 of the Act that a credit contract is a consumer credit contract was not applicable.

The Court of Appeal decided that acceptance of the loan offer comprised the credit contract, and not signing of the formal loan agreement. This determination was on the basis that the couple would not have been likely to have paid the substantial application fee had they not been committed to borrowing the money. Because the declarations were not made at, or before, that time, the presumption in section 13 of the Act was not rebutted.

However, in this case, the lender was saved because the totality of the evidence (including, but not limited to, the declarations made by the couple) proved that the loan was in fact to be used primarily for business and/or investment purposes, and the evidence rebutted the section 13 presumption.

This case should serve as a warning to lenders to ensure that, where loans to individuals are for business or investment purposes, declarations to that effect are obtained at the earliest possible opportunity.

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<sup>1</sup> *Burke v Advanced Securities Limited* [case citation]

## **Lender has no duty to borrower in relation to a quantity surveyor appointed by a lender**

*The High Court decided that a lender did not have a fiduciary duty to a borrower when it appointed a quantity surveyor to determine when progress payments under a construction loan were payable.*

This case<sup>1</sup> was brought by a borrower seeking to obtain an injunction prohibiting the lender from completing a mortgagee sale of his property.

The borrower purchased a property with the assistance of a loan secured by a mortgage over the property.

Subsequently, trustees of the borrower's family trust entered into a loan with the same lender to develop the house on the property. The loan agreement contained the following conditions:

- each drawdown amount was to be fully certified by a quantity surveyor appointed by the lender; and
- the existing mortgage over the property was to be transferred to the trust.

The loan agreement limited the liability of the two other trustees to the assets of the trust. The liability of the borrower was not limited.

A few days later, a guarantee was given by the borrower in respect of the obligations of the trust. At the same time, the lender also consented in writing to a transfer of the property from the borrower to the trust, subject to the existing mortgage.

The lender appointed its quantity surveyor and construction commenced. Ten approved drawdown requests were received by the lender over a seven month period. At the end of that period, the quantity surveyor considered that the amount remaining in the construction budget to complete the work was sufficient. However, no further drawdown requests were received from the quantity surveyor and the lender raised this with the trust. By this stage, relations between the builder and the borrower had significantly deteriorated and construction had ceased.

A few months after the trust stopped making payments under its loan, the lender issued letters of demand followed by formal Property Law Act default notices. Finally, the lender undertook a tender process for mortgagee sale which resulted in it entering into an agreement for sale and purchase of the property.

The trust applied for an interim injunction to stop settlement of the mortgagee sale. The test for determining whether an interim injunction should be granted is:

- is there a serious question to be tried in the proceeding; and
- where does the balance of convenience lie?

The trust argued that the mortgage was continuing security for the borrower's personal indebtedness to the lender and did not secure the trust's loan facility because there was no link of that facility to the mortgage (that is, the borrower had not guaranteed the facility). Contrary to the signed electronic copy of the guarantee provided by the lender, the trust argued that the borrower had not signed the guarantee. The trust alternatively argued that, if it transpired that the guarantee did exist, then it was unenforceable because it was signed by the borrower by mistake or by reason of misrepresentation.

The court rejected both arguments. In relation to the first argument, the court held that it was satisfied on the basis of ample evidence, including a copy of the guarantee and a solicitor's certificate prepared in relation to the guarantee, that a guarantee was in fact signed by the borrower. On the second argument, the court referred to the solicitor's certificate, which clearly certified that the solicitor acting had fully explained the nature and effect of the provisions of the securities, deeds and agreements.

The court noted that, as a trustee of the trust, the borrower would have understood that the intention of the parties was that the lender's security for the loan to the trustees would include a mortgage over the property. She would have been aware of the changed basis upon which matters were proposed to proceed and that the property would instead be transferred subject to the existing mortgage. She was clearly aware that, in the circumstances, the lender would require her guarantee to ensure that the mortgage would provide security for the loan.

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<sup>1</sup> *Piper v ANZ National Bank Limited* High Court, Auckland CIV 2008-404-2686

In any case, even if the guarantee had not been executed, the borrower was personally liable under the loan agreement. Her personal liability was secured by the mortgage, so even were it not for the guarantee, the amounts would be secured under the existing mortgage. As such, there was no serious question to be tried that the existing mortgage did not secure the loan facility to the trust.

The trust also argued that, by reason of the lender's appointment of the quantity surveyor, it owed contractual, tortious and fiduciary duties to the trust and that the lender had breached those duties.

#### *Contractual duties*

The court held that the condition precedent to drawdown requiring certificates from a quantity surveyor was plainly for the benefit of the lender and directed at ensuring the maintenance of the value of the security. There was no express or implied provision in the loan agreement imposing contractual duties on the lender to protect the trust from poor workmanship or cost over-runs.

#### *Tortious duties*

The court held that, even if the lender owed a duty in tort to the trust, there was no evidence of a breach of the duty. The trust's claim was essentially that the lender was liable to the trust for negligent misstatements by the quantity surveyor. The court determined that there was no express or deemed assumption of responsibility by the lender to monitor for the benefit of the trust the reliability of the advice or information provided by the quantity surveyor to the lender.

#### *Fiduciary duty*

The court determined that the relationship between the lender and the trust was not a fiduciary one. The relationship did not go beyond a normal banker-customer relationship and the lender did not assume responsibility to safe-guard the trust's interests before its own.

## Solicitors undertakings are assignable

*An undertaking given by solicitors to a lender is assignable along with the rest of the loan documentation.*

This case<sup>1</sup> was brought by a lender who took the benefit of an assignment of the loan and security documentation when it purchased a loan from another lender.

When the loan agreement was entered into, the borrower's solicitors undertook to the original lender to hold deposit funds and not to release them without the original lender's prior consent.

The solicitors received deposit funds and transferred the money to the borrower, which subsequently went into liquidation.

The issue was whether the undertaking given to the original lender was enforceable against the solicitors by the assignee lender.

The court decided that the undertaking was capable of being assigned because anything that the law recognises may be subject to ownership may be assigned, and the undertaking was one of the benefits of the loan agreement.

The solicitors accepted that the undertaking was enforceable by the original lender and it was therefore a chose in action, which is assignable pursuant to section 130 of the Property Law Act 1952.

The solicitors were aware of the assignment because they attended to the borrower on execution of the assignment documentation. While the assistant judge recognised that there may be some merit in an argument that there was no *proper* notification of the assignment, it was not enough to dismiss the summary judgment.

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<sup>1</sup> *Dominion Finance Ltd v Cavell Leitch Pringle and Boyle* High Court, Christchurch, 23 April 2008, CIV 2007-409-002674

## Discharge of mortgage not breach of guarantor's rights

*This case was an unsuccessful appeal by a guarantor against summary judgment entered against him after the company whose loan he guaranteed went into liquidation.*

In this case<sup>1</sup>, a lender registered a mortgage over a borrower company's property and took a guarantee from the company's director as security for repayment of a loan.

The mortgaged property was sold, with the purchase price payable in three instalments, two of which were due prior to settlement of the sale.

At the time the company started showing signs of financial difficulty by failing to pay instalments due under the loan, the purchaser had paid the first two instalments of the purchase price. Around this time, the guarantor resigned as a director of the company but remained a guarantor of the loan.

Realising that, if the company was wound up, the purchaser would be an unsecured creditor for the amount of the first two instalments, the purchaser purchased the lender's securities, including the mortgage and the guarantee. Notice of assignment of the securities was given to the company and to the guarantor.

Following the passing of the date for settlement of the sale of the mortgaged property, the purchasers issued specific performance proceedings and took possession of the property. The company subsequently went into liquidation and the purchaser concluded the sale with the liquidators.

Summary judgment was entered in favour of the purchaser against the guarantor for the balance outstanding and the guarantor appealed on the basis of the following arguments:

- by discharging the mortgage, the mortgagee had breached an obligation to act in good faith by defeating his right of subrogation and further prejudicing his potential liability as guarantor; and
- by discharging the mortgage in breach of the good faith obligation, the contract could be reopened under sections 10 and 11 of the Credit Contracts Act 1981.

The court decided that:

- as the guarantor's liability under the guarantee was as if he was a principal debtor, his rights of subrogation and indemnity could not have arisen until the loan was fully paid; and
- the guarantee clearly stated that the guarantor was not discharged, nor were his obligations affected, by failure to enforce a relevant document or by releasing another party from a relevant document.

This is a very strong case for the sanctity and freedom of contract and a comforting interpretation of the "boiler plate" provisions of what have become standard contracts of guarantee.

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<sup>1</sup> *Buxton v Roc Mac* [2008] NZCA 129

## Condition precedent to give guarantee insufficient

*Where a loan agreement required a separate guarantee as a condition precedent, failure to obtain a separate guarantee meant that no guarantee was given.*

In this case<sup>1</sup>, the format of the loan agreement gave the impression that there were separate groups of covenantors and guarantors but recorded both in the same box. In addition, it specified as a condition precedent that those named as guarantors were to sign a separate guarantee before the loan was advanced.

When the loan was not repaid, the lender sought summary judgment against the defendant as guarantor. The defendant argued that he was not a guarantor because he had not signed a separate guarantee.

The judge determined that all parties whose names were recorded in the same box on the agreement should be considered to have the same status and that the draftsman ought to have made it clear which were covenantors and which were guarantors.

If the lender advanced the loan before satisfaction of the condition precedent that separate guarantees were to be given, then this was the lender's risk.

In addition, the agreement required guarantors to receive independent legal advice. The judge noted that although this was usually to avoid a claim of undue influence, it would be anomalous if this was only required when signing a separate guarantee and not where liability as guarantor arose under the loan agreement.

Accordingly, it was found that the defendant was not liable as guarantor.

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<sup>1</sup> *GH Securities Trustees Ltd v Nielsen* High Court, Auckland, 16 April 2008, CIV 2007-404-5413

## Legislation/In Parliament

### Key aspects of the Financial Advisers Bill still under consideration

*The Finance and Expenditure Committee has recently released its second interim report on the Financial Advisers Bill and has called for a further round of public submissions on its latest proposals. In this article, Bell Gully partner Haydn Wong re-looks at the main aims and expectations of the Bill as introduced last year and outlines the current changes under consideration.*

#### Background

The Financial Advisers Bill was introduced into Parliament in December last year and received its first reading in February this year. Concerns about certain aspects of the Bill prompted Commerce Minister Lianne Dalziel to take the relatively unusual step of proposing changes to the Bill to be considered as part of the Finance and Expenditure Committee's review of it.

To date, there have been two rounds of public consultation on the Bill during the select committee process which have been followed by two interim reports on the Bill. The committee has again invited submissions on its most recent report which indicates that the committee is considering further changes in the direction of the Bill. Submissions close on 22 August.

However, it is still only concepts which are being debated. Again, the committee's latest proposed changes have not been supported by drafted amendments to the Bill, which leaves considerable scope for uncertainty in terms of practical outcomes since the devil will be very much in the detail to come.

In a recent speech to the Institute of Financial Advisers, Lianne Dalziel indicated that the decision on whether an updated draft Bill will be released for comment before it is reported back to Parliament is a decision for the select committee, but went on to note that she would be concerned at a delay which would not allow sufficient time for the Bill to pass before the General Election. Given that the final select committee report is due in Parliament by 1 September, it seems likely that any further amendments to the Bill will be in the Committee of the Whole House by way of a Supplementary Order Paper. Although the Minister has indicated that her officials will continue to work with industry during this phase of the Bill, the process will be necessarily pressurised given the tight timeframes that will apply at that stage and the scope for amendment limited as a consequence.

#### Aims and expectations

The Financial Advisers Bill forms part of the wider financial services law reform aimed at tightening the regulation of financial advisers and financial service providers and increasing protections for members of the public when seeking financial advice. However since the Bill was first introduced the Commerce Minister has indicated that the Bill has undergone a change in focus. The recent collapse of finance companies, together with industry feedback and investor responses, has meant that instead of the Bill being primarily about reviewing the regulations around the financial sector and encouraging industry participation, the focus "is now on rebuilding investor confidence as quickly as possible".

As drafted, the Bill has three aims:

- *To ensure that members of the public can make informed decisions in deciding whether to use a financial adviser and in assessing a financial adviser's financial advice.*

Financial advisers will be required to disclose their experience and qualifications, certain criminal convictions, fees and potential conflicts of interest (which will replace the investment adviser disclosure obligations).

- *To ensure that people acting as financial advisers have sufficient experience and expertise to provide advice in their particular area.*

The Bill requires that all financial advisers are registered and meet the criteria for receiving and maintaining registration.

- *To hold financial advisers accountable for the advice that they give.*

The Bill imposes certain conduct obligations on financial advisers, including the obligation to act with integrity, to exercise reasonable care, diligence and skill, and a prohibition on engaging in misleading or deceptive conduct.

The Bill's conduct and disclosure obligations are enforceable through a range of civil remedies, including compensation orders for compensating investors' losses and banning orders for advisers, and specific offences.

### **Who is a financial adviser?**

The Bill regulates the giving of financial advice and the activities of financial advisers. Put broadly, only a registered financial adviser may give financial advice in the course of business to a member of the public.

The Bill then goes on to impose a number of requirements on financial advisers giving financial advice, including disclosure requirements and conduct requirements.

The key definitions that determined the scope of the Bill's application were originally cast in very broad terms, presumably to attempt to address the range of possible circumstances in which financial advice is given. Lianne Dalziel has since commented that it "was never the intent of the Bill to capture every person who discusses financial matters but it was necessary to start this way so [the Government] would have a clear picture of who should and who should not be covered" by way of receiving critical feedback in relation to those who should not be caught.

Financial advice is defined as providing a recommendation, opinion or guidance in the course of business on the financial implications of a financial decision. A financial decision, as the Bill was originally drafted, was defined to include saving, holding, investing or realising or borrowing money or property, giving a security (including a guarantee or indemnity) and making financial provision for the future.

As the Bill was originally drafted, it cast a wide net and relied on exemption-making powers to exclude any persons or classes of persons who were inadvertently captured. The cumulative effect of these definitions created considerable potential for capturing activities that most would not normally consider to be financial advice. For example, advice in relation to the sale of any asset is included, which could extend to sales of motor vehicles. A reliance on exemptions seems an inefficient way to prescribe the scope of the Bill, especially given the penalties associated with a failure to comply with its provisions.

Following feedback after the first reading of the Bill (and at the request of the Government) the select committee issued an interim report proposing that the scope of the Bill be narrowed in two ways:

- the Bill will only capture advice given in relation to specified "financial products"; and
- only persons who are, broadly, in the occupation of giving financial advice will be financial advisers for the purposes of the Bill.

### ***Narrower definition of financial products***

It was proposed that advice in relation to a financial decision must relate to the buying, selling or holding of financial products. Financial products are defined as:

- securities (as defined in the Securities Act 1978); or
- any contract of life insurance, disaster insurance, general insurance and medical insurance; or
- any consumer credit contract (as defined in the Credit Contracts and Consumer Finance Act 2003).

### ***Occupational focus***

It was also proposed that the Bill be amended so that a financial adviser would only refer to a person:

- whose primary occupation is to provide advice in relation to any savings or investment planning; or
- who regularly provides such advice in the course of their business.

This change was seen as more controversial. One could argue consumers should be protected from those who actually provide financial advice, regardless of whether they purport to have that as their primary occupation or regularly do so. In some respects, those who provide financial advice on an ad hoc basis may present an even greater risk in terms of competency.

### ***Latest approaches under consideration***

In its latest interim report, the select committee has indicated that there has been qualified support to the proposal to narrow the application of the Bill and it will proceed with this approach by ensuring the focus is on financial products, rather than financial decisions or occupations.

#### *Definition changes*

The committee is now considering recommending that the reference to “implications of a financial decision” in the Bill as introduced be removed, and that “financial advice” be defined with reference to “financial products”. The Committee is also considering amending the Bill to clarify that the definition of “financial product” could include debt, equity, credit, and risk products, as well as investment in real estate.

#### *A tiered approach for financial advisers*

In a third attempt to get the balance right for financial advisers covered by the Bill, the select committee is now considering taking a more middle-of-the-road approach.

The latest proposal would involve amending the Bill to establish two levels of financial advisory services, each with a different level of obligation imposed on the adviser. This is seen as having the advantage of allowing for more flexibility in dealing with the different occupations and as providing a more tailored regulatory response for different types of financial advice.

Under this proposal, “Category 1 Advisory Service” would include advice on complex securities or investment and savings planning. Any individual providing Category 1 Advisory Service would have to be authorised by the Securities Commission to provide such advice.

“Category 2 Advisory Services” would include advice on credit, general insurance or simple securities, such as bank term deposits or call accounts. Individuals falling under this category would not need to be authorised to provide these services, but would be subject to the basic disclosure and conduct requirements of the Bill and their own individual obligations under the Financial Service Providers (Registration and Dispute Resolution) Bill. It is also likely that most individuals falling under this category, namely those working for registered banks, insurance companies, credit unions and building societies would be covered by their institution’s certification (see the discussion below).

However, early responses from the industry indicate that this two-tiered approach is not favoured by some. In particular, there is concern that in adopting a two tier approach there is a potential for some to exploit loopholes in the classification of products between the two categories and in the complexity of deciding which category an advisor is in.

#### *Authorisation requirements for Category 1 Advisers*

The select committee is also considering making some recommendations about how financial advisers will be required to seek authorisation from the Securities Commission. This is likely to involve the financial adviser being required to meet relevant competency levels, meet fit and proper person requirements and be registered under the Financial Service Providers (Registration and Dispute Resolution) Bill. Authorised financial advisers would be required to comply with any ongoing disclosure and conduct requirements specified in regulations, and the terms and conditions of their authorisation.

### **New disclosure obligations**

The latest interim report notes that the committee is considering introducing tiered disclosure obligations for the different categories of financial advisers through the provision of a new regulation making power that would allow for regulations that specify disclosure obligations applying to different categories of advisers.

The Bill would be amended to ensure that there is a general obligation to make disclosure in addition to the existing obligations relating to the form and accuracy of disclosure, and the regulation making power would replace the specific disclosure obligations currently in the Bill.

## **Supervision of financial advisers – co-regulatory vs Securities Commission**

### ***Co-regulatory model***

The Bill previously provided for a co-regulatory model with "approved professional bodies" responsible for the registration and monitoring of financial advisers and the Securities Commission responsible for registering and overseeing the approved professional bodies, and for ensuring the overall health of the financial advice industry. It was the approved professional bodies that were to set standards for financial advisers to join the body, monitor their members, carry out discipline, participate in dispute resolution and report to the Securities Commission.

The intention of the co-regulatory model was for each sector within the financial advice industry to establish its own approved professional body, to allow each sector to set rules relevant to the sector.

### ***Concerns with the co-regulatory model***

There were two main concerns with the co-regulatory model. First, the many high-profile collapses of finance companies and associated allegations of sub-standard financial advice have made it less palatable for the financial advice industry to be seen as largely self-regulated. While the Securities Commission would have had an overall supervisory role, when it comes to monitoring individual financial advisers the responsibility would lie with the approved professional bodies.

The second concern was that it would take too long to set up the approved professional bodies. Although some sectors already have a self-regulating body that could be adapted into an approved professional body, such as NZX for listed securities advisers, a number of sectors do not. By moving to the Securities Commission as the sole regulator, the Commerce Minister indicated that the time required to introduce the new rules could be shortened from four years to two.

### ***Securities Commission as the sole regulator***

These concerns around industry self-regulation and timing have led to the proposal that the entire responsibility for regulation be placed on the Securities Commission. The Commission will undertake all of the functions previously assigned to approved professional bodies.

It is proposed that the Securities Commission would consult with the financial adviser industry and that the commission would include at least one person from the industry.

While the co-regulatory model is no longer considered a viable option, concerns are still being voiced over the proposal to provide regulatory oversight by the Securities Commission rather than through industry-led approved professional bodies. Some of the issues which are raised with this centralised approach include:

- how the Securities Commission will organise itself to ensure the efficient processing of registration and accreditation of investment advisers;
- how the Securities Commission will develop the registration and accreditation requirements for different sectors of the financial adviser industry and the degree of, and effectiveness of, consultation with industry in this regard; and
- the complications caused by the Securities Commission acting as rule setter, exemption provider, investigator, prosecutor and, to an extent, enforcer of the requirements of the Bill and the requirements for registration and accreditation.

### ***New Commissioner of Financial Advisers***

Further discussion on how some of these issues are to be addressed is provided in the latest select committee report. The committee notes that it is considering the establishment of a Commissioner of Financial Advisers as part of the Securities Commission. This, it notes, would help ensure that the Securities Commission can act as both a statutory enforcer as well as the regulator.

Under this proposal, all functions of the Securities Commission would be exercised by the new commissioner, except for investigations and the enforcement of breaches of statutory obligations (criminal

breaches). The commissioner's role would include responsibility for establishing a code of conduct and undertaking disciplinary proceedings for breaches of that code of conduct. To assist the commissioner's decision making, the committee further proposes that a Rule-Making Committee and a Disciplinary Committee be established to ensure that the commissioner receives advice from the industry when exercising his or her judgement.

### **Institutional accreditation system**

The other aspect of change to the regulatory regime is the newly-introduced concept of an institutional accreditation system. Certain institutions, particularly banks, have pointed out that it would be unduly costly and onerous for all their employees to be individually registered and that it should be sufficient for the institution alone to be accredited. Under the proposed institutional accreditation system, an employee of an accredited institution would not need to be individually accredited, so long as the only financial advice that the employee gives is in relation to products offered or sold by his or her employer.

The certification of an institution would enable an institution to meet the obligations of all financial advisers affiliated with that institution, and would allow an institution to standardise compliance for advisers affiliated with that institution.

The criteria for an industry to be accredited have not yet been established so it is difficult to assess the merits and risks of this system. The Minister of Commerce and the latest select committee report have indicated that the institution would have to show that it has processes in place to ensure that any employees or agents covered by its certification have appropriate product and client knowledge and that the institution is accountable for advice it gives (for example, through a customer complaints resolution mechanism). Such institution would also need to be registered under the Financial Service Providers (Registration and Dispute Resolution) Bill.

In a recent speech the Minister of Commerce has also indicated that certified institutions would be responsible for identifying those employees or agents who need to be individually authorised by the Securities Commission where the type of advice given by them falls outside that covered by the institution's certification.

It is unknown what would qualify as an institution. If the definition is broad, this could lead to a quasi-approved professional bodies model for those that satisfy being, to an extent, self-regulated. In its latest report the select committee has indicated that this accreditation model would be available for use by a range of financial institutions, including banks, insurance companies and credit unions.

In any event, this outcome represents something of a compromise that simplifies the situation for those advisers that come within its ambit. The committee is however now considering requiring individual financial advisers covered by an institution accreditation to still meet their individual disclosure obligations under the Bill.

As with many of the proposed changes, the robustness and effectiveness of the system will depend on yet-to-be announced details.

To access a copy of the [Second Interim Report on the Financial Advisers Bill](#) and a copy of [the Bill](#) visit parliament's website at [www.parliament.nz](http://www.parliament.nz).

*For an article by Banking and Finance partner David Craig on other aspects of the recent financial services law reforms, please [click here](#).*

**For more information please contact:**

**[Haydn Wong](#)**  
Partner

## Trans-Tasman mutual recognition of securities offerings – about to become a reality

*After falling into abeyance for the last two years, there has been a sudden flurry of activity towards an agreement between the New Zealand and Australian governments for the mutual recognition of securities offerings in the two countries.*

In 2006, the Ministry of Economic Development (**MED**) circulated for consultation draft regulations to give effect to an agreement between the New Zealand and Australian Governments for the mutual recognition of securities offerings in the two countries. The Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008 (the **Regulations**) were passed on 3 June.

It has been seven years since this regime was first discussed between the two Governments, so the Regulations have been a long time coming. But they should nonetheless be welcomed by Australian issuers, who will be able to extend an Australian securities offering to New Zealand with little additional regulation.

In summary, an Australian issuer of securities will be able to offer those securities to the public in New Zealand without triggering the application of New Zealand securities laws (subject to certain exceptions) if:

- the offer is a regulated offer in Australia (that is, an offer in respect of which a disclosure document, product disclosure statement or similar offer document is required under Australian law);
- the Australian issuer is entitled to offer the securities under Australian law; and
- the Australian issuer has given the New Zealand Registrar of Companies (the **Registrar**) an opt-in notice accompanied by certain specified documents (in particular, the Australian offer documents).

The offer must also comply with a number of ongoing requirements. For example:

- the offer must remain open in Australia at all times during which it is open in New Zealand;
- the Australian offer documents must contain certain warning statements;
- the Australian issuer must give the Registrar notice of certain changes relating to the Australian offer; and
- the Australian issuer may also have to file annual financial statements under the Financial Reporting Act 1993.

Importantly, failure to comply with these ongoing requirements does not jeopardise the availability of the exemption for the offer.

The flip side of this exemption is that securities offered by a New Zealand issuer in Australia under the Australian recognition scheme will be subject to New Zealand securities laws. In other words, the regulation that applies to a securities offering will now depend on the location of the issuer rather than (as is currently the case) the location of the investor.

While the current economic climate may not be conducive to securities offerings, it seems inevitable that Australian issuers will start to take advantage of the Regulations once market conditions improve. Given the relatively minimal compliance cost involved, extending an Australian offer to New Zealand investors may become routine for many Australian issuers.

The Securities Commission and its Australian counterpart, ASIC, have jointly produced a publication outlining the requirements for securities offerings to be made on both sides of the Tasman. [Click here](#) to review the publication online.

## Recent developments

### Finance companies forum announcement

*Following its enquiry of listed companies in April, NZX Regulation held a forum to consult on issues related to market disclosure on 28 May.*

NZX Regulation's objective was to achieve a joint understanding with listed companies in relation to:

- best practice around continuous disclosure obligations under Listing Rule 10.1; and
- the potential to improve the level of information available to the market by way of additional voluntary reporting of key metrics.

The participating companies considered the current Listing Rules to be highly effective in focusing directors on the need to make appropriate disclosure, and the consequences of failing to do so.

Because of the wide variety of models and structures used by the group, the participants did not support introducing an industry-wide set of standard reporting metrics. They believe that the existing regime would be best supported by aggressive enforcement, particularly considering the pecuniary penalties and resulting civil liability under the recent amendments to the Securities Markets Act 1988.

## **Capital markets development taskforce announced**

*Commerce Minister Lianne Dalziel has launched a taskforce that will see the government working together with the private sector to develop capital markets in New Zealand.*

The taskforce, to be chaired by investment banker Rob Cameron, is to develop an action plan to be released towards the end of next year.

Announcing the taskforce, Ms Dalziel said that “to deliver wealth and jobs, New Zealand firms need ready access to affordable capital. The taskforce will identify ways to make this happen”.

The taskforce will report to a group of senior Ministers, including Finance Minister Michael Cullen, Economic Development Minister Pete Hodgson and Associate Finance Minister Trevor Mallard.

Taskforce Chairman Rob Cameron has described implementation of the taskforce as a timely opportunity to position New Zealand’s capital markets in a rapidly evolving global environment.

For more information, [click here](#) to link to the Ministry of Economic Development’s website.

## Derivatives guide

*Bell Gully banking and finance partners David Craig and Jonathan Ross have updated the firm's Derivatives Guide.*

The Derivatives Guide primarily addresses the issues that, in our experience, are typically raised by overseas entities seeking to carry out derivatives-related activities in New Zealand or with a New Zealand counterparty.

This guide should also assist those who already have some experience with the New Zealand derivatives industry.

[Click here](#) to read a pdf version of the guide.

## eDealing update

*An update on progress with electronic dealings of land.*

### **Overview of development of eDealing**

Bell Gully has been using Land Information New Zealand's (**LINZ**) Landonline online electronic system for registering land title documents since the beginning of 2007. Since that time, there have been a number of developments that have improved Landonline's functionality and increased the number of land title instruments that can be registered electronically using the system. LINZ introduces these developments as periodic "Releases" from time to time.

1 May 2007 was the mandatory date by which all discharges of mortgage had to be completed electronically. Release 2.9 was introduced on 11 June 2007. However, most of the changes related to the appearance of the database rather than the functionality of Landonline.

From 1 August 2007, it has been compulsory for all standard transfers and mortgages (i.e. no annexure schedules) to be completed electronically. Release 2.10, introduced on 8 October 2007, made more substantial changes to Landonline's capabilities, increasing the number of instruments capable of being registered electronically. This update also streamlined the sign & certify procedures, making the database more user-friendly.

Release 3.0 on 24 April 2008 has meant that all discharges of mortgage, transfers and mortgages are e-capable. Multiple transfers and mortgages are able to be completed within the same dealing. There is also greater flexibility, with conveyancers now able to use eDealing to complete more complex transfers and mortgages.

In addition, there is now the option to "Add Text" or "Add Image" to certain instruments. This means that additional clauses or conditions can be included as an annexure schedule to the instrument being registered. Where these functions are used, the dealing is not automatically registrable and require LINZ staff to check the information before the eDealing transaction is registered. Therefore, the dealing is "lodged" immediately, but it may take up to 15 days for it to appear on the title.

With Release 3.1, LINZ aims for all land transactions to become e-capable, including variations of mortgages, caveats, changes of names and easements.

31 October 2008 is currently the date from which LINZ plans to make electronic lodgement compulsory for all instruments.

### **Commercial issues in relation to eDealing**

As eDealing has become market practice, it has become evident that the electronic environment, as with the paper environment, has some limitations. Outlined below are some commercial issues that we have identified.

#### *Opening hours of the Land Register*

The Land Transfer Regulations prescribe opening hours for the Land Register of 9am to 4pm. While it is possible to create, pre-validate, sign & certify and release instruments at any time, an eDealing cannot be submitted to alter the Register before 9am or after 4pm.

As such, if settlement is due to occur in the afternoon of any day, including funds being drawn down, it is important to remember that the eDealing (containing all instruments - for example, discharge of old mortgage, transfer and new mortgage) may not be able to be submitted until the following morning.

From our experience, the reason for the delay is that confirmation of receipt of funds may not be able to be provided by the borrower's solicitor until the following morning, or that the borrower's solicitor is awaiting confirmation of receipt of funds from the vendor's solicitor. This means that the vendor's solicitor and the borrower's solicitor will not release the instruments that they are responsible for until they have received adequate funds.

Furthermore, while the Register can be altered from 9am onwards, it can take several hours until all instruments have been released and the eDealing is submitted.

In order to protect our clients' interests during this period, our practice is to hold a guaranteed search of each certificate of title in addition to undertakings from all other parties involved in the eDealing. However, it is worth noting that, during this intervening period, it is possible for other instruments, such as caveats or mortgages, to be registered.

*Lodged eDealings can be requisitioned*

As outlined above, it is now possible to register instruments that contain additional text or images, such as annexure schedules. An instrument that contains additional information is considered to be "non-standard". The additional text/image can be included simply by typing text into the box provided or by attaching a document. As there is a greater possibility for human error with "non-standard" instruments, these must be checked by a LINZ officer to ensure that they comply with the provisions of the Land Transfer Act. As such, while a "standard instrument" is automatically registered, a "non-standard" instrument must be lodged, which can take up to 15 business days. If an eDealing contains a combination of standard and non-standard instruments, the whole dealing will be lodged for registration. During the 15 day period, the eDealing will appear as a "pending dealing" to those who search the title and any instruments registered will be added to the title behind the lodged dealing. As such, the lodgement process does not alter the priority of the eDealing, but it can take up to 15 days to receive confirmation that the titles have been updated.

If the LINZ officer determines that there is an error in a lodged instrument, they will "requisition" the eDealing to the submitting firm to correct the error. The requisitioning process does not prejudice the priority of the eDealing as a whole. However, if a dealing has a significant error or omission, then the eDealing can be rejected, which means it is not acceptable for registration. A rejected dealing will be given a new dealing number and will need to be amended and resubmitted. The priority of a rejected dealing will be lost.

A re-submission fee applies for rejected and requisitioned eDealings.

If you have any questions or would like further information on any of the above, please feel free to contact any member of the Bell Gully Banking and Finance Department for assistance.

## Bell Gully news

### **Bell Gully solicitor wins scholarship for Oxford study**

Wellington banking and finance solicitor Stacey Lulham has won the 2008 Banking and Financial Services Law Association scholarship.

### **Effective risk allocation in infrastructure projects**

Bell Gully partners Garry Downs and Hugh Kettle have examined how identifying and allocating risk is an important part of delivering successful infrastructure projects at this week's major Auckland infrastructure symposium.

### **Bell Gully supports PPP for vital infrastructure project**

Bell Gully has made a submission to the Government backing the use of public private partnerships (PPP) for important New Zealand infrastructure development such as the Waterview Connection.

### **Legislation to transform capital markets, boost investor confidence**

The public war of words that has broken out between Minister of Commerce Lianne Dalziel and media commentator Brian Gaynor about the Capital Market Development Taskforce is a useful reminder of pending developments arising from the Review of Financial Products and Providers (RFPP).

## Useful Web links

### *New Zealand government*

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

### *New Zealand financial agencies and organisations*

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

### *New Zealand commercial sites*

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

### *Australian government sites*

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

### *Australian commercial sites*

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

### *International sites*

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