

BELL GULLY



# Financial Services Quarterly

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SUMMER 2010

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**Welcome to the Summer 2010 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 in these areas:

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- **Current account drawings deemed tax avoidance**
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- **"Key" reforms – what's left**
- **Guide for Qualifying Financial Entities**

**Sydney seminar**

Sweeping changes to the financial services legal landscape are imminent in New Zealand. Finance partners David Craig and Murray King will be in Sydney on Monday, 29 March to present a seminar on the implications of the new legislation for offshore entities that have activities in New Zealand. [Click here](#) for further information or visit [www.bellgully.com/resources/resource.02500.asp](http://www.bellgully.com/resources/resource.02500.asp).

**Need more information?**

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

*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

### **Current account drawings deemed tax avoidance**

A series of current account drawings made by a property developer from his trust and corporate entities amounted to tax avoidance.

### **Extremely high rates of interest acceptable for short-term loans**

A lender making short-term loans was justified in charging interest at 520% per annum.

## Legislation/In Parliament

### **Review of the statutory framework for financial reporting**

The Ministry of Economic Development has released copies of the 147 submissions it received on its Statutory Framework for Financial Reporting discussion document.

### **Government responds to Capital Market Development Taskforce recommendations**

The Government has prepared an action plan in response to the 60 recommendations made by the taskforce.

### **Amendments to financial advisers legislation introduced**

The Financial Services Providers (Pre-Implementation Adjustments) Bill, which amends the Financial Service Providers (Registration and Dispute Resolution) Act and the Financial Advisers Act, was introduced in to Parliament in December.

### **Submissions on the review of the operation of the CCCFA**

In September 2009, the Ministry of Consumer Affairs released the discussion document: Review of the Operation of the Credit Contracts and Consumer Finance Act 2003.

### **Anti-Money Laundering and Countering Financing of Terrorism Regulations Discussion Document**

The Ministry of Justice has released an informal discussion document on regulations and codes of practice under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

### **Retail deposit scheme deeds replaced**

Treasury has issued replacement Crown guarantee deeds to make the Retail Deposit Guarantee Scheme more flexible for deposit taking institutions, while continuing to protect current depositors.

### **Securities Trustees and Statutory Supervisors Bill**

A bill that requires corporate trustees and certain statutory supervisors to be licensed was introduced in to Parliament in December.

### **New regulations for moratorium proposals**

Debt issuers, including finance companies, dealing with moratorium proposals now face tougher measures.

### **"Key" reforms – what's left**

John Key's recent opening speech to Parliament outlined the Government's proposed economic reforms for 2010, including the proposed tax reform to be revealed in this year's Budget.

## Recent developments

### **Consultation on liquidity requirements for NBDT sector**

The Reserve Bank has released a consultation paper on policy options for liquidity requirements for the non-bank deposit taking sector.

### **Guide for Qualifying Financial Entities**

The Securities Commission has published the first of its guides to assist the financial adviser industry to prepare for the new regulatory regime.

### **Reserve Bank and NZX in talks**

The Reserve Bank of New Zealand and NZX have been in discussions on a potential joint venture to provide clearing and settlement services in New Zealand.

### **Financial reporting about transparency, not mere compliance**

The Securities Commission is urging companies to make transparency, not merely technical compliance, the goal of their financial reporting.

### **The crisis and monetary policy: what we learned and where we are going**

Treasury has released a background paper on an address by Dr Alan Bollard to the Canterbury Employers' Chamber of Commerce in January.

## In the courts

### **Current account drawings deemed tax avoidance**

*The Taxation Review Authority has upheld the Inland Revenue's assessment that a series of current account drawings made by a property developer from his trust and corporate entities amounted to tax avoidance.*

The newly released decision has implications worth considering.

[Click here](#) to link to our review of the Taxation Review Authority reasoning and conclusions or visit [www.bellgully.com/resources/resource.02486.asp](http://www.bellgully.com/resources/resource.02486.asp)

### **Extremely high rates of interest acceptable for short-term loans**

*The District Court has decided that a lender making short-term loans was justified in charging interest at 520% per annum.*

In this case<sup>1</sup>, the lender specialised in loans designed to cover borrowers for cashflow shortfalls between pay days. Interest was presented in money rather than percentage terms – for every \$100 loaned, \$10 was payable per week in interest. This amounted to 520% per annum.

The issue for consideration by the court was whether the lender could recover such a high rate of interest on default.

Finding in favour of the lender, the court noted that it was necessary to bear in mind that the lender's business model was to make short-term, relatively low value, loans so that the rate of interest had to be high enough to recover not just the level of risk, but also the administration costs involved in processing the loans. Such rates were found to be justifiable only in the short term.

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<sup>1</sup> *My Pay Day Loan v Lepou* [2009] DCR 890

## Legislation/In Parliament

### **Review of the statutory framework for financial reporting**

*The Ministry of Economic Development has released copies of the 147 submissions it received on its Statutory Framework for Financial Reporting discussion document released in September last year.*

The discussion document proposes changes to the standards-setting infrastructure and discusses which entities should have financial reporting obligations. It should be read together with a companion discussion document released simultaneously by the Accounting Standards Review Board entitled [Proposed Application of Accounting and Assurance Standards under the Proposed New Statutory Framework for Financial Reporting](#) or access it at:  
[www.asrb.co.nz/documents/ASRB%20Accounting%20and%20Assurance%20Standards%20Discussion%20Document.pdf](http://www.asrb.co.nz/documents/ASRB%20Accounting%20and%20Assurance%20Standards%20Discussion%20Document.pdf)

Significantly, the Government has decided to maintain the status quo in relation to disclosure of private company accounts despite considerable pressure to require such accounts to be made public. As a very general statement, domestic companies who do not raise money from the public do not have to publicly disclose their financial statements.

[Click here](#) to access the submissions or visit [www.med.govt.nz/templates/Page\\_\\_\\_\\_\\_42523.aspx](http://www.med.govt.nz/templates/Page_____42523.aspx)  
[Click here](#) to read Bell Gully's submission or visit [www.med.govt.nz/upload/71380/043-Bell-Gully.PDF](http://www.med.govt.nz/upload/71380/043-Bell-Gully.PDF)

### **Government responds to Capital Market Development Taskforce recommendations**

*The Government has prepared an action plan in response to the 60 recommendations made by the taskforce.*

The action plan sets out how the Government will progress each recommendation and a timetable for implementation.

[Click here](#) for more information or visit [www.bellgully.com/resources/resource.02497.asp](http://www.bellgully.com/resources/resource.02497.asp)

## Amendments to financial advisers legislation introduced

*The Financial Services Providers (Pre-Implementation Adjustments) Bill, which amends the Financial Service Providers (Registration and Dispute Resolution) Act and the Financial Advisers Act, was introduced in to Parliament on 8 December 2009.*

The Bill makes some technical amendments to the Financial Service Providers (Registration and Dispute Resolution) Act. Measures to simplify the implementation of the Financial Advisers Act and to reduce some of the compliance costs associated with the new regime are introduced mainly in relation to the qualifying financial entity (QFE) model. The proposed changes include:

- Requiring a QFE to name individual contractors whose advice it will take responsibility for, instead of automatically being responsible for advice from all its contractors.
- Allowing a QFE's employees and named contractors to provide financial adviser services on the QFE's category 1 products (complex products such as shares), without being individually licensed. This is currently permitted only for the QFE's employees.
- Permitting the employees and named contractors to provide financial adviser services for products for which the QFE is a promoter under the Securities Act. Currently, the Financial Advisers Act allows this only if the QFE is the issuer of the product.

Also, a technical, but significant, amendment is proposed to the territorial scope provision in the Financial Service Providers (Registration and Dispute Resolution) Act. The effect of the change will be that the Act will apply to a person who provides a financial service in New Zealand regardless where that person resides, is incorporated, or carries on business. It will no longer be necessary for the financial service provider to be in New Zealand at the time the service is performed in order for the Act to apply.

Commerce Minister Simon Power said he expects the changes to take effect in the first half of this year. The Government is still working through potential changes to the way investment transactions are regulated under the Financial Advisers Act, following recent targeted consultation with industry.

[Click here](#) to read the press release or visit [www.beehive.govt.nz/release/amendments+financial+advisers+act+introduced](http://www.beehive.govt.nz/release/amendments+financial+advisers+act+introduced)

## **Submissions on the review of the operation of the CCCFA**

*In September 2009, the Ministry of Consumer Affairs released the discussion document: Review of the Operation of the Credit Contracts and Consumer Finance Act 2003.*

The discussion document included 16 questions associated with proposed changes to the Credit Contracts and Consumer Finance Act, and invited submissions on the proposals. 59 submissions were received, and the Ministry has now published a brief summary to highlight comments in the submissions.

[Click here](http://www.consumeraffairs.govt.nz/policylawresearch/CCCFA/cccfa-submissions/submissions-cccfa.html) to link to the Ministry's summary of the submissions or visit [www.consumeraffairs.govt.nz/policylawresearch/CCCFA/cccfa-submissions/submissions-cccfa.html](http://www.consumeraffairs.govt.nz/policylawresearch/CCCFA/cccfa-submissions/submissions-cccfa.html)

## **Anti-Money Laundering and Countering Financing of Terrorism Regulations Discussion Document**

*The Ministry of Justice has released an informal discussion document on regulations and codes of practice under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.*

It invites discussion and comment on preliminary policy for the regulatory regime that sits under the Act, and seeks initial views on proposed requirements for reporting entities.

Formal consultation for reporting entity obligations is expected in early May, with submissions closing on 19 March.

[Click here](http://www.justice.govt.nz/publications/global-publications/a/anti-money-laundering-and-countering-financing-of-terrorism-regulations-discussion-document/anti-money-laundering-and-countering-financing-of-terrorism-regulations-discussion-document) to access the discussion document or access it at [www.justice.govt.nz/publications/global-publications/a/anti-money-laundering-and-countering-financing-of-terrorism-regulations-discussion-document/anti-money-laundering-and-countering-financing-of-terrorism-regulations-discussion-document](http://www.justice.govt.nz/publications/global-publications/a/anti-money-laundering-and-countering-financing-of-terrorism-regulations-discussion-document/anti-money-laundering-and-countering-financing-of-terrorism-regulations-discussion-document)

## **Retail deposit scheme deeds replaced**

*Treasury has issued replacement Crown guarantee deeds to make the Retail Deposit Guarantee Scheme more flexible for deposit taking institutions, while continuing to protect current depositors.*

The changes are also intended to improve consistency between the current scheme, which ends on 12 October 2010, and the extension scheme, which will operate from 12 October 2010 to December 2011.

Existing investments by eligible depositors are not affected by the changes - Brian McCulloch, Treasury's Director of Financial Operations, said "*the Crown stands fully behind its guarantee commitments and the safety net remains in place*".

Institutions participating in the Deposit Guarantee Scheme were sent replacement Deeds of Guarantee that included revised terms and conditions. The revised deeds:

- clarify various arrangements that may arise if a deposit taking institution defaults;
- allow participating institutions to offer both guaranteed and non-guaranteed debt securities;
- allow a 14 day "stand down" between a potential default and invoking the Crown guarantee, which could provide time for the institution to resolve issues and avoid receivership; and
- allow the Crown to set a timeframe for claims to be made after a default.

Institutions participating in the Scheme had until 4 December 2009 to accept the revised deeds, which came into effect on 1 January 2010.

If an institution declined to sign the revised deed, then new deposits or investments after 1 January 2010 are not guaranteed. However, existing eligible deposits made prior to 1 January 2010 will continue to benefit from the existing Crown guarantee until expiry of the current Retail Deposit Guarantee Scheme on 12 October 2010 (unless those deposits become due and payable earlier).

Deposits or investments made after 1 January 2010 will be guaranteed so long as the financial institution has signed the revised deed.

Institutions must inform investors whether or not the investment that they are making is guaranteed. This information will be available in the institution's investment statement or prospectus. Dr McCulloch warned "*As always, we recommend that depositors and investors are well advised about their investments and make sure they understand their investment choices before they make any commitments*".

## Securities Trustees and Statutory Supervisors Bill

*A Bill that requires corporate trustees and certain statutory supervisors to be licensed was introduced in to Parliament on 15 December 2009 by Commerce Minister Simon Power.*

The overarching objective of the Bill is to protect the interests of investors, and enhance investor confidence in financial markets, by:

- requiring persons who wish to be appointed as trustees, statutory supervisors, and unit trustees to be capable of effectively performing the functions of trustees, statutory supervisors, or unit trustees;
- requiring trustees, statutory supervisors, and unit trustees to perform their functions effectively; and
- enabling trustees, statutory supervisors, and unit trustees to be held accountable for any failure to perform their functions effectively.

The new regime will apply to trustees of debt securities, unit trustees, and statutory supervisors of certain collective investment schemes and retirement villages.

Under the Bill, all trustees, statutory supervisors, and unit trustees must be bodies corporate, and their directors and senior managers must be of good character. Retirement village statutory supervisors have been included in the regime in recognition of the similar role they play to trustees of investment products, in monitoring the financial position of retirement villages.

The Bill contains a number of provisions designed to ensure that trustees, statutory supervisors, and unit trustees comply with their obligations. The Securities Commission may seek pecuniary penalty and compensatory orders against those who fail to comply.

Under the Bill, trustees, statutory supervisors, and unit trustees are required to:

- report to the Securities Commission any breach or potential breach of any issuer obligation and notify the Commission of the steps that they intend to take as a result;
- report to the Securities Commission when any issuer they supervise is likely to become insolvent, and notify the Commission of the steps that they intend to take as a result; and
- when requested by the Securities Commission, attest as to the issuer's compliance with the issuer obligations. In circumstances where they cannot so attest, they must state the reasons why.

The Bill is expected to receive its first reading this year.

[Click here](#) to read a copy of the press release or visit [www.beehive.govt.nz/release/bill+improves+quality+corporate+trustees039+supervision](http://www.beehive.govt.nz/release/bill+improves+quality+corporate+trustees039+supervision)

## **New regulations for moratorium proposals**

*Debt issuers, including finance companies, dealing with moratorium proposals now face tougher measures.*

In simple terms, moratorium proposals provide investors with a choice between a moratorium (foregoing interest or principal repayments (or both) for a period of time) and a receivership.

To date, moratorium proposals have been implemented by 12 finance companies with approximately \$2 billion involved.

The recently introduced Securities (Moratorium) Regulations 2009 require companies proposing moratoria to give investors tailored disclosure documents. They also require companies already in moratorium to report their progress to investors. Should a moratorium not proceed as planned, secured investors will be able to vote for a receiver to be appointed.

Click here to read the press release or visit  
[www.beehive.govt.nz/release/new+regulations+moratorium+proposals](http://www.beehive.govt.nz/release/new+regulations+moratorium+proposals)

## **"Key" reforms – what's left**

*John Key's recent opening speech to Parliament outlined the Government's proposed economic reforms for 2010, including the proposed tax reform to be revealed in this year's Budget.*

[Click here](#) for our summary of those Victoria University-based Tax Working Group's proposals that have been ruled out by the Prime Minister, and those that remain on the table. We also focus on what options remain for the property sector. You can access this publication at:  
[www.bellgully.com/resources/resource.02485.asp](http://www.bellgully.com/resources/resource.02485.asp)

## Recent developments

### **Consultation on liquidity requirements for NBDT sector**

*The Reserve Bank has released a consultation paper on policy options for liquidity requirements for the non-bank deposit taking sector.*

The options are aimed at decreasing liquidity risk in the deposit-taking sector, which includes finance companies, building societies and credit unions. Submissions close on 15 March. The intention is to make policy recommendations to Cabinet in the second quarter of this year.

[Click here](http://www.rbnz.govt.nz/news/2010/3888319.html) for further details or visit [www.rbnz.govt.nz/news/2010/3888319.html](http://www.rbnz.govt.nz/news/2010/3888319.html)

### **Guide for Qualifying Financial Entities**

*The Securities Commission has published the first of its guides to assist the financial adviser industry to prepare for the new regulatory regime.*

The *QFE Adviser Business Statement Guide* explains the document required to be prepared by a business applying to the Commission to become a Qualifying Financial Entity.

For a copy of the *QFE Adviser Business Statement Guide*, go to the [Securities Commission of New Zealand website](http://www.seccom.govt.nz): [www.seccom.govt.nz](http://www.seccom.govt.nz)

### **Reserve Bank and NZX in talks**

*The Reserve Bank of New Zealand and NZX have been engaged in discussions on a potential joint venture to provide clearing and settlement services in New Zealand.*

This follows on from the passage of the Settlement Systems, Futures, and Emissions Units Bill (which was enacted as the Reserve Bank of New Zealand Amendment Act 2009, Securities Markets Amendment Act 2009, Personal Property Securities Amendment Act 2009, and the Securities Amendment Act 2009).

The new legislation provides for the designation of systems that clear and settle products, not just payments. NZX announced last year that it intended to launch a new Central Counter Party clearing and settlement system under the new legislation. At present, New Zealand has two settlement systems: Austraclear New Zealand, run by the Reserve Bank, and NZX's FASTER system.

As a first step, the Reserve Bank and NZX will undertake a review to determine the feasibility of jointly providing the clearing and settlement functions of the two organisations.

[Click here](http://www.rbnz.govt.nz/news/2009/3840583.html) for the press release or visit [www.rbnz.govt.nz/news/2009/3840583.html](http://www.rbnz.govt.nz/news/2009/3840583.html)

## **Financial reporting about transparency, not mere compliance**

*The Securities Commission is urging companies to make transparency, not merely technical compliance, the goal of their financial reporting.*

This follows completion of Cycle 11, the latest round of the Commission's financial reporting monitoring programme. Securities Commission Chief Accountant Alistair Boulton said that the latest results show an improvement on the previous cycle, but raised concerns that the same mistakes were still being made.

"The standard is about moving beyond mere technical compliance to true transparency – ensuring the market has a clear insight into companies' operations...".

## **The crisis and monetary policy: what we learned and where we are going**

*Treasury has released a background paper on an address by Dr Alan Bollard to the Canterbury Employers' Chamber of Commerce on 29 January 2010.*

The address includes a discussion on how the inflation targeting framework has performed and on other factors that the Reserve Bank Governor considers relevant to obtaining balanced growth or macroeconomic stability.

In his concluding remarks Dr Bollard says: *"We need to be realistic. The world is not ours to influence, and it is unlikely to offer us perfect conditions. But in New Zealand, we will be seeking less distortion from future tax policy, and an increased macro-orientation of prudential policy."*

[Click here](http://www.rbnz.govt.nz/speeches/3885871.html) to read the full speech or access it at [www.rbnz.govt.nz/speeches/3885871.html](http://www.rbnz.govt.nz/speeches/3885871.html)

## Bell Gully news

### **Bell Gully assists in delivery of major New Zealand transport technology project**

The signing of a contract to deliver an integrated super transport ticket for Auckland marks a significant milestone for many involved in the project, including Bell Gully as legal advisers. This month the Auckland Regional Transport Authority, in conjunction with its partner Thales and its funders the New Zealand Transport Agency and the Auckland Regional Council, signed the contract introducing Auckland and New Zealand's first, true multi-modal transport ticket. The system will mean passengers will be able to use one smartcard ticket seamlessly between public transport trains, buses and ferries.

### **Partner-led pro bono programme supports those in need**

Bell Gully's commitment to helping those in need has seen it develop a formal, partner-led, pro bono programme that has it targeting a \$1 million spend within three years. In addition to formalising its relationship with a number of worthy charities, the firm has also forged valuable relationships with three community law centres, at a time when the centres were facing what could have been one of the most destabilising years of their existence.

For further details and more news visit [www.bellgully.com/news/index.asp](http://www.bellgully.com/news/index.asp)

## 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]