Financial Services Quarterly

AUTUMN 2010

financial services quarterly

Welcome to the Autumn 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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Need more information?

For more information on any of the cases, articles and features in *Financial Services Quarterly*, please email 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

Lender fails in bid to use further assurance clause to take additional security
The Supreme Court determined that a power of attorney given in favour of a lender in a security document, together with a further assurance clause, does not allow a lender to take additional security.

Financing statements – the importance of getting the debtor's name right
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Court of Appeal finds investment scheme oppressive under the CCCFA
A scheme that didn't involve any outlay of cash, but required a mortgage over the home of two pensioners, breached the CCCFA.

Legislation/In Parliament

Consumer law overhaul planned
Plans are afoot to simplify consumer legislation by consolidating 10 current laws into a smaller number of enhanced laws.

Developments to restore confidence of investors in New Zealand's capital markets
Minister of Commerce Simon Power has announced some major developments for the financial industry "*to restore the confidence of mum and dad investors in [New Zealand's] capital markets*".

Government announces 'super-regulator' for financial markets
Legislation to establish a new single regulator for New Zealand's financial markets is expected to be introduced this year.

Insolvency Practitioners Bill introduced
The Insolvency Practitioners Bill introduces a negative licensing system that gives the Registrar of Companies the power to prohibit individuals from providing corporate insolvency services, or to place them under supervision, for up to five years.

Financial Advisers Act – latest developments

Cabinet agrees to change financial adviser regime
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Draft code of professional conduct released for public consultation
The code specifies the minimum standards of professionalism that investors can expect of authorised financial advisers, including competence, knowledge and skills, client care, ethical behaviour and continuing professional training.

Guidance on boundary between financial planning and advice
In order to help advisers prepare to meet the requirements of the Financial Advisers Act, the Securities Commission has issued guidance on the boundary between a financial planning service and financial advice.

Regulations under finance sector laws
Regulations are to be developed under the Financial Advisers Act and the Financial Service Providers (Registration and Dispute Resolution) Act.

Improvements to broking services under the new regime
The Government has announced that it will amend the Financial Advisers Act to enable it to be effectively implemented in relation to both firms and individuals providing broking services.

Exemption for advice that is 'incidental' to business
The Commerce Select Committee is proposing to adopt an exemption to cover the provision of financial advice that is incidental, as opposed to an integral part, of business operations.

Financial adviser compliance pathway announced
Financial advisers are being given extra time to comply fully with the new regime.

Ready for FSPR
All financial service providers, including financial advisers, must be registered by 1 December 2010.

Recent developments

CCCFA - revised draft credit fees guidelines released
The Commerce Commission has released revised draft guidelines outlining its enforcement approach to credit fees under the Credit Contracts and Consumer Finance Act.

Capital market recommendations progressing
The Government has released a progress report on its response to the recommendations made by the Capital Market Development Taskforce.

Government to improve KiwiSaver regulation
The Government has announced its intention to make changes to improve the governance and management of KiwiSaver schemes.

The regulatory landscape - what needs to change
Chair of the Securities Commission, Jane Diplock, gave a presentation addressing the gaps in the current regulatory framework and the need for reform.

Report on Cycle 11 of the Financial Reporting Surveillance Programme
The Securities Commission has released its findings from Cycle 11 of its Financial Reporting Surveillance Programme.

Credit ratings mandatory for non-bank deposit takers
The Reserve Bank has announced that credit ratings are now mandatory for non-bank deposit takers.

Wholesale guarantee facility closed
The New Zealand Wholesale Guarantee Facility closed at the end of April, but the Retail Deposit Guarantee Scheme continues to operate.

Government moves to reduce aircraft financing costs
New Zealand is to become a party to the Cape Town Convention and associated Aircraft Protocol, which is intended to reduce finance costs for companies purchasing and leasing aircraft.

Changes coming to the Companies Office
The Companies Office is replacing its current IT system with a purpose-built platform called “Enterprise”.

In the courts

Court of Appeal finds investment scheme oppressive under the CCCFA

A scheme that didn't involve any outlay of cash, but required a mortgage over the home of two pensioners, breached the CCCFA.

The case[1] was brought by a retired husband and wife, who entered into an arrangement to purchase an Auckland apartment. No deposit was payable, but mortgages over both the apartment, and their previously unencumbered home, were taken as security for payment of the purchase price.

The finance was provided under a "fastdoc" scheme. The advance was approved because there was sufficient value in the loan to value ratio of their home, and a declaration of their ability to pay was signed. No proof of income was required. The borrowers were noted as self-employed, when in fact, they were retired. They were aged 65 and 66, and had a combined pension income of $21,736 per annum.

The borrowers sought to avoid the credit contract on the basis that it was unconscionable at common law, or that it was oppressive and should be re-opened under Part 5 of the Credit Contracts and Consumer Finance Act (the **CCCFA**). The lender claimed to be an innocent lender that provided a facility arranged by a broker, and had effectively contracted out of its usual functions by virtue of the agency arrangement with the broker.

The Court of Appeal decided that the credit contract was oppressive, and remitted the case to the High Court to determine the appropriate remedy.

> We consider this to be somewhat of a test case for many investors in a similar position, and anticipate that the decision will be appealed. Any updates on the case will be reported in future issues of *Financial Services Quarterly*.

[1] *Bartle v GE Custodians Limited* [2010] NZCA 174

Lender fails in bid to use further assurance clause to take additional security

The Supreme Court determined that a power of attorney given in favour of a lender in a security document, together with a further assurance clause, does not allow a lender to take additional security.

In this case[1], security was given over the borrower's rights under:

- an agreement to purchase shares; and
- a loss of profits insurance policy.

When the borrower failed to repay the loan, and the secured assets were determined to be worthless, the lender purported to exercise its power of attorney to take a general security interest over all of the borrower's assets. It then immediately made demand for payment and appointed receivers.

Determining that "*nothing could be plainer*" from the drafting that the borrower was to have no liability exceeding the value of the two specified items of property and that the lender's only recourse in the event of default was to that property, the Supreme Court noted:

"In the documentation of commercial transactions the drafter will frequently, out of caution (belt and braces) or perhaps without thinking about function in the particular case, incorporate boilerplate provisions which have little or no work to do. While a court will strive to find a role for such general provisions to play, their presence should not be permitted to lead to the distortion of the objective intention of the parties which can be discerned from a reading of the whole contract (or in this case, combination of documents), and in particular a clause which has been marked out by the parties as an important element of the bargain."

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[1] *Totara Investments Limited v Crismac Limited and Ulster Limited* [2010] NZSC 36

Financing statements – the importance of getting the debtor's name right

In a recent application for summary judgment, the High Court at Napier decided there was an arguable case that a financing statement was seriously misleading (and therefore invalid), because the names of the individual partners, and not the name of the partnership, were recorded on the financing statement.

The case[1] concerned an argument between a financier, who had a first registered financing statement in respect of a general security agreement, and a supplier of farming stock, who had a second registered financing statement in respect of specific assets.

There were two arguments.

The first argument centred around whether or not the supplier had priority over the specific assets, because, it argued, its registration afforded it a purchase money security interest. The court determined that it was arguable that it did not, because the supplier seemed unable to identify exactly which stock it had supplied.

The second argument was about whether the supplier's financing statement was seriously misleading, and therefore invalid. The financier argued that because the debtor was a partnership operating under the name "*Awapapa Station*" the financing statement should have been registered with that name recorded as the debtor. In fact, the supplier's financing statement recorded the debtor as the two individuals who made up the partnership.

The judge decided that, because the debtor name was the relevant "searchable field" in this case (these were not serial-numbered goods), it was reasonably arguable that the supplier's financing statement may be seriously misleading, with the result that its security interest was unperfected, and subject to the financier's perfected interest.

The case serves as a reminder that, where the debtor is a partnership, the name recorded as the debtor in the financing statement should be that recorded in the partnership's constitution, or partnership agreement, and not the personal names of the partners.

[1] *Rabobank NZ Limited v StockCo Limited* [2010] BCL 207

Legislation/In Parliament

Consumer law overhaul planned

Plans are afoot to simplify consumer legislation by consolidating 10 current laws into a smaller number of enhanced laws.

In an address to the Employers and Manufacturer's Association, Consumer Affairs Minister Heather Roy outlined the objectives of what is called the "*One Law – One Door*" project as:

- defining the principles underpinning New Zealand's consumer laws; and
- simplifying and consolidating existing consumer law.

In her address, Ms Roy said that:

- "One Door *refers to a simplified complaints apparatus rather than a system that leaves the consumer to negotiate a host of complaints and disputes tribunals, ombudsmen and so on that currently serve to confuse the applicant while sometimes adding cost to the tax payer. To make the simplified* One Law *a reality, initial thinking is to consolidate much of the current legislation into one strong, clear piece of law, in essence creating an enhanced Fair Trading Act".*
- *The enhanced Fair Trading Act would be complemented by the Consumer Guarantees Act. Sitting alongside these two laws could be an enhanced Credit Contracts and Consumer Finance Act, incorporating the Credit (Repossession) Act and the Motor Vehicle Sales Act. The Weights and Measures Act could also sit alongside or potentially be a separate part of an enhanced Fair Trading Act".*

Developments to restore confidence of investors in New Zealand’s capital markets

In a speech to the Institute of Financial Professionals New Zealand annual awards on 28 April, Minister of Commerce Simon Power announced some major developments for the financial industry "to restore the confidence of mum and dad investors in [New Zealand's] capital markets”.

The proposed developments include:

- the establishment of a new regulator, to be named the *Financial Markets Authority*; and
- improvements to the KiwiSaver regulatory regime.

He also announced that, in order to allow the industry a further six months to ensure that all training and education requirements are completed, the new financial advisers regime would not fully come into force until July 2011.

Click here to read a full transcript of the speech.

In addition, a bill to improve the quality of corporate trustees’ supervision has passed its first reading. The *Securities Trustees and Statutory Supervisors Bill* requires corporate trustees and statutory supervisors that supervise certain financial investments to be licensed.

The bill is intended to protect investors’ interests, and to enhance market confidence, by:

- requiring trustees and statutory supervisors to be capable;
- requiring them to perform their functions effectively; and
- enabling the Securities Commission to hold them accountable for any failure to act according to the expected standards.

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

Government announces 'super-regulator' for financial markets

*Legislation to establish a new single regulator for New Zealand's financial markets, the Financial Markets Authority (**FMA**), is expected to be introduced this year.*

The FMA, which is hoped to be up and running early next year, will take over responsibility for:

- the powers and functions of the Securities Commission;
- those parts of the Companies Office that deal with offer documents, financial statements and financial service providers;
- some of the functions of the National Enforcement Unit of the Ministry of Economic Development;
- the functions of the Government Actuary (monitoring and supervising superannuation and KiwiSaver schemes); and
- insurance supervision (temporarily, before this role is moved to the Reserve Bank).

The FMA will also have an auditor oversight function, which was to have been the responsibility of the reconstituted Accounting Standards Review Board. Specifically, the FMA will have sole responsibility for:

- enforcing securities, financial reporting and company laws as they apply to financial services and securities markets; and
- regulating and overseeing trustees, auditors, directors of financial service providers, and financial advisers.

In addition, the FMA will be responsible for approving NZX's conduct rules, and may request changes to existing rules. NZX will continue to enforce its own rules, but the functions of the NZ Markets Disciplinary Tribunal will be transferred to a new statutory rulings panel serviced by the FMA. The Government will also have a power to make market conduct regulations that will replace or be inserted into NZX rules.

Click here for the full press release, which includes a Q&A section.

Insolvency Practitioners Bill introduced

The Insolvency Practitioners Bill introduces a negative licensing system that gives the Registrar of Companies the power to prohibit individuals from providing corporate insolvency services, or to place them under supervision, for up to five years.

The Bill aims to make it easier for practitioners who are unfit to practise to be prohibited, or placed under supervision, rather than the current system of a creditor or other party having to apply to the High Court for an order prohibiting them from practising. It is hoped the law will be in force by July 2011.

Click here to read the press release.

Financial Advisers Act – latest developments

Cabinet agrees to change financial adviser regime

Cabinet has agreed to policy changes in connection with the financial adviser regime, and has invited the Commerce Select Committee to consider them as part of the Committee's consideration of the Financial Service Providers (Pre-Implementation Adjustments) Bill, which amends the Financial Advisers Act (the ***Act****).*

The changes cover three main issues, each of which has been the subject of submissions made by industry participants concerned at the inflexible and unworkable nature of the regime currently embodied in the Act and in the Financial Service Providers (Registration and Dispute Resolution) Act. The three main issues are:

- the application of the legislation to advice provided to wholesale clients;
- the relatively constrained scope of the qualifying financial entity (or QFE) model; and
- the application of the legislation to generic, non-personalised (or "class") advice.

The proposed changes would:

- reduce the obligations on advisers to wholesale clients such as institutional investors, large companies, and highly sophisticated individuals;
- allow institutions that operate as groups of related companies to use the 'qualifying financial entity' model efficiently;
- allow companies to issue generic advice, such as brochures, in their own name;
- increase the powers of the Securities Commission to grant limited exemptions from the regime; and
- increase the Government's ability to give total exemptions from the regime through regulations.

The Select Committee has decided to formally accept the Cabinet Paper. Accordingly, the issues raised in the paper can now be raised as part of submissions to the Select Committee on the Bill. The Committee was scheduled to report the Bill back to Parliament on 24 May.

Click here to read the Bell Gully article *"Fundamental changes proposed to new financial advisers legislation – better late than never*".

Draft code of professional conduct released for public consultation

The code specifies the minimum standards of professionalism that investors can expect of authorised financial advisers, including competence, knowledge and skills, client care, ethical behaviour and continuing professional training.

Commissioner for Financial Advisers, David Mayhew expects to receive the final draft Code in June for his approval and subsequent recommendation. Mr Mayhew says "*completing the Code is critical to the regime as it will stipulate the requirements for advisers to be authorised. The draft Code is the best indication of what the financial requirements are likely to be, so advisers who are a long way off that mark should take remedial steps immediately. Failure to do so means risking having their businesses shut down when the regime commences*".

Click here to read the Securities Commission's news release.

Guidance on boundary between financial planning and advice

In order to help advisers prepare to meet the requirements of the Financial Advisers Act, the Securities Commission has issued guidance on the boundary between a financial planning service and financial advice.

Commissioner for Financial Advisers, David Mayhew says "*The Commission is responding to industry concerns about the intersection of the work required when giving financial advice with that required by a financial planning service, as defined in the Financial Advisers Act*".

The guidance note is available on the Securities Commission's website.

Regulations under finance sector laws

Regulations are to be developed under the Financial Advisers Act and the Financial Service Providers (Registration and Dispute Resolution) Act.

The regulations cover:

- the exact content of disclosure that financial advisers will have to make to clients;
- the fees charged to financial service providers and financial advisers; and
- the form of the new register of financial service providers.

Commerce Minister Simon Power said "*the new disclosure regulations will require financial advisers to clearly disclose key information, such as what their fees are, whether there are any limitations on their services, and whether they have any conflicts of interest*".

The disclosure regulations were scheduled to be gazetted in April.

Improvements to be made for broking services under the new financial advisers regime

*The Government has announced that it will amend the Financial Advisers Act (the **Act**) to enable it to be effectively implemented in relation to both firms and individuals operating broking services.*

At present, the Act only allows appropriately registered or authorised individuals to perform broking services (or "investment transactions" as they are defined in the Act), and not firms. The Government has acknowledged that this would create difficulties for a number of banks, insurance providers, non-bank deposit takers and various other institutions.

A Supplementary Order Paper (**SOP**), which amends the Financial Service Providers (Pre-Implementation Adjustments) Bill, has now been introduced to give effect to the Government's proposal.

It:

- inserts a new Part 3A in the Act to contain provisions regulating brokers. To the extent that financial advisers are also brokers, their broking services will be regulated under this Part;
- renames "investment transactions" as "broking services" in the Act, and the scope of the services is clarified as being "the receipt, holding, or payment of client money or client property by a person acting on behalf of a client". It also clarifies that handling items such as non-transferable cheques and automatic payment forms is not a broking service, and extends the list of cases where a person does not provide a broking service to include:
    - employees handling money on behalf of their employer; and
    - intermediaries handling money as agents of providers of financial products (by excluding product providers from the definition of "client" in relation to a broking service);
- allows both individuals and entities to provide broking services;
- applies similar disclosure and conduct obligations to brokers in the new Part 3A to those that applied previously to investment transactions carried out by financial advisers (although these obligations are generally applied to the entity or employer that is the broker, rather than to the individual employee). Also, Part 3A does not require disclosure by brokers to other brokers or to product providers;
- provides for the Securities Commission to continue to have the role of enforcing compliance with these obligations, and provides it with the power to direct brokers to comply with them. The Securities Commission is also given a power of exemption from disclosure or conduct obligations in Part 3A, to help ensure that there is minimal overlap with other regimes that regulate the handling of client money and property (e.g. regulation of market participants by NZX);
- ensures that the previous offences that applied to authorised financial advisers carrying out investment transactions apply to brokers that are entities as well as individuals; and
- changes the Financial Service Providers (Registration and Dispute Resolution) Act to require:
    - both individuals and entities in the business of providing broking services to be registered, unless exempted (with the exception that employees of registered entities will not need to be separately registered as brokers themselves); and
    - dispute resolution schemes to share information relating to disputes about brokers with the Securities Commission.

As a consequence of replacing the "investment transaction" definition and dealing with the provision of broking services in a separate part of the Act, the SOP also changes the categories of "financial adviser service" to include a person who makes an "investment management decision" instead of an "investment transaction". That is, a financial adviser will include anyone who decides which financial products to acquire or dispose of on behalf of a client (acting under authority given to them, or their principal or employer). However, an exception is made for investment managers appointed by a product provider who makes decisions relating to the provider's products.

Click here to read the Cabinet paper.

Exemption for advice that is 'incidental' to business

The Commerce Select Committee is proposing to adopt an exemption to cover the provision of financial advice that is incidental, as opposed to an integral part, of business operations.

The Financial Advisers Act (the **Act**) is open to a wide interpretation which could require persons who were not intended to be classed as 'advisers' (for example, retail assistants) to be trained and registered financial advisers.

We understand that, following submissions made on behalf of the New Zealand Retailers Association , the Commerce Select Committee is now proposing to adopt an exemption to cover the provision of financial advice which is incidental to business operations.

In practice, we expect this exemption to operate mainly to exclude retail staff advising customers on hire purchase options, and will bring the Act more into line with its Australian equivalent.

Financial adviser compliance pathway announced

Financial advisers are being given extra time to fully comply with the new financial advisers' regime.

The compliance pathway will still require all financial advisers to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act, and to have become a member of an approved dispute resolution scheme (if required), by 1 December of this year. Financial advisers will also have to have submitted their applications for authorisation (or, in the case of a qualifying financial entity (**QFE**)), have submitted their applications for QFE status), and started undertaking any training necessary, by 1 December.

However, they will then have an additional six months (until 30 June 2011, when the regime comes into effect) to complete any required training and have applications for authorisation and QFE status processed by the Securities Commission. Financial service providers who do not provide financial advice will need to be registered, and become a member of an approved dispute resolution scheme (if required), by 1 December 2010. If a financial service provider is not registered, or has not become a member of a dispute resolution scheme (if required), by this time, they will not be permitted to continue providing financial services.

Summary of key dates	>
1 July 2010	Applications for registration as a financial service provider and authorisation as a financial adviser open at www.fspr.govt.nz
1 December 2010	Financial Service Providers (Registration and Dispute Resolution) Act fully in force: • financial service providers must be registered and be a member of an approved dispute resolution scheme (if required); and • applications for authorisation must have been received (or, in the case of a QFE, applications must have been submitted for QFE status), otherwise financial service providers and financial advisers cannot legally provide services.
1 July 2011	Financial Advisers Act fully in force – financial advisers must be authorised. Similarly, organisations seeking QFE status will have to have been approved.

It is expected that both the Financial Service Providers (Pre-Implementation Adjustments) Bill and the Code of Conduct for Financial Advisers will be finalised by July this year.

Click here for the full press release, which includes a Q&A section.

Ready for FSPR

All financial service providers, including financial advisers, must be registered by 1 December 2010.

Registration is expected to open on the new Companies Office website for the Financial Service Providers Register from 1 July.

Details of fees and costs are available on the website www.fspr.govt.nz.

Recent developments

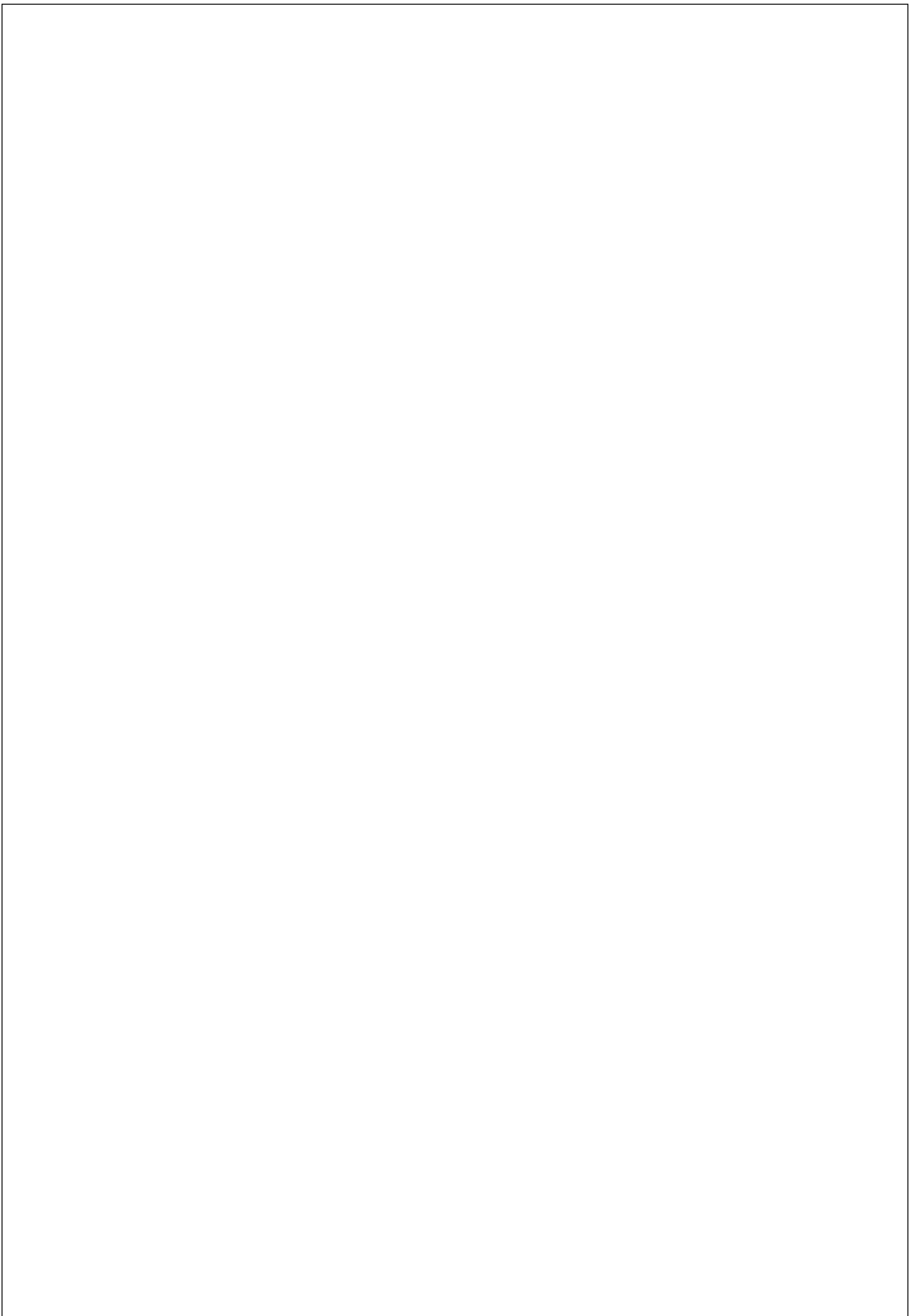
CCCFA - revised draft credit fees guidelines released

*The Commerce Commission has released revised draft guidelines outlining its enforcement approach to credit fees under the Credit Contracts and Consumer Finance Act (**CCCFA**).*

The draft guidelines, which were revised following receipt of submissions on an earlier version circulated in 2009, focus on section 41 of the CCCFA, which prohibits unreasonable credit and default fees. The guidelines also refer to sections 42 and 44, which set out rules for determining whether establishment, credit and other default fees breach section 41.

Commerce Commission Fair Trading Manager Graham Gill said that "*The guidelines will be updated as court precedent is available to provide further clarification on these sections of the CCCFA. The Commission has a number of credit fees cases currently before the Courts that are likely to assist with this. An aspect of section 44 which particularly requires clarification is the application of 'reasonable standards of commercial practice'. The Commission is going to work with the credit industry to try and establish some agreed approaches*".

Click here to read the draft guidelines.



Capital market recommendations progressing

*The Government has released a progress report on its response to recommendations made by the Capital Market Development Taskforce (**CMDT**).*

In December last year, the CMDT made 60 recommendations as part of its proposed plan for the development of capital markets in New Zealand.

Releasing a progress report on the Government's response, Commerce Minister Simon Power said "*the Government agrees with the taskforce's views that capital markets are key to improving the financial wellbeing of all New Zealanders and a vital source of finance for business*. ... *That's why we've brought forward the implementation of a number of the taskforce's recommendations, including fast-tracking of the creation of a new financial regulator, the Financial Markets Authority, and improving KiwiSaver regulations. Overall, this report shows the action plan is largely on track, with a number of initiatives to be covered off by the review of the Securities Act*".

Click here to view the progress report.

Government to improve KiwiSaver regulation

The Government has announced its intention to make changes to improve the governance and management of KiwiSaver schemes.

Commerce Minister Simon Power said that "*Mum and dad investors need to be certain that KiwiSaver is well governed and that those managing their hard-earned savings will be held accountable if there is wrong-doing*".

The key changes include the following:

- The Securities Act will be changed to provide that the manager of a retail KiwiSaver scheme is the "issuer". This will mean that the manager, and not the trustee, as at present, is primarily responsible for false and misleading statements made in prospectuses, investment statements, and advertisements. The manager will also owe a legal duty of care to investors, and will be required to act in their interests.
- Retail KiwiSaver schemes are to be brought within the model of the Securities Trustees and Statutory Supervisors Bill currently before Parliament. Under this model, all retail KiwiSaver schemes will be required to operate under a licence set by the Financial Markets Association.
- The regulation of trustees of retail KiwiSaver schemes will be brought into line with the new regime that will apply for other types of managed funds.
- Managers will be required regularly to provide ongoing information to the public and regulators regarding their performance, their fees, and what they have invested in.

At this stage, the changes are not expected to apply to non-retail KiwiSaver schemes, that is, employer-based and some other vocational based schemes, or non-KiwiSaver superannuation schemes.

Click here for the press release, which includes a Q&A section.

The regulatory landscape - what needs to change

As a precursor to the regulatory changes announced by the Commerce Minister the following day, Chair of the Securities Commission Jane Diplock gave a presentation to the 4th Annual Regulatory Evolution Summit in Wellington on 27 April.

In her address, Ms Diplock addressed the gaps in the current regulatory framework and the need for reform.

She noted that the following key points should be considered as part of any regulatory review:

- the oversight of managed funds;
- making company directors more accountable;
- providing regulators with the power to deal with new forms of financial products that are not covered by securities law (to deal with situations like Blue Chip); and
- timely enforcement.

Click here to read the full transcript of the speech.

Report on Cycle 11 of the Financial Reporting Surveillance Programme

The Securities Commission has released its findings from Cycle 11 of its Financial Reporting Surveillance Programme.

In general, the level of compliance with NZ IFRS was found to be appropriate for a developed capital market, but the Commission considers that there is still room for issuers to improve their compliance to ensure greater transparency in the New Zealand market.

The results from Cycle 11 show a consistent series of technical breaches in financial reporting areas, which the Commission has highlighted in news releases and public reports. These include:

- inadequate or incorrect disclosure of credit risk and interest rate sensitivity in relation to financial instruments;
- the non-disclosure of an explicit and unreserved statement of compliance with IFRS;
- omissions from key management personnel compensation disclosures and the non-disclosure of consideration used to settle related party transactions;
- inadequate disclosure of assumptions underlying goodwill impairment testing;
- the non-disclosure of the nature of non-audit services provided by auditors; and
- inadequate disclosure of the specific assumptions underlying valuation of property, plant and equipment.

Click here to read the full report.

Credit ratings mandatory for non-bank deposit takers

*The Reserve Bank has announced that credit ratings are now mandatory for non-bank deposit takers (**NBDTs**).*

Mandatory credit ratings are a key component of the new prudential regulatory regime for deposit-taking finance companies, building societies and credit unions.

The new regime also includes capital adequacy requirements, restrictions on lending to related parties, governance and risk management requirements.

Not all deposit takers will have credit ratings, as some may be exempt from the requirement by the Reserve Bank. For example, in recognition of the cost of obtaining and maintaining a rating, small NBDTs (i.e. those with less than $20 million of consolidated liabilities), are able to operate with an exemption from the credit rating requirement, provided that the Reserve Bank has been notified in advance.

Disclosure

The Securities Commission has released a guidance note for NBDTs on disclosure of credit ratings.

The major features of the guidance note are:

- The Commission expects that, where an advertisement for securities displays promised rates of return, the advertisement should also feature information about the NBDT's credit rating.
- The Commission views credit rating information as material information. Accordingly, every prospectus of an NBDT should include information on its credit rating.
- Investment statements of NBDTs should also include information on credit ratings. This information should be conveyed in plain language and should be sufficient to help non-expert investors understand the credit rating.
- The Commission's enforcement approach will focus on whether NBDT's are ensuring that prospective investors have access to clear and easily comparable information about credit ratings.
- The credit rating must be given by a rating agency approved by the Reserve Bank.

The Ministry of Economic Development is developing new regulations that will introduce mandatory disclosure requirements for disclosure of credit rating information in a NBDT's registered prospectus, investment statement and advertisements for its securities.

Wholesale guarantee facility closed

The New Zealand Wholesale Guarantee Facility closed at the end of April, but the Retail Deposit Guarantee Scheme continues to operate.

The wholesale facility was established in November 2008 to help banks operating in New Zealand to access funding during the global financial crisis. Since New Zealand banks are now able to raise wholesale funding without having to rely on the guarantee, the facility was closed on 30 April.

No claims have so far been made under the facility, and Treasury does not consider it likely that any claims will be made under the existing 24 guarantees.

The closure of the wholesale facility does not affect the current or extended Retail Guarantee Deposit Schemes.

Government moves to reduce aircraft financing costs

*Transport Minister Stephen Joyce has announced that New Zealand will become a party to the Cape Town Convention and associated Aircraft Protocol (the **Convention**), which is intended to reduce finance costs for companies purchasing and leasing aircraft.*

The Convention is a treaty that establishes comprehensive laws in each ratifying country, dealing with essentially all aspects of buying, selling, leasing and financing aircraft and engines. This includes perfection and filing issues, default, remedy, insolvency, priorities, title and aircraft de-registration.

The Convention allows lenders and lessors to register their security interests in mobile equipment on an international register. In addition, it offers globally consistent legal remedies for financial defaults by debtors, as well as additional rights, such as the ability to remove an aircraft from a national civil aircraft register and export it.

The Minister has indicated that legislation will need to be amended to enable New Zealand to become a party to the Convention, and that the Government would like to introduce amending legislation by the middle of the year.

Changes coming to the Companies Office

The Companies Office is replacing its current IT system with a purpose-built platform called "Enterprise".

Some of the new services and changes are:

- A personalised workplace/dashboard, including a company watch and a task list that informs clients of their filing requirements.
- Address verification with NZ Post and the ability to include website addresses.
- New authority management for maintaining an entity - no more company keys.
- Mandatory registration to use transactional services.

The new Companies Office Register, based on the *Enterprise* platform, is due to be released on 28 June.

Click here for further details.

Bell Gully news

CCH New Zealand Budget Report 2010
The 2010 Budget contains the most substantive tax reforms New Zealand has seen for many years. Bell Gully, in conjunction with CCH, has produced a report providing an in-depth analysis of the Budget.

Leadership and complex legal work help earn Young Corporate Lawyer of the Year title
A lawyer dealing with complex issues including human rights and intercountry adoption is the winner of this year's CLANZ-Bell Gully Young Corporate Lawyer of the Year Award.

For further details and more news visit www.bellgully.com/news/index.asp

Useful Web links

New Zealand Government

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

New Zealand financial agencies and organisations

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

New Zealand commercial sites

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

Australian Government sites

- Banking Ombudsman [www.abio.org.au]
- National Office for the Information Economy [www.noie.gov.au]

Australian commercial sites

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

International sites

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