

BELL GULLY

Corporate Reporter

6 SEPTEMBER 2010

Welcome to Issue No. 3 of Corporate Reporter, Bell Gully's regular round-up of corporate and general commercial matters, designed to keep you informed on regulatory developments, legislation and cases of interest.

IN BRIEF

Items in this issue include:

- Proposed changes for amalgamations and schemes of arrangements involving large companies;
 - Supreme Court confirms use of counterfactual test for misuse of market power cases;
 - Submissions on the Securities Act review discussion document released;
 - Legislative reforms for civil disputes passed;
 - Securities Commission's 2010 Annual Report;
 - Review of the Crown Minerals Act;
 - Developments for the new financial advisers' regime; and
 - The latest media releases from the New Zealand Commerce Commission and the Australian Competition and Consumer Commission.
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COMMERCIAL

Regulatory developments

New legislation enacted will bring improvements for civil litigants

Bills to update and streamline New Zealand's outdated limitation law and to resolve trans-Tasman disputes more effectively (and at lower cost) have been passed.

Limitation Bill

The [Limitation Bill](#) clarifies and improves the existing limitation law contained in the Limitation Act 1950. In particular, it clarifies what claims are affected by limitation periods; when those periods commence and provides further clarity to the exceptions from and modifications to those commencement periods. It also addresses the unfairness arising from the current law insofar as a limitation period may end before a claimant knows something is wrong.

Under the new Act, the limitation period for most "money claims" will be six years after the act or omission on which the claim is based. After this time period has expired a defendant can raise a limitation defence against the claim. The new Act also introduces a new "late knowledge date" which gives a claimant at least three years from when they discover the claim to bring proceedings. However, to prevent liability for an indeterminate time there is a longstop limitation period of 15 years starting from the date of the cause of action.

The 1950 Act will continue to apply to claims based on acts or omissions before the new Act comes into force (which is expected to be on 1 January 2011). But claims under the 1950 Act must be brought by the later of 15 years from the date of the act or omission, or five years after the new Act commences.

Trans-Tasman Proceedings Act 2010

The [Trans-Tasman Proceedings Act](#) implements the agreement between the New Zealand and Australian governments on trans-Tasman court proceedings and regulatory enforcement, which was signed in July 2008. Australia passed similar legislation to implement the agreement in March 2010. The new regime will be particularly welcome to trans-Tasman businesses, as it will enhance the efficiency and efficacy of commercial litigation involving assets or events in both jurisdictions. The new regime:

- allows civil proceedings from one country to be served on a defendant in the other country as of right;
- expands the range of civil court judgments from one country that can be enforced in the other, and streamlines the process for enforcement of those judgments;
- introduces a common statutory test to determine whether a court in one country should decide a dispute or 'give way' to a court in the other country;
- facilitates greater use of technology to enable parties and their lawyers to appear remotely in proceedings in the other country; and
- improves regulatory enforcement between countries by allowing civil pecuniary penalties and certain criminal regulatory fines imposed in one country to be enforced in the other.

The new Act will not come into force until supporting regulations are in place.

Revised UNCITRAL Arbitration Rules

The United Nations Commission on International Trade Law (**UNCITRAL**) has adopted a [revision of its arbitration rules](#). This is the first revision of the UNCITRAL Rules since their adoption in 1976. The revised Rules apply to arbitrations where the arbitration agreement referencing UNCITRAL arbitration is concluded on or after 15 August 2010. Unless the parties agree otherwise, the 1976 version of the Rules will remain in force for arbitrations in which the agreement to arbitrate was concluded before that date.

The UNCITRAL Arbitration Rules are a comprehensive, internationally accepted, set of rules which parties can adopt for an arbitration arising under their contract.

Insurance (Prudential Supervision) Bill passes into law

The [Insurance \(Prudential Supervision\) Bill](#) which reforms and extends prudential supervision to cover the insurance industry has been passed. The Bill establishes a system for licensing insurers, imposes prudential requirements on insurers, provides for the supervision of compliance with those requirements by the Reserve Bank and confers certain powers on the Reserve Bank to act in respect of insurers in financial or other difficulties.

The basic proposition of the Bill is that virtually all insurers are covered, regardless of the class of insurance business written, including life insurers, health insurers, captive insurers, re-insurers, and the insurance activities of incorporated societies. Similarly, the Act applies regardless of the nature of the entity conducting the insurance.

The implementation phase of the new Act includes a transitional period of up to three years to enable insurers to bring themselves into compliance with the new requirements.

COMPANY LAW

News from the Companies Office

Registrar of Companies will not appeal Feltex decision

The Registrar of Companies has announced that it will not appeal the District Court decision of 2 August 2010 under which former directors of Feltex Carpets Limited successfully defended charges under section 36A of the Financial Reporting Act 1993 for certain errors that appeared in Feltex's 2005 interim accounts.

[Click here to read the media release](#)

[Click here for Bell Gully commentary on the District Court decision](#)

Regulatory developments

Companies to be allowed to use electronic voting for company decisions

In a recent [speech](#) to the New Zealand Shareholders Association, Commerce Minister Hon Simon Power announced that the Companies Act 1993 will be amended to allow companies to opt in to using electronic shareholder participation for company decisions. Currently there is some uncertainty over whether reading the

Companies Act and the Electronic Transactions Act 2002 together makes electronic voting and prior direct electronic voting permissible.

The proposed amendments to the Companies Act will be included in the Regulatory Reform (Omnibus) Bill 2010, which is expected to be introduced to Parliament soon.

MERGERS AND ACQUISITIONS

Regulatory developments

Government announces changes for amalgamations and schemes of arrangements

Last month, Commerce Minister Hon Simon Power *announced* that parts of the Companies Act that relate to schemes of arrangement and amalgamations for large companies will be amended to better align them with the Takeovers Code regime. This is a long-awaited response to recommendations made by the Takeovers Panel to the Labour Government in 2008.

Although there has been a period of relative silence on the topic, in the past the Takeovers Panel has expressed its concern about the perceived increase in the use of amalgamations and schemes of arrangements under the Companies Act as an alternative to a takeover offer made under the Takeovers Code. The Panel has been pressing for legislative reform to address that concern, calling for substantive amendments to both Parts 13 and 15 of the Companies Act where code companies are involved. The Minister of Commerce has *recommended to Cabinet* that it approve the *Takeovers Panel's 2008 recommendations*.

The Minister has indicated that the changes are likely to be implemented through legislation to be introduced next year. Given the significance of these changes for code companies, we expect interested parties will be given an opportunity to make submissions on the legislation at the select committee stage.

[Click here for more detailed Bell Gully commentary on the proposed changes](#)

CAPITAL MARKETS

Regulatory developments

Securities Act review submissions

The Ministry of Economic Development (**MED**) has released copies of the submissions it received on its *discussion document* on proposed reforms to New Zealand's securities laws. A complete overhaul of current legislation is proposed, with the introduction of a new Act to replace the Securities Act 1978 and the Securities Markets Act 1988, and amendments to a range of other legislation dealing with aspects of securities law.

The discussion document sought feedback on MED's proposals on a range of issues through a Q & A format (with over 200 questions). To read Bell Gully's submissions [click here](#).

For copies of all of the published submissions [click here](#).

Securities Commission

Last full year annual report of the Securities Commission

The Securities Commission has released its [2010 Annual Report](#), which is likely to be its last full year annual report given its functions will be taken over by the new Financial Markets Authority (FMA) in 2011.

The Commission's Chair, Jane Diplock, begins her chairman's report with the statement that "the last 12 months have been among the most significant in the history of New Zealand's financial market regulation". She also makes a number of comments on the proposed new regulatory regime under the FMA including her view that "it is vital that the FMA is adequately funded and resourced, and armed with a broader regulatory mandate and legal powers than the Securities Commission has been". She is particularly concerned that the following two regulatory additions are made:

- widening the regulator's powers by making directors' duties enforceable by the regulator; and
- giving the FMA call-in powers to regulate new financial products that expose vulnerable consumers to investment risk, regardless of the strict letter of the law.

The Annual Report outlines the Commission's enforcement and surveillance priorities over the past 12 months, which include details of its investigations into failed finance companies and the enforcement actions taken in response to breaches it uncovered. The report notes that as at 30 June 2010, investigations are continuing in relation to 13 finance companies.

Other work highlighted in the report includes the Commission's role:

- advising the Ministry of Economic Development on the establishment of the FMA;
- warning finance company investors to seek advice when faced with unsolicited and below face-value offers for their debentures;
- issuing guidance notes for disclosure by KiwiSaver providers and credit rating disclosure by non-bank deposit takers;
- completing its fourth annual oversight review of the NZX's performance of its regulatory function as a registered exchange;
- investigating 27 possible cases of market misconduct;
- mobilising the financial services industry around the setting up of a new profession of licensed financial advisers;
- granting a new class exemption to allow listed companies to raise more money from existing shareholders;
- progressing two applications for designation as settlement systems, together with the Reserve Bank; and
- assisting overseas regulators in their cross-border investigations.

[Click here to read the full report](#)

Further class exemptions from the Financial Reporting Act for overseas issuers

The Securities Commission has extended the [Financial Reporting Act \(Overseas Issuers\) Exemption Notice 2009](#) to grant a class exemption to certain German and Dutch incorporated issuers from various financial reporting requirements under the Financial Reporting Act so they can use their overseas GAAP compliant financial statements. This extends the class exemption previously granted to certain US and UK incorporated issuers. See

the [Financial Reporting Act \(Overseas Issuers\) Exemption Amendment Notice 2010](#) and the [Financial Reporting Act \(Overseas Issuers\) Exemption Amendment Notice \(No 2\) 2010](#) for further details.

Unsolicited offers – guidance for investors

Following a number of complaints about unsolicited offers that have been made for shares, debentures and other investments, the Securities Commission has issued guidance to investors on some “pitfalls” they may face when considering such an offer.

[Click here for further details](#)

Financial adviser regime developments

Revised version of the Code of Professional Conduct for Authorised Financial Advisers approved

The Commissioner of Financial Advisers, David Mayhew, has approved the [revised draft Code of Professional Conduct for Authorised Financial Advisers](#) (the **Code**) submitted by the Code Committee for Financial Advisers on 19 August. It is now with the Commerce Minister for his approval.

An earlier draft of the Code was rejected by the Commissioner as he was not satisfied that it was consistent with the Financial Advisers Act 2008 in three respects, two of which affected operative provisions of the Code. In response to the Commissioner’s direction made on 17 August, the Committee made further amendments to the Code, including:

- the description of the financial adviser services requiring authorisation, which are set out in the Background to the Code, has been updated to reflect changes to the Act that came into force on 1 July;
- an explanatory note has been added to Code Standard 5; and
- a note has been added to Code Standard 8 clarifying that, where a client has opted out of receiving a suitability assessment, with the result that the adviser ends up providing a class service, the adviser must comply with Code Standard 10.

Code Committee Chairman Ross Butler is encouraging advisers to take advantage of the resources provided by the sector, and by training providers, to ready themselves for the new regime.

Information on the competence requirements for authorisation can be found at www.afacompetence.org.nz, where advisers can also book examination and workplace assessment, upload evidence, and check assessment results.

[Click here to view the Commissioner’s letter to the Minister](#)

Financial Service Providers register now open

The recent opening of the Financial Service Providers register marks the start of the transition to full implementation of the Financial Advisers Act and the Financial Service Providers Act (Registration and Dispute Resolution) Act.

Commerce Minister Hon Simon Power is urging those who provide financial services to register, noting that "the requirement to register applies to a wide range of financial service providers, and anyone who is in doubt about whether it applies to them should seek legal advice".

The Financial Service Providers Register is available at www.fspr.govt.nz.

Government's backstop financial service dispute resolution scheme announced

Minister of Consumer Affairs Hon John Boscawen has [announced](#) that Financial Dispute Resolution and the Banking Ombudsman Scheme have been formally approved as financial service dispute resolution schemes under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Financial Dispute Resolution is the operating name of the Government's backstop, or reserve, scheme. It will be operated by Dispute Resolution Services Limited. The [Financial Service Providers \(Dispute Resolution – Reserve Scheme\) Rules 2010](#) set out the rules governing the operation of the reserve scheme.

These schemes, along with the Insurance & Savings Ombudsman Scheme and Financial Services Complaints Ltd, will provide independent dispute resolution services where complaints about financial products and services can be resolved.

New guides for AFAs and QFEs

The Securities Commission has released the [AFA Authorisation Guide](#) and an [updated edition of its QFE Adviser Business Statement Guide](#), to help financial advisers prepare for the new regulatory regime.

The AFA Authorisation Guide explains how to apply to become an Authorised Financial Adviser (AFA). The Securities Commission recommends it for use as a reference during the online application process, in conjunction with the on screen help text.

The QFE Adviser Business Statement Guide explains how to prepare an Adviser Business Statement for a business that chooses to apply for status as a Qualifying Financial Entity (QFE) in the new regulatory regime. The revised guide has new content on QFE groups and covers partner entities, nominated representatives and associated entities.

New Zealand Exchange (NZX)

NZX announces "Go-Live Date" for its new clearing and settlement system

NZX has obtained all regulatory approvals necessary for the operation of its new clearing and settlement system. Following the successful completion of system migration steps, the first date of operation for the settlement system will be today, 6 September 2010 (the "Go-Live Date").

The proposed amendments to the NZSX/NZDX Listing Rules, NZAX Listing Rules, NZX Participant Rules and the NZ Markets Disciplinary Tribunal Rules (**NZMDT Rules**) and Procedures came into force as from 12.01am on 6 September 2010. For details of these amendments see the previous issue of *Corporate Reporter*, but note that some additional technical amendments were made to the NZAX Listing Rules ([click here for details](#)) and the NZMDT Rules ([click here for details](#)) after the 6 August 2010 changes.

Copies of the amended Rules and Procedures are available at <http://www.nzx.com/market-supervision/rules/>

[Click here to read the announcement](#)

In the courts

Court of Appeal confirms requirements for developers offering participatory securities in communal residential facilities through incorporated societies

Verano Properties Limited v Sever [2010] NZCA 386

Background

In the first issue of *Corporate Reporter* we discussed the High Court decision of this case – which has now been confirmed by the Court of Appeal. The case raised an issue concerning the Securities Act (Residential Property Developments) Exemption Notice 1999 (the **1999 Notice**) which was revoked and replaced by the Securities Act (Real Property Developments) Exemption Notice 2007 (the **2007 Notice**). Since the 2007 Notice is of similar effect to the 1999 Notice, this Court of Appeal decision is relevant to any developer who has relied on, or seeks to rely on, the 2007 Notice as well.

The exemption notices apply to developers who offer securities in the form of membership of a society (incorporated under the Incorporated Societies Act 1908) that confer rights to participate in the ownership and use of communal facilities (participatory securities) in a residential property development. The purpose of the notices is to provide developers with exemptions from a number of important disclosure provisions in Part 2 of the Securities Act 1978 (including the obligation to issue a prospectus) in marketing the development to the public, provided certain conditions are met. These conditions include providing the purchasers, who will be admitted to "membership of a society" under the terms of the agreement for sale and purchase, with the rules of the society and other documents before subscription so as to ensure that the purchasers are fully informed before committing themselves to the transaction.

The facts

In this case, in reliance on the 1999 Notice, the developer had sought specific performance for settlement of a sale and purchase agreement with a purchaser of a lot in a subdivision development. Under the sale agreement it was acknowledged that the developer intended to establish a residents' society for the purpose of owning and maintaining common facilities in the subdivision and that the developer was intending to procure the incorporation of an incorporated society of which the owners of the lots in the subdivision would be required to become members. The society was incorporated prior to the sale agreement becoming unconditional but it was not in existence when the agreement was executed.

The purchaser refused to settle the sale agreement on the basis that the agreement was void under section 37 of the Securities Act because the developer had not registered a prospectus for the development, as required by the Securities Act in respect of the participatory securities. The purchaser claimed that the developer could not rely on the 1999 Notice for not registering the prospectus because the society had not been incorporated at the time they entered into the sale agreement in breach of regulation 4(a)(i) of the exemption notice.

The developer contended that the wording of regulation 4(a)(i) did not preclude an interpretation that the society need not be incorporated until the time of settlement. In particular, it argued, this was a more practical and sensible interpretation of the regulation given that the sale agreement for such developments may never become unconditional and the society may never be needed because the development does not proceed.

Court of Appeal's decision

The Court of Appeal dismissed the developer's appeal, confirming that in order for the developer to gain the benefit of the exemptions provided by the 1999 Notice (and, by analogy, the 2007 Notice) the incorporated society needs to exist when the specified securities are subscribed for. Under the wording of regulation 4(a)(i) this is when the purchaser enters into the agreement with the developer, not in the time period between execution and settlement. In reaching this decision the court took into account the overall context and purpose of the exemption notice and the Securities Act, noting that it was important for the exemption notice to "be interpreted in a way that is consistent with the Act rather than, as the [developer] suggest[s], in a manner that is consistent with the type of transaction it concerns".

COMPETITION AND CONSUMER LAW

In the courts

Supreme Court confirms counterfactual test for determining misuse of market power cases

The Commerce Commission v Telecom Corporation of New Zealand Limited and Telecom New Zealand Limited [2010] NZSC 111

Background

In 1999, Telecom was suffering detriment as a result of the exponential growth in the use of dial-up internet. The level of termination charges it was facing was unsustainable but would be reduced if residential customers moved to the Telecom network. Accordingly, Telecom introduced changes to its calling system to encourage customers to switch to its network – residential customers using an 0867 dial-code would not be charged for their calls to internet service providers (ISPs). An ISP then lost its right to claim termination fees from Telecom relating to that call. The Commerce Commission alleged that Telecom had breached section 36 of the Commerce Act (as it stood at the time) by using its dominant position in the market for an anti-competitive purpose, preventing or deterring its competitors from engaging in competitive conduct by reducing or eliminating the termination fees that would have otherwise been payable to its competitors.

A previous Bell Gully article ([Time to counter the counterfactual?](#)) discussed the decisions of the High Court and the Court of Appeal – the decision of the Court of Appeal has since been appealed to the Supreme Court.

The High Court followed the decisions of the Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 and *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145, which held that a counterfactual test must be applied in assessing section 36 cases. The High Court found that, while Telecom did enjoy a dominant position in the market at the relevant time, Telecom did not "use" that position in the required competition law sense.

On appeal, the Commission contended that the counterfactual test should not be the sole test for determining whether "use" had been made of a dominant position. The Commission referred to a number of decisions of the

High Court of Australia, where the counterfactual test had not been regarded as the sole test for determining use of a dominant position, including:

- the materially facilitated approach in the judgment of the majority of the court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1*; and
- the direct observation approach suggested by Deane J in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177*.

The Commission submitted that, rather than always applying the counterfactual test, the Court should also be able to refer to these other approaches. The Court of Appeal was sympathetic to the Commission's arguments for a more flexible approach, but concluded that it was bound to apply the law as laid down by the Privy Council. It noted that any change of approach could only be made by the Supreme Court.

The Supreme Court decision

First, the Supreme Court took the opportunity to clarify that the concepts “use” and “taking advantage of” have essentially the same meaning in a section 36 context – commenting that the concept of “use” implicitly means “advantageous use”.

In terms of the test for “use”, the Court did not accept the Commission’s argument that the Australian authorities represented permissible alternative approaches to making a comparison between the actual market and a hypothetical workably competitive market – the latter providing the underlying basis for the counterfactual test. It decided that a proper analysis of the Australian cases supported the view that those cases did not provide for a range of tests, but in fact followed the same counterfactual approach as had been adopted in New Zealand. The Court took the opportunity to make clear that the focus of the counterfactual test was on whether a firm would as a matter of commercial judgment act in the same way in a workably competitive market, not whether a firm could act that way – the Court found that in the Australian cases, either explicitly or implicitly, there was consideration of what the dominant firm would have done in a competitive market.

The Court noted that when addressing the concept of “using” market power, it is important to take an approach which gives firms and their advisers certainty when assessing whether or not proposed conduct may breach section 36 – “having a range of tests...would not assist predictability of outcome”. It also noted that, “the necessary assessment must be undertaken on the basis that the otherwise dominant firm will act in a commercial rational way in the hypothetically competitive market”.

Accordingly, the Court concluded by holding that, in response to the advent of dial-up internet and the sizeable termination charges being incurred as a result, “any firm acting competitively, whether dominant or not, would have taken steps to mitigate the loss by introducing a scheme analogous to the 0867 package rather than continue to incur substantial losses...it has therefore not been proved that Telecom used its (assumed) dominant position in the relevant markets when introducing its 0867 service.”

Although the Court of Appeal was uncomfortable with the counterfactual test and noted that, depending on the context, it is not always a useful approach, the Supreme Court has clearly determined that the Privy Council's counterfactual approach should continue as the sole test for determining misuse of market power cases.

New Zealand Commerce Commission (NZCC)

Media releases

The NZCC has issued the following media releases:

Industry regulation and regulatory control

Commerce Commission draft decision: Reset default price-quality path to include a revenue differential term

The NZCC has released its consultation paper and draft decision to amend the default price-quality path applying to electricity distribution businesses for the period 2010-2015 by including a revenue differential term.

[Click here for more](#)

Market behaviour

Commerce Commission files freight forwarding cartel proceedings and settles with two defendants

The NZCC has filed proceedings in the High Court in Auckland against a number of companies accused of anti-competitive conduct in the freight forwarding market.

[Click here for more](#)

Guidelines on recognising and deterring bid rigging released by Commerce Commission

The NZCC has released three related resources to assist purchasers in both the public and private sectors in recognising and deterring bid rigging.

[Click here for more](#)

Telecommunications

Commerce Commission draft report recommends resale deregulation

The NZCC has released its draft report into whether the services that Telecom provides to other telecommunications companies to be resold should remain subject to the Telecommunications Act 2001.

[Click here for more](#)

Consumer issues

Court of Appeal clarifies intention under the Fair Trading Act

A recent Court of Appeal decision has clarified the interpretation of Section 17 of the Fair Trading Act. Section 17(a) of the Act prohibits the offering of gifts and prizes where there is no intention to provide the prize or provide a prize as offered.

[Click here for more](#)

Fair Trading Act guidelines for bundled telecommunications products issued

The NZCC has issued guidelines to help telecommunications retailers better understand their Fair Trading Act obligations in relation to the disclosure of bundled telecommunications products.

[Click here for more](#)

Rental car companies and directors fined for misleading consumers

Two Christchurch-based rental car companies, Affinity Car Rental New Zealand Limited and Euro Car Rental New Zealand Limited, and their directors, Kylee and Gary Harris, have pleaded guilty to 18 charges of breaching the Fair Trading Act. The Christchurch District Court has imposed fines and costs totalling \$37,960 as well as ordering a total of \$5,750 to be paid in reparation to affected consumers.

[Click here for more](#)

Balmoral Homes directors fined and ordered to pay reparation for Fair Trading Act breaches

Two directors of a Christchurch-based building company that has gone into liquidation pleaded guilty to multiple charges of breaching the Fair Trading Act in the Christchurch District Court. They have been fined \$15,000 each and have been ordered to pay a total of \$97,000 in reparation and a further \$30,000 for emotional harm reparation in total for six complainants.

[Click here for more](#)

Australian Competition and Consumer Commission (ACCC)**Selected ACCC media releases**

The ACCC has issued the following media releases:

Mergers and acquisitions**ACCC allows merger of Jetset Travelworld / Stella Travel Services**

The ACCC will not oppose the proposed acquisition of Stella Travel Services Holdings Pty Ltd by Jetset Travelworld Limited. The brands of Stella Travel Services include Harvey World Travel and Travelscene American Express, and Jetset Travelworld also operates Qantas Holidays and Qantas Business Travel.

[Click here for more](#)

Market behaviour**Draft decision to authorise Queensland liquor accord**

The ACCC has made a draft decision to grant conditional authorisation for a pro-forma liquor accord arrangement in Queensland for three years. The pro-forma liquor accord arrangement proposed by the State of Queensland acting through the Office of Liquor and Gaming Regulation includes a range of measures such as some limited restrictions on discounting and on the supply of certain drinks.

[Click here for more](#)

ACCC proposes to allow Agsafe to continue industry stewardship program

The ACCC proposes to grant authorisation to Agsafe Limited for a further three years to allow it to continue to enforce the Agsafe Accreditation and Training Program. Authorisation allows Agsafe to impose trading sanctions on persons and premises that do not comply with the rules of the program.

[Click here for more](#)

Sydney Airport stops certain price rises after ACCC concerns

Sydney Airport Corporation Limited has confirmed that it will not increase charges for aircraft parking for regional airlines unless the charges are notified to the ACCC. "The ACCC has reminded Sydney Airport that the Trade Practices Act requires it to notify the ACCC of any proposed increase in aircraft parking charges for regional airlines serving passengers travelling within NSW," ACCC chairman Graeme Samuel said. "Accordingly, Sydney Airport will not increase charges for aircraft parking for regional airlines unless those prices are notified to the ACCC."

[Click here for more](#)

Baxter penalised for breach of Trade Practices Act

Justice Mansfield has ordered Baxter Healthcare Pty Ltd to pay a penalty of A\$4.9 million for contraventions of sections 46 and 47 of the Trade Practices Act 1974. This followed a previous decision in 2008 by the Full Federal Court declaring that Baxter had breached the misuse of market power and the exclusive dealing provisions of the Act when it entered long term contracts with State health purchasing authorities.

[Click here for more](#)

Consumer issues**Court finds Panasonic bonus Nintendo Wii promotion misled consumers**

The Federal Court has declared that Panasonic Australia Pty Ltd misled consumers in its 2008 Bonus Wii promotion. Panasonic's advertising represented that consumers who purchased a participating television would be eligible to receive a Bonus Nintendo Wii gaming console by redemption.

[Click here for more](#)

ACCC alleges VIPtel Mobile misled customers and acted unconscionably

The ACCC has instituted proceedings in the Federal Court, Darwin against EDirect Pty Ltd, which also trades as VIPtel Mobile. The ACCC alleges EDirect engaged in both misleading and unconscionable conduct in entering into verbal contracts with consumers for mobile phone packages via telemarketing.

[Click here for more](#)

ENERGY AND RESOURCES

Regulatory developments

Government begins review of Crown Minerals Act 1991

Minister of Energy and Resources, Hon Gerry Brownlee, released the [Reviewing the Crown Minerals Act 1991 discussion paper](#) on 27 August 2010, which contains proposals in relation to the reform of New Zealand's mineral and petroleum permitting regime.

The discussion paper forms part of a wider review of the legislative, regulatory (including minerals programmes), taxation and royalty arrangements for petroleum and minerals in New Zealand – progressing under the Government's Petroleum Action Plan (which was released in November 2009 to increase investment in petroleum exploration and production in New Zealand).

The discussion paper is the first part of this wider review of the petroleum and minerals management regime and focuses on proposals to amend the Crown Minerals Act 1991 (**CMA**). A separate review and consultation on the various minerals programmes and regulations is expected to occur in March – April 2011.

The proposed changes to the CMA set out in the discussion paper are intended to encourage economic development from New Zealand's mineral resources, ensure that the minerals management regime is fit for purpose and achieve streamlining and simplification. In particular, the key proposals include:

- having a clear purpose statement in the CMA;
- enabling the CMA to clearly manage new technologies, resources and activities (for example, providing for methane hydrates and including new classes of permits);

- changing the regime relating to minerals programmes, including removing royalties provisions from minerals programmes (which would be provided for in regulations) and allowing for certain minor changes to be made to such minerals programmes without the need for consultation;
- the removal of policy and operational matters relating to permitting and providing for these in appropriate minerals programmes or in block offers. In addition, the Government has suggested some changes to policy and operational matters, such as:
 - amending the mandatory time limit for petroleum exploration permits to provide for a tiered approach that would cover a range of circumstances, such as onshore and offshore exploration; and
 - amending section 32 of the CMA to specify that permit holders only have a right of priority over any other person to apply for a subsequent exploration or mining permit where they have met certain criteria under a prospecting or exploration permit, as opposed to having a general right to be awarded such subsequent permit in those circumstances;
- enhancing the management of permit holders' non-compliance with their permit obligations and the CMA and regulations, for example:
 - providing that interest or penalties will be payable upon late payments of fees and royalties; and
 - specifying greater requirements in relation to the decommissioning of facilities after operations cease;
- simplifying the regime for transfers and dealings under section 41 of the CMA. In particular, the Government is proposing to amend section 41 to provide that only transfers of permits and permit interests and not dealings with a permit require the approval of the Minister. Also, such approval will be of the transfer itself, rather than approval of the agreement which effects the transfer, and the Minister would be required to have regard to the financial and technical capability of the proposed transferee. The Minister may also require a bond to be lodged by the transferee;
- optimising data requirements and disclosure obligations, including requiring further information from mining permit holders and amending the period of confidentiality of raw data from a five year maximum period to a three year maximum period; and
- various other measures aimed at optimising the development of the minerals management regime, including:
 - adding a general power for the Minister to reserve particular minerals or land from allocation; and
 - amending the current regime of petroleum development and production to achieve a more efficient development of resources, for example, requiring notification of a discovery by a permit holder which would trigger a timeframe in which the permit holder must surrender the area relating to the discovery or must commit to a work programme to evaluate it.

Submissions on the discussion paper are due by 8 October 2010.

BELL GULLY CLIENT UPDATES

Further commentary

In addition to the Corporate Reporter, Bell Gully also produces one-off client updates on corporate matters of particular significance. During the period covered by this issue of the Corporate Reporter we have published the following client updates:

- [Takeovers Panel's proposals for amalgamations and schemes of arrangement by "code" companies are underway](#)
- [Employment Bills released to amend Employment Relations Act and Holidays Act](#)
- [Employment Bills under consideration – law changes open to submissions](#)
- [Financial Services Quarterly – Spring 2010](#)

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