

Corporate Reporter

13 AUGUST 2010

Welcome to Issue No. 2 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:

- The Draft New Zealand Energy Strategy and Draft New Zealand Energy Efficiency and Conservation Strategy;
 - The Securities Commission's review of issuers' corporate governance disclosures;
 - Directors cleared of liability under the Financial Reporting Act;
 - The latest financial advisers' regime developments;
 - Proposed regulations and codes of practice for the AML/CFT regime;
 - Recent Court of Appeal decisions concerning the Companies Act and the Securities Act;
 - Developments in the electricity sector; 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

Regulations and codes of practice for the AML/CFT Act released for consultation

A consultation document which contains proposals for regulations required to complete the shape of the new Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) regime has been released. The document also contains proposals for codes of practice related to customer due diligence (CDD), which are central to the regime.

The proposals should clarify the extent of responsibilities for reporting entities sufficiently to enable business planning to commence. The document includes proposals for the following:

- commencement timeframes;
- exemptions to clarify the AML/CFT Act to entities, transactions, products and services, and the extent of obligations that apply;
- applicable thresholds;
- CDD, including the basis for verification, entities to whom simplified due diligence may be applied and identity requirements for enhanced due diligence;
- the way in which third party relationships will be managed in specific circumstances;
- eligibility for designated business groups and the process of electing to join such a group;
- factors which must be taken into account in risk assessments;
- annual reporting requirements; and
- prescribed forms.

Submissions have been invited on all aspects of the proposals, and in particular on whether the proposals are technically accurate and adequately address industry concerns. The closing date for submissions is 6 September 2010.

It is anticipated that final decisions on regulations will be made and communicated in late September. Regulations are likely to be gazetted in December 2010.

[Click here for further details](#)

Amendments proposed for the Consumer Guarantees Act

The [Consumer Guarantees Bill 2010](#) (a private member's bill) has passed its first reading and has been sent to the Commerce Select Committee. The committee has now called for submissions on the Bill.

The Bill amends the Consumer Guarantees Act 1993 in the following two areas:

- extended warranties, and
- the supply of goods and services by suppliers through a competitive bidding process using an online trading facility. (Suppliers are defined in the Act as persons who, in trade, supply goods and services to consumers.)

The Bill provides that consumers are to be informed about whether an extended warranty they are considering purchasing provides any benefit, right, or convenience that is greater than the rights under the Act. The Bill also provides for a cooling-off period once an extended warranty has been purchased. This will allow consumers to

reconsider whether to continue with the extended warranty. If they decide not to do so within the cooling-off period they will be entitled to a full refund of the amount paid for the warranty.

The Bill also seeks to clarify the uncertainty as to whether online sales are covered by the Act by specifically providing that online sales are covered.

Submissions close on 9 September 2010.

[Click here for further details](#)

COMPANY LAW

In the courts

Directors cleared of liability under the Financial Reporting Act

*Ministry of Economic Development v Feeney and others**

Bell Gully acted for the former directors of Feltex Carpets Limited in an important decision delivered by the District Court. The directors successfully defended charges under section 36A of the Financial Reporting Act 1993 (**FRA**) for certain errors that appeared in Feltex's 2005 interim accounts.

The directors relied on the defence provided in section 40 of the FRA that they took "all reasonable and proper steps" to ensure compliance with the Act. The meaning of this section had not yet been ruled on by the New Zealand courts. Judge Doogue agreed that the directors had taken all reasonable and proper steps by:

- ensuring that the company had a well resourced financial management team;
- establishing a comprehensive transition process from the old accounting standards to the new ones (GAAP to IFRS);
- engaging a reputable accounting firm (Ernst & Young) to:
 - prepare an IFRS assessment report to identify the differences in reporting as result of the introduction of IFRS;
 - supervise a steering committee at Feltex to conduct a standard by standard review of IFRS; and
 - conduct a review of Feltex's 2005 interim accounts;
- having processes in place which ensured that all relevant documents and information were made available to Ernst & Young;
- obtaining assurances from the CFO that the company's internal financial controls were adequate and effective; and
- having a properly constituted audit committee to oversee the integrity of the financial reporting and control process.

The decision is important as it confirms that directors are entitled to rely on the advice of properly qualified professional advisers provided that the directors are properly informed as to the affairs of the company and have proper systems and processes in place. Judge Doogue dismissed the prosecution's argument that the directors themselves should have reviewed the lengthy and complex IFRS standards and then applied those to Feltex's interim financial statements. This proposition was found to be "utterly unrealistic", as "company directors will not have anywhere near the same level of knowledge and expertise in accounting standards that a specialist auditor will have and the best course for a director is to seek and follow the advice of an expert". Further, "reliance on

advice, where appropriate conditions are satisfied, does not detract from, but enhances the quality of directors' duties".

[Click here for a copy of the decision](#)

**Bell Gully acted for the defendants in this case.*

The difference between 'fair value' and 'fair market value' may not be as big as you think

Fong v Wong [2010] NZCA 301

Background

In a previous Bell Gully article ([Directors with inside information must buy and sell shares for 'fair value'](#)) we discussed the earlier High Court decision of *Wong v Fong* which has since been appealed. This case provides a useful reminder that section 149 of the Companies Act 1993 requires share transactions involving directors with material non-public information to be for 'fair value'. If they are not, the director is liable to the seller (or buyer) for the difference between the 'fair value' and the price at which the shares were sold, regardless of whether the parties have reached a prior express agreement on the sale price.

The case involved parties who had been involved in a family business run through corporate entities. When the business relationship broke down, the minority shareholder exited the business by selling its shares to the majority shareholder. However, a problem arose when the minority shareholder asked the independent expert (PwC) to assess the sale price of the shares at their 'fair market value' instead of their 'fair value' as required by section 149 and the company's constitution. As a result the PwC valuation included a 30 percent minority discount.

PwC acknowledged that if it had been asked to apply a 'fair value' standard the result would have been different, noting that fair value in this context requires an assessment of what the buyer gains and what the seller gives up, and an equitable sharing of gains and losses.

When the minority shareholder was unable to persuade the majority shareholder that the PwC valuation was not a 'fair value', it settled the transaction and brought proceedings against the majority shareholder to seek the difference between the 'fair market value' assessed by PwC and the "fair value" under section 149.

The High Court held that the shares had to be exchanged for 'fair value' in accordance with section 149 and found, on the facts, that the fair value of the shareholding should be calculated in the manner undertaken by PwC but without the application of the 30 percent minority discount, since a minority discount to that extent was not appropriate for a company which had been a majority controlled business founded on the basis of a personal relationship involving mutual confidence.

The Court of Appeal's decision

On appeal there was no dispute as to the application of section 149. The only issue for the Court of Appeal was whether, in the context of section 149, it was proper for the court to hold that the PwC valuation had not yielded a 'fair value'.

The court held that the High Court had been right to find that the outcome of PwC's 'fair market value' valuation did not yield a result that constituted 'fair value' for the purposes of section 149. However, the court's reasons for reaching this decision are of note. The court emphasised that it only viewed the case on the same terms as the High Court because the expert evidence provided by PwC and a share valuation analyst indicating that "fair

value” and “fair market value” were two distinct concepts went unchallenged in the High Court. In its view it was not open for the High Court to have gone behind the uncontested evidence of the analyst and the view expressed by PwC that an assessment of ‘fair value’ would have yielded a different outcome from the ‘fair market value’ assessed by PwC. Nor was it appropriate for the court, in the absence of evidence to the contrary, to have said that it was incorrect for PwC to apply a minority discount in the context of its ‘fair market value’ assessment.

For itself however, the Court of Appeal noted that it was “not entirely convinced that fair market value and fair value really are different concepts”. In its opinion the terms ‘value’ and ‘market value’ are usually seen as synonymous and therefore found it “hard to see why there is any real difference between them”.

CAPITAL MARKETS

Securities Commission

Issuers could improve corporate governance reporting

The Securities Commission has recommenced its reviews of issuers' corporate governance disclosures, with a view to promoting high standards of corporate governance by issuers and ultimately improving confidence in New Zealand's capital markets. The Commission last undertook such a review in 2005.

In its latest review, the Commission reviewed the disclosures of 68 issuers (with balance dates ranging from 30 June 2008 to 30 June 2009) by analysing disclosures made in their annual reports and websites against the [Securities Commission's Corporate Governance Principles and Guidelines](#).

The review found that issuers could improve their reporting by disclosing:

- how directors observe and foster high ethical standards, such as by complying with a code of ethics;
- how remuneration incentives align with the issuer's objectives and risk management policies;
- how risk management policies are applied to material business and environmental risks faced by the issuer (e.g. by providing a risk matrix);
- how the board builds constructive relationships with shareholders that encourage them to engage with the entity (for example, under market disclosure and communications policies); and
- who the board considers its key stakeholders are and how it respects their interests.

A further measure would be for issuers to ensure that any standing corporate governance documents are readily available to interested investors and stakeholders, for example, via the issuer's website.

Examples of good corporate governance disclosures provided by issuers in the Commission's report, included The Warehouse Group Limited, Auckland International Airport Limited and Fisher & Paykel Healthcare Limited.

To read the Commission's full report [click here](#).

Financial adviser regime developments

Draft Code for Financial Advisers in final stages

The Code Committee for Financial Advisers has recommended a [final version of the draft Code of Professional Conduct for Authorised Financial Advisers](#) (the **Code**) to the Commissioner of Financial Advisers for consideration and approval. The Code will then be sent for ministerial approval and gazettal.

The recommendation of the Code to the Commissioner of Financial Advisers follows a final round of consultation on the Code which closed on 21 July 2010. Changes made in the final Code following consultation include:

- The insertion of a “reasonableness” requirement to Code Standards 1, 6 and 10. For example, the requirement to place the interests of the client first under Code Standard 1 is now qualified by what is reasonable in the circumstances.
- The removal of the requirement for information to be provided in writing to clients under Code Standards 7 and 8, to facilitate client instructions and advice provided over the telephone.
- In relation to the competence requirements under Code Standard 16:
 - an eligibility sunset date of 1 January 2014 has been set for alternative qualifications and designations; and
 - a designation previously attained that has not been retained at the time an Authorised Financial Adviser (**AFA**) seeks authorisation will be recognised, on the condition that the AFA has completed at least 20 hours continued professional training in the 12-months immediately before first becoming authorised (including 10 hours of structured training). Previously, an AFA was required to maintain membership of a professional body for a continuous period of at least twelve months immediately before first becoming authorised.

[Click here for further details](#)

Further transitional measures now in place for the new financial advisers’ regime

The following transitional orders and regulations were made on 9 August 2010:

- the [Financial Advisers Act Commencement Order 2010](#), which brings into force, in specified stages, the provisions of the [Financial Advisers Act 2008](#) (the **FAA**) that are not already in force;
- the [Financial Service Providers \(Registration and Dispute Resolution\) Act Commencement Order 2010](#) which brings Part 2 and section 48 of the [Financial Service Providers \(Registration and Dispute Resolution\) Act 2008](#) (the **FSP Act**) into force in specified stages; and
- the [Financial Service Providers and Financial Advisers Transitional Regulations 2010](#) which:
 - provide that a period of authorisation of a financial adviser or a period of grant of Qualifying Financial Entity (**QFE**) status under the FAA must not commence before 1 December 2010 (on which date the key related provisions under the FAA come into force); and

- o ensures that the section requiring persons who provide financial adviser services to be registered under the FSP Act (section 20D) is technically effective in the implementation period,

(together, **the Transitional Regulations**).

The transitional scheme for financial advisers under the Transitional Regulations is as follows:

<p>On and from 16 August 2010</p>	<ul style="list-style-type: none"> • the register opens under the FSP Act and persons may register under that Act, but are not required to do so; • applications for approval as an authorised financial adviser or for QFE status may be made, and decided on, under the FAA. However, no period of authorisation or grant of QFE status can commence before 1 December 2010; • the disciplinary committee can be established under the FAA; • all interpretative and other provisions of the FAA relevant to this preliminary implementation stage come into force. However, no conduct obligations for financial advisers, brokers, QFEs, or members of QFE groups come into force at this stage.
<p>On and from 1 December 2010</p>	<ul style="list-style-type: none"> • it becomes mandatory for providers of financial services (other than financial adviser services) to be registered under the FSP Act; • the holding-out protections for the terms of authorised financial advisers and QFEs come into force (because periods of authorisation and periods of grants of QFE status may commence from this time); and • most of the conduct obligations under the FAA for financial advisers, brokers, QFEs, and members of QFE groups, and the related enforcement provisions, come into force.
<p>On and from 1 April 2011</p>	<ul style="list-style-type: none"> • at this time, the FSP Act is fully in force; • it becomes mandatory for financial advisers to be registered under the FSP Act; • any person seeking to rely on a grant of QFE status to avoid the need to register its employees and nominated representatives must have that status granted by this date.
<p>On 1 July 2011</p>	<ul style="list-style-type: none"> • all remaining provisions of the FAA come into force. In particular: <ul style="list-style-type: none"> - the restrictions on who is permitted to provide financial adviser services (sections 17 to 20 of the FAA) and the prohibition on holding out as a financial planner or investment planner (section 20B of the FAA) come into force; and - the disclosure obligations for financial advisers and brokers replace those set out in the Securities Markets Act 1988 for investment advisers and brokers.

Regulations have also been made setting:

- fees and the levy under the FSP Act (See the [Financial Service Providers \(Fees and Levy\) Regulations 2010](#) for details.);
- fees for applications to be authorised financial advisers and QFEs under the FAA and for the renewal of authorisation and QFE status (See the [Financial Advisers \(Fees\) Regulations 2010](#) for details.)

Both regulations come into force on 16 August 2010.

NZSX/NZDX & NZAX Listing Rule amendments

NZX Market Supervision has given notice of amendments to the NZSX/NZDX and NZAX Listing Rules (the **Rules**). The Rules are dated 6 August 2010 and are in a form agreed with the Securities Commission and as submitted to the Minister of Commerce under the Securities Markets Act 1988.

The amendments include the following:

- *Changes relating to NZX's new clearing and settlement system which will come into effect on the Go-Live Date* (still to be advised by NZX). In brief these are:
 - all references to the "FASTER System" have been replaced by the term "Settlement System";
 - the definition of Ex Date has been amended to provide that it shall be the second Business Day before the Record Date for that entitlement, unless NZX determines otherwise;
 - rights issues will require five Business Days notice prior to the Ex Date. Quotation of Rights will cease four Business Days before the closing date for acceptances and renunciations.
- *Corporate Actions Announcements*: Issuers will be required to provide information regarding the amount of foreign dividend payment credits per share and, in the case of PIE issuers, excluded income per share, when notifying the market of corporate actions.
- *Share Purchase Plans*: Rule 7.3.4(c) is amended to reflect changes made to the Securities Act (NZX-Share and Unit Purchase Plans) Exemption Notice 2005 by the Securities Act (NZX-Share and Unit Purchase Plans) Exemption Amendment Notice 2009 – which increased the annual monetary threshold for share purchase plans made under the 2005 Exemption Notice from \$5,000 to \$15,000.
- *General amendments*: A number of minor amendments have been made to address minor typographical errors and omissions contained in the existing versions of the Rules.

NZX has provided a marked copy of the Rules which shows additional amendments made to the draft Rule amendments provided with its earlier announcement of the amendments dated 25 June 2010. However, NZX has removed the previous marked-up copy of the Rules (which showed the changes noted above) from its website.

The amendments will come into effect on the date NZX notifies to the market on which the Settlement System will become operative (the **Go-Live Date**). The determination of the Go-Live Date is dependent on NZX receiving the necessary regulatory approvals.

[Click here to view the Rules](#)

[Click here for further details](#)

NZX Participant Rule amendments

NZX Market Supervision has given notice of amendments to the NZX Participant Rules. The amended Rules are dated 6 August 2010 and are in a form agreed with the Securities Commission and as submitted to the Minister of Commerce under the Securities Markets Act 1988. The amendments relate to the introduction of NZX's new clearing and settlement system and will come into effect on the Go-Live Date (which is still to be advised by NZX). NZX has provided one marked copy of the Rules, which shows the differences between the amended Rules and the draft NZX Participant Rules provided with the earlier NZX notice on the Rule amendments (dated 25 June 2010). NZX has also provided final Procedures, marked against the version provided with the 25 June 2010 notice.

[Click here for further details](#)

[Click here to view the Rules](#)

Notice of amendment to NZMDT Rules

NZX Market Supervision has given notice of amendment to the NZ Markets Disciplinary Tribunal Rules (**NZMDT Rules**). The amendments relate to the introduction of NZX's new clearing and settlement system and the introduction of a new derivatives market in New Zealand. These amendments will come into effect on the Go-Live Date (which is still to be advised by NZX). The amended NZMDT Rules are dated 6 August 2010 and are in a form agreed with the Securities Commission and as submitted to the Minister of Commerce under the Securities Markets Act 1988. NZX have provided marked copies which show the differences between the amended NZMDT Rules and Procedures and the NZMDT Rules and Procedures which are presently in force.

[Click here for further details](#)

[Click here to view the Rules](#)

In the courts

Applying the Securities Act's minimum subscription safe harbour exemption to an offer

Braemar Lodge 2004 Limited (in rec) v Owers [2010] NZCA 300

If a security is offered to the public in contravention of the Securities Act 1978, then the allotment is void, monies are required to be repaid and the directors of the issuer can face criminal liability. However, there are a number of categories of investors for whom securities offers are exempt from some or all of the requirements of the Act. This includes offers to investors who fall under the minimum subscription safe harbour exemption (in section 3(2)(a)(iia) of the Act) which provides that an offer of securities made to persons who are each required to pay a minimum subscription price of "at least \$500,000" for securities **before the allotment** of those securities [*emphasis added*] is not an offer of securities to the public.

In this recent Court of Appeal decision involving an offer of participatory securities, the court had to determine whether the offer came under the minimum subscription safe harbour exemption. The particular question for the court was whether the "allotment" of the securities occurred before the date on which the purchaser's obligation to pay was due and thereby had excluded the application of the safe harbour exemption on the facts.

Facts

Braemar was a vehicle for the construction and development of a luxury tourist accommodation complex. It offered units in the complex for sale subject to a management agreement that gave a right to let the units for tourist accommodation. Under the terms of the sale and purchase agreements, on the settlement date, each purchaser was required to pay a subscription price of at least \$500,000 (less a deposit paid by way of a home bond arrangement) to obtain a unit and a proportionate right to share in the net tariff income of the property development (a "pooled income scheme").

It was accepted that the right to share in the income was a "participatory security" for the purposes of the Securities Act and Braemar, after it had become aware that the offer may have been in breach of the Securities Act, had given an enforceable undertaking to the Securities Commission (in relation to offers it had already made) and obtained an exemption (the Securities (Braemar Lodge 2004 Limited Exemption Notice) 2005) from the Securities Commission for future offers. The Exemption Notice exempted Braemar from complying with the prospectus and investment statement requirements and various other requirements of the Securities Act, provided that Braemar complied with the provisions of the notice. This included a condition requiring Braemar to return the purchasers' deposits to them if a registrable transfer instrument for the units was not provided within a

specified time period. Braemar failed to meet that condition and the purchasers sought an order from the High Court that the sale and purchase agreements were void under the terms of the Exemption Notice.

Braemar argued that the purchasers were not entitled to the protections offered by the Exemption Notice because the notice had no effect given that the offer came within the minimum subscription safe harbour exemption (in section 3(2)(a)(iia) of the Act). The purchasers asserted that the safe harbour exemption did not apply to the offer because under the terms of the sale and purchase agreement they were not required to pay the full subscription price before the allotment of the securities had taken place. The High Court agreed with the purchasers and declared the sale and purchase agreements void under section 37 of the Securities Act.

The Court of Appeal's decision

On appeal, Braemar argued that it was wrong for the High Court to hold that the allotment of the securities had occurred at the time an obligation to make payments became unconditional. Braemar argued that allotment could not precede settlement, registration of the purchasers as holders of the securities and their registration as proprietors of the titles for the units.

The Court of Appeal, dismissing the appeal, held that for the purposes of section 3(2)(a)(iia) "allotment" occurred upon each sale and purchase agreement becoming unconditional. Section 2 of the Securities Act defines "allot" to include "sell, issue, assign, and convey". The Court held that the breadth of that definition makes the approach ordinarily adopted in respect of the allotment of shares "readily applicable" to contractual arrangements. The Court dismissed Braemar's arguments that allotment only occurred on registration of the security and that allotment requires a positive step of apportionment or notification. Justice Cooper saw no reason why the participatory securities could not be both issued and sold under the individual sale and purchase agreements at the point when they became unconditional and noted that the definition in the Act makes no reference to registration. The agreement itself, coupled with the fact that it was unconditional, was sufficient notification.

The Court of Appeal accordingly held that the minimum subscription price safe harbour did not apply to this transaction. Further Braemar could not rely on the Exemption Notice because a condition of the notice was not met within the defined settlement period. As a result, under section 37(4) of the Securities Act, the allotments made were invalid and of no effect.

COMPETITION AND CONSUMER LAW

New Zealand Commerce Commission (NZCC)

Media releases

Industry regulation and regulatory control

Commerce Commission releases starting price adjustment consultation paper

The NZCC has released a consultation paper on its proposed framework for making 'starting price adjustments' under a default price-quality path applied to non-exempt electricity distribution businesses and to gas pipeline businesses.

[Click here for more](#)

Market behaviour

\$100,000 penalties imposed in Waikato pathology services case

The High Court in Auckland has imposed penalties on Pathology Associates Limited and New Zealand Diagnostic Group and after they admitted being parties to an anti-competitive agreement concerning community pathology testing services in the Waikato area. The Court ordered that New Zealand Diagnostic Group pay a penalty of \$65,000 and Pathology Associates Limited pay a penalty of \$35,000.

[Click here for more](#)

Telecommunications

Indicative process for regulation of mobile termination rates

The NZCC has announced its indicative process for determining mobile termination rates, following the announcement by the Minister for Communications and Information Technology, Stephen Joyce, that he has accepted the NZCC's recommendation to amend the Telecommunications Act 2001 to allow the regulation of mobile termination access services. The Minister's decision is expected to take effect in mid to late September 2010.

[Click here for more](#)

Commerce Commission releases draft review of unbundled local loop backhaul services

The NZCC has released a draft report on its review of where Telecom faces competition in the provision of backhaul services for the unbundled copper local loop. Backhaul is only regulated where Telecom faces limited competition.

[Click here for more](#)

Consumer issues

Commerce Commission directs payment of \$45 million to ANZ/ING investors

The NZCC has determined the payment method for distribution of the \$45 million settlement fund agreed with ANZ National Bank Limited and ING (NZ) Limited in respect of the ING Diversified Yield Fund and ING Regular Income Fund. The NZCC has determined that the payment method should target returning about 95 percent of the capital originally invested by eligible investors, taking into account payments already received or likely to be received.

[Click here for more](#)

Budget Loans pleads guilty to misleading – \$500,000 returned to consumers

Budget Loans Limited has pleaded guilty to 34 charges of breaching the Fair Trading Act in the Auckland District Court. The charges relate to misleading claims made by Budget Loans that it was entitled to recover certain

interest and fees from its debtors, when as a matter of law it was not. Budget Loans have been fined \$30,750.

[Click here for more](#)

Souvenir company fined for misleading 'New Zealand made' claims

A Christchurch-based company that supplies souvenir and gift shops at airports and major tourist destinations throughout New Zealand has been fined \$48,000 in the Christchurch District Court. Prokiwi International Limited pleaded guilty to 17 representative charges of breaching the Fair Trading Act between March 2008 and May 2009 for supplying products that were packaged in a way likely to mislead customers that the products were New Zealand made when this was not true.

[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 calls for comment on proposed acquisition of Stella Travel Services Holdings Pty Limited by Jetset Travelworld Limited

The ACCC has issued a Statement of Issues on the proposed acquisition of Stella Travel Services Holdings Pty Limited by Jetset Travelworld Limited.

[Click here for more](#)

ACCC does not propose to intervene in sale of Mobil's retail assets

The ACCC has announced that it does not propose to intervene in the sale of Mobil's retail assets to 7-Eleven and the on-sale of the South Australian assets to Peregrine Corporation, conditional on receiving undertakings from each acquirer to divest certain assets.

[Click here for more](#)

Novartis pharmaceutical acquisition allowed

The ACCC has announced that it will not oppose the proposed acquisition of Alcon Laboratories Inc by Novartis AG, after accepting court enforceable undertakings from Novartis.

[Click here for more](#)

ACCC to consult market on proposed undertakings from NAB and AXA

The ACCC has commenced market consultation on proposed undertakings offered by National Australia Bank Limited (NAB) and AXA Asia Pacific Holdings Limited (AXA). The undertakings seek to address the ACCC's competition concerns that the proposed acquisition of AXA by NAB would be likely to result in a substantial lessening of competition.

[Click here for more](#)

Market behaviour

ACCC: No cross-subsidy in Australia post

The ACCC has issued its fifth report assessing cross-subsidy between the services provided by Australia Post.

"The regulatory accounts do not provide evidence that Australia Post is cross-subsidising its competitive services with revenue from its monopoly services," ACCC chairman Graeme Samuel said.

[Click here for more](#)

ACCC institutes legal action against Bertini pram distributor, IGC Dorel

The ACCC has instituted legal proceedings against IGC Dorel Pty Limited and its CEO, Robert Berchik, for allegedly engaging in resale price maintenance. IGC Dorel is alleged to have supplied the 'Bertini' brand range of prams to retailers on condition that retailers must sell or advertise those prams at prices specified by IGC Dorel, effectively not allowing them to discount Bertini prams. It is alleged that Mr Berchik was knowingly concerned in the alleged conduct of IGC Dorel.

[Click here for more](#)

Telecommunications**\$18 million penalty imposed on Telstra**

Justice Middleton in the Federal Court, Melbourne has penalised Telstra A\$18.55 million for denying competitors access to infrastructure in contravention of its carrier licence. Telstra admitted to contravening the law by refusing access to other telecommunications providers for the connection of their broadband equipment in seven key metropolitan exchanges in Perth, Melbourne, Adelaide and Brisbane.

[Click here for more](#)

Consumer issues**Supplier misled buyers on franking cartridges**

PB Supplies Pty Limited and Postage Meter Supplies and associated individuals had contravened the Trade Practices Act 1974 over claims about the qualities of their products and their relationship with customers, the Federal Court has found.

[Click here for more](#)

Solar panel retailers amend claims on discounts and electricity savings

Two retailers of solar panel systems have amended their marketing campaigns after the ACCC raised concerns that representations in their advertisements were likely to mislead or deceive consumers.

[Click here for more](#)

Fitness First provides ACCC with undertaking

Fitness First Australia has provided the ACCC with a court enforceable undertaking after concerns that Fitness First's 'Gold Coin to Join' promotion did not comply with the all inclusive pricing provisions of the Trade Practices Act 1974.

[Click here for more](#)

Federal Court declares phone card advertising false and misleading

The Federal Court in Perth has declared that phone card sellers Prepaid Services Pty Limited and Boost Tel Pty Limited had engaged in misleading conduct and made false representations in regard to the value, price, and benefits of their phone cards.

[Click here for more](#)

ENERGY AND RESOURCES

Regulatory developments

Release of Draft New Zealand Energy Strategy and Draft New Zealand Energy Efficiency and Conservation Strategy

On 22 July 2010, Energy and Resources Minister, Hon Gerry Brownlee, released a Draft New Zealand Energy Strategy (**NZES**) and Draft New Zealand Energy Efficiency and Conservation Strategy (**NZEECS**) for public consultation.

NZES

The draft NZES sets out the Government's direction for energy and the role that energy will play in the New Zealand economy. Once finalised, it will replace the [2007 New Zealand Energy Strategy](#). The Government has identified four priorities in the draft NZES to achieve its goal of maximising the energy sector's contribution to New Zealand's economic growth:

- **Developing New Zealand's energy resources:** The Government is aiming for further commercialisation of petroleum and mineral fuel resources. It plans to increase exploration activity and improve knowledge of our petroleum basins. The Government intends to develop and encourage investment in renewable energy resources, with a goal that 90 percent of electricity generation be from renewable sources by 2025. Another focus is embracing new energy technologies by keeping up with international energy developments and funding New Zealand research.
- **Promoting energy security and affordability:** The Government believes that "value for money" (i.e., the least cost provision of energy) is best achieved by competitive energy markets. To ensure long-term security and reliability of energy supply, the Government is continuing to invest in generation, transmission, distribution and in demand management technology.
- **Achieving efficient use of energy:** The Government is focusing on providing better consumer information to inform energy choices, including reporting price margins for petrol, diesel and LPG, and providing energy efficiency labelling and standards for electrical appliances. Another strategy is promoting energy efficiency schemes for businesses, including energy audits, and grant and subsidy programmes. Other initiatives include promoting an energy efficient transport system and continuing the Government programme to install insulation and clean heating devices in homes.
- **Promoting environmental responsibility:** To develop best practice in environmental management for energy projects, the Government has commenced a review of the Resource Management Act 1991 and is developing a National Policy Statement on Renewable Electricity Generation. It will also continue to monitor and address the adverse environmental effects of various forms of energy and continue developing Government policies to reduce greenhouse gas emissions.

NZEECS

The draft NZEECS aims to make improvements in energy efficiency, energy conservation and renewable energy. Through the NZEECS, the Government is aiming to deliver 55 petajoules (PJ) of saving across the economy by 2015. This would amount to a nine percent reduction in New Zealand's economy-wide energy intensity.

The main areas where the Government is focussed on improving energy efficiency are the transport, business and residential sectors. In the transport sector, the Government will continue to support improvements to roads

and public transport, and promote the use of biofuels and electric vehicles. In the business and residential sectors, the Government will continue to promote the development of energy efficient buildings and homes.

Implementation and consultation

The Ministry of Economic Development will oversee and coordinate the implementation of Government actions to support the NZES and NZEECS, and will report annually to the Minister of Energy and Resources on the progress of both draft strategies.

The public are invited to provide written submissions on the draft strategies by 2 September 2010.

[Click here for more information](#)

Options Paper – New Zealand Petroleum Reserves

An Options Paper was released by Energy and Resources Minister, Hon Gerry Brownlee on 10 August 2010, aimed at improving the quality of information provided by industry, and published by Government, of the Crown's petroleum resources.

The Options Paper is in response to Ministerial directives from the 2009 electricity market review and the Government's [2009 Petroleum Action Plan](#). The Options Paper outlines measures to improve the quality of published information on gas reserves and measures to improve the quality of information provided by industry to Government.

The principal objectives stated in the Options Paper are to ensure a reasonable degree of consistency in estimation methodologies between fields and companies, to improve the accuracy and precision of reported reserves and to widen the spectrum of reported reserves.

The Options Paper considers three options:

- *Option 1:* carrying out more extensive analysis of existing information provided to Crown Minerals, but no regulatory change;
- *Option 2:* Option 1, plus extending the information reporting requirements to include information on a wider range of potential resources, similar to the processes currently undertaken by the United Kingdom. Option 2 would involve legislative and regulatory changes, which would be incorporated into the broader review of the Crown Minerals Act; and
- *Option 3:* Option 2, plus extended reporting requirements to allow the Government to undertake full independent assessments of reserves estimates, similarly to the Norwegian model. Option 3 would provide the most complete information on the Crown's hydrocarbon resource.

The Ministry of Economic Development has stated that its preferred option at this stage is 'Option 2' given it meets the principal objectives of the Options Paper at the least cost.

Feedback on the Options Paper closes on 10 September 2010.

[Click here for further information](#)

Electricity regulatory developments

New Electricity Industry (Enforcement) Regulations released for consultation

The Ministry of Economic Development (**MED**) has released an exposure draft of the new [Electricity Industry \(Enforcement\) Regulations 2010](#) for consultation. Submissions are due on 18 August 2010.

These new Regulations are another part of the Government's package responding to the issues raised by the Ministerial Review of the governance arrangements for the electricity industry.

The remaining provisions of the Electricity Governance Regulations 2003 (which have not been included in the [Electricity Industry Participation Code](#) or in the [Electricity Industry Bill](#)) are included in these new Regulations. The new Regulations (which are to come into force on 1 October this year) briefly:

- deal with the complaint and investigation processes for dealing with breaches of the Code;
- deal with the liability limits for industry participants for breaches of the Code;
- set out the procedures for the Rulings Panel to deal with disputes between participants under the Code; and
- set out provisions dealing with the membership and operation of the Rulings Panel.

MED has pointed out that a further Supplementary Order Paper will be required to amend provisions of the Electricity Industry Bill before it is passed by Parliament in order to clarify certain matters which are dealt with in these new Regulations.

[Click here for further details](#)

NOTABLE AUSTRALIAN DEVELOPMENTS

News from Australian Securities and Investments Commission (ASIC)

ASIC releases guidance on a director's duty to prevent insolvent trading

ASIC has released regulatory guidance to assist directors to understand and comply with their duty under the Corporations Act 2001 to prevent insolvent trading. The Corporations Act requires a director of a company to prevent the company from incurring a debt if the company is insolvent, or if the company will become insolvent by incurring the debt or a range of debts including the debt.

Regulatory Guide 217 ([Duty to prevent insolvent trading: Guide for directors](#)) sets out four key principles which ASIC considers directors should follow to meet their obligation to prevent insolvent trading. That is, to:

- keep themselves informed about the company's financial position and affairs;
- regularly assess the company's solvency and investigate financial difficulties immediately;
- obtain appropriate professional advice to help address the company's financial difficulties where necessary; and
- consider and act in a timely manner on the advice.

The guide also details factors which ASIC will consider when deciding to bring proceedings against a director for allowing a company to trade while insolvent (including criminal proceedings and proceedings to recover compensation for loss resulting from insolvent trading).

[Click here for further details](#)

Market integrity rules

Under the Corporations Act's new rule-making regime (following the enactment of the Corporations Amendment (Financial Market Supervision) Act 2010) ASIC has issued market integrity rules for the ASX, ASX 24, APX, IMB, NSXA and SIM VSE markets. The rules apply to market operators, market participants, other prescribed entities and financial products traded on the relevant markets.

ASIC, who is responsible for supervising compliance with the new rules, has also issued regulatory guides on the respective rules.

ASIC notes that its "approach in making market integrity rules has been to not change the substance of the pre-existing obligations that apply to participants of the relevant markets at this time".

[Click here for further details and to access the new rules and guides](#)

ASIC updates disclosure guidance for capital protected products and retail structured or derivative products

ASIC has released a report outlining its key findings from a review of selected Product Disclosure Statements (PDSs) for capital protected products and other structured or derivative products marketed to retail investors. The report, ([Review of disclosure for capital protected products and retail structured or derivative products](#)), is the result of a programme commenced by ASIC in January 2009 and has involved the review of 64 PDSs for adequacy of disclosure.

Recommendations arising from the review to make more effective disclosure to prospective investors include:

- clearly explaining counterparty risk, and include supporting financial information, to ensure retail investors can assess the issuer's financial ability to meet its counterparty obligations;
- of capital protected products, ensuring disclosure is sufficient so that investors can assess the likelihood of early termination or any other significant limitations of these products; and
- providing better disclosure of break costs that may apply where an investor seeks to terminate or redeem a product before its maturity date.

[Click here for further details](#)

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:

- [*Input methodologies – the allure of certainty*](#)
- [*New Resource Management Processes Beginning to Bite*](#)

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For more information on any of the items in the Corporate Reporter, please contact your usual Bell Gully adviser or any member of Bell Gully's [Corporate](#), [Commercial](#) or [M&A](#) teams. Alternatively, you can contact the editor [Diane Graham](#) by email or call her on 64 9 916 8849.

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