

BELL GULLY

Corporate Reporter

22 JULY 2010

Welcome to the first issue 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 revised Trans-Tasman MOU on coordination of business law;
 - The second consultation draft of the Code of Professional Conduct for Authorised Financial Advisers;
 - The outcome of the Government's stocktake of Schedule 4 of the Crown Minerals Act;
 - Two new Code Words from the Takeovers Panel;
 - Recent case law arising from the Securities Act;
 - A new Securities Commission Guidance Note;
 - 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

New Zealand Productivity Commission Bill introduced

Earlier this year the Government announced that it would set up a new Productivity Commission (modelled on the Australian Productivity Commission) to do research and provide an alternative source of policy advice to help the Government improve productivity in both the public and private sectors.

Legislation (the [New Zealand Productivity Commission Bill](#)) has now been introduced to establish the New Zealand Productivity Commission as an independent Crown entity.

The Commission (which is to be governed by 3 to 4 Commissioners) will be an independent agency with both specialised internal investigative capacity and a mandate to undertake inquiries and regulatory reviews. The scope of productivity-related inquiries, reviews, and research undertaken by the Commission will include matters relating to labour, natural resources, industry, competition and investment. It is also envisaged that the Australian and New Zealand Productivity Commissions will work cooperatively on issues of mutual interest.

The Government intends to pass the legislation this year and set up the Commission by April 2011.

Trans-Tasman MOU on Coordination of Business Law

A [revised Memorandum of Understanding on Coordination of Business Law between Australia and New Zealand](#) was signed on 23 June 2010. The revised MOU follows from a release of [27 short-term and medium-term proposals for the single economic market agenda](#), released in August last year, and reaffirms both countries' commitment to coordination of trans-Tasman business law (as expressed in the earlier MOU signed in 2006). The MOU was revised in accordance with the commitment to review the MOU every five years. The mutually agreed outcomes are in the areas of insolvency law, financial reporting policy, financial services policy, competition policy, business reporting, corporation law, personal property securities law, intellectual property law, and consumer policy.

COMPANY LAW

News from the Companies Office

Annual return changes

As part of the Companies Office's new IT platform, the Companies Office has introduced a number of enhancements to its online processes, including some changes for annual returns.

Reminder system

The timing of annual return reminders has changed. Instead of being sent two weeks prior to the month that reminders are due for filing, reminders will now be sent on the first day of the month in which they are due. A second courtesy reminder will be sent during the third week of the month and the overdue reminder will be sent out on the first day of the following month.

Auditor question removed

The annual return question 'Did the shareholders unanimously agree that no auditor will be appointed for the coming year?' is to be removed from the annual return. However, this only means that the Companies Office no longer collects this information. The requirements of the Companies Office Act 1993 around passing this resolution still apply.

[Click here for details of other online process changes](#)

Public notification changes

From 30th July 2010, copies of public notices required to be given by the Registrar of Companies relating to company removals, company restorations and corrections to the register will no longer be advertised in major newspapers. Instead, they will be advertised in the "Public Notices" section of the Companies Office's website at www.business.govt.nz/companies/news-updates/public-notices

MERGERS AND ACQUISITIONS**Takeovers Panel issues new Code Words****Code Word 25A (on timing rules) replaced with Code Word 25B**

The Takeovers Panel has re-issued Code Word Number 25A (which should now be discarded) as Code Word 25B. This Code Word contains guidance notes on the timing rules of the Takeovers Code; rule 3(2) of the Code as well as a guidance note on rule 7(e) of the Code (relating to 'creeping').

[Click here to access Code Word 25B](#)

Code Word 27 on upstream acquisitions

Following on from the Takeovers Panel's public consultation on upstream acquisitions last year, the Panel has now released a guidance note on its policy for dealing with the impacts of the Takeovers Code on upstream acquisitions.

[Click here to access Code Word 27](#)

Regulatory developments**Changes to the Takeovers Act 1993**

The [Takeovers Amendment Act 2010](#) has made some technical changes to the definition of "code company" in the Takeovers Act 1993 and replaced references to "specified company" in the principal Act.

CAPITAL MARKETS

Regulatory developments

Cabinet Paper on the FMA and KiwiSaver changes released

The Ministry of Economic Development has released the Cabinet Paper relating to Cabinet decisions made in April 2010 on the establishment of the Financial Markets Authority and changes to the regulation of KiwiSaver.

[Click here to access this paper](#)

Securities Commission

Guidance Note on application of Securities Markets Act 1988 to Commodities Futures Contracts

In response to queries from market participants, the Securities Commission has issued a new [Guidance Note](#) setting out the Commission's approach to aspects of the insider trading provisions of the Securities Markets Act 1988 as they apply to the trading of commodities futures listed on an authorised futures exchange. The approach will also apply to other futures contracts covered by the Act.

Financial adviser regime developments

Revised draft Code for Financial Advisers released

The Code Committee for Financial Advisers has released a revised [draft Code of Professional Conduct for Authorised Financial Advisers](#), and sought further consumer and adviser input. The draft document reflects:

- legislative changes arising from [Financial Advisers Amendment Act 2010](#) and the [Financial Service Providers \(Registration and Dispute Resolution\) Amendment Act 2010](#) passed last month;
- Ministerial and other expectations around the timing and outcomes of regulatory change; and
- the Committee's decisions on matters raised in submissions and other input.

The draft Code also assumes that regulations will be promulgated under the Act to allow category 2 product advisers, such as mortgage brokers and life insurance advisers, to voluntarily opt into the authorisation regime.

The Committee has also released an [issues paper](#) which summarises the major submission points raised on the first draft of the Code and outlines the main elements of the Committee's response to those issues in preparing this second draft of the Code.

Submissions on the draft Code closed on 21 July 2010.

[Click here for further details](#)

In the courts

When is an individual a “defacto” director under the Securities Act?

HLH Equity Trading Limited v White

The Securities Act provides a number of criminal and civil consequences that may be imposed on both an issuer of a public offer of securities and the issuer’s directors, if the issuer and/or its directors have not complied with the relevant requirements of the Securities Act in making the offer. The question in this recent High Court case was whether it was necessary for a person to be formally appointed as a director of the issuer for the purposes of establishing that person’s liability under the Securities Act, or whether the Act also applied to “defacto directors” of the issuer.

The facts of the case involved a series of failed property investment projects for which securities had been offered to members of the public without a prospectus or investment statement. Separate investment vehicles had been used for each of the investment projects, but they were all arranged and marketed by the same husband and wife team, Mr and Mrs White. Given that there was no prospectus or investment statement accompanying the offers, the investors were entitled to take action against both the issuers and the directors of those issuers (under section 37(6) of the Securities Act 1978) for recovery of their subscription monies.

One of the issues in the case was whether Mrs White was personally liable under section 37(6) for the repayment of subscription monies paid to one of the investment vehicles (a company) even though it was not one of the investment vehicles for which she had been formally appointed as a director. This required the court to address the meaning of “director” for the purposes of section 37(6).

The definition of “director” in the Securities Act refers to “any person occupying the position of a director of the company by whatever named called”. The court considered that Parliament had “clearly intended to allow persons who are not formally, or validly appointed as directors ... to be regarded as directors for the purposes of the Act”. Therefore, the question for the court was whether Mrs White had occupied a position as a “director”. In the absence of relevant New Zealand authority on this point, the court looked to English authority for guidance and concluded that in order to determine that question “a holistic approach is required, in which the Court is required to analyse all of the relevant evidence in order to determine, as a matter of fact, the role that the putative director played in the governance of the company. Persons who are not formally or validly appointed as directors will only be held liable to investors under the Act if it can be demonstrated that they carried out functions that would ordinarily be within the domain of the directors of the company.”

On the facts, the court found that although Mrs White had played a role in marketing and promoting the particular investment project on behalf of the company, her involvement did not go beyond that. Her husband, as director, had been the only one responsible for the corporate governance of the company. Mrs White, not being a “defacto director”, was therefore held not to be liable under section 37(6) in respect of subscriptions paid for that particular investment offer.

Incorporated societies must be “incorporated” to take advantage of Securities Act class exemption for communal facilities in residential property developments

Verano Properties Limited v Severs

This High Court case concerns 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**). It should be noted that as the 2007 Notice is of similar effect to the 1999 Notice, the 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 in a property development. The purpose of the notices is to provide developers with exemptions from sections 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” on execution of an 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.

This case confirms that in order to gain the benefit of the exemptions provided by the 1999 Notice (and, by analogy, the 2007 Notice), the documents required to be supplied by the developer to any prospective purchaser must have included the rules of a society which has actually been incorporated under the Incorporated Societies Act 1908, not those of a society proposed to be incorporated under that Act.

It has been a common conveyance practice not to incorporate the society at the time agreements for sale and purchase are signed, but to incorporate it in the run up to settlement. The decision therefore is not only relevant for future offers by developers, but, as noted by Justice Williams, will also mean that a number of developments may need to seek to regularise their positions by applying for relief under section 37AA of the Securities Act. The Securities Commission, which administers the notices, does not have power to amend the notices retrospectively, so individual developer’s relief applications or alternatively, retrospective legislation, will be required.

COMPETITION AND CONSUMER LAW

New Zealand Commerce Commission (NZCC)

Speeches

Telecommunications in the transforming environment, presentation at the 11th Annual Telecommunications and ICT Summit

On 29 June 2010 Dr Ross Patterson, Telecommunications Commissioner, gave a presentation at the 11th Annual Telecommunications and ICT Summit. He set the context of the shift to an all Internet Protocol (IP) world, assessed the competition and regulatory issues that would arise, discussed the Open Access model for Next Generation Networks, and set out the current and future challenges which would need to be addressed.

[Click here for more](#)

Media releases

The NZCC has issued the following media releases:

Telecommunications

Telecom settles over wholesale loyalty offer – \$1.6 million to be paid in compensation

The NZCC has reached a \$1.6 million settlement with Telecom Corporation of New Zealand Limited. The settlement follows a NZCC investigation launched after receiving complaints from the telecommunications industry alleging that Telecom Wholesale's 'loyalty offers' breached Telecom's Separation Undertakings.

[Click here for more](#)

Consumer issues

Reasons for price increases must not be misrepresented

The NZCC is reminding businesses of their obligation under the Fair Trading Act not to mislead consumers about the reasons for price increases. The reminder comes ahead of the 2.5 per cent GST increase in October, but is also pertinent to the debate surrounding the effect of the Emissions Trading Scheme on electricity and petrol prices.

[Click here for more](#)

Commerce Commission urges caution again over holiday vouchers

Consumers should exercise caution when approached by telemarketers selling vouchers for discounted or free holidays, hotels and flights, the NZCC has warned.

[Click here for more](#)

Australian Competition and Consumer Commission (ACCC)

Media releases

The ACCC has issued the following media releases:

Market behaviour

ACCC proposes to authorise North West Shelf Gas Project joint marketing

The ACCC proposes to grant conditional authorisation to the joint venture partners in the North West Shelf Gas Project to jointly market and sell their individual domestic gas entitlements for supply in Western Australia.

[Click here for more](#)

ACCC seeks comment on proposed increases in prices for regional airlines serving NSW

The ACCC has released an issues paper seeking comment from interested parties on Sydney Airport's proposal to increase the prices it charges to regional airlines that serve passengers travelling within New South Wales.

[Click here for more](#)

ACCC objects to car rental collective bargaining at Perth Airport

The ACCC has objected to a proposal by five car rental companies (Hertz, Thrifty, Avis, Budget and Europcar) to collectively negotiate with Perth Airport. "The ACCC considers that the arrangements may reduce competitive tensions between the car rental companies by facilitating sharing commercially sensitive information between group members," acting ACCC chairman Michael Schaper said.

[Click here for more](#)

Telecommunications

ACCC implements the Australian Competition Tribunal's 2009 WLR, LCS And PSTN OA individual exemption orders

The ACCC has published a list of 129 Exemption exchange service areas (ESAs) for the wholesale line rental (WLR), local carriage service (LCS) and public switched telephone network originating access (PSTN OA) services. The list of Exemption ESAs was prepared in accordance with the Australian Competition Tribunal's WLR, LCS and PSTN OA Individual Exemption Orders made in late 2009 and is based on information provided by Telstra and access seekers.

[Click here for more](#)

Consumer issues

ACCC institutes proceedings against Auscha corporation over power savings claims

The ACCC has instituted legal proceedings in the Federal Court against Auscha Corporation Pty Ltd and its Products Development Officer, Nagarajah Rajkumar, for alleged breaches of the Trade Practices Act 1974.

[Click here for more.](#)

ACCC issues contempt of court proceedings against Lualhati Jutsen

The ACCC has issued proceedings against Lualhati Jutsen (also known as 'Teddi Jutsen') alleging contempt of court. Ms Jutsen is the first respondent in the ACCC's proceedings involving allegations of participation in a pyramid selling scheme referred to as TVI Express, 'TVI Team Oz'.

[Click here for more](#)

Nupak gives undertaking to court regarding 'Goody' plastic bags

The ACCC instituted legal proceedings against Goody Environment Pty Ltd and Nupak Australia Pty Ltd, alleging that the companies engaged in misleading and deceptive conduct and made false representations regarding 'Goody' brand plastic bags. At a directions hearing in the Federal Court, Nupak Australia Pty Ltd gave interim undertakings to cease making representations regarding 'Goody' plastic bags.

[Click here for more](#)

ENERGY AND RESOURCES

Mining sector developments

No removal of Schedule 4 land - Crown Minerals Act 1991

On 20 July, Minister of Energy and Resources, Hon Gerry Brownlee, and Conservation Minister, Hon Kate Wilkinson, announced the Government's final decision not to remove any land from Schedule 4 of the Crown Minerals Act 1991 for the purposes of mineral exploration or extraction.

The announcement followed an eight week discussion period and consultation process following the release of the Government's discussion paper, [Maximising Our Minerals Potential](#).

The Government has also released the following decisions arising from the consultation process:

- the Government intends to undertake a significant aeromagnetic survey of non-Schedule 4 land in Northland and on the West Coast of the South Island;
- 12,400 hectares of land comprised in 14 different areas will be added to Schedule 4;

- significant applications to mine on public conservation land will be publicly notified;
- the proposed conservation fund (which was to be funded by a percentage of royalties from mineral extraction on Schedule 4 land) will not be established; and
- both land-holding Ministers and the Minister of Energy and Resources will now need to approve applications for access arrangements to Crown land for mineral developments.

The additions to Schedule 4 are expected to occur in October 2010. The Ministers are also expected to announce their decisions on how the other changes will be implemented on or around this time.

[Click here](#) for more information

Electricity regulatory developments

Update on Electricity Industry Bill and New Code

The Electricity Industry Bill which is due to come into force on 1 October 2010 will introduce a new governance regime for the electricity industry. Some important elements of this new regime are:

- **New Independent Electricity Authority:** The independent Electricity Authority (EA) will replace the current Electricity Commission (EC). To address the issue of independence from the Government and the lack of focus in the objectives and functions of the EC, the EA is to be established as an Independent Crown Entity under the Crown Entities Act 2004. The EA's objective and functions are to be focussed on the development and administration of the market rules for the electricity industry. As a consequence of this more focussed objective, a number of functions carried on by the EC will be taken over by other entities such as the Commerce Commission (approval of national grid upgrades) and the EECA (energy conservation initiatives). The principal implication for electricity market participants is that the EA is likely to be more focussed and responsive in relation to the development and management of the rules governing the electricity market. The removal of Ministerial involvement will result in timing efficiencies, especially in relation to changing the market rules and there will also be more scope for the EA to take a commercial and pragmatic approach to dealing with industry participants compared to the current approach of the EC.
- **New Industry Participation Code:** The Bill requires that the electricity market rules (to be called the Electricity Industry Participation Code) contain provisions which are consistent with the objective and functions of the EA. The initial version of the Code that will come into effect on 1 October 2010 is to comprise the provisions of the current Electricity Governance Rules 2003 (with the exception of the provisions dealing with grid planning and upgrades), certain parts of the Electricity Governance Regulations 2003, the existing regulations dealing with security of supply and the connection of distributed generation and the expanded functions of the System Operator. The Code is comprised of 17 consecutively numbered Parts with each Part being delineated by a number, and with the internal clauses in the Parts being further delineated as sub-clauses. The Bill permits certain documents relating to technical matters, which the EA considers are too long or are otherwise impractical to include in the published Code, to be included by reference. The EA will be the party responsible for handling changes to, and exemptions from compliance with, the Code.
- **New Matters:** As a consequence of the more focussed objective and functions of the EA and the repeal of the various regulations dealing with electricity governance, security of supply and the connection of distributed generation, the provisions of these regulations have been included in the Code and will be administered by the EA. Further, the Bill makes provision for the EA to address a number of issues in the period after the date that the new regime is scheduled to start (currently 1 October 2010). These matters include developing mechanisms to manage price risks arising from transmission constraints, rewarding

demand side participation, standardised tariff structures for distributors in retailer interposed situations and the facilitation of an active financial hedge market. The EA has a period of one year to deal with these matters and, if it is unable to do so, there is a mechanism which requires the EA to report to the Government suggesting how any particular matter should be addressed. The Government has retained power to amend the Code to deal with these new matters if they are not dealt with satisfactorily by the EA.

It will be important for industry participants to keep up to date with developments in the new governance regime and, in particular, in relation to the “new matters” in the run up to 1 October 2010 and during the following twelve months so that participants can monitor the development of the new policies and processes and have appropriate input into them.

Levy regulations

The changes to the electricity governance regime outlined in the Electricity Industry Bill will require a revision to existing electricity levy arrangements from 1 October 2010. These arrangements determine how the costs of governing the electricity industry are allocated amongst various classes of levy payers. The Ministry of Economic Development issued a [discussion paper](#) setting out proposed revisions to the levy arrangements last month and has received eight submissions from industry participants and interested parties. To view these submissions [click here](#).

Feedback is also being sought from levy payers with respect to the level of funding to be recovered under the proposed new levy arrangements.

[Click here for further details](#)

Electricity Commission consultations

Draft 2010 Statement of Opportunities

The Electricity Commission has called for submissions on its draft 2010 Statement of Opportunities which sets out potential opportunities for efficient management of the grid, over a 30-year time horizon, including potential investments in upgrades and transmission alternatives. Submissions close on 6 August 2010.

[Click here for further details](#)

Review of part D of the Electricity Governance Rules

The Electricity Commission has released its third [consultation paper](#) undertaken in connection with its fundamental review of part D of the Electricity Governance Rules 2003. The paper contains the proposed new rules, which reflect the Commission’s analysis of the issues, options and the submissions received during its review of the existing part D of the Rules. The proposed new rules will not be finalised before the intended establishment date of the Electricity Authority under the Electricity Industry Bill, but the Commission is consulting now with the intention that the outcome may be of use to the Authority. Submissions close on 20 August 2010.

[Click here for further details](#)

NOTABLE AUSTRALIAN DEVELOPMENTS

News from the Government

Australian Government releases Cooper Review into superannuation

The Australian Government has released the final report of the review into the governance, efficiency, structure and operation of Australia's Superannuation System (the Cooper Review). In May 2009 the Government commissioned the Cooper Review to provide it with recommendations on how to make superannuation simpler, safer and more efficient. The Government has stated that it will consider the final recommendations of the report before providing its response. Copies of the report are available at www.supersystemreview.gov.au.

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:

- [*Employment law changes announced*](#)
- [*Commerce Commission signals shift in approach*](#)

NEED MORE INFORMATION?

Contact us

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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