

## Final chapter in New Zealand equity swaps case?

Legislature to take over from the courts

“On 8 March 2004, the Privy Council, New Zealand’s highest court, denied GPG’s petition to appeal against the decision of the Court of Appeal in *Perry Corporation v Ithaca (Custodians) Limited.*”



**David Craig - Partner**

### Appeal denied

On 8 March 2004, the Privy Council, New Zealand’s highest court, denied GPG’s petition to appeal against the decision of the Court of Appeal in *Perry Corporation v Ithaca (Custodians) Limited.*

That decision by the Privy Council effectively brings to a close this 18-month legal dispute. However, it appears that the legal issue at the heart of the dispute (which concerns the application of New Zealand’s substantial securityholder disclosure regime to equity swaps) is still in play.

### Amending legislation announced

Immediately after the Privy Council decision was released, the Government confirmed that it would legislate to require “parties acting in concert” to disclose their interest in the underlying shares. This amendment will be part

of legislation resulting from a broader review of the substantial securityholder regime, which began in 2002. The Government’s intention is to introduce legislation in the middle of this year, which would come into force at the beginning of 2005.

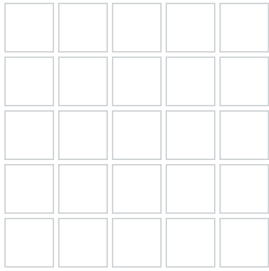
While it is difficult to comment on this announcement without having seen any draft legislation, the principle behind the proposed amendment is of some concern. What the Government appears to be saying is that it is lowering the bar that sets the boundaries of what constitutes a disclosable “relevant interest.” Under the current law, a person who does not otherwise own or control shares does not have a “relevant interest” in those shares unless that person has an “arrangement or understanding” with another person who *does* have ownership or control. The Court of Appeal in *Perry* confirmed that an “arrangement or understanding” necessarily involves communication and consensus between the parties.

By contrast, the Government’s announcement seems to dispense with the requirement for communication and consensus between the parties. Parties will be required to disclose a “relevant interest” in shares where they reach a common understanding with respect to those shares. It does not seem to matter that the parties may arrive at the common understanding totally independently of each other.

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## Legislature to take over from the courts

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If that indeed turns out to be the case, psychic powers will be at a premium. Entities would be required to surmise the understanding of their counterparties with respect to any underlying shares and, if that understanding matches their own, the parties could be “acting in concert”.

No doubt, the devil will be in the detail. However, the concept will not be welcomed by (among others) equity swap counterparties whose portfolio includes New Zealand-listed shares. It is impossible to say whether *Perry* would have been decided differently had an amendment along these lines been in force at the time. But it would invariably have helped GPG’s position.

### **Exemption may be available for some swap counterparties**

In anticipation of this amendment, or as a step towards being able to conduct more New Zealand business, counterparties may wish to consider seeking an exemption from compliance with the substantial securityholder regime. The Securities Commission has previously granted entity-specific exemptions to persons who have a “relevant interest” in shares as a result of an equity swap entered into for financing purposes.

For further information, please contact your usual Bell Gully adviser or:

#### **AUCKLAND**

David McPherson	david.mcpherson@bellgully.com	64 9 916 8988
Murray King	murray.king@bellgully.com	64 9 916 8971
Jonathan Ross	jonathan.ross@bellgully.com	64 9 916 8811

#### **WELLINGTON**

David Craig	david.craig@bellgully.com	64 4 915 6839
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**Auckland**  
Vero Centre, 48 Shortland Street  
PO Box 4199, Auckland, New Zealand, DX CP20509, www.bellgully.com  
Telephone 64 9 916 8800, Facsimile 64 9 916 8801

**Wellington**  
HP Tower, 171 Featherston Street  
PO Box 1291, Wellington, New Zealand, DX SX11164, www.bellgully.com  
Telephone 64 4 473 7777, Facsimile 64 4 473 3845

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