WELCOME
to Issue No. 43 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:

• More fine-tuning for the Financial Markets Conduct Act regime,
• Consultation on draft Trusts Bill to modernise the law of trusts,
• AML/CFT regulations for the new prescribed transactions reporting regime,
• Consultation on lenders’ rights for non-disclosure in consumer credit contracts,
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### NEED MORE INFORMATION?
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 Capital Markets, Commercial, M&A or Competition teams. Alternatively, you can contact the editor Diane Graham by email or call her on 64 9 916 8849.

**Disclaimer**
This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. You should take legal advice before applying the information contained in this publication to specific issues or transactions.
CAPITAL MARKETS

Regulatory developments

Financial Markets Conduct Regulations amended

Another set of amendments to the Financial Markets Conduct Regulations 2014 (FMC Regulations) have been enacted as the Ministry of Business, Innovation and Employment (MBIE) works its way through issues that were not able to be addressed prior to implementation of the new Financial Markets Conduct Act 2013 (FMC Act) regime as well as issues that have arisen since its implementation. See the Financial Markets Conduct Amendment Regulations (No.2) 2016. Most of the amendment regulations came into force on 28 October 2016.

Key amendments

The amendment regulations include changes which:

- clarify the financial information that must be included in a product disclosure statement for an offer of debt or equity securities relating to a business, subsidiary, or body corporate that the issuing group has or will acquire in the relevant reporting period,
- clarify the provisions relating to offers of convertible debt securities that are issued by registered banks,
- clarify the requirements for certain offers of Crown debt securities, including where such securities are on-sold by a wholesale investor to a retail investor,
- modify the superannuation scheme rules to make it easier for them to become a recognised overseas pension scheme (a ROPS) for the purposes of United Kingdom legislation (and to allow money from United Kingdom pension funds to be invested in those schemes). The amendments also prevent certain withdrawals for a ROPS where the withdrawal is inconsistent with the requirements for a ROPS and allow certain withdrawals that are permitted under those requirements,
- allow more flexibility in relation to the quorum requirements for meetings of investors who hold debt securities issued by a credit union or a building society by allowing the trust deed for credit unions and building societies to set quorum requirements and override a default 25% threshold in the FMC Regulations,
- allow fund updates for superannuation or workplace savings schemes which are closed at registration and which remain closed to be made available annually, rather than quarterly,
- for multiple-participant superannuation schemes, remove the requirement for employer-specific supplements to be uploaded to the register of offers of financial products (i.e., the Disclose Register), and
- clarify when New Zealand may be treated as the country of a fixed-interest asset when preparing information under Schedule 4 (for the PDS, register entry and fund updates for managed funds) or Schedule 21 (for the disclosure statement and investment proposal for discretionary investment management services) of the FMC Regulations.

Insider trading prohibitions modified

The amendment regulations also include provisions to address market participants’ concerns that the insider trading provisions in the FMC Act (in sections 241 to 243 of the Act) are wider in application than the rules previously imposed under the Securities Markets Act 1988, in so far as they could be interpreted to extend to acquisitions of financial products by way of issue. As a temporary measure a transition provision (which ends on 30 November 2016) was included in Schedule 1 of the FMC Regulations to exclude the insider trading provisions
from applying to such trades. From 1 December 2016 new specific regulations (see Regulation 114A) carry over the effect of this transition provision by exempting certain conduct from being insider conduct. The conduct involves acquiring a debt security, an equity security, or a managed investment product by way of issue. As under the transition provision, these exemptions do not apply to an acquisition of a financial product under an offer made in reliance on the quoted financial product disclosure exclusion in clause 19 of Schedule 1 of the FMC Act. Again, these are only intended to be a temporary measure while MBIE continues to work through this issue. The Ministry has until 30 November 2017 to do this.

Select Committee consults on amendments to the FMC Act and the Friendly Societies and Credit Unions Act

The Commerce Select Committee has called for submissions on proposed amendments to the Financial Markets Conduct Act 2013 (FMC Act) and the Friendly Societies and Credit Unions Act 1982 as part of its consideration of the omnibus Regulatory Systems (Commercial Matters) Amendment Bill. Submissions close on 1 December 2016.

The Bill is a vehicle for smaller regulatory fixes to be progressed for a number of Acts in a timely and cost-effective manner and, as a result, most of the amendments address relatively technical issues.

Amendments to the FMC Act

The changes proposed for the FMC Act are ones that have been identified during the implementation of that Act. They include:

- allowing financial statements for a registered scheme to be filed within four months of the scheme’s balance date, rather than the scheme manager’s balance date. (This is currently addressed under the Financial Markets Conduct (Financial Reporting: Balance Dates of Managers and Registered Schemes) Exemption Notice 2015.),

- allowing for offers of options by way of issue over quoted products of the same class of existing quoted products to be made under the same class of quoted financial product disclosure exclusion in clause 19 of Schedule 1,

- resolving a number of technical and liability issues for the limited disclosure document regime put in place for some offers that are exempted from the FMC Act’s Part 3 product disclosure statement requirements under Schedule 1 of the Act (which includes offers of ‘category 2 products’ by registered banks),

- new provisions to provide the Financial Markets Authority (FMA) with regulation making powers to allocate, as between an issuer and a non-issuer offeror (where the offeror is not the issuer under an offer by way of sale), responsibility (and corresponding liability) for compliance with the various disclosure and other obligations applicable to offers made under the Schedule 1 exclusions,

- providing more flexibility to allow regulations to specify which provisions of the regulations made for the purposes of clause 26 of Schedule 1 are Part 3 offer provisions and, if a provision is so specified, whether it may result in the higher level of civil liability or the lower level of civil liability under sections 101(3) and 101(4) of the FMC Act,

- clarifying that disclosure under section 96 (information to be made available to investors or other prescribed persons) or section 97 (information to be made publicly available) can be required at any time after an offer is first made, regardless of whether the products have been issued,
allowing discretionary investment management service (DIMS) providers and prescribed intermediary service providers (crowd funding and peer-to-peer lending service providers) to continue providing services where defective disclosure has been made, subject to prescribed conditions,

removing a minor inconsistency between the licensing test for applicants and the test for authorising a related body corporate,

empowering the FMA to make exemptions from subpart 8 of Part 8 of the FMC Act, which contains prohibitions on indemnity and insurance that may not be appropriate in all circumstances, and

clarifying that standard indemnities do not prevent transfers of financial products continuing to be made without a signature from the transferee.

Reduced changes for Credit Unions

The exposure draft of the Regulatory Systems Amendment Bill released last year for consultation contained extensive amendments to the Friendly Societies and Credit Unions Act 1982 (FSCU Act) to provide for the incorporation of credit unions and related governance and other changes. However, these provisions have not been carried over into the Regulatory Systems (Commercial Matters) Amendment Bill. No explanation has been given for this change, but presumably it is because they represented substantive amendments which are not in keeping with the “small regulatory fix” scope of the omnibus Bill. The proposed changes to the FSCU Act are therefore now relatively minor.

The amendments clarify that the rules of a registered society or the rules of a credit union may provide for meetings to be held using audio, audio and visual, or electronic communication; and permit voting by their members by post or electronic means or by proxy. The amendments also clarify that members of registered societies do not necessarily have to be present at a meeting for the purpose of voting on matters considered at the meeting.

New FMA legislative notices for the FMC Act regime

The Financial Markets Authority (FMA) continues to make inroads into the long list of legislative notices required to support the Financial Markets Conduct Act 2013 (FMC Act) regime, including those that need to be in place before the two-year transition period for the full implementation of the FMC Act ends on 30 November 2016.

Since the last issue of Corporate Reporter (which is available here) the following additional legislative notices have been enacted:

- Financial Markets Conduct (Disclosure Using Overseas GAAP) Exemption Notice 2016: This notice applies to certain overseas issuers with a primary listing on an overseas market in specified jurisdictions who make a regulated offer of debt or equity securities under the FMC Act regime. The exemptions allow financial information contained in a product disclosure statement (PDS) and a register entry to be determined or prepared in accordance with overseas GAAP rather than NZ GAAP and also allow that financial information to be audited by an auditor qualified under the laws of the relevant jurisdiction rather than a New Zealand qualified auditor. The PDS and register entry must contain prescribed warning statements with respect to the use of overseas GAAP in place of NZ GAAP. A copy of the notice is available here.

- Financial Markets Conduct (Overseas FMC Reporting Entities) Exemption Notice 2016: This notice exempts overseas FMC reporting entities with a primary listing on an overseas market in certain recognised jurisdictions from some of the financial reporting obligations in Part 7 of the FMC Act. The main effects of the exemption are to allow such entities to:
  - substitute overseas GAAP for NZ GAAP in their financial statements,
- have their financial statements audited by an auditor qualified in the relevant overseas jurisdiction,
- be relieved from the New Zealand specific requirements relating to the signing and dating of financial statements, and
- allow any separate financial statements required for the entity’s New Zealand business to also be prepared with the overseas GAAP and be audited by either an auditor under the laws of the relevant jurisdiction, an Australian auditor, or a New Zealand qualified Auditor.

A copy of the notice is available [here](#).

- **Financial Markets Conduct (Licensed Independent Trustees of Restricted Schemes) Exemption Notice 2016:** This notice provides exemptions relating to the requirement for restricted schemes to have a licensed independent trustee that satisfies paragraph (c) of the definition of “independent” in section 131(3) to allow for a licensed independent trustee to be a director of a restricted scheme’s sole corporate trustee. A copy of the notice is available [here](#).

- **Financial Markets Conduct (Overseas Subsidiary Balance Date Alignment) Exemption Notice 2016:** This notice exempts FMC reporting entities with overseas subsidiaries operating in jurisdictions with inflexible balance dates to be exempt from the balance date alignment requirement under section 461(3) of the FMC Act (subject to certain conditions). A copy of the notice is available [here](#).

- **Financial Markets Conduct (Overseas Registered Banks and Licensed Insurers) Exemption Notice 2016:** This notice replaces the Financial Markets Conduct (Overseas Registered Banks and Licensed Insurers) Exemption Notice 2015, which exempts overseas registered banks and overseas insurers licensed by the Reserve Bank of New Zealand from financial reporting and audit obligations of the FMC Act. It carries over most of the 2015 notice provisions subject to the following changes. The notice now:
  - allows Australian qualified auditors to audit New Zealand business financial statements,
  - removes the New Zealand-specific financial statement dating and signing requirements, so that signing procedures used in other jurisdictions may be used instead,
  - allows sufficient time for the lodging of financial statements in New Zealand compatible with the requirements of the recognised overseas regimes, and
  - recognises overseas auditors for custodian assurance engagements.

A copy of the notice is available [here](#).

- **Financial Markets Conduct (Communal Facilities in Real Property Developments) Designation Notice 2016:** This notice provides relief through a class designation from requirements under the FMC Act for new shares in companies that manage communal facilities in real property developments in recognition that these shares do not, in substance, equate to “financial products” for the purposes of the FMC Act regime. The underlying intent of these shares is to provide a mechanism for the use and enjoyment of communal facilities attached to the ownership of a particular piece of property and to attribute cost rather than generate return or manage financial risk. A copy of the notice is available [here](#).

- **Financial Markets Conduct (Communal Facilities in Real Property Developments) Exemption Notice 2016:** This notice is related to the above designation notice and applies to existing shares in companies that manage communal facilities in real property developments where the shares were offered to the public in reliance on the Securities Act (Real Property Developments) Exemption Notice 2007 or a similar notice. The notice exempts the company from complying with certain obligations under the FMC Act, including the ongoing disclosure and governance requirements and the financial reporting obligations under Part 7 of the Act which would otherwise apply from 1 December 2016 following the end of the two year transition period. A copy of the notice is available [here](#).

The FMA has been regularly updating the market on the status of these legislative notices and on its plans relating to future notices. The latest of these FMA regulatory updates was released in October and is available [here](#). This update includes details on proposed legislative notices for:

- property and forestry schemes,
cooperative companies and industrial and provident societies,
overseas banks from certain recognised jurisdictions making offers of simple debt products such as call deposits and term deposits on a similar basis to those offered by New Zealand registered banks,
offers made by overseas issuers from certain recognised jurisdictions (that have broadly equivalent financial reporting requirements and regulatory oversight to New Zealand) where New Zealand investors are not the primary target of such offers,
offers made by overseas issuers from certain recognised jurisdictions (that have broadly equivalent financial reporting requirements and regulatory oversight to New Zealand) where New Zealand investors are not the primary target of such offers,
officers of horse bloodstock syndicates and bloodstock companies from the disclosure, governance, financial reporting and audit requirements of the FMC Act,
exemptions from financial reporting requirements and the ongoing minor disclosure and governance requirements for New Zealand issuers that have only offered under the Securities Act (Employee Share Purchase Schemes – Unlisted) Exemption Notice 2011 and any related individual exemption notices,
designating certain types of shares as managed investment products (MIPs) rather than equity securities where those shares are in economic substance more akin to MIPs than equity securities, and
managed investment schemes that are in the process of winding up and debt issuing companies that are in liquidation or receivership.

Most of these proposed legislative notices are expected to be finalised by the end of this month. The exemption notices will be available on FMA’s website here.

Funding and levies decisions for the FMA, XRB and the Companies Office

The Government has approved a number of changes to the funding of the Financial Markets Authority (FMA), the External Reporting Board (XRB) and the Companies Office. These changes include:

- NZ$9.8 million per year in additional funding for the FMA and NZ$5.3 million per year in additional funding for the Companies Office,
- changes to the structure of the FMA levy model to more closely align the levy for each stakeholder with the benefits they receive, and
- a number of reduced Companies Office fees.

Details of these changes are available here, together with copies of the submissions received by the Ministry of Business, Innovation and Employment on a consultation on these changes in July and August this year.

Some of the biggest increases in FMA levies relate to services provided by banks and NBDTs with more than NZ$1 billion in total assets, DIMS providers who manage funds over NZ$500 million, MIS managers (and trustees) in respect of managed assets exceeding $2 billion, as well as for levies payable by brokers, custodians and derivatives issuers.

The new FMA levies will be in effect from 1 July 2017.
Financial Markets Authority (FMA)

FMA consults on regulatory returns for prescribed intermediary services

The FMA is currently reviewing what information licensed crowdfunding and peer-to-peer lending service providers will be required to supply in their annual regulatory returns.

An annual regulatory return is a standard licence requirement for all licensees. These returns are mandatory and help the FMA to make sure licensees continue to perform their market services effectively post-licensing.

Details on the consultation are available here.

FMA consults on revised guidance on advice for KiwiSaver sales

The FMA is seeking feedback on a draft guidance note: KiwiSaver advice. This guidance note is for providers advising on KiwiSaver products and will replace the FMA’s 2012 Guidance Note: Sale and Distribution of KiwiSaver.

Many providers have found that the FMA’s 2012 Guidance Note is too restrictive, which results in some people not getting the help they need, as providers see it as risky to provide advice. This guidance updates and clarifies the FMA’s view of what falls within ‘personalised’ advice (which only some advisers can give) and ‘class’ advice, so advisers can be more confident they are within the rules.

Submissions close on 16 December 2016. For further details click here.

Final version of revised Code of Professional Conduct for AFAs released

The final version of the revised Code of Professional Conduct for Authorised Financial Advisers (AFAs) has been released. It comes into force on 1 December 2016.

The key changes from the current version of the Code include:

- **New default minimum competence, knowledge and skills standard**: The default minimum competence, knowledge and skills standard has been amended to require AFAs to attain the components of the New Zealand Certificate in Financial Services (level 5) that are relevant to their work (Code Standard 16). As a result, the acceptable alternative qualifications identified in the Competence Alternatives Schedule have been revised to reflect the new default minimum standard. As a transition measure, the old default minimum standard of the National Certificate in Financial Services (Financial Advice)(Level 5) will continue to be recognised for authorisations coming into effect before 1 January 2019.

- **Communication requirements for ‘personalised’ services**: Code Standard 8 has been restructured, with a new Code Standard (Agreeing the nature and scope of service) introduced, and the prescribed requirements that needed to be satisfied to comply with the Suitability Code Standard (now Code Standard 9) have been removed. The changes require AFAs to agree, at the outset, the nature and scope of ‘personalised’ services provided to retail clients, and clarify any limitations and impact of these services with clients.

- **Clarification for AFAs providing DIMS**: Code Standard 3 has been amended to clarify that providing a discretionary investment management service (DIMS) does not preclude an AFA from being able to state or imply that they are independent, or that any financial adviser services provided are independent.
Further information is available on the FMA’s website here.

FMA Information Sheet on the regulation of communal facilities in real property developments

The FMA has published an information sheet on the changes to the regulation of companies and incorporated societies managing communal facilities in real property developments under the Financial Markets Conduct Act 2013 (FMC Act). It also discusses the new FMC designation and exemption notices (noted above) which have been granted to provide relief from FMC Act requirements.

2016 FMA Annual Report and KiwiSaver Report released

The FMA has released its 2016 FMA Annual Report (available here) and its annual KiwiSaver Report (available here) that summarises the FMA’s activities as a regulator relating to KiwiSaver.

Disclose Register

Fund updates for closed schemes transitioning to the FMC Act regime

The Disclose Register now allows managed investment schemes that are closed to new members or are closed sections of schemes to provide fund updates if the scheme is registered as a ‘skeleton’ offer, without the need to produce a Product Disclosure Statement (PDS) or associated register data entry. For further details click here.

Reserve Bank of New Zealand

Catastrophe risk survey for licensed insurers

The Reserve Bank is conducting a brief survey of licensed insurers on their processes and governance of assessing their catastrophe exposures. A copy of the survey is available here.

NZX Limited (NZX)

Disclosure of key audit matters within audit reports for NZX listed issuers

NZX has reminded NZX listed issuers that amendments will come into effect in relation to the disclosure of key audit matters (KAMs) within audit reports for reporting periods ending 31 December 2016 and beyond. The inclusion of KAMs is part of a reform of audit reporting worldwide which will significantly improve the value of an audit for stakeholders. KAMs are defined as those matters that, in the auditor’s professional judgement, were of most significance in the audit of the financial statements of the current period.

Further information on the auditor reporting reforms can be found here. Chartered Accountants Australia and New Zealand has also prepared a report that analyses early adoption of the enhanced audit report.
Takeovers Panel consults on amendments to the Takeovers Code

The Takeovers Panel is consulting on three substantive issues and various technical amendments to the Takeovers Code (the Code). Submissions close on 2 December 2016.

One of the Takeovers Panel’s current concerns is whether the Code is imposing unnecessary cost barriers for small Code companies, particularly with respect to capital-raising and the undertaking of other share transactions. To date, the Panel has attempted to alleviate these concerns by enacting a class exemption (the Takeovers Code (Small Code Companies) Exemption Notice 2015) from rule 6(1) of the Code for allotments by small unlisted companies (which have total assets that do not exceed $20 million). However, the Panel believes that it may be appropriate to propose an amendment to the definition of “Code company” in the Takeovers Act and Code to add an asset threshold of total assets of more than $20 million for unlisted companies if the Code is preventing small companies from raising the capital they need to survive, thrive, and grow, or undertake other share transactions cost-effectively. As an alternative to changing the threshold, the Panel is also canvassing the possibility of creating a lighter compliance regime for small Code companies - a “Code light” – but this is not the Panel’s preferred option.

The other substantive issues being considered by the Panel relate to the timing provisions under the Code (arising from the use of ‘calendar days’ and not ‘working days’), the limited use of electronic communication by target companies and offerors during takeovers, and the limited accessibility of Code documents for shareholders of Code companies. With regard to the latter issues, the Panel is considering recommending amendments to the Code to the effect that:

- a target company is required to provide to an offeror, with its share register, the email address of every shareholder (holding equity securities or voting securities the subject of the offer) who has provided their email address to the target company for the purposes of electronic receipt of documents (“e-shareholder”),

- every Code-regulated communication made by a Code company or an offeror to an e-shareholder is required to be made electronically, however, an e-shareholder can request to also receive communications in hard copy, and

- the Panel may make copies of Code-regulated documents available on its website.

The consultation paper, the official feedback form and a marked-up copy of the Takeovers Code containing proposed drafting changes which reflect the suggested amendments found in the consultation paper are available on the Panel’s website here.

New “Code Word” released

The latest edition of the Takeovers Panel’s Newsletter, Code Word 42, is now available on the Panel’s website here. This edition includes items on:

- developments in relation to determining “interest classes” for schemes of arrangement under Part 15 of the Companies Act 1993 involving Code companies,

- the Panel’s approach to disaggregations of holding or control of voting rights in Code companies under the fundamental rule of the Takeovers Code (Rule 6), and
• information on a new timing rules calendar which is being created for the Panel’s website.

MOU with the FMA

The Panel has entered into a Memorandum of Understanding (MOU) for information sharing and regulatory cooperation with the Financial Markets Authority (FMA). A copy of the MOU can be found here.

Regulatory developments

Select Committee consults on amendments to the Takeovers Code

The Commerce Select Committee has called for submissions on proposed amendments to the Takeovers Act 1993 and the Takeovers Code as part of its consideration of the omnibus Regulatory Systems (Commercial Matters) Amendment Bill. Submissions close on 1 December 2016.

The amendments transfer the jurisdiction to consider Takeovers Code company takeover expense-related disputes from the courts to the Takeovers Panel with the view that this will provide for more timely and cost-effective decisions for the parties.

Proposed amendments to overseas investment legislation to accommodate TPPA

Although it is now more than likely to be redundant with US president-elect Donald Trump’s stance on the Trans-Pacific Partnership (TPP), the Government has made further progress on the necessary legislative amendments which would enable New Zealand to ratify the TPP Agreement (TPPA). The latest proposals concern regulations which will be made under an amendment to the Overseas Investment Act 2005 (OIA) to implement new screening thresholds for overseas investments if the Trans-Pacific Partnership Agreement Amendment Bill (which was passed into law this week) ever comes into force.

The OIA generally requires overseas investments in significant business assets in New Zealand to be screened by the Overseas Investment Office if the value of that investment is greater than NZ$100 million (although Australian non-government investors have a higher screening threshold arising from the 2011 Investment Protocol to the Australia New Zealand Closer Economic Partnership). Under the investment chapter of the TPPA, New Zealand has agreed to increase the NZ$100 million threshold to NZ$200 million for TPPA signatories. This change will also trigger the most favoured nation (MFN) obligations in New Zealand’s existing free trade agreements (with China, Chinese Taipei, Hong Kong, and South Korea) which means, in certain circumstances, investors from these territories will also receive the higher screening threshold.

The Trans-Pacific Partnership Agreement Amendment Bill introduces an amendment to the OIA to provide a power to make regulations to implement the necessary higher investment screening thresholds. Treasury is now consulting on the draft Overseas Investment Amendment Regulations that the Government proposes making under this new OIA regulation making power. These will insert a new Part 2A in the Overseas Investment Regulations 2005 to implement the higher screening threshold arising from the TPPA and New Zealand’s existing free trade agreements with MFN commitments. To ensure consistency in the regulatory regime, it is also proposed that the existing Australian regulations that implement the Closer Economic Relationship Investment Protocol with Australia are remade in the new Part 2A. The threshold for Australia is currently NZ$498 million for non-government investors and NZ$104 million for government investors (indexed for inflation), which will remain unchanged.
A copy of the consultation paper is available [here](#) and the draft Overseas Investment Amendment Regulations are available [here](#).

Submissions close on **18 November 2016**.

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**Applications under the Overseas Investment Act 2005 - a practical update**

New Zealand’s overseas investment regime has been in the media spotlight in recent times. While lobbying organisations and political parties closely scrutinise the decisions of the Overseas Investment Office, those in the investment community have raised concerns that the regime is overly burdensome and time consuming. Against this background, there have been a number of changes in process and regulation, with further changes in the pipeline, aimed at ensuring the regime is fit for purpose. For a brief overview of the regime and some of the recent and impending developments, see Bell Gully’s latest practical update [here](#).

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**COMMERCIAL**

**In the courts**

**High Court says court can reopen oppressive credit contracts in an undefended proceeding**

A recent High Court decision in *Real Finance Limited v Setefano* [2016] NZHC 2293 provides clarification that a court can reopen a credit contract on the grounds of oppression under the Credit Contracts and Consumer Finance Act 2003, in an undefended debt recovery proceeding.

This will be of concern to financiers as it shifts an evidential burden on to them to disprove oppression, in circumstances where a debtor itself has not raised the issue. The courts have previously held that the onus is on a party asserting oppression to provide evidence to support that assertion – except in the ”plainest of cases” a mere assertion is insufficient.

For full details of this decision and its implications see our earlier update [here](#).

**Court of Appeal upholds parties’ choice of law in cross-border employment relationship**

Employers based overseas will be relieved to hear that their choice of law provisions with their New Zealand-based employees do hold weight with the New Zealand courts.

A Court of Appeal decision released last Friday (*New Zealand Basing Limited v Brown* [2016] NZCA 525) has overturned an Employment Court judgment that applied New Zealand’s Employment Relations Act despite a clause in the employment agreement stating that the law of Hong Kong was to apply.

The Court of Appeal decision confirms that the Employment Relations Act will not apply if the parties have a bona fide and legal agreement to be bound by a foreign law.

For further details on this decision read our earlier client update [here](#).
Regulatory developments

Consultation on draft Trusts Bill to modernise the law of trusts

The Ministry of Justice has released an exposure draft of a bill which will replace the Trustee Act 1956 and update the general law governing trusts in New Zealand for consultation. A copy of the draft Trusts Bill is available [here](#) and a copy of the consultation paper is available [here](#). Submissions close on 21 December 2016.

The draft Trusts Bill has been developed in response to the Law Commission’s 2013 report [Review of the Law of Trusts: A Trusts Act for New Zealand](#) and is largely based on 48 of the Commission’s 51 recommendations set out in that report. The Ministry points out that it is unlikely that any changes will be made to the underlying policy decisions made in relation to the Bill at this point in the process, as these have been extensively canvassed during the Commission’s review and subsequently agreed to by Cabinet. Accordingly, the purpose of the Ministry’s consultation is mainly to determine whether the wording and structure of the draft Bill is sufficiently clear, and whether anything may create unintended consequences.

The Bill includes provisions to:

- make it easier for people to understand how to appropriately use trusts to manage their affairs,
- provide clear mandatory and default trustee duties so people know what their obligations are if they’re involved in managing a trust,
- require trustees to manage and provide information to beneficiaries,
- provide flexible trustee powers and updated rules,
- provide clear rules for when people make changes to a trust or wind them up, and
- provide more options for removing and appointing trustees without having to go to court while also preserving people’s ability to ask the courts to intervene to resolve disputes.

The Bill applies to all trusts, including commercial trusts used in the capital markets and banking and financial services structures which have traditionally relied on the high degree of flexibility permitted by the existing common law in relation to trusts. The Bill recognises this by modifying how certain provisions of the Bill will apply to such trusts, and the Ministry is interested in receiving comments on whether those modifications are appropriate.

A final version of the Bill is expected to be introduced to Parliament in 2017.

AML/CFT regulations made for new international wire and domestic cash transactions reporting regime

In 2015 amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML/CFT Act) were made to address criticisms of the OECD Working Group on Bribery regarding perceived gaps in New Zealand’s legislation, and to try to bring New Zealand more in line with some overseas developments (see the [AML/CFT Amendment Act 2015](#)). This included introducing a new “prescribed transaction” reporting regime for international wire transactions and domestic physical cash transactions which comes into force next year on 1 July 2017, and is in addition to the current transaction reporting obligations under the Act (for cross border movements of cash and suspicious transactions). Under this regime reporting entities will be required to report to the Financial Intelligence Unit within the Police all international wire transfers over NZ$1,000 and all domestic physical cash transactions over NZ$10,000 in the form of “prescribed transaction reports”. Each prescribed transaction report must be made “as soon as practicable, but not later than 10 working days after the transaction” and will need to be in the form set out in the [Anti-Money Laundering and Countering Financing of Terrorism (Prescribed Transactions Reporting) Regulations 2016](#) which were enacted last week.
The Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Amendment Regulations 2016, which were also enacted last week, exempt a reporting agency that is an ‘intermediary institution’ from making a prescribed transaction report in respect of any international wire transfer under the new regime. An intermediary institution, in relation to a wire transfer, is a person that participates in a transfer of funds that takes place through more than one institution but is not an ordering institution or a beneficiary institution.

Consultation on the consequences of non-disclosure for lenders under the CCCFA

In response to a request from the New Zealand Bankers Association, the Commerce and Consumer Affairs Minister Paul Goldsmith is considering amending the legal consequences for the parties to a consumer credit contract where a lender fails to meet its information disclosure obligations under the Credit Contracts and Consumer Finance Act 2003 (CCCFA). More particularly, the Minister is considering amendments to section 99(1A) of the CCCFA, which forfeits a creditor’s right to any interest or fees for the period during which non-compliant disclosure was made. In a press release dated 2 November 2016, the Minister noted that he is concerned that this section “might lead to unfair outcomes, particularly where the information the lender fails to disclose is very minor or where the borrower suffers no harm”.

Prior to making any final decision on this issue the Ministry of Business, Innovation and Employment (MBIE) is seeking feedback from the public on a range of alternatives to the current system in section 99(1A). These include:

- maintaining the current system but imposing a cap on the amount or proportion of interest and fees that a lender forfeits,
- maintaining the current system but allowing the lender to attempt to argue before a court that forfeiting all interest and fees would be disproportionate (which is currently MBIE’s preferred approach),
- amending section 99(1A) so that the borrower can only avoid paying the interest and fees if they can convince a court that the error in information disclosure meets a materiality threshold,
- repealing section 99(1A) so that the lender does not have to forfeit the interest and fees once corrective disclosure is made.

A copy of MBIE’s discussion document and details on how to make submissions are available here. Submissions close on 28 November 2016.

Property Law Act amendments

New sections have been added to the Property Law Act 2007 (PLA) as a result of the recent modernisation of the Judicature Act 1908. The PLA now includes provisions which were previously covered under the Judicature Act to:

- preserve the requirement that an acknowledgement of a part payment of a debt be in writing if it is to be effective to discharge the whole debt,
- deal with the assignment of securities and rights of creditors to a surety who pays a debt,
- provide for relief to be available for payment made under a mistake, regardless of whether the mistake is one of fact or law, and for that mistake to be judged on the law at the time the payment was made.

See the Property Law Amendment Act 2016 for details.
Government consults on New Zealand's retail payment systems

The Government is seeking public input on an issues paper which has been developed by the Ministry of Business, Innovation and Employment (MBIE) following its analysis of New Zealand’s retail payment systems.

Retail payment systems are the platform through which transactions between consumers and merchants are processed. Fees for use of these systems are charged to businesses by banks and often passed on to consumers either through an extra surcharge or as part of the cost of goods and services.

In February 2016, the Government asked MBIE to examine New Zealand’s retail payment systems in the context of:

- merchant concerns about increasing fees for the processing of electronic transactions,
- industry developments, including the adoption of new technologies, and
- ongoing-reforms to the oversight and regulation of retail payment systems in overseas jurisdictions.

The issues paper outlines how retail payment systems (with particular focus on card networks and the EFTPOS system) work in New Zealand and looks at the economic outcomes that result from New Zealand’s retail payment systems.

In preparing the issues paper, MBIE asked whether consumers and merchants are benefiting from on-going innovation; card payment systems are being used efficiently; and whether consumers and merchants are bearing a fair share of the costs. MBIE found that the market dynamics suggest cause for concern in both the credit and debit card markets. Issues MBIE identified include:

- economic inefficiency in the credit card market,
- increased prices for all consumers, with only higher-income consumers benefiting from rewards offered by credit card providers,
- emerging inefficiency in the debit card market,
- barriers to entry in the debit market, and
- higher costs placed on smaller merchants to pay for the processing of retail transactions.

The issues paper does not consider options to address these issues in any great detail, as the Government wants to fully understand the issues before it decides whether to proceed any further. Commerce and Consumer Affairs Minister Paul Goldsmith says the feedback on the issues paper will “inform MBIE’s policy work around whether regulation is needed to ensure a fair distribution of costs between banks, businesses and consumers”.

Submissions on the issues paper are due on 13 December 2016. The accompanying media release is available here.

Call for submissions on ASEAN FTA

The Ministry of Foreign Affairs and Trade has called for submissions on how well the ASEAN Australia New Zealand Free Trade Agreement (ASEAN FTA) has been working and what can be done to maximise its benefits for New Zealand businesses. This will help inform the Government’s approach to the upcoming review of the ASEAN FTA next year. The Ministry is particularly interested in receiving feedback from companies that use ASEAN FTA or that might use ASEAN FTA in the future.

For more information visit the Ministry’s website here. Submissions close on 2 December 2016.
Closer relations between New Zealand and the European Union

On 5 October 2016, New Zealand and the European Union signed the Partnership Agreement on Relations and Cooperation between New Zealand and the European Union (the Partnership Agreement).

The Partnership Agreement represents a significant step forward in the relationship between the European Union and New Zealand. It creates for the first time a treaty-level platform for the further development of the relationship by identifying current and future areas of cooperation and establishing mechanisms for dialogue across a broad range of policy areas. In particular, it is considered a co-requisite as well as pre-requisite to a free trade negotiation with the European Union. However, it still requires the consent of the European Parliament and ratification by all 28 of the European Union’s Member States. It is therefore not possible to determine at this stage when the Partnership Agreement may enter into force.

The Ministry of Foreign Affairs and Trade has prepared a national interest analysis as part of New Zealand’s internal procedures for ratifying the Partnership Agreement. A copy of that analysis is available here.

COMPANY LAW

Regulatory developments

Select Committee consults on amendments to the Companies Act

The Commerce Select Committee has called for submissions on proposed amendments to the Companies Act 1993 as part of its consideration of the omnibus Regulatory Systems (Commercial Matters) Amendment Bill. Submissions close on 1 December 2016.

Further financial reporting compliance changes for ‘large’ companies

Following changes to the Companies Act which came into force in April 2014, only ‘large’ companies are now required to prepare financial statements under that Act (with other companies being given the right to ‘opt-out’ or ‘opt-in’ to the financial reporting requirements depending on whether they have more or less than 10 shareholders). This Bill introduces some further amendments to the financial reporting default positions for ‘large’ companies that are subsidiaries of an overseas company registered on New Zealand’s register of overseas companies (overseas parent company).

Currently, a large company (A) is not required to prepare financial statements if it is a subsidiary (with no subsidiaries of its own) of a New Zealand incorporated company (B) and B prepares group financial statements in accordance with New Zealand financial reporting requirements. This exception is being extended so that the default position under the Companies Act is the same where company (A) is a subsidiary of an overseas parent company that prepares group financial statements in accordance with New Zealand financial reporting requirements.

Similarly, there is currently an exception to the requirement for a large company (with one or more subsidiaries) to prepare group financial statements if it is a subsidiary of a New Zealand incorporated company that prepares

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1 There are two tests to determine whether a company is “large” in respect of an accounting period for the purposes of the Companies Act’s financial reporting requirements – an assets test and a revenue test. If a company meets the applicable threshold under either test, then, unless it is an “inactive entity” the company is “large”. Each test must be assessed for each accounting period and it will be based on the position of the company for the two preceding accounting periods. The assets and revenue for subsidiaries are taken into account when applying the tests. A different threshold applies under each test if the company is a subsidiary of an overseas company or owned by an overseas resident.
group financial statements which include that company. This exception is being extended to cover situations in which the company is a subsidiary of an overseas parent company that prepares group financial statements.

The financial statement registration requirements are also being amended for consistency and to remove an unnecessary compliance burden for some large companies. Currently, large companies may be required to file their financial statements if shares that, in aggregate, control the exercise of 25% or more of the voting power of the company are held by:

- a subsidiary of a body corporate incorporated outside New Zealand,
- a body corporate incorporated outside New Zealand, or
- a person not ordinarily resident in New Zealand.

This requirement does not apply to a company if it is a subsidiary of another company that is incorporated in New Zealand and that company files audited group financial statements (which include the company) at the Companies Office. The Bill extends this registration exception to cover situations in which the large company is a subsidiary of an overseas parent company and audited financial statements for the group of that overseas parent company are filed at the Companies Office.

**Large companies can opt out of preparing an annual report**

In addition to the changes to the financial reporting preparation and filing requirements for specific large companies, the Bill introduces a new general ‘opt-out’ right for all large companies (other than those that are classified as FMC reporting entities under the Financial Markets Conduct Act 2013) in respect of the obligation to prepare an annual report.

The Bill provides that the requirement to prepare an annual report does not apply to a large company if it is not required to prepare financial statements and shareholders who together hold at least 95% of the voting shares agree that the annual report need not be prepared.

**Shareholders’ meetings**

Currently, a company does not need to hold an annual meeting of shareholders if everything that is required to be done at a meeting is done by written resolution in accordance with the requirements set out in section 122 of the Companies Act. The Bill adds to this exception by providing that a company also does not need to hold an annual meeting if there is nothing required to be done at the meeting, the board resolves that it is in the interests of the company to rely on this new statutory provision, and the constitution of the company does not require the meeting to be held.

**Other proposed changes**

In brief, the Bill also:

- amends Schedule 1 of the Act to clarify that a constitution may provide for different matters for different kinds of proxies and clarify when postal votes that are cast using electronic means must be received,
- clarifies that information for only one of the directors living in an enforcement country needs to be provided to satisfy the resident director statutory requirement,
- modifies the requirement that a company must give notice of any financial assistance to its shareholders for cases where the company’s shares are quoted on a licensed market. The notice must be given to the licensed market operator instead,
- provides new powers to the Companies Registrar to remove an overseas company from the overseas register if satisfied that it has ceased to carry on business in New Zealand, and
provides a rule in the voluntary administration provisions for determining, in the context of bilateral netting agreements, whether there are mutual credits, mutual debts, or other mutual dealings in relation to transactions involving trustees.

COMPETITION AND CONSUMER LAW

New Zealand Commerce Commission (NZCC)

Media releases

The NZCC has issued the following media releases:

Industry regulation and regulatory control

NZCC releases final report on its review of Fonterra’s 2015/16 base milk price calculation

The NZCC has released its final report on Fonterra’s base milk price calculation for the 2015/16 dairy season. The NZCC’s view, after considering submissions on the draft report released last month, is that Fonterra’s calculation of the 2015/16 base milk price is largely consistent with both the efficiency and contestability purposes of Dairy Industry Restructuring Act.

Click here for more

NZCC releases draft report on Fonterra’s 2016/17 Milk Price Manual

The NZCC has released its draft report on its annual statutory review of Fonterra’s Milk Price Manual for the 2016/17 dairy season. The NZCC’s draft finding is that the 2016/17 Manual is largely consistent with the purpose of the milk price monitoring regime under the Dairy Industry Restructuring Act 2001.

Click here for more

Mergers and acquisitions

NZCC clears rendering merger

The NZCC has given clearance to the Wallace Group Limited Partnership to acquire up to 100% of the assets and business of Wallace Corporation Limited, Farm Brands Limited (and related companies) and Keep It Clean Limited.

Click here for more

Letter of Unresolved Issues for Vodafone/Sky merger

The NZCC has sent a Letter of Unresolved Issues to Vodafone and Sky television in relation to their proposed merger.

Click here for more

Aon applies for clearance to acquire Fire Protection Inspection Services

The NZCC has received an application from Aon New Zealand to acquire the business and assets of Fire Protection Inspection Services Limited.

Click here for more

NZCC proposes to decline NZME/Fairfax merger

The NZCC has published its draft determination on NZME and Fairfax’s application under the Commerce Act seeking authorisation to merge their media operations in New Zealand. The NZCC’s preliminary view is that it should decline to authorise the merger.

Click here for more
Telecommunications

NZCC recommends deregulating Spark’s wholesale voice services
The NZCC has released a report for consultation indicating its intention to recommend to the Minister for Communications that Spark’s resale voice services be deregulated. Click here for more

Draft decision on $50 million liability allocation for telecommunications providers
The NZCC released its draft decision about how much 15 telecommunications providers will pay towards the $50 million Telecommunications Development Levy for 2015/16. Click here for more

NZCC proposes to continue telephone number portability
The NZCC has released a draft determination proposing to continue the regulation of number portability services for both local and mobile telephone numbers for another five years. Number portability enables a customer to switch telecommunications providers while retaining the same telephone number. Click here for more

NZCC releases draft decision on service levels of Chorus UBA
The NZCC has released the draft decision in its review of the non-price features of the Unbundled Bitstream Access (UBA) service. Click here for more

Market behaviour

NZCC receives landfill authorisation application from the Nelson and Tasman Councils
The NZCC has received a joint application from the Nelson City Council and the Tasman District Council to form a business unit to operate the two landfills in the Nelson-Tasman region. Click here for more

Consumer issues

NZCC consulting on credit fees guidelines
The NZCC has released updated draft guidelines designed to assist lenders when setting credit fees. Click here for more

Bike Barn charged with misleading customers over its sale prices
The NZCC has filed 16 charges against Bikes International Limited and Bike Retail Group Limited (which both operate as Bike Barn) relating to misleading conduct. Click here for more

Trustpower fined $390k over misleading broadband offer
Trustpower Limited has been fined $390,000 in the Auckland District Court after pleading guilty to misleading consumers over the price and terms of its bundled electricity and unlimited data broadband offer. Click here for more

Charges laid over Nurofen specific pain range painkillers
Reckitt Benckiser (New Zealand) Limited faces 10 charges brought by the NZCC alleging it misled the public about the nature, characteristics and suitability of its Nurofen specific pain range products. Click here for more

NZCC releases 2016 Consumer Issues Report
The NZCC has released its 2016 Consumer Issues Report, presenting a picture of issues affecting New Zealand consumers. Click here for more
NZCC obtains highest penalties yet against mobile traders
Mobile traders Ace Marketing Limited and Smart Shop Limited (trading as SmartStore) have been fined $150,000 and $135,000 respectively after being sentenced in the Auckland District Court.
*Click here for more*

Sales Concepts pleads guilty to false Christmas delivery promise
Mobile trader Sales Concepts Limited has pleaded guilty to 10 charges in the Auckland District Court brought by the NZCC under the Fair Trading Act 1986 for misleading consumers.
*Click here for more*

Warning about phone survey scam that offers non-existent cash prizes
The NZCC is warning New Zealanders about being cold-called by a company called Li Bai Corporation, as it is believed to be a scam.
*Click here for more*

Yoghurt Story fined for falsely claiming its products are yoghurt
Yoghurt Story New Zealand Limited and Frozen Yoghurt Limited have been sentenced and fined in the Auckland District Court for misleading the public about the nature and characteristics of their frozen yoghurt products.
*Click here for more*

Ninth mobile trader charged as NZCC continues clamp down on non-compliance
Mobile trader, Bestdeals 4 You Limited has pleaded guilty to 19 charges brought by the NZCC relating to the layby sales agreements and consumer credit contracts it offered customers.
*Click here for more*

Expedia and Booking.com amend parity contract clauses
Expedia and Booking.com will amend price and availability parity clauses in their contracts with New Zealand accommodation providers to resolve a NZCC investigation.
*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 will not oppose Vocus Communications’ move on Nextgen*
The ACCC has announced it will not oppose the proposed acquisition by Vocus Communications of Nextgen Networks Group Pty Ltd and two development projects: the Australian Singapore Cable and the North West Cable System.
*Click here for more*

**Telecommunications**

*ACCC draft decision maintains wholesale ADSL regulation during transition to NBN*
The ACCC has released its draft decision to continue regulating the wholesale asymmetrical digital subscriber line (ADSL) service for a further five years.
*Click here for more*
Consumer issues

ACCC takes action against the Joystick Company for alleged misleading e-cigarette “no toxic chemicals” claims
The ACCC has commenced proceedings in the Federal Court against The Joystick Company Pty Ltd, an online e-cigarette retailer, for alleged false or misleading representations that its products did not contain any toxins or formaldehyde, were “independent from” chemicals found in conventional cigarettes, and had been approved by the ACCC.
Click here for more

ACCC finalises investigation into GlaxoSmithKline’s pricing claims
The ACCC has concluded its investigation into whether GlaxoSmithKline made misleading statements about a price increase of its Panadol Osteo products.
Click here for more

ACCC advises franchising industry to consider its agreements ahead of new unfair contracts law
The ACCC is warning franchisors about potentially unfair contract terms under a new law offering greater protections to small businesses from 12 November 2016.
Click here for more

Dulux to pay $400,000 for misleading cooling paint claims
The Federal Court has ordered DuluxGroup (Australia) Pty Ltd to pay penalties totalling $400,000 for making false or misleading representations about the temperature reducing characteristics of two paint products, in proceedings brought by the ACCC.
Click here for more