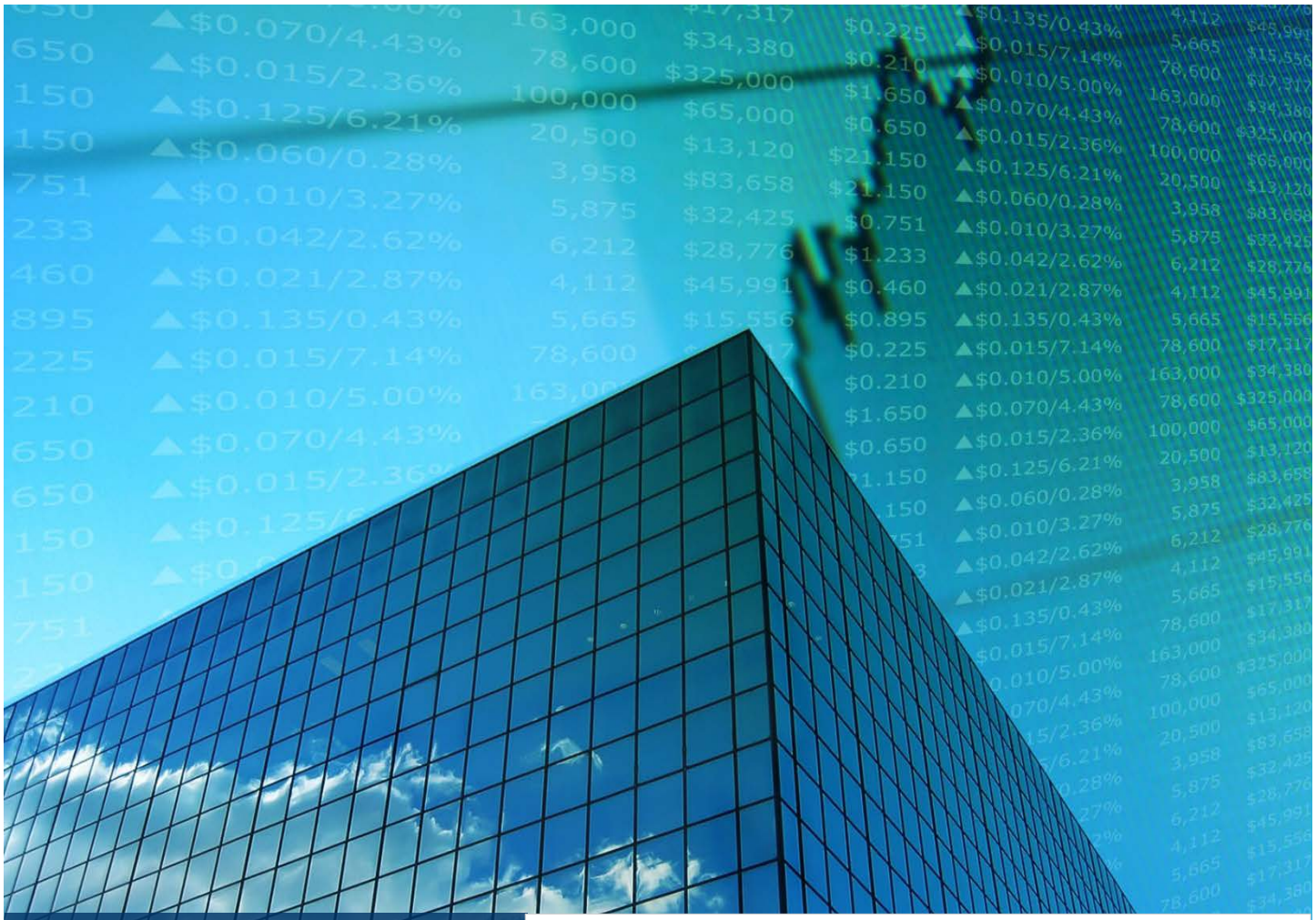
Corporate Reporter

7 SEPTEMBER 2018



WELCOME

to Issue No. 54 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:

- **Select Committee reports back on the Financial Services Legislation Amendment Bill,**
- **Supreme Court looks at relief afforded to majority shareholders under the Companies Act for major transaction disputes,**
- **New overseas investment rules come into force in October,**
- **Joint consultation on the NZ ETS framework and a better NZ ETS for forestry,**
- **Continuous disclosure rules do not apply to listed companies in administration, and**
- **The latest media releases from the New Zealand Commerce Commission and the Australian Competition and Consumer Commission.**

BELL GULLY

CONTENTS

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.

CAPITAL MARKETS

Legislative developments

Select Committee reports back on the Financial Services Legislation Amendment Bill

The Economic Development, Science and Innovation Committee has reported back to Parliament on the Financial Services Legislation Amendment Bill and the Bill is now waiting to complete its final stages.

The Bill does two main things. It:

- overhauls the current regulatory regime for financial advice to improve the availability and quality of financial advice; and
- makes changes to address the misuse of the Financial Service Providers Register.

These changes are being made through amendments to the Financial Markets Conduct Act 2013 (**FMC Act**) and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP Act**) and by repealing the Financial Advisers Act 2008. Further details on the key provisions in the Bill are discussed in a previous issue of Corporate Reporter here.

Following consideration of the 71 written submissions (available to view here) and 34 oral submissions made to the select committee, the committee has made a number of recommended changes to the Bill (which can be viewed here). Some of the main issues which have been addressed by the committee's changes are outlined below:

- **Nominated representatives:** The Bill allows a licensed financial advice provider to engage "nominated representatives" to give advice on its behalf. It is intended that financial advice providers will bear ultimate responsibility for the conduct of their nominated representatives, largely by being required to put in place tightly controlled processes and systems (to be assessed by the Financial Markets Authority (**FMA**) during the licensing process). However, there is some concern that the Bill does not go far enough on this front. The committee has therefore recommended clarifying the limited discretion that nominated representatives will have (in new section 431Q of the FMC Act) by requiring financial advice providers to:
  - have in place processes and controls that limit the nature and scope of the advice that the nominated representatives give, and allow the provider to regulate what advice is given and the circumstances in which it is given;
  - ensure that the advice given by a nominated representative is commensurate with their competence, knowledge, and skill;
  - ensure compliance with its processes and controls, and monitor their effectiveness.
- **Definition of giving financial advice extended:** The select committee has recommended two changes for defining what type of financial advice is covered by the new regime (as set out in new section 431C of the FMC Act):
  - The definition of giving financial advice is to include a person who makes a recommendation or gives an opinion about switching funds within a managed investment scheme (that is, the type of advice that is commonly given in relation to KiwiSaver schemes).

- A regulation-making power has also been included to allow the regime to be extended to other, specific financial planning services, such as where an insurance plan is designed.

- **Subcontracting providers:** As drafted, the Bill fails to address how the regime applies to "entities" (rather than just an individual) contracted to give advice on behalf of a financial advice provider. This has now been remedied through amendments to new section 431D of the FMC Act so that a person provides a financial advice service when they give regulated financial advice on their own account, or engage "one or more individuals" to provide advice on their behalf. The committee has also recommended various other amendments to clarify how the duties in the Bill apply to the parties in a subcontracting arrangement.

- **Exclusions from regulated financial advice clarified:** A new Schedule 5 to the FMC Act sets out certain exclusions from the Bill's proposed regulatory regime. This includes an exclusion for financial advice that is given by a conveyancing practitioner, journalist, lawyer, lecturer, qualified statutory accountant, valuer or a real estate agent. To address concerns that this exclusion may be too wide in practice, the scope of the exclusion has been refined so it is now clear that the exclusion only applies where the advice is given:

  - in the ordinary course of carrying on the respective occupation; and

  - as an ancillary part of carrying on the principal activity of that occupation.

- **Reporting requirements for dispute resolution schemes:** Under the current FSP Act provisions, government-approved dispute resolution schemes are required to notify the relevant regulator if they receive a series of material complaints about a financial service provider. The Bill takes this a step further by requiring the schemes to notify the regulators if a member "has contravened, may have contravened, or is likely to contravene" relevant legislation "in a material respect". It also requires the schemes to notify the regulator if they receive a material complaint in relation to certain providers.

  In response to submissions, the select committee is recommending that this obligation only applies once the dispute resolution scheme has reasonable grounds to believe that a participant has contravened, or is likely to contravene, relevant legislation in a material respect. This will require the schemes to consider evidence provided by the complainant and the member in order to determine if a material contravention has occurred or is likely to occur. The committee is also recommending that a regulation-making power is included to allow regulations to prescribe additional instances in which information must be shared.

- **Addressing misuse of the Financial Service Providers Register:** The select committee recognises that the provisions which amend the requirements for entities wanting to register on the Financial Service Providers Register (**FSPR**) may inadvertently result in loss of oversight for the Government of some providers in relation to compliance with international standards on money laundering and the financing of terrorism. It is therefore recommending amendments to ensure that all New Zealand financial service providers to which the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 applies are still required to register on the FSPR (subject to any exemption in the Act).

Amendments to the transitional provisions

The Bill contains a number of transitional provisions to enable industry members to transition to the new regime as smoothly as possible. This includes a two-year period during which time financial advice providers will be able to operate under a transitional licence.

Under the current proposed provisions the FMA would be required to have regard to whether applicants hold a transitional licence when considering full licence applications. However, this has been identified as being unnecessary by the select committee and the requirement has been removed as part of its recommendations.

In addition, the committee is recommending allowing providers who are not qualifying financial entities (**QFEs**) which currently provide class advice through non-registered staff to be able to engage those staff as nominated

representatives in the transitional period. This would allow those non-QFE businesses to continue providing equivalent advice while subjecting them to the conduct and care duties of the new regime.

Timing

The Bill is expected to be passed this year. However, the exact date for the new regime to take effect will be set by Order in Council. This is expected to be approximately nine months after a new Code of Professional Conduct for Financial Advice Services has been approved. At that point, most elements of the new regime, including the legislative duties and enforcement mechanisms, would take effect. However, transitional licensing measures and competency safe harbours will be implemented for a period of two years to allow existing industry participants time to prepare for the new regime requirements.

Submissions published on the Financial Advice Code Working Group's consultation paper

In March 2018 the Financial Advice Code Working Group released a consultation paper that sought feedback on issues and concepts for drafting the Code of Professional Conduct for Financial Advice Services. Submissions closed on 30 April 2018. The Financial Advice Code Working Group received submissions from 150 submitters and recently published these on MBIE's website here. The submissions will inform the development of the draft Code standards.

The new Code will set standards of competence, knowledge and skill, ethical behaviour and client care for the new financial advice regulatory regime being enacted under the Financial Services Legislation Amendment Bill (discussed above). The Code Working Group are expecting to release a draft code for further feedback later this year.

Updates will be made available on the Code Working Group's website here.

New entity added to robo-advice class exemption notice

The Financial Advisers (Personalised Digital Advice) Exemption Notice 2018 (**principal notice**), which came into force in June this year, has been amended by the Financial Advisers (Personalised Digital Advice) Exemption Amendment Notice 2018.

The principal notice permits entities listed in Schedule 1 of the notice to provide personalised services to retail clients where those services are provided through a digital advice facility. The amendment notice adds Nikko Asset Management New Zealand to that list of entities.

In the courts

Continuous disclosure rules do not apply to listed companies in administration

Recently, the Financial Markets Authority sought the court's opinion in a case stated procedure between it and the administrators of CBL Incorporation Limited on whether the continuous disclosure obligations for listed issuers under the NZX Listing Rules and the Financial Markets Conduct Act 2013 (**FMC Act**) continue to apply when the issuer is in voluntary administration. The High Court ruled that they do not.

There is nothing in the FMC Act, the NZX Listing Rules or in the voluntary administration provisions governed by Part 15A of the Companies Act that explicitly addresses whether companies in administration are required to comply with the continuous disclosure obligations. Justice Venning ruled, however, that when these statutes and rules are read together, Parliament intended that administrators would only be required to provide the disclosure to creditors required by Part 15A, and not the more extensive and immediate disclosure to the market contemplated by the NZX Listing Rules.

A copy of the ruling is available here, and for further Bell Gully commentary on the ruling click here.

Financial Markets Authority (FMA)

FMA proposes guidance change on what constitutes a 'business'

Under the Financial Markets Conduct Regulations 2014 issuers making regulated offers of debt and equity securities are required to provide investors with a Product Disclosure Statement (**PDS**) that contains selected financial information for recent or proposed business acquisitions. This often gives rise to questions on whether an issuer has in fact acquired a business, rather than a collection of assets. In answer to that question the FMA currently takes the same position as it did under the Securities Act regime, namely to focus on whether there was sufficient continuity in the acquired operations so that disclosure of the prior financial information is material to a potential investor's understanding of future operations of the issuing group. This is based on the Securities Commission's 2004 paper *Definition of a Business for the Purpose of the Securities Regulations 1983*.

The FMA is now of the view that a better approach is for issuers to use the definition of business and guidance in GAAP, and has set out its views in a proposed new guidance note for consultation. Under this approach issuers are told they should interpret the definition of business using the guidance set out in Appendix B of NZ IFRS 3: Business Combinations (or any replacement guidance).

The proposed guidance note also sets outs additional information issuers should consider disclosing for asset acquisitions.

For further details see a copy of the consultation paper here. Submissions closed on 30 August 2018.

FMA consults on an exemption for custodians of restricted MIS schemes

The FMA is considering granting a class exemption for custodians of restricted managed investment schemes (**MIS**), so they will no longer have to obtain an assurance engagement with a qualified auditor on the design and operational effectiveness of the custodian's processes, procedures and controls.

The proposed exemption would only be available to restricted schemes fully administered by an administration manager, and that do not have material investment exposures outside MISs domiciled in New Zealand or Australia and operational cash administrated by the administration manager. It is proposed that it will be a condition of the exemption that the scheme's administration manager obtain an assurance engagement.

A copy of the consultation paper is available here. Submissions closed on 31 August 2018.

FMA's work plan for 2018/19

The FMA has published its second Annual Corporate Plan setting out its priorities for 2018/19. These include:

- the FMA/RBNZ Conduct and Culture review that was initiated in May this year following the Australian Royal Commission into Misconduct in Banking, Superannuation and Financial Services Industry (see details here);
- ongoing proactive and reactive engagement with management and boards of licensed entities to highlight and test expectations around conduct and governance;
- engagement with listed companies, NZX participants and service providers to explain and reinforce expectations around governance obligations;
- thematic work on cyber-resilience and development of its monitoring approach;
- a thematic review of the custodian sector;
- working with MBIE to implement a new financial benchmarks regime; and
- ongoing proactive and reactive engagement with issuers to outline expectations and improve standards of initial and ongoing disclosure.

FMA reviews QFE insurance providers' replacement business practices

Following on from its previous reports on sale practices within the life insurance industry, the FMA has published a report on its findings from an investigation into how Qualified Financial Entities (**QFEs**) ensure consumer protection through their operational policies and procedures when selling replacement insurance policies.

Results from KiwiSaver statements survey released

An FMA commissioned survey to understand New Zealanders' opinions on their KiwiSaver statements and how they use them has found that 53 per cent of KiwiSaver members who saw their fees in dollar amounts in their annual statements thought "they are about right". This year, for the first time, providers have had to display the fees a member paid in dollar amounts in the annual member statement. The most common reason KiwiSaver members are likely to change their scheme remains 'if the fees seemed high'.

NZX Limited (NZX)

Update on the NZX Listing Rule review

NZX has published the (non-confidential) submissions it received on its April 2018 consultation paper and exposure draft of its proposed new listing rules. The submissions can be accessed here.

NZX received 30 submissions from a range of interested parties, including listed companies, investors, industry bodies, and other stakeholders in the New Zealand market. This was however significantly fewer than the approximately 70 submissions and survey responses received at the first stage of the review process.

In general, NZX received favourable feedback on its proposed updated market structure and rules, which are more user-friendly than NZX's existing listing rules. Most submissions were also supportive of the proposed

minimum listing and ongoing listing obligations (which we outlined in a previous client update here). However, there are some remaining areas of concern. These include:

- continuing issues with the proposed changes to the "Associated Persons" definition;
- the proposed treatment of major transactions; and
- the proposal to introduce a concept of constructive knowledge in respect of the continuous disclosure requirements.

Concern was also directed at NZX's proposal for a six month transition period, with some viewing this as too short especially if this leads issuers to having to call a special meeting to update governing documents in response to the rule changes, rather than at a scheduled annual meeting.

NZX plans to publish the final approved updated rules in Q4 2018 together with details of the implementation and transition plans. Subject to relevant approvals, it is intended that the updated rules will take effect from 1 January 2019, with a six month transition period before the changes fully take effect.

Changes for NZX's trading and clearing pricing structure on 1 October

NZX has confirmed it will implement changes to its trading and clearing pricing structure on 1 October 2018, together with technology improvements. Targeted policy changes to support the pricing and technology changes will also be implemented, although the timing for those are still to be confirmed.

The new trading and clearing pricing schedule can be accessed here. It replaces the fixed fee model to a fully variable or value based fee structure.

NZX will introduce a minimum crossing size for trading on its Main Board and NZAX markets, initially set at $50,000. Off-market crossings may be conducted below this level provided they result in "price improvement" for both sides of the trade.

The full announcement is available here.

Reserve Bank of New Zealand (RBNZ)

RBNZ holds insurer data workshops

RBNZ is holding a series of workshops this month for the purposes of consulting informally with the insurance industry on:

- the wording of Definitions and Guidance for the Insurer Return and the Quarterly Insurer Survey; and
- other matters relating to Insurer Data Collections.

Further details are available here.

MERGERS & ACQUISITIONS

Overseas investment

New overseas investment rules come into force in October

Overseas Investment Amendment Act 2018

Controversial changes to the Overseas Investment Act 2005 were enacted on 22 August 2018 under the Overseas Investment Amendment Act 2018. The new provisions will come into force on 22 October 2018 and should be considered in relation to any contemplated transactions.

The amendments require that overseas investors (which include "foreign-owned" New Zealand businesses) obtain consent before acquiring:

- residential land in New Zealand;
- Forestry Rights (of greater than 1,000 hectares in a calendar year); and
- certain *profits-à-prendre* (the right to extract or harvest crops or minerals from land).

New consent tests have also been introduced for both residential land and in relation to forestry rights. A key difference to the existing regime is that there will be five available pathways for an overseas buyer of residential land. A buyer of residential land could satisfy: the original 'benefit to New Zealand' test; the 'commitment to reside in New Zealand' test; the "increased housing" test; the "non-residential use" test; or the "incidental residential use" test. Purchasers of forestry interests (either freehold interests or forestry rights covering an area of 1,000 hectares a year) will be able to meet either a "modified" benefits test or a "special" benefits test.

The Act introduces a number of new "exemptions" and provides greater power to the OIO to grant specific "case by case" exemptions. Late changes to the Act's exemption provisions specifically note that the purpose of the exemption authority in the Act is to provide flexibility where compliance with the Act is "impractical, inefficient or unduly burdensome". We would hope that this purpose statement means that the OIO will feel empowered to adopt an accommodating and efficient approach to the granting of exemption applications.

In practice, the amendments will capture a broader range of commercial transactions than the existing rules do, including those where the newly-defined 'sensitive land' may not be a fundamental part of the intended acquisition. A manager's house attached to a factory may impose a need for OIO consent on a transaction that may not previously have attracted that condition, for example.

For more detailed commentary see our earlier update here.

From early October, details about the changes and how to apply for consent will be added to the OIO section of its website.

Overseas Investment Amendment Regulations 2018

In addition to the amendments made to the Overseas Investment Act, new regulations also come into force on 22 October 2018. The Overseas Investment Amendment Regulations 2018 amend the Overseas Investment Regulations 2005 to give effect to the changes introduced under the Overseas Investment Amendment Act 2018 relating to forestry activities, regulated *profits-à-prendre*, and residential land. This includes the regulations for the new "special" benefit test relating to forestry activities.

The Amendment Regulations also provide for a number of other more general amendments, which include some substantive changes in respect of the following existing exemptions:

- the exemption which allows companies and other entities that are overseas persons and own sensitive assets to transfer the sensitive assets to different entities in a corporate group without consent, as long as the ultimate ownership and control of the sensitive assets by overseas persons does not increase;

- the shareholding creep exemption which permits an overseas person who has previously been granted consent to acquire securities to acquire more of those securities subject to certain conditions;

- the exemption which permits an overseas person to acquire two or more security arrangements if they are acquired together as a portfolio or bundle and the total value of consideration provided for that portfolio or bundle does not exceed $100 million (with the removal of the $100 million cap, but so that the exemption still cannot be relied on to avoid consent for an overseas investment in significant business assets); and

- the exemption relating to relationship property acquired by New Zealand incorporated companies.

Takeovers Panel

Updated guidance on schemes of arrangement and amalgamations

The Takeovers Panel has updated its August 2017 Guidance Note on Schemes of Arrangement and Amalgamations under Part 15 of the Companies Act 1993. The latest version is available here (and a comparison version showing the changes here).

One of the main changes has been to include a new section on the Panel's approach on issuing a no-objection statement where differential consideration is offered under a scheme to shareholders and/or their associates.

The Panel has also added commentary on the treatment of equity security holders (other than shareholders) by scheme proponents and the appropriate protections that may be appropriate for them during a Code-regulated transaction.

COMMERCIAL

Legislative developments

Joint consultation on the ETS framework and a better ETS for forestry

The New Zealand Emissions Trading Scheme (**NZ ETS**), New Zealand's main tool for reducing greenhouse gas emissions and meeting our emissions reduction targets, is the subject of a consultation being jointly run by the Ministry for the Environment and Te Uru Rākau (Forestry New Zealand, which is part of the Ministry for Primary Industries (**MPI**)).

The consultation discusses:

- proposals primarily focused on improving the framework of the NZ ETS to ensure it is a credible and well-functioning scheme (set out in the Ministry for the Environment. 2018. Improvements to the New Zealand Emissions Trading Scheme: Consultation document); and

- proposals related to forestry to reduce complexity and other barriers to forestry owners being part of the scheme (set out in 'A Better ETS for Forestry Proposed amendments to the Climate Change Response Act 2002' discussion document).

Submissions on both sets of proposals close on 21 September 2018.

Some of the key proposals include:

- introducing an annual process for setting and announcing NZ ETS unit (**NZU**) supply volumes over a five-year rolling period. This will set a cap on the number of NZUs supplied into the NZ ETS market, and allow this to be managed over time;
- auctioning NZUs using a single round, sealed bid, uniform price auction format;
- replacing the current price ceiling in the NZ ETS, the $25 fixed price option, with a different price ceiling called a cost containment reserve (CCR). Under this structure, the units held in the reserve are auctioned once the price ceiling is reached;
- limiting the number of international units NZ ETS participants can use if the scheme reopens to international carbon markets;
- changing how forests earn and repay carbon credits in the NZ ETS;
- introducing a mechanism for recognising emissions mitigation from harvested wood products;
- creating a new permanent forest activity in the NZ ETS; and
- introducing a package of operational changes to improve the way the NZ ETS works for forestry participants.

Background

The proposals are in response to the findings of the 2015/16 ETS review and the subsequent July 2017 in-principle decisions made by Cabinet under the National-led Government (see further commentary here), which the current Government agreed to pursue in December 2017 through legislative amendments to the Climate Change Response Act 2002 by the end of 2019. The proposals also allow for the Government's proposed Zero Carbon Bill (which would introduce a new net zero emissions target for 2050) to be taken into account (see further details on the proposed Bill here).

This consultation does not consider the role of agriculture in the NZ ETS. Whether and how agriculture emissions should enter the scheme is expected to be addressed in the second half of 2019, following advice from the Climate Change Commission (which is to be established under the Zero Carbon Bill).

Further information

For further information on the consultation, visit the Ministry for the Environment's website here (for the NZ ETS framework proposals) and the MPI website here (for the forestry proposals).

Productivity Commission releases report on a "low-emissions economy"

The Productivity Commission has released its final report to the Government regarding its recent in-depth inquiry into how New Zealand can reduce its domestic greenhouse gas emissions through a transition to a low-emissions economy, while at the same time continuing to grow income and well-being. The commission has concluded that

New Zealand can make the transition, but it will require consistent and concerted effort across government, business, households and communities. The report recommends a suite of policy reforms to help drive the transition.

Three key changes that must occur if New Zealand is to achieve its low-emissions goals by 2050 are:

- a transition from fossil fuels to electricity and other low-emissions fuels across the economy. This means a rapid and comprehensive switch of the light vehicle fleet to electric vehicles (EVs) and other very low-emissions vehicles, and a switch away from fossil fuels in providing process heat for industry, particularly for low- and medium-temperature heat users;

- substantial levels of afforestation to offset New Zealand's remaining emissions. This will require sustained rates of planting over the next 30 years (mostly on land currently used for sheep and beef farming) potentially at an annual rate approaching the highest ever recorded (100,000 hectares in 1994); and

- changes to the structure and methods of agricultural production. This will include diversification of land use towards horticulture and cropping, and greater adoption of low-emissions practices on farms.

The commission says that delaying action will compound the transition challenge, making it more costly and disruptive, and limiting viable and cost-effective mitigation options in the future.

Further information is available on the commission's website here.

Changes ahead for the PPSR

The Companies Office is currently undertaking an across-the-board redevelopment of the Personal Property Securities Register (**PPSR**) and website, with the new PPSR launching on 1 October 2018 (see details here). As part of that redevelopment the information that must be specified in a financing statement or financing change statement will include the debtor's New Zealand Business Number, if it has one. This and a number of other minor and technical amendments are being introduced through amendments made under the Personal Property Securities Amendment Regulations 2018, which also come into force on 1 October 2018.

Holidays Act Issues Paper released for consultation

The Holidays Act Taskforce has released an Issues Paper (for consultation) setting out the Taskforce's understanding regarding the key issues faced by employers, employees and payroll providers in trying to implement the Act.

The Minister of Workplace Relations and Safety established the Taskforce in May 2018 to review the Holidays Act 2003 and recommend changes. The Taskforce includes employer, employee and government representatives, and was commissioned by the Government following a joint request from unions and employers.

The Issues Paper, and a summary of the process for making submissions, is available here. Submissions close on 12 October 2018.

Submissions closed on proposed changes to the Insolvency Practitioners Bill 2010

After a seven-week consultation period, submissions have now closed on the proposed amendments to the Insolvency Practitioners Bill 2010.

The Minister of Commerce and Consumer Affairs announced the consultation in early July, following the introduction of a Supplementary Order Paper which would make significant changes to the Bill. The Bill has now been referred back to Select Committee.

The Supplementary Order Paper proposes, among other things:

- A new co-regulation model for insolvency practitioners, to impose and monitor the minimum standards to be applied to insolvency practitioners;
- A new statutory right for aggrieved parties to apply to the Court for redress if they consider they have suffered a loss as a result of an insolvency practitioner's failure to comply with their legal obligations;
- The exclusion of related creditors from voting in creditors' meetings, unless the Court orders otherwise;
- A further restriction on when liquidators may be appointed by directors or shareholders, in circumstances where a creditor has also made an application to liquidate;
- A new duty on practitioners to report "serious problems" they discover;
- A new voidable transaction provision for dispositions that happen after a liquidation application has been filed.

The Supplementary Order Paper can be found here. Bell Gully's submission can be found here.

Amendments to AML/CFT regulations for real estate agents

In preparation of the extension of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**the Act**) regime to real estate agents from 1 January 2019, regulations (which will also come into force on that date) have been enacted to amend the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011.

The Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Amendment Regulations 2018:

- insert a definition of a customer, in relation to a real estate agent;
- remove the exclusion of licensed or registered auctioneers from the definition of reporting entity in section 5(1) of the Act;
- exclude property management activities from the scope of the Act;
- specify the time at which a real estate agent must conduct standard due diligence.

Suspicious Activity Reports guideline

The New Zealand Police Financial Intelligence Unit has issued a Suspicious Activity Reporting Guideline to help clarify obligations to report suspicious activity under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

The guideline:

- explains the basics of money laundering and terrorism financing;
- provides specific typologies and indicators to assist reporting entities identify suspicious activities;
- helps reporting entities comply with Suspicious Activity Reporting obligations by specifying when reports must be made, in what circumstances, what details to include, and how to report them.

Click here to read the guideline.

Update on new land transfer laws

New Zealand's land transfer laws are being updated with the introduction of the Land Transfer Act 2017, which will come into effect towards the end of 2018.

The new Land Transfer Act aims to simplify and modernise the law, make it more accessible, and improve certain property rights.

The new legislation makes some language changes that may necessitate amendments to documentation. For example:

- "Certificate of Title" becomes "Record of Title";
- "Proprietor" becomes "Owner";
- "Dominant tenement" becomes "Benefitted land"; and
- Servient tenement" becomes "Burdened land".

There have also been some changes to reduce the time frames associated with obtaining guaranteed searches, and registering mortgages in reliance on guaranteed searches:

- guaranteed searches won't be able to be ordered earlier than 5 working days from the date a transaction is settled; and
- a mortgage must be registered within 20 working days from the day after the day a transaction is settled.

As part of the implementation process, new regulations, standards and directives will need to be issued by the Registrar-General of Land. Exposure draft regulations are expected to be issued for public consultation later this year.

Click here for more information.

COMPANY LAW

In the courts

Supreme Court looks at relief afforded to majority shareholders under the Companies Act for major transaction disputes

A recent Supreme Court decision (*Baker v Hodder* [2018] NZSC 78) addresses important questions about the use of section 174 of the Companies Act 1993 in circumstances where there is a dispute about the passing of a special resolution required under section 129 of the Act.

Background

Section 129 prohibits a company from entering into a major transaction unless the transaction is approved by a special resolution or is contingent on such approval. It is part of a regime imposing restrictions on the management powers of the board, and provides a way for shareholders opposing a major transaction to exit the company by exercising their buy-out rights. Section 174 allows a shareholder to apply for relief where the affairs of a company are being conducted in a way that is oppressive, unfairly discriminatory or unfairly prejudicial to the applicant.

In this case, a company's majority shareholders (the Hodders, who held 70 per cent of the shares) wanted to proceed with the sale of the company's only asset (a farm) but to give effect to the transaction a special resolution was required under section 129. When the company's minority shareholders (the Bakers, who held 30 per cent of the shares) refused to comply with the section 129 requirement, the Hodders sought relief from the court under section 174.

The High Court made an order for the Bakers to sign the special resolution necessary to authorise the transaction under section 129 (concluding on the facts that the Bakers' refusal to agree to the special resolution was unfairly prejudicial to the Hodders, and in reliance on a previous High Court case which the court held could be used as a basis for concluding that there was an established process justifying the making of such an order).

The Court of Appeal had declined to determine an appeal by the Bakers, deciding that the case was moot given the transaction had already been completed. But, the Supreme Court unanimously decided that the Court of Appeal should have heard and determined the Bakers' appeal to that court, and having reached that conclusion decided that it should address the substantive merits rather than remitting the case to the Court of Appeal.

The Supreme Court's decision

In the Supreme Court, the Bakers argued that the use of section 174 in these particular circumstances undermined their rights as shareholders under section 129, and that the High Court had no jurisdiction to make the order.

The Supreme Court acknowledged that the language used in section 174 "is not obviously apt where the oppression complained of consists of a shareholder invoking the right to decline to approve a major transaction under [section] 129". However, it went on to say that given section 174(3) contemplates that a section 174 order may be made against a person other than the company, including a shareholder that "could be taken as suggesting that [section] 174 could apply where a shareholder or group of shareholders refuses to approve a major transaction under [section] 129".

It was not necessary for the Supreme Court to reach a definitive view on the circumstances in which the exercise of minority rights under the Companies Act might itself constitute oppression under section 174, because the court found that the High Court hearing had been miscarried (and quashed the order the court made under section 174 on that basis). But the court did indicate that one situation in which it may be appropriate to make an

order under section 174 against a minority shareholder who refuses to approve a major transaction "is where there are particular circumstances that mean the minority shareholder is breaching a duty owed to the company or to another shareholder or an understanding among shareholders as to the ongoing conduct of the affairs of the company".

The court also noted that if section 174 did apply in such a situation "the power to make an order under that section would need to be exercised with great caution". As an example, it said that if, on the facts of the case before it, the High Court did have the power to make an order under section 174 and such an order was justified, the form of the order made, requiring the Bakers to sign a special resolution approving the transaction, was inappropriate. It usurped their position as shareholders and "presupposes that the Bakers were not able to act out of self-interest".

Comment

The Supreme Court has left the door open for a majority shareholder to be granted relief under section 174 for a dispute under section 129 of the Companies Act, but only in limited cases.

Shareholders exercising their voting rights in relation to a major transaction are, in usual circumstances, not subject to any obligations to each other or to the company and can act in their own 'self-interest'. Therefore, to make a claim within section 174 that a minority shareholder is acting in a manner which is oppressive and unfairly prejudicial in not voting in favour of a section 129 special resolution, something more is required. Otherwise, the purpose of section 129 would be undermined.

The Supreme Court has also indicated that even if a court did have jurisdiction to make an order under section 174 for such claims, there is no precedent (and it may be inappropriate) for the order to take the form of requiring minority shareholders to approve a transaction that is subject to a section 129 special resolution. Instead, it suggested (on the facts of this case) that a more appropriate remedy would have been to appoint a receiver to carry out the transaction. Or, alternatively, a more appropriate course of action for the majority shareholders may have been to apply to the court for an order appointing a liquidator under section 241 of the Companies Act (on the grounds that it was just and equitable for the company to be wound up).

Recent developments

Clarification of dividend rules in companies

A Member's bill which seeks to give clarification of dividend rules outlined in sections 36 and 53 of the Companies Act 1993 has passed its first reading and is now with the Primary Production Committee.

Currently, section 36 of the Act suggests that provision for "dry shares" (which are shares that do not carry dividend rights in prescribed circumstances) can be made in the constitution. However, section 53(2) of the Act which prevents the board of a company from authorising dividends in certain circumstances could be read to negate that right. The Companies (Clarification of Dividend Rules in Companies) Amendment Bill aims to remove this doubt by providing that nothing in section 53(2) of the Act prevents the constitution of a company from containing a rule that some shares in a class do not confer a right to receive dividends in specified circumstances.

The select committee has called for submissions, which close on 27 September 2018. Click here for further details.

Companies Office

Companies Office introduces annual return enhancements

As part of the annual return process, businesses are now able to provide the following optional information: company's trading name, phone number, email address, website address and industry classification.

Click here for further details.

Avoiding rejection of electronic signatures at the Companies Office

The Companies Office accepts documents that are signed electronically, provided they follow its standards for using electronic signatures.

In a recent reminder notice on this, the Companies Office has noted that documents will be rejected if they:

- do not capture authentication, time and source details;
- have signatures that have been cut and pasted, or created using a touch screen;
- were modified after the signature was applied; or
- used software that is not part of the Adobe Approved Trust List (AATL) program.

COMPETITION AND CONSUMER LAW

New Zealand Commerce Commission (NZCC)

Media releases

The NZCC has issued the following media releases:

Industry regulation and regulatory control

Proposal to retain power to regulate national mobile roaming
The NZCC has released its preliminary view to retain the power to regulate national mobile roaming, should it be required in the future. This regulation would enable a new operator to quickly expand its coverage beyond its own initial physical network.
Click here for more

NZCC broadly satisfied Christchurch Airport not earning excessive profits
The NZCC is broadly satisfied Christchurch International Airport is not targeting excessive profits in the five years from 1 July 2017 and is seeking feedback before finalising its report.
Click here for more

Assessment of electricity lines companies' asset management
The NZCC has released its high level observations from the 2016 and 2017 asset management plans of New Zealand's 29 electricity lines companies, which cover the period from 2016 to 2027. Feedback on the paper is welcome via email to regulation.branch@comcom.govt.nz.
Click here for more

Draft report on review of Fonterra's 2017/18 base milk price calculation
The NZCC has released its draft report on Fonterra's base milk price calculation for the 2017/18 dairy season. The final report will be published on 18 September 2018.
Click here for more

Draft decision to approve Transpower's Wellington conductor replacement
The NZCC has released its draft decision proposing to approve $23.5 million for Transpower to replace the conductors and strengthen the structures of a 9.5km section of its high voltage direct current transmission network in Wellington.
Click here for more

Performance summaries released for gas pipeline companies
The NZCC has published one-page summaries of key performance measures for each of New Zealand's four regulated gas distribution businesses – First Gas, Powerco, GasNet and Vector.
Click here for more

NZCC proposes to authorise extending the restrictions on the marketing of infant formula
The NZCC has reached a preliminary view that it should allow members of the Infant Nutrition Council (INC) to restrict their advertising and marketing of infant formula for children up to 12 months of age, for a period of five years.
Click here for more

NZCC seeks views on how the mobile market will perform for consumers as technology changes
The NZCC has released an issues paper calling for submissions on its initial assessment of the mobile market being carried out under section 9A of the Telecommunications Act 2001. The NZCC is seeking evidence on how the market is performing for consumers now and whether there are any issues that regulation might help resolve.
Click here for more

Commission retains power to regulate national mobile roaming
The NZCC has decided not to start an investigation into whether national mobile roaming should be deregulated. Under the Telecommunications Act, the NZCC is required once every five years to consider the deregulation of certain services, including national mobile roaming.
Click here for more

Mergers and acquisitions

Letter of issues for Ingenico/Paymark merger
The NZCC has sent a Letter of Issues to Ingenico Group SA in relation to its proposed acquisition of Paymark Limited. The letter outlines that, at this stage, the NZCC is not satisfied that the acquisition would not be likely to have the effect of substantially lessening competition.
Click here for more

Proceedings filed against Wilson Parking over acquisition of Wellington car park
The NZCC has filed proceedings in the High Court at Wellington alleging Wilson Parking substantially lessened competition for the supply of car parking in the Boulcott Street area in central Wellington when it acquired the rights to operate the Capital car park.
Click here for more

Clearance granted for Goodman Fielder to acquire Lion's yoghurt business
The NZCC has granted clearance for Goodman Fielder to acquire the assets related to the manufacture and distribution of 'Yoplait' branded yoghurt in New Zealand from Lion.
Click here for more

Clearance granted for OMV to acquire Shell's gas and liquids portfolio
The NZCC has granted clearance to OMV to acquire Royal Dutch Shell's gas and liquids portfolio in New Zealand.
Click here for more

Statement of preliminary issues released for proposed Thales / Gemalto merger
The NZCC has published a statement of preliminary issues relating to the application from Thales S.A. seeking clearance to acquire Gemalto N.V.
Click here for more

Market behaviour

Anonymous whistleblowing tool launched to help people report cartels
The NZCC has launched an anonymous whistleblowing tool to enable people to report cartels without being identified. The tool is being delivered by WhistleB, a global whistleblowing service provider.
Click here for more

NZCC releases 2018/19 priorities
The NZCC has identified six particular areas of focus for the next 12 months. These are: retail telecommunications, responsible lending, online retail, motor vehicle sales, non-notified mergers, and electricity distributors' service quality.
Click here for more

Consumer issues

Spark charged over billing issues and offer to new customers
The NZCC has laid Fair Trading Act charges against Spark New Zealand Trading Limited alleging it made false or misleading representations relating to its billing and a $100 offer for new customers. The NZCC says the charges arose from three separate alleged failings.
Click here for more

Fine for failing to disclose 'in trade' status
A Palmerston North man has been fined $5,000 on three charges under the Fair Trading Act for failing to disclose his trader status when selling items on the internet, and for selling an unsafe cot online. It is the first time the NZCC has taken a prosecution for failing to disclose 'in trade' status.
Click here for more

Different name, same stuff - LuxStyle becomes Digital Sourcing
The NZCC is alerting the public to be wary when browsing for products online on sites operated by Digital Sourcing, formerly known as LuxStyle, a company based in Denmark. In January 2018 the NZCC issued an alert about LuxStyle's "deliver now, pay later" sales method.
Click here for more

Car dealership tried to avoid CGA responsibilities with 'as is where is' ads
Vehicle Logistics Limited has been fined $75,000 over misrepresenting consumers' rights when selling used vehicles online, and for failing to display essential vehicle information. Five of the charges arose from representations that the vehicles were offered for sale on an "as is where is basis" and/or that "no guarantee or warranty" applied.
Click here for more

Kiwipure charged over claims about its water filters
Kiwipure Limited has pleaded not guilty to eight charges laid by the NZCC alleging it made unsubstantiated claims about the benefits and ability of its water filters to soften water.
Click here for more

NZCC to sue Viagogo
The NZCC is to commence civil proceedings in the High Court against Switzerland-based ticket resale website Viagogo. The proceedings will be under the Fair Trading Act for misleading representations.
Click here for more

Brilliance fined $540,000 for misleading representations about steel mesh
Brilliance International Limited has been fined $540,000 for making false and misleading representations relating to its steel mesh products which are used to earthquake strengthen buildings.
Click here for more

Online phone store warned for using price discounts it couldn't back up
Amaysim Operations Pty Ltd, trading as Buy Mobile, has been warned by the NZCC for the unsubstantiated claims it made about discounts on the price of some mobile phones. The NZCC believes Buy Mobile is likely to have breached the Fair Trading Act.
Click here for more

Vodafone faces charges for billing customers after contract finished
The NZCC has laid Fair Trading Act charges against Vodafone New Zealand Limited alleging it made false representations in invoices sent to its customers.
Click here for more

NZCC seeks first declaration that contract terms are unfair
The NZCC has commenced High Court proceedings seeking a declaration that mobile trader Home Direct Limited's consumer contracts contained unfair terms relating to its "voucher entitlement scheme". Unfair terms became unlawful under the Fair Trading Act in March 2015.
Click here for more

NZCC charges "free range" egg farmer
The NZCC has laid eight charges against Xue Chen, the owner of a West Auckland free range egg farm which trades under the name Gold Chick Poultry Farm. Mr Chen sold millions of caged eggs as free range by falsely labelling them, and now faces charges under both the Crimes Act and the Fair Trading Act.
Click here for more

Australian Competition and Consumer Commission (ACCC)

Selected ACCC media releases

The ACCC has issued the following media releases:

Industry Regulation and Regulatory Control

ACCC commences inquiry into regulation of wholesale mobile voice and SMS services
The ACCC has commenced a public inquiry to decide whether to extend, vary or revoke the domestic mobile terminating access service (MTAS) declaration, or whether to make a new declaration.
Click here for more

Market behaviour

ACCC takes action against Pacific National and Aurizon

The ACCC has instituted proceedings in the Federal Court against Pacific National and Aurizon for allegedly reaching an understanding in relation to Aurizon's intermodal business that would be likely to have the effect of substantially lessening competition in the supply of intermodal and steel rail linehaul services.

Click here for more

Consumer issues

Meriton to pay $3 million for misleading consumers on TripAdvisor

The Federal Court has ordered serviced apartments accommodation provider Meriton Property Services to pay penalties of $3 million for manipulating TripAdvisor reviews, in breach of the Australian Consumer Law.

Click here for more

Heinz ordered to pay $2.25 million penalty over misleading health claim

The Federal Court of Australia has ordered H.J. Heinz Company Australia Ltd (**Heinz**) to pay penalties totalling $2.25 million for making a misleading health claim that its Little Kids Shredz products were beneficial for young children.

Click here for more

AUCKLAND

VERO CENTRE, 48 SHORTLAND STREET
PO BOX 4199, AUCKLAND 1140, NEW ZEALAND
DX CP20509
TEL +64 9 916 8800 **FAX** +64 9 916 8801

WELLINGTON

171 FEATHERSTON STREET
PO BOX 1291, WELLINGTON 6140, NEW ZEALAND
DX SX11164
TEL +64 4 915 6800 **FAX** +64 4 915 6810

BELL GULLY