

BELL GULLY

# Corporate Reporter

7 AUGUST 2015

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**Welcome to** Issue No. 36 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:

- Further changes for the Health and Safety Reform Bill;
  - Leading institutional investors set out their expectations for New Zealand's listed companies' corporate governance practices;
  - New class exemptions for the AML/CFT regime;
  - Exemption to reduce Takeovers Code compliance burden on small Code companies;
  - Exemption from application of new provision of the CCCFA to wholesale credit markets;
  - Double setback for ACCC in price fixing claims;
  - The latest media releases from the New Zealand Commerce Commission and the Australian Competition and Consumer Commission.
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## COMMERCIAL

### Regulatory developments

#### Further changes for the Health and Safety Reform Bill

The second reading of the Health and Safety Reform Bill has been completed, following the House's receipt of the Transport and Industrial Relations Select Committee's report on the Bill last month. A copy of the Committee's report is available [here](#).

The majority of the Committee recommended that the Bill be passed with various amendments. However, the Labour Party (who proposed separate amendments to the Bill in Supplementary Order Papers [99](#), [100](#) and [101](#) following the release of the Committee's report) the Green Party and the New Zealand First Party voted against the Bill at its second reading.

There have been some key changes to definitions of roles in the Bill including to officer and volunteer workers, and to overlapping duties for PCBU's (Persons Conducting a Business or Undertaking), as well as changes to worker engagements and participation provisions. The Government also intends to further clarify some provisions in the Bill (through Supplementary Order Papers) to provide more certainty for businesses about what they will be required to do to meet their duties. MBIE has released a summary document of those key changes [here](#).

For Bell Gully commentary on the proposed changes see our earlier update: [Health and Safety Reform Bill – the Select Committee finally reports](#).

The Bill is on course to be passed in the second half of 2015. There will be some months between when the Bill is passed and when it comes into force to allow time for businesses to prepare for their responsibilities under the new law.

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#### New Zealand has finalised its accession to the WTO's Agreement on Government Procurement

New Zealand has finalised its accession to the World Trade Organisation's Government Procurement Agreement (GPA). It will come into effect for New Zealand on **12 August 2015**.

By joining the GPA, New Zealand businesses will gain guaranteed access to bid for government contracts in 43 WTO member countries, including the US, Canada, Korea, Japan and the 28 European Union countries. Government procurement in these markets is valued in excess of USD\$1.7 trillion per year. This is expected to grow as other WTO members such as China accede to the GPA over time.

Information about accessing export markets can be found on MBIE's website [here](#).

New Zealand's [Government Rules of Sourcing](#) were developed with the GPA in mind, so it is unlikely that there will be any significant changes to the way New Zealand's government agencies procure goods and services and for how businesses bid for government contracts as a result of New Zealand's accession to the WTO GPA.

## New class exemptions for the AML/CFT regime

### Class exemptions for managing intermediaries

In July, the [Anti-Money Laundering and Countering Financing of Terrorism \(Class Exemptions\) Amendment Notice \(No 2\) 2015](#) amended the principal notice (the Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2014) to reduce the customer due diligence (CDD) obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) for reporting entities who transact with managed funds or certain other financial institutions.

The exemptions, subject to certain conditions, allow reporting entities to conduct simplified CDD on certain “licensed managing intermediaries” (e.g. registered schemes and licensed non-bank deposit takers) and relieve the requirement to conduct standard CDD on certain types of beneficial owners of other “specified managing intermediaries” (e.g. financial institutions and schemes not subject to the same level of regulatory oversight as “licensed managing intermediaries”).

The Financial Markets Authority has released an information sheet which explains the background to these new class exemptions and sets out some key points for complying with the exemptions. A copy of the information sheet is available [here](#).

### Class exemption for PAYE intermediaries

The Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2014 has been amended also by the [Anti-Money Laundering and Countering Financing of Terrorism \(Class Exemptions\) Amendment Notice 2015](#) to provide an exemption for PAYE intermediaries conducting authorised transactions under the Income Tax Act 2007 from most of the provisions of AML/CFT Act.

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## MERGERS AND ACQUISITIONS

### Takeovers Panel

#### Exemption to reduce compliance burden on small Code companies

Following two consultation rounds, the Takeovers Panel has granted a class exemption for persons who increase their holding or control of voting rights in a ‘small Code company’ as a result of an allotment of voting securities by the Code company. See the [Takeovers Code \(Small Code Companies\) Exemption Notice 2015](#).

The exemption allows unlisted Code companies with total assets of NZ\$20 million or less to opt out of compliance with what is commonly known as the fundamental rule (Rule 6(1)) of the Takeovers Code, which prohibits shareholding increases above 20% of a Code company’s voting rights, except for increases that are made under the Takeovers Code’s rules.

The exemption applies only to share issues and only if the company meets the following two main requirements:

- first, the company's board must resolve that, in its opinion, opting-out is in the best interests of the company; and
- secondly, the company must have given shareholders a disclosure document and an opportunity to object to the opt-out and require full Code compliance.

If holders of 5% or more of the free float (which excludes the voting rights of those who will rely on the exemption to increase their holdings in the company, together with their associates) object to the opt-out, the issue can proceed only if it is done in full compliance with the Code.

The Panel has previously indicated that it will consider whether it would be appropriate to extend the application of the class exemption to other Code transactions, after the operation of the class exemption for allotments had been observed.

## New Guidelines issued on Takeovers Panel's fees and charges

The Takeovers Panel has published some updated administrative guidelines ([The Takeovers \(Fees\) Regulations 2001 Administrative Guidelines - Charges](#)). These relate to the fees and costs it can charge under the Takeovers (Fees) Regulations 2001 for specific applications, including:

- exemption applications;
- applications relating to the approval of independent advisers;
- applications for the Panel's new 'no-objection statement' required for amalgamations by Code companies; and
- section 32 meetings under the Takeovers Act 1993.

## CAPITAL MARKETS

### Regulatory developments

#### Exemption from application of new provision of the CCCFA to wholesale credit markets

Under section 99B of the Credit Contracts and Consumer Finance Act 2003 (the **CCCFA**) if a creditor who is required to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the **FSP Act**) is not registered, neither the creditor nor any other person may, in relation to a credit contract to which the creditor is a party, enforce any right in relation to the costs of borrowing.

This provision was introduced last year (although it did not come into force until June this year) as part of the 2014 amendments to the CCCFA, primarily to address failures to register under the FSP Act by third tier lenders that provide credit to consumers. However, concerns have since been raised about its application to wholesale credit markets for business or investment lending (particularly with regards to lending by international financial institutions into New Zealand) as it has the potential to create significant uncertainty about the enforceability of interest payments.

To address these concerns, the [Credit Contracts and Consumer Finance Amendment Regulations \(No 3\) 2015](#) amends the Credit Contracts and Consumer Finance Regulations 2004 so that section 99B is no longer applicable if:

- the debtor is a body corporate, the Crown, a Crown entity, or a local authority; and
- the credit contract involves two or more creditors.

Accordingly this exemption may apply, for example, to:

- a credit contract that is provided under a regulated offer of debt securities under the Financial Markets Conduct Act 2013 or an offer made to wholesale investors under an exclusion to Part 3 of that Act; and
- a credit contract provided under a syndicated loan arrangement.

The two model disclosure statements in Schedule 2 of the principal regulations have also been replaced to correct the descriptions in those statements relating to a debtor's obligations if a debtor cancels a credit contract.

These regulations come into force on **28 August 2015**.

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## Financial Markets Conduct (Financial Reporting: Balance Dates of Managers and Registered Schemes) Exemption Notice 2015

The Government is proposing to amend the Financial Markets Conduct Act 2013 as part of the [Regulatory Systems Bill](#) (which has yet to be introduced) to require financial statements to be filed within four months of the registered scheme's balance date, not within four months of the scheme manager's balance date as is currently required by section 461A (and 461H) of the Act.

In the meantime, FMA has granted the [Financial Markets Conduct \(Financial Reporting: Balance Dates of Managers and Registered Schemes\) Exemption Notice 2015](#) which exempts a manager of a registered scheme (where the scheme has a balance date that is different from the manager's balance date) from the requirements in sections 461A and 461H of the FMC Act to complete and lodge financial statements for the scheme (and any associated separate fund) within four months after the manager's balance date.

The exemptions are subject to the conditions that:

- the financial statements of the scheme (and of any separate fund) are instead completed and lodged within four months after the scheme's balance date; and
- the manager provides notification of its reliance on this notice.

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## Transitional and saving provisions for KiwiSaver schemes now in one place

The transitional and savings provisions in Regulation 3A and Schedule 1AA of the KiwiSaver Regulations 2006 for the implementation of the Financial Markets Conduct Act regime have been revoked by the [KiwiSaver Amendment Regulations 2015](#) and have been replaced by amendments to clauses 10 and 11 of Schedule 1 of the Financial Markets Conduct Regulations 2014 (the **FMC Regulations**) by the [Financial Markets Conduct \(KiwiSaver\) Amendment Regulations 2015](#).

The new provisions in clauses 10 and 11 of Schedule 1 of the FMC Regulations:

- provide, in respect of pre-transition KiwiSaver schemes, for certain references in the KiwiSaver Regulations 2006 to continue to be treated as references to trustees of, or trustee fees in relation to, those schemes;
  - preserve for pre-transition KiwiSaver schemes certain fees regulations that were in force immediately before 1 December 2014 and that were prescribed for provisions of the KiwiSaver Act 2006 that were also in force immediately before that date and that continue to apply to those schemes; and
  - provide for certain references in preserved regulations relating to annual reports for relevant schemes to be read as referring to provisions of the KiwiSaver Act 2006 as amended by the Financial Markets (Repeals and Amendments) Act 2013.
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## Financial Markets Authority (FMA)

### Draft guidance on risk indicators and descriptions of managed funds

FMA has issued a further consultation paper on its proposed guidance note related to risk indicators. This follows on from FMA's December 2014 consultation on this topic (see details on that consultation [here](#)).

Under the Financial Markets Conduct Act's disclosure requirements for managed funds, managers are required to include a risk indicator for a managed fund in the initial offer document (the **PDS**) and as an entry in the Disclose register when the PDS is lodged, and in each fund update and in the corresponding Disclose register update. The purpose of the risk indicator is to provide investors with a simple tool that shows the historical volatility of returns of the fund. The risk indicator is also intended to help investors make decisions by providing them with a way to compare the volatility between various managed investment scheme products.

Although the Financial Markets Conduct Regulations 2014 allow FMA to issue frameworks or methodologies for risk indicators, FMA consider that a guidance note is more appropriate at this time.

The policy underpinning the New Zealand requirements for risk indicators is based on the guidelines for the calculation of a 'synthetic risk and reward indicator' produced by the Committee of European Securities Regulators (the **CESR Guidelines**). Rather than duplicating the CESR Guidelines, the draft guidance note focuses on how managers may use the CESR Guidelines to assist them in meeting the New Zealand requirements.

There are no material changes to FMA's December 2014 proposed guidance, but FMA has now added three sections which address how to describe a fund's volatility, how to name funds to reflect their risk profile, and address matters relating to the updating of PDSs when a fund's risk category changes.

Submissions on this consultation close on **14 August 2015**.

A copy of the consultation paper and the submission form are available [here](#).

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## Corporate governance developments

### Leading institutional investors set out their expectations for New Zealand's listed companies' corporate governance practices

Last week, the newly established NZ Corporate Governance Forum released a set of [Corporate Governance Guidelines](#) to promote good corporate governance practice by New Zealand listed companies, based on international principles and frameworks that institutional investors globally regard as best practice.

The Forum is made up of 16 institutional investors who, according to the Forum's [press release](#), collectively manage equities worth more than 15% of the total New Zealand equity market. Further membership of the Forum is open, by invitation, to fund managers managing in excess of \$100 million in New Zealand listed equities (whether as principal or agent), and there is also scope for the Forum to extend honorary membership to organisations or individuals who do not meet that criteria.

The Guidelines build on the recently updated Financial Markets Authority [Corporate Governance Handbook for Directors](#) (which the Forum supports) and, according to the Corporate Governance Forum Chair, Anne-Maree O'Connor, "explain what institutional investors are looking for in the companies they own". This includes:

- boards of listed companies comprising of a majority of independent non-executive directors;
- directors serving longer than nine years being subject to annual re-election in order to improve independence, succession planning and board renewal;
- companies communicating their processes for ensuring an appropriate mix of skills and diversity on the board;
- not allowing companies to materially dilute shareholders without their approval;
- better disclosure across a range of issues which are material to the long-term success of a company (such as strategy, risks, key performance indicators, remuneration policy and environmental and social issues); and
- not undermining the principle of one share: one vote in the New Zealand market through the current use of a 'show of hands' at company AGMs.

For further details on the Forum and the Guidelines: [click here](#).

## COMPETITION AND CONSUMER LAW

### In the courts

#### Double setback for ACCC in price fixing claims

The Australian Competition and Consumer Commission (**ACCC**) has received a double setback with the Full Court of the Federal Court of Australia ruling against the regulator in two important cases last week.

The Full Federal Court has allowed an appeal by Flight Centre Travel Group Ltd against a decision of the Federal Court where Flight Centre was found to have attempted to induce anti-competitive arrangements with three international airlines and ordered to pay A\$11 million in penalties. A copy of the court's decision is available [here](#).

In addition, the Full Federal Court disallowed an appeal by the ACCC against a decision which dismissed allegations of price fixing by Australia and New Zealand Banking Group Ltd (**ANZ**). A copy of that decision is available [here](#).

Both cases concerned novel claims of price fixing. In the Flight Centre case a principal and its agent were argued to be 'in competition' with each other. In the ANZ case internal (bank) and external (mortgage broker) distribution channels were argued to be 'in competition' with each other. The ACCC had alleged certain discussions about customer pricing by the parties had led to price fixing conduct, in breach of Australian competition law. New Zealand's price fixing prohibition also contains an 'in competition' test and therefore the cases are likely to be persuasive in applying New Zealand competition law.

The judgments are likely to give greater certainty to commercial parties in principal and agent or broker relationships in the application of competition law to arrangements between those parties. However, the Full Federal Court observed that the existence of an agency relationship, or a broker relationship, between two parties does not always mean that those parties cannot be in competition with each other. Each case must be considered on its own facts.

We will provide an update on the Courts' reasoning when we have considered the judgements.

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## 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 Wellington Airport's revised pricing**

The NZCC has released its final report confirming its view that Wellington International Airport Limited is targeting returns for the period from 1 June 2014 to 31 March 2019 that fall within the estimated range of acceptable returns.

[Click here for more](#)

##### **NZCC issues update on fast track amendments for IM review**

The NZCC has decided to fast track the consideration of airport land valuation rules as part of the input methodologies review announced on 10 June.

[Click here for more](#)

##### **NZCC releases final report on Christchurch Airport's pricing information**

The NZCC has published its final report on Christchurch International Airport Limited's disclosure of revised pricing information.

[Click here for more](#)

##### **NZCC confirms North Island Grid Upgrade Project decision**

The NZCC has released its final decision increasing the amount Transpower can recover for the North Island Grid Upgrade (NIGU) Project by \$52.3 million. The Commission's final decision also approved the four output amendments proposed by Transpower. The review did not revisit the original Electricity Commission decision to approve the project.

[Click here for more](#)

## **Telecommunications**

### **NZCC releases further draft decisions on prices of copper lines and broadband service for consultation**

The NZCC has released further draft decisions for consultation setting proposed prices that Chorus can charge for use of its local copper lines and broadband service over the next five years. These are wholesale prices that Chorus charges retail telecommunications companies.

[Click here for more](#)

## **Mergers and acquisitions**

### **Connor Healthcare withdraws merger appeal**

Connor Healthcare Limited has withdrawn its appeal to the High Court of the NZCC's decision declining clearance for it to acquire all of the shares in Acurity Health Group Limited that it did not already own. Connor's withdrawal of the appeal means that the NZCC's decision declining clearance for the acquisition stands.

[Click here for more](#)

### **NZCC registers Z Energy's application for clearance to acquire Chevron New Zealand**

The NZCC has registered an application from Z Energy Limited seeking clearance to acquire 100% of the shares in Chevron New Zealand Ltd, the owner of the Caltex brand in New Zealand.

[Click here for more](#)

### **Statement of preliminary issues for Z's application to acquire Chevron New Zealand**

The NZCC has published a statement of preliminary issues relating to Z Energy Limited's application to acquire 100% of the shares in Chevron New Zealand.

[Click here for more](#)

### **NZCC gives clearance to Pfizer/Hospira merger**

The NZCC has given clearance for Pfizer Inc. to acquire all of the shares of Hospira Inc. Both parties are active in the development and supply of a range of pharmaceutical products.

[Click here for more](#)

### **FedEx applies for clearance to acquire TNT**

FedEx Corporation, a United States based provider of transportation and delivery services, has applied to the NZCC for clearance to acquire all of the shares in TNT Express N.V, a Netherlands based international delivery company.

[Click here for more](#)

### **NZCC wool scouring conference deferred**

The NZCC has decided to defer the reconvening of the conference which had been scheduled for 5 August 2015.

[Click here for more](#)

## **Market behaviour**

### **NZCC files court proceedings against livestock companies**

The NZCC has filed court proceedings against PGG Wrightson, Elders New Zealand and five individuals for alleged price fixing in connection with the introduction of the National Animal Identification Tracing Act 2012.

[Click here for more](#)

**Small businesses targeted by Corporate Portal invoicing scam**

The NZCC is warning New Zealand small business owners of an invoicing scam undertaken through the post by a German company which operates a website called Corporate Portal New Zealand. Business owners have been approached to update their business details with the Corporate Portal and have reported being misled into entering an ongoing subscription contract.

[Click here for more](#)

**Consumer issues****Beware of website offering government grants and funding to businesses**

The NZCC is warning start-up and small businesses to beware of an organisation called New Zealand Small Business Assistance Centre (**NZSBAC**) that is offering access to government grants. NZSBAC is not part of or connected to the New Zealand Government, despite the website giving some people the impression that it is.

[Click here for more](#)

**More NZ businesses agree to end 'opt out' pricing**

The NZCC has welcomed the decisions of House of Travel and Nakedbus to end the use of additional 'opt out' charges when selling tickets to customers online. The Commission's investigations into Jetstar, Dash Tickets and Ticket Direct are ongoing.

[Click here for more](#)

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**Australian Competition and Consumer Commission (ACCC)****Selected media releases**

The ACCC has issued the following media releases:

**Industry regulation and regulatory control****ACCC lodges submission on Harper Review recommendations**

The ACCC has provided a submission to the Commonwealth Treasury's consultation on the recommendations of the Competition Policy Review Panel. The submission is focused on a subset of the recommendations, particularly those that changed since the Draft Report, and deals with some specific details as to how the recommendations can be implemented.

[Click here for more](#)

**Mergers and acquisitions****ACCC opposes Sea Swift Pty Ltd's proposed acquisition of Toll Marine Logistics**

The ACCC has decided to oppose the proposed acquisition by Sea Swift Pty Ltd of the Northern Territory and far north Queensland marine freight business of Toll Marine Logistics Australia (a division of Toll Holdings Limited, whose ultimate owner is Japan Post) because it would be likely to substantially lessen competition.

[Click here for more](#)

## Market behaviour

### ACCC unsuccessful in appeal by Flight Centre

The Full Court of the Federal Court of Australia has allowed an appeal by Flight Centre Travel Group Limited (Flight Centre) against a decision of the Federal Court in which Flight Centre was found to have attempted to induce anti-competitive arrangements with three international airlines to eliminate differences in international airfares offered to customers, and ordered to pay penalties totalling \$11 million.

[Click here for more](#)

### Alleged cartel conduct in the Canberra construction industry

The ACCC is aware of serious allegations and evidence presented to the Royal Commission into Trade Union Governance and Corruption concerning alleged cartel conduct in the construction industry in Canberra, particularly concreting and scaffolding.

[Click here for more](#)

## Telecommunications

### ACCC approves Telstra's revised migration plan

The ACCC has approved Telstra's revised Migration Plan, which sets out how it will progressively migrate telephone and internet services to the National Broadband Network as it is rolled out.

[Click here for more](#)

## NEED MORE INFORMATION?

### Contact us

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

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