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• Changes proposed for the Takeovers Code,
• Amendments to the Companies Act to reduce compliance costs,
• Latest FMA consultations and publications,
• Select Committee considers amendments to the AML/CFT Act, and
• The latest media releases from the New Zealand Commerce Commission and the Australian Competition and Consumer Commission.
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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.

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Details of the changes ahead for the financial advisers’ regime released

The Ministry of Business, Innovation and Employment (MBIE) has released an exposure draft of the Financial Services Legislation Amendment Bill for public consultation. It is an omnibus bill that repeals the Financial Advisers Act 2008 and introduces a comprehensive package of changes that will create a new regime for financial advice through amendments to the Financial Markets Conduct Act 2013 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The purpose of this consultation was to identify and resolve any practical problems with the Bill before it is introduced to Parliament. Further opportunity for public submissions on the Bill will take place during the Select Committee process.

The proposed reforms in the Bill are aimed at establishing a more level playing field of regulation for all financial advisers. The new regime should make it more straightforward for financial advisers to comply with the legislation and to give consumers the advice that they need (especially for those entities that wish to make robo-advice platforms available to persons in New Zealand). For a summary of the key changes see our earlier client update - Snapshot of the financial advice regulatory reforms and MBIE’s fact sheet on the proposed new regime here.

MBIE has also consulted on proposed transitional arrangements set out in a consultation paper accompanying the Bill. A FAQ sheet responding to some questions asked during the consultation period (which ended on 31 March 2017) has also been released.

There are other key pieces to the new regime which are still to come, including:

- a new Code of Conduct (which will be developed by a Code Working Group that is expected to be appointed in August 2017),
- regulations setting out disclosure and licensing requirements,
- the legislative provisions for the transitional arrangements (which will incorporate the feedback MBIE received on the consultation paper), and

For further information on the proposed reforms, visit MBIE’s website here.

Further amendments to the FMC Act in place

The omnibus Regulatory Systems (Commercial Matters) Amendment Act 2017, which was enacted on 30 March 2017, includes amendments to the Financial Markets Conduct Act 2013 (FMC Act) to address various issues that have come to light during the implementation of that Act. There is a relatively long implementation date of 30 March 2018 to allow supporting regulations to be put in place, where necessary, but some changes are expected to come into force earlier by Orders in Council.

Some of the key changes to the FMC Act include:

- requiring 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),

- extending the same class of quoted financial product disclosure exclusion in clause 19 of Schedule 1 to include offers of options by way of issue over quoted products of the same class of existing quoted products,

- 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 circumstances prescribed by regulations and compliance with prescribed conditions,

- new provisions to provide the Financial Markets Authority (FMA) with regulation-making powers to allocate, 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,

- 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

- 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).

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**Financial Markets Authority (FMA)**

**New licence requirements for providers of short-duration derivative products**

Following concerns over the potential harm short-duration derivative products pose for investors, the FMA has reconsidered its interpretation of the definition of “derivative” in section 8 of the Financial Markets Conduct Act 2013 (the FMC Act) and has confirmed that providers making regulated offers of those products should, in fact, be licensed as derivatives issuers.

This is a change from the FMA’s previous position which, to date, has meant that any foreign exchange agreement settled within three working days, and any other derivative settled within one working day was not regulated and did not require businesses selling those products to be licensed.

As a result of the FMA’s new approach, from 1 December 2017 any providers making regulated offers of short-duration derivative products to New Zealanders that settle within three days, whether they are based in New Zealand or elsewhere, will require a licence. The FMA expects all currently unlicensed providers to apply for a licence by 1 August 2017 and be fully compliant by 1 December 2017. Providers who already have a licence will need to review their existing product disclosure statements and business practices to ensure they comply with FMC Act obligations for these products. Providers will also need to consider whether they need to register on the Financial Service Providers Register, or amend their registration.

One unintended consequence of the FMA’s revised approach is that deliverable spot FX contracts that settle within three working days may also be caught by the definition of “derivative” in section 8 of the FMC Act. The FMA therefore sought feedback on whether it should use its designation power to declare that spot FX contracts physically settled by delivery of an amount of currency within three working days are not derivatives for the purposes of the FMC Act. A copy of the consultation paper is available [here](#).
For commentary on the FMA’s proposals see our earlier client update: [FMA moves to license issuers of short-duration derivatives](#).

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**FMA consults on non-GAAP financial information**

The FMA is updating its 2012 Guidance note “Disclosing non-GAAP financial information” to reflect the requirements of the Financial Markets Conduct Act 2013 ([FMC Act](#)) and the FMA’s observations and findings from the review of non-GAAP financial information since 2012. Feedback on a draft version of the proposed new guidance note closed on 7 April 2017. A copy of the consultation paper is available [here](#).

In addition, the FMA is proposing to issue guidance for equity issuers on the use of non-GAAP financial information in a product disclosure statement. This follows on from the FMA’s concerns that issuers are overusing non-GAAP financial measures, resulting in crowded financial tables and complex footnotes that are difficult for investors to understand. A consultation paper on the proposed guidance note is available [here](#). Submissions close on 31 May 2017.

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**Relief for non-NZX participant brokers**

The FMA has announced that it will issue a limited transitional class exemption for non-NZX participant brokers from the Financial Advisers Act 2008 requirement that they keep client money and property separate from their own money and property. This will allow non-NZX brokers to maintain a limited buffer of their own money in their client money trust account to reduce the risk of a temporary shortfall that may prevent client transactions settling or result in one client’s funds being used to settle a transaction for another client.

The exemption relief will apply for a transitional period until 30 November 2020, when the notice granting similar relief for NZX participants expires. The notice is expected to be in place by mid-2017. Further details on the proposed exemption and the exemption conditions are available [here](#).

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**FMA publishes updated guidance on KiwiSaver sales and advice**

The FMA has updated its 2012 guidance on sales and advice for KiwiSaver providers following its consultation last year. A copy of the 2017 Guidance Note is available [here](#).

Currently, financial advisers can give customers ‘information only’, or they can give ‘class’ or ‘personalised’ advice. Only some advisers can give personalised advice. The guidance note discusses the FMA’s view of how the different categories of advice can be applied to assist advisers and providers ensure that they are acting within the rules.

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**Conduct Outcomes Report released**

The FMA has published its first ‘Conduct Outcomes Report’ (which was previously published as the Investigations and Enforcement Report). A copy of the report is available [here](#).

The report highlights the key issues and actions from the FMA’s enforcement, supervision and preventative activities in the period 1 July 2015 to 30 June 2016. It also includes commentary on the FMA’s views on the outcomes of actions it has taken.
FMA consults on KiwiSaver fees methodology

When proposed changes to the Financial Markets Conduct Regulations 2014 (FMC Regulations) are enacted, KiwiSaver providers will be required to include (from 31 March 2018) the total fees each KiwiSaver investor paid, during the previous year, in dollar values in the annual statements to KiwiSaver investors.

In preparation of this proposed change, the FMA is consulting on how those fees should be calculated and disclosed, with a view to ensuring that all KiwiSaver providers calculate the dollar figure for individual fees in the same way. A copy of the consultation paper is available here. Submissions close on 5 May 2017.

NZX Limited (NZX)

NZX issues new guidance on correcting consensus

Last year NZX consulted on proposed changes to its Continuous Disclosure Guidance Note, specifically in relation to how issuers should assess and disclose against analyst forecasts and prior year performance. Feedback from this consultation assisted NZX formulate the updates to a new Guidance Note, which was published on 28 April 2017.

A copy of the updated Continuous Disclosure Guidance Note is available here. NZX has also published an explanatory note here, which sets out the key changes NZX made to the consultation draft of the Guidance Note, and a mark-up of the changes to the December 2014 Continuous Disclosure Guidance Note (which is available here).

Changes to NZX Listing Rules for submitting announcements

The FMA has approved changes to the NZX Main Board/Debt Market and NZAX Listing Rules. The rule changes remove the ability for issuers to submit announcements to NZX for release via email so that all announcements, including announcements that may contain material information, are submitted through the Market Announcement Platform (MAP).

Third party announcements, such as those required by the Financial Markets Conduct Act 2013 for Substantial Product Holders and Directors and Officers, and the Takeovers Code are not affected by the rule changes. These should continue to be provided to NZX by email.

The scheduled go live date for the changes is 22 May 2017 (unless timing for implementation is unexpectedly delayed) and it is intended that the rule changes will apply from this date. A marked copy of the amended Listing Rules, showing changes from the existing Listing Rules is available here.

The final amended version of the updated Listing Rules will be available once the amendments come into effect.

NZX is also changing the way administrative trading halts are applied after the release of an announcement by an issuer which contains material information or falls within a prescribed category. Under the new system, an administrative trading halt will be placed automatically based on the confirmation made by the issuer.

For further details click here.
New Practice Notes provide further guidance on NZX’s Listing Rules

Following on from its initial release of new practice notes in January this year, NZX has published an additional five practice notes. The practice notes are intended to assist issuers and their advisers with common questions and practical guidance on NZX’s Main Board and Debt Market Listing Rules as well as the NZAX Listing Rules (together the listing rules).

The latest practice notes provide a guide to NZX Regulation’s policy and practice in the following matters:

- managing the disclosure of results of shareholders’ meetings (together with a shareholders’ meeting results announcement template to assist issuers),
- NZX’s expectations on disclosure when an issuer is added or removed from an index,
- the process for release of a bond on delisting and for replacing bonds held by NZX to secure compliance with the listing rules, and
- circumstances when an issuer may need to request a trading halt in its securities and how issuers apply for trading halts (with accompanying templates for trading halt requests).

The practice notes can be accessed [here](#).

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Reserve Bank of New Zealand (RBNZ)

Issues paper released for the first phase of the Insurance (Prudential Supervision) Act 2010 review

The RBNZ is consulting on an Issues Paper as part of the first phase of a comprehensive review of the Insurance (Prudential Supervision) Act 2010 (IPSA) regime.

A copy of the Issues Paper is available [here](#). The consultation period closes on 30 June 2017.

Review outline and timeline

The RBNZ has indicated that the review of the IPSA will progress in three broad phases.

This first phase of the review focuses on the identification of potential issues. Stakeholders' submissions on the Issues Paper will be considered along with recommendations arising from the recent International Monetary Fund review of New Zealand's regulatory and supervisory framework for the insurance sector (which are expected to be published in the second quarter of 2017) for the purpose of determining which areas should be taken forward to Phase 2 of the review. This phase may involve workshops and forums to discuss the ideas presented in the Issues Paper.

Phase 2 will take place over 2017 and 2018 and will entail more in-depth analysis of the issues and confirmation of any policy concerns, including the development of options to address them. The key conclusions from Phase 2 will be presented in an Options Paper for further consultation. In the final phase, any legislative change proposals will be developed. Legislative changes are expected to be introduced to Parliament during 2018 at the earliest.
Potential issues for comment

The Issues Paper outlines the rationale, terms of reference and intended process for the review. In addition, the paper provides an illustration of the types of areas that the RBNZ considers have the potential to enhance the operation of the IPSA regime, and provides some context and discussion on those areas in sufficient detail to enable stakeholders to comment on them and assist in the identification of any further potential concerns. This includes issues relating to:

- the scope of the IPSA in terms of the nature of insurance contracts or entities that are subject to the legislation,
- overseas insurers and whether the current regime adequately protects the interests of New Zealand policyholders and provides a sufficiently level playing field in terms of compliance costs and capital,
- the possible introduction of a statutory fund concept for overseas non-life insurers,
- the effectiveness of the statutory fund framework for life insurers,
- licensed insurers' systems of governance and internal control functions,
- the enforcement regime within the IPSA,
- the distress management powers of the RBNZ in Part 4 of the IPSA,
- the framework for the application of minimum capital requirements and the ability to vary or alter prudential capital requirements in response to an insurer's individual circumstances,
- the appropriate application of solvency requirements for overseas insurers,
- the current framework for notification and approval of material transactions and policy changes,
- the current framework for disclosures of financial strength ratings, solvency margin components and ratios, and
- the balance of requirements set out in legislation and those requirements set out using other legislative tools such as regulations, standards and guidance.

In addition, the RBNZ is encouraging stakeholders to provide any comments they wish to make on:

- areas of the legislation that may require technical improvements to improve drafting clarity,
- additional areas that could be taken forward under the review, and
- any areas, having regard to the legislative objectives, that unduly restrict competition and innovation.

The review is intended to consider areas where legislative change may be required. As such, the technical content of the current solvency standards are not within the scope of the review.

Further details

Further details on the review of the IPSA and the current consultation are available on the RBNZ's website here.
RBNZ updates its assessment of AML/CFT risks

The RBNZ is responsible for supervising compliance by registered banks, non-bank deposit takers and life insurers with the Anti-Money Laundering and Countering Financing of Terrorism Act (AML/CFT Act).

This month the RBNZ released the second edition of the Sector Risk Assessment (SRA 2017) to assist RBNZ AML/CFT reporting entities to understand the risks of money laundering and terrorism financing in the RBNZ sectors. The RBNZ expects this to act as a trigger for reporting entities to review and, where necessary, update their AML/CFT policies, procedures and internal controls. The SRA 2017 should also be used to inform a reporting entity’s risk management and mitigation.

A copy of the SRA 2017 is available here.

In the courts

Warminger and FMA will appeal High Court market manipulation ruling

In a judgment delivered in March this year (Financial Markets Authority v Warminger), the Auckland High Court found former Milford Asset Management portfolio manager Mark Warminger manipulated the market on two occasions through his trading activity in 2014.

The decision is noteworthy as it is the first case of its kind decided in a New Zealand court, and provides helpful guidance on the law in this area. It may not, however, remain so for long as Mr Warminger has lodged an appeal against the High Court’s findings against him, and the Financial Markets Authority (FMA) has confirmed that it will cross-appeal against the High Court’s dismissal of some of its claims.

Background to the decision

Alleged market manipulation

An NZX Market Surveillance Team investigation in mid-2014 revealed that Mark Warminger had on several occasions placed multiple bids for small quantities of stock on-market using Direct Market Access (DMA) which increased the last traded price of the stock, or moved the quotations; then, shortly after, sold a larger volume of that same stock off-market at a higher price through a different broker. Mr Warminger’s trades using the DMA facility were anonymous in the market at the relevant times they were made, but became identifiable two days later.

This prompted the FMA to further investigate Mr Warminger’s conduct and eventually issue civil proceedings against him, alleging that he manipulated the market in breach of section 11B of the Securities Market Act 1988 (SMA) on ten occasions in 2014.

The legal context

Section 11B of the SMA applies to trade-based market manipulation. It seeks to prohibit anyone from trading in a way that has, or is likely to have, the effect of creating a false or misleading appearance:

- with respect to the extent of active trading in the securities, or
- with respect to the supply of, demand for, price for trading in, or value of those securities, and

that person knows or ought to know, such an effect would occur or was likely to occur.

The High Court decision

Justice Venning found against Mr Warminger in two of the ten alleged share trades: Fisher & Paykel Healthcare (FPH) on 27 May 2014 and a2 Milk Company on 9 July 2014. For the other eight causes of action, Venning J was unable to find on the balance of probabilities that Mr Warminger’s conduct amounted to a breach of section 11B given Mr Warminger’s legitimate explanations for those transactions and the evidence before the Court.

In reaching this outcome, Venning J confirmed that while ‘purpose’ is not an express element of section 11B, consideration of the purpose behind the trades is an important consideration, and even went as far as saying that it may be “the key factor which distinguishes culpable manipulation from a trade made for genuine reasons”. This is in line with Australian authorities which have also identified purpose as an important consideration in the context of similar market manipulation provisions.

Venning J acknowledged that many market trades have the potential to impact the price of stocks. His Honour also accepted that trades can be made for indirect motives and affect the price of stocks without being manipulative, for example price or volume discovery.

In establishing a trader’s purpose, Venning J acknowledged that market data could be conclusive, but went on to say that in most cases the surrounding context of a trade will be significant. Direct evidence from letters, emails and phone calls made leading up to the trades as well as circumstantial evidence suggesting motives to manipulate share price formed part of the considerations behind Venning J’s findings. For example, in relation to the FPH trade, the Court took into account that before making the DMA trades Mr Warminger was overweight in the stock and knew of significant buying interest that day through communications with brokers.

Further, the Court took the position that given Mr Warminger’s experience and knowledge of the industry, if the court was satisfied that Mr Warminger’s purpose was to achieve a particular outcome by his trades (in breach of section 11B), then Mr Warminger would also know or ought to know that they were likely to achieve the actual effect alleged by the FMA. The FMA was not required to prove that any particular market participant was actually affected under section 11B.

Application to traders under the FMC Act regime

Although this decision is based on legislation that has been repealed, section 11B of the SMA has been carried forward essentially unchanged in the Financial Markets Conduct Act 2013 (FMC Act). The decision therefore is relevant for market participants operating under the FMC Act regime and, if the parties do proceed with the appeal, both the FMA and other market participants will benefit from further judicial guidance on the SMA market manipulation provisions.

The decision is also likely to influence NZX’s updated proposed trading conduct guidance note which includes recommendations on market manipulation and recording client communications. A copy of the February 2017 consultation draft of the guidance note is available here.
MERGERS & ACQUISITIONS

Legislative developments

Takeovers Panel to determine expenses disputes

A recent amendment to the Takeovers Act 1993 has transferred the function of determining disputes over the reimbursement of expenses recoverable by a target company (and its directors) in relation to an offer or a takeover notice from the courts to the Takeovers Panel. The reason behind this change is, according to the explanation given in the amending legislation, “to ensure that timely and cost-effective decisions are made in relation to takeovers code company takeover expense-related disputes”. Under the new provisions, parties are entitled to appeal against a Panel determination to the High Court.

As part of this change, the provisions in Rule 49 of the Takeovers Code which allowed a director of a target company and the target company to recover expenses have been repealed and replaced by similar provisions in the Takeovers Act. Consequential amendments have also been made to the Takeovers (Fees) Regulations 2001.

Transition provisions in the amending legislation (the omnibus Regulatory Systems (Commercial Matters) Amendment Act 2017) provide that the new Takeovers Act provisions only apply to an offer or a takeover notice if the takeover notice is received by the target company on or after 31 March 2017 (i.e., when the provisions came into force). Rule 49 in the Takeovers Code continues to apply in any other case.

To view the new provisions see sections 47 to 53 of the Takeovers Act here.

Takeovers Panel

Takeovers Panel recommends changes to the Takeovers Code

The Takeovers Panel has released its recommendations to the Minister of Commerce and Consumer Affairs in relation to a number of amendments that it suggests should be made to the Takeovers Code (available here). These recommendations follow on from a public consultation on the proposed amendments in October 2016.

The recommendations include three substantive alterations which would:

- amend the definition of “code company” in the Takeovers Act and Takeovers Code (Code) so that an unlisted company that does not have either total revenue of $15 million or more, or total assets of $30 million or more, no longer needs to comply with the Code,

- change the reference from “days” in the Code to “working days” (bringing the Code in line with the definition found in the Companies Act) and amend the Code’s timing rules to reflect this, so that the number of days within which things must or must not occur effectively remains the same as under the status quo (except for during holiday periods),

- alter the Code so that it facilitates the electronic communication by offerors under a takeover, and by the code company, with shareholders for Code-regulated transactions, and to facilitate the Takeovers Panel’s publication of Code-regulated documents.

In addition to these three substantive changes, the Panel has also recommended a number of technical amendments, largely dealing with drafting anomalies or minor inconsistencies in the wording of the Code.
Omnibus Act passed to make a number of fixes to legislative provisions

The **Regulatory Systems (Commercial Matters) Amendment Act 2017** was enacted on 30 March 2017. This is an omnibus Act which has been used as a vehicle for what are considered to be smaller regulatory fixes in 16 Acts managed by the Ministry of Business, Innovation and Employment. The Act includes changes to the following statutes, which are discussed in more detail in the relevant sections of this issue of Corporate Reporter:

- Companies Act 1993,
- Financial Markets Conduct Act 2013,
- Takeovers Act 1993,
- Friendly Societies and Credit Unions Act 1982,

and the:

- Building Societies Act 1965,
- Commerce Act 1986,
- Construction Contracts Act 2002,
- Fair Trading Act 1986,
- Financial Advisers Act 2008,
- Financial Service Providers (Registration and Dispute Resolution) Act 2008,
- Insolvency Act 2006,
- New Zealand Superannuation and Retirement Income Act 2001,
- Energy Efficiency and Conservation Act 2000, and

There are staggered implementation dates for the amendments, but the majority will come into force by 30 May 2017.

**New Act will replace 12 contract and commercial statutes on 1 September**

The **Contract and Commercial Law Act 2017** (CCL Act) was enacted on 1 March 2017, and comes into force on 1 September 2017. It is the first of a series of revision statutes that will be introduced under a new legislative process put in place to make some of New Zealand’s older statutes clearer and easier to understand. The process allows for changes in language, format and punctuation and any necessary clarifications to the existing legislation, but does not allow for policy or substantive law changes.

The CCL Act consolidates into a single piece of legislation the following 11 contract and commercial law statutes (which will be replaced by the CCL Act on 1 September 2017):

- Carriage of Goods Act 1979,
- Contracts (Privity) Act 1982,
- Contractual Mistakes Act 1977,
- Contractual Remedies Act 1979,
- Electronic Transactions Act 2002,
- Frustrated Contracts Act 1944,
- Illegal Contracts Act 1970,
- Minors’ Contracts Act 1969,
- Sale of Goods Act 1908,

It also repeals section 1(4) and (5) and Parts 1, 2, and 4 of the Mercantile Law Act 1908 and the Mercantile Law Amendment Act 1922.

References to the repealed Acts in documents made before the CCL Act comes into force will be treated as a reference to the CCL Act or to a provision in the CCL Act that replaces, or that corresponds to, the repealed provision. However, by 1 September 2017 all new contracts should reference, where applicable, the new CCL Act provisions. Accordingly, businesses should review and update their standard terms and conditions in preparation for the Act’s implementation.

Conveniently the CCL Act contains two useful schedules to assist users in navigating the new legislative provisions. Schedule 2 sets out which provisions have been amended to clarify Parliament’s intent or remove inconsistencies (with brief explanations of the nature of the amendment). Schedule 3 provides a comparative table which shows the sections of the CCL Act alongside the corresponding section of the relevant repealed Act.

**Select Committee is considering amendments to the AML/CFT Act**

In March the Government introduced the [Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill](#) to Parliament, and it is currently being considered by the Law and Order Select Committee. The committee is due to report back to Parliament on the Bill by 24 July 2017.

The Bill’s main focus is on extending the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) to the Phase 2 sectors, which includes real estate agents, law firms, accountants, conveyancers, the New Zealand Racing Board, and some high-value dealers. When undertaking certain activities that pose a high risk for money laundering and terrorism financing, these sectors will be required to know who their customers are and on whose behalf they act. The sectors will be required to report large cash transactions, and (other than high-value dealers) will also be required to report suspicious activity, and develop and maintain a risk assessment and compliance programme. High-value dealers will be able, but not required, to report suspicious activities that come to their attention.

The Bill also makes amendments to existing provisions to improve the operation of the AML/CFT regime. These include expanding the situations where reporting entities can undertake simplified customer due diligence, and introducing two provisions which implement recommendations made by the recent Government Inquiry into Foreign Trust Disclosure Rules, by:

- expanding the scope of the current suspicious transaction reporting requirement to include reporting suspicious activities, and
- providing greater flexibility to share information to meet the purposes of the AML/CFT Act, including mechanisms to enable information flows between the Government and the private sector.

The Government intends that the extended AML/CFT Act will come into force in stages, sector by sector, beginning in early 2018.

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Changes ahead for Friendly Societies and Credit Unions Act

It has been nearly three years since the Government first announced that it would introduce legislation to update the Friendly Societies and Credit Unions Act 1982 (FSCU Act) to bring New Zealand in line with other countries, and reduce unnecessary operating and compliance costs for credit unions and associations. The proposed changes initially appeared in the exposure draft of the Regulatory Systems Amendment Bill released in 2015 for consultation, but it was later decided that the changes were not a good fit for what was essentially an omnibus bill addressing relatively minor regulatory fixes. The same proposed changes have now been introduced to Parliament in the form a member’s bill drawn from a ballot earlier this month – the Friendly Societies and Credit Unions (Regulatory Improvements) Amendment Bill.

The key changes proposed by the Bill include:

- providing for credit unions and associations of credit unions to incorporate and have all the powers of a natural person,
- ensuring legal certainty by vesting the assets, liabilities, undertaking, and business of existing credit unions in the new incorporated entities with a tax base roll over from the old entity to the new, so that the transfer itself does not generate tax,
- reducing the minimum number of credit union members needed for an association of credit unions to be validly constituted from seven to two,
- simplifying the statutory objects of an association,
- removing the ‘ultra vires rule’ insofar as an ultra vires act would otherwise render the relevant transaction invalid or unenforceable and instead include provisions relating to validity of acts similar to those in the Companies Act 1993,
- reducing transaction costs by permitting credit unions to make loans directly to SMEs that are related to members of that credit union, and
- reducing compliance costs by allowing friendly societies and credit unions to use electronic and postal voting for general and special resolutions.

In the meantime, the original bill in which these changes first appeared has now been enacted as the Regulatory Systems (Commercial Matters) Amendment Act 2017. That Act includes amendments to the FSCU Act to 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 to 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. See subpart 9 of Part 1 of the Act for details of those changes (which come into force on 30 May 2017).

Other recent developments

Cyber security update

Report on cyber security strategy

The Government has released its first annual report on the implementation of New Zealand’s Cyber Security Strategy and Action Plan. A copy of the report is available here.
The report sets out progress under the four goals of New Zealand’s Cyber Security Strategy, Action Plan, and National Plan to Address Cybercrime (launched in December 2015): achieving cyber resilience; building cyber capability; addressing cybercrime; and enhancing international cooperation.

Our earlier client update “Cyber security - Government's strategy on track” summarises the key points from the report that are likely to be of particular relevance to New Zealand businesses.

New national cyber security unit launched

The Government has launched CERT NZ, a new cyber security unit to help New Zealanders respond to online threats.

The unit will sit at the centre of New Zealand’s cyber security architecture to deliver on five core functions of incident reporting, response coordination, readiness support, vulnerability identification and threat identification.

For more information go to: https://www.cert.govt.nz/

A right to data portability: Privacy and competition law concerns

In his 3 February report to the Minister of Justice, the Privacy Commissioner made a number of recommendations for reform to the Privacy Act 1993. Among them was the recommendation that a right to data portability be introduced.

Data portability refers to an individual's ability to easily move their personal information from one agency to another. That right has recently been incorporated into the EU General Data Protection Regulation (GDPR), which entitles individuals to receive the personal data they have provided to an agency in a "structured, commonly used and machine-readable format". It also entitles individuals to request that the agency transmit that information directly to another agency (which may include a competing business) where technically feasible.

Intuitively, the introduction of such a right would appear to be a positive development for members of the public. There is clear value for people in being able to retrieve their own information easily and in an interoperable format. However, during consultation for the GDPR a number of less straightforward issues were raised. These included the risk that the transferral of information between agencies could lead to the disclosure of important (and valuable) business information, the risk that increased portability could escalate the mischief resulting from a security breach, and the negative ramifications of the consequential rise in compliance costs.

These concerns, and others, have been more comprehensively addressed in the article "A Right to Data Portability: Privacy and Competition Law Concerns", by Bell Gully's Kristin Wilson and Joanna Trezise, published in the April 2017 edition of Law Talk. The full article is available on the New Zealand Law Society’s website here.
COMPANY LAW

Legislative developments

Regulatory fixes to the Companies Act in force from 30 May 2017

As noted above, the Regulatory Systems (Commercial Matters) Amendment Act 2017 (the Amendment Act) was enacted in March. This omnibus legislation makes various amendments to the Companies Act 1993, including a number of changes aimed at reducing compliance costs for companies. Most of the amendments to the Companies Act will come into force on 30 May 2017.

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 fewer than 10 shareholders). The Amendment Act provides some further changes to the financial reporting default positions for ‘large’ companies so that:

- a large company (which has no subsidiaries of its own) is not required to prepare financial statements if the company is a subsidiary of either a New Zealand parent company or an overseas company registered on New Zealand’s register of overseas companies (overseas parent company) that is required to prepare group financial statements, and

- a large company (with one or more subsidiaries) is not required to prepare group financial statements if group financial statements for the group are prepared by a New Zealand parent company or an overseas parent company.

Similarly, the financial statement registration requirements have been 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 or a body corporate incorporated outside New Zealand.

This requirement does not apply to a company if it is a subsidiary of a New Zealand parent company that files audited group financial statements (which include the company) at the Companies Office. The Amendment Act extends this filing 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.

A further change also amends the Companies Act so that some large overseas companies with small New Zealand branches are not subject to an audit requirement if there is no audit requirement in the company’s home jurisdiction.

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3 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.
Large companies can opt out of preparing an annual report

In addition to the changes to the financial reporting preparation and filing requirements for large companies, the Amendment Act provides large companies (that are not classified as FMC reporting entities under the Financial Markets Conduct Act 2013) with a new general ‘opt-out’ right in respect of the obligation to prepare an annual report.

Under the Amendment Act the requirement to prepare an annual report does not apply to a board of a large company if that company 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 Amendment Act 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 not to hold the meeting (having regard to whether there is any particular issue that the shareholders should be given an opportunity to discuss, comment on, or ask questions about), and
- the constitution of the company does not require the shareholders’ meeting to be called or held.

Other changes

In brief, the Amendment Act also:

- 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 an NZX licensed market. The notice must be given to NZX instead,
- clarifies that a constitution may provide for different kinds of proxies for different matters (e.g., a different specified time for the production of a proxy by electronic means), and set out when postal votes that are cast using electronic means must be received,
- removes ambiguities which arose in the context of the information required for satisfying the resident director statutory requirement where there was more than one director who fell within the alternate “enforcement country” provision,
- 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
- amends aspects of the liquidation regime in the Companies Act to broaden the ability of derivative counterparties to net amounts under bilateral netting arrangements where the counterparty to the derivative transaction is a trustee.
New tax bill to overhaul the taxation of employee share schemes

The Government has introduced legislation to overhaul the taxation of employee share schemes. The Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Bill:

- introduces a new taxing point for share scheme benefits,
- rationalises the deduction rules for share schemes, and
- amends the existing rules for tax exempt share schemes.

For further details, see our earlier client update on this development [here](#) and the Inland Revenue Department’s commentary on the Bill [here](#).

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News from the Companies Office

New Companies Office fees from 1 July 2017

Last year, the Government approved changes to some Companies Office fees, along with changes to levies to fund the Financial Markets Authority and External Reporting Board. The new fees and levies will be effective from 1 July 2017. The Companies Office has provided details of some of the changes to fees and levies in the Companies Register [here](#).

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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 invites discussion on related party transactions**
The NZCC is considering how transactions between energy networks and related businesses should be regulated and has released a paper seeking feedback on how it should approach this topic. [Click here for more](#)

Mergers and acquisitions

**NZCC declines clearance for Vodafone/Sky merger**
The NZCC has declined to grant clearance for the proposed merger of Sky Network Television and Vodafone New Zealand. [Click here for more](#)

**NZCC declines clearance for sprinkler inspection services merger**
The NZCC has declined to grant clearance for Aon New Zealand to acquire the fire sprinkler and alarm inspection business of Fire Protection Inspection Services Limited. [Click here for more](#)
Vero seeks clearance to acquire Tower
The NZCC has received a clearance application from Vero Insurance New Zealand Limited to acquire up to 100% of the shares in Tower Limited. The NZCC has published a Statement of Preliminary Issues relating to the proposed acquisition of Tower by Vero.
Click here for more

Spark seeks clearance to acquire TeamTalk
The NZCC has received a clearance application from Spark New Zealand Trading Limited to, either directly or indirectly, acquire up to 100% of the shares of TeamTalk Limited. The NZCC has published a Statement of Preliminary Issues relating to the proposed acquisition. This application has since been withdrawn.
Click here for more

Further extension to NZME/Fairfax merger
On Wednesday 22 March the NZCC received a lengthy submission from NZME and Fairfax providing further analysis and expert evidence in support of its merger authorisation application. The NZCC informed the applicants on Friday 24 March that if it is to properly consider the information provided then it must extend the current agreed decision date of 11 April. The applicants have now agreed to a new decision date of 2 May 2017.
Click here for more

Telecommunications
Chorus network capacity to continue to grow to meet customer need
The NZCC has released the final decision in its review of the non-price features of the Unbundled Bitstream Access (UBA) service. UBA enables retail telecommunications companies to provide internet services over Chorus’ copper network without installing their own equipment in exchanges.
Click here for more

Market Behaviour
Property Brokers Manawatu and director fined $1.5m in price fixing case
Property Brokers Limited and its director Tim Mordaunt have been ordered to pay penalties totalling NZ$1.5 million in a judgment of the High Court, following a hearing in March.
Click here for more

NZCC grants authorisation to Nelson and Tasman Councils’ joint landfill application
The NZCC has granted authorisation, subject to conditions, to allow the Nelson City Council and the Tasman District Council to form a business unit to jointly operate the two landfills in the Nelson-Tasman region.
Click here for more

Consumer Issues
Judge criticises mobile trader for targeting the vulnerable
Mobile trader Bestdeals 4 You Limited has been fined NZ$47,250 in the Auckland District Court for failing to disclose key consumer information about its credit contracts and layby sales agreements.
Click here for more

First jail sentence in NZCC case
Vikram Mehta, owner of mobile trader Flexi Buy Limited, has been sentenced in the Auckland District Court to two years imprisonment after taking money from customers without intending to supply goods as promised.
Click here for more

Rapid Loans to refund over $1 million in unreasonable fees
Internet-based lender Rapid Loans NZ Limited has agreed to compensate borrowers approximately NZ$1.4 million following a NZCC investigation into unreasonable fees.
Click here for more
NZCC issues warning over chicken size representations
Poultry producers Inghams Enterprises (NZ) PTY Limited and Tegel Foods Limited have been issued with warnings by the NZCC over packaging representations about the size of chickens.
Click here for more

Misleading Christmas deal results in $145k fine for mobile trader
Mobile trader Sales Concepts Limited has been fined NZ$145,000 in the North Shore District Court after pleading guilty to 10 charges under the Fair Trading Act 1986 relating to its ‘Christmas Deal Bundles’.
Click here for more

Guilty pleas in NZCC’s 12th mobile trader prosecution
Truck shop operator Budget Warehouse Limited has pleaded guilty to 18 charges relating to its customer credit contract documents.
Click here for more

NZCC wins appeal in Budget Loans case
The NZCC won its appeal against a District Court decision to dismiss 19 charges against two finance companies (Budget Loans Limited and Evolution Finance Limited), who were convicted on 106 charges under the Fair Trading Act in 2016. The companies originally faced 125 charges but 19 were dismissed by Judge Sharp.
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 denies authorisation for insurance companies to jointly set a cap on sales commissions
The ACCC has issued a final determination denying authorisation to 16 insurance companies to agree to a cap of 20 per cent on commissions paid to car dealers who sell their add-on insurance products.
Click here for more

ACCC denies authorisation for banks to collectively bargain with Apple and boycott Apple Pay
The ACCC has issued a determination denying authorisation to the Commonwealth Bank of Australia, Westpac Banking Corporation, National Australia Bank, and Bendigo and Adelaide Bank to collectively bargain with Apple and collectively boycott Apple Pay.
Click here for more

ACCC proposes to grant authorisation to SA businesses for the joint purchase of electricity
The ACCC has issued a draft determination proposing to allow the South Australian Chamber of Mines and Energy, along with 24 other South Australian businesses, to establish a joint electricity purchasing group. The ACCC proposes to grant authorisation for 11 years.
Click here for more

Consumer Issues

ACCC takes action against Aveling Homes over online review websites
The ACCC has instituted proceedings in the Federal Court against Aveling Homes Pty Ltd, a Perth-based home building company, for alleged misleading conduct and false or misleading representations. The alleged conduct is in relation to review websites Aveling Homes created for its businesses, Aveling Homes and the First Home Owner’s Centre.
Click here for more