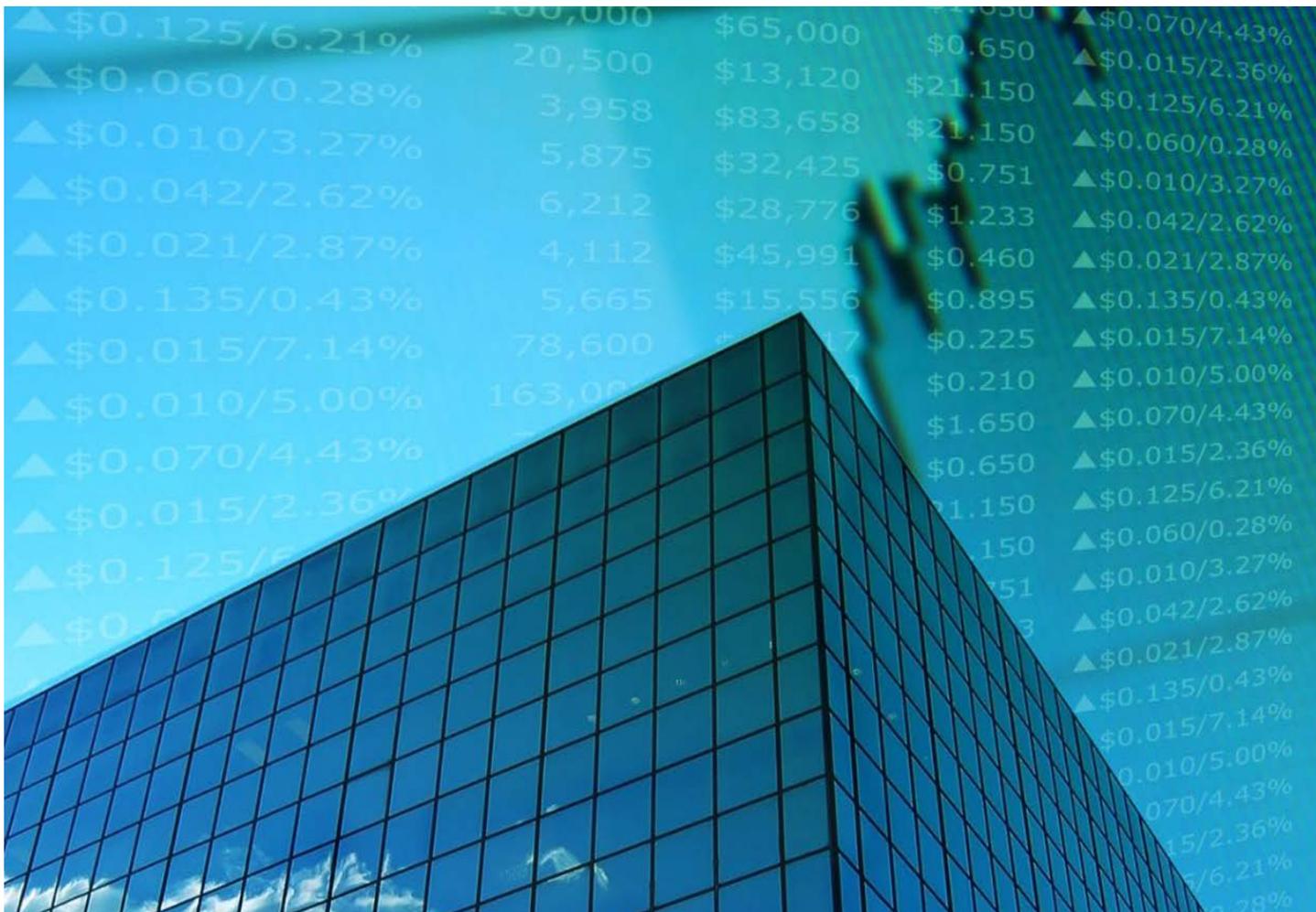


# Corporate Reporter

30 OCTOBER 2017



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## WELCOME

to Issue No. 48 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.

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- NZX consults on the scope of its Listing Rules review,
- Consultation on AML/CFT regulations for Phase 2,
- FMA issues guidance on ICOs and cryptocurrency services,
- New guidance on substantial product holder disclosures,
- Next steps for review of IPSC announced,
- New class designation for short duration forward foreign exchange contracts, 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.

#### **Disclaimer**

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

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## CAPITAL MARKETS

### Regulatory developments

#### Update on the Financial Advice Code Working Group

As part of the impending overhaul of the regulatory regime for providing financial advice, the Financial Advice Code Working Group is consulting with targeted focus groups on the basic design parameters for a first-cut draft of a code of conduct for the new regime. According to the [question sheet](#) provided for the consultation, the Code Working Group is “approaching the consultation process with no preconceptions as to outcomes” and is seeking input from the “widest possible range of affected and interested parties”.

In contrast to the current Code of Professional Conduct for Authorised Financial Advisers which is an occupational code that applies to a narrow range of advisers, the new code will be a service code for the whole financial advice industry. It will set minimum standards of specific competence, knowledge and skills in respect of different types of financial advice and financial advice products; set standards of general competence, knowledge and skills that apply to all persons that give financial advice; and set minimum standards of ethical behaviour, conduct and client care.

The Code Working Group was appointed in June this year to expedite development of the code ahead of the passage of the Financial Services Legislation Amendment Bill. The Bill is an omnibus bill that will give effect to the new regulatory regime through amendments to both the Financial Markets Conduct Act 2013 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the repeal of the Financial Advisers Act 2008. For an overview of the proposed key changes to the regulation of financial advice see the Ministry of Business, Innovation and Employment fact sheet [here](#).

Following this current targeted consultation, a draft code of conduct will be released for another round of consultation before the Code Working Group determines the final form and detail of a code to be recommended to the Minister of Commerce. The Government's decisions around the new code will be reflected in the Financial Services Legislation Amendment Bill.

For details on the membership of the Code Working Group and current consultation click [here](#).

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#### Submissions released on foreign margin rules consultation

In July this year, the Reserve Bank of New Zealand (**RBNZ**) and the Ministry of Business, Innovation and Employment (the **Agencies**) sought feedback on potential legislative changes to address the implications for New Zealand of foreign margin requirements for uncleared over-the-counter (**OTC**) derivatives implemented as part of the Group of Twenty's global derivatives reforms. Individual responses received as part of the consultation are now available on RBNZ's website [here](#).

RBNZ is currently analysing the responses. If a legislative response is chosen, RBNZ has indicated that an exposure draft of the proposed legislation may be released for further consultation prior to its introduction into Parliament.

Click [here](#) for details on the consultation and to read Bell Gully's views on the Agencies' proposals.

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## Financial Markets Authority (FMA)

### New class designation for short duration forward foreign exchange contracts

In April 2017, the FMA gave notice that it had reconsidered its interpretation of the definition of “derivative” in section 8 of the Financial Markets Conduct Act 2013 (the **FMC Act**), and confirmed that businesses selling short-duration derivative products should, in fact, be licensed as derivatives issuers.

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 derivatives issuer licence.

One unintended consequence of the FMA’s revised approach is that spot foreign exchange contracts that settle by delivery of the relevant amount of currency within three working days (**short duration FX forwards**) are also captured by the definition of “derivative”. The FMA therefore sought feedback earlier in the year on whether it should use its designation powers to declare that short duration FX forwards are not derivatives for the purposes of the FMC Act. Click [here](#) for further details on that consultation and [here](#) for a copy of the FMA’s report on the submissions it received from its consultation.

Following consideration of those submissions, the FMA has issued a class designation notice (the [Financial Markets Conduct \(Forward Foreign Exchange Contracts\) Designation Notice 2017](#)) declaring that forward foreign exchange contracts, physically settled by delivery of an amount of currency within three working days, are not regulated financial products for the purposes of the FMC Act. The notice applies to agreements to buy or sell currency (whether New Zealand or foreign currency) or to exchange one currency for another (whether New Zealand or foreign currency) that involve the delivery or payment of the relevant amount of currency within three working days. As a consequence:

- initial and ongoing disclosure and governance requirements under the FMC Act do not apply to short duration FX forwards,
- an issuer is not, by reason only of the issue of short duration FX forwards, required to comply with financial reporting obligations under Part 7 of the Act as an FMC reporting entity (although financial reporting obligations may apply under other laws),
- issuers who offer short duration FX forwards will not need to obtain a derivatives issuer licence as a result of those offers, and
- the requirements relating to the handling of derivatives investor money and derivatives investor property by derivatives issuers will not apply.

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### New guidance on substantial product holder disclosures

Following a consultation in June this year, the FMA has published new [guidance on substantial product holder disclosures](#). This guidance updates the FMA’s previous guidance issued in 2014.

Under the provisions in the Financial Markets Conduct Act 2013 (**FMC Act**) a person who has a “relevant interest” in five per cent or more of quoted voting products in a listed company (referred to as a **substantial product holder**) is required to disclose when they become a substantial product holder (**SPH**) as well as certain changes to their interest in a company. The concept of “relevant interest” is defined in sections 235 to 237 of the FMC Act. Generally, a person will have a relevant interest in securities if they are the holder of the securities, they have the

power to exercise, or control the exercise of, a right to vote attached to the securities or they have the power to dispose of, or control the exercise of a power to dispose of, the securities.

In brief, the guidance note:

- sets out the FMA's findings from a 2015 review of SPHs' disclosure notices (**SPH notices**) and highlights the FMA's areas of concern,
- reminds SPHs of their statutory disclosure obligations under the FMC Act and Financial Markets Conduct Regulations 2014 (**Regulations**),
- clarifies what the FMA expects of market participants in relation to their SPH disclosures, and
- provides guidance in areas where there has been confusion about how the FMC Act and Regulations are applied.

The FMA is particularly concerned with the number of SPH notices it reviewed that did not include:

- in initial disclosures, details of all transactions and events which led to the acquisition of the substantial holding in the four months prior to the start date of the substantial holding,
- the minimum information required for aggregated on-market trades (that is, the date range of the aggregated on-market trades, how the relevant interest was acquired, disposed of, or changed in nature, the total consideration paid or received for the on-market aggregated trades, and the total number of financial products to which the aggregated on-market trades related),
- sufficient information to enable the market to understand the nature of a relevant interest in the substantial holding.

The guidance note also addresses recent concerns over discrepancies in the interpretation of the "relevant interest" provisions for SPH disclosures when applied to individuals managing funds. The FMA has stated that it will engage with the Ministry of Business, Innovation and Employment to consider clarifying the law on this issue. In the interim, the FMA has confirmed that it does not expect individuals who manage funds to make SPH disclosures for financial products they may control through the funds they manage solely because:

- that particular fund has a five per cent holding in a listed company, or
- the five per cent threshold is met when their personal holdings are combined with the holdings in the fund they manage.

To view a copy of the FMA's response to the submissions it received on the June consultation click [here](#).

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## FMA has given a green light for robo-advice exemption

The FMA has announced that it will accelerate the introduction of robo-advice by exercising its exemption powers under the Financial Advisers Act 2008 (**FAA**). Without such an exemption, innovators in the financial advice sector would have faced a wait of more than 18 months before legislative changes to enable this form of advice are brought into force.

The announcement follows on from a consultation on this issue in June, in which the majority of submitters were in favour of the FMA granting an exemption. Copies of 47 of the 49 submissions the FMA received on its

consultation have been released as part of a report ([here](#)) that also contains a summary of the key themes of the submissions.

The FAA currently only accommodates the provision of personalised financial advice by a human. Consequently, it effectively prohibits the provision of “robo-advice” – that is, financial advice generated by an algorithm which is tailored to an individual’s personal financial circumstances and goals. This prohibition has frustrated those who see robo-advice as a solution to the “financial advice gap” which will give more New Zealanders access to affordable, quality financial guidance.

While this obsolete law is being addressed as part of the overhaul of the regulatory regime for providing financial advice (detailed [here](#)), that law change will not take effect until at least April 2019.

The details of the exemption are yet to be finalised, but the FMA has confirmed that:

- it will not impose financial limits on personalised robo-advice, and
- the eligible product list has been expanded to include mortgages and personal insurance products.

The FMA has indicated that it will start taking exemption applications in early 2018. It has advised that companies seeking to offer personalised robo-advice will have to provide the FMA with:

- good character declarations for directors and senior managers, and
- information showing they have the capability and competence to provide the robo-advice service.

The FMA has also advised that the exemption conditions will also be designed to be consistent with the requirements for authorised financial advisers.

The FMA will begin consulting next month on the specific details of the application process and the drafting of the exemption notice.

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## FMA issues guidance on initial coin offers and cryptocurrency services

The FMA has published [commentary on initial coin offers \(ICOs\)](#) aimed at assisting firms understand the regulatory framework they may be operating under and to ensure they meet any obligations they may have when raising funds in New Zealand.

An ICO is a relatively recent innovation for cryptocurrency developers, and involves selling cryptographic tokens (or, digital assets) to raise funds for an online venture, such as the development of a digital platform.

In keeping with the views expressed by the Australian Securities and Investment Commission and other overseas regulators, the FMA has indicated that the regulation of an ICO will depend on the ICO’s structure and operation, and the rights attached to the tokens offered in the ICO. Broadly, if the tokens are offered to retail investors in New Zealand the ICO may trigger particular disclosure (and, in some cases, governance and licensing) requirements under the Financial Markets Conduct Act 2013 (**FMC Act**) where those tokens represent any of the four types of financial product regulated by the Act (that is, equity securities, debt securities, managed investment products or derivatives). Further, even if the tokens do not fall under any of the four types of financial product, given they would still be classified as “securities” under the FMC Act, where appropriate, the FMA could use its designation powers to designate the tokens to be a particular financial product based on their economic substance.

If the ICO is not governed under the FMC Act, the FMA points out that it may still be subject to the general law and the Fair Trading Act 1986 to the extent the offer of services or products is “in trade”.

Alongside the commentary on ICOs, the FMA has also published commentary ([here](#)) for firms based in New Zealand that provide a ‘financial service’ related to cryptocurrencies, such as exchanges issuing their own cryptocurrency to facilitate trading, wallet providers, and broking.

In keeping with the FMA’s willingness to facilitate responsible innovation within the digital sphere, it is encouraging firms wishing to hold an ICO or provide a ‘financial service’ related to cryptocurrencies to contact it for informal assistance.

Wearing its investor advocate hat, the FMA has also issued a warning to investors ([here](#)) of the inherent risks involved with cryptocurrencies and associated services, particularly where cryptocurrencies are offered online through unregulated ICOs or on unregulated exchanges, with no connection to New Zealand.

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## FMA and ASIC confirm collaborative approach to fintech

The FMA and the Australian Securities and Investment Commission (**ASIC**) have reaffirmed their commitment (set out in their 2012 Memorandum of Understanding) to collaboration and cooperation on the expanding opportunities in fintech and innovation. This includes sharing information and views on the regulatory issues arising from emerging technology and increasing innovation.

Both regulators have indicated that they will provide assistance to businesses hoping to make ventures into each other’s markets by providing referrals for advice and support.

For further details see the FMA’s full media release [here](#).

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## FMA extends exemption for AFAs providing DIMS

The [Financial Markets Conduct \(Offers of Financial Products Through Authorised Financial Advisers Supplying Personalised DIMS\) Exemption Notice 2015](#) currently exempts offerors of financial products from the disclosure requirements in Part 3 of the Financial Markets Conduct Act 2013 (**FMC Act**) where offers are made through authorised financial advisers (**AFAs**) providing personalised discretionary investment management services (**DIMS**) under the Financial Advisers Act 2008. This exemption was introduced as a temporary measure to put offers made through AFAs in the same position as offers made through DIMS licensees under the FMC Act, and was originally to expire next month. However, the FMA has now extended the exemption until 5 November 2020 to allow the current position to continue until the legislative changes being introduced under the Financial Services Legislative Amendment Bill have been brought into effect.

A copy of the notice giving effect to that change is available [here](#).

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## FMA revokes two exemption notices

The following notices will be revoked on 1 December 2017 under the [Financial Markets Conduct \(Extension of Term and Revocation of Exemptions\) Notice 2017](#):

- The Financial Markets Conduct (Financial Reporting: Balance Dates of Managers and Registered Schemes) Exemption Notice 2015, which is now unnecessary given amendments made to the Financial Markets

Conduct Act 2013 (**FMC Act**) in August 2017 to require a scheme's financial statements to be completed and lodged within 4 months of the balance date of the scheme (rather than the balance date of its manager). That is, scheme managers previously relying on the exemption notice can now comply with the amended provisions of the FMC Act.

- The Financial Markets Conduct (Dual-listed FMC Reporting Entities) Exemption Notice 2015, given that issuers can instead rely on the Financial Markets Conduct (Overseas FMC Reporting Entities) Exemption Notice 2016, which contains wider exemptions than those under the 2015 notice.

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## FMA releases Bank Bill Benchmark Rate and closing rates guidance

The FMA has published guidance ([here](#)) on conduct and expected controls in relation to trading that sets the Bank Bill Benchmark Rate (**BKBM**) and closing rates in the New Zealand market. These benchmarks are widely used as reference prices for financial instruments, contracts, and for measuring the performance of investment funds.

The FMA's guidance is part of wider efforts to encourage banks and other market participants to return to trading in the bank bill market, following concerns over the steady decline in the volumes of bank bills traded in the wholesale market overall and, in particular, within the BKBM rate set window. When fewer banks participate in setting a benchmark there are increased risks the benchmark may not accurately represent the underlying market.

One of the key reasons proffered by market participants for why bank bill volumes have trended lower in recent years is that there is a perceived increase in regulatory risk following the global and domestic regulatory reforms introduced in response to the LIBOR scandal in 2012, and the legal action in Australia last year relating to allegations of manipulation of the Australian short-term interest rate benchmark (the Bank Bill Swap Rate).

The FMA's guidance note aims to reduce some of that regulatory uncertainty by setting out the FMA's intended approach to enforcement under the Financial Markets Conduct Act 2013 (**FMC Act**). To a large extent, the FMA has drawn on the recent High Court judgment in *Financial Markets Authority v Warminger*<sup>1</sup> as a base for its approach. That judgment applies to market manipulation of listed securities under the now repealed Securities Markets Act 1988. However, the FMA is of the view that the same reasoning by the court in that case would apply to trading in bank bills (or other unlisted financial products) for the purposes of the misleading and deceptive conduct provisions that apply to those products under Part 2 of the FMC Act.

The guidance note also sets out six high-level principles on trading controls that the FMA expects banks and other market participants to meet (albeit in different ways, depending on the risk present in their business).

In addition, the FMA endorses the more detailed international guidance provided in the [FMSB Standards](#) relating to conduct around reference price transactions in the wholesale fixed income markets and the [FX Global Code](#), issued by the Bank of International Settlement, that sets out a common set of guidelines to promote the integrity and effective functioning of the wholesale foreign exchange market.

As further background, the FMA has published an overview ([here](#)) of the BKBM and benchmarks, their purpose and how they are regulated. This is directed at local bank staff involved in trading activity or oversight of trading activity, as well as finance teams in New Zealand businesses that have exposures linked to the BKBM.<sup>2</sup>

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<sup>1</sup> [2017] NZHC 327

<sup>2</sup> Also see the recent article by Andrew Kendall "Developments in financial market benchmarks" in the Reserve Bank of New Zealand's June 2017 Bulletin (Vol.80. No.4) [here](#).

## FMA reports on the misuse of the FSPR and its enforcement role

The FMA has published a 20 page report describing the work it has undertaken since 2014 to prevent the misuse of the New Zealand Financial Service Providers Register (**FSPR**). A copy of the report is available [here](#).

The FSPR is an online public register of financial service providers set up under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP Act**). It was introduced to meet Financial Action Task Force recommendations to combat money laundering and the financing of terrorism. It also enables consumers and regulators to see information about businesses and individuals providing financial services. However, FSPR registration does not mean that the financial services provider is necessarily licensed, monitored or supervised by regulators in New Zealand or another jurisdiction, and the FMA are keen to reinforce that message, particularly to prevent overseas businesses and individuals trying to use FSPR registration to give a misleading impression that their activities are regulated by New Zealand authorities.

The FMA does not oversee the FSPR, however, in 2014 the FMA was granted powers to direct the Registrar of the FSPR at the Companies Office to both deregister as well as prevent businesses and individuals from registering on the FSPR, where the FMA considers there is potential harm to consumers or New Zealand's financial markets.

In the three years covered by the report, only 20 per cent of the businesses and individuals wanting to join the FSPR that were referred to the FMA by the Registrar for further investigation were allowed to register. The FMA also reviewed 115 registrations on the FSPR, resulting in 69 firms being deregistered from the FSPR and 21 choosing to deregister voluntarily. Of those, three financial service providers brought legal action against the FMA for its decision to direct the Registrar to deregister them. These all were resolved in the FMA's favour, leading the FMA to conclude that it can rely on its "expertise and knowledge of financial markets in New Zealand and overseas when assessing registration".

Some of the features likely to cause the FMA concern when reviewing FSP applications include where:

- the shareholder and directors of the company are largely based overseas, and the New Zealand-based director has little knowledge of or control over the company's business operations, finance, structure, associations and customers,
- the registered office of the business is a serviced or virtual office with administration support staff only,
- the company does not understand that if it is just providing back-office administration and secretarial services, this does not meet the definition of a financial service under the FSP Act,
- the business's customers are predominantly based overseas.

The report also indicates that the FMA's approach will be increasingly based on taking enforcement action against the New Zealand directors of companies abusing the FSPR. This includes bringing actions relating to compliance requirements under the Companies Act that apply to FSP-registered companies, as well as under the FSP Act.

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## Relief provided to managers of multiple-participant schemes

Following a consultation at the beginning of this year, the FMA has granted managers of multiple participant schemes (**MPSs**) class exemptions from provisions in the Financial Markets Conduct Act 2013 (**FMC Act**) that relate to participation agreements that form part of the governing document for the scheme.

The [Financial Markets Conduct \(Multiple-participant Schemes—Participation Agreements\) Exemption Notice 2017](#) exempts scheme managers of MPSs from the requirement to register participation agreements (and lodge

any amendments to them) on the online Management Investment Scheme Register (established under the FMC Act regime as one part of the Disclose Register). The exemptions are subject to various conditions to ensure that members of the superannuation plans provided under the MPSs still have easy access to the information they need to make decisions about their investment, and to support effective monitoring by supervisors and the FMA.

The notice also provides a transition exemption for existing MPSs from clause 48(3) of Schedule 4 of the Financial Markets Conduct Regulations 2014, to the extent that the clause requires the product disclosure statement (**PDS**) for the MPS to include a statement containing information about participation agreements. The effect is that the section in the PDS on “*Where you can find more information*” need not refer to participant agreements. This avoids existing PDSs being in breach of clause 48(3) for failing to state where the participation agreements can be found. The exemption ceases to be available when a replacement PDS is filed. At that time, managers would then need to comply with clause 48(3) by including a statement in the replacement PDS about the participation agreements.

The notice came into force on 23 October 2017.

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## FMA instigates further insider trading proceedings

The FMA has filed criminal charges against an individual in the Auckland District Court alleging insider trading in contravention of the Securities Markets Act 1988. This follows on from the first prosecution and sentence earlier this year since the introduction of criminal liability for insider trading and tipping in 2008, where the District Court sentenced a former employee of NZX-listed transport technology company EROAD Limited to serve six months’ home detention for disclosing inside information and tipping a former employee to sell shares in the company. Details of that case are available in our earlier update [here](#).

These prosecutions confirm the FMA’s public indications that insider trading and market manipulation are a key strategic risk to efficient markets, and that it will be prepared to use criminal proceedings to deter and sanction serious misconduct that is either intentional or reckless.

The charges in the current proceedings relate to trading in shares of VMob Group Limited, which now trades as Plexure Group Limited. The individual was formerly engaged in a senior role in the company.

Click [here](#) for the FMA’s full media release.

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## FMA publishes annual reports for 2017

The FMA has published its annual report for the financial year ending 30 June 2017, setting out the results it has achieved over that period as against its stated intentions. Click [here](#) to view the full report or a short version of it.

The FMA has also published its annual KiwiSaver Report ([here](#)) that summarises its activities as a regulator relating to KiwiSaver.

## NZX Limited (NZX)

### NZX consults on the scope of its Listing Rules review

NZX has released a [discussion document](#) and a [survey](#) (for those wishing to provide quick feedback) seeking submissions on NZX's proposed scope and areas of focus for its Main Board/Debt Market Listing Rules review. This is the first of two consultations proposed for the review. Submissions for this round close on 17 November 2017.

This is the first major review of NZX's Listing Rules since they were introduced in 2003. It targets both specific areas of the Listing Rules which are not operating effectively, as well as wider issues involving the development of New Zealand's capital markets.

NZX has already signalled that a likely outcome of the review (although this is still to be finalised) will be to reduce the complexity of NZX's three equity markets (NZX Main Board, NZAX and NXT) by consolidating them into an updated market structure via a single rule set with differential standards for equity issuers (in keeping with the approach adopted by the LSE and the UK Listing Rules). Assuming the outcome of differential standards in some form is supported, NZX are seeking feedback on the options for approaching differentiation.

Additional key focus areas for the review include:

- amending the Listing Rules to accommodate the listing of a broader range of financial products (including, for example, green bonds) and issuers, with fit for purpose rules for smaller equity issuers, debt and funds,
- enhancing investor protections to increase confidence and participation in NZX's markets,
- improving access for foreign listings to expand the range of investable products for New Zealand investors, and
- removing unnecessary compliance costs from the current Listing Rules, and ensuring the Listing Rules are easy to navigate and use (by organising the rules into a more structured, modular format).

NZX expects to be able to implement amended Listing Rules by the end of 2018 (subject to a transition period), and has proposed the following tentative timetable:

<b>Process feedback, conduct further workshops, prepare rule amendments</b>	December - April 2018
<b>Publish exposure draft seeking feedback on draft rules</b>	April 2018
<b>Further feedback due</b>	May 2018
<b>Refine rules and send application to FMA for approval</b>	Early Quarter 3 2018
<b>Announce approved rules</b>	Quarter 3 2018
<b>Amended rules to take effect</b>	Quarter 4 2018
<b>Transition period and refinement of rules</b>	Half year 1 2019

Further details on the consultation are available [here](#).

## Revised NZX Participant Rules in place from 1 December 2017

The FMA has approved amendments to the NZX Participant Rules and the Derivatives Market Rules. In addition, amendments to the Clearing and Settlement Rules have been approved by the FMA and Reserve Bank of New Zealand to reflect the changes made to the capital adequacy sections of the Participant Rules and Derivatives Market Rules. Most of the amendments will come into effect on 1 December 2017.

The rule amendments address a range of matters, including clarifying the information participants should know about their clients for the purpose of monitoring compliance, and ensuring adequate arrangements are in place for the control of all broking offices.

A marked copy of the amended rules, showing changes from the existing rules is available on NZX.com [here](#).

NZX expects to provide updated guidance on the material areas of the amended rules by 1 December 2017.

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## New round of NZX practice notes released

NZX Regulation has published a further round of practice notes since the last issue of Corporate Reporter, taking the total to 22 since the beginning of this year.

These practice notes sit alongside NZX's existing guidance notes, and provide practical guidance on various aspects of NZX's listing rules. The latest practice notes include guidance on:

- a change of an issuer's balance date,
- what is required of issuers that want to rely on the QFP exemption to make an offer,
- how to approach a bond redemption or call,
- some recommendations on making effective announcements, and
- how to make an application for listing and quotation of new equity securities.

Practice Note 10/2017 (Trading Halt Applications), Practice Note 11/2017 (Providing information, as required under legislation, to NZX); and Practice Note 17/2017 (Disclosure Practices) have also been updated.

All of NZX's practice notes are available [here](#).

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## Reserve Bank of New Zealand (RBNZ)

### Next steps for review of IPSA announced

RBNZ has released a [feedback statement](#) following the closing of submissions on the [Issues Paper: Review of the Insurance \(Prudential Supervision\) Act 2010](#). Individual redacted submissions are available on RBNZ's website [here](#). For details on the Issues Paper see our earlier update [here](#).

The statement acknowledges the feedback RBNZ received from 42 submitters, provides a preliminary timetable for Phase 2 of the Review, and outlines how several issues raised by submitters that were not discussed in the Issues Paper are being taken forward.

In general, submitters agree that there are a number of areas where the effectiveness of the framework introduced by the Insurance (Prudential Supervision) Act 2010 (**IPSA**) could be improved or compliance costs reduced. As a result, RBNZ's review of IPSA is broadly supported, although there is seen to be little need for fundamental change to the legislation as a whole.

Over the next six months the review will focus on:

- the scope of the legislation (that is, which business lines and entities are subject to the requirements of IPSA and RBNZ prudential supervision),
- consideration of the treatment of branch operations to balance overseas participation in the New Zealand market with New Zealand policyholders' and wider economic interests,
- the use and empowerment of regulatory instruments within the legislation, including suitability of merit reviews of regulatory framework developments, and
- Financial Strength Ratings, disclosure requirements, and the data collection framework.

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## MERGERS & ACQUISITIONS

### Overseas investment

#### Minor change to the threshold for Australian non-government in-bound investment

In 2013, trans-Tasman business investment became significantly easier with the enactment of the Overseas Investment (Australia) Amendment Regulations 2013 which increased substantially the threshold for which non-government trans-Tasman investments require regulatory approval. This threshold is adjusted to a new amount each year, if an inflation-based formula produces an amount greater than the previous year's amount.

For the period from 1 January to 31 December 2018, the Australian non-government in-bound threshold for investments in significant business assets will be increased from NZ\$501 million to NZ\$516 million. If the investment is more than that, consent is required under the Overseas Investment Act 2005. Other overseas investors require regulatory approval for business acquisitions over NZ\$100 million.

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### Takeovers Panel

#### New Chief Executive for the Takeovers Panel

The Takeovers Panel has appointed Andrew Hudson (previously the Panel's General Counsel) to the position of Chief Executive.

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#### Takeovers Panel updates exemption to reflect current market practice

The Takeovers Panel has introduced amendments to the class exemption that provides an exemption for allotments of voting securities under certain entitlement offers where one or more overseas shareholders are excluded from direct participation in the offer (in clause 8B of the Takeovers Code (Class Exemptions) Notice (No 2) 2001).

The amendments to clause 8B include:

- removing the condition requiring a registered financial service provider be appointed on behalf of the overseas shareholders who are excluded from the offer, and
- allowing a related company of an NZX trading and advising firm (and not just an NZX trading and advising firm) to be appointed on behalf of the overseas shareholders to sell the relevant rights (or the voting securities to which the relevant rights relate) and ensure that each excluded overseas shareholder is paid that shareholder's pro rata share of the net proceeds of those sales.

These amendments align clause 8B with current market practice and ensure that compliance with the conditions for the exemption are practicable.

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

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## Revised Guidance Note on Schemes of Arrangement

The Takeovers Panel has released an updated version of its February 2017 Guidance Note on Schemes of Arrangement. The updated version is available [here](#).

The main changes to the February 2017 Guidance Note include:

- additional guidance on the Panel's views on interest class determination,
- new guidance on how the Panel will view other Takeovers Code protections in its consideration of a no-objection statement; such as, limiting the types of conditions that an offeror can rely on for avoiding the transaction, and requiring timely payment to shareholders,
- more guidance on the no-objection application process, including that the Panel generally requires a minimum of two weeks to review final drafts of the scheme documents and to consider whether to give a no-objection statement,
- new guidance on the use of disclaimers, including a requirement for providing a disclaimer in scheme documentation where the Panel provides a letter of intent that it does not intend to object to the scheme, and
- updated templates for the a Deed Poll, Letter of Intention and the No-objection Statement.

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## COMMERCIAL

### Legislative developments

#### Consultation on AML/CFT regulations

The Ministry of Justice is seeking submissions on the first tranche of proposed regulations under the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act 2009 following recent amendments to the Act to put in place "Phase 2" of New Zealand's AML/CFT laws. A copy of the consultation paper is available [here](#) and feedback can be given through an online survey [here](#) or through written submissions. The closing date for submissions is 31 October 2017.

Consistent with the staged implementation of the Phase 2 sectors, new regulations will be made in different rounds or 'tranches'. This first tranche covers matters that need to be addressed before the first Phase 2 reporting entities (lawyers, conveyancers and trust and company service providers) are required to comply on 1 July 2018. Wider changes to the AML/CFT regime that are also due to come into effect on 1 July 2018, and which affect all (Phase 1 and Phase 2) reporting entities, are also being addressed. This includes consultation on:

- prescribing the information that Phase 1 and 2 entities need to provide when they submit a Suspicious Activity Report,
- prescribing the annual report form for many of the Phase 2 entities,
- clarifying the scope of an 'occasional activity' under the AML/CFT Act, and
- several minor and technical amendments to four existing AML/CFT Regulations.

Alongside the work on regulations, the New Zealand Police's Financial Intelligence Unit (FIU) will provide a revised National Risk Assessment (intended to be available in November 2017). Phase 2 Sector Risk Assessments and sector-specific guidance to help businesses understand, prepare for and meet their AML/CFT obligations, are also in development by the Department of Internal Affairs.

The Ministry anticipates that final decisions on the first tranche of regulations will be made in December 2017, and they will be in force by February 2018.

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## In the courts

### First court determination under the AML/CFT Act

*Department of Internal Affairs v Ping An Finance (Group) New Zealand & Anor [2017] NZHC 2363*

On 30 September 2017, the High Court imposed NZ\$5.29 million of pecuniary (financial) penalties under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the **AML/CFT Act**). This is the first such determination under the AML/CFT Act.

The case arose from an investigation by the Department of Internal Affairs, which is one of the three supervisors responsible for enforcing the Act, into the activities of Ping An Finance (Group) New Zealand Company Limited (**PA**) and its sole director. The court found that there had been "serious, systemic deficiencies in complying with a multiplicity of obligations under the [AML/CFT] Act" resulting in "widespread contraventions across several key areas which were not isolated or infrequent."

While the actions of PA and its director were at the more serious end of the non-compliance spectrum, the case demonstrates that New Zealand is serious about AML/CFT measures and that the supervisors of the regime will take action where there is deemed non-compliance with the AML/CFT Act. Reporting entities need to actively monitor their AML/CFT compliance function (with senior management involvement), and if instances of non-compliance are identified, immediate steps should be taken to rectify the situation.

For Bell Gully commentary on this case refer to our earlier update [here](#).

## COMPANY LAW

### News from the Companies Office

#### New look websites for the Companies Office and Companies Register

This month saw the launch of redesigned websites for the Companies Office [here](#) (being the parent website containing insights and articles, news and notices and legislative information about the Companies Office) and the Companies Register [here](#) (the home of the Companies Register application, which contains the register search, login access and over 100 help guides).

For further details on the changes click [here](#).

## COMPETITION AND CONSUMER LAW

### In the courts

#### First case on unsubstantiated representations under the Fair Trading Act

Last month, Fujitsu General New Zealand Limited (**Fujitsu**) was convicted and fined in the District Court for making unsubstantiated representations on its website about the efficiency of its heat pumps over a period of more than two years. This is the first time that a business has been convicted since the substantiation provision (in section 12A) of the Fair Trading Act 1986 came into effect in 2014. Section 12A defines such a representation as being made if the person making the representation does not, when the representation is made, have reasonable grounds for the representation (irrespective of whether the representation is false or misleading).

Fujitsu was also convicted and fined for making misleading misrepresentations about performance characteristics of its heat pumps under section 13(e) of the FTA. Details of the court's decision are available in our earlier update [here](#).

This case serves as a reminder to businesses that if they make claims or imply something about their goods or services under the FTA they must have reasonable grounds for making those claims. Although there is not a precise test for what constitutes reasonable grounds, substantiating a representation should be based on credible sources of information which relate directly to the actual representations being made. For example, it was not enough in this case for Fujitsu to rely solely on the fact that it carried more energy stars (given by a government agency) across its range than any other brand of heat pump to substantiate claims such as Fujitsu was "NZ's most energy efficient heat pump range" and that a particular heat pump range delivered "better heat efficiency" and constituted "the most efficient system ever".

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

### Regulatory developments

#### Report on review of unfair contract terms under the FTA

The Commerce Commission has released a report ([here](#)) which details the findings of its third industry review of "unfair contract terms". Although the review is focused on gym membership contracts, it highlights a number of issues that all suppliers of consumer goods and services should be aware of, including:

- the scope of 'entire agreement' clauses,
- the importance of writing contracts in "plain English", and
- the application of the prohibition on "unfair contract terms" to Privacy Statements and incorporated documents.

A summary of the report is in our earlier client update [here](#).

## New Zealand Commerce Commission (NZCC)

### Media releases

The NZCC has issued the following media releases:

#### Industry Regulation and Regulatory Control

##### **Have your say on Powerco's proposal to spend \$1.32 billion on its lines network**

The NZCC has released its Issues Paper for electricity distributor Powerco Limited's proposal to increase its prices and change its quality standards to spend \$1.32 billion on operating and maintaining its electricity lines network. The paper sets out the key issues the NZCC intends to focus on in its review of Powerco's proposal, and invites consumers and interested parties to share their views.

[Click here for more](#)

##### **Tighter requirements proposed for related party transactions for gas pipeline and electricity lines companies**

The NZCC has released its draft decision to improve the rules governing related party transactions for electricity lines and gas pipeline businesses. The rules are designed to ensure customers do not end up paying higher prices for electricity and gas because the lines or pipeline businesses get a related party to carry out services, such as network maintenance or tree trimming, rather than using an independent contractor.

[Click here for more](#)

##### **Final report on review of Fonterra's 2016/17 base milk price calculation**

The NZCC has released its final report on Fonterra's base milk price calculation for the 2016/17 dairy season. In reaching its final view, the NZCC considered submissions received on its draft report which was published on 15 August 2017. The NZCC's overall conclusion on the consistency with the Dairy Industry Restructuring Act 2001 is unchanged from its draft report.

[Click here for more](#)

##### **Annual performance summaries released for electricity lines companies**

The NZCC has published its latest one-page summaries of key performance measures for each of New Zealand's 29 electricity lines companies, covering the year to 31 March 2017. As regulated utilities, lines companies are required to publicly disclose key performance information under Part 4 of the Commerce Act.

[Click here for more](#)

##### **NZCC releases draft report on Fonterra's 2017/18 Milk Price Manual**

The NZCC released its draft report on its annual review of Fonterra's Milk Price Manual for the 2017/18 dairy season. The manual sets out Fonterra's methodology for calculating the price it will pay farmers per kilogram of milk solids.

[Click here for more](#)

##### **Process and issues paper released for review of Auckland and Christchurch Airport prices**

The NZCC has released a process and issues paper for its review of the prices Auckland and Christchurch International Airports have set to apply for the period 1 July 2017 to 30 June 2022. Under Part 4 of the Commerce

Act, which regulates markets where there is little or no competition, the airports are subject to information disclosure regulation. While the NZCC does not regulate the prices the airports charge, its role is to review airport pricing decisions to promote greater public understanding about their performance.

[Click here for more](#)

### **No change proposed for information requirements on gas companies seeking customised price-quality paths**

The NZCC has released a draft decision which proposes not to amend the information requirements applying to gas pipeline businesses which apply for a customised price-quality path. The draft decision forms part of the review of Input Methodologies, which are the upfront rules, requirements and processes that apply to businesses the NZCC regulates in markets with little or no competition.

[Click here for more](#)

## **Mergers and Acquisitions**

### **NZCC grants clearance for HealthCare NZ to acquire Geneva Healthcare**

The NZCC has granted clearance for HealthCare of New Zealand Holdings Limited to acquire 100% of the shares in Geneva Healthcare Limited and its related companies. The merging parties predominantly provide home and community support services funded by the Accident Compensation Corporation, District Health Boards, and the Ministry of Health.

[Click here for more](#)

### **NZCC grants clearance for Essilor and Luxottica merger in NZ market**

The NZCC has granted clearance for Essilor International (Compagnie Générale d'Optique) S.A. and Luxottica Group S.p.A to merge their business activities in New Zealand. The proposed global merger would bring together a supplier of prescription lenses with a supplier of prescription frames and sunglasses. The parties have sought clearance from a number of regulators in different countries including New Zealand.

[Click here for more](#)

### **NZCC clears Tronox to buy titanium dioxide pigment business of Cristal**

The NZCC has granted clearance for Tronox Limited to purchase the titanium dioxide (TiO<sub>2</sub>) pigment business of National Titanium Dioxide Company Ltd (**Cristal**), so far as it affects markets in New Zealand. The proposed global merger would bring together two suppliers of TiO<sub>2</sub> pigment. The white pigment is used to increase the brightness and durability of products such as paints, plastics, paper, inks, pharmaceuticals, fibres, and cosmetics.

[Click here for more](#)

### **Daiken seeks clearance to acquire Dongwha**

The NZCC has received a clearance application from Daiken New Zealand Limited to acquire 100% of the shares in Dongwha New Zealand Limited. Daiken is the New Zealand subsidiary of Daiken Corporation, a Japanese company specialising in the manufacture and supply of wood-based construction materials. In New Zealand, Daiken manufactures and supplies medium density fibreboard from a plant it operates in North Canterbury.

[Click here for more](#)

**Statement of Preliminary Issues released for Daiken/Dongwha**

The NZCC has published a statement of preliminary issues relating to the proposed acquisition of Dongwha New Zealand Limited by Daiken New Zealand Limited. The statement outlines the main issues the NZCC considers important in deciding whether or not to grant clearance to the proposed merger.

[Click here for more](#)

**Telecommunications****New infographic series to demystify telecommunications for consumers**

The NZCC has released the first in a series of infographics aimed at helping consumers navigate the often complex world of telecommunications. The infographic is called "How do I choose my broadband?" and encourages consumers to think about how their household uses the internet before deciding how much data and what speed they might need from their plan.

[Click here for more](#)

**Draft decision on what major telcos will contribute to \$50m development levy**

The NZCC has released its draft decision on how much 16 telecommunications providers will each pay towards the Government's \$50 million Telecommunications Development Levy for 2016/17. The Government uses the annual levy to pay for telecommunications infrastructure and services which are not commercially viable, including the relay service for the deaf and hearing-impaired, broadband for rural areas, and improvements to the 111 emergency service.

[Click here for more](#)

**Market Behaviour****Final settlement reached in livestock price fixing case**

A settlement has been reached with Elders Rural Holdings Limited in a price fixing case arising from the livestock industry's response to the introduction of the National Animal Identification and Tracing Act 2012. The NZCC launched an investigation in 2012 after receiving a complaint from a Northland farmer. As Elders is no longer trading, the NZCC and Elders agreed to seek a declaration from the Court that Elders breached the price fixing provisions of the Commerce Act.

[Click here for more](#)

**Consumer Issues****Truck shop fined for deficient consumer contracts**

Truck shop operator Macful International Limited, has been fined \$126,000 on 16 charges after failing to adequately disclose key information in consumer contracts and register as a financial services provider.

[Click here for more](#)

**Gyms to shape up after NZCC review into unfair contract terms**

Gyms have agreed to amend their standard form contracts after a NZCC review into unfair contract terms in the sector. The Fair Trading Act bans contract terms which create a significant imbalance of rights or obligations between companies and consumers.

[Click here for more](#)

**NZCC files proceedings against Harmony over its platform fee**

The NZCC has filed civil proceedings in the High Court at Auckland against peer-to-peer lender Harmony Limited and Harmony Investor Trustee Limited. The NZCC alleges a breach of the Credit Contracts and Consumer Finance Act 2003 which prohibits lenders from charging unreasonable credit fees.

[Click here for more](#)

**NZCC releases Consumer Issues Report for 2016/17 year**

The NZCC has released its Consumer Issues Report for the year to 30 June 2017. The Report is one of the initiatives undertaken by the NZCC to better understand the potential issues facing New Zealand consumers and where there is likely to be the greatest harm.

[Click here for more](#)

**Fujitsu fined \$310,000 in NZCC's first unsubstantiated claims case**

Heat pump supplier Fujitsu General New Zealand Limited has been fined \$310,000 for making unsubstantiated or misleading claims about the energy efficiency and performance of some of its heat pumps. Fujitsu pleaded guilty to seven charges under the Fair Trading Act for unsubstantiated or misleading claims made over a period of more than 2 years, from June 2014 to October 2016.

[Click here for more](#)

**Collective bargaining authorisation application from Waikato – Bay of Plenty Chicken Growers Association**

The NZCC has received an application from the Waikato - Bay of Plenty Chicken Growers Association Incorporated seeking authorisation on behalf of its members to collectively negotiate the terms and conditions for its members to supply chicken growing services to Inghams Enterprises (NZ) Pty Limited.

[Click here for more](#)

**Owner fined \$151,875 for misrepresenting cladding as premium brand**

A former director and owner of the now-defunct Christchurch Lightweight Concrete Limited has been fined \$151,875 for misrepresenting autoclaved aerated concrete cladding panels as the Australian-made "Hebel" brand. Darryl Campbell pleaded guilty to nine charges under the Fair Trading Act for his misrepresentations to Christchurch Lightweight staff and customers between July 2007 and June 2010.

[Click here for more](#)

**Don't sell unsafe products urges NZCC**

The NZCC is urging importers, distributors and retailers to ensure that the products they sell comply with all relevant mandatory product safety standards and consumer information standards. The safety standards cover products, including toys and children's nightwear, that have the potential to cause serious injury. The consumer information standards require that clothing is labelled with origin and fabric care details.

[Click here for more](#)

**Cash for CAB in Commission settlement with Tower**

The Citizens Advice Bureau will receive approximately \$75,000 as part of a settlement agreed between the NZCC and Tower Insurance. Tower overcharged some of its customers by failing to properly apply multi-policy discounts. It offers a discount when customers hold more than one eligible insurance policy for car, house, contents or a boat. The total discount varies depending on the number and type of policies a customer holds.

[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 decision on NBN Co's SAU variation on hold**

The ACCC has announced it will not make a decision on NBN Co's proposed variation to its special access undertaking (SAU) until NBN Co further progresses its consultation with customers on its pricing model.

[Click here for more](#)

#### Mergers and Acquisitions

##### **ACCC calls for comment on Platinum Equity's proposed acquisition of OfficeMax**

The ACCC has flagged initial concerns in relation to the proposed acquisition of OfficeMax Australia by Platinum Equity. Platinum Equity recently acquired the Australian and New Zealand businesses of Staples Inc. The ACCC has outlined its preliminary view that combining Staples and OfficeMax may substantially lessen competition in the supply of traditional office products such as stationery, notebooks, and copy paper to large commercial and government customers in Australia.

[Click here for more](#)

##### **ACCC won't oppose Tronox's proposed acquisition of Cristal's titanium dioxide business**

The ACCC has decided to not oppose the proposed acquisition by Tronox Limited of the titanium dioxide business of National Titanium Dioxide Company Limited (**Cristal**). Tronox and Cristal both produce titanium dioxide pigment in Australia, which is used as an additive in products such as paint, plastics, and ink to impart whiteness, provide opacity qualities, and protection by absorbing ultraviolet light.

[Click here for more](#)

#### Consumer Issues

##### **ACCC takes ticket reseller Viagogo to court**

The ACCC has instituted proceedings in the Federal Court against ticket reseller Viagogo alleging it breached the Australian Consumer Law when reselling entertainment, music and live sport tickets from 1 May 2017 to 26 June 2017. The ACCC alleges that Viagogo made false or misleading representations, and engaged in misleading or deceptive conduct, regarding the price of tickets on its online platform by failing to disclose substantial fees.

[Click here for more](#)

##### **ACCC proposes to authorise roll out of Woolworths' discount programs to participating BP sites**

The ACCC has issued a draft decision proposing to grant conditional authorisation to a commercial alliance between BP Australia Pty Ltd, BP Resellers, and Woolworths Limited. Authorisation would allow participating BP service stations to accept Woolworths shopper dockets and participate in the Woolworths Rewards loyalty program, if BP is successful in acquiring Woolworths' service stations.

[Click here for more](#)

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