



**BELL GULLY**

# Financial Services Quarterly

---

AUTUMN 2015

---



**BELL GULLY**

# financial services quarterly

**Welcome to the Autumn 2015 issue of *Financial Services Quarterly*, a review of current legal issues in the financial sector.**

Each quarter, we summarise recent issues and preview upcoming developments in these areas:

**In the courts**  
**Legislation/In Parliament**  
**Recent developments**  
**Bell Gully news**  
**Useful Web links**

**In this issue:**

- **Parent company liable for subsidiary's debts in liquidation**
- **Latest from the Financial Markets Authority**
- **CCCFA update - draft Responsible Lending Code**
- **Commerce Commission releases Unfair Contract Terms Guidelines**

**Need more information?**

For more information on any of the cases, articles and features in *Financial Services Quarterly*, please email [rachel.gowing@bellgully.com](mailto:rachel.gowing@bellgully.com) or call on 64 9 916 8825.

*Disclaimer: this publication is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters dealt with in this publication.*

## In the Courts

### **Parent company liable for subsidiary's debts in liquidation – an exception to the separate legal personality principle**

A recent High Court decision highlights a provision in the Companies Act that allows a party to pierce the "corporate veil" in a corporate group context.

### **Ignorance is bliss: trade creditors find it easier to hold on to payments received**

The Supreme Court has released its decision in the long-running *Fences & Kerbs* litigation concerning voidable transactions, adopting an interpretation of the voidable transaction regime that it acknowledged was *against* the "generally accepted view in New Zealand".

### **NZCC files criminal proceedings against Auckland finance companies**

The Commerce Commission has filed criminal proceedings in the Auckland District Court against two finance companies, alleging their repossession and debt recovery practices breached the Fair Trading Act.

## Legislation/In Parliament

### **New Australian trans-Tasman mutual recognition regime regulations**

Australia has enacted regulations to allow for the continued effectiveness of the 2006 trans-Tasman recognition regime agreement between the Australian and New Zealand governments.

### **Non-bank Deposit Takers (Declared-out Entities) Regulations 2015**

In certain circumstances, the Public Trust and specified classes of entities are not NBDTs for the purposes of the Non-bank Deposit Takers Act.

### **Small changes to the Australian in-bound investment thresholds for 2015**

In 2013, trans-Tasman business investment became significantly easier with the enactment of the Overseas Investment (Australia) Amendment Regulations 2013. The Australian in-bound threshold has been increased for 2015.

## Recent developments

### **CCCFA update - draft Responsible Lending Code**

The Ministry of Business, Innovation and Employment received 45 submissions on the Draft Responsible Lending Code released for consultation late last year.

### **Commerce Commission releases Unfair Contract Terms Guidelines**

The Commerce Commission has published its final Unfair Contract Terms Guidelines, setting out the approach the Commerce Commission will take when enforcing the new unfair contract terms provisions under the Fair Trading Act 1986.

### **Phase 2 of the Financial Markets Conduct Act regime in place**

On 1 December 2014, the second phase of the implementation of the Financial Markets Conduct Act 2013 came into force. Subject to some remaining transitional measures, this marks the final stage of the complete overhaul of New Zealand's financial and securities law regime, which was initiated nearly a decade ago.

### **Latest from the Financial Markets Authority**

- Updated Corporate Governance in New Zealand – Principles and Guidelines handbook published
- Guidance released for FMCA accountability framework
- Guidance on offers under the FMCA regime
- FMCA exemptions under consideration
- Handbook for directors considering an IPO
- Proposed additional standard conditions for Authorised Financial Advisers
- What is your FMC balance date?
- Response to submissions on the content and form of information for the "Disclose" register
- AML/CFT Audit - getting yours underway
- Going Public - a director's guide
- Fund update template and guidance for calculating risk indicators

### **Revised NZX continuous disclosure guidance note**

The NZX has released an updated version of its continuous disclosure guidance note.

## In the Courts

### **Parent company liable for subsidiary's debts in liquidation – an exception to the separate legal personality principle**

*A recent High Court decision<sup>1</sup> highlights a provision in the Companies Act 1993 (the **Act**) that allows a party to "pierce the corporate veil" in a corporate group context.*

It is a fundamental principle of company law that a company is a legal entity separate and distinct from its shareholders, with its own separate legal rights and obligations. This is expressly stated in section 15 of the Act and means that, in practice, shareholders are not generally liable to meet obligations incurred by the company beyond their contribution of the share capital.

Although rarely invoked, section 271 of the Act allows a court (on the application of the liquidator, a creditor or a shareholder) to order a "related company" to pay the whole or part of claims made against a company in liquidation, where it is just and equitable to do so.

In the recent decision, the liquidators were successful in obtaining an order under section 271, requiring a parent company to pay the whole of a claim made in relation to a lease entered into by a wholly owned subsidiary in liquidation.

Click [here](#) for a case summary.

Although this decision is specific to the facts of the case, there are some key lessons to be learned. In particular, a parent company should ensure that there are appropriate legal and commercial arrangements in place to give effect to the separate legal status of each of its subsidiaries. This includes:

- ensuring that the subsidiary's board gives separate consideration to the position of the subsidiary, and does not just have regard to the interests of the parent company or the wider group (even where the subsidiary's constitution permits the board to have regard to such interests);
- operating the subsidiary as a separate company and not as a division of the parent company;
- maintaining separate company records and resolutions;
- if a common bank account is used for the group, ensuring that clear records of the subsidiary's transactions are kept within the internal records of the group, and that any payments and receipts through a common bank account are not accounted for as parent company transactions; and
- ensuring that invoices are addressed to the subsidiary.

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

---

<sup>1</sup> *Lewis Holdings Ltd v Steel and Tube Holdings Ltd* [2014] NZHC 3311.

## **Ignorance is bliss: trade creditors find it easier to hold on to payments received**

*The Supreme Court has released its decision in the long-running Fences & Kerbs litigation concerning voidable transactions,<sup>2</sup> adopting an interpretation of the voidable transaction regime that it acknowledged was against the "generally accepted view in New Zealand".*

The Court's decision means that it will now be significantly easier for a creditor to defend voidable transaction claims made by a liquidator. It provides greater certainty to suppliers that they will be able to retain payments received from debtors who subsequently go into liquidation. However, it will make it more difficult and more expensive for liquidators to make recoveries on voidable transaction claims, which have been an important source of funds for conducting liquidations.

The decision will provide significant relief for creditors aggrieved at the perceived unfairness of having a liquidator seek repayment of transactions when they had no knowledge of the debtor's insolvency. It will now be much more likely that they will be able to establish the defence in section 296(3) of the Companies Act to such claims, which will likely result in fewer applications to set aside transactions being brought by liquidators.

Conversely, the decision will require a significant change in how liquidators approach voidable transactions. In practice, the focus of argument will now be the creditor's knowledge of the company's insolvency. It is important to remember that it is for a creditor to prove that they did not have reason to suspect the company's insolvency, and that a reasonable person in their position would not have so suspected. Consequently, where a liquidator considers a transaction to be voidable, they still need to pursue this with the creditor who received payment.

Practically speaking, it will be in a creditor's interests to know as little as possible about the debtor's financial position prior to receiving a payment. Creditors should seek to avoid making reference to the potential insolvency of the debtor in writing. The decision may also deter creditors from taking enforcement action, which may subsequently be used as evidence of their knowledge.

Click [here](#) for a full discussion of the decision and its background.

---

<sup>2</sup> *Fences & Kerbs v Farrell* [2015] NZSC 7.

## **NZCC files criminal proceedings against Auckland finance companies**

*The Commerce Commission has filed criminal proceedings in the Auckland District Court against two finance companies, alleging their repossession and debt recovery practices breached the Fair Trading Act.*

The finance companies are charged with misleading debtors, including by:

- repossessing or threatening to repossess debtor's property when they did not have a right to do so;
- adding interest and costs to loan balances after debtors' property had been repossessed and sold;
- telling debtors they had to make loan payments at a higher rate than had been set by the Court; and
- telling debtors that they had a shorter time to remedy a loan default before their goods were repossessed than is allowed under law.

According to Commerce Commission Competition General Counsel Mary-Anne Borrowdale:

*"Ultimately it is now for the Court to decide whether the evidence shows that Budget Loans' and Evolution Finance's conduct was illegal. However, all finance companies should be aware that we are paying close attention to their conduct and won't hesitate to act if we believe they are misleading debtors about their rights and obligations."*

## Legislation/In Parliament

### **New Australian trans-Tasman mutual recognition regime regulations**

*Australia has enacted regulations<sup>3</sup> to allow for the continued effectiveness of the 2006 trans-Tasman recognition regime agreement between the Australian and New Zealand governments.*

This follows the coming into force of the New Zealand mutual recognition regime provisions in Part 9 of the Financial Markets Conduct Regulations 2014 on 1 December.

The regulations also provide for the transitional provisions under the new Financial Markets Conduct Act regime, which allow issuers to continue to comply with the Securities (Mutual Recognition of Securities Offerings - Australia) Regulations 2008 in certain circumstances until 1 December 2016.

The regulations allow New Zealand issuers of debentures, shares, interests in managed investment schemes and other securities to make offers in Australia using New Zealand disclosure documents, and without needing to meet other requirements of Australia's Corporations Act 2001 (for example, licensing requirements).

---

<sup>3</sup> The Corporations Amendment (Mutual Recognition of Securities Offers) Regulation 2014.

## **Non-bank Deposit Takers (Declared-out Entities) Regulations 2015**

*The [Non-bank Deposit Takers \(Declared-out Entities\) Regulations 2015](#) provide that, in certain circumstances, the Public Trust and specified classes of entities are not NBDTs for the purposes of the [Non-bank Deposit Takers Act 2013](#).*

The classes of entity are:

- intra-group funding vehicles;
- payment facility providers;
- special purpose vehicles established for raising capital for a registered bank; and
- small charities that would otherwise be NBDTs for the purposes of the Act.

Click [here](#) for more information.

## **Small changes to the Australian in-bound investment thresholds for 2015**

*In 2013, trans-Tasman business investment became significantly easier with the enactment of the Overseas Investment (Australia) Amendment Regulations 2013. The Australian in-bound threshold has been increased for 2015.*

The Overseas Investment Office recently confirmed that the Australian in-bound threshold, which currently applies to investments in business assets worth more than NZ\$477 million, will be increased to \$496 million for the period from 1 January to 31 December 2015. The current threshold of NZ\$100 million for Australian Government investments has also been increased to \$NZ104 million for the same period.

Australian investors continue to face the same rules as other overseas investors under the Overseas Investment Act for investments in sensitive land or fishing quota, and are also subject to the same rules where the proposed investment in a "significant business asset" includes sensitive land and/or fishing quota.

## Recent developments

### **CCCFA update - draft Responsible Lending Code**

*The Ministry of Business, Innovation and Employment (**MBIE**) received 45 submissions on the [Draft Responsible Lending Code](#) released for consultation late last year.*

The Code sets out detailed guidance for lenders on how to comply with the lender responsibility principles, which are due to come into force in June as part of wider amendments to the Credit Contracts and Consumer Finance Act 2003.

The submissions are available on MBIE's website [here](#).

Click [here](#) to read our earlier client update on the consultation.

## **Commerce Commission releases Unfair Contract Terms Guidelines**

*The Commerce Commission has published its final [Unfair Contract Terms Guidelines](#), setting out the approach the Commerce Commission will take when enforcing the new unfair contract terms provisions under the Fair Trading Act 1986.*

Click [here](#) for an update setting out the key changes that the Commerce Commission has made to the initial draft version of the Guidelines that were released in July last year.

## Phase 2 of the Financial Markets Conduct Act regime in place

*On 1 December 2014, the second phase of the implementation of the [Financial Markets Conduct Act 2013 \(FMCA\)](#) came into force.<sup>4</sup> Subject to some remaining transitional measures, this marks the final stage of the complete overhaul of New Zealand's financial and securities law regime, which was initiated nearly a decade ago.*

- transition measures in place following repeal of securities legislation;
- Financial Markets Authority guidance available on compliance timing and application issues;
- Financial Markets Conduct Regulations;
- key changes from the September unofficial draft FMC Regulations and the final FMC Regulations;
- additional regulations for the FMCA regime; and
- further changes still to come.

---

<sup>4</sup> Under the [Financial Markets Legislation \(Phase 2\) Commencement Order 2014](#).

## Latest from the Financial Markets Authority (FMA)

### Updated Corporate Governance in New Zealand – Principles and Guidelines handbook published

*At the end of last year, the Financial Markets Authority released the 2014 [FMA Corporate Governance in New Zealand – Principles and Guidelines handbook](#), which updates and replaces the Corporate Governance Handbook that was first produced by the then Securities Commission in 2004.*

This follows consultation on a draft version of the updated handbook in November 2014. For details of that consultation, see our earlier client update [here](#), and the summary of the FMA's responses to the submissions it received on that consultation [here](#).

Like the 2004 Corporate Governance Handbook, the 2014 handbook is intended to serve as a reference guide for directors, executives and advisers in their decisions about how best to apply nine key corporate governance principles, taking into account the current environment, and relevant international best practice. It also supports the principles underpinning the Financial Markets Conduct Act 2013.

The FMA has indicated that the handbook may be subject to further updates following review of the 2004 OECD Principles of Corporate Governance, which was also initiated in late 2014 and is expected to be completed later this year.

For further details on the updated handbook and the proposed changes to the 2004 OECD Principles of Corporate Governance see our client update: [FMA and OECD update their Corporate Governance Principles and Guidelines for the new corporate environment](#).

### Guidance released for FMCA accountability framework

*The FMA has released further guidance to assist with the implementation of Part 4 of the Financial Markets Conduct Act 2013 (**FMCA**). These are the:*

- *SIPO Guidance Note:* This guidance note on Statement of Investment Policy and Objectives (**SIPOs**) outlines how the FMA expects managers of managed investment schemes and their supervisors to approach SIPOs under Part 4 of the FMCA; and
- *Information sheet: Amendments to governing documents to comply with the FMCA:* This information sheet is an application guide for those who wish to seek the FMA's consent to governing document amendments under clause 26 of Schedule 4 of the FMCA.

These supplement the previous guidance given by the FMA for Part 4 (see *Guidance note: Governance under Part 4 of the FMC Act* and the *Information sheet: Reporting duties under Part 4 of the FMC Act*).

### Guidance on offers under the FMCA regime

*The FMA has updated its website, addressing the requirements for financial product offer information under the Financial Markets Conduct Act (**FMCA**).*

The information provided includes:

- an overview of the offer disclosure requirements;
- the FMA's position on pre-registration reviews of the new product disclosure statements; and
- issuers' obligations, disclosure exclusions and exemptions.

It also includes a [table](#) summarising circumstances where the disclosure exclusions in Part 1 of Schedule 1 of the FMCA are available, and what the associated limited disclosure and other requirements (if any) are for each exclusion.

## **FMCA exemptions under consideration**

*The FMA has noted that a number of exemptions will be required to be carried over from the Securities Act regime, in addition to exemptions required to address new issues arising under the Financial Markets Conduct Act regime.*

Under the Securities Act regime, a number of class exemptions were granted to address various difficulties encountered by market participants operating under the regime. Only some of these difficulties have been addressed as part of the Financial Markets Conduct Act 2013 (**FMCA**), and the associated Financial Markets Conduct Regulations 2014.

The FMA proposes to publish an outline of these issues this year, and consult on them in the first quarter of next year.

In the meantime, the FMA has prepared a table summarising which Securities Act exemptions it does not consider require new equivalent FMCA exemptions. See: [Issues that no longer arise under the FMC Act regime](#).

Businesses can continue to rely on these exemptions, to the extent they still apply and have not expired, during the two-year transition period for any offers made under the Securities Act regime.

For further information on exemptions under the FMCA [click here](#).

## **Revised guidance note: Offering financial products in New Zealand and Australia under mutual recognition**

*An updated guide has been published jointly by the FMA and the Australian Securities and Investments Commission for New Zealand and Australian issuers offering financial products, including interests in managed or collective investment schemes in both countries.*

The guidance note explains what issuers have to do under the trans-Tasman mutual recognition scheme for offers of financial products. A copy of the guide is available [here](#).

The guide replaces the earlier guide (last updated in 2011) and reflects the new trans-Tasman mutual recognition scheme under the Financial Markets Conduct Act 2013 and the Financial Markets Conduct Regulations 2014. It includes discussion on the transitional arrangements that are in place until 1 December 2016 for the continued application of the former Securities Act 1978 regime for some offers.

## **Consultation on additional standard conditions for Authorised Financial Advisers**

*Following on from the FMA's consultation in November 2014 on the minimum standards for Authorised Financial Advisers (AFAs) providing personalised Discretionary Investment Management Services (DIMS), the FMA invited feedback on proposed additional standard conditions set out in this [consultation paper](#), in place of those set out in FMA's November 2014 paper.*

The proposed additional standard conditions, which will only apply to AFAs authorised to provide personalised DIMS, will be incorporated into the standard conditions on 1 June 2015.

Click [here](#) for further details.

## **Report on issuers' compliance with filing financial statements**

*The FMA has released a follow-up report on its initial review last year on issuers' compliance with financial reporting filing obligations.*

In the report, the FMA notes that issuers should be considering what changes to processes and systems are required to ensure that they can meet the shorter preparation and financial reporting filing requirements under the Financial Markets Conduct Act 2013 (**FMCA**) for their first FMC balance date.

The report is available [here](#).

The FMCA reduces the time period for filing financial statements to four months after balance date.

An issuer's first FMC balance date depends on when and how it becomes an FMC reporting entity. The FMA website contains useful transition information for issuers [here](#).

## **FMA and NZX sign Memorandum of Understanding**

*In January this year, the FMA and NZX Limited (**NZX**) signed a [Memorandum of Understanding \(MoU\)](#) setting out the framework for engagement and co-operation between them in respect of their complementary regulatory responsibilities.*

The MoU focuses on four key areas and formalises protocols and structures to enable greater collaboration. These include:

- relationship governance;
- oversight review process;
- operational interaction between NZX and FMA; and
- public statements.

The MoU also confirms the inauguration of two joint NZX/FMA committees, one for oversight matters and the other for operational functions.

## **Handbook for directors considering an IPO**

*The FMA has published a new handbook aiming to help directors assess whether going public is the right choice for their company, and to provide an insight into the process.*

The handbook outlines six questions for directors of companies considering an Initial Public Offering to think about (and discusses matters to consider in relation to these questions):

1. Do I understand the company's business?
2. Is the board doing its job?
3. Have we chosen the right advisers and do I understand their roles?
4. Are we giving investors the right information?
5. Is the price right?
6. Do I understand the impact going public will have on the company?

Click [here](#) to read the handbook, which is intended to be read alongside another FMA handbook, [Corporate Governance in New Zealand: Principles and Guidelines](#) which is a resource for directors, executives and advisers to help them understand what is expected of them more generally in their governance roles.

## **Proposed additional standard conditions for Authorised Financial Advisers**

*In November last year, the FMA consulted on additional standard conditions for Authorised Financial Advisers (AFAs) providing personalised Discretionary Investment Management Services (DIMS).*

The main amendment was the removal of the mandatory audit requirement of the net tangible assets calculation for all AFA's providing personalised DIMS. The new proposed additional standard condition only requires AFAs providing personalised DIMS to have their net tangible asset calculations audited upon request of the FMA.

## **What is your FMC balance date?**

*The FMA has launched an [online tool](#) to help you work out your FMC balance date.*

It is important reporting entities identify their balance date early so they can plan ahead to meet the shorter filing timeframes.

## **Response to submissions on the content and form of information for the "Disclose" register**

*The FMA has published a response to submissions received from its recent "Consultation Paper: Content and form of Disclose register information".*

Click [here](#) to read the guidance note.

## **AML/CFT Audit - getting yours underway**

*For most businesses that are reporting entities for Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT), its AML/CFT Audit must be completed by 29 June 2015.*

As this will be the first AML/CFT Audit for most businesses, the FMA recommends starting early.

Useful information, including:

- how to get started;
- guidelines; and
- FAQs that detail specific information on what is necessary to complete your audit,

is available [here](#).

## **Fund update template and guidance for calculating risk indicators**

*The FMA has released a consultation paper for market participants that manage funds, and for their supervisors and investors.*

The paper explains how the FMA proposes to use two of the tools available to it under the Financial Markets Conduct Act 2013 and the Financial Markets Conduct Regulations 2014 to support the new offers regime for managed funds. The FMA consulted on a proposed "frameworks or methodologies" template for fund updates (which, when finalised, will be binding) and new guidance for calculating risk indicators.

Click [here](#) to read the paper.

## **Revised NZX continuous disclosure guidance note**

*The NZX has released an updated version of its continuous disclosure guidance note (the Revised Guidance Note).*

The Revised Guidance Note is a significant re-write of its predecessor (which was released in April 2011). It provides more detailed guidance on several important topics, in particular some of the key terms within the “material information” definition, immediacy, safe harbour concepts and various practical matters.

Click [here](#) for more information.

# Bell Gully news

For further details and more news visit the **publications section** of our website

## Useful Web links

### *New Zealand Government*

- [Consumer Affairs](#)
- [Inland Revenue Department](#)
- [Ministry of Business, Innovation & Employment](#)
- [Ministry of Foreign Affairs and Trade](#)
- [New Zealand Government](#)
- [NZ Treasury](#)
- [Office of the Clerk of the House of Representatives \[New Zealand Parliament\]](#)
- [Parliamentary Counsel Office](#)

### *New Zealand financial agencies and organisations*

- [Commerce Commission](#)
- [The Companies Office](#)
- [Export Credit Office](#)
- [NZ Law Commission](#)
- [Office of the Banking Ombudsman – password required](#)
- [Insurance and Savings Ombudsman](#)
- [Privacy Commissioner](#)
- [Personal Property Securities Register](#)
- [Reserve Bank of New Zealand](#)
- [Takeovers Panel](#)
- [Financial Markets Authority](#)

### *New Zealand commercial sites*

- [CLANZ](#)
- [Financial Services Federation](#)
- [Chartered Accountants Australia and New Zealand](#)
- [NZ Bankers' Association](#)
- [NZ Institute of Economic Research](#)
- [NZX](#)
- [The New Zealand Initiative](#)

### *Australian Government sites*

- [Banking Ombudsman](#)

### *Australian commercial sites*

- [Australian Financial Markets Association](#)
- [Australian Securities and Investment Commission](#)
- [Australian Stock Exchange](#)

### *International sites*

- [Bank for International Settlements](#)
- [International Monetary Fund](#)
- [International Swaps and Derivatives Association](#)
- [NASDAQ](#)
- [New York Stock Exchange](#)
- [United States Securities and Exchange Commission](#)
- [World Bank](#)