

Financial Services Quarterly

WINTER 2018



BELL GULLY

Welcome to the Winter 2018 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:

- [Financial services conduct and culture review](#)
- [Double tax agreement interpretation in the spotlight again](#)
- [Insider trading laws – clarity for the market](#)
- [Tax treatment of cryptocurrencies](#)

Need more information?

For more information on any of the cases, articles and features in *Financial Services Quarterly*, please email 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

[Double tax agreement interpretation in the spotlight again](#)

The correct interpretation of New Zealand's double tax agreements is once again in the spotlight after a recent Court of Appeal decision treats them in the same way as private contracts.

LEGISLATION/IN PARLIAMENT

[Review of Credit Contracts and Consumer Finance Act](#)

MBIE is undertaking a review of the 2015 amendments to the CCCFA to assess progress of the reforms.

[Insider trading laws – clarity for the market](#)

New regulations clarify that in most cases, insider trading rules do not apply to new issues of financial products.

[Financial advice regulatory reforms – update](#)

- Submissions on the Financial Services Legislation Amendment Bill
- Consultation paper on the Code of Professional Conduct for Financial Advice Services

RECENT DEVELOPMENTS

[Financial services conduct and culture review](#)

The Reserve Bank and the FMA have initiated a “review of conduct and culture by New Zealand financial services entities” in response to the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

[Tax treatment of cryptocurrencies](#)

The Inland Revenue has published a Q&A on the income tax treatment of cryptocurrencies, clarifying its view of some of the key issues.

[Reserve Bank consults on authorisation for unlicensed overseas banks](#)

The reform proposed by the consultation document is relevant for all overseas banks that have activities in New Zealand but are not registered banks in New Zealand.

Latest from the Financial Markets Authority

[Guidance for crowdfunding and peer-to-peer lending](#)

The FMA has published guidance on fair dealing in advertising and communications for licensed crowdfunding services, peer-to-peer lenders and the companies that offer financial products on these platforms.

[Improving financial information in an Equity PDS](#)

The FMA has finalised its Guidance Note: *Improving Financial Information in an Equity PDS*.

[Consultation on regulatory returns for licensed derivative issuers, MIS managers and DIMS providers](#)

The FMA has consulted on the content of the new regulatory returns process from licensed derivative issuers, managers of managed investment schemes, providers of discretionary investment management services, and other interested parties.

[Soft commissions and the conflicts they create for insurance advisers](#)

The FMA has published a report on how soft commissions can create the risk of conflicted conduct for insurance advisers.

[Proposal to require market service licensees make an annual declaration of compliance](#)

The FMA recently consulted on whether market service licensees (but not licensed independent trustees) should be required to make an annual declaration of compliance as part of the regulatory return under their standard licence conditions.

[FMA provides financial information guidance for an Equity PDS](#)

The FMA has issued guidance on the financial information section contained in a product disclosure statement for a regulated offer of equity securities (Equity PDS).

[Room for improvement in PDSs](#)

The FMA has issued a report summarising feedback from investors who had recently invested in an IPO, bond offer or property scheme offered as a managed investment scheme.

[Continuous disclosure obligations during voluntary administration](#)

The FMA intends to file a case stated procedure to seek the court’s determination on whether continuous disclosure obligations for listed issuers continue to apply when the issuer is in voluntary administration.

IN THE COURTS

Double tax agreement interpretation in the spotlight again

The correct interpretation of New Zealand's double tax agreements is once again in the spotlight after a recent Court of Appeal decision treats them in the same way as private contracts.

Previously, local and international rulings suggested the international context and purposes of such treaties should be taken into account.

Click [here](#) for a summary of the decision and its implications.

LEGISLATION/IN PARLIAMENT

Review of Credit Contracts and Consumer Finance Act

The Ministry of Business, Innovation and Employment is undertaking a review of the 2015 amendments to the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) to assess progress of the reforms.

In particular, the review will look at whether there is:

- better informed decision making for consumers;
- reduced predatory and irresponsible lending; and
- increased lender compliance with legal requirements.

A discussion paper is expected to be released in the next couple of months, with recommendations to Cabinet expected in the final quarter.

Click [here](#) for more information.

Insider trading laws – clarity for the market

New regulations clarify that in most cases, insider trading rules do not apply to new issues of financial products.

Amendments to the Financial Markets Conduct Regulations 2014, which come into effect on 7 June 2018, remove uncertainty around whether or not insider trading rules apply when new financial products are being issued.

Click [here](#) for a full report on the new regulations and their implications.

Financial advice regulatory reforms – update

Submissions on the Financial Services Legislation Amendment Bill

The Economic Development, Science and Innovation Select Committee has released 71 submissions it received on the Financial Services Legislation Amendment Bill (**FSLA Bill**), and has until 7 June 2018 to report back to the House on its recommendations.

The Ministry of Business, Innovation and Employment (**MBIE**) will now engage with consumers and industry to develop draft regulations for the new regime, including regulations that set the new disclosure requirements specifying what should be disclosed, to whom, how and when.

Click [here](#) for more information.

Consultation on the Code of Professional Conduct for Financial Advice Services

The Code Working Group established by the MBIE released a consultation paper setting out its preliminary thoughts on the key concepts for the new Code of Professional Conduct for Financial Advice Services, which will be a central part of the new financial advice regime.

Once the new code has been approved, businesses will have about nine months to get a transitional licence, and two years to become fully licensed.

Click [here](#) for more information.

RECENT DEVELOPMENTS

Financial services conduct and culture review

*The Reserve Bank of New Zealand (**Reserve Bank**) and the Financial Markets Authority (**FMA**) have initiated a “review of conduct and culture by New Zealand financial services entities” in response to the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Australian RC**).*

The Australian RC was established late last year in response to reports of widespread misconduct in Australian financial services, and is expected to issue its final report and recommendations early in 2019.

Concerned that the Australian RC might affect confidence in New Zealand’s financial institutions, the Governor of the Reserve Bank and the FMA’s Chief Executive met with 16 New Zealand bank chief executives, seeking assurances that the issues identified by the Australian RC were not evident in New Zealand.

Following these meetings, a “review of conduct and culture by New Zealand financial services entities” was initiated, involving 10 banks and 15 life insurance companies.

To date, the review has not uncovered evidence of any systemic issues that would warrant a commission of inquiry in New Zealand, but the Reserve Bank and the FMA are conscious that the work they have initiated may test this view.

Click [here](#) to read the Reserve Bank’s and the FMA’s joint statement.

Tax treatment of cryptocurrencies

The Inland Revenue has published Q&A on the income tax treatment of cryptocurrencies, clarifying its view of some of the key issues.

Click [here](#) for a summary of the key issues.

Click [here](#) to read the publication: *Questions & Answers: Cryptocurrency and tax.*

Reserve Bank consults on authorisation for unlicensed overseas banks

The reform proposed by the consultation document is relevant for all overseas banks that have activities in New Zealand but are not registered banks in New Zealand.

Section 64 of the Reserve Bank of New Zealand Act 1989 prohibits a person from “*carry[ing] on any activity directly or indirectly in New Zealand ... using a name or title that includes a restricted word*” (such as “bank”). The prohibition is deliberately drafted in broad terms.

In August 2017, the RBNZ announced its intention to reform the current process it undertakes to permit an unlicensed (i.e., non-registered) bank to operate in New Zealand without violating section 64. The current process typically involves an application by the bank for a ‘non-objection’ letter from the RBNZ.

That process is set to change if and when the RBNZ’s proposal is implemented. Specifically, the RBNZ is proposing that the non-objection letter process be discontinued, and replaced by the authorisation process in section 65. The new section 65 process will be a considerably more comprehensive one than the current non-objection letter process. Moreover, once an authorisation has been granted, the authorised bank will face on-going conduct and reporting obligations in New Zealand.

Until the new policy is finalised, the Reserve Bank has stated that it will not be assessing new applications by overseas banks to carry on activities in New Zealand using restricted words without becoming registered banks in New Zealand. There will likely be a transitional period for overseas banks who already have letters of non-objection after the new policy is formally introduced.

Click [here](#) to read the Reserve Bank’s consultation paper. Submissions close on 6 June 2018.

LATEST FROM THE FINANCIAL MARKETS AUTHORITY

Guidance for crowdfunding and peer-to-peer lending

The Financial Markets Authority (FMA) has published guidance on fair dealing in advertising and communications for licensed crowdfunding services, peer-to-peer lenders and the companies that offer financial products on these platforms.

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

Improving financial information in an equity PDS

The FMA has finalised its Guidance Note: Improving Financial Information in an Equity PDS.

The revisions on the guidance result from consultation carried out last year in response to concerns that:

- the financial information presented in an equity PDS was unnecessarily complicated; and
- issuers and their professional advisers had different interpretations than the FMA on the application of some of the rules.

Click [here](#) to read the Guidance Note.

FMA consults on regulatory returns for licensed derivative issuers, MIS managers and DIMS providers

The FMA has consulted on the content of the new regulatory returns process for licensed derivative issuers, managers of managed investment schemes, providers of discretionary investment management services, and other interested parties.

The consultation, which has now closed, outlined the information the FMA plans to ask about the regulatory returns for providers.

Click [here](#) for more information.

Soft commissions and the conflicts they create for insurance advisers

The FMA has published a report on how soft commissions can create the risk of conflicted conduct for insurance advisers.

Direct connections were found between incentives like overseas trips and switching policies to reach volume targets, and the FMA is concerned that insurers are designing and offering incentives that potentially set advisers up to fail in complying with their obligations.

Click [here](#) to read the FMA's report: *Conflicted remuneration (soft commissions) in the life and health insurance industry.*

Sales and advice, and the risks of conflicted conduct will be examined in two further reviews by the FMA. One will look at insurance replacement business practices in large financial institutions, while the other will look at the structure of bank incentives in the sale of financial products.

Proposal to require market service licensees make an annual declaration of compliance

The FMA recently consulted on whether market service licensees (but not licensed independent trustees) should be required to make an annual declaration of compliance as part of the regulatory return under their standard licence conditions.

Click [here](#) for more information.

FMA provides financial information guidance for an Equity PDS

*The FMA has issued guidance on the financial information section contained in a product disclosure statement for a regulated offer of equity securities (**Equity PDS**).*

This follows concerns that financial information was being presented in an unnecessarily complicated manner, and different interpretations were being given to certain regulatory requirements for the Equity PDS (set out in Schedule 3 of the Financial Markets Conduct Regulations 2014).

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

Room for improvement in PDSs

The FMA has issued a report summarising feedback from investors who had recently invested in an IPO, bond offer or property scheme offered as a managed investment scheme.

Generally, investors found the product disclosure statement (**PDS**) useful, and an improvement on previous offer documents.

However, even experienced investors still struggled with some aspects of the PDS, and the FMA would like to see issuers improve their disclosures. Feedback suggests investors would like to see:

- more detailed information about the company's management and directors, as well as social responsibility information;
- a financial information section that is not overly complex; and
- risk information that is not too broad and generic.

For further information, click [here](#) to read the FMA's media release, and [here](#) to read the report *Product disclosure statements: understanding investors' information needs*.

Continuous disclosure obligations during voluntary administration

The FMA intends to file a case stated procedure to seek the court's determination on whether continuous disclosure obligations for listed issuers continue to apply when the issuer is in voluntary administration.

Click [here](#) to read the FMA's media release.

BELL GULLY NEWS

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

[Holidays Act to be reviewed](#)

[GDPR \(EU\) and Privacy Bill \(NZ\) - a momentous week for privacy law](#)

[A win for contractual certainty - UK Supreme Court finds "no oral variation" clauses enforceable](#)

[Multinational tax proposals move closer to enactment with \(some\) taxpayer concessions](#)

[CCH New Zealand Budget Report 2018](#)

[OIO residential land amendments delayed](#)

[Insider trading laws - clarity for the market](#)

[Proposed GST changes for low value goods](#)

[A fresh look at the recoverability of takeover expenses](#)

[NZX consults on revamped listing rules under a new market structure](#)

[Tax treatment of cryptocurrencies - Questions and \(some\) Answers](#)

[Double tax agreement interpretation in the spotlight again – Court of Appeal reverses foreign tax credits decision](#)

[New reforms set to modernise Privacy Act](#)

[Bell Gully's the big picture: takeovers update](#)

[Employers face claims by MBIE for holiday pay non-compliance](#)

[Insurance contract law reform back on the agenda for 2018](#)

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

- [NZFMA](#)
- [ILANZ](#)
- [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](#)

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

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

BELL GULLY