CORPORATE REPORTER

23 July 2020

ITEMS IN THIS ISSUE INCLUDE:

- Update on the new financial advice regime commencing on 15 March 2021
- FMA, NZX and other corporate COVID-19 regulatory relief measures that remain in place
- FMA consultation on renewal of FMC Act exemption notices
- NZX consultation on direct listings
- Changes to the overseas investment regime and consultation on further changes
- Emissions trading reforms in place
- The new Privacy Act and consultation on replacement codes of practice
- The latest media releases from the New Zealand Commerce Commission and the Australian Competition and Consumer Commission

WELCOME

to issue No.64 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.

CAPITAL MARKETS | MERGERS & ACQUISITIONS | COMMERCIAL | CORPORATE LAW | COMPETITION & CONSUMER LAW

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CAPITAL MARKETS - general developments

New financial advice regime delayed until 15 March 2021

The government has delayed the start of the new financial advice regime as a result of the impacts of the COVID-19 pandemic.

The original start date of 29 June 2020 has been extended to 15 March 2021 under the Financial Services Legislation Amendment Act Commencement Order 2020.

Transitional licensing remains open until the start date of the new regime, and applications are being processed. The Financial Markets Authority (**FMA**) is recommending that applications be submitted before the end of 2020 as a contingency. Transitional licences granted will come into effect on 15 March 2021. From that date, full licence applications will start to be processed.

The new Code of Professional Conduct for Financial Advice Services will also come into force on the new start date. However, there will be a further two-year transition period that includes a safe harbour for existing advisers to continue providing the advice they are able to provide under the current Financial Advisers Act regime while they work towards meeting the new competency standards set by the Code.

The FMA has advised that Authorised Financial Advisers will not be required to submit their annual 'information returns' this year, providing regulatory relief ahead of the new regime.

As an interim measure the FMA has also indicated that it will extend the following exemption notices (which are due to expire in November this year) up until the new financial advice regime legislative changes have been brought fully into effect:

- Financial Advisers (Non-NZX Brokers – Client Money) Exemption Notice 2017
- Financial Advisers (NZX Brokers – Client Money and Client Property) Exemption Notice 2015
- Financial Markets Conduct (Offers of Financial Products Through Authorised Financial Advisers Supplying Personalised DIMS) Exemption Notice 2015

All three updated notices are expected to be place by September 2020.

All other obligations under the Financial Advisers Act 2008 and current Code of Professional Conduct remain in force until 15 March 2021.

Disclosure requirements finalised for the new financial advice regime

The government has set new disclosure requirements to ensure that consumers can make more informed decisions under the new regulatory regime for financial advice which comes into force in March 2021.

The disclosure requirements are set out in the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2020 (**regulations**) made under the Financial Services Legislation Amendment Act 2019. They do not come into force until 15 March 2021, but enacting them now gives market participants the time they need to prepare for the new regime. As a consequence the proposed transition provisions in the October 2019 exposure draft of the regulations have not been included in the regulations.

There have been a number of improvements made to the regulations in response to feedback the Ministry of Business, Innovation and Employment (**MBIE**) received on the exposure draft. A summary of those changes are set out in an information sheet published by MBIE. Many of those changes have been directed at ensuring the disclosure obligations are more workable for the range of circumstances in which financial advice is given. For example, the previously proposed record keeping requirement for each disclosure made has been removed, and a materiality threshold has been added to avoid over-disclosure of matters like conflicts, commissions, incentives and regulatory actions so that they only apply where such matters would likely materially influence a client's decision.

The regulations amend the Financial Markets Conduct Regulations 2014 (**FMC Regulations**) by requiring people who give regulated financial advice to retail clients to give the information set out in a new Schedule 21A of the FMC Regulations. This includes information regarding:

- the licence status they hold and certain duties that they are subject to,

- the financial advice services they can provide, the range of products they can advise on, and any limitations on the advice,
- the applicable fees and costs associated with the advice,
- the commissions, incentives and other conflicts of interests that could impact the advice,
- the complaints handling and dispute resolution process, and
- any previous disciplinary history, and certain criminal convictions or civil proceedings.

Different information is required to be disclosed at different stages of the advice process so that clients receive information as it becomes relevant to them. In summary, those stages are:

- public disclosure (to give retail clients access to information that will help them find a financial advice provider that meets their needs),
- disclosure when the nature and scope of the advice a client is seeking become known (to give retail clients information that will help them make an informed decision about whether to seek advice from a particular person or provider or whether to act on that advice),
- disclosure when advice is given (to give retail clients information that will help them make an informed decision about whether to act on advice that they have been given), and
- disclosure when a complaint is made (to give dispute resolution information).

Consultation on proposed licensing conditions for financial advice providers

In preparation for full licensing of financial advice providers under the Financial Services Legislation Amendment Act 2019 commencing on 15 March 2021, the FMA is consulting on the proposed classes of licence and the standard conditions to be imposed on full licences.

The FMA is considering imposing eight standard conditions for full licences. All financial advice provider full licence holders and each of their authorised bodies will need to comply with the standard conditions.

Submissions on the consultation paper close on 7 August 2020.

The standard conditions currently imposed on financial advice provider transitional licences remain unchanged.

Update on the Financial Markets (Conduct of Institutions) Amendment Bill

The Finance and Expenditure Committee report on the Financial Markets (Conduct of Institutions) Amendment Bill has been deferred until 12 August 2020, the day when Parliament will be dissolved for the general election.

Technically the Bill will also lapse on that day, but it can be reinstated by the new House when Parliament resumes.

The written submissions made to the select committee are now available online here, including Bell Gully's submission which can be viewed here.

The Bill proposes a new conduct regulation regime that will affect banks, insurers, non-bank deposit takers and intermediaries. As introduced, the Bill proposes a far reaching set of new systems and controls requirements and flags the possibility of incentive compensation being subject to detailed regulatory restrictions. For further details on the Bill see our publication: The Big Picture: Financial Markets - Are you prepared for a conduct regulation regime?

FMA consults on expiring FMC Act class exemption notices

The FMA is consulting on 16 existing class exemption notices supporting the Financial Markets Conduct Act 2013 (FMC Act) regime that will expire in the second half of 2021. Submissions close on 20 August 2020.

These notices, which were put in place when the regime was first implemented, provide solutions to various FMC Act regime compliance issues that are unique to particular classes of market participants.

In order to renew the notices the FMA is required to ensure that the statutory test for renewing the exemption is met. This includes obtaining evidence from market participants about the extent of reliance on each exemption notice under review, the impact of the exemptions (and what the impact of not having the exemptions would be) and compliance costs.

In addition to seeking feedback on those matters, the FMA is also interested in addressing any amendments to the notices that may be required, and is particularly interested in issues that have been raised concerning the following notices:

- Financial Markets Conduct (Overseas Registered Banks and Licensed Insurers) Exemption Notice 2020, which replaced the expired 2016 notice in May this year for an interim period, and the Financial Markets Conduct (Overseas FMC Reporting Entities) Exemption Notice 2016 (with regard to extending the current lists of overseas GAAP and the jurisdictions in those notices, and on whether any additional conditions should be imposed for reliance on the notices),
- Financial Markets Conduct (Incidental Offers) Exemption Notice 2016 (with regard to any further recognised overseas exchanges or overseas GAAP which should be included in the notice),
- Financial Markets Conduct (Employee Share Purchase Schemes) Exemption Notice 2016 (relating to (i) whether offers of options to acquire equity securities by way of transfer should be included in the notice and (ii) whether to extend the relief under the notice for unique offerings of non-voting shares under an employee share purchase scheme that go beyond the 10% limit),
- Financial Markets Conduct (Overseas Banks Offering Simple Debt Products) Exemption Notice 2016 (with regard to the jurisdictions recognised in the notice).

The FMA's initial review of the exemption notices indicates that only two of the 16 notices under review may be redundant because they are not relied on. Those are the:

- Financial Markets Conduct (Disclosure using Overseas GAAP) Exemption Notice 2016, and
- Financial Markets Conduct (Recognised Exchanges) Exemption Notice 2016. (However, the FMA is interested in feedback on whether there are any technical or practical difficulties that may be impeding reliance on this notice).

The other exemption notices under review are the:

- Financial Markets Conduct (Overseas Subsidiary Balance Date Alignment) Exemption Notice 2016,
- Financial Markets Conduct (Employee Share Purchase Scheme Shares Offered under Securities Act 1978) Exemption Notice 2016,
- Financial Markets Conduct (Securities Offered under Securities Act 1978 Exemptions Recognising Overseas Regimes) Exemption Notice 2016,
- Financial Markets Conduct (Licensed Independent Trustees of Restricted Schemes) Exemption Notice 2016,
- Financial Markets Conduct (Communal Facilities in Real Property Developments) Exemption Notice 2016,
- Financial Markets Conduct (Property Schemes – Custody of Assets) Exemption Notice 2016,
- Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016,
- Financial Markets Conduct (Equine Bloodstock) Exemption Notice 2016, and the
- Financial Markets Conduct (Small Co-operatives) Exemption Notice 2016.

The consultation document and the template for making submissions are available here.

FMA renews FMC Act financial reporting exemption for small DIMS providers

An exemption in favour of small discretionary investment management services (DIMS) providers relating to certain financial reporting requirements has been renewed by the Financial Markets Authority.

The Financial Markets Conduct (Financial Reporting – DIMS Licensees) Exemption Notice 2020 grants an exemption in favour of small to medium-sized licensed providers of DIMS. It provides relief from certain financial reporting and audit obligations under the Financial Markets Conduct Act, depending on the

amount of retail funds under management. The notice renews the exemptions contained in the 2015 notice, with no substantive changes.

Relief granted for eligible restricted schemes from assurance engagement requirement

The Financial Markets Conduct (Restricted Schemes – Custodian Assurance Engagement) Exemption Notice 2020 grants relief to certain custodians of eligible restricted schemes from the obligation to obtain an assurance engagement from an auditor.

The relief is aimed at those custodians which directly hold all of the scheme property and where the performance of all administration functions and relevant record-keeping functions with respect to the holding of scheme property is contracted to a single, New Zealand-based administration manager.

In such cases, the custodian assurance engagement is in practice supplemented by an assurance engagement obtained by the administration manager, and so the benefits of requiring the custodian to obtain a custodian assurance engagement are outweighed by the costs.

FMA publishes review findings and guidance on financial reporting

Following the Financial Market Authority's 2019 review of 30 NZX listed entities' compliance with financial reporting requirements, the FMA has published a report setting out its key findings. The report also provides guidance and expectations for future reporting, particularly given the rapidly changing COVID-19 environment.

Areas identified as requiring improvement include:

- a lack of accounting records for:
  - management discussions and conclusions on areas involving significant judgement and/or complex accounting estimates,
  - supporting the completeness of identified related parties, related party transactions and disclosures of these in the financial statements, and
  - supporting the materiality considerations (both quantitative and qualitative), including the materiality considerations made to the level of disclosures in the notes to the financial statements.
- inadequate disclosure of significant accounting estimates and judgements,
- inadequate disclosures on new accounting standard requirements, in particular with NZ IFRS 15 Revenue from Contracts with Customers, and
- failure to follow FMA's guidelines concerning non-GAAP financial information.

The report also notes the importance of interim financial statements which may be the first financial report released for listed entities post COVID-19. The FMA is expecting those statements, particularly for material and relevant matters (such as estimation uncertainties, key assumptions, business impact, underlying drivers of performance, strategies, risks and future prospects), to include the same level of disclosure that would be required for the full financial statements.

To assist with the preparation of financial statements, the FMA highlights the Australian regulatory body (ASIC) publication COVID-19 implications for financial reporting and audit: Frequently asked questions as a useful resource.

The External Reporting Board has also published a guide that explains the communication tools used in auditor reports and the likely impact of COVID-19 on auditor reporting.

FMA and XRB issue second report on enhanced auditor reporting

The FMA and the External Reporting Board (XRB) have followed up their 2017 report on key audit matters (KAMs) with a new report on the evolution of trends in KAM reporting in the three years since they were introduced.

KAMs provide transparency about the matters that, in the auditor's judgement, were of most significance in the audit of the financial statements. The objective of KAMs is to provide users of the financial statements with a better understanding of how the audit was conducted and complexities that arose, by disclosing information previously only available to those charged with governance at the entity.

The review included detailed analysis of 254 audit reports, with analysed trends by sector for banking and finance, and insurance, as well as common KAMs reported within other sectors. The most notable KAMs relate to:

- The entity's strategic goals, or wider macro-economic or environmental factors.
- Compliance with financial covenants.
- Scoping of the audit and assessing sufficiency of audit evidence obtained for differing geographic locations and businesses.
- Significant events in the current year.
- The impact of accounting standards issued but not yet effective.
- Non-financial areas (particularly for public entities).

Users can expect to see much more variation in audit reports in response to the impact of COVID-19, including new KAMs, and different responses to the KAMs identified.

FMA guidance on liquidity risk management for managed investment schemes

The FMA has published a guide on liquidity risk management, setting out its expectations for the Managed Investment Scheme (MIS) managers it supervises. This includes guidance on managing liquidity risk at times of heightened market uncertainty and volatility, such as in the current COVID-19 pandemic.

The information in this guide is also relevant to supervisors in relation to their frontline regulatory oversight of MIS managers.

The guide contains principles and practices for liquidity stress testing and related management, sourced from a range of authoritative international sources, including the work of the Financial Stability Board and the International Organization of Securities Commissions.

The FMA also notes that the guide provides context for MIS managers in preparation for the FMA's proposed survey of MIS liquidity risk management practices which it intends to undertake in late 2020.

Auditor Regulation and Oversight Plan 2020-2023

The FMA has published its Auditor Regulation and Oversight Plan 2020-2023.

The plan sets out the areas the FMA will focus on as part of its role in reviewing the quality of FMC audits, and contributing to the integrity and development of the audit profession.

NZX consults on disclosure settings for direct listings

NZX has released a consultation paper seeking submissions in respect of proposals to amend the disclosure settings for direct listings.

In this context 'direct listings' refers to both compliance listings (when a new issuer lists on NZX without conducting a capital raising or selling down its existing financial products) and reverse listings (where an existing issuer enters into a transaction which results in a significant change in the ownership of the majority of its shares; and, the nature of its business).

NZX is proposing to make changes to the NZX Listing Rules to amend the disclosure settings for direct listings by:

- clarifying that prospective financial information is not required to be included in Profile documents, and
- introducing a framework for NZX Foreign Exempt Issuer applicants that have an existing listing and quotation on ASX or another Recognised Stock Exchange, to allow NZX to prescribe the nature and content of the Profile documents for such applicants, through templates designed on a jurisdictional basis.

The final date for submissions is **31 July 2020**.

FMA levy changes for the Financial Service Providers Register

The Financial Markets Authority (Levies) Amendment Regulations 2020 amend regulations on levies payable by specified classes of financial market participants.

The amendments set out in the Regulations, which came into force on 1 July, increase the levies payable, and introduce three new levy classes for:

- administrators of financial benchmarks that hold a market services licence,
- smaller listed issuers, and
- licensed market operators that operate a growth market.

The Companies Office, which is responsible for collecting the levies on behalf of the FMA, provides a breakdown of the new levies on its website here. The Financial Service Provider Register has a separate table for each relevant levy class.

The Regulations also revoked the Financial Markets Authority (Levies) Amendment Regulations 2019 (mostly not yet in force) on 26 June, due to the new financial advice regime being delayed.

FMA's annual Statement of Intent and NZX compliance review

The FMA has published its latest Statement of Intent for 2020-24 and annual NZX General Obligations Review for the period 1 January to 31 December 2019, providing valuable insight into the FMA's current approach and steps businesses can take to assist compliance with financial markets rules.

For commentary on what you need to know from these publications refer to our recent update here.

Reserve Bank of New Zealand Act Review – consultation extended

The government has extended the third round of consultation for Phase 2 of the Review of the Reserve Bank of New Zealand Act by six months.

Noting that regulatory agencies, industry and other stakeholders are focussed on dealing with the impacts of COVID-19, the date for submissions has been extended to 23 October 2020.

This consultation focuses on the proposed Deposit Takers Act, which will:

- provide for a new prudential regulatory regime for 'deposit takers' – financial institutions that take deposits and provide loans, such as banks and credit unions; and
- introduce a deposit insurance scheme, which will insure deposits up to NZ$50,000 on a per depositor, per-institution basis.

Click here for more information.

Reserve Bank releases its Appointed Actuary Thematic Review Report

The Reserve Bank has released a number of recommendations in a comprehensive review of the Appointed Actuary role.

The review was launched to better understand how the Appointed Actuary role works in practice for insurers, actuaries and the Reserve Bank, and to identify potential areas for improvement to make the role and regime more effective.

Although the review concludes that the regime and appointed actuary role are largely effective, a number of key areas for improvement were identified. This includes the need for clarity and guidance around the Reserve Bank's expectations of the Appointed Actuary role, and the risk that the impartiality of the Appointed Actuary could be adversely impacted by factors such as the influence of senior management and reporting lines. For further details see the full report here.

A number of recommended improvements require legislative change, and these will be subject to consultation during the Insurance (Prudential Supervision) Act 2010 review which will be re-launched later this year.

The Reserve Bank has also outlined its expectations of insurers and Appointed Actuaries with respect to the existing requirements in a policy note which will be followed up with formal guidance following the public consultation.

The Reserve Bank is reviewing the Insurance (Prudential Supervision) Act 2010 (**IPSA**). This review was put on hold in line with the regulatory relief offered by the Reserve Bank in response to the COVID-19 pandemic, and some of the matters raised regarding the Reserve Bank's role in considering the sale and wider oversight of the insurance sector will be factored into this review including; increased policyholder protection, making regulatory processes more efficient and removing unnecessary compliance costs on the industry. The Reserve Bank intends to resume the IPSA review from the first quarter of 2021, with an overarching consultation on the review's scope. The review is likely to be a two to three year process.

Update on the Financial Market Infrastructures Bill

The Finance and Expenditure Committee report on the Financial Market Infrastructures Bill has been deferred until 12 August 2020, the day when Parliament will be dissolved for the general election.

Technically the Bill will also lapse on that day, but it can be reinstated by the new House when Parliament resumes.

The written submissions made to the select committee are now available online here.

The Bill establishes a new regulatory regime for financial market infrastructures (**FMIs**), those multilateral systems which provide trading, clearing, settlement, and reporting services in relation to payments, securities, derivatives, and other financial transactions.

It also provides certain FMIs with legal protections concerning settlement finality, netting, and the enforceability of their rules. The Bill will replace Parts 5B and 5C of the Reserve Bank of New Zealand Act 1989.

We outlined the key parts of the Bill in our earlier publications here and here.

Progress made on the Infrastructure Funding and Financing Bill

The Transport and Infrastructure Committee has reported back on the Infrastructure Funding and Financing Bill, introduced to Parliament at the end of 2019. The Bill is now at the Committee of the whole House stage, and is expected to complete the Parliamentary process before the House rises and Parliament is dissolved for the general election.

The Bill introduces a new funding and financing model to support the provision of infrastructure for housing and urban development.

The core of the new funding model involves the setting of a multi-year levy (enabled by legislation) for a local infrastructure project, which is paid by beneficiaries of the projects to a Special Purpose Vehicle (**SPV**). This levy would be collected by local authorities via their normal rates collection mechanisms, on behalf of the SPV, and used to service the financing raised to pay for the infrastructure. Typically, a levy would last between 25 to 50 years. Once constructed, the infrastructure will transfer to the relevant local authority who will have ongoing responsibility for operating and maintaining the asset.

The Bill aims to create flexibility in the infrastructure financing system so that economically viable projects can go ahead, without being burdened by a local authority's financing constraints. Crucially, the Bill will separate the financing decisions of the infrastructure project from a local authority's usual financing processes and constraints by ring-fencing debt away from a local authority's balance sheet.

There are no changes to the statutory processes local authorities are obliged to follow when planning and consenting infrastructure.

The Committee received 38 written submissions in total, 32 from organisations and 6 from individuals, with the majority supporting the broad intent of the Bill and the enabling model.

A copy of the Committee's report and its recommended amendments to the Bill is available here.

FMA renews Takeovers Panel exemption from FMC Act disclosure obligations

The Financial Markets Conduct (Takeovers Panel) Exemption Notice 2020 has been enacted to replace the 2015 Notice which was revoked on 15 July, without any substantive amendments.

The notice exempts the Takeovers Panel from the substantial holding disclosure provisions of the Financial Markets Conduct Act 2013 (**FMC Act**) in respect of any relevant interest in quoted voting products of a listed issuer that the Panel has, as the result of an enforceable undertaking granted in performing its regulatory role in Takeovers Code regulated transactions.

Court rules on status of cryptocurrencies

For as long as cryptocurrencies have been around, lawyers have pondered over the existential question of what exactly they are. In a landmark decision, the High Court considered the legal nature of cryptocurrencies for the first time in New Zealand.

The two key issues before the Court were:

- Is cryptocurrency "property" as defined in section 2 of the Companies Act 1993 and, as a related issue, can cryptocurrencies form the subject matter of a trust?
- Was the company that went into liquidation holding cryptocurrency on trust for account holders through the provision of its storage and exchange services?

Click here for a full summary of, and commentary on, the case.

AML/CFT counter-measures required for new high-risk jurisdictions

The Financial Action Task Force (FATF) has issued a Call for Action in relation to two countries – Democratic People's Republic of Korea (DPRK) and Iran.

This calls upon all jurisdictions, including New Zealand, to apply AML/CFT counter-measures to protect the international financial system from the ongoing money laundering, terrorism financing, and proliferation financing risks emanating from the DPRK and Iran. On 20 May 2020, the Ministry of Justice and New Zealand Police issued a joint statement in relation to these countries and the FATF Call for Action.

CAPITAL MARKETS - COVID-19 temporary measures

FMA's COVID-19 'no-action' approach

In April the FMA announced that the primary approach it intended to take was 'no-action' where a market participant breaches, or expects to breach, a regulatory obligation as a result of the COVID-19 circumstances and seeks relief from the FMA.

As part of this approach, there is a general expectation that where possible, breaches will be remediated at a later date, and as such the requirement to comply is being delayed rather than removed. The FMA also expects market participants to take steps to mitigate any risks resulting from the breach.

The FMA has published details of some of its 'no-action' decisions that affect a wide range of market participants. These include decisions made on requirements relating to:

- licensed discretionary investment management service (**DIMS**) providers' quarterly limit break reports, quarterly related party transaction reports, quarterly DIMS retail client reports and DIMS retail client annual reports,
- licensed intermediaries, licensed derivatives issuers, and MIS managers' agreed upon procedures reports, and
- MIS managers' full portfolio holdings reports.

Further details on the FMA's 'no-action' approach and on how to apply for such relief is available on the FMA's website here. The FMA has also granted class exemption notices in relation to COVID-19 for certain financial reporting and assurance engagement obligations, as discussed below.

COVID-19 related reporting relief for FMC reporting entities and scheme managers

Regulatory relief for periodic reporting and other reporting and disclosure requirements for FMC reporting entities and scheme managers has been formalised under the Financial Markets Conduct (Financial Reporting and other Relief – COVID-19) Exemption Notice 2020, effective from 29 April 2020.

This notice provides FMC reporting entities, with accounting periods that end on or after 31 December 2019 but before 1 August 2020, six months to comply with the Financial Markets Conduct Act requirement to produce and file their audited financial statements. This is provided the relevant entity believes, on reasonable grounds that it is not reasonably practicable for it to comply within the standard statutory period of four months because of the outbreak of COVID-19. A similar extension is provided for managers of a registered scheme, which have up to six months to produce the scheme's audited financial statements for balance dates from 31 January 2020 to 31 July 2020.

Examples provided by the FMA on what might constitute reasonable grounds includes the additional time that may be required to assess the impact of COVID-19 on the entity's business, and how that information should be reflected in their financial statements.

Other conditions for reliance on the notice, include:

- notifying the FMA in writing that they are relying on the exemption on or before the original due date for the obligations, and
- in some cases, lodging a copy of the notice to the FMA with the Registrar of Financial Service Providers.

Where a market participant relies on an extension for providing audited financial statements, the notice also allows such participants two-month extensions from other related FMC Act requirements, as summarised in the table below.

Market participant	Additional two-month extensions for other related requirements
Continuous equity and debt issuers	Updating certain information on the offers register
Managers of registered schemes	Preparing an annual report
Managers of restricted schemes that are not operated on a unitised basis	Making an annual fund update available and supplying confirmation information to members
Managers of closed-ended schemes	Calling and holding an annual meeting
Issuers of regulated products	Having financial product registers audited
Custodians of registered schemes and derivatives issuers	Obtaining assurance engagements

The notice also amends the following exemption notices to provide the same two-month time extensions for obtaining an assurance engagement under the:

- Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016,
- Financial Markets Conduct (Overseas Custodians—Assurance Engagement) Exemption Notice 2018,
- Financial Markets Conduct (Property Schemes—Custody of Assets) Exemption Notice 2016, and
- Financial Markets Conduct (Restricted Schemes—Custodian Assurance Engagement) Exemption Notice 2020.

NZX provides COVID-19 class relief for listed issuer's financial reporting requirements

NZX has granted a class waiver, under which the timing requirements for the release of results announcements and annual reports has been extended for issuers with certain balance dates, if those issuers consider they require that additional time to meet their periodic reporting requirements.

NZX coordinated this class waiver with the FMA's comparable relief for FMC reporting entities under the Financial Markets Conduct (Financial Reporting and other Relief – COVID-19) Exemption Notice 2020 (as discussed in the item above).

The NZX's waiver provides similar relief to issuers of debt, equity and fund securities subject to NZX's periodic reporting requirements by:

- **Full year and half year results announcements** - increasing the current period from 60 days to 90 days for releasing results announcements after the end of a financial year (for issuers with a full year balance date falling on a date between 1 January 2020 and 31 July 2020) or half year (for issuers with a full year balance date falling on a date between 1 August 2019 and 31 December 2019),
- **Annual reports** - extending the period required for preparing and delivering an annual report for debt and equity issuers (with a full year balance date falling on a date between 1 January 2020 and 31 July 2020) from within three months after the end of a financial year to five months, and
- **Scheme annual reports** - extending the period required for preparing and delivering an annual report for a relevant scheme (for issuers with a full year balance date falling on a date between 1 January 2020 and 31 July 2020) from within three months after the end of a financial year for the scheme to five months.

NZX has included an appendix to the waiver which illustrates the impact of the class waiver on the specified periodic reporting obligations. For example, the current timing requirement for an issuer with a balance date of 30 June 2020 for releasing its full year results announcement was 31 August 2020 and is now 28 September 2020.

The class waiver is subject to certain conditions, including that any issuer relying on the timing extensions, publish a statement to be released through the NZX Market Announcement Platform, in advance of the relevant current deadlines in the NZX Listing Rules stating:

- that the issuer is relying on the class waiver, and the extent of that reliance (i.e. for release of the preliminary financial statements, the annual report, or both), and
- to the extent possible, when the issuer expects to release its preliminary financial statements and/or the annual report (as applicable).

The issuer must then keep the market informed of the expected publication dates should there be any change.

Financial Advisers (Custodian Assurance Engagement Relief—COVID-19) Exemption Notice 2020

This COVID-19 relief notice provides exemptions from compliance with various statutory timeframes in keeping with the exemptions granted under the Financial Markets Conduct (Financial Reporting and other Relief – COVID-19) Exemption Notice 2020 discussed above.

The COVID-19 relief notice provides a two-month extension for custodians to comply with their duties to obtain assurance engagements under the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 and the Financial Advisers (Overseas Custodians—Assurance Engagement) Exemption Notice 2018, where the duty arises in relation to relevant periods that end on or after 31 December 2019 but before 1 August 2020. To rely on the exemption the custodian must believe, on reasonable grounds, that it is not reasonably practicable to comply within the required time frame because of the outbreak of COVID-19.

The COVID-19 relief notice also amends the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017 on corresponding grounds by extending the timeframe for complying with the condition that a non-NZX broker obtains an auditor's report regarding the non-NZX broker's compliance with the conditions in that notice for relying on the exemption to the requirement to hold client money separately under the Financial Advisers Act.

Custodians and non-NZX brokers relying on an exemption in the COVID-19 relief notice must notify the FMA in writing if they are relying on the exemption on or before the original timeframe for compliance.

The FMA recommends that a clear and complete record is kept of the reasons for the belief that it is not reasonably practicable to comply within the required time frame because of the outbreak of COVID-19, as they may request this information.

FMA takes a stance on continuous disclosure relief for NZX listed issuers

Recently the Australian Government provided regulatory relief with a view to enabling listed issuers and their officers to more confidently provide guidance to the market, and to make it harder for class actions to be brought against listed issuers and officers during the COVID-19 crisis on the basis of forecasts that are found to be inaccurate. Following calls for New Zealand to introduce similar relief measures, the FMA has issued a statement noting that it believes New Zealand's legislative settings and the manner in which they are applied "should already afford listed issuers and their officers' sufficient protection to encourage disclosure".

In its statement the FMA also notes that:

- there has been very little evidence in New Zealand of an opportunistic class action culture developing in relation to director liability,
- the FMA is unlikely to pursue a continuous disclosure breach where "an issuer and its officers can show evidence they have exercised appropriate due diligence and acted reasonably on information available at the time",
- the FMA is keen for information to be shared with investors rather than avoided altogether, and urges "directors to be brave in their disclosure decisions, and be willing to confront material uncertainties in their financial statements and forward-looking information", and
- the content of disclosures should be considered carefully to ensure they use appropriate tone, context, and caveat statements, particularly where the information includes uncertainties or relies on assumptions.

Under Australia's temporary measures, directors and officers of listed issuers are now only liable for failing to disclose market-sensitive information where they *knew, or were reckless or negligent* as to whether, the information would have a material effect on the price of the issuer's securities.

FMA reminder on inside information restrictions

The FMA has published a reminder setting out its expectations of market conduct in the context of capital raising activities due to COVID-19, and the potential for a broader range of individuals to have access to inside information.

In particular, the FMA is encouraging NZX-listed companies to mitigate inside information misconduct risks by:

- controlling and limiting access to inside information,
- retaining detailed records of information insiders, including when they received inside information and for what purpose,
- providing a reminder to employees regarding inside information conduct prohibitions and any obligations under staff trading policies,
- requiring employees to proactively notify the company if they disclose or come into possession of inside information (e.g. through inadvertent disclosure),
- ensuring that the processes governing requests to trade from directors, staff, contractors and associated individuals are adequate and are followed consistently, and
- ensuring that directors and senior managers promptly file their ongoing disclosures of dealings in relevant interests.

NZX's COVID-19 support package to assist issuers' access to equity capital

NZX has introduced measures aimed at ensuring NZX listed issuers are able to access sufficient equity capital urgently should the need arise, in addition to any existing debt facilities. These measures will remain in place until 31 October 2020 unless the NZX specifies an earlier date.

The measures introduced under a class waiver granted on 19 March 2020 include:

- **Placements** – increasing the percentage of additional shares that can be issued in any 12-month period without having to obtain shareholder approval from 15 per cent to 25 per cent.
- **Share Purchase Plans (SPP)** – allowing all shareholders to purchase up to NZ$50,000 worth of new shares in any 12-month period (rather than the current cap of NZ$15,000) and increasing the threshold at which shareholder approval is required for an SPP from 5 per cent of the shares already on issue to 30 per cent.
- **Rights issues** – allowing a rights issue to be announced on the "EX Date" and reducing the closing date for rights issue applications from seven business days to three business days after the last letter of entitlement is sent if the only means by which holders of rights are able to accept the offer is electronic means.

The NZX makes it clear that these measures support participation by retail shareholders, and seek to mitigate dilutionary effects. In particular, NZX has made it clear that issuers should be mindful of the NZX Corporate Governance Code recommendation that favours pro rata capital raisings that allow existing investors to avoid dilution.

A further class waiver and ruling was granted on 26 March 2020 to permit issuers to utilise a structure commonly referred to as an "ANREO" or Accelerated Non-Renounceable Entitlement Offer, and to allow both ANREOs and AREOs (or accelerated renounceable entitlement offers) to include differentiated pricing in any retail entitlement offer.

We published commentary on these capital raising alternatives, including discussion on the new 'ANREO' structure and some of the key legal considerations that a board will need to assess when deciding to raise equity during this period of market and economic uncertainty.

Takeovers Panel grants temporary COVID-19 exemptions to facilitate capital raising

The Takeovers Panel has granted a suite of temporary class exemptions from the Takeovers Code under the Takeovers Code (Facilitation of Capital Raising in Response to COVID-19) Exemption Notice 2020 aimed at facilitating major shareholders to participate in equity offers above their pro-rata entitlement, including through acting as sub-underwriters.

The COVID-19 exemptions apply to certain allotments of voting securities conducted on or after 10 April 2020 and before the close of 31 October 2020. In summary these are:

- An exemption which permits increases in voting control of up to 10 per cent in addition to that which would be able to be acquired under the Takeovers Code.
- A series of exemptions for allotments of voting securities pursuant to pro rata offers (which provide further relief over and above what is provided under the Takeovers Code (Class Exemptions) Notice (No 2) 2001).
- An exemption for persons who underwrite pro rata offers (this is not limited to professional underwriters).
- An exemption for professional underwriters (which provides further relief over and above what is provided under the Takeovers Code (Professional Underwriters) Exemption Notice 2004).

There are no exemptions for acquisitions of voting securities.

The Panel has also released a Guidance Note on the exemptions, which includes worked examples of a number of scenarios.

New FMA guidance on customer vulnerability practices

The FMA has published an information sheet explaining its expectations for financial services firms to prioritise a review of customer vulnerability practices in light of the COVID-19 crisis.

AML/CFT verification requirements during COVID-19 Alert Levels

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) supervisors published joint guidance on managing customer due diligence and account monitoring requirements under the AML/CFT regime during New Zealand's COVID-19 alert levels.

Impact of COVID-19 on independent AML/CFT audits

The FMA has indicated that it will grant targeted relief to an AML/CFT reporting entity where COVID-19 impacts its ability to have its independent audit undertaken within the statutory timeframe.

Section 59(2) of the AML/CFT Act requires a reporting entity to have its risk assessment and AML/CFT programme independently audited every two years.

Any reporting entity unable to complete its independent audit on time due to COVID-19 should contact the FMA to discuss their position.

Business finance guarantee scheme

The government has launched a business finance guarantee scheme for small and medium-sized businesses, to enable banks to provide credit to viable customers where they otherwise may not be willing to do so.

Under the scheme, businesses with annual revenue of up to NZ$80 million can apply to participating banks for loans of up to NZ$500,000. The government is guaranteeing 80% of the risk, with banks covering the remaining 20%. Loans will be available under the scheme until 30 September 2020.

The Reserve Bank of New Zealand is supporting the scheme by providing banks access to long-term funding at a low interest rate.

For more information click here and here.

For more information on the Reserve Bank's Term Lending Facility, click here.

MERGERS AND ACQUISITIONS

Overseas investment rules tightened for ongoing economic fallout from COVID-19

The government has made urgent changes to the Overseas Investment Act 2005 to protect New Zealand business assets amidst the economic fallout of the COVID-19 pandemic. This reflects similar moves in other jurisdictions, including Australia.

The changes, which came into force on 16 June 2020 under the Overseas Investment (Urgent Measures) Amendment Act 2020 (**Urgent Measures Act**), introduce a temporary requirement to notify the Overseas Investment Office (**OIO**) of all overseas investments resulting in more than 25 per cent overseas ownership of a New Zealand business or its assets, or an increase to an existing holding beyond 50, 75 or 100 per cent being acquired, irrespective of the value of the transaction. This is in addition to the current consent regime, which in general terms only applies to acquisitions of sensitive land, or shares or assets worth at least $100 million.

This new notification requirement will be reviewed by the government every 90 days and will only remain in place while the effects of the COVID-19 emergency justify the requirement continuing.

The Urgent Measures Act also accelerated parts of the Phase II reforms to New Zealand's overseas investment rules first agreed by cabinet and announced to the public in late 2019. These include:

- **A new national interest assessment**, similar to the national interest test that underpins Australia's regime, which applies to transactions that are already screened under the Overseas Investment Act 2005 (**OI Act**) and warrant greater scrutiny. This may be applied to:
  - certain investments in strategically important businesses/assets,
  - investments where a foreign government or its associates would hold a 10 per cent or greater interest, and

- any other transaction that the Minster in its broad discretion decides is of national interest,

Under the national interest test, the Minister may decline consent for, or impose conditions on, transactions and require the disposal of investments that are "contrary to the national interest".

- **A national security and public order risks management regime**. In time this will replace the above emergency notification power with a call-in power. This will empower the government to review certain investments in strategically important businesses that are not ordinarily screened under the OI Act, and impose conditions on, prohibit, or dispose of investments that pose a significant risk to national security or public order (that is, broader national interest considerations could not be taken into account).
- **Defining the strategically important businesses** that the national interest test or call-in power will apply to. In general terms, these are businesses that develop, produce, or maintain military or dual-use technology, are critical direct suppliers to intelligence or security agencies, provide telecommunications infrastructure or services, generate or distribute electricity, are involved in designated ports and airports, are systemically important financial institutions or financial market infrastructures, or are media businesses that have an impact on New Zealand's media plurality.
- **Temporary standing consent** for:
  - investments in less sensitive land that are only screened because the land adjoins land that is sensitive in its own right,
  - transactions involving certain New Zealand listed issuers and managed investment schemes, as discussed in our article here).
- **Simplifying the screening requirements for low risk transactions** by undertaking more targeted assessments of an investor's character and capability, by only considering serious proven matters, allegations of serious matters where proceedings have begun, and any enforceable undertakings entered into by the investor (although this is yet to come into force).

Other changes to the OI Act provide the OIO with stronger enforcement powers. These include:

- increasing the OIO's ability to act against those that break the rules, by being able to seek injunctions and accept enforceable undertakings,
- increasing maximum fixed civil pecuniary penalties from NZ$300,000 to NZ$500,000 for individuals and NZ$10 million for corporates,
- introducing a range of new tools that will manage investors who pose significant national security and public order risk.

The Overseas Investment Amendment Regulations 2020 have been enacted to amend the Overseas Investment Regulations 2005 in support of the Urgent Measures Act. In addition, regulations have been made to clarify aspects of the application of the Urgent Measures Act to certain transactions (see the Overseas Investment (Transitional Matters) Amendment Regulations 2020).

For commentary on these new provisions see our earlier updates:

- Government announces urgent law changes to prevent opportunistic acquisitions of New Zealand businesses
- Government passes urgent overseas investment legislation with key amendments
- Overseas investment reforms to take effect in two weeks

Submissions are open for the Overseas Investment Amendment Bill (No 3)

The Finance and Expenditure Committee is calling for submissions on a second bill which was introduced as a package with the recently enacted Overseas Investment (Urgent Measures) Amendment Act 2020. The closing date for submissions is expected to be 31 August 2020, but this is still to be confirmed by the Committee.

In essence the Overseas Investment Amendment Bill (No 3) includes the remaining Phase II reforms announced by the government in 2019 that were originally part of the discharged Overseas Investment Amendment Bill (No 2) 2020 (introduced to Parliament on 19 March 2020, just prior to the implementation of the Government's 4-level COVID-19 Alert System), but were not considered by the government as necessary to mitigate the economic effects of COVID-19.

The Bill includes both measures that are aimed at managing risks posed by overseas investment more effectively, and measures that simplify the assessment process, including by removing low risk transactions from the regime for which screening is unnecessary.

On the whole, the changes will be welcomed by the business community. They address long-standing concerns about the current regime, which have made it a global outlier in terms of complexity and consent timeframes.

The measures aimed at improving the operation of the regime include:

- Amendments to the types of "adjoining land" that can make land sensitive: Even though on its face the list of adjoining land types has grown (the list in the Bill is now longer than the list in the current Act), the Bill has pleasingly narrowed the types of adjoining land by focusing on particularly important sensitive public land held under statute. It is encouraging to see the Bill removing immaterial reserve or open space land as an adjoining land trigger. The new adjoining land list also resolves the inconsistency in the current Act caused by defining sensitive adjoining land by reference to a regional or district plan. This has resulted in the same parcel of land being sensitive in one region or district but not in another because of the way different councils describe the use of open space and reserve land. Overall, this should lower costs for investors in assessing sensitive land holdings and remove some transactions from being screened under the Act at all. As set out above, this amendment has been accelerated by way of a standing consent being granted to transactions that would benefit from this new regime if it were in force.
- Cutting the red tape: The Bill simplifies the regime by:
    - streamlining the process for determining whether an investment in sensitive land will benefit New Zealand, including by simplifying and clarifying the counterfactual assessment, and
    - no longer requiring repeat investors to be subject to a full screening process for subsequent investment applications if they have been screened and approved in a prior investment.
- Reducing the number of leases requiring screening: The Bill no longer requires leases or other interests of less than 10 years (whether this threshold is reached in a single interest or cumulative interests) other than residential leases to be screened. Leases or other interests in land that relate to land that is residential will continue to have a 3-year-term threshold.
- Amendments which reduce the number of NZX listed issuers that will be overseas persons. Under the regime (pre-Emergency Measures Act), New Zealand listed issuers that are 25 per cent or more owned or controlled by one or more overseas persons are considered overseas persons. Because the shareholdings of all overseas persons are aggregated for this purpose, numerous NZX listed issuers are categorised as "overseas persons" under the current definition in the Act (although, benefit from a standing consent under the Emergency Measures Act where they meet the new test as set out below).

  Under the Bill this will change. New Zealand listed issuers will no longer be considered overseas persons, unless they are more than 50 per cent owned by overseas persons or one or more overseas persons hold 10 per cent or more and combined these substantial shareholders account for more than 25 per cent. The changes also ensure that managed investment schemes will be overseas persons if their manager or trustee is an overseas person or if more than 25 per cent of the value of the investment products in the investment scheme are invested on behalf of overseas persons.
- Exemptions for fundamentally New Zealand entities: There will be a new power for Ministers to exempt from the regime persons, transactions, interests or assets that the Minister considers to be fundamentally New Zealand owned or have a strong connection to New Zealand. We strongly support these changes as we see all too frequently, what are fundamentally New Zealand entities being unnecessarily dragged through time-consuming and expensive OIO consent processes. In the last year alone, we have been involved in multiple OIO consent processes for investments undertaken by entities that are majority beneficially owned by New Zealanders. We look forward to seeing the criteria that will be used to determine whether an entity is 'fundamentally New Zealand owned', and the detail of the forthcoming regulations will be critical in determining how useful this exemption will be.

The amendments to the Overseas Investment Act regime aimed at strengthening how the Act manages risk include:

- A higher threshold for acquiring farmland and more stringent farmland advertising requirements: The requirement to advertise land before an agreement is entered into could create substantial difficulties for any transactions that involve farm land, and in particular corporate M&A transactions. While the Bill introduces a more detailed exemption regime, it is not clear when exemptions will be granted (the

detail of this will be provided through an update to the Gazette notice). This could be of concern if it is not made clear that normal corporate transactions with a small farm land component need not comply with onerous advertising requirements in advance of a transaction.

- **New tax information requirements**: Not foreshadowed in the Cabinet Paper, the Bill includes a new power to make regulations that require an applicant to provide information to the IRD for the purposes of assisting with the administration or enforcement of tax law. This is similar to requirements in overseas regimes, but the detail of the regulation will be critical in determining how onerous such an obligation might be.
- **Reintroducing the emergency notification regime**: The Bill introduces a regulation making power, giving the government scope to reintroduce an emergency notification regime similar to that included in the Overseas Investment (Urgent Measures) Amendment Act 2020, if necessary to respond to a future emergency.

Bell Gully will be lodging detailed submissions on the Bill and we encourage those impacted by the changes to do the same.

COMMERCIAL

Pushing ahead with projects - the COVID-19 Recovery (Fast-track Consenting) Act 2020

The government has enacted legislation which fast-tracks resource consenting and designation processes for eligible projects that are planned and ready to go, and accelerates the beginning of work on a range of different sized and located projects.

The COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Act**) is a short-term intervention by the government in response to the social and economic effects of COVID-19. It provides an alternative consenting pathway to the Resource Management Act 1991 (**RMA**), but does not amend that Act.

The Act establishes three pathways for a project to access the fast-track consenting and notice of requirement process:

- **Projects listed in the Act:** The first pathway applies to the 17 projects listed in Schedule 2 of the Act, which are automatically eligible for fast-track consenting.
- **Projects confirmed through Orders in Council**: The second pathway applies to all other public and private projects. Any person with an eligible project can apply to the Minister for the Environment for access to be referred to the fast-track consenting and designation process. The Minister will consider a project against criteria that includes consideration of the economic benefits a project will give to communities or industries affected by COVID-19; how it will affect social and cultural wellbeing now and into the future; whether the project's timeline will benefit from the fast-track process; and the public benefit that would accrue from the project. Details of the application process are available on the Ministry for the Environment's website.
- **Permitted works on existing infrastructure** - The third pathway enables Waka Kotahi NZ Transport Agency, and KiwiRail Holdings Limited to be permitted to carry out small-scale repair, maintenance and minor upgrade works on their existing infrastructure within the road and rail corridor without a resource consent.

The Act also enables government agencies Kāinga Ora and the Ministry for Housing and Urban Development, and local government to access these provisions if confirmed through an Order in Council.

The Act came into effect on 9 July 2020, and under a sunset clause will be repealed on 9 July 2022.

The RMA remains as the primary legislation for resource consenting for all projects that are not eligible under the Act.

Privacy Bill passes and consultation on codes of practice begins

The long-awaited, and much anticipated Privacy Act 2020 is set to come into force on 1 December 2020, replacing the current Privacy Act 1993. This requires the replacement of the six codes of practice under the 1993 Act. The Office of the Privacy Commissioner is now seeking public submissions on four of the replacement codes.

Privacy Act 2020

The enactment of the Privacy Act follows a long review period, dating back to the appointment of the Law Commission to review the Privacy Act in 2006. Over that time there has been exponential growth in data-driven innovation, significant international developments in data protection and a spate of high-profile data breaches. Against this background, the new Privacy Act has had strong bipartisan and industry support.

The most significant change under the Privacy Act is the introduction of a mandatory reporting regime for 'notifiable privacy breaches'. This new regime applies to all entities that are subject to the Privacy Act. This now includes almost every New Zealand entity, as well as personal information collected or held by an overseas entity in the course of carrying on business in New Zealand.

To assist entities to prepare for this new regime, we have prepared a practical Guide to the Privacy Act 2020 and Mandatory Privacy Breach Notification. The guide contains:

- an overview of the new notifiable privacy breach regime,
- a summary of further changes under the new Privacy Act 2020, and
- a checklist of key practical steps you should take to ensure your business is prepared.

Codes consultation

As explained in an information paper, the Office of the Privacy Commissioner is staggering the release of the draft replacement codes to ensure submitters are provided with sufficient time to comment on the codes. There are currently two privacy codes of practice open for consultation, with a final release of documents planned for 29 July 2020:

- Health Information Privacy Code - with an accompanying information paper on that Code.
- Justice Sector Unique Identifier Code - with an accompanying information paper on that Code.
- Credit Reporting Privacy Code - (with an accompanying information paper on that Code)
- Superannuation Schemes Unique Identifier Code - (with an accompanying information paper on that Code)

Submissions on the first two codes close on 12 August 2020, and the next two codes on 19 August 2020. The changes are generally limited to those necessary to align the codes with the new Privacy Act, including minor drafting modernisation. No substantive new policies are implemented, other than those required by the Act.

New guidance on the penalty doctrine

The Supreme Court's judgment in *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53 is now New Zealand's leading authority on the application of the penalty doctrine - the rule that contractual parties should not be permitted to excessively punish one another for breach.

The Supreme Court, endorsing the approach in the Court of Appeal, found that whether a clause is a "penalty" turns on whether it imposes a consequence out of all proportion to the innocent party's "legitimate interests" in performance. This is a further endorsement of freedom of contract, or in other words the ability for commercial parties to freely decide between themselves terms which appropriately secure performance.

For further details see our commentary on the decision here.

Emissions Trading Reforms are now in place

The progress of the Climate Change Response (Emissions Trading Reform) Amendment Bill remained on track during the COVID-19 lockdown period and received Royal assent on 22 June.

The government has also released detailed NZ ETS settings needed for the reformed New Zealand Emissions Trading System (NZ ETS) to work; a provisional emissions budget, a unit supply limit or cap, and price controls for 2021-2025. These will be set through regulations which were consulted on at the beginning of the year, as detailed in an earlier update here.

The Climate Change Response (Emissions Trading Reform) Amendment Act 2020 (**ETR Act**) makes significant reforms to the architecture of the NZ ETS to improve the scheme's central role in supporting New Zealand's transition to a low-carbon economy. The key reforms have a primary role in influencing the price which drives investment in carbon absorption and abatement activities, along with the liquidity of the market. This includes:

- **Capping emissions**: The ETR Act introduces a decision making framework to enable the government to set limits on the supply of New Zealand units (**NZUs**) into the NZ ETS, thereby capping allowable emissions. To date, the scheme has not had a cap on the number of NZUs being supplied into the market, as the scheme was originally designed to operate within a broader global cap set by the Kyoto Protocol. The new cap requires an emissions budget to be in place based on the greenhouse gas emissions reduction targets under the Paris Agreement and our own domestic targets under the Zero Carbon Act. The first three emissions budgets will be recommended by the new Climate Change Commission (established under the Zero Carbon Act) and set by the government by the end of 2021. The government has set a provisional emissions budget to guide the cap in the interim (click here for further details).

- **Introducing government auctioning of NZUs:** This allows the government to sell NZUs directly to the NZ ETS through auctioning to align the supply of NZUs in the NZ ETS with New Zealand's emission reduction targets. Auctioning is expected to begin in March 2021. The rules for selling units by auction in the NZ ETS are to be published in regulations later this year. These rules will include scheduling of auctions and managing volume of NZUs, operating price controls, preparing for auctions, bidding rules, settlement and reporting.

- **Establishing price controls to auctioned NZUs**: The current fixed price option (**FPO**), which allows market participants to choose to pay NZ$25 for every tonne of emissions they emit instead of buying units from emission unit holders, has been replaced with a new cost containment reserve (**CCR**). The CCR is designed to release additional NZUs for sale at auction if the auction clearing price reaches a specified price trigger. The government has announced that in 2021 the CCR will be triggered if the unit price reaches NZ$50. In addition, the ETR Act enables a price floor to be implemented through an auction reserve price. This gives the government a tool to manage extremely low prices in the NZ ETS, providing long-term confidence for low-emissions investments such as forestry. The government has announced that the minimum accepted price to bid at auction will be NZ$20 in 2021 and rise by two per cent for each subsequent year. Regulations setting the price controls are expected to be published later in 2020. The government has decided to keep the FPO in place (but will raise it to NZ$35) during the transition to auctioning to give participants certainty about the maximum compliance costs they face until auctioning is fully established.

Other measures introduced under the ETR Act include:

- **Phasing out industrial allocation from 2021**: Currently the government gives units to some businesses to recognise that the NZ ETS could impact their international competitiveness because of emission costs. The ETR Act mandates a slow phase-down of all industrial allocation at a rate of 1 per cent each year from 2021 which will continue until 2030. The annual phase-out rate will increase to 2 per cent from 2031-2040 and to 3 per cent from 2041-2050. The ETR Act sets up a legislative process which will enable the Minister for Climate Change (on the recommendation of the Climate Change Commission) to decrease or increase the base phase out rate for one or more industrial activities. This approach is to provide flexibility in cases where activities are at differing risks from emissions leakage.

- **Substantial changes for forestry,** including:
    - Introducing average accounting for post-1989 forests (in place of the existing "carbon stock change" accounting mechanism) to reduce the costs and complexity of the ETS for forest owners.

- Disestablishing the existing Permanent Forest Sink Initiative (PFSI) – The PFSI under the Forests Act 1949 is being replaced with a new permanent post-1989 forest activity in the NZ ETS with effect from 1 January 2024.
- Exempting eligible forests from the requirement to surrender units to cover emissions from temporary adverse events, such as fire or wind throw.

- **Facilitating an alternative 'Joint Action Plan" between the government, iwi/Māori and the agriculture sector** for farm-level emissions pricing by 2025 including providing:
  - a mechanism for the Minister for Climate Change and Minister of Agriculture to report back on the features of a farm-level pricing scheme in 2022 (through the emissions trading scheme or a developed alternative pricing system),
  - steps for the independent Climate Change Commission to monitor and report (by no later than 30 June 2022) on progress towards agreed milestones and progress towards compliance with farm-level obligations,
  - processor-level pricing of methane and nitrous oxide emissions from livestock and fertilisers on farms from 2025 under the NZ ETS (if no alternative mechanism is agreed),
  - a regulation-making power for the Minister for Climate Change to impose surrender obligations on processors if progress towards milestones is considered insufficient.

The Environment Committee's majority report on the Climate Change Response (Emissions Trading Reform) Amendment Bill (as amended by Supplementary Order Paper No. 413) was released on 4 May 2020 and the Bill (which had further amendments made to it by Supplementary Order Paper No. 506 at the Committee of the whole House stage) was passed on 16 June.

Extension for first Climate Change Commission report

The Climate Change Commission, which was established last year under the Zero Carbon Act, was due to deliver its first package of work on climate change action to the Minister of Climate Change on 1 February 2021. This has been extended to 31 May 2021 to factor in the impact of COVID-19 on the Commission's work programme.

The Commission's report will include advice on emissions budgets, the emissions reduction plan, biogenic methane emissions and New Zealand's Nationally Determined Contribution under the Paris Agreement.

The extension is not expected to impact the Minister's obligation to meet the deadline of 31 December 2021 set by the Zero Carbon Act for the first three emissions budgets.

Further details are available on the Climate Change Commission's website.

Powers of attorney, electronic signatures and the CCLA

The Contract and Commercial Law Act 2017 (CCLA) has been amended so that the provisions in that Act relating to electronic signatures apply to security agreements containing powers of attorney.

Part 4 of the CCLA clarifies the legal requirements regarding the use of electronic signatures in place of "wet ink" signatures, including where signatures are required under statutory requirements. However, it does not extend to provisions of enactments relating to powers of attorney.

Temporary modifications have been made to the CCLA by the COVID-19 Response (Further Management Measures) Legislation Act 2020 to mitigate problems with legislative compliance due to physical presence requirements so that the Act now applies to a deed that creates a power of attorney in connection with a security interest. This change applies retrospectively from 21 March 2020 until 16 November 2020 (unless it is extended by an Order in Council).

AML/CFT (Exemptions) Amendment Regulations 2020

These regulations revoked the expiry date for the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011 so that they can continue in force, subject to any amendments, until replaced or revoked.

Government COVID-19 small business loan applications extended

Revenue and Small Business Minister Stuart Nash has announced that applications for the Small Business Cashflow Loan Scheme will be extended to 31 December 2020.

The scheme provides one-off loans to businesses (employing 50 or fewer full-time employees) impacted by COVID-19 to support their cash flow needs. The loan amount is NZ$10,000 plus NZ$1,800 per equivalent full-time employee, up to a maximum amount of NZ$100,000, for a maximum term of five years. The annual interest rate is 3% beginning from the date of the loan being provided. However, interest is not charged if the loan is fully paid back within one year.

Full details of the scheme are available here.

New Zealand Business Number (Authority to Require NZBN) Regulations 2020

These regulations authorise the Inland Revenue Department to require an eligible entity that applies for a loan under the small business cashflow scheme to register for an NZBN (if it hasn't already done so) and provide that NZBN to the department. The regulations came into force on 19 May 2020.

MBIE signals further consultation for the review of copyright legislation

In 2018 the Ministry of Business, Innovation and Employment (MBIE) published an issues paper, which included a set of proposed objectives for the review of New Zealand's copyright regime. In November 2019, MBIE published a paper outlining a set of revised objectives in response to feedback on the issues paper. However, in response to recent stakeholder feedback MBIE withdrew that paper this month to give all stakeholders a further opportunity to fully contribute to any changes to the original objectives.

MBIE expects to carry out the consultation on potential changes to the objectives as early as possible in the next Parliamentary term. Following this, there will be a consultation on an Options Paper.

Click here for further details.

CORPORATE LAW

Compliance flexibility provided for companies and other business entities

The COVID-19 Response (Requirements For Entities — Modifications and Exemptions) Act 2020 contains various measures to enable businesses to manage some of the practical impacts of complying with statutory obligations and obligations contained in the entity's rules or constitution amid the COVID-19 pandemic.

The key measures introduced by this Act include enabling:

- Registrars and Ministers to issue exemption notices concerning compliance with statutory obligations (such as calling or holding meetings and auditing, assurance, or financial reporting or review requirements),
- certain requirements and restrictions in an entity's constitution or rules (for example, in relation to holding meetings, methods of voting, deferral of financial reporting and other procedural or administrative processes) to be modified by a majority of the entity's governing officers rather than in accordance with its constitution or rules (and the procedures for amending the constitution or rules in any enactment), and
- the use of electronic means, including electronic voting and the use of electronic signatures, when an entity's constitution or rules do not permit this.

The provisions apply to building societies, charitable trust boards, companies, credit unions, firms, friendly societies, incorporated societies, industrial and provident societies, limited partnerships, and certain Māori governance entities.

These provisions apply until 30 November 2020, unless extended by an Order in Council, up to but no later than 31 March 2021.

Temporary business debt hibernation scheme

The government has introduced a Business Debt Hibernation (BDH) scheme under the COVID-19 Response (Further Management Measures) Legislation Act 2020 to provide a pathway for otherwise profitable businesses to re-open once the COVID-19 crisis passes.

Until 24 December 2020 (or any later date prescribed by regulations), most companies, partnerships, and other trading entities that were registered or existed prior to 3 April 2020 will be able to propose to creditors that most debts of the business should be put into a form of 'hibernation' for up to six months, as long as the entity can meet certain conditions.

The introduction of the BDH scheme reflects the fact that none of New Zealand's existing insolvency processes provide an effective "standstill" mechanism for businesses with short term liquidity problems. The scheme will sit alongside the existing regimes, including voluntary administrations, creditors' compromises, schemes of arrangements, and private arrangements.

We provided commentary on the BDH scheme in our article COVID-19 Insolvency law relief: What's in the Bill, and how to use it. General information on the scheme is also available on MBIE's website which includes links to the relevant BDH forms required by the Companies Office.

The BDH scheme does not extend to registered banks, licensed insurers, non-bank deposit takers, licensed derivatives issuers, operators of designated settlement systems or sole traders.

FMA regulated entities that enter a BDH scheme will be subject to some additional notification requirements and expectations as outlined by the FMA.

Temporary safe harbour for directors

A temporary safe harbour from sections 135 and 136 of the Companies Act 1993 has been introduced to address the risk of directors of otherwise solvent companies being unable to continue trading because of COVID-19 liquidity shock.

The COVID-19 Response (Further Management Measures) Legislation Act 2020 introduces significant, but temporary, amendments in a new Schedule 12 of the Companies Act 1993 to the two directors' duties that apply specifically to insolvency scenarios:

- the duty not to trade recklessly (section 135), and
- the duty not to allow the company to incur obligations without a reasonable belief that they will be met when due (section 136).

Together, these duties protect the interests of the company's existing creditors. They also protect the interests of new creditors that may arise from ongoing trading. Effectively, the duties prohibit directors from taking unreasonable business risks at the expense of creditors who will not be paid.

Many directors were concerned that they would breach these duties by continuing to trade through the uncertainty created by the COVID-19 crisis. The Act addresses that by providing a safe-harbour so that directors' decisions to continue to trade, and to incur new obligations, will not breach the duties set out above for an initial safe harbour period between 3 April 2020 and 30 September 2020 (or such later date as is set by regulations) if the directors can establish:

- **No prior issues**: The company was either:
  - able to pay its debts as they fell due on 31 December 2019, or
  - formed between 1 January 2020 and 3 April 2020,
- **COVID-19 is causing liquidity problems**: In the good faith opinion of the directors, the company is facing or is likely to face significant liquidity problems in the next six months as a result of the effects of COVID-19 on the company, their creditors, or their debtors, and
- **The company will be solvent by 30 September 2021**: The directors, in good faith, consider that it is more likely than not that the company will be able to pay its debts as they fall due by 30 September 2021 (for example, because trading conditions will improve or they will reach a compromise with creditors).

For commentary on some practical aspects of these new measures refer to our earlier update here.

Change for the voidable transaction regime

The COVID-19 Response (Further Management Measures) Legislation Act 2020 has brought forward some changes approved by Cabinet last year relating to the voidable transactions regime.

In November 2019 Cabinet agreed to reduce the clawback period for voidable transactions in the Companies Act 1993 from two years to six months prior to the commencement of the liquidation where the parties are not related. This reflects the recommendation of the Insolvency Working Group (set up in 2015) which found that the two-year rule placed a very heavy emphasis on the interests of creditors as a whole and posed significant risks to commercial confidence.

The COVID-19 Response (Further Management Measures) Legislation Act 2020 also reduces the clawback period for voidable charges over property or undertakings of the insolvent company in relation to unrelated parties from two years to six months.

These changes came into force on 16 May 2020 and only apply in respect of liquidations that commence on or after that date.

Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Amendment Regulations 2020

These regulations, which come into force on 19 June 2020, revoke the expiry date for the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011 so that they can continue in force, subject to any amendments, until replaced or revoked.

Changes to Companies Office practices for COVID-19 environment

The Companies Office has introduced some temporary measures to assist with compliance obligations during the COVID-19 pandemic.

- **Use of electronic signatures**: The Companies Office has extended its standard guidelines for the use of electronic signatures on documentation and information provided to the Registrar of Companies. New interim guidelines describe the circumstances in which the Companies Office will accept documentation and information under an electronic signature due to the restrictions caused by the COVID-19 pandemic. These will remain in place until the Companies Office notifies otherwise on its website.
- **Statutory declarations**: The Companies Office will accept declarations that are required to be filed under legislation administered by the Companies Office made in accordance with the Epidemic Preparedness (Oaths and Declarations Act 1957) Immediate Modification Order 2020 while it remains in force. Further details are available here.
- **Filing annual returns, financial statements or annual confirmations**: The Companies Office has noted that it will be resuming its normal compliance activities from August 2020 with regards to the filing of annual returns, financial statements and other documents. To date, it has not been taking any action when statutory deadlines have not been met as a result of COVID-19 related issues.
- **Exemptions from compliance obligations**: The COVID-19 Response (Requirements For Entities — Modifications and Exemptions) Act 2020 provides the Registrar with the ability to grant exemptions (until 30 November 2020) from a range of statutory obligations, including auditing, assurance, or financial reporting requirements. The Companies Office has noted on its website that exemptions won't be made unless there are clear problems to resolve. There is no formal application process in place, instead entities are encouraged to contact the Registrar to discuss any issues that may require an exemption.

Companies Office fees have been impacted by increases in FMA levies

New Financial Markets Authority (FMA) levies came into force on 1 July 2020 under the Financial Markets Authority (Levies) Amendment Regulations 2020.

The Companies Office has the responsibility of collecting these levies, through its registers, on behalf of the FMA.

A detailed breakdown of the new levies are set out in the table below.

Register	Service	Previous FMA levy	New FMA levy
Companies Register	Company incorporation	$9.00	$17.39
	Company annual return	$9.00	$17.39
	Company annual return API	$9.00	$17.39
	Financial statement filing (under the FMC Act)	$48.00	$60.00
Disclose Register	Product Disclosure Statement per PDS or prospectus	$2,600	$3,500
	Product Disclosure Statement per managed fund	$530	$700
	File financial statements (per set of statements under the Financial Markets Conduct Act 2013)	$48.00	$60.00
Limited Partnerships Register	Apply to register a new limited partnership (NZ & overseas)	$9.00	$17.39
	File an annual return (NZ & overseas)	$9.00	$17.39
Building Societies Register	Register a building society	$9.00	$17.39
	File an annual return	$9.00	$17.39
	Financial statement filing (under the FMC Act)	$48.00	$60.00
Credit Union	Incorporate as a credit union	$9.00	$17.39
	File an annual return	$9.00	$17.39
	Financial statement filing (under the FMC Act)	$48.00	$60.00
Friendly societies	Register as a friendly society	$9.00	$17.39
	File an annual return	$9.00	$17.39
	Financial statement filing (under the FMC Act)	$48.00	$60.00

New regulatory regime for insolvency practitioners in force on 1 September 2020

The Insolvency Practitioners Regulation Act 2019 and the Insolvency Practitioners Regulation (Amendments) Act 2019 were scheduled to come into force on 17 June 2020.

However, to allow for delays caused by circumstances related to COVID-19, the new regime will now come into force on 1 September 2020.

The Insolvency Practitioners Regulation Act 2019 establishes a co-regulatory regime for insolvency practitioners operating in New Zealand, providing for licensing by accredited bodies, and introducing new licensing requirements.

The Insolvency Practitioners Regulation (Amendments) Act 2019 makes a number of changes to the Companies Act 1993 and the Receiverships Act 1993 to reflect the requirements of the new regulatory regime.

The following regulations have also been enacted to support the regime:

- The Companies (Reporting by Insolvency Practitioners) Regulations 2020, which establish new reporting requirements to

- provide creditors with certain information relating to an insolvency so that they can assess the likelihood that they will be repaid, and the extent of any payment they may receive,
- facilitate the Registrar's oversight function in respect of data collection, and
- assist creditors, professional bodies and the Registrar of Companies to detect inappropriate conduct, such as potential fraud, by insolvency practitioners.

- The Insolvency Practitioners Regulations 2020, prescribe certain aspects of the new scheme, such as fees, the companies levy, and information that should be included and searchable on the Insolvency Practitioners Register.

COMPETITION & CONSUMER LAW

Landmark Supreme Court decision confirms key aspects of NZ price fixing prohibition

The Supreme Court has confirmed key aspects of the price fixing prohibition in New Zealand.

In 2013, Trade Me changed the way it charged real estate agencies to list properties for sale, which increased annual listing costs. In response, representatives of a number of Hamilton based real estate agencies met and (the Court found) agreed that their default position would be to on-charge the listing fee. The Commerce Commission alleged that this constituted an agreement to control prices in breach of the Commerce Act 1986 and commenced proceedings against two of the agencies involved.

Click here for our discussion on the four key findings from the *Lodge Real Estate Limited v Commerce Commission* decision.

Government announces measures to strengthen anti-competitive conduct law

The government has announced it has agreed on changes to section 36 of the Commerce Act which will strengthen the law to prohibit firms with market power from engaging in conduct that substantially lessens competition, regardless of whether they would have done the same thing if they didn't have market power.

Alongside these changes, the government intends to change the competition law treatment of intellectual property rights and covenants. The proposed amendments also increase penalties for businesses engaging in anti-competitive mergers, which has been a major enforcement focus of the Commerce Commission in recent years.

Further information is available on the MBIE's website and in our commentary on the Government's announcement.

A Bill will be introduced in the next Parliamentary term, in early 2021, detailing these proposed reforms.

Commerce Commission has released new 'Green Marketing' guidelines

The Commerce Commission has released new guidelines to help businesses understand their obligations when making environmental claims, including how to avoid breaching the Fair Trading Act.

Environmental claims can include statements about recycling, biodegradability, and the use of recycled content or natural products. The guidelines cover general principles and include examples of cases taken by the Commission in the past.

For our commentary on the guidelines, click here.

Competitor collaboration in a new world

The government and the Commerce Commission have taken concrete steps to facilitate desirable collaboration between competitors in the face of COVID-19.

On 1 May 2020, the Commission issued guidelines on how it will assess certain competitor collaboration in light of COVID-19. The guidelines are welcome; they provide clarity on the process and speed with which the Commission will assess such collaboration, as well as some of the practical considerations that will be

relevant in assessing compliance (for example, the extent to which government departments have been involved and how to structure the arrangements to minimise their competitive impact).

Shortly afterwards, legislation was enacted that should enable the Commission to issue authorisations more quickly to businesses entering into arrangements that raise competition issues, but which nevertheless have a net public benefit overall (see Part 1 of Schedule 2 of the COVID-19 Response (Further Management Measures) Legislation Act 2020). Under the Act this flexibility only applies during the 'epidemic period' (being up until six months after the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked).

For our commentary on these measures, click here.

Draft addendum to the Responsible Lending Code: COVID-19

The Ministry of Business, Innovation and Employment has consulted on additional guidance for the Responsible Lending Code.

The proposed addendum covers situations where existing consumer credit contracts are varied or replaced to alleviate borrowers' financial difficulties brought on by COVID-19 on or before 31 October 2020.

This addendum also sits alongside Commerce Commission Guidance, which sets out their expectations and enforcement approach.

Further details are available on MBIE's website.

Loan shark protections introduced early

The government brought forward protections against loan sharks as part of the COVID-19 Response (Taxation and other Regulatory Urgent Measures) Act 2020.

The changes under the Credit Contracts Legislation Amendment Act 2019 (**CCLA Act**) were due to start on 1 June 2020. However, the following improved protections were brought forward to 1 May 2020:

- borrowers from high-cost lenders don't have to pay back more than 100% of the loan principal,
- compound interest on high-cost loans is banned, and
- fees for defaulting payments are limited to NZ$30 (unless the lender can show that a higher amount reflects their costs).

Click here for more information.

The remaining changes relating to high-cost loans (the 0.8% per day interest rate cap and regulation of mobile traders) came into force on 1 June 2020.

Fit and proper certification

Commencement of new part 5A of the CCLA Act, which relates to fit and proper person certification, has been delayed from 1 September 2020 to no earlier than 1 March 2021.

The remaining reforms (which include director and senior manager liability for statutory damages and compensation) have been delayed from 1 April 2021 to no earlier than 1 October 2021 and no later than 1 April 2023. The delay reflects the fact that lenders are likely to have reduced capacity to prepare for such reforms as they respond to the COVID-19 pandemic. You can find more information on the changes and new commencement dates on MBIE's website.

The Commission is also preparing a 'fit and proper' certification guidance document in late 2020. This guidance will assist lenders and mobile traders to understand how to make an application and how the Commission will apply the criteria in assessing whether individuals are fit and proper.

The commencement dates will be reviewed every three months.

COVID-19 amendments to the CCCFA Regulations

The Credit Contracts and Consumer Finance (Exemptions for COVID-19) Amendment Regulations 2020 provide exemptions from certain requirements of the Credit Contracts and Consumer Finance Act 2003 where registered banks offer mortgage and household debt relief to borrowers impacted by the effects of COVID-19.

The exemptions facilitate variations of existing contracts, and entry into replacement contracts, for the purpose of reducing those difficulties.

A Federal Court of Australia judgment has implications for New Zealand lenders

A judgment by the Full Court of the Federal Court of Australia in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 is likely to be influential when the equivalent provisions in New Zealand's consumer credit regime (and planned new regulations) are first considered in a New Zealand Court.

The judgment confirms that the responsible lending provisions of Australia's National Consumer Credit Protection Act 2009 gives latitude to lenders to determine how they should perform the assessments of unsuitability required by law before entering into credit contracts.

For our commentary on the New Zealand implications of this judgment click here.

Under the influence - identifying advertisements on social media

Recently, the Advertising Standards Authority (ASA) issued a ground-breaking decision upholding two complaints that a social media influencer had not sufficiently identified that certain Instagram posts were in fact commercial endorsements.

This was the first time the ASA Complaints Board has dealt with substantive issues about influencer advertising and identification.

While this complaint was made against the social media influencer directly rather than the brands she was endorsing, overseas regulators have targeted both influencers and the companies and brands they have promoted. Both parties can be found liable if a social media advertisement is misleading. As such, both influencers and the brands they promote need to follow best practice to avoid consumers being misled and brand damage occurring.

For further details see our earlier commentary on the ASA decision here.

Update on the Fair Trading Amendment Bill

The Economic Development, Science and Innovation Committee report on the Fair Trading Amendment Bill has been deferred until 12 August 2020, the day Parliament will be dissolved for the general election.

Technically the Bill will also lapse on that day, but it can be reinstated by the new House at the stage it reaches prior to the dissolution of Parliament.

The written submissions to the committee are available online here.

This Bill amends the Fair Trading Act 1986 to introduce new protections against unfair practices by prohibiting unconscionable conduct in trade, and by extending the Act's existing protections against unfair contract terms in standard form consumer contracts to also apply to small trade contracts. The Bill also strengthens the ability of consumers to require uninvited direct sellers to leave or not enter their property.

NZCC MEDIA RELEASES

The New Zealand Commerce Commission (NZCC) has issued the following media releases:

Industry regulation and regulatory control

Draft decision approving Transpower's $154 million major capex proposal

The NZCC has published its draft decision paper approving a major capital expenditure proposal from Transpower. If finalised, the decision would allow Transpower to invest and increase its revenue to recover a maximum of $154 million on grid assets and equipment to manage voltage stability in the Waikato and Upper North Island region. Transpower submitted its proposal to the NZCC in December 2019. The proposal is for the first stage of a two-stage project Transpower wants to undertake. The NZCC expects to make its final decision by 3 September 2020.

NZCC receives Aurora Energy's application to increase prices to fund $383 million network investment plan

The NZCC has received Aurora Energy's application to increase its prices to fund a $383 million 3-year plan to address safety and reliability issues on its electricity lines network. Aurora says its investment plan is to address historic under-investment in its network resulting in a gradual deterioration of its equipment. To pay for this investment, Aurora is proposing significant price increases from April 2021. Aurora's proposal estimates the 3-year increase in the total average residential power bill is between 10.6% and 16.7%, or an additional $20 to $30 a month, depending on what region the customer is in. A draft decision is due to be released by the NZCC before Christmas, with a final decision to be made in March 2021.

Aurora Energy penalised almost $5 million for excessive level of power outages

Aurora has been ordered by the High Court to pay a penalty of almost $5 million for contravening its network quality standards through an excessive level of power outages from 2016 to 2019. As a regulated monopoly under the Commerce Act, Aurora is subject to price-quality regulation that sets limits on the total revenue it can earn, as well as the level of outages that can occur on its network.

Electricity bills expected to reduce for Powerco and Wellington Electricity consumers

Electricity bills for consumers of two electricity lines companies in the North Island are expected to reduce from 1 April 2020 as a result of a downward adjustment to Powerco and Wellington Electricity's allowable revenues. The reason for the amendment is to ensure all regulated lines companies have the same weighted average cost of capital, regardless of whether they are on a default price-quality path or a customised price-quality path. The final decision document can be found here.

NZCC welcomes High Court judgment in Dairy judicial review

The NZCC has welcomed a High Court judgment which dismisses a judicial review challenge by Open Country Dairy Limited to the NZCC's report into Fonterra's base milk price calculation for 2017/18. The NZCC's report had been published in September 2018 as part of its functions under the Dairy Industry Restructuring Act. At the end of each dairy season, the NZCC is required to publicly report on Fonterra's processes for calculating the base milk price (**BMP**), which is the average price Fonterra pays to farmers per kilogram of milk solids. The report assesses the extent to which the BMP calculation provides incentives for Fonterra to operate efficiently and is consistent with contestability in the market for purchasing farmers' milk.

NZCC guidelines

NZCC releases guidelines on environmental claims

The NZCC has released guidelines to help traders understand their obligations when making environmental claims, including how to avoid breaching the Fair Trading Act (**FTA**). The guidelines can be found on the NZCC's website.

COVID-19: NZCC issues guidance on consumer rights and business obligations

The NZCC has issued guidance for consumers and businesses to assist them in understanding what their rights and obligations are in relation to disruptions to travel, trading and events as a result of COVID-19. The NZCC's guidance covers general legal principles and has a series of frequently asked questions in areas such as travel, events, weddings, subscriptions and memberships. However, circumstances can vary

from contract to contract and the NZCC encourages businesses and consumers to discuss the situation with one another, to work out a solution that best fits the circumstances of their relationship.

NZCC issues COVID-19 advice for lenders and borrowers

The NZCC has issued new guidance for consumer lenders and borrowers to assist them during the COVID-19 pandemic. The NZCC said that it appreciates the serious impact that COVID-19 is likely to have on lenders and borrowers. Lenders will want to provide additional support and flexibility to financially stressed borrowers at this time and the scale of borrowers' needs is expected to be unprecedented. Appropriate access to credit should be facilitated and maintained while borrowers' interests are also properly protected. Guidance for lenders and a question and answer document for borrowers can be viewed on the NZCC's website.

COVID-19: NZCC issues guidance on business collaboration

The NZCC has issued guidance on how it is assessing business collaborations that are being entered into in response to COVID-19. The NZCC has said the guidance aims to provide clarity and certainty for businesses as they navigate an unprecedented commercial environment and for consumers who should expect to continue to experience the benefits of competition. For more information see here.

Mergers and Acquisitions

Statement of Preliminary Issues released for AJ Park's application to acquire Baldwins

The NZCC has published a Statement of Preliminary Issues in relation to an application by AJ Park to acquire Baldwins' New Zealand assets. AJ Park is part of the ASX listed IPH group of IP professional services businesses and provides a range of IP related services including the registration and maintenance of patents and trademarks, and commercial legal advice. Baldwins also provides a range of IP related professional services including the registration and maintenance of patents and trademarks, and intellectual property enforcement and litigation. The Statement of Preliminary Issues and a public version of the application can be found on the NZCC's case register.

NZCC grants clearance for Elanco to acquire Bayer's animal health business subject to divestment

The NZCC has granted clearance for Elanco to acquire Bayer's animal health business, subject to a divestment undertaking requiring Elanco to divest three brands: Maggo, Zapp Encore, and Osurnia. Elanco applied to the NZCC for clearance to acquire Bayer AG's animal health business in February 2020 as part of a global transaction. Elanco is a US-based global animal healthcare company that develops, manufactures and distributes healthcare treatments for a range of different companion animals (such as cats and dogs) and production animals (such as sheep, cattle and other ruminants). The public version of the written reasons for the decision will soon be available on the NZCC's case register.

NZCC grants clearance for Verifone to acquire Smartpay

The NZCC has granted clearance to Verifone to acquire the assets used by Smartpay and its subsidiaries to operate the Smartpay business in New Zealand. In considering Verifone's application for clearance, the NZCC focused on the impact of the proposed acquisition on competition for the supply of terminals to small and medium sized retailers. The NZCC said it is satisfied that the proposed acquisition is unlikely to substantially lessen competition in any New Zealand market. The NZCC said that the presence of competing suppliers, with the ability to expand, is likely to constrain Verifone in its ability to raise prices or reduce service quality, and that because there are sufficient alternatives for terminal suppliers, Verifone would be unlikely to be able to foreclose competitors. A public version of the written reasons for the decision will soon be available on the NZCC's case register.

Dechra granted clearance to acquire Osurnia from Elanco

The NZCC has granted clearance to Dechra to acquire the assets, rights and liabilities relating to Osurnia from Elanco. In reaching its decision, the NZCC considered the potential impact of the proposed acquisition on competition in the market for the wholesale supply of products for the treatment of otitis in dogs. The NZCC said it is satisfied that the acquisition is unlikely to substantially lessen competition in this market. The NZCC considers that the presence of competing suppliers with the ability to expand is likely to constrain Dechra in its ability to raise prices or reduce the quality of its otitis treatment products. A public version of the written reasons for the decision will soon be available on the NZCC's case register.

NZCC grants clearance for Cengage and McGraw-Hill to merge their publishing businesses in New Zealand

The NZCC has granted clearance for Cengage and McGraw-Hill to merge their global publishing businesses. In reaching its decision, the NZCC considered the competitive impact of the proposed merger on the supply of textbooks to schools and higher education institutions in New Zealand. The NZCC's focus

was predominantly on considering the ability of the merged entity to reduce quality in the relevant subject areas in New Zealand, through potential reductions in the range and quality of the content of textbooks and in the supporting learning materials. The NZCC said that the presence of other major publishers in New Zealand, together with the presence of smaller suppliers in particular subject areas, is likely to constrain the merged entity such that a substantial lessening of competition in those subject area markets in New Zealand is unlikely. A public version of the written reasons for the decision can be found on the NZCC's case register.

NZCC grants clearance for T&G application to acquire Freshmax

The NZCC has granted clearance for Turners & Growers to acquire 100% of the shares in Freshmax. In reaching its decision, the NZCC considered the potential impact of the proposed acquisition on competition in the markets for the wholesale supply of fresh produce, cool-chain distribution services and contract ripening services in New Zealand. The NZCC said it was satisfied that the acquisition is unlikely to substantially lessen competition in any New Zealand market and that it considers the presence of competing suppliers in the relevant markets, along with the countervailing power of some customers and growers, is likely to constrain the ability of T&G to raise prices or reduce service quality. The NZCC also considered whether the acquisition could affect competition by enabling T&G to coordinate with its competitors, but concluded that this was unlikely due to the fluctuating nature of supply and demand for fresh produce and the ability of customers to buy direct from growers. A public version of the written reasons for the decision will soon be available on the NZCC's case register.

Statement of Issues released for Mylan N.V./Upjohn Inc. clearance application

The NZCC has published a Statement of Issues relating to an application from Mylan and Upjohn seeking clearance to merge their global pharmaceutical businesses. In New Zealand, both parties supply off-patent prescription medicines including cholesterol and triglyceride regulators, non-steroidal antirheumatics, antiepileptics and erectile dysfunction products. The Statement of Issues can be found on the NZCC's case register.

NZCC grants clearance for Juice Technologies to acquire APT

The NZCC has granted clearance for Juice Technologies (operating in New Zealand as Infocare Systems Limited) to acquire APT (trading as APT Childcare). In reaching its decision, the NZCC considered the possible impact of the proposed acquisition on competition in the national market for the supply of student management system software to providers of childcare for pre-school children. The NZCC said that it is satisfied that the presence of competitive alternative suppliers in the relevant market, including from a recent entrant, together with the potential for new entry, will likely constrain the ability of Infocare to raise prices or reduce service quality. The NZCC was also satisfied that the changes occurring in the market, coupled with the ability of customers to switch suppliers, will ensure that the merged firm is constrained from coordinating with competitors. A public version of the written reasons for the decision is available on the NZCC's case register.

NZCC closes investigation into Datix's acquisition of RL Solutions

The NZCC closed its investigation into Datix's acquisition of RL Solutions. In September 2018, the NZCC opened an investigation into Datix's acquisition of RL Solutions under section 47 of the Commerce Act. Later that month, Datix completed the transaction without receiving clearance from the NZCC. Datix divested several of its customers to a new supplier of patient safety software, which the NZCC considered will ensure Datix continues to face meaningful competition. The NZCC closed its investigation on 10 December 2019 without taking further action as its concerns with the acquisition were addressed. A summary of the reasons outlining the NZCC's decision will be available on the NZCC's case register.

Investigation opened into Objectives' acquisition of Master Business Systems

The NZCC has opened an investigation into Objective's acquisition of Master Business Systems (**MBS**). The NZCC will consider whether the acquisition would be likely to substantially lessen competition in any relevant market in breach of section 47 of the Commerce Act. Objective did not apply for clearance for the acquisition which occurred on 29 November 2019. Objective and MBS are both suppliers of software used to lodge building consent applications and manage the building consent process. Their brands include Objective Trapeze, AlphaOne, GoGet and GoMobile.

Market behaviour

Nelson pharmacy and a director fined $344,000 and $50,000, respectively, for price-fixing

The Wellington High Court has ordered Prices Pharmacy 2011 Limited and a director of the company, Stuart Hebberd, to pay fines of $344,000 and $50,000 respectively, after they admitted to entering into a

price-fixing arrangement with competing Nelson pharmacies in breach of the Commerce Act. The Court found that the effect of the arrangement was to fix the prices that the participating pharmacies would charge for filling prescriptions. The immediate consequence was to substantially lessen competition in the Nelson community pharmacy market, to the detriment of the customers purchasing the prescription medicines. A copy of the judgment is available on the NZCC's case register.

Consumer issues

Court of Appeal issues ruling in case regarding Harmoney's lending model

The Court of Appeal has largely dismissed peer to peer lender Harmoney's appeal against a High Court opinion on a question of law, and upheld the NZCC's cross appeal. Harmoney was appealing the High Court's May 2018 findings which included that Harmoney's "platform fee" is a credit fee under the Credit Contracts and Consumer Finance Act (**CCCFA**). The Court of Appeal overturned an earlier finding of the High Court which found that investors are creditors.

High Cost lender Ferratum admits responsible lending breaches

Ferratum has admitted breaching responsible lending provisions of the CCCFA. In the period covered by the settlement, Ferratum loaned amounts between $100 and $1,000, charging interest of between 52% and 803% per annum with loan terms of between 7 and 45 days. Ferratum admitted that it breached the CCCFA in respect of 46 named borrowers by failing to make reasonable enquiries as to those borrowers' requirements and objectives, failing to exercise reasonable care in advertising loans, and failing to assist those borrowers to reach informed decisions as to whether or not to enter into loans.

High cost lender Pretty Penny quits NZ, writes off loans in NZCC settlement

Australian high-cost short-term lender Quadsaa Pty Limited (trading as Pretty Penny and PPL) has undertaken to write off all outstanding loan balances in a settlement agreement with the NZCC. After indicating that Pretty Penny is no longer lending in New Zealand, it has also signed court-enforceable undertakings that it will no longer advertise for, invite or enter into consumer loans in New Zealand, and it will not provide any information about borrowers to third parties (except where required by law).

Whangarei finance company in $945,334 settlement with NZCC

Current and former borrowers of Whangarei-based finance company, Profile Finance, will receive $945,334 in credits and refunds after Profile Finance signed a settlement agreement with the NZCC. The NZCC investigation found that, during the relevant period, Profile Finance did not provide all the key information to borrowers that is required under the CCCFA.

NZCC finalises 'fit and proper' person criteria

The NZCC has finalised the criteria it will use to assess whether a lender is 'fit and proper' under changes to the CCCFA, after receiving submissions from interested stakeholders. The confirmed 'fit and proper' criteria focuses on whether all directors and senior managers of lenders and mobile traders are competent, financially sound, honest, reputable, reliable and competent to do the job. Details of the submissions, the NZCC responses and the finalised criteria are outlined in the consultation response report, which can be found here.

HSBC warned over disclosure failures

The NZCC has issued a warning to HSBC over its failure to comply with the information disclosure requirements of the CCCFA. HSBC self-reported the matter to the NZCC following a routine audit of its business in New Zealand. HSBC identified six occasions between 2014 and 2018 when it failed to disclose an interest rate increase to borrowers. The failures affected 225 loans and 180 borrowers. In light of the actions already taken by HSBC and the relatively small number of affected borrowers, the NZCC decided that a warning was appropriate in this case.

Kitset home business director pleads guilty to breaching the Fair Trading Act

Emma Gestro the director of now defunct Get Design (a business that advertised and sold small kitset buildings) has pleaded guilty to three charges laid by the NZCC for breaching the FTA when taking payment for goods. The NZCC alleged Ms Gestro breached the FTA by demanding or accepting payment for small kitset buildings sold by Get Design, when she did not have reasonable grounds to believe that delivery could occur within the specified contractual period, or within a reasonable time. The charges arose from Ms Gestro's conduct with three customers between July 2016 and July 2017 when the company was placed in liquidation.

Couple and company fined for false or misleading fire extinguisher servicing claims

Aero Fire, a fire extinguisher service company, its owner and his wife have been fined a total of $60,000 on FTA charges and have undertaken that they will no longer participate in the fire extinguisher servicing industry, following a NZCC investigation. Aero Fire operated primarily in Auckland and Hamilton, offering fire extinguisher installation and servicing to small businesses such as shops and restaurants. It pleaded guilty to four charges under the FTA relating to false or misleading representations made regarding the installation, servicing and maintenance of fire extinguishers and the need for those services.

Health supplement firm fined $194,400 for mislabelling its products and found guilty of failing to supply information to the NZCC

Invercargill firm Gateway Solutions Limited (formerly trading as Silberhorn Limited) has been fined $194,400 in the Dunedin District Court for misrepresentations it made about its deer velvet health supplements. The company and its director and majority shareholder, Mr Ian Carline, were also found guilty of failing to supply information to the NZCC during its investigation. In February 2014, the NZCC received a complaint alleging that Silberhorn's deer velvet health supplements contained less deer velvet than was described on the product labels, with capsules being topped up with carob – a manufacturing aid. In November 2017, the company pleaded guilty to 26 charges under the FTA for conduct that was liable to mislead the public as to the nature or characteristics of the products, including four charges for claims made on its website.

$120,750 in fines for unsafe "Ha-ha Groan Hammer" and rubber animals

Two importing companies have been fined a total of $120,750 on FTA charges following toy safety investigations by the NZCC. Feel So Good Limited was fined $60,000 and Espoir Limited was fined $60,750. Both companies supplied toys found to be unsafe following testing by the NZCC.

NZCC issues warning to Hong Kong based electronics retailer

Online electronics retailer Becextech has been warned for conduct that the NZCC considers has likely breached the FTA. In the NZCC's view, Becextech has likely breached the FTA by failing to clearly disclose that some mobile phones it was selling were refurbished, thereby misleading consumers into believing that they were buying new mobile phones at discounted prices, selling extended warranties that did not contain the mandatory information required to be disclosed to consumers, and making unsubstantiated and false or misleading representations about the price of goods by representing certain goods as being available at discounted prices and 'on-sale' without having reasonable grounds to support the level of discount claimed.

Viagogo confirms website changes and accepts jurisdiction of NZ courts

The NZCC will no longer seek an interim injunction against online event ticket seller Viagogo, after Viagogo made changes to its website and gave undertakings to the Court that it would not undo those changes. Viagogo has also now submitted to the jurisdiction of the New Zealand courts. The changes Viagogo has made to its website have largely addressed the interim injunction application filed by the NZCC which alleged that Viagogo was misrepresenting the price and availability of tickets as well as the "guarantees" attached to tickets. Viagogo has also undertaken that it will take reasonable steps to ensure that the phrases "All tickets 100% guaranteed!" or "100% guaranteed" will not appear in Google search results.

Telecommunications

Independent tests show NZ's broadband performed well during COVID-19 lockdown

The NZCC's latest Measuring Broadband New Zealand report shows that on average, copper and fibre broadband connections experienced no significant decrease in download speeds during lockdown, despite unprecedented demand on broadband networks. The latest Measuring Broadband New Zealand Autumn 2020 report is now on the NZCC's website.

Feedback wanted on protections for consumers that Chorus wants to move off copper and broadband services

The NZCC is seeking feedback on its draft 'copper withdrawal code'. The code is intended to protect consumers that Chorus wants to move off its old copper network onto faster and more reliable technologies such as fibre networks. The draft code sets minimum requirements that Chorus must meet before it will be able to stop providing copper services, such as landlines and ADSL or VDSL broadband, to a consumer – including that equivalent services must be provided over fibre. The NZCC is inviting feedback from individual consumers and advocacy groups about the proposed code. Submissions can be

made via the NZCC's website by 5pm on 17 July 2020. The final code is expected to be finalised and published in September 2020.

Annual Telecommunications Monitoring Report shows fibre broadband overtakes copper

The NZCC has released its Annual Telecommunications Monitoring Report highlighting trends in the industry, including that fibre has overtaken copper as the main way Kiwi households access the internet from home. The report shows that at 30 September 2019 there were 880,000 homes and businesses connected to the fibre broadband network, an increase of 31% from 2018. Meanwhile, copper connections dropped 23% to 581,000 over the same period. Fixed wireless connections have also been growing, up 14% to 188,000 from 2018. However, growth was at a slower rate, almost half the rate of the previous year. The full report can be found on the NZCC's website.

Draft guidance released on NZCC's approach to unbundled fibre

The NZCC has released draft guidance to help the telecommunications industry understand its approach to monitoring and enforcing obligations on Chorus and the other local fibre companies to allow retailers access to unbundled fibre services with acceptable terms and prices. The NZCC intends to publish its final guidance later this year.

ACCC MEDIA RELEASES

The Australian Competition and Consumer Commission (ACCC) has issued the following selected media releases:

Industry regulation and regulatory control

Views sought on issues for draft news media and digital platforms bargaining code

The ACCC is seeking views to inform its work on developing a new draft mandatory code that will address bargaining power imbalances between Australia's news media businesses and Google and Facebook. The Australian Government announced in April that it had directed the ACCC to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms. The Government has asked that a draft mandatory code be released for public consultation before the end of July 2020, with a final code to be settled soon thereafter.

Mergers and acquisitions

Google's purchase of Fitbit raises preliminary competition concerns

The ACCC has outlined preliminary concerns with Google's proposed acquisition of Fitbit, stating that Google's access to consumer health data may raise entry barriers, further entrench its dominant position and adversely affect competition in several digital advertising and health markets. Fitbit, a company that makes wearable devices, has collected health information from consumers for more than 10 years, including users' daily step counts, heart rate and sleep data. The ACCC has said that its concerns are that Google buying Fitbit will allow Google to build an even more comprehensive set of user data, further cementing its position and raising barriers to entry to potential rivals. The ACCC's final decision will be announced on 13 August 2020.

Bunnings' Adelaide Tools acquisition not opposed

The proposed acquisition of Adelaide Tools and Oaklands Mower Centre by Bunnings Group won't be opposed, after the ACCC decided the transaction isn't likely to substantially lessen competition. The ACCC said that although Bunnings closely competes with the trade-focused tool and equipment specialists, it was not satisfied that the differences between Bunnings and the Adelaide Tools businesses and the existence of large expanding specialist tool retailers, such as Total Tools (with six stores in Adelaide) and Sydney Tools (which intends to open stores in every state and territory), meant that the threshold of a substantial lessening of competition was not reached. Further information is available here.

Telecommunications

NBN Co, telcos to coordinate on demand surge and consumer support package

The ACCC has granted interim authorisation allowing NBN Co and five retail service providers to work together to take measures necessary to keep Australia's telecommunications networks operating effectively during the COVID-19 pandemic as well as to support consumers and small businesses adversely impacted by the pandemic. At the request of the Minister for Communications, Cyber Safety and the Arts,

NBN Co and Australia's five biggest retail service providers have formed a special working group, which includes Telstra, Optus, Vodafone Hutchison, TPG and Vocus. The ACCC will be an observer on the special working group

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