CORPORATE REPORTER

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WELCOME

to issue No.69 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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BELL GULLY

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CAPITAL MARKETS

Climate-related financial disclosures bill passes

The Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill has been through the parliamentary process with some resulting changes, and is now awaiting Royal assent.

New Zealand is the first country in the world to enact legislation requiring mandatory climate-risk reporting for the financial sector. This omnibus Bill will amend the Financial Markets Conduct Act 2013, the Financial Reporting Act 2013, and the Public Audit Act 2001 to broaden non-financial reporting by requiring, and supporting the making of, climate-related disclosures by certain FMC reporting entities.

Key provisions

In summary, there are four key parts to the Bill:

- Climate-related disclosures will be mandatory for all "climate reporting entities".
- Disclosures must be made in accordance with climate standards to be issued by the External Reporting Board (**XRB**).
- Disclosures relating to greenhouse gas (**GHG**) emissions will need to be verified by an assurance practitioner (although, as discussed below, this requirement will not apply for the first three years).
- The Financial Markets Authority (**FMA**) will be responsible for enforcing compliance, which it will do under its existing statutory powers, including monitoring the disclosures.

Climate reporting entities

The financial entities caught by the Bill, described as "climate reporting entities", cover the majority of assets under management in New Zealand, including:

- all registered banks, credit unions, and building societies with total assets of more than NZ$1 billion,
- all managers of registered investment schemes with greater than NZ$1 billion in total assets under management,
- all licensed insurers with greater than NZ$1 billion in total assets under management or annual premium income greater than NZ$250 million, and
- all large issuers listed on the NZX with a market capitalisation over NZ$60 million.

Changes were made to the Bill's definition of a 'climate reporting entity' for listed issuers during the parliamentary process. As introduced, the Bill applied to "every entity that is listed on a licensed market". However, this has now been modified so that it only includes listed issuers which are "large listed issuers" (defined as issuers with a market capitalisation over NZ$60 million, or with quoted debt securities with a total face value over NZ$60 million) which are not "excluded listed issuers" (that is, listed issuers whose securities are listed only on a growth market, or listed issuers who have no quoted equity or debt securities).

Reporting standards and requirements

Reporting will be against the reporting standards issued by the XRB. These will align with the recommendations made by the Taskforce on Climate Related Financial Disclosures (**TCFD**), which are widely accepted as international best practice for climate-related financial reporting.

In line with the TCFD's recommendations, the mandatory climate-related disclosures will focus on the following core areas of business operations for climate reporting entities:

- the organisation's governance strategy,
- risk management, and
- metrics and targets used to monitor and assess climate-related risks and opportunities.

As introduced the Bill took a comply-or-explain approach to disclosures, meaning that climate reporting entities were required to either comply with the applicable reporting standards, or if not, explain why not. However, due to concerns that this approach would result in substantially different reports and quality of reporting (and therefore would undermine the climate-related disclosure regime's goal of providing consistent and comparable climate reporting) the Bill now requires all climate reporting entities to apply

the same climate standards for their disclosures. The Government believes that any need for differential reporting can be achieved through the application of the climate standards set by the XRB.

Failure to comply with the reporting requirements could attract a range of penalties, ranging from fines of up to NZ$50,000 for infringement offices, to NZ$500,000 for individuals or NZ$2.5 million for reporting entities for more serious breaches.

Delayed implementation of assurance requirements

As introduced, the Bill required disclosures relating to GHG emissions to be verified by a qualified assurance practitioner from the same date as the climate-related reporting requirements come into force.

However in recognition of the fact that it will take time to build and grow professional capacity in the audit and assurance industry for climate reporting, disclosures relating to GHG emissions no longer require immediate assurance verification. The assurance provisions will now come into effect within three years (rather than the original one year period) after the Bill receives Royal assent.

In addition, the original proposal to introduce a separate licensing and accreditation regime for climate-related assurance practitioners has now been removed from the Bill.

Under the Bill, assurance practitioners, in carrying out an assurance engagement, are still required to comply with all applicable auditing and assurance standards, and it will be an offence, liable on conviction to a fine not exceeding NZ$50,000, for an assurance practitioner to contravene applicable assurance standards. The XRB is currently assessing what updates may be required to the existing assurance standard for GHG statements (ISAE (NZ) 3410).

Reporting timeline

Climate reporting entities will be required to prepare climate statements in respect of the first accounting period commencing on or after the XRB issue the first climate standard (which is expected to be by December 2022). This means that entities could be required to make disclosures for accounting periods that start on or after 1 January 2023. For example:

- A reporting entity with a 31 December balance date (i.e. reporting period 1 January to 31 December), would be required to prepare their first climate statement as part of their 31 December 2023 reporting.
- A reporting entity with a 30 June balance date (i.e. reporting period 1 July to 30 June), would be required to prepare their first climate statement as part of their 30 June 2024 reporting.

It is therefore important for climate reporting entities to prepare for the new regime now. For tips on how to prepare for climate risk reporting visit the XRB's website here.

Upcoming consultations on the XRB climate-related financial reporting standards

The XRB has already published a consultation on the governance and risk management sections of the proposed climate-related financial reporting standards. This consultation closes on 22 November 2021.

Work is also underway on the more complex 'Strategy and Targets & Metrics' sections of the disclosure standards. A four-week consultation on these aspects is expected to be released in March 2022. This will include discussion specifically on scenario planning and accounting for GHG emissions.

A formal exposure draft of the climate-related financial reporting standards is expected to be released in July 2022, together with accompanying documents such as the transitional provisions. This consultation will be open for three months.

Consultation on options for new FMA funding and implementation of the CoFI regime

MBIE and the FMA are seeking feedback on the additional funding the FMA requires to oversee three new legislative regimes – the Conduct of Financial Institutions (CoFI), the proposed changes to insurance contract law (ICL) and the new mandatory climate-risk reporting for the financial sector (CRD). As part of this consultation, they are also asking for input on the implementation of the CoFI regime. Submissions close on 7 November 2021.

Funding

The discussion document outlines:

- two different funding options (that reflect two different regulatory approaches) under each of the CoFI, ICL, and CRD regimes, and
- proposed changes to the FMA levies paid by financial markets participants who are in scope of the CoFI, ICL and CRD regimes.

The new FMA funding and levies are expected to be in place by July 2022.

Implementing the CoFI regime

The discussion document also seeks feedback on MBIE's preferred approach for implementing the Financial Markets (Conduct of Institutions) Amendment Bill (**CoFI Bill**), including how to address the possible overlap with the end of the transitional licensing window for the financial advice providers regime, and whether there should be a phased approach to the obligation to hold a conduct licence for different classes of financial institutions.

The CoFI Bill proposes a new conduct and culture regime for banks, insurers, non-bank deposit takers, and some intermediaries (collectively referred to as 'financial institutions' under the Bill). The CoFI regime will also require financial institutions to obtain a licence from the FMA to act as a financial institution. For more detail on the regime see: The Big Picture: Financial Markets – Greater detail on the conduct regulation regime.

The CoFI Bill is expected to pass by the first half of 2022. On this basis, MBIE's current thinking is that the supporting regulations would also be passed within that timeframe, and there would be an 18-month licensing window for financial institutions to obtain the relevant licence before all obligations in the CoFI Bill come into force in December 2024.

In MBIE's view this timeframe will give financial institutions sufficient time to prepare for the new regime, particularly given that the FMA has been communicating to financial institutions its continued expectation that they should demonstrate good conduct in their dealings with consumers, and has asked institutions to check they have systems and controls in place needed to ensure good conduct and fair treatment of consumers. Examples given in the discussion document as the types of tasks required to prepare for the regime include:

- developing fair conduct programmes,
- ensuring any incentives arrangements offered comply with incentive regulations,
- preparing fair conduct programme summaries for publication,
- reviewing and amending contractual arrangements (e.g., agency agreements with intermediaries),
- undertaking product and service reviews, and
- undertaking staff training and investment in IT systems.

Reserve Bank consults on policyholder security for the review of IPSA

The Reserve Bank has published an options paper about policyholder security as part of the second stage of its review of the Insurance (Prudential Supervision) Act 2010 (IPSA).

This is the second of a series of five consultations on specific options for reforming different sections of IPSA, beginning with an options paper published last year on the scope of the act and the treatment of overseas insurers. The Reserve Bank expects to publish its policy decisions on all the issues raised in the options papers in early 2023, before moving on to legislative drafting.

This consultation deals with statutory funds and solvency requirements, along with two disclosure requirements that are particularly designed to help policyholders assess insurers' financial soundness.

The options paper provides an overview of the Reserve Bank's approach to policyholder security and looks at relevant sections of the legislation, including:

- the solvency disclosure requirements and the requirements for financial strength ratings from an approved rating agency,
- the provisions in IPSA that empower, apply and draw on the solvency standards,
- whether IPSA should contain provisions requiring minimum termination values, and
- the requirement for life insurers to establish 'statutory funds' to look after the assets that underpin their liabilities to life insurance policyholders, and whether statutory fund protections should extend to other insurance contracts.

The Reserve Bank is seeking feedback on a series of questions concerning the above areas. It is also inviting stakeholders to assess whether the overall level of policyholder security provided by IPSA is appropriate, and whether it is worth considering some form of policyholder guarantee scheme. The closing date for submissions is 15 November 2021.

Additional information on the review of the IPSA and the current consultation are available on the Reserve Bank's website.

Change of insurance interim solvency standard implementation date

The Reserve Bank has decided to change the date of implementation of the Interim Solvency Standard from 1 January 2022 to 1 January 2023.

This follows the Reserve Bank's consultation in July this year on a draft Interim Solvency Standard for insurers, which determines the minimum amounts of capital that insurers must hold. The new date aligns with the date on which insurers must adopt IFRS 17 (the new accounting standard for insurance contracts).

The final Interim Solvency Standard is expected to be published by 1 October 2022.

Further details are available here.

Reserve Bank consults on a new enforcement framework

The Reserve Bank is seeking feedback on a proposed new enforcement framework to promote confidence in compliance across the sectors it regulates.

In March, the Reserve Bank announced the establishment of an enforcement department that has been tasked with transforming the Reserve Bank into a "flexible and proactive regulator" that reflects its "evolving responsibilities, legislative powers and expectations". The department is operationally separate from the Reserve Bank's existing supervision team.

The Reserve Bank's desire for dedicated enforcement capability is not surprising. The Bank's regulatory remit is steadily expanding and its existing supervisory and enforcement responsibilities are coming under increased scrutiny.

In the consultation paper released last week, the Reserve Bank has asked for feedback on the principles and criteria which will guide its enforcement decision making process.

Submissions close on 24 November 2021. The Reserve Bank expects to release its finalised Enforcement Principles and Criteria in early 2022.

Date fixed for requirement to register on the FSPR

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 was amended in 2019 to expand the range of persons who are required to be registered as financial service providers.

Those amendments include transitional provisions that give existing providers a period of grace within which to become registered. The Financial Service Providers (End of Transitional Period) Order 2021 sets 16 December 2021 as the date the grace period expires.

Target dates set for the transition to full FAP licences

The FMA has set 30 September 2022 as the target date by when all transitional financial advice providers (FAPs) should apply for their Class 1 or Class 2 full licences. For Class 3 licence applicants, the target date is 30 June 2022.

All FAP transitional licences expire on the close of 16 March 2023.

Further details are available on the FMA's website.

FMA issues new guidance on advertising of financial products

Following on from a consultation last year, the FMA has issued new guidance on the FMA's expectations for advertising financial products, and expects firms to ensure their current marketing practices and campaigns are in line with the new guidance.

The guidance note focuses on the FMA's expectations for how the fair dealing provisions in Part 2 of the FMC Act should be applied in practice to communications made for the purposes of advertising or

promoting offers of financial products. It also covers the application of the specific advertising provisions in Part 3 of the FMC Act for regulated offers of financial products.

As well as traditional advertising mediums in print, broadcast, digital and outdoor formats, the guidance applies to social media, seminars, newsletters, product brochures and promotional fact sheets, direct mail (for example, written letters or email), group presentations, and advertorials, among other formats.

For discussion on this guidance note see our article here.

Changes required for new KiwiSaver default members

The KiwiSaver (Reallocation and Transfer of Default Members) Regulations 2021 put in place measures for the transition to the six new KiwiSaver default providers when the terms of the current default providers end on 30 November 2021.

In March 2021, the Government announced new default provider arrangements for KiwiSaver, with six default providers being appointed, down from the current nine. Only four of the current providers have been retained.

After 1 December, a KiwiSaver default member who is not with one of the new six default providers will automatically be transferred to one of the six new default providers (by the Inland Revenue Department), unless they request not to be transferred.

These regulations set out the requirement to reallocate and transfer the transferring default members and set out the things that providers of old default schemes and new default schemes must do to facilitate or enable that transfer.

Final update from the FMA on its review of FMC Act class exemption notices

Last year the FMA consulted on its review of 16 class exemption notices which are due to expire this year. It has decided to grant continued exemption relief for all of these notices, other than the Financial Markets Conduct (Disclosure Using Overseas GAAP) Exemption Notice 2016 which expires on 3 November 2021.

These 16 notices, which were put in place to support the regime under the Financial Markets Conduct Act 2013 (**FMC Act**) when it was first implemented, provide solutions to various FMC Act regime compliance issues that are unique to particular classes of market participants.

As noted in previous issues of the Corporate Reporter, the FMA has made various announcements on its website as it made decisions on whether or not to grant continued exemption relief. In its latest and final update, the FMA has confirmed that it will grant relief on substantially the same basis as under the following two existing notices:

- Financial Markets Conduct (Incidental Offers) Exemption Notice 2016.
- Financial Markets Conduct (Recognised Exchanges) Exemption Notice 2016.

The FMA expects to finalise the new notices to give effect to these decisions before the current exemption notices expire in November 2021.

Since our last publication, the following class exemption notices have now been granted:

- Financial Markets Conduct (Overseas Banks Offering Simple Debt Products) Exemption Notice 2021
- Financial Markets Conduct (Communal Facilities in Real Property Developments) Exemption Notice 2021
- Financial Markets Conduct (Employee Share Purchase Scheme Shares Offered under Securities Act 1978) Exemption Notice 2021
- Financial Markets Conduct (Overseas Subsidiary Balance Date Alignment) Exemption Notice 2021
- Financial Markets Conduct (Equine Bloodstock) Exemption Notice 2021

For the full list of the new notices granted under this review visit FMA's website.

Continued disclosure relief for offerors of kauri bonds

Earlier this year the FMA sought feedback on the Financial Markets Conduct (Wholesale Investor Exclusion - $750,000 Minimum Investment) Exemption Notice 2017, which will expire on 4 February 2022.

This notice exempts offerors of certain financial products from some requirements that must be given to wholesale investors in order to rely on the $750,000 wholesale investor exclusion in Schedule 1 of the FMC Act. It applies to offerors of Kauri bonds and other unsubordinated debt securities.

The FMA has continued the relief for offerors of kauri bonds in the replacement notice (Financial Markets Conduct (Wholesale Investor Exclusion - $750,000 Minimum Investment) Exemption Notice 2021), but it has decided not to continue relief for offerors of other unsubordinated debt securities having found no evidence of material reliance on this exemption in the market. The new notice comes into effect on 5 February 2022.

KiwiSaver Confirmation Information methodology notice

The FMA has announced that it has decided, in principle, to grant a new notice that will continue the settings in the Financial Markets Conduct (KiwiSaver Confirmation Information) Methodology Notice 2017, which expires on 27 July 2022.

Under the Financial Markets Conduct Regulations 2014 confirmation information for individual KiwiSaver scheme members must contain the approximate total sum, expressed as a dollar amount, of the fees charged to that member. The Methodology Notice sets out a methodology which KiwiSaver providers must use to calculate the "approximate" dollar amount of the total annual fees charged to each KiwiSaver member.

Under the new notice providers will be able to continue to use either the total annual fund charges (TAFC methodology) or the member's balance at the date the units of the funds are valued (cents per unit or CPU methodology). However, the FMA's preference is for providers to use the CPU methodology.

Proposed financial reporting exemptions for FMC reporting entities in liquidation, receivership or voluntary administration

The FMA is considering granting relief for insolvent FMC reporting entities from certain FMC Act financial reporting obligations.

At present, the FMC Act requires insolvent FMC reporting entities to continue producing audited financial statements in parallel with the external administrators' reports required under New Zealand's insolvency laws. This is seen as providing little benefit to investors and creditors. As a result, the FMA is considering offering three types of relief based on a similar approach taken in Australia:

- Exemption relief - Relief from certain financial reporting duties by way of a class exemption, for all insolvent FMC reporting entities (except managed investment schemes) to which a liquidator is appointed, subject to certain conditions.
- Deferral relief - Relief from certain financial reporting duties, for all FMC reporting entities (except managed investment schemes) to which a voluntary administrator or receiver is appointed, for a period of 12 months from the appointment of the external administrator, subject to certain conditions.
- Case-by-case relief - Individual relief on a case-by-case basis from the financial reporting duties in situations not covered by the exemption or deferral relief where similar policy considerations apply and the exemption criteria under the FMC Act are met.

For a full discussion on the issues and the FMA's preferred options refer to the FMA's consultation paper.

FMA updates its customer vulnerability information sheet for financial service firms

The FMA has updated its customer vulnerability information sheet expectations for financial service firms in light of the increasing economic impact of COVID-19.

Financial services firms would be well advised to consider how their current processes measure up to these expectations and how they can demonstrate that they identify and respond adequately to the needs of vulnerable customers in practice.

For commentary on the FMA's updated expectations refer to our article here.

FMA provides "no action' regulatory relief for COVID-19

The FMA has confirmed that it will be applying a "no action approach" against market participants experiencing difficulties meeting their regulatory obligations due to the latest COVID-19 restrictions.

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.

If you need 'no action' relief you are encouraged to apply to the FMA with specified details, including the reasons you require the relief and when and how you intend to remediate the breach.

Details of 'how to apply' and a list of 'no action relief' that has previously been granted to a wide range of market participants are available on the FMA's website.

FMA deterrence in action

The FMA has escalated its enforcement activity this year, including initiating pecuniary penalty proceedings for market manipulation and anti-money laundering failings.

Market manipulation

The FMA has filed civil High Court proceedings against an individual for alleged information-based market manipulation in contravention of the Financial Markets Conduct Act 2013 (**FMC Act**) and the Securities Markets Act 1988. The individual made anonymous posts on Sharetrader's online investor forum without disclosure of involvement in the company referenced. The FMA describes the case as an important reminder that information-based market manipulation can occur on social media and forums, where investors are increasingly gathering to discuss stocks. See the FMA's media release for further details.

Fair dealing breach

The FMA issued a direction order to a property development and investment company for contravening the 'fair dealing' provisions in the FMC Act by advertising materials likely to mislead or deceive investors on the company's website and social media channels.

The direction order required the company to remove the advertising materials and to ensure future materials are not likely to mislead or deceive about the inherent risks of financing property development projects.

AML/CFT breaches

The FMA has secured its first pecuniary penalty for breaches of the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act. The High Court imposed a fine of NZ$770,000 on CLSAP NZ for breaches that included failures to:

- conduct customer due diligence,
- terminate an existing business relationship because of inabilities to conduct due diligence,
- report suspicious transactions and activities, and
- keep requisite records.

The FMA has also issued public formal warnings to other reporting entities for failures to comply with AML/CFT requirements, and recently reported that given the regime has been in place for eight years, it has less tolerance for failures to meet obligations. In particular, the FMA intends to continue monitoring firms' processes, with more in-depth assessments of how they add new customers, as well as their monitoring of accounts and transactions, and reporting of suspicious activity to the Police Financial Intelligence Unit.

Further details on the FMA's monitoring of the AML/CFT Act over the past three years (1 July 2018 – 30 June 2021) are available in its August 2021 AML/CFT monitoring insights report.

Monitoring the derivatives issuer sector

The FMA is in the process of conducting an in-depth monitoring review of the licensed derivatives issuer industry, which it expects to conclude before the end of the year. Recent enforcement action by the FMA includes censuring derivatives issuers for:

- persistent and systemic breaches of its licence obligations, including failing to conduct product suitability tests for clients, repeatedly failing to meet net tangible asset requirements, and not regularly providing statements to derivative investors regarding their investments, and
- failing not to hold investor money on trust, separate from the licensee's own money.

MERGERS AND ACQUISITIONS

New overseas investment fees and penalties in place

On 13 September 2021 the Overseas Investment Office's new fees framework came into effect.

The Overseas Investment (Fees) Amendment Regulations 2021 alter the fees payable for matters under the Overseas Investment Act 2005. This follows a review by the Overseas Investment Office (**OIO**) of its fee levels and framework in 2020, and a consultation period which ended in March 2021.

In some categories fee increases have been limited compared to initial proposals. For example, the initial proposal was to charge NZ$86,700 for a "complex" significant business assets (**SBA**) application. We are pleased to see that there is no longer scope to treat SBA applications as "complex". The resulting fee increase from NZ$32,000 to NZ$38,800 is more appropriate given the recent simplifications to the SBA consent process. However, in other categories, such as sensitive land applications, the fee increases remain substantial and similar to initial proposals.

Fees invoicing now will be a three-step process for most applications:

- a lodgement fee is payable when an application is submitted,
- an assessment fee is payable once an application is accepted, and
- a monitoring compliance fee is payable before consent can be granted.

For further details see our article here and the OIO's website.

Overseas Investment (CPTPP - Peru) Amendment Regulations 2021

Peru has joined other countries that have ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which New Zealand is a party, and can now enjoy an increased significant business assets threshold under New Zealand's overseas investment regime.

The Overseas Investment (CPTPP - Peru) Amendment Regulations 2021 amend Part 5 of the Overseas Investment Regulations 2005, which provides for alternative monetary thresholds for overseas investments in significant business assets for the purpose of implementing New Zealand's obligations under the CPTPP Agreement. The increased monetary thresholds (from NZ$100 million to NZ$200 million) apply for the purpose of determining whether overseas investments in business assets from CPTPP countries require consent under the Overseas Investment Act 2005.

COMMERCIAL

Consultation on AML/CFT legislation

The Government is undertaking a comprehensive review of the Anti-Money Laundering and Countering Financing Act 2009 (AML/CFT) and the supporting regulations to see how well the legislation is working in practice.

In a 133 page consultation paper the Ministry of Justice outlines areas of concern identified by the Ministry and the other agencies involved in the supervision of the AML/CFT regime, as well as the recommendations made by the Financial Action Task Force (**FATF**) following its recent evaluation of the regime. Changes to the legislation that may come from the review, include matters that:

- address emerging areas of risk and support other government priorities,
- improve compliance with FATF standards,
- ensure that compliance costs are proportionate to risks for individual businesses and across the economy in general,
- modernise the legislation to reflect the digital economy, and
- avoid or mitigate unintended consequences resulting from the operation of the regime (such as making it harder for legitimate non-profit organisations to operate, closing accounts of risky customers or businesses, and excluding people from the formal financial system).

The Ministry is seeking feedback on all of these matters, and also wants submissions on any issues or changes that may not have been identified in the paper through responses to both specific questions based on set topics, as well as on more general open-ended questions on the AML/CFT regime.

Timeframe

Submissions on this consultation close on 3 December 2021, and the review itself is expected to finish by 30 June 2022 with the Ministry reporting back to the Minister of Justice on its recommendations. It is not envisaged that any amendments to the Act would be made before 2024/2025. However, it is possible that some changes could be progressed sooner through regulations, class exemptions, and codes of practice.

Extension of submission deadline for annual AML/CFT reports

The AML/CFT Supervisors agreed to change the submission deadline for reporting entities' annual AML/CFT reports (from 31 August to 30 September 2021) to address difficulties caused by the current COVID-19 Alert Levels.

The full extension announcement is available here.

The guidance the AML/CFT Supervisors published in March 2020 regarding compliance with AML/CFT verification requirements during COVID-19 Alert levels still remains applicable.

Digital Identity Services Trust Framework Bill

The Government has introduced a bill to provide a legal framework for the provision of secure and trusted digital identity services for individuals and organisations in New Zealand. The framework will apply to service, technology and information providers.

The Digital Identity Services Trust Framework Bill establishes a trust framework (consisting of primary legislation, a set of rules and regulations) for the provision of user-authorised digital identity services that enable a user to share personal or organisational information in digital form in a transaction with a relying party. This includes services or products that:

- check the accuracy of personal or organisational information,
- check the connection of personal or organisational information to a particular individual or organisation, and
- provide secure sharing of personal or organisational information between trust framework participants.

The trust framework consists of five components:

- **Accreditation scheme** - There will be an opt-in accreditation scheme that establishes minimum requirements for handling personal and organisational information that accredited digital identity service providers (**TF providers**) must comply with. TF providers are likely to be organisations such as government departments, existing identity service providers, and other private sector organisations that verify identity. Users or consumers of digital identity services will not have to be accredited to use accredited digital identity services.
- **TF Authority**: An authority will be responsible for making decisions on applications for accreditation and renewal of accreditation, conducting investigations following complaints or, on its own initiative, and granting remedies for breaches. The TF Authority will also be responsible for maintaining a register of TF providers, which will enable the public to check the accreditation status of individuals and organisations and any digital identity services offered by them.
- **TF Board** - A governance body (**TF Board**) will have responsibility for recommending draft TF rules to the relevant Minister and undertaking consultation on the rules before it does so. The TF Board will also undertake education, publish guidance, and monitor the performance and effectiveness of the trust framework. A Maori Advisory Group will be established to advise the TF Board on Māori interests and knowledge as they relate to the operation of the trust framework. The board must also seek advice from the Māori Advisory Group if a matter the board is dealing with raises matters of tikanga Māori or Māori cultural perspectives.
- **TF Rules** - A set of rules will regulate the operation and administration of the trust framework. The TF Rules will identify the types of digital identity services that may be accredited services, and also set minimum requirements in the following five areas:
  - identification management,
  - privacy and confidentiality (which must be consistent with the Privacy Act 2020),
  - security and risk,
  - information and data management, and
  - sharing and facilitation.

  The TF Rules may also set other requirements for periodic self-assessment and reporting by TF providers for compliance with the rules, complaints and dispute resolution processes to be operated by TF providers, and other matters. The rules may set different minimum or other requirements for different types of providers and services.

  TF providers will be able to use approved trust marks to show their compliance with the TF Rules.
- **Complaints and penalties** - To protect the integrity of the trust framework and to enforce compliance with the TF Rules, the Bill allows for people to submit complaints to the TF Authority if they believe a TF provider has breached one or more of the TF Rules, the regulations, terms of use of trust marks, or the Act. If the TF Authority finds that a breach has occurred, it can grant remedies, such as publishing a public warning, suspending a TF provider's accreditation, or cancelling their accreditation. The Bill also contains offences for activities that threaten the integrity of the trust framework, such as falsifying accreditation.

The Bill passed its first reading this week and will now be referred to the Economic Development, Science and Innovation Committee for consideration and public consultation.

Submissions open on drone regulation

The Civil Aviation Bill, which includes proposed changes to the way drones are regulated in New Zealand, passed its first reading on 1 October, and is now open for submissions. The closing date for submissions is 11 November 2021.

The proposed reforms would clarify drone operators' responsibilities, as well as creating new consequences for misuse (as part of broader measures to reform the regulation of the civil aviation sector). For more information, see our previous update on the Bill and the proposed changes here.

Drones have the potential to make significant changes to how New Zealanders do business and transport goods, and could create extensive benefits for various industries. These include agritech, utilities, public safety, FMCG logistics, and – as noted during the First Reading – "different emerging technologies" that are "not yet discovered". In introducing the Bill, Minister David Clark explained that the proposed

framework is intended to offer "a more flexible regime that is fit for purpose now but allows for the kinds of changes that might be required in the future."

The Minister of Transport Michael Wood has welcomed the Bill as a "once in a generation chance to get the rules right." We anticipate that any business which relies on fast and efficient delivery, logistics, or monitoring systems, is likely to have an interest in submitting on the Bill.

Feedback sought on definition of a Māori business

Public consultation on the draft definition of a Māori business began on 6 October, and will end on 5 November 2021.

Creating an agreed definition will enable consistency across government in how Stats NZ measure Māori business activity.

Further information is available here.

Privacy Commissioner issues first "Compliance Notice"

The Office of the Privacy Commissioner (OPC) has used new powers under the Privacy Act 2020 to issue its first "Compliance Notice."

The notice was issued to the Reserve Bank of New Zealand (**RBNZ**), in relation to the highly publicised cyber-attack in 2020 which exposed various weaknesses in the RBNZ's security measures.

Compliance Notices are one of a range of new enforcement powers introduced under the Privacy Act in December last year. The new powers reflect the OPC's broader focus on proactively managing compliance with the Privacy Act, rather than being focused predominantly on responding to complaints.

See our article here for more details.

New regime for legislation in place from 28 October 2021

On 28 October 2021 the Legislation Act 2019 (and the associated Legislation (Repeals and Amendments) Act 2019) and the Secondary Legislation Act 2021 will come into force.

This legislation is a package. The Legislation Act 2019 will replace the Legislation Act 2012. It will also replace the Interpretation Act 1999.

When the new regime comes into force, much of what is currently in the Legislation Act 2012 and the Interpretation Act 1999 will continue. But there are key changes in the following areas:

- **Secondary legislation**: A new general term "secondary legislation" has been introduced for instruments that are made under a law-making power delegated by Parliament and make or change the law. The different sorts of legislation delegated by Parliament go by a number of titles, some of the most common being "regulations", "rules" and "Orders-in-Council" (which reflect their different nature and purpose). These titles will remain under the secondary legislation reforms. However, the terms "legislative instruments", "disallowable instruments", and "tertiary legislation" will disappear, and will be replaced by the new general term "secondary legislation". The new Legislation Act defines an instrument as secondary legislation if it is stated by an Act to be secondary legislation. The Secondary Legislation Act 2021 amends every provision in existing primary legislation (currently estimated to be over 27,000) that empowers the making of secondary legislation to state this explicitly.
- **Interpretation of legislation**: The new Legislation Act updates the principles and rules about the interpretation of legislation, including by updating default definitions, providing some new default powers, and making current interpretation rules work better. For example, the Act:
    - clarifies when a document is sent by post is taken to be sent and received (the equivalent rules for emails are already covered by Part 4 of the Contract and Commercial Law Act 2017), and
    - adds further rules to help determine when legislation commences and on how to calculate the start and end of monthly periods set out in legislation.

Secondary legislation drafted by the Parliamentary Council Office (**PCO**) will continue to be published in full on the New Zealand legislation website and notified in the New Zealand Gazette. Over the next few months, a new secondary legislation tab and links will be added to Acts so that there is easier access to PCO-drafted secondary legislation for that Act.

Over time, this website will be expanded to include secondary legislation drafted by bodies other than the PCO (unless a restricted and specified exception applies) so there is a single authoritative place where almost all legislation can be accessed. In the interim there is a new minimum standard of Gazette publication plus internet publication on the maker's website that will apply to secondary legislation made under an empowering provision to be enacted after 28 October 2021.

Powers of attorney, electronic signatures and the CCLA

The Contract and Commercial Law Act 2017 (CCLA) has been amended temporarily so that the provisions in that Act relating to electronic signatures apply to security agreements containing powers of attorney during COVID-19 restrictions.

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 will be made to the CCLA by the COVID-19 Response (Management Measures) Legislation Bill 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. The effect of the change will be to enable such deeds to be executed electronically.

This change is consistent with the same measures that were introduced in 2020, but have since lapsed.

UK Supreme Court rules on scope of lawful economic duress

When do robust commercial negotiations cross the line into lawful, but illegitimate, pressure such that the resulting contract should be set aside?

This was the issue before the UK Supreme Court in *Pakistan International Airlines Corporation v Times Travel (UK) Limited* [2021] UKSC 40, a recent decision which puts the spotlight on the controversial doctrine of lawful act economic duress. We consider the case, and its potential implication for New Zealand law in our article here.

CLIMATE CHANGE

Consultation on how to shape the first emissions reduction plan

The Government is seeking feedback on a discussion document which describes a range of proposed actions the Government is considering including in the first emissions reduction plan.

On 31 May2021, the Climate Change Commission (**Commission**) released its final report with its recommendations for the first three emissions budgets (2022–25, 2026–30, 2031–35), and the climate action it considers necessary to reduce emissions to meet those budgets.

Final decisions on the first three emissions budgets will be made by the Government and published alongside the first emissions reduction plan in May 2022. This plan will set out how the Government will achieve the first budget and manage the impacts policies may have on employers and employees, regions, iwi and Māori, and wider communities. The policies that form the first emissions reduction plan will span every sector of the economy and include changes across a range of areas, including energy, transport, waste, agriculture, construction and financial services.

Since the Commission's final report was published, the Government has been working on a wide range of proposals on how Ministers and agencies can support emissions reductions in their portfolios, and on what can be included in the final plan. It is this work that has formed the basis of this discussion document. Other proposals that have already been consulted on, either through previous policy development, or through the Commission's consultation, are not included in the discussion document.

The consultation ends on 24 November 2021.

Extension of statutory time frames for the emissions reduction plan proposed

The COVID-19 Response (Management Measures) Legislation Bill amends the Climate Change Response Act 2002 to extend the statutory time frames for the emissions reduction plan (and corresponding emissions budgets decisions). This is considered necessary because of delays to consultation and engagement on the first emissions reduction plan caused by the current COVID-19 outbreak.

The statutory decisions and extensions are as follows:

- the statutory deadline for the first emissions budget (for the period 2022–2025) will be extended from 31 December 2021 to 31 May 2022,
- the statutory deadline for the second emissions budget (for the period 2026–2030) will be extended from 31 December 2021 to 31 May 2022,
- the statutory deadline for the third emissions budget (for the period 2031–2035) will be extended from 31 December 2021 to 31 May 2022, and
- the statutory deadline for the first emissions reduction plan (to achieve the first emissions budget) will be extended from 31 December 2021 to 31 May 2022.

The extension of time frames for the first emissions budget also has consequences for the setting of auctioning limits and price controls for the NZ ETS through annual regulations. Accordingly, for the regulations due to be made in 2022 (after the first emissions budget is set), this Bill removes the usual three-month delay to commencement. The three-month delay will continue to apply to regulations made in subsequent years.

NZ ETS cost containment reserve trigger price set to rise materially from 2022

The Climate Change (Auctions, Limits, and Price Controls for Units) Amendment Regulations 2021 have made material changes to the amount of the annual cost containment reserve trigger price for the New Zealand Emissions Trading Scheme (NZ ETS) auctions for 2022 to 2026.

The cost containment reserve trigger price essentially acts as a price cap for the quarterly NZ ETS auctions. If secondary market prices follow suit, the change has the potential to mean a significant increase in the cost of compliance for emitters, while strengthening the case for investment linked to decarbonisation.

Further details are in our article here.

Changes afoot for the NZ ETS

Recent public consultations on the industrial allocation and governance framework for the NZ ETS could lead to regulatory reform that would materially impact NZU trading and associated market governance and dynamics.

Submissions have now closed on the Ministry for the Environment's two public consultations on:

- reforming NZ ETS industrial allocation, and
- designing a governance framework for the NZ ETS.

Any changes resulting from the industrial allocation consultation are likely to be progressed through an amendment to the Climate Change Response Act introduced in 2022, and later through changes to the industrial allocation regulations. Any actual changes to allocations or eligibility are unlikely to take effect until 2024.

Click here for more.

CORPORATE LAW

New bill to clarify that a director may take into account recognised ESG factors

A Bill, in the name of the Labour MP, Duncan Webb, has been drawn out of the members' bill ballot and could lead to wider debate on directors' duties and the role of environmental, social and governance (ESG) factors in acting in the "best interests" of a company.

The Companies (Directors Duties) Amendment Bill proposes to clarify that the matters to be taken into account by directors in determining the best interests of a company (under section 131 of the Companies Act 1993) are open-ended but may include matters that take into account recognised ESG factors, such as:

- recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi),
- reducing adverse environmental impacts,
- upholding high standards of ethical behaviour,
- following fair and equitable employment practices, and
- recognising the interests of the wider community.

As drafted, the Bill does not substantially change the current position. However, like many members' bills it may serve to provide a forum for more debate on an issue that deserves further consideration.

We have already seen increased scrutiny of directors' duties in the context of ESG factors in decision-making in the November 2020 Aotearoa Circle's Sustainable Finance Forum roadmap and in the Institute of Directors' July 2021 joint whitepaper on stakeholder governance with Minter Ellison Rudd Watts. The issue was also raised by Winkelmann CJ, and Glazebrook and France JJ in their 2019 paper "Climate Change and the Law" which highlights that directors' duties may become a pathway through which companies are required to consider and address climate change.

The Bill is currently awaiting its first reading, and is expected to receive the support of caucus to proceed to the select committee stage.

Renewed compliance flexibility provided for companies and other business entities

The COVID-19 Response (Management Measures) Legislation Bill amends the COVID-19 Response (Requirements For Entities — Modifications and Exemptions) Act 2020 to reinstate various measures that 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 revived by this Bill 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) provided that the majority of the entity's governing officers believe, on reasonable grounds, that the modification goes no further than is, or is likely to be, reasonably necessary in the circumstances, 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 will apply after the Bill receives Royal assent until 30 April 2022, unless extended by an Order in Council, up to but no later than 30 October 2022. They will also apply retrospectively for a specified time period.

COMPETITION & CONSUMER LAW

Fair Trading Amendment Act 2021

Legislation which amends the Fair Trading Act 1986 to increase protections for New Zealand consumers and business against unfair commercial practices has now been passed.

In welcoming the passage of the Bill, the Minister of Commerce and Consumer Affairs, David Clark, emphasised that: "*We are tightening the screws on unfair and dishonest business activity, which has no place at any point in time, but especially as our economy recovers from the impact of COVID-19*."

The Fair Trading Amendment Act:

- introduces a prohibition against unconscionable conduct in trade,
- extends the current protections against unfair contract terms in standard form consumer contracts to also apply to certain business-to-business contracts that form part of trading relationships with an actual or expected value below NZ$250,000 per year,
- strengthens the ability of consumers to require uninvited sellers to leave or not enter their premises, including through the use of 'Do Not Knock' stickers, and
- makes a number of minor, technical changes to the Fair Trading Act.

The key changes under the Bill (including the changes relating to unfair contract terms) will come into force in August 2022.

For more details, see our article here.

New regulatory regime for the retail payment system introduced

The Government is introducing a regulatory regime to ensure that retail payment systems operate in the interests of New Zealand consumers and businesses.

The Commerce Commission will be the regulator of this new regime and will have a package of regulatory tools to allow it to achieve the purpose of the regime.

The Retail Payment System Bill sets out a process to determine which retail payment networks should be designated for regulation. It defines a retail payment network as the participants, arrangements, contracts, and rules that facilitate a class of retail payment. Initial designations for the Mastercard and Visa credit and debit networks have been included in the Bill.

The Bill also sets an initial pricing standard that requires reductions in interchange fees (which are a major component of merchant service fees) as soon as practicable for transactions on the Mastercard and Visa networks. This initial pricing standard also prohibits operators providing net monetary or non-monetary compensation to issuers (such as reduced scheme fees, discounts, and rewards) in addition to issuers receiving interchange fees.

The initial pricing standard will commence six months after enactment of the Bill. The remainder of the Bill will commence the day after Royal assent, allowing the Commission to begin monitoring the retail payment system to inform any future regulation.

The Bill is currently awaiting its first reading in the House.

For background on the development of the Bill refer to MBIE's website.

Changes made to the Gambling Act for lotteries

The Gambling Act 2003 is being amended to allow lotteries that are used to raise funds for charitable or non-commercial purposes to continue to operate during COVID- 19 restrictions.

The amendments (which are being made under the COVID-19 Response (Management Measures) Legislation Bill) allow, for a period of two years, all class 3 gambling operators licensed to conduct a lottery to:

- offer lottery tickets by email or by phone, and receive payment via a communication device, and
- issue tickets electronically.

Without these changes, class 3 gambling operators would face significant constraints in their ability to run their lotteries at Alert Level 3, as face-to-face sales would not be possible, and they would be unable to operate them at all under Alert Level 4. Extending this provision will therefore enable all class 3 lotteries to be resilient in any future outbreaks.

Court says some 'robust realism' can be applied to Bunnings' lowest price claims

Scrutiny of lowest price claims by major retailer Bunnings has seen the District Court decide that a "degree of robust realism" can apply to such claims.

Last month, the District Court dismissed all charges laid by the Commerce Commission against Bunnings under the Fair Trading Act (**FTA**). The Commission could not prove beyond a reasonable doubt that Bunnings had misled the public into thinking all of its prices were the lowest on offer in the market, and the Commission's evidence failed to show that Bunnings prices were not the lowest.

The Court also found Bunnings' 'lowest prices' taglines were not representations within the meaning of the FTA but that in any event they were not false or misleading even though Bunnings' prices were not always the lowest.

Fortunately, for businesses and consumers left wondering how to interpret such an outcome, the Court has also provided guidance as to how often it is acceptable not to have the lowest prices when you claim you do.

For details on the decision refer to our article here.

Corporate and personal penalties imposed for one-off attempt to enter into a cartel

A new case imposing penalties under the Commerce Act 1986 highlights the potential risks of discussions with competitors, if those discussions are not kept within legitimate boundaries.

A penalty of between NZ$400,000 and NZ$520,000 was held to be appropriate for a single, unsuccessful attempt to enter into a price-fixing agreement, with an additional penalty of NZ$24,000 to be paid by the person involved.

See our article here for more details.

Lending responsibly to consumers: insights from the Moola settlement

A recent Commerce Commission settlement has provided helpful insights into the Commission's view of responsible lending obligations, and offers timely guidance to lenders who are updating and enhancing their responsible lending processes in anticipation of the more prescriptive regulations coming into force on 1 December 2021.

On 6 October 2021, the Commerce Commission announced that it had entered into a settlement with Moola.co.nz Limited (**Moola**), an online short-term high-cost lender, after Moola admitted breaches of its responsible lending obligations under the Credit Contracts and Consumer Finance Act 2003.

Moola provides high-cost short term personal loans of up to NZ$5,000 through the moola.co.nz and needcashtoday.co.nz websites.

Further information is available in our recent article.

Proposed addendum to the Responsible Lending Code

MBIE is considering reinstating guidance on the Responsible Lending Code that was originally introduced last year (and expired on 31 March 2021) in light of the recent COVID-19 Delta variant outbreak.

The proposed addendum will cover situations where an existing consumer credit contract is varied or replaced for the purpose of reducing a borrower's financial difficulties brought on by the economic or health impacts of COVID-19.

The addendum will expire on 1 February 2022, because it is only intended to apply for a relatively short period of time while there is significant disruption and uncertainty. From 1 February, new Chapter 12 of the Responsible Lending Code comes into effect and provides updated, permanent guidance on dealing with hardship.

The Government is also introducing amendments to the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) through the COVID-19 Response (Management Measures) Legislation Bill to enable a new addendum to come into force more quickly. Currently any changes to the Code cannot come into force sooner than 28 days after the changes are notified in the Gazette. To give effect to urgent updates to the Code, the amendment provides that changes to the Code that are notified in the Gazette on or before 31 December 2021 can come into effect sooner than 28 days after they are notified in the Gazette. After 31 December 2021, the 28-day requirement will apply again.

Further details are available on MBIE's website.

Deferred implementation for CCCFA reforms

Various reforms to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) made under the Credit Contracts Legislation Amendment Act 2019 that were due to come into force on 1 October have been deferred for another two months due to the latest COVID-19 outbreak.

The Credit Contracts Legislation Amendment Act Commencement Amendment Order 2021, defers, for two months, the commencement of most of the provisions of the Credit Contracts Legislation Amendment Act 2019 that were due to come into force on 1 October 2021. This includes:

- new rules strengthening requirements to lend responsibly, including new rules about the inquiries that lenders must make, before entering into agreements, so as to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives and that the borrower will make the payments under the agreement without suffering substantial hardship,
- duties to be imposed on directors and senior managers to ensure that lenders comply with their obligations,
- lender advertising to be subject to minimum advertising standards (which include the provisions requiring a lender who advertises credit in a language to also have to offer to provide the borrower with information about the loan in that language), and
- creditors and debt collectors to be required to disclose specific information to debtors before starting debt collection activity.

The regulations supporting these provisions have also been deferred by the Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020 Amendment Regulations 2021 and the CCCF Amendment Regulations 2020 Amendment Regulations 2021.

These regulations now come into force on 1 December 2021.

The deferrals do not apply to the new requirements for certification, which commenced on 1 October 2021. Under those requirements, all directors and senior managers of lenders offering consumer credit contracts are now required to meet a "fit and proper person" test in order for the lender to register under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Those requirements also apply to mobile traders.

Final changes to the Credit Contracts and Consumer Finance Regulations 2004

The final regulations are now in place for the full commencement of the Credit Contracts Legislation Amendment Act 2019.

The Credit Contracts and Consumer Finance (Exemptions, Annual Returns, and Other Matters) Amendment Regulations 2021 make various changes to the Credit Contracts and Consumer Finance Regulations 2004, including:

- Removing the need for advertisements for consumer credit contracts to state the period during which the interest rate is fixed, if the annual interest rate is fixed for the entire period of the contract.
- Providing exemptions for insurance premium funding agreements from the requirements that lenders must make inquiries under section 9C(3)(a) of the CCCFA.
- Providing exemptions from the new certification requirement that requires creditors under consumer credit contracts, including mobile traders, to hold a certification from the Commerce Commission that their directors and senior managers are fit and proper persons. This includes exemptions that relate to purposes of securitisation or covered bond arrangements, and non-financial services businesses that provide credit on an interim basis (which the Commission has provided further clarity on in its updated Fit and Proper Person Certification Guidance).
- Declaring the underlying lenders to be creditors from the time when the credit contracts are entered into (rather than from assignment).
- Prescribing requirements for annual returns, including the date by which the return must be provided and the 12-month period to which it must relate (which don't come into force until 1 December 2021).
- Transitional provisions concerning the requirement to make reasonable inquiries so as to be satisfied of a matter under section 9C of the CCCFA and the provision of the first annual return (which don't come into force until 1 December 2021).

NZCC MEDIA RELEASES

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

Industry regulation and regulatory control

NZCC shines light on EDB reporting of asset management practices

The NZCC is encouraging electricity distribution businesses (**EDBs**) to continue to improve their annual Asset Management Plans (**AMPs**). In its Reporting of Asset Management Practices paper, the NZCC presents a targeted review of five key areas of EDBs' asset management practices that have particular influence on outcomes for electricity consumers. The NZCC's analysis is designed to encourage EDBs to acknowledge and explain adverse trends in asset performance and to detail the mitigating actions being taken as part of their AMP disclosures.

New regulatory regime to promote fuel market competition started on 11 August 2021

A new regulatory regime designed to enhance competition in New Zealand's fuel markets came into effect on 11 August 2021. The NZCC has a monitoring and enforcement role under the Fuel Industry Act 2020, key parts of which are intended to stimulate competition at the wholesale level of the market. An infographic explaining the new regulatory regime is on the NZCC's website.

NZCC announces enhanced information disclosure requirements for Aurora Energy

The NZCC has announced a suite of enhanced information disclosure (**ID**) requirements on Aurora Energy to give consumers and other stakeholders greater visibility of what Aurora is doing to address safety and reliability issues on its network under a customised price-quality path approved in March this year. The additional ID requirements are set out in a reasons paper and determination on the NZCC's website. The enhanced ID requirements for Aurora are on top of the standard ID requirements that apply to all the country's 29 electricity distribution businesses.

NZCC approves further Transpower power line upgrade in South Auckland

The NZCC has given approval to Transpower to spend $14.59 million in addition to the $36 million the NZCC approved in March 2021 to upgrade its South Auckland network. The further $14.59 million is an amendment to the NZCC's March decision and will cover the cost of replacing conductors on Transpower's

Otahuhu-Wiri transmission line and strengthening the towers and foundations required to support the new conductors. The NZCC's final decision is on its website.

NZCC releases final report on its review of Fonterra's base milk price

The NZCC has released its final report on Fonterra's calculation of the base milk price it will pay farmers in the 2020/21 dairy season. The NZCC found that Fonterra's forecast price of $7.45 - $7.65 per kilogram of milk solids for the season is calculated in a way that is likely to be consistent with the requirements of the milk price monitoring regime under the Dairy Industry Restructuring Act. The final report is on the NZCC's website.

NZCC warns EA Networks for $3.3 million price path contravention and accepts enforceable undertakings

The NZCC has accepted enforceable undertakings from electricity lines company EA Networks for contravening its regulated price path by approximately $52,000 in the 2020 assessment period and issued a warning to EA Networks for contravening its regulated price path by approximately $3.3 million in the 2021 assessment period. A copy of the enforceable undertakings for the 2020 price path contravention and warning letter for the 2021 price path contravention are available on the NZCC's case register.

NZCC releases draft report on Fonterra's 2021/22 Milk Price Manual

The NZCC released its draft report on its annual review of Fonterra's Base Milk Price Manual for the 2021/22 dairy season. The Manual describes the methodology used by Fonterra to calculate its base milk price – the amount farmers receive from Fonterra for each kilogram of milk solids in a dairy season. The NZCC's preliminary conclusion is that the Manual is consistent with both the efficiency and contestability dimensions of the purpose of the base milk price monitoring regime with the exception of the rule for the asset beta. The NZCC welcomes submissions on its draft report by 15 November 2021. The draft report and related information can be found here. The final report will be published by 15 December 2021.

Market behaviour

NZCC seeking declarations that agreements not to bid on Google Ads breach Commerce Act

The NZCC has filed proceedings at the High Court in Christchurch seeking declarations that consumer loan provider Moola engaged in cartel conduct relating to online advertising on Google Ads. The NZCC alleges Moola reached agreements with other consumer loan providers that they would not bid on each other's brand names on Google Ads. The NZCC also alleges agreements were reached that the companies would negatively match certain keywords. The NZCC is not seeking a pecuniary penalty in this proceeding.

NZCC issues determination on HP New Zealand's application to engage in resale price maintenance

The NZCC has authorised HP New Zealand Limited (**HP**) to engage in resale price maintenance (**RPM**) in relation to its proposed HP online stores and HP online marketplace stores for a period of five years. On 22 March 2021, HP applied for authorisation to engage in RPM in relation to its HP stores. The conduct for which HP requested authorisation involves HP specifying the prices for which a third-party distributor will sell HP products to consumers on the HP Stores. The determination is available on the NZCC's case register.

Penalties imposed in container depot price fixing case

The High Court has ordered Specialised Container Services (Christchurch) Limited (**SCS Christchurch**) and its director Grant Tregurtha to pay penalties in relation to an attempted price fix of "vehicle booking system" fees. The NZCC alleged that Mr Tregurtha, a director of SCS Christchurch, attempted to reach an agreement with a competitor to charge the same or similar "vehicle booking system" fee to customers of its container depot. The NZCC alleged, and SCS Christchurch and Mr Tregurtha admitted, that this conduct amounted to an attempt by SCS Christchurch and Mr Tregurtha to enter into a price fixing agreement with a competitor in breach of the Commerce Act. The High Court imposed penalties of $62,500 against SCS Christchurch and $24,000 against Mr Tregurtha. The judgement is available on the NZCC's case register.

Penalty imposed for taxi cartel conduct

The High Court has ordered Hutt and City Taxis Limited (**Hutt & City**) to pay a penalty of $150,000 in relation to fixing the prices of taxi fares. In the NZCC's proceedings against Hutt & City, filed in May 2021, the NZCC alleged, and Hutt & City admitted, that Hutt & City breached the Commerce Act by agreeing with two competing taxi companies to implement a minimum charge of $25 for pick-up taxi trips from the on-demand taxi rank at Wellington Airport. A copy of the judgment is available on the NZCC's case register.

Statement of Preliminary Issues released for New Zealand Tegel Growers Association's application seeking authorisation for collective bargaining

The NZCC has published a statement of preliminary issues relating to an application from the New Zealand Tegel Growers Association seeking authorisation on behalf of its members to collectively negotiate the terms and conditions of its members' supply of chicken growing services to Tegel Foods Limited. The NZCC invites interested parties to provide comments on the likely benefits and detriments, including the likely competitive effects, of the proposed arrangement by 25 March 2022. The NZCC is currently scheduled to make a decision on the application by 25 March 2022. The Statement of Preliminary Issues and a public version of the application can be found on the NZCC's case register.

Statement of Preliminary Issues released for Anytime NZ Limited collaborative activity clearance application

The NZCC has published a Statement of Preliminary Issues relating to the application from Anytime NZ Limited (**Anytime NZ**) seeking clearance for proposed agreements with its franchisees. The proposed agreements contain standardised pricing provisions. Anytime NZ considers that the standardised pricing provisions are or may be cartel provisions, but that they are reasonably necessary for a collaborative activity and the proposed agreements would not substantially lessen competition. The NZCC is currently scheduled to make a decision on the application by 3 November 2021. The Statement of Preliminary Issues and a public version of the application can be found on the NZCC's case register.

Mergers and acquisitions

NZCC grants clearance for Assa Abloy NZ to acquire NZ Fire Doors

The NZCC has granted clearance to ASSA ABLOY New Zealand Limited to acquire all of the shares in NZ Fire Doors Limited. A public version of the written reasons can be found on the NZCC's case register.

Aon withdraws application for Willis Towers Watson acquisition

Aon plc has formally withdrawn its application to the NZCC for clearance to acquire Willis Towers Watson Public Limited Company. The NZCC had been scheduled to make a decision on Aon's clearance application by 20 August 2021.

NZCC grants clearance for Trade Me's acquisition of Homes.co.nz

NZCC has granted Trade Me Limited clearance to acquire PropertyNZ Limited. A public version of the written reasons for the decision are available on the NZCC's case register.

NZCC grants clearance for Are Media Limited to acquire Ovato Retail Distribution NZ Limited

The NZCC granted clearance for Are Media Limited to acquire 100% of the shares in Ovato Retail Distribution NZ Limited. A public version of the written reasons for the decision is available on the NZCC's case register.

Can Plan withdraws application for Betta Bins acquisition

Can Plan Nelson Limited has formally withdrawn its application to the NZCC for clearance to acquire certain general residential waste assets of Nelmac Limited's waste collection business trading as Betta Bins.

Statement of Preliminary Issues released on EROAD/Coretex clearance application

The NZCC has published a statement of preliminary issues relating to the clearance application from EROAD Limited seeking to acquire all of the shares in Coretex Limited. The Statement of Preliminary Issues and a public version of the clearance application are available on the NZCC's case register.

Mercury cleared to acquire Trustpower's retail business

The NZCC has granted clearance for Mercury NZ Limited to acquire Trustpower Limited's retail business. The NZCC's investigation indicated that there are no regions in New Zealand where Mercury and Trustpower are each other's closest competitors. Further, the merged entity would face competition from other electricity and gas retailers, including both large gentailers and smaller retailers. A public version of the written reasons for the decision are available on the NZCC's case register.

Statement of Preliminary Issues released on Cargotec/Konecranes clearance application

The NZCC has published a statement of preliminary issues relating to Cargotec Corporation's application seeking clearance to acquire Konecranes Plc as part of a global merger. The Statement of Preliminary Issues and a public version of the clearance application are available on the NZCC's case register.

George Weston Foods (NZ) Limited seeks clearance to acquire Dad's Pies Limited

The NZCC has received an application from George Weston Foods (NZ) Limited seeking clearance to acquire 100% of the shares of Dad's Pies Limited. A public version of the clearance application is available on the NZCC's case register.

Statement of Preliminary Issues released for proposed acquisition of Pulse Health by owner of Wakefield and Bowen private hospitals

The NZCC has published a Statement of Preliminary Issues relating to an application from Pacific 2021 Bidco NZ Limited seeking clearance to acquire 100% of the shares in Pulse Health NZ Limited from Health Care Australia Pty Limited. The NZCC is currently scheduled to make a decision on the application by 17 November 2021. The Statement of Preliminary Issues and a public version of the application can be found on the NZCC's case register.

Consumer issues

Royal jelly supplements mislead consumers as being from New Zealand

New Zealand Health Food Company Limited (**NZHFC**) has been fined $377,000 after pleading guilty to engaging in conduct that was liable to mislead the public about the origin of ingredients in its royal jelly supplements. The combination of phrases and images used by NZHFC to market its royal jelly products gave the impression that the products were from New Zealand when the key ingredient came from China.

Mainland Finance in $1.1m settlement with NZCC over unreasonable fees

Vehicle finance company Mainland Finance has entered into a settlement with the NZCC acknowledging that it charged unreasonable credit and default fees and agreeing to compensate borrowers. As part of the settlement, Mainland Finance has provided the NZCC with enforceable undertakings which explain how it will find and remediate borrowers who were charged the unreasonable fees. The total amount to be paid to customers is approximately $1.1million ($366,500 in establishment fees, $489,600 in administration fees and $249,600 in default fees). A copy of the settlement agreement and enforceable undertakings can be found on the NZCC's website.

Kmart agrees to improve toy safety procedures following an NZCC investigation

Kmart has provided court enforceable undertakings to the NZCC to improve its toy safety procedures, and in particular the test it applies when making age grading assessments for its home brand toys. This follows an NZCC investigation into whether certain push along 'Kids & Co' fire engine toys, sold by Kmart, failed to comply with the mandatory product safety standard for toys for use by children 3 years of age or under. The undertakings can be found on the NZCC's case register.

The Safety Warehouse warned about "The Drop" event

Greenback Ecommerce Limited trading as The Safety Warehouse (**TSW**) has been warned by the NZCC for engaging in conduct that it considers was liable to mislead and likely to have breached the Fair Trading Act in its promotion of "The Drop" event held in Aotea Square, Auckland, on 5 December 2020. In the NZCC's view TSW's promotion of the event on social media platforms and its website was liable to mislead consumers by creating the impression that $100,000 in cash would be given away at the event, when in fact only a total of $3,600 of money was given away. The warning letter has been published on the NZCC's case register.

Certification now mandatory for lenders and mobile traders

From 1 October 2021, lenders providing consumer credit and mobile traders selling on credit must be certified by the NZCC or face penalties, unless one of the exemptions apply to them. The main exemption is if a lender is licensed or registered by the Financial Markets Authority or Reserve Bank of New Zealand. There is also a new exemption that relates to securitisation or covered bond arrangements. Lending without being certified could result in penalties of up to $600,000 for a company or $200,000 for an individual. If lenders or mobile traders are unsure about whether they need to be certified, they should read the certification guidance on the NZCC's website and seek legal advice if they need it.

NZCC requires Eastland Network Limited to repay consumers $355,000

The NZCC has accepted enforceable undertakings from electricity lines company Eastland Network Limited (**Eastland**) for overcharging its customers $327,000 in the 2020 assessment period. The undertakings require Eastland to repay consumers $327,000, plus an additional $28,000 in interest. A copy of the enforceable undertakings for the 2020 price path contravention is available on the NZCC's website.

Companies in hot water for selling unsafe hot water bottles and toys

A wholesaler and a retailer have been fined a total of $140,000 under the Fair Trading Act for selling hot water bottles and toys that did not comply with mandatory safety requirements. Paramount Merchandise Company Limited (**Paramount**) was fined $104,000 after pleading guilty in the Manukau District Court to five charges under the Fair Trading Act, including three charges that it supplied hot water bottles in 2019 that were banned from sale in New Zealand because they did not comply with an applicable safety standard, and two charges of making false and/or misleading representations that two types of the hot water bottles supplied complied with the standard when they did not. In August this year, ND Import & Export Limited (**ND Import & Export**) was fined $36,000 after pleading guilty to three charges for supplying toys that did not comply with the mandatory product safety standard for children's toys, and another three charges for supplying hot water bottles that were banned from sale in New Zealand. The judgements related to Paramount and ND Import & Export can be found on the NZCC's case register.

Telecommunications

NZCC releases draft decision valuing Chorus' fibre network at $5.427b

The NZCC has released for consultation a draft view on the value of Chorus' fibre network for regulatory purposes. The value of the network – or Chorus' initial regulatory asset base – is a key building block in determining the revenues Chorus will be able to earn over the first 3 years of the new regulatory regime starting 1 January 2022. The draft decision is on the NZCC's website.

Latest broadband performance report confirms similar speeds between North and South Islands on Fibre Max plans

The latest report from the NZCC's Measuring Broadband New Zealand programme has been released, confirming similar speeds for Fibre Max plans across the country, with only slightly slower speeds for consumers in the South Island. More information about Measuring Broadband NZ, including registering to become a volunteer, can be found on the MBNZ website. The report and an online dashboard to explore the results in more detail are available on the NZCC's website.

NZCC recommends improvements to telco dispute resolution scheme

The NZCC has released for consultation a draft report recommending improvements to the Telecommunications Dispute Resolution Scheme (**TDRS**) so that it delivers better outcomes for consumers and industry. The TDRS was created by industry body the Telecommunications Forum New Zealand Inc. (**TCF**) to deal with consumer complaints about mobile, internet, and landline services more than a decade ago. The draft recommendations and the proposed timeline for the TCF to implement them are in the report on the NZCC's website. Final recommendations will be published on 11 November 2021.

NZCC seeks views on improving telecoms retail service quality

The NZCC released a discussion document calling for views on retail service quality issues in the telecommunications sector that it considers need improving. Improving Retail Service Quality – Draft Baseline Report draws on six months of consultation with consumers and industry, plus insights from one of the largest surveys on what issues matter to telecommunications consumers and why. The retail service quality baseline report and the Research NZ consumer survey report can be found on the NZCC's website. Submissions have now closed.

NZCC proposes extending regulatory protections for phone number portability

The NZCC has released a draft determination proposing to continue the regulation of number portability services for both local and mobile telephone numbers for another five years. The current determination will expire on 19 December 2021 with the new determination then taking effect on 20 December 2021. The NZCC's draft determination and reasons paper are on its website. Submissions are due on 26 October 2021, and cross submissions are due by 5 November 2021.

NZCC gives Transpower approval to recover costs of developing new transmission pricing methodology (TPM)

The NZCC has allowed Transpower to recover the approximately $5 million it has spent so far in developing a new transmission pricing methodology. In doing so, the NZCC has amended Transpower's individual price-quality path, which establishes the maximum revenues that Transpower may recover from its customers for its electricity transmission services, as well as the minimum quality standards it must meet in supplying those services. The submissions, along with the NZCC's final decision, are available on the NZCC's website.

ACCC MEDIA RELEASES

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

Mergers and acquisitions

JBS' proposed acquisition of Rivalea raises preliminary competition concerns

The ACCC has outlined its preliminary competition concerns about JBS Australia Pty Limited's (**JBS**) proposed acquisition of Rivalea Holdings Pty Limited and Oxdale Dairy Enterprise Pty Limited (together, **Rivalea**) in a statement of issues published on 16 September 2021. JBS is Australia's largest meat and food processing company. Rivalea farms and processes pigs. If the acquisition proceeds, JBS will have a significant presence in pig farming, export accredited pig abattoirs, and smallgoods through its Primo brand. The ACCC's preliminary view is that while JBS and Rivalea do not compete closely, the proposed acquisition may give rise to vertical integration concerns. The ACC's statement of issues and further information is available on the ACCC's public register page.

Market behaviour

ACCC finds Qantas and Japan Airlines alliance not in the public interest

The ACCC has denied authorisation for Qantas and Japan Airlines to coordinate flights between Australia and Japan under the terms of a joint business agreement. The ACCC found that the agreement would likely lead to reduced competition as international travel resumes, to the detriment of passengers travelling between Australia and Japan. The ACCC concluded that granting the authorisation would not only remove competition between Qantas and Japan Airlines, it would make it very difficult for other airlines to operate on routes between Australia and Japan. More information, including the ACCC's final determination, is available on the ACCC's public register on its website.

ACCC alleges Mercedes-Benz minimised risk of defective Takata airbags during compulsory recall

The ACCC has instituted Federal Court proceedings against Mercedes-Benz Australia/Pacific Pty Limited for allegedly failing to comply with their obligations under a compulsory recall of defective, and potentially deadly, Takata airbags. The ACCC alleges that, between July 2018 and March 2020, in communications with consumers on at least 73 occasions, Mercedes-Benz contravened the Takata compulsory recall notice by minimising the risks associated with defective Takata airbags and failing to use attention-capturing, high-impact language to avoid consumers ignoring recall notices. The ACCC is seeking declarations, pecuniary penalties, an order requiring a product recall compliance program, and costs.

ACCC proposes to authorise Commercial Radio Australia to collectively bargain with Google and Facebook

The ACCC has issued a draft determination proposing to authorise Commercial Radio Australia (**CRA**) to collectively negotiate with Facebook and Google over payment for their member stations' news content featured on the platforms. CRA, a radio industry association, currently represents 261 member stations, which provide commercial radio broadcasting and audio content to Australian communities on analogue and digital radio and via online platforms. The draft determination will authorise CRA to collectively negotiate on behalf of all of its members other than stations operated by Nine Entertainment Co. The proposed authorisation is for a period of 10 years. The ACCC's draft determination and more information on how to make a submission are available on the ACCC's public register.

Consumer issues

Google's dominance in ad tech supply chain harms businesses and consumers

An ACCC inquiry into the advertising technology (or 'ad tech') sector has identified significant competition concerns and likely harms to publishers, advertisers and, ultimately, consumers. The report concludes that enforcement action under Australia's existing competition laws alone is not sufficient to address the competition issues in the sector, and that the ACCC should be given powers to develop specific rules in response. The report finds that Google has a dominant position in key parts of the ad tech supply chain and estimates that more than 90 per cent of ad impressions traded via the ad tech supply chain passed through at least one Google service in 2020.

Full Federal Court finds Employsure Google Ads misleading

The Full Federal Court has unanimously upheld an appeal by the ACCC in relation to Google Ads published by workplace relations advisor Employsure Pty Limited. The Full Court found that Employsure had breached the Australian Consumer Law by making misleading representations that it was, or was affiliated with, a government agency, overturning the judgment of Justice Griffiths that dismissed this claim at first instance. A hearing on relief, including penalties, will be held at a later date.

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