# CORPORATE REPORTER 13 December 2019 ITEMS IN THIS ISSUE INCLUDE: • Bill introduced to establish a new conduct regime for financial institutions Consumer credit legislation passes final reading · Government announces decisions on insurance law reform measures • Final decisions made for review of bank capital requirements • The latest developments for the climate change legislative reforms • Dividend rules clarified in the Companies Act The latest media releases from the **New Zealand Commerce** Commission and the Australian Competition and ConsumerCommission

# **WELCOME**

to issue No.62 of Corporate Reporter, Bell Gully's regular round-up of corporate and general commercial matters, designed to keep you informed on regulatory developments, legislation and cases of interest.











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# **CONTENTS** PAGE Capital Markets 3 Bill introduced to govern the conduct of financial institutions New venture capital fund legislation passed Standard conditions for transitional financial advice provider licences Further transitional provisions for the financial advice regime in force Final decisions made for review of bank capital requirements Reserve Bank to publish banks' material breaches Financial Markets Conduct (NZCDC Settlement System) Exemption Notice 2019 Disclosure exemption remains for directors and senior managers with interests in passive funds FMA releases its annual Audit Quality Monitoring Report FMA has updated its director's guide for improving audit quality New NZX rules in force on 1 January 2020 Mergers & Acquisitions Government to introduce a "National Interest Test" to the overseas investment regime Increased overseas investment threshold for Australian investments in significant business assets **Takeovers Panel Annual Report 2019** Takeovers Panel publishes new CodeWord Commercial 9 Submissions on the Emissions Trading Reform Bill close in January 2020 Consultation on auctioning rules proposed for the NZETS Proposed changes for climate change forestry sector regulations Updates to guidance on the AML/CFT Supervisory Framework and Territorial Scope Corporate Law 10 Dividend rules clarified in the Companies Act "Good Governance" resources help company directors

# Competition and Consumer Law

10

Consumer credit legislation passes final reading
Government announces decisions on insurance law reforms
First "Unfair Contract Terms" declaration granted by the High Court
The latest media releases from the New Zealand Commerce Commission
The latest media releases from the Australian Competition and Consumer Commission.

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# Bill introduced to govern the conduct of financial institutions

Following on from the Government's announcement in September this year, a bill has been introduced to Parliament to improve the conduct of financial institutions in respect of services and products provided to consumers.

The Financial Markets (Conduct of Institutions) Amendment Bill is a response to the Financial Markets Authority (FMA) and the Reserve Bank's joint conduct and culture reviews into the sales and conduct practices within New Zealand banks and insurers, following revelations emerging out of Australia's Hayne Royal Commission.

The Bill creates a new regulatory regime for the general conduct of financial institutions and their intermediaries. It covers registered banks, licensed insurers, and licensed non-bank deposit takers (NBDTs) and will apply broadly to all services and associated products provided by those institutions. This includes consumer contracts of insurance and consumer credit contracts. It also covers most other financial services referred to in the Financial Service Providers (Registration and Dispute Resolution) Act 2008 when those services are retail services.

Intermediaries have been included in the regime to ensure that the obligations on banks, insurers and NBDTs flow down the supply chain and result in better outcomes for consumers that deal with intermediaries involved in the provision of a relevant service or an associated product. Specific provisions in the Bill define who falls under the intermediary category, and worked examples have been included in the Bill to illustrate how the provisions will apply in practice.

#### New conduct licensing regime and new fair conduct standard

At the core of the Bill is a requirement for banks, insurers and NBDTs (the **financial institutions**) to be licensed by the FMA under Part 6 of the Financial Markets Conduct Act 2013 (**FMC Act**).

A new subpart 6A will be inserted into Part 6 of the FMC Act to regulate the conduct of the financial institutions. This establishes a new fair conduct principle that the financial institutions (and certain intermediaries) must treat consumers fairly, including by paying due regard to their interests (from the early design of products and services to post-sale dealings).

# Fair conduct programme

To ensure compliance with the new fair conduct principle, the financial institutions will be required to establish, implement, and maintain an effective fair conduct programme. This includes setting policies, processes, systems, and controls throughout every relevant part of their business, from the governance level to day-to-day interactions with consumers. The Bill sets out certain requirements for the programme, and other requirements will be prescribed in regulations.

The financial institutions will be required to "take all reasonable steps" to ensure that intermediaries also comply with their conduct programmes, unless those intermediaries are financial institutions or financial advice providers who are subject to the new Financial Services Legislation Amendment Act 2019 regime.

## Remuneration and incentives obligations

Under the new regime financial institutions and intermediaries must comply with regulations that regulate commissions, benefits or other incentives. The regulations will be able to prohibit incentives that are determined or calculated in any way by reference (directly or indirectly) to the volume or value of the services or products. Regulations will also be able to impose conditions on licences relating to incentives.

#### Whistleblowing and mandatory reporting requirements

To provide support and a clear process for people who may wish to report misconduct issues and help uncover any such issues under the new regime, the Bill provides protection to employees and agents of

financial institutions and intermediaries who report a contravention of a provision of the FMC Act or of the fair conduct principle to the FMA.

## **Enforcement**

The new duties will be enforced as civil liability provisions under the FMC Act. This means, for example, that a contravention may give rise to a pecuniary penalty of up to \$5 million or three times the amount of the gain made or loss avoided. In addition, the FMA has a range of enforcement options, such as giving direction orders.

## Regulatory overlaps addressed

The Bill also provides for interactions between different regulatory regimes and regulators that arise as a result of the new conduct regime, including multiple pecuniary penalties for the same conduct, proceedings under different enactments, and licensing for conduct and prudential activity.

#### Next step

The Government has previously indicated that this legislation is being fast-tracked, so we expect to see it being given priority in the 2020 Parliamentary calendar. The Bill is currently awaiting its first reading, which may not happen before the House rises for the summer break. When the Bill is sent to the Finance and Expenditure Select Committee, interested parties will be given an opportunity to make submissions on the Bill. Details of the submission process will be available on Parliament's website here.

# New venture capital fund legislation passed

Legislation has been passed to establish a new Venture Capital Fund, which aims to attract private sector investors to the domestic venture capital market and help innovative, knowledge-intensive businesses to grow.

Work began on the Venture Capital Fund Bill following the Government's budget announcement in May 2019 of a new fund to help bridge the 'capital gap' for New Zealand firms that expand beyond the early start-up phase.

Under the Venture Capital Fund Bill the Guardians of New Zealand Superannuation will monitor the dual outcomes of capital reaching New Zealand entities and the development of New Zealand's early stage capital markets. It will contract New Zealand Venture Investment Fund Limited to manage the Venture Capital Fund, with the Minister of Finance as the responsible Minister for the Guardians.

The Venture Capital Fund is expected to have a life of 15 years, consisting of a five-year investment period and a 10 year "harvest" period, and will receive up to NZ\$300 million over five years.

# Standard conditions for transitional financial advice provider licences

The Financial Markets Authority (FMA) has imposed two standard conditions for transitional licences.

The FMA consulted on conditions for transitional licences to provide financial advice, and has imposed two standard conditions requiring financial advice providers to maintain adequate records and have a fair, timely and transparent internal process for resolving client complaints.

These conditions will come into effect from 29 June 2020 as part of the new financial advice regime.

Click here for more information.

# Further transitional provisions for the financial advice regime in force

Further transitional provisions in the Financial Services Legislation Amendment Act 2019 have been brought into force under the Financial Services Legislation Amendment Act Commencement Order (No 2) 2019.

These provisions allow persons to apply for registration under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 for a "financial advice service" under the new regime before it comes into force in June 2020.

# Final decisions made for review of bank capital requirements

The Reserve Bank of New Zealand has published its final decisions in its Capital Review, aimed at improving the resilience of New Zealand's banking system.

The key decisions centre on material increases in the minimum regulatory capital requirements for locally incorporated registered banks as set out in the high-level summary table below.

	Current capital level requirements	Increased capital level requirements
New Zealand's systemically- important banks (ANZ, ASB, BNZ and Westpac)	7% owner equity	13.5% owner equity
	8.5% Tier 1 capital	16% Tier 1 capital
	10.5% Total minimum capital	18% Total minimum capital
All other New Zealand Banks	7% owner equity	11.5% owner equity
	8.5% Tier 1 capital	14% Tier 1 capital
	10.5% Total minimum capital	16% Total minimum capital

The changes involve a significant increase in the amount of Common Equity Tier 1 capital, or "owner equity", (which is the highest quality of capital as it is permanently available to absorb a bank's financial losses), and Additional Tier 1 capital which includes owner equity and, up to a maximum of 2.5%, of money provided by investors in redeemable, perpetual, preference shares with no contractual contingent features. The Reserve Bank estimates that this will see the amount of high-quality capital in the banking system increase by around 50%.

Tier 2 capital has also been kept in the mix by incorporating it in the capital framework via the 'Total minimum capital' requirement. However, under the 2019 reforms, Tier 2 capital consists of long term subordinated debt with no contractual conversion features (currently Tier 2 capital consists of long-term subordinated debt that must include conversion or write-off clauses).

The next step in the process will be a consultation on an 'exposure draft' of the detailed regulatory requirements to be included in the Banking Supervision Handbook to give effect to these decisions. The Reserve Bank expects this consultation will be ready by 1 April 2020. An indicative date for the end of the consultation on the exposure drafts is 1 June 2020, with the revised chapters coming into effect on 1 July 2020. There will be a transition period of seven years (rather than the five years originally proposed) before banks are required to fully comply with any of the rules.

Further details are available on the Reserve Bank's website here.

# Reserve Bank to publish banks' material breaches

In an effort to improve transparency and market discipline, from next year the Reserve Bank of New Zealand will report material breaches by banks on its website.

The new policy will require banks to report any material breaches or possible breaches of a requirement "promptly", and to report minor breaches every six months.

Click here for more information.

# Financial Markets Conduct (NZCDC Settlement System) Exemption Notice 2019

This notice continues the exemption granted by the Financial Markets Conduct (NZCDC Settlement System) Exemption Notice 2014 which was revoked on 30 November 2019.

It exempts clearing participants and depository participants from the substantial product holder requirements in sections 276 to 279 of the Financial Markets Conduct Act 2013 in respect of interests in financial products that arise as a result of holding and transferring those interests through the usual operation of NZX Limited's markets and the NZCDC settlement system.

# Disclosure exemption remains for directors and senior managers with interests in passive funds

The Financial Markets Conduct (Disclosure of Relevant Interests by Directors and Senior Managers) Exemption Notice 2019 continues the exemptions under the Financial Markets Conduct (Disclosure of Relevant Interests by Directors and Senior Managers) Exemption Notice 2014, which was revoked at the end of November.

The notice exempts a director or a senior manager of a listed issuer from disclosing relevant interests in quoted financial products if:

- the financial products are the managed investment products of a passive fund, or
- financial products of the listed issuer are approved for trading on a securities exchange in Australia or the United Kingdom (subject to conditions).

Compliance with the disclosure regime in these circumstances is generally considered unlikely to provide information that furthers the market information or anti-insider trading purposes of the disclosure regime.

# FMA releases its annual Audit Quality Monitoring Report

Each year the FMA prepares a report on the quality review it carries out on the systems, policies and procedures of registered audit firms and licensed auditors. The latest report summarises the FMA's findings from reviews it carried out between 1 July 2018 and 30 June 2019. Each of the audit firms reviewed during this cycle had been reviewed previously.

In this year's report, the FMA highlight their expectations of directors and auditors of financial statements, and outline key areas that auditors and directors should focus on to improve their audit quality. The report also compares the FMA's audit quality monitoring findings with their survey of investors on perceptions of audit quality and reflects on the audit inquiries underway in other jurisdictions.

One of the FMA's focus areas this year was on issues associated with related party transactions. Factors identified as contributing to deficient audits in respect of related party transactions include:

- rating related party transactions as low risk even when there were significant transactions,
- not making enquiries to understand any procedures the entity had in place to identify related parties
  and related party transactions, and what controls, if any, existed to review and ensure accuracy and
  completeness,
- not searching for undisclosed related parties, for example by reviewing the Companies Office register for directors or key management personnel, to determine if the entity's list was complete, and
- not questioning the rationale of directors allowing certain related party transactions to take place nor challenging of management assertions that the transaction has been made at arm's length.

# FMA has updated its director's guide for improving audit quality

The FMA has revised its November 2018 handbook for directors of FMC reporting entities on audit quality. The handbook sets out how directors can contribute to the quality of audits and outlines the role of the FMA and auditors.

Some of the key changes from the 2018 version include:

• noting that paying a fair and reasonable fee for the audit, and providing the auditor with sufficient time to perform a compliant audit contribute to the quality of an audit,

- a reminder to directors and audit committees that they should provide a trusted environment where auditors can raise differences and challenge management opinion without the risk that the audit relationship will be discontinued in the next year,
- a recommendation to:
  - keep longer-term audit planning and rotation in mind when selecting different audit firms for non-assurance services (with a view to ensuring the entity has the choice of multiple audit firms for the tendering process),
  - consider whether the audit firm should be appointed on a fixed-term basis only (for example 7 years), with a view to help increase independence between the management of the entity and the audit firm, as it removes the risks that arise when the audit firm is eligible for reappointment.

New emphasis was also placed on the need for auditors to request certain written representations from management that include that related party relationships and transactions are appropriately accounted for and disclosed during and after the audit.

The November 2019 Audit Quality - a director's guide is available here.

The FMA has also published an investor guide to show how good quality audit helps provide better financial reporting information.

# New NZX rules in force on 1 January 2020

New rules for NZX listed issuers and NZX Trading Participants come into force on 1 January 2020.

## NZX Listing Rule change

The NZX Listing Rules which take effect on 1 January introduce a new timetable requirement regarding when an investor can elect to participate in a dividend reinvestment plan (**DRP**).

The amendment requires the final election date for investor participation in a DRP to be at least one business day after the record date for the relevant dividend payment to investors who do not participate in the issuance.

A marked-up copy of the amended Rules is available here.

# NZX Participant Rules 2020

The NZX Participant Rules have been amended through the Financial Markets Conduct (NZX Participant Rules) Approval of Rule Change Notice 2019 to facilitate mandatory voice recording for Trading Participants.

The amendments to the Rules which come into effect on 1 January introduce mandatory recoding of electronic communications and voice recording for Trading Participants in respect of all communications by or with the Market Participant's institutional sales and trading desk and/or principal desk (including communications regarding proprietary and facilitation trading). Records must be kept in a retrievable form for six months.

NZX has published a new Guidance Note to assist participants with the new requirements.



# Government to introduce a "National Interest Test" to the overseas investment regime

Associate Minister of Finance David Parker has announced the Government's intention to introduce legislation in early 2020 that will give the Overseas Investment Office "new powers, consistent with global best practice, to protect New Zealand's best interests...".

Click here for more information.

# Increased overseas investment threshold for Australian investments in significant business assets

Australian investors currently have the benefit of an exemption from the requirement for OIO consent if they are investing in significant business assets in New Zealand, and the value of the transaction is below certain thresholds.

These thresholds may be adjusted each year according to formulae set out in the Overseas Investment Regulations 2005. From 1 January to 31 December 2020, Australian investors will benefit from increased thresholds under the Regulations.

The OIO has notified that, from 1 January to 31 December 2020, the thresholds will increase to:

- NZ\$537 million, if the investor is an Australian non-government investor, and
- NZ\$113 million, if the investor is an Australian government investor.

The threshold for Australian non-government investors is higher than the NZ\$200 million threshold that applies to certain investors from the ten other Comprehensive and Progressive Agreement for Trans-Pacific Partnership member nations and from certain other nations with which New Zealand has "most favoured nation" obligations under existing trade agreements, such as the People's Republic of China and Hong Kong.

The higher threshold for Australian non-government investors is likely to provide them with a competitive advantage in sale situations where the Australian investor can put in a bid that is not conditional on OIO consent.

The definition of non-government investor is complex, and some transaction structures can render the investor ineligible for the higher threshold. Overseas investment in sensitive land still requires OIO consent, regardless of the value of the transaction, unless the investor can rely on an exemption.

# **Takeovers Panel Annual Report 2019**

The Takeovers Panel's 2019 Annual Report notes the very positive feedback the Panel received from its stakeholders over the year on its processes and professionalism.

Transaction activity remained steady throughout the year, with the total number of transactions for the year at 23 slightly higher than the transactions monitored by the Panel in the previous year. In addition to the 19 Code-regulated transactions, the Panel also monitored four schemes of arrangement under the Companies Act 1993, although one of the proposed schemes of arrangement was notified but abandoned by the scheme promoters prior to completion.

Other work by the Panel included working with MBIE officials to carry forward the Panel's various recommendations for amendments to the Takeovers Act and the Code. The key amendments related to simplifying the Code's timing rules and encouraging electronic access to information in Code-regulated transactions. The Panel also worked with MBIE officials to ensure that the proposed amendment to raise the threshold at which the Code applies to unlisted companies was included in the Regulatory Systems (Economic Development) Amendment Act 2019.

# Takeovers Panel publishes new CodeWord

The latest issue of the Takeovers Panel's CodeWord includes an article which outlines the Panel's general views about who controls the voting rights in a Code company that are held by a limited partnership.

Click here to read this issue.



# Submissions on the Emissions Trading Reform Bill close in January 2020

The Environment Select Committee has set the closing date for submissions on the Climate Change Response (Emissions Trading Reform) Amendment Bill as 17 January 2020.

Submissions are also now open on proposed amendments to the Bill introduced by the Minister for Climate Change, Hon James Shaw through a Supplementary Order Paper (SOP) released last week. The amendments made by this SOP relate to the agricultural activities listed in Schedule 3 of the Climate Change Response Act 2002. The effect of the amendments will be to impose obligation on activities in a staged fashion.

The SOP also amends the Bill to add provisions to support the formal agreement between the Government and the agriculture sector, known as the 'Joint Action Plan'. Those provisions cover the following:

- a mechanism for the Minister for Climate Change and Minister of Agriculture to report back on the features of the 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,
- regulation-making power for the Minister for Climate Change to impose surrender obligations on processors if progress towards milestones is considered insufficient.

For further details on the Bill refer to the previous issue of Corporate Reporter here.

# Consultation on auctioning rules proposed for the NZETS

The Ministry for the Environment has opened a consultation on the regulatory proposals for the rules that will govern auctions in the New Zealand Emissions Trading Scheme.

Submissions on the Ministry's consultation: Reforming the New Zealand Emissions Trading Scheme: Rules for auctioning close on 19 December 2019.

# Proposed changes for climate change forestry sector regulations

The Ministry for Primary Industries is consulting on proposed amendments to the Climate Change (Forestry Sector) Regulations 2008.

These will assist determine the operational detail of changes required to support regulatory proposals to improve the NZETS for forestry being introduced under the Climate Change Response (Emissions Trading Reform) Amendment Bill 2019.

See A Better Emissions Trading Scheme for Forestry: Proposed Changes to the Climate Change (Forestry Sector) Regulations 2008. The consultation closes on 20 December 2019.

# Updates to guidance on the AML/CFT Supervisory Framework and Territorial Scope

The AML/CFT Supervisors have updated the guidelines on territorial scope and the supervision framework to reflect the expansion of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) to include new sectors.

The Territorial Scope Guidance notes are designed to assist businesses to determine whether they have obligations under the AML/CFT Act.

The Supervisory Framework provides an explanation of the actions, strategies, tools and techniques that are used by the AML/CFT Supervisors to achieve their shared objectives under the AML/CFT Act. This guidance has also been updated to reflect New Zealand's adherence to the recommendations set by the Financial Action Task Force.



# Dividend rules clarified in the Companies Act

The Companies (Clarification of Dividend Rules in Companies) Amendment Act 2019 has reconciled interpretation issues with sections 36 and 53 of the Companies Act 1993 regarding whether a company's constitution can provide for differential dividends in circumstances specified in the constitution.

The Act clarifies that a company's constitution may provide for "differential dividends" and that the board may authorise a dividend in accordance with the constitution. It also makes it clear that a company's constitution can only provide for shares in a class to receive "differential dividends" if this is based on objective criteria (rather than the exercise of a discretion by, or an opinion of, the board).

"Differential dividend" has been redefined to mean a dividend:

- in respect of some but not all the shares in a class, or
- that is of a greater value per share in respect of some shares of a class than it is in respect of other shares of that class.

The three existing exclusions in the Companies Act for when a board may authorise a differential dividend have been retained.

# "Good Governance" resources help company directors

The Companies Office has collaborated with the Institute of Directors and business.govt.nz to create resources for small business owners to help them develop and move into business director responsibilities.

Register of Companies Ross van der Schyff says "Good Governance is a set of resources based on global best practice in governance, made relevant specifically for Kiwi businesses".

The resources are available at business.govt.nz.



# Consumer credit legislation passes final reading

The Credit Contracts Legislation Amendment Bill, which was introduced in April this year, passed its third reading on 12 December.

The Bill responds to issues identified by the Ministry of Business, Innovation and Employment (MBIE) following its review of the consumer credit sector in 2018 by introducing significant changes to the Credit Contracts and Consumer Finance Act 2003 to reduce irresponsible and predatory lending, and resulting consumer harm. However, the effect of the changes is likely to be widely felt by lenders across all sectors of the consumer credit industry. The changes will be phased in to allow lenders sufficient time to implement them, but by 1 April 2021 at the latest.

Details of the changes are outlined in our earlier updates on the Bill here and here. This includes commentary on the extensive additional amendments to the Bill that were made following the Finance and Expenditure Committee's recommendations last month. Further changes to the Bill were also made under a Supplementary Order Paper at the Committee of the whole House stage relating to the enforcement of guarantees given by guarantors in respect of consumer credit contracts.

The main changes the Bill introduces are:

- a cap on the rate of interest and fees for high-cost loans of 0.8% per day, and a cap on total interest and fees to 100% of the first amount borrowed,
- requirements to keep records that substantiate that loans are affordable and suitable and fees are not unreasonable,
- the ability to set prescriptive requirements for affordability, suitability and advertising,

- a fit and proper person test for directors and senior managers of creditors and mobile traders,
- duties on directors and senior managers and tougher penalties for irresponsible lending,
- disclosure at the commencement of debt collection, and
- requirements for consumer credit providers to give statistical information about their business to the Commerce Commission on an annual basis.

MBIE is currently consulting on supporting regulations for the Bill with the release of the draft Credit Contracts and Consumer Finance Amendment Regulations 2020 and an accompanying discussion paper in November. Submissions on those are open until 5 February 2020. Further information on the proposed regulations is available in our update here.

# Government announces decisions on insurance law reforms

Following extensive feedback from stakeholders on an options paper released by the Minister of Commerce and Consumer Affairs Kris Faafoi in April this year, the Government has now released its policy decisions for the reform of insurance contract law.

The decisions include:

- Placing the responsibility on insurers to ask consumers specific questions when processing new insurance policies, and requiring consumers only to "take reasonable care not to make a misrepresentation" in answer to those questions. Currently, consumers are required to disclose all information that a prudent insurer would consider to be relevant, even if not specifically asked for.
- Requiring insurance policies to be written and presented clearly, so that consumers can easily understand them.
- Ensuring insurers respond proportionately when consumers don't disclose something they should have, or misrepresent themselves.
- Strengthening protections for consumers against unfair terms in insurance contracts.
- Extending powers to the Financial Markets Authority to monitor and enforce compliance with the new requirements.

Click here for more information.

An exposure draft of the legislation that will implement these decisions is expected to be released for consultation in mid-2020.

# First "Unfair Contract Terms" declaration granted by the High Court

The first declaration that a contract is "unfair" has been issued by the High Court.

Almost five years after the introduction of the Unfair Contract Terms regime, the High Court has provided welcome guidance on its scope, and the importance of transparency in assessing whether terms are "unfair".

Click here for a detailed discussion of this decision.



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

# Industry regulation and regulatory control

#### Retail fuel market study recommends changes to benefit competition and consumers

The NZCC has released its final report on the retail fuel market and has recommended changes to stimulate competition and benefit consumers. The full report, executive summary and infographics showing the NZCC's key findings and recommendations are available here.

# NZCC releases final report on Fonterra's 2019 / 2020 Milk Price Manual

The NZCC released its final report on its annual review of Fonterra's farm gate Milk Price Manual for the

2019 / 2020 dairy season (the **Manual**). The Manual sets out Fonterra's methodology for calculating its base milk for the season using a notional processor construct. The milk price monitoring regime is intended to promote greater confidence in the consistency of Fonterra's base milk price with contestable market outcomes.

# Balance struck between keeping electricity costs low for customers and ensuring adequate investment in lines networks

The NZCC has released its final decision on the default price-quality paths (**DPPs**) which apply to 15 of New Zealand's regulated electricity lines companies for the period 2020-2025. The DPP set out the maximum revenue the monopoly lines companies are allowed to earn from their customers and the minimum quality standards they must meet, measured in terms of power outages on their networks. NZCC Deputy Chair, Sue Begg, said the final decision strikes a balance between the need to minimise electricity distribution costs for consumers, while ensuring a stable regulatory regime where lines companies have incentives to invest in their networks to maintain reliability and meet the long-term needs of their customers.

# Mergers and acquisitions

# Statement of Preliminary Issues released for Property Brokers application to acquire Farmland's real estate business on the West Coast

The NZCC has published a statement of preliminary issues relating to an application from Property Brokers Limited to acquire the West Coast real estate business and property management business of Farmlands Real Estate Limited and Farmlands Real Estate Property Management Limited (together Farmlands Real Estate). The NZCC is currently scheduled to make a decision on the application by 12 February 2020. However, this date may be extended as the investigation progresses. The Statement of Preliminary Issues and a public version of the application can be found here.

#### Statement of preliminary issues released for the Cengage/McGraw-Hill merger

The NZCC has published a Statement of Preliminary Issues relating to an application from Cengage and McGraw-Hill Education to merge their global publishing businesses. In New Zealand both parties supply textbooks and other educational materials. The statement outlines the key competition issues the NZCC considers important in deciding whether or not to grant clearance to the proposed merger. The NZCC is currently scheduled to make a decision on the application by 16 January 2020. However, the NZCC notes this date may be extended as the investigation progresses. The Statement of Preliminary Issues and public version of the application can be found here.

## Market behaviour

#### Proceedings filed against container depot company and director for attempted price fixing

The NZCC has filed High Court proceedings against Specialised Container Services (Christchurch) and its director Grant Tregurtha, alleging that, in January 2018, Mr Tregurtha sought to reach an agreement with a competitor to charge the same "vehicle booking system" fee to customers. The NZCC alleges that this conduct amounted to an attempt by Specialised Container Services (Christchurch) and Mr Tregurtha to enter into a price fixing agreement with a competitor in breach of the Commerce Act.

# **Consumer issues**

# Hamilton finance company warned over car loan and repossession

The NZCC has warned Hamilton-based WeCare Finance that, in the Commission's view, it likely breached the lender responsibility principles of the Credit Contracts and Consumer Finance Act by failing to exercise the care, diligence and skill of a responsible lender before entering into a loan agreement; make reasonable inquiries before entering into the loan agreement, so as to be satisfied that it was likely that the borrower would make the repayments without suffering substantial hardship; and treat the borrower reasonably and in an ethical manner when it repossessed her vehicle.

#### Court fines GO Healthy for misleading 'New Zealand Made' claims

Health supplements seller GO Healthy New Zealand has been fined \$337,500 in the Auckland District Court for misleading consumers by claiming its supplements were "made in New Zealand", when the key ingredients in the majority of its products were imported. GO Healthy New Zealand pleaded guilty to three charges under the Fair Trading Act, following the NZCC's investigation.

#### Refunds for Home Direct customers after first Unfair Contracts Term declaration

The NZCC is urging customers of mobile trader Home Direct to check if they are eligible for a credit or refund, after the High Court declared that terms in its contracts relating to its "voucher entitlement scheme" were unfair and unenforceable. Under Home Direct's voucher entitlement scheme, customers continued to make direct debit payments, after they had paid off their goods, which were then converted into "voucher entitlements". The NZCC says only way to avoid forfeiting the additional payments was to purchase more goods from Home Direct.

#### NZCC warns property trader Peter Lee and PWG Limited

Following an investigation by the NZCC, Property trader Peter Lee and business PWG, trading as Property Wise and Auckland House Buyers, have been warned by the NZCC for making unsubstantiated or misleading representations that the NZCC believed likely breached the Fair Trading Act. The representations included statements that price was at "fair market value", that PWG had a certain number of years' real estate experience, PWG trading as Property Wise was the recipient of a "Property Professional of the year 2013/2014" award, and that endorsements on the business's websites were from genuine and satisfied customers. NZCC Chair, Anna Rawlings, said Mr Lee and PWG did not have reasonable grounds to make any of these claims at the time they were being made, and that the claims were misleading and were likely to breach the law.

# Torpedo7 fined \$80K for selling bikes with no front brakes

Sports goods retailer Torpedo7 (trading as 1-day.co.nz) has been fined \$80,000 for supplying bicycles without front brakes and certain product information, as required under the mandatory Pedal Bicycles product safety standard. Between 4 October and 17 November 2017, Torpedo7 (via its 1-Day website) advertised and offered to supply 100 Hang-Ten Cruiser bicycles and subsequently supplied 53 bicycles that were not compliant with the standard, and were, therefore, supplied in breach of the Fair Trading Act.

#### Consumer complaints to NZCC leap 20%

The NZCC has released a snapshot of the complaints it received from 1 July 2018 to 30 June 2019. The snapshot sets out that consumer complaints to the NZCC have increased more than 20% in the 2018 / 2019 year, to nearly 9,000.

## **Telecommunications**

# Final decision on telco providers' contributions to \$50 million development levy

The NZCC has released its final decision on how much 16 telecommunications providers will each pay towards the Government's \$50 million Telecommunications Development Levy for 2018 / 2019. It has also issued a consultation document on changes to the levy which may see some broadcasting services companies included from next year. Spark, Vodafone, Chorus and 2degrees will collectively pay more than 90% of the levy.

# NZCC releases final decision on Transpower's price-quality path

The NZCC has issued its final decision on the maximum revenue Transpower can earn and the minimum quality standards it must meet under its individual price-quality path for the period 2020 – 2025. Deputy Chair, Sue Begg, said the NZCC has approved a revenue allowance of \$4.05 billion for the next five years, a reduction of 15% or over \$685 million compared to its current five-year period, with the key reduction in allowable revenues resulting from the significant reduction in the weighted average cost of capital from 7.19% in the current period to 4.57% for the 2020 - 2025 period.

#### New regulatory regime for fibre broadband networks taking shape

The NZCC has released its draft decisions on the design of the new regulatory regime for fibre broadband networks. Telecommunications Commissioner Dr Stephen Gale said the new regulatory regime for fibre aims to ensure quality fibre internet services are delivered to New Zealanders at an appropriate price, at the same time as incentivising providers to invest, innovate and run their networks efficiently. The new regime will apply from the beginning of 2022, by which time most New Zealanders will have access to ultra-fast fibre broadband.



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

# Industry regulation and regulatory control

#### Petrol prices fall due to international factors

According to the ACCC's latest quarterly petrol monitoring report the average retail price in the five largest cities was 142.1 cents per litre (cpl), a drop of 3.2 cpl on the June quarter. The report shows that the average retail petrol prices in Sydney, Melbourne, Brisbane, Adelaide and Perth fell slightly in the quarter ending September 2019, due to a drop in international oil prices and a reduction in gross retail margins. The report also stated that petrol prices would have been lower were it not for a weaker Australian dollar.

# **Mergers and Acquisitions**

## Cengage McGraw-Hill educational publishing deal

The ACCC has raised preliminary competition concerns about the merger of Cengage Learning and McGraw-Hill Education. Its preliminary concerns relate primarily to higher education textbooks and the acquisition of higher education authors' rights in Australia.

# Proposed Asahi-CUB deal raises cider, beer market concerns

The ACCC has preliminary competition concerns about Asahi's proposed acquisition of Carlton & United Breweries. The ACCC has formed a preliminary view that the proposed acquisition will reduce competition in the market for cider and may also reduce competition in the beer market.

#### **Market Behaviour**

#### Action against Tasmanian Ports Corporation for alleged misuse of market power

The ACCC has instituted Federal Court proceedings against Tasmanian Ports Corporation in its first case taken under the amended misuse of market power provision. The ACCC alleges that Tasmanian Ports Corporation prevented Engage Marine from expanding in Tasmania by failing to provide long term berths for its tug boats, and refusing to place Engage Marine on the shipping schedule, which is necessary for it to provide towage services.

#### **Consumer Issues**

#### Coles to pay Norco dairy farmers around \$5.25 million following ACCC investigation

Following an ACCC investigation relating to allegations that, in a media release, social media posts and instore signage, Coles represented that the full benefit of the 10 cents per litre (cpl) retail price increase announced on 19 March 2019 would be passed on to farmers. The ACCC considered it had a strong case that Coles had been misleading consumers. Coles committed to the ACCC that it will pay an additional 7 cpl for 2 litre and 3 litre Coles branded fresh milk, which amounts to around \$5.25 million to Norco for milk supplied between 1 April 2019 and 30 June 2020, resolving the ACCC's investigation.

## **Telecommunications**

# Competition in NBN wholesale market keeps growing

The ACCC has released its latest quarterly Wholesale Market Indicators Report. The report sets out that the National Broadband Network (NBN) is now providing over 6.1 million residential broadband services, with more than half a million new services having been added between July and September. The report also shows that more wholesale access seekers are directly connecting with the NBN at more NBN points of interconnect. There were at least nine different wholesale access seeker groups directly connected to the NBN at all of the 121 points of interconnect in the September quarter, while at least ten access seekers were connected at 119 of the POIs.

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