CORPORATE REPORTER

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WELCOME

to issue No.61 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

Mandatory climate-related financial disclosures are on the horizon for financial market participants

A joint consultation, by the Ministry of Business, Innovation and Employment and the Ministry for the Environment, has been released on the design of a climate-related financial disclosure regime for financial institutions and other entities that participate in New Zealand's financial markets.

This follows the Government's decision in August this year to accept the Productivity Commission's recommendation to endorse the June 2017 recommendations by the Financial Stability Board Task Force on Climate-related Financial Disclosures (the **TCFD**) as an appropriate avenue for the disclosure of climate risk (see the Productivity Commission's August 2018 report Low-emissions Economy).

The consultation

The consultation addresses four key questions:

- What are the arguments for retaining the status quo, versus introducing new mandatory climate-related financial disclosures?
- What should be disclosed?
- Which entities should be disclosing?
- When should they start disclosing?

To inform the discussion, the discussion document includes commentary on why there is an international drive for financial market participants and financial institutions to make climate-related financial disclosures; the current situation in New Zealand; the links between directors' legal obligations and climate change risk; and the issues around designing a disclosure system.

Ultimately, the Government's objective is to move to a position where the effects of climate change become routinely considered in business and investment decisions in a way that contributes to a low-emissions, climate-resilient economy. There is now increasing recognition of the importance of disclosure of financial risk from climate change by financial market entities in meeting that objective. Better information gathering and analysis by entities for disclosure purposes facilitates better decision making, and provides reporting entities with incentives to manage risks and take advantage of opportunities. High quality disclosures also help investors, lenders and insurers to make decisions that are more informed.

The preferred option

The Government's preferred option is to introduce legislation for new mandatory (comply-or-explain) disclosure requirements, with the TCFD reporting framework as the default 'comply' element. Extended external reporting and sustainability frameworks that are aligned with TCFD would also be acceptable under the new regime.

Consistent with the TCFD recommendations, the disclosure system would apply to listed issuers, banks, general insurers (including reinsurers), asset owners (i.e. institutional investors) and asset managers (i.e. investment managers). The consultation seeks feedback on whether there should be a small entity exemption, and if so, what criteria should be used (e.g. annual revenue, total assets, a combination of the two, or some other measures).

The disclosures would be made in a stand-alone climate-related financial disclosure report, within the entity's annual report.

Non-disclosure would only be allowable on the basis of the entity's analysed and reported conclusion that they see themselves as not being materially affected by climate change, with an explanation as to why they have not complied in the annual report.

The proposal envisages that the new mandatory (comply-or-explain) climate-related financial disclosures would come into effect for financial years commencing six months on or after the date that the regulations are introduced.

There would be a one-year financial year transition period where it would be permissible to not provide a full set of TCFD disclosures, subject to explaining why the disclosures are incomplete.

What is the TCFD reporting framework?

The TCFD framework is widely regarded as international best practice for climate-related financial disclosures. Its recommendations are structured around four thematic areas (which are supported by a set of disclosures):

- **Governance**: Disclose the organisation's governance around climate-related risks and opportunities.
- **Strategy**: Disclose the actual and potential impacts of climate-related risks and opportunities on the organisation's businesses, strategy, and financial planning where such information is material.
- **Risk management**: Disclose how the organisation identifies, assesses, and manages climate-related risks.
- **Metrics and targets**: Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.

The recommendations are designed to generate decision-useful, forward-looking information on climate-related financial impacts, and also to increase focus on the risks and opportunities of transitioning to a lower-carbon economy.

Trends for disclosure of financial risk from climate change

The New Zealand Government is not alone in considering how best to implement TCFD-aligned disclosures, although if new mandatory disclosure requirements were to be introduced it would place New Zealand at the forefront of countries exploring this.

The TCFD recommendations have already had recognition in New Zealand, notably in NZX's Environmental, Social and Governance Guidance Note. The updated NZX Corporate Governance Code also recommends that an issuer “should provide non-financial disclosure at least annually, including considering material exposure to environmental, economic and social sustainability risks and other key risks."

The TCFD recommendations have been similarly recognised in Australia, the United Kingdom (**UK**) and by the European Union. The ASX Corporate Governance Council updated its Corporate Governance Principles and Recommendations in February 2019 to include an amendment to “encourage entities to consider whether they have a material exposure to climate change risk" by reference to the TCFD recommendations. The UK Government has set out an expectation for all listed companies and large asset owners to disclose in line with TCFD by 2022, and is exploring mandatory disclosure. The European Union is considering reopening the EU Non-Financial Reporting Directive, which would likely make TCFD disclosure mandatory, and its non-binding guidelines for reporting of climate-related information in June 2019, draw heavily on the TCFD recommendations.

Next steps

The feedback from this consultation will inform the Government’s final decisions about the proposed regime on climate-related financial disclosures. After the consultation period has ended, officials will prepare a report that summarises the submissions and recommends changes in response and then seek agreement from Cabinet to make the recommended changes.

Submissions close on **13 December 2019**.

Start date confirmed for the new financial advice regime

The Financial Services Legislation Amendment Act Commencement Order 2019 provides for the new financial advice regime being introduced under the Financial Services Legislation Amendment Act 2019 to commence on 29 June 2020.

From that date, the remaining provisions of the Financial Services Legislation Amendment Act 2019 (**FSLA Act**) will come into force and the Financial Advisers Act 2008 will be repealed.

The FSLA Act includes a two-year transitional period from 29 June 2020 that allows financial advisers (and nominated representatives) to continue providing the advice they are legally able to provide under the current regime if they do so under a transitional financial advice provider licence. A safe-harbour for existing participants also will apply to provide time for them to meet the competency standards in the new code of conduct.

Regulations implemented for transitional licensing of financial advice providers

A number of regulations have been enacted to facilitate the transitional licensing of financial advice providers under the new financial advice regime.

These are:

- The Financial Service Providers (Registration) Amendment Regulations (No 2) 2019, which make minor changes to the registration regulations to facilitate transitional licensing,
- The Financial Markets Authority (Levies) Amendment Regulations 2019, which amend the FMA levies to provide for the same amount of funding from the financial advice sector for the FMA, and
- The Financial Markets Conduct (Fees) Amendment Regulations (No 2) 2019, which set the licensing fees that will apply in the new regime.

The regulations do not come into force until **25 November 2019**, which has meant the FMA has had to delay to the start date for accepting transitional licence applications until then.

MBIE consults on disclosure regulations for the financial advice regime

The MBIE has released draft regulations that set the disclosure requirements in the new financial advice regime for consultation.

Earlier in the year, the Government made policy decisions on the new disclosure requirements that will apply to financial advice providers (**FAPs**), or those they engage to give advice, when the remainder of the Financial Services Legislation Amendment Act 2019 provisions come into force on 29 June 2020. This followed a consultation on proposed disclosure requirements in April 2018 and two rounds of consumer testing. MBIE is now consulting on whether the exposure draft of the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019 achieve the Government's policy decisions and whether they are workable in practice.

The draft Regulations divide the process of giving financial advice into three stages:

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

They also set out the information that must be made available or given to retail clients at each stage. This is summarised in the table below.

INFORMATION	SUMMARY OF INFORMATION TO BE DISCLOSED		
	PUBLICALY AVAILABLE ON A FAP's WEBSITE AND ON REQUEST	TO RETAIL CLIENTS WHEN NATURE AND SCOPE OF FINANCIAL ADVICE SERVICE IS KNOWN	TO RETAIL CLIENTS WHEN THE NATURE AND SCOPE OF THE ADVICE IS KNOWN
LICENSING INFORMATION	A summary of the licensing status of the FAP and a brief summary of any conditions on the licence that may limit or restrict the advice that can be given.	A summary of the licensing status of the FAP and a brief summary of any conditions on the licence that may limit or restrict the advice that will be given.	Any material changes to information already given.

INFORMATION	SUMMARY OF INFORMATION TO BE DISCLOSED		
	PUBLICALY AVAILABLE ON A FAP's WEBSITE AND ON REQUEST	TO RETAIL CLIENTS WHEN NATURE AND SCOPE OF FINANCIAL ADVICE SERVICE IS KNOWN	TO RETAIL CLIENTS WHEN THE NATURE AND SCOPE OF THE ADVICE IS KNOWN
NATURE AND SCOPE OF THE ADVICE	Information on the types of advice that the FAP gives, the financial advice products that can be advised on, and whether there are any limitations (including on the product providers whose products can be advised on).	Information on the types of advice that will be given, the financial advice products that will be advised on, and whether there are any limitations (including on the product providers whose products will be advised on).	Any material changes to information already given.
RELIABILITY HISTORY	Not required at this stage.	Information regarding any recent instances of being publicly disciplined, relevant convictions or civil proceedings and, in the case of financial advisers, any recent bankruptcies or insolvencies.	Any material changes to information already given.
INDENTIFYING INFORMATION	Not required at this stage.	Information to help identify the FAP, financial adviser or nominated representative.	Information to help identify the FAP, financial adviser or nominated representative.
FEES OR EXPENSES	An explanation of any fees that might be charged for financial advice, including the circumstances in which they may be payable.	Information regarding any fees or expenses that may need to be paid in relation to the giving of financial advice, including the circumstances when they are payable and the amount of any fees (if known) or an estimate (if practicable).	If not previously disclosed, information regarding any fees or expenses that may need to be paid in relation to the giving of financial advice, or following the advice, including the circumstances when they are payable and, the amount of any fees (if known) or an estimate (if practicable).
CONFLICTS OF INTEREST AND INCENTIVES	A description of any conflicts of interests, an explanation of the circumstances in which commissions or other incentives will be received and a brief explanation of how any conflicts will be managed.	A description of any conflicts of interests and any commissions or other incentives that will or may be received, including the amount or value of these, and a brief explanation of how any conflicts will be managed.	A description of any conflicts of interests and any commissions or other incentives received in relation to the advice, including the amount or value of these, and a brief explanation of how any conflicts will be managed.
COMPLAINTS HANDLING AND DISPUTE RESOLUTION	Information regarding the internal complaints procedure and external dispute resolution process.	Not required at this stage.	Information regarding the internal complaints procedure and external dispute resolution process.
DUTIES INFORMATION	Not required at this stage.	Not required at this stage.	A description of the duties in the FMC Act that the person is required to meet.
AVAILABILITY OF INFORMATION	A statement to the effect that the client is able to request for the information to be provided in a hard copy or an electronic copy.	A statement to the effect that the client is able to request for the information to be provided in a hard copy or an electronic copy.	A statement to the effect that the client is able to request for the information to be provided in a hard copy or an electronic copy.

INFORMATION	SUMMARY OF INFORMATION TO BE DISCLOSED		
	PUBLICALY AVAILABLE ON A FAP's WEBSITE AND ON REQUEST	TO RETAIL CLIENTS WHEN NATURE AND SCOPE OF FINANCIAL ADVICE SERVICE IS KNOWN	TO RETAIL CLIENTS WHEN THE NATURE AND SCOPE OF THE ADVICE IS KNOWN
TIMING	Members of the public (or members of the section of the public to which the information is applicable) must be able to easily access the information on the website at all reasonable times.	As soon as practicable after the FAP, financial adviser or nominated representative who gives advice knows the general nature and scope of the advice the client is seeking, and has reasonable grounds for concluding that advice will be given to the client, and before financial advice is given.*	When the financial advice is given, or if that is not practicable, as soon as practicable after the advice is given.*

*Information does not need to be provided if it has been given in the last 12 months, unless there have been any material changes to the information provided previously. If there has been a material change in the past 12 months, an updated version of the information that has changed or an explanation of what has changed must be provided. In any case, the information must be given if the client requests it.

In addition, the Regulations also provide for:

- FAPs, or those they engage to give advice, to provide clients with information regarding their complaints handling processes and dispute resolution arrangements at the point a complaint about a financial advice service is received,
- the manner in which information must be disclosed (which, includes that it is given free of charge and is presented in a clear, concise and effective manner), and
- a new licence condition on a market services licence for a FAP to keep a record of each disclosure made under the Regulations.

The Regulations further clarify:

- that when a duty to disclose applies to an individual financial adviser or nominated representative, a FAP may give the information to a client directly on the individual financial adviser's or nominated representative's behalf, and
- that if one person is required to provide the initial information, but is unlikely to be the person who gives financial advice to the client, in such cases the disclosures should relate to the person who will give the financial advice.

Next steps

The regulations are expected to be passed in early 2020, and come into force in June 2020. The consultation asks for feedback on whether transitional provisions are needed to ensure that the industry has sufficient time to meet the new disclosure requirements.

A copy of the consultation paper is available here.

Decisions announced on new financial advice regime exemptions

Following a consultation in August 2019, the FMA has reached "in principle" decisions on whether various existing exemptions offered under the Financial Advisers Act 2008 will continue under the new financial advice regime.

The FMA has agreed that relief will continue to be given to:

- Australian financial services licensees with no place of business in New Zealand and their representatives, to allow them to provide unsolicited regulated financial advice to retail clients in New Zealand from offshore,
- overseas custodians of client money and client property from new regulations to be made under the Financial Markets Conduct Act 2013, to relieve overseas custodians from the requirement to obtain an

assurance engagement from a New Zealand qualified auditor that complies with requirements in the New Zealand regulation, and

- overseas custodians of scheme property under the Financial Markets Conduct (Overseas Custodians—Assurance Engagement) Exemption Notice 2018, to align the expiry date with expiry of the proposed new exemptions for overseas custodians of client money and client property.

Details on the proposed exemptions and conditions of those exemptions are available on the FMA's website. Interested parties have been invited to consult on the drafting of the exemption notices by request to the FMA (at exemptions@fma.govt.nz).

The FMA has also confirmed that it does not intend to continue exemption support provided by the following notices, as regulatory changes will mean that support is no longer required under the new financial advice regime:

- Financial Advisers (Certified Investment Management Analyst) Exemption Notice 2017.
- Financial Advisers (Non-NZX Brokers – Client Money) Exemption Notice 2017 and Financial Advisers (NZX Brokers – Client Money and Client Property) Exemption Notice 2015.
- Financial Advisers (Personalised Digital Advice) Exemption Notice 2018 and related amendment notices.
- Financial Markets Conduct Act (Offers of Financial Products Through Authorised Financial Advisers Supplying Personalised DIMS) Exemption Notice 2015.

New conduct regime for banks, insurers and NBDTs announced

The Government has announced wide-ranging legislative reforms to govern the conduct of financial institutions.

A new licensing regime will be introduced for banks, insurers and non-bank deposit takers (**NBDTs**) in respect of their general conduct, including aspects of how they design and offer sales incentives.

The reforms are a response to the 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 legislation is expected to be introduced by the end of 2019. Click here for more.

NZX publishes its third Thematic Review

NZX released its 2019 Thematic Review that reports on issuer practices for identifying and flagging market announcements containing material information (over a six-month period from 1 January 2019 to 30 June 2019).

A copy of the report is available online here.

NZX's market announcement platform (**MAP**) provides for announcements containing material information to be flagged as "P", to denote their potential price sensitivity. The review found that issuers are generally assessing and flagging material announcements appropriately. However, there is room for improvement. In particular, NZX is keen to eliminate practices by some issuers which reduce the effectiveness of the "P" flag for investors. This includes applying the "P" flag to:

- administrative announcements that objectively did not contain material information,
- announcements issuers consider will be of interest to investors or for the 'avoidance of doubt', but which do not contain material information.

NZX also found evidence of some inconsistent market practice on the flagging of announcements regarding issues of new debt securities. In NZX's view, information regarding a new issue of debt securities by an existing listed debt security issuer will be unlikely, in the absence of additional factors, to have a material effect on the price of that issuer's existed quoted debt securities. As such, NZX considers that it should be rare for such announcements to be marked with a "P" flag.

The review did not cover those announcements that are prescribed by NZX as announcement types to which the "P" flag will automatically be applied, for example, preliminary half and full year results and annual report releases.

Consultation on new Mid-Point Order Book for NZX Trading Participants

NZX is consulting on technical amendments to the NZX Participant Rules to facilitate the introduction of the Mid-Point Order Book.

NZX is currently upgrading its Trading System and moving to the Nasdaq ME platform. This presents the opportunity for NZX to provide additional functionality for NZX Trading Participants, through the creation of an undisclosed order book, the "Mid-Point Order Book".

The consultation paper explains the key features of the Mid-Point Order Book, and includes an exposure draft of the proposed amendments to the NZX Participant Rules that will be required to introduce the Mid-Point Order Book.

Submissions close on **15 November 2019**.

FMA releases annual report for 2019

The FMA has released its annual report for the year to June 2019, which is described in the report as a "watershed year" for the regulator.

Conduct and culture reviews within retail banks and life insurers dominated the FMA's activities over this period. This included interviews with 870 staff of firms involved in the review and reviewing over 2,000 documents. The FMA continues to monitor progress on the firms' plans to address the issues that were identified in the reviews.

This was also a strong year for enforcement activity. The report reveals that the regulator spent $2.98 million, which was well-over its $2 million litigation fund budget, because of a number of large litigation matters undertaken during the year. The Minister of Commerce and Consumer Affairs Kris Faafoi has since announced that the Government has increased the budget to $6 million for the 2020 financial year that began on 1 July. This, he said, "ensures the regulator is well placed to respond to misconduct and it sends a clear message that the FMA is resourced to take on those with deep pockets".

The annual report highlights the FMA's work to prepare the financial advice industry for the new regime in June 2020. This has included:

- building systems to support the application process for transitional and full licensing,
- creating guidance documents and communicating updates to the current adviser population, and
- engaging with industry to help them understand their options and obligations under the new regime.

FMA's 2019 KiwiSaver Annual Report

The 2019 KiwiSaver Report summarises the FMA's activities as a regulator relating to KiwiSaver for the year to the end of March 2019, and is based on all providers' statutory data for the reporting period.

The report shows that there has been an increase in KiwiSaver membership (up 3.1 per cent on the prior year) as well as an increase in funds under management (up 17 per cent).

Over the last few years the FMA has focussed on fees charged by providers for KiwiSaver funds, which aren't coming down as expected and are high compared to broadly similar funds in the UK. In the year ahead the FMA intends to broaden this focus to also examine whether KiwiSaver schemes are providing good value for money for New Zealanders. This will include:

- refining how it assesses value for money in KiwiSaver, including researching how to measure value for money, and how to accommodate value-added services marketed by providers,
- continuing research into how people are reacting to the reporting of fees in dollar terms in their annual member statements, and
- undertaking research into active and passive management in KiwiSaver, to ensure that firms' activities match their marketing and to aid assessment of value for money.

Another focus area for the FMA has been to encourage KiwiSaver default providers to improve their percentage of members who make an active choice on their investment. There has been good progress in this area, with six out of the nine default providers improving their percentage of active choice members during the reporting period.

MERGERS AND ACQUISITIONS

"Code companies" must be "at least medium-sized" under the takeovers regime

The definition of a "code company" in the Takeovers Act 1993 has been amended to include an additional limb requiring unlisted companies to be "at least medium-sized".

The change is aimed at removing unnecessary compliance and cost burdens for smaller unlisted companies that fall under the current regime.

Under the new definition an unlisted company is "at least medium-sized" if:

- the company has completed one or more accounting periods and either or both of the following are true:
  - on the last day of the company's most recently completed accounting period, the total assets of the company and its subsidiaries (if any) are at least $30 million,
  - in the most recently completed accounting period, the total revenue of the company and its subsidiaries (if any) is at least $15 million, or
- the company has not completed its first accounting period and on the last day of the most recently completed month the total assets of the company and its subsidiaries (if any) are at least $30 million.

The amendment has been made by the omnibus Regulatory Systems (Economic Development) Amendment Bill (No 2), which was passed last week and will come into force two months after it receives Royal assent.

This change goes further than the Takeovers Code (Small Code Companies) Exemption Notice 2016, which has been revoked by the Bill. That notice allows unlisted companies with total assets of $20 million or less to opt out of Takeovers Code compliance where a person increases their holding or control of voting rights as a result of an allotment, acquisition or buyback of voting securities by the code company

The Bill also amends the Takeovers Act to clarify that Code regulated transactions which result in a person becoming a dominant owner of the company (that is, holding or controlling 90% or more of the voting rights in the company) must be completed under the Code's Part 7 compulsory acquisition procedure.

COMMERCIAL

Zero Carbon Bill passes final reading

Heralded as a "historic moment" for New Zealand, the Government with the support of the National Party passed the Climate Change Response (Zero Carbon) Amendment Bill last week.

The primary purpose of the Bill is to provide a framework for New Zealand to develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5 degrees Celsius above pre-industrial levels and to prepare for, and adapt to, the effects of climate change. To achieve this, the Bill:

- Sets a new greenhouse gas emissions reduction target to:
  - reduce all greenhouse gases (except biogenic methane) to net zero by 2050,
  - reduce emissions of biogenic methane within the range of 24–47 per cent below 2017 levels by 2050, including to 10 per cent below 2017 levels by 2030.
- Establishes a system of a series of five-year emissions budgets to act as stepping stones towards the long-term target.
- Requires the Government to develop and implement policies for climate change adaptation and mitigation.
- Establishes a new, independent Climate Change Commission (**Commission**) to provide expert advice and monitoring to help keep successive governments on track to meeting long-term goals.

At the select committee stage of the Bill the Environment Committee considered approximately 10,000 submissions and heard 800 submitters in person. The Committee made a number of recommended amendments to the Bill which have been included in the final form of the legislation. These include:

- requiring the Commission to have regard for the Crown/Māori relationship, Te Ao Māori, and specific impacts on iwi and Māori when performing all its functions and duties and exercising its powers to assist the Crown to give effect to the principles of the Treaty of Waitangi,
- allowing the Commission to consider the form of the target in its reviews, including the use of offshore mitigation or domestic forestry offsets,
- requiring the Commission to have regard to the implication and potential implications of land-use change on communities when preparing advice on emissions budgets and emission reductions plans,
- enabling the Commission to provide advice to Government on whether emissions from international shipping and aviation should be accounted for in emissions budgets and the target—and, if so, how—when it undertakes its review of the 2050 target,
- removing the clause that allowed public decision makers to exclude the 2050 target or an emissions budget from their decision making without the risk that those decisions could be invalidated. In addition, the emissions reduction plan the budget is required to produce in response to each emissions budget has been added as a permissive consideration that decision makers can have regard to when exercising their public functions,
- allowing the Commission the authority to request information on climate change adaptation from reporting organisations to ensure that the Commission is not reliant on the Minister for the information that it needs to perform its adaptation functions.

For a closer look at some of the key legal and commercial considerations on the Bill, refer to our earlier client update here.

Bill introduced to implement previously announced changes to the NZETS

The Government has introduced the Climate Change Response (Emissions Trading Reform) Amendment Bill following a review of the New Zealand Emissions Trading Scheme (NZETS) undertaken by the previous government in 2015-2016 and public consultations carried out in 2018.

Like the Climate Change Response (Zero Carbon) Amendment Bill, this bill will amend the current Climate Change Response Act 2002 (**CCR Act**).

Key changes

The amendment bill makes a wide range of changes, all of which reflect previous policy decisions announced over the last year. The key changes include:

- updating the purpose of the CCR Act to support implementation of New Zealand's international climate commitments under the Paris Agreement and domestic targets and emissions budgets, to be set under the Climate Change Response (Zero Carbon) Amendment Act (**Zero Carbon Act**),
- providing the framework to enable the supply of New Zealand Units (**NZUs**) to be restricted over a five-year rolling period, capping allowable emissions to align them with the five year emissions budgets in the Zero Carbon Act,
- introducing Government auctioning of NZUs in a way that aligns the supply of NZUs in the NZETS to New Zealand's emission reduction targets,
- replacing the current fixed price option (the NZ$25 payable in place of surrendering a NZU) with a cost containment reserve which will operate through NZETS auctions,
- mandating a slow phase-down of all industrial allocation from 2021 and enabling further reductions in allocation as the risk of emissions leakage reduces,
- introducing averaging accounting (in place of the existing "carbon stock change" accounting mechanism) for all post-1989 forests registered in the NZETS from 1 January 2021 (and optional for forests registered in 2019 and 2020),
- disestablishing the existing Permanent Forest Sink Initiative, and replacing it with a new permanent post-1989 forest activity in the NZETS,

- introducing a large package of operational and technical forestry changes to reduce operational complexity and encourage the establishment of new forests, particularly by small forest owners and farm foresters, and
- updating the compliance and penalties regime so it is fit for purpose, including the introduction of strict liability infringement offences to deter low-level non-compliance.

Agriculture emissions

The Bill also gives effect to the Government's decision (which was announced on 24 October 2019) to join forces with the farming sector to develop an alternative pricing mechanism for on-farm emissions, and use the NZETS as the fall-back option for agricultural emissions.

If an alternative pricing mechanism is not established, under the Bill the agriculture sector will enter the NZETS at farm-level for livestock emissions and processor level for fertiliser emissions from the year beginning 1 January 2025. This date could be brought forward if a proposed review in 2022 finds that commitments regarding the joint action plan are not being met.

Mandatory reporting obligations on livestock emissions will apply at farm level for emissions from the year beginning 1 January 2024.

To reflect the Labour-New Zealand First Coalition Agreement, the Bill amends the existing level of free allocation to agriculture in the CCR Act from 90% to 95%, if agriculture emissions were included in the NZETS. This means the agriculture sector will only be exposed to five per cent of the total costs of its emissions on entry into the scheme.

The Explanatory Note to the Bill states that the necessary provisions to support the policy decisions on agriculture during the interim period to 2025 have not been included in the Bill on introduction. These will be incorporated into the Bill through draft text provided to the Environment Select Committee or by a Supplementary Order Paper.

Next steps

The Bill has been referred to the Environment Select Committee, which must report back on the Bill by 5 May 2020. Interested parties are able to make submissions to the Committee here. The closing date for submissions has yet to be set.

Energy in New Zealand 2019

The Ministry of Business, Innovation and employment has released its annual round-up of the energy sector "Energy in New Zealand 2019", highlighting key trends in energy supply, transformation, demand and price for the 2018 calendar year.

AML/CFT high risk jurisdictions list updated

The Financial Action Task Force (FATF) updated its list of 'high risk and other monitored jurisdictions' on 18 October 2019 regarding its on-going review of jurisdictions' compliance with Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) standards.

In New Zealand, AML/CFT Act reporting entities are required to conduct an enhanced level of customer due diligence on all non-resident customers from countries that have insufficient AML/CFT systems or measures in place. There are additional requirements to monitor and examine business relationship and transactions involving these countries, and where necessary, have additional measures or restrictions on dealing with them.

The additional countries on the FATF list are Iceland, Mongolia and Zimbabwe. These countries are identified as having strategic AML/CFT deficiencies and have developed an action plan with FATF to resolve them. Ethiopia, Sri Lanka and Tunisia have come off the list so are no longer subject to FATF's ongoing monitoring process.

Revised partnership legislation in force from April 2020

The Partnership Law Act 2019 (PLA) received Royal assent in October and will come into force on 21 April 2020.

The PLA revises and re-enacts the Partnership Act 1908 without changing the 1908 Act's substance. However, it does make some minor amendments "to clarify Parliament's intent or reconcile inconsistencies". Those "minor" amendments are set out and explained in Schedule 2 of the PLA.

The PLA is the second "revision Act" (the first being the Contract and Commercial Law Act 2017 (**CCLA**)). Revision Acts are the result of a mechanism that was introduced under the Legislation Act 2012 to systematically revise the presentation of some New Zealand statutes to make them more accessible. The Legislation Act (section 35) states that a provision of an Act, that has been certified to be a revision Act, is not intended to change the effect of the law, unless it expressly provides that a particular provision is intended to do so.

When it comes into force the PLA will apply both to new business partnerships and existing ones under the 1908 Act. References to the 1908 Act in existing agreements will be deemed to be a reference to the PLA or a provision within it. Helpfully, like the CCLA, the Act includes a comparative table of the clauses in the PLA with the 1908 Act in Schedule 3 of the PLA.

Revised Legislation Act enacted

The Legislation Act 2019 rewrites and replaces the Legislation Act 2012 to implement publication and other reforms relating to the production of legislation, and also updates and re-enacts the Interpretation Act 1999.

The key changes to the current Legislation Act include:

- introducing a new general term "secondary legislation" for instruments that are made under a law-making power delegated by Parliament and make or change the law (which will replace existing categories, including "disallowable instrument", "legislative instrument", and "tertiary legislation"),
- expanding the content of the New Zealand legislation website by requiring that secondary legislation (if not made by local authorities) is identified and published on the website (unless a restricted and specified exception applies) so there is a single authoritative place where almost all legislation can be accessed,
- putting the Interpretation Act 1999, with some technical improvements, into the Legislation Act so that all laws about the making and application of legislation are contained in one piece of legislation, and
- providing legislative disclosure requirements which require agencies to disclose information about the development and key features of government-initiated legislation at the time of introduction.

The improvements made to the Interpretation Act include:

- clarifying 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
- adding further rules to help determine when legislation commenced or how to calculate the start and end of monthly periods set out in legislation.

To give effect to the new "secondary legislation" category, a separate bill is currently being prepared for introduction to Parliament (the Secondary Legislation (Access) Bill) that will amend every provision in primary legislation (currently estimated to be 4,000) that empowers the making of secondary legislation to state this explicitly.

The Legislation Act (other than provisions relating to regulation powers) will not come into force until various supporting regulations are in place (including the enactment of the Secondary Legislation (Access) Bill), and business and technology changes needed for the Parliamentary Council Office to publish the additional legislation have been made.

The Legislation (Repeals and Amendments) Act 2019 (which was originally part of the Legislation Bill) has also been enacted. This Act includes interim amendments, which were brought into force on 28 October 2019, affecting the operation of the Legislation Act 2012 (such as removing the obligation to designate bookshops for the sale of legislation) and realigning some drafting responsibilities under other Acts.

CORPORATE LAW

Tidy-ups for the Companies Act and the Limited Partnerships Act

The omnibus Regulatory Systems (Economic Development) Amendment Bill (No 2) which makes a number of changes to the Companies Act 1993 and the Limited Partnerships Act 2008 to clarify and update provisions, was passed last week and will come into force two months after the Bill receives Royal assent.

The amendments to the Companies Act include:

- allowing documents to be sent by email to a creditor that is a body corporate,
- allowing the notice for a shareholders' meeting to specify a time that is less than 48 hours before the meeting as the time by which shareholders must cast proxy votes and electronic votes,
- adding some additional serious dishonesty offences to the criteria that a court may use as grounds to disqualify people from being appointed as a director or promoter of a company or from taking part in the management of a company.

The amendments to the Limited Partnerships Act include:

- aligning the requirements about where general partners (or certain associated natural persons) must live with similar requirements that apply to directors of companies under section 10 of the Companies Act 1993,
- amending the information requirements on general partners who are resident in an enforcement country,
- amending the provisions which lists persons who are disqualified from holding office as a general partner to address changes to the Insolvency Act 2006, and
- providing that section 328(3)(a) of the Companies Act applies to give public notice of the restoration of limited partnerships to the register.

Government announces insolvency law reform measures

Cabinet has agreed to a package of reforms to improve aspects of insolvency law, notably for voidable transactions and other recoveries, and preferential claims under the Companies Act 1993.

The bulk of these reforms are drawn from recommendations made in a 2017 report of the Insolvency Working Group (IWG), which was established by the previous government in 2015 to provide advice on aspects of corporate insolvency law. Submissions on the consultation of the 2017 report are available here.

Voidable transactions and other recoveries

The Companies Act empowers liquidators to reverse certain types of transactions involving the insolvent company that took place prior to the commencement of its liquidation. These include transactions that can be viewed as tantamount to fraud on the creditors of the insolvent company. They also allow liquidators to 'clawback' certain transactions within a two-year period that are inconsistent with the principle that creditors of the same class should be treated equally (known as "voidable transactions").

To provide a more reasonable level of business certainty for individual creditors, Cabinet has agreed to reduce the clawback period for:

- voidable transactions, and
- voidable charges over property or undertakings of the insolvent company,

from two years to six months prior to the commencement of the liquidation where the insolvent company and creditor are not related parties.

Cabinet has also agreed to standardise the clawback period for voidable transactions and all other classes of recovery at four years where the debtor company and the preferred creditor are related parties. This means that the clawback period will be increased from two years to four years:

- for voidable transactions where a creditor is a related party of the insolvent company,
- where an insolvent company has given a charge in favour of a related party, and

- for transactions at undervalue with related parties.

The clawback period also will be increased from three to four years for transactions with related parties for inadequate or excessive consideration.

The creditor's defences available under the voidable transactions regime will remain the same, as the Commerce and Consumer Affairs Minister Kris Faafoi decided not to follow the IWG's recommendation to repeal the 'gave value' test in section 296(3) of the Companies Act.

A number of other changes relating to voidable transactions are also proposed. These include:

- widening the definition of "related creditor" and "related entity" to include the range of individuals covered by the definition of "relative" and "close business associate" in the Financial Markets Conduct Act 2013 and adding the concept of 'shadow director' (e.g. a person who is not a board member but directs or instructs one or more board members in the exercise of their duties or powers),
- reducing the deadline for liquidators to file claims under the voidable transactions and recovery provisions from six to three years, with a discretion for the High Court to extend the filing period, if it would be just and equitable to do so.

Work on a possible regulatory solution for sharing losses among Ponzi scheme investors, however, has been put on hold to avoid delaying progress on these reforms.

Reckless trading claims

Cabinet has agreed to follow the IWG's recommendation to amend the Companies Act to provide that recoveries from reckless trading claims against directors will be made available to unsecured creditors only, as is the case in Australia and the United Kingdom. Under the current regime liquidators often do not have incentives to make reckless trading claims because there can be a mismatch between who pays the cost of making a claim and who benefits. In many cases:

- the costs will be met from the remaining assets of the company and, therefore, be met indirectly by unsecured creditors because there will be less for the liquidator to distribute to them, and
- any creditors who have security over all of the company's assets will obtain the benefits from a successful claim.

The change is being made to help rebalance unfair outcomes between unsecured and secured creditors and change the behaviour of directors (based on the assumption that an increased threat of personal liability will reduce the incidence of reckless trading).

Preferential claims

Cabinet has agreed to make some changes to the ranking of creditors under the Companies Act who are paid ahead of ordinary unsecured creditors. These include:

- clarifying that long service leave is included within the scope of the existing preferential claim for employees of the insolvent company and extending this claim to cover payments made in lieu of notice,
- requiring insolvency practitioners to honour at least 50 per cent of the value of gift cards and vouchers, if the company continues to trade after being placed into receivership or liquidation.

The IWG's recommendation to impose a six month time limit on the preferential claim for amounts unpaid to Inland Revenue (e.g. unpaid income tax, GST and withholding payments) and Customs (customs duty) was not adopted. Instead, MBIE, Inland Revenue and Customs will prepare a discussion document for release in late 2020 on improving the availability of tax and duty debt information (such as a tailored information disclosure regime) aimed at better supporting unsecured creditors.

Next steps

It is expected that a Bill will be introduced in 2020, with a view to it being enacted in 2021. An exposure draft of an Insolvency Law Reform Bill to implement these changes will be released for consultation prior to the bill being introduced.

Further details are available on MBIE's website here.

COMPETITION & CONSUMER LAW

Regulatory fixes for the Fair Trading Act and the CCCFA

The omnibus Regulatory Systems (Economic Development) Amendment Bill (No 2) which makes a number of changes to the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003 (CCCFA) to clarify provisions and address some regulatory gaps, was passed on 7 November and will come into force two months after the Bill receives Royal assent.

The Bill amends the Fair Trading Act to better reflect the nature and purpose of product safety standards, by clarifying that it is "goods" that must comply with a standard (before a person can supply the goods), rather than requiring the person supplying the goods to comply. This is consistent with the interpretation of the existing provisions by the courts.

The changes to the CCCFA include:

- clarifying that the overarching lender responsibilities in section 9C(2) of the Act apply to "relevant insurance contracts",
- adding offences and infringement offences for breach of certain requirements for the publication of standard form contract terms (section 9J) and publication of costs of borrowing (section 9K),
- allowing lenders to opt-in to the new repossession scheme introduced by the Credit Contracts and Consumer Finance Amendment Act 2014 for all loans which they administer, and
- providing that the Act's repossession regime does not apply to goods owned by companies or where a business declaration has been signed.

Select Committee recommends changes to the Credit Contracts Legislation Amendment Bill

The Finance and Expenditure Committee has reported back on the Credit Contracts Legislation Amendment Bill with a number of recommendations.

The Bill amends the Credit Contracts and Consumer Finance Act (**CCCFA**) in response to issues identified by MBIE following its review of the consumer credit sector in 2018. It introduces significant changes to protect vulnerable consumers from harm arising from "problem debt" (although the effect of the changes is likely to be more widely felt by lenders), including:

- new requirements for assessing potential borrowers' suitability for and ability to repay loans,
- a cap on the amount of interest and fees that can be charged on high-cost loans,
- new penalties for lenders that do not comply with the requirements, and stronger enforcement provisions.

Further details on the Bill as introduced are available in our earlier client update here.

The Committee's recommendations include the changes to the Bill which were announced by the Minister of Commerce and Consumer Affairs Kris Faafoi in September here. The key recommendations include:

1. Interest/fee caps for high-cost loans

- The addition of a daily cap of 0.8 per cent on charges for high-cost loans (on top of the planned 100 per cent limit on how much can be charged over the life of the loan), which would include interest, credit fees, and interest charges, but would exclude default fees. Default fees on high-cost consumer loans would be limited to either $30 or an amount set by regulations, unless the creditor were to prove that the fees are reasonable.
- Closing potential loopholes to the rate cap, by prohibiting creditors from charging compound interest and entering into any scheme that is designed to avoid the rate cap.
- Retaining the 50 per cent limit in the definition of a "high-cost consumer credit contract" (rather than reducing it to 30 per cent as several submitters argued for), but requiring a statutory review of the limit after three years. The definition would also be extended to include contracts where the total interest charged (including default interest) is or is likely to be 50 per cent or more on an unpaid balance in the event of default or the credit limit being exceeded.

2. Mobile trader credit sales

- A credit sale under which a mobile trader supplies consumer goods to a natural person has been included so that it is now a credit contract and a consumer credit contract under the CCCFA.

3. Responsible lending

- The provisions requiring lenders to undertake responsibility for ensuring that products are “suitable” and “affordable” will be extended to apply when making “material changes” to a consumer credit contract.
- Creditors will be required to refund insurance premiums if they have breached their obligations to make reasonable inquiries before an insurance contract is entered into under the responsible lending provisions. They would also be required to release consumers from guarantees where they have breached their obligations to make reasonable inquiries before a guarantee is given.

4. "Fit and proper person" test / due diligence

- Controlling owners (that is, owners with beneficial ownership of 50 per cent or more) of creditors and mobile traders will be excluded from the requirement to be assessed as fit and proper persons in order for the lender to be certified under the CCCFA. If such owners occupy a position that allows them to exercise significant influence over the management or administration of a company, they would need to be assessed as a senior manager.
- In the context of a securitisation or covered bond arrangement, the due diligence requirements will be applied to the directors and senior managers of the contract manager rather than on the directors and senior managers of the trustees.

5. Fees

- A new requirement has been introduced for lenders to reset their fees when they know, or reasonably ought to know, that there has been a change in the creditor’s business or costs that is likely to affect the reasonableness of the fee at the time a contract is entered into.

5. Disclosure

- Additional disclosure requirements have been added in relation to the creditor’s dispute resolution scheme and financial mentoring services for hardship applications, specified complaints and where a creditor declines an application for a high-cost consumer credit contract.
- The proposed disclosure requirements concerning advertisements in a language other than English have been simplified. Under the new provision, a lender will be required to take reasonable steps to provide information that will assist borrowers to make an informed decision, and must do so in any language in which they have advertised.

5. Defence costs

- The provisions that would prohibit insurance policies that indemnify an individual against pecuniary penalties have been aligned with provisions in section 80A of the Commerce Act 1986, and now allow insurance and indemnification for defence costs arising from proceedings if the individual has been found not to be liable for a civil penalty.

6. Annual reporting

- A new provision has been introduced which requires creditors to provide annual returns to the Commerce Commission to support monitoring and enforcement.

The Committee has also made a number of changes to the commencement provisions, which many submitters claimed were unrealistic. Changes to the enforcement, penalties and remedies for existing responsible lending obligations will continue to come into force immediately, but the majority of the provisions will now come into force by Order in Council at the time of the Government’s choosing. This provides for those amendments which require creditors to make significant changes to their systems and processes.

Next steps

The Bill is yet to complete the Parliamentary process, but is expected to pass later this year.

Reforms for law on unfair commercial practices

The Government has announced its policy decisions regarding additional protections against unfair conduct and unfair business-to-business contract terms, following a consultation in December 2018.

The Government has decided to:

- extend the existing protections against unfair contract terms in standard form consumer contract terms to also apply to standard form business contracts with a value below $250,000, and
- introduce a prohibition against unconscionable conduct for the supply or acquisition of goods or services.

These changes will be implemented as part of the Fair Trading Amendment Bill, which is expected to be introduced to Parliament by early 2020.

Click here for more.

Labelling to avoid a breach of the Fair Trading Act 1986

The New Zealand Commerce Commission has issued a warning to Hell Pizza regarding the advertising of its "Burger Pizza", which in the Commission's view likely breached the Fair Trading Act 1986 by misleading consumers into thinking the pizza included meat as an ingredient when it did not.

The issue of how plant-based meat or dairy alternatives can be labelled and promoted is currently a subject of global debate. This determination by the Commission may be a sign of things to come for New Zealand and is considered in detail in our client update "A meaty issue - when is a burger not a burger?"

NZCC MEDIA RELEASES

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

Industry regulation and regulatory control

NZCC releases final report on Fonterra's milk price

The NZCC has released its final report on Fonterra's base milk price calculation. The price for the 2018/2019 dairy season was calculated at $6.35 per kilogram of milk solids. The report does not cover the forecast 2019/2020 price of $6.25-$7.25 that Fonterra announced in May. NZCC Deputy Chair, Sue Begg, said no issues had been raised in submissions to the NZCC's draft report that warranted a change to its conclusions that Fonterra's calculation is largely consistent with both the efficiency and contestability purposes of DIRA.

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

The NZCC released its draft report on its annual review of Fonterra's Farmgate Milk Price Manual for the 2019/2020 dairy season. NZCC Deputy Chair, Sue Begg, said the Manual remains largely consistent with the purpose of the milk price monitoring regime under the Dairy Industry Restructuring Act. The NZCC says it has no concerns with Fonterra's amendments this year, but that it still concludes that the exclusion of farmer support costs remains an aspect of the Manual that is inconsistent with the contestability dimension of the purpose of the regime.

Gas businesses' risk management practices reviewed

The NZCC has published two reports detailing the findings of its review (undertaken for the NZCC by independent experts AECOM) of regulated gas pipeline businesses' risk management practices. The reports assessed how well First Gas had specifically assessed, documented and managed geotechnical risk and geohazards affecting its gas transmission pipelines, and reviewed regulated gas pipeline businesses' risk management practices more generally. The NZCC says the review found that risk management practices are generally in good shape and reasonably consistent across all the gas pipeline businesses.

Mergers and acquisitions

Statement of Preliminary Issues released for the proposed Cardrona/Treble Cone acquisition

The NZCC has published a Statement of Preliminary Issues concerning the application from Cardrona Alpine Resort Limited seeking clearance to acquire either the shares of Treble Cone Investments Limited or the assets it uses to operate the Treble Cone ski field. The NZCC said it will focus on assessing the relevant geographic and customer dimensions of the market and, in particular, whether the commercial ski fields compete with other skiing related activities and other ski fields located elsewhere in the South Island. The Statement can be found here.

NZCC grants clearance for Queenstown Bungy to acquire Taupo Bungy

The NZCC has granted clearance for Queenstown Bungy to acquire Taupo Bungy's bungy, swing and associated business in Taupo. The NZCC's major consideration was whether Queenstown Bungy's operations in Auckland and Queenstown compete closely with Taupo Bungy's operations in Taupo. NZCC Chair, Anna Rawlings, said the NZCC is satisfied that the acquisition is unlikely to substantially lessen competition in any New Zealand market because, as they operate in different regions, the bungy operators are not close competitors.

Cengage and McGraw-Hill seek clearance

The NZCC has received a clearance application from Cengage and McGraw-Hill to merge their global educational publishing businesses. Cengage and McGraw-Hill are both global publishers of educational products, such as textbooks and other learning materials used in educational institutions. In New Zealand, Cengage supplies textbooks and associated products to the primary, secondary and tertiary education sectors (i.e. universities and polytechnics), while McGraw-Hill predominantly supplies these products to the tertiary sector with a small volume supplied to the primary sector. A public version of the clearance application is available on the NZCC's case register.

Market behaviour

Ronovation to pay $400k for price fixing in Auckland real estate market

The High Court has ordered Ronovation to pay a penalty of $400,000 after it admitted to price fixing in Auckland's residential real estate market. Ronovation (trading as Ronovationz) was set up in April 2009 and conducted business advising members on how to acquire and improve investment properties in Auckland. The price fixing occurred in 2011 when Ronovation's director, Mr Hoy Fong, developed a set of rules to ensure members were not competing against each other. NZCC Chair, Anna Rawlings, said the Ronovation case was the first time the NZCC had brought proceedings against a buyer side cartel.

NZCC files proceedings against alleged horse transport cartel

The NZCC has filed High Court proceedings against the International Racehorse Transport New Zealand Partnership (**IRT Partnership**) for alleged price fixing in the provision of services for equine air freight. The NZCC says that IRT Partnership's joint venture agreement with one of its competitors included a pricing structure for the provision of services which they had previously been in competition for and a profit-sharing clause. The NZCC alleges that the agreement provided for the fixing, controlling and maintaining of the retail prices to be quoted and charged, and the size of discounts that could be given, for equine airfreight services, in breach of the cartel provisions of the Commerce Act.

Consumer issues

Linsa Finance in $350K settlement with NZCC

The NZCC has signed a settlement agreement with finance company Linsa Finance and has discontinued High Court proceedings. Linsa Finance has agreed to return $350,000 to about 900 current and former borrowers, for failing to disclose key information required under the Credit Contracts and Consumer Finance Act 2003 in 1,721 of its loan contracts, between 6 June 2015 and 29 March 2016. The NZCC became aware of these omissions when it undertook a review of third tier lenders' contracts in early 2016.

NZCC to appeal Steel & Tube sentence

The NZCC has filed an application for permission to appeal against the sentence imposed on Steel and Tube for false and misleading representations about steel mesh products. Last month Justice Duffy imposed a $2.009 million fine on Steel & Tube in the Auckland High Court in relation to 24 charges under the Fair Trading Act. The NZCC is seeking leave to appeal this decision on the bases that the Judge erred when sentencing the company, by failing to properly attribute the knowledge of a Steel & Tube manager to the company, applying an excessive totality discount to the penalty, and failing to adequately take into account the size of Steel & Tube and the potential for it to gain from the conduct.

NZCC warns Hell Pizza over "Burger Pizza"

The NZCC has warned Hell Pizza that its advertising of the "Burger Pizza" was, in its view, likely to have breached the FTA. The NZCC says that the overall impression conveyed to consumers by Hell Pizza's initial advertising was that the product comprised meat, when in fact the patty was made from plant-based protein. The NZCC received a number of complaints (several of which said they believed the Burger Pizza included meat) about the Hell Pizza promotion after it began on 21 June 2019.

NZCC wins appeal over Viagogo injunction case

The NZCC has successfully appealed against the High Court's decision not to issue an interim injunction against Switzerland-based online ticket reseller Viagogo. In February the High Court at Auckland dismissed the NZCC's application for an interim injunction to stop Viagogo making allegedly false and misleading representations about tickets, including about price and availability, saying that it had no jurisdiction because Viagogo had not been formally served with the Court proceedings in Switzerland. On appeal, the Court of Appeal said that the High Court erred in finding it did not have jurisdiction because the jurisdiction to grant interim relief was not limited in the same way as a final determination.

NZCC lays 10 charges against heat pump servicing company

The NZCC has laid ten charges under the FTA against Ocean Contracting (also trading as Ocean Heatmaster) for representations it made during the servicing of heat pumps. The NZCC alleges that Ocean Contracting misled consumers by telling them that their heat pumps were leaking refrigerant gas and that it would cost between $180 and $400 to "top up" the refrigerant gas. The NZCC alleges that none of the complainants' heat pumps required a refrigerant top-up, and the evidence it gathered suggests that Ocean Contracting did not actually carry out the gas top-ups which it held out as necessary.

Telecommunications

Transpower warned for breaching its quality standards

The NZCC has issued national electricity grid operator, Transpower, with a formal warning for breaching a number of its quality standards in the 2015/2016 and 2016/2017 reporting years. The quality standards Transpower is subject to cover a range of operational outcomes like the maximum duration of outages or interruptions it can incur on parts of its network each year, the availability of assets, and how it manages its assets. NZCC Deputy Chair, Sue Begg, said Transpower had breached a range of quality standards over the two years but that the NZCC considered a warning was sufficient, as Transpower largely acted in accordance with good industry practice and consumer harm was not significant.

Draft decision on contributions to $50 million telecommunications development levy

The NZCC released its draft determination on how much 16 telecommunications providers will each pay towards the Government's $50 million Telecommunications Development Levy for 2018/2019. The TDL is used to pay for telecommunications infrastructure and services which are not commercially viable. The levy, about one per cent of telecommunications services revenue, is paid by providers earning more than $10 million per year for providing telecommunications services. The draft determination provides that Spark, Vodafone, Chorus, and 2degrees will collectively pay more than 90 per cent of the TDL. Growing uptake of fibre services means that the contributions to the TDL by Enable, Northpower and Ultrafast Fibre have significantly increased. A copy of the draft determination can be found here.

NZCC releases proposed approach for emergency calling code

The NZCC has released a consultation paper outlining its emerging views and proposed approach to establishing the 111 Contact Code. The Government's Ultra-Fast Broadband (**UFB**) programme will see 87 per cent of homes and businesses able to connect to fibre networks by the end of 2022. The Government's Rural Broadband Initiative is also improving broadband connections in rural areas, largely using wireless technology. As the copper network in New Zealand is gradually withdrawn there may be a small number of New Zealanders who could be left without the means to call NZ emergency services by dialling 111 during an emergency if they have a power failure. The 111 Contact Code is intended to put in place protections for those vulnerable consumers.

Other

NZCC responding to security breach from stolen computer equipment
The NZCC is working with Police and taking a range of other actions following the theft of computer equipment (containing more than 200 meeting and interview transcripts across a range of the NZCC's work) belonging to an external provider. The NZCC's own network and systems have not been breached. The information potentially contained on the stolen computer equipment does not include any documents or general consumer complaints provided to the NZCC. Chief Executive, Adrienne Meikle, says the NZCC has been in close contact with Police and is confident that every possible action is being taken to locate and recover the stolen equipment.

Court order made to protect confidentiality of information contained on stolen computer equipment
The NZCC has been granted an interim injunction by the High Court to help protect the confidentiality of information contained on stolen computer equipment belonging to one of its external providers. The injunction is made against unknown persons who may at any stage possess information on or taken from the equipment. The injunction prohibits any person from dealing with the stolen information in any way, including copying, communicating or publishing it. The High Court has also made orders suppressing information relating to the external service provider, the nature of the services provided by the provider to the NZCC, and information about the burglary not disclosed by the Police. Anyone failing to comply with these Court orders could be held in contempt of court.

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

Industry regulation and regulatory control

Holistic, dynamic reforms needed to address dominance of digital platforms
The ACCC's container stevedoring monitoring report says that higher infrastructure charges imposed on trucks and rail operators at ports helped the container stevedoring industry increase average revenue per container lift for the first time in seven years. The report shows that revenues generated by the infrastructure charges rose by 63 per cent in 2018/2019 on the previous year. These revenues helped to offset an 8.1 per cent decline in average quayside revenue because of competition between stevedores and increasing bargaining power of the shipping lines.

Mergers and Acquisitions

Viva Energy's proposed acquisition of Liberty Oil's wholesale business not opposed
The ACCC won't oppose the proposed acquisition of the remaining 50 per cent interest in Liberty Oil Holdings' (**Liberty**) wholesale business by Viva Energy Australia (**Viva**), a wholly owned entity of Viva Energy Group. Viva and Liberty are both wholesalers and retailers of fuel products. The proposed acquisition involves Liberty's wholesale business only. Viva's interest in Liberty's retail business will remain at 50 per cent. The ACCC found that the proposed acquisition is unlikely to substantially lessen competition in the wholesale supply of fuel products because the threat of fuel retailers switching to an alternative supplier is likely to constrain Viva's wholesale prices and supply terms post-acquisition.

Market Behaviour

Heating product distributor Bromic admits to resale price maintenance
Bromic, a national distributor of outdoor heating products, has admitted to engaging in resale price maintenance when it introduced a 'minimum advertised pricing' policy in a court enforceable undertaking accepted by the ACCC. The 2018 policy required retailers not to advertise Bromic branded heating products for sale at a price cheaper than a price determined by Bromic, and contained potential sanctions for retailers who did not comply. Bromic stopped referring to and enforcing the policy after April 2018 but did not take any steps to communicate to its retail distributors that the policy was no longer in effect.

The dangers of monopolists without constraint

ACCC Chai, Rod Sims, speaking at the Australasian Transport Research Forum on the ACCC's perspectives on a number of transport issues, says the Port of Newcastle is at risk of becoming a monopolist without constraint. Mr Sims stated that "A monopolist that controls this type of bottleneck infrastructure, operating without any regulation, has a clear incentive to maximise profits by raising prices even if this means reduced volumes or less use of their service".

Consumer Issues

Mazda in court for alleged unconscionable conduct and false or misleading representations

The ACCC has instituted proceedings in the Federal Court against Mazda Australia alleging that it engaged in unconscionable conduct and made false or misleading representations in its dealings with consumers who bought one of seven new Mazda vehicles between 2013 and 2017. The ACCC alleges that these consumers began experiencing faults with their vehicles within a year or two of purchase.

Telecommunications

Price certainty for legacy wholesale telecommunications services

The ACCC has decided to maintain existing price and non-price terms until 30 June 2024 for seven declared, or regulated, fixed line wholesale services. The seven declared services, predominantly supplied by Telstra, include: the unconditioned local loop service, line sharing service, wholesale line rental, local carriage service, fixed originating and terminating access services, and wholesale ADSL. The ACCC's decision means wholesale prices for non-NBN fixed line services will reduce in real terms over the next five years.

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