Financial Services Quarterly

SUMMER 2005

Bell Gully

Welcome to the Summer 2005 issue of *Financial Services Quarterly*, a review of current legal issues in the financial sector.

Each quarter, we summarise recent issues and preview upcoming developments under these headings:

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In the courts

Register your interest as lessor or risk losing priority

The High Court has again considered priorities of competing parties under the Personal Property Securities Act and confirmed that the owner of a leased asset can lose its rights to a lender that has a registered security interest over the asset.

What happens when one of three trustees acts without the knowledge or authority of the other two trustees?

Without the knowledge of the other two trustees, a trustee arranged a letter of credit with a bank for the accommodation of the trust and the other trustees refused to accept liability.

Be careful when you release a joint debtor - you may release each other joint debtor

The High Court has confirmed that a creditor's release of one joint and several debtor will release the other debtors from the same obligation unless the release is qualified by reservation of rights against the other debtors.

Know what you're getting yourself into when you give a guarantee

The High Court has awarded summary judgment against a guarantor, noting *"the guarantor's concern is understandable; after four years he faces a claim in excess of $1 million. That is all he gets for trying to help another, from which offer of help he would have received nothing anyway"*.

Does a transfer of shares on change of a trustee trigger rights of pre-emption?

The Court of Appeal has determined that a change of trustee shareholders with no change in the underlying beneficial ownership did not trigger rights of pre-emption.

When are payments voidable in terms of section 292(2) of the Companies Act?

The Court of Appeal has agreed with a liquidator that payments made to a supplier were voidable in terms of section 292(2) of the Companies Act 1993.

Receivers' and mortgagees' duties essentially the same when selling mortgaged property

The English Court of Appeal has considered the obligations of a mortgagee selling a mortgaged property compared with the obligations of a receiver appointed by a mortgagee to sell a mortgaged property and concluded that the obligations are essentially the same.

Dodgy dividends fail to satisfy the solvency test

A liquidator successfully sought repayment of two dividends totalling $330,000 made to the company's shareholders on the basis that the distributions breached the Companies Act. The liquidator also argued in the alternative that the defendants had failed as directors to exercise the care, diligence and skill of reasonable directors.

Register your interest as lessor or risk losing priority

*The High Court has again considered priorities of competing parties under the Personal Property Securities Act 1999 (the **PPSA**) and confirmed the recent Portacom[1] decision that the owner of a leased asset can lose its rights to a lender that has a registered security interest over the relevant asset.*

This case[2] centred around rights to a stallion owned by a company that went into receivership.

In the insolvency proceedings, two parties claimed first priority over the stallion. The first claimed priority over the stallion as part of the company's assets by virtue of a debenture. The debenture pre-dated the PPSA but was registered on the Personal Property Securities Register (the **PPSR**) on the day the PPSA came into force.

The company had entered into a lease-to-purchase agreement for the stallion with its owner, who was the second party claiming priority over the stallion.

The PPSA provides that a lease for a term of more than one year (which the lease-to-purchase agreement was) is deemed to be a security interest that is registerable under the PPSA.

There was no doubt that both the interest of the debenture holder pursuant to the debenture and the interest of the owner under the lease-to-purchase agreement were both security interests for the purposes of the PPSA. However, the owner never registered the lease-to-purchase agreement on the PPSR.

The PPSA sets out a regime for determining the priority of competing security interests, and specifies in section 66 that a "perfected" security interest takes priority over an "unperfected" security interest.

There are two steps to perfection of a security interest:

- attachment (when value is given by the secured party and the debtor has rights in the secured asset(s)); and
- registration or the taking of possession.

Following frequent failures by the company to make the payments due under the lease-to-purchase agreement, the owner had repossessed the stallion, but section 41(b)(ii) of the PPSA specifically excludes the taking of possession as a result of seizure or repossession from qualifying as a perfecting step. The debenture holder therefore took priority.

The Court noted that:

- *"the fact that [the owner] may have legal title to [the stallion] is simply irrelevant where, in a situation where, as here [the owner] holds an unperfected security interest and is in competition with a party which has a perfected security interest… It is the lessee who is to be treated as the owner of the goods for registration and priority purposes, and not the lessor"; and*
- *"To those unfamiliar with the [PPSA], this conclusion may be surprising, and perhaps difficult to accept… But the result is a reflection of the extent to which the registration regime introduced by the [PPSA] has altered long established priority principles grounded in notions of legal title. Irrespective of title, it is paramount that security interests be the subject of registration if priority is to be preserved".*

[1] *Graham and Gibson and Ors v Portacom New Zealand Limited* [2004] 2 NZLR 528

[2] *Waller and Agnew v NZ Bloodstock Limited* (High Court, Auckland, CIV-2004-404-004093, 2 December 2004, Allan J)

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In the courts

What happens when one of three trustees acts without the knowledge or authority of the other two trustees?

Without the knowledge of the other two trustees, a trustee arranged a letter of credit with a bank for the accommodation of the trust and the other trustees refused to accept liability.

This is an encouraging decision, which comments specifically on the well-drafted provisions of a bank's standard form document. Lenders should check that their guarantees contain similar provisions to ensure that they are adequately protected.

In this case[1], Mr Davidson was a trustee of a trust together with his wife and solicitor. Without the knowledge of the other two trustees, he arranged a letter of credit with a bank for the accommodation of the trust.

The trustees had previously given an all-obligations guarantee to the bank, and were also signatories to the bank's standard terms and conditions.

When called on for $200,000 that the bank had paid under the letter of credit, the trustees refused to accept liability.

The High Court found in favour of the trustees, and the bank appealed the decision.

The main questions considered by the Court of Appeal were:

- Were the trustees liable to the bank in damages for breach of representations that the relevant resolutions had been passed?
- Was Mrs Davidson liable to indemnify the bank for amounts paid under a letter of credit pursuant to a Deed of Guarantee Indemnity the trustees entered into with respect to the trust's obligations, both existing and future?

The first ground for the appeal failed, with the Court of Appeal noting that the bank:

- had a major problem in that two of the trustees were unaware of the transactions; and
- was aware of the need for unanimity.

The Court held that the trustees could not be liable for breach of representation because effectively no representation had been given. It was the trustees acting unanimously who were the "customer". As there was no unanimity, the "customer" had not represented anything in relation to the letter of credit and could have no duties regarding it.

The second ground for the appeal was successful, with the Court of Appeal finding clear liability on the part of both Mr and Mrs Davidson under the indemnity set out in the document (substantially reproduced below):

> "***Unenforceability of obligations***: *As a separate and continuing undertaking, the Guarantor unconditionally and irrevocably undertakes to the Bank that, should the Guaranteed Indebtedness not be recoverable from the Guarantor under this Deed for any reason, including a provision of this Deed or an obligation (or purported obligation) of the Customer to pay Guaranteed Indebtedness or to perform or comply with a Guaranteed Obligation being or becoming void, voidable, unenforceable or otherwise invalid, whether or not that reason is or was known to the Bank and whether or not that reason is:*

a. *a defect in or lack of powers of the Customer or the Guarantor or the irregular exercise of those powers; or*

b. *a defect in or lack of authority by a person purporting to act on behalf of the Customer or the Guarantor;*

the Guarantor will, as a sole and independent obligation, pay to the Bank on demand the amount which the Bank would otherwise have been able to recover (on a full indemnity basis)".

[1] *ASB Bank v Davidson* (Court of Appeal, 95/03, 8 October 2004, Glazebrook, William Young and Chambers JJ)

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Be careful when you release a joint debtor - you may release each other joint debtor

The High Court has confirmed that a creditor's release of one joint and several debtor will release the other debtors from the same obligation unless the release is qualified by reservation of rights against the other debtors.

Banks should check their release documents to ensure that they include specific wording providing that where one joint debtor is released, its rights against each other joint debtor are preserved.

In this case[1], the company had borrowed $176,000 and its shareholders had guaranteed the loan.

The company failed to pay amounts due under the loan and the creditor sought repayment from the shareholders pursuant to the guarantee.

The creditor and one of the guarantors (the **1st Guarantor**) entered into a written agreement (the **June Settlement**) pursuant to which the guarantor agreed to pay $200,000 in two equal payments of $100,000, in full and final settlement of the creditor's claims.

Without the 1st Guarantor's knowledge, the creditor purported to settle its claim against the other guarantor (the **2nd Guarantor**) the following month (the **July Settlement**). Under the July Settlement, the 2nd Guarantor agreed to transfer a residential property valued at $153,000 to the creditor, who agreed to settle its claim against the 2nd Guarantor separately from the 1st Guarantor.

The 1st Guarantor was subsequently advised that, because it and the 2nd Guarantor were joint and several guarantors, the July Settlement effectively cancelled the 2nd Guarantor's obligations to the 1st Guarantor (extinguishing the 2nd Guarantor's obligation to contribute to the 1st Guarantor's settlement).

In the District Court, the Judge found that the 1st Guarantor was entitled to cancel the June Settlement and was entitled to relief under section 9 of the Contractual Remedies Act for the sum of $100,000 (being the amount the 1st Guarantor would have been entitled to recover from the 2nd Guarantor).

In the High Court, Priestly J set out the following general principles on release of guarantors:

- The release of one joint debtor is the release of all. The release (whether express or implied) of one of a number of joint or joint and several guarantors, without the consent of the others, and without reserving remedies against the other, will bar the creditor's right of action against other guarantors.
- Where a guarantor pays more than his rateable proportion of a joint debt between himself and a co-guarantor, he is entitled to exercise a right of contribution against his co-guarantor, because he has discharged the obligations of the co-guarantor to the creditor.
- The right of contribution arises in the following circumstances:
  - first, the guarantor and co-guarantor must have guaranteed a common liability;
  - secondly, the guarantor must have paid more, or be about to pay more, than his rateable proportion of the total guaranteed debt. Contribution is also available to a guarantor who pays the whole debt or a part in satisfaction of the whole debt, even if the amount paid is less than the limit of the guarantor's liability; and
  - thirdly, the right to contribution must not have been contractually excluded or lost.

The High Court determined that the effect of the June Settlement was to:

- settle the 1st Guarantor's liability to the creditor at $200,000;
- release both guarantors from ongoing exposure to the creditor; and
- create a right of the 1st Guarantor to seek contribution from the 2nd Guarantor of $100,000.

The High Court determined that the July Settlement did not affect the rights of the 1st Guarantor against the 2nd Guarantor.

The Court concluded that equity and justice required that the 1st Guarantor be indemnified against a possible contribution claim from the 2nd Guarantor. An award of costs was made to place the 1st Guarantor in the same position as it was when it settled with the creditor under the June Settlement.

[1] *Perry Developments Limited v Catley* (High Court, Hamilton, CIV 2003-419-001684, 28 September 2004, Priestley J)

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Know what you're getting yourself into when you give a guarantee

The High Court has awarded summary judgment against a guarantor, noting "the guarantor's concern is understandable; after four years he faces a claim in excess of $1 million. That is all he gets for trying to help another, from which offer of help he would have received nothing anyway".

In this case[1], a loan was granted to purchase and develop property at Gulf Harbour for residential units. The loan was not repaid and the borrower company went into liquidation. The loan was guaranteed by the defendant and another party who was adjudicated bankrupt.

The defendant had signed the guarantee at the request of the other guarantor, who was the father of his daughter-in-law. He had little knowledge of the loan and did not benefit financially from it.

The lender spent money to complete unfinished work on the units so that the property could be realised as security. The properties were sold and funds received applied to the amount due under the loan contract. The outstanding balance due was claimed from the defendant as guarantor.

The High Court dismissed various defences put forward by the defendant, including that:

- the lender had taken between 14 and 26 months to sell all the units, which was too long and did not comply with the lender's duty to mitigate the loss;
- the units were sold under value; and
- there was a failure to notify the defendant.

The High Court determined the defendant was liable to pay an amount in excess of $1 million, despite receiving no benefit in an attempt to help another.

[1]*Harts Contributory Mortgagees Nominee Company Limited v Fenton* (High Court, Auckland , CIV-2004-404-002517, 27 September 2004, Associate Judge Christiansen)

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Does a transfer of shares on change of a trustee trigger rights of pre-emption?

The Court of Appeal has determined that a change of trustee shareholders with no change in the underlying beneficial ownership did not trigger rights of pre-emption.

In this case[1], the shares in the company were held by trustees, and the constitution of the company stated that a "*shareholder intending to transfer any shares must give a transfer notice in writing to the Board*".

A trustee was removed pursuant to the exercise of a power of appointment and a new trustee appointed in substitution. A transfer giving effect to this change was executed and presented to the company for registration.

The trustees argued that a transaction is fairly regarded as a transfer only if it amounts to a disposal of the beneficial ownership of shares or, alternatively, if it is by way of sale. In response, the company argued that the word "transfer" referred to changes of legal title rather than beneficial title.

The Court of Appeal overturned the High Court's decision, determining that, on the basis of its interpretation of the particular provisions of the constitution, a transfer on a change of trustees did not trigger rights of pre-emption.

[1] *Ord & Anor v Calan Healthcare Properties Ltd* (2004) 9 NZCLC 263,711

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When are payments voidable in terms of section 292(2) of the Companies Act?

The Court of Appeal has agreed with a liquidator that payments made to a supplier were voidable in terms of section 292(2) of the Companies Act 1993 (the ***Act****).*

In this case[1], a pharmacy purchased a business with a vendor's loan of $81,000 secured by a first ranking debenture.

From the outset, the pharmacy had difficulties meeting its payment obligations to its supplier and to the vendor. When the pharmacy ceased trading and sold the business, it used the proceeds of sale to pay out all its creditors other than the vendor.

The vendor served a statutory demand and, following non-payment, obtained an order placing the pharmacy in liquidation. The Official Assignee was appointed as liquidator and was subsequently replaced by the applicant.

The applicant contended that four payments made by the pharmacy to its supplier were voidable in terms of section 292(2) of the Act, and filed and served a notice setting aside those transactions.

High Court

The supplier successfully sought an order of the High Court that the transactions not be set aside. In making the order, the High Court determined that two of the four payments were not made in the ordinary course of business. However, the supplier received all of the payments in good faith and altered its position in the reasonably held belief that the payments were validly made and would not be set aside, satisfying the requirements of section 296(3) of the Act.

Court of Appeal

On appeal, the Court determined that the transactions should be set aside, concluding that:

- at all times, the pharmacy was insolvent and the supplier knew that the pharmacy's liabilities exceeded the realisable value of its assets;
- the supplier was aware of details of the pharmacy's financial performance and must have appreciated that it was insolvent;
- the payments made to the supplier enabled it to receive more towards satisfaction of its debt than it would have received in a liquidation; and
- the supplier was aware that it was being treated preferentially when it received the payments because it knew that:
  - the pharmacy was insolvent;
  - the pharmacy was not meeting its obligations to the vendor; and
  - if the pharmacy was liquidated, it would diminish the pool of funds available for the other creditors, including the vendor.

[1] *Graham v Pharmacy Wholesalers (Wellington) Limited* (Court of Appeal CA 37-04, 17 December 2004, Glazebrook, Hammond & William Young JJ)

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Receivers' and mortgagees' duties essentially the same when selling mortgaged property

The English Court of Appeal has considered the obligations of a mortgagee selling a mortgaged property compared with the obligations of a receiver appointed by a mortgagee to sell a mortgaged property and concluded that the obligations are essentially the same.

In this case[1], a property company was set up for the benefit of the Ezekiel family. This company, and other related companies, had borrowed from the bank and secured the borrowings by granting mortgages over 34 properties that they owned. In May 1996, the bank demanded repayment of its loans and then appointed receivers over all of the properties. The receivers sold the properties within 18 months from the date of their appointment.

The mortgages provided that the receivers were the agent of the mortgagors. When the receivers were initially appointed, they looked at adding value to six of the properties by obtaining planning permission for development and leasing a vacant property. They applied for planning permission but decided not to go ahead with the planning applications or wait for the completion of negotiations for the lease. Instead they sold the properties immediately in their current state.

The mortgagors argued that the receivers owed a duty of care to the mortgagors because they were appointed as agent of the mortgagor and because they had exclusive control over the mortgagors' property. Accordingly, the mortgagors contended that the receivers were under a duty to pursue the planning applications and to proceed with the lease before selling the properties.

The Court discussed the difference between the duties owed to a mortgagor by a mortgagee and the duties owed to a mortgagor by a receiver appointed by a mortgagee.

The Court stated that a mortgagee who exercises a power of sale owes a duty to take reasonable steps to obtain the true market value of a property at the time when the mortgagee decides to sell the property. A mortgagee may insist on an immediate sale even though this may not be the best time to realise the best price.

In comparison, the Court considered that, in the absence of a provision to the contrary (in either the mortgage or the receivers' appointment), receivers must actively protect the charged property that they have been appointed over. However, the Court then stated that the primary duty of receivers was to ensure that the secured debt is repaid, so a receiver's overriding obligation in this regard is to the bank, and not the mortgagor.

Accordingly, the Court reached the view that a receiver is under the same, but no greater, obligations to the mortgagor than the mortgagee. A receiver will not be liable to the mortgagor unless it acts in bad faith or does not take reasonable steps to obtain the best price at the relevant time.

In this instance, all the receivers were bound to do was to bring to the purchaser's attention the prospect of the planning permission and the lease and to take reasonable care to obtain a sale price that reflected this.

[1] *Silven Properties Limited and another v Royal Bank of Scotland plc and others* [2003] EWCA CIV 1409

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Dodgy dividends fail to satisfy the solvency test

*In this case[1], a liquidator successfully sought repayment of two dividends totalling $330,000 made to the company's shareholders (the **defendants**) on the basis that the distributions breached section 52 of the Companies Act 1993 (the **Act**) (i.e. the directors could not be satisfied on reasonable grounds that the company would satisfy the solvency test).*

The liquidator also argued in the alternative that the defendants had failed as directors to exercise the care, diligence and skill of reasonable directors (as required by section 137 of the Act).

Prior to its liquidation, the company imported T-shirts from Australian manufacturers and took advantage of the "Australian preference" rule in the Customs and Excise Act and its Regulations. This meant that, if more than 50% of the cost of the goods arose in Australia, it could import the goods from Australia free of duty.

Customs investigated the company and found that claims made under the Australian preference rule could not be substantiated. Accordingly, the company was found to be liable for duty of more than $130,000. In the meantime, the company had made certain payments to its shareholders.

The Court held in favour of the liquidator in respect of both causes of action, finding that:

- at the date of the distributions, the defendants were well aware of at least a contingent debt to Customs and could not make the required declaration of solvency at the date of the resolution; and
- such approach accorded with the policy behind the whole distributions regime of avoiding prejudice to creditors and the term distribution ought not to be construed in a narrow manner.

[1] *Samarang Developments (in liquidation) Walker v Campbell* (High Court, Christchurch, CIV-2003-409-002094, 30 September 2004, John Hansen J)

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In the journals

Threatening banks with accessory liability claims

This article considers the much discussed Court of Appeal decision in *US International Marketing Limited v The National Bank of New Zealand Limited* and discusses when a bank should be liable to a third party for aiding a breach of trust by the bank's customer.

Master agreements, bridges and delays in enforcement, part 1

An article extolling the benefits of extending termination and close-out netting as a method of controlling credit risk in derivatives markets to a broad range of transactions.

Trans-Tasman battle for priority

This article looks at the differences between the regimes for registering charges in Australia under the Corporations Act 2001 and in New Zealand under the Personal Property Securities Act 1999.

Threatening banks with accessory liability claims

DF Dugdale, *New Zealand Business Law Quarterly Volume 10*

This article considers the much discussed Court of Appeal decision in US International Marketing Limited v The National Bank of New Zealand Limited[1] *and discusses when a bank should be liable to a third party for aiding a breach of trust by the bank's customer.*

The company was a customer of the bank and wished to make payments out of its account. The bank subsequently received a letter claiming that another company in liquidation was entitled to $15,000 that was held in that company's account. The bank sought legal advice and then froze the customer's account.

The bank was sued by the company for damages for breach of contract (being a breach of the promise to pay out the money deposited at the bank on the agreed terms). The Court of Appeal overturned the High Court's decision and held that the bank was liable to pay damages to the company for freezing its account. The test adopted by the Court was whether the bank had acted dishonestly in the circumstances. If so, they would be liable for breach of trust.

In his judgment, Justice Tipping noted that the banks are facing a dilemma. If a bank freezes funds, then it may be liable to compensate the customer for loss if there are insufficient grounds to freeze the account. On the other hand, if a bank knows that a third party has a beneficial interest in the funds and declines to freeze the funds, then it may be subject to a claim for dishonest assistance.

Mr Dugdale argues in this article that the judge overstated the dilemma that banks are facing. He considers that only in very rare circumstances will a bank face a claim for dishonest assistance if it complies with its customer's directions instead of complying with the requests of a third party. The author argues his point on the basis that "*it is both socially desirable and commercially essential that a bank should fulfil its obligations to provide to its customers the service that it has promised to provide*".

Mr Dugdale goes on to state that, if a third party considers that they have such a claim, they should apply to the Court for an injunction rather than contacting the bank to freeze the funds. He concludes that "*it is difficult to see how a banker can ever be held to be dishonest simply because he has loyally done what he promised his customer to do rather than breaching that obligation relying on assertions by a stranger to the contract*".

[1](Court of Appeal, Auckland, CA 144/02, 28 December 2003, Tipping, Anderson & Glazebrook JJ)

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In the journals

Master agreements, bridges and delays in enforcement, part 1

Schuyler K Henderson, *Butterworths Journal of International Banking and Financial Law,* November 2004

An article extolling the benefits of extending termination and close-out netting as a method of controlling credit risk in derivatives markets to a broad range of transactions. This article is the first in a three-part series.

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Trans-Tasman battle for priority

Ruth Wang and Miles Burt, *Australian Banking and Finance Law Bulletin* (2004) 20(6) BLB 13

*This article looks at the differences between the regimes for registering charges in Australia under the Corporations Act 2001 and in New Zealand under the Personal Property Securities Act 1999 (the **PPSA**).*

The article briefly summarises the different registration systems and then discusses the treatment of charges in two scenarios:

- where personal property located in Australia and encumbered by a registered charge granted in favour of an Australian bank is moved to New Zealand and becomes subject to a security interest in favour of a New Zealand bank; and
- where an Australian bank has a charge over a company's assets and the company purchases assets in New Zealand.

Personal property located in Australia and subsequently moved to New Zealand

According to section 27 of the PPSA, where goods are moved to New Zealand, a security interest registered in another jurisdiction will be continuously perfected if the secured party registers a security interest within 60 days of the goods being brought into New Zealand or within 15 days of the secured party obtaining knowledge that the goods have been moved.

The article points out that, if an Australian bank fails to register within this time, it may lose priority to a New Zealand registered security interest. It also points out that the PPSA provides no guidance on what constitutes knowledge for the purposes of registering within the relevant time frame.

Property purchased in New Zealand

Section 26(1)(a) of the PPSA provides that New Zealand law (and hence the PPSA) applies where, at the time the security interest attaches to the collateral, the collateral is located in New Zealand. Accordingly similar issues to those discussed above arise in respect of registration and priority.

If you are funding against an asset that is overseas but is intended to be brought into New Zealand, it is worth considering waiting out the 60 days during which a foreign registered security interest can be perfected in New Zealand before funding.

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Legislation / In Parliament

Taxation of securities lending transactions to catch up with foreign laws

In November 2004, the Government released a discussion document proposing reform of the taxation of securities lending transactions in New Zealand.

Review of the Financial Reporting Act part II

The second part of a two-part review of the Financial Reporting Act has been released. Its main provisions are summarised.

Government to review regulation of financial intermediaries

Last year, the Government announced its intention to appoint a task force to review the regulation of financial intermediaries in New Zealand. The role of the task force is to assess the existing regulatory framework for financial intermediaries and to recommend options for reform.

New bill proposes tougher securities laws

A new bill introduced into Parliament in November 2004 represents a continuation of recent securities law reform aimed at ensuring confidence in New Zealand's capital markets.

New Credit Reporting Privacy Code

This new code gives individuals the right to access personal information held by credit reporters and aims to increase the accuracy of this information.

Taxation of securities lending transactions to catch up with foreign laws

In November 2004, the Government released a discussion document proposing reform of the taxation of securities lending transactions in New Zealand.

New Zealand does not have a large domestic securities lending market, in part due to the tax treatment of such transactions. The proposals could increase New Zealand's attractiveness as an investment option, creating a bigger onshore securities lending market.

Securities lending

Securities lending involves the "lending" of securities by way of transfer coupled with the subsequent transfer of those securities back to the lender at a later date in return for a fee.

Financial intermediaries borrow securities to remedy shortfalls needed for delivery to a third party. Those lending the securities, usually passive institutional investors, benefit from these lending returns in addition to the usual dividends and other benefits generated by the securities themselves.

There are currently no specific rules governing the taxation of securities lending transactions in New Zealand and ordinary principles apply to the taxation of such transactions based on their legal form.

The discussion document proposes the introduction of tax rules that will apply to certain qualifying securities lending transactions.

It also proposes a strengthening of the existing imputation credit and non-resident withholding tax (**NRWT**) anti-avoidance rules to reduce tax avoidance opportunities that arise as a result of the current tax treatment of securities lending transactions.

Current tax treatment

In substance, securities lending transactions are similar to loans but, as the borrower of the securities must actually obtain legal title to them, the lender must legally dispose of the securities. This triggers a taxable event for the lender.

If the securities concerned are financial arrangements (for example, debentures or government stock), a base price adjustment under the accrual rules will be triggered when the securities are transferred by the lender. The borrower and lender must also account for accrual income and expenditure under the accrual rules during the period of the transaction.

If the securities concerned are excepted financial arrangements, such as shares, the accrual rules will not apply. Any gain or loss on the transfer of the shares will be taxed under ordinary principles. If the lender holds the shares on revenue account (i.e. acquired the shares with intention of resale or is a dealer in shares), any gain will be taxable.

As a result, potential lenders are often reluctant to enter into securities lending transactions where a taxable gain would be realised.

Concerns have been raised by the New Zealand Stock Exchange (**NZX**) that the current treatment of securities lending transactions restricts liquidity and reduces the attractiveness of New Zealand as an investment destination by creating barriers to establishing an onshore securities lending market.

Proposed rules for qualifying transactions

The government has proposed taxing qualifying securities lending transactions on their economic substance rather than their legal form.

Qualification criteria

The proposed new rules will apply to a wide range of securities:

- Shares;
- Units;
- Bonds;
- Debentures;
- Convertible notes;
- Rights or options issued by a company or unit trust listed on a recognised exchange or that are ordinarily available for subscription or purchase by the public; and
- Bonds, debentures or similar securities issues by any government.

In addition, all of the following criteria must be met:

- Agreements must be in writing and any consideration received by the lender from the borrower must be identified in the written agreement. Standard international agreements may be used as the basis for New Zealand lending agreements.
- Identical securities must be returned at the end of the loan period, along with the collateral minus any lending fee.
- The securities must be returned to the lender within 12 months of disposal.
- The transaction must be on arm's-length terms and not between associated borrowers and lenders.

If these criteria are met, no taxable event will be triggered for the lender upon the transfer and reacquisition of the securities. The lender will not be taxed, apart from the tax implications of receipt of a lending fee and any corporate action distribution received for the securities during the term of the lending transaction.

Under the proposed rules, the borrower will be assumed to acquire the securities and dispose of them at the same market value, avoiding tax consequences for the borrower.

Proposed anti-avoidance rules

Where a transaction does not meet the "qualifying" criteria, ordinary principles will continue to apply but new anti-avoidance measures will be introduced to prevent taxpayers trading imputation credits or avoiding NRWT through securities lending.

These proposed rules are designed to prevent a taxpayer who is not in a position to fully benefit from imputation credits from, for example, temporarily lending their shares to another taxpayer who is able to use those credits.

The government is concerned that the borrower could be able to obtain imputation credits for shares they do not economically own and believes this to be against the intent of the imputation rules.

The discussion document also proposes cancelling imputation credits if they are paid to a shareholder who does not have "economic ownership" of the shares and who is under an obligation to make a related payment passing on the benefit of receiving tax credits to the economic owner of the shares (i.e. the lender). One proposal put forward to measure economic risk is to adopt the Australian approach of determining the delta of a taxpayer's position in a share.

Delta is a financial concept that measures the change in the value of a taxpayer's position for a $1 change in share price. In Australia, if a taxpayer's delta position in a share is less than 30% then the taxpayer is deemed not to have economic exposure to the shares. The higher a taxpayer's delta, the higher the economic risk the taxpayer bears, as the taxpayer is highly exposed to volatility in share prices.

A similar test will be introduced for NRWT.

The government is also considering the introduction of a safe harbour mechanism to exempt small investors from the need to comply with the new anti-avoidance rules. Any safe harbour is likely to be based on the value of securities held.

Conclusion

The proposed rules are designed to bring the New Zealand tax treatment of securities lending transactions into line with international standards, to position the country as an attractive investment option and to stimulate the development of an onshore securities lending market.

However, there is a sting in the tail, as the Government is using the opportunity proposed by the NZX to bring in additional anti-avoidance rules.

The Government requested feedback on the proposals contained in the discussion document. Submissions were due by 31 January 2005.

Advice and information

Please contact a member of our tax team if you would like further information on the discussion document.

Auckland

Niels Campbell
Phone: 64 9 916 8944
Email: Niels Campbell

Wellington

Graeme Smaill
Phone: 64 4 915 6995
Email: graeme smaill

Need more information?
For more information on any of the cases, articles and features in *Financial Services Quarterly*, please email rachel.gowing@bellgully.com or call on 64 9 916 8825.

Review of the Financial Reporting Act part II

The second part of a two-part review of the Financial Reporting Act has been released. Its main provisions are summarised below.

Institutional arrangements

It is proposed that the existing Accounting Standards Review Board be reconstituted. The new body will be a consolidated independent crown entity with additional functions to setting reporting standards.

These include an interpretative and determinative function, the power to grant exemptions and issue policy statements, and influencing international standards as they are made.

The model will be broadly based on the flexible set of powers available to the Takeovers Panel. The body will be formally responsible for initiating new standards and actively commissioning them through to final approval.

Enforcement

Alternate options in addition to the criminal law are proposed to be explored as a means of enforcement to ensure greater compliance. As an administrative remedy a specialist tribunal with power to determine disputes over accounting issues could be established.

Entities subject to reporting requirements

It is proposed that the Financial Reporting Act be altered to merely determine the content of financial reports (that is, *what* must be reported and *how*). This amounts to setting generally accepted accounting practice ("**GAAP"**). Other relevant legislation would be amended to determine *who* has the obligation to produce financial reports. The aim would be to ensure the Financial Reporting Act is flexible enough to allow other subsequent legislation to refer to it for the substantive content of reporting obligations for certain entities.

The document considers the reporting obligations of the following entities:

- registered charitable entities;
- non-issuer companies;
- issuers of securities to the public; and
- overseas companies.

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Government to review regulation of financial intermediaries

Appointment of task force

On 26 August last year, the Government announced its intention to appoint a task force to review the regulation of financial intermediaries in New Zealand. The role of the task force is to assess the existing regulatory framework for financial intermediaries (such as share brokers, mortgage brokers, insurance brokers and financial advisers) and to recommend options for reform.

The Government's securities law reform programme

The task force's review is part of the final stage of the Government's four-stage securities law reform programme. The first three stages are:

- the enactment of a Takeovers Code;
- the enactment of a Securities Markets and Institutions Bill (dealing with matters such as insider trading, continuous disclosure by issuers and the supervision of securities and futures exchanges); and
- the enactment of a Securities Trading Law Reform Bill (dealing with matters such as market manipulation and the application of securities trading laws to specific financial products and entities).

The first two stages have been completed. The third stage has resulted in the introduction of a Bill into Parliament on 30 November 2004.

What could we expect?

While it is far too early to try to predict the regulatory model that will result from this review, it is unlikely that this industry will become less regulated than it is now. Currently, the regulation of financial intermediaries in New Zealand could best be described as piecemeal, light-handed, disclosure-based and largely self-regulated. In particular, with few exceptions, there is no requirement for financial intermediaries in New Zealand to be licensed.

This is in complete contrast to the comprehensive and more uniform regulatory regime in Australia under the Financial Services Reform Act. While few market participants in New Zealand would wish to see the Australian model adopted here in its entirety, the government has indicated that compatibility with Australia is important. Given the stated intention of the Governments of both countries to work towards a single economic market, it would come as no surprise to see a new regulatory regime in New Zealand that is a compromise between the current model and the Australian FSRA.

The case for more regulation of financial intermediaries in New Zealand can only have strengthened with the collapse in early September 2004 of Access Brokerage Limited, a discount share broker.

Timing

The Government expects the task force to report back with its recommendations within six months of appointment, and anticipates announcing its decisions on reform by the middle of this year.

Need more information?
For more information on any of the cases, articles and features in *Financial Services Quarterly*, please email rachel.gowing@bellgully.com or call on 64 9 916 8825.

New bill proposes tougher securities laws

A new bill introduced into Parliament in November 2004 represents a continuation of recent securities law reform aimed at ensuring confidence in New Zealands capital markets.

Highlights include specific market manipulation rules, changes to the substantial security holder disclosure regime (addressing the issue in the Perry equity swap case[1]), the purported extension of insider trading rules to cover futures contracts, and the imposition of criminal liability for insider conduct.

Outline of the Bill

The Securities Legislation Bill (the **Bill**) is the end result of the third stage of the Government's four-stage securities law reform programme. (The final stage is the review of the regulation of financial intermediaries, which a Government-appointed task force is currently conducting.)

Broadly, the Bill does five things:

- it amends provisions in the Securities Act 1978 relating to remedies and the investigation and enforcement powers of the Securities Commission;
- it amends takeovers legislation (most notably by removing the $20 million threshold test for "specified companies" and "code companies");
- it amends the provisions in the Securities Markets Act 1988 relating to substantial security holder disclosure and insider trading;
- it introduces new market manipulation laws; and
- it replaces the Investment Advisers (Disclosure) Act 1996 with a new regime for regulating investment advisers and brokers.

This article focuses solely on the last three of these matters. They represent the most substantial, and are likely to be the most controversial, changes to be effected by the Bill.

Securities Markets Act

Substantial security holder disclosure

New terminology

The Bill does not change the substance of the current disclosure obligations. However, there is a change in terminology. The Bill introduces new concepts of "event disclosure obligations" and "request disclosure obligations".

An event disclosure obligation arises when:

- a person begins to have a substantial holding (i.e., a relevant interest in 5% or more of the listed voting securities of a public issuer); or
- there is a change of 1% or more in the substantial holding; or
- the nature of the substantial holding changes; or
- a person ceases to have a substantial holding.

A request disclosure obligation arises when the Securities Commission or the public issuer requires a person to disclose to the market any relevant interest, or power to acquire a relevant interest, in securities. The person to whom the request is made need not be a substantial security holder.

The Perry amendment

The most significant change is to the key "relevant interest" definition. Specifically, the Bill extends the definition of that term to include circumstances where a person has a power or control in relation to a security as a result of a "practice". Practice includes market practice and persons' practices in dealing with each other.

This change was signalled by the Government following the decision of the Court of Appeal in the *Perry* equity swap case, which was commented on in the Summer 2004 issue of *Financial Services Quarterly*.

The decision in that case was that Perry Corporation, having sold and subsequently re-acquired shares underlying a cash-settled equity swap, did not retain a "relevant interest" in those shares. This was because there was no arrangement or understanding between Perry and its counterparty banks for Perry to re-acquire the shares. The re-acquisition was simply the result of the operation of "market reality".

The *Perry* case could well have been decided differently if the Bill were law at the time.

This proposed change should be of concern to equity swap counterparties. In particular, it is disturbing that one market participant could acquire a relevant interest from another in circumstances where there is no meeting of the minds between them.

The inherent uncertainty over what constitutes "market practice" will invariably mean that many counterparties will adopt a conservative approach and choose to disclose. Alternatively, other counterparties may seek an exemption from the Securities Commission for equity swaps entered into for financing purposes. Bell Gully has successfully obtained such exemptions in the past.

Insider conduct

The perceived ineffectiveness of New Zealand's current insider trading laws is a well-known fact. Despite being in force for 17 years, no one has yet been held liable for insider trading under the Securities Markets Act.

In an attempt to strengthen the law in this area, the Bill proposes to adopt a regime similar to that in Australia (an approach becoming increasingly common in New Zealand's commercial law reform).

The new legislation is expressed to focus on the threat that insider trading poses to market integrity rather than (under the current law) the breach of fiduciary duty that the insider owes to the company. Quite what this policy shift will mean in practice is not clear.

The prohibitions

The Bill imposes on "information insiders" a prohibition on certain insider conduct. Specifically, an information insider may not trade, disclose or advise or encourage others to trade. An "information insider" is a person who:

- has material information relating to the public issuer that is not generally available to the market; and

- knows, or ought to know, that the information is both material and not generally available to the market.

Liability

The Bill retains the current civil liability rules, under which an insider can be liable for up to the greater of the value of the relevant securities and three times the gain made or loss avoided.

However, importantly, the Bill also imposes criminal liability on those who knowingly engage in insider conduct. The maximum penalty is five years' imprisonment and a $300,000 fine for an individual and a $1 million fine for a company.

Extension of rules to cover futures contracts

The insider conduct prohibitions purport to extend to cover trading in contracts on an authorised futures exchange. The Bill's explanatory note suggests that this will improve the efficiency of, and investor confidence in, the futures markets.

We describe this as a "purported" effect because it seems that the relevant provisions of the Bill do not achieve the clear effect that the drafters intended.

Specifically, the insider conduct rules prohibit trading, disclosure, advice or encouragement in relation to "securities of a public issuer". While futures contracts are now expressly "securities", they are not securities "of a public issuer". By way of example, a futures contract on, say, Telecom shares is not a security "of Telecom".

However, in this respect at least, there is no suggestion that New Zealand should follow the lead of Australia and apply insider rules to OTC derivatives.

Market manipulation rules

Currently, New Zealand has no statutory market manipulation rules other than a little-used section in the Crimes Act 1961 and the general prohibition on misleading or deceptive conduct contained in the Fair Trading Act 1986.

The Bill proposes to make market manipulation a criminal offence, subject to the same maximum penalties as insider conduct (five years' imprisonment and a $300,000 fine for an individual and a $1 million fine for a company). The market manipulation rules, like the insider conduct rules, will also cover dealings in futures contracts.

The Bill introduces three market manipulation offences of making misleading statements, causing misleading appearance of trading, and generally engaging in misleading conduct.

Misleading statements

The specific elements of this offence are the making of a statement or the dissemination of information where:

- the statement or information is false or misleading in a material respect;
- the person knows, or ought reasonably to know, that this is the case; and
- the statement or information is likely either to induce a person to trade in the securities of a public issuer or to have the effect of increasing, reducing, maintaining or stabilising the trading price.

Misleading appearance of trading

The specific elements of this offence are doing, or omitting to do, anything where:

- the act of omission is likely to create a false or misleading appearance with respect to either the extent of trading or the supply of, demand for, or price or value of, securities; and
- the person knows, or ought reasonably to know, that this is the case.

A person will be presumed to have committed this offence in cases involving what is known as "churning" (i.e. trading that results in no change of beneficial ownership) or "corresponding trades" (i.e. where two related parties offer to trade on substantially matching terms).

General misleading conduct

The third offence differs from the first two in its generality, in its application to all securities (not just listed ones) and all dealings in securities (not just trading), and in the strict liability it imposes (that is, knowledge is not required). This catch-all offence prohibits a person engaging in conduct, in relation to any dealing in securities, that is likely to mislead or deceive.

Liability for breach of this general prohibition appears to be civil only.

Investment advisers and brokers

The Investment Advisors (Disclosure) Act currently regulates investment advisors and investment brokers. It provides for a two-tier regime of mandatory disclosure and request disclosure.

The Bill will repeal that Act and replace it with a regime that is based solely on mandatory disclosure. Under this new regime, an investment adviser may not give investment advice, and an investment broker may not receive investment money or property, without first giving the client a disclosure statement.

That statement must disclose matters such as the experience and qualifications of the investment adviser, the investment broker's procedures for dealing with client money and property, and the nature of any criminal convictions of the adviser or broker.

Territorial scope of legislation

A welcome feature of the Bill is its attempt to outline the territorial scope of its provisions. Bell Gully is frequently asked by foreign-based financial institutions to advise on the application of New Zealand legislation to financial services provided to New Zealand residents from offshore (typically, via the internet). Often, the legal position is not clear.

The Bill will overcome this uncertainty through express provisions addressing territorial scope. The territorial scope differs depending on the regime in question. For example, the general misleading conduct prohibition will apply to conduct outside New Zealand by a person resident, incorporated or carrying on business in New Zealand to the extent that the conduct relates to dealings in securities within New Zealand.

On the other hand, the investment adviser and broker rules will apply to services performed for a person in New Zealand, regardless of where the adviser or broker is resident, incorporated or carries on business.

Timing

Once the Bill is enacted, its provisions relating to substantial security holder disclosure, and the rules for investment adviser and brokers, will come into force on a date specified by Order in Council (likely to be some time next year). The remainder of the Bill will come into force on 1 November 2005.

1 *Perry Corporation & Anor v Ithaca (Custodians) Ltd & Ors* (Court of Appeal, 43-03, 16 December 2003, Gault P, Blanchard & Glazebrook JJ)

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New Credit Reporting Privacy Code

This new code gives individuals the right to access personal information held by credit reporters and aims to increase the accuracy of this information.

The Credit Reporting Privacy Code 2004 applies to all credit reporting agencies, imposing obligations on them to supply credit information to individuals free of charge. Credit agencies have had to abide by the Privacy Act since 1993, but now they will also be obliged to follow the new code, which sets out more specific requirements.

The code introduces time limits for how long credit information can be held on a credit file, and ensures that consumers are entitled to be told what happens to their personal information when they apply for a loan or make a credit purchase. It also establishes new complaints processes and introduces rules governing who can access the information and what they can do with it.

According to Privacy commissioner Marie Shroff, "the code sets out to build greater transparency, accuracy and fairness". In her recent press release, Ms Shroff also referred to the necessity for reliable information in credit reports to avoid harmful inaccuracies. Until now, there have been relatively few formal controls over the information held and its use, and people have had no real opportunity to verify data before it is stored.

The code comes into force on 1 April 2006 (except for clauses 7 and 8, which commence on 1 April 2005, allowing individuals free access to information held about them by credit reporters, and requiring credit reporters to have a complaints procedure in operation).

The code applies directly to credit reporters. Credit reporters are entities that collect credit and personal information and sell it to third parties. Credit providers are banks and other financial institutions that provide credit.

From 1 April 2006, the code will also apply indirectly to credit providers by way of subscriber agreements between credit reporters and credit providers. Subscriber agreements will, among other things, require credit providers to clearly explain to their customers what happens to personal information when a check is carried out.

Key features of the new code include:

- free access by individuals to their own credit reports from 1 April this year;
- steps to ensure people know what happens to their personal information when they apply for a loan or make a credit purchase;
- a plain language summary of rights;
- obligations on credit reporters to maintain high standards in all aspects of their work; and
- improved standards of reporting accuracy through:
  - requiring businesses supplying information for credit reports to ensure it is accurate and updated as necessary;
  - requiring credit reporters to maintain an audit programme that may make subscribers subject to spot checks on the reliability of information they have supplied;
  - requiring credit reporters to flag disputed records while they are being checked; and
  - requirements to ensure that information on one individual is not wrongly attributed to another.

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Recent developments

New Zealand's angel capital market

A market study has identified individuals in New Zealand willing to provide equity investment and management expertise to fledgling businesses.

Stable platform of financial standards

The Accounting Standards Review Board has announced the establishment of a stable platform of New Zealand equivalents to the international financial reporting standards.

Historical financial information in offer documents

The Securities Commission has published a draft practice note about the presentation of historical financial information in offer documents during the transition period to New Zealand's equivalent to International Financial Reporting Standards.

Westpac to incorporate in New Zealand

The Reserve Bank has confirmed Westpac Banking Corporation's decision to incorporate in New Zealand.

Should online securities traders be subject to the Securities Markets Act?

Commerce Minister Margaret Wilson has written a letter to online securities trader *Unlisted*, outlining why she thinks it should be subject to the Securities Markets Act.

New Zealand's angel capital market

A market study has identified individuals in New Zealand willing to provide equity investment and management expertise to fledgling businesses.

The Ministry of Economic Development has released a report analysing the market study and highlighting the key characteristics of the "angel capital market" in New Zealand.

Angel investors are typically affluent individuals who have enjoyed business success and who are willing to invest in, and provide management expertise to, fledgling New Zealand businesses. The study estimates these "angels" number up to 20,000 people, but it is suspected that the actual number of active investors is considerably less.

Ministry senior adviser Nick Davis says that many countries have moved to solve the problem of linking investors with entrepreneurs by supporting the establishment of "Business Angel Networks". These networks enable investors to share information, and benefit businesses by reducing their costs of searching for potential investors. Some networks already exist while others are being established.

Key findings from the study are that:

- New Zealand's angel capital market is significantly more sophisticated than it was five years ago;
- there is a better understanding in the marketplace about how to make money out of new ideas; and
- more professional investors are participating in the market, bringing with them a more rigorous attitude towards these investments.

The report can be downloaded from http://www.med.govt.nz/irdev/ind_dev/access-to-finance/angel-investment/index.html.

ⓘ **Need more information?**
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Stable platform of financial standards

On 25 November 2004, the Accounting Standards Review Board announced the establishment of a stable platform of New Zealand equivalents to the international financial reporting standards.

These New Zealand equivalents will replace the existing NZ Generally Accepted Accounting Practices (**NZ GAAP**) used in financial reporting and are equivalent to standards that are being applied in both the European Union and Australia from 2005. Compulsory compliance will begin on 1 January 2007, but companies may choose to apply the new standards from 1 January this year.

The Honourable Margaret Wilson considers that the adoption of the standards will bring a number of significant benefits to the New Zealand economy as New Zealand moves to improve capital investment. She also stated that the standards will fill a number of gaps not covered by the New Zealand standards, such as impairment of assets and share based payments.

Visit www.icanz.co.nz/ScriptContent/Index.cfm for more information on the standards.

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Recent developments

Historical financial information in offer documents

The Securities Commission has published a draft practice note about the presentation of historical financial information in offer documents during the transition period to New Zealand equivalents to International Financial Reporting Standards.

The note sets out the approach the Commission wishes to take in relation to presentation and disclosure in prospectuses for offers of securities, to ensure an appropriate level of information is provided to investors.

Visit the Commission's website at www.sec-com.govt.nz/, where a copy of the draft practice note is available.

Need more information?
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Westpac to incorporate in New Zealand

The Reserve Bank has confirmed Westpac Banking Corporation's decision to incorporate in New Zealand.

Reserve Bank Governor Dr Alan Bollard has commented "the Reserve Bank's local incorporation policy requires systemically important banks to incorporate in New Zealand. Local incorporation provides, among other things, a well-understood legal framework for the conduct of business in New Zealand and a local board to act in the best interests of the New Zealand bank".

The Reserve Bank has indicated that it will be working closely with Westpac to assist in the local incorporation process.

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Should online securities traders be subject to the Securities Markets Act?

Commerce Minister Margaret Wilson has written a letter to online securities trader Unlisted*, outlining why she thinks it should be subject to the Securities Markets Act (the* ***Act****).*

The Act gives Ms Wilson the power to declare that its provisions apply to otherwise unregulated securities markets.

Unlisted is not a registered securities exchange and therefore is not subject to the disclosure, insider trading and oversight provisions of the Act. Ms Wilson has said that *Unlisted's* value and trading volumes, and the number and type of issuers, have developed to the point where its investors should be protected by the Act.

Unlisted and other interested parties have been given three months to express their views before a final decision is made.

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Bell Gully news

New appointments at Bell Gully reflect investment in people and clients

Bell Gully has appointed two new partners and 10 new senior associates, demonstrating its continued investment in its people.

Merger mania highlights strength of New Zealand's legal marketplace, as Bell Gully ranked country's top M&A legal adviser

Bell Gully's ranking as one of Asia Pacific's top merger and acquisitions advisers demonstrates a robust local marketplace for corporate legal services.

Asia Pacific Legal 500 success signals clean sweep for Bell Gully in 2004 rankings and awards

Bell Gully has topped the New Zealand rankings in *The Asia Pacific Legal 500*, the region's most respected guide to commercial law firms, for the third year running.

Off the shelf

Other useful articles and publications from Bell Gully.

New appointments at Bell Gully reflect investment in people and clients

Bell Gully has appointed two new partners and 10 new senior associates, demonstrating its continued investment in its people.

"We can only provide exceptional service with the very best people, and the war for legal talent intensifies every year," said Bell Gully chairman Matthew Cockram. That's why we invest in our people and this is an impressive line-up of new appointments.

"Many of these people began their careers with us and have returned to the firm after gaining valuable international experience. Others have been with us since they graduated, providing great continuity of service for our clients.

"I'm delighted that Bell Gully can entice top-quality people back from New York and London and retain our in-house stars."

New Partners

Tom Bennett specialises in government, land transport, construction and projects, and commercial law.

Murray Tingey, a litigator specialising in insolvency cases, began his career with Bell Gully and returned to the firm after three years experience with law firm Clifford Chance in the UK.

New Senior Associates

Brendan Cash is a litigator specialising in energy, insolvency and construction cases, and recently returned from the UK after three years working with Ashurst in London.

David Coull specialises in mergers and acquisitions, commercial, corporate and securities law. He returned to Bell Gully last year after completing a Masters in Law at Cambridge and working for law firm Cravath, Swaine & Moore in the US and UK.

Fiona Heiford specialises in tax and GST, trusts and personal asset planning and investment products and superannuation. She has worked at Bell Gully since 1997.

Liz Lim specialises in banking and finance law and began her career at ANZ, then worked for law firm Allen & Overy in London for two years before returning to join Bell Gully last year.

Josh McBride is a litigator specialising in insolvency, corporate and securities and telecoms cases. He began his career at Bell Gully and rejoined the firm in 2004 after working for law firms Gilbert & Tobin in Sydney and Freshfields Bruckhaus Deringer in London.

Nichole Moynagh specialises in commercial property and leasing law and recently returned to Bell Gully after working for another national law firm.

Graeme Olding specialises in tax and GST and trade law. In addition to his New Zealand practice, Graeme has also worked in Australia during the countrys introduction of GST.

Michael Spooner specialises in commercial, construction energy, electricity and land transport law and has recently returned from the UK where he worked at London Electricity and law firm Ashurst.

Jenny Stevens is a litigator specialising in competition law. She began her career with Bell Gully before working in the UK for law firm Norton Rose. Jenny returned to Bell Gully last year.

Damian Stone specialises in Maori services, commercial, forestry, fisheries and government law. He began his career with the Treaty of Waitangi Fisheries Commission before joining Bell Gully in 2000.

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Merger mania highlights strength of New Zealand's legal marketplace, as Bell Gully ranked country's top M&A legal adviser

Bell Gully's ranking as one of Asia Pacific's top merger and acquisitions advisers demonstrates a robust local marketplace for corporate legal services.

International researchers Thomson Financial today named Bell Gully among the top 15 law firms working on M&A deals in the Asia Pacific region in 2004 - the only Kiwi firm to appear among the dominant global and Australian legal players in the region.

Overall, 2004 deal activity in the Asia Pacific region was up significantly on comparable figures for 2003.

"Despite a strong Kiwi dollar, New Zealand M&A activity has also surged by up to 40% over the last year, according to Thomson," said Bell Gully's corporate practice leader, Brynn Gilbertson.

"While deal values in the region are lower than European or US takeovers, our lawyers are working on transactions that are just as complex and challenging as those being done in New York or London."

"We're delighted at being named as one of the top legal advisors in the region, despite being based in one of the region's smaller economies, particularly as some had been predicting the demise of the large New Zealand law firms and the corporate community that they serve," said Mr Gilbertson.

Bell Gully also consolidated its reputation as New Zealand's leading M&A legal adviser by topping Bloomberg's 2004 league tables, also published today.

Mr Gilbertson believed that M&A activity in 2005 could cool slightly but wouldn't slump as dramatically as it did in 2002.

"The New Zealand legal market remains robust," said Mr Gilbertson. "While it will always be one of the smaller market places for corporate legal advice in areas such as M&A, competition among local legal firms will continue to be fierce just as it is in Sydney and elsewhere in the Asia Pacific region."

Bell Gully achieved the following rankings according to tables released today by Thomson Financial and Bloomberg.

- Top New Zealand firm by deal value in all of Thomson Financial's Australia/New Zealand tables of M&A Legal Advisers.
- Top New Zealand firm by deal value in all of Thomson Financial's Asia Pacific Excluding Japan tables of M&A Legal Advisers the only New Zealand firm to appear in the top 15 in the Asia Pacific league tables.
- Top New Zealand firm by deal value and number of deals in Bloomberg's 2004 M&A Legal Advisory League Tables.

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Asia Pacific Legal 500 success signals clean sweep for Bell Gully in 2004 rankings and awards

Bell Gully has topped the New Zealand rankings in *The Asia Pacific Legal 500* , the region's most respected guide to commercial law firms, for the third year running.

This completes a successful year for the firm, which has now topped all the major legal rankings and league tables announced in 2004.

In *The Asia Pacific Legal 500* , Bell Gully received 11 top-tier rankings for its practice areas, more than any other New Zealand law firm. The guide also named 21 Bell Gully partners as "leading individuals" in their field - again, more than any other New Zealand law firm.

"These are excellent results, and to top the rankings three years in a row is a tribute to the consistent and quality service that our lawyers deliver for our clients," said Matthew Cockram, Bell Gully Chairman.

"Our challenge is to do even more for our clients in 2005 - and hopefully top the rankings four years in a row."

The ranking rounds off a great year for Bell Gully in external reviews and awards, with leading rankings in *Chambers Global* , *IFLR 1000* and *Thomson Financial's* Australasian mergers and acquisitions (M&A) legal advisor rankings for 2004, plus the award of IFLR New Zealand Law Firm of the Year in March 2004.

Additional information

Bell Gully is New Zealand's leading commercial law firm with over 200 legal staff.

The Asia Pacific Legal 500 2004/2005 is the guide to the leading commercial law firms in Asia and Australasia. It is published by Legalease.

Bell Gully was ranked as "top tier" for its legal expertise in the following areas:

- banking and finance
- capital markets
- corporate and commercial
- dispute resolution
- energy and natural resources
- insolvency
- insurance
- project finance
- real estate
- tax
- telecommunications

The following Bell Gully lawyers were ranked as "leading individuals" in their field:

Banking and Finance
David Craig
Murray King
David McPherson

Capital Markets
Garry Downs
Richard Hanna

Disclaimer: this publication is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters dealt with in this publication

Commercial Property
Matthew Cockram

Corporate Commercial / M&A
Andrew Brown
Brynn Gilbertson
Jonathan Ross

Dispute Resolution
Mike Colson
Mark O'Brien

Employment
Rob Towner

Energy and Natural Resources
Chris Gordon
James Willis

IT / Telecoms
Wayne Hudson
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Useful Web links

New Zealand government

- Inland Revenue Department [www.ird.govt.nz]
- Ministry of Economic Development [www.med.govt.nz]
- Ministry of Foreign Affairs and Trade [www.mfat.govt.nz]
- New Zealand Government [www.govt.nz]
- NZ Government E-Commerce Information [www.ecommerce.govt.nz]
- NZ Treasury [www.treasury.govt.nz]
- Office of the Clerk of the House of Representatives [www.clerk.parliament.govt.nz]
- Parliamentary Counsel Office [www.pco.parliament.govt.nz]

New Zealand financial agencies and organisations

- The Companies Office [www.companies.govt.nz]
- Export Credit Office [www.treasury.govt.nz/exportcreditoffice]
- NZ Law Commission [www.lawcom.govt.nz]
- Office of the Banking Ombudsman [www.bankombudsman.org.nz]
- Office of Insurance and Savings Ombudsman [www.iombudsman.org.nz]
- Office of the Privacy Commissioner [www.privacy.org.nz]
- Personal Property Securities Register [www.ppsr.govt.nz]
- Reserve Bank of New Zealand [www.rbnz.govt.nz]
- Securities Commission [www.sec-com.govt.nz]
- Takeovers Panel [www.takeovers.govt.nz]

New Zealand commercial sites

- CLANZ [www.clanz.org]
- Institute of Chartered Accountants [www.icanz.co.nz]
- NZ Bankers' Association [www.nzba.org.nz]
- NZ Business Roundtable [www.nzbr.org.nz]
- NZ Institute of Economic Research [www.nzier.org.nz]
- NZ Exchange [www.nzx.com]

Australian government sites

- Banking Ombudsman [www.abio.org.au]
- National Office for the Information Economy [www.ogo.gov.au]

Australian commercial sites

- Australian Financial Markets Association [www.afma.com.au]
- Australian Securities and Investment Commission [www.asic.gov.au]
- Australian Stock Exchange [www.asx.com.au]

International sites

- Bank for International Settlements [www.bis.org]
- Global Banking Law Database [www.gbld.org]
- International Monetary Fund [www.imf.org]
- International Swaps and Derivatives Association [www.isda.org]
- NASDAQ [www.nasdaq.com]
- New York Stock Exchange [www.nyse.com]
- United States Securities and Exchange Commission [www.sec.gov]
- World Bank [www.worldbank.org]