



**Welcome to the Autumn 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:

In the courts  
In the journals  
Legislation/In Parliament  
Recent developments  
Bell Gully news  
Useful Web links



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## In the courts

### Retention of title clause in favour of lender ineffective

Where funds are advanced for the purpose of purchasing a specific asset, a clause which purports to allow the lender to retain title to that asset until it is repaid is unlikely to be effective where title has not been transferred to the lender and no security interest has been registered.

### Voidable transactions: payments made outside usual payment pattern

The High Court has indicated that payments that do not fit a company's usual pattern of making payments, and that are made at a time when it cannot pay its debts, may be voidable on the application of a liquidator.

### No undue influence nor unconscionable bargain in shareholder guarantees

In this case, the High Court was not satisfied that there was any undue influence exerted by a father in getting his daughters to guarantee a loan for their hotel business, nor that there was any unconscionable bargain, and the lender was not on inquiry as to either possibility.

### In England, bank owes duty of confidentiality to payee under letter of credit

The House of Lords found in this case that a bank owed a duty of confidentiality to the payee under a letter of credit.

### No contracting out of right to register caveat

In a recent High Court decision, an attempt to contract out of the purchaser's right to register a caveat over land was regarded as contrary to public policy and invalid.

## In the courts

### Retention of title clause in favour of lender ineffective

*Where funds are advanced for the purpose of purchasing a specific asset, a clause which purports to allow the lender to retain title to that asset until it is repaid is unlikely to be effective where title has not been transferred to the lender and no security interest has been registered.*

This case emphasises the importance, for anyone considering lending money, of attending to the proper formulation and registration of security arrangements.

Jade McTainsh agreed to lend her father money to buy a boat. According to the loan agreement, she would retain title to the boat until she had been repaid in full. However, REM Holdings later seized the boat to satisfy a judgement in its favour against Jade's parents.

The High Court<sup>1</sup> judge agreed with the District Court judge's decision that title to the boat was never transferred to Jade and that she was not the beneficial owner. The retention of title clause was an attempt to give Jade security for the loan, but it was not registered on the Personal Property Securities Register and as a result Jade was an unsecured creditor of her father.

<sup>1</sup> *McTainsh v REM Holdings Limited* (High Court, Tauranga, 27 January 2005)

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## In the courts

### Voidable transactions: payments made outside usual payment pattern

*The High Court has indicated that payments that do not fit a company's usual pattern of making payments, and that are made at a time when it cannot pay its debts, may be voidable on the application of a liquidator.*

In a recent case<sup>1</sup>, the liquidators of EBFC claimed that digger hire payments made to WT at a time when EBFC was unable to pay its debts, which enabled WT to receive more towards satisfaction of its debt than it would otherwise have received or been likely to receive in liquidation, were voidable as transactions having a preferential effect under section 292 of the Companies Act 1993.

The High Court held that the payments were not made "in the ordinary course of business" because:

1. the usual pattern was for EBFC to pay WT's monthly invoices in the last week of the month following the invoice whereas the payments in question were lump sum payments made from time to time to reduce the balance outstanding; and
2. evidence also showed that EBFC chose which creditors it would pay when it started experiencing cashflow difficulties.

The High Court also declined to deny recovery to the liquidators under section 296(3) of the Companies Act 1993.

To succeed on this ground, WT had to prove that, even if the payments were made in the ordinary course of business, it had received the payments in good faith and had altered its position in the reasonably held belief that the payments were validly made and would not be set aside. It was also necessary for the Court to be of the opinion that it would be inequitable to order recovery.

However, the Court found that section 296(3) did not help WT in the circumstances because:

1. a letter sent by WT to EBFC requesting part payment of outstanding invoices indicated that subsequent payments were not received in good faith;
2. there was no evidence to suggest that, had the payments not been made, WT would have ceased hiring the digger to EBFC; and
3. there was nothing to suggest that it would be unfair for the liquidators to recover the payments.

<sup>1</sup> *Watchorn Transport v Blanchett* (High Court, Hamilton, 23 November 2004)



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## In the courts

### No undue influence nor unconscionable bargain in shareholder guarantees

*In this case, the High Court was not satisfied that there was any undue influence exerted by a father in getting his daughters to guarantee a loan for their hotel business, nor that there was any unconscionable bargain, and the lender was not on inquiry as to either possibility.*

This case is reassuring for creditors taking personal guarantees from shareholders or directors in relation to the obligations of a company. The Court indicated that, in those circumstances, creditors are not generally expected to look into potential issues of undue influence or unconscionability.

The daughters were the sole shareholders and directors of a company which operated a hotel in Wanganui. A brewery, which supplied products to the hotel, made loans of \$350,000 to the company and guarantees were provided by the daughters and their father. The company subsequently defaulted and demand was made on the daughters as guarantors.

At the times of the loans, the daughters were aged 22 and 23. They claimed that they had little or no previous experience in the hotel industry and that their father was the driving force in purchasing and setting up the business.

The Court had to decide whether the transactions could be set aside by reason of undue influence. The daughters claimed that their father had pressured them into signing the guarantee and knowledge of his undue influence ought to have been imputed to the brewery.

The Court held in relation to undue influence that:

1. it was not satisfied that there was undue influence and, even if there was, responsibility for the father's undue influence could only be imputed to the brewery if the brewery was put on notice;
2. a creditor will be put on inquiry where there is a relationship of trust and confidence between a borrower and a guarantor - however, here the borrower was a company and so the relationship was clearly a commercial one;
3. the transaction was manifestly and excessively to the financial advantage of the daughters as the guarantee made the loan to their company possible - the father had no interest in procuring the guarantee as he did not personally stand to gain anything from the loan;
4. since the borrower and the guarantors had essentially the same broad interests, there was nothing to alert the brewery to any risk of undue influence; and
5. the guarantee itself was a part of a completely usual everyday arrangement where the shareholders of closely-held companies are required to give guarantees.

The daughters also argued that the transaction constituted an unconscionable bargain. In response to that claim, the Court was of the opinion that:

1. even if the daughters were in a disadvantaged position because they had no previous business experience, there was nothing before the Court to show that the brewery had knowledge of this; and
2. there was no inadequacy of consideration as the daughters stood to gain all the benefits from the loan as shareholders and directors.

1 *New Zealand Breweries v Jays & Ors* (High Court, Wanganui, 14 December 2004)

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## In the courts

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*The House of Lords found in this case<sup>1</sup> that a bank owed a duty of confidentiality to the payee under a letter of credit.*

Mr Jackson imported goods from a company in Thailand for a customer in England. The customer would place orders with Jackson and, in order to effect payment, the customer's bank would issue letters of credit in favour of Jackson. The letters of credit provided for payment of the agreed sum upon production of various documents.

This arrangement continued for two and a half years until, by mistake when handling a demand made under a letter of credit, the bank sent to the customer documents which should have been sent to Jackson. One of those documents was the Thai supplier's original invoice which revealed to the customer Jackson's substantial mark-up on the value of the goods. As a result, the customer placed no further orders with Jackson and thereafter bought the goods directly from the Thai supplier.

Jackson commenced proceedings against the bank for breach of its duty of confidentiality claiming damages for the lost opportunity to make further profits from the trading relationship with the customer.

The letter of credit did not contain an undertaking that the bank would treat the documents provided to it as confidential. However, the Court found that the information was confidential to Jackson and that it was the duty of the bank to protect that confidentiality.

<sup>1</sup> *Jackson and Anor v Royal Bank of Scotland Plc* [2005] UKHL3

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This case<sup>1</sup> involved an agreement for the sale and purchase of land, which included a term that the purchaser would not caveat the title before the vendor had lodged plans for a proposed subdivision of the land. However, the plans were never lodged and the purchaser registered a caveat anyway.

The vendor later sought to cancel the contract on the basis that it could not obtain the necessary consents, and the purchaser sought an order that its caveat would not lapse.

Justice Baragwanath stated that a "no caveat" clause was contrary to public policy and should not be given effect. Even in the event that the clause had been effective, the vendor had repudiated the contract by asserting that it was cancelled and the purchaser was entitled to protect its position.

<sup>1</sup> *Fu Hao Construction Limited v Landco Albany Limited* [2005] 1 NZLR 541

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## In the journals

### [Changes to consumer credit contracts](#)

This article summarises the main implications of the Credit Contracts and Consumer Finance Act 2003, which came into full force on 1 April 2005.

### [Mistake with name invalidates entire financing statement in Canada](#)

New Zealand courts have not yet considered the effect of a misleading error in a registered financing statement. However, this article discusses a recent Canadian case suggesting that an innocent mistake could render the entire financing statement invalid.

### [Reserve Bank amends bank disclosure requirements](#)

Registered banks are required to publish quarterly disclosure statements covering a wide range of financial and prudential information. The Reserve Bank of New Zealand has made a number of changes to these requirements, which are discussed in this article.

### [The nuts and bolts of the Securities Amendment Act 2004](#)

The Securities Amendment Act 2004 came into force on 15 April 2004. It introduced several significant changes, including the addition of two categories of private offers, a new eligible persons exception and new rules regarding pre-prospectus advertising. This article provides an overview of the changes.

### [Letters of comfort and contractual liability in Australia](#)

This article advises that, in order to avoid contractual liability, Australian issuers of letters of comfort should state expressly that the documents are not intended to have legal effect.

### [Corporate insolvency - the Australian statutory framework](#)

This article, the first in a three part series, considers the Australian statutory framework in the area of insolvency relating to preferences and uncommercial transactions and looks at some recent decisions in the Australian courts.

### [Adopting NZ IFRS: some tax consequences](#)

While companies have been able to adopt International Financial Reporting Standards (IFRS) voluntarily since 1 January 2005, adoption will become mandatory in 2007 for all reporting entities. In this article, some of the consequences for income tax and dealings with the IRD are examined.

## In the journals

### Changes to consumer credit contracts

Joel Lafferty, Bannister & von Dadelszen, *LawTalk* 641, 14 March 2005

*This article summarises the main implications of the Credit Contracts and Consumer Finance Act 2003, which came into full force on 1 April 2005.*

The Credit Contracts and Consumer Finance Act 2003 is a major piece of new legislation that introduces [important changes for New Zealand's credit industry](#). Read more about the Act in the Legislation/In Parliament section of this issue of *Financial Services Quarterly*.

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## In the journals

### Mistake with name invalidates entire financing statement in Canada

Sara Cameron, "PPSA Seriously Misleading Financing Statement", *New Zealand Law Journal*, April 2005 (page 107-108)

*New Zealand courts have not yet considered the effect of a misleading error in a registered financing statement. However, this article discusses a recent Canadian case suggesting that an innocent mistake could render the entire financing statement invalid.*

In a recent Canadian case<sup>1</sup>, part of the debtor's name was entered on a financing statement as "Motorhome" instead of "Motor Home". While the serial number was correct, the Court held that "*a right number cannot save a wrong name and conversely a right name cannot save a wrong number*". While it is unclear whether New Zealand courts would adopt such a rigid approach, it is certainly a lesson to take all care to ensure that the details entered in financing statements are accurate.

<sup>1</sup> *Stevenson as Trustee of the estate of Moncton Motor Home & Trailer Sales Ltd v GMAC Leaseco Ltd* (2003) NBCA 26



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## In the journals

# Reserve Bank amends bank disclosure requirements

Ken Matthews, "Amendments to bank disclosure requirements", *Reserve Bank of New Zealand Bulletin*, Vol.68, No.1

*Registered banks are required to publish quarterly disclosure statements covering a wide range of financial and prudential information. The Reserve Bank of New Zealand has made a number of changes to these requirements, which are discussed in this article.*

### Insurance business

The first of these changes relates to insurance business. The Reserve Bank has introduced a policy that limits the amount of insurance business a bank may have to no more than 1% of the assets of its New Zealand banking group. The rationale for this is that excessive mixing of insurance and banking activities would make the interpretation of financial disclosures more difficult and reduce the usefulness of capital adequacy. All registered banks are now required to disclose the amount and nature of insurance business that is conducted within their New Zealand banking groups.

### Exposures to connected persons

The Reserve Bank sets limits on the exposures to connected persons that New Zealand incorporated registered banks may have, in order to prevent excessive de facto reduction of capital. The Reserve Bank has introduced a change from a standard limit to a rating-contingent limit.

That is, the higher the credit rating of the bank, the higher the limit the bank is allowed. Banks are now also required to disclose, for example, the rating-contingent limit that applies to them, whether the limits have been complied with in the relevant quarter and, if not, the nature of the breaches. In addition, banks must disclose whether exposures have been calculated on a gross or a net basis.

### Concentrations of credit exposures

All registered banks are required to disclose the number of exposures they have to individual counterparties that exceed 10% of the bank's equity. Banks must now also break down the aggregate of such exposures into three categories:

1. rated exposures that are of an investment grade;
2. rated exposures below investment grade; and
3. other exposures.

The intention is to disclose the financial strength of the bank's debtors and the number of them.

### Branch balance sheet information

Overseas incorporated registered banks are now required to disclose the amount of retail deposits they have in New Zealand. This relates to the Reserve Bank's policy on local incorporation a registered bank must be locally incorporated if it has retail deposits in New Zealand exceeding \$200 million. In addition, registered banks must also be locally incorporated if their New Zealand liabilities, net of related party funding, exceed \$10 million.

### Miscellaneous amendments

1. Banks must disclose their credit ratings.
2. Locally incorporated banks must disclose the name of each person who has an ownership interest of 5% or more or who can appoint 25% or more of the directors.



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## In the journals

### The nuts and bolts of the Securities Amendment Act 2004

Dean Seymour, Anderson Lloyd Caudwell, "Securities Amendment Act 2004", Lawlink, Autumn 2004

*The Securities Amendment Act 2004 came into force on 15 April 2004. It introduced several significant changes including the addition of two categories of private offers, a new eligible persons exemption and new rules regarding pre-prospectus advertising. This article provides an overview of the changes.*

#### **Additional categories of private offer**

The Securities Amendment Act 2004 (the **Act**) provides for two new categories of private offer:

1. offers to relatives or close business associates of a director of the issuer; and
2. offers to persons who are each required to pay a minimum subscription price of at least \$500,000.

In relation to private offers, Mr Seymour also discusses the recent case of *Lawrence*<sup>1</sup>. In that case, the Court of Appeal held that, in order to be a private offer, the persons selected must have a relationship with the issuer that is similar to the people provided in the exempted categories. That is, they must be in a position to look after themselves either because of knowledge of investment matters or because of their relationship with the issuer.

#### **Eligible persons exemption**

An offer will be exempt from the disclosure obligations of the Securities Act 1978 and Securities Regulations 1983 where it is made to a person who is:

1. wealthy (a chartered accountant has certified that the person has net assets of at least \$2 million or an annual gross income of at least \$200,000 for the previous two years); or
2. experienced in investing money or in the business to which the security relates. Experienced is defined by reference to the person's ability to assess a number of factors, including the merits of the offer, the value of the security, the risks involved, and the adequacy of the information provided by the person making the offer.

Such a person must be given written notice of the reason for the application of the exemption, which the eligible person must acknowledge in writing before the security is allotted.

#### **Pre-prospectus advertising**

The Act provides that issuers may now seek non-binding expressions of interest from the public. There are, however, a number of protections for the public. For example, the information that can be contained in an advertisement is restricted, and the advertisement must state that no money is being sought and that no applications will be accepted or money received unless the offeree has received an investment statement.

<sup>1</sup> [2004] 3 NZLR 37

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## In the journals

### Letters of comfort and legal liability in Australia

*Australian Banking and Finance Law Bulletin, Volume 20, Number 8*

*This article advises that, in order to avoid contractual liability, Australian issuers of letters of comfort should state expressly that the documents are not intended to have legal effect.*

A letter of comfort is generally given by a third party who has some commercial relationship with the borrower in a financing transaction. They are used to encourage lenders to enter into transactions without the third party having to give a guarantee.

Examples of statements used in letters of comfort include undertakings from the issuer to maintain its shareholding in the borrower, confirmation that the issuer is aware of the transaction, and statements that the issuer will use its influence to see that the borrower complies with its obligations.

English courts have shown a reluctance to interpret letters of comfort as having a contractual effect, and have focussed on a construction of letters of comfort under which they are not legally binding.

This can be contrasted with Australian courts, where letters of comfort have more readily been held to impose some form of legal liability on the issuer, not just a moral obligation. The Australian courts favour giving proper effect to commercial transactions. This article mentions a recent case in which the judge stated that it was necessary to identify whether or not there was the requisite intent to contract in any given context.

The author suggests that, if an issuer wishes to avoid having contractual liability, it should expressly state that the document is not intended to have legal effect. However, the author also points out that it is likely that letters qualified in this manner may be unacceptable to the intended recipient.

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## In the journals

### Corporate insolvency - the Australian statutory framework

John Warde, "Corporate insolvency: preferences and uncommercial transactions - an overview", *Australian Banking and Finance Law Bulletin*, January 2005

*This article, the first in a three-part series, considers the Australian statutory framework in the area of insolvency relating to preferences and uncommercial transactions and looks at some recent decisions in the Australian courts.*

The Corporations Act 2001 (Cth) gives liquidators a wide range of powers to set aside or vary transactions that have been entered into by insolvent companies that are subsequently wound up.

Among other powers, a liquidator can seek to set aside what are known as "unfair preferences" and "uncommercial" transactions, and recover the proceeds for the benefit of the general body of unsecured creditors.

In particular, this article looks at:

1. the powers of the court to set aside voidable transactions;
2. who receives the benefit of property after a transaction is avoided by a liquidator;
3. judicial discussion about the power of the court to make an order requiring the relevant moneys to be paid or the property transferred to the company rather than the liquidator;
4. when a transaction is a voidable transaction; and
5. when a transaction is an insolvent transaction.

The Australian insolvency framework is, of course, of relevance in New Zealand when considering the similar concepts that are set out in Part 16 of our Companies Act 1993.

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## In the journals

### Adopting NZ IFRS: some tax consequences

Niels Campbell, Bell Gully Tax Newsletter, March 2005

*While companies have been able to adopt International Financial Reporting Standards (IFRS) voluntarily since 1 January 2005, adoption will become mandatory in 2007 for all reporting entities. In this article, some of the consequences for income tax and dealings with the IRD are examined.*

This Tax Newsletter can be read in full at [www.bellgully.com/resources](http://www.bellgully.com/resources). For more information about NZ IFRS generally, visit [www.icanz.co.nz](http://www.icanz.co.nz).

Much has been written about the accounting, reporting and capital-raising effects of adopting NZ IFRS. Although you could be forgiven for thinking that NZ IFRS adoption will have little impact on tax law, specific areas of income tax do stray into the accounting measurement area and are worth considering.

This article discusses certain tax implications of adopting NZ IFRS. In particular, the article explains:

1. the potential for foreign-controlled companies to be denied interest deductions under New Zealand's thin capitalisation rules due to the change in accounting values; and
2. the benefits of making balance sheet provisions for tax that include at-risk tax positions as contingent liabilities (rather than actual liabilities) or filing on a conservative basis with adjustments to be notified later.



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## Legislation/In Parliament

### [The Credit Contracts and Consumer Finance Act 2003 comes into force](#)

On 1 April 2005, the long awaited CCCFA came into full effect. The CCCFA has replaced the Credit Contracts Act 1981 and the Hire Purchase Act 1971 and introduces significant changes to the way in which consumer credit contracts are regulated.

### [The Income Tax Act 2004 replaces the old Income Tax Act 1994](#)

The new Act applies to most taxpayers from 1 April 2005. However, for taxpayers with a balance date other than 31 March 2005, the new Act applies from the start of their 2005/2006 income year.

### [New laws to counter money laundering and terrorist financing](#)

The OECD's Financial Action Task Force has advised the Government that changes are needed in our laws to bring New Zealand up to speed with international standards. In response to these recommendations, the Government has drafted the Terrorism Suppression Amendment Bill (No. 2), which introduces a number of important changes to New Zealand's largely deregulated financial system.

### [Tax changes for company migrations](#)

New rules announced in March mean that companies migrating from New Zealand will have to pay tax on all income and, in some cases, capital gains derived before migrating.

### [Announcement of new limited partnership regime](#)

The Government has announced that a Bill to give effect to a new limited partnership regime will be introduced next year to encourage venture capital investment in New Zealand.

## Legislation/In Parliament

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The CCCFA has required creditors to make major changes to their systems and documents in preparation for the 1 April effective date. It will be important for creditors to continue to monitor developments within the industry as compliance with the CCCFA is tested by the Commerce Commission and the courts.

The Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) is intended to:

1. improve redress for consumers;
2. disclose more information to consumers to allow them to make better credit decisions; and
3. give consumers a fairer deal in terms of interest charges, fees and early repayment (by, for example, prescribing the amount that can be charged).

The CCCFA regulates all contracts under which credit is provided to consumers or goods are leased to consumers (effectively where the loan proceeds or leased assets are to be used by natural persons for personal, household or domestic use).

Unlike the old law, there are now detailed provisions dealing with the amounts and type of fees that creditors can charge, how commissions must be disclosed and how related contracts such as insurance contracts are regulated.

The old safe harbour for loans greater than \$250,000 has been removed and interest-free consumer credit contracts may now be subject to regulation.

While the CCCFA has tightened regulatory control of the consumer credit industry, the effect on business borrowing is the opposite. The introduction of the CCCFA marks a new period of deregulation of non-consumer credit contracts. Such borrowing is now excluded from most provisions of the Act, except for those that allow for the re-opening of oppressive contracts.

The Commerce Commission is responsible for enforcing the legislation. The Commission may conduct civil or criminal proceedings for breaches of the CCCFA and is responsible for promoting compliance within the credit industry.

This is the first time that credit law is being enforced by a regulatory agency. Potential penalties include fines of up to \$300,000 and a maximum jail term of one year. However, perhaps of more concern to the credit provider are the discretionary penalties available under the CCCFA. These include a regime whereby, upon the third infringement of the CCCFA, the Commission can seek a court order banning an individual or company from providing credit.

The Government has allowed the industry 18 months to implement new policies to ensure compliance with the CCCFA, which was passed in October 2003. However, the Commerce Commission has announced that it will focus on promoting compliance between 1 April and 30 June, with "full enforcement" taking effect from 1 July.



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## Legislation/In Parliament

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*The new Act applies to most taxpayers from 1 April 2005. However, for taxpayers with a balance date other than 31 March 2005, the new Act applies from the start of their 2005/2006 income year.*

### Legislation rewritten

The Income Tax Act 2004 (the "new Act") is essentially a rewrite of the Income Tax Act 1994 (the "old Act"), apart from a few identified policy changes. The language in the old Act is complex and, in parts, rife with uncertainties and ambiguities. The main purpose of the rewrite was to produce tax legislation that is clear, uses plain language and is structurally consistent.

The new Act rewrites the first five Parts (A to E) of the old Act, which deal with the purpose and interpretation of the new Act, the core provisions, income, deductions and the timing and quantifying rules. Related definitions (generally contained in section OB 1) have also been rewritten.

The remaining parts of the old Act are still to be rewritten and enacted.

The new Act is not intended to change the law, except for the limited generally minor policy changes identified in Schedule 22A.

### Unintended changes

It is almost inevitable that such a substantial rewording and reordering of the Act will result in unintended changes.

Taxpayers will need to check that the new wording has the same effect as the old wording had, or was thought to have had.

An advisory panel, chaired by Sir Ivor Richardson and including representatives of the IRD, Treasury, the Law Society and the Institute of Chartered Accountants of New Zealand, will consider submissions on the effect of unintended changes. A number of submissions have already been received and are being considered by the panel.

It is expected that unintended changes will generally be reversed by appropriate retrospective amendments to the new Act.

An exposure draft published by the IRD suggests that if the new Act is amended to reverse an unintended change of meaning and this results in a taxpayer being left with a tax shortfall, no interest or penalties will be imposed provided that an acceptable tax position was taken in the first place. The amount of the shortfall would still need to be paid.

The new Act makes it clear that if the new wording produces uncertainty or an absurdity then the wording in the old Act should be used to determine the intended meaning in the new Act.

### No policy changes

The IRD has said that the rewrite will not be used as an opportunity to change current policy or tilt the playing field to its advantage. Any policy changes will be implemented through the usual legislative process rather than via the rewrite.

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The IRD expects that the rewrite of the remaining Parts of the Act will take two to three years. Parts H and I, which deal with the taxation of certain entities and losses, have already been rewritten but are still in draft form.

The draft legislation can be viewed online at [www.taxpolicy.ird.govt.nz](http://www.taxpolicy.ird.govt.nz).

### **Advice and information**

Please contact a member of our tax team if you would like further information in this area.

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## Legislation/In Parliament

### New laws to counter money laundering and terrorist financing

*The OECD's Financial Action Task Force has advised the Government that changes are needed in our laws to bring New Zealand up to speed with international standards. In response to these recommendations, the Government has drafted the Terrorism Suppression Amendment Bill (No.2), which introduces a number of important changes to New Zealand's largely deregulated financial system.*

Justice Minister Phil Goff has conceded that there is no specific evidence pointing to the conclusion that New Zealand is currently being exploited by international crime and terrorist networks to launder money or finance terrorism.

Nevertheless, several potential loopholes have been identified that can be addressed in order to comply with strict international requirements. According to the Minister, the administrative costs associated with introducing the new law are outweighed by the risk of damage to New Zealand's financial and political reputation that could result if no action is taken.

Cabinet has suggested that the following changes be implemented by legislation:

- a comprehensive monitoring framework to ensure that all financial institutions meet standards for countering money laundering and terrorist financing;
- a registration regime for persons providing money transfer or currency change services;
- statutory requirements for financial institutions to comply with customer due diligence and to implement anti-money laundering systems and procedures;
- a requirement that financial institutions obtain, verify and retain information concerning the identity of the originator of wire transfers;
- a possible requirement that directors and senior managers of financial institutions in the insurance and securities sectors are evaluated to ensure that they meet the fit and proper persons' criteria.

An interagency working group, chaired by the Minister, is currently consulting with the financial sector on the function and funding of the anti-money laundering framework and registration regime. A Select Committee report is due on 31 May 2005.



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## Legislation/In Parliament

### Tax changes for company migrations

*New rules announced in March mean that companies migrating from New Zealand will have to pay tax on all income and, in some cases, capital gains derived before migrating.*

For a more detailed explanation of the tax changes for companies migrating from New Zealand, please read our newsletter online at [www.bellgully.com/resources](http://www.bellgully.com/resources).

#### Migrations

Companies migrate from New Zealand when they cease to be New Zealand tax resident and become tax resident in another country.

This usually occurs when a company changes its place of incorporation, although it might also occur when a company moves its centre of management from New Zealand.

In some cases, migrations could provide a significant tax benefit by allowing the repatriation of profits and capital gains to a parent company's jurisdiction free of New Zealand tax. The new rules are intended to prevent that.

#### New rules

As of 21 March 2005, a migrating company is treated as having disposed of all its assets and liabilities immediately before migrating, for their market value. The company is then treated as if it had liquidated at the time it ceased to be a New Zealand resident.

The potential tax consequences of this include taxable gains arising on assets held on revenue account, the realisation of capital gains on assets not held on revenue account, and the creation of a new cost base for assets remaining in New Zealand.

The existing rules that apply to liquidations of New Zealand companies also apply to the migrating company. This means that:

1. withholding tax is payable on the deemed dividend of its shareholders' funds;
2. distributions will not be treated as dividends to the extent that the migrating company has available subscribed capital;
3. capital gains can be distributed free of New Zealand tax, although gains distributed to non-resident company shareholders holding 20% or more of the migrating company are subject to non-resident withholding tax; and
4. imputation credits can be attached to dividends paid by the migrating company.



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## Legislation/In Parliament

### Announcement of new limited partnership regime

*The Government has announced that a Bill to give effect to a new limited partnership regime will be introduced next year to encourage venture capital investment in New Zealand.*

The Government has announced a new limited partnership regime in order to encourage venture capital investment into New Zealand. A Bill is expected to be introduced in 2006 setting out the legislation necessary to give effect to the new regime.

A limited partnership has separate legal personality and comprises general and limited partners. A general partner is personally liable for the debts of the partnership, but limited partners are liable only to the extent of their investments and only have management involvement in limited circumstances (similar to company shareholders). New Zealand limited partnerships will be given flow-through tax status under the new legislation.



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## Recent developments

### [Establishment of Joint Trans-Tasman Council on Banking Supervision](#)

In February, the Minister of Commerce announced the establishment of a Joint Trans-Tasman Council on Banking Supervision, but emphasised that there was no agreement to a single banking regulator.

### [Reserve Bank favours changes to enhance our trans-Tasman banking policy harmonisation](#)

Dr Alan Bollard, Governor of the Reserve Bank of New Zealand, has announced that the Reserve Bank is currently developing strategies and policies to minimise potential adverse effects of off-shore developments on New Zealand's financial sector.

### [Guidance from Securities Commission for finance companies on improving disclosure to investors](#)

Following a Discussion Paper released in September last year, the Securities Commission has now published a report with guidance for finance companies on raising the level of disclosure they make to investors.

### [New Credit Reporting Privacy Code](#)

Some parts of the new Credit Reporting Privacy Code, which applies to all businesses in New Zealand that gather and sell credit information, took effect as of 1 April 2005. The Code has implications for credit providers as well as credit reporting businesses.

### [Report on compliance by registered banks with the Securities Act 1978](#)

In its most recent newsletter, the Securities Commission says it has found that most banks are aware of their statutory obligations to ensure that customers receive investment statements before applying for term deposits and other investment products.

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### Establishment of Joint Trans-Tasman Council on Banking Supervision

*In February, the Minister of Commerce announced the establishment of a Joint Trans-Tasman Council on Banking Supervision, but emphasised that there was no agreement to a single banking regulator.*

"Last week we committed to establish a Joint Trans-Tasman Council on Banking Supervision comprising the two Treasuries, the Australian Prudential Regulation Authority and the Reserve Bank of New Zealand. But let me stress that this is not a commitment to a single trans-Tasman banking regulator.

"The Council will look at ways to enhance cooperation; review trans-Tasman crisis response preparedness; provide policy advice on the principles of policy harmonisation; and report on possible legislative changes to ensure the Australian Prudential Regulation Authority and the Reserve Bank of New Zealand can support each other in the performance of their current regulatory responsibilities.

"We also undertook to explore what legislative changes may be necessary to ensure APRA and the RBNZ can support each other in the performance of their current regulatory responsibilities at least regulatory cost."



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*Dr Alan Bollard, Governor of the Reserve Bank of New Zealand, has announced that the Reserve Bank is currently developing strategies and policies to minimise the potential adverse effects of off-shore developments on New Zealand's financial sector.*

The recent focus of the Reserve Bank has been on enhancing trans-Tasman policy harmonisation and reassessing bank regulations and supervision policies.

As part of this process, the Reserve Bank has taken another look at its "three pillars approach" (being self-regulation, market discipline and regulatory and supervisory requirements).

The approach is based on the notion that those who have the most to lose from a mismanaged bank ought to bear the greatest risk management burden. Directors, management and creditors are therefore expected to bear the responsibility for outcomes.

In order to reduce New Zealand's exposure to external shocks, the Reserve Bank is now developing local incorporation and outsourcing policies which require that systemically-important banks in New Zealand be incorporated locally and retain the ability to function on a stand-alone basis.

In addition, Dr Bollard has commented that the announcement of the formation of a Joint Trans-Tasman Council on Banking Supervision represents another step towards refining New Zealand's systems for monitoring and coordinating regulatory issues with Australia.

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## Recent developments

### Guidance from Securities Commission for finance companies on improving disclosure to investors

*Following a Discussion Paper released in September last year, the Securities Commission has now published a report with guidance for finance companies on raising the level of disclosure they make to investors.*

The report describes the Securities Commission's expectations for disclosure under the Securities Act 1978 and Securities Regulations 1983 and indicates the approach that will be taken with regard to enforcement.

The Commission reviewed the financial statements of 16 finance companies. The review highlighted three main areas where financial disclosure and financial reporting practices needed to be improved. However, the report also noted that the disclosure requirements depend on the particular circumstances of each finance company.

1. Firstly, the Commission focussed on the disclosure of financial information relating to Financial Reporting Standard 33. FRS 33 sets out the minimum acceptable level of disclosure for financial institutions.

The Securities Commission emphasised the need for finance companies to explain to investors the risks of any investment, including the risks that apply to finance companies generally and the specific risks for the particular company (including its credit risk management policy).

The Commission's guidance also sets expectations about disclosure of finance companies' principal activities and experience in various industry sectors, and about explanations of companies' ratings.

The essence of the Securities Commission's advice in relation to FRS 33 was the need for investors to be able to make informed investment decisions and assess risks.

2. Secondly, the Commission made several suggestions with regard to disclosure of related party transactions and activities. The report emphasised the fact that related party transactions and the risks of activities undertaken by related parties are material matters for investors.

Consequently, finance companies should provide clear disclosure and explanations of related party lending.

3. Thirdly, the Securities Commission addressed the issue of disclosure where there is no specific guide in New Zealand financial reporting standards. The Commission advises finance companies as follows:

- Finance companies should clearly identify the revenue from the different sources of a finance company's activities. Furthermore, the accounting policies adopted by finance companies to recognise each material revenue source should be clearly disclosed.
- In relation to financial instruments, improved disclosure is needed about the basis for recognising financial instruments in financial reports.

At the end of the year, the Commission is expected to review a sample of disclosure documents from various finance companies. Enforcement action against finance companies could follow if the review reveals breaches of disclosure laws.

(Securities Commission, *Report on Disclosure by Finance Companies*, 22 April 2005)



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### New Credit Reporting Privacy Code

*Some parts of the new Credit Reporting Privacy Code, which applies to all businesses in New Zealand that gather and sell credit information, took effect as of 1 April 2005. The Code has implications for credit providers as well as credit reporting businesses.*

The Code introduces a new level of focus on fair and transparent processes for collecting and using personal information in credit transactions. Banks and other credit providers will need to review their current business practices.

The Office of the Privacy Commissioner has developed the Credit Reporting Privacy Code in order to introduce some formal controls over the collection and use of personal information by credit reporting businesses.

The main objectives of the Code are to improve the accuracy of credit reporting, to reduce opportunities for the misuse of credit information, and to encourage effective complaints handling procedures.

The Code is to be phased in, with some requirements taking effect on 1 April 2006. However, as of 1 April 2005, credit reporters have been required to:

1. provide free access by individuals to their own credit information; and
2. have clear, fast and effective complaints resolutions procedures.

From 1 April 2006, credit reporters must also:

1. proactively improve standards of accuracy;
2. ensure individuals have information about their rights; and
3. prevent unauthorised access to credit information.

The Credit Reporting Privacy Code has clear implications both for credit reporters and for consumers, but credit providers such as banks are also affected.

In particular, credit providers wishing to use the services of credit reporters will (before 1 April 2006) need to sign subscriber agreements under which they will be required to explain clearly to their customers what happens to personal information when a credit check is done.

The Credit Reporting Privacy Code is legally enforceable.

For more information, visit [www.privacy.org.nz](http://www.privacy.org.nz).

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*In its most recent newsletter, the Securities Commission says it has found that most banks are aware of their statutory obligations to ensure that customers receive investment statements before applying for term deposits and other investment products.*

The Securities Commission's latest quarterly newsletter comments on a report published by the Commission in March, which dealt with compliance by registered banks with the requirement of the Securities Act 1978 to provide investment statements.

The Commission began its report after finding that some banks were advertising term investment products in such a way that investors could subscribe for the products without first receiving an investment statement.

Banks are required to make sure that investors receive investment statements before subscribing for debt securities such as term deposits and other types of investment accounts.

The Commission found that most banks were aware of the legislative requirements, and had adequate processes to ensure compliance.

However, some banks noted areas where their compliance systems could be improved, and one bank did not have an investment statement for its term investment products.

For more information, visit [www.sec-com.govt.nz](http://www.sec-com.govt.nz).

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## Bell Gully news

### [Bell Gully again named IFLR New Zealand Law Firm of the Year](#)

Bell Gully has been named IFLR New Zealand Law Firm of the Year at the IFLR awards in Hong Kong for the second consecutive year.

### [Law firm Bell Gully elects new chairman](#)

Leading law firm Bell Gully has elected David Simcock as its next Chairman, effective 11 April 2005.

### [Bell Gully success in Which Lawyer rankings](#)

Leading law firm Bell Gully received the highest possible ranking in four out of six areas of law in the recently published Which Lawyer New Zealand Handbook 2005 - more top-place rankings than any other New Zealand law firm.

### [Off the shelf](#)

*Other useful articles and publications from Bell Gully.*

## Bell Gully news

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*Bell Gully has been named IFLR New Zealand Law Firm of the Year at the IFLR awards in Hong Kong for the second consecutive year.*

Chairman Elect David Simcock collected the award on 10 March at a ceremony at the Ritz-Carlton Hotel in Hong Kong.

Bestowed by respected global publication, International Financial Law Review (IFLR), the awards evaluate the best law firms in each major jurisdiction throughout Asia Pacific on a range of measures, including market reputation and major transactions.

"This is the third time in four years that we've won the IFLR award," said David. "The award is not only recognition of the depth of talent that we have within this firm but also the breadth of top class national and international clients we work with.

"It's our people and our clients that keep us at the top of the market and, while we are delighted with the award, the greater focus always remains on client satisfaction."



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## Bell Gully news

### Bell Gully elects new chairman

*Bell Gully elected David Simcock as its next Chairman in March.*

David took over as Chairman on 11 April from Matthew Cockram, who has accepted a role as Chief Executive of Bluewater Group Holdings.

"I joined the firm as law clerk in 1984 and I recently enjoyed four years in the role of Chairman," said Matthew. "The decision to leave the best law firm in New Zealand has been a difficult one, but this was an opportunity I felt unable to refuse."

David Simcock has been a partner at Bell Gully since 1980.

"I am both delighted and honoured to have been elected as the firm's new Chairman. Bell Gully is a fantastic firm, and I look forward to working with our people and clients to ensure that the firm enjoys continued success."

David also paid tribute to his predecessor: "I would like to thank Matthew Cockram for his substantial contribution as Chairman over the last four years."

"He has led us successfully to our current leading position in the New Zealand and international marketplaces, and I wish him well in his new role as Chief Executive of Bluewater Group Holdings."



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### Bell Gully success in *Which Lawyer?* rankings

*Bell Gully received the highest possible ranking in four out of six areas of law in the recently published Which Lawyer? New Zealand Handbook 2005 - more top-place rankings than any other New Zealand law firm.*

The firm gained top tier rankings in M&A, dispute resolution, restructuring and insolvency, and labour and employee benefits.

In addition, Bell Gully had more top-ranked individual partners than any other New Zealand law firm - Brynn Gilbertson (M&A), David Flacks (M&A), Brian Latimour (dispute resolution) and Rob Towner (labour and employee benefits) were all named as "leading lawyers", the highest ranking available. In total, the firm had 16 lawyers ranked by the guide.

*Which Lawyer?* is published annually by London's Practical Law Company, and is compiled through independent research, client references and peer review.



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Regulator Report

#### **Employment**

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Dealing with employee fraud

Do the right thing

#### **Intellectual Property**

Intellectual Property Update

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Legal professional privilege and in-house counsel

International litigation issues - a New Zealand perspective

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Charities Bill reported back

Out with the old and in with the new

Tax changes for company migrations

Adopting NZ IFRS: Some Tax Consequences



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## Useful Web links

### New Zealand government

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

### New Zealand financial agencies and organisations

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

### New Zealand commercial sites

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

### Australian government sites

- [Banking Ombudsman \[www.abio.org.au\]](http://www.abio.org.au)
- [National Office for the Information Economy \[www.ogo.gov.au\]](http://www.ogo.gov.au)

### Australian commercial sites

- [Australian Financial Markets Association \[www.afma.com.au\]](http://www.afma.com.au)
- [Australian Securities and Investment Commission \[www.asic.gov.au\]](http://www.asic.gov.au)
- [Australian Stock Exchange \[www.asx.com.au\]](http://www.asx.com.au)

### International sites

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