



BELL GULLY

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Welcome to the Spring 2009 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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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.

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.

In the courts

Guarantees, priorities and rights of subrogation – a significant new case

A recent judgment of the High Court of Australia has significant implications for guarantors, mortgagees, and legal practitioners involved in mortgagee sales and the drafting of guarantees and priority documents.

Legislation/In Parliament

Review of the Credit Contracts and Consumer Finance Act underway

The Ministry of Consumer Affairs has announced a review of the Credit Contracts and Consumer Finance Act, which has now been in force for over four years with mixed results.

Anti-Money Laundering and Countering Financing of Terrorism Act passed

The Anti-Money Laundering and Countering Financing of Terrorism Act was assented to on 16 October and commenced, in part, on that date.

Simplified securities disclosure regime

A simplified disclosure prospectus regime has applied since 1 October.

Amendments to financial advisers regime

In response to concerns from industry, the Government is proposing amendments to the Financial Advisers Act and the Financial Service Providers (Registration and Dispute Resolution) Act.

Regime to improve quality of trustees' supervision

The Government has agreed to a new regime for corporate trustees and statutory supervisors who supervise debt issuers and some collective investment schemes.

Legal protection for New Zealand settlement systems

Legislation providing legal backing for settlement systems was passed on 17 November.

Insurance (Prudential Supervision) Bill

The Insurance (Prudential Supervision) Bill was introduced into Parliament on 29 October.

In the journals

Lord of the ratios

Commentary on the Reserve Bank of New Zealand's liquidity policy.

Octaviar: dead or just sleeping?

The Queensland Court of Appeal has overturned the Supreme Court's decision in *Octaviar*.

Recent developments

Credit card settlements lower New Zealand business costs

The Commerce Commission believes that its settlements with seven financial institutions will bring a new competitive landscape to the credit card industry in New Zealand.

Statutory framework for financial reporting – discussion document

The Ministry of Economic Development has released a discussion document proposing changes to the standards-setting infrastructure and discussing which entities should have financial reporting obligations.

Briefing on finance company failures

The Commerce Committee has published a report following its briefing on finance company failures.

Minimum standards of ethical behaviour and client care for authorised financial advisers

The Code Committee for Financial Advisers has proposed minimum standards of ethical behaviour and client care for authorised financial advisers.

In the courts

Guarantees, priorities and rights of subrogation – a significant new case

A recent judgment of the High Court of Australia has significant implications for guarantors, mortgagees, and legal practitioners involved in mortgagee sales and the drafting of guarantees and priority documents.

In particular, lenders will need to consider whether the 'no competition' language in their standard form guarantees is sufficient to prevent guarantors from claiming rights against debtors in competition with lenders.

[Click here](#) to read more.

Legislation/In Parliament

Review of the Credit Contracts and Consumer Finance Act underway

The Ministry of Consumer Affairs has announced a review of the Credit Contracts and Consumer Finance Act 2003 (CCCFA), which has now been in force for over four years with mixed results.

The Ministry has released a discussion document¹ highlighting certain issues with the CCCFA and making a number of significant proposals for reform.

The proposed changes are wide-ranging and significant. They include:

- preventing the use of all present and after-acquired security clauses by requiring itemised disclosure of any property over which a creditor has a security interest;
- additional disclosure requirements for prepayment fees;
- requirements for credit card issuers to disclose the cost to consumers of making only minimum repayments; and
- stipulating that third party fees may only be passed on by a creditor if the third party has an arm's length relationship with the creditor.

[Click here](#) for a summary of the key issues and proposals most relevant to lenders.

Anti-Money Laundering and Countering Financing of Terrorism Act passed

The Anti-Money Laundering and Countering Financing of Terrorism Act was assented to on 16 October and commenced, in part, on that date.

According to the Ministry of Justice, "this new law forms part of a legislative package that will implement the first phase of reforms to New Zealand's anti-money laundering and countering financing of terrorism (AML/CFT) regulatory regime...recognising that effective control of money laundering and crime that leads to it needs collaboration between the financial sector and government".

Justice Minister Simon Power said that "the Act will ensure that New Zealand's financial sector continues to be attractive to legitimate international investors, and is not seen as a safe haven for organised criminals and tax evaders".

A lead-in time allows financial service providers to ensure they have the necessary measures in place to comply with the new laws.

[Click here](#) to read Bell Gully's practical guide to the legislation.

¹ Available at www.consumeraffairs.govt.nz

Simplified securities disclosure regime

A simplified disclosure prospectus regime has applied since 1 October.

On 26 August Commerce Minister Simon Power confirmed that Cabinet has approved new securities regulations (the Securities Regulations 2009), which implement a range of recommendations made by the Capital Markets Development Taskforce, including implementation of the simplified disclosure prospectus regime.

[Click here](#) to read more.

Amendments to financial advisers regime

In response to concerns from industry, the Government is proposing amendments to the Financial Advisers Act and the Financial Service Providers (Registration and Dispute Resolution) Act.

Commerce Minister Simon Power says “the amendments intend to simplify the implementation of the Acts and reduce costs, while still encouraging public confidence in the industry and promoting sound and efficient delivery of financial advice”.

The proposed changes include:

- requiring a qualifying financial entity (QFE) to name individual contractors whose advice it will take responsibility for;
- allowing a QFE’s named contractors to provide financial adviser services on complex products without being individually licensed; and
- permitting employees and named contractors to provide financial adviser services for products for which the QFE is a promoter under the Securities Act.

Mr Power has also indicated his intention to change term life insurance, bonus bonds and call building society shares from category 1 to category 2 to allow easier public access to “simple, well understood financial products”.

The public will have an opportunity to contribute at select committee stage. Iain Southall, Private Secretary to Mr Power, has advised that they hope to get the amendments introduced and have a first reading before Christmas.

Regime to improve quality of trustees' supervision

The Government has agreed to a new regime for corporate trustees and statutory supervisors who supervise debt issuers and some collective investment schemes.

Commerce Minister Simon Power announced the new regime, which is intended to remove the automatic right for the six statutorily approved trustee corporations to supervise issuers of debt and some collective investment schemes, and will require trustees to be licensed by the Securities Commission.

The Commission will be empowered to tailor licences so that trustees have processes in place that are in proportion to the level of risk associated with the issuers they supervise.

Mr Power also reported that the regime will have additional measures to improve the quality of supervision provided by trustees, including:

- enhanced powers of enforcement against trustees who fail to comply with their duties;
- greater prescription around matters that must be addressed in trust deeds;
- mandatory reporting to the Securities Commission by trustees when issuers may be nearing default on securities; and
- giving the Commission the power to direct trustees to take action against issuers.

Legislation is expected to be ready for introduction into Parliament by the end of the year.

Legal protection for New Zealand settlement systems

Legislation providing legal backing for settlement systems was passed on 17 November 2009.

The Settlement Systems, Futures, and Emissions Units Bill was split into four bills at the Committee stage:

- Reserve Bank of New Zealand Amendment Bill;
- Securities Markets Amendment Bill;
- Personal Property Securities Amendment Bill; and
- Securities Amendment Bill.

At present, New Zealand law only provides for the designation of payment systems, which are used to settle cash. Under the new legislation, the designation regime will be extended to settlement systems more generally. Minor changes have also been made to align the regulatory environment for exchanges in both the securities and futures markets, and to support the development of the market for emissions units.

[Click here](#) to read the full press release.

Insurance (Prudential Supervision) Bill

The Insurance (Prudential Supervision) Bill was introduced into Parliament on 29 October 2009, following a period of consultation.

The bill establishes a licensing regime for insurers, and introduces prudential regulations that place strong reliance on self-discipline under the supervision of the Reserve Bank. The bill will replace existing outdated legislation and fill gaps where no prudential regulation currently exists. It will also remove inconsistent legislative application between different insurance sectors.

[Click here](#) to read more.

In the journals

Lord of the ratios

The Economist, 5 September 2009

Commentary on the Reserve Bank of New Zealand's liquidity policy.

The author discusses the "trio of specific funding ratios" introduced by the Reserve Bank of New Zealand, which locally incorporated banks will be required to meet within a couple of years. These are made up of "two 'mismatch' ratios designed to ensure banks have enough cash and liquid assets readily available if creditors suddenly come calling and a 'core funding ratio'". This requires that at least 75% of banks' total lending will have to be funded with "stickier" liabilities, such as retail deposits and wholesale borrowing maturing in more than a year. The desired effect is that depositors will be less likely to pull their money out because it is insured.

None of the big New Zealand banks currently meet the new threshold, but the author suggests that the new policy is not as tough as it seems because the banks' Australian parents have no comparable rule and can borrow cheaply in the Australian market and pass on the proceeds.

Octaviar: dead or just sleeping?

Diccon Loxton, Allens Arthur Robinson, Australian Banking and Finance Law Bulletin

The Queensland Court of Appeal¹ has overturned the Supreme Court's decision in Octaviar², commented on in the Autumn 2009 issue of *Financial Services Quarterly*.

The Supreme Court had determined that execution of a deed categorising a guarantee as a "Transaction Document" was a variation to the terms of the charge and should have been registered. The Court of Appeal reversed the Supreme Court's decision, finding that the deed was not a variation of the charge, or a new charge, and did not need to be registered.

In his article, Mr Loxton expressed his approval of the decision, but warned security takers to remain on the alert. Pending resolution of any further appeal, registration or otherwise of documents such as the one in question in this case "remains a question of balancing risk and expense".

¹ *Public Trustee of Queensland v Octaviar Ltd: Octaviar Administration Pty Ltd; and Fortress Credit Corporation (Australia) II Pty Ltd* [2009] QCA 282; BC 200908562

² *Octaviar Ltd, Re; Re Octaviar Administration Pty Ltd* [2009] QSC 37; (2009) ACSR 621

Recent developments

Credit card settlements lower New Zealand business costs

The Commerce Commission believes that its settlements with seven financial institutions will bring a new competitive landscape to the credit card industry in New Zealand.

The Commission expects retailers to benefit from significant new product offerings and lower interchange fees, with "savings to retailers over the next three years ... to be in the order of \$70 to \$80 million...and would expect to see this passed on to consumers over time through lower retail prices".

[Click here](#) to view public versions of each of the settlement agreements.

Statutory framework for financial reporting – discussion document

The Ministry of Economic Development has released a discussion document proposing changes to the standards-setting infrastructure and discussing which entities should have financial reporting obligations.

At the same time, the Accounting Standards Review Board released a companion document entitled *Proposed Application of Accounting and Assurance Standards under the Proposed New Statutory Framework for Financial Reporting*.

The main objective of the MED discussion document is "to create a financial reporting framework that is coherent, complete and consistent. There is also a need to balance the benefits of financial reporting against the compliance costs, to have a system that is as simple and clear as practicable and promote New Zealand-Australia financial reporting convergence".

[Click here](#) to read a copy of the MED's discussion document. The closing date for submissions is Friday 29 January 2010.

Briefing on finance company failures

The Commerce Committee has published a report following its briefing on finance company failures.

The Committee believes that a select committee inquiry into the issues associated with finance company failures is warranted, and terms of reference were drafted.

The closing date for written submissions on the terms of reference was 15 October.

[Click here](#) to download a pdf copy of the briefing.

Minimum standards of ethical behaviour and client care for authorised financial advisers

The Code Committee for Financial Advisers has proposed minimum standards of ethical behaviour and client care for authorised financial advisers.

The Committee has advised that standards will be developed by it in the light of submissions received, and through the process of preparing a draft Code that will be released for consultation early in 2010.

Submissions are due on Friday 18 December 2009.

[Click here](#) for a copy of the consultation paper.

Bell Gully news

[Bell Gully first New Zealand firm to be awarded full Asia Pacific top rankings](#)

Bell Gully has become the first New Zealand law firm to secure top tier rankings across all practice areas in a single year after the release of the latest Asia Pacific Legal 500 guide.

[Shear investment raises thousands in Shave for a Cure](#)

Support for New Zealanders with leukaemia and their families has been boosted with the raising of just over \$75,000 in the annual Bell Gully and PricewaterhouseCoopers Shave for a Cure event.

[Former PM has launched Bell Gully Women Leaders' series](#)

Former Prime Minister the Rt Hon Dame Jenny Shipley launched a Bell Gully initiative aimed at encouraging women into leadership.

Useful Web links

New Zealand Government

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

New Zealand financial agencies and organisations

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

New Zealand commercial sites

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

Australian Government sites

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

Australian commercial sites

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

International sites

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