

**BELL GULLY**

# Corporate Reporter

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**Welcome to** Issue No. 13 of Corporate Reporter, Bell Gully's regular round-up of corporate and general commercial matters, designed to keep you informed on regulatory developments, legislation and cases of interest.

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## **IN BRIEF**

Items in this issue include:

- The Financial Markets Conduct Bill;
- The Companies and Limited Partnerships Amendment Bill;
- FMA to issue guidance for issuers on alternative performance measures;
- Commerce Committee's report on finance company failures;
- Consultation on KiwiSaver Performance Fees Guidance Note;
- Changes to the Electricity Industry Participation Code;
- Bill introduced to deter hard-core cartel behaviour; and
- The latest media releases from the New Zealand Commerce Commission and the Australian Competition and Consumer Commission.

## COMMERCIAL

### In the courts

#### Partnership dissolution: when do partners' obligations end?

A recent Court of Appeal decision (*Clark v Libra Developments Ltd [2011] NZCA 493*), provides a useful guide to the general principles which apply to partners who do not have a formal agreement in place governing the dissolution of their partnership. In particular, the decision discusses the extent of the duty on former partners to complete partnership opportunities which exist at the time of dissolution under the Partnership Act 1908 and under their fiduciary obligations to each other.

#### Background

Mr Clark and Mr Hyslop (through a company owned by a trust controlled by Mr Hyslop) had been found to be in a partnership as property developers from 1997 to 2002. At the time the partnership was terminated by Mr Clark in October 2002 (in acrimonious circumstances) there were a number of property developments which the partnership was engaged or which were in prospect, including a possible contract to refurbish a building as a hotel (the **hotel project**). The appeal arose from a High Court judgment which determined a range of issues relating to the manner of calculation of the partnership's assets.

#### The appeal

One of the principal issues on appeal was whether the High Court had been correct in its finding that Mr Clark was obliged to complete (for the benefit of the partnership) the hotel project, and the consequential effects this finding had on the damages and other relief which Mr Hyslop was entitled to in respect of the project.

Mr Clark argued that there was no basis for the High Court's finding. He argued that his only obligation in respect of the hotel project was the obligation not to profit, for his benefit alone, from the opportunity the partnership had possessed at the time of dissolution.

#### The Court of Appeal's decision

The Court of Appeal noted that, in the absence of any relevant provisions in a partnership agreement or under a contractual obligation assumed by the partnership to a third party, any such obligation on Mr Clark (as a former partner) to complete the hotel project could only arise under section 41 of the Partnership Act or from any fiduciary duty on the part of Mr Clark.

#### *Section 41 of the Partnership Act (Continuing authority of partners for purposes of winding up)*

Section 41 of the Partnership Act provides authority for each partner to bind the firm "so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise...".

The court referred to previous decisions which have established that:

- the power or obligation to continue the firm's business after dissolution under section 41 is limited and extends only so far as is necessary to wind up its affairs and to complete "transactions" begun but unfinished at the time of dissolution;
- section 41 does not oblige partners to enter into new bargains or contracts, particularly if that would require incurring substantial expenditure or liabilities which did not exist at the date of dissolution; and

- section 41 does not require a partner to undertake fresh liabilities in order to preserve an asset of the partnership.

The Court of Appeal concluded that there was no obligation on the part of Mr Clark under section 41 to complete the hotel project for the benefit of the partnership for these reasons:

- Even though, as the High Court judge had found, the opportunity to undertake the refurbishment of the hotel building may have come to fruition if the partnership had not been dissolved, this opportunity was not an “asset” of the partnership to which section 41 was intended to apply as part of the winding up of the affairs of the partnership. It was only an opportunity.
- In this case no work had commenced on the hotel project and no contract to do so had been completed. A partner in a dissolved partnership is not obliged to undertake fresh and substantial liabilities in order to preserve partnership opportunities.

#### *The duty of good faith*

Having concluded that there were no obligations on the part of Mr Clark under the Partnership Act to proceed with the hotel project for the benefit of the partnership, the court went on to consider the nature of Mr Clark’s fiduciary obligations as a partner.

The court noted that “it is fundamental that partners owe a duty of good faith to each other and that this duty extends beyond dissolution of the partnership until the completion of the winding up”. The duty precludes a partner taking advantage of information, business connections or opportunities belonging to the partnership in order to secure private advantage or profit to the exclusion of the other partner or partners without their consent.

The duty of good faith also requires that former partners continue to act equitably towards each other in the winding up of the affairs of the partnership in a way which is fair to all concerned. However, the court did not believe that this duty extended to an obligation on Mr Clark to obtain and complete a contract to refurbish the hotel building for the benefit of the partnership. This, it said, would be inconsistent with the obligations of former partners under section 41 of the Partnership Act and, while acknowledging that equity and the general law may supplement the rights and duties imposed under that Act, the court considered it would be inappropriate to extend the operation of section 41 beyond its terms and intended purpose.

#### *The appropriate remedy*

The court concluded that although Mr Clark had not been in breach of his fiduciary obligations for not pursuing the partnership’s entitlement to the project, he could not take over for his sole benefit the opportunities and business connections the partnership possessed. As such, the appropriate remedy was to order Mr Clark to account to his former partner for any profit achieved by him which was properly attributable to his breach of fiduciary duty in appropriating the business opportunity of the partnership to himself.

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## Faxes are now included in anti-spam laws

Unsolicited commercial faxes now count as spam under the Unsolicited Electronic Messages Act 2007.

The schedule of the Unsolicited Electronic Messages Act was amended by the [Unsolicited Electronic Messages Order 2011](#) (with effect from 21 October) to remove ‘facsimiles’ from the list of exempt electronic messages. This means that an individual or company may no longer send a commercial fax, with a New Zealand link, to a recipient that has not consented to receiving the message.

For further details visit the Department of Internal Affairs website [here](#).

## COMPANY LAW

### Regulatory developments

#### Companies and Limited Partnerships Amendment Bill 2011 introduced

In the final days of the 49<sup>th</sup> Parliament, the outgoing Commerce Minister Hon Simon Power introduced the [Companies and Limited Partnerships Amendment Bill](#). This is an omnibus bill that covers a number of proposed reforms which were agreed by Cabinet and publicised earlier in the year, including:

- tightening requirements around company registration and company directors to assist protect New Zealand's company registration process against criminal activity from overseas jurisdictions (and applying similar measures for limited partnerships). See the article "**Proposed new measures to counter companies and limited partnerships being used for criminal activity overseas**" in this section for details;
- criminalising the breach of certain director's duties (which was part of the securities law reforms agreed to by Cabinet). See the article "**Proposal to criminalise directors' duties introduced to Parliament**" in this section for details; and
- prohibiting "code companies" (covered by the Takeovers Code) from long-form amalgamations under Part 13 of the Companies Act and providing more rigorous voting thresholds and additional judicial oversight for court-approved schemes of arrangement, amalgamation, or compromise under Part 15 of that Act. Further details of these amendments are discussed in the article "**New proposals for amalgamations and schemes of arrangement by "code" companies introduced**" in the Mergers and Acquisition section below.

The Ministry of Economic Development has indicated that it expects this Bill to have its first reading in early 2012 and to have the parliamentary process finished by the end of the year.

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#### Proposed new measures to counter companies and limited partnerships being used for criminal activity overseas

As noted in the previous item, the [Companies and Limited Partnerships Amendment Bill](#) introduces a number of measures to assist in the prevention of New Zealand companies and limited partnerships being used for criminal activity in overseas jurisdictions.

##### **New requirement for a resident agent**

###### *Resident agent requirement*

The Bill requires that all New Zealand registered companies must have a resident agent if they do not have a director who lives in either New Zealand or an "enforcement country". The enforcement countries are still to be named in regulations, but they will only include countries that can enforce New Zealand judgments imposing regulatory regime criminal fines.

The new provision will also apply to companies that are already registered, although existing companies will be given 6 months after the commencement of the new rules to comply with the requirement.

Companies (and their directors) who fail to comply with this new requirement will commit an offence and be liable on conviction to penalties. In addition, the Registrar of Companies has been given a power to remove the company from the companies register if the requirement is not met.

#### *Qualifying as a resident agent*

The resident agent must live in New Zealand, cannot be an auditor of the company, and must be a natural person. The qualifications of a resident director otherwise reflect the qualifications for a director, which specify that a person must not have been banned (in New Zealand or overseas) from being a director, general partner, resident agent, or promoter of a company or limited partnership and is not bankrupt.

#### *Role of the resident agent and extent of an agent's liability*

The resident agent's role is administrative, rather than that of a manager. Essentially, the agent will be required to ensure that the directors and the company comply with their respective statutory reporting and record-keeping obligations. Failure to do so will see the resident agent commit an offence and be liable on conviction to a fine.

Defences are given so that if the resident agent proves that all reasonable and proper steps were taken to ensure a requirement would be complied with, the resident agent will not be liable. In addition, the resident agent is not liable for the correctness of the content of any document relevant to the requirements.

As an incentive for a resident agent to resign if he or she becomes aware of the non-compliance by others, the new provisions provide that a resident agent is not liable in respect of acts, omissions, and decisions of other people that occur within 3 months before the resident agent resigns.

For the purposes of indemnity and insurance, a resident agent is to be treated as an employee under the Companies Act.

### **Limited Partnerships**

The Bill also makes amendments to the Limited Partnerships Act 2008 of a similar nature to the Companies Act amendments regarding the registered agent requirement – although with the necessary modifications to reflect the differences between a limited partnership and a company.

The amendments require a limited partnership to have a resident agent if the limited partnership does not have:

- a general partner who is a natural person living in New Zealand or in an enforcement country; or
- a general partner that is a partnership governed by the Partnership Act 1908 that has at least one partner who is a natural person living in New Zealand or in an enforcement country; or
- a general partner that is a company registered on the New Zealand register under the Companies Act. Such a company will be required by the changes to the Companies Act made by the Bill either to have a director who is resident in New Zealand or an enforcement country, or to have a resident agent.

The qualifications of a resident agent of a limited partnership are the same as for a resident agent of a company.

The Bill also takes the opportunity to address the fact that there are currently no legislated qualifications for general partners. General partners who are natural persons must meet qualification requirements equivalent to those set out in the Companies Act under a new section 19A(2) of the Limited Partnerships Act. General partners

that are partnerships governed by the Partnership Act 1908 are covered by new section 19B, which requires at least one partner of such a partnership to meet the qualifications set out in new section 19A(2).

### **Enhanced powers for the Registrar of Companies for both companies and limited partnerships**

In order to ensure the Registrar of Companies can take effective action where there are concerns that a company or limited partnership is not being used for legitimate business reasons, the Bill provides for enhancements to the Registrar's powers. These include:

- enhanced investigative and removal powers, along with the power to warn the public about suspect entities by a note in the relevant register; and
- the power to ban persons from being involved in the administration or management of entities.

### **Next steps**

We expect interested parties will be given an opportunity to make submissions on these new measures at the select committee stage, which is likely to be in early to mid 2012.

## **Proposal to criminalise directors' duties introduced to Parliament**

The [\*Companies and Limited Partnerships Amendment Bill\*](#) amends the Companies Act 1993 to introduce new offences in relation to serious breaches of two existing directors' duties.

The question of whether there is a case for criminalising directors' statutory duties first arose in the Ministry of Economic Development's [2010 "Securities Law Review" discussion paper](#) and was later approved by Cabinet as part of their policy decisions on securities law reforms. (See the [February 2011 Cabinet paper](#) and [May 2011 Cabinet paper](#) for details).

The impetus for this change largely arose from the aftermath of the recent finance company failures which raised concerns that regulators do not have appropriate powers to take action against directors for reckless or dishonest conduct or for the intentional breach of directors' duties.

The proposed new offences first appeared in the August 2011 exposure draft of the Financial Markets Conduct Bill. However, it was indicated in the exposure draft that they may be introduced in another bill.

The two new offences relate to serious breaches of the:

- the duty provided for in section 131 of the Companies Act (that is, the duty of directors to act in good faith and in the best interests of the company); and
- the duty provided for in section 135 of the Companies Act (that is, the duty of directors not to agree to, or cause or allow, company business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors).

The scope of the new offences is the same as that proposed by the Ministry of Economic Development in the exposure draft of the Financial Markets Conduct Bill. Both offences require actual knowledge for criminal liability. In the case of a breach of section 131, this requires knowledge that "the act or omission is seriously detrimental to the interests of the company". In the case of a breach of section 135, this requires knowledge that "the act or omission will result in serious loss to the company's creditors".

The penalty for both offences is imprisonment for a term not exceeding 5 years or a fine not exceeding \$200,000.

## MERGERS AND ACQUISITIONS

### Regulatory developments

#### New proposals for amalgamations and schemes of arrangement by “code” companies introduced

Last year, the Minister of Commerce announced that the parts of the Companies Act relating to schemes of arrangement and amalgamations for companies subject to the Takeovers Code (**code companies**) would be amended to better align them with the Takeovers Code regime. These amendments have been incorporated as part of the omnibus [Companies and Limited Partnerships Amendment Bill](#) introduced last month.

In the past, the Takeovers Panel has expressed its concern about the use of amalgamations and schemes of arrangements under the Companies Act as an alternative to a takeover offer made under the Takeovers Code. It has been pressing for legislative reform to address that concern since 2006 and the Panel has engaged in a number of public consultations on the issue. The Bill adopts the recommendations made by the Takeovers Panel to the Labour Government in 2008.

#### The proposed changes

The Bill makes the following changes to the Companies Act:

- **Part 13 amalgamations prohibited:** The use of long-form amalgamations under Part 13 of the Act will be prohibited where an amalgamating company is a code company. Short-form amalgamations (i.e. for intra-group reorganisations) will still be permitted.
- **Court process to be more aligned with Takeovers Code requirements:** The court must only approve a scheme that would have any effect on the voting rights of shareholders in a code company if:
  - the court is satisfied that the shareholders of that code company would not be adversely affected by the transaction not being undertaken under the Takeovers Code; or
  - the applicant has filed a “no-objection” statement from the Takeovers Panel. The Panel has indicated that the criteria for issuing a “no-objection” statement will include a requirement, among other things, that an independent adviser’s report has been provided to shareholders.

The court will retain its discretion to not approve a scheme even if a “no objection” statement is provided by the Takeovers Panel.
- **Codification of interest class tests:** Legislative guidance (in the form of a new schedule to the Act) has been given for determining interest classes for the purposes of voting on a resolution to approve a scheme of arrangement. This codifies current common law principles.
- **Two limb voting test (75% approval by each interest class and approval by 50% of the total eligible voting rights):** Shareholders may only approve a scheme by:
  - a resolution approved by a majority of 75% of the votes of the shareholders in each interest class entitled to vote and voting on the question; and
  - a resolution approved by a simple majority of the votes of those shareholders entitled to vote (i.e., not just 50% by number of those voting on the resolution). This second limb applies on an overall basis rather than by each interest class separately.
- **Exemption from Takeovers Code for Court approved schemes:** If the Court approves the scheme, then the code company would be exempt from the application of the Takeovers Code.

Consequential amendments will also be made to the Takeovers Act 1993 to provide for the Takeovers Panel's new function of considering whether to provide statements of no objection under the Companies Act.

#### Timing and next steps

As noted above, the Companies and Limited Partnerships Amendment Bill is likely to pass its first reading and be sent to the Commerce Select Committee early next year. Given the significance of these changes for code companies, we expect interested parties will be given an opportunity to make submissions on the legislation at the select committee stage.

## Takeovers Code (Class Exemptions) Notice (No 2) 2001

The Takeovers Code (Class Exemptions) Notice (No 2) 2001 was amended by the [Takeovers Code \(Class Exemptions\) Notice \(No 2\) 2001 Amendment Notice \(No 2\) 2011](#) with effect from 4 November 2011 to correct a drafting error in Schedule 2 of the notice.

An updated version of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 is available [here](#).

## CAPITAL MARKETS

### Regulatory developments

#### Still opportunities for further input on the Financial Markets Conduct Bill

Last month, the Commerce Minister Hon Simon Power introduced the [Financial Markets Conduct Bill 2011](#) (**FMC Bill**) which, as noted in the explanatory note to the Bill, is intended to provide "an enduring financial market conduct regulatory regime that promotes confident and informed participation in New Zealand's financial markets."

The FMC Bill has grown in length by 160 pages from the 400 page exposure draft of the bill released in August (for details on the exposure draft, see our earlier update [here](#)) and includes a number of recommendations made by the 73 submitters on the exposure draft as well as the transitional provisions (in Part 9) and consequential amendments (in Schedule 4) which were not part of the exposure draft.

#### Scope of the FMC Bill

In brief, the FMC Bill:

- regulates the offer of financial products for issue (and some offers for sale);
- provides general prohibitions on misleading and deceptive conduct to apply to financial markets;
- makes wide-ranging changes to the governance of financial products and services. These include additional requirements for specific types of managed investment schemes;
- regulates financial product markets and activity on them; and
- makes changes to the liability regime for contraventions of securities law.

The FMC Bill will replace the Securities Act 1978, the Securities Markets Act 1988, the Securities Transfer Act 1991, the Unit Trusts Act 1960, the Superannuation Schemes Act 1989, and parts of the KiwiSaver Act 2006.

However, much of this legislation will continue to apply for a period after the commencement of the FMC Bill under transitional provisions set out in Part 9 of the Bill.

### **You can still have your say on the FMC Bill**

There are still opportunities to influence the final provisions of the FMC Bill and accompanying regulations (which will contain much of the technical detail for the new regime).

The Ministry of Economic Development (**MED**) has announced that it intends to follow a similar process to the development of the FMC Bill for the regulations. Following informal discussions with market participants it intends to release a discussion document on the regulations in mid-2012. This will be followed by the release of an exposure draft of the regulations with a view to finalising regulations by mid-2013.

There will also be an opportunity to make submissions on the FMC Bill during the select committee process. If the previous Government's timeline is kept, this is likely to be in the first quarter of 2012 with a view to the Bill being passed by late 2012 or early 2013.

### **Reviewing the FMC Bill**

To assist with the review of the FMC Bill, the MED has collated a table of the [submissions](#) it received on the exposure draft of the FMC Bill. This table is available on the MED's website [here](#). The table includes brief MED comments indicating where a change to the exposure draft has or has not been made in response to the submissions or where further consideration is required.

The MED has also released an [unofficial compare version](#) of the FMC Bill which shows changes between the exposure draft and the introduction version.

Read together, these documents show the changes made to the exposure draft of the FMC Bill in response to submissions and all other changes that have been made. For further background material released by the MED on the FMC Bill and its review of New Zealand's securities legislation [click here](#).

### **The new product disclosure statements**

Under the FMC Bill the requirement for issuers to prepare a prospectus and investment statement will be replaced with a requirement to prepare a single product disclosure statement (**PDS**) tailored to retail investors. All the detail relating to the form and content of the PDS will be set out in regulations, which will be developed over the next 12 months.

The FMC Bill gives some guidance regarding the style of a PDS by requiring that an issuer must ensure that information in the PDS is "worded and presented in a clear, concise and effective manner". This requirement is taken from the Australian Corporations Act. In addition, the [February 2011 Cabinet paper](#) and public statements by the MED indicate that a PDS will be tailored to fit specific financial products and will be heavily prescribed for mainstream products in order to promote comparability.

For the most part, this follows the approach taken to the development of product disclosure statements in Australia, which is progressively working through the products to produce tailored documents. Last year Australia introduced tailored PDS regimes for margin loans, superannuation products and simple managed investment products under the [Corporations Amendment Regulations 2010 \(No 5\)](#).

Two recent regulatory guides released by Australia's regulatory body for financial markets (ASIC) are also likely to be of interest to the development of New Zealand's regulations. In October, ASIC updated its policy guide on preparing PDSs (see [Regulatory Guide 168 Disclosure: Product Disclosure Statements \(and other disclosure obligations\)](#)) and issued a new guide to assist issuers and their advisers in producing "clear, concise and

effective” disclosure (a concept which, as noted above, has been adopted in the FMC Bill) – see [Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors](#).

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## Commerce Committee’s report on finance company failures released

In October, the Commerce Select Committee released their long awaited report on their inquiry into finance company failures during the global financial crisis and its aftermath.

The inquiry, which was initiated in August 2009 in response to concerns for investors, in part has been superseded by a number of legislative developments. In 2008 prudential regulation of non-bank deposit takers by the Reserve Bank of New Zealand was introduced, as well as new licensing and dispute resolution regimes for financial advisers. These measures were followed in 2010 and 2011 by new licensing and supervision regimes for trustees and auditors, and the establishment of a new consolidated regulator for the finance sector, the Financial Markets Authority (**FMA**). These developments are acknowledged by the committee in the report, which includes a detailed outline of the regulatory measures that have been taken to address the underlying causes of the finance company failures listed in Appendix C to the Report. In particular the committee highlights the following achievements:

- Finance companies’ governance rules have been strengthened. They must now have independent directors and minimum levels of capital and liquidity, and must limit their exposure to related parties.
- Financial advisers are now subject to stricter training, registration, and conduct standards, and must belong to approved dispute resolution schemes.
- Regulatory lines of responsibility have been clarified, and the FMA established as a new consolidated regulator with robust powers (including the power to undertake civil actions on behalf of investors when this is in the public interest) and funding.
- Trustees and auditors are now subject to stronger accountability requirements.
- Disclosure is being standardised and made subject to auditing.

The report also notes that measures proposed in the exposure draft of the Financial Markets Conduct Bill (which has since been introduced to Parliament) will go some way to addressing many of the issues raised in relation to investors’ information about investment proposals. This includes:

- introducing a requirement based on the principle that an advertisement of investment products must not contain any matter likely to deceive, mislead or confuse and giving the FMA jurisdiction over all breaches;
- refining the disclosure requirements for offers of financial products, while recognising a need for balance to ensure the compliance burden on issuers does not stifle business development;
- providing different forms of product disclosure statement for different types of investment products; and
- providing the FMA with the power to issue “frameworks” and “methodologies” regarding the way information to be made publicly available is presented. The committee hopes that this new power will be used to establish a framework for companies’ presentation of their profitability results.

The committee also emphasises in the report that it considers it vital that investors be helped to compare investment options using a standardised set of information, which is audited and kept up-to-date. In this regard the report cautions that regulations prescribing the content of a product disclosure statement will need to ensure that information is readily understandable and meshes appropriately with the requirements of the Reserve Bank’s non-bank deposit takers regime. The report also notes that care will be needed in designing the new online securities offer register so that its format is accessible to investors, while providing detailed information for those who want it.

The committee recommends several further improvements, which include:

- investigating the possibility of banning conflicted remuneration structures for financial advisers;
- introducing legislation to allow class actions;
- ensuring that resources are available to regulators to ensure that enforcement is both timely and effective;
- stating the duties to be imposed on directors “clearly and forcefully in legislation, according to the principles set out in the [February 2011 Cabinet paper](#)” and
- accelerating work on means of penetrating trusts to recover assets for creditors.

However, their strongest recommendation is that serious efforts be made to improve ordinary New Zealanders’ understanding of financial issues.

To read the full report [click here](#).

## Financial Markets Authority (the FMA)

### FMA signals its intention to provide guidance on the use of alternative performance measures for issuers

The FMA has announced that it will release a draft regulatory guide for public consultation in 2012 on the use of alternative performance measures (such as “underlying profit” or “normalised profit”) by financial market issuers in public communications.

This follows on from concerns that financial information prepared and presented other than in accordance with accounting standards (non-conforming financial information, or **NCFI**) has the potential to be misleading and can also lead to inaccurate comparisons of performance in different entities.

The types of public communications which have commonly contained NCFI (in recent times) include:

- annual reports;
- documents accompanying annual reports (e.g. market announcements and presentations to investors); and
- transaction documents, such as prospectuses.

#### Key proposals for the guide

The FMA has indicated that some of the key proposals will include:

- NCFI should not be given undue prominence, emphasis or authority when compared with financial information prepared in accordance with accounting standards;
- Restrictions on the use of NCFI on the face of the financial statements;
- A reconciliation between NCFI and statutory information must be presented along with an explanation for each material adjustment. In addition an explanation on why such NCFI is presented should also be included along with details of its calculation;
- A consistent approach from period to period should be adopted in calculating NCFI and, where there are changes, an explanation and reconciliation should be provided;
- Adjustments made to information prepared in accordance with accounting standards should be unbiased, and should not merely remove “bad news”;
- Entities should disclose if the NCFI has been audited or reviewed;
- NCFI should be clearly identified as non-conforming;

### ASIC guide on NCFI

The Australian Securities and Investments Commission (**ASIC**) released a draft regulatory guide in relation to NCFI (*CP 150 Disclosing financial information other than in accordance with accounting standard*) for consultation earlier this year and ASIC is currently in the process of finalising this guide. The FMA has stated that it will closely consider ASIC's regulatory guide in developing appropriate and relevant guidance for the New Zealand Market.

### Preliminary consultation

Initial discussions with market participants have already commenced, and the FMA is encouraging those with an interest in financial reporting to join the debate.

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

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## Consultation on KiwiSaver Performance Fees Guidance Note

In response to a number of enquiries regarding the reasonableness of performance-based fees charged by investment managers of KiwiSaver schemes, the FMA has prepared a [draft guidance note](#) and released it for consultation prior to finalising the note for publication.

The guidance note is designed to provide Managers and Trustees of KiwiSaver schemes with a basis on which they can determine whether any performance fees that are proposed to be charged, or are charged, either directly or indirectly, to a member's investment in the scheme can be considered "not unreasonable". This builds on [Guidance Note KSGN2](#) issued in March 2008 by the Government Actuary.

Submissions on the guidance note close on 2 December 2011. For further details visit the FMA's website [here](#).

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## FMA consults on auditor licensing and audit firm registration

The FMA is consulting with the auditing profession and other interested parties on the implementation of the Auditor Regulation Act 2011, which comes into force on 1 July 2012. The Act applies only to audits of issuers of securities and other entities who are required to file publicly financial statements under the Financial Reporting Act 1993.

The first of a series of consultation papers is available [here](#). This paper covers FMA's proposed:

- minimum standards for licensing that a person must meet in order to be issued with a licence to perform issuer audits;
- the kinds of conditions to which such licences must, and may, be subject;
- minimum standards an audit firm must meet in order to be registered; and
- criteria which must be met in order for individuals and firms to be eligible for the transitional arrangements of the Act.

The final date for submissions on this paper is 16 December 2011.

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## Roadmap for markets regulation: Oliver Wyman stakeholder report

The FMA has published on its website a [report](#) written by management consultants Oliver Wyman detailing the findings of local stakeholder research. The research was conducted at the point the FMA was established earlier in 2011. The report outlines stakeholder priorities, sets out key strategic priorities for the FMA and highlights challenges to implementation. FMA Chief Executive Sean Hughes said "This report serves as a roadmap for us and has formed the basis of our thinking for the recently released Statement of Intent."

To read the FMA's Statement of Intent [click here](#).

## ENERGY AND RESOURCES

### Electricity and gas sector developments

#### National Code of Practice for Utility Operators' Access to Transport Corridors

On 10 November 2011, the Minister for Infrastructure approved the [National Code of Practice for Utility Operators' Access to Transport Corridors](#) (the **Code**), as required under the Utilities Access Act 2010 (the **Act**). Compliance with the Code will be mandatory from 1 January 2012.

##### Summary of the Code

The Code is an industry-led initiative that provides a framework for corridor managers and utility operators to exercise and manage their respective rights and obligations in respect of transport corridors (road and rail). Utility operators are defined to include electricity, gas, and telecommunications network operators.

The Code recognises the rights of utility operators under the following legislation:

- the Electricity Act 1992;
- the Gas Act 1992;
- the Telecommunications Act 1987;
- the Local Government Act 2002; and
- the Postal Services Act 1998.

However, the Code is not intended to change the operation of this legislation, but rather to provide a set of guiding principles for corridor managers and utility operators. It achieves this by clarifying the relationship between the various legal regimes and standardising the processes, procedures and conditions for access to transport corridors.

The Code sets out the processes and procedures (including standard forms and templates) for:

- utility operators to exercise their rights of access to the road corridor for the placement, maintenance, improvement and removal of utility structures;
- corridor managers to exercise their right to apply reasonable conditions in relation to such works undertaken in the road corridor; and
- managers of railway and motorway corridors to exercise their discretion to grant rights of access to utility operators.

## Limitations

The Code notes that electricity lines carrying voltages in excess of 110kV and 100MVA capacity, or gas lines with pressures greater than 2000kPa, do not have direct legal rights of access to the road corridor. However, it is expected that the relevant parties will comply with the procedures outlined in the Code in respect of such installations.

## Effect of the Code

The Act requires utility operators and corridor managers to co-ordinate work done in transport corridors by complying with the processes and procedures set out in the Code, except to the extent that the Code is inconsistent with any applicable legislation, or where all parties agree not to comply with the Code.

A utility operator or corridor manager can be ordered by the court to comply with the Code. Failure to comply with such an order is an offence, liable on summary conviction to a fine of up to \$200,000.

## Changes to the Electricity Industry Participation Code

The Electricity Authority has provided its Report to the Government about the various matters set out in section 42 of the Electricity Industry Act 2010 which the Authority was required to address during the year. The Report can be accessed [here](#).

The Report indicates that a number of the matters have been addressed by way of changes to the [Electricity Industry Participation Code 2010](#) (**Code**, see new Part 12A). These matters are:

- **Negotiation of Use of System Agreements**

Distributors and retailers are to negotiate the terms of their use of system agreements (including any amendments) in good faith.

If either party believes that it is unlikely to agree the terms of a use of system agreement with the other party then it may give notice to the other party requiring it to enter into mediation.

- **Prudential Requirements**

If a distributor is involved in a retailer interposed relationship with consumers, then the relevant use of system agreement must provide that the retailer can elect to comply with the distributor's prudential requirements by:

- having a minimum Standard and Poors Rating Group BBB- credit rating (or equivalent) and not subject to a negative credit watch (**option 1**); or
- providing a cash payment equal to two weeks worth of line charges or security by an appropriate third party or a combination of these (**option 2**). The cash deposit is to be held in a trust account in the name of the retailer and interest earned is to be paid net of any account fees and withholdings to the retailer on a quarterly basis.

If the retailer decides to provide security in the form contemplated in option 2, the distributor may determine whether the retailer is to provide additional security of the type provided in the Code for up to two months worth of line charges in total. Additional interest is payable by the distributor to the retailer on any amount of additional security above the two weeks' estimate of line charges.

- **Consumer Guarantees Act Indemnity**

Unless otherwise agreed between the parties, each use of system agreement between a distributor and a retailer must include, or is deemed to include, a prescribed form of indemnity in favour of the retailer in respect of liability under the Consumer Guarantees Act 1993 for breaches of acceptable quality of supply, where those breaches were caused by an event or conditions on the distributor's network.

- **Changes to Tariff Structure**

If a distributor involved in a retailer interposed relationship with consumers for the purposes of sending accounts to consumers, wishes to make a change to its tariff structure that will materially affect the retailer or the consumers it must consult with that retailer about the change.

- **Electricity Information Exchange Protocol (EIEP 12) and Standard Tariff Codes**

Distributors and retailers are required to comply with this Protocol when exchanging tariff rate information. Standard tariff codes are to be used.

**When do the changes come into force?**

With the exception of the following matters the changes to the Code come into force on 1 December 2011:

- the provisions dealing with the changes to tariff rates and the exchange of information (using EIEP12) will apply from 1 July 2013;
- the provisions dealing with a change of tariff structures do not apply to a change made by a distributor before 1 May 2012;
- the requirement dealing with the negotiation of amendments to existing use of system agreements (i.e., agreements in force before 1 December 2011) will apply from 1 July 2013; and
- the provisions dealing with prudentials will apply from 1 May 2012 in relation to the existing use of system agreements (i.e., agreements in force before 1 December 2011).

The Electricity Authority intends to monitor distributors' compliance with the new Code provisions with the first report to the Electricity Authority's Board being made on 1 May 2013 and annually thereafter.

**Model Use of System Agreements**

The Electricity Authority intends to review and finalise the existing model Use of System Agreements for both the retailer interposed and conveyance only situations and release the model documents in early 2012. These model agreements are intended to provide standard best practice terms and conditions for use of system agreements. However, their use will not be mandatory.

## COMPETITION AND CONSUMER LAW

### Regulatory Updates

#### Bill introduced to deter hard-core cartel behaviour

After consultation last year and again this June, the *Commerce (Cartels and Other Matters) Amendment Bill* (the **Cartel Bill**) was introduced to Parliament on 13 October. The Bill introduces criminal sanctions for hard-core cartel behaviour and makes a number of other amendments to the Commerce Act (including to the provisions that govern jurisdiction and penalties).

The Cartel Bill was accompanied by the release of a *Cabinet Paper* on the *exposure draft of the Commerce (Cartels and Other Matters) Amendment Bill* (see our previous article *Draft bill to criminalise "cartel" behaviour* for details) which reports back on the recent public consultation on the exposure draft of the Cartel Bill and outlines the Commerce Minister's final policy recommendations for the introduction of the Cartel Bill.

The Ministry of Economic Development received sixteen written submissions on the exposure draft (Bell Gully's submission is available [here](#)) and held a number of workshops with competition law specialists, corporate counsel, economists and other business representatives.

The key substantive changes to the exposure draft bill arising out of the consultation process include:

#### ***Design of the prohibition and exemptions***

- the repeal of the prohibition on exclusive dealing/collective boycotts (in section 29) on the basis that such prohibited conduct is now also covered by a new cartel prohibition (in section 30) and retaining section 29 would create uncertainty and undue expense for parties to proceedings under the Act;
- an exemption for vertical supply arrangements where the cartel provision does not have the dominant purpose of lessening competition between any parties to the arrangement. This is in recognition that such arrangements are commercially common place and generally enhance consumer welfare;
- the repeal of the *per se* prohibition in relation to covenants in favour of relying on the substantive competition provision in section 28;

#### ***The criminal offence***

- raising the mental element for the criminal offence from requiring knowledge to requiring intention to fix prices, allocate markets, restrict output or rig bids. This recommendation was made on the basis that requiring intention ensures that civil and criminal liability are better differentiated;

#### ***Other matters***

- delaying the enforcement of criminal sanctions for two years from the date of commencement of the Act to ensure that the benefits of criminalisation are realised and the costs are mitigated;
- extending the jurisdiction of the Commerce Act to include, as contraventions, activities that only partially occur in New Zealand. Cabinet considered that the jurisdictional rules applying to criminal conspiracies should apply to the cartel offence;
- amending the penalties for obstruction to reflect similar penalties in other New Zealand business law statutes, raising the penalty for individuals to \$100,000 and to \$300,000 in any other case.

- clarifying the turnover limb of the current sanctions by explicitly linking it to turnover in the accounting periods that the offending took place.

It is worthwhile noting that Cabinet also agreed that the fee associated with seeking clearance, for both M&A and collaborative activities clearances, would be raised from \$2,000 (excl GST) to \$7,000 (excl GST).

For additional Bell Gully commentary on the new criminal regime introduced by the Cartel Bill [click here](#).

## New Zealand Commerce Commission (NZCC)

### Speeches

The NZCC has issued the following speeches:

#### **Moderator's Speaking Notes for the Mini-Plenary Session: Regional Co-operation, ICN Cartel Workshop 2011, Bruges, Belgium**

On 11 October 2011 Mary-Anne Borrowdale, General Counsel Competition Branch, presented a speech on co-operation between cartel enforcement agencies. She based the speech on the phrase "to assist and be assisted" which features in the Commerce Commission (International Co-operation and Fees) Bill 2008.

[Click here for more](#)

#### **Speech to the International Telecommunications Union (ITU) Asia-Pacific Regulator's Roundtable, Melbourne, Australia**

On 7 November 2011 Dr Ross Patterson, Telecommunications Commissioner, presented a speech which summarised the different regulatory models implemented in New Zealand over the past 21 years and set out the current regulatory issues New Zealand faces.

[Click here for more](#)

### Media releases

The NZCC has issued the following media releases:

#### **Industry regulation and regulatory control**

##### **Commission issues consultation paper on UFB information disclosure requirements**

The NZCC has issued a consultation paper on Information Disclosure requirements for companies who will be building fibre networks as part of the Government's ultra-fast broadband initiative. The companies are Enable Networks, Ultrafast Broadband Limited, North Power Fibre and Chorus Limited.

[Click here for more](#)

##### **Commerce Commission progresses default price-quality paths for gas pipeline services**

The NZCC announced it is seeking feedback on its draft decisions on the first default price-quality paths for gas pipeline services regulated under Part 4 of the Commerce Act 1986. The NZCC proposes the initial gas price-quality paths should apply from 1 July 2012, and be set by 'rolling over' existing prices.

[Click here for more](#)

##### **NZCC to appeal input methodology decision**

The NZCC has announced that it will appeal the recent High Court decision which held that the NZCC should have determined further input methodologies before seeking to reset starting prices for certain electricity distribution businesses (EDBs). The High Court decision has resulted in a delay to the proposed mid-period price reset of the default price-quality path for EDBs that would have been effective from 1 April 2012.

[Click here for more](#)

**Commerce Commission review shows improvement in electricity asset management planning**

The NZCC has released a review of asset management plans disclosed by the EDBs for the period beginning 1 April 2011. The review assessed the three disclosure areas identified in the 2009 review as having relatively weak compliance: service levels, network development planning, and expenditure forecasts, reconciliations and assumptions.

[Click here for more](#)

**Commerce Commission sets revenues for Transpower for the three years from mid-2012**

The NZCC has announced the forecast maximum revenues that Transpower is able to earn for the three year period from April 2012. The revenues determine the total amount Transpower can charge its customers, namely power companies and large electricity users. Overall, the figures announced are significantly higher than previous years with the 2012/13 revenue allowance being 21.7% higher than the current revenue allowance.

[Click here for more](#)

**Mergers and acquisitions****Statement of Preliminary Issues and timetable for Fonterra's authorisation application**

The NZCC has published a statement of preliminary issues relating to an application received from Fonterra Co-operative Group Limited seeking authorisation. Fonterra has formed a limited partnership with Silver Fern Farms Limited to create Kotahi Logistics with the intent to coordinate freight services.

[Click here for more](#)

**Statement of preliminary issues for Pact Group's application to acquire the plastic pails business of Viscount Plastics**

The NZCC has published a statement of preliminary issues relating to the application made by Pact Group seeking clearance to acquire the plastic pails business of Viscount Plastics. Both Pact Group and Viscount Plastics supply plastic packaging products in Australia and New Zealand, including plastic paint and food pails.

[Click here for more](#)

**Market behaviour****Commerce Commission reaches settlement over collusion in refrigerator compressor industry**

The NZCC has agreed to a settlement with Empresa Brasileira de Compressores S.A, a major manufacturer of refrigerator compressors, following an investigation into cartel conduct. The NZCC began investigating the cartel in 2009 following information received from an informant who was granted immunity under the NZCC's cartel leniency policy.

[Click here for more](#)

**Go ahead for Commerce Commission freight forwarding cartel case against Kuehne+Nagel**

The High Court has given the NZCC the go ahead to proceed to trial against Kuehne+Nagel International AG in relation to the NZCC's ongoing freight forwarding cartel case. Kuehne+Nagel is the remaining defendant to a case brought by the NZCC last year against six international freight forwarding companies for breaches of the Commerce Act. All of the other defendants have since settled with the NZCC, and the High Court has ordered penalties totalling \$8.85 million.

[Click here for more](#)

**Telecommunications****Telecom pays \$31.6 million in compensation in settlement of sub-loop extension discrimination claim**

The NZCC has reached a \$31.6 million settlement with Telecom over alleged discrimination under the Telecom Separation Undertakings. The settlement follows a decision by the NZCC in May to issue legal proceedings alleging that Telecom had discriminated against other telecommunications companies in breach of the

Undertakings by failing to provide them with unbundled bitstream access in conjunction with the sub-loop extension service when Telecom was providing an equivalent service to its own retail business.

[Click here for more](#)

#### **Commerce Commission publishes three decisions that implement Telco Act amendments**

The NZCC has released three decisions which follow recent amendments to the Telecommunications Act. The amendments required the NZCC to review some of the current standard terms determinations (STDs) ahead of the structural separation of Telecom into Chorus and Telecom Retail.

[Click here for more](#)

### **Consumer issues**

#### **Poor lending practices cost Auckland finance company over \$55,000**

eFeMCee Finance Limited (**FMC**) and its director, Albert Loots, each pleaded guilty to 40 charges under the Credit Contracts and Consumer Finance and Fair Trading Acts following a NZCC investigation into the company's lending practices. FMC admitted charging unreasonable fees and misleading customers, and has refunded borrowers over \$39,600 and written off loan balances.

[Click here for more](#)

#### **Telecom refunds customers after inaccurate broadband meter readings**

Telecom has admitted breaching the Fair Trading Act after misleading some customers about the amount of broadband data they used. Telecom said the inaccurate readings for approximately 97,000 customer accounts between November 2010 and June 2011 were due to a software fault in broadband data usage meters.

[Click here for more](#)

#### **Commerce Commission settles timber claim against Carter Holt Harvey**

The NZCC has agreed to a settlement with Carter Holt Harvey Limited (**CHH**) which ends civil proceedings brought by the NZCC under the Fair Trading Act. As a result of the settlement of the case CHH will make a voluntary ex-gratia payment of \$1.5 million to a project relating to the restoration and rebuilding of Christchurch following the earthquakes. Based on advice from industry experts, the Commission said it has no reason to believe the Laserframe timber posed any safety concerns and CHH made no admission that any person suffered loss or damage from the sale of Laserframe timber.

[Click here for more](#)

#### **Second phone card company fined for misleading marketing**

Compass Communications Limited pleaded guilty to five charges of breaching the Fair Trading Act through its marketing of five prepaid phone cards between 1 November 2008 and 30 June 2009, earning the company a fine of \$140,000.

[Click here for more](#)

#### **Vodafone fined almost \$82K for misleading mobile phone \$1 a day customers**

Vodafone New Zealand Limited was fined \$81,900 in the Auckland District Court after being found guilty of breaching the Fair Trading Act in relation to its \$1 a day mobile phone internet data charges.

[Click here for more](#)

## Australian Competition and Consumer Commission (ACCC)

### Selected ACCC media releases

The ACCC has issued the following media releases:

#### Mergers and acquisitions

##### **ACCC not to oppose SABMiller's acquisition of Foster's Group**

The ACCC will not oppose the proposed acquisition of Foster's Group by SABMiller plc, after concluding that the acquisition is not likely to substantially lessen competition in the Australian market for the supply of bulk and packaged beer.

[Click here for more](#)

##### **ACCC not to oppose acquisition of Count Financial Limited**

The ACCC will not oppose the proposed acquisition of Count Financial Limited by the Commonwealth Bank of Australia. The ACCC concluded that the acquisition would not raise significant competition concerns in either of the supply of life insurance or superannuation product sectors.

[Click here for more](#)

#### Market behaviour

##### **ACCC authorises Qantas and American Airlines Joint Business Agreement (JBA)**

The ACCC has granted authorisation for a JBA between Qantas and American Airlines. The airlines will coordinate operations on services between Australia/New Zealand and the United States and on their respective services which support these trans-Pacific routes.

[Click here for more](#)

##### **ACCC proposes to authorise alliance between Virgin Australia and Singapore Airlines**

The ACCC has issued a draft decision proposing to grant authorisation for Virgin Australia and Singapore Airlines to enter into an integrated network aviation alliance. Under the alliance, the airlines will cooperate on all aspects of their Australia – Singapore services and any international and domestic connecting routes, including joint pricing and scheduling, and joint marketing and sales.

[Click here for more](#)

##### **Court penalises Queensland construction companies for controlling tender prices**

The Federal Court in Brisbane has imposed penalties against three Queensland-based construction companies for engaging in illegal price controlling conduct known in the construction industry as cover pricing. The conduct related to tenders for one Local Government and three State Government construction projects in Queensland.

[Click here for more](#)

##### **Korean Air Lines penalised \$5.5 million for price fixing cartel**

Korean Air Lines is the eighth international airline to settle proceedings against it and this penalty, combined with those already ordered against other airlines, brings the total ordered in Australia against these cartel participants to \$52 million.

[Click here for more](#)

#### Consumer issues

##### **ACCC appeals Google decision**

The ACCC has filed an appeal against the recent decision of the Federal Court in relation to certain advertisements appearing on Google's website. The ACCC alleges that Google engaged in misleading or

deceptive conduct by publishing advertisements on Google's search results page where a headline of the advertisement comprised a business name, product name or web address of a business not sponsored, affiliated or associated with the advertiser.

[Click here for more](#)

#### **Wicked Campers pays infringement notices**

Juicy Love Pty Ltd trading as Wicked Campers has paid four infringement notices totalling \$26,400 to the ACCC for advertising which was misleading about the price of hiring its campervans between February and August 2011. The ACCC considered that these advertisements and representations failed to specify the single total price payable for the campervans and failed to adequately disclose certain mandatory fees and charges.

[Click here for more](#)

## BELL GULLY CLIENT UPDATES

### Further commentary

In addition to the Corporate Reporter, Bell Gully also produces one-off client updates on corporate matters of particular significance. During the period covered by this issue of the Corporate Reporter we have published the following client updates:

- **Employer acted reasonably in refusing union access**  
New provisions in section 20A of the Employment Relations Act 2000 requiring a union to request and obtain consent before entering a workplace, have received support from employers but widespread union contempt.  
[Read on](#)
- **Commerce (Cartels and Other Matters) Amendment Bill**  
After consultation last year and again this June, the Minister of Commerce introduced the Commerce (Cartels and Other Matters) Amendment Bill into Parliament on 13 October. [Read on](#)
- **Preventing illegal internet downloads – an employer's guide**  
Last week, Telecom, Orcon, TelstraClear and Vodafone each confirmed receipt of multiple detection notices relating to the illegal downloading of music. Orcon and TelstraClear have received further notices this week.  
[Read on](#)
- **Qantas industrial action grounded**  
The announcement by Qantas on Saturday of immediate plans to lock out striking employees and ground its fleet worldwide attracted much media attention. [Read on](#)
- **Back to the start for starting price adjustments?**  
Vector's recent successful judicial review proceedings against the Commerce Commission represents the first skirmish in what is likely to be a lengthy battle surrounding the Commission's initial decisions relating to regulation under the amended Part 4 of the Commerce Act. [Read on](#)

## NEED MORE INFORMATION?

### Contact us

For more information on any of the items in the Corporate Reporter, please contact your usual Bell Gully adviser or any member of Bell Gully's [Corporate](#), [Commercial](#) or [M&A](#) teams. Alternatively, you can contact the editor [Diane Graham](#) by email or call her on 64 9 916 8849.

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