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Commercial Applications of Company Law

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[¶201] Introduction

This chapter introduces you to company law. It begins by looking at the scope of company law, summarising the issues addressed by company law and the nature of the obligations and duties created by it.

The second part then goes on to identify the main sources of the legal rules governing companies and their participants. It includes a detailed treatment of the history, structure and effect of the *Companies Act 1993*, which is the main statute governing companies in New Zealand.

The third part looks at the roles played by the Registrar of Companies, the New Zealand Exchange (the NZX), the Financial Markets Authority (FMA) and the courts in regulating companies.

SCOPE AND OPERATION OF COMPANY LAW

[¶202] What is “company law”?

Company law:

- provides for the formation (and, ultimately, termination) of companies
- confers on companies some special features (for example, limited liability)
- regulates the relationships between participants in companies (for example, the relationship between directors and shareholders), and
- facilitates dealings between companies and outsiders (an example of an outsider is a customer of the company).

These functions of company law are discussed in this chapter.

As legal entities, companies are subject to the law in the same way as all other legal persons. This means that laws such as criminal law, property law, contract law, tort law, competition law and environmental law apply to companies (sometimes with some necessary modifications to take account of the fact that companies are artificial persons). The fact that these laws apply to companies does not, however, make these laws part of what we generally consider to be “company law”.

[¶203] What does company law cover?

The aspects of company law dealt with in this book fall into one of the following three broad themes:

- The creation and termination of companies, and the conferring on companies and their participants of particular legal characteristics (separate legal personality, capacity and limited liability).
- The relationships (i) between participants in companies (shareholders, directors and other officers of the company, and sometimes employees), and (ii) between the company and its participants (in particular, rules relating to share capital, shareholders’ rights, directors’ duties and other matters relating to the management of companies). However, company law is not the only law that deals with the relationships between participants in companies. For example, the relationship between employees and their company is regulated by industrial relations or employment law. Employment law deals with the working conditions of employees, including the hours to be worked and the wages to be received.
- The implications for persons dealing with a company rather than an individual. A person may deal with a company voluntarily (for example, by entering into a contract with the

company) or involuntarily. For example, a person may be the victim of a crime or an act of negligence committed by an officer of a company. There are rules that help determine when the actions of the officer will be treated as the actions of the company so that the company is liable to the person affected by the crime or act of negligence.

These three broad themes are reflected in the structure of this book. Chapters 3, 5 and 24 deal with rules falling in the first group. Chapters 6–20 and 23 cover the rules in the second group. Chapters 21 and 22 deal with the rules in the third group.

How does company law provide for the formation and termination of companies, and confer their characteristics?

Through the first set of rules, company law provides for the formation and termination of companies. Because companies are artificial legal persons created and extinguished by the State, laws are necessary to establish or terminate their existence. The special characteristics of companies — separate legal personality, corporate capacity, and the limited liability of shareholders — exist because they are provided for by company law. Company law confers, and defines the limits of, these characteristics.

How does company law regulate the internal management of companies?

The second set of rules govern how the shareholders of the company relate to each other and to the directors and other officers. These rules determine the rights and duties of each type of participant.

Company law provides for the creation and issue of shares which may confer upon the holders of those shares rights to participate in profits generated by the company and to participate in certain fundamental decisions affecting the company. It also provides for the cancellation of those shares in certain circumstances.

It establishes the rules for managing companies: providing for the appointment of officers to run the company; prescribing the respective decision-making powers of shareholders and directors; imposing duties on officers in the performance of their functions, and, limitations on the exercise by shareholders of their voting powers in certain circumstances.

In addition, company law governs the mechanics of running a company (including the procedures for calling and conducting meetings of directors and of shareholders), particularly through providing the framework for the operation of the company's internal governance rules. It also provides for sanctions and remedies where these rules are contravened.

Company law also includes some rules that apply to the relationship between companies and their creditors. These include rules to allow companies to give security over their assets, and rules that prevent companies from taking certain actions (for example, reducing their capital) that may adversely affect creditors. Special rules designed to protect creditors govern the way in which companies must be managed when they become insolvent.

How does company law affect dealings between companies and outsiders?

The fact that companies exist as separate legal persons raises particular issues for those who deal with them. These are addressed by the third set of rules. These rules operate as an interface between the company and the operation of the common law (decisions of the courts).

¹ For a discussion of the meaning of "common law", see ¶210.

A person may deal with a company voluntarily, where the person elects to enter into a legal relationship with that company (for example, through entering into a contract with the company). A person may involuntarily come to deal with the company where the company commits a wrong that affects the person and the wrong is capable of legal remedy. For example, a person who lives next door to a company's premises may be affected by a breach by the company of laws preventing pollution.

Because companies, as artificial persons, can act only through individuals, the issue for the person having dealings with the company is: when are that individual's actions treated as actions of the company, so the company is liable for those actions? This is the central concern of the

third group of rules.

[¶204] Enforcing company law

Company law operates in some cases to impose duties or obligations on people and companies. If a person or company breaches one of these rules of company law, then, depending on which rule is breached, one or both of the following may result:

- The person may be made subject to a criminal law sanction, such as a fine or a term of imprisonment (companies may also have to pay fines if they breach some rules). A criminal law sanction is imposed by the State.
- The person or company may be stopped from engaging in the wrongful conduct, be required to do some further act or compensate any person harmed by the breach — for example, by paying damages. These consequences are known as private law remedies — that is, company law confers private rights on individuals that can be enforced through the courts.

How can company law impose both public and private sanctions?

In some cases, when a person contravenes a part of the company law, he or she can be punished by the State (in the form of fines or imprisonment). This is because contravention of certain provisions of the *Companies Act 1993* is a criminal offence.

Breaches of certain provisions of the Companies Act may also result in a person being banned from participating in the management of companies for a specified period. These banning orders operate to protect the public from being exposed to dealing with people who have a history of unlawful conduct in managing companies and as a form of State sanction.

Alternatively, or in addition to a right to some form of compensation, a person affected by an act or omission that breaches company law rules may be entitled to ask the court for orders that the wrongdoer stop doing something or agree to do a particular act or thing. These are examples of private law rights or remedies — the person affected does not have to rely on the State to enforce the obligation on his or her behalf.

Sanctions are discussed in more detail in Chapter 16.

[¶205] What are the main sources of company law?

Company law is derived from a number of different sources. This means that it may be necessary to look in more than one place to see if a particular action or proposal is affected by legal rules. Important sources of company law include:

- the *Companies Act 1993*
- case law, and
- other sources of law, including the Companies Act 1993 Regulations 1994, the *Securities Act 1978*, the *Securities Markets Act 1988*, the *Financial Reporting Act 1993*, the *Financial Markets Authority Act 2011* and the NZX Listing Rules.

These sources of law are discussed in ¶206–¶220.

THE COMPANIES ACT 1993

[¶206] What is the Companies Act 1993?

The main statute regulating companies in New Zealand is the *Companies Act 1993*. This Act has been amended and updated on many occasions since 1993. The Companies Act deals with the registration of companies, membership and internal management, share capital, accounting records and audit requirements, voluntary administration and liquidations.

The Companies Act is the statutory source of company law in New Zealand. It contains many (but

not all) of the company law rules described in the previous section. The Companies Act commenced on 1 July 1994, replacing the *Companies Act 1955* (see ¶207). The *Companies Act 1993* took effect on 1 July 1994 in respect of new companies. Companies registered under the 1955 Act were given three years to register under the 1993 Act. If such a company did not voluntarily register, it was automatically registered under the 1993 Act as of 1 July 1997.

[¶207] History of the Companies Act 1993

In Chapter 1, we looked at the historical development of companies. Here we look at the history of company law statutes in New Zealand. The *Companies Act 1993* is the most recent of those statutes.

Subsequent to Polynesian settlement, with the arrival of British colonists, New Zealand initially became a British possession (as an appendage of the Australian colony of New South Wales). It became a separate colony in 1841 and was granted representative Government in 1853, but did not achieve dominion status until 1947. For most of its history, and especially in the period 1860–1993, New Zealand looked to the United Kingdom (UK) for guidance on companies legislation. In short, much of New Zealand statute law has been derivative. In companies legislation, there was a long-standing tendency to follow UK legislation word for word. By adopting this policy, New Zealand sought to access the decisions of the UK courts on its companies legislation and any amending legislation. This was a low-cost and effective solution to company regulation when resources were minimal. There were other good reasons for following an established path — cultural bias and legal heritage being but two of them. Another important reason for following a UK model for company law was that the primary outside source of capital for New Zealand was the UK. The adoption of a UK model for company law in New Zealand gave UK investors confidence in New Zealand investments.

Some key milestones in the evolution of New Zealand companies legislation are:

- the period before representative Government
- the *Joint Stock Companies Act 1860*
- the *Companies Act 1868*
- the *Companies Act 1882*
- the *Promoter's and Director's Liability Act 1891*
- the *Companies Act 1901*
- the *Companies Act 1933*
- the *Barton Report 1934*
- the *Companies Act 1955*, and
- the *Companies Act 1993*.

These stages in the development of company law in New Zealand are outlined below.

A short history of companies legislation in New Zealand

The majority of businesses in early New Zealand were established either as sole proprietorships or as partnerships under the UK law of the time. Joint stock companies in New Zealand could be formed by an Act of the UK Parliament, by Letters Patent or by the UK Companies Acts of 1844 and 1856. Alternatively, companies could operate in New Zealand pursuant to legislation passed by New South Wales and Victoria.

The first company legislation passed by the General Assembly of New Zealand was the *Joint Stock Companies Act 1860*, which followed the UK *Joint Stock Companies Act 1856*. Between 1860 and 1882, various amending legislation of a technical nature was passed. The principal influence was the UK *Companies Act 1862*.

The New Zealand *Companies Act 1882* copied the UK *Companies Act 1867*. In response to

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reckless company promotion in England between 1881 and 1890, the *Director's Liability Act 1890* was passed. This Act was a response to the inadequacy of the law of tort to control the activities of directors and promoters. In New Zealand, the UK Act was quickly copied in the *Promoter's and Director's Liability Act 1891*.

In the *Companies Act 1901*, the New Zealand legislation once again adopted a UK model, the *Companies Act 1900*. This New Zealand Act also marked the end of a separate regime for mining companies in New Zealand. The *Companies Act 1901* was amended and consolidated in 1903, 1908 and 1933.

The 1903 Act introduced a distinction between private and public companies in New Zealand. Part IV of the 1903 Act introduced a special regime for small companies not exceeding 25 persons whereby certain provisions of the Act were inapplicable. Private companies were also prohibited from issuing a prospectus seeking moneys from the public. Only public companies could issue a prospectus.

Thus, from 1903 until the *Companies Act 1993*, when the distinction between private and public companies was abolished, company law in New Zealand was largely concerned with three types of companies: private companies, which were always prohibited from issuing a prospectus, public companies and public listed companies.

In 1934, the *Barton Report* was released. The report catalogued a number of abusive practices undertaken by so-called "land utilisation" companies in New Zealand. The principal recommendation of the *Barton Report* was the establishment of a Corporate Investments Bureau (CIB) which would be given wide powers. The CIB was the stillborn precursor of the present Securities Commission, which was established by the *Securities Act 1978*. Its proposed powers, however, were much wider than those of the Securities Commission. To this extent, the proposed CIB was similar to a centralised enforcement body such as the Securities and Exchange Commission (SEC) established in the United States by the *Securities Exchange Act 1934*. However, the opportunity to follow the USA model was missed and the proposed CIB was not established.

The *Companies Act 1955* was an almost exact copy of the UK Act of 1948. It was amended on an ad hoc basis in response to various crises until the introduction of the *Companies Act 1993*. Professor Dale Oesterle has described it in this way:

"Until 1993, New Zealand had in place an obsolete Companies Act, modelled on a 1948 United Kingdom Act which the United Kingdom itself had substantially modified. Advances in corporate finance, international capital markets, and basic organization theory made the Act a national liability. New Zealand was regulating the computer age with laws drafted for the scrivener."

2 DA Oesterle, "Why have a Companies Act?" in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1st ed, 1994), p 313.

In 1986, the Minister of Justice asked the New Zealand Law Commission to report on the form of a new Companies Act. The New Zealand Law Commission produced two reports. These were:

- New Zealand Law Commission, *Company Law: Reform and Restatement* (1989), Law Commission Report No 9, and
- New Zealand Law Commission, *Company Law Reform: Transition and Revision* (1990), Law Commission Report No 16.

After major revisions, the draft Act produced by the Law Commission was passed by the New Zealand Parliament in late 1993. For the first time, UK models were abandoned. Instead, the *Companies Act 1993* was based on a Canadian model, the Business Corporations Act, which in turn was based on the corporate law statute of the State of New York. The new Act jettisoned the old public/private company distinction. As a result, we can generally divide New Zealand companies into two types, depending on whether or not they are listed on the New Zealand Stock Exchange (the NZSX). NZSX-listed companies are subject to the NZX Listing Rules and the New Zealand securities regulation regime contained in the *Securities Act 1978* and the *Securities Markets Act 1988*.

The Financial Markets Authority (FMA) was established on 1 May 2011, after the enactment of the *Financial Markets Authority Act 2011*. This Act replaced the former Securities Commission and Government Actuary with the FMA, and consolidated into the FMA some regulatory functions previously carried out by the Companies Office, the Ministry of Economic Development and the NZX. The FMA is an independent Crown entity responsible for administering a range of financial markets legislation. It also regulates securities exchanges, financial advisers and brokers, and trustees and issuers. The FMA website, <www.fma.govt.nz> provides information on the role and functions of the FMA. FMA's organizational chart is depicted in Figure 2.1



Source: Financial Markets Authority 2011 available at <<http://www.fma.govt.nz/about-us/who-we-are/organisation-chart/>> (last accessed 11 November 2011)

[¶208] Content of the Companies Act 1993

The *Companies Act 1993* provides for the formation of New Zealand companies and the registration of foreign companies operating in New Zealand. It also regulates company management, reorganisations and the liquidation of companies.

Does the Companies Act apply to all kinds of companies?

The Companies Act contains rules relating to all kinds of companies, so that the rules governing large public companies like Telecom Corporation of New Zealand Limited are contained in the same statute as the rules governing small companies. Some company law scholars think this "one size fits all" solution is problematic. Professor John Farrar says that "[t]he problem with the Act overall is that it is too complicated for a small incorporated firm and it is argued that there is a need for a new type of entity to meet the needs of such business (which statistically is the most numerous in New Zealand)".

3 J Farrar, "Introduction", in J Farrar (gen ed), *Company and Securities Law in New Zealand* (2008), para 1.6.

How is the Companies Act divided up?

The Companies Act is divided into Parts. They are: (The mixture of arabic and roman numerals follows the legislation.)

- **Part 1 — Preliminary** . This Part contains definitions of many of the terms used in the Companies Act.
- **Part 2 — Incorporation** . This Part deals with the essential requirements of a company and the method of incorporation. It confirms that a company is a legal entity in its own right separate from its shareholders that continues in existence until it is removed from the New Zealand register.
- **Part 3 — Capacity, Powers, and Validity of Actions** . This Part contains statements of the legal capacity and powers of companies.
- **Part 4 — Company Names** . This Part deals with the reservation of company names, changes of company names and the use of a company name.
- **Part 5 — Company Constitution** . This Part states that a company may, but does not have to, have a constitution. If a company does not have a constitution, s 28 states that the company, the board, each director and each shareholder of the company have the rights, powers, duties and obligations set out in the Companies Act. This means that the Act operates as a default constitution or as a set of replaceable rules. Where a company wishes to have a constitution, this Part sets out the means for adopting, altering or revoking a constitution.
- **Part 6 — Shares and Debentures** . This Part deals with such matters as the issue of shares, distributions to shareholders, the acquisition of its own shares by a company, treasury stock, the redemption of shares, financial assistance by a company in the purchase of its own shares, transfer of shares, and the creation and maintenance of the share register.
- **Part 7 — Shareholders and Their Rights and Obligations** . This Part defines the term "shareholder" and then deals with the powers of shareholders, minority buy-out rights, classes of shareholders and "interest groups", and shareholder meetings.
- **Part 8 — Directors and Their Powers and Duties** . This Part provides definitions of the terms "director" and "board", discusses powers of management and lists a director's duties (such as a director's duty of care), self-interested transactions, and the appointment and removal of directors.
- **Part 9 — Enforcement** . This Part deals with injunctions, derivative actions, and personal actions by shareholders, and with the ratification and inspection of records.
- **Part 10 — Administration of Companies** . This Part concerns the way in which a company contracts with other parties, and contains provisions dealing with a company's registered office, company records and address for service.
- **Part 11 — Accounting Records and Audit** . This Part sets out the accounting records required to be kept by a company and the appointment of auditors.
- **Part 12 — Disclosure by Companies** . This Part imposes obligations on companies to disclose information to shareholders by means of the annual report. It also contains provisions for the inspection of records by the public and shareholders.
- **Part 13 — Amalgamations** . This Part details the procedure for the amalgamation of companies.
- **Part 14 — Compromises with Creditors** . This Part sets out the procedure for effecting compromises with creditors.
- **Part 15 — Approval of Arrangements, Amalgamations, and Compromises by Court** . This Part sets out the procedure for obtaining court approval for these types of schemes.
- **Part 15A — Voluntary Administration** . This is a new part of the Act, effective as of 1 November 2007. Voluntary administration (VA) is a mechanism whereby an insolvent company can enter a temporary safety zone (or "moratorium") from creditors' claims while a considered decision is made by the creditors on whether the company should execute a "deed of arrangement", be wound up or be returned to the control of its board of directors.

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- **Part 16— Liquidations** . This Part sets out the rules that apply when a company becomes insolvent and goes into liquidation.
- **Part 17 — Removal from the New Zealand Register** . This Part sets out the procedure for the removal of a company from the register.
- **Part 18 — Overseas Companies** . This Part sets out the procedure for the registration of overseas companies on the overseas register.
- **Part 19 — Transfer of Registration** . This Part specifies the applicable circumstances and procedures when an overseas company wishes to be registered under the Act.
- **Part 20 — Registrar of Companies** . This Part details the functions of the Registrar and Deputy Registrar of Companies.
- **Part 21 — Offences and Penalties** . This Part details the criminal penalties attaching for failure to comply with the provisions of the Act, together with the orders that may be made against directors.
- **Part 22 — Miscellaneous** . This Part deals with such matters as service of documents, directors' certificates and regulations.

OTHER SOURCES OF COMPANY LAW

[¶209] Overview

In addition to the *Companies Act 1993*, company law rules can be found in:

- case law (or “precedent”)
- the Companies Act 1993 Regulations 1994
- the *Financial Reporting Act 1993*
- the *Securities Act 1978* and the *Securities Markets Act 1988*, and
- the NZX Listing Rules.

Each of these important sources of company law is described below.

[¶210] Case law

Case law is an important source of the rules that govern companies. New Zealand has a “common law” system of law in which the recorded decisions of courts operate as binding statements

4 Under the doctrine of “precedent”, a decision of a superior court (that is, a court ranked above another in the hierarchy of courts) binds a lower court. This means that, if a judge or panel of judges in a superior court has stated that, for example, a provision of a statute should be interpreted in a particular way, judges in lower courts must also adopt that interpretation.

of the way in which statutory provisions are to be interpreted. Those decisions may also themselves be a source of legal rules not recorded or not recorded fully in legislation.

5 The process of recording legal rules in legislation is called “codification”. Civil law systems such as those found in many European and Asian countries have fully or almost fully codified laws.

Case law (or “precedent”) can be a source of:

- additional rules governing companies that are not contained in the *Companies Act 1993*, and
- binding statements governing interpretation of the provisions of the Companies Act.

How do we use case law to find legal rules?

Many students have difficulty using case law to interpret legislation or to find additional legal

rules. Under the New Zealand system of law, judges can make decisions only on the issues brought before them by the parties to the litigation, and on the particular facts of the case presented to them.

6 Sometimes judges will include in their reasons for judgment opinions about matters not directly in issue. For example, a judge may express a view about what the applicable law would be if the facts of the case were different. These statements are referred to as “obiter dicta” (that is, remarks made in passing) and are not binding (although they may be persuasive) in later cases.

The system is an adversarial one, in which the parties to the litigation are responsible for discovering and presenting the facts to the court, and preparing arguments about the way in which the law should be applied.

The judgment will generally contain an outline of the facts presented to the judge, a summary of the opposing legal arguments put by the parties, and the judge’s decision on what the correct law is and how it should be applied to the particular facts before the court. The judge’s decision is only a statement of the law as it applies to the particular facts before the court.

In later cases that deal with similar issues, lawyers take the reasoning applied by the judge in the earlier judgment and argue either that the facts of the later case are so similar to those in the earlier judgment that the same outcome should result, or that the facts are so different that a different approach should be adopted.

7 Alternatively, the lawyers may argue that the earlier judgment was incorrectly decided. Case law, therefore, operates as a guide to what the law is, or how it should be applied, when the facts in issue are similar to the ones on which an earlier, binding decision has been reached.

Some important characteristics of case law

Case law is “reactive”, in the sense that courts must wait for parties who have a disagreement to come before them to ask for an adjudication on an issue. This means its coverage is essentially piecemeal — that is, if no one has brought a dispute on an issue before a court, there will be no applicable case law. This has two important implications for company law:

- Company law by its nature often involves commercial disputes. Because of the delays and costs in litigation, commercial parties will often prefer to come to a private arrangement to settle disputes without going to court.
- There is often a considerable delay between the time at which a new provision is included in the Companies Act and the time at which (if ever) it comes before the courts for interpretation.

We will see throughout this book a number of provisions of the Companies Act on which there is little or no applicable case law.

[¶211] Companies Act 1993 Regulations 1994

Additional rules relating to more mechanical, administrative matters are set out in the Companies Act 1993 Regulations 1994. The Regulations prescribe, for example, the content of the various forms that are required to be lodged with the Companies Office.

[¶212] Corporations (Investigation and Management) Act 1989

The *Corporations (Investigation and Management) Act 1989* empowers the Registrar of Companies to ascertain whether companies are in danger of failing and, where necessary, to appoint a statutory manager to run the company.

[¶213] Serious Fraud Office Act 1990

The *Serious Fraud Office Act 1990* established the Serious Fraud Office (the SFO). The function of the SFO is to detect and investigate serious fraud. The director of the SFO may instigate proceedings against a company under this legislation.

[¶214] Financial Reporting Act 1993

The *Companies Act 1993* contains provisions concerning the keeping of accounting records. Provisions dealing with the preparation of financial statements are found in the *Financial Reporting Act 1993*. The Financial Reporting Act also sets up an Accounting Standards Review Board (the ASRB). The function of the ASRB is to determine appropriate accounting standards with which companies will be required to comply.

[¶215] Proposed Changes to Securities Regulation in New Zealand

The New Zealand Labour Government commenced a comprehensive review of New Zealand's securities scheme in 2008. The review process was primarily driven by the effects of the global financial crisis. In March 2011, the Cabinet announced its decision to introduce substantial changes to securities law, the disclosure regime for publicly listed companies and the regulation of managed investment schemes. The reforms will result in the enactment of the **Financial Markets Conduct Act** and the repeal of the *Securities Act 1978*, the *Securities Markets Act 1988* and other related investment legislation that traditionally formed the cornerstone of New Zealand's securities regulation regime.

The *Financial Markets Conduct Bill 2011* (FSM Bill) was introduced into Parliament in October 2011. The objectives of the Bill are to ensure confidence in New Zealand's capital markets and improve companies' ability to raise capital. The FSM Bill will repeal and replace a number of Acts, including:

- 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*.

The proposed legislation is close to Australian legislative models. Key aspects of the FMC Bill are discussed in Chapter 27.

[¶216] The NZX Listing Rules

We noted in Chapter 1 that a very small proportion of New Zealand companies are "listed" companies — that is, their securities are listed for quotation on the three markets conducted by the New Zealand Exchange (the NZX). These markets are known as the NZSX (the equity market), the NZAX (the alternative market for smaller companies) and the NZDX (the debt market). Thus, NZSX provides a trading facility for equity securities issued by companies listed on it. Listing means that securities issued by the company can be bought and sold by investors through a public, organised, listed market. The reasons for listing and its consequences are discussed in Chapter 5.

When they list, companies agree as part of a contract with the NZX that they will comply with rules imposed under the NZX Listing Rules. These rules are additional to those imposed on companies by the *Companies Act 1993*. The Listing Rules cover a variety of matters, such as imposing additional disclosure requirements and imposing additional requirements that a company must meet before the company enters into certain types of transactions or issues new securities. The purpose of the Listing Rules is to ensure that the market for listed companies' securities is transparent, liquid and informed, and that the interests of the companies' public shareholders are protected.

Only listed companies and their participants are required to comply with the Listing Rules.

The NZX Listing Rules are additional and complementary to companies' common law and

statutory obligations. If a company or its participants breach the Listing Rules, the NZX can remove or suspend that company's securities from quotation.

The Listing Rules essentially operate as private law that is binding only as a matter of contract between the NZX and the listed company. However, the FMA has the power to enforce compliance by a listed company where the NZX's continuous disclosure listing rules apply to that listed company. The relevant listing rule is Listing Rule 10.1.1 (once a listed issuer becomes aware of material information concerning itself, it must immediately release that information to the NZX) and this rule is given statutory force by s 19B of the *Securities Markets Act 1988*.

Where the NZX Listing Rules impose additional requirements on listed companies relevant to the matters discussed in this book, those Listing Rules are discussed briefly.

[¶217] How are the NZX Listing Rules divided up?

The NZX Listing Rules (which can be downloaded from the NZX website) were amended effective 6 August 2011 (partly as a result of recent market conditions) and are divided into 11 sections and various appendices. These are discussed below:

- **Foreword** . The foreword to the Listing Rules describes the market and the principles upon which the Listing Rules are based.
- **Section 1 — Interpretation, Rulings and Waivers** . This section deals with matters of interpretation, rulings and waivers. For example, the terms "material information" and information that is "generally available to the market" are defined.
- **Section 2 — Compliance and Enforcement** . Here, NZX Listing Rule 2.1.1 states that the Listing Rules are a contract enforceable against the issuer by a shareholder. The role of the NZ Markets Disciplinary Tribunal is defined in this section.
- **Section 3 — Constitutions, Trust Deeds and Directors** . This section states that the Constitution of each issuer shall have certain compulsory provisions in it. For example, Listing Rule 3.3.1 says that each issuer shall have at least three directors, two of who must be resident in New Zealand.
- **Section 4 — Takeover Provisions for Issuers that are not Code Companies** . This section provides that such issuers must have certain compulsory provisions in their constitutions. For example, Listing Rule 4.3.1 states that such issuers must have notice and pause provisions in their constitutions.
- **Section 5 — Listing and Quotation** . This section contains rules dealing with admission to the NZX for listing. Applications for listing may be made by an "overseas listed issuer" where a stock exchange other than the NZX is the "home exchange". Generally, an applicant for listing must have an anticipated market value of \$5m. An issuer that does not comply with the rules may be granted listing with the designation "Non Standard". Listing Rule 5.2.3 contains the "spread" requirements. Generally, the spread requirements are met if the issuer's securities are held by at least 500 members of the public holding at least 25% of the securities of the class issued. Listing is a privilege not a right, and, pursuant to Listing Rule 5.3.1, the NZX is not obliged to grant listing notwithstanding that all applicable provisions of the rules have been satisfied by the applicant for listing. At any time, the NZX may impose conditions to any listing. For example, the NZX may impose restrictions (sometimes called "escrow provisions") for a specific period on the sale or disposal of vendor securities. Similarly, the NZX has an absolute discretion to suspend the quotation of any securities.
8 NZX Listing Rule 5.4.2.
- **Section 6 — Requirements for Documents** . This section sets out documentation standards. For example, the constitution of any issuer must be approved by the NZX.
- **Section 7 — Issues and Buy Backs of Securities** . This section deals with the Offering Document requirements (Prospectus, Investment Statement or Profile) of the NZX. The NZX must approve every such offering document. The section also contains rules regarding share buy-backs, notification of the level of subscription and the role of the Organising Participant.

- **Section 8 — Voting Rights and Rights of Equity Securities** . This section deals with the voting rights attached to shares and modification of the rights of security holders.
- **Section 9 — Transactions with Related Parties and Major Transactions** . This section begins by dealing with transactions involving the disposal or acquisition of assets. For example, Listing Rule 9.1.1 prohibits the disposal of over 50% of the assets of an issuer without the prior approval of an ordinary or special resolution (where s 129 of the *Companies Act 1993* applies). Listing Rule 9.2 deals with related-party transactions. Listing Rule 9.3 contains voting restrictions in respect of certain transactions.
- **Section 10 — Disclosure and Information** . Listing Rule 10.1.1 requires that every issuer shall, once it becomes aware of any "Material Information" (as defined in s 1), immediately release that material information to the NZX except in certain defined circumstances. Some examples of information which is likely to be regarded as material information are provided in this section. In addition, the form of disclosure is mandated (for example, via the NZX's Market Announcement Platform). Other provisions in this section deal with the release of information upon major change of control or direction and annual and half-yearly reports.
- **Section 11 — Transfers and Statements** . This section deals with transfers of securities and the issue of statements relating to securities to shareholders.

REGULATION OF COMPANIES

[¶218] Overview

Companies are a special type of legal person, created by the Government following an application for registration. The special status of companies as legal persons, and the special rights and protections (such as limited liability) conferred on participants in companies, mean that companies are treated as requiring special regulation. In addition, the provisions of the *Companies Act 1993* require administration and enforcement. This section summarises the respective roles of the Companies Office, the FMA and the courts in regulating companies. By contrast, in Australia one regulator performs the work done by the Companies Office and the FMA. In Australia, the Australian Securities and Investments Commission (ASIC) registers companies and administers Australia's securities regulation regime.

[¶219] The Companies Office and the Registrar of Companies

In New Zealand, the **Ministry of Economic Development (MED)** has overall responsibility for companies. This responsibility is discharged by its Business Services Branch. The Business Services Branch of the MED is headed by a Deputy Secretary with responsibility for the **Companies Office**.

The **Registrar of Companies** heads the Companies Office. The Registrar of Companies is a position created by statute. The Registrar is the principal regulator of companies in New Zealand. The role and powers of the Registrar are contained in Part XX of the *Companies Act 1993*.

What is the structure of the Companies Office?

As stated, the Registrar of Companies heads the Companies Office. Immediately beneath the Registrar is the Group Manager of Business Registries. There are five main operational units beneath the National Manager of Business Registries:

- **The National Enforcement Unit** : The manager of the National Enforcement Unit has responsibility for prosecutions and the director prohibitions. This unit is based in Auckland.
- **Central Region** : The manager of this unit has responsibility for client services and the insurance and superannuation unit.
- **Internet Support** : The manager of this unit has responsibility for internet support and online promotions.

- **Contact Centre and Southern Region** : The manager of this unit has responsibility for the contact centre, client services and quality control.
- **Northern Region** : The manager of this unit has responsibility for legal services, client services, compliance, other registers, document processing and document imaging.

What are the main functions of the Companies Office?

Details of the organisational structure, functions and legislation administered by the Companies Office can be found at the website of the Companies Office.

9 www.companies.govt.nz.

As further discussed in Chapter 17, one of the principal functions of the Companies Office is to maintain registers containing information about companies that can be accessed by members of the public.

Some of the following information about the function of the Companies Office is extracted from the Companies Office, *Online with NZ Business: Strategic Business Plan 2005–06*. This booklet has not been updated.

The Companies Office is responsible for the provision of services relating to the registration of companies and other corporate entities and public access to corporate and securities information. The Companies Office has compliance and enforcement functions under the Companies Act, the *Securities Act 1978*, the *Corporations (Investigation and Management) Act 1989*, the *Financial Reporting Act 1993* and the *Friendly Societies and Credit Unions Act 1982*.

Corporate body registers maintained by the Companies Office : The Companies Office maintains and manages a number of registers including the following:

- New Zealand and overseas companies
- financial service providers
- cooperative companies
- incorporated societies
- industrial and provident societies
- limited partnerships and overseas limited partnerships
- charitable trusts
- unit trusts
- friendly societies
- superannuation schemes
- contributory mortgage brokers
- credit unions, and
- building societies.

Administration of the registries falls into four areas:

- new registrations
- maintenance of registered information
- removal of defunct entities, and
- ensuring compliance with statutory disclosure obligations.

The Companies Office monitors compliance and timeframes for filing changes to registered information, as prescribed by the associated legislation.

The information held on the registers is available for public search. Searches can be conducted online via the Companies Office website or at the regional office where the company is registered.

Since May 2002, the Companies Office has maintained the **Personal Property Securities Register**. This register is a centralised, fully electronic register that creates a single procedure for the creation and registration of security interests in personal property. This register was provided for in the *Personal Property Securities Act 1999* and is discussed further in Chapter 20.

In August 2010, the Companies Office introduced the **Financial Services Providers Register**. The register was established in accordance with the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (FSP Act). The FSP Act came into effect on 1 July 2011 and established a *compulsory registration* system for financial service providers. Thus, all financial service providers must be formally registered under the FSP Act and are also expected to comply with the care, diligence and skill provisions of the *Financial Advisers Act 2011*.

In order to qualify for registration, financial service providers are generally required to be members of an industry-run dispute resolution scheme or an alternative dispute resolution scheme established by the Ministry of Consumer Affairs.

The purposes of the register are set out in s 26 of the FSP Act as follows:

- to enable the public and any person to identify registered financial service providers and access information about them
- to assist any person in the exercise of the person's powers or the performance of the person's functions under the Act
- to prohibit certain people from being involved in the management or direction of registered financial service providers, and
- to conform to New Zealand's obligations under the Financial Action Task Force Recommendations on Money Laundering.

The register includes information about financial service providers, the type or types of financial service for which the financial service provider is registered and the name and business address of the approved dispute resolution scheme or the reserve scheme of which the financial service provider is a member.

Securities and corporate compliance: A number of statutory responsibilities in relation to the supervision of corporate bodies and issuers of securities have been transferred from the Companies Office to the FMA. [The Securities and Corporate Compliance Unit of the Companies Office ceased to exist on 1 May 2011 when the FMA came into being. Previous functions carried out by the unit included: market supervision; investigation of non-compliance with various statutory regimes and enforcement of legislation.](#)

[1220] The Financial Markets Authority

The Financial Markets Authority (FMA) is the chief governmental agency with responsibility for regulating the financial sector. As stated, it took over the functions of the former Securities Commission (NZSC) and the office of the Government Actuary in 2011. The FMA derives its functions and powers from the *Financial Markets Authority Act 2011*. This Act came into force on 1 May 2011 and had the effect of establishing the FMA as of this date. As a result, any powers of the Securities Commission as of 1 May 2011 have been transferred to the FMA. The FMA also has new and enhanced powers.

What is the principal legislation?

The ***Financial Markets Authority Act 2011*** sets out the main objectives and functions of the FMA. The **Act** comprises four parts.

- **Part 1 — Preliminary**. This Part specifies the purposes of the Act and deals with matters of interpretation

- **Part 2 — Financial Markets Authority** . This Part establishes the FMA and describes its functions and objectives. It also contains provisions dealing with the membership of the board of the FMA, divisions of the FMA and FMA meetings.

- **Part 3 — General Information-gathering and Enforcement Powers.** This Part is divided into five Subparts. Subpart 1 defines the information-gathering powers of the FMA. It provides that the FMA has power to obtain information, documents and evidence. Subpart 2 deals with the sharing of information and documents between the FMA and other law enforcement or regulatory agencies and overseas regulators. Subpart 3 is concerned with representative actions and empowers the FMA to exercise a person's right to bring a civil action against a financial market participant where it considers this to be in the public interest. Subpart 4 is entitled "Other Powers". The FMA may in accordance with this Subpart make confidentiality orders, accept undertakings and state a case for opinion before the High Court. Subpart 5 contains miscellaneous provisions relating to FMA's powers.
- **Part 4 — Miscellaneous Provisions.** This Part deals with regulations relating to fees, charges and costs. It also provides for the disestablishment of the NZSC and the Government Actuary and covers the consequences of such disestablishment. For example, s 72 states that the functions, duties and powers of the NZSC vest in the FMA to the extent that those functions, duties and powers are consistent with those of the FMA under the *Financial Markets Authority Act* and other legislation.

- **Schedule 1** to the Act refers to **financial markets legislation**, including the:

- [Financial Advisers Act 2008](#)
- [Financial Service Providers \(Registration and Dispute Resolution\) Act 2008](#)
- [Parts 4](#) and [5](#) and [Schedules 1](#) and [2](#) of the KiwiSaver Act 2006
- [Securities Act 1978](#)
- [Securities Markets Act 1988](#)
- [Securities Transfer Act 1991](#)
- [Superannuation Schemes Act 1989](#)
- [Unit Trusts Act 1960](#)

- **Schedule 2** covers FMA's search powers.

- **Schedule 3** deals with amendments to other enactments and **Schedule 4** sets out the amendments required to replace references to the Securities Commission or Government Actuary with the FMA.

What is FMA's structure?

The FMA is an independent Crown entity for the purposes of s 7 of the Crown Entities Act 2004. Its main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets. Like the former Securities Commission, the FMA comprises between five and nine members. It is able to act in divisions of three members. In addition, the Minister of Commerce will be able to appoint up to five associate members for specified matters. This enables the FMA to deal with special requirements arising from its functions or build up expertise in particular areas.

What are FMA's main functions?

While the FMA assumes any powers possessed by its predecessor (the Securities Commission), it also has new and expanded powers by virtue of the FMA itself. Among these powers are the general information-gathering (search and seizure) and enforcement powers contained in Pt 3 and the levy raising power contained in Pt 4 of the FMA Act.

Section 9 of the Act sets out the functions of the FMA. These can be précised as:

COMPANY LAW

- to promote the participation of businesses, investors, and consumers in the financial markets
- to perform and exercise the functions, powers, and duties conferred or imposed on it by or under the financial markets legislation and any other enactments
- to monitor compliance with and investigate conduct that constitutes or may constitute a contravention of legislation including the Financial Advisers Act 2008, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, the Securities Act 1978 and the Securities Markets Act 1988. It has the same powers in relation to legislation such as the Companies Act 1993, the Corporations (Investigation and Management) Act 1989, the Co-operative Companies Act 1996, the Financial Reporting Act 1993, Limited Partnerships Act 2008, Pt 5C of the Reserve Bank of New Zealand Act 1989 and the Trustee Companies Act 1967, to the extent that these Acts apply to "financial markets participants". The latter term is defined in s 4 and encompasses financial advisers and brokers.
- to monitor, and conduct inquiries and investigations into any matter relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct relating to those markets.

What are FMA's statutory powers?

The FMA takes over all powers of the Securities Commission except where the FMA Act otherwise provides.

26 Section 72(1)(a) of the FMA Act.

- **General grant of power** : The FMA can do anything that a natural person of full age and capacity can do, provided it is for the purpose of performing its functions and subject to any Act or rule of law.
- **General information-gathering and enforcement powers** appear in Pt 3 of the FMA Act. Part 3, subpart 1 of the FMA Act makes provision for the FMA's power to require a person to supply evidence or produce documents (s 25); the FMA's power to receive evidence (s 26); how evidence may be given (s 27) and witnesses expenses: s 28.

The following make up the most important of the FMA's specific statutory powers under the FMA Act.

- **General information-gathering powers** :

- **Information-gathering**: Like the Securities Commission, the FMA is able to require a person to supply information, produce documents or give evidence if the FMA considers this to be desirable for the purposes of performing its functions. Section 25 of the FMA Act confers a broad range of powers on the FMA to obtain information.

28 Section 25

- **Protection against liability**: The FMA is protected from liability in exercising its powers unless acting in bad faith.

29 Section 55.

- **Power to enter and search place, vehicle, or other thing**: The FMA may authorise a specified person to, enter and search premises, subject to a search warrant. The new power extends to "vehicles" and "other things", meaning intangible things like email addresses and Internet data storage facilities. This provision was made because financial information is usually stored in computer files and aligns the FMA's power to the changes envisaged by the Search and Surveillance Bill 2009. The term "vehicle" is defined as "any conveyance that is capable of being moved under a person's control, whether or not the conveyance is used for the carriage of persons or goods, and includes a motor vehicle, aircraft, train, ship or bicycle."

30 Section 29.

Schedule 2 of the FMA Act contains extensive provisions regarding search warrants,

carrying out inspection and search powers, privileges, disposal of things seized, immunities and offences.

Search Warrants: The FMA must apply for a search warrant to an "issuing officer", i.e. a Judge of the High Court or District Court. The issuing officer can grant a search warrant where he/she is satisfied that there are reasonable grounds to suspect that a person has engaged or is engaging in conduct that constitutes or may constitute a contravention of the financial markets legislation; and the proposed search is likely to yield evidential material.

30 Section 29(3).

The application must be made in writing and submitted to the issuing officer electronically, unless this would result in delays that would compromise the effectiveness of the search and the question of whether a warrant should be issued can properly be determined on the basis of an oral communication or a personal appearance by a specified person. An application for a search warrant must, amongst other things, outline the grounds on which the application is made, as well as a description of the place, vehicle, or "other thing" proposed to be entered and searched. The issuing officer may require the provision of further information concerning the grounds on which the search warrant is sought.

31 Clause 2 of Schedule 2.

Carrying out search and inspection powers: Clauses 11 to 28 of Schedule 2 of the FMA Act set out FMA's "search powers" defined as "every search warrant issued" under the Act and "every power conferred under section 29 to enter and search (without a warrant) any place, vehicle, or other thing." Clause 12 provides that every search power authorises the person exercising it to do the following:

- enter and search the place, vehicle or other thing that the person is authorised to enter and search, and any items or items found in that place, vehicle or other thing
- to request any person to assist with the entry and search
- to use any force in respect of any property that is reasonable for the purposes of carrying out the entry and search and any lawful seizure
- to seize any thing that may be seized lawfully
- to bring and use in or on the place, vehicle, or other thing searched any equipment that is reasonable to use in the circumstances for the purposes of carrying out the entry and search
- to copy any document, or part of a document, that may be lawfully seized
- to access and copy intangible material from a computer system or other data storage device located at the place, vehicle or other thing searched
- to use any reasonable measures to gain access to any computer system or other data storage device located at the place, vehicle or other thing searched and create a forensic copy of any material in such a computer system or other data storage device; and
- to take photographs, sound and video recordings, and drawings of the place, vehicle or other thing searched, and of any thing found therein.

32 Clause 12 of Schedule 2.

Privileges: A person may make a claim of privilege in respect of any thing that is seized or sought to be seized. The effect of asserting such a claim is to prevent the search of any information to which the privilege may apply.

33 Clause 30 of Schedule 2.

False application for a search warrant: Clause 40 of Section 2 states that it is an offence to knowingly make an application for a search warrant that contains a false assertion or statement.

– **Powers for receiving evidence** : The FMA has the power to hear evidence which would not otherwise be admissible in a court of law. It may receive evidence through specified persons if the evidence is likely to assist the FMA in dealing effectively with any matter before it. The FMA may receive evidence whether or not given on oath.

32 Sections 26, 27.

– **Exercise of inspection and evidence powers for overseas regulators** : An overseas regulator may request the FMA to inquire into any matter related to its functions and the FMA has the power to comply with such request. Sections 31– 33 deal with the power of the FMA to act on requests of overseas regulators, the FMA's consideration of such requests and the conditions that may be imposed on providing such information.

34 Section 31.

– **Sharing of information:** The FMA may provide to a law enforcement or regulatory agency or an overseas regulator any information that the FMA holds if it is satisfied that protections are in place to maintain the confidentiality of the information provided.

35 Section 30.

– **Power to accept undertakings** : The FMA has the power to accept enforceable undertakings.

35 Sections 46, 47.

– **FMA may exercise persons' right of action:** The FMA has the discretionary right to commence or take over civil proceedings on behalf of investors against financial markets participants when it considers it is in the public interest to do so. This right is circumscribed. If an individual is involved, the High Court cannot grant leave to the FMA to commence or take over proceedings. It extends to representative actions in appropriate circumstances. The FMA may commence proceedings without the leave of the High Court only if:

- a person has not yet commenced proceedings in respect of the matter
- the FMA serves a written notice on the person of its intention to bring the action in court, and
- the person does not commence proceedings or object to the FMA commencing proceeding within 30 working days of the FMA giving notice to the person.

36 Sections 34, 35. 36, 39.

– **Power to make confidentiality orders:** The FMA has wide power to make an order prohibiting the publication of any information provided in connection with any inquiry.

37 Section 44.

– **Power to state case for opinion of High Court:** This power is provided for in s 48 of the FMA Act.

– **Power to require warning to be disclosed:** Where the FMA has issued a warning, it may order the relevant person to disclose such warning on its Internet site or offer document.

37 Section 49.

– **FMA may authorise person to obtain information or documents:** The relevant powers are contained in ss 52– 55 of the FMA Act.

– **Privileges: witnesses and counsel:** Section 56 of the FMA Act confirms that witnesses

and counsel have the same privileges as witnesses have in proceedings before a court.

– **Witness costs:** The FMA may where it deems it appropriate reimburse a witness for his or her expenses.

37 Section 28.

- **General enforcement powers of the FMA :**

The FMA has taken over all of the enforcement powers of the Securities Commission except as specifically provided otherwise in the FMA Act. While the FMA Act itself “provided otherwise” for the general investigation and enforcement powers contained in the Securities Act 1978 in a new Pt 3 of the FMA Act, only one minor change was made to the Securities Markets Act 1988 in the FMA Act: see schedule 3 of the FMA Act. The FMA has taken over the enforcement role of the Securities Commission in relation to the Securities Markets Act.

The Securities Markets Act sets out the enforcement powers of the FMA in relation to matters covered by that Act (eg insider conduct, market manipulation, general dealing misconduct, continuous disclosure, substantial holding disclosure and directors’ and officers’ disclosure obligations).

The FMA’s enforcement role in relation to regulation of the offer of securities to the public is contained in the Securities Act. The FMA has the power to make some enforcement orders itself and can also apply to the court for other enforcement orders. It can also make pecuniary penalty orders and declarations of contravention and can apply to the court for compensatory orders and other civil remedy orders on behalf of those who have suffered loss.

In addition to enforcing the Securities Act and the Securities Markets Act, the FMA now has an enforcement role in respect of “financial markets legislation” as defined in the FMA Act. This includes the new regime for financial advisers and brokers which is in full force as of 1 July 2011.

Enforcement powers under the Securities Markets Act:

The Securities Markets Act sets out the enforcement powers of the FMA in relation to matters covered by that Act (eg insider conduct, market manipulation, general dealing misconduct, continuous disclosure, substantial holding disclosure and directors’ and officers’ disclosure obligations). The Securities Commission had the power to make a variety of orders under the Act, including prohibition and corrective orders, disclosure orders and temporary banning orders for investment adviser and broker activities where a provision in the Securities Markets Act has been contravened. These powers now reside with the FMA. The main powers of the FMA under the Securities Markets Act can now be summarised as follows:

- **Power of the FMA to seek injunctions :** Under Pt 5, subpart 2, the FMA has the power to apply for an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of a provision: see s 42K.
- **Power of the FMA in relation to Insider Conduct :** Under Pt 1, subpart 1, insider conduct is subject to criminal liability. However, pursuant to Pt 5, subpart 3, the FMA also has the power to seek a pecuniary penalty order and a declaration of contravention: see s 42R and 42S. The maximum amount of the pecuniary penalty is described in s 42W.
- **Power of the FMA in relation to Market Manipulation :** Under Pt 1, subpart 1, various forms of market manipulation (such as false or misleading statements or information and false or misleading appearance of trading) are subject to criminal liability. Note, however, that pursuant to the Securities Markets (Market Manipulation) Regulations 2007, there are carve-outs for market stabilisation, short selling and the crossing of trades. However, pursuant to Pt 5, subpart 1, the FMA has the power to make prohibition and corrective orders: see s 42. The FMA may make a prohibition or a corrective order or both if it is satisfied that someone has contravened or would contravene:
 - a market manipulation prohibition or exemption
 - the general dealing misconduct prohibition
 - an investment advisers’ or brokers’ disclosure obligation or exemption

- the prohibition on holding out as a securities exchange unless registered or an exemption to that prohibition
- the prohibition on holding out as a futures exchange unless authorised or an exemption to that prohibition, or
- an unsolicited offer obligation or exemption.

A prohibition order may prohibit or restrict the making of any statement or the distribution of any document. The purpose of the order must be to prevent a contravention or a further contravention. A corrective order may direct the contravening person to publish corrective statements in accordance with the order at the contravening person's own expense.

Next, pursuant to Pt 5, subpart 3, the FMA has the power to seek a pecuniary penalty order and a declaration of contravention in relation to this activity: see s 42R and 42S.

• **Power of the FMA in relation to the General Dealing Misconduct prohibition** : Under Pt 1, subpart 2, a new general dealing misconduct prohibition is introduced in s 13. The section has extraterritorial scope (see s 18) but there are a set of carve-outs in s 14– 17. The section follows s 1041H of the *Australian Corporations Act 2001* and the case law on the cognate Australian section is directly relevant. The prohibition is in addition to the general prohibition on misleading or deceptive conduct in trade in the *Fair Trading Act 1986*. No criminal sanction attaches to this prohibition. However, pursuant to Pt 5, subpart 1, the FMA has the power to make prohibition and corrective orders: see s 42. Next, pursuant to Pt 5, subpart 3, the FMA has the power to seek a pecuniary penalty order and a declaration of contravention in relation to this activity: see s 42R and 42S.

• **Power of the FMA to enforce Continuous Disclosure Regime** : Part 2 contains two subparts. Subpart 1 deals with continuous disclosure by public issuers. Under the NZX Listing Rule 10.1.1, a listed company is required to notify the NZX as soon as it becomes aware of any "material information" concerning itself. The Listing Rules are part of the Listing Agreement between the listed company and the NZX and are a private contract. However, NZX LR 10.1.1 now has an added statutory force because s 19B states that public issuers must disclose in accordance with listing rules if continuous disclosure listing rules apply. Under Pt 5, subpart 1, the FMA has the power to make a disclosure order where a continuous disclosure obligation or exemption has been contravened: see s 42B. Failure to comply with an order made by the FMA under s 42B is an offence: see s 42J. Next, pursuant to s 42R, the FMA may seek a pecuniary penalty order and declaration of contravention.

• **Power of FMA to make disclosure order regarding relevant interests by directors and officers of public issuers** : Part 2, subpart 2, requires directors and officers of public issuers to disclose a relevant interest within a period of five trading days. Disclosure must be made to the registered exchange with which the public issuer is listed and in the interests register of the public issuer. Failure to comply is an offence: see s 19ZD and 19ZF. Under s 42B(b), the FMA has the power to make a disclosure order.

• **Power of the FMA to apply for order where substantial security holder disclosure provisions have been breached** : Part 2, subpart 3, requires that (subject to certain carve-outs), substantial security holders (persons who have a relevant interest in 5% or more of the voting securities of a public issuer) must make disclosure to the issuer and the registered exchange. Under s 34, the FMA has the power to require disclosure of all relevant interests (by way of "tracing notices"). Failure to comply is an offence: see s 35BA. Under Pt 5, subpart 1, the FMA may make a disclosure order: see s 42B(c). The FMA may seek a pecuniary penalty order and declaration of contravention in respect of a breach of a substantial holding disclosure obligation or exemption: see s 42R and 42S.

• **Powers of the FMA in relation to the co-regulatory securities regulation regime** : Part 2B is entitled, "Securities Exchanges". Part 2B, subpart 1, deals with the registration, conduct and control of exchanges (such as the market operated by the NZX). Part 2B, subpart 2, deals with the monitoring of securities markets. As a result of Pt 2B, the FMA has a role in the administration of the NZX. Part 2B of the Securities Markets Act 1988 gives the FMA significant supervisory functions over securities exchanges such as the NZX. Part 2B was

amended by the Securities Markets Amendment Act 2011. The Securities Markets Amendment Act in effect as of 1 May 2011 has significantly changed the powers of the FMA in relation to registered exchanges. The amendments are largely concerned with:

- the relationships between the FMA, the registered exchange and the Minister
- the rules made by the registered exchange under contract and pursuant to legislation.

The way in which the regime operates is described below:

– **Part 2B, Subpart 1** : Securities markets can only be operated by a “registered exchange” although a securities market may be exempted from the provisions of Pt 2B. Registration of exchanges is governed by s 36F. The NZX is a registered exchange.

– **Part 2B, Subpart 1A**: Subpart 1A is entitled “Market rules” and was inserted on 1 May 2011 by section 16 of the Securities Markets Amendment Act. The purpose of this subpart is to provide for the approval of market rules and changes to market rules to apply to registered markets under a contract between a registered exchange and the exchange participants. Under s 36G, a registered exchange must operate its securities markets in accordance with “market rules” (listing rules and business rules) that comply with Subpart 1A. Any proposed new market rules must be approved: see s 36O. A registered exchange that acts in contravention of s 36G commits an offence: see s 43B(2). A market rule lacks effect unless the FMA approves it under s 36L. The FMA will pre-approve all new market rules or changes to market rules. Statutory criteria for the approval of market rules appear in s 36K(2). One criterion is “encouraging growth and innovation in New Zealand’s securities and futures markets”: s 36FC(2)(d). Section 36M confers power on the FMA to request changes to market rules on certain matters if it considers it necessary or desirable to do so. Section 36N stipulates that market rules must be generally available for public inspection.

– **Part 2B, Subpart 2** : This subpart is entitled “Obligations and oversight in respect of registered markets.” The FMA is given a general oversight power of a registered exchange. It also has the power to access real-time surveillance information.

New general obligations in respect of registered markets appear in s 36Y. To the extent that it is reasonably practical, a registered exchange must do all things necessary to ensure that each of its registered markets is a fair, orderly and transparent market. Adequate arrangements must be made for, inter alia, handling conflicts of interest, monitoring the conduct of exchange participants and enforcing compliance. A registered exchange must give an annual report to the FMA and the Minister of Commerce on the extent to which it has complied with its s 36Y obligations. However, the FMA may carry out a general obligations review at any time: s 36YB. In that case, the FMA must give a written report on such review to the Minister of Commerce: s 36YC. If the FMA considers that a registered exchange has failed to meet its obligations, the FMA can require it to submit an action plan. An acceptable action plan is enforceable by the FMA.

Role of FMA in monitoring of securities markets: First, a registered exchange must notify the FMA of disciplinary actions and suspected contravention of its conduct rules: s 36ZD. Second, registered exchange must give the FMA material information given to market participants: s 36ZG. Third, a registered exchange must give the FMA or the Takeovers Panel information or assistance on request: s 36ZK. Fourth, a registered exchange must give the FMA notice on continuous disclosure determinations: s 36ZM. Fifth, the FMA may give directions to the registered exchange. The direction may require the exchange to suspend trading in a particular security: s 36ZO. Sixth, the FMA may give a continuous disclosure direction to a registered exchange: s 36ZP. These powers of the FMA are backed by the criminal sanction contained in s 36ZX.

Under Pt 5, subpart 1, the FMA has the power to make a prohibition or corrective order in relation to s 36A(1) which states that there must be no holding out as a securities exchange unless registered. Failure to comply with an order made by the FMA is an offence: see s 42J.

Powers in relation to futures exchange : Part 3 is entitled, “Dealing in Futures

Contracts". It introduced a regime for registering a futures exchange in New Zealand. The FMA has the power to make a prohibition order or a correction order in relation to s 37A(1) which states that there must be no holding out as a futures exchange unless authorised. Failure to comply with an order made by the FMA is an offence: see s 42J.

Powers in relation to investment advisers and investment brokers :Part 4 of the Securities Markets Act (Investment advisers and brokers) was repealed on 1 July 2011.

Powers in relation to unsolicited offer orders: Part 5 of the Act (Enforcement and remedies) is amended by granting the FMA power to make unsolicited offer orders: s 42EA. This power is designed to deal with "low ball" unsolicited offers to acquire securities.

Enforcement powers under the Securities Markets Act: The FMA has the power to make some enforcement orders itself and can also apply to the court for other enforcement orders. It can also make pecuniary penalty orders and declarations of contravention and can apply to the court for compensatory orders and other civil remedy orders on behalf of those who have suffered loss.

In addition to enforcing the Securities Act and the Securities Markets Act, the FMA now has an enforcement role in respect of "financial markets legislation" as defined in the FMA Act. This includes the new regime for financial advisers and brokers which is in full force as of 1 July 2011. FMA's enforcement powers in relation to financial advisers and brokers are detailed in Chapter 26.

[¶221] The New Zealand Exchange Limited

We saw in Chapter 1 that some companies elect to have their securities listed for quotation on the main securities market conducted by the New Zealand Exchange Limited (the NZX). When they do so, they contract with the NZX that they will comply with the NZX Listing Rules. The NZX acts as co-regulator with the FMA in the sense that it has a primary policing function for listed companies' compliance with those rules. However, it is important to remember that the NZX is not a governmental or regulatory agency like the FMA.

Historically, it was the *Sharebrokers Amendment Act 1981* that enabled the Stock Exchange Association of New Zealand and each of the then four trading exchanges to form together as a statutory membership-based entity.

In late 2002, however, members of the New Zealand Stock Exchange (the NZSE) voted in favour of the demutualisation of the NZSE.

39 For a general discussion of the demutualisation process, see E McKnight, R Fraser and H Gething, *Demutualisation* (1996). For a discussion of demutualisation of the Australian Stock Exchange in October 1998, see F Donnan, "Self-Regulation and the Demutualisation of the Australian Stock Exchange" (1999) 10 *Australian Journal of Corporate Law* 1. See, also, IOSCO, *Issues Paper on Exchange Demutualisation* (June 2001).

Technological change and competitive pressures drove the change.

40 See NZSE, *Annual and Special Meeting Documentation* (16 October 2002). Thanks to Elaine Campbell, General Counsel of the NZX, for relevant documentation.

Enabled by the New Zealand Stock Exchange Restructuring Act 2002, the NZSE became a limited liability company — NZSE Limited — with its own constitution on 1 January 2003. As a result, new Conduct Rules for the NZSE were introduced. The Conduct Rules comprised the Business Rules and the Listing Rules. The Business Rules comprised the NZSE Business Rules 2002, the NZSE Regulations and the NZSE Code of Practice.

On 30 May 2003, NZSE Limited announced a further change of name to New Zealand Exchange Limited, trading as NZX, as part of a re-branding exercise. (Thus, the new website of the NZX is www.nzx.com and that website has a new format.) The NZX listed on its own stock market — the NZSX — on 4 June 2003.

41 J Whyte, "NZ exchange sizes up the task ahead", *The Australian Financial Review*, 31 January 2003, p 73 (discussing listing of NZSE Limited in 2003); J Whyte, "Full steam ahead for NZSE listing", *The Australian Financial Review*, 29 May 2003, p 19 (NZSE to list on its own market on 4 June 2003); Anon, "NZSE to change name", *The Weekend Australian Financial Review*, May 31–June 1 2003, p 11 (name change from NZSE to NZX ahead of NZX listing); J Whyte, "NZX

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shares list at top of price range", *The Australian Financial Review*, 5 June 2003, p 21 (NZX listed on its own market on 4 June 2003); R Callick, "Exchange makes an impressive Mark", *The Australian Financial Review*, 8 July 2003, p 53 (longer review article describing the work of Mark Weldon as change agent and CEO of the NZX).

As of 2011, the key rules of the NZX are as follows:

- NZSX /NZDX Listing Rules (August 2010)
- NZAX Listing Rules (August 2010), and
- NZX Participants Rules (August 2010).

The main markets now operated by the NZX are as follows:

- **The NZSX** : The New Zealand Stock Market (the NZSX) is NZX's premier equities market. It features the securities of most of New Zealand's listed companies and a number of overseas companies. Companies on the NZSX have one of three listing types. The first type is primary listing where NZX is the home exchange and the company abides by NZX Listing Rules. The second type is dual primary listing where the company abides by all NZX Listing Rules as well as its home exchange listing rules. The third type is overseas dual listing where the company abides by a limited number of NZX Listing Rules as well as those of its home exchange. Companies generally quote ordinary shares on the NZSX. They can also quote options, partly paid shares, warrants units, and notes and preference shares with equity-like characteristics. For a company to list on the NZSX, the securities being quoted must have a minimum anticipated market value on initial listing and a specific spread of shareholders.
- **The NZDX** : The New Zealand Debt Market (the NZDX) offers a range of investment securities, including corporate and government bonds and fixed-income securities.
- **The NZAX** : The New Zealand Alternative Market (the NZAX) provides a market for the raising of capital and the trading of securities issued by companies that, because of their size or structure, may not be suited to the NZSX.

What is the legal status of the NZX Listing Rules?

The NZX Listing Rules form part of the listing agreement between the NZX and the listed company. The listing agreement is a private contract. In effect, it provides that the NZX may vary its Listing Rules as it sees fit (subject always to the approval process contained in s 360 of the *Securities Markets Act 1988*) and may act unilaterally in relation to exercising its powers to suspend or delist a company.

The NZX or a security holder — via the *Contracts (Privity) Act 1982* — has the ability to enforce the Listing Rules. The FMA plays an important role in enforcing the Listing Rules relating to continuous disclosure.

42 Sections 19B, 19G, *Securities Markets Act*.

Also of relevance here is subpart 2 of Pt 2B of the *Securities Markets Act*. This subpart most clearly establishes the new co-regulatory regime for securities regulation in New Zealand. The subpart gives the FMA powers of oversight that may have the effect of enforcing a listing rule.

In Australia, the Listing Rules of the Australian Stock Exchange (the ASX) primarily operate as private law that is binding only as a matter of contract between the ASX and the listed company.

43 See CCH Australia, *Annotated Listing Rules*.

However, they do have general statutory force. This is because s 793C of the *Corporations Act 2001* gives the courts the power, on the application of ASIC, the ASX or a "person aggrieved", to order any person obliged to comply with the Listing Rules to do so.

The securities market operated by the NZX is a market where buyers and sellers exchange listed securities, and where a company requiring additional capital may issue newly listed securities to prospective buyers. The NZX states that its purpose is to provide and operate an efficient market for the raising of capital for listed companies and the trading of securities, including shares and fixed-interest securities such as bonds and Government stock. These functions and objectives are aspects of the economic role of financial markets. Most microeconomists define an efficient

market as one in which the costs of transactions are minimised. The function of the market is also to transfer financial resources from those with surplus funds to those who can use those assets more productively. This function also enhances the risk-bearing capacity of the economy.

[¶222] Jurisdiction of courts

Companies are legal persons capable of suing and being sued in their own name — that is, they can be the plaintiff or defendant in a civil proceeding, or a defendant in a criminal proceeding. This section reviews the jurisdiction of courts over companies, explaining which courts are allowed to hear matters in which companies are involved.

What courts have jurisdiction over companies generally?

In matters other than those arising under the *Companies Act 1993*, companies are subject to the ordinary jurisdictional rules. For example, an action to recover a debt would be brought in the court system, in either the District Court or the High Court, depending on the amount of money involved. The current rules setting out the monetary limits for jurisdiction for courts can be found in the *District Courts Act 1947*. The same would be true for tort claims, such as claims by or against the company for negligence.

What courts have jurisdiction over matters arising under the Companies Act?

Matters arising under the Companies Act fall into two categories:

- actions for breach of a provision of the Companies Act (criminal), and
- proceedings in accordance with the Companies Act (such as an application for an order for the appointment of a liquidator under s 241).

Which court has jurisdiction to hear or decide a matter under the Companies Act depends on the particular matter. Matters can be decided in the general court system (in the District Court or the High Court), subject to relevant jurisdictional limits.