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EDITORIAL 341

ARTICLES

Insider trading in Australia and New Zealand: Information that is "generally available" – *Keith Kendall* and *Gordon Walker*

The Australian and New Zealand Governments are parties to a *Memorandum of Understanding (2006 MOU) on Business Law Co-ordination* flowing from the *Closer Economic Relations (CER) Agreement*. Pursuant to the 2006 MOU, the parties seek, where possible, to coordinate their business laws in order to advance economic union. One area selected for coordination is securities regulation. In 2006, as part of an ongoing reform program, the New Zealand Parliament will consider a Bill to effect changes to New Zealand's securities regulation regime. In particular, major changes to the insider trading laws are contemplated. The changes will criminalise insider trading and remove the requirement for an insider to have a connection with the relevant company. These proposed amendments – following the strictures of the 2006 MOU – are explicitly based on the Australian legislation on insider trading. The Australian insider trading regime contains a "carve out" from liability where information is "generally available", a term not used in the current New Zealand provisions dealing with insider trading. This article examines the meaning of the term "generally available" as used in Australia to determine whether information qualifies as "inside information". The present term used in the New Zealand legislation – "publicly available" – is then analysed. Finally, the use of the term "generally available" as it appears in the proposed New Zealand regime is examined with reference to the Australian jurisprudence. 343

Providing financial services "efficiently, honestly and fairly" – *Paul Latimer*

ASIC sees the obligation of acting efficiently, honestly and fairly in *Corporations Act 2001* (Cth) s 912A(1)(a) as both a stand-alone obligation that an Australian Financial Services (AFS) licensee must satisfy, and an obligation that encompasses other obligations under an AFS licence. A licensee may be in breach of its statutory obligation to provide services efficiently, honestly and fairly even if it is complying with all of its other specified obligations. This general obligation includes personal competencies, and imposes continuing obligations on the licensee and its representatives when providing financial services from the beginning of the relationship to its end. Included in the licensee's obligations are its duties as an employer to its employees, even if intermingled with other obligations regarding financial services. The obligation of acting efficiently, honestly and fairly parallels legal action under other sections in the *Corporations Act*. The importance of the test is that it triggers ASIC's administrative procedure of suspending, cancelling or banning an offender for breach of the obligation to act efficiently, honesty and fairly. This can present potential problems because it allows ASIC to bypass specific provisions in the *Corporations Act*, avoid the decision whether to pursue civil or criminal proceedings, avoid briefing prosecutors and allows it to deal with the matter by means of the administrative process of suspending, cancelling or banning a licensee for breach of the

obligation to act efficiently, honestly and fairly. Even criminal activity such as false transfers, false entries, illegal trading and manipulation – which ASIC may classify as gross misconduct – can be dealt with administratively for failure to provide financial services efficiently, honestly and fairly. The test of whether financial services are provided efficiently, honestly and fairly is written in plain English. It is not encumbered with existing interpretations and its scope is not fixed, so it cannot become obsolete, and like the evolution of *Trade Practices Act 1974* (Cth) s 52, the expected standard of the financial services licensee of efficiency, honesty and fairness will continue to evolve to meet new situations in the marketplace for financial services. 362

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Editorial inquiries:
Tel: (02) 8587 7000

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