

PRESENTERS

Andrew Beck, Barrister, Wellington

Andrew Beck is a barrister specialising in civil litigation, with an emphasis on company, tax and commercial law. He has appeared in cases at all levels up to the Privy Council, and was formerly Associate Professor of Law at the University of Otago. His publications include *Morison's Company Law*, *New Zealand Company Law & Practice*, *Guidebook to New Zealand Companies & Securities Law*, *Corporate Debt: Statutory Demands*, and numerous articles in local and overseas journals.

Denis Clifford, Barrister Wellington

Denis Clifford is a commercial barrister, previously having practised for many years as a senior commercial partner with Buddle Findlay. Denis also spent two years as an adviser in the Prime Minister's Department. Denis has a wide-ranging commercial and public law practice. He teaches companies and securities law at the Victoria University Law School.

The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.

CONTENTS

1. COMPANY LAW	1
Introduction.....	1
Changes to the Act	1
Developments in the courts	1
<i>Impact of the Supreme Court</i>	1
Constitutions	2
<i>Ord v Calan Healthcare</i>	2
<i>Court of Appeal</i>	3
Shareholder oppression.....	3
<i>Proper approach</i>	4
<i>Interim relief and pre-emptive rights</i>	5
<i>Corporate governance principles</i>	5
Cracking the corporate egg	6
Personal liability	7
Corporate governance principles	8
<i>ASIC v Rich</i>	9
Illegitimate trading.....	10
<i>Löwer v Traveller</i>	10
<i>Walker v Allen</i>	12
<i>Mountfort v Tasman Pacific</i>	14
The limitation escape route	15
<i>Rethinking the cause of action</i>	16
Sharing liability	17
<i>Paape v Fahey</i>	17
<i>Mason v Lewis</i>	18
Pooling of assets	18
<i>Sections 271 and 272</i>	19
<i>Mountfort v Tasman Pacific Airlines</i>	20
<i>The company law context</i>	21
2. INSOLVENCY LAW	23
Introduction.....	23
Personal property securities	23
The statutory regime	23
Changes in thinking.....	23
Failure to register	24
Lessors beware.....	26
Beware the receiver.....	27
Liquidation changes	28
The existing scheme.....	28
The proposed test.....	30
Liquidation and set-off.....	32
Operation of s 310.....	32
The <i>Trans Otway</i> case.....	34
3. SECURITIES LAW: INTRODUCTION – THE CURRENT ENVIRONMENT	37
Background to reform	37
Key components of reform programme	38
Takeovers Code	38
The Securities Markets and Institutions Bill	38
Review of securities law – the Securities Legislation Bill	39
Review of the Securities Act.....	39
The key elements	40

4. OFFERS OF SECURITIES IN THE PRIMARY MARKET - THE SECURITIES ACT 1978 41

Overview and core provisions.....	41
Key concepts.....	41
Security.....	42
<i>Scope of term “security” - cases</i>	43
Offer.....	44
The public.....	44
<i>Sections 3(1) and (2)</i>	45
<i>Interpretational difficulties</i>	46
<i>Kiwi Co-op</i>	46
<i>Lawrence</i>	47
<i>Significance of Lawrence</i>	50
<i>The public - earlier cases</i>	50
<i>The “\$500,000” and the “eligible person” exemptions</i>	51
<i>\$500,000 to invest?</i>	51
<i>Are you eligible?</i>	52
<i>Are you wealthy?</i>	52
<i>Are you experienced?</i>	52
Allotment and subscription.....	52
Offering documents.....	53
Breaches and their consequences.....	54
<i>GreenTEK – the facts</i>	55
<i>GreenTEK – the proceedings</i>	56
<i>Reuhman’s appeal</i>	57
<i>Paape’s substantive claim against directors</i>	57
<i>Section 37 – other cases</i>	59
<i>The Illegal Contracts Act – relief orders</i>	59
<i>The position today</i>	61
<i>Mandatory and discretionary relief orders</i>	61
<i>Section 37A – voidable allotments</i>	62
<i>Voiding an allotment</i>	63
<i>Relief orders</i>	63
Other director liabilities.....	63
<i>Civil liability for untrue statements</i>	63
<i>Untruth</i>	64
<i>Reliance and causation</i>	65
<i>Criminal liability</i>	65
The Wakefield and Vertex IPO reports.....	66
<i>Wakefield Hospital</i>	66
<i>Vertex</i>	67
<i>Comment</i>	68

5. REGULATION OF THE SECONDARY MARKET – THE SECURITIES MARKETS ACT 1988

..... 69

Overview.....	69
Insider trading – key concepts.....	69
<i>Insider</i>	70
<i>Inside information</i>	72
<i>Buying, selling or tipping</i>	72
<i>Exceptions</i>	73
<i>Enforcement</i>	73
<i>Private enforcement</i>	73
<i>Enforcement by the Commission</i>	76
<i>Enforcement and the Securities Legislation Bill</i>	77
Continuous disclosure by public issuers.....	77
<i>Material information</i>	78
Directors’ and officers’ disclosure.....	79
Disclosure by substantial security holders.....	80
<i>Overview</i>	80
<i>Key concept – relevant interest</i>	81

<i>Power</i>	83
<i>Arrangement or understanding</i>	83
<i>The Perry “gap”</i>	84
<i>Time for disclosure</i>	85
<i>Section 32 orders</i>	85
The regulation of exchanges	87
<i>Overview – the Unlisted decision</i>	87
<i>Registered exchanges</i>	88
<i>Policy of SMA</i>	88
<i>Monitoring of registered exchanges</i>	89
6. THE SECURITIES LEGISLATION BILL	91
Overview	91
Insider trading	91
Substantial security holder disclosure	92
Market manipulation	92
Remedies and penalties	92
Pecuniary penalty orders and declarations	93
Concluding remarks	93
7. THE TAKEOVERS ACT 1993 AND THE TAKEOVERS CODE	95
The background to the Code	95
The key features of the Code	96
The fundamental rule	96
Exceptions to the fundamental rule	97
<i>Full and partial offers</i>	97
<i>Acquisition and allotment with shareholder approval</i>	98
<i>“Creep”</i>	98
<i>Compulsory purchase</i>	98
<i>Table of permitted exceptions</i>	98
The takeover process	99
<i>Minimum acceptance condition</i>	99
<i>Equal treatment of shareholders</i>	100
<i>The notice and offer</i>	100
<i>Dealings during the offer period</i>	100
<i>Associates and anti-avoidance</i>	101
The Code in practice	101
<i>How the Takeovers Panel works</i>	101
<i>Exemptions</i>	102
<i>Enforcement</i>	105
<i>Penalties</i>	107
Current issues	107
<i>Lock-up agreements</i>	107
<i>Associate status</i>	108
<i>Defensive tactics</i>	110
8. COMMERCE ACT AND FAIR TRADING ACT	113
Introduction	113
Rules of attribution	113
<i>Giltrap City</i>	113
<i>Kinsman v Cornfields</i>	115
Reviving door to door sales	116
<i>High Court</i>	117
<i>Court of Appeal</i>	117
<i>Approach to consumer legislation</i>	118