

## **PRESENTERS**

### **Colin Carruthers QC, Wellington**

Colin Carruthers is a Queen's Counsel practising from Chambers in Wellington. His background is as a litigation partner in a major firm. He commenced practice at the Bar in 1987 and was appointed Queen's Counsel in 1990. He has appeared as senior counsel in many major commercial cases. He has also had significant experience in criminal work, including Serious Fraud Office prosecutions, tax prosecutions, securities prosecutions and other regulatory prosecutions. He is a Past President of the New Zealand Bar Association.

### **Victoria Heine, Chapman Tripp, Wellington**

Victoria's background is in general commercial litigation but she has particular expertise in regulatory litigation and enforcement. Her clients are predominantly large corporates in the energy, airport, media, banking and financial services industries. Victoria has acted for a number of directors subject to a financial markets investigations. She is frequently involved in threatened litigation and enforcement actions under the Commerce Act, including in relation to alleged cartels, and potential breaches of the regulations provisions of that Act.

# CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>1. SECTION ONE: OVERVIEW.....</b>	<b>3</b>
A NEW WORLD?.....	3
WHERE LIABILITY BEGINS .....	3
THE ROLE OF THE GLOBAL FINANCIAL CRISIS .....	4
THE FINANCIAL MARKETS CONDUCT BILL .....	6
<i>Civil pecuniary penalties</i> .....	6
<i>Compensatory orders</i> .....	7
<i>Criminal sanctions</i> .....	8
COMPANIES ACT 1993 .....	9
CARTEL BILL .....	9
<i>Penalties</i> .....	11
<i>Prosecution guidelines</i> .....	11
<b>2. SECTION TWO: KEY CASES.....</b>	<b>13</b>
NEW ZEALAND CASES .....	13
FELTEX .....	13
<i>Background</i> .....	13
<i>Analysis</i> .....	14
<i>Decision</i> .....	15
DAVIDSON .....	16
<i>Background</i> .....	16
<i>Analysis</i> .....	16
<i>Decision</i> .....	18
NUPLEX.....	19
<i>Background</i> .....	19
<i>Commentary</i> .....	19
LOMBARD .....	20
<i>Background</i> .....	20
<i>Analysis</i> .....	21
<i>Decision</i> .....	22
BRIDGECORP .....	23
<i>Background</i> .....	23
<i>High Court Decision</i> .....	24
<i>Court of Appeal</i> .....	26
NATHANS FINANCE NZ LTD .....	27
<i>Background</i> .....	27
<i>Analysis</i> .....	28
<i>Decision</i> .....	29
AUSTRALIAN CASES .....	30
THE JAMES HARDIE CASES.....	30
<i>Background</i> .....	30
<i>Key findings</i> .....	31
CENTRO .....	32
<i>Background</i> .....	32
<i>The decision</i> .....	32
<i>Key findings</i> .....	33
OVERVIEW OF THE CURRENT LEGAL POSITION .....	33
<i>Governance v management</i> .....	33
<i>Directors must exercise their own independent judgment</i> .....	34
<i>Financial literacy is important</i> .....	34
<i>It is important for directors to understand the business</i> .....	35
<i>Advice may be relied upon</i> .....	36
<i>But advice should be treated critically</i> .....	36

<i>Directors can make mistakes – provided that directors have made all reasonable efforts to avoid error</i> .....	37
<i>Governance – the legal perspective</i> .....	37
<i>Some tips</i> .....	38
<b>3. SECTION THREE: KEY ISSUES .....</b>	<b>39</b>
DIRECTORS' ACCESSORY LIABILITY FOR CORPORATE OFFENCES .....	39
FINANCIAL MARKETS CONDUCT BILL.....	40
<i>Meaning of "contravene" – accessory liability</i> .....	40
<i>Overview of the FMC Bill</i> .....	41
ACCESSORY LIABILITY LEGISLATIVE PROVISIONS CURRENTLY IN FORCE .....	42
THE SECURITIES MARKETS ACT 1988 ACCESSORY LIABILITY PROVISIONS.....	42
<i>The Nuplex Settlement – a missed opportunity for clarification of the SMA provisions</i> .....	43
THE COMMERCE ACT 1986 ACCESSORY LIABILITY PROVISIONS .....	44
THE LEADING CASE ON ACCESSORY LIABILITY – NEW ZEALAND BUS LTD v COMMERCE COMMISSION ....	45
<i>Background</i> .....	45
<i>The High Court decision – Miller J</i> .....	46
<i>Court of Appeal</i> .....	48
<i>The Court of Appeal result</i> .....	52
<i>The Supreme Court to the rescue?</i> .....	52
<i>An alternative analysis to NZ Bus: Commerce Commission v Koppers Arch Wood</i> .....	53
<i>What does this all mean? – Conclusions</i> .....	54
FAIR TRADING ACT 1986 .....	55
<i>The accessory liability requirements – a "wrongful act" with mens rea</i> .....	56
TAX ADMINISTRATION ACT 1994.....	57
CONCLUSIONS ON ACCESSORY LIABILITY .....	59
SENTENCING.....	60
<i>Penalties in New Zealand cases</i> .....	60
<i>Penalties in Australian cases</i> .....	61
DEVELOPMENTS IN DIRECTOR INSURANCE .....	61
<i>The case</i> .....	61
<i>The judgment</i> .....	62
<i>The insurance industry's response</i> .....	62
<i>Other Issues</i> .....	63
DOCUMENT RETENTION .....	64
<i>Deeds of indemnity</i> .....	65
THE USE OF EVIDENCE OBTAINED FOR THE PURPOSES OF CIVIL PROCEEDINGS IN SUBSEQUENT CRIMINAL PROCEEDINGS AGAINST DIRECTORS .....	66
<i>The relevant statutory powers</i> .....	67