



HANDLING REGULATORY INVESTIGATIONS

- **key themes from a lawyer's point of view**
- **ComCom, FMA, SFO, OPC, DIA and more acronyms than you can bear!**

Presentation to NZICA Forensic SIG



COMMERCE COMMISSION

Competition law, Fair Trading, telco/energy/dairy, CCCFA, unfair contracts

Notices - s98 (CA) or s47G (FTA) – if “necessary or desirable for... carrying out functions or exercising its powers”, can require anybody to:

- Furnish information
- Produce documents
- Appear in person to give evidence
- Search warrant (dawn raids)
- Cease and desist orders – may be rescinded?
- Big proponent of leniency/amnesty programme

Consumer Law: unfair contract terms a big priority

Cartels Bill – criminalisation now dropped





FINANCIAL MARKETS AUTHORITY

- Growing scope of activities across all financial products/services
- Corporate governance, culture, and directors duties are the new focus
- Financial Advisors Act enforcement and FSP register under review
- FMA Act - s25-29 powers to demand information, documents, or attendance to give evidence – where “necessary or desirable for the purposes of performing or exercising its functions, powers, or duties”
- Supervisory role – desk-based and on-site visits
- Active on requests from overseas regulators
- Step-in rights and representative actions
- Publish warnings and accept court-enforceable undertakings





SERIOUS FRAUD OFFICE

- Serious and complex fraud (large in scale, impact or complexity)
- Typically \$2m and above, or multiple victims, or wide public interest
- But strategic approach for smaller cases in particular areas – eg corruption & bribery, players are trusted gatekeepers (eg lawyers)
- If “reason to suspect” an investigation into affairs of anyone may disclose serious or complex fraud, can use various powers (s5 or s9)
- Case-load overlap with FMA
- Online fraud and cybercrime scams
- Limited criminal law mandate, recovery of victims’ lost funds is civil law matter
- Different focus, budget, staffing needs now finance company cases wound up.





OFFICE OF THE PRIVACY COMMISSION

IN THE PAST:

- Privacy Act seen to lack in bite, no real sanctions
- But a huge overseas focus (Edward Snowden, EU DP Directive); local issues arising too (GCSB surveillance, marketing to databases)

But these days:

- New more active Commissioner, promising to name and shame, with doubled budget funding of the Office
- Tackling Veda for misuse of credit check database
- Cyber security risk has seat at the top Board-tables

PROPOSED OVERHAUL:

- Mandatory reporting of data breach (loss, leak, hack); New offences with \$10,000 fine – eg. fail to report breach; destroy documents if person has sought access to data



REINVENTING THEMSELVES? RBNZ, OSH

BANKS, INSURERS, NBDT

- RBNZ has been tasked with migrating from a policy setting body and think-tank to a prudential supervisor to a tough AML/CFT enforcer
- Is this possible?
- Not under-resourced, but FMA and DIA will eclipse it as AML Supervisor under the current regime
- Most at risk of “regulatory capture”?
- Is that a problem?

PROPOSED OVERHAUL of HSE becomes a reality:

- Dept of Labour/OSH/WSNZ – compliance manual & paper trail war – found wanting in Pike River, law change underway

Health & Safety is already a mature regime: fines and reparation are standard; next, focus on the Boardroom and individuals

Enforceable undertakings, improvement notices, compliance orders



STUCK IN THE BUREAUCRACY? MPI, NZTA

To date:

- Mixture of briefs, and wearing different conflicted hats: policy, adjudicator, enforcer, industry adviser?

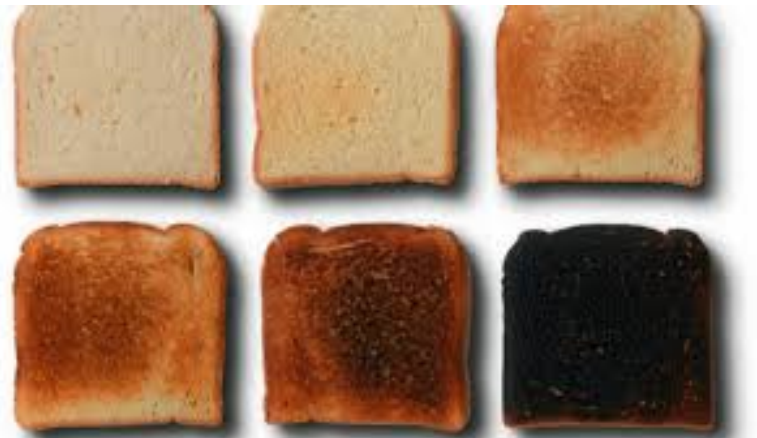
But going forward:

- Toughen up on farming industry animal welfare and pollution issues
- After 6 years in the ~~baking~~, making, new Food Act 2014 will come into force with plethora of compliance rules and traps for the unwary

TRANSPORT REGULATIONS STILL

DESPERATELY NEED OVERHAUL:

- NZTA barely coping with new technology in land transport?
- Maritime Safety NZ
- Aviation authorities





DEPARTMENT OF INTERNAL AFFAIRS

- Historically, bit of a mixed bag in terms of jurisdiction and enforcement
- Casino and Gambling Act enforcement is long-standing
- But increasingly growing in stature as a regulator- eg Financial Integrity Unit has good capacity and is relied upon by the FMA and others - smaller cases or particular areas – eg forex/derivative trader scams
- Anti-spam legislation

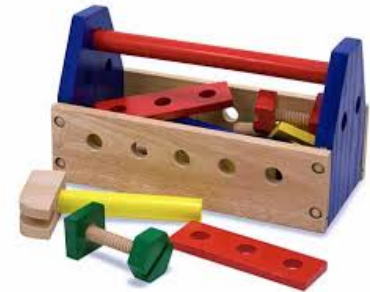




REGULATORY ISSUES (ACROSS THE BOARD)

TRENDS INCLUDE:

- Sheet responsibility home to individuals
- Strict liability and criminalisation
- Much wider range of tools in the kit-bag: from infringement notices to bans to reparation and criminal prosecution
- Cost recovery – direct or indirect means
- PR and media usage by the enforcers
- Ethics, reputation, and culture are the new focus
- Are Boards more concerned about brand value, longevity, individual status, or just securing this financial year's bonus?





REGULATORY ISSUES (ACROSS THE BOARD)

But really, just how much more is needed for the enforcers' toolkit?

FMC Act and Regs...phew!

AML/CFT a modern example, borrowing from overseas

Refocus on simplicity or proper use of what we have, rather than ever more-creative statutory powers and tools?





Particular issues in cross-border investigations

Strategy must be aligned, but many practical difficulties

- Managing multi-jurisdictional cases and legal teams
- Identifying likely locations of documents, witnesses, assets or liabilities
- Determining where to initiate legal proceedings, or procedural challenges, to maximise results
- interim injunctions, urgent court orders
- Maintaining legal privilege in document sharing
- Regulators and inter-govt co-operation agreements



ASSEMBLE THE RIGHT TEAM OF EXPERTS

- expert legal counsel (not a G.P)
- specialist forensic accountant (not a G.P)
- fraud investigators
- digital/IT experts
- Ex-government enforcement personnel/relationships/ authorities
- valuation professionals





COMPLIANCE OBSESSED IN MODERN TIMES?

- Board, Legal, Compliance, Audit functions must be all in sync
- Culture needs to be set from the top down, and seen to be a leadership attribute
- Taking short cuts or budget cuts will inevitably lead to a failing or prosecution somewhere (but will it be on the next CEO's watch?)
- Whistleblowing – informants – hotlines – secrecy.
- How many 'lines of defence' can you afford? Three? More?



“I sleep like a baby
- meaning, I wake up every
night screaming and
crying.”

Larry Thompson, GC/CoSec, PepsiCo, NY, 2014