Investing in New Zealand

A guide for international business

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MinterEllisonRuddWatts


New Zealand

Contents

About us

MinterEllisonRuddWatts is a full service New Zealand law firm with offices in Auckland and Wellington. Nationally, we have 47 partners and more than 200 legal staff. We advise our clients on a wide range of practice areas, from regulatory to commercial law, finance to real estate, employment to taxation, and from public law to dispute resolution. Our clients come from a broad range of sectors including banking and financial services, central and local government, infrastructure, energy and resources, manufacturing, health and aged care, telecommunications, media and technology.

We are a member of the international MinterEllison Legal Group. With more than 200 partners and 900 legal staff, the MinterEllison Legal Group is one of the largest law firms in the Asia-Pacific region.

Our network of offices in New Zealand, Australia, Asia and the United Kingdom enables us to provide a full range of legal services to both local business and international companies.

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Introduction

New Zealand is an open and competitive economy with a population of around 4.8 million.

The country has a range of strong manufacturing and service sectors which complement a highly efficient agricultural sector. Technology is now New Zealand's third largest export sector behind tourism and dairy, and is one of New Zealand's fastest-growing sectors, important for the future prosperity of New Zealand and is the fastest growing segment of the economy generating 8% of our GDP and 9% of our exports.

The economy is operating in a low interest rate environment and is strongly trade-oriented with the agricultural, horticultural, forestry, mining and fishing sectors - all playing an important role in the export sector and employment. Overall, the primary sector contributes to over 70% of New Zealand's merchandise exports. Primary industry export performance continues to outpace expectations for the year ending June 2019, with export revenue now forecast to reach $45.6 billion. This is 6.9% higher than the previous year, and 3.0% higher than forecast.

Foreign investment is generally welcomed and all levels of government are keen to promote business, economic development and employment growth. In the World Bank Doing Business 2019 survey report, New Zealand was ranked as the best country in terms of the ease of doing business and ranked first in the 'Starting a Business' category. The findings in this survey complement the findings in the 2019 Index of Economic Freedom, compiled by the Wall Street Journal and the Heritage Foundation, which ranked New Zealand third in the world on the economic freedoms measured.

New Zealand has also been ranked as the second least corrupt country (behind Denmark) by Transparency International in its Corruption Perceptions Index 2018.

New Zealand's economic growth before the global financial crisis was strong. The country's strong primary sector meant New Zealand weathered the crisis better than a number of other developed nations. The strength and durability of New Zealand's economy can largely be attributed to the following factors:

- a strong primary sector that is quick to respond to global opportunities
- a marked increase in the flexibility of the economy, leading to a much more dynamic economy able to respond to shifts in markets and manage significant economic shocks
- a sound and sustainable macroeconomic framework, leading to a marked reduction in economic volatility, allowing households and businesses to plan for greater certainty
- a marked increase in the efficiency of the government sector

This highlights that, notwithstanding global uncertainty and downstream issues, the New Zealand business environment is sound. Aspects such as a reasonably predictable policy environment, clear property rights, and high levels of trust and transparency provide a sound basis for sustained growth.

This guide for international business is intended to:

- provide an introductory overview to investing in New Zealand
- answer some preliminary questions frequently asked by those unfamiliar with the New Zealand economy

For more comprehensive professional advice, please contact either the Auckland or Wellington offices of MinterEllisonRuddWatts, details can be found at the back of this guide.

Reasons to invest in New Zealand

New Zealand offers numerous advantages for smart investment, from a highly-skilled workforce to strategic connections with Asia-Pacific and global markets.

The world's top country to do business in
New Zealand is an economic powerhouse. The World Bank's 2019 Doing Business report ranked New Zealand as the easiest place to do business in the world.

With its competitive and low compliance tax system, the US-based Tax Foundation's 2017 International Tax Competitiveness Index ranks New Zealand's overall tax system as second in the developed world for its competitiveness and first for its individual (ie. personal) taxes.

In New Zealand there is no payroll tax, no social security tax, no stamp duties, no estate tax and no general capital gains tax (although it can apply to some specific investments). Interacting with public authorities is also easy and transparent.

Home to Australasia's fastest growing city
Since 2010, New Zealand and Auckland's economic growth has been faster than most developed countries. Auckland makes up more than a third of New Zealand's population and is projected to go from just over 1.65 million in 2016 to 2.2 million in 2043 (medium projection).

Investors can take advantage of the new business, commercial and industrial spaces, and services being built in Auckland and nationwide, to support our growing population and globally competitive industries.

A time zone advantage
New Zealand is 12 hours ahead of the United Kingdom, and between two and six hours ahead of Australia and many major Asian cities. The country is perfectly located for multinational companies to service customers through the night for a number of countries, including the United Kingdom, Europe and the United States.

A global talent hub
Investors can tap into New Zealand's highly educated and experienced workforce. With Australasia's largest recruitment bases of highly-skilled employees, and a large pool of private and public sector researchers, the country's labour market is flexible and mobile.

The gateway to booming Asia-Pacific markets
With Asia shaping global trade and investment flows for years to come, New Zealand is a strategic place to set up business to serve the Asia-Pacific and Western economies, while also gaining preferential access to international markets (including Australia, China, Singapore, Hong Kong, Indonesia, Malaysia, Thailand and Vietnam). This is due to the Free Trade Agreements New Zealand has signed with major Asia-Pacific economies.

Globally connected
New Zealand is a major hub for international air travel, with most major international airlines flying frequently in and out of Auckland Airport. Deep water ports serve global and regional shipping lines at internationally competitive costs.

A highly developed financial hub
New Zealand has one of the most developed financial systems in the world. Here you can be first on the stock market (the country's stock exchange is the first to open worldwide each trading day). Several major trading banks and numerous other banking institutions are based here, along with agents and sales offices representing many international banks. The Reserve Bank of New Zealand supervises the country's banking system to ensure the country is financially stable.

A fair labour environment and competitive costs
New Zealand's labour laws support business owners and employees, and offer highly competitive wage rates and low on-costs and overheads – all crucial advantages over comparable investment locations.

New Zealand's Pay As You Earn (PAYE) deductions are easy to do and include income tax and accident compensation cover.

System of Government

New Zealand's founding document is the Treaty of Waitangi (Te Tiriti o Waitangi), first signed on 6 February 1840, between Māori chiefs representing various iwi (tribes) and representatives of HM Queen Victoria of The United Kingdom of Great Britain and Ireland. It resulted in the declaration of British sovereignty over New Zealand by Lieutenant Governor William Hobson in May 1840, and guaranteed certain rights to Māori, including the rights of a British subject.

New Zealand became fully independent following a series of steps taken during the 20th century. The final practical constitutional link to Britain of New Zealand's Parliament was removed by the Constitution Act in 1986. The Treaty remains an important document in New Zealand's constitution recognizing the special position of Māori.

Today, New Zealand's Government is formed from a democratically elected House of Representatives. The Government advises the Sovereign (Head of State) HM Queen Elizabeth II as Queen of the Realm of New Zealand. By convention, the Sovereign is the source of all executive legal authority in New Zealand and acts on the advice of the Government.

Power is distributed across three branches of Government – Parliament, the Executive, and the Judiciary. Parliament makes the laws. The Executive (Ministers of the Crown, also known as the Government) administers the law. The judiciary interprets the law through the courts. New Zealand is a common law country, meaning law is developed and shaped through the decisions of the judiciary.

Parliament and Government

The New Zealand Parliament makes law through a process of examining, debating and passing bills. Each bill goes through several stages, giving Members of Parliament (or MPs) and the public the chance to have their say. Parliament has a single chamber, the House of Representatives (or the House). This means that for a Bill to be enacted into law it needs to be passed by the House, currently made up of 119 MPs. The Governor-General (currently Dame Patsy Reddy) is the Sovereign's representative in New Zealand and carries out a formal constitutional function by signing Acts into law once they have been passed by the House.

Every three years, Parliament is elected using the Mixed Member Proportional ('MMP') system, replacing the previous First Past the Post system in 1996. MMP works using two votes. The first is the 'Party vote', which determines each party's share of seats in Parliament, and the second is the 'Electorate vote', which determines who will represent each geographical electorate in Parliament. A simple majority of seats is required to govern, which can be made up by a single majority party or a group/coalition of parties. After an election, the party (or group/coalition of parties) with the majority of seats in the House forms a Government. The leader of the largest party in Government will generally become the Prime Minister and lead a Cabinet of around 20 Ministers. In practice, the Prime Minister acts as the leader of the nation.

The MMP system allows for minor parties to have a place in Government. Since the introduction of MMP, each of the two largest parties, the centre-right National Party and the centre-left Labour Party have consistently required the support of smaller parties to form a Government.

Following the general election in September 2017, New Zealand currently has a Labour-led coalition Government. Rt Hon. Jacinda Ardern, leader of the Labour Party, is the

current Prime Minister of New Zealand. The Government is built on a coalition arrangement between the Labour Party and the New Zealand

First Party, with a confidence and supply agreement entered into with the Green Party.

Complementing the roles of the executive Government and Parliament, the judiciary applies the law by interpreting the legislation passed by Parliament. It hears and decides cases by applying the relevant law and undertakes judicial review of administrative decisions. The judiciary is independent and generally operates under an open system. Most courts are public and New Zealanders are free to comment on the outcomes of any dispute resolution process. This feature aims to enhance public confidence and accountability in the process.

The court of final appeal is the Supreme Court of New Zealand, which was established by the *Supreme Court Act 2003* and replaced the Judicial Committee of the Privy Council which is based in the United Kingdom. The Supreme Court is made up of five judges and is presided over by the Chief Justice.

New Zealand's international trade profile

With a population of around 4.8 million, trade is essential to New Zealand's continued prosperity and is a fundamental component of the Government's broader economic policies, designed to promote higher sustainable growth. New Zealand therefore has one of the more open economies in today's global trading system.

New Zealand's top five import and export destinations include the People's Republic of China, Australia, the United States of America, Japan, South Korea and Germany. New Zealand's export profile continues to be dominated by agricultural commodities, with dairy, meat and forestry products constituting the top three export commodities.

New Zealand is committed to an open, rules-based international trading system and is an active participant in the World Trade Organization ('WTO'). Its market access commitments are among some of the most extensive and liberal in the WTO.

New Zealand is party to a range of regional, bilateral and multilateral free trade agreements ('FTAs'). The most notable of these is its long-standing Closer Economic Relations Agreement with Australia where almost all barriers to trade in goods and services have been eliminated. The Investment Protocol to the New Zealand-Australia Closer Economic Relations Trade Agreement was entered into force on 1 March 2013. The Protocol maintains the status of Closer Economic Relations as the highest quality free trade agreement that New Zealand or Australia has. Accordingly, Australia and New Zealand have one of the most open economic trade relationships between any two countries, with both countries moving progressively towards much closer integration of policies, laws and regulatory regimes through processes of coordination, mutual recognition and harmonisation.

New Zealand has FTAs with a range of its trading partners, including Malaysia, the People's Republic of China, the Republic of Korea, the Association of Southeast Asian Nations ('ASEAN') and Australia, and closer economic partnership agreements with Hong Kong (China), Singapore and Thailand, all of which reinforce the relatively open nature of the New Zealand economy. New Zealand is also a party to the Trans-Pacific Strategic Economic Partnership, along with Brunei Darussalam, Chile and Singapore. Negotiations on an FTA with the Gulf Cooperation Council (comprising Bahrain, Oman, Kuwait, Saudi Arabia, the United Arab Emirates and Qatar) have concluded, but the agreement is not yet signed.

New Zealand is currently negotiating FTAs with India, the European Union and Russia, Belarus and the Kazakhstan Customs Union (negotiations have commenced for Russia, Belarus and the Kazakhstan Customs Union, but are currently suspended). In early 2013, negotiations on the Regional Comprehensive Economic Partnership between ASEAN and six ASEAN Free Trade Partners (New Zealand, Australia, China, India, Japan and Korea) commenced, with the twenty-fourth round of negotiations taking place in October 2018 in Auckland. New Zealand is also negotiating the Trade in Services Agreement with twenty two other participants, all of which are members of the WTO, and the Pacific Agreement on Closer Economic Relations. An upgrade to New Zealand's FTA with China is also currently being negotiated.

New Zealand is party to the Trans-Pacific Partnership (TPP) signed on 4 February 2016, along with Australia, Brunei Darussalalm, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam. Although the United States withdrew from the TPP in January 2017, several of the remaining countries have indicated they wish to progress with the trade deal. The TPP aims to establish a regional free trade agreement that is intended to strengthen economic ties between these countries and, in particular, in the Asia-Pacific region.

The potential benefits for New Zealand from the TPP are likely to include:

- tariff elimination on 93% of New Zealand's trade with its new FTA partners once the TPP is fully phased in
- reduced compliance costs for goods exporters
- more opportunities to access government procurement contracts
- reduced barriers to services trade and investment

Establishing a business presence

Overview

Trading with New Zealand
It is possible to do business with New Zealand companies without setting up a formal business structure in New Zealand.

The following key issues will require consideration:

- New Zealand tariffs apply to a limited range of goods imported from overseas. If however, a local manufacturer is licensed to produce the goods in New Zealand, the issue of tariffs will only apply to any imported components
- agency and distribution agreements can be entered into freely and are not the subject of specific regulation. The terms of any agreement with agents and distributors must therefore carefully address all aspects of the relationship

Other legal issues that may arise include:

- protection of intellectual property rights
- the law that the parties choose to govern the contract, the relevant forum for enforcing the contract and the possible impact of the United Nations Convention on Contracts for the International Sale of Goods (New Zealand is a party to that Convention)
- security for payment, including title retention, and the potential requirement to register any such interest in accordance with the Personal Property Securities Act 1999 in order for it to be valid
- dispute resolution and the relevant forum for settling disputes
- currency of payment and protection against exchange rate fluctuations
- potential product liability claims

There are no exchange controls at the border. Persons arriving in or leaving New Zealand must declare if they are carrying in excess of NZ$10,000 cash or foreign currency equivalent in cash or cash equivalent.

New Zealand maintains an anti-money laundering and countering financing of terrorism regime intended to meet the requirements of the international Financial Action Task Force. That regime has been strengthened by the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, which came into full force on 30 June 2013. This creates significant obligations, particularly for financial institutions, casinos and other reporting entities. Civil and criminal penalties exist for any persons who provide or collect funds for terrorist acts, or who are involved in, or engage in, money laundering.

United Nations Security Council sanctions are implemented in New Zealand law by regulations made under the United Nations Act 1946. That Act provides the New Zealand Government with discretion to impose or remove sanctions by Order in Council of the Governor-General.

Trading in New Zealand

In general, foreign investors do not need to set up a New Zealand registered company or other legal entity in order to conduct business in New Zealand. However, a foreign company conducting business in New Zealand may need to register on the overseas register administered by the New Zealand Companies Office if the requirement in the Companies Act 1993 is met.

If the Companies Act 1993 requirement is, or is expected to be, triggered, by the investor's New Zealand activities, then the investor might want to consider setting up a new entity in New Zealand.

Foreign companies usually establish a business presence in New Zealand either by:

- establishing or acquiring a New Zealand subsidiary company, or
- establishing a branch office.

Other options for structuring an investment in New Zealand include using a partnership or a limited partnership. The decision on what corporate form to adopt will generally depend more on commercial and perhaps taxation considerations, rather than strict legal considerations.

When establishing a business presence in New Zealand, consideration should be given to the following matters under New Zealand law:

- the investment structure
- business acquisition rules
- the overseas investment regime
- taxation
- competition (anti-trust) and consumer protection law
- intellectual property
- employment and industrial relations
- real estate rules
- environment and resource management law
- financial services regulation

Each of these matters is discussed in the remainder of this guide.

Investment structures

Foreign companies usually establish a business presence in New Zealand either by:

- establishing or acquiring a New Zealand subsidiary company or
- establishing a branch office.

Other options for structuring an investment in New Zealand include using a partnership or a limited partnership.

Companies and branches

Companies

Company law is regulated by the provisions of the Companies Act 1993.

The activities of companies listed on a licensed market operated by NZX Limited are also regulated by the relevant listing rules and other legislative requirements.

Any person, either alone or together with another person, may apply to incorporate a company under the Companies Act 1993. A company has the full capacity of a natural person, subject to the Companies Act 1993 and its constitution (if any). Incorporation entitles the company to carry on business anywhere in New Zealand.

To incorporate a company, an application must first be made to reserve the company's name with the New Zealand Registrar of Companies. A name cannot be reserved which is identical to, or almost identical to, the name of another registered company. Certain names are protected or restricted by legislation and may need approval from relevant authorities before they can be reserved (for example, names including the words 'bank' or 'royal').

An online application in the prescribed form must be made to the Registrar of Companies to incorporate the company under the reserved name. The company must:

- have a registered office and an address for service at a physical address in New Zealand
- have at least one share
- have at least one director and one shareholder (who may be the same person)
- have at least one director who either lives in New Zealand, or lives in Australia and is a director of a company registered in Australia
- provide ultimate holding company information (if applicable) to the Registrar of Companies.

The directors of a company must provide their date and place of birth to the Registrar of Companies. This information will not be publicly available.

Income tax, goods and services tax and employer registration for tax purposes may also be able to be applied for at the same time as company incorporation (although, the company may need to provide proof of its fully functional New Zealand bank account to the New Zealand tax office before these applications will be processed), or alternatively these registrations can be applied for following incorporation, once the company has opened a New Zealand bank account.

Each company is allocated a unique identifying number on incorporation. Generally, provided that all necessary information is available, companies can be incorporated and trading within one to three business days.

There are criminal sanctions for breaches of certain directors' duties.

The Registrar of Companies has powers to investigate and remove companies from the Register of Companies, along with the power to warn the public about suspect companies by placing a warning note on the Register.

Branch office

A foreign company can establish a branch in New Zealand by registering on the overseas register under the Companies Act 1993. Registration is compulsory if the foreign company is 'carrying on business' in New Zealand. The Companies Act 1993 does not clearly define what activities constitute 'carrying on business'. For this reason, it is advisable for foreign companies to seek professional advice prior to commencing business in New Zealand.

Main legal differences

The decision on whether to establish a subsidiary or branch office will generally depend on commercial and perhaps taxation considerations, rather than legal considerations.

The following table sets out the main legal and taxation differences between establishing a company in New Zealand and doing business through a branch office established in New Zealand.

Subsidiary company	Branch office
Companies law	**Companies law**
▪ separate legal entity incorporated with the Registrar of Companies and given a unique identifying number ▪ liabilities remain with the subsidiary in the absence of guarantees and like arrangements, or if the subsidiary trades while insolvent in which case liability may be placed on directors	▪ not a separate legal entity (ie a branch office is part of the foreign company) ▪ registered with the Registrar of Companies as an overseas company and given a unique identifying number ▪ liabilities remain with the foreign company ▪ must not commence business until the name of the foreign company has been reserved
Overseas investment regulations	**Overseas investment regulations**
▪ if a foreign company acquires an existing subsidiary company that has certain land or assets in New Zealand, or if the foreign company establishes a new subsidiary company to acquire certain land or assets in New Zealand, prior approval may be required before completing the transaction	▪ approval may be required before certain land or assets in New Zealand are acquired by the branch office
Taxation	**Taxation**
▪ resident for New Zealand tax purposes ▪ taxed on all net income wherever sourced at the corporate tax rate of 28% ▪ dividends paid by the subsidiary will be subject to New Zealand non-resident withholding tax ('NRWT') at a rate of 30% which may be reduced by domestic law or under an applicable double taxation agreement to 15%, 5%, or 0%	▪ taxed on all net income attributable to the branch at the corporate tax rate of 28% ▪ may be affected by a double taxation agreement ▪ no New Zealand tax on repatriation of branch office profits to head office
Debt to equity funding ratio	**Debt to equity funding ratio**
▪ subsidiary's interest deductions will be limited if the debt percentage (being the ratio of debt to net assets, being assets net of non-debt liabilities) of its New Zealand group is greater than 60%, and exceeds 110% (or 100% in some instances) of the debt percentage of its worldwide group	▪ branch's interest deductions will be limited if the debt percentage (being the ratio of debt to net assets, being assets net of non-debt liabilities) of its New Zealand group is greater than 60%, and exceeds 110% (or 100% in some instances) of the debt percentage of its worldwide group
Exchange controls	**Exchange controls**
▪ financial institutions must report significant cash transactions and transfers and any suspicious transactions	▪ restrictions and reporting requirements apply to transactions between a company's branch and head office
Ongoing administrative responsibilities	**Ongoing administrative responsibilities**
▪ must lodge annual returns with the Registrar of Companies ▪ may be required to file audited financial statements of the company (including subsidiaries) with the Registrar of Companies depending on the value of its (and its subsidiaries) assets, revenue and degree of overseas ownership ▪ may be required to hold a shareholder meeting (or pass a resolution in lieu of meeting) each year ▪ required to maintain certain registers (eg directors, shareholders)	▪ must lodge annual returns with the Registrar of Companies ▪ may be required to file audited financial statements (for its New Zealand operations and separately for the foreign company (and its subsidiaries) of which the branch is a part) with the Registrar of Companies depending on the value of its global (including subsidiaries) and New Zealand assets and revenue ▪ the branch is not required to hold annual shareholder meetings or maintain registers under New Zealand law

Partnerships

In New Zealand, a partnership is the relationship which exists between persons carrying on a business in common, with a view to profit.

Partnerships (other than limited partnerships) are regulated by the Partnership Act 1908, together with the terms of any agreement between the partners.

Because a partnership (other than a limited partnership) is not a separate legal entity:

- each partner is the agent of the other partners and may make contracts, undertake obligations, and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business
- arrangements between partners will protect partners in their relationship with each other. Third parties without knowledge to the contrary, however, are protected from actions committed by partners beyond their authority
- each partner is personally liable, for the liabilities of the partnership. The liability of each partner is unlimited
- the property of the partnership is owned by the partners personally as joint owners
- each partner is liable personally, jointly and severally, for torts committed by the partners

Different rules, however, apply to limited partnerships. A partnership and each of its partners will need to be registered for income tax purposes. As part of this registration process, the partnership and/or the partners may need to provide proof of a fully functional New Zealand bank account to the New Zealand tax office, or otherwise demonstrate that customer due diligence has been completed by a New Zealand reporting entity. A partnership must submit a joint return of income to the New Zealand Inland Revenue disclosing its income, allowable deductions and the distribution of profits to partners, although the partnership itself will not be assessed for income tax. The partners individually must submit a separate return of income to Inland Revenue and pay tax on their share of partnership profits.

A partnership, other than a limited partnership, does not have to be formally registered.

Limited partnerships

The Limited Partnerships Act 2008 provides for limited partnerships, which are similar in nature to limited partnerships in other jurisdictions.

A limited partnership must have at least one general partner and one limited partner. A person may not be both a general partner and a limited partner of the same limited partnership at the same time.

General partners are responsible for the management of the limited partnership and have unlimited liability (jointly and severally) for the unpaid debts and liabilities of the limited partnership incurred while that person is a general partner, to the extent the limited partnership cannot pay those debts or liabilities. Limited partners' liability for the debts or other liabilities of the limited partnership will generally be limited to the amount of any unpaid committed capital. This limited liability may be lost in certain circumstances where a limited partner involves itself in the management of the limited partnership, in which case it will have unlimited liability as if a general partner with respect to the relevant transactions.

The legislation sets out 'safe harbours' – that is, activities that do not constitute taking part in the management of a limited partnership.

A limited partner who undertakes 'safe harbour' activities will not be deemed to be liable as if a general partner for that reason.

A limited partnership must have a limited partnership agreement between the limited partnership and all of its partners.

Limited partnerships are formally registered in a similar manner to companies. However, the limited partnership agreement is not registered and details of limited partners (although required to be filed) may not be searched by the public. Details of general partners are filed and selected information is publically available. A limited partnership is a separate legal entity.

For New Zealand tax purposes a limited partnership is not a tax paying entity and is treated as fiscally transparent (subject to certain limits on utilisation of tax losses). The loss limitation rules specific to limited partnerships limit the amount of deductions a limited partner can claim to the amount they have at risk with respect to their investment in the limited partnership (e.g. capital contribution plus any limited partnership obligations they have agreed to guarantee). Deductions denied in one income year may be able to be carried forward and claimed in a subsequent income year. There are also anti-streaming rules which prevent the streaming of particular items of income or expenditure to individual limited partners.

Limited partnerships are also subject to the general tax implications of carrying on a partnership business (for example, the tax treatment of partners and partnership property on entry to and exit from the partnership, and disposals of partnership property). A limited partnership and each of its partners will need to be registered for income tax purposes. As part of this registration process, the limited partnership and/or the partners may need to provide proof of a fully functional New Zealand bank account to the New Zealand tax office, or otherwise demonstrate that customer due diligence has been completed by a New Zealand reporting entity.

The Registrar of Companies has investigative powers, and the power to warn the public about suspect limited partnerships by placing a warning note on the Register of Limited Partnerships.

Additional requirements of limited partnerships include:

- Each limited partnership must have at least one general partner:
  - who either lives in New Zealand, or lives in Australia and is a director of a company that is registered in Australia ('Resident General Partner Requirements')
  - that is a limited partnership and that has at least one general partner who meets the Residential General Partner Requirement
  - that is a partnership governed by the Partnership Act 1908 and that has at least one partner who meets the Residential General Partner Requirements
  - that is a company under the Companies Act 1993 (and so is subject to equivalent director rules, as noted in the 'Companies' section above)
  - that is an overseas company registered as such under the Companies Act 1993 and that has at least one director who meets the Resident General Partner Requirements
- Individuals who are general partners must comply with certain qualification requirements.
- Individuals who are general partners or limited partners must provide their date and place of birth to the Registrar of Companies. This information will not be publicly available.

Acquisitions of companies and businesses

Regulation

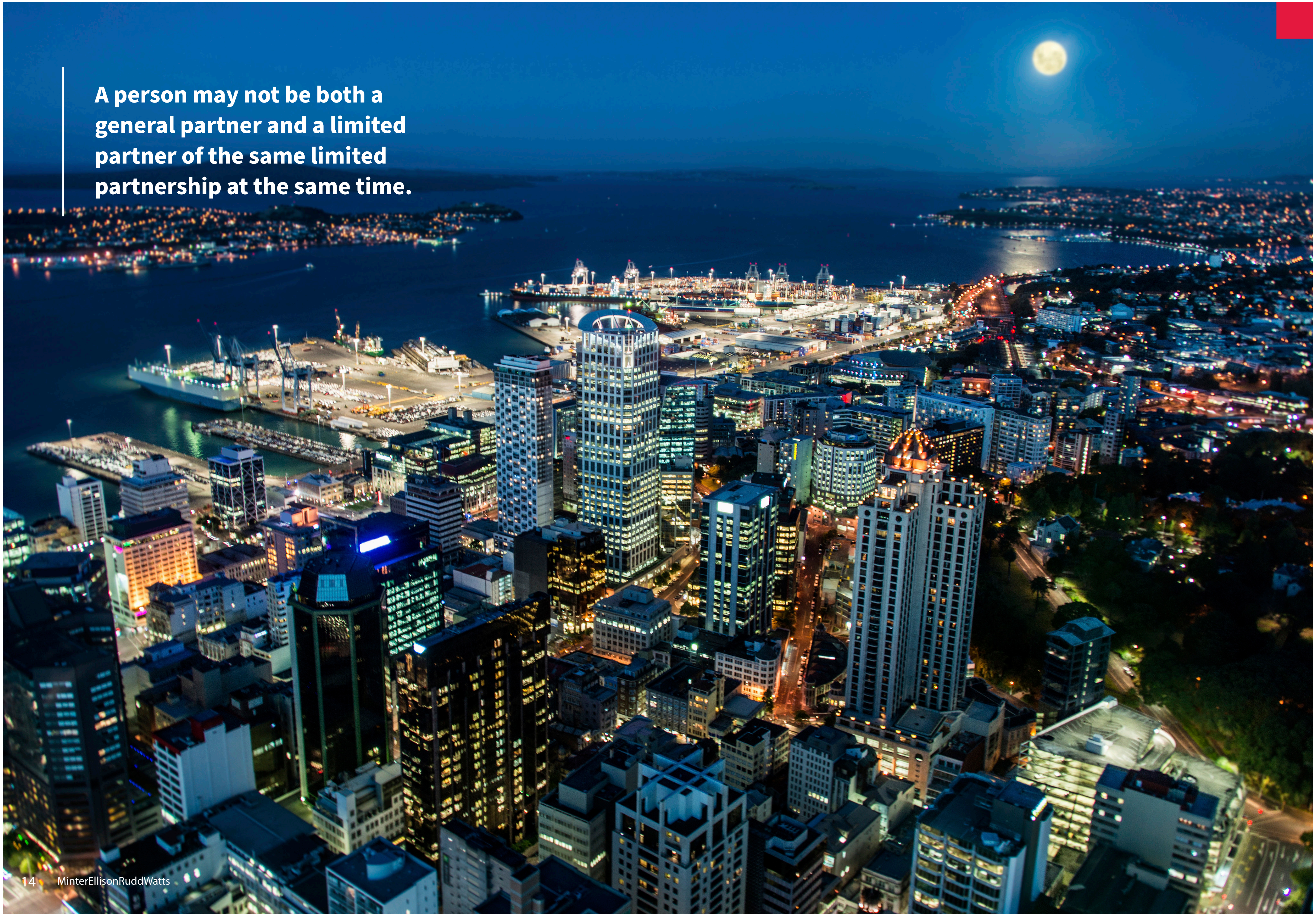
Acquisitions of shares and businesses are regulated by:

- the Companies Act 1993
- the Financial Markets Conduct Act 2013
- the Takeovers Act 1993 and the Takeovers Code (where the target company is a 'code company')
- the NZX Listing Rules (where either party to the acquisition is listed on licensed market operated by NZX Limited)
- the Commerce Act 1986
- the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005
- any other legislation affecting the relevant industry of the corporation or business being acquired.

Matters which may need to be considered

Under the Companies Act 1993 the following factors need to be considered:

- if the acquisition is a 'major transaction' for a party (generally a transaction worth more than 50% of the market value of a company's assets), and that party is registered under the Companies Act 1993, the acquisition will require the approval by way of a 'special resolution' of the shareholders of that party
- generally, a company can only give financial assistance to a person to acquire shares in the company if the board has previously resolved that the company should provide the assistance, that giving the assistance is in the best interests of the company and of benefit to shareholders not receiving it



A person may not be both a general partner and a limited partner of the same limited partnership at the same time.

- that its terms and conditions are fair and reasonable to the company and to shareholders not receiving the assistance, and that the company can satisfy the solvency test
- the solvency test requires that a company be able to pay its debts as they become due in the normal course of business and that the value of the company's assets is greater than the value of its liabilities, including contingent liabilities
- the acquisition by a company of its own shares is regulated, and the Companies Act 1993 requires that the solvency test, amongst other matters, be satisfied; and dealings by directors in the securities of companies which are not listed are restricted

Securities laws

Where an investment into New Zealand is made and securities (whether newly issued or previously allotted) are offered as payment, New Zealand's securities laws may apply. In general, unless an exemption or exception applies, these laws require the preparation of disclosure documents (e.g. a product disclosure statement) in respect of the securities being offered. As in other jurisdictions, non-compliance with New Zealand's securities laws can result in significant civil and criminal penalties.

Therefore, persons or companies investing in New Zealand and offering securities as payment need to be mindful that disclosure documents may need to be prepared in respect of those securities.

In some circumstances, Australian investors are able to take advantage of Part 9 of the Financial Markets Conduct Regulations 2014 which provides for a mutual recognition scheme between New Zealand and Australia allowing issuers to extend offers of equity or debt securities and certain other products in their trans-Tasman counterpart country without needing to prepare a separate offer document under the other country's laws. Certain minor procedural requirements must be met to rely on the mutual recognition scheme.

Under the Financial Markets Conduct Act 2013:

- a person is a 'substantial product holder' in a listed issuer if the person has a 'relevant interest' in 5% or more of any class of quoted voting products of a listed issuer. A listed issuer includes a company listed on the NZX
- every person who is or becomes a substantial product holder, or who ceases to be a substantial product holder, must give notice of that fact to the listed issuer and to the NZX
- a substantial product holder must notify the listed issuer and NZX Limited of changes of 1% or more in the number of quoted voting products in which the holder has a relevant interest, and/ or of changes in the nature of the holder's relevant interest
- the language used in the definition of 'relevant interest' is very wide, extending to many interests in addition to registered ownership
- an 'information insider' cannot trade in quoted financial products (which includes quoted and certain unquoted derivatives) of a listed issuer in New Zealand. This is a person who is in possession of information about a listed issuer which is not publicly available, but which, if it were, a reasonable person would expect to materially affect the price of the listed issuer's quoted financial products. The information insider must also know or ought to know they have inside information. Similarly, information insiders may not advise or encourage others (directly or indirectly) to trade or continue holding financial products of that listed issuer, or disclose such information to other people, if that person knows, ought reasonably to know or believes that those people will or are likely to subsequently trade or advise or encourage others to trade or continue to hold the listed issuer's quoted financial products
- a person making statements or disseminating information about a listed issuer in New Zealand which they know, or ought reasonably to know, is false in a material aspect or is materially misleading, and which is likely to influence trading, price or the exercise of voting rights of that listed issuer's quoted financial products (which includes quoted and certain unquoted derivatives) is prohibited. It is also prohibited to take or omit to take action which the person knows, or ought reasonably to know, will, or is likely to have, the effect of creating or causing the creation of a false or misleading appearance of trading or otherwise the supply, demand, price or value of the quoted financial products of a listed issuer in New Zealand

The Takeovers Act 1993 and the Takeovers Code apply to 'code companies'. A code company is a company that:

- is (or was in the prior 12 months) listed on a licensed market (e.g. the NZX) and has quoted voting securities on issue, or
- has 50 or more shareholders and 50 or more share parcels and is at least medium-sized (being a company and subsidiaries that have at least $30 million in assets or $15 million in revenue in the most recent financial year).

Non-compliance with New Zealand's securities laws can result in significant civil and criminal penalties.

Under the Takeovers Code, no person can:

- become the holder or controller of more than 20% of the voting rights in a Code Company (taking into account shares in the Code Company held by 'associates')
- increase an existing holding or controlling interest of 20% or more of the voting rights in a Code Company, except by means of:
  - an acquisition under a 'full offer' or 'partial offer' in accordance with the Takeovers Code
  - an acquisition or allotment approved by an ordinary resolution of the shareholders of the Code Company in accordance with the Takeovers Code excluding the acquirer, disposer, allottee and their associates
  - a 'creeping' acquisition, which allows a shareholder who already holds or controls more than 50% but less than 90% of the voting rights in a Code Company to acquire up to an additional 5% of the voting rights in a 12 month period by reference to the lowest shareholding in that 12 month period
  - a compulsory acquisition, which allows a shareholder who already holds or controls 90% or more of the voting rights in a Code Company to compulsorily acquire the remaining voting rights in the Code Company, subject to certain timeframes under the Takeovers Code. If these timeframes expire, further voting rights can be acquired by agreement but not compulsorily
  - a scheme of arrangement approved by the Court under the Companies Act 1993

Under the NZX Listing Rules, companies (and subsidiaries of companies) listed on the NZX cannot enter into certain major transactions and transactions involving related parties without the prior approval of the shareholders of that listed company.

Company Thresholds

The following shareholding thresholds are relevant to acquisitions of shares and/or businesses in New Zealand.

100% – Wholly owned subsidiary, consolidation for tax purposes

90% – Required threshold for compulsory acquisition of minority holding in a code company under the Takeovers Code

80%

75% – Required majority for special resolution under the Companies Act 1993 (unless a company's constitution specifies a higher majority)

70%

66% – Minimum continuous shareholding for carry-forward of imputation credits.

Minimum commonality of shareholding for tax grouping (allowing offset of tax losses within the tax group)

60%

50% – Threshold level of foreign ownership for the thin capitalisation rules and association for purposes of the transfer pricing rules

49% – Minimum Continuous Shareholding for carry-forward of accumulated tax losses

40%

30%

25% – Threshold level of overseas ownership to be deemed an "overseas person" under the Overseas Investment Act 2005

20% – Threshold level of holding or control of voting rights in a code company, including associates. To acquire more than 20% or increase a 20% stake in that company, the acquirer will need to comply with the Takeovers Code and/or get court approval.

10%

5% – Threshold for notification by substantial product holders of relevant interests in quoted voting products of listed issuers as required by the Financial Markets Conduct Act 2013

0%

New Zealand’s foreign investment rules

New Zealand’s foreign investment law attempts to balance the encouragement of foreign investment in New Zealand with the view that it is a privilege for overseas persons to invest in the country. The regulatory regime reflects this general policy approach by applying a level of control to discourage undesirable investment.

The Overseas Investment Act 2005 (OIA) and the Overseas Investment Regulations 2005 (OIR) regulate foreign investment in New Zealand.

Certain overseas persons who propose to acquire, or acquire control of, sensitive land and/or significant business assets in New Zealand will need to apply for consent under the OIA. However, certain transactions do not require consent.

The relevant Ministers or the Overseas Investment Office (OIO) under delegation make decisions in accordance with the criteria set out in the OIA and the OIR. The OIO is responsible for screening all investment proposals that fall within the criteria set out in the OIA and the OIR, and for monitoring compliance with any conditions of consent granted under the OIA.

Penalties for failure to comply with any of the requirements of the OIA or the OIR are set out in the OIA.

The regulatory regime was amended by the Overseas Investment Amendment Act 2018 and the Overseas Investment Amendment Regulations 2018 (effective from 22 October 2018) to restrict overseas persons buying residential property in New Zealand, as well as to introduce measures to encourage foreign investment in forestry. The Government is embarking on a second phase of its review of the legislation and it is likely that there will be further changes to the investment rules by 2020.

Overseas persons

The OIA defines an ‘overseas person’ as:

- an individual who is neither a New Zealand citizen nor ordinarily a resident in New Zealand;
- a body corporate that is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand
- a body corporate (A) if overseas person(s) have 25% or more of any class of A’s securities or the power to control the composition of 25% or more of A’s governing body or the right to exercise or control the exercise of 25% or more of the voting power at a meeting of A
- a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or a unit trust) (B), where 25% or more of B’s partners or members are overseas persons, or the overseas person(s) have a beneficial interest in or entitlement to 25% or more of B’s profits or assets (including on B’s winding up), or the overseas person(s) have the right to exercise or control the exercise of 25% or more of the voting power at a meeting of B
- a trust (C) where 25% or more of C’s governing body are overseas persons, or the overseas person(s) have a beneficial interest in or entitlement to 25% or more of C’s trust property, or 25% or more of the persons having the right to amend or control the amendment of C’s trust deed are overseas persons, or 25% or more of the persons having the right to control the composition of C’s governing body are overseas persons;
- a unit trust (D) where the manager or trustee, or both, are overseas persons, or where overseas person(s) have a beneficial interest in or entitlement to 25% or more of D’s trust property.

An associate of an overseas person may also be treated as if they were an overseas person for certain purposes.

Transactions requiring consent of The Overseas Investment Office

In general, an overseas person is required to obtain the consent of the OIO if it proposes to acquire, or acquire 'control' of, sensitive land and/or significant business assets in New Zealand. Control is generally associated with an overseas person obtaining a 25% or more ownership or controlling interest in any asset or land.

Consent required for the acquisition of significant business assets

An overseas investment in significant business assets is:

- the acquisition of rights or interests in securities of a person (E) where, as a result of the acquisition, the overseas person has a 25% or more ownership or control interest in E or an increase in an existing 25% or more ownership or control interest in E and where, in each case, the value of the securities or the consideration provided, or the value of the assets of E or E and its 25% or more subsidiaries, exceeds NZ$100 million
- the establishment of a business in New Zealand where the business is carried on for more than 90 days in any one year (whether consecutively or in aggregate) and the total expenditure expected to be incurred in setting up the business exceeds NZ$100 million
- acquisition of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand where the total consideration paid or payable for the assets exceeds NZ$100 million

Consent required for the acquisition of sensitive land

Consent is required if an overseas person or an associate of an overseas person wishes to acquire an interest in sensitive land. Land is sensitive if it has certain features such as location, size, use or historical significance, and an 'interest in land' includes freehold, and other qualifying interests such as leasehold and profits-a-prendre. Consent may also be required if an overseas person or an associate of an overseas person wishes to acquire an interest in residential land in certain cases. Refer to pages [40-42] where sensitive land and the foreign investment rules are further discussed.

Exemptions to the requirement to obtain consent of The Overseas Investment Office

Certain transactions are exempt under the OIR from the requirement to obtain the consent of the OIO. These transactions include, among other things and under certain circumstances:

- certain transactions where there is internal restructuring but no change in the ultimate beneficial ownership
- certain financing transactions, particularly the enforcement of a security arrangement
- certain trust transactions
- transfer of assets to the overseas beneficiaries of a deceased estate
- certain transactions of life insurance entities and retirement schemes (of whom at least 75% of the beneficiaries are New Zealand citizens or residents)
- certain Property (Relationships) Act 1976 transactions
- certain underwriting and sub-underwriting transactions
- certain small increases in shareholding where there is already consent in place
- certain acquisitions by overseas custodians acquiring rights or interests in custodial property
- certain land transactions commonly known as re-grants
- certain transactions where relevant land of a certain type and area is already in overseas ownership and control
- certain periodic leases and residential tenancies of residential land that have certain permitted characteristics
- certain transactions involving the acquisition of residential apartments that are purchased off the plans, or hotel units for hotel use
- acquisitions of forestry rights of a particular nature or size
- certain investments in significant business assets (but not sensitive land) by certain Australian non-government investors where the value of the New Zealand assets in the business does not exceed (as at 1 January 2020) NZ$537 million, or by certain Australian government investors where the value of the New Zealand assets in the business does not exceed (as at 1 January 2020) NZ$113 million (note these thresholds increase annually with inflation)
- certain investments in significant business assets (but not sensitive land) by certain investors from member countries of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, where the value of the New Zealand assets in the business does not exceed (as at 1 January 2020) $200 million

The OIR also gives the Minister of Finance (in conjunction with the Minister for Land Information in the case of transactions involving land) a discretionary power to exempt

An overseas person is required to obtain the consent of the OIO if it proposes to acquire sensitive land and/or significant business assets.

any person or transaction from any requirement or requirements provided in the OIA or the OIR (although this discretion is likely to be exercised only in exceptional circumstances).

Criteria for transaction consent

Consent will only be granted to a proposal for the acquisition of significant business assets or sensitive land if the relevant Government Ministers or the OIO are satisfied that:

- the overseas person or the individuals with control of the overseas person have business experience and acumen relevant to the overseas investment
- the overseas person has demonstrated financial commitment to the overseas investment
- the overseas person or the individuals with control of the overseas person are of good character and are acceptable under the Immigration Act 2009

There are additional and more onerous criteria which apply to an investment in sensitive land. In the case of land which is sensitive for reasons other than being residential land, these generally require the applicant to demonstrate that the investment in sensitive land is to the benefit of New Zealand.

Where an overseas person seeking to acquire residential (but not otherwise sensitive) land, the person will instead need to be able to demonstrate that the property is for personal use and they reside or intend to reside in New Zealand permanently, or that they intend to develop the land to build additional new housing units on the land for sale to the public.

Consent must be obtained before a transaction takes effect. A retrospective application may be made, but these will be subject to fines and penalties.

Offences and penalties

Potential investors should note that it is an offence under the OIA to:

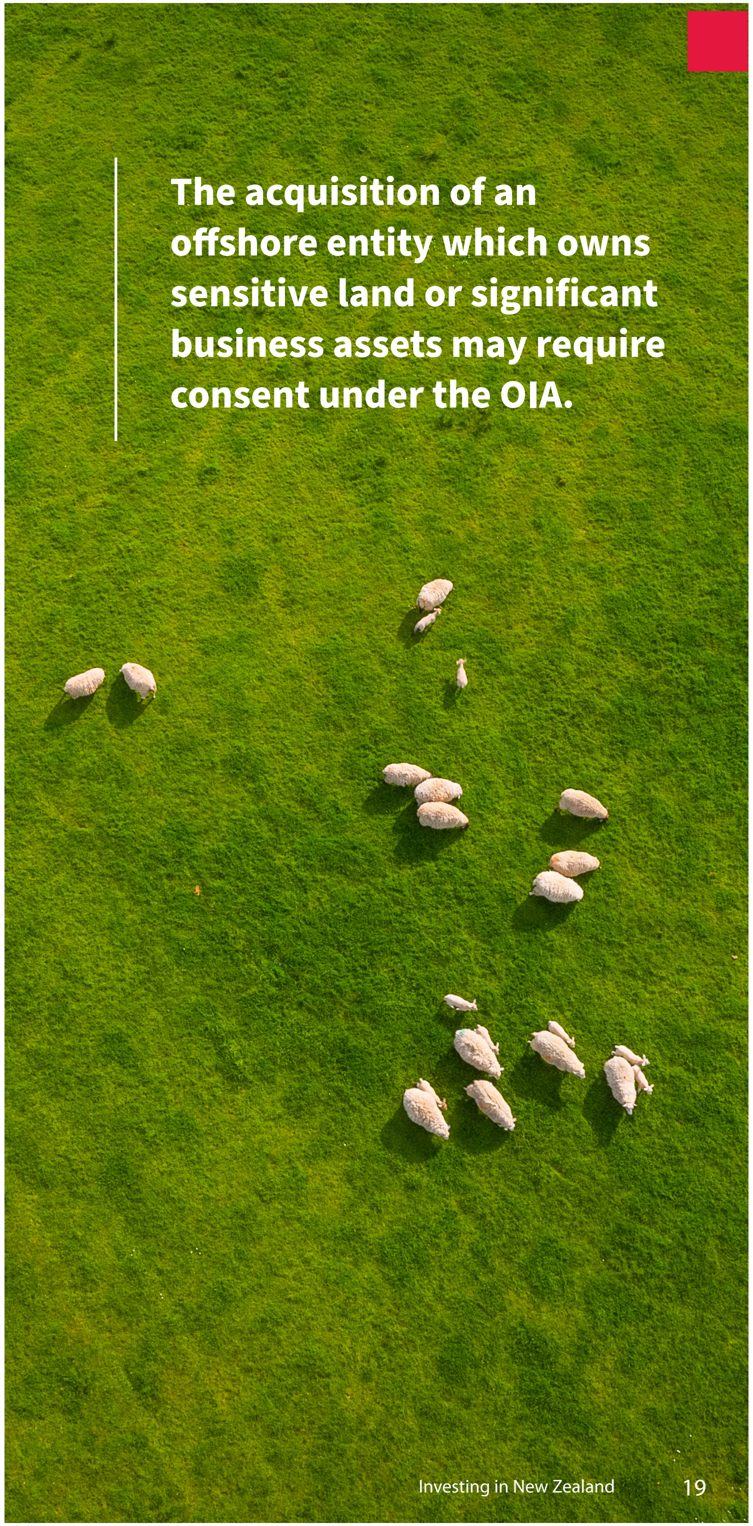
- give effect to investments without gaining consent required by the OIA
- knowingly or recklessly make a false or misleading statement or material omission in any communication with the OIO or in any information provided to the OIO or in any offer or representation made for the purposes of the OIA or the OIR
- resist or obstruct or deceive any person who is exercising, or attempting to exercise, any power or function under the OIA or the OIR
- knowingly or recklessly make a false or misleading statement or material omission in any communication with the OIO or in any information provided to the OIO or in relation to the OIA or the OIR
- fail to comply with the OIA or the OIR, or a notice, requirement, or condition given or imposed under the OIA or the OIR

In general, a person who commits an offence under the OIA may be liable to imprisonment for a term not exceeding 12 months (in the case of individuals), or to a range of civil penalties or fines not exceeding NZ$300,000 (in the case of individuals and bodies corporate).

Where a person breaches the OIA or the OIR, or fails to comply with any condition of, any approval or exemption granted under the OIA or the OIR, the OIO has a range of enforcement powers available, including seeking a Court order requiring disposal of the rights or interest in securities or sensitive land.

International Transactions

Transactions involving the acquisition of an offshore entity which owns, either itself or through its subsidiaries, sensitive land or significant business assets in New Zealand (described as 'international transactions' by the OIO) may require consent under the OIA despite the transaction taking place outside of New Zealand.



Taxation

New Zealand imposes taxation on the worldwide income of persons (including companies and unincorporated bodies) resident in New Zealand for taxation purposes, and on the New Zealand-sourced income of non-residents.

Income can have a New Zealand source even if paid outside New Zealand. Accordingly, companies and individuals doing business in, or with New Zealand, should be aware that income could become subject to New Zealand taxation, even though they may not have an established place of business in New Zealand.

There are double taxation agreements ('DTAs') between New Zealand and a number of countries. If an investor is eligible for relief under a DTA, they are generally only subject to New Zealand tax on their business profits if they have a 'permanent establishment' in New Zealand.

However, New Zealand may impose limited withholding taxes on dividends, interest and royalties paid to the investors even if they do not have a permanent establishment in New Zealand.

Countries with which New Zealand has a double taxation agreement

Australia	Mexico
Austria^	Netherlands^
Belgium *^	Norway^
Canada	Papua New Guinea
Chile	Philippines
China	Poland
Czech Republic	Russian Federation
Denmark	Samoa
Fiji	Singapore
Finland	South Africa
France	Spain
Germany	Sweden
Hong Kong	Switzerland
India^	Taiwan
Indonesia	Thailand
Ireland	Turkey
Italy	United Arab Emirates
Japan	United Kingdom^
Korea	United States of America
Malaysia	Vietnam

* A protocol to amend the existing DTA with Belgium has been signed but is not yet in force.

^ Negotiations are currently taking place to amend existing DTAs with Austria, Belgium, India, the Netherlands, Norway and the United Kingdom.

New Zealand is also currently negotiating to enter into DTAs with Luxembourg, Portugal, Saudi Arabia, and Slovak Republic.

Residence

A company is a resident of New Zealand for tax purposes if:

- it is incorporated in New Zealand
- it has its head office in New Zealand
- it has its centre of management in New Zealand
- the directors exercise control of the company from New Zealand (acting in their capacity as directors, whether or not decision-making by directors is confined to New Zealand)

An individual is a resident of New Zealand for tax purposes if he or she:

- has a permanent place of abode in New Zealand (whether or not he or she has a permanent place of abode elsewhere)
- is in New Zealand for more than 183 days in any 12-month period (the 183 days does not have to be consecutive, and part days count as whole days).

Source of income

The determination of the source of particular items of income is dependent in most cases on the particular facts. New Zealand income tax law also lays down rules that apply in a number of instances to deem income to have a New Zealand source. Examples include where contracts are performed in New Zealand.

Taxable income and rates of tax

Taxable income is generally computed in the same manner for both individuals and companies. It is necessary to calculate the gross income and deduct from it the allowable deductions and any available losses to arrive at the taxable income on which tax is charged. The resulting tax liability can be satisfied by way of tax credits to the extent that they are available.

In principle, capital gains are not subject to tax in New Zealand, although a number of types of capital gain (arising from the disposition of land or personal property) can be included in taxable income in certain instances (for example where land or personal property was acquired for the purpose of disposal).

The deductions allowable are generally all those expenditures and losses incurred in gaining or producing the taxpayer's gross income, or necessarily incurred in carrying on business for that purpose. Certain expenditure is not deductible, including that of a capital, private or domestic nature.

Certain tax deductions can be claimed by a taxpayer notwithstanding that they may be of a capital nature, such as depreciation and interest.

The standard taxation year runs from 1 April to 31 March There is an ability to adopt an alternative tax balance date, for example to align the financial and tax balance dates of a New Zealand subsidiary company with those of an overseas parent or group. The following table summarises the current principal rates of taxation in New Zealand:

Natural persons	Taxable income range NZ$	Marginal rate of taxation
	0 – 14,000	10.5%
	14,001 – 48,000	17.5%
	48,001 – 70,000	30%
	70,001 and over	33%
Companies	Taxed at the flat rate of 28%	
Trusts	Taxed on trustee income at the flat rate of 33%	

Portfolio Investment Entity regime

The portfolio investment entity ('PIE') regime encourages taxpayers to make investments through a managed fund, unit trust or company. Taxpayers investing in this way will potentially pay less tax than they would by investing directly.

An entity that satisfies the requirements to be a PIE is able to elect to enter into the PIE regime. The most common type of PIE is the multi- rate PIE. All PIEs are not taxable on gains from trading in shares in New Zealand and certain Australian companies. Tax is paid on any income derived by a multi-rate PIE on the investors' behalf by the PIE at the rate of either 0%, 10.5%, 17.5% or 28%, which reflects the tax rates for individuals but with a lower top tax rate.

For individuals, tax paid by the multi-rate PIE generally represents the final tax, and they do not generally need to pay any further tax to reflect their personal tax liability in respect of income derived through the PIE. There are also rules to ensure that the benefit of tax credits and other tax benefits are passed on to investors by the multi-rate PIE.

If it meets certain criteria, a PIE may qualify as a foreign investment PIE. There are two categories of foreign investment PIE, both of which generally provide a zero rate of tax for non- resident investors. These are:

- the zero-rate PIE
- the variable-rate PIE

These categories were intended to make New Zealand more attractive to non-resident investors and ensure that foreign investment PIEs could compete with funds in traditional offshore centres that invest internationally in more traditional offshore centres.

There are restrictions regarding the types of investment that can be held by foreign investment PIEs. A zero-rate PIE must invest primarily offshore and only hold minimal investments in New Zealand, except that up to 5% of the PIE's income can be New Zealand-sourced interest and up to 1% of the PIE's income can be from New Zealand equity.

A variable-rate PIE is able to invest in both New Zealand and offshore markets. The general principle applying to the New Zealand investments of a variable-rate PIE is that a non-resident investor should be placed in a no worse position than if he or she had invested directly. Non-resident investors will pay no New Zealand tax in relation to income derived by the variable rate PIE from outside of New Zealand. Tax will be payable in relation to the PIE's New Zealand- sourced income at variable rates depending on the nature of the income and the tax treaty position with the investor's country of residence. The following rates of tax will generally apply to the variable-rate PIE:

- 0% for foreign-sourced income
- 0% on dividends derived from a New Zealand company that are fully imputed
- 1.44% on New Zealand-sourced financial arrangement income (being the deductible approved issuer levy rate)

In order for the zero rate or lower variable rates of tax to apply, a non-resident must elect to be a 'notified foreign investor' by notifying the PIE that they wish to be treated as such. Certain requirements must be met in order for the election to be valid, including that the election cannot be made by a controlled foreign company, a non-portfolio foreign investment fund, or a non-resident trustee of a trust other than a foreign trust.

Look-through company regime

A 'look-through company' ('LTC') regime may apply to a corporate entity that is a New Zealand resident body corporate (under both New Zealand law and DTAs) with five or fewer look-through counted owners. All shares in the LTC must have uniform entitlements to distributions, although shareholders may have different voting rights. The shares must be held by natural persons, trustees or another LTC, and generally cannot be held by charities or Māori authorities. In order to be a LTC, all look-through counted owners must make certain elections to Inland Revenue. Some limits apply in relation to foreign shareholders and foreign-sourced income derived by a LTC.

The taxation of a LTC is generally the same as that for a limited partnership in that the LTC is taxed as a flow-through entity and not as a company.

The income, expenditure, tax credits and other tax items of a LTC are allocated to shareholders in accordance with their effective look-through interests, which will generally be determined by calculating a shareholder's average percentage shareholding in the LTC throughout the year. Profits of the LTC are taxed at the shareholder's marginal tax rate, with the LTC's losses able to be offset against the shareholder's other income. However, where the ownership interests in the LTC are held more than 50% by non-residents, the foreign income that can be earned by the LTC will be limited to the greater of $10,000 and 20% of the LTC's gross income in the relevant year. If this limit is exceeded, the company will no longer be eligible to be an LTC and will be taxed as an ordinary company.

International transfer pricing

There is legislation specifically aimed at preventing tax minimisation through transfer pricing. This can affect pricing policies between a New Zealand company and an overseas parent, subsidiary or associated company.

New Zealand applies the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (OECD Guidelines) to cross-border transactions between related parties, and from 1 July 2018, New Zealand's transfer pricing legislation expressly includes reference to the OECD Guidelines.

Multinationals that have applied the OECD Guidelines to demonstrate that cross-border transactions with a New Zealand related party are at 'arm's length' should therefore be generally compliant with New Zealand's transfer pricing regime.

Where the arm's length principle is not satisfied, Inland Revenue has the power to recharacterise transactions and substitute an amount of consideration between related parties with an arm's length amount. Inland Revenue has a seven year period to amend an assessment for tax for income years commencing from 1 July 2018, if it has notified the taxpayer of an audit or investigation within four years. For tax positions taken prior to this, Inland Revenue's ability to adjust a taxpayer's transfer pricing position is limited to four years.

There is no express legislative requirement for taxpayers to prepare and submit transfer pricing documentation to Inland Revenue. However, the onus of proof is on taxpayers to establish that their pricing is on arm's length terms, so taxpayers are strongly encouraged to prepare and regularly update documentation and benchmarking studies.

Local group entities of foreign headquartered multinationals that are subject to country-by-country (CbC) reporting requirements are not required to file CbC reports with Inland Revenue. However, CbC reporting requirements do apply for multinationals headquartered in New Zealand with an annual group turnover of €750 million.

Companies and dividends

New Zealand imposes tax on company distributions under an 'imputation system'. Dividends are generally taxable, but can be imputed with the tax paid by the company. This tax is then allowed as a credit to shareholders against their own tax liability. Imputed dividends pass between resident companies in a manner that also transfers the imputation credit.

Dividends paid between New Zealand resident companies which are 100% commonly owned are exempt from tax in most cases.

When a New Zealand resident company pays a dividend to a non-resident shareholder, the dividends are subject to non-resident withholding tax ('NRWT') at the rate of 30%, unless a reduced rate can be applied under the domestic rules or a relevant tax treaty.

A 0% NRWT rate will generally apply if the dividend is "fully imputed" (i.e. where credits are attached to the dividend for income tax paid by the company) and paid to a

non-resident who has a 10% or greater direct voting interest in the company.

Alternatively, if a company fully imputes a dividend paid to a non-resident who has a less than 10% direct voting interest in the company, a supplementary dividend can be paid, funded by a tax credit equal to the amount of NRWT on the dividend, so that the non-resident receives the same net amount as if there was no NRWT.

For dividends that are not fully imputed, the rate of NRWT can be reduced to 15% where a tax treaty exists between New Zealand and the recipient's country of tax residence. Some tax treaties permit a further reduction to 5%, and a limited number of treaties (such as New Zealand's treaties with Australia, the United States and China) allow a 0% NRWT rate to apply. This will usually be determined by the respective voting interests held by the non-resident in the company (and, in the case of New Zealand/China tax treaty, whether the beneficial owner of the Dividends is a government entity).

The company paying the dividend is required to withhold and account for NRWT. NRWT is a final tax in the case of dividends (i.e. the non-resident recipient of the dividend will have no additional New Zealand income tax liability).

Branch offices

A non-resident company carrying on business in New Zealand through a branch, or a permanent establishment, is subject to New Zealand income tax at the rate of 28% on the net taxable income attributable to that branch.

Interest

Interest paid by a New Zealand resident borrower to a non-resident lender that is not a registered bank in New Zealand and does not lend through a branch in New Zealand is subject to NRWT. The borrower is required to withhold and pay the NRWT to Inland Revenue.

NRWT applies as a final tax, unless the lender and the borrower are 'associated'. In the case of two companies, they will generally be associated if there is a group of persons who:

- have a 50% or greater voting interest in both companies
- have a 50% or greater common market value interest in both companies
- control both companies by any other means

Where the lender and the borrower are associated, NRWT is not the final tax and the non-resident receiving the interest remains liable for New Zealand income tax at their marginal tax rate, less any allowable deductions for expenditure incurred in producing this income. The non-resident lender may be allowed a credit for the NRWT already paid by the borrower (subject to any applicable DTA and the domestic laws of the lender's home jurisdiction).

NRWT generally applies at 15%, but may apply at 10% if DTA relief applies.

In addition, if the lender and borrower are not associated and the applicable registrations are completed, the NRWT rate can be reduced to 0% by the payment of an approved issuer levy, equal to 2% of the amount of the interest payment, to Inland Revenue.

The interest paid by the New Zealand taxpayer is usually allowed as a deduction against gross income. Accordingly, there may be advantages in financing a New Zealand subsidiary by way of debt rather than equity capital. However, thin capitalisation rules can limit tax deductions for interest.

Thinly capitalised New Zealand companies, which are 50% or more controlled by a single foreign shareholder and its associated persons or by a 'non-resident owning body', are effectively denied a tax deduction for interest to the extent that the debt percentage exceeds certain safe harbours.

This is generally where the company's New Zealand group's debt percentage (i.e. the ratio of its net assets, being assets less non-debt liabilities, to debt) is greater than 60%, and exceeds 110% of the debt percentage of the worldwide group to which the New Zealand group belongs. This is reduced to 100% where the New Zealand group is controlled by a non-resident owning body.

The permissible ratio can be increased for a company which is part of a group that is highly leveraged on a worldwide basis.

Similar rules also apply to trusts and direct investment by a foreign investor (ie branches and permanent establishments). There is a concession for companies that enter into financial arrangements with third parties for the purpose of on-lending. However, the concession does not apply to foreign-owned banks, which are subject to a separate and more complex thin capitalisation regime.

Further 'outbound' thin capitalisation rules may apply to New Zealand tax residents with controlled foreign company ('CFC') or foreign investment fund ('FIF') investments.

These rules apply where a New Zealand tax resident holds more than 10% of its assets outside of New Zealand, has borrowed to fund its investment in the CFC or the FIF (and its finance costs exceed NZ$1 million), and the debt percentage of the New Zealand tax resident's New Zealand group and worldwide group both exceed a certain prescribed level.

The prescribed debt percentage is 75% for the New Zealand group, and 110% of the debt percentage of the worldwide group to which the New Zealand group belongs.

Where the outbound thin capitalisation rules apply, a New Zealand resident will be denied a tax deduction for its finance costs (ie interest payments), to the extent that it exceeds both of the prescribed safe harbour thresholds.

Interest on debt calculated by reference to the borrower's profits or stapled to equity is generally non-deductible expenditure for the borrower and is treated as a dividend (i.e. taxable income) when received by the investor.

Interest payments by New Zealand borrowers to cross-border related parties are only deductible to the extent that they are consistent with the interest limitation rules.

If applicable, these rules limit the interest rate that can be applied to such debt by capping the credit rating of the New Zealand borrower when pricing the relevant interest rate.

The New Zealand borrower will be denied a deduction for the portion of interest payments that exceed the amount permitted under the interest limitation rules.

Under the interest limitation rules, typically the credit rating of the New Zealand borrower must be determined by the credit rating of its ultimate parent (unless there is no identifiable parent, in which case the credit rating will be capped to a minimum of BBB-).

These restrictions will not apply where the New Zealand borrower is not a 'Base Erosion and Profit Shifting (BEPS) risk' entity, being an entity:

- with a debt percentage of 40% of more, and the debt percentage is more than 110% of the debt percentage of its worldwide group
- that has borrowed from a related party lender that is resident in a different tax jurisdiction to its ultimate parent, and that tax jurisdiction has a tax rate of less than 15%)

Any non-standard or exotic loan features (such as subordination, or debt with an excessive term) that would artificially inflate the interest rate will also be disregarded when determining the interest rate that can be applied to the cross-border related party debt.

Existing significant third party debt can also be used to determine an appropriate interest rate, and safe harbour interest rates are available for debt of less than NZ$10 million.

Royalties

Royalties are deemed to have a source in New Zealand if they are paid by a New Zealand resident (unless paid in respect of a business carried on outside New Zealand by the New Zealand resident through a fixed establishment outside New Zealand) or are paid by a non-resident and are deductible for New Zealand tax purposes.

In the absence of any DTA applying, royalties derived by non-residents from New Zealand sources are subject to NRWT at the rate of 15% on the gross royalty.

The person paying the royalty is required to withhold and pay the NRWT to Inland Revenue.

NRWT is a final tax if the royalty is a ‘cultural royalty’, paid for the use or production of any artistic, literary, dramatic, or musical work, in which copyright subsists. NRWT is an interim tax (meaning that the recipient of the royalty payment may have further New Zealand income tax liability for the payment they receive) where the royalty is an industrial or commercial royalty, or is payment for know-how.

In the case of residents of countries with which New Zealand has a DTA, New Zealand withholding tax is generally limited to an amount not exceeding 10% of the gross royalty income, unless the royalties are connected with a New Zealand branch (although this depends on the DTA, for example the DTA between New Zealand and Malaysia limits tax to 15% and the DTA between New Zealand and Australia limits tax to 5%).

Losses

Provided that shareholder continuity requirements are met, a company can carry forward its New Zealand tax losses indefinitely and can offset those losses against future taxable income.

The right of a company to carry forward tax losses is lost if a continuity of ownership test is not met. The test requires that 49% or more of all voting (and in some cases market value) rights are beneficially owned by the same persons from the beginning of the year of loss to the end of the year of offset (although part-year offsets are also allowed).

Losses can also be transferred between companies that are members of the same group, provided that certain ownership tests and other conditions are met. A 66% commonality of ownership from the beginning of the year of loss to the end of the year of offset is required (although part year offsets are also allowed).

Foreign-sourced income

New Zealand residents are subject to tax on their worldwide income, with any double taxation generally being relieved by means of a foreign tax credit system. New Zealand residents holding interests in certain types of overseas entities may be subject to New Zealand tax on deemed income from those entities, regardless of whether it is distributed or not, under the controlled foreign company (‘CFC’) or foreign investment fund (‘FIF’) regimes. These regimes establish methods to calculate any such income and impose New Zealand tax on it.

A CFC is a foreign company which (broadly) is controlled by five or fewer New Zealand residents, or in which a New Zealand resident has a 40% or greater control interest. The CFC regime may subject a New Zealand taxpayer who holds an interest in a CFC to tax on attributed (deemed) income from that CFC, if the CFC generates ‘passive income’. CFCs that generate less than 5% of their total (gross) income from passive sources (ie dividends, interest or royalties) generally qualify to be ‘non-attributing active CFCs’ and the CFC rules do not otherwise apply to them. Dividends derived by New Zealand companies from active CFCs are exempt from New Zealand tax. There are a number of tests prescribed to calculate whether a CFC qualifies as a non-attributing active CFC (and is therefore excluded from the CFC income attribution rules), or is a passive CFC (and is therefore subject to the attribution rules).

In addition, thin capitalisation rules apply to ensure that CFC investments are not excessively debt funded with interest deductions being claimed in New Zealand.

The FIF regime applies to foreign portfolio share investments (ie investments of less than 10% in foreign companies). New Zealand residents will generally be entitled to apply the ‘fair dividend rate’ method to determine how deemed income arises for their FIF investment (although other methods are available). Under the fair dividend rate method, deemed income equal to 5% of the opening market value of the New Zealand resident’s total offshore share portfolio arises at the start of the tax year. The fair dividend rate method does not allow for losses to be claimed for tax purposes, but some New Zealand resident investors may be entitled to switch FIF methods and use the comparative value method which provides the ability to claim losses. The regime works on a ‘pooled investment’ approach for applicable investments and not on an investment-by-investment approach. This means all such investments must be grouped together when performing the fair dividend rate calculation.

There are certain investments that the FIF regime does not apply to, including total pooled investments with a cost of NZ$50,000 or less (where held by a natural person), investments in certain Australian resident companies listed on the Australian Stock Exchange, certain Australian unit trusts, certain employee share schemes, certain Australian superannuation schemes, and investments in some New Zealand start-up or venture capital companies that migrate offshore to gain access to finance. Additionally, there is an active income exemption (as in the CFC regime) for non-portfolio interests in FIFs. A non-portfolio interest in a FIF is where there is an interest of 10% or more.

Tax concessions

New Zealand does not generally offer tax incentives to encourage investment in New Zealand.

Investors seeking to use New Zealand as an intermediary in their investment strategy should seek professional advice as to the effect of the foreign tax credit system.

Under the transitional resident tax exemption, natural persons who become tax residents in New Zealand for the first time (or after a 10 year absence from New Zealand) are exempt from New Zealand taxation on foreign sourced income for up to 48 months of their tax residency.

New Zealand offers incentives to encourage donations to charities and non-profit organisations. The concessions are similar to those offered in the United Kingdom and Australia, with the ability of natural persons to receive refundable tax credits, and for companies to receive tax deductions, up to the amount of their annual net income.

A voluntary payroll giving regime also exists, which allows employees to have their charitable donations deducted from their pay by their employers. This regime aims to make charitable giving easier for employees.

> **The AEOI is effectively a global version of FATCA, aiming to combat offshore tax evasion.**

Goods and services tax

Goods and services tax ('GST') at the rate of 15% applies generally to the supply of goods and services by GST registered businesses in New Zealand. Significant exceptions include supplies of financial services and residential rental of property, which are generally exempt from GST.

Non-residents may also be liable for GST. For example, a non-resident supplier of 'remote services' to New Zealand resident consumers may be required to register and account for GST on those services. A non-resident may also be subject to GST on supplies of goods to New Zealand, for example on importation of the goods into New Zealand if they are the importer of record. From 1 October 2019, offshore suppliers of low value goods to New Zealand consumers may be liable for GST on those supplies.

Exports of goods, the provision of services to non-residents which are not consumed in New Zealand, and the sale of interests in land or of a 'going concern' to business purchasers are generally zero-rated (i.e. GST is charged at the rate of 0%).

A non-resident business that receives goods or services in New Zealand, but does not make taxable supplies in New Zealand can register for GST. Voluntary GST registration allows it to claim back the GST that it has paid on supplies received in New Zealand.

Other taxes

New Zealand operates a no-fault, Accident Compensation Corporation insurance scheme ('ACC') covering all persons (including non-residents) injured in New Zealand. Compensation for workplace and non-workplace accidents is provided by the New Zealand Government. This compensation is funded by levies imposed on employers, employees and motorists.

Fringe benefit tax ('FBT') is payable by all employers on any non-cash benefits provided in connection with the employment relationship, to employees or persons associated with employees. A fringe benefit may take the form of private use or enjoyment of a motor vehicle (or the availability of a motor vehicle for such use), employment-related loans, subsidised transport, contributions to certain insurance or superannuation schemes, or any benefit of any kind received by an employee. Employers will generally pay FBT on a quarterly basis (although an employer may elect to pay FBT on an annual basis).

All employers paying FBT on a quarterly basis can choose to pay FBT for the first three quarters at the single rate option of 49.25% on all benefits provided to employees or 43% under the alternate rate. Where an election has been made under the single rate option to pay FBT at 49.25% for the first three quarters, the employer can pay 49.25% in the fourth quarter or use the alternate rate calculation for the fourth quarter. Where FBT is paid using the alternate rate option in any of the first three quarters, the employer must complete a full alternate rate calculation or short form alternate rate calculation for the fourth quarter.

Employers who elect to pay FBT on an annual basis can either pay FBT at the flat rate of 49.25% or use the alternate rate calculation process.

Local body revenues are raised through rates levied on land owners.

There is no stamp duty or other similar document taxes in New Zealand.

FATCA reporting obligations

The United States ('US') Foreign Account Tax Compliance Act ('FATCA') aims to reduce and detect non-compliance by US taxpayers. FATCA is incredibly broad and (despite being a US based regime) impacts a number of New Zealand businesses and entities.

New Zealand has signed an Intergovernmental Agreement ('IGA') with the US in relation to FATCA. Under the IGA, any entity that is classified as being a New Zealand Financial Institution ('NZFI') will need to register with the US Internal Revenue Service, carry out due diligence in respect of the accounts it maintains, and report certain information to Inland Revenue.

New Zealand entities that are not NZFIs may also be affected by FATCA. In the course of doing business with a NZFI (such as a bank), such entities may need to provide FATCA-related information to the NZFI or may have information about their accounts reported to Inland Revenue as part of that NZFI's FATCA compliance.

AEOI reporting obligations

The OECD's Automatic Exchange of Information (AEOI) initiative is effectively a global version of FATCA, aiming to combat offshore tax evasion and increase voluntary tax compliance. AEOI involves an annual exchange of information between participating governments, with the relevant information being collected and reported by financial institutions in accordance with the terms of the Common Reporting Standard (CRS).

NZFIs are required to comply with the CRS customer due diligence, information collection and reporting obligations to facilitate New Zealand's exchange of information with other tax authorities on an ongoing basis. As a result, if an NZFI identifies an account holder as being a foreign tax resident (or in some instances, as being controlled by a foreign tax resident) information about that person and the account may be supplied to Inland Revenue and on-provided to the person's country of tax residence.

Tax on property transactions

In relation to residential property bought or sold on or after 1 October 2015:

- non-residents and New Zealanders buying and selling any property other than their main home are required to provide a New Zealand IRD number as part of the land transfer process
- non-resident buyers and sellers are required to provide their tax identification number from their home country, along with current identification such as a passport
- non-residents must have a New Zealand bank account before they can obtain a New Zealand IRD number (subject to certain exceptions)

Gains made from residential property will be subject to tax on sale (under the 'bright line test') if the property was acquired on or after:

- 1 October 2015 and sold within two years of purchase or
- 29 March 2018 and sold within five years of acquisition

Unless the property is:

- the seller's main home
- inherited from a deceased estate or
- transferred as part of a relationship property settlement

A withholding tax also applies for non-residents selling residential property subject to the bright line test, known as residential land withholding tax ('RLWT'). This means that tax on any profit from the sale of a residential property that is subject to the bright line test is collected from non-resident sellers at the point of sale, based on the assumption that such tax was owed. The non-resident seller may then need to show that the tax was not owed in order to get a refund.

The Future of New Zealand's tax system

New Zealand's Government-appointed Tax Working Group ('TWG') recently concluded a wide-ranging review of the country's tax rules and released a Final Report that suggests various changes that could be made to New Zealand's tax system.

The TWG's recommendations are not binding on current or future Governments and may or may not be used to inform future legislative changes.

The TWG's most notable recommendation, that New Zealand adopt a wide-ranging capital gains tax, has been rejected by the New Zealand Government.

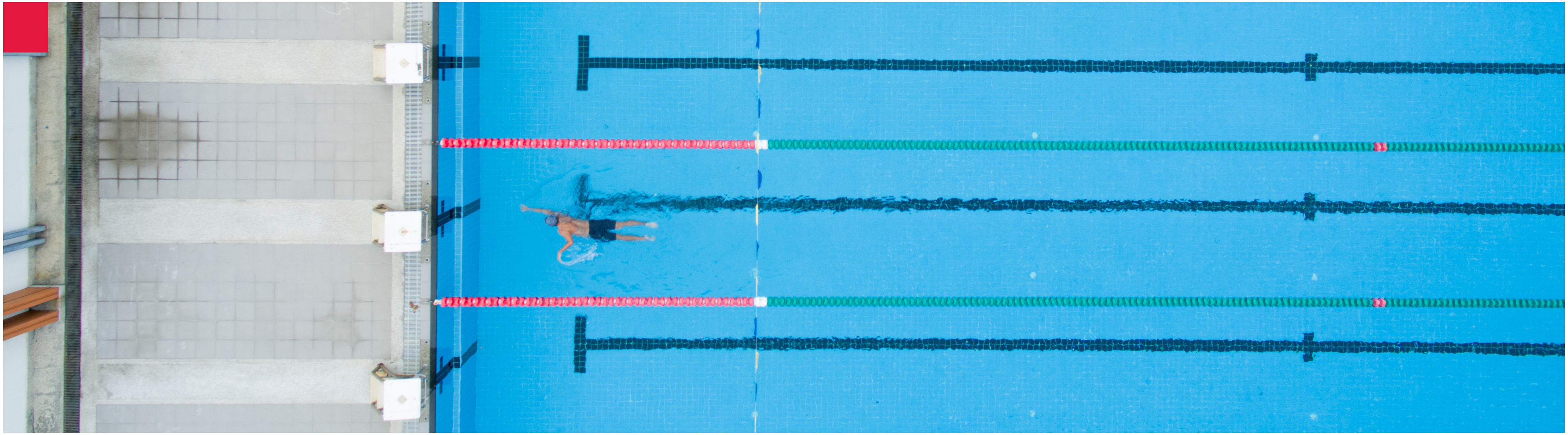
The Government has announced that other proposals made by the Tax Working Group will be considered, such as:

- reviewing the current rules for taxing land speculators, including the taxation of vacant land
- adopting a framework for taxing negative environmental externalities
- reviewing the taxation of retirement savings
- a raft of changes to simplify and reform business taxes
- various other items relating to the administration and integrity of the tax system

The Government has also noted that many of the TWG's recommendations are included in its 2019/2020 tax policy work programme and/or other agency work programmes, including those relating to:

- environmental and ecological outcomes
- the international tax framework
- the future of work and taxation of the hidden economy
- taxation of charities

A digital services tax is also being considered by the New Zealand Government. This is likely to be an interim measure, while it works with the OECD to reach a broad international consensus on the issue.



Competition (anti-trust) and consumer protection law

In New Zealand, competition and consumer protection law is largely regulated by the Commerce Act 1986 ('Commerce Act'), the Fair Trading Act 1986 ('FTA'), the Consumer Guarantees Act 1993 ('CGA'), and the Credit Contracts and Consumer Finance Act 2003 ('CCCFA').

The Commerce Act was closely modelled on the provisions of Australia's Trade Practices Act 1974 (which was renamed the Australian Competition and Consumer Act 2010 on 1 January 2011) which was, in turn, influenced by US anti-trust law.

The Commerce Act:

- prohibits cartels and other anti-competitive arrangements
- prohibits taking advantage of substantial market power
- regulates mergers and acquisitions
- governs the imposition of price control on particular goods and services.

The New Zealand Commerce Commission (NZCC) is responsible for administering and enforcing the Commerce Act. However, only the Courts can impose penalties for breaches of the Commerce Act.

The NZCC may grant clearances for mergers or acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The NZCC may grant an authorisation, on public benefit grounds, for a proposed acquisition or for certain conduct that would otherwise result in a substantial lessening of competition.

Competition provisions

Anti-competitive conduct

The Commerce Act contains a broad prohibition on contracts, arrangements or understandings which have the purpose, effect, or likely effect of substantially lessening competition in a market.

The Commerce Act also contains a number of specific prohibitions. For example, the following conduct is anti-competitive and illegal:

- cartels - arrangements between competitors in the supply or acquisition of goods or services that have the purpose, effect or likely effect of:
  - price fixing
  - restricting output
  - market allocating

Exceptions to the cartel prohibition exist for collaborative activities and vertical supply contracts and an exception to the price fixing prohibition exists joint buying and promotion agreements.

Taking advantage of substantial market power

It is illegal for a person with substantial market power to take advantage of that power for the purpose of:

- preventing someone from entering a market

- deterring or preventing a person from competing
- eliminating a person from a market

Mergers and acquisitions
The Commerce Act prohibits the acquisition of shares or business assets if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

The acquisition of a foreign company by another foreign company may be subject to the Commerce Act if the acquisition affects a market in New Zealand.

The NZCC can apply to the High Court for a declaration where an overseas person acquires a controlling interest in a New Zealand company and the acquisition is likely to substantially lessen competition.

If a declaration is granted the Court can require the New Zealand company to cease trading within six months, dispose of shares or other assets specified by the Court, or take any other action the Court considers is consistent with the purpose of the Commerce Act.

Consumer protection

The consumer protection provisions of the FTA, CGA and CCCFA aim to protect consumers by:

- prohibiting conduct which is likely to be misleading or deceptive. This prohibition is extremely broad and includes not only the making of untrue claims or statements, but also omitting to give all relevant details and failing to correct mistaken impressions
- implying warranties into sales transactions with consumers. The CGA implies warranties into sales transactions relating to the quality and standard of goods and services supplied. These warranties cannot be excluded from supply transactions other than where goods or services are acquired for commercial purposes and this is stated in the supply contract
- requiring creditors who enter into consumer credit contracts to provide consumers with a written disclosure statement containing specific information about the terms of the contract. The CCCFA places restrictions on the means of applying interest and provides rules and guidelines for fees, payments, credit-related insurance, repayment waivers, extended warranties and cancellation. For contracts entered into after 6 June 2015, the Credit Contracts and Consumer Finance Amendment Act 2014 applies. This Act introduces lender responsibility principles and a responsible lending code. Lenders must exercise the care, diligence and skill of a responsible lender in all its dealings with borrowers and guarantors, make reasonable enquiries, help borrowers and guarantors make an informed decision, act reasonably and ethically, and comply with the repossession and licensing rules

The FTA contains a number of specific provisions aimed at protecting consumers, including:

- a prohibition on unfair contract terms in standard form contracts
- a requirement that any extended warranties must include a comparison of the protection available under the CGA and those provided by the extended warranty; and
- a prohibition against unsubstantiated representations, namely making certain representations in trade, unless a person has reasonable grounds for that representation at the time of the representation

Specific industry regulation

The NZCC also administers certain sector-specific regulations which apply to electricity line businesses, gas pipelines, telecommunications companies, airports, and the dairy industry.

Penalties for breaching the Commerce Act and Fair Trading Act

The penalties for breaching the Commerce Act are substantial. The maximum penalty (per offence) for a corporation breaching the restrictive trade practice provisions of the Commerce Act is the greater of NZ$10 million, three times the value of any commercial gain resulting from the contravention or, if the commercial gain cannot be readily ascertained, 10% of group turnover.

A corporation may be liable for a maximum penalty of NZ$5 million for breaching the business acquisition provisions of the Commerce Act.

A breach of the FTA exposes a corporation to a maximum penalty of NZ$600,000 per offence.

Individuals can also incur penalties of up to NZ$500,000 (per offence) for breaching the Commerce Act and up to NZ$200,000 per offence for breaching the FTA.

In addition, other remedies such as compensatory damages, exemplary damages, injunctions, divestment orders and orders excluding individuals from management may be awarded by a court.

The NZCC received additional funding in 2016 and, as a result, has invested in increased enforcement action, particular in the consumer protection space.

In April 2019 the Commerce (Criminalisation of Cartels) Amendment Bill was passed by Parliament. As a result, the Commerce Act now contains criminal sanctions for engaging in cartel conduct from 8 April 2021. The criminal regime will run in parallel with the current civil regime. From 8 April 2021, an individual who has been convicted for intentionally engaging in cartel conduct will face a penalty of up to seven years' imprisonment or a fine of up to $500,000, or both.

Leniency and cooperation

The NZCC operates a Cartel Leniency Policy to encourage the reporting of cartels. Under the policy, immunity from NZCC initiated proceedings will be granted to the first person involved in a cartel to inform and cooperate fully with the NZCC provided the following conditions are met:

- the applicant must be the first person in the cartel to approach the NZCC
- all relevant available information must be provided to the NZCC
- the applicant must admit their role in the cartel
- the applicant must fully and truthfully cooperate with the NZCC on a continuing basis
- individuals must appear as a witness if required by the NZCC and body corporates must encourage current and former directors, officers or employees to give evidence if required
- the applicant must confirm that their involvement in the cartel has ceased, unless the NZCC requires cartel participation to continue for evidentiary purposes; and confidentiality in respect of the leniency application must be maintained

The Cartel Leniency Policy incorporates a marker system, allowing leniency applicants to preserve their position at the front of the line for a limited time while they collect further information to submit a formal leniency application to the NZCC. An applicant may be eligible for immunity even if the NZCC is already aware of or investigating a particular cartel if the information provides the NZCC with sufficient evidence to warrant initiating proceedings.

The NZCC may exercise its discretion to take a lower level of enforcement action against subsequent immunity applicants in exchange for information and continuing co-operation under the policy.

If an applicant is not eligible for immunity, the Cartel Leniency Policy provides for an 'Amnesty Plus' regime where an applicant reports another separate (new) cartel. They may then secure immunity for the new cartel and increased cooperation discounts for the first cartel.

The NZCC also has a general Cooperation Policy which operates in relation to the rest of the Commerce Act, the CCCFA, Dairy Industry Restructuring Act 2001, Electricity Industry Reform Act 1998 (EIRA) and FTA (the EIRA limits the ability of electricity generators to be involved in distribution and vice versa; the NZCC has the ability to grant exemptions). Under this policy, the NZCC may take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete cooperation.

The Commerce Act implications for business conduct and transactions can often be complex. Consequently, it is advisable to seek professional advice on the issue before carrying on business in New Zealand or entering into a transaction which may affect a market in New Zealand.

The NZCC operates a Cartel Leniency Policy to encourage the reporting of cartels.

Intellectual property

New Zealand provides comprehensive protection for intellectual property including:

- patents
- registered designs
- trade marks
- domain names
- copyright
- circuit layout
- plant variety rights
- trade secrets, confidential information
- geographical indications
- unfair competition, passing off and Fair Trading Act 1986 actions.

Much of New Zealand's intellectual property legislation has undergone reform in recent years to ensure that New Zealand meets its international obligations under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and there are currently reviews of copyright, plant variety rights, competition, and ancillary intellectual property laws that are likely to progress through 2019 and 2020.

Copyright

Copyright gives the exclusive right to reproduce or to otherwise deal with original literary, artistic, dramatic or musical works, together with other protected subject matter, such as films, sound recordings and computer programs. Copyright arises automatically when the work is created and does not rely on a system of registration.

New Zealand adheres to a range of international conventions providing reciprocal protection with other member countries.

Generally, the original copyright in a work will be owned by the person who actually performs or creates the work. Exceptions include where a contract is used to change the default ownership position, work produced in the normal course of employment, and for some works produced under commission. New Zealand's copyright regime extends protection to industrially applied designs, although the term of such copyright is limited to 16 years. For other works, copyright generally subsists for 50 years following the death of the author/creator of the work. For films, sound recordings and broadcasts, the 50 year term runs from the end of the year the work is made or, if made available to the public, from the end of that year.

In 1998, the Copyright Act was amended to remove the protection previously available to copyright owners against parallel imports and as a significant policy change the Act was amended to allow parallel imports. However, in 2013 the Copyright (Parallel Importing of Films) Amendment Act introduced a limited five month ban on the parallel importation of films other than for private or domestic purposes. The ban is no longer in place, having ended on 31 October 2016.

Digital technology is now accounted for in the Copyright Act after amendments to that Act in 2008. The digital technology copyright regime includes:

- the definition of 'copying' now includes copying digital works
- manufacturing of devices which circumvent technological protection measures is prohibited
- changes have been made to the fair dealing provisions to allow format-shifting for personal use. However, this is limited to music, and permits only a single copy for each device of the music owner. These changes seek to balance the right of access and use by the community

Amendments covering internet service providers' (ISPs) obligations and liability in regard to repeat copyright infringement by internet account holders have proved controversial. The Copyright (Infringing File Sharing) Amendment Act came into force on 1 September 2011 with the intention that it would deter file sharing. It inserted s92A of the Copyright Act 1994 which now has a regime with a three tier notice system to deter illegal file sharing.

Under the new provisions:

- copyright owners will contact internet account holders through ISPs to report misuse of their copyright work
- internet users caught illegally downloading copyright material will be given up to three infringement notices:
  - a detection notice informs the user that they have downloaded copyright material and that their actions are illegal
  - a warning notice will be sent to the user if they infringe copyright again (and have already received a detection notice)
  - an enforcement notice will be sent to the user if, having received both detection and warning notices, they infringe copyright once more
- after issuing an enforcement notice, the copyright owner may:
  - seek reparation costs of up to NZ$15,000 through the Copyright Tribunal
  - apply to a District Court to suspend, for a period of up to six months, the internet accounts of the infringing user
- internet users will have the right to challenge any notice, make submissions to the Copyright Tribunal refuting the copyright owner's claims, and request a hearing
- in cases before the Copyright Tribunal, the existence of an infringement notice will establish the presumption that an infringement occurred. This presumption may be rebutted by the account holder

The Government is currently undertaking a review of the Copyright Act 1994. The purpose of the review is to ensure New Zealand's copyright regime:

- provides incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
- permits reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand
- is effective and efficient, including:
  - providing clarity and certainty
  - facilitating competitive markets
  - minimizing transaction costs
  - maintaining integrity and respect for the law, and
- is consistent with the New Zealand Crown's obligations under Te Tiriti o Waitangi.

The initial consultation phase for the review ended in April 2019, and the reviewers will assess the submissions and feedback received. This will help inform the development of a paper that will set out potential options for change to the copyright regime.

Trade marks

New Zealand protects trade marks through registration, under the Fair Trading Act 1986 and in passing off.

A registered trade mark can be a sign, logo, colour, smell, sound or shape (provided that it can be represented graphically), which is used by a business to identify and distinguish its goods or services from those of others in the market.

Registration gives the owner the exclusive use of that trade mark for specified goods and services. For a trade mark to be registered it must have a distinctive character (which can be acquired through use) and not be confusingly similar to any previously registered or unregistered trade marks, unless registered with consent of the owner of those other marks. More limited protection is also provided against use of similar marks, and protection extends to similar goods and services. In certain circumstances protection is also provided for well known marks even when used for dissimilar goods or services.

Registration is for a period of 10 years from the date of registration.

Registrations can then be renewed for further periods of 10 years. Registrations are vulnerable to removal for non-use on the application of a third party, if there is a continuous period of non-use for three years or more post registration.

In New Zealand, generally, the first person to use the trade mark or, in the absence of use or reputation in New Zealand, the first person to file an application to register the mark, is entitled to be registered as the owner of that mark. Applications can be challenged if a third party has sufficient reputation in New Zealand.

We recommend businesses expanding to New Zealand check the ability to use a mark in New Zealand without infringing third party rights and register trade mark protection in New Zealand. It is also important that agreements including distribution, franchise, licence, joint venture and agency agreements with local New Zealand parties clearly cover ownership of trade marks in New Zealand. Licensed use should be authorised and controlled by the registered proprietor of the marks.

A registered trade mark is not infringed through use of the registered trade mark for comparative advertising in accordance with honest practices. Another defence for registered trade mark infringement is through use of the registered trade mark with legitimate parallel imports put on the market internationally by the trade mark owner, or with the trade mark owners express or implied consent, or under the owners control.

The Madrid Protocol has been in force in New Zealand since 2012. This means that 'international' trade mark applications (based on New Zealand national trade marks) can be filed with the Intellectual Property Office of New Zealand (IPONZ). Importantly, IPONZ will also be able to receive international registrations filed with the World Intellectual Property Organization (WIPO) designating New Zealand.

Patents

New Zealand law on patents is governed by the Patents Act 2013 (which came into force fully on 13 September 2014).

A patent application can be filed with a provisional specification (followed by a complete specification), or a complete specification. The term of a patent, if granted, runs for 20 years from the date of filing of the complete specification, provided renewal payments are made when due.

For a patent application to be successful, the invention must:

- be industry applicable
- contain an inventive step that is 'non-obvious'
- be new or novel

A patent application can also be filed in New Zealand for protection overseas through the Patent Cooperation Treaty (PCT). Under the PCT system, a patent application can be made that designates other countries that participate in the PCT, simultaneously seeking protection for the invention in designated countries.

Since a Court of Appeal decision in 2000, Swiss-type claims, for example, 'The use of composition X in the manufacture of a medicament for treating disease Y', have been allowed in New Zealand.

Also, under the Patents Act 2013 there is a regulatory review exception to establish that a patent is not infringed by acts done for the purposes of developing and submitting information required under New Zealand law or the law of any other country that regulates the manufacture, construction, use, importation, hire, sale or disposal of any product.

The 2013 Act includes stricter examination requirements for the grant of patents and increased opportunities to challenge patents both pre- and post-grant.

Key elements of the 2013 Act include:

- patent applications must now demonstrate:
  - absolute (international) novelty, rather than the historic requirement of novelty only in New Zealand
  - patentability to the balance of probabilities (demonstrating that the invention is patentable)
  - utility (demonstrating that the invention has specific, credible and substantial usefulness)
- third parties may ask the Commissioner to re-examine granted patents
- exclusion categories to patentability have been introduced.

Patenting of some computer programs is allowed. Computer programs 'as such' (where the alleged invention lies solely in it being a computer program) will not be patentable but inventions involving computer programs, for example 'embedded software' (ie software used in the electronics of machinery), will be patentable – as long as the usual criteria for patentability are met.

Amendments have recently been made to the 2013 Act to align it to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. These include the provision of a grace period for disclosure made in the 1-year period immediately preceding the patent date. Disclosure of matter constituting an invention during this time, by or with the consent of certain persons including the patentee, will now not be deemed part of the prior art base.

Registered designs

New and original features of shape, configuration, pattern or ornament, as they are applied to an article, may be registered under the Designs Act 1953.

Design registration gives the owner the exclusive right to use that design in New Zealand. 'Use' of the design includes the exclusive rights to make, import/sell or hire the article to which the design has been applied, or license out the design.

Registered protection is for an initial period of five years, renewable for two additional five-year periods so the possible total protection is 15 years. To be registrable in New Zealand a design must have 'local novelty', meaning that the design must not have been published or publicly used in New Zealand before the date of the application.

In New Zealand, industrial designs (e.g. designs which are industrially applied) may also be protected through copyright law. The period of protection given to industrial designs under the Copyright Act 1994 is 16 years. One advantage of design registration, over copyright protection, is that the certificate of registration serves as evidence in court of ownership of the design.

Where relevant we recommend consideration is given to protecting industrial designs as registered trade marks as well, where the logo or shape marks include a design aspect.

Major Events Management Act 2007

The Major Events Management Act 2007 came into force in late 2007. It is intended to counter the problem of ambush marketing that undermines official events, and provides a framework of controls which can be enforced once the Minister for Economic Development 'declares' an event as a Major Event for the purposes of the Act. Protection periods are then set in place where the controls are in effect. Knowingly breaching the provisions of the Act can lead to a penalty of up to NZ$150,000.

Domain names

The Domain Name Commissioner is responsible for the oversight of the .nz domain name registration system. Domain names within the '.nz' space are registered on a 'first-come, first-served' basis subject to another party having prior rights for the same second level domain. Registration can be done through an authorised registrar who registers the domain name on the Shared Registry system. Registration of a domain name does not create any proprietary rights in the name. New Zealand Courts will recognise rights in domain names where there is reputation or goodwill in the name.

The New Zealand Domain Name Commission recently changed its policy to allow 'non-commercial entities' to withhold certain details from records including address and telephone number. Name, email address and general location details will still be available.

Disputes about who should be the registrant of a domain name have often been handled by court action, including by claims for breach of the Fair Trading Act 1986 and through passing off actions. Since 2008, the Domain Name Commission has offered a Dispute Resolution Service (DRS) to assist with disputes of this nature. Anyone who wishes to make a complaint about the registration of a '.nz' domain name may use this system. The DRS aims to provide timely resolutions to disputes, meaning that there are tight timeframes involved in the process.

Complainants must demonstrate that:

- they have rights to a name which is identical or similar to the domain name in dispute
- the registration of the domain name by the current registrant is unfair. This means that the domain name was registered or acquired in a manner which took unfair advantage of, or was unfairly detrimental to the Complainant's rights, or that the domain name is likely to be used in this manner.

To succeed, the complainant must prove that 'on the balance of probabilities' both factors are present.

The DRS operates three tiers of resolution:

- the first is informal mediation (applicable only if there is a response to a complaint)
- the second is expert determination
- the third arises if an appeal is lodged, where a panel of three experts is appointed to make a final decision.

The mediation process is free to use, but if an expert determination is required, then the person making the complaint must pay a fee. A further fee is required if an appeal is lodged.

Circuit layouts

Protection is provided for circuit layouts and integrated circuits under the Layout Designs Act 1994. The protection is provided by the creation of copyright-style intellectual property rights in original circuit layouts, or integrated circuits made in accordance with a circuit layout. This protection lasts fifteen years from the date that the layout design was made, or for ten years after the design was first commercially exploited, if this occurred within five years of its creation.

No provision is made for registration of the rights, and the owner has the exclusive right to copy the layout, make an integrated circuit in accordance with the layout, and exploit the layout commercially in New Zealand.

Trade secrets

Trade secrets and confidential information are protected under New Zealand law.

When preparing a contract, careful consideration should be given to the protection of trade secrets and confidential commercial information.

In the absence of an express contract (in which all elements of the contract are specially stated), some protection is given by a long-established principle of equity, whereby a person may be forced to respect the circumstances of a confidence. Nevertheless, it is prudent to make specific provision for confidentiality in all agreements.

Plant varieties

Plant varieties are protected in New Zealand by the Plant Variety Rights Act 1987. Since the Act passed, there have been significant advances in plant breeding techniques and international developments. A grant may be made only if the Commissioner is satisfied that the plant variety is new, distinct, homogenous and stable.

The Government is currently undertaking a review of the Act. The purpose of the review is to:

- ensure the regime is consistent with New Zealand's international obligations
- modernise the regime consistent (where appropriate) with other intellectual property legislation
- find the right balance between strengthening plant breeders' rights to encourage innovation (consistent with our international obligations) and preserving the interests of growers, consumers, Māori and other interested groups to achieve a net benefit to New Zealand as a whole

The public consultation period ended in December 2018. The Government intends to launch the next stage of consultation on the review through the release of an options paper in mid-2019.

Geographical indications

New Zealand provides protection for Geographical Indicators (GIs) by the general provisions of the Fair Trading Act 1986 and the law of passing off. GIs are geographical names which identify goods as originating in a territory, region or locality, where a given quality, reputation or other characteristic of the goods is essentially attributable to those geographical origins.

The Geographical Indications (Wine and Spirits) Registration Act 2006 ('Registration Act') introduced a legislative framework that brings New Zealand into line with its obligations under the TRIPS Agreement in relation to wine and spirits.

The Registration Act provides a new definition of 'geographical indication' to ensure that only those GIs that meet the TRIPS Agreement definition may be registered under the Registration Act. It also establishes a registration system for GIs for wines and spirits and streamlined the process for registering GIs.

The Registration Act has been significantly amended by the Geographical Indications (Wine and Spirits) Registration Amendment Act 2016 which came into force on 27 July 2017. Most notably, GIs are being introduced for wine and spirits and the Act provides a regime for the registration of place names for wines and spirits. New Zealand and foreign place names will be registrable. GI registrations will be effective for a period of 5 years and can be renewed for a further 10 years. GIs and trade marks will be mutually exclusive – subject to some exceptions.

Protection for GIs for other goods and non-registered GIs will continue to be dealt with under the Fair Trading Act 1986 and the tort of passing off.

Unfair competition

The general law and some statutes such as the Fair Trading Act 1986 and the Commerce Act 1986 provide a basis for restraining some forms of unfair competition. For example, the Fair Trading Act 1986 can be used to prevent one trader misrepresenting that his goods or services are those of another.

The Government is currently undertaking a review of certain elements of the Commerce Act. The review proposes repealing sections of the Commerce Act that shield some intellectual property arrangements from competition law. This may apply to cases in which the use, licensing or refusal to license intellectual property rights could lead to a lessening of competition.

The consultation phase ended in April 2019, and the reviewers will assess the submissions and feedback received.

Technical amendments

On 4 June 2019, the Government released a Proposed Intellectual Property Laws Amendment Bill, through which it intends to make 'technical" amendments to the Patents Act 2013, the Trade Marks Act 2002, the Designs Act 1953, and associated regulations.

The Proposed Bill is at public submissions stage, ending on 2 August 2019. The Government plans to review the public submissions, to inform its instructions for the Parliamentary Counsel Office, which will draft the Amendment Bill for submission to Parliament.

Employment and industrial relations

Employment relationships in New Zealand are primarily governed by minimum entitlement legislation, written employment agreements and common law.

Employment Relations Act 2000

The principal legislation is the Employment Relations Act 2000 ('ERA'). Underpinning New Zealand's employment relations system is a statutory obligation on employers, employees and unions to deal with each other in 'good faith' in most employment matters, including (but not limited to) bargaining for employment agreements, discussing any proposal which may affect employees' employment, allowing workplace access to union representatives and making employees redundant. This duty of good faith contains several specific requirements that parties must comply with.

Under the ERA, employment relationships for all employees in New Zealand are governed by either:

- an individual employment agreement ('IEA'), being a contract between an employer and a single employee
- a collective agreement ('CA'), being a contract between one or more employers and one or more unions, which binds members of the union(s) who come within the agreement's coverage clause

Both IEAs and CAs must contain certain minimum terms, which are set out in the ERA and incorporated by other legislation. In all other respects, terms of employment are for negotiation between the employee (or the union or other representative on his/her behalf) and the employer. For example, entitlements to redundancy payments, penal or overtime rates, and long service leave are matters for negotiation.

A number of procedural requirements also apply to bargaining for IEAs and CAs. Under the ERA, any dismissal or other action by an employer must meet the statutory test of justification – the employer's actions, including how the employer acted, must be what a 'fair and reasonable' employer could have done in all the circumstances at the time the dismissal or other action occurred. The ERA also sets out a (non exhaustive) list of factors that the Employment Relations Authority and the Employment Court will consider when applying the test described above. A dismissal or other action by an employer will not be considered unjustifiable merely because of procedural defects (provided they were minor and the employee was not treated unfairly or placed under duress).

The ERA also provides protection for employees when their employer's business is restructured and their work will be performed by or on behalf of a new employer. Certain categories of employee (such as those engaged in the cleaning or food catering industries and/or carrying out specified types of work) are considered 'vulnerable' in the context of restructuring. When the employer's business is restructured, those 'vulnerable' employees have the right to elect to transfer to the new employer(s) on identical terms and conditions of employment, unless the new employer (along with 'associated' businesses) has 19 or fewer employees. The CAs and IEAs of other employees must contain employee protection provisions. These provisions must set out the procedures that the employer will follow when negotiating with the new employer in relation to the effects of the restructuring upon affected employees.

Employment relationship problems

Disputes, grievances and other employment relationship problems are determined, in the first instance, by specialist institutions (the Employment Relations Authority and the Employment Court). Mediation provided by the Labour Group of the Ministry of Business, Innovation and Employment is required in almost all situations as the first forum for dispute resolution. Employees can take claims against their employers for a number of reasons including unjustified dismissal, unjustified disadvantage, discrimination, sexual or racial harassment, duress in respect of union membership, or over a breach of the ERA, an IEA or a CA. In addition, 'disputes' may be pursued in respect of the interpretation, application or operation of an IEA or a CA.

Fixed-term and casual agreements

Most employees are employed on a permanent basis (that is, for an ongoing and indefinite period). However, in some circumstances, employers are able to enter into fixed-term or casual employment agreements with employees. In respect of fixed-term employment, specific requirements, set out in the ERA, must be complied with. In particular, the employer must have genuine reasons based on reasonable grounds for engaging the employee on a fixed-term, rather than a permanent, basis (e.g. specific project work or covering parental leave), and the employee must be advised of these reasons.

Where a fixed-term agreement is entered into, the employer must ensure that the agreement is signed by the employee before they commence work and that the agreement includes a written description of the way in which the employment will end and the reasons for this. A failure to comply with all ERA requirements will mean that the employer cannot rely on the fixed-term provisions to end the employment relationship and the employee can seek to be treated as a permanent employee.

Employees may also be employed on a casual basis. There is no definition of 'casual' employment in the ERA, but a number of characteristics have been generally assessed as indicating a casual employment arrangement.

These include that the employee works irregular hours intermittently (i.e. only on an 'as and when required' basis), and that there is no obligation on the employer to provide work, or for the employee to accept work.

Employee unions

Where an employer employs a non-union member whose work is covered by the coverage clause of a CA, as of 6 May 2019, the employee must be employed on the same terms and conditions as the CA for the first 30 days of employment. In addition, within the first 10 days of employment, the employer must provide the employee with a form which is used to indicate to the employer whether the employee intends to join the union.

Union membership is voluntary. It is unlawful to discriminate against employees or prospective employees due to their membership or non-membership of a union.

Under current law, employees may only strike, and employers may only lock-out employees, in relation to collective bargaining for a CA which will bind the employees concerned (provided that at least 40 days have passed since the bargaining was initiated), or in some other strictly limited situations. Strike action in response to a dispute under an existing (non-expired) CA, sympathy strikes or political strikes are unlawful.

Union representatives may enter the workplace without consent, provided the employees are covered under or bargaining towards a CA. In other circumstances, union representatives must obtain consent from the employer. However, the employer must not unreasonably withhold consent.

Independent contractors

Businesses can engage independent contractors to provide services where this is appropriate. The provisions of the ERA and other minimum employment-related entitlements will not apply to a (genuine) independent contractor.

However, in determining whether a person is an independent contractor or an employee, the courts will look at the real nature of the relationship, as it operates in practice. While relevant, any contractual or other documentation that purports to define the relationship will not be determinative.

There are a number of indicators that will be considered in determining the real nature of the relationship. In limited situations, industry practice may also be used as a measure of the real nature of the relationship. If the real nature of the relationship between the parties is more akin to an employment relationship, then it is likely that the provisions of the ERA and other employment related legislation (including annual and sick leave) could apply.

Holidays and sickness

The Holidays Act 2003 provides for 11 specified public holidays to be taken as paid days of holiday if an employee ordinarily works on those days.

If an employee works on a public holiday that is a normal day of work for that employee, he/she is entitled to be paid at least time and a half of his/her normal pay for the hours worked and also to receive an alternative paid day's holiday. If an employee works on a public holiday that is not a normal day of work, he/ she is entitled to at least time and a half for the hours worked, but no alternative holiday. The Holidays Act 2003 clarifies how to calculate what an employee should be paid in circumstances where it is impracticable to assess what an employee would have been paid on a public holiday, alternative holiday, sick leave day or bereavement leave day. An employee and an employer may also agree, in writing, to transfer the observance of a public holiday to another working day.

All employees are entitled to a minimum of four weeks' paid annual leave after each year of continuous employment with the same employer (including part-time employees). Timing of annual holidays is to be agreed between the employer and the employee, but the employer must not unreasonably withhold consent to a request for annual leave. The employer can direct the employee to take annual leave on 14 days' notice if agreement is not reached.

An employee can request to 'cash up' to one week of annual leave per year, but the employer does not have to agree to do so. This cannot be a term or condition of employment and the employer cannot raise the possibility of 'cashing up' with the employee.

When an employee leaves a job, he/she is entitled to be paid accrued holiday pay upon termination.

After six months' employment with the same employer, an employee is entitled to a minimum of five paid days' sick leave during each subsequent 12 month period of employment. This sick leave covers sickness or injury of the employee, the employee's spouse or partner, or someone who depends on the employee for care, and is able to be accumulated from year to year up to a maximum of 20 days.

After six months' employment an employee is also entitled to bereavement leave. Bereavement leave is of either one or three days' duration per bereavement, depending on the proximity of the relationship between the employee and the deceased.

After six months' employment an employee can access up to 10 days paid leave if the employee is affected by domestic/ family violence.

For casual employees, annual holidays may be paid with the employee's pay if their employment is so intermittent or irregular that it is impracticable for the employer to provide the employees with four weeks' annual leave. A casual employee may also be entitled to paid sick leave (depending on whether the requirements under the Holidays Act 2003 apply). Annual holidays may also be paid with the employee's pay for an employee employed for a fixed term of less than 12 months.

Parental leave

To be eligible for parental leave, an employee needs to have worked for the same employer for at least six months before the expected date of delivery or adoption and for an average of at least 10 hours per week.

There are four types of unpaid leave which can be taken:

- special leave
- maternity leave
- partner's leave
- extended leave

Where the employee has been employed at least 12 months (at the expected date of delivery) prior to the expected date of delivery, an employer can be required to hold an employee's job open for up to 52 weeks in total while parental leave is taken.

When an eligible employee has been employed for less than 12 months they are not entitled to extended leave, so the employer is only required to hold the job open for up to 14 weeks.

Eligible employees and self-employed people are also entitled to up to 22 weeks of Government funded payments during their parental leave, paid at the lesser of the employee or self-employed person's earnings or an annually specified rate. From 1 July 2020, eligible persons will be entitled to 26 weeks' paid parental leave. Instead of paid parental leave, employees and self-employed people may choose to take a parental tax credit. This entitlement can be transferred to an employee or self-employed person's spouse or partner.

Flexible working arrangements

Employees have the right to request flexible working arrangements from their employer.

Any employee may make a request (in writing) for a variation to their working arrangements. Any such request must include particular details set out in the ERA.

The ERA outlines the circumstances in which an employer may refuse an employee's request for flexible working arrangements. An employer may decline the request if grounds relating to an inability to rearrange the workplace without having a negative effect on the business are made out. An employer must decline the request if the employee is bound by a collective agreement, the request relates to working arrangements to which the collective applies, and the employee's requested working arrangements (if accepted) would be inconsistent with the collective agreement.

An employer must consider the employee's request for flexible working arrangements and advise the employee of the outcome as soon as possible (but no later than one month after receiving the request). If the request is refused, the employer must notify the employee of the refusal and the reason(s) for it, and must specify and explain the grounds relied upon relating to the effect on the employer's business (if any). The ERA also sets out a process for resolution of disputes relating to requests for flexible working arrangements.

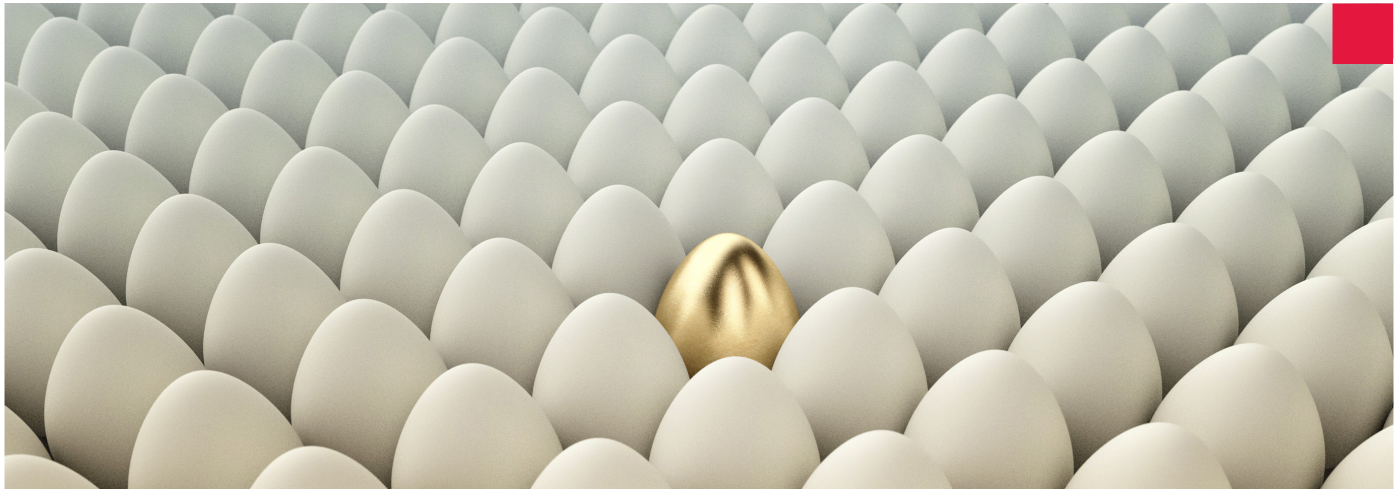
Wages or salary

Subject to certain taxation and other legislation under the Wages Protection Act 1983, an employer must pay the entire amount of any wages/salary to an employee without deduction, unless the deduction is requested by, or consented to by the employee. Wages/salary must be paid in cash unless otherwise agreed to by the employee. Most wages/salaries are paid to employees by direct credit (and the employment agreement needs to specify this mode of payment).

The Minimum Wage Act 1983 allows minimum wages to be set by Order in Council. This Act also provides for a 40 hour, 5 day week (not including overtime), but this can be varied by agreement between the employee and the employer.

The minimum wage, as at 1 April 2019, is NZ$17.70 per hour, before tax, for an 'adult worker' (an employee aged 16 years and over and who is not a 'trainee' or 'new entrant'). Workers who are aged either 16 or 17 years of age and who meet certain employment history criteria will also be entitled to the 'adult' minimum wage.

Workers who are 'starting out', or who are undergoing particular types of training, will be entitled to a minimum wage no less than 80% of the 'adult' minimum wage (i.e. as at 1 April 2019 NZ$14.16 per hour, before tax).



KiwiSaver work-based saving scheme

The KiwiSaver Act 2006 introduced a voluntary, work-based savings scheme in New Zealand. The purpose of the scheme is to encourage New Zealanders to save and help improve their financial wellbeing, particularly in retirement. The scheme is administered by the New Zealand Inland Revenue Department through the 'pay as you earn' ('PAYE') system. The Inland Revenue Department forwards employee participants' contributions to their KiwiSaver scheme for investment.

In terms of which employers must comply with the KiwiSaver Act 2006, it applies to all employers who are New Zealand residents or carrying on business from a fixed establishment in New Zealand (as defined in particular sections of the Income Tax Act 2007).

As KiwiSaver is a work-based savings plan, employers play an important role. From an administrative standpoint, employers are required to give new employees, and other existing employees who are interested, a KiwiSaver information pack (provided by the Inland Revenue). Employers pass on employees' details to the Inland Revenue to enable them to be enrolled, and deduct KiwiSaver contributions from employees' gross income. Employers also hand out investment statements for their preferred KiwiSaver provider, if they have one. If an employer does not comply with their obligations under the Kiwisaver Act 2006, they may be liable to pay a monetary penalty.

Employers are required to make compulsory employer contributions to KiwiSaver for employee members. The employer contribution is only for those employees who are enrolled in KiwiSaver and actually making contributions. The current rate of compulsory employer contributions is 3% of the employee's gross salary or wages and the employee also has a minimum 3% contribution rate. The definition of 'gross salary or wages' is very wide, and includes bonuses, commission, overtime, extra salary, gratuity or other remuneration of any kind.

More information about KiwiSaver can be found at the KiwiSaver information website: www.kiwisaver.govt.nz.

Trial and probationary periods

Under the ERA, employers with fewer than 20 employees are able to include an agreed trial period in their employment agreements with new employees. A trial period must be agreed to by the employee (in a signed employment agreement) before their employment commences and can be for a maximum period of up to 90 days. There are very strict requirements that an employer must comply with to ensure that such a trial period provision is valid. During the agreed trial period, the employer may terminate the employment relationship at any time and the employee will have no recourse to any of the ordinary procedures that exist under the ERA in respect of unjustified dismissal (provided the strict legal requirements are satisfied).

Employees will, however, still be able to bring a claim against their employer which is not based on unjustified dismissal (for example unjustified disadvantage, discrimination, or sexual or racial harassment).

Employers with 20 or more employees may include probationary period provisions in their employment agreements. Probationary periods last for the amount of time stipulated in the employment agreement. During the probationary period the employer must inform the employee if there are any issues with their performance, and give the employee support and training to improve to the required standard. If the employee is still not performing to the required standard at the end of the probationary period the employer must follow a fair process to dismiss the employee, and the employee must be provided their contractual notice period. Unlike statutory trial periods, if the employee is dismissed during a probationary period the employee will have recourse to ordinary procedures to bring a claim under the ERA.

Health and safety

The Health and Safety at Work Act 2015 (HSW Act) imposes duties on persons in a workplace.

The HSW Act replaces the previous duties owed by employers and principals (under the now repealed Health and Safety in Employment Act 1992) with a broader duty owed by “persons conducting a business or undertaking”(‘PCBUs’). PCBUs owe duties, so far as is reasonably practicable, to ensure the health and safety of workers who work for the PCBU, or whose activities are influenced or directed by the PCBU (e.g. people who work for a contractor or subcontractor hired by the PCBU). PCBUs must also ensure, so far as is reasonably practicable, that no other person’s health and safety is put at risk from work carried out by or for the PCBU.

There are also duties imposed on:

- PCBUs who manage or control workplaces
- PCBUs who design, manufacture, import, supply, install or construct plants, substances or structures
- directors and officers of PCBUs (in particular, the HSW Act imposes an obligation on directors and officers to exercise due diligence to ensure that the PCBU complies with its duties)
- workers and other people in a workplace (e.g. visitors)

The HSW Act provides a three-tiered hierarchy of offences. For the most serious category of offences, the maximum penalty is NZ$3 million for an organisation, NZ$600,000 or imprisonment for up to five years for a director, officer or self-employed person, and NZ$300,000 or imprisonment for up to 5 years for any other individual.

Accident compensation

All employers are required by law to contribute to a Government-controlled ACC insurance fund in respect of personal injuries suffered at work. These entitlements are available to employees on a ‘no fault’ basis. Similar funds also cover personal injuries incurred outside of work. The legislation prohibits actions for damages as a result of personal injury.

The ACC fund provides rehabilitation, weekly compensation, lump sum compensation for permanent impairment and funeral grants, survivors’ grants, weekly compensation for dependents and childcare payments. Employers are required to provide an employee with the first week’s compensation, consisting of 80% of his or her salary for work related injuries.

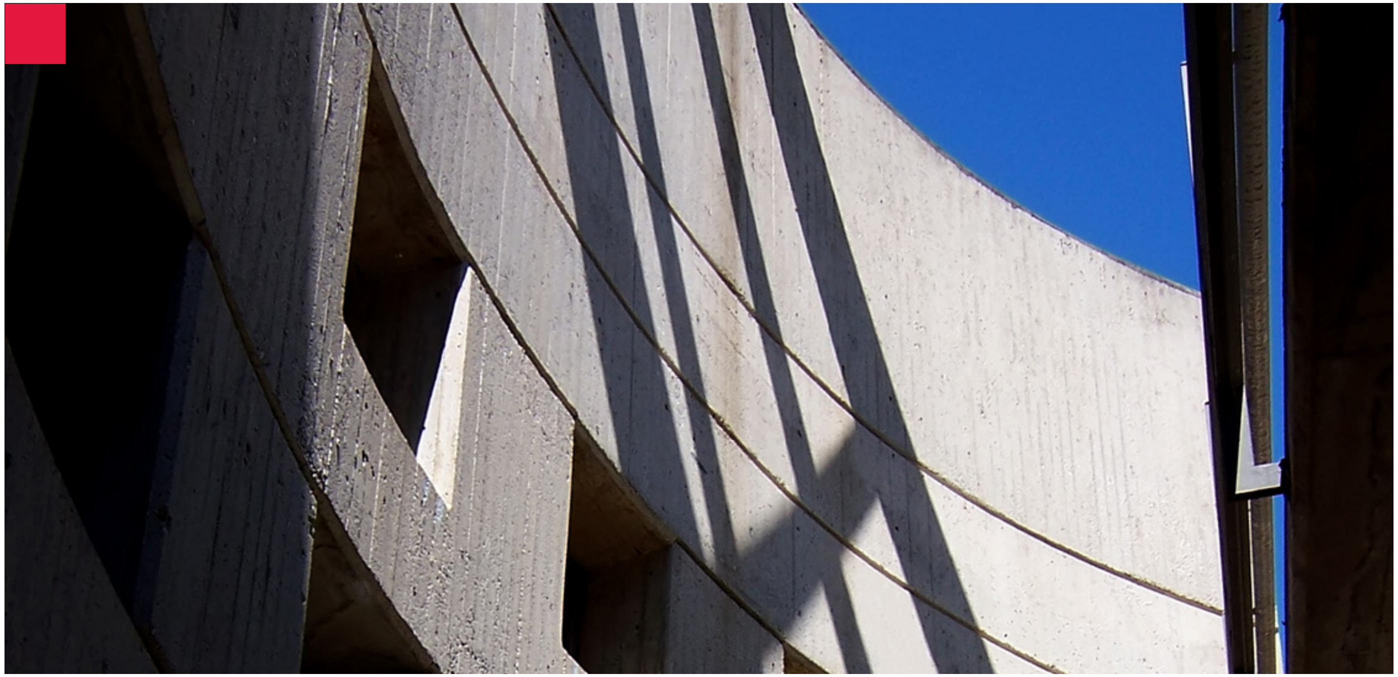
As an alternative to contributing under the general ACC scheme, employers can apply for entry to the ACC Partnership Programme. Under this programme employers provide for their own insurance cover for work place injuries. In return for ‘standing in the shoes of ACC’ and taking on these responsibilities, the employers pay a significantly reduced ACC levy. Any employer can apply for entry, although it is more suited to large employers who can meet the specified criteria set by ACC.

General

Many aspects of employment law in New Zealand are governed to some extent by case law. In particular, case law sets out the process employers are required to follow in respect of disciplinary procedures, dismissals and termination for poor performance or redundancy. In some cases, these steps are relatively stringent. It is important that all employers in New Zealand have a good understanding of the current case law.

There is also other employment relations legislation which we have not discussed specifically here (e.g. human rights, privacy and whistleblowers legislation). It is recommended that any employer establishing a business in New Zealand obtains a full description of the relevant legal obligations which apply to employers.

It is also important for anyone planning to establish or acquire a business in New Zealand to ascertain the current terms in all relevant employment agreements, the content of existing workplace policies and practices, any contingent liability on the employer and the requirements of New Zealand’s employment legislation. Where there is any likelihood of a conflict of laws, all employment agreements and other contractual documentation (e.g. confidentiality agreements) should expressly indicate the law which is to govern the agreement and the employment relationship.



New Zealand's real estate rules

Land law in New Zealand

New Zealand operates a system of land title by public register known as the "Torrens System". A public register of all land titles and interests on land is kept by central government. Registration of legal land ownership and land interests is compulsory. The land register system is fully computerised. All land titles and interests are stored in a computer-based national register and, since 2009, all land dealings must be completed online through Land Information New Zealand's website: www.landonline.govt.nz. Lawyers must still be used to register transfers of land titles and also for the registration of land title interests.

Land in New Zealand is privately owned by individuals, companies, the government and other entities. Most land is 'freehold' or 'fee simple' ownership in perpetuity. A record of title is issued for each parcel of land. The record of title records the name(s) of the registered owner, the status of the land, the technical description of the allotment number(s) of the land and any other rights or interests recorded against that land parcel (for example, restrictive covenants and easements).

Leasing commercial office space

New Zealand has an active commercial office leasing market with a range of leasing stock of varying grades available in commercial centres. Commercial terms such as term, rental, rent reviews, lease inducements, rent free periods, contributions to fit-out and other benefits can be negotiated directly with landlords. Landlords often specify the form of deed of lease, which is usually one of several industry standard lease forms with specific amendments. Commercial leases are usually not registered on the public land register.

Rent rates can include or exclude the tenant's share of operating expenses for the building, Council rates, light/power/water for the common areas and services etc.

Commercial office space is generally leased for medium periods (3 –7 years), with tenants having rights to renew for further terms. Leases for a single long term period such as 20 years are not common in the commercial office market. Rent reviews are normally undertaken periodically within lease periods and are often based on market rates or inflation-adjusted increases.

Some material leasing rights and obligations, such as the process for cancellation of leases are prescribed by statute.

If the land being leased is sensitive land, and the term of the lease is three years or more, then OIO consent will be needed before the lease is entered into. However, in most cases leases of commercial offices in an urban area do not involve sensitive land.

Foreign investment rules

There are restrictions under the OIA and the OIR on foreign investment in certain land in New Zealand.

OIO consent is required if an overseas person wishes to acquire sensitive land (which since 22 October 2018 includes all residential land).

Land is sensitive if it has certain features such as location, size, use or historical significance, and an 'interest in land' includes freehold, and other qualifying interests such as leasehold and profits-a-prendre. Any type of land can be sensitive land, including commercial/industrial, farm land, forestry land and coastal property. All residential land is now sensitive land.

The acquisition by an overseas investor of an interest in sensitive land requires consent (unless an exemption applies). An interest means freehold in addition to leases, and any other interest, with a term of three years or more (including rights of renewal) if not specifically exempted.

Determining whether land is sensitive land can be complex. The OIO does have helpful diagrams and guides to explain what land is sensitive (see https://www.linz.govt.nz/overseas-investment) but we recommend obtaining legal advice before signing any contracts relating to land interests to ensure compliance with the OIA.

Residential land

The New Zealand Government recently changed the law to make all residential property sensitive land under the OIA. As a result overseas persons may only acquire residential land if they:

- hold a permanent resident visa for New Zealand and have been actually living within the country for a specified period of time or
- obtain consent from the OIO. There are specific statutory tests that must be satisfied in order to obtain consent to buy residential land depending on the circumstances and intended use, such as:

  - the person holds a residence class visa and has committed to reside in New Zealand (the property is for personal use) or

  - it will be developing the land and adding to New Zealand's housing supply or

  - it will convert the land to another non-residential use

It is also possible to apply for a 'standing consent' in advance of a future transaction in respect of residential land if the person meets certain criteria.

Australian and Singaporean citizens do not need to obtain consent to acquire residential land, provided that the residential land is not sensitive for any other reason. There is also a new provision that allows an overseas person to apply for 'standing consent'. The rules and different tests that apply are complex to work through. Some helpful information about buying residential land can be found at https://www.linz.govt.nz/overseas-investment but we recommend obtaining legal advice before signing any contracts to buy residential land. The foreign investment rules have been discussed on pages [17-19], where there is additional information on who is an overseas person, transactions that do not require consent and details of penalties and offences.

Forestry

Recent changes to the OIA bring forestry rights within the ambit of the foreign investment rules. Previously, the foreign investment rules did not apply to forestry rights. Despite this, it was common for investments in the forestry sector to trigger the need for OIO consent due to such investments amounting to the acquisition of significant business assets and/or including the acquisition of sensitive land.

Going forward it should be easier for investors in forestry to obtain OIO consent due to the introduction of a streamlined approval path, which is available regardless of whether the investment is a forestry right or a land acquisition. The amended legislation streamlines the approval path by simplifying two elements of the OIO consent criteria – the benefit to New Zealand test and the counterfactual test (both described later in the OIO consent criteria section). To satisfy the benefits to New Zealand test for forestry investment, the OIO will need the overseas person to commit to continuing certain existing arrangements (including domestic log supply), in addition to a commitment to re-planting, but it will not require evidence of any 'added benefit' resulting directly from the investment. The OIO will apply a limited counterfactual test where it will compare the proposed use, against the current use instead of the wider prescribed comparisons, which is much harder to satisfy. There are also certain exemptions from the need to obtain OIO consent, including for small investments.

There is provision for an overseas person to apply for 'standing consent' in advance of a future transaction if the person meets certain criteria.

Farmland

Under the foreign investment rules, farmland is land which is used for agricultural, horticultural or pastoral purposes, for the keeping of bees, poultry or livestock. This definition does not include forestry or forestry rights, but does include farmland acquired to develop new forestry.

Before the OIO will give consent to a farmland transaction, the farmland (or interest in farmland) must have been offered for sale on the open market to New Zealanders. The sale advertisement must be published within the 12 month period preceding the OIO application for which consent is made or the date on which the transaction is given effect.

When assessing an application for investment in rural land (non-urban land of 5 hectares or more), the OIO must identify that the benefit of the investment to New Zealand will be, or is likely to be, substantial and identifiable to allow the investment to proceed. The Government has also directed the OIO to place most weight on certain economic benefits and the extent to which New Zealanders have oversight or can participate in the investment going forward.

OIO consent criteria

For proposed purchases involving sensitive land (other than residential land), the overseas investor must meet criteria additional to those set out on pages 17–19. The overseas investor must supply evidence to the OIO of either intending to reside in New Zealand indefinitely or that the proposed investment is of benefit to New Zealand, having regard to a number of factors including the following economic and environment factors.

Economic benefits:

- creating new job opportunities
- introducing new technology or business skills
- increased export receipts
- improving market competition, efficiency or

productivity or enhanced domestic services

- introducing new investment for development purposes
- increasing the processing of New Zealand's primary products

Environmental benefits:

- providing mechanisms for protecting or enhancing significant indigenous vegetation and significant habitats of indigenous fauna
- mechanisms for protecting and enhancing existing areas of significant habitats for trout, salmon and other wildlife
- mechanisms for protecting or enhancing historic heritage within the relevant land
- mechanisms for providing, protecting or improving walking access over the relevant land by the public
- if the relevant land is or includes foreshore or seabed, or a bed of a lake or river, whether that land has been offered back to the Crown

The OIR contains a further list of factors for assessing whether an overseas investment in sensitive land will benefit New Zealand which focus on a range of additional economic and public policy matters.

In addition, the OIO applies a 'counterfactual test' when assessing these likely benefits to New Zealand. This test requires the overseas investor to prepare a comparison of what is likely to happen as a result of the overseas investment and what is likely to happen without the overseas investment.

For economic benefits assessment criteria, the OIO will only take account of the additional economic benefits from an overseas investment where those benefits would not occur without that overseas investment. The overseas investor must also provide an outline of the "counterfactual" scenario of what would eventuate if the transactions did not proceed and the investment was acquired by an adequately funded and reasonably competent alternative New Zealand purchaser.

The overseas investor must demonstrate that they will provide more benefits to New Zealand than a New Zealand purchaser of the investment. The OIO disregards any benefits that the overseas purchaser might provide which would also result should a New Zealand purchaser make the same investment.

Practical issues for overseas investors in New Zealand

In our experience, specific issues which overseas investors should be aware of include:

- Structuring the timeframe of the purchase transaction to allow it to remain unconditional until OIO consent is granted. The indicative processing times for applications to acquire sensitive land is currently 90 to 120 working days. Complicated applications take longer. We recommend allowing a four to six month timeframe
- The 'counterfactual' OIO benefits analysis must clearly demonstrate what the overseas investor can add to the New Zealand economy and industry sector, over and above that which a New Zealand investor can show
- A large amount of supporting financial and personal information and details are required of overseas directors and shareholders of not only the investing entity, but also of its ultimate controlling parent company. The OIO requires details of ownership structures in order to clearly identify the ultimate individuals who own and/or control the investment entity undertaking the New Zealand investment
- All relevant financial, business and personal information must now be included in the initial application otherwise the application may not pass the OIO's preliminary quality assurance assessment, in which case the application will be returned for updating
- Even where the application passes the OIO's initial quality assurance assessment, the OIO will still do its own independent checking and will request further information and details as it sees necessary. These further information requests can delay the approval process
- OIO consent to any purchase usually contains specific conditions which the purchaser must fulfil post-completion. These could include offering training, scholarships, employment opportunities, investment in Research and Development, or ongoing free public access to natural resources/features on the land. The OIO monitors and requires reporting on these post-purchase conditions. There are penalties for non-fulfilment
- All information provided to the OIO is subject to the Official Information Act 1982 and can be requested for public release by any person. There are grounds to withhold personal information and information that might cause commercial prejudice to parties, but the starting point is that information will be released unless parties can demonstrate strong grounds to withhold information
- The OIO's brochure entitled 'Buying land in New Zealand Key Information for Overseas Investors' (which provides advice on buying or leasing land in New Zealand) is now available in traditional Chinese, simplified Chinese, Korean, and Spanish/Latin American.

New Zealand’s environment and resource management law

New Zealand’s environment and resource management law provides for the sustainable management of natural and physical resources, while recognising the importance of New Zealand’s unique biodiversity and environment.

Summary of relevant laws and regulations

The Resource Management Act 1991 (‘RMA’) is the principal environmental and development statute in New Zealand. The RMA establishes a comprehensive regime for dealing with resource management issues and sets out the roles and responsibilities of decision makers, including:

- District and Regional Councils, and Unitary Councils (which have the combined functions of District and Regional Councils)
- Minister for the Environment
- Minister of Conservation
- Environment Court (a specialist Court with jurisdiction established under the RMA)
- Environmental Protection Authority

Various other statutes may also be applicable to resource management issues, such as the:

- Local Government Act 2002 (bylaws)
- Hazardous Substances and New Organisms Act 1996 (waste management, regulation of dangerous and hazardous substances)
- Health and Safety at Work Act 2015 (regulation of hazardous substances)
- Waste Minimisation Act 2008 (solid waste management)
- Building Act 2004
- Conservation Act 1987
- Reserves Act 1977
- Public Works Act 1981
- Climate Change Response Act 2002, and the Climate Change (Emissions Trading) Amendment Act 2008 and associated regulations (greenhouse gas emissions and trading scheme)
- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (environmental management in New Zealand’s Exclusive Economic Zone and Continental Shelf)

Resource consents

The RMA introduces a hierarchy of governing documents, including:

- National Policy Statements
- National Environmental Standards
- Regional Policy Statements
- Regional Plans
- District Plans

These documents contain rules that determine whether resource consents may be required to undertake certain activities. They also contain policies against which applications for resource consents must be assessed.

Generally, the greater the adverse effects of the proposed activity on the environment, the greater the complexity in the processing and determination of applications for resource consent. The time and cost involved in obtaining resource consents will also increase with more complex applications.

The five main types of resource consent are:

- land use consents
- subdivision consents
- coastal permits
- water permits
- discharge permits

Land use consents and subdivision consents are granted for an unlimited term, unless otherwise specified in the consent. Coastal, water and discharge permits can be granted for a term of up to 35 years. Resource consents are often subject to detailed conditions. Conditions may specify site design and management of operational effects, ongoing monitoring and reporting and financial contributions towards infrastructure.

Enforcement under the RMA

The RMA allows for a range of enforcement action (including the prosecution of offences) to be taken if there is non-compliance with the RMA. Such matters could be the subject of an abatement notice or enforcement order (a Court order requiring action or non-action to be taken) or could be subject to a prosecution or infringement notice.

Offences

Major offences occur when there are, amongst other things, breaches of:

- duties and restrictions concerning activities on land, within beds of rivers and lakes and the coastal marine area, the use of water, and discharges of contaminants
- resource consents
- enforcement orders
- abatement notices

Minor offences relate to other matters such as obstructing an enforcement officer, or breaching a summons.

Penalties

Offences under the RMA are criminal in nature and are heard in the District Court by an Environment Court Judge.

The RMA imposes a strict liability regime, and it is, therefore, not necessary for the prosecution to establish that the defendant intended to commit an offence. Generally, once responsibility for the act or omission in question is established, then (subject to the limited statutory defences established by the RMA), conviction follows.

Major offences carry a maximum fine of NZ$300,000 or a term of imprisonment not exceeding two years for a natural person, and a maximum fine of NZ$600,000 for a legal person. In circumstances where the offence is a continuing one, the offender can be subject to a further fine not exceeding NZ$10,000 for each day the offence continues. If a court is satisfied that the offence was committed in the course of producing a commercial gain, the court may, in addition to imposing the above penalties, order that the person pay an amount up to three times the value of any commercial gain relating to the commission of the offence. To date, maximum fines imposed under the RMA have not approached the upper limit, although terms of imprisonment are occasionally imposed (e.g. in a prosecution relating to deliberate acts by a repeat offender).

Liability of principals or directors

Where an offence is committed by a person acting as an agent, contractor, or employee, the principal is also liable on the same terms and to the same extent as if the offence had been committed personally by the principal.

Where the defendant is a corporate entity, it is possible for its directors and/or management to face liability for the acts of the company. However, the RMA does provide some defences for directors and management:

Neither the directors nor any person concerned in the management of the corporation knew or could reasonably be expected to have known that the offence was to be, or was being, committed, or the corporation took all reasonable steps to prevent the commission of the offence.

Resource management system reforms

The Government is proposing changes to the resource management system through a two stage reform programme.

Stage one: an amendment bill is expected to provide greater public involvement in resource consents and other changes to improve the workability of the RMA, and the Ministry for the Environment is working towards its introduction in late 2019.

Stage two: a comprehensive review of environmental and planning laws is also intended. The timing of this review is uncertain, but expected before the end of 2020. Any resulting law changes will occur after that.

Canterbury earthquake response and recovery

In response to the Canterbury earthquake on 4 September 2010, the Government enacted the Canterbury Earthquake Response and Recovery Act 2010 (‘CERRA 2010’).

The primary purpose of the CERRA 2010 was to provide statutory power to assist with response and recovery efforts in the aftermath of the September earthquake. To achieve this purpose, the CERRA 2010 allowed the Governor-General, by Order in Council, to grant an exemption from, modify or extend any provision of any enactment, including the RMA.

Following the second Canterbury earthquake on 22 February 2011, the CERRA 2010 was repealed with effect from 18 April 2011 and replaced by the Canterbury Earthquake Recovery Act 2011 (’CERA 2011’). All Orders in Council made under the CERRA 2010 are to be treated as if they were made under the CERA 2011.

CERA 2011 expired at the close of 18 April 2016. This led to the enactment of the Greater Christchurch Regeneration Act 2016 (GCRA 2016).

The primary purpose of GCRA 2016 is to support the regeneration of greater Christchurch. It focuses on the importance of local leadership and joint cooperation between local and central government to drive greater Christchurch's regeneration.

Powers under GCRA 2016 have decreased slightly from CERA 2011 to reflect the regeneration focus. For instance, emergency demolition powers were removed. Planning processes in GCRA 2016 have greater local leadership and participation than under CERA 2011. The GCRA 2016 also established a Crown-council entity called Regenerate Christchurch whose purpose is to support a vibrant, thriving Christchurch that has economic, social, and lifestyle opportunities for residents, businesses, visitors, investors, and developers.

Functions of Regenerate Christchurch include:

- developing visions, strategies and Regeneration Plans to assist in achieving regeneration
- making recommendations and providing advice to the Minister on the development, revocation and amendment of Plans
- facilitating increased investment
- dadvising companies such as Ōtākaro Limited and Development Christchurch Limited
- commenting on regeneration outcomes, interventions and contributions by Ōtākaro Limited and Development Christchurch Limited
- providing advice on regeneration issues to Christchurch City Council and to the Minister

Contaminated land liability

In New Zealand, liability for contamination or cleaning up contaminated sites is most commonly addressed under the RMA by way of:

- regulating discharges of contaminants into the environment (including land, water and air) through requirements to obtain and comply with resource consents, unless the discharge is expressly allowed by a National Environmental Standard, other regulations or a rule in a regional or district plan
- casting a wide net for parties who may be liable for offences for breaching the RMA

The RMA defines contaminated land as "land that has a hazardous substance in or on it that (a) has significant adverse effects on the environment; or (b) is reasonably likely to have significant adverse effects on the environment".

Local councils have a mandate to control the effects of contaminated land and to control activities that cause land to become contaminated. Regional councils have limited powers to enter land and undertake inspections and investigations of contamination. They also have the ability to take enforcement action if there is a breach of the RMA or of the conditions of a resource consent, or to require a person to do something:

> *"necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier."*

The RMA does not presently specify whether:

- regional council power with respect to such sites can be exercised in relation to pre-1 October 1991 contamination
- which party (polluter, owner, occupier or all parties) should be properly targeted when the regional council is exercising its powers

The Resource Management (National Environmental Standards for Assessing and Managing Contaminants in Soil to Protect Humans) Health Regulations 2011 came into force on 1 January 2012. The Standard requires landowners to assess contamination levels of potentially contaminated sites before undertaking a change in land use, subdivision or earthworks. The responsibilities under the Standard attach to the land, so a current landowner will need to comply with the Standard regardless of whether they were responsible for the contamination.

Health and Safety at Work Act 2015 and Hazardous Substances and New Organisms Act 1996

Businesses in New Zealand also need to consider issues and potential issues relating to any other statutory or planning authorisation outside of the realms of the RMA. For example, special authorisation is required for trade waste discharges and, in situations where hazardous chemicals are being stored or handled at a particular site, a Location Test Certificate may be required under the Health and Safety at Work Act 2015 ('HSW Act').

The HSW regime covers specific substances which are classified according to their potential hazardous properties. Those properties include:

- explosiveness
- flammability
- oxidisation
- corrosiveness
- toxicity

The regulation of hazardous substances outside of the workplace is managed under the Hazardous Substances and New Organisms Act 1996 ('HSNO Act').

New organisms are managed and regulated by the HSNO Act. Authorisation is required for introduction or development of new organisms, including:

- organisms that became extinct before 29 July 1998
- organisms with approval to be in containment
- organisms with approval to be released with controls
- genetically modified organisms
- organisms that were deliberately eradicated from New Zealand
- organisms present in New Zealand before 29 July 1998 in contravention of the Animals Act 1967 or the Plants Act 1970
- risk species

The Environmental Protection Authority ('EPA') is responsible for the assessment and regulatory approval process for hazardous substances and new organisms. When the EPA receives an application for a hazardous substance approval, WorkSafe NZ makes sure the rules sufficiently protect the health and safety of people at work.

Climate Change

New Zealand is a party to the United Nations Framework Convention on Climate Change ('UNFCCC'), which enables countries to collectively consider how to address climate change. New Zealand ratified the Kyoto Protocol, which committed the country to set internationally binding emission reduction targets for a commitment period of 2008 to 2012.

In 2009, the Government decided to adopt an emissions reduction target for the period 2013 to 2020 under the UNFCCC rather than under the Kyoto Protocol. From 2021 onwards, New Zealand's commitment to reducing greenhouse gas emissions is governed by the Paris Agreement.

New Zealand's commitments under the Paris Agreement include:

- having an emissions reduction target that is regularly updated
- regularly reporting on emissions and the tracking towards targets
- providing financial support to developing countries' mitigation and adaption efforts
- maintaining a plan for adaption.

The Climate Change (Emissions Trading) Amendment Act 2008 established an Emissions Trading Scheme ('ETS'). The ETS is the main tool for ensuring New Zealand meets its international obligations to reduce greenhouse gas emissions. It has a number of mandatory participants that largely include those high up the production chain. The ETS covers forestry, liquid fossil fuels, industrial processes,

stationary energy, waste and agriculture sectors. These sectors' entry into the ETS was staggered until 1 January 2015. To date, the agricultural sector has yet to fully enter the ETS.

Under the ETS, mandatory participants that emit greenhouse gases are required to pay for all greenhouse gas emissions. The 'currency' of the ETS is a New Zealand Unit ('NZU'). A participant is required to surrender one NZU per tonne of greenhouse gas emitted. Participants from some sectors received a free allocation of NZUs when the ETS was introduced as compensation for the impact of the scheme. Activities that remove greenhouse gases from the atmosphere may earn NZUs under the ETS.

The Government is in the process of reforming the ETS and related climate change legislation to align with New Zealand's obligations under the Paris Agreement.

The introduction of the Climate Change Response (Zero Carbon) Amendment Bill was introduced to the House in May 2019 and will set an emissions reduction target of net zero by 2050 for all greenhouse gases (except biogenic methane emissions, which are required to be reduced by 24%-47% of 2017 emissions by 2050) and established the Climate ChangeCommission, which will assist the Minister in its functions of setting five-year emissions budgets and national adaptation plans. A second Climate Change Bill is expected, and will introduce changes to the ETS including strengthening enforcement.

Financial services regulation

New Zealand financial service regulation will apply to overseas institutions offering financial products or services to clients in New Zealand, as well as those looking to establish or invest in New Zealand businesses.

‘Carrying on business’ in New Zealand

Where the threshold for ‘carrying on business’ in New Zealand is met, registration and reporting obligations may apply to overseas entities wishing to do financial services business in New Zealand.

Companies Act 1993

Overseas companies ‘carrying on business’ in New Zealand must register as an ‘overseas company’ under the Companies Act 1993 (Companies Act).

Although the Companies Act does not exclusively define this phrase, in our view, key factors to consider will be whether:

- there is an element of continuity to transactions,
- there is an intention of pecuniary gain
- there is a continual and systematic presence in New Zealand
- contracts have been negotiated, entered into, or executed in New Zealand.

Ultimately, there is no clear single test to determine when an entity is carrying on business in New Zealand. As such, we would recommend seeking legal advice if you think your business will fall within any of the activities outlined above.

For financial institutions, it will be important to also consider the potential AML/CFT implications of registering under the Companies Act, as described below.

See also the section under ‘Investment Structures’ for further information [pages 9-10].

AML/CFT Act 2009

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) imposes obligations on ‘reporting entities’ (which includes financial institutions) to have in place procedures and processes to detect, deter, manage and mitigate money laundering and the financing of terrorism.

A ‘financial institution’ means a person who, in the ordinary course of business, carries on one or more of a range of specified financial activities under the AML/CFT Act.

The AML/CFT Act does not contain express provisions setting out its extra-territorial scope. However, if you are not required to be registered under the Companies Act as ‘carrying on business’ in New Zealand, and are not registered, or required to be registered as a financial service provider under the FSPA, the AML/CFT Act will generally not apply to you.

Financial service providers

Financial Service Providers Register

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA), sets out a framework for the registration of financial service providers in New Zealand and requires financial service providers who provide financial services to:

- register on the online Register of Financial Service Providers
- for those who provide financial services to retail clients in New Zealand, sign up to an approved dispute resolution scheme

The FSPA only applies, however, to persons who:

- are in the business of providing a financial service (whether or not the business is their only business or their principal business)

- are ordinarily resident, or have a 'place of business', in New Zealand (regardless of where the financial service is to be provided)
- are required to be licensed under a New Zealand licensing enactment (i.e. the Financial Advisers Act 2008, the Reserve Bank of New Zealand Act 1989, the Insurance (Prudential Supervision) Act 2010, the Financial Markets Supervisors Act 2011, the Non-bank Deposit Takers Act 2013 and the Financial Markets Conduct Act 2013, each discussed further below)
- do not have the benefit of an exemption

Generally, the place of business test requires physical premises in New Zealand at a permanent and fixed location that is readily identifiable with the financial service provider. As such, foreign financial service providers who reside outside New Zealand and provide financial services in New Zealand will generally not need to register (provided they are not required to be a licensed provider under a licensing enactment).

The Registrar and the Financial Markets Authority also actively monitor and will take steps to de-register overseas businesses who seek to register in New Zealand for optical purposes without a real substantive presence in New Zealand.

Note that if you are considering an acquisition of a New Zealand registered entity, notification requirements for changes of owner and director may apply after the event.

Financial advisers and discretionary investment

Advisers Act 2008 (FAA) applies to a 'financial adviser service' received by a client in New Zealand, regardless of where the person providing the service is resident, incorporated or carries on business. A 'financial adviser service' includes giving 'financial advice', providing an 'investment planning service' and providing a 'discretionary investment management service' (DIMS) (each as defined under the FAA.

Financial Advisers

The FAA regulates 'financial advisers' by requiring providers of financial adviser services or broking services to be registered, or in certain cases, authorised by the Financial Markets Authority (e.g. in the case of advisers providing personalised advice in respect of more complex products), unless you are an 'exempt provider'.

You will be an 'exempt provider' if you are not ordinarily a resident in New Zealand, do not have a place of business in New Zealand, and provide a financial adviser service to wholesale clients only. However general conduct requirements (e.g. an obligation to exercise care, diligence and skill when performing services) will still apply.

DIMS

Currently DIMS are regulated under both the FAA (largely in respect of personalised DIMS) and the FMCA (in respect of class DIMS). The provision of a DIMS will not be deemed a 'financial adviser service' if, among other things, it is exempted under the FMCA (i.e. the service is not a retail service).

Brokers

The FAA also applies to a 'broking service' received by a client in New Zealand.

Brokers and custodians who carry on the business of receiving and holding, paying or transferring client money or client property must comply with certain broker disclosure and conduct obligations. These obligations apply whether or not the business is the provider's only business or the provider's principal business, and regardless of whether the service is provided from overseas or in New Zealand.

However, fewer conduct obligations will apply to brokers providing broking services to certain wholesale clients only.

Under Review

The FAA has been under review by the relevant Government Ministry. As a consequence of the Financial Services Legislation Amendment Act 2019 (which has been recently enacted) the FAA will be repealed, and its provisions largely restated under the FMCA. It is not anticipated at this stage, that this will affect significantly (if at all) services provided by overseas persons to wholesale clients in New Zealand.

Bank registration

The Reserve Bank of New Zealand Act 1989 (RBNZ Act) provides that, subject to certain exceptions, no person may carry on any activity directly or indirectly in New Zealand (whether through an agent or otherwise)' using a name that includes the word 'bank' or a related word unless it is a registered bank, exempted or authorised by the Reserve Bank.

Registered banks are subject to the full regulatory oversight of the Reserve Bank. Essentially, the registration regime is a form of licensing and each New Zealand registered bank is required to comply with certain conditions of registration.

Overseas banks must also have the approval of, and comply with, the prudential requirements of their home supervisor to conduct banking business in New Zealand.

Reserve Bank consent is required before a person acquires 'significant influence' over a registered bank. Consent will also be required if a person proposes to increase that level of significant influence beyond the level permitted under an existing consent.

When consent is sought, the Reserve Bank has the power to specify the level of influence a person may have and impose any terms and conditions on the consent as it thinks fit.

NBDTs

The Reserve Bank also acts as the prudential regulatory authority for non-bank deposit takers (NBDTs) in accordance with the Non-bank Deposit Takers Act 2013 (NBDT Act). A NBDT will include anyone that is not a registered bank but who (a) makes an offer of debt securities to retail investors; and (b) carries on the business of borrowing and lending money, or providing financial services, or both. Relief can be obtained for overseas banks in some circumstances.

An NBDT must be licensed as a non-bank deposit taker by the Reserve Bank. They must also obtain an independent credit rating, have and comply with specific governance requirements and a risk management programme, restrict related party exposures, and have capital, capital ratio and liquidity requirements, among other things. They are also required to have a New Zealand trustee and trust deed, unless exempted.

Reserve Bank consent is required before giving effect to a transaction that will result in a person increasing their 'level of influence' over a NBDT such that the person will have the ability to appoint 25% or more members of the governing body or have a qualifying interest in 20% or more of the voting securities. Consent will also be required if the person's influence extends beyond the permitted threshold under an existing consent or if, at the time the NBDT became licensed the NBDT already met the threshold described above, beyond the level existing at that time.

When consent is sought, the Reserve Bank has the power to impose any terms and conditions on the consent as it thinks fit.

Insurers

All insurers and reinsurers carrying on insurance business in New Zealand must be licensed under the Insurance (Prudential Supervision) Act 2010 (IPSA). Licence obligations include, among other things, maintaining solvency and filing solvency statements (in accordance with standards prescribed by the Reserve Bank) and obtaining, publishing and disclosing to New Zealand policy holders and the Reserve Bank current financial strength ratings from an approved rating agency.

In addition, where a person would become a holding entity of a licensed insurer, or would obtain 'control' of a licensed insurer as a result of a proposed transaction (i.e. have the power to exercise, or control the exercise of 50% or more of the voting rights), they must notify the Reserve Bank of the transaction. After notification, the Reserve Bank will consider whether, if the proposed transaction takes effect, it would still be satisfied that the licensed insurer meets the initial licensing criteria.

Insurance intermediaries are regulated separately, primarily under the Insurance Intermediaries Act 1994 (IIA). The IIA imposes certain requirements on 'insurance intermediaries' and 'brokers'. It also prescribes how payments made to intermediaries affect the respective liabilities of insurers and the insured. It is not, however, a registration or licensing regime and does not impose onerous conditions (although a broker must maintain one or more insurance broking accounts with a financial institution in New Zealand).

Offers of financial products

The Financial Markets Conduct Act 2013 (FMCA) regulates offers of 'financial products', which include four discrete categories – debt securities, equity securities, managed investment products and derivatives.

Certain disclosure obligations will apply if an offer is a 'regulated offer' of financial products (i.e. essentially arising where the offer involves retail investors).

The FMCA also implements fair dealing rules for financial products and services (which will apply in relation to both retail and wholesale clients), creates registration and governing document requirements for regulated offers of debt securities and managed investment schemes, and creates a licensing regime for managers of registered managed investment schemes (but only in respect of retail offers), trustees of certain superannuation schemes, equity crowd-funding and peer-to-peer lending platform providers, providers of class DIMS to retail clients and derivative issuers to retail counterparties.

Managed investment schemes

If, therefore, a managed investment scheme is offered to retail investors in New Zealand, it will need to be registered in New Zealand under New Zealand law. If the scheme is offered solely to wholesale investors in New Zealand, it will not need to be registered.

Registered managed investment schemes are highly regulated and have specific registration, disclosure and governance requirements under the FMCA. The manager of the scheme must be licensed and an independent supervisor (trustee) must be appointed. A licensed manager, or their authorised body, is required to send a report to the FMA if it becomes aware that a transaction or other arrangement has been, or will likely be, entered into that has or will result in a person obtaining or losing control of the licensed manager (or the authorised body) i.e. resulting in a change in holding company or change in who has the capacity to determine the outcome of decisions about the entity's financial and operating policies.

Derivatives

Issuers who make regulated offers of derivatives are required to be licensed. Derivatives issuers (whether licensed or not) are also subject to requirements relating to holding derivatives investor money and property for both retail and wholesale clients.

Licensed derivatives issuers are subject to the same change of control reporting condition as licensed managers (see 'Managed investment schemes' above).

All insurers and reinsurers must be licensed under the Insurance (Prudential Supervision) Act 2010.

Entry into New Zealand

New Zealand's immigration law is set out in the Immigration Act 2009 and in Immigration New Zealand's Operational Manual, made pursuant to the Immigration Act 2009.

The Immigration Act 2009 provides for two main categories of visa: residence class visas and temporary entry class visas. Residence class visas consist of permanent resident and resident visas. Entry class visas consist of temporary, interim and limited visas.

New Zealand has a universal visa system. This means that all foreign nationals will require a visa to be in New Zealand unless a visa waiver applies. A 'visa' is required to travel to, enter and stay in New Zealand.

Visiting New Zealand

A visitor's visa is required for entry into New Zealand by any person other than:

- a New Zealand citizen or residence visa holder
- an Australian citizen or resident who holds a current Australian permanent residence visa or a current Australian resident return visa
- a person who is exempt from the requirement to hold a visa to be in New Zealand
- a citizen of a country which has a visa waiver agreement with New Zealand in which case the person does not need to get a visitor's visa if visiting New Zealand for three months or less (or six months if from the United Kingdom)

Working in New Zealand

Any person who is not a New Zealand or Australian citizen or resident or subject to an exemption, and wants to work in New Zealand, must hold a valid work visa.

A work visa may be granted if the person meets health and character requirements. They must then also meet the work and skill requirements that are set out in the various categories that a person may apply under, to work in New Zealand.

People wanting to live and work permanently in New Zealand can apply for a work visa under the following categories:

- Skilled Migrant category
- Work to Residence
- Residence from Work
- Employee of Relocating Business

People wanting to work temporarily in New Zealand can apply under the following categories: Temporary Work, Working Holiday and further categories relating to seasonal work in horticulture and viticulture.

The duration of a work visa varies depending on which work visa is being applied for, but generally the maximum duration is for three years.

There are special categories for people (for example, crews of foreign fishing vessels, or members of approved exchange schemes) who need to meet a special set of criteria before the work visa or permit will be granted or who are applying to work for an Accredited Employer. An 'Accredited Employer' is an employer that regularly recruits skilled overseas workers and has successfully applied to be accredited with Immigration New Zealand.

Entrepreneur work visa

An entrepreneur work visa is applicable to those interested in establishing a business in New Zealand. It enables the holder to move to New Zealand and buy or establish a business. An entrepreneur work visa is often required when applying for residence in New Zealand under the Entrepreneur Residence Category.

An entrepreneur work visa is a three year work visa in two stages: a Start-up stage and a Balance stage.

- Start up stage – if an entrepreneur work visa is approved, the holder will initially be given a 12 month work visa, enabling them to buy or establish a business in New Zealand
- Balance stage – this is for the remaining 24 months of the visa. The balance of the visa will be granted once Immigration New Zealand is satisfied that steps have been taken to establish the business

In order to be approved for an entrepreneur work visa, the applicant must:

- make a minimum capital investment of NZ$100,000 (excluding working capital), unless this requirement is waived
- meet or exceed 120 points on a scale which awards points for factors relating to the likely success of the proposed business and its value to New Zealand
- have a business plan
- not have been involved in bankruptcy or business failure within the 5 years preceding the date the application is made
- not have been involved in business fraud or financial impropriety
- meet health and character requirements, and
- meet English language requirements

Residence in New Zealand

Every person who wishes to immigrate to New Zealand needs to apply for residence. Residence entitles the person to live, study and work indefinitely in New Zealand.

The main categories for residency applications are Business/ Skilled Migrant, Family, and International/ Humanitarian. The Business/ Skilled category has a minimum English language level requirement. There are also health and character requirements for all categories.

Skilled Migrant category

To be granted residency under the Skilled Migrant category, an applicant must be under 55 years of age and score at least 100 points to register an expression of interest. Expressions of interest are then collected into a pool over a certain period and ranked. Those with over 160 points are automatically invited to apply for residency. After this, lower scoring expressions of interest with certain factors, such as skilled employment in New Zealand are selected, followed by other lower scoring expressions of interest.

When asked to apply for residency, applicants are required to provide proof of the claims made in their expressionof interest. The application will be assessed based on the proof provided by the applicant and on their ability to settle successfully and make a real contribution to New Zealand's social and economic development.

Points and bonus points are awarded for the following:

Points	Bonus points
Offer of employment or current employment in New Zealand	Awarded if employment is in an area of absolute skills shortage, a region outside Auckland, above the high remuneration threshold, or their partner has employment or an offer of employment in New Zealand
Work experience	Awarded for having at least two years' work experience in New Zealand
Qualifications	Awarded for a recognised New Zealand qualification, a qualification that is in an identified future growth area or an area of absolute skills shortage, partner qualifications, and has close family support in New Zealand

If an applicant is unsuccessful in receiving an invitation to apply for residency the first time, they will remain in the pool for six months, and if unsuccessful after then, their application will be withdrawn. However, if they wish, they can lodge another application.

Business categories

There are three business categories used for the purpose of residency applications, as follows:

- Investor category
- Entrepreneur category
- Employees of Relocating Business category

The objective of the business immigration policy is to attract migrants who will contribute to New Zealand's economic growth by increasing the country's skills base, encourage enterprise and innovation, and foster international linkages.

Investor category

Investors can apply under either the Investor 1or the Investor 2 categories, depending on their intended level of investment.

- Investor 1 – those investing a minimum of NZ$10 million in an acceptable investment for three years. The key features are:
  - no age limit
  - no English language requirements
  - applicants must spend 44 days in New Zealand in each of the last two years of the three year investment period
- Investor 2 – those investing a minimum of NZ$3 million for four years. The key features are:
  - investors must notify interest in being invited to apply for a resident visa by tendering an Expression of Interest (EOI)
  - up to the age of 65
  - three years' business experience
  - applicants must spend 146 days in New Zealand in each of the final three years of the four year investment period
  - reasonable English language skills.

(Note, only 400 applications can be approved annually under the Investor 2 category).

Entrepreneur category

The Entrepreneur Residence Category enables migrants to be granted residence if they have established a high growth and innovative business with export potential in New Zealand. There are two ways of qualifying for residence under the Entrepreneur Residence Category: the 2 year option and the 6 month option.

- Entrepreneur Residence Category (2 years) – those who have successfully established or purchased a business in New Zealand, and have been self-employed in that business for at least two years, and the business has benefited New Zealand significantly
- Entrepreneur Residence Category (6 months) – this option provides a faster track to residence for applicants who have been running a high value business for at least six months (have made a capital investment of at least NZ$500,000 in their business; have created at least three ongoing and sustainable full time jobs for New Zealand citizens or residents)

Employees of relocating business category

This category aims to promote New Zealand as a place in which to relocate businesses. To be considered under this category the owner(s) of the relocating business must demonstrate that the business will operate in New Zealand and be of benefit to New Zealand. The applicant must be a key employee of that business and must not be eligible for any other kind of New Zealand resident visa.

Family category

The objective of this category is to allow individuals to maintain, and be part of, a family unit.

This category is available to those applicants who:

- are in a genuine and stable marriage, or a de facto or homosexual relationship, with a New Zealand citizen
- are a parent of an adult child who is a New Zealand citizen or resident, and their family's 'centre of gravity' is in New Zealand
- have a New Zealand citizen or resident parent, brother or sister who is living in New Zealand, and no other siblings or parents are living in the same country in which the applicant is currently living in, and have an acceptable offer of employment in New Zealand
- are a dependent child of a New Zealand citizen or resident and who want to live permanently in New Zealand

There is also a family quota category run by ballot.

Residence from work policy

This policy provides additional pathways to gaining residence in New Zealand. Applicants must still meet lodgement, bona fide applicant, health, character, and English language requirements.

The pathways are:

- talent policy (employment with accredited employers)
- talent policy (for individuals with exceptional talent in a field of art, culture or sport)
- long-term skill shortage list (employment in an occupation on this list)

More information on the current requirements for entry to and work in New Zealand can be found at Immigration New Zealand's website: www.immigration.govt.nz.

Want to learn more?

Contact the MinterEllisonRuddWatts
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