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NEW ZEALAND LAWYERS

# Doing business in New Zealand.

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*Buddle Findlay has produced this document to highlight areas of New Zealand law which may affect you while doing business in New Zealand. We have made every effort to ensure the information is accurate as at the date of publication. However, it should not be relied upon as a basis for making business decisions as circumstances, business conditions, government policy, and interpretation of the law may change.*

*We would be happy to assist anyone who wishes to obtain advice or information on matters contained in this document - please email us at [bfmail@buddlefindlay.com](mailto:bfmail@buddlefindlay.com).*

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# ABOUT NEW ZEALAND

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## Political system

New Zealand is an independent state of the British Commonwealth. Queen Elizabeth II is the Head of State. However, convention dictates that she and her representative in New Zealand, the Governor General, remain politically neutral and follow the advice of government ministers (except in exceptional circumstances).

In 1993, New Zealanders voted in a referendum to adopt the Mixed Member Proportional (MMP) parliamentary system, and the system was introduced for the 1996 general election. MMP is a form of proportional representation based on the German model, where voters each cast a party vote (to choose the political party they want to represent them in Parliament) and an electorate vote (to choose which individual from their electorate they want to be their member of Parliament).

New Zealand has an independent and democratically elected Parliament consisting of one house, the House of Representatives. The House of Representatives has 121 members of whom 62 represent the general geographic electorates, 7 represent Māori electorates and 52 are political party list members. The total number of members each party has in the House is determined by the proportion of the party vote it receives. If a party has less electorate members than required by its party vote, list members are added to make up the difference. General elections are held every 3 years and then next one will take place in 2011.

Historically, the 2 significant political parties have been Labour (centre left) and National (centre right). Under MMP, however, smaller political parties play a greater role in government. The National party currently governs under Prime Minister John Key through 3 confidence and supply arrangements with the United Future, ACT and Māori parties.

Police, education, fire and social welfare services are under the control of central government. Territorial authorities, such as district and city councils, administer local community services such as rubbish collection and water supply.

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## Legal system

New Zealand's legal system developed from the British model. While English and New Zealand case law (common law) remains important in many areas, much of New Zealand's law is codified in Acts of Parliament.

The system of Courts is hierarchical, and extends from District Courts through High Courts to the Court of Appeal and the Supreme Court. Prior to the establishment of the Supreme Court (January 2004), New Zealand's highest Court of Appeal was the Privy Council in London, England. There are also specialist tribunals empowered by statute, such as the Employment Relations Authority, Human Rights Review Tribunal, Environment Court and Commerce Commission. Decisions of these bodies are subject to the supervisory jurisdiction of the High Court.

The public receives protection under the New Zealand Bill of Rights Act, which restrains government action. The Human Rights Act prevents discrimination by private companies and individuals in some circumstances. The public may obtain certain information held by government bodies on request under the Official Information Act.

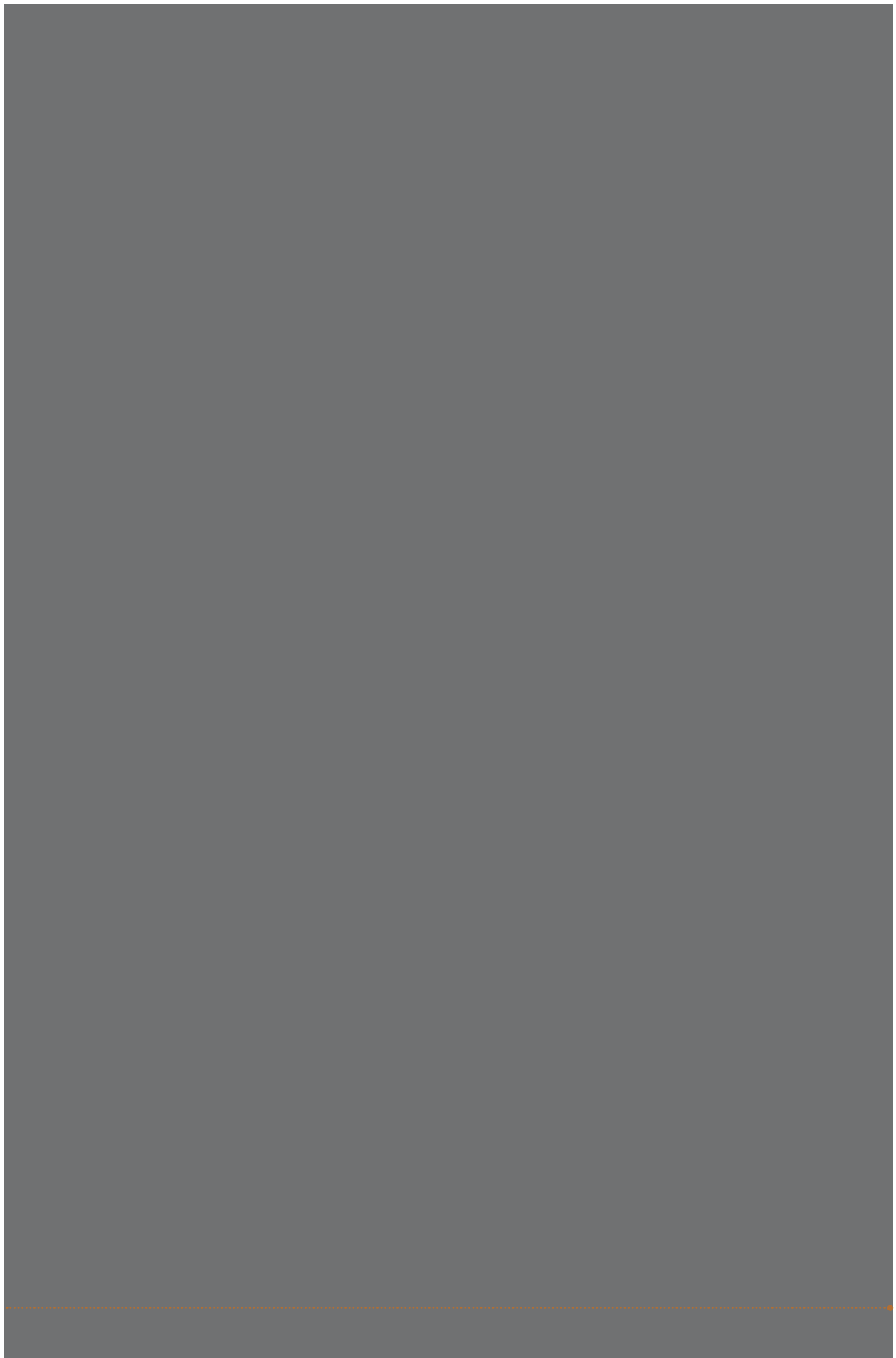
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## Economy

The economy is based on a private enterprise system. The government generally confines its commercial activities to those that are seen to have a “public good” element. In the early 1990s the government privatised its interests in a variety of industries - more recent asset sales include the sale of interests in energy and airport assets.

Extensive deregulation over the last 2 decades has promoted competition and reduced many regulatory burdens. New Zealand’s approach to regulation is generally “light-handed”, though there is a comprehensive regulatory environment to protect consumer and investor interests. Legislation such as the Commerce Act 1986, the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 ensures that companies do not engage in anti-competitive behaviour and that consumers are supplied with goods of reasonable quality.

New Zealand’s economic development has traditionally been based on its agricultural products. Since the 1980s, the emphasis has changed, and agricultural products currently provide approximately 33% of New Zealand’s total exports of commodities. The other 67% includes manufactured goods, forestry products, fish and horticultural and engineering products.



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# COMING TO NEW ZEALAND

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## Immigration

Government immigration policy provides a range of opportunities for people wishing to live and work in New Zealand on a temporary basis, and for people wishing to settle permanently in New Zealand in order to work, invest or establish a business.

The Immigration New Zealand website, [www.immigration.govt.nz](http://www.immigration.govt.nz), includes introductory information on government immigration policy, as well as downloadable forms and guides.

### TEMPORARY WORK IN NEW ZEALAND

Generally, a work visa and work permit are required by people wishing to live and work in New Zealand on a temporary basis. A work visa/permit may be issued for periods of up to 5 years, depending on the applicable policy.

Government work policy provides a number of schemes for applicants to live and work in New Zealand on a temporary basis. Outlined below is the Essential Skills Work Policy and Specific Purpose or Event Policy.

Applicants and prospective employers must satisfy general requirements in respect of these policies. Applicants must meet prerequisite standards regarding health and character, and prospective employers must show established compliance with New Zealand immigration and employment laws.

### ESSENTIAL SKILLS WORK POLICY

The Essential Skills Work Policy allows New Zealand employers to recruit workers from overseas on a temporary basis to meet worker shortages where workers cannot be recruited in New Zealand. Immigration New Zealand will assess the skill level of an occupation (from 1 to 5, with skill level 1 being the highest) by reference to the Australian and New Zealand Standard Classification of Occupations (ANZSCO). An offer of employment under this Policy must substantially match the description for that occupation under the ANZSCO. The applicant must also be suitably qualified for the occupation (by training or experience) and the applicant's qualifications and experience relevant to the proposed role in New Zealand. Permits and visas granted under the Essential Skills Work Policy generally arise in the following situations:

- If an applicant has an offer of employment in an occupation on the Immediate Skill Shortage List or Long Term Skill Shortage List, Immigration New Zealand will accept that no suitably qualified New Zealand workers are available. The current Immediate Skill Shortage/Long Term Skill Shortage Lists are available on the Immigration New Zealand website
- If an employer establishes that there are no New Zealand workers suitably qualified or readily able to be trained to fill a particular position, the employer may be granted Approval in Principle by Immigration New Zealand to temporarily employ workers from overseas. Prospective employees for that position can then apply for a work visa or work permit

- If an applicant has an offer of employment in an occupation not on the Immediate Skill Shortage List and the employer does not have Approval in Principle to employ overseas workers, a specific case may be made by evidencing a shortage in the New Zealand labour market justifying the employment of an overseas worker. Evidence includes showing that the employer has made genuine attempts to attract and recruit suitable New Zealand workers and has been unsuccessful. In the case of lower-skilled occupations (skill levels 4 or 5), Immigration New Zealand will seek advice from Work and Income New Zealand in relation to every application, to establish whether there are suitable unemployed New Zealanders available to take up the work
- The Essential Skills Work Policy also provides for some exceptional cases. For example, where an applicant with specialist skills is identified as contributing to New Zealand’s economic development, or where a national representative organisation of occupations or industries in New Zealand experiences significant problems recruiting highly skilled specialist employees from overseas under any other category of Work Policy. In these cases, an employer may request that Immigration New Zealand make special provision and allow the specialists to be employed.

### **SPECIFIC PURPOSE OR EVENT POLICY**

Applicants may be granted a work visa and permit under the Specific Purpose or Event Policy if Immigration New Zealand is satisfied that granting the application is likely to benefit New Zealand without impacting negatively on employment opportunities for New Zealand workers. The applicant must be coming to New Zealand for a specific purpose or event and must be skilled in areas relevant to the specific purpose or event.

There are a number of recognised “specific purposes or events”, including:

- A senior or specialist business person being on short term secondment to a substantial New Zealand company or a New Zealand subsidiary of an overseas company
- A person being seconded to New Zealand to be the chief executive or senior staff member of a multinational company for which similar applications have been approved
- Principal applicants for residence under the Business Investor category (if their application has been approved in principle) investigating direct investment opportunities and making direct investments in New Zealand.

### **SETTLING PERMANENTLY IN NEW ZEALAND**

A residence visa/returning resident’s visa and residence permit is required by people wishing to settle permanently in New Zealand to work, invest or establish a business. A residence permit and visa entitles the holder to live in New Zealand on a permanent basis.

There are 4 main categories under which an applicant may obtain permanent residence in New Zealand: Skilled Migrant, Business, Work to Residence (leading to Residence from Work), Family. The first 3 of these categories are outlined below.

Residence applicants must meet general health, character and English language standards.

### **SKILLED MIGRANT CATEGORY**

The Skilled Migrant Category is a points-based system that provides a pathway to permanent residence in New Zealand for people who have skills to fill identified needs and opportunities in New Zealand. Points are allocated based on whether an applicant has been offered or is in current skilled employment in New Zealand, and on their work experience, qualifications, age and existing family members in New Zealand.

## **BUSINESS IMMIGRATION POLICY**

The Business Immigration Policy comprises a number of schemes enabling people to settle permanently in New Zealand to work, invest or establish a business.

The Policy covers 4 main categories of applicant: investors, employees of relocating businesses, long term business visitors and, entrepreneurs.

Successful applicants under the following Business Immigration and Work to Residence categories may apply for permanent residence after certain further criteria are met under each policy. For example, under the Work to Residence Policies, after holding a work visa for at least 2 years (and meeting all other requirements), the holder may apply for a residence visa and permit under the Residence from Work Policy, allowing the holder to live and work in New Zealand permanently.

### ***Migrant Investment Policy***

The Migrant Investment Policy allows individuals with capital to invest in New Zealand to apply for residence. The Policy has 2 categories, with both categories requiring that all applicants meet the basic health and character requirements:

- Under the Investor Plus (Investor 1 Category), the applicant must have investment funds and/or assets equivalent to at least NZ\$10m and retain those funds or assets in an acceptable New Zealand investment for 3 years. Applicants under this category are required to reside in New Zealand for at least 73 days each year in years 2 and 3 of the 3 year investment period. There is no maximum age or English language requirement for applicants under this Category.
- The Investor (Investor 2 Category) requires an applicant to have at least 3 years business experience, be aged 65 years or under, and meet English language requirements. The applicant must nominate funds and/or assets of at least NZ\$1.5m for investment funds, and NZ\$1m for settlement funds. Applicants are required to retain investments funds in an acceptable investment for 4 years, and reside in New Zealand for a minimum of 146 days each year in years 2, 3 and 4 of the 4 year investment period.

More information is available on the [Immigration New Zealand website](#).

### ***Employees of relocating businesses category***

This category allows key employees of a relocating business (who are not eligible under any other Residence Policy) to live in New Zealand and work for the relocated business. There are a number of requirements both for the business that is relocating and for any employee relocating with the business. In particular, Immigration New Zealand must be satisfied that the applicant is a key employee of the business and that New Zealand Trade and Enterprise supports the relocation of the business.

### ***Long term business visa***

A long term business visa or permit is suitable for those wishing to establish a business in New Zealand. Applicants must provide a satisfactory business plan, have business experience relevant to their business proposal and have sufficient funds (in addition to investment capital) to be self-supporting during their stay in New Zealand. Successful applicants may later apply for permanent residence in New Zealand under the Entrepreneur Category.

### *Entrepreneur category*

The Entrepreneur category allows persons who successfully establish a business in New Zealand to work and live here permanently, provided that Immigration New Zealand is satisfied the business benefits New Zealand. Establishing a business includes establishing or purchasing a business or purchasing at least 25% of the shareholding of a business. The applicant must have been self-employed in New Zealand that business for at least 2 years.

### *Work to residence policies*

Government residence policy also includes 3 Work to Residence Policies: Talent (Accredited Employers) Work Policy, Talent (Arts, Culture and Sports) Work Policy and Long Term Skill Shortage List Work Policy.

Under the Talent (Accredited Employers) Work Policy, accredited employers may supplement their New Zealand workforce in their core area of business activity. To be eligible under this policy, an applicant must be aged 55 years or under and have an offer of employment from an accredited employer for full-time employment for a period of at least 24 months. The position offered must be in the employer's core area of business with a minimum base salary of NZ\$55,000 per annum. Where an employer is granted accreditation by Immigration New Zealand, it will be accredited for a period of 12 months. Accreditation may be renewed annually.

The Talent (Arts, Culture and Sports) Work Policy provides for applicants who have an exceptional talent in a declared field of art, culture or sport, who are sponsored by a New Zealand organisation of national repute in the relevant field and who are 55 years or younger.

To be eligible for residence under the Long Term Skill Shortage List Work Policy, an applicant must have an offer of employment for a position on the Long Term Skill Shortage List that meets the specifications for the position and must be suitably qualified for the position. Any offer must be for full-time employment for a period of at least 24 months. The Long Term Skill Shortage List identifies areas with a sustained shortage of skilled workers and is reviewed bi-annually. A current copy of the **Long Term Skill Shortage List** is maintained on the Immigration New Zealand website.

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# ESTABLISHING A BUSINESS

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## Establishing a business - alternative structures

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As a result of New Zealand's Commonwealth legal tradition, the forms of business structure found in countries such as the United Kingdom, Canada and Australia also exist in New Zealand. These include limited liability companies, partnerships and limited partnerships.

The choice of business structure will be dictated by various matters, including the desire of investors to have limited liability, the size and nature of the relevant business, the need to raise funds from the New Zealand public, and tax considerations. Irrespective of the chosen structure, it is important to note that particular types of business may be subject to specific licensing and regulatory controls that are not covered in this guide, for example insurance providers and real estate agents.

In general, foreign investors prefer the company structure.

An overseas company may conduct business in New Zealand by:

- Incorporating a subsidiary in New Zealand
- Registering as an "overseas company" (i.e. as a New Zealand branch of an overseas company)
- Acquiring an existing New Zealand company.

Legal, tax and commercial considerations will influence an investor's choice of corporate structure. Buddle Findlay is able to provide tax and legal advice to assist with such a decision.

If an overseas person or company has special requirements – for example wanting to provide financial services or establish a non-profit organisation - other forms of entity may be more appropriate and Buddle Findlay can provide advice on which vehicle may be most suitable. In addition, we can provide advice on establishing partnerships, limited partnerships and joint ventures with existing businesses.

### **INCORPORATE A SUBSIDIARY**

Incorporating a subsidiary is a relatively simple matter. The desired company name must be reserved (and approved by the Registrar of Companies) and the relevant administrative documentation must be registered. A New Zealand subsidiary is required to have a registered office in New Zealand but is not required to have New Zealand directors or officers.

As a separate company from the overseas parent, the subsidiary is a separate legal entity from its shareholder. Shareholders of companies incorporated in New Zealand obtain limited liability automatically (unless an unlimited company is specifically created).

A wholly owned subsidiary of a foreign parent is required to file accounts with the Registrar of Companies relating only to its operations, not the operations of its overseas parent company.

## **BRANCH OF AN OVERSEAS COMPANY**

An overseas company conducting business in New Zealand must register under the Companies Act 1993 as an overseas company. Registration must occur within 10 working days of the overseas company commencing business in New Zealand. Registration involves obtaining approval from the Registrar of Companies for the use of the name of the overseas company and lodging the relevant administrative documentation. Failure to register may attract liability for the company and each director for a fine of up to NZ\$10,000.

Unlike a subsidiary, a branch is not a separate legal entity to the overseas company. There is no requirement that New Zealand directors sit on the board of an overseas company.

An overseas company is required to file 2 separate sets of financial statements with the Registrar of Companies, namely, accounts relating to its worldwide operations and accounts relating to the New Zealand operation.

## **ACQUISITION**

In addition to commercial and tax issues, a company acquiring a New Zealand company must consider the application of the Overseas Investment Act 2005, the Takeovers Code and the Commerce Act. This legislation is discussed in more detail on pages 4-12.

## **PARTNERSHIPS**

New Zealand law recognises partnerships, which are defined in the Partnerships Act 1908 as the relation that subsists between persons who carry on a business in common with a view to profit.

Whether any particular venture is a partnership is a question of fact irrespective of how the founding documents are worded. The key feature of a partnership is that partners are personally liable for partnership debts and losses.

A partnership should be established by a partnership agreement which sets out the rights and obligations of the partners and the rules governing the operation of the partnership.

## **LIMITED PARTNERSHIPS**

In May 2008, the New Zealand government introduced limited partnerships in the form of the Limited Partnerships Act 2008. The purpose of this legislation was to establish a modern regime that provides a flexible and internationally recognisable structure, similar to limited partnerships in use in other jurisdictions, and to facilitate the development of the venture capital industry in New Zealand.

The most recognisable feature of a limited partnership is its hybrid nature. It is a separate legal entity which provides the protection of limited liability for its limited partners but it is taxed in the same way as a traditional partnership (often referred to as flow through or tax transparency).

A limited partnership must be registered, have a partnership agreement, at least one general partner and one separate limited partner. There is a substantial amount of flexibility afforded to what a partnership agreement may incorporate and like a company's shareholders agreement (but unlike a company's constitution) privacy is maintained as a partnership agreement will not be a publically available document. Also, while all partners' details must be registered, only details of the general partner will be made public thereby keeping the details of the underlying investor base confidential.

While the limited partnership regime is in its early stages there is a sense that it may be a popular business vehicle with local and overseas investors alike. Investors are attracted by not only the potential tax benefits but also the less arduous disclosure requirements and reduced compliance costs traditionally struck in company structures.

### **JOINT VENTURES**

A joint venture is an arrangement between 2 or more parties who contribute resources to a particular project. A joint venture may be carried out via:

- A separate limited liability company (of which each joint venture party is a shareholder)
- A partnership
- A limited partnership
- An unincorporated contractual joint venture.

The structure and operation of a joint venture should be dealt with:

- In the case of a company, in its constitution and/or shareholders' agreement
- In the case of a partnership or limited partnership, in the partnership agreement
- In the case of an unincorporated contractual joint venture, in a written joint venture agreement.

### **ALTERNATIVE FORMS OF ENTITY**

Alternative business structures may be appropriate if you wish to establish a non-profit entity (e.g. a charitable trust or incorporated society) or your members wish to work together co-operatively (e.g. a co-operative company or industrial and provident society).

If you wish to establish a financial services business, a bank, unit trust or building society may be appropriate.

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## **Foreign investment controls**

### **OVERSEAS INVESTMENT ACT 2005**

The Overseas Investment Act:

- Sets out a consent procedure for overseas persons and their associates investing in “sensitive land” or “significant business assets” in New Zealand
- Imposes conditions upon such investment and enables the regulator, being the Overseas Investment Office, to monitor compliance with those conditions.

### **OVERSEAS PERSONS**

The Overseas Investment Act applies to “overseas persons” and “associates of overseas persons” investing in New Zealand. An “overseas person” is:

- An individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand
- A company that is incorporated outside New Zealand
- A company that is 25% or more owned or controlled by an “overseas person”
- Certain types of partnerships, joint ventures, trusts, or unit trusts that are (in broad terms) 25% or more managed, controlled, or governed (as applicable) by an overseas person(s), or where 25% or more of the beneficiaries of the relevant entity are overseas persons.

The Overseas Investment Act defines “associates of overseas persons” broadly. Any person that an overseas person appoints to conduct business in New Zealand on its behalf or any person who acts under the direction of or jointly with an overseas person is an associate.

## **TRANSACTIONS REQUIRING CONSENT**

### *Investment in sensitive land*

An overseas person (or associate of an overseas person) must obtain consent in order to acquire “sensitive land”. See section on **purchasing land** on page 27 which describes what constitutes sensitive land.

Also, an overseas person (or associate of an overseas person) that wishes to purchase a company that (directly or indirectly) owns or controls an interest in sensitive land must obtain consent to:

- Acquire ownership or control of 25% or more of the target company
- Increase an existing 25% ownership or control of the target company
- Acquire rights or interests in the target company if, as a result of the acquisition, the target company will become an overseas person.

### *Investment in significant business assets*

Consent is required for an overseas person (or an associate of an overseas person) to:

- Acquire ownership or control of 25% or more of a company where the value of the shares or consideration provided or the value of the assets of the company and its 25% or more subsidiaries exceeds NZ\$100m
- Increase an existing 25% ownership or control of a company where the value of the shares or consideration provided or the value of the assets of the company and its 25% or more subsidiaries exceeds NZ\$100m
- Establish a business in New Zealand where the business is carried on for more than 90 days in any year and the total expenditure to be incurred in establishing such business exceeds NZ\$100m
- Acquire property in New Zealand to be used in carrying on business in New Zealand (whether by one transaction or a series of linked transactions) if the total value of the consideration provided for the property exceeds NZ\$100m.

## **PROCEDURE FOR OBTAINING CONSENT**

Each overseas person and associate making the investment must apply to the Overseas Investment Office for consent. Consent must be obtained before the overseas investment is given effect under the relevant transaction (i.e. before the property or business to which the transaction relates is acquired or disposed of). The application for consent must be in writing and must be accompanied by a statutory declaration verifying that the information contained in the application is true and correct.

The legislation imposes certain conditions on every consent. Consent may also be granted subject to additional conditions.

**Criteria for obtaining consent regarding investments in sensitive land:** See section on **purchasing land** on page 27 for a description of the criteria used.

**Criteria for obtaining consent regarding investments in significant business assets:** The applicable criteria used by the Overseas Investment Office to assess whether consent should be granted for overseas investments in significant business assets are that:

- The overseas person, or in the case of a company, each of the overseas persons with control of the company:
  - has business experience and acumen relevant to the investment
  - is of good character
  - is not a person prohibited by section 15 or section 16 of the Immigration Act 2009 (which lists certain persons that are not eligible for visas or entry permission under that Act)
- The relevant overseas person has demonstrated financial commitment to the investment.

### **ENFORCEMENT AND PENALTIES**

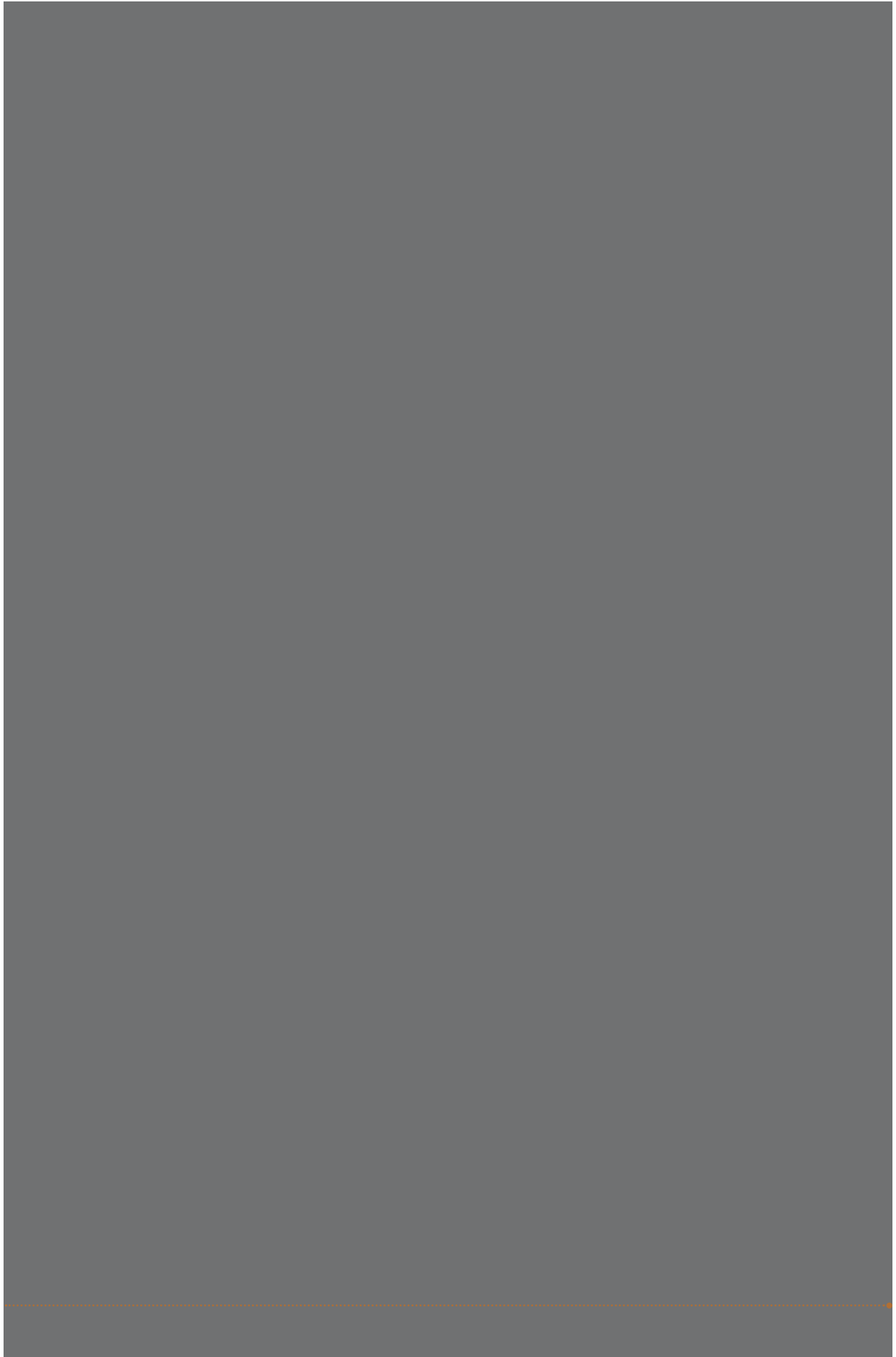
If a person fails to obtain consent under the Overseas Investment Act or enters into a transaction having the effect of defeating, evading or circumventing operation of the Act, that person commits an offence and may be liable:

- In the case of an individual, to imprisonment for up to 12 months or to a fine up to NZ\$300,000
- In the case of a company, to a fine up to NZ\$300,000.

If a person knowingly or recklessly makes any false or misleading statement or any material omission to the regulator, that person commits an offence and may be liable to a fine up to NZ\$300,000.

In addition, the Court may, on the application of the regulator:

- Order the disposal of property acquired in contravention of the Overseas Investment Act
- Order payment of a civil penalty.



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# CORPORATE REGULATION

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## Securities regulation

If an entity wishes to raise capital by offering securities to the public (whether equity, debt or other securities) in New Zealand, it must comply with a number of requirements. The offering of securities to the public is primarily regulated by the Securities Act 1978 and the Securities Regulations 1983. The Securities Act requirements are largely aimed at protecting investors by ensuring they are adequately informed. For example, there is a requirement to provide investors with an investment statement and, on request, a registered prospectus.

If an offer of securities is made exclusively to the following, the offer is not treated as an offer to the public and the Securities Act requirements do not apply:

- Habitual investors, relatives or close business associates of the issuer
- Investors required to pay more than NZ\$500,000 for the securities on the day on which the securities are allotted
- Any other person who in all the circumstances can properly be regarded as having been selected otherwise than as a member of the public.

However, great care needs to be taken in assessing these provisions. Buddle Findlay can assist you in interpreting the exclusions from the general requirements of the Securities Act.

### INVESTMENT STATEMENT

Where an offer of securities is made to the public, an issuer must issue an investment statement to each prospective investor. This is the key disclosure document which provides information to the prudent but non-expert investor. The investment statement must detail such matters as the potential risks, returns and charges relating to the investment. A subscriber must receive an investment statement before an issuer can allot any securities to the subscriber. There are no registration requirements for an investment statement but the Securities Commission can make an order suspending an investment statement or prohibiting its distribution if it considers the statement is false, misleading or non-compliant with the relevant legislation.

### REGISTERED PROSPECTUS

In addition to an investment statement, an issuer of securities to the public must register a prospectus with the Registrar of Companies and provide it to potential investors on request. The purpose of the prospectus is to truly and fairly convey all material information about the:

- Offer of securities (in more detail than the investment statement)
- Financial position and performance of the issuer
- Risks involved in the offer
- Material interests of those involved in making the offer (e.g. directors of the issuer).

Further, where the security being offered is a debt security the issuer must appoint a trustee (being one of the statutory trustee corporations or a person approved for the purpose by the Securities Commission) and enter into a trust deed.

## EXEMPTIONS

Certain securities offerings are exempt from some or all of the disclosure requirements of the Securities Act, including offers of:

- Any estate or interest in land for which a separate certificate of title can be issued
- Any interest in any company or partnership operating in certain professions (e.g. legal firms, engineers, veterinary practices, etc)
- Debt securities issued by a registered bank
- Any security issued by the Crown.

Certain offers will also be exempt from some requirements of the Securities Act where they are made to “eligible” persons, defined as persons who are wealthy (meeting either the Securities Act’s income or asset thresholds), experienced in investing money and/or experienced in the industry to which the offer relates.

The Securities Commission also has the power to grant general exemptions from certain provisions of the Securities Act and Securities Regulations (previous exemptions have been granted in respect of charitable issuers, overseas listed issuers, issuers of convertible securities, etc) or specific exemptions relating to particular issuers.

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## New Zealand’s capital market

New Zealand has one registered national stock exchange. The exchange is operated by New Zealand Exchange Limited (NZX). It offers listing on the main board or the newly introduced alternative market (NZAX), which is designed particularly for developing companies and companies with non-traditional structures that need access to the market.

While equity securities constitute the majority of trading in New Zealand, there are facilities for trading in a wide range of securities including hybrids and debt securities.

## LISTING RULES

Issuers with securities listed on NZX are bound by the NZX Listing Rules. The rules govern the relationship between issuers and NZX.

## BROKERS

Investors can buy and sell securities on the market operated by NZX only through an accredited broker. There is a relatively small list of accredited brokers in New Zealand, compared with some jurisdictions, which reflects the dominance of several large firms and the relatively small size of the New Zealand capital market. To be registered as a broker, both individual brokers and the firms employing them must have a licence from the High Court.

More information about the New Zealand capital market is available at [www.nzx.com](http://www.nzx.com).

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## Takeovers Code

The New Zealand Takeovers Code applies to companies that are listed on the stock exchange or that have more than 50 shareholders. These are called “Code companies”.

The Takeovers Code is based on a fundamental rule which prevents any person from becoming the holder or controller of more than 20% of the voting rights in a Code company except in a manner permitted by the Code. If any person already holds more than 20% then that holding cannot be increased except as permitted by the Code.

The Code has deeming provisions with an anti-avoidance purpose which deal with situations where groups of people act jointly or in concert or join together as “associates” (very widely defined). The aim is to ensure that the structuring of securities transactions does not defeat the basic purpose and intent of the Code.

### EXCEPTIONS

There are permitted exceptions to the fundamental rule which allow a person to increase their holdings or control above the 20% threshold. The exceptions are:

- With the approval of shareholders (only disinterested shareholders may vote)
- By making an offer for all outstanding shares in a Code company (a full offer)
- By making an offer for a certain percentage of the total shares in a Code company (a partial offer)
- By making acquisitions in the 50% to 90% range at a rate of 5% per annum (“creep” provision)
- By making acquisitions in the 90% to 100% range by compulsory acquisition or any other purchase
- Under an exemption issued by the Takeovers Panel.

Although the Takeovers Code has, by international standards, greater flexibility in allowing full and partial offers, there is a minimum acceptance condition. Under both full and partial offers a bidder must receive acceptances that result in the bidder holding or controlling a minimum of 50% of the voting rights of the Code company. This rule is obviously not applicable if the bidder already holds or controls more than 50% of the voting rights before making an offer.

### TARGET COMPANY OBLIGATIONS

The Takeovers Code has a 14 day notice and pause period, being the period between the date of the notice of the takeover offer and the date any acquisition can be made under the Code offer. The target company has a number of obligations during an offer, including the preparation of a target company statement and the obtaining of an independent adviser’s report.

There are various restrictions on the directors of a Code company exercising certain defensive tactics. It is expressly acknowledged that directors may seek to encourage competing bona fida offers, however there is no obligation on directors to “auction” control of the company.

Further information about the Takeovers Panel and the operation of the Code can be found at [www.takeovers.govt.nz](http://www.takeovers.govt.nz).

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# Competition law

## COMMERCE ACT

Competition law in New Zealand is governed by the Commerce Act. The aim of the Commerce Act is to promote competition in New Zealand markets for the long term benefit of consumers.

The Commerce Act regulates business acquisitions that impact negatively on competition and prohibits certain restrictive trade practices.

## BUSINESS ACQUISITIONS

### PROHIBITION OF CERTAIN BUSINESS ACQUISITIONS

The Commerce Act prohibits the acquisition of assets or shares of a business if the acquisition would have, or would be likely to have the effect of, substantially lessening competition in a market. In determining whether an acquisition has or is likely to have such an effect, the Commerce Commission will:

- **Define the relevant market** The relevant market is the market in New Zealand for the goods or services supplied by the business (including any goods or services substitutable for such goods or services).
- **Determine the impact of the acquisition on the market** This analysis involves a comparison of the likely market outcome that would result if the acquisition did proceed (the “factual”) against the likely market outcome if the acquisition did not proceed (the “counterfactual”). If the factual results in substantial lessening of competition against the counterfactual, the acquisition will not comply with the Commerce Act.

### SAFE HARBOURS

The Commerce Commission has released some safe harbour guidelines for acquisitions that are unlikely to substantially lessen competition. The safe harbours are as follows:

- If the combined market share of the 3 largest firms in the relevant market is below 70% and the market share of the combined entity (after the acquisition) is less than 40%
- If the combined market share of the 3 largest firms in the relevant market is above 70% and the market share of the combined entity (after the acquisition) is less than 20%.

If the proposed acquisition falls within these safe harbours, clearance from the Commerce Commission may not be required.

An acquisition that falls outside the safe harbours may still not have the effect of substantially lessening competition in the relevant market. A business can apply for clearance from the Commerce Commission if it believes that the acquisition will not result in the substantial lessening of competition. Alternatively, a business may apply for authorisation from the Commerce Commission.

## **CLEARANCES AND AUTHORISATIONS**

There is no compulsory notification regime in New Zealand for proposed mergers or acquisitions. However, businesses may apply for clearances or authorisations from the Commission.

The Commission may grant clearance for an acquisition where it is satisfied that an acquisition will not, or will not be likely to, have the effect of substantially lessening competition.

Alternatively, the Commission may grant an authorisation if it is satisfied that any substantial lessening of competition and any other general detriments are outweighed by the public benefits of the transaction.

## **BUSINESS ACQUISITION PENALTIES**

For a breach of the business acquisition provisions, individuals may be penalised up to NZ\$500,000. Companies may be penalised up to NZ\$5m.

Companies may also be ordered to dispose of any assets or shares acquired in contravention of the Commerce Act.

## **RESTRICTIVE TRADE PRACTICES**

The Commerce Act prohibits various restrictive trade practices which may be classified as follows:

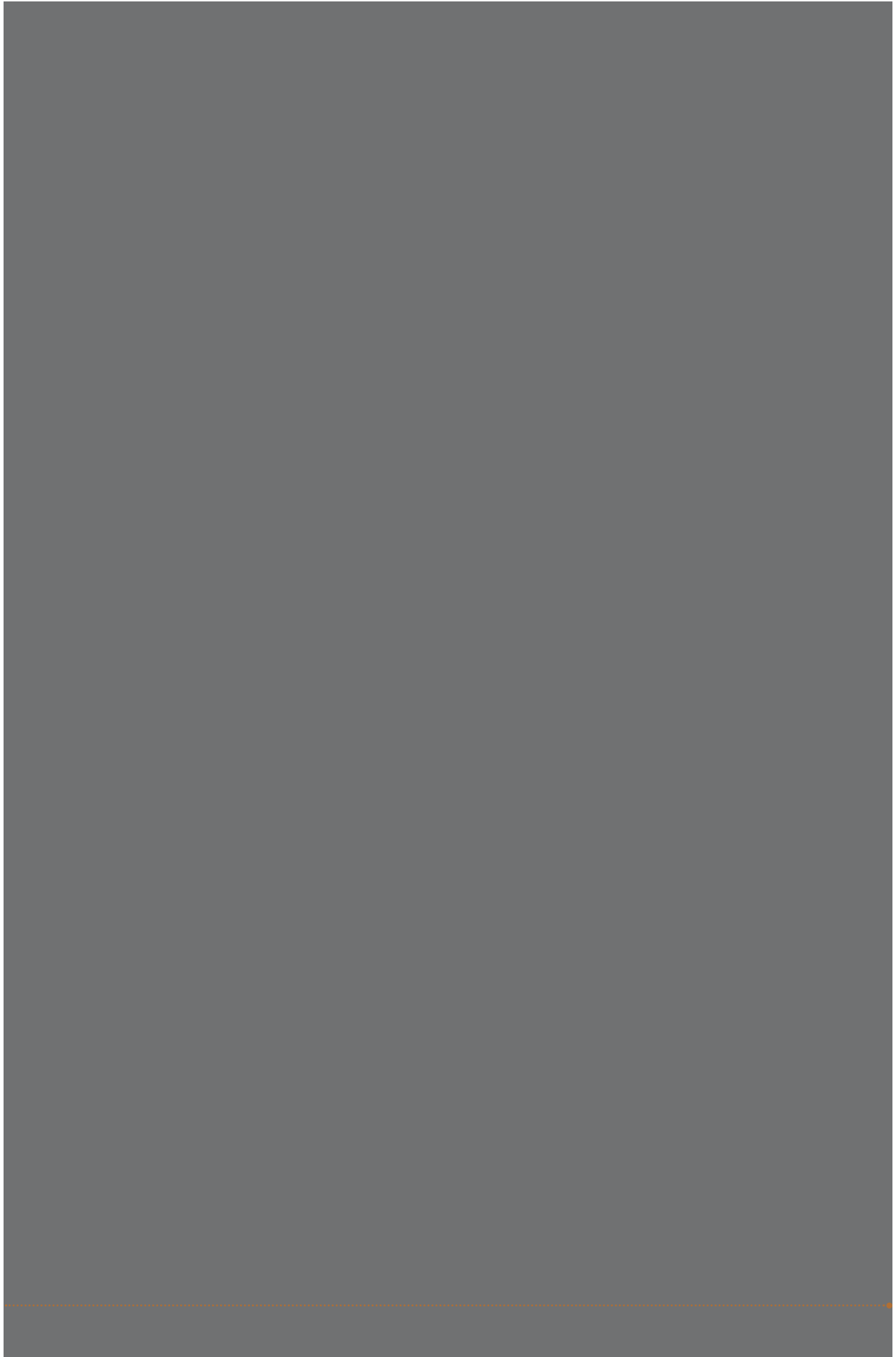
- **Collective practices**
  - contracts, arrangements or understandings that substantially lessen competition
  - contracts, arrangements or understandings that exclude competitors
  - contracts, arrangements or understandings amongst competitors that have the purpose, effect, or likely effect of fixing prices.
- **Unilateral practices**
  - suppliers of goods fixing minimum resale prices
  - companies with a substantial degree of power in a market taking advantage of its market strength for an anti-competitive purpose. Anti-competitive purposes are restricting the entry of a person into a market, preventing or deterring a person from engaging in competitive conduct in a market, or eliminating a person from a market.

### *Restrictive trade practices penalties*

The Commerce Commission may impose penalties on individuals of up to NZ\$500,000 for breaching restrictive trade practices prohibitions. Companies are prohibited from indemnifying their directors, employees or agents for penalties incurred as a result of price fixing.

A company may be fined an amount which does not exceed the greater of:

- NZ\$10m
- 3 times the value of any commercial gain resulting from the contravention or, if the commercial gain cannot be established, 10% of the turnover of the group of companies to which the company belongs.



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## FINANCIAL SERVICES

The banking industry in New Zealand is supervised by the Reserve Bank, which is regulated by the Reserve Bank of New Zealand Act 1989. The Reserve Bank acts as the central body managing monetary policy with the intention of achieving and maintaining price stability and promoting a sound and efficient financial system. The Reserve Bank produces and manages the New Zealand currency. While the Reserve Bank is fully owned by the New Zealand government, it has operational autonomy.

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### Banks in New Zealand

All banks operating in New Zealand need to be registered. There are 19 banks currently registered in New Zealand. These include prominent Australasian banks such as ANZ National Bank, ASB, Bank of New Zealand, CBA, Kiwibank and Westpac, and some well know international banks such as Bank of Tokyo-Mitsubishi, Citibank, HSBC and Rabobank.

Some of the registered banks focus on wholesale funding in specific market sectors and investment banking and do not offer retail banking.

To operate and use the term “bank” in its title, a financial institution must apply to the Reserve Bank. For an application to be successful, the Reserve Bank must be satisfied that the business undertaken by the applicant will consist of borrowing and lending money or the provision of financial services. The Reserve Bank is required to assess the following matters in determining an application:

- Incorporation and ownership structure of the applicant
- Size of the proposed business
- Ability of the applicant to carry out its business in a prudent manner
- Standing of the applicant and its owner in the financial markets
- Suitability of the current management of the applicant.

Applications from overseas entities will also be assessed on the regulatory requirements relating to banking in the home jurisdiction of the applicant and the size and nature of their proposed business. In addition, the Reserve Bank will investigate the following in assessing the ability of the overseas applicant to carry on its business in a prudent manner:

- Amount of capital in relation to the size and nature of the proposed business
- Loan concentration and risk exposure
- Separation of banking activities from any other activities of the applicant
- Applicant’s internal controls and accounting systems
- Policies and procedures in place relating to risk management
- Business arrangements of the proposed bank that are to be carried out by persons other than the bank or the applicant.

Once a bank is registered, its conduct is supervised by the Reserve Bank in accordance with the Reserve Bank of New Zealand Act. Registered banks must comply with various requirements, including the provision of quarterly disclosure statements.

If a bank is systematically important, the Reserve Bank may impose additional requirements on it to maintain systems and management in New Zealand.

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## Financial institutions

In addition to registered banks, New Zealand also has many financial institutions that provide a full range of finance products. New Zealand's non-bank financial institutions take a variety of forms including private savings banks, merchant banks, finance companies, small loan companies, stock and station agents, building societies, trust and mortgage companies, and insurance companies.

A non-bank financial institution that is firstly in the business of borrowing and lending money or providing financial services (or both) and secondly offers debt securities to the public, is also regulated by the Reserve Bank. As with registered banks, the Reserve Bank imposes various restrictions on non-bank deposit takers in relation to their corporate governance structure and their compliance with credit rating requirements, capital adequacy requirements and related party transaction restrictions.

Financial institutions that take monetary deposits from the public must also comply with the Securities Act. For further discussions on the requirements of the Securities Act, see the section on **securities regulation** on page 14.

It should also be noted that a new regulatory regime targeting the financial services and advisory industry has recently been introduced under the Financial Advisers Act 2008 (FAA) and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA). Although the FAA and the FSPA have been passed into law, they are not expected to come into force until the end of 2010 as much of the detail needed to flesh out the requirements and regulations surrounding the new regime has yet to be developed.

Once in force, the FAA and FSPA will replace the current investment adviser and broker regime under the Securities Markets Act 1988. This will represent a significant change in approach from the relatively simple pre-engagement disclosure requirements of the existing regime to an all encompassing registration-based system characterised by licensing and conduct obligations on those individuals and organisations operating in financial services industry.

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## Raising finance in New Zealand

New Zealand operates a relatively unrestricted system for raising and providing finance, both domestically and internationally, with no specific approvals or similar regulatory restrictions or controls for onshore or foreign borrowing or lending, subject to the laws relating to the issue of securities generally, see the section on **securities regulation** on page 14. Raising finance can include unsecured and secured borrowing. Secured borrowing includes charges or mortgages over land and chattels and, for companies, various security agreements can be put in place over the assets of the company.

Entry by a company into financial arrangements with its lenders will require the appropriate corporate authorisations to have been given by the directors and/or shareholders in order to comply with the Companies Act. For the purposes of providing finance, lenders will often rely on a certificate from a director of the company as to the financial position (i.e. solvency etc) of the company, sometimes combined with a solicitor's opinion, stating that relevant requirements of the Companies Act have been complied with and that necessary corporate authorisations have been given.

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## Insolvency and credit recovery

New Zealand law provides a number of insolvency procedures. The most commonly used are bankruptcy (in the case of individuals), liquidation (in the case of companies), and receiverships (companies, trusts, individuals). From late 2007 the new voluntary administration procedure has been available for rehabilitation of companies in financial difficulty. These procedures are governed by the Insolvency Act 2006, the Companies Act and the Receiverships Act 1993.

The Insolvency (Cross-border) Act 2006 has been in force since July 2008. This adopts the UNCITRAL Model Law for cross border insolvency.

Although New Zealand has a creditors' compromise procedure for insolvent companies, there are no mandatory moratorium periods on creditor enforcement unless and until a proposal is approved by the requisite majorities of creditors (and any further requirements are met). This procedure is therefore rarely used.

### **BANKRUPTCY**

Bankruptcy applications may be initiated by either a debtor or a creditor. Once adjudged bankrupt, the property of the debtor passes to the official assignee for the benefit of the debtor's creditors in accordance with their relative entitlements (the Insolvency Act provides for equal treatment of creditors but has exceptions allowing certain limited classes of creditors to receive dividends in priority to others). The official assignee is granted various powers to investigate the affairs of the bankrupt and to set aside various classes of preferential or undervalue transactions. Various restrictions apply to a debtor while bankrupt, including limits on the ability to engage in business. However, a bankrupt will generally be discharged after 3 years, at which point the debtor has a "fresh start", being released from most types of debt.

### **LIQUIDATION**

Liquidation involves the application of similar principles to a body corporate. The process can be initiated by various parties, including the shareholders of the company and a Court on the application of a creditor. Once appointed, a liquidator has custody and control of the company's assets in order to realise the assets for the benefit of creditors. As with bankruptcy, the liquidator has the ability to investigate the affairs of the company and, where appropriate, to commence proceedings against directors for breach of their duties or to set aside preferential or undervalue transactions. Payments of dividends to creditors are made in accordance with pari passu principles, subject to the priority payment of certain prescribed classes of creditors (secured, preferential and, lastly, unsecured).

## RECEIVERSHIP

Bankruptcy and liquidation are both largely procedures that benefit unsecured creditors. Secured parties are generally expected to rely upon enforcement powers granted under security documents or pursuant to the Personal Properties Securities Act 1999 (see section below), including powers of sale and the ability to appoint receivers to the secured assets. The latter process is governed by the Receiverships Act, which provides a creditor-friendly system of taking control of the secured assets, with the purpose of selling the secured assets (if possible as a going concern) to satisfy the debt of the appointer. In contrast to official assignees or liquidators, a receiver's primary duty is to the appointing creditor.

## CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003

The Credit Contracts and Consumer Finance Act 2003 (CCCFA) applies to all "credit contracts" made on or after 1 April 2005 and replaces previous credit contracts and hire purchase legislation.

The CCCFA is primarily consumer protection legislation. The core provisions of the CCCFA do not – with the exception of the provisions relating to oppression – apply to business transactions. The core provisions apply only to those credit contracts that are "consumer credit contracts". Essentially, a consumer credit contract is a credit contract entered into by an individual for "personal, domestic or household purposes".

For further detail on this Act, see the section on **consumer protection** on page 36.

## PERSONAL PROPERTY SECURITIES ACT 1999

The Personal Property Securities Act establishes a code for determining the validity and priority of the claims of secured creditors and other parties with interests in personal property. The Act is based on similar regimes operating in North America.

The Personal Property Securities Act represents a significant departure from the previous priority rules based on English law concepts. To best protect its priority to personal property (collateral), a secured party needs to "perfect" its "security interest" in that collateral by registering a financing statement against the debtor at the New Zealand Personal Property Securities Register (Securities Register).

The Act applies to transactions which create "security interests" in personal property. A security interest is defined as an interest provided for by a transaction which creates an interest in personal property as security for an obligation irrespective of the form of the transaction or the identity of the person having title to the collateral. Personal property includes virtually all assets and property other than land and some other specific exceptions (for more information as to security interests over land, see the property section on page 22). The types of transactions governed by the Personal Property Securities Act therefore include fixed and floating charges, chattel mortgages, hire purchase agreements, retention of title arrangements and finance leases.

In addition to transactions which create "genuine" security interests, the Personal Property Securities Act also deems that certain transactions create security interests notwithstanding that they may not be in the nature of a secured transaction. These include the lease or bailment of goods for a term of more than one year and the purchase or transfer of an account receivable.

As a general rule, priority between secured parties with a perfected security interest in the same collateral item is determined by the order in which financing statements were registered against the debtor at the Securities Register. The general rule provides that the first secured party to register has priority. However, the priority rules under the Personal Property Securities Act are complex and there are a number of specific priority rules which modify the general rules.

The Personal Property Securities Act also regulates the enforcement of security interests in collateral by secured parties. The secured party and the debtor can agree to contract out of certain of the debtor's statutory rights which would otherwise apply on enforcement. It is therefore common for security agreements to be drafted to contract out of some or all of the debtor's rights.

### **ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRORISM ACT 2009**

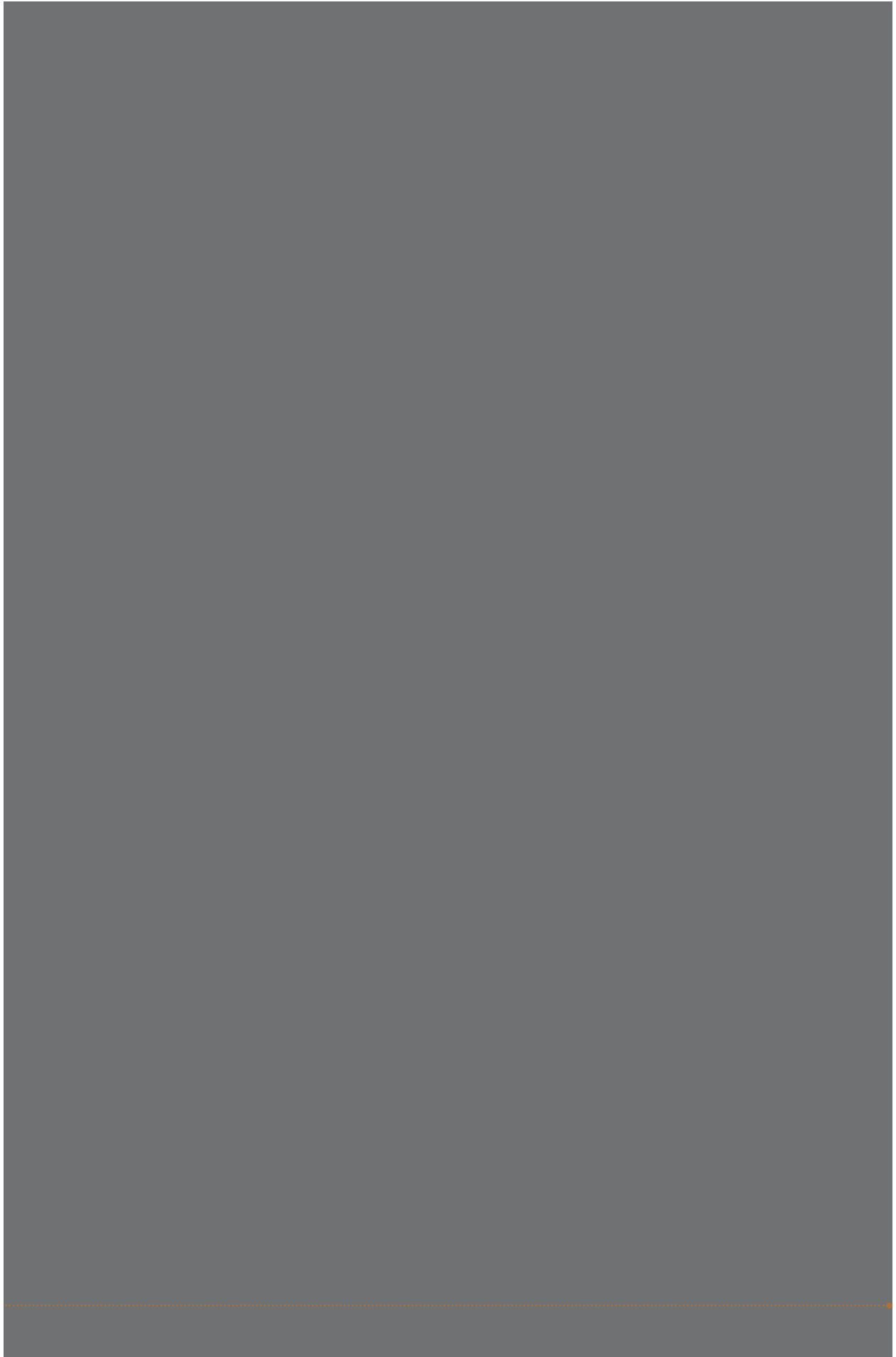
The Anti-Money Laundering Act imposes various obligations on reporting entities that include financial institutions.

Part 2 of the Act, expected to come into force by late 2011, will impose various obligations on reporting entities, requiring them to:

- Carry out varying levels of customer due diligence in order to satisfy themselves that financial transactions are legitimate (the level of due diligence will depend on the type of customer, the nature or circumstances of the transaction and the level of risk involved)
- Produce, implement and maintain a detailed written risk assessment of the money laundering and financing of terrorism risks that they face and then to establish and maintain an appropriate and detailed written compliance programme to address these risks
- Report any suspicious transactions to the Commissioner of Police and retain information that is collected in relation to the identity of the relevant customers
- Maintain detailed records of every transaction that is conducted through the reporting entity so that each transaction can be readily reconstructed at any time.

The Act also appoints Anti-Money Laundering / Countering Financing of Terrorism (AML/CFT) supervisors. As at the date of this document, there are 3 such supervisors: the Reserve Bank of New Zealand, the Securities Commission and the Department of Internal Affairs.

The Reserve Bank supervises reporting entities that are banks, life insurers and non-bank deposit takers while the Securities Commission supervises trustee companies, futures dealers, collective investment schemes, brokers and financial advisers. The Department of Internal Affairs on the other hand supervises casinos, non-deposit taking lenders, money changers and all other reporting entities not supervised by the Reserve Bank or the Securities Commission.



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# PROPERTY AND LAND LAW

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## Property law

### LAND TITLE SYSTEM

New Zealand utilises a land registration and transfer system based on the Torrens system. This system revolves around a public register of land ownership and is used in a number of other countries, including Australia, the United Kingdom and Singapore. The primary advantage of the Torrens system is that a purchaser of land can rely on the correctness of the title to land as it is recorded in the public register. Furthermore, in New Zealand the Crown guarantees that the details on the register are true and complete.

Almost all land in private ownership in New Zealand is held under the Torrens system as enacted in the Land Transfer Act 1952. This Act provides for a public register of land, divided into 12 land registration districts. All transactions in relation to a piece of land, including transfers of the land and the registration of mortgages, easements, caveats and other legal interests over the land, are recorded on a register of computer interests (these are commonly called “certificates of title”) retained in the relevant registry’s electronic register. The computer interest register also records the area of the land. A search copy of the computer interest for a parcel of land can be obtained (for a nominal fee) by various agents who will obtain the search from the land transfer office in the registration district in which the land is situated. The purpose of including all this information on the register is to put the public on notice of all interests which may affect the land, however, it should be noted that where land is designated as “Māori land” then, as the Māori Land Court also holds records relevant to such land, a search of the Māori Land Court’s register for the land should also be obtained to ensure that all relevant interests in the land are known.

When a purchaser of land searches the public register, he or she will be provided with a search copy of the relevant computer interest. As the Crown guarantees that all interests affecting the land appear on the title, the purchaser need not look any further to ascertain the true property owner. As a result, the process of purchasing land in New Zealand is relatively straightforward and reliable.

### TREATY OF WAITANGI AND MĀORI LAND CLAIMS

The Treaty of Waitangi was entered into between the first inhabitants of New Zealand, the Māori, and the British Crown in 1840. The Treaty served initially as a means of ensuring a peaceful colonisation of New Zealand by British settlers. The Treaty guaranteed continued use by Māori of their land and resources. A series of subsequent land confiscations by the Crown and gradual dissipation of Māori land holdings resulted in increased reference to the Treaty itself as a means of protecting Māori interests from further erosion, and restoring to Māori land and resources previously taken from Māori possession.

In response to pressure to formally adopt the Treaty and for a fulfilment of guarantees provided under the Treaty, the New Zealand government enacted the Treaty of Waitangi Act in 1975. This legislation established an administrative body - the Waitangi Tribunal - to investigate and hear Māori claims relating to the loss of land and resources.

At present, there are numerous claims under the Treaty of Waitangi Act by various Māori tribes throughout New Zealand. These claims, however, do not relate to privately owned land except in certain limited situations where the land was previously held by certain types of Crown entities. This is because only Crown land (including certain land previously held by certain Crown entities), resources and assets are subject to possible restoration to Māori. Accordingly, overseas investors should be aware of possible Māori land claims when purchasing land or assets that are or have been owned by the Crown or Crown trading entities.

A Māori land claim under the Treaty will generally be indicated by a memorial noted on the appropriate computer interest.

## **PURCHASING LAND**

### **AGREEMENTS FOR SALE AND PURCHASE OF LAND**

An agreement for sale and purchase of land in New Zealand, and agreements for certain other dispositions of land, must be in writing and signed by the parties to the transaction or their lawful representatives. Generally, the vendor's real estate agent or solicitor prepares the agreement for sale and purchase. It is usual for the purchaser to pay a deposit to the vendor's agent which is released to the vendor when the agreement becomes unconditional.

An agreement for sale and purchase may be subject to certain conditions or may be unconditional. Conditions can be included for the benefit of either party. The party having the benefit of a condition must use its best endeavours to satisfy that condition unless the agreement states otherwise. If conditions cannot be satisfied within the stipulated time, either party may then avoid the agreement for sale and purchase, usually by giving written notice to the other party. If the contract is avoided, the purchaser is generally entitled to the return of any deposit or monies paid.

A prudent purchaser will either make a full investigation of the land before entering into an agreement (employing professional advisers where appropriate) or, more commonly, make the agreement subject to conditions which allow that investigation to occur subsequently. Common conditions relate to title investigation, building inspection, resource management issues, arranging finance and (in respect of leased commercial or industrial buildings) investigation of leases.

### **OVERSEAS INVESTMENT IN NEW ZEALAND LAND**

As mentioned on page 9 the Overseas Investment Act sets out a consent procedure for overseas persons investing in sensitive New Zealand assets, including "sensitive land".

Land is "sensitive land" if it is:

- Non-urban land (being farm land or any urban land not being used for commercial, industrial or residential purposes) greater than 5 hectares
- Land on any of a number of selected islands around New Zealand
- Foreshore or seabed
- Land greater than 0.4 hectares that is:
  - part of a lake bed
  - held for conservation purposes
  - used as a reserve.
  - historic land
  - subject to a heritage order

Sensitive land also includes land that adjoins selected land and exceeds stated size limits.

The Overseas Investment Act specifies a number of criteria to be used by the Overseas Investment Office in assessing whether consent should be granted to overseas investments in sensitive land. Those criteria are that:

- The overseas person, or in the case of a company, each of the overseas persons with control of the company:
  - has business experience and acumen relevant to the investment
  - is of good character
  - is not a person prohibited by section 15 or section 16 of the Immigration Act 2009 (which lists certain persons that are not eligible for visas or entry permission under that Act)
- The relevant overseas person has demonstrated financial commitment to the investment
- If the relevant land is or includes farm land, the farm land (or the securities to which the overseas investment relates) have been offered for acquisition on the open market to persons who are not overseas persons (unless there is an exemption that applies), and
- Either:
  - the overseas person is a New Zealand resident or intends to reside in New Zealand indefinitely, or
  - in the opinion of the relevant ministers, the investment will, or is likely to, benefit New Zealand (and if the relevant land includes non-urban land exceeding 5 hectares, the benefit to New Zealand must be “substantial and identifiable”).

#### *Criteria for determining whether an investment will benefit New Zealand*

The criteria that must be used to determine whether an investment will benefit New Zealand (as set out in section 17 of the Overseas Investment Act) are whether:

- The investment would create new jobs, allow for the retention of jobs that might otherwise be lost, introduce new technologies or new business skills, increase exports for New Zealand exporters, enhance market competition, efficiency or productivity, introduce additional investment for development purposes into New Zealand, or increase processing in New Zealand of New Zealand’s primary products
- The investment includes adequate mechanisms for the protection of flora, fauna, and the environment generally
- The investment includes adequate mechanisms for the protection of historic heritage and historic places
- The investment provides for adequate walking access over the land for members of the public
- Any foreshore, seabed riverbed or lakebed included in the proposed investment has been offered to the Crown in accordance with regulations.

Other factors to be taken into account (as set out in regulation 28 of the Overseas Investment Regulations 2005) are:

- Whether the investment will result in consequential benefits to New Zealand (such as additional investment)
- Whether the relevant overseas person is a key person in a key industry of a country with which New Zealand will, or is likely to, benefit from having improved relations
- Whether refusing the application for consent will, or is likely to adversely affect New Zealand's image overseas or its trade or international relations, or result in New Zealand breaching any of its international obligations
- Whether the investment will result in the owner of the land undertaking other significant investment in New Zealand

- Whether the relevant overseas person has previously undertaken investments that have been, or are, of benefit to New Zealand
- Whether the overseas investment will, or is likely to, give effect to or advance a significant Government policy or strategy
- Whether the overseas investment will, or is likely to, enhance the ongoing viability of other overseas investments undertaken by the relevant overseas person
- Whether the investment will, or is likely to, assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land
- Whether New Zealand's economic interests will be adequately promoted by the overseas investment
- The extent to which New Zealanders are likely to be able to oversee or participate in the overseas investment.

### **COMMERCIAL AND INDUSTRIAL BUILDING LEASES**

Every lease in New Zealand is negotiated between the landlord and tenant because there is no single standard form of commercial lease. There are, however, a number of widely used forms of commercial leases, such as the Property Council of New Zealand (PCNZ) standard office lease for large commercial buildings with numerous tenants, the PCNZ standard retail lease for retail developments, and the somewhat simpler Auckland District Law Society standard deed of lease.

Most leases provide that the tenant is responsible for paying various outgoings (sometimes called “operating expenses” or “property expenses”) in addition to the rent. Common outgoings payable by the tenant include local authority rates, insurance premiums and internal maintenance costs. Some leases, particularly of premises in multi-tenanted buildings or shopping malls, impose on the tenant a share of all the expenses of ownership, operation and management of the property.

Most commercial leases are for a period of years, often including rights of renewal. Most leases also provide a rent review clause which allows the landlord to review the rent at specified intervals. These leases often include a ratchet clause which allows rent to increase, but not decrease (either at all, or to below the level of rent that was payable at the commencement date of the lease), on a review.

Leases may permit a tenant to transfer his or her interest in the lease by way of assignment or sublease. It is common that the landlord’s consent will be required before such a transfer may take place, although generally the landlord’s consent may not be unreasonably withheld. When a tenant transfers its interest in the lease to another party, generally both the original tenant, its guarantors (if any) and the new tenant remain liable under the lease until its expiry.

### **BUILDING ACT 2004**

Building in New Zealand is regulated by the Building Act 2004. This Act establishes a building code that every building and all building works in New Zealand must comply with. The Building Act grants territorial authorities, such as local district and city councils, the power to approve or decline building consents and apply any conditions that the authority feels necessary to ensure that any building is safe, sanitary, has adequate fire escape egress and is constructed in a way to promote sustainable development.

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## Environmental and planning law

### RESOURCE MANAGEMENT ACT 1991

The principal environmental and planning legislation in New Zealand is the Resource Management Act 1991. The purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources.

The Resource Management Act covers all use and development of natural and physical resources including land, water, the coast and air resources. The Resource Management Act focuses on managing the adverse effects of activities on the environment. Every person has a general duty to avoid, remedy or mitigate any adverse effect on the environment arising from any activity. Controls on development are set out in publicly notified statutory planning documents, administered by local authorities called regional councils or territorial authorities (city and district councils). A range of activities may require resource consents in the form of land use and subdivision consents, and coastal, water and discharge permits under the Resource Management Act.

The Resource Management Act has a range of penalty and enforcement provisions. There are specific provisions under which directors and senior managers of a company may be found personally responsible for the acts or omissions of the company.

### RESOURCE CONSENTS

All activities must be authorised either by the relevant district / regional plan or by a resource consent granted by the relevant consent authority. Resource consents include land use consents, subdivision consents, water permits, coastal permits and discharge permits. Existing use rights are given some legal protection to continue where new rules requiring that consent be obtained are introduced.

District and regional plans classify activities into a range of activity types and this classification determines when resource consents are required. Activities range from permitted activities, which can be carried on without consent, to controlled, discretionary and non-complying activities, for which consents must be obtained. Some activities may be prohibited altogether.

District plans control the use of land. Most district plans zone land for different uses and establish rules for different activities. Regional plans control the use of water and discharges of contaminants into the environment.

The Resource Management Act sets out detailed provisions regarding the resource consent application process. An application must include comprehensive information assessing the environmental effects of the proposal.

Depending on the type of activity, the application may proceed without public notification, on a publicly notified basis, or with limited notification to affected parties only. If an application is publicly notified, any person may make a submission against or in support of the application and has a right of appeal to the Environment Court.

## STATUTORY PLANNING PROCESS

District and regional councils regularly notify proposed new provisions of their statutory planning documents. It is beneficial for entities to be aware of proposed new plan provisions that may affect their activities and to participate in the public submission process at council level and in the Environment Court. Private parties may also seek private plan changes to rezone land to allow specific activities.

## ENVIRONMENT COURT

The Resource Management Act establishes a specialist Court, the Environment Court, to hear appeals on resource consent applications and proposed plan changes. The Court also has jurisdiction on enforcement matters and to issue declarations. Appeals to the High Court, the Court of Appeal and Supreme Court may only be taken on points of law.

## MĀORI ISSUES

The Resource Management Act makes special mention of Māori issues. There are general instructions to regional and district councils to recognise and provide for as a matter of national importance “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites] and other taonga [treasures]” and to take into account the principles of the Treaty of Waitangi.

### Enforcement

Enforcement action under the Resource Management Act is a readily accessible means for regional and district councils to ensure that resource users comply with the terms of their resource consents, or to stop operations that are in breach of a consent, a district or regional plan, or the Resource Management Act. Some of the enforcement provisions can also be utilised by the general public.

Enforcement procedures can be used to require a resource user to remedy any adverse environmental effects of a one-off accident at the user’s cost. The current land owner or occupier may be liable to remedy such adverse effects even if the environmental problem was caused by a previous owner or occupier of the land.

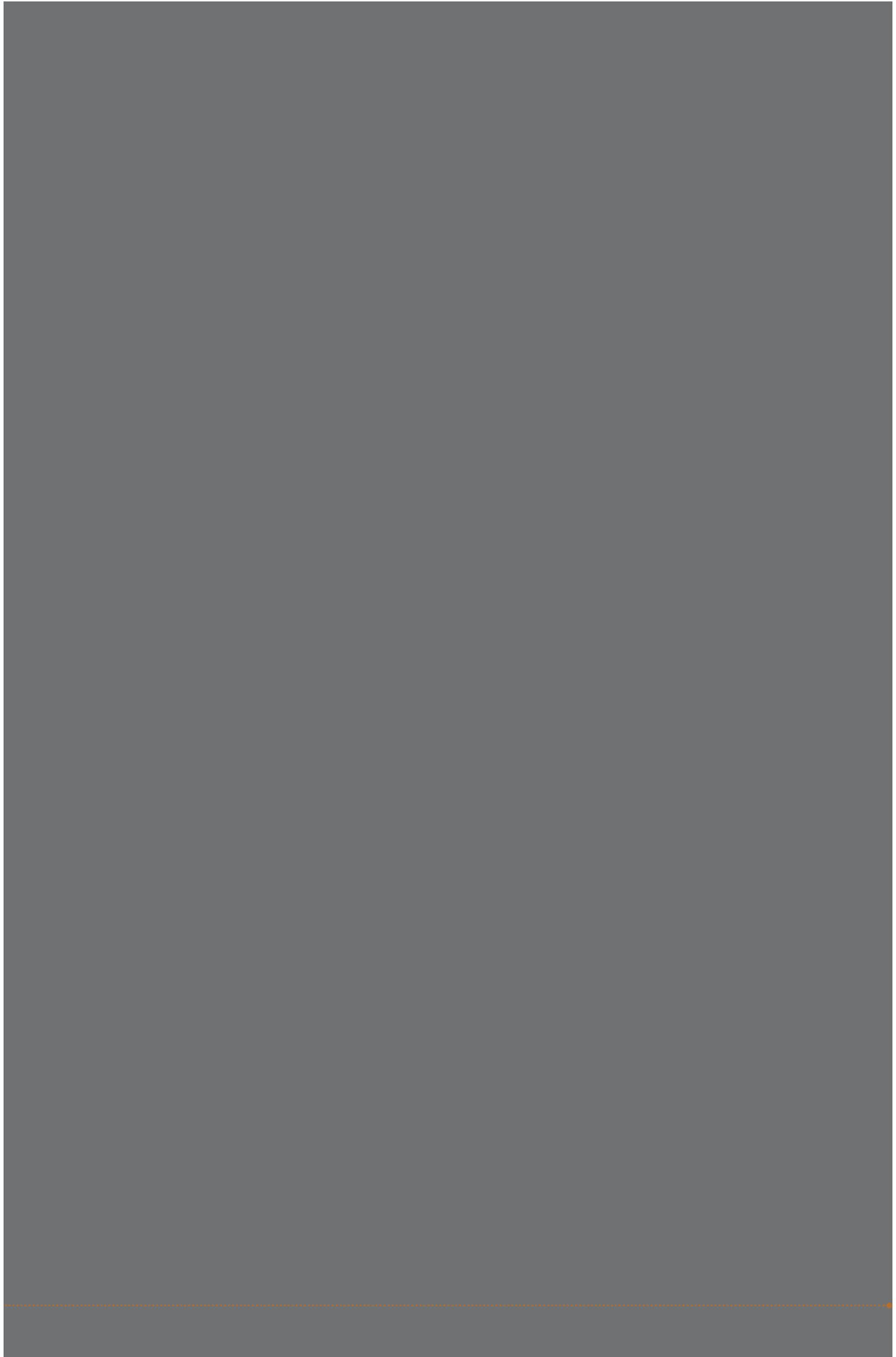
The Resource Management Act also contains a separate regime of strict liability criminal offences. Individuals and companies can be prosecuted for the offences. Conviction can result in fines up to a maximum of NZ\$600,000 and imprisonment.

Directors and senior managers of corporate entities who know or should know that the actions in question are taking place may be held personally liable for those actions of the corporate entity which are in breach of the Resource Management Act. Such directors and managers do not need to know that the actions are contrary to the Resource Management Act to be liable.

## **FINANCIAL/DEVELOPMENT CONTRIBUTIONS**

New land developments that create demand for infrastructure, including wastewater, storm water and reserves, will generally be required to contribute to the public cost of providing those infrastructure services by making financial or development contributions to the relevant council. Financial contributions are imposed as conditions of resource consents. Some councils use development contributions instead of financial contributions. Development contributions are charged in accordance with policies made under the Local Government Act 2002.

The Resource Management Act also allows for recovery of administrative costs by regional and district councils. The general rule is that the resource developer is responsible for these costs so long as they are reasonable.



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# INTELLECTUAL PROPERTY

## TRADE MARKS

Trade marks can be registered pursuant to the Trade Marks Act 2002. Registration provides the owner with the exclusive statutory right to use that trade mark in New Zealand in relation to the goods or services for which it is registered. The initial registration period is 10 years and a registration can be renewed for subsequent 10 year periods upon payment of renewal fees.

Use is not a pre-requisite for filing a trade mark application. However, registered trade marks can be revoked if they are not used for a continuous period of 3 years.

To be registrable, a trade mark must be distinctive. Examples of marks that typically may not be registered include descriptive words, surnames and names with geographical significance. Trade marks that contain Māori text or imagery may not be registered if they are considered offensive to Māori.

Trade mark registration is administered by the Intellectual Property Office of New Zealand (IPONZ). Trade marks can be registered in as little as 6 to 7 months from the filing date.

New Zealand is a member of the Paris Convention and therefore trade marks can be filed in New Zealand 6 months after they were first filed in another Convention country, and claim the original overseas filing date. New Zealand is not at present a member of the Madrid Protocol but is expected to be sometime in 2011.

## DOMAIN NAMES

Businesses can reserve and use New Zealand domain names e.g. “.co.nz” and “.net.nz”. There is no requirement that the registrant have a business presence in New Zealand. There are also no restrictions on the number of domain names that one registrant may reserve.

A Dispute Resolution Service (DRS) operated by the Office of the Domain Names Commissioner provides an administrative forum for the resolution of disputes concerning domain names. The DRS is based on the UK Nominet system.

## BUSINESS NAMES

There is no official business name register in New Zealand.

## COMPANY NAMES

Company names can be reserved for incorporation under the Companies Act, but a name cannot be reserved or used for incorporation under the Companies Act if it is nearly identical to an existing company name. Registration of a company with a particular name gives no practical protection in the name itself. Trade mark registration is the best way to protect a company name in New Zealand.

## PASSING OFF/FAIR TRADING ACT 1986

Unregistered trade marks are protected under the provisions of the Fair Trading Act. If use of a trade mark is misleading or confusing, or likely to mislead or confuse, the Fair Trading Act can be used against the party causing the confusion or deception. Actual confusion is not a requirement under the Act.

Unregistered trade marks are protected under the tort of passing off if it can be shown that business goodwill has been damaged or is likely to be damaged by another party as a result of a misrepresentation in trade that is likely to deceive or cause confusion.

## **COPYRIGHT**

The Copyright Act 1994 protects original "works" (artistic, literary (including software), dramatic and musical works, sound recordings, communication works (such as webcasts, television and radio broadcasts) and films. Protection under the Copyright Act gives the owner the exclusive rights in the work including the right to copy the work, issue copies of the work to the public, play and perform works, communicate the work (using a communication technology) and make an adaptation of the work.

In New Zealand, copyright comes into existence upon creation of a work (there is no requirement to register). Some works need to be recorded in a material form for copyright to exist in them.

The term of copyright is generally the life of the author plus 50 years (for literary, dramatic, musical, artistic works). However, industrially applied artistic works are only protected for 16 years from the year of first industrial application. The Copyright Act also recognises and protects moral rights including the right to be identified as an author. Moral rights cannot be assigned.

The Copyright Act provides that an employer owns all works created by an employee in the normal course of their employment. Similarly, the Act provides that the commissioner of certain original works is presumed to own the copyright in the commissioned work. Both these provisions can be overridden by contract.

## **PATENTS**

The Patents Act 1953 provides for the grant of patents for "inventions", which are defined as "any manner of new manufacture and any new method of practical process". To be patented, the invention must be new (a local novelty test applies) and non-obvious. The period of protection is 20 years. Patents can be renewed by the payment of renewal fees.

New Zealand is a member of the Paris Convention and Patent Co-operation Treaty.

"Swiss type" claims (i.e. new therapeutic uses for existing pharmaceuticals) are recognised in New Zealand.

## **DESIGNS**

The Designs Act 1953 provides for the registration of designs (features of shape, configuration, pattern and ornamentation) that are new and original. Designs cannot be registered if they are solely functional.

Designs can be registered for a maximum period of 15 years (renewal fees are due after 5 and 10 years respectively).

## **CONFIDENTIAL INFORMATION**

Information is confidential if it is communicated in circumstances that impart an obligation of confidence. Obligations of confidence can arise under contract (e.g. confidentiality and non disclosure agreements) and if the circumstances of communication require confidence (e.g. fiduciary duties) confidentiality or non-disclosure agreements, fiduciary duties and by contractual provisions such as restraints of trade which limit the ability to use information.

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# REGULATION AFFECTING DAY-TO-DAY BUSINESS OPERATION

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## Consumer protection

### CONSUMER GUARANTEES ACT 1993

The Consumer Guarantees Act creates minimum standards of quality for all goods or services that are usually acquired for personal or domestic use by consumers. A breach of any of the guarantees (set out below) will usually entitle a consumer to a remedy prescribed by the Consumer Guarantees Act. Depending on the circumstances, the consumer may be able to seek a remedy against the supplier or the manufacturer. The provisions in the Consumer Guarantees Act are designed to be self-policing in the sense that consumers enforce their own rights under the Consumer Guarantees Act.

#### COVERAGE

A consumer is a person who "acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption" and excludes anyone who acquires the goods or services for the purpose of resupplying them in trade or for consuming them in the course of a process of production or manufacture. Auctions and tenders are not covered by the Consumer Guarantees Act.

#### GENERAL RULE - NO CONTRACTING OUT

The general rule is that contracting out of the Consumer Guarantees Act is not permitted. Breach of this rule is an offence under the Fair Trading Act and can attract liability for penalties of up to NZ\$200,000 for a company and NZ\$60,000 for an individual. The exception to this rule is the ability of a supplier to contract out of the Consumer Guarantees Act where the person acquiring goods or services (ordinarily covered by the Consumer Guarantees Act) does so for "the purposes of a business".

#### GUARANTEES FOR THE SUPPLY OF GOODS

The Consumer Guarantees Act sets out the following guarantees in relation to the supply of goods:

- The supplier has the right to sell the goods, which are free from undisclosed securities
- The consumer has the right to undisturbed possession
- The goods are of an acceptable quality (except where the defect has been drawn to the consumer's attention)
- The goods are fit for the purpose for which they were acquired
- The goods comply with their description and sample
- Where the price is not determined, the consumer is not liable to pay more than a reasonable price
- Repairs and spare parts are reasonably available, subject to certain exceptions.

Depending on the circumstances, a consumer's remedies may include repair (where a defect can be remedied), replacement, refund, compensation for reduction in value, or damages for reasonably foreseeable loss or damage.

## **MANUFACTURERS' GUARANTEES**

The Consumer Guarantees Act also sets out manufacturers' guarantees, which include guarantees of acceptable quality, compliance with descriptions, availability of spare parts for a reasonable period, and that any express guarantees given are binding. A consumer's remedy against a manufacturer is damages (consisting of reduction in value or reasonably foreseeable loss). A consumer is only entitled to have goods repaired or replaced if the manufacturer has expressly warranted to do so.

## **GUARANTEES FOR THE SUPPLY OF SERVICES**

The Consumer Guarantees Act sets out the following guarantees in relation to the supply of services:

- The services are carried out with reasonable care and skill
- The services are fit for the purpose made known to the supplier by the consumer
- The services will be completed within a reasonable time
- The consumer is not liable to pay more than a reasonable price for the service.

Depending on the circumstances, consumers' remedies may include remedy of the failure, cancellation of the contract, compensation for reduction in value or damages for reasonably foreseeable loss or damage.

## **FAIR TRADING ACT 1986**

The aim of the Fair Trading Act is to promote "fair" competition for the benefit of both consumers and businesses. To achieve this purpose, the Act prohibits businesses engaging in misleading and deceptive conduct and certain unfair practices, and provides for the disclosure of consumer information and the setting of product safety standards.

## **MISLEADING AND DECEPTIVE CONDUCT**

The Fair Trading Act contains a general provision prohibiting businesses from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. In addition, certain specific types of conduct are prohibited, including misleading and deceptive conduct relating to the supply of goods and services and employment. It is also an offence under the Act to make false or misleading representations relating to matters such as the quality, price, performance characteristics or place of origin of goods, and to having the requisite skills, qualifications or approvals to perform a service.

## **UNFAIR PRACTICES**

It is an offence under the Fair Trading Act to engage in certain practices, including bait advertising (e.g. not having enough promotional stock), pyramid selling schemes, not honouring gift or prize promotions, and importing goods bearing false trade marks.

## **CONSUMER INFORMATION**

Regulations may be made under the Fair Trading Act to require business to disclose certain information about goods and services. Current regulations require disclosure of the country of origin of clothing and footwear, the fibre content of clothing, and care instructions for clothing.

## **PRODUCT AND SERVICES SAFETY**

Regulations can be made under the Fair Trading Act to prevent injury arising from the supply of goods and services. The Minister can declare goods unsafe and compulsorily recall products subject to safety regulations, such as children's toys and nightwear, baby cots and walkers, cigarette lighters and bicycles.

## **PENALTIES**

The Fair Trading Act is policed by the Commerce Commission which can bring proceedings against infringers. Individuals may also bring private civil proceedings for injunctions and damages under many sections of the Fair Trading Act. If civil claims are upheld, the Courts can impose fines of up to NZ\$200,000 on companies and up to NZ\$60,000 on individuals. Courts may grant other remedies, such as injunctions, damages and corrective advertising orders.

## **CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003**

The Credit Contracts and Consumer Finance Act 2003 (CCCFA) applies to all “credit contracts” made on or after 1 April 2005 and replaces previous credit contract and hire purchase legislation.

A credit contract is any contract under which credit is or may be provided. Credit is defined under the CCCFA and means a right granted by a person to another person to:

- Defer payment of a debt
- Incur a debt and defer its payment
- Purchase property or services and defer payment for that purchase (in whole or in part).

The CCCFA is primarily consumer protection legislation. The core provisions of the CCCFA do not - with the exception of the provisions relating to oppression - apply to business transactions. The core provisions apply only to those credit contracts that are “consumer credit contracts” - credit contracts entered into by individuals for “personal, domestic or household purposes”.

The CCCFA contains a presumption that a credit contract entered into by an individual is a consumer credit contract. However, under the CCCFA a creditor may rely on a declaration from the debtor, obtained in accordance with the CCCFA, that the contract is for business or investment purposes, unless the creditor has reason to believe otherwise.

The CCCFA imposes a number of restrictions and obligations on creditors under consumer credit contracts. These include restrictions on the level of establishment, default and early termination fees that can be charged by a creditor. A creditor also has initial, guarantor, variation, request and continuing disclosure obligations. A creditor’s initial disclosure obligations include a requirement to disclose to the debtor in a “disclosure statement” certain “key information” relating to the contract within the time period set out in the CCCFA.

Failure to comply with the provisions in the CCCFA attracts severe penalties. The CCCFA gives a Court the power to “re-open” and amend the terms of a credit contract, or any security interest taken in connection with a credit contract, if the contract or security interest contains a term that is “oppressive” or if any party to the credit contract or security interest exercises or intends to exercise a right under the contract in an “oppressive” manner.

Sanctions available to the Court also include the imposition of fines and/or awarding statutory damages in respect of a contract or an entire class of contract. The Commerce Commission is vested with investigative powers and has a role in enforcing the CCCFA.

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## Business operation

### **SALE OF GOODS ACT 1908**

The Sale of Goods Act applies to sales of commercial goods that are not covered by the Consumer Guarantees Act. Such goods include goods purchased for resupply or resale, or for use in manufacturing processes, and personal or household goods for use in business (where the seller has contracted out of the Consumer Guarantees Act).

The Sale of Goods Act imposes various warranties into the sales of commercial goods, including warranties of merchantable quality, fitness for purpose, and compliance with sample and description.

The remedies available to the buyer include refunds and compensation. Sellers can however exclude or vary these implied warranties by express agreement.

### **EMPLOYMENT LAW**

Employment relationships in New Zealand are governed primarily by the Employment Relations Act 2000. The Employment Relations Act enshrines the principle of good faith and promotes bargaining. The parties to an employment relationship must deal with each other in good faith and not do anything, either directly or indirectly to mislead or deceive each other. The Employment Relations Act also promotes the right of employees to bargain collectively.

### **EMPLOYMENT AGREEMENTS**

In New Zealand the relationship between employer and employee is documented by an employment agreement. Employment agreements may be individual (personal to the individual employee and employer) or collective (covering a group of employees and entered into between one or more unions and employers).

It is compulsory to have either an individual or collective agreement and both must be in writing.

### **UNIONS**

Union membership is not compulsory in New Zealand. However, unions have specific rights of access to workplaces under the Employment Relations Act. Employers must recognise the union that represents their employees. About 18% of employees in New Zealand are members of a union.

### **DISPUTES**

Employees have the right to take a personal grievance against their employer for unjustified dismissal or, if they have not been dismissed but suffered some other detriment, for unjustified disadvantage. The Employment Relations Act encourages mediation as the first step in attempting resolution of employment disputes.

By pursuing a personal grievance, an employee can seek various remedies such as an award for compensation for lost wages together with an award for humiliation, loss of dignity and injury to feelings.

Under a recent amendment to the Employment Relations Act, employers with fewer than 20 employees can specify in the employment agreement a “trial period” of up to 90 days. If an employee is dismissed during this trial period, he or she cannot bring a personal grievance or other legal proceedings in respect of the dismissal. However, employees on trial periods are still protected against discrimination, sexual and racial harassment, duress, or unjustified action by an employer.

### **DISCRIMINATION**

The Employment Relations Act (together with the Human Rights Act 1993) prohibits discrimination against employees on the grounds of sex, marital status, religious belief, colour, race, ethnic origins, disability, age, family status, sexual orientation, and participation or involvement in the activities of a union as a union official or as a member. Employees who believe they have been discriminated against may take a personal grievance to the Employment Relations Authority or make a complaint to the Human Rights Commission.

### **REDUNDANCY**

There is no statutory right to any redundancy payment under New Zealand laws. Entitlement to any redundancy payment depends on the relevant employment agreement. Agreements can specifically exclude any right to redundancy pay. In certain circumstances where a business has been sold or transferred, the Employment Relations Authority can fix appropriate redundancy payments for the employees affected.

### **TRANSFERS OF UNDERTAKINGS**

There is limited protection in New Zealand for the rights of employees if the business they work for is sold or transferred. Employees in several specified sectors, such as cleaners and food caterers have the statutory right for their employment to be automatically transferred on the same terms and conditions to the new owner of the business. Other employees have no such right, although their employment agreement must contain a clause setting out what steps the employer will take to protect the employees' rights in such a situation.

### **WAGES**

In April 2010, the minimum wage for employees aged 16 years and over rose to NZ\$12.50 an hour before tax, except for new entrants and employees subject to the minimum training wage. That equates to NZ\$102 for an 8 hour day, or NZ\$510 for a 40 hour week.

In April 2010, the new entrants minimum wage and the training minimum wage rose to NZ\$10.20 an hour. That equates to NZ\$81.60 for an 8 hour day, and NZ\$408 for a 40 hour week.

There is no statutory minimum wage for employees who are under 16 years old.

In most industries, employers pay wages and salaries at levels above the minimum wage level.

### **HOLIDAYS**

There are 11 statutory public holidays in New Zealand. Under the Holidays Act 2003 all employees are entitled to a minimum of 4 weeks annual holidays.

Under the Holidays Act, employees are also entitled to at least 5 days paid sick leave per annum, and paid bereavement leave on the death of close family members. Employees are entitled to accumulate sick leave up to a maximum of 20 days, although the parties can extend this by agreement.

Maternity leave of up to 14 weeks is available for employees with 6 months continuous service. Extended parental leave, up to a total period of 52 weeks, can be shared between both parents if they have 12 months service with their respective employers. Employers are not required to pay employees for parental leave, but government-funded paid parental leave is available to the primary caregiver, up to a maximum of NZ\$429.74 per week (before tax) for up to 14 weeks.

## **HEALTH AND SAFETY**

The Health and Safety in Employment Act 1992 provides that employers must take all practicable steps to ensure the safety of employees while at work. Employers must identify hazards, provide employees with information regarding emergency procedures and risk management, and keep a register of all accidents in the work place. Employers must also take steps to ensure the safety of people who are not employees but who are visiting the work place. Work-related stress is included as a “harm” under the Health and Safety in Employment Act. The Department of Labour administers the Act and can prosecute employers for breach of the Health and Safety in Employment Act.

## **ACCIDENT COMPENSATION**

New Zealand's law relating to personal injury is unique. Legal claims relating to personal injury are prohibited (other than for exemplary damages). Instead, a statutory scheme provides no-fault personal injury cover for all New Zealand citizens, residents and temporary visitors to New Zealand - whether injury occurs in the workplace or elsewhere.

The scheme is governed by the Injury Prevention, Rehabilitation, and Compensation Act 2001 and has various funding sources, including levies on employers and employees.

Compensation available under the scheme includes coverage of treatment and rehabilitation costs, payments for loss of earnings, independence allowances, funeral expenses and death benefits for dependants.

Legal claims for personal injury are generally prohibited in New Zealand under the Injury Prevention, Rehabilitation Compensation Act. This Act replaces such claims with a no-fault statutory scheme which provides cover for individuals suffering personal injury.

The Act covers the majority of personal physical injuries, whether resulting from negligence or accident, and whether occurring in the workplace or elsewhere. Employers are required to contribute to the scheme by payment of levies. The amount of these levies is determined by the employer's prior accident “rating”.

## **SUPERANNUATION AND PENSIONS**

### **GOVERNMENT SUPERANNUATION**

Financial superannuation assistance is available in New Zealand for people who meet certain criteria. To receive superannuation, a person must:

- Be 65 years of age or over
- Be a New Zealand citizen or permanent resident
- Have lived in New Zealand for a certain amount of time
- Normally live in New Zealand when the application is made.

## **PRIVATE SUPERANNUATION**

There are many voluntary retirement savings schemes operating in New Zealand that are designed to assist people to put money aside for their retirement and to supplement the superannuation assistance provided by the government. Private schemes must be set up under a trust deed and should be registered with the Government Actuary. A voluntary retirement savings scheme, KiwiSaver, came into force on 1 July 2007. Employees are automatically enrolled in KiwiSaver when they start a new job and can decide to opt-out between days 14 and 56 after starting work. Employees can also elect to join KiwiSaver at any time. Employers are required to make KiwiSaver deductions from employees' wages and forward them to the Inland Revenue Department in much the same way as PAYE. Employees can choose to make the minimum contribution of 2%, or contribute at 4% or 8% if they wish. Following amendments to the KiwiSaver legislation in December 2008, compulsory employer contributions may now be included as part of an employee's "total remuneration package" under their employment agreement.

## **PENSIONS**

Pensions are available to:

- Ex-military service people who are 65 years or over and have a disability attributable to their service
- Ex-military service people who are under 65 years old and are unable to work due to a disability attributable to their service
- The surviving spouse of ex-military people who have died as a result of a severe disability or medical condition caused during their service.

## **PRIVACY ACT 1993**

The Privacy Act 1993 was introduced to promote and protect individual privacy.

The Privacy Act establishes 12 Information Privacy Principles (IPPs). The IPPs relate to the collection, use and disclosure of personal information by public and private sector agencies, and to each individual's right to access such information.

## **ENFORCEMENT**

Only one of the IPPs can be enforced in Court - the right of an individual to access information held about them. Breach of any other IPP does not automatically create an infringement of the Privacy Act. The breach must reach the higher level of "an interference with the privacy of an individual" before a right of complaint and remedy is available.

The Privacy Act provides detailed procedures to be followed if a person alleges interference with his or her privacy, including investigation and mediation by the Privacy Commissioner (a position established under the Privacy Act). Ultimately, the Privacy Commissioner can refer an unresolved matter to a Proceedings Commissioner who can bring an action before the Complaints Review Tribunal. The Complaints Review Tribunal may grant a variety of remedies including a declaration, an order requiring certain action, damages, and costs against a party.

## **APPLICATION TO BUSINESS PRACTICES**

The design and use of forms which gather personal information needs to be reviewed to ensure that forms reasonably inform individuals about the fact and purpose of collection, the recipient of the information, rights of access to and correction of the information, and a range of other details. A number of the IPPs also directly impact on use of information about an individual for credit risk assessments and human resources purposes.

## **IMPORTING, EXPORTING, TARIFFS AND DUTIES**

Importing and exporting activity is governed by the Customs and Excise Duties Act 1996 and administered by the New Zealand Customs Service. New Zealand Customs operates a modern importing and export system to facilitate international trade. This system, in conjunction with the New Zealand government's preference for low tariff and duties, provides an environment which is conducive to trade, making New Zealand an attractive place to undertake business.

The Customs Service must clear all imported and exported goods. To obtain clearance, importers and exporters must make a declaration which includes providing a description of the nature, quantity, origin and, in the case of exports, the destination of their goods. Almost all imported goods are subject to a 12.5% Goods and Services Tax, and some imports are also subject to tariffs. Given the importance of border security (particularly regarding biosecurity), the legislative requirements and procedure are strictly enforced with penalties imposed for non-compliance.

### **GENERAL PROCEDURE FOR IMPORTING AND EXPORTING**

People wanting to undertake importing or exporting activities in New Zealand must use one of 2 electronic systems the Customs On-line Declaration Service or the Electronic Data Interchange software (EDI), which must be installed by the importer or exporter on its computer system. EDI has lower transaction costs for obtaining Customs clearances than the on-line service so is suitable for high frequency importers and exporters.

The Customs On-Line Declaration Service is suited to one-off or low volume users. The Customs On line Declarations website is designed for regular importers and exporters who have sufficient knowledge of Customs requirements to clear their own exports with Customs. Alternatively, a freight forwarder or Customs broker can be engaged to undertake the transaction.

Both importers and exporters are responsible for making accurate customs entries, paying all Customs charges, and retaining all relevant documentation for 7 years. Documentation must be presented to Customs on demand.

### **PENALTIES**

Customs enforces a wide range of prohibitions and restrictions on imports and exports at the border.

Export and import entries providing details of shipments to be exported or imported are a legal declaration to Customs under the Customs and Excise Duties Act. A penalty can be imposed for filing entry documentation that contains an error or omission that renders the documentation materially incorrect or results in any amount of payable duty not being declared or paid. Regardless of whether a Customs broker or agent is used, the importer or exporter remains liable for any penalties or prosecution action taken under the Customs and Excise Duties Act for providing an erroneous entry or declaration to Customs.

### **DUTIES AND TARIFFS**

In recent times, the New Zealand government has pursued a liberal trade policy and only imposes duties on selected goods entering New Zealand to protect the most vulnerable New Zealand industries. Approximately 95% of imports (by value) enter New Zealand free of duty either because the goods are of a type not made in New Zealand (e.g. watches), or because they come from a preferential source such as Australia. Approximately 56% of import categories carry no duty.

The majority of goods subject to import duty have a rate imposed at around 5% to 7% of the goods' value. The manufacturing industry, particularly the textile, clothing and footwear industry, are subject to more protectionist measures. Goods competing with New Zealand's textile, clothing and footwear industry attract the highest tariffs, of up to 19% or more.

New Zealand Customs applies duties to imported goods based on the following criteria:

- **Tariff classification** The New Zealand Customs Service Working Tariff document is a commodity coding system used to identify and describe goods based on the World Customs Organisation International Convention guidelines
- **Concession applicability** Goods are generally grouped together and fixed with a duty under the tariff classification system. However, there are special concessions for some goods
- **Preference** New Zealand extends preferential tariff access to goods which are the "produce" or "manufacture" of specified countries and country groups.

An importer who is uncertain as to the origin of their goods can obtain information from Customs. An importer can also obtain a pre-importation ruling to determine the tariff classification or even seek a concession or preference where it is unsure of the nature of its goods.

Ad-valorem tariff rates have been gradually reducing from 1 July 2006. The highest tariff rates of that generally apply to clothing, footwear and carpet were reduced to a maximum of 12.5% on 1 July 2008, and further reduced to 10% on 1 July 2009. Tariff rates on all other goods reduced to 5% on 1 July 2008, and will be maintained at that rate until 1 July 2013.

The New Zealand Customs Service also imposes anti-dumping and countervailing duties at the time imported goods are entered and cleared for Customs' purposes. These duties are designed to correct the price of goods imported into New Zealand that are under-priced in their country of origin.

### **GOODS AND SERVICES TAX (GST)**

Generally, goods imported into New Zealand, are liable for GST of 15%. There are very few exceptions. Customs collects the GST on imports as if it were Customs duty. GST is payable on the sum of the following amounts:

- The Customs value of the goods
- Any import duty, anti-dumping and countervailing duties, and industry specific levies
- The freight and insurance costs incurred in transporting the goods to New Zealand.

The importer is responsible for the payment of GST on imported goods. Under New Zealand law, an importer is the person by or for whom the goods are imported.

Special rules apply to the temporary importation of goods (i.e. if goods are brought into New Zealand for less than 12 months).

A reverse charge mechanism applies to imports of services in certain situations. Where the reverse charge applies, the importer will be liable to pay the GST.

Most exports are zero-rated for GST purposes, subject to satisfying certain criteria.

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## Taxation

New Zealand has 2 principal taxes - income tax and GST.

### INCOME TAX

New Zealand imposes income tax on the basis of both residence and source. Broadly, residents of New Zealand for tax purposes are liable to tax in New Zealand on their worldwide income, with a credit available in most circumstances in respect of foreign taxes paid. Non-residents of New Zealand are subject to New Zealand income tax only on income with a New Zealand source, subject to possible complete or partial relief under an applicable tax treaty.

With the exception of employee income, income tax in New Zealand is generally imposed on a net taxable income basis (also sometimes called a gross/global approach). That is, tax is imposed on all income (from any source) less exempt income and less allowable deductions. Some income is specifically excluded from income tax and some entities are entirely or partly exempt from income tax, such as charities.

### GST

GST is a broad-based consumption tax, similar to a value added tax, levied at 15% on the supply of most goods and services in New Zealand. Any person who within a 12 month period makes total supplies in New Zealand in excess of NZ\$60,000 in the course of all "taxable activities" is liable to be registered for GST. Some supplies are taxed at the rate of zero per cent ("zero-rated"), including exported goods, goods situated overseas, taxable activities disposed of as going concerns, and certain exported services. A person registered for GST who makes supplies (including zero-rated supplies) can generally claim an input tax credit for GST paid by that person on supplies received. Other specified supplies are exempt from GST. The main exempt supplies are domestic financial services, leases of residential accommodation, salary and wages, and the supply of fine metal.

Normally GST will have no impact on business profits, except for administration and compliance costs, and cash flow effects. There are instances where the tax will be imposed on the business taxpayer as a final customer.

### CAPITAL GAINS TAX

New Zealand does not have a separate capital gains tax regime. However, in some circumstances, income tax may be imposed on profits made on the sale or other disposition of assets, including real and personal property (for instance, where such assets are acquired for the purposes of resale). In addition, certain foreign portfolio equity holdings are subject to tax on a deemed return of 5% of the value of those holdings at the start of the relevant income year. All other returns from such holdings are exempt.

### GIFT DUTY

Dispositions of property which are made for inadequate consideration or for no consideration may be liable for gift duty. Gift duty is only payable in relation to New Zealand property, or where the donor is domiciled in New Zealand, or is a body corporate incorporated in New Zealand. There is a proposal to repeal gift duty.

## OTHER TAXES

There is currently no inheritance tax, stamp duty (apart from cheque duty), land tax or estate duty in New Zealand. There is however excise duty on alcoholic drinks, tobacco and certain fuels as well as accident compensation levies. Import tariffs are imposed on certain goods, subject to relevant free trade agreements. There are also other central government and local government (territorial authority) charges, such as vehicle registration fees and rates in relation to land.

## Income tax rates

The main income tax rates (excluding ACC levy) are currently:

Individuals	10.5%	income to NZ\$14,000
	17.5%	NZ\$14,001 - NZ\$48,000
	30%	NZ\$48,001 - NZ\$70,000
	33%	NZ\$70,001 and over
Trusts	33%	(certain trusts are subject to 45% tax)
Companies	30%	whether resident or non-resident, to reduce to 28% from the 2011/2012 income year

## CORPORATE INCOME TAXES

### RESIDENCE

A company is subject to income tax on all worldwide income derived while a resident of New Zealand. A company is deemed to be resident in New Zealand if it is incorporated in New Zealand or its head office, centre of management or director control is in New Zealand. A tax credit is allowed in respect of foreign tax paid on foreign-sourced income, not exceeding the proportionate New Zealand tax on the foreign-sourced income, where such foreign tax is similar in nature to New Zealand income tax. A non-resident company is generally subject to income tax only on income with a source in New Zealand.

### DIVIDENDS PAID/RECEIVED

Dividends paid by a company are not deductible to it, but are generally taxable to the company's shareholder(s). Dividends may not be taxable to a shareholder when that shareholder is also a company and is a member of the same wholly owned group of companies as the payer.

New Zealand has a full imputation system, which is similar to the franking system operated in other jurisdictions. Resident companies may attach imputation credits to dividends paid to shareholders. The credits represent income tax which has been paid by the company on its profits. The credits can be used by New Zealand tax-resident shareholders to offset any tax payable in respect of their taxable income. Imputation credits generally cannot be utilised by non-residents (other than indirectly through the application of a foreign investor tax credit regime).

## LOSSES

Generally, losses incurred by resident and non-resident taxpayers may be carried forward indefinitely and offset against future taxable income from a New Zealand source. Corporate losses can be carried forward indefinitely and offset against future profits provided that a certain level of shareholder continuity, broadly at least 49%, is maintained. There is generally no 'same business' test in relation to loss carry-forward. Company losses may also, subject to certain requirements (including a requirement that the companies have at least 66% commonality of ultimate shareholding), be utilised by offsetting those losses against the income of other group companies.

## SPECIAL TAX SITUATIONS

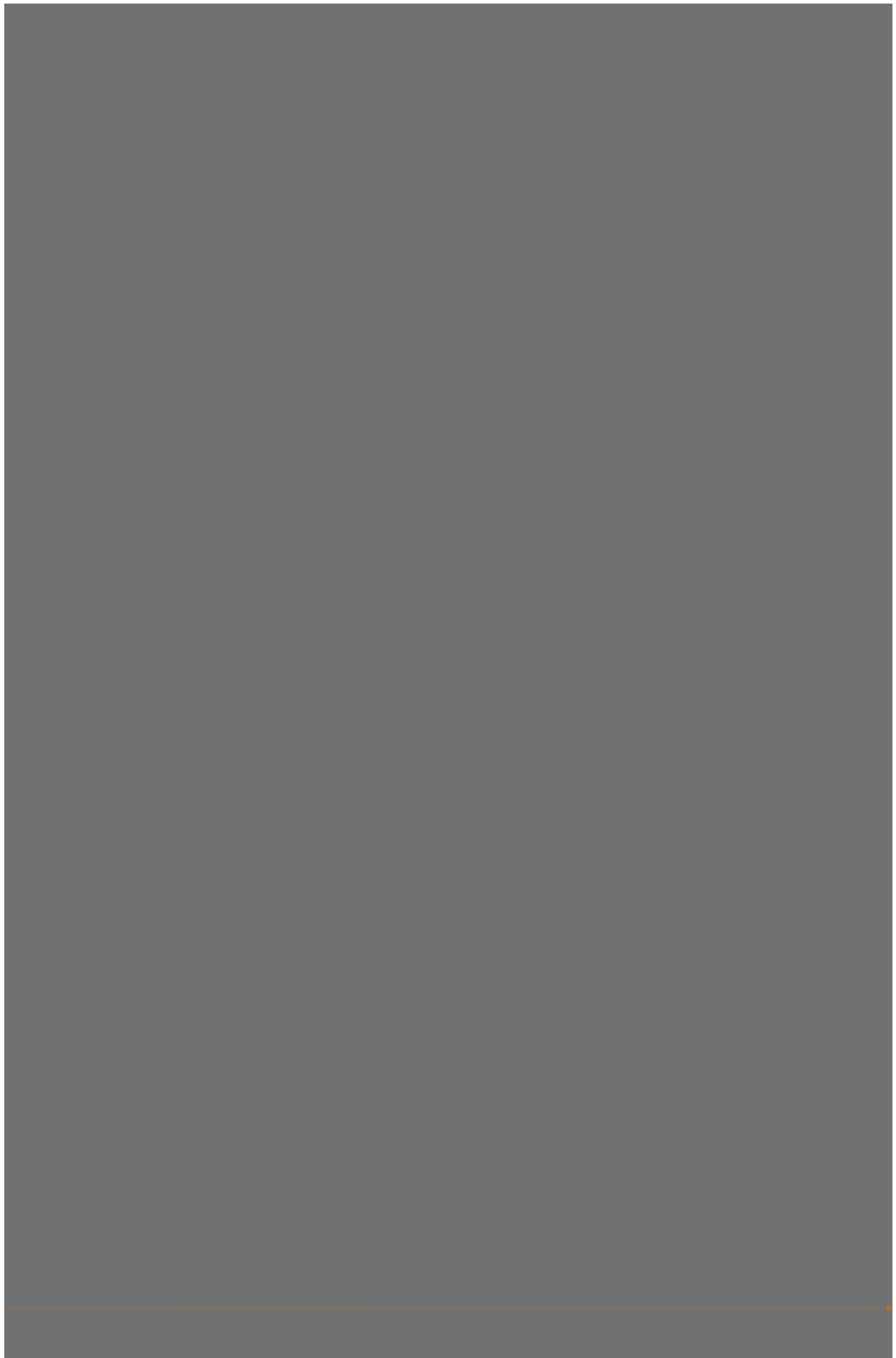
In New Zealand there are various regimes governing specialist entity types and taxation situations. These include detailed rules governing:

- Trusts
- Unit trusts
- Partnerships and joint ventures
- Portfolio Investment Entities
- International tax regimes in relation to:
  - transfer pricing
  - thin capitalisation
  - foreign investor tax credits
  - controlled foreign companies and foreign investment funds
- Withholding taxes, including:
  - resident withholding tax
  - non-resident withholding tax and approved issuer levy
  - deductions from salary and wages
  - non-resident contractors' withholding tax.

For assistance with New Zealand tax advice, contact:

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