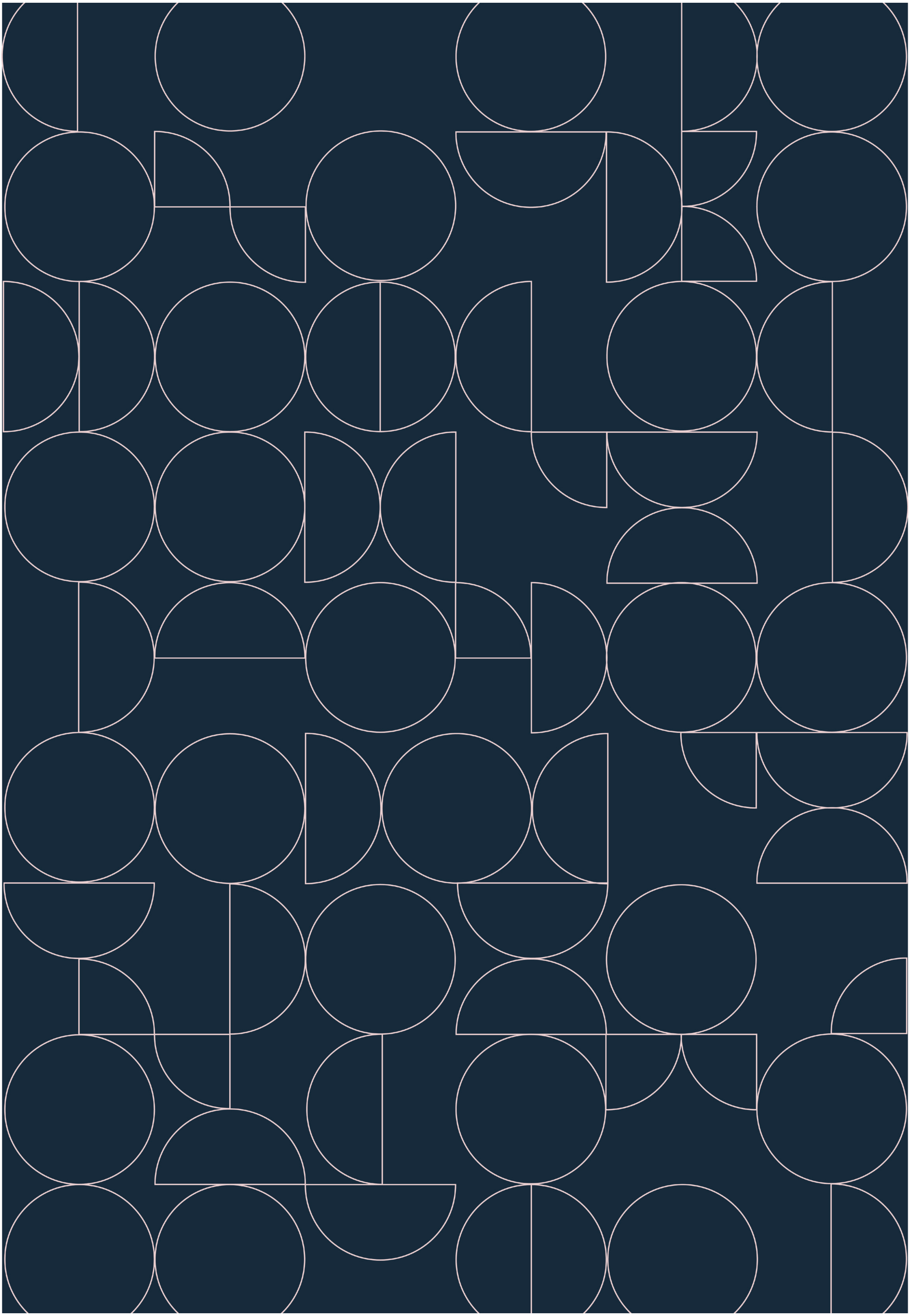
Doing Business in New Zealand.

© Buddle Findlay 2022. All rights reserved.

buddlefindlay.com

BUDDLE FINDLAY



Contents

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.

01
About Buddle Findlay

About Buddle Findlay

Who we are

Buddle Findlay is one of New Zealand’s leading commercial and public law firms with offices in Auckland, Wellington and Christchurch. Our firm has a total of 233 lawyers, including 47 partners and, with business operations staff, a total workforce of 334 people. Our origins date back over 127 years, to the earliest days of legal practice in New Zealand.

Our key point of difference as a firm is our reputation as New Zealand's collaborative law firm. Our central value proposition is 'exceptional outcomes through collaboration'.

Buddle Findlay is progressive, well respected and at the forefront of the legal profession. We have an open and approachable client-focused culture, with a determination to continually provide the highest quality of service. Buddle Findlay’s experienced partnership brings an energy and enthusiasm to New Zealand’s legal market. Our practical approach makes us a valued strategic adviser to our clients with an ability to provide balanced advice within a broader commercial context.

About us

Buddle Findlay maintains extremely close relationships with a number of overseas law firms. The majority of our partners and senior associates have spent time working in major firms in a number of jurisdictions, including the United Kingdom, the United States, Australia, Hong Kong and Singapore. As a result of this experience, and our ongoing work with major foreign firms in cross-border deals, we have established a reliable network of strong international affiliations.

The breadth of our relationships mean that we can recommend appropriate advisers in terms of both expertise and cost, as we are not bound to any single firm or formal alliance.

Buddle Findlay is increasingly working with clients based in Asia, and in recent times Chinese investors in particular, interested in pursuing opportunities in New Zealand. This includes private investors to high-profile institutional investors.

We are aware of clients’ preferences and requirements and have the ability to work in Mandarin, Cantonese and Korean.

Our services

Buddle Findlay provides the full range of services to the corporate and public sector, including:

- Corporate and commercial
- Banking and financial services
- Public and administrative law
- Competition law and industry regulation
- Health law
- Property and construction
- Employment
- Tax
- Infrastructure
- Litigation and dispute resolution
- Insolvency and restructuring
- Environment and resource management
- Intellectual property
- Māori law
- Technology, media and telecommunications.

02
About New Zealand

About New Zealand

Political system

New Zealand is an independent realm 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).

New Zealand has a mixed member proportional (MMP) electoral system. 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 120 members of whom 64 represent the general geographic electorates, seven represent Māori geographic electorates and 49 are political party list members. The total number of members each party has in the House of Representatives is determined by the proportion of the party vote it receives. If a party has fewer electorate members in the House of Representatives than required by its party vote, list members are added to make up the difference. General elections are held every three years and the next one is scheduled to take place in the last quarter of 2023.

Historically, the two significant political parties have been Labour (centre left) and National (centre right). Under MMP, however, smaller political parties play an influential role in government. The current government is drawn exclusively from the Labour Party, which gained an absolute majority in Parliament in the 2019 election. The Prime Minister is Hon. Jacinda Ardern.

Police, education, health, 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.

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 the District Courts and the High Courts to the Court of Appeal and the Supreme Court. Prior to the establishment of the Supreme Court in January 2004, New Zealand's highest appellate court was the Privy Council in London, England. There are also specialist bodies empowered by statute, such as the Employment Relations Authority, the Human Rights Review Tribunal, the Environment Court and the 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.

Economy

The economy is based on a private enterprise system.

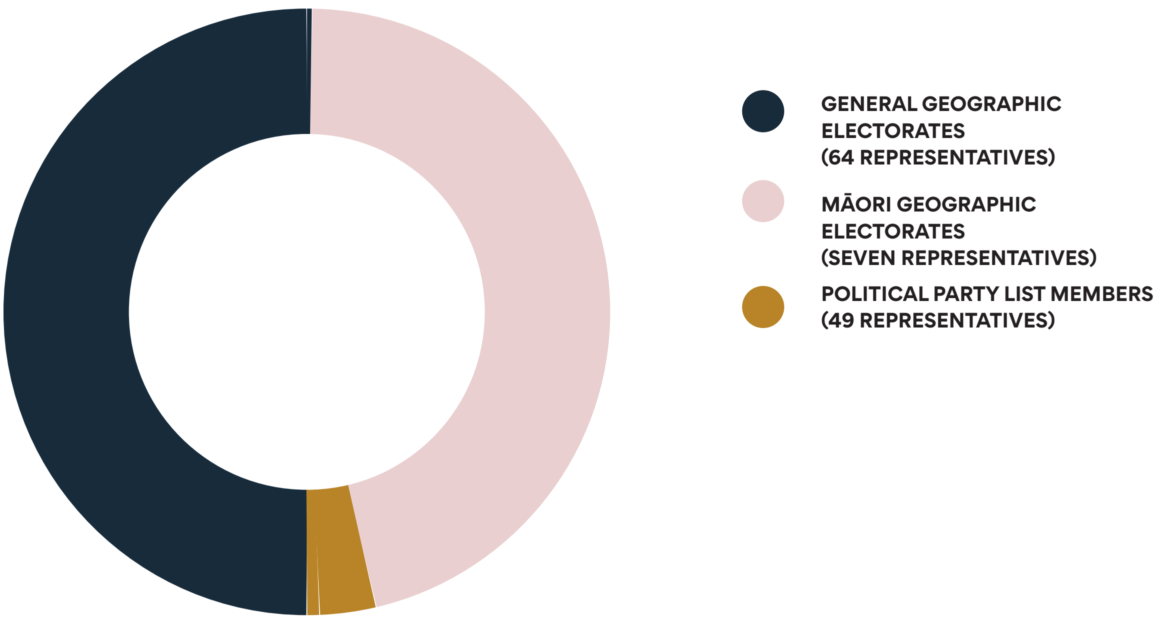
The Government generally confines its commercial activities to those that are seen to have a 'public good' element. In the early 1990s, the government privatised its interests in a variety of industries - more recent asset sales include the sale of interests in energy and airport assets.

Extensive deregulation over the last three 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. Agricultural commodities still account for around half of New Zealand's total exports. Other major exports include tourism, forestry products, manufactured goods, fish and horticultural products, and engineering products.

"New Zealand has an independent and democratically elected Parliament consisting of one house, the House of Representatives."

NEW ZEALAND PARLIAMENT - HOUSE OF REPRESENTATIVES



03
Coming to New Zealand

Immigration

Please note: Border controls and restrictions for international travel have been put in place due to Covid-19. Please visit covid19.govt.nz for up-to-date information.

If you are not a New Zealand or Australian national, you will need a visa to live and work in New Zealand.

A very brief outline of certain immigration procedures and policies relevant to those intending to invest and/or establish a business in New Zealand, and to live and work in New Zealand for that purpose is set out below. The Immigration New Zealand website, immigration.govt.nz, includes introductory information on government immigration instructions, as well as downloadable forms and guides.

As at 22 April 2021, entry to New Zealand from all countries except Australia remains strictly controlled to help prevent the spread of Covid-19. Immigration New Zealand has postponed certain visa programmes, including the Skilled Migrant Category Resident Visa. In addition, temporary visa applications from outside New Zealand or a quarantine-free travel zone are currently suspended, with a small number of exemptions. The list of exemptions is available on the Immigration NZ website.

Investing in or establishing a business in New Zealand

Work or residence visas are available for people who wish to invest in a New Zealand business and live and work here (investors), or people who intend to purchase or establish a new business in New Zealand (entrepreneurs).

Investors

Individuals intending to make certain types of large investments in New Zealand may apply for a residence visa via two categories, each of which has health and good character requirements. A brief description of each investor category is set out below.

INVESTOR 1 CATEGORY	Available for people who have at least NZ$10m to invest in acceptable New Zealand investments for a minimum of three years. Applicants are required to reside in New Zealand for at least 44 days during each of the last two years of the three-year investment period. If at least NZ$2.5m of the investment funds are invested in growth investments, Investor 1 migrants are able to spend their required time in New Zealand more flexibly (ie a minimum of 88 days at any time over the three year period).
INVESTOR 2 CATEGORY	Available for experienced business people with a minimum of NZ$3m to invest in acceptable New Zealand investments over a four year period. This category uses a points-based system to assess eligibility, and requires that the applicant has at least three years of recognised business experience, is under 65 years old, and meets English language requirements. Applicants must spend a minimum of 146 days per year in New Zealand. If at least NZ$750,000 of the funds are invested in certain growth-oriented investments, there is greater flexibility in the time required to be spent in New Zealand (ie a minimum of 438 days at any time over the four year investment period).

Entrepreneurs

People intending to purchase or establish a business in New Zealand can apply for an Entrepreneur Work Visa, which enables entrepreneurs to work in their own business in New Zealand for up to three years. Applicants must make a minimum capital investment of NZ$100,000, provide a detailed business plan, have business experience relevant to their proposal and start their business within 12 months.

"If you are not a New Zealand or Australian national, you will need a work or residence visa to live and work in New Zealand."

Additionally, applicants need to score at least 120 points on the Entrepreneur Work Visa points scale, and meet health, good character, and English language requirements. Immigration New Zealand may consider waiving the NZ$100,000 capital investment requirement for businesses in science or ICT sectors that show a high level of innovation export potential.

The Entrepreneur Work Visa is granted for an initial 12 month period. Once the applicant's business is established, the applicant can apply for a further work visa for another 24 months.

Entrepreneurs who have established and operated high growth and innovation businesses with export potential in New Zealand can apply under the Entrepreneur Residence category to be granted residence. An Entrepreneur Resident Visa allows persons to continue operating their business in New Zealand and stay here indefinitely. There are two ways of qualifying for residence under this category:

TWO YEAR OPTION	Under this option, the applicant must prove that he or she has operated a successful business for at least two years which has benefited New Zealand significantly and met other requirements. Applicants do not have to be on an Entrepreneur Work Visa to be granted residence under this option.
SIX MONTH OPTION (FAST-TRACK)	Under this option, applicants who are currently on an Entrepreneur Work Visa can fast track residency by proving that for six months they have been running a high value business in which they have invested capital of at least NZ$500,000 and created at least three full-time ongoing and sustainable permanent employment positions for New Zealand citizens or residents. Residency can be revoked if the applicant does not maintain these requirements.

Global impact

Entrepreneurs and investors who have been accepted into the Edmund Hillary Fellowship can apply for a Global Impact Work Visa. This visa allows applicants to live, work and study in New Zealand for up to three years. It also provides a pathway to permanent residency after 30 months, provided that the applicant remains on the Edmund Hillary Fellowship for two and a half years and maintains the support of the Fellowship.

Applicants must meet health, good character, and fit and proper person requirements. A high standard of English is required, and applicants must have NZ$36,000 to support themselves in New Zealand.

General work and residence visas

A number of work and residence visa options are available to overseas persons and their employers. A few of the main general categories are outlined below. Due to Covid-19, selection of Expressions of Interest for the Skilled Migrant Category Resident Visa is currently postponed, and temporary visa applications from outside New Zealand or a quarantine-free travel zone are suspended, with limited exemptions.

Skilled migrants

The Skilled Migrant Category Residency Visa 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. Immigration New Zealand requires people to first submit an Expression of Interest (EOI), which is assessed based on points. As of February 2020, Immigration New Zealand was only selecting EOIs with 160 points or above. If the EOI is selected, Immigration New Zealand will invite the person to apply for the Skilled Migrant Category Residency Visa.

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, recognised qualifications and age. The Skilled Migrant Category Resident Visa is not available to persons over 55 years old and is not designed for people who are self-employed. Applicants must meet English language, health, and good character requirements.

Work to residence

The following Work to Residence visa options provide a work visa for up to two and a half years, and can lead to a residence class visa. These visas also have health and good character requirements.

TALENT (ACCREDITED EMPLOYERS) WORK	Accredited employers may supplement their New Zealand workforce in their core area of business activity. To be eligible, 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 two years. The position offered must have a minimum base salary of NZ$79,560 per annum and be work that is the employer's main reason for being in business where the employer will have direct responsibility for the employee's work output.
TALENT (ARTS, CULTURE AND SPORTS) WORK	An applicant who has an exceptional talent in a declared field of art, culture or sport. Applicants must be internationally recognised, prominent in their field, and prove that their presence will enhance New Zealand's achievements or participation in that field. Additionally, applicants must possess the support of a New Zealand organisation that is recognised for its excellence in the applicant's field of talent and have an acceptable sponsor to provide accommodation and financial support. Applicants must also be aged 55 years or younger.
LONG TERM SKILL SHORTAGE LIST	The applicant must have a current offer of employment for a full-time position on the Long Term Skill Shortage List that meets the specifications for the position. Applicants must be suitably qualified for the position, have the necessary work experience, and possess the relevant occupational registration. The Long Term Skill Shortage List identifies areas with a sustained shortage of skilled workers and is reviewed annually. A current copy of the Long Term Skill Shortage List is maintained on the Immigration New Zealand website.

After holding one of these work visas for at least two years (and subject to meeting various other requirements listed in the Residence from Work Category section of the Operational Manual's Residence Instructions), the holder may apply for a residence class visa, which allows the holder to live and work in New Zealand indefinitely.

Essential Skills Work

The Essential Skills Work Instructions allow New Zealand employers to recruit workers from overseas on a temporary basis to meet worker shortages where workers cannot be recruited in New Zealand. A work visa under this category may be for a maximum duration of three to five years (depending on skill level of the particular job offered) and is not a pathway to residence.

Prior to 2020, Immigration New Zealand used a combination of a job's Australian and New Zealand Standard Classification of Occupations (ANZSCO) skill level and the salary to assess whether a person was low, mid or high skilled. In 2020, Immigration New Zealand replaced this with a median-wage threshold as an indicator of skill. Applicants are assessed as either at or above the median wage, or below the median wage. The applicant must be suitably qualified for the occupation with qualifications and experience relevant to the proposed role in New Zealand. If registration is required for the position, the applicant must obtain occupational registration.

Specific purpose or event

Applicants may be granted a work visa for a specific purpose or event 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. To apply, an applicant must be coming to New Zealand for a specific purpose or event, have related skills, and be able to define the amount of time needed to complete the specific purpose or event. Qualifications and evidence must be provided if they are necessary to undertake the specific purpose or event. Health and character requirements also need to be met.

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

- A senior or specialist business person who has a job offer for a short term secondment either in a substantial New Zealand company or a New Zealand subsidiary of an overseas company
- A business person being transferred to New Zealand as an intra-corporate transferee to take up a position as an executive, senior manager or specialist personnel
- Principal applicants for residence under the Investor 1 or 2 Resident Visas or the Parent Retirement Resident Visa (if their application has been approved in principle) who are investigating direct investment opportunities in New Zealand.

Employees of relocating businesses

Key employees of a business that is relocating to New Zealand (and who are not eligible under any other residence visa) may apply for an Employees of Relocating Business Resident Visa to live here and work for the relocated business. There are a number of requirements both for the business that is relocating and for any employee. In particular, Immigration New Zealand must be satisfied that the applicant has an integral role in the business and that New Zealand Trade and Enterprise supports the relocation of the business.

Upcoming visa changes

The Government has announced changes to temporary work visas, taking effect from mid-2021:

- A new temporary work visa: the new visa replaces six existing work visas, including the Essential Skills Work Visa and the Long Term Skill Shortage List Work Visa
- A new visa application process: the new application system will be employer-led. Before hiring a migrant on the new employer-assisted temporary work visa, employers will need to undertake three steps. They are required to apply for accreditation as an employer, apply for a job check to make sure the role they want to fill cannot be done by New Zealanders, and request the migrant worker to apply for a visa.

Citizenship

To qualify for citizenship by grant under the Citizenship Act 1977, an applicant must (among other things):

- Be entitled in terms of the Immigration Act 2009 to be in New Zealand indefinitely (eg have a resident visa without conditions)
- Have been present in New Zealand with New Zealand residence for at least 1,350 days during the five years immediately preceding the application
- For at least 240 days in each of these five years
- Be of good character
- Have sufficient knowledge of the English language and the responsibilities and privileges attaching to New Zealand citizenship
- Intend, if granted citizenship, to live in New Zealand indefinitely.

Immigration advice

Pursuant to the Immigration Advisers Licensing Act 2007, the only people legally able to give immigration advice in New Zealand are licensed immigration advisers and certain exempt people (which include New Zealand lawyers with a current practicing certificate). Immigration New Zealand will not accept applications made through unlicensed advisers (unless they are exempt).

04
Establishing a business

Alternative structures

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 businesses 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. However, there is an increasing trend for the use of limited partnerships (discussed further below) since the introduction of the Limited Partnerships Act 2008, particularly for investment funds and joint ventures.

An overseas company may conduct business in New Zealand by:

- Incorporating a subsidiary in New Zealand
- Registering as an 'overseas company' (ie 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 in New Zealand is a relatively simple matter. The desired company name must be reserved (and approved by the Registrar of Companies) and certain administrative documentation must be registered. A New Zealand subsidiary is required to have a registered office in New Zealand. A New Zealand subsidiary is also required to either have a director that lives in New Zealand or have a director that lives in an enforcement country (currently only Australia) and is a director of a company registered in that enforcement country.

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).

Large companies, in which at least 25% of the shareholder voting power is held by a subsidiary of a company incorporated outside of New Zealand, a company incorporated outside of New Zealand or a person not ordinarily resident in New Zealand, may be required to file financial statements with the Registrar of Companies. These would relate only to their operations and the operations of any subsidiaries if the company's parent company does not already file audited group financial statements.

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.

Each year certain overseas companies (eg most large overseas companies) must prepare annual reports containing their financial statements and make those annual reports available to their shareholders.

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 1986. This legislation is discussed in more detail on pages 21-26 and 43.

Partnerships

New Zealand law recognises partnerships, which are defined in the Partnership Law Act 2019 as the relationship 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 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 publicly 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.

The limited partnership regime has become a popular business vehicle with local and overseas investors alike, particularly for investment funds and certain types of joint ventures. 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 two or more parties who contribute resources to a particular business. A joint venture may be carried out via:

- A 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 joint venture agreement.

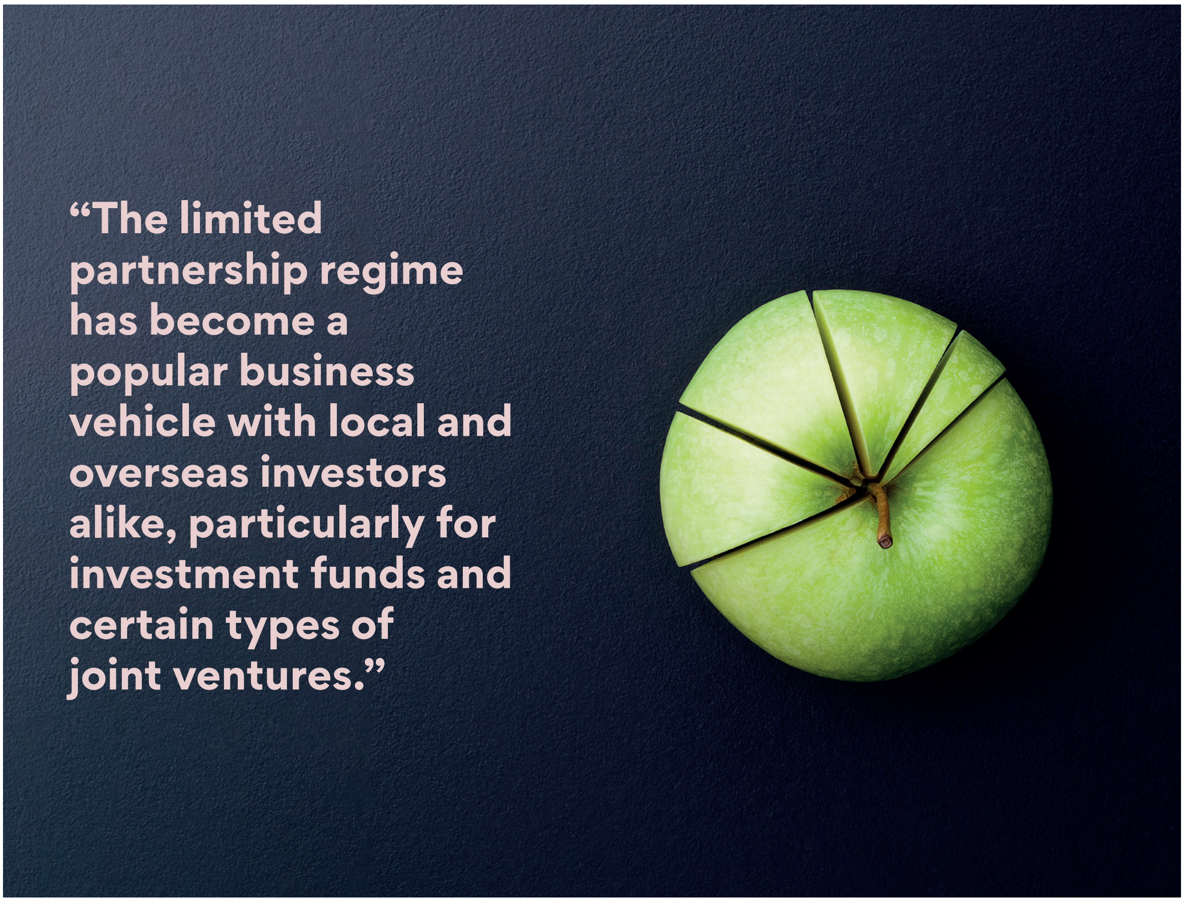
Alternative forms of entity

Alternative business structures may be appropriate if you wish to establish a non-profit entity (eg a charitable trust or incorporated society) or your members wish to work together cooperatively and/or trade with the entity (eg a cooperative company or industrial and provident society).

If you wish to establish a financial services business, a building society, managed investment scheme or some other structure may be appropriate.

Foreign investment controls

The Overseas Investment Act 2005 sets out a consent procedure for overseas persons and their associates investing in significant business assets in New Zealand. For more information about New Zealand's foreign investment control regime, please refer to page 43.



05 Corporate regulation

Securities regulation

The Financial Markets Conduct Act 2013 (FMC Act) is the primary piece of New Zealand legislation regulating the issuance, promotion and sale of financial products (ie equity securities, debt securities etc) in New Zealand.

When disclosure is required

As a general rule, disclosure is required in circumstances where an issuer is proposing to make a 'regulated offer' of financial products. However, the FMC Act provides a range of exclusions enabling issuers to raise capital without requiring regulatory disclosure. The key types of offers of financial products which are excluded from the disclosure requirements under the FMC Act include:

- Offers to 'wholesale' investors (eg investment businesses such as brokerage firms; persons who have owned or carried out transactions to acquire financial products with a value of at least NZ$1m, or had net assets or total turnover with a value of at least NZ$5m, in the previous two years; government agencies; individuals who are able to provide certifications demonstrating adequate investment experience; or persons investing at least NZ$750,000 in the relevant financial product)
- Offers to relatives or close business associates of the issuer
- Offers to fewer than 20 investors that raise no more than NZ$2m in total, in any 12 month period (the 'small offer exclusion')
- Offers of the same class of financial products as are already listed on NZX or the ASX (provided the ASX-listed issuer has a secondary listing on a licensed market operated by NZX) (the 'same class exclusion')
- Offers under employee share purchase schemes.

The Financial Markets Authority (FMA) (New Zealand's financial markets regulator) also has the power to grant general exemptions from certain provisions of the FMC Act (previous exemptions have been granted in respect of overseas listed issuers, forestry schemes etc) or specific exemptions relating to particular issuers.

With the different exemptions and exclusions that apply under the legislation, many offers will be able to be structured in such a manner as to avoid the need to prepare offering documents. 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 FMC Act.

FMC Act offering documents - product disclosure statement and registry entry

The FMC Act requires the preparation of a single offering document that must be provided to investors called the Product Disclosure Statement (PDS). The PDS is intended to provide a clear, concise, and effective summary of information for investors to aid their decision-making, and is subject to strict length limits (for example, a PDS for an offer of debt securities is limited to 30 pages in length) with tightly prescribed contents. The PDS will be accompanied by a register entry.
All regulated (that is, public) offers of financial products will have a register entry on a website operated by the Registrar of Financial Service Providers, that will provide additional, more detailed information such as full financial statements and ongoing information. The particular requirements for the contents of the PDS and the register entry are set out in the Financial Markets Conduct Regulations 2014.

New Zealand's capital market

New Zealand has one national stock exchange operated by NZX. NZX is termed a 'licensed market operator' under the FMC Act. It is licensed to operate New Zealand's equity markets, the NZX Main Board.

An unregistered stock exchange also operates in New Zealand ('Unlisted', unlisted.co.nz). Unlisted is targeted towards small to mid-sized, growth companies. In December 2015, the FMA granted an exemption to Unlisted from the licensing requirements of the FMC Act. Accordingly, investors trading in securities listed on Unlisted do not have the same protections afforded to investors trading in securities listed on NZX.

Listing rules

Issuers with securities listed on NZX are bound by the NZX Listing Rules (which govern the relationship between issuers and NZX) In addition to the main NZX Listing Rules issuers should be mindful of and conduct themselves in accordance with the NZX Corporate Governance Code (which is appended to the NZX Listing Rules).

The NZX Corporate Governance Code, sets out a series of specific but non-binding recommendations based around eight good corporate governance principles. Issuers with securities listed on NZX must disclose, in their annual report and/or website, the extent to which they comply with these recommendations, or alternatively explain why they do not comply.

Stock brokers

Investors can buy and sell securities on the markets 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. Brokers must be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA) as discussed further on page 28 and in order to execute trades directly on NZX need to be accredited as NZX participants.

More information about the New Zealand capital market is available at nzx.com.

"New Zealand has one national stock exchange operated by NZX. NZX is termed a 'licensed market operator' under the FMC Act."

Takeovers Code

The New Zealand Takeovers Code applies to New Zealand-registered companies that are listed on the stock exchange or that have 50 or more shareholders and 50 or more share parcels and are of a certain threshold size (which will be met if a company (in aggregate with its subsidiaries) had more than NZ$30m in total assets and/or more than NZ$15m in total revenue in its most recently completed accounting period or, if a company has not completed its first accounting period, if (in aggregate with its subsidiaries) it had more than NZ$30m in total assets on the last day of the previous month).

These companies are called 'Code companies'. In addition, if a company ceases to be a Code company as a result of certain transactions or events it may still remain, for a period, subject to the Takeovers Code in certain circumstances.

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 Takeovers Code. If any person already holds more than 20% then that holding cannot be increased except as permitted by the Takeovers Code.

The Takeovers 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 Takeovers 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 up to 5% per annum ('creep' provision)
- By making acquisitions in the 90% to 100% range by compulsory acquisition or otherwise
- 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 or, if a partial offer would result in the bidder holding or controlling a lower percentage, the offer must be approved by the disinterested shareholders. 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 10 working 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 fide 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 Takeovers Code can be found at takeovers.govt.nz.

Competition law

Commerce Act

Competition law in New Zealand is governed by the Commerce Act 1986. The aim of the Commerce Act is to promote competition in New Zealand markets for the long term benefit of consumers in New Zealand.

The Commerce Act regulates business acquisitions that impact negatively on competition and prohibits certain restrictive trade practices. The Commerce Commission is the regulatory body responsible for enforcing competition law.

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 which, as a matter of fact and commercial common sense, are 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.

The Commerce Act applies to transactions that occur in New Zealand, as well as transactions that occur outside New Zealand but have effects in New Zealand. For example, the Commerce Act will apply if the merging parties have subsidiaries in New Zealand or have controlling interests in New Zealand companies. 'Controlling interests' can arise in a number of different ways, including through control of the composition of the board, a 20% or more ownership interest, control of voting rights, and entitlements to dividends.

Clearances and authorisations

There is no compulsory notification regime in New Zealand for proposed mergers or acquisitions. However, businesses may apply for a clearance or an authorisation from the Commerce Commission if there is a risk (or a perceived risk) that a proposed merger or acquisition may breach the Commerce Act.

The Commerce 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 in the relevant market.

Alternatively, if a proposed merger or acquisition is likely to substantially lessen competition in the relevant market, the relevant business may apply for an authorisation for the merger. In order to grant an authorisation, the Commerce Commission must be satisfied that any lessening of competition is outweighed by the public benefits of the transaction.

Concentration indicators

The Commerce Commission uses market share and concentration indicators to identify those mergers that are less likely to raise competition concerns. Specifically, the two indicators that a merger is less likely to raise competition concerns are:

INDICATOR 1	Where, post-merger, the three largest entities in the market have a combined market share of less than 70%, and the merged entity's market share is less than 40%.
INDICATOR 2	Where, post-merger, the three largest entities in the market have a combined market share of 70% or more, and the merged entity's market share is less than 20%.

An acquisition that falls outside the indicators may not have the effect of substantially lessening competition in the relevant market. On the other hand, an acquisition that is within the concentration indicators may still raise competition concerns. A business can apply for clearance from the Commerce Commission if it believes that the acquisition will not result in a substantial lessening of competition. Alternatively, a business may apply for authorisation from the Commerce Commission.

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 (but there is a proposal in the Commerce Amendment Bill 2021 to increase this maximum penalty to align with the maximum penalties for restrictive trade practices outlined below).

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

Restrictive trade practices - Prohibitions of restrictive trade practices

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

- Collective practices:
  - cartel provisions are provisions in contracts, arrangements, or understandings amongst competitors that, regardless of the effect on competition, have the purpose, effect, or likely effect of price fixing, restricting output, or market allocating. The Commerce Act includes an exception from the prohibition of cartel provisions for cartel provisions that are reasonably necessary for the purpose of certain collaborative activities , as well as for certain provisions in vertical supply agreements and some joint buying/promotion agreements
  - contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition in a market
- Unilateral practices:
  - a firm fixing minimum resale prices for goods it supplies
  - a firm with a substantial degree of power in a market taking advantage of its market power for an anti-competitive purpose. An anti-competitive purpose is a purpose of 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. The Commerce Amendment Bill 2021 proposes to broaden the prohibition to capture any conduct by a person with a substantial degree of power in a market that has the purpose, effect, or likely effect of substantially lessening competition in a market.

"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."

Clearances and authorisations

As is the case with proposed mergers and acquisitions, businesses may apply for a clearance or authorisation from the Commerce Commission for particular types of restrictive trade practices if there is a risk (or a perceived risk) that a proposed restrictive trade practice may breach the Commerce Act.

The Commerce Commission may grant clearance for a cartel provision if it is satisfied that the parties to the cartel provision are involved in a collaborative activity, the cartel provision is reasonably necessary for the purpose of the collaborative activity, and the arrangement containing the cartel provision would not have the effect or likely effect of substantially lessening competition.

Alternatively, if a proposed restrictive trade practice is likely to substantially lessen competition in a market, the relevant business may apply for an authorisation for the restrictive trade practice. In order to grant an authorisation for a restrictive trade practice, the Commerce Commission must be satisfied that any lessening of competition is outweighed by the public benefits of the restrictive trade practice.

Restrictive trade practices penalties

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

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

- NZ$10m
- Three 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 breaching the Act belongs.

In April 2019, the House of Representatives passed the Commerce (Criminalisation of Cartels) Amendment Act 2019, which took effect on 8 April 2021. In addition to civil penalties, criminal sanctions now apply to certain breaches that involve entering into or giving effect to a cartel provision with the intention of engaging in price fixing, restricting output, or market allocating. The offence targets the individuals who are involved in the decision-making. Under the criminal provisions:

- Individuals are liable on conviction for imprisonment of up to seven years, a fine not exceeding NZ$500,000, or both
- Companies are liable on conviction for a fine up to the same level as the current civil penalties (the greater of NZ$10m, three times the value of the commercial gain, or 10% of the company's turnover).

06 Financial services

Financial service providers

Individuals or firms who are in the business of providing financial services to persons in New Zealand are required (subject to any applicable prescribed thresholds, exclusions or exemptions) to register under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA). Additionally, Individuals or firms may also be required to be |registered due to the fact that they are required to hold a licence under a licensing enactment (eg a requirement to hold a market services licence under the Financial Markets Conduct Act 2013 (FMCA)) or due to the fact that they are a reporting entity for the purposes of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

The register is known as the Financial Service Providers Register (FSPR) and registration is an on-line process. The FSPA has recently been amended to provide enhanced abilities for. Due to the perceived misuse of the FSPR in recent years (eg FSPR registration made by persons with no, or very little, connection with New Zealand), the New Zealand regulatory agencies now have the power to deny or cancel registration where the provider cannot meet the prescribed threshold or falls into one of the exclusions or exemptions in the FSPA.

Financial advisors and brokers

Prior to 15 March 2021, the provision of financial advice and broking services was governed by the Financial Advisers Act 2008 (FAA).

In 2019 the Financial Services Legislation Amendment Act 2019 (FSLAA) was passed, which changed the rules for the provision of financial advice to retail clients. The FSLAA also introduced a new client broking/custodial regime substantially similar to the previous regime under the FAA.

The FSLAA repealed the FAA and substantively amended the FMCA to bring over the requirements from the FAA and require a provider of 'regulated financial advice' to have a market services licence and be registered on the FSPR.

The new regime provides a shift away from the adviser types under the old regime (eg Registered Financial Adviser (RFA), Authorised Financial Adviser (AFA) and Qualified Financial Entity (QFE) adviser) and all advisers are now required to meet the same standards under a revised Code of Professional Conduct for Financial Adviser Services (New Code).

Under the new regime, all financial advice is provided either by a financial adviser or a nominated representative who must be engaged by an authorised body or financial advice provider (FAP), and operate under a FAP licence to give 'regulated financial advice' to retail clients.

The new regime sets out that a person gives 'financial advice' if that person:

- Makes a recommendation or gives an opinion about acquiring or disposing of (or not acquiring or disposing of) a 'financial advice product'
- Makes a recommendation or gives an opinion about switching funds within a managed investment scheme
- Designs an investment plan for a person
- Provides financial planning of a kind prescribed by the regulations.

The new regime sets out that a person gives 'regulated financial advice' if the financial advice it gives is in the ordinary course of a business and none of the exclusions in the FMCA apply.

The FSLAA also provides for a new broking service regime, which is called a 'client money or property service' in the amended FMCA. The service itself has the same meaning as a broking service under the FAA. The definition of client money in the FSLAA/FMCA (which is key to the application of the regime) also has the same meaning as under the FAA. The regulatory controls imposed on providers of a client money or property service to retail clients (which include disclosure, conduct and property and money handling obligations) are more onerous when compared to providers of a client money or property service to wholesale clients.

Banking in New Zealand

The banking industry in New Zealand is prudentially supervised by New Zealand's central bank, the Reserve Bank of New Zealand (Reserve Bank), whose powers are contained in the Reserve Bank of New Zealand Act 1989 (RBNZ Act). The Reserve Bank manages monetary policy with the intention of achieving and maintaining price stability and as prudential supervisor is responsible for promoting a sound and efficient financial system and avoiding significant damage that could arise from bank failure. 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 independence.

Any financial institution that wants to operate or undertake activities in New Zealand and use the word 'bank', 'banker' or 'banking' in their name or title must apply to the Reserve Bank to become a registered bank. According to the Reserve Bank website there are 26 banks currently registered in New Zealand. These include prominent Australasian banks such as ANZ Bank New Zealand, ASB, Bank of New Zealand, CBA, Kiwibank and Westpac, and some well-known international banks such as MUFG Bank (previously known as Bank of Tokyo-Mitsubishi), Citibank, HSBC, Rabobank, Industrial and Commercial Bank of China, and Bank of India.

A financial institution that wants to operate as a bank in New Zealand may choose whether it wants to set up a branch or a local subsidiary in New Zealand.

The Reserve Bank prefers that financial institutions incorporate a local subsidiary in New Zealand. However, a financial institution is only obliged to do so if it is systematically important (ie if its New Zealand liabilities, not owed to related parties, exceed NZ$15b) or if it has more than NZ$200m of retail deposits in New Zealand and it operates in a country that gives priority to local depositors (eg Australia). Setting up a branch in New Zealand, rather than a local subsidiary, will have the advantage of having fewer Reserve Bank policies apply (eg governance, connected party exposure and open bank resolution).

In some limited circumstances, foreign-owned banks may be permitted to operate as both a branch and a New Zealand-incorporated subsidiary ('dual registration'). If a bank is permitted to have dual registration, there are a number of conditions that could be imposed, including that the branch operation is restricted from taking retail deposits.

To apply to be a registered bank, the applicant's business must consist of borrowing and lending money or the provision of financial services and the applicant must provide material relevant to the following criteria:

- **Incorporation and ownership structure of the applicant,** including the name of the proposed bank, method of incorporation, ownership of the proposed bank, structure charts of the proposed bank's group and, if the proposed bank is to incorporate a local subsidiary, proposed composition of the board, the source of initial capital and the constitution of the proposed bank
- **Size of the proposed business,** including a description of the services the proposed bank intends to provide and of the market sectors it plans to target and forecasts for the first three years of operation as a registered bank
- **Ability of the applicant to carry out its business in a prudent manner,** including an outline of the prudential and AML/CFT policies to be employed by the proposed bank, the nature and extent of audit arrangements, the accounting systems and internal controls and, where relevant, the arrangements for supervision of the New Zealand operations by the parent bank or head office and a description of the proposed risk management systems and policies, details relating to any functions or business to be outsourced and the capital structure of the proposed bank
- **Standing of the applicant and its owner in the financial markets,** including an outline of the parent company's main activities and areas of expertise, a list of the major shareholders of the parent company, the financial accounts for the parent company for the last three years and an outline of the extent and type of support that the parent company will be providing to the applicant
- **Suitability of the current management of the applicant,** including the résumés of the existing or proposed directors and executives, a copy of their criminal record and written consent for the Reserve Bank to make enquiries with any relevant authority.

Applications from overseas entities may also be required to provide information on the regulatory requirements relating to banking in the home jurisdiction of the applicant and the nature and extent of financial and other information disclosed to the public by the applicant or its parent company.

The Reserve Bank primarily imposes its policies (which are set out in the Reserve Bank's Banking Supervision Handbook and can be found on the Reserve Bank's website) through the conditions of registration of each registered bank. The Reserve Bank can impose or vary conditions of registration on seven days' notice. The Reserve Bank's standard conditions of registration are set out in appendix one of BS1 in the Reserve Bank's Banking Supervision Handbook and include minimum capital adequacy and liquidity requirements, limits on related party exposure and conducting non-financial activities and requirements relating to the corporate governance of the registered bank. Banks that become systematically important (ie the bank's New Zealand liabilities exceed NZ$15b) are subject to additional requirements.

Registered banks must also publish quarterly disclosure statements and the credit rating of the registered bank.

Please note, in November 2017 the Government announced it would undertake a review of the RBNZ Act to create a modern monetary and financial policy framework. This review was split into two stages:

- Phase 1, which was completed in 2018 and resulted in the addition of 'supporting maximum sustainable employment' to the economic objectives of the Reserve Bank and the establishment of a committee decision-making model for monetary policy decisions called the 'Monetary Policy Committee' (MPC)
- Phase 2, which is underway and involves a comprehensive review of the legislative framework, to ensure that the RBNZ Act is fit for purpose, flexible, and enduring. As a result of phase 2, the Government decided that the current Reserve Bank Act will be replaced with two new pieces of legislation - a 'Reserve Bank Act', which will replace the parts of the RBNZ Act 1989 that relate to the Reserve Bank's institutional arrangements, and a 'Deposit Takers Act', which will enable the Reserve Bank to better regulate institutions that take deposits and oversee a new deposit insurance scheme.

At the time of writing (April 2021), the Reserve Bank has indicated that it expects the new Reserve Bank Act to commence in mid-2022 and the new Deposit Takers Act to be enacted in late 2022.

"Registered banks must also publish quarterly disclosure statements and the credit rating of the registered bank."

Other financial institutions

Financial institutions that are in the business of borrowing and lending money or providing financial services (or both) and offer debt securities to the public (a 'non-bank deposit taker') are also regulated by the Reserve Bank in accordance with the Non-bank Deposit Takers Act 2013. A financial institution can be declared to be a non-bank deposit taker by regulation (and therefore be subject to the non-bank deposit takers regime).

Any financial institution that wants to carry out the activities of a non-bank deposit taker (as defined above) needs to obtain a licence before providing these activities. Non-bank deposit takers can apply for a licence from the Reserve Bank by submitting a licence application form, a suitability notice for each director and senior officer and providing financial information (and in some circumstances, information about the non-bank deposit taker's controller).

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. These restrictions may be imposed as conditions on the licence granted by the Reserve Bank to the non-bank deposit taker.

The Reserve Bank largely relies on the trustee of the non-bank deposit taker (as required by the FMCA for issuers of debt securities) to monitor whether the non-bank deposit taker is complying with these prudential requirements (which will form part of the relevant trust deed). The trustee is obliged to report to the Reserve Bank if the trustee believes that there has, or may have been, or is likely to be, a material breach of these prudential requirements.

Financial institutions that take deposits from the public must also comply with the FMCA. For further discussions on the requirements of these enactments, see the section on securities regulation on page 21.

Financial institutions that provide consumer finance in New Zealand but do not offer debt securities in New Zealand (eg because they only raise funds in wholesale markets or from banks or their parent companies) are not prudentially regulated. The only registration requirement is as a Financial Service Provider (see the separate section on Financial Service Providers on page 28). The obligations of Financial Service Providers are not typically particularly onerous.

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 (with the exception of the law relating to the issue of securities, which is outlined on page 21).

The sources of funding available in New Zealand are:

- Banks
- Non-bank deposit takers
- Finance companies, including non-bank deposit takers
- Wholesale markets
- Debt capital markets.

If the entity raising finance in New Zealand has sufficient capital and, generally, a strong credit rating, funding may be raised through unsecured borrowing. Generally, however, lenders will require security over the borrower's property. Security may be taken in the form of a charge or mortgage over land or other non-personal property and/or a security interest (pursuant to the Personal Property Securities Act 1999) over all present and after-acquired personal property or specific personal property.

New Zealand lending documentation is generally consistent with international practice. 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 1993 (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 (ie solvency etc) of the company and other matters, 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.

New Zealand also has a debt capital market (with some debt securities listed on the NZX). The market is relatively small and typically only accessed by larger corporates.

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 (of secured assets). From late 2007, a 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 1993 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 less common than other forms of corporate insolvency.

Bankruptcy

Bankruptcy applications may be initiated by either a debtor or a creditor. Once adjudicated 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 distributions in priority to others). The Official Assignee is granted various powers to investigate the affairs of the bankrupt, to set aside certain transactions entered into prior to adjudication, and to recover money from a party to an irregular transaction. 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 three years, at which point the debtor has a 'fresh start', being released from most types of debt other than debts arising from fraud, court fines, court reparation orders, or child support and maintenance, which survive bankruptcy.

Liquidation

Liquidation involves the application of similar principles to bankruptcy. The process can be initiated by various parties, including the shareholders of the company and a court on the application of a creditor (a creditor may also seek court orders to appoint a receiver where a power is otherwise unavailable under a security document). Once appointed, a liquidator has custody and control of the company's assets in order to realise the assets for the benefit of unsecured creditors. Secured creditors retain rights in relation to the company's assets subject to the security. 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 insolvent transactions. Payments of distributions 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 on secured creditors below), including powers of sale and the ability to appoint receivers to the secured assets. The latter process is governed by the Receiverships Act 1993, which allows a secured creditor to appoint a receiver to realise the assets or manage the business of a company. In contrast to the official assignee or liquidators, a receiver's primary duty is to exercise his or her powers in the best interests of the appointing creditor.

Credit contracts

The Credit Contracts and Consumer Finance Act 2003 (CCCFA) applies to all 'credit contracts'.

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'.

The Credit Contracts Legislation Amendment Act 2019 (CCLAA) was enacted on 19 December 2019 and amends the CCCFA. While the CCLAA does not substantially change the way in which the CCCFA currently regulates the provision of credit, it does, however, impose a number of additional obligations on lenders providing consumer credit in New Zealand. These new obligations include prescriptive requirements to make it clearer what lenders must do in order to comply with their obligations, the introduction of new duties on directors and senior managers of creditors to exercise 'due diligence' to ensure that the creditor complies with the CCCFA and the introduction of a certification regime administered by the Commerce Commission. Whilst some amendments made to the CCCFA have already come into force at the time of writing (April 2021), the key operative provisions will come into force on 1 October 2021.

For further detail on the CCCFA, see the section on consumer protection on page 55.

Secured creditors

The Personal Property Securities Act (PPSA) establishes a code for determining the validity and priority of the claims of secured creditors and other parties with interests in personal property. The PPSA is based on similar regimes operating in North America and a similar regime came into full force in Australia in early 2012.

The PPSA represents a significant departure from the previous priority rules that were 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 taking possession of it or by registering a financing statement against the debtor on the New Zealand Personal Property Securities Register (Securities Register). Registering a financing statement is an on-line process.

The PPSA applies to transactions that create 'security interests' in personal property. A security interest is defined as an interest in personal property created or provided for by a transaction that (in substance) secures payment or performance of an obligation, irrespective of the form of the transaction or the identity of the person having title to that property. Personal property includes virtually all assets and property other than land, although there are a few other narrow exceptions. (For more information about security interests over land, see the property section on page 37.) The types of transactions governed by the PPSA therefore include, for example, fixed and floating charges, chattel mortgages, hire purchase agreements, retention of title arrangements and finance leases relating to personal property.

The PPSA also deems that security interests arise from some arrangements that may not be ordinarily thought of as creating security. These include, for example, the lease or bailment of goods for a term of more than one year and the purchase or transfer of an account receivable. The result of this is that in some circumstances it is advisable for an owner of property to register a financing statement in relation to their own property while it is in the possession of another (to ensure priority over other secured creditors of the party in possession).

As a general rule, priority between secured parties with a perfected security interest in the same collateral is determined by the order in which the secured parties took possession or registered financing statements against the collateral on the Securities Register. However, the priority rules under the PPSA are complex and there are a number of specific priority rules that modify the general rule in certain circumstances.

The PPSA 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 that 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 regulations

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML-CFT Act) places obligations on certain reporting entities, including financial institutions, casinos, trust and company service providers and financial advisers, lawyers, accountants, real estate agents, high-value dealers and the New Zealand Racing Board, to detect and deter money laundering and counter the financing of terrorist activities.

Obligations

Under the Act reporting entities that carry on business in New Zealand must:

- Perform a detailed risk assessment of the money laundering and financing of terrorism risks that they face and establish and maintain a detailed written compliance programme that includes procedures to detect, deter, manage and mitigate money laundering and financing of terrorism
- Appoint an AML-CFT compliance officer
- Carry out various levels of customer due diligence to satisfy themselves that financial transactions are legitimate
- Report suspicious activity to the Police Commissioner (in practice, to the Financial Intelligence Unit of the New Zealand Police) and retain information collected regarding the identity of the relevant customers
- Maintain detailed records of each transaction conducted through the entity to allow for transactions to be readily reconstructed
- Report prescribed transactions within 10 working days to the Police Commissioner. A prescribed transaction is one that involves cash of more than NZ$10,000 or overseas funds in excess of NZ$1000.

AML/CFT supervisors

There are three AML/CFT supervisors under the Act, namely: the Reserve Bank, the Financial Markets Authority (FMA) and the Department of Internal Affairs (DIA).

The Reserve Bank supervises reporting entities that are banks, life insurers and non-bank deposit takers while the FMA supervises issuers of securities, trustee companies, futures dealers, collective investment schemes, brokers and financial advisers. The DIA supervises casinos, non-deposit taking lenders, money changers and all other reporting entities not supervised by the Reserve Bank or the FMA.

Codes of practice

These AML/CFT supervisors may issue codes of practice from time to time. These provide a statement of practice to assist reporting entities to determine and meet their obligations under the AML-CFT Act and Regulations. Compliance with a code of practice is not mandatory, but a reporting entity will be treated as complying with certain sections of the AML-CFT Act when it complies with the relevant code of practice.

At the time of writing this document, the only code of practice in force is the Amended Identity Verification Code of Practice 2013, which provides a suggested best practice for all reporting entities conducting name and date of birth identity verification on customers (that are natural persons) that they have assessed to be low to medium risk. The explanatory note for the Code of Practice was updated in December 2017.

07
Property and land law

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 2017. 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 record of title retained in the relevant registry's electronic register. The record of title also records the area of the land. A search copy of the record of title for a parcel of land can be obtained (for a nominal fee) by various agents who will obtain the search from Land Information New Zealand (LINZ) via its LandOnline service. 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. LINZ is currently developing various improvements to Landonline to unify this information.

When a purchaser of land requests a guaranteed search of the public register, he or she will be provided with a search copy of the relevant record of title. As the Crown guarantees that all interests affecting the land appear on the record of 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 - as well as cost-effective.

Treaty of Waitangi and Māori land claims

The Treaty of Waitangi was entered into between the first inhabitants of New Zealand, 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 by the Crown.

In response to pressure to formally adopt the Treaty and for a fulfillment 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 1975 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 potential Māori land claim under the Treaty will generally be indicated by a memorial noted on the record of title.

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 record of title investigation, building inspection, resource management issues, arranging finance and (in respect of leased commercial or industrial buildings) investigation of leases.

Foreign investment controls

The Overseas Investment Act 2005 (and its subsequent amendments) sets out a consent procedure for overseas persons and their associates investing in sensitive land in New Zealand. For more information about New Zealand's foreign investment control regime, please refer to page 43.

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 (ADLS) 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. In 'gross leases' (more common in certain parts of the country, such as Wellington) the rent payable incorporates the outgoings. 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. Some commercial leases (notably later versions of the ADLS standard deed of lease) include rent abatement provisions where premises cannot be accessed as a result of an emergency (such as an earthquake, or more recently, due to government restrictions relating to the Covid-19 pandemic).

Leases may permit a tenant to transfer its 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 code and seismic issues

Building in New Zealand is regulated by the Building Act 2004. This Building 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.

In recent years, following a number of major earthquakes that have affected Canterbury (2010 and 2011) and Marlborough and Wellington (2013 and 2016), seismic issues have become particularly prominent. Buildings will be required to meet a minimum seismic standard within the next few decades (if they do not do so currently). The time periods for mandatory upgrades will depend on the location of the building and the likelihood of earthquakes in that particular location. Separately from the building code, seismic issues have become important considerations for landlords and tenants in areas with high seismic risk. Negotiations may take place over the applicability of leases if there is any damage to the premises, or if the tenant cannot access its premises on account of a government/local authority cordon (if there is no damage to the premises). Certain tenants are also requiring minimum seismic standards for the buildings, particularly blue-chip and/or anchor tenants. We also note that regulatory changes in respect of seismic standards are likely in the future, but no timing has been announced by the Government. The Ministry of Business, Innovation and Employment released its Seismic Risk Working Group initial report in respect of regulatory changes in November 2020 and has signalled it will now consult with the building industry and wider public on proposed settings for building performance requirements.

Environmental and planning law

Resource management Act 1991

The principal environmental and planning legislation in New Zealand, for the time being, is the Resource Management Act 1991 (RMA). The purpose of the RMA is to promote the sustainable management of natural and physical resources.

The RMA covers all use and development of natural and physical resources including land, water, the coast and air resources. The RMA 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 RMA.

The RMA 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.

The Government has signalled its intention to repeal the RMA and replace it with several Acts. This process is unlikely to change fundamentally many of the principles currently underpinning the legislative scheme (and the matters summarised below), but some significant changes are nonetheless likely.

Resource consents

Generally, all activities must be permitted under the relevant district/regional plan or authorised 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, restricted discretionary, 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 divide land within the district into zones with different controls on various land uses within each zone. Regional plans control the use of water and discharges of contaminants into the environment.

The RMA 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. Any person who makes a submission has a right to appeal the consent authority's decision to the Environment Court.

Special procedures exist for proposals considered to be nationally significant. The Minister for the Environment (and/or the Minister of Conservation, for proposals relating partly or wholly to the coastal marine area) may direct that such a proposal be considered in the first instance by the Environment Court or a specially appointed Board of Inquiry (with appeals to the High Court on points of law only).

Statutory planning process

District and regional councils regularly notify proposed changes to 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 RMA establishes a specialist court, the Environment Court, to hear appeals on resource consent applications and proposed plan changes. The Environment Court also has jurisdiction on enforcement matters and can issue declarations. Appeals to the High Court, the Court of Appeal and the Supreme Court may only be taken on points of law.

Māori issues

The RMA makes special mention of Māori issues. There is a strong direction that consent authorities 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]". Consent authorities must also have particular regard to kaitiakitanga and take into account the principles of the Treaty of Waitangi.

Enforcement

Enforcement action under the RMA 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 RMA. 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 RMA 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 for a company, and imprisonment or a fine up to a maximum of NZ$300,000 for an individual.

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 RMA. Such directors and managers do not need to know that the actions are contrary to the RMA to be liable.

Financial/development contributions

Proponents of 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. Many councils use development contributions instead of financial contributions. Development contributions are charged in accordance with policies made under the Local Government Act 2002.

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

Exclusive economic zone and continental shelf (environmental effects) Act 2012

A legislative framework to manage the marine environment in New Zealand's exclusive economic zone and continental shelf (the water column and seabed/subsoil respectively beyond the 12-nautical mile limit regulated by the RMA) came into force in mid-2013. The purpose of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 is to promote the sustainable management of the natural resources in these areas.

A person wishing to undertake certain activities in the exclusive economic zone and/or continental shelf, such as exploratory or development oil drilling or seabed mining, must first obtain a marine consent from a centralised regulator, the Environmental Protection Authority. Depending on the nature of the proposed activity, a public hearing of the application may be held. Parties can appeal decisions of the Environmental Protection Authority to the High Court on points of law. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act has a range of penalty and enforcement provisions, including provisions under which directors and senior managers of a company may be found personally responsible for the acts or omissions of the company.

08
Foreign investment controls

The Overseas Investment Act 2005 requires overseas persons and their associates to obtain consent before investing in "significant business assets" or "sensitive land" (including forestry rights) in New Zealand. If consent is not required, there is a national security and public order call-in regime that requires mandatory notification for some investments and allows for a voluntary notification for others.

The Act provides for conditions to be imposed on overseas investments, and enables the regulator, the Overseas Investment Office, to monitor compliance with those conditions.

The Act, in combination with provisions of the Fisheries Act 1996, also regulates certain investments in fishing quota. Please seek specific advice in relation to fishing quota investments.

Investments that require consent: significant business assets and sensitive land (including forestry rights)

Significant business assets

Overseas persons, or their associates, must get regulatory consent to invest in significant business assets in New Zealand. Consent will generally be required when the overseas person or their associate is:

- Acquiring ownership or control of more than 25% of a person (for example, a body corporate) where the value of the shares or consideration provided or the value of the assets of the person and its more than 25% subsidiaries exceeds NZ$100m
- Increasing an existing more than 25% ownership or control interest in a person (for example, a body corporate) over the relevant ownership or control limit where the value of the shares or consideration provided, or the value of the assets of the person and its more than 25% subsidiaries, exceeds NZ$100m[1]
- Establishing a business in New Zealand if the business is carried on for more than 90 days in any year and the total expenditure to be incurred in establishing the business exceeds NZ$100m
- Acquiring property (including goodwill and other intangible assets) 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.

There are alternative monetary threshold for investments by certain Australian investors, and for investors from countries with which New Zealand has certain trade or economic partnership agreements.

Sensitive land

Overseas persons, or their associates, must get regulatory consent to invest in sensitive land in New Zealand. At present, consent is required to acquire a freehold interest in sensitive land, or a leasehold (or any other) interest in sensitive land that is for a term of ten years or more (unless the land is residential land, in which case a three-year or more threshold applies).

An interest in sensitive land may be acquired directly, for example by acquiring the land under a sale and purchase agreement, or indirectly, for example by acquiring a more than 25% interest in a company that owns or leases sensitive land.

---

1. The consent requirement does not apply for investors who already have an existing more than 25 percent ownership or control interest who make additional incremental investments that do not result in a material change in ownership or control. Material change is defined in relation to ownership or control limits, set at 50, 75, and 100 percent.

Broadly, land is sensitive land if it includes:

- Residential land of any size, which includes land categorised as residential (R) or lifestyle (L) in the relevant District Valuation Roll
- Non-urban land greater than five hectares. Non-urban land includes:
  - farm land, which is land used for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry or livestock
  - any land other than land that is both in an urban area, and used for commercial, industrial or residential purposes
- Land on a number of specified islands around New Zealand
- Marine and coastal area
- Land greater than 0.4 hectares that is:
  - part of a lake bed
  - historic land
  - held for conservation purposes
  - subject to a heritage order
  - used as a reserve, public park, for recreation purposes, or as open space
  - set apart as Māori reservation.

Sensitive land also currently includes land that adjoins certain types of land (for example, marine and coastal area, the bed of a lake, a reserve or regional park, conservation land, or Māori reservation that adjoins marine and coastal areas) and exceeds specified size limits. It may be necessary to obtain a sensitive land certificate from an accredited Crown property services provider to confirm if particular land is sensitive.

Who is an overseas person?

An 'overseas person' is:

- An individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand
- A body corporate that is incorporated outside New Zealand
- A body corporate that is a New Zealand listed issuer that meets either or both of the ownership or control tests
- Certain partnerships, unincorporated joint ventures or other unincorporated bodies of persons (other than trusts, unit trusts, managed investment schemes or limited partnerships) that are more than 25% managed, controlled or governed by an overseas person or where more than 25% of the beneficiaries are overseas persons
- Certain trusts, unit trusts, managed investment schemes and limited partnerships that meet the applicable ownership or control tests.

Assessing whether a person is 'ordinarily resident' is complex and depends on the type of investment. For the purposes of an investment in residential land, a different definition of 'ordinarily resident in New Zealand' applies, compared with investments. In either case, however, the requirements are prescriptive and entail more than simply having permanent residency status.

Overseas persons from Australia and Singapore may be able to rely on exemptions relating to residential land, relationship property, and, for Australia only, regulated profits à prendre. In those cases, the consent requirements for overseas investors will not apply.

Associates

The OIA also covers 'associates' of an overseas person. In broad terms, an associate is any person who acts for or on behalf of, or is a 'front' for, an overseas person. For example, 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.

Consent process

The Overseas Investment Office (OIO) handles the consent process. Consent decisions are made by an Associate Minister of Finance (for sensitive land decisions and significant business assets decisions), and the Minister for Land Information (for sensitive land decisions only). If an investment is required to undergo a national interest assessment, the Minister of Finance will decide whether an investment is contrary to the national interest, separately from the Minister(s) deciding on the substance of the application.

Decisions may be delegated to the Overseas Investment Office depending on the nature and complexity of the application.

Each overseas person (or associate) making the investment must apply to the Overseas Investment Office for consent. Consent must be obtained before a legal or equitable interest in the sensitive New Zealand assets is acquired.

However, an overseas person can enter into an agreement to purchase sensitive New Zealand assets without breaching the Act, provided that the agreement is conditional on obtaining consent (and consent is obtained before the transaction is completed).

Statutory timeframes are in effect for all applications, although a failure to meet these timeframes does not give rise to legal rights or remedies. Timeframes vary depending on the application type and can range from 10 to 100 working days depending on the transaction. When an application involves two or more pathways/tests the longer timeframe applies. The timeframes include time for applicants to respond to requests for information (within a "reasonable time" as specified by the OIO), and time for applications to be considered by Ministers (where applicable), but excludes certain "pauses", "extensions", and "exceptions". "Working days" excludes Saturdays, Sundays, public holidays and any day in the period commencing 25 December and ending on 15 January.

Criteria for consent

Investor test

The investor test applies to nearly all overseas persons. To meet the investor test, the relevant overseas person (and if that person is not an individual, each individual that controls that person) – each of which is referred to below as the 'investor' – must:

- Disclose whether any of the character and capability factors listed in the Act are established
- If any of the factors are established, the relevant investor must satisfy decision-makers that it does not make them unsuitable to own or control a sensitive New Zealand asset.

There are 12 character and capability factors in total, and they include (in summary):

- Whether, at any time, the investor has been convicted of an offence and sentenced to imprisonment for five years or more
- Whether, at any time in the preceding 10 years:
  - a court has imposed a penalty on the investor for contravention of the Act or regulations
  - the investor has been convicted of an offence and sentenced to imprisonment for a term of 12 months or more
  - if the investor is not an individual, the investor has been convicted of an offence and sentenced to pay a fine
  - a court has imposed a civil pecuniary penalty on the investor for contravention of any enactment
- Whether the investor is prohibited from being a director or promoter of, or concerned in the management of, a company or other entity under certain laws (eg the Financial Markets Conduct Act 2013)
- Whether the investor has become liable, in the preceding 10 years, to pay a penalty in respect of an abusive tax position or tax evasion (in any jurisdiction), or has outstanding unpaid tax of NZ$5m or more.

The investor test does not need to be met if an applicant is applying under the 'commitment to reside in New Zealand' test or, in very limited circumstances, investments involving large apartment developments. These are discussed further below.

There are also additional criteria that only apply to investments in sensitive land (see below).

Consent will only be granted if all of the relevant criteria are met.

Investors are able to apply at any time for an assessment of whether they meet the investor test (separate to any consent application). If there have been no relevant changes since the test was last satisfied by the investor, then the investor test will be met.

Additional criteria for investment in sensitive land

There are additional criteria that only apply to investments in sensitive land. The criteria depend on the consent pathway used. Which pathways are available depends on the type of sensitive land that is the subject of the Overseas Investment Office application.

Only one of the pathways needs to be met in respect of the relevant land. For example, a person may be granted consent based on the commitment to reside pathway. If so, it is not necessary to satisfy the benefit to New Zealand test.

The Act provides for a standing consent to be granted in some circumstances – eg, if an investor was applying under the increased housing pathway. This allows an applicant to obtain consent even if they have not yet identified the particular land they intend to acquire.

A summary of the key requirements for each pathway, and the type of sensitive land for which each pathway is available, is set out below.

Commitment to reside

This pathway is available for investments in land that is residential only, or land that is residential and sensitive for another reason (eg, residential land that includes an historic place).

This pathway is for overseas investors that are committed to residing in New Zealand and are acquiring the residential land as their main home and residence.

Increased housing

This pathway is available for investments in land that is residential land only.

This pathway is for overseas investors that want to buy residential land and develop it in such a way as to increase New Zealand's housing stock. It requires that the relevant Ministers are satisfied that certain outcomes (eg, increasing housing, on-sale, and non-occupation) are likely to occur.

Non-residential use

This pathway is available for investments in land that is residential only.

This pathway is for overseas investors that want to buy residential land for a non residential use – eg, the acquisition of a residential home that will be used as a dental surgery.

It requires that the relevant Ministers are satisfied that the land will be, or is likely to be, used for non-residential purposes in the ordinary course of business for the relevant business, and will not be held for future residential use.

Incidental residential use

This pathway is available for investments in land that is residential only.

This pathway is for overseas investors that want to buy land and use it for residential purposes, but only in support of a relevant business – eg, as staff accommodation. It requires that:

- The relevant Ministers are satisfied that the residential land will be, or is likely to be, used for residential purposes, but only in support of the relevant business (which cannot be in the business of using land for residential purposes)
- The relevant interest is, or will likely be, acquired in the ordinary course of business.

Ministers may also take into account considerations such as whether reasonable alternatives exist, and whether the land would be used as accommodation for staff.

Ordinarily resident/intention to reside

This pathway is available for investments in land that is sensitive but not residential.

This pathway is for overseas investors that are ordinarily resident in New Zealand or intending to reside in New Zealand indefinitely. It requires that the individual holds a residence class visa and is either domiciled in New Zealand, or has been residing in New Zealand with the intention to reside there indefinitely (having done so for at least the preceding 12 months). Absence from New Zealand for no more than 183 days in aggregate does not prevent a person from satisfying this requirement.

Benefit to New Zealand

If none of the above pathways are available, the investor must meet the benefit to New Zealand test.

For investments in forestry (other than permanent forestry), there are up to three benefit to New Zealand pathways that may be available to the investor. All other investors must meet the standard benefit to New Zealand test.

Standard benefit to New Zealand test

Benefits are assessed by comparing what is likely to happen with the investment, with what is likely to happen without the investment. This is a "before and after" counterfactual test that requires the benefits of the investment to be measured against the status quo. The decision-maker must take a proportionate approach when assessing whether the benefit test is met (in particular, by considering whether the benefit is proportionate to the sensitivity of the land and the nature of the overseas investment transaction).

The question of whether an investment will, or is likely to, benefit New Zealand is determined with reference to specific, including:

- Economic benefits (eg, new jobs, increased exports, and introduction of new technology or business skills)
- Benefits to the natural environment (for example, the protection of indigenous flora)
- Continued or enhanced access by the public to sensitive land, or the features giving rise to the sensitivity
- The continued or enhanced protection of historic heritage
- Giving effect to or advance significant government policy
- Oversight of, or participation in, the overseas investment or any relevant overseas person, by persons who are not overseas persons
- Consequential benefit to New Zealand.

If the land includes fresh or seawater areas and the consent relates to the acquisition of land or pastoral lease, then the Crown must be notified in accordance with the specified procedure.

If the land is or includes farm land over 5 hectares, Ministers must give certain economic benefits and the oversight or participation factor high relative importance, and ensure that the applicant has demonstrated in relation to one or more of those factors that the benefits represent a substantial benefit to New Zealand. There are also certain advertising requirements for farm land that must be met.

Recent changes to the statutory regime clarified the benefit to New Zealand test by clarifying that the decision-maker must deduct from benefits arising under a factor any directly comparable aspect of the counterfactual, to determine the net benefit. Note that where an overseas investment involves water bottling or extracting, negative impact on water quality or sustainability is an additional factor, which can be deducted from any other benefit.

Forestry-specific pathways

The forestry-specific pathways are intended to simplify the consent process for forestry investors. As a preliminary point, there is an exemption for an overseas person acquiring fewer than 1,000 hectares of forestry rights per calendar year, for which the requirement for consent does not apply.

While a forestry investor could choose to apply under the standard benefits test, the following two streamlined pathways are also available.

Modified benefits test

This test requires that the overseas person demonstrate that the investment will likely result in benefit to New Zealand, compared with what the current owner would create. The proportionate approach is therefore not required.

This test is most likely to be relevant when a forestry investor proposes to convert bare land into a forestry operation. Generally, the overseas person must show that they will use the land exclusively (or nearly exclusively) for forestry, and that the crop will be replanted after harvest. The land can be used for residential purposes, but only to provide accommodation to support the forestry activities.

Special forestry test

This is a streamlined test, which can be used when buying forestry land or purchasing land to establish a forest.

The test is a 'checklist' of criteria; no further analysis is required. Generally, the overseas person must show that they will use the land exclusively (or nearly exclusively) for forestry, and that the crop will be replanted after harvest. The relevant land cannot be solely residential. The land can be used for residential purposes, but only to provide accommodation to support the forestry activities.

A standing consent is available on the basis of this test. This allows a person to obtain consent prior to identifying the particular land that they intend to acquire. To obtain a standing consent, the overseas person must, among other things, have a strong track record of compliance with the Act.

National interest test

The national interest test allows for greater scrutiny of certain consent applications, and empowers the Government to decline consent if the transaction is not in New Zealand's national interest.

Transactions of national interest are defined as those that involve a foreign government (directly or indirectly), and exceed certain thresholds or that relate to certain strategically important businesses (for example, electricity generators, and critical direct suppliers to the Defence Force).

In addition, the relevant Minister can call in any other consent application by giving notice that the relevant transaction could be contrary to the national interest, and therefore that it will be assessed under the national interest test.

However, the November 2021 Ministerial Directive provides that the starting point is that an investment is in New Zealand's national interest, and that the Overseas Investment Office should only escalate a transaction to the Minister for a national interest assessment if certain indicators are present – for example, that the proposed investment would grant an investor significant market power within an industry as it would result in the vertical integration of a supply chain or would provide a foreign government with disproportionate access or control over sensitive assets.

Emergency notification regime and national security and public order call-in regime

Emergency notification regime

In 2020, during the COVID-19 outbreak and the consequential economic uncertainty, the Government introduced a temporary emergency notification regime to require transactions that would not ordinarily be screened to be subject to review. While this regime has now been replaced by the national security and public order call-in regime, the Minister can reinstate an emergency notification regime, subject to certain safeguards.

National security and public order call-in regime

The emergency notification regime has been replaced by a permanent "call-in" regime. Under the regime, the relevant Ministers can "call in" transactions involving certain strategically important assets that would not otherwise be subject to screening.

Notification is mandatory for investment in some industries and voluntary for others. Notification is mandatory before giving effect to the transaction if the target business or entity either:

- Researches, develops, produces or maintains military or dual use technology; or
- Is a critical direct supplier to the New Zealand Defence Force, GCSB, or SIS.

An investor can choose to voluntarily notify a transaction in other strategically important assets, but must do so within six months of the transaction being given effect. If a transaction is not voluntarily notified, it may later be "called in". A decision must be made within 55 working days of notification (although this can be extended by up to 30 working days).

Transactions that are found to pose risks to national security or public order can be prohibited, have conditions imposed on them, or be required to be unwound.

Enforcement and penalties

The Overseas Investment Office monitors compliance with the OIA and consent conditions. Offences under the Overseas Investment Act include:

- Giving effect to an overseas investment without consent
- Defeating, evading or circumventing the operation of the OIA
- Restricting, obstructing or deceiving a person who is executing a power or function under the OIA.

The penalties for these offences are:

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

It is also an offence to:

- Knowingly or recklessly make any false or misleading statements or material omissions to the regulator, or provide false or misleading documents (fine up to NZ$300,000)
- Without lawful excuse, fail to comply with the OIA, regulations, or a related notice, requirement or condition (fine up to NZ$100,000).

Where a person has contravened or committed an offence under the Act, failed to comply with a notice requiring information failed to comply with a consent condition, or been involved in a breach of the Act, the Overseas Investment Office may apply for the Court to (amongst other things):

- Order the disposal of property acquired in contravention of the Overseas Investment Act
- Order payment of a civil penalty not exceeding the higher of NZ$500,000 for individuals or NZ$10m for companies, three times the amount of any quantifiable gain, the cost of remedying the relevant breach of condition, or the loss suffered by a person in relation to a breach of condition
- Seek an injunction restraining a person from engaging in conduct that is or would be a breach of the Act.

The Overseas Investment Office can also accept enforceable undertakings from investors who have breached the Act.

Foreign investment controls

The Overseas Investment Act 2005 sets out a consent procedure for overseas persons and their associates investing in 'significant business assets' or 'sensitive land' in New Zealand. For more information about New Zealand's foreign investment control regime, please refer to page 43.

09 Intellectual property

Trade marks

Registered and unregistered trade marks are protected in New Zealand. Priority is given to the first person to use or register the mark, whichever is the earlier.

Registration is the strongest from of legal protection for trade mark rights and is highly recommended for the certainty it brings, the breadth of protection and the related cost advantages, especially for enforcement processes. Registration may also act as a deterrent to others using the same or similar mark.

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 and/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 three years or more.

To be registrable, a trade mark must be distinctive and can include a word(s), logos, devices, colours and even sounds and smell and combinations of these trade mark types. Examples of marks that are typically not registerable include descriptive words and names with geographical significance associated with the relevant goods or services. 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 six months from the filing date.

New Zealand is a member of the Paris Convention and therefore trade marks can be filed in New Zealand six months after they were first filed in another Convention country, and claim the original overseas filing date.

New Zealand is also a member of the Madrid Protocol. International applications based on New Zealand national trade mark applications and registrations can be filed with IPONZ. Also, IPONZ can receive international registrations filed with the World Intellectual Property Organisation designating New Zealand as a country in which protection is sought.

Unregistered trade marks are protected by the tort of Passing Off and the consumer protection provisions of the Fair Trading Act 1986.

Under the Fair Trading Act, if use of a trade mark is misleading or deceptive, or likely to mislead or deceive another party's trade mark, the Act can be used against the party causing the confusion or deception . An action under the Act can be commenced to protect a reputation and/or goodwill but mere confusion is not enough to found an action under the Act based on reputation only.

Passing off occurs if the goodwill of a business 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. Compared to the Fair Trading Act, goodwill is needed, and confusion is enough to found an action.

Domain names

Businesses can register and use New Zealand domain names in the .NZ space (eg '.nz', '.co.nz', '.net.nz' and '.org.nz'). The .NZ registry is an open registry (ie there is no requirement for the registrant to have a registered trade mark, company and/or business presence in New Zealand). There are also no restrictions on the number of domain names that one registrant may register.

A Dispute Resolution Service (DRS) operated by the Office of the Domain Name Commission provides an administrative forum for the resolution of disputes concerning domain names. The DRS is based on the UK Nominet system and favours trade mark owners.

Business names

Unlike Australia, 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 identical or nearly identical to an existing company name. Registration of a company with a particular name does not, in itself, give a right to use the company name in conflict with a prior registered or unregistered trade mark. Nor does registration of a company name, in itself, give a right to prevent another person from using the same or a similar trading name or other trade mark. Company name registrations provides little, if any, legal protection in a name. By contrast, trade mark registration is the most effective way to protect a trading name or other trade mark in New Zealand.

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 the work, 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 (such as in writing or stored on a computer) 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 need to be asserted and 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 Copyright 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 contractual provisions to the contrary.

Patents

The Patents Act 2013 provides for the grant of patents for inventions, including manufacturing processes, machines, pharmaceutical and products. To be patented, the invention must be industrially applicable (be able to be made or used in some kind of industry), new or novel and contain an inventive step that is non-obvious. The maximum period of patent protection is 20 years. New Zealand is a member of the Paris Convention and Patent Co-operation Treaty.

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 five 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 (eg confidentiality and non disclosure agreements) and if the circumstances of communication require confidence (eg fiduciary duties) and by contractual provisions such as restraints of trade which limit the ability to use information.

"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."

10
Regulation affecting day-to-day business operation

Consumer protection

Consumer guarantees Act 1993

The Consumer Guarantees Act creates minimum standards of quality for all goods or services that are ordinarily acquired for personal, domestic, or household use. 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. This definition excludes anyone who acquires the goods or services for the purpose of resupplying them in trade, consuming them in the course of a process of production or manufacture or (in the case of goods) repairing or treating in trade other goods or fixtures on land.

General rule - no contracting out

The general rule is that contracting out of the Consumer Guarantees Act is not permitted. There is an exception to this rule for business transactions. Specifically if all parties to the agreement are in trade, those parties may contract out of the Consumer Guarantees Act if it is fair and reasonable to do so. The agreement to contract out must be in writing.

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, the goods must be free from undisclosed securities, and the consumer has the right to undisturbed possession
- The goods are of an acceptable quality(fit for purpose, of an acceptable appearance and finish, free from minor defects, safe and durable), except where a 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
- If the supplier is responsible for delivery, the goods are received at the time agreed (or within a reasonable time).

Liability for guarantees

If goods fail to meet any of the guarantees, consumers may have a right of redress against the supplier, manufacturer, or both the supplier and manufacturer.

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 compensation for reasonably foreseeable loss or damage.

Manufacturers are also liable for any express guarantees they give to consumers.

The following persons are also deemed to be manufacturers by the Consumer Guarantees Act:

- Any person holding itself out to the public as the manufacturer
- Any person attaching their brand or mark to the goods
- If the goods are manufactured outside New Zealand and the manufacturer is not in New Zealand, the importer or distributor of the goods.

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 (if the time is not fixed in a certain way)
- Where the price is not determined, the consumer is not liable to pay more than a reasonable price for the service.

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

Fair Trading Act 1986

The purpose of the Fair Trading Act is to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. To achieve this purpose, the Fair Trading Act prohibits unfair conduct and practices, promotes fair conduct and practices, and provides for the disclosure of consumer information and the setting of product safety standards.

General rule – no contracting out

The general rule is that contracting out of the Fair Trading Act is not permitted. There is a limited exception to this rule for business transactions. Specifically, if all parties to the agreement are in trade, those parties may contract out of the following sections of the Fair Trading Act, if it is fair and reasonable to do so:

- Section 9 (misleading and deceptive conduct)
- Section 12A (unsubstantiated representations)
- Sections 13 and 14(1) (false and misleading representations).

The agreement to contract out must be in writing.

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, services, and employment. It is also an offence under the Fair Trading 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 (for example, not having enough promotional stock), pyramid selling schemes, not honouring gift or prize promotions, and importing goods bearing false trade marks.

Unsubstantiated representations

The Fair Trading Act prohibits persons in trade from making unsubstantiated representations. Unsubstantiated representations are representations made without reasonable grounds at the time they are made. It does not matter whether the representation is in fact false or misleading.

Consumer information

Regulations may be made under the Fair Trading Act to require businesses to disclose certain information about goods and services. Current regulations require disclosure of certain information relating to clothing and footwear, used motor vehicles, and water use efficiency standards.

Unsolicited goods and services and uninvited direct sales

Consumers are not obliged to pay for unsolicited goods, and it is an offence to demand payment for such goods. A cool-down period (and other conditions) applies to sales made as a result of an uninvited direct sale, and the consumer must be made aware of their rights.

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. There is also a voluntary product recall regime.

Unfair contract terms

The Commerce Commission may apply to a Court for a declaration that a term in a standard form consumer contract is an 'unfair contract term'. A term in a consumer contract may be unfair if it:

- Causes a significant imbalance to the parties' rights
- Is not reasonably necessary to protect a party's interests
- Would cause detriment to a party if it were enforced.

Only the Commerce Commission can apply to the Court for a declaration that a term is 'unfair'. If a contract term is decided to be unfair it is a breach of the Act to enforce that term.

- In late 2019, a Bill was introduced to implement proposed amendments to the Fair Trading Act. These changes include: Extending protection against unfair contract terms to standard form business contracts with a transaction value of below NZ$250,000
- Prohibiting unconscionable conduct relating to the supply or acquisition of goods or services (eg the exploitation by a stronger party of a weaker party).

As at April 2021, the Bill is at the Select Committee stage and it is not clear when the legislation may pass.

Penalties

The Commerce Commission is the regulatory body responsible for enforcing the Fair Trading Act. Individuals may also bring private actions under the Act.

Courts can impose fines of up to NZ$600,000 for companies and NZ$200,000 for individuals. A court may also grant other remedies, such as injunctions, damages and corrective advertising orders. The Commerce Commission may issue infringement offences for breaches of some provisions of the Act.

Credit contracts and consumer finance Act 2003

The primary purpose of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) is to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land. The core provisions of the CCCFA do not apply to business transactions (with the exception of the provisions relating to oppression and repossession, which apply to contracts relating to 'consumer goods', including when purchased by a business). The core provisions only apply to credit contracts that are 'consumer credit contracts'. Consumer credit contracts are contracts entered into by individuals wholly or predominantly for personal, domestic, or household purposes.

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 contains a provision that, if a party alleges that a credit contract entered into by an individual is a consumer credit contract, it will be presumed to be a consumer credit contract until proven otherwise. 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 fees and interest that can be charged by a creditor, obligations to make suitability and affordability checks into borrowers in compliance with the Credit Contracts and Consumer Finance Regulations 2020 (both when a loan is made available and when any material changes are made), as well as various reporting and disclosure obligations.

The CCCFA requires lenders to comply with 'lender responsibility principles' when entering into consumer credit contracts (and certain limited other contracts). The principles include: exercising the reasonable care, diligence and skill of a responsible lender; assisting the borrower to reach an informed decision; and treating the borrower (and their property) reasonably and in an ethical manner. There are detailed and prescriptive regulations that a lender must comply with when assessing the suitability and affordability of credit for the purposes of complying with the lender responsibility principles. The Minister of Commerce and Consumer Affairs publishes a Responsible Lending Code, which sets out guidance on how lenders can implement the lender responsibility principles. The Code is not binding, but compliance with the Code is viewed as evidence that a lender has complied with the principles.

Directors and senior managers of creditors have a duty to exercise due diligence to ensure that the creditor complies with the CCCFA. This includes:

- Implementing (and requiring staff to comply with) procedures to ensure compliance with the CCCFA
- Ensuring that appropriate systems are in place to identify deficiencies with these procedures
- Taking prompt action to remedy any deficiencies discovered.

All creditors under a consumer credit contract and all 'mobile traders' are required to be certified by the Commerce Commission. As part of this process, the Commission must be satisfied that all the applicant's current and prospective directors and senior managers are fit and proper persons.

Penalties

The Commerce Commission enforces the CCCFA. Individuals may also bring private actions under the CCCFA.

Courts can impose penalties of up to NZ$600,000 (and NZ$200,000 for an individual), and may grant other remedies such as amending the terms of a credit contract, injunctions, or prohibiting enforcement of certain terms. Directors and senior managers may also be liable for statutory damages and compensation. Importantly, directors and senior managers are prevented from being indemnified or insured for penalties under the Act or for any costs arising in defending any civil proceeding where a penalty is imposed.

Contract and Commercial Law Act 2017

The Contract and Commercial Law Act is an omnibus piece of legislation that contains provisions applying to sales of goods that may not be covered by the Consumer Guarantees Act (these provisions were formerly in the Sale of Goods Act 1908). Such goods include goods purchased for resupply or resale, goods 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 Contract and Commercial Law Act imposes various warranties into the sale 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. However, it is reasonably easy for sellers to exclude or vary these warranties by express agreement.

Employment law

Employment relationships in New Zealand are governed primarily by the Employment Relations Act 2000. The parties to an employment relationship must deal with each other in good faith, acting honestly, openly and constructively. 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 employment agreement, and that agreement must be in writing. New employees who are not union members but fall within the coverage of a collective agreement must be employed for the first 30 days on the terms and conditions of that collective agreement (and any additional terms and conditions that are mutually agreed and no less favourable).

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 and must pass on certain information about the union to prospective and new employees, and information about new employees to the union (unless the employee opts out).

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. From 27 June 2020, employees in triangular employment relationships (ie employed by one entity but working under the control or direction of another) will also have the right to join a 'controlling third party' to a personal grievance against their employer.

By pursuing a personal grievance, an employee can seek various remedies such as reinstatement (the primary remedy available if dismissed) or compensation for lost wages, humiliation, loss of dignity and injury to feelings. The Employment Relations Act encourages mediation as the first step in attempting to resolve employment disputes.

Employees can also pursue claims for discrimination, sexual and racial harassment, duress, or breach of contract or breach of their statutory rights.

Discrimination

The Employment Relations Act (together with the Human Rights Act 1993) prohibits discrimination against employees on the grounds of sex, marital status, religious or ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status, sexual orientation, being affected by family violence, union membership status, and participation or involvement in the activities of a union. 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 law. Entitlement to any redundancy payment depends on the relevant employment agreement. It is common to expressly exclude any right to redundancy pay in employment agreements, although notice of termination for redundancy must be given. In certain limited 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 employees if all or part of the business they work for is sold or transferred. Employees in several specified sectors, such as cleaners and caterers, have a statutory right to transfer their employment on the same terms and conditions to the new owner of the business. Other employees have no such right to transfer, 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

The current minimum wage for employees aged 16 years and above is NZ$20 an hour before tax. That equates to NZ$160 for an eight hour day, or NZ$800 for a 40 hour week.

A lower minimum wage can apply to employees starting out in work (aged 16-19), and those undergoing formal training. The current 'starting out' and 'training' minimum wages are NZ$16 an hour before tax. That equates to NZ$128 for an eight hour day, and NZ$640 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 and leave

Under the Holidays Act 2003 all employees are entitled to a minimum of four weeks' annual holidays (after 12 months' employment). There are also 11 statutory public holidays. An additional statutory public holiday will be introduced for 'Matariki' in 2022.

Employees are entitled to at least five days' paid sick leave per annum after 6 months' employment. There is a Bill currently before Parliament which, if passed, will increase this entitlement to 10 days' paid sick leave per annum. Employees are entitled to accumulate sick leave up to a maximum of 20 days, although the parties can extend this by agreement.

Employees are also entitled to three days' paid bereavement leave on the death of close family members or following a still-birth or miscarriage, after six months' employment.

Employees affected by family domestic violence are entitled to up to 10 days' paid family violence leave per annum.

A government-appointed working party completing a full review of the Holidays Act in 2019 and made 22 recommendations to improve the Holidays Act. Some of the recommendations include extending bereavement leave to include more family members, employees becoming entitled to bereavement leave and family violence leave from their first day of employment, and employees becoming entitled to one day of paid sick leave from their first day of employment, with an additional day given per month until the minimum entitlement is reached. The Government has accepted the recommendations and new legislation is expected to be introduced in 2022.

The Parental Leave and Employment Protection Act 1987 allows for up to 26 weeks of 'primary carer' leave for employees who meet the six month or 12 month employment tests set out in the Act and who are pregnant, who have given birth to a child, or who take permanent primary responsibility for the care, development, and upbringing of a child under six years of age. This leave may be transferred to the biological mother's spouse or partner in certain circumstances. Pregnant employees are also entitled to up to 10 days' unpaid leave for reasons connected with their pregnancy (eg to attend medical appointments).

Employers are not required to pay employees for parental leave, but government-funded parental leave payments are available for primary carers who meet the legislative threshold for payments, up to a maximum of NZ$606.46 per week (before tax) for up to 26 weeks. Self-employed people may also be entitled to these payments. In certain circumstances, additional payments are available in respect of preterm babies.

Certain entitlements may also be available for the spouses or partners of primary carers. These include unpaid partner's leave of one week (after six months' service) or two weeks (after 12 months' service).

Extended leave, up to a total period of 52 weeks, can be shared between both parents. The amount of extended leave available depends on the parents' length of service with their respective employers.

Health and safety

The Health and Safety at Work Act 2015 provides that a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU. This duty also applies to workers whose work is influenced or directed by the PCBU, while they are working. The definition of 'workers' covers any individual who works in any capacity for a PCBU, including but not limited to work as an employee.

A PCBU is also required, so far as is reasonably practicable, to ensure that the health and safety of other people is not put at risk from work carried out as part of the conduct of the business or undertaking. 'Health' under the Health and Safety at Work Act means not only physical but also mental health.

Amongst other duties, and again so far as is reasonably practicable, PCBUs must provide and maintain a work environment that is without risks to health and safety, as well as safe plant, structures and systems of work. PCBUs must also provide any information, training, instruction, or supervision that is necessary to protect people from risks to their health and safety arising from work carried out as part of the business or undertaking.

An 'officer' of a PCBU has a personal duty to exercise due diligence to ensure that the PCBU complies with its duties under the Act. An officer includes a director of the PCBU and any other person holding a position which allows them to exercise significant influence over the PCBUs management, such as a chief executive.

WorkSafe New Zealand, the national workplace health and safety regulator, can prosecute PCBUs, officers and others for breach of the Health and Safety at Work Act. Significant penalties may be imposed for serious breaches, including imprisonment.

Accident and compensation

New Zealand's law relating to personal injury is unique. Legal claims for compensation arising from 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 Accident Compensation Act 2001 and has various funding sources, including levies on employers and employees.

The Accident Compensation Act covers the majority of personal physical injuries, whether resulting from negligence or accident, and whether occurring in the workplace or elsewhere. It also covers a limited range of mental injuries. Employers are required to contribute to the scheme by payment of levies. The amount of these levies is determined by the risk classification of the employer's business, how much staff are paid and the type of cover. For work-related personal injuries that are covered by the Accident Compensation Act, employers are also required to pay 80% of the earnings lost by that employee during their first week of incapacity.

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

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 (or the Cook Islands, Niue or Tokelau) 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, keep proper accounts that are audited annually, and should be registered with the FMA.

KiwiSaver

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 may opt-out between two and eight weeks after starting work (in certain circumstances late opt-outs may be accepted between eight weeks and three months after starting work). Employees in existing jobs may also elect to join KiwiSaver at any time.

Employees can choose to make the minimum contribution of 3%, or they may elect a higher contribution rate of 4%, 6%, 8% or 10%, of their income directly through their employer. Voluntary contributions can also be made by any person to their KiwiSaver provider directly. When an employee has opted into KiwiSaver, an employer is required to make KiwiSaver deductions from that employee's wages and forward them to the Inland Revenue Department in much the same way as PAYE. Employers must also pay compulsory employer contributions of at least 3% of the employee's gross salary or wages for employees who are enrolled in and making contributions to KiwiSaver. A government contribution is also made annually to all KiwiSaver accounts, up to a maximum of NZ$521.43. To get the full government contribution, you must contribute at least NZ$1042.86 of your own money between 1 July to 30 June each year. Special rules apply for KiwiSaver members who are under 18 years of age and who are over 65 years of age.

Privacy

The Privacy Act 2020 came into force on 1 December 2020, replacing the Privacy Act 1993. The Privacy Act provides a framework for protecting individuals' right to privacy of personal information. The Privacy Act covers some, but not all, of the requirements of the GDPR – and compliance with the GDPR will generally satisfy an agency's privacy obligations in New Zealand.

The Privacy Act establishes 13 Information Privacy Principles (IPPs). The IPPs govern the collection, use and disclosure of personal information by public and private sector agencies, and individuals' rights to access such information. Privacy Codes of Practice also apply to specific areas - particularly health, telecommunications and credit reporting.

Enforcement

Only one of the IPPs can be enforced in Court - the right of an individual to access information held about them by a public sector agency. The breach of any other IPP does not automatically create an infringement of the Privacy Act. Rather, the breach must reach the higher level of 'an interference with the privacy of an individual' before a remedy may be available.

The Privacy Act provides detailed procedures to be followed if a person alleges that their privacy has been interfered with, including investigation and mediation by the Privacy Commissioner (a position established under the Privacy Act). Generally, the Privacy Commissioner encourages individuals to try to resolve matters directly with the agency before making a complaint to their Office. The Privacy Commissioner can investigate a complaint and make recommendations to parties. The Privacy Commissioner can issue compliance notices requiring an agency to comply with the Act, and require an agency to give individuals access to their personal information. Ultimately, if a matter cannot be resolved, the Privacy Commissioner can refer an unresolved matter to the Director of Human Rights Proceedings who can bring an action before the Human Rights Review Tribunal. The person alleging interference can also bring an action if the Director decides not to take proceedings or agrees to the person bringing their own proceedings. The Human Rights Review Tribunal may grant a variety of remedies including a declaration, an order requiring certain action, damages, and costs against a party.

Notifications

If an agency commits a privacy breach that causes serious harm to someone, or is likely to do so, it is required to notify the Office of the Privacy Commissioner as soon as possible. Failure to notify is an offence and an agency can be fined up to NZ$10,000.

Application to business practices

The design and use of forms which gather personal information need to ensure that the 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 the use of information about an individual, including for credit risk assessments and human resources purposes.

Agencies are also responsible for ensuring that any personal information they disclose to organisations outside of New Zealand is adequately protected. Before disclosing information to overseas organisations, agencies will need to ensure that the receiving organisation is subject to the Privacy Act (if they do business in New Zealand) or privacy laws that provide comparable safeguards, the receiving organisation agrees to protect the information in a way that provides comparable safeguards to the Privacy Act, or the receiving organisation is covered by a binding scheme or is subject to the privacy laws of a country prescribed by the New Zealand Government. If these criteria are not met, an agency can only disclose personal information to the overseas organisation with consent from the individual concerned. The individual must be expressly informed that their information may not be given the same protection as provided by the Privacy Act. There are some limited exceptions, for example, where disclosure is necessary to prevent a serious threat to someone's life or health.

In addition, agencies must have someone in the agency who knows about privacy and is designated to be a ‘privacy officer’. Agencies must ensure that they hold any personal information with appropriate protections and that any requests from an individual for access to their personal information are dealt with in accordance with the Privacy Act and the relevant IPPs.

Importing, exporting, tariffs and duties

Importing and exporting activity is governed by the Customs and Excise Duties Act 2018 and administered by the New Zealand Customs Service (Customs). 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.

Customs 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 15% Goods and Services Tax (GST), 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

Persons wanting to undertake importing or exporting activities in New Zealand must use one of two electronic systems - the Customs Online Declarations website 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 online service so is suitable for high frequency importers and exporters.

The Customs Online Declarations website is suited to one-off or low volume users. The Customs Online Declarations website is designed for regular importers and exporters who have sufficient knowledge of the requirement 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 seven 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.

The majority of goods subject to import duty have a rate imposed at around 5% 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 10% or more.

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.

Customs 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.

GST

Generally, goods imported into New Zealand are liable for GST at the rate of 15%. There are very few exceptions. Customs collects the GST on imports that have an estimated customs value of NZ$1,000 or more 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 (ie 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. Non-resident suppliers of low value goods to New Zealand consumers are responsible for charging and accounting for GST on those goods.

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

Taxation

New Zealand has two 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 generally imposed on all income (from any source) other than excluded and exempt income, less allowable deductions. 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, currently levied at 15% on the supply of most goods and services in New Zealand.

Normally GST will have no impact on business profits, except for administration and compliance costs, and cash flow effects. However, there are instances (particularly in the financial services sector) where the tax will be imposed on the business taxpayer as a final customer.

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 at the time of supply and of delivery, land transactions between registered persons, 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 to make taxable supplies. Other specified supplies are exempt from GST. The main exempt supplies are domestic financial services, leases of residential accommodation, salary and wages, and supplies of fine metal.

GST also applies to cross-border 'remote' services and intangibles supplied by non-resident suppliers (including e-books, music, videos and software purchased from offshore websites) to New Zealand resident consumers. These rules require non-resident suppliers to register and return GST on these supplies if the supplies in aggregate exceed, or are expected to exceed, NZ$60,000 in a 12 month period.

The growing popularity of internet shopping websites has given rise to a perception among New Zealand businesses that they are being unfairly disadvantaged when GST is not collected on low value goods. In order to address this disparity, the Government has introduced new rules which will require offshore suppliers to collect GST on low value goods at the point of sale. GST will continue to be collected at the border for goods over NZ$1,000.

Offshore suppliers are required to register and return GST if their total supplies in a 12-month period to New Zealand consumers are equal to or greater than NZ$60,000. This is the same threshold for GST registration that applies to New Zealand-resident businesses and non-residents supplying services into New Zealand.

There are also specific rules for marketplaces and 're-deliverers' who meet the NZ$60,000 threshold.

Marketplaces

When an offshore supplier sells their goods through an electronic marketplace, the new rules deem that the marketplace has made the supply in the course or furtherance of their taxable activity. Accordingly, the marketplace will be required to register and return the GST on the supply instead of the supplier.

Electronic marketplaces will be required to register, whereas non-electronic marketplaces may register with the Commissioner's approval.

Re-deliverers

Re-deliverers are a service used by consumers when an offshore supplier does not offer shipping to New Zealand. The consumer can elect to have the goods delivered to the re-deliverer, which is an intermediary address. The re-deliverer will then deliver the goods to the New Zealand consumer for a fee. The new rules will require re-deliverers to register for and to return GST in respect of the goods that they re-deliver to a New Zealand address.

Capital gains tax

New Zealand does not currently 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 (in this case, any returns from these holdings will not otherwise be subject to tax).

Land

Real property which is residential property (other than a person's main home) and which is disposed of within five years of acquisition, if it was acquired before 27 March 2021, or within 10 years of acquisition, if it was acquired on or after 27 March 2021, will be deemed to have been acquired with the intention of resale, and any gain will be subject to income tax (with some limited exceptions). The government has also introduced a withholding tax on non-residents selling residential land which is subject to this rule.

Transferors and transferees of land must also provide certain identity details and information in a tax statement, referred to as a Land Transfer Tax Statement, in order for the transfer of land to be registered through the New Zealand's electronic land title registration system.

From 1 April 2019, residential property deductions are ring-fenced, meaning that they can only be used to offset income from residential property. Residential property deductions cannot exceed the amount of income earned from the property for the year. Excess deductions must be carried forward from year to year until they can be used. The rules can be applied on a portfolio basis or on a property-by-property basis. In March 2021, the Government announced its intention to deny deductions for interest on mortgages or loans on residential investment properties. The new rules will apply from 1 October 2020 for properties acquired on or after 27 March 2021. For residential investment properties acquired before 27 March 2021, the rules will be phased in over a period of four years.

Under, the Overseas Investment Act 2005 (OIA) some residential and lifestyle land falls in the category of 'sensitive land' for the purposes of the OIA. Overseas persons who are not resident in New Zealand will generally not be able to buy existing houses or other pieces of residential land. A natural person is an overseas person for this purpose under the OIA if they are neither a New Zealand citizen nor 'ordinarily resident in New Zealand'. A person will be ordinarily resident in New Zealand if they hold a permanent residence visa and have been residing in New Zealand for at least a year, is tax resident in New Zealand and have been present in New Zealand for at least 183 days in the past year. However, overseas persons will be able to buy residential land in certain situations, including if they will be developing the land and adding to New Zealand's housing supply; or if they will convert the land to another use and are able to demonstrate this would have wider benefits to the country.

Base erosion and profit shifting

The Government has introduced a number of changes to combat activities that are used by some multinationals to pay little or no tax anywhere in the world. There are four main changes:

- **Interest limitation rules:** Preventing multinationals from using artificially high interest rates on loans from related parties to shift profits out of New Zealand
- **Permanent establishment anti-avoidance rules:** Preventing artificial arrangements entered into to avoid having a taxable presence in New Zealand
- **Transfer pricing rules:** Preventing transfer pricing payments to shift profits into offshore group members in a manner that does not reflect the actual economic activities undertaken in New Zealand and offshore
- **Hybrid and mismatch rules:** Stopping hybrid and branch mismatches that exploit differences between countries' tax rules to achieve an advantageous tax position.

Other taxes

There is currently no inheritance tax, stamp duty, cheque duty, general land tax, gift duty or estate duty in New Zealand. There are however accident compensation levies and also excise duty on alcoholic drinks, tobacco and certain fuels. 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.

In June 2019, the Government released a discussion document on taxing the digital economy so that multinational digital companies that do significant business in New Zealand pay their fair share of tax. The options proposed included a digital services tax (DST) which would be a low rate tax (2% to 3%) on the gross turnover of certain highly digitalised business that are attributable to New Zealand. The other option is to change the current international income tax rules in accordance with the international tax framework. This would depend on an internationally agreed solution by the OECD. The Government stated that it supported the internationally agreed solution approach, but it would seriously consider a DST if the OECD did not make sufficient progress. In October 2020, the OECD released documents relating to its work on addressing the tax challenges arising from the digitalisation of the economy. The OECD considers that they now have a blueprint for a future agreement. It is not yet clear how long it would take to reach and implement any new rules arising from the OECD work or whether the New Zealand Government will adopt the OECD's approach or bring in its own DST.

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 39% Remaining income over $180,000
TRUSTS	33% (certain trusts are subject to tax at 45%)
COMPANIES	28% whether resident or non-resident

Corporate income taxes

Residence

A New Zealand tax resident company is subject to income tax on all worldwide income derived. A company is deemed to be tax 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 New Zealand tax otherwise payable on that 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 a small number of other jurisdictions (notably, Australia). 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, subject to a 66% shareholding continuity requirement. 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. 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. Where the required level of shareholder continuity to carry forward losses is not met, companies may apply the new business continuity test. Under that test a business may carry forward its losses unless there has been a major change in its business activities.

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, limited 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 a related approved issuer levy regime
    - deductions from salary and wages
    - non-resident contractors' withholding tax.

BUDDLE FINDLAY

AUCKLAND
HSBC Tower, 188 Quay Street, PO Box 1433
Auckland 1140, New Zealand
DX • CP24024 P • 64 9 358 2555

WELLINGTON
Aon Centre, 1 Willis Street, PO Box 2694
Wellington 6140, New Zealand
DX • SP20201 P • 64 4 499 4242

CHRISTCHURCH
83 Victoria Street, PO Box 322
Christchurch 8140, New Zealand
DX • WX11135 P • 64 3 379 1747

buddlefindlay.com