Russell McVeagh

# Investing in New Zealand

April 2022

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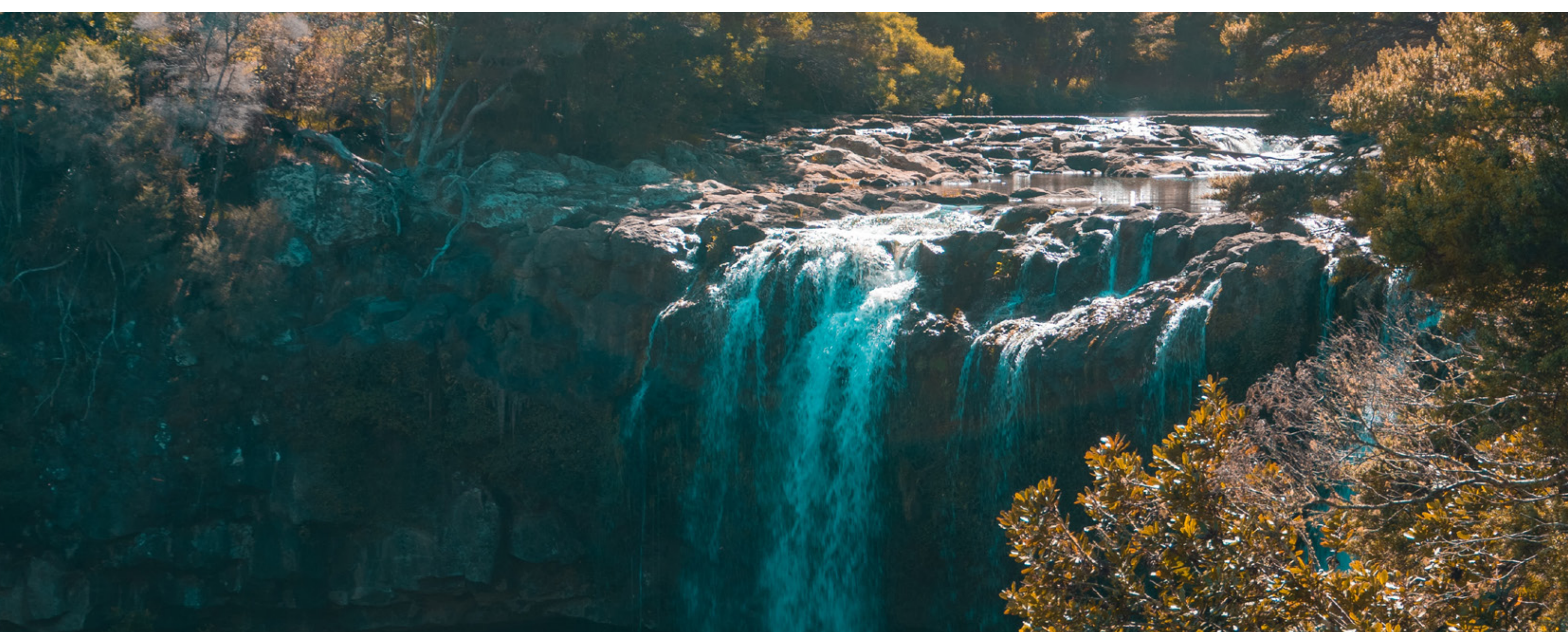

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# Introduction

This is a basic guide for those wishing to invest in New Zealand and provides a high-level summary of key topics that investors should be aware of, including New Zealand's overseas investment, competition law, taxation and employment regimes.

The information in this guide is correct as at April 2022.

Anyone considering investing in New Zealand should seek advice from Russell McVeagh on the specific details of their proposed investment.

This publication is intended only to provide a summary of the subject covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice. If you require any advice or further information on the subject matter of this newsletter, please contact the partner/solicitor in the firm who normally advises you, or alternatively contact one of our specialists listed at the end of this publication.

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## About Russell McVeagh

Widely regarded as New Zealand's premier law firm, Russell McVeagh is committed to operating on the cutting edge of legal practice. With an impressive track record of attracting clients from throughout Australasia and internationally, the firm acts for 6 of the NZX 10 companies, many of New Zealand's major corporates, including numerous energy and utilities companies, all of New Zealand's retail banks, and New Zealand's largest company and largest listed company.

All of our practice groups are respected as leaders in the market and we assist clients with their most complex, challenging and high-profile transactions. Russell McVeagh continues to be on almost every major transaction in the country (conflicts aside). Find out more about our expertise on our website.

We employ approximately 330 staff and partners across our Auckland and Wellington offices, and our lawyers are the best in their fields and recognised internationally for their expertise.

Our specialist lawyers broadly operate in the following teams:

(a) Mergers and Acquisitions and Corporate Advisory, including inbound Overseas Investment;

(b) Banking and Finance;

(c) Competition, Regulatory and Public Law;

(d) Property and Construction;

(e) Environment, Planning and Natural Resources;

(f) Litigation;

(g) Employment;

(h) PPP/Infrastructure;

(i) Tax;

(j) Technology;

(k) Intellectual Property; and

(l) Privacy, Cybersecurity and Data Protection.

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# 1 Introduction to New Zealand

Investing in New Zealand. April 2022

# 1. INTRODUCTION TO NEW ZEALAND

## Legal system

1.1 New Zealand has a common law legal system. As well as legislation made by Parliament and local rules made by local councils, the law is also made up of the common law, which is developed by judges as they make decisions in different cases. Legislation made by Parliament will always override common law.

1.2 The court system is a hierarchy of courts that includes two appeal courts (the Court of Appeal and the Supreme Court), whose decisions are binding on courts below them in the hierarchy.

## System of government

1.3 Although the British Queen remains New Zealand's head of state, New Zealand is a completely independent self-governing democracy. New Zealand adopted the Westminster system of government when it was a British colony and does not have a written constitution or a federal system.

1.4 Legislation is made by a single unicameral Parliament. All 120 members of Parliament are elected every three years using a Mixed-Member Proportional ("**MMP**") electoral system, which was adapted from Germany's electoral system. MMP means that many political parties are represented in Parliament, and a stable Government with the confidence of a parliamentary majority is usually formed by multiple parties entering coalition and/or confidence and supply arrangements, led by either the centre-right National Party or the centre-left Labour Party.

1.5 Government in New Zealand is open, accessible and accountable. The regulatory environment is relatively stable. All laws and key government decisions are usually made after public consultation where any interested person is welcome to make a submission. However, on occasion laws are passed very quickly and with minimal public input.

1.6 The small size of New Zealand and its government makes it easy to gain access to and communicate with Ministers, their officials and members of Parliament. Also, the political parties in Parliament forming the Opposition ensure that the Government is accountable for its actions.

1.7 Government in New Zealand is based on the principle of the rule of law, which means that any decisions made by Government must be in accordance with the law. Decisions made unlawfully can be challenged in the courts.

1.8 There is also a system of local government. Each city and region has its own local council which governs local matters and makes local decisions, such as decisions about planning controls, permitted uses and zoning and construction permits. However, legislation made by Parliament will always override any local rules made by local councils.

## Investing in New Zealand

1.9 From 1984, New Zealand underwent an intense period of deregulation. Government subsidies were removed, import regulations liberalised, tariffs slashed, exchange rates freely floated (i.e. no exchange controls remain in place), controls on interest rates and prices eliminated, and marginal rates of taxation reduced. New Zealand is now almost entirely unprotected by import controls and subsidies. Its agricultural sector is a world-leader in innovation, quality and efficiency and it manages to thrive against larger countries with very limited assistance from the Government.

1.10 New Zealand has strong trade relationships with Asia, the Pacific, the Americas and the European Union. It actively lobbies for free trade and the removal of anti-competitive restrictions. Significantly, in April 2008 New Zealand became the first country to negotiate a free trade agreement with China. On 24 March 2017, New Zealand's Ministry for Foreign Affairs and Trade set its trade policy for the next 10 to 15 years, which includes "continuing with urgency to build on our network of free trade agreements". Since then, New Zealand has been successful in negotiating the following free trade agreements and economic partnerships:

(a) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018);

(b) Upgrades to the New Zealand-China Free Trade Agreement (2019);

(c) Pacific Agreement on Closer Economic Relations (PACER) Plus, ratified to date by Australia, Cook Islands, Kiribati, Niue, Samoa, Solomon Islands and Tonga (2020);

(d) Regional Comprehensive Economic Partnership, with the 10 Association of Southeast Asian Nations (ASEAN) countries along with Australia, China, Japan and Korea (2022); and

(e) New Zealand - United Kingdom Free Trade Agreement (2022).

1.11 In addition, New Zealand is currently in the process of negotiating a comprehensive free trade agreement with the European Union.

1.12 New Zealand has become an attractive destination for overseas investment because it is one of the most deregulated, and least corrupt, economies in the world. It offers sound economic practices with good opportunities for solid growth. Since October 2015, New Zealand has also implemented an "Investment Attraction Strategy" to attract more high-quality foreign business investment to New Zealand.

1.13 Like other developed countries, New Zealand has an established overseas investment regime which requires foreign investors to obtain approval for certain transactions. Not all transactions require approval and whether consent is required will depend on the nature and value of the investment. Overseas investors must also comply with all relevant commercial law in New Zealand.

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# 2 Overseas Investment Regime

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## 2. OVERSEAS INVESTMENT REGIME

### Introduction

2.1 The Overseas Investment Act 2005 ("**OIA**") and the Overseas Investment Regulations 2005 ("**Regulations**") establish the framework for the overseas investment regime in New Zealand. The Overseas Investment Office ("**OIO**") oversees the regime and is responsible for assessing, and in many cases deciding, applications from overseas investors who intend on making investments in New Zealand that are caught by one of the various pathways under the OIA.

2.2 New Zealand's overseas investment regime is notorious for being one of the most complex in the world, however, well advised investors can expect to navigate it successfully in the vast majority of cases. The regime seeks to find the appropriate balance between encouraging beneficial overseas investment in New Zealand and protecting New Zealand's interests. OIO consent is not always required, but when it is required the application process is relatively intensive, and the time required to obtain consent (which can be anywhere from six weeks to six months, or longer) will need to be factored into the relevant transaction's settlement timetable.

2.3 The key factors which determine whether OIO consent is required are whether the applicant is an "overseas person" and whether the transaction will result in an overseas investment in:

(a) "significant business assets";

(b) "sensitive land" (which includes any residential land, farm land and certain forestry rights); or

(c) fishing quotas.

2.4 Certain transactions and investors who require consent may also be subject to a separate "national interest" test, which grants the Minister of Finance a broad discretion to prohibit or impose conditions on transactions that otherwise require consent and which are considered contrary to New Zealand's national interest.

2.5 Even in cases where OIO consent is not required under the usual significant business assets or sensitive land pathways, investors will still need to consider whether the transaction involves New Zealand land or assets that are used in a "strategically important business". If so, the transaction will be subject to a "national security and public order call-in power", which allows the Minister of Finance to call in the transaction for review and to block, impose conditions on, or unwind the transaction if the Minister considers it poses a significant risk to New Zealand's national security or public order.

### Overseas Persons

2.6 Under the OIA, an overseas person includes:

(a) any person who is not a New Zealand citizen or ordinarily resident in New Zealand; and

(b) any body corporate that is incorporated, registered or established outside New Zealand; and

(c) any company, partnership, body corporate or trust, which is, in the case of any entities referred to in (b) and (c), more than 25% directly or indirectly owned or controlled by overseas persons; and

(d) any managed investment scheme the manager of which is an overseas person.

2.7 Alternative tests apply to New Zealand incorporated and listed issuers and certain managed investment schemes.

### Significant Business Assets

2.8 An overseas investment in "significant business assets" occurs, in summary, where:

(a) in the case of an acquisition of securities, an overseas person acquires a more than 25% ownership or control interest, or increases an existing more than 25% ownership or control interest to a 50% or 75% or more ownership or control interest, or to a 100% ownership or control interest, in the target entity, and:

(i) the target is a New Zealand entity and the value of the securities acquired or the consideration provided for those securities, exceeds NZ$100 million; or

(ii) the value of the target entity's assets in New Zealand, and the New Zealand assets of the target entity's more than 25% direct and indirect owned and controlled entities (regardless of where they are established) exceeds NZ$100 million; or

(iii) the target entity has a more than 25% direct or indirect ownership or control interest in one or more New Zealand entities, which, directly or indirectly through their more than 25% owned or controlled entities (regardless of where they are established) have assets anywhere in the world the value of which exceeds NZ$100 million; or

(b) an overseas person acquires assets in New Zealand and the total consideration provided (in aggregate in respect of related or linked transactions) exceeds NZ$100 million; or

(c) an overseas person establishes a business in New Zealand where the business is carried on for more than 90 days in any year, and the total expenditure expected to be incurred, before commencing the business, in establishing the business, exceeds NZ$100 million.

Note the NZ$100 million threshold referred to above may be set at a higher amount (currently NZ$200 million) if the overseas person is domiciled in a country that has obligations to New Zealand under various international agreements, as set out in paragraph 2.49. In addition, the above thresholds are significantly higher for Australian "non-government" entities (NZ$560 million for the year to 31 December 2022, adjusted upwards annually for inflation).

### Investor test

2.9 If consent is required for an investment in significant business assets, the investor must meet the investor test ("**Investor Test**"). The Investor Test is structured as a negative 'bright line' test, which is met if none of a list of "character" and "capability" factors are met or, notwithstanding that a factor is met, the OIO is nevertheless satisfied that the person is not unsuitable to own or control sensitive New Zealand assets. These factors are aimed at determining whether the relevant entities and persons are suitable to own or control sensitive New Zealand assets.

2.10 Each 'relevant overseas person' and each "individual with control" in respect of the overseas investment must pass the Investor Test:

(a) The 'relevant overseas person(s)' are the entity making the investment (e.g. the purchaser of the qualifying interest in sensitive land or business assets) and any upstream entities that will make or control key decisions in respect of the investment (such as the decision to enter into the transaction, any future decision to divest of the investment, material capital and operating expenditure in respect of the investment, and day to day decision-making in respect of the investment).

(b) The 'individuals with control' in respect of an overseas investment are the individuals who control the 'relevant overseas person(s)' – usually the board of directors of those persons, and may also include members of executive management with the power to make material decisions in respect of the investment.

2.11 Much of the OIO's focus in respect of the Investor Test is on the ownership and control structure for the investment and identifying the correct entities and individuals who should be subject to the test.

2.12 The Investor Test will be met if each "relevant overseas person" and each "individual with control" meets the following character and capability factors:

*Character factors*

(a) has not been sentenced to imprisonment for a term of five years or more (at any time);

(b) has not been sentenced to imprisonment for a term of 12 months or more (within the last 10 years);

(c) if not an individual, has not been convicted of an offence for which the person has been sentenced to pay a fine;

(d) has not been ordered by a court to pay a civil pecuniary penalty in respect of a contravention of any enactment;

(e) has not had a penalty imposed for a contravention of the OIA or the Regulations;

(f) has not been the subject of any other proceedings commenced against the person for any offence, or contravention of an enactment, that carries a penalty corresponding to those listed above;

(g) has not entered into an enforceable undertaking or an equivalent agreement with any regulator in respect of any contravention or alleged contravention of any enactment;

*Capability factors*

(h) is not prohibited from being a director, promotor, or manager of a company;

(i) has not been liable to pay a penalty for tax avoidance or evasion; and

(j) does not have outstanding unpaid tax of NZ$5 million or more.

If any of the above factors apply, the Investor Test may still be met if the OIO is otherwise satisfied that this does not make the investor unsuitable to own or control sensitive New Zealand assets.

### Sensitive Land

2.13 An overseas investment in "sensitive land" is the acquisition by an overseas person, either directly or indirectly through an acquisition of securities, of a qualifying interest in "sensitive land".

2.14 Qualifying interests include (but are not limited to) freehold title, leases with a total term (including rights of renewal and historic interests) of three years or more (for residential land) or ten years or more (for other sensitive land) and certain profits à prendre with a total term of ten years or more.

2.15 Investments in securities will be treated as an investment in sensitive land requiring consent under the OIA where they result in the acquisition of a more than 25% direct or indirect ownership or control interest in an entity, or an increase in an existing more than 25% ownership or control interest to a 50% or 75% or more ownership or control interest, or to a 100% ownership or control interest, in an entity, where that entity has a qualifying interest in sensitive land.

2.16 "Sensitive land" includes (but is not necessarily limited to):

(a) residential land being land that is categorised as "residential" or "lifestyle" in the relevant local authority's District Valuation Roll, and residential flats;

(b) non-urban land (e.g. farming or other agricultural or horticultural blocks) of more than five hectares; and

(c) land adjoining a variety of other types of land of a certain size (e.g. national parks, historic places, foreshore or land subject to heritage orders).

2.17 If consent is required by an overseas investor for an investment in sensitive land, the investor will need to meet the Investor Test described above, and usually will also need to satisfy the OIO that the investment will result in a net benefit to New Zealand (the "**Benefit Test**").

*Benefit to New Zealand test*

2.18 The Benefit Test assesses the likely benefits of a proposed overseas investment against seven broad categories, or 'benefit factors', when compared to the current state of affairs (at the earlier of the time the transaction is entered into or the date that the application for consent is made).

2.19 The seven categories of benefit factors are:

(a) **Economic benefits** – for example: the creation of new jobs (or retention of jobs which would otherwise be lost); the introduction of new technology or business skills; increased productivity; increased export receipts; increased processing of primary products; and a reduced risk of illiquid assets.

(b) **Environmental benefits** – for example: protection of indigenous flora and fauna; improved water quality; and erosion control.

(c) **Public access** - to the sensitive land, or to the features giving rise to the sensitivity.

(d) **Protection of historic heritage** - in or on the relevant land.

(e) **Advancing one or more significant government policies.**

(f) **An increase in the oversight or participation by New Zealanders in the investment.**

(g) **Other benefits** - that are likely to arise from the investment but which do not fit within one of the other factors.

2.20 In order to satisfy the Benefit Test, the investor must submit an "investment plan" with its application, describing:

(a) the current state of the relevant land/assets, and how they are currently being used by the present owner;

(b) what the investor plans to do with the assets over a certain (e.g. three to five year) time horizon; and

(c) the net benefits to New Zealand that will arise from the investment when compared to the current state and use of the land/assets, with particular reference to the benefit factors above that are relevant to the investment and the investor's investment plans.

2.21 The investor must be sufficiently certain of, and committed to, its investment plans so as to satisfy the OIO that the net benefits claimed by the investor are "likely" to occur. In practice, this means that benefits claimed by investors must be expressed as firm commitments in order for them to be given weight by the OIO. The OIO will make those commitments conditions of its consent to the investment. Fulfilment of those conditions will be monitored by the OIO's monitoring and enforcement teams after completion of the investment.

2.22 In assessing the benefits to New Zealand associated with an overseas investment, the OIO is required to take a proportionate approach, meaning that the benefits required to be established by an investor must be proportionate to the sensitivity of the land, the size and nature of the land, and the nature of the overseas investment (including the particular interest in land being acquired, e.g. leasehold or freehold).

### Residential land

2.23 Residential land is land that is categorised as 'residential' or 'lifestyle' by the relevant local authority's District Valuation Roll and residential flats.

2.24 In order to obtain consent to acquire residential land, an overseas person must demonstrate that (and will be subject to conditions of consent requiring that):

(a) if an individual, they will commit to reside, and become a tax resident, in New Zealand; or

(b) housing supply will be increased as a result of the investment; or

(c) the residential land is being acquired for conversion to a non-residential use; or

(d) the residential use is incidental to a relevant business use; or

(e) that the acquisition will be beneficial to New Zealand (i.e. meet the Benefit Test described above).

### Farm land

2.25 Due to its special importance and significant economic and cultural value to New Zealand, special rules apply to overseas investments in "farm land".

2.26 Farm land is defined broadly as land that is used exclusively or principally for agricultural, horticultural or pastoral purposes, or for the keeping of bees, poultry or livestock. It can capture a wide range of agricultural land uses, from dairy farms, to greenhouses, orchards and vineyards.

2.27 In order to ensure that New Zealanders have been given sufficient opportunity to purchase the relevant farm land, farm land must generally be advertised on the open market before the overseas person enters into a transaction to acquire that land, although exemptions can be applied for in certain limited circumstances.

2.28 The Benefit Test is also analysed differently by the OIO and Ministers for farmland with a total area of more than five hectares. In particular:

(a) the economic benefit factors and oversight or participation by New Zealanders benefit factors are required to be given high relative importance; and

(b) the investor must show that the benefit to New Zealand will be, or is likely to be, 'substantial' (which in practice is a materially higher threshold).

### Fishing quotas

2.29 Commercial fishing in New Zealand is controlled by the Fisheries Act 1996 ("**Fisheries Act**"), which establishes a quota management system. Most commercial fishing cannot be undertaken within New Zealand's territorial waters without the ownership of a fishing quota. The OIA and Regulations, in conjunction with the Fisheries Act, prohibit overseas persons from having an interest in a fishing quota or an interest through a business that, directly or indirectly, owns or controls a fishing quota, unless consent is obtained. The criteria for consent for an overseas person to obtain an interest in a fishing quota is generally similar to the criteria for an investment in sensitive land, including that the investor test and the benefit to New Zealand test must be met.

### Forestry

2.30 Overseas investments in forestry, such as the acquisition of a freehold or leasehold interest in bare land that is to be converted to plantation forest, the purchase of an existing forest, forestry lease or forestry right, or an investment in a forestry business, require consent under the OIA. An overseas person may purchase up to 1,000 hectares of forestry rights per calendar year, or any forestry right of less than three years duration, without consent.

2.31 Forestry investors can take advantage of a simplified Benefit Test where the land "will be or is likely to be used exclusively or nearly exclusively, for forestry activities" (i.e. maintaining, harvesting or establishing a crop of trees), and there is a commitment to replant following harvest. The simplified Benefit Test can be met by committing to maintain existing arrangements for supply of logs to New Zealand processors and existing environmental protections. The applicant is not required to show any additional benefit resulting directly from the investment.

2.32 If the relevant land includes any existing homes on residential titles, those homes can either be retained for staff accommodation or removed for the purposes of the forestry business.

2.33 In February 2022 the Government announced an intention to pass legislation later in the year which will require an overseas investor looking to acquire land for conversion to production forestry to apply for consent under the standard Benefit Test. The proposed changes will also clarify that the simplified forestry Benefit Test is not available for permanent carbon forestry.

### National interest test

2.34 In addition to the Investor Test and, if applicable, the Benefit Test, applications for consent may also be assessed by the OIO and Minister against "national interest" considerations (the "**National Interest Test**").

2.35 The National Interest Test mandatorily applies where the investment:

(a) relates to land or assets used in a "strategically important business"; or

(b) will result in one or more "non-New Zealand government investors" from a single country acquiring a more than 25% direct or indirect ownership or control interest in the target business or assets.

2.36 A "strategically important business" is a business that is involved in ports, airports, or electricity generation, distribution, metering or aggregation, provides a large or medium drinking water supply, provides a wastewater or sewerage network, or disposes of sewage or storm water, is involved in telecommunications infrastructure or services, is a New Zealand registered bank or involved in financial market infrastructure, is a media business with significant impact, or owns or controls high-risk critical national infrastructure.

2.37 The "non-New Zealand government investor" definition is complex, but in broad terms an entity will be considered a non-New Zealand government investor if it is, or its upstream owners are, more than 25% owned or controlled, directly or indirectly, by one or more government related entities (such as sovereign wealth funds, SOEs, public pension funds (national/federal, state or municipal) and/or their associated entities) from a single country.

2.38 The Minister also has residual discretion to review under the National Interest Test any other investment that is the subject of an application for consent and which the Minister considers may pose risks to New Zealand's national interest. As such, the Government has a broad discretion to prohibit a transaction proposed to be undertaken by investors on "national interest" grounds, even if the investor otherwise meets the Investor Test and, if applicable, the Benefits Test. Potential factors that could trigger the application of the National Interest Test include if the proposed investment:

(a) has foreign government or associated involvement that is below the 25 per cent threshold but grants that government (or its associates, or both) disproportionate levels of access or control to sensitive New Zealand assets;

(b) would grant an investor significant market power within an industry or result in vertical integration of a supply chain; or

(c) is potentially inconsistent with government objectives, for example environmental or economic objectives.

2.39 The National Interest Test will be used to block or restrict an overseas investment transaction rarely and "only where necessary to protect New Zealand's core national interests". The rebuttable presumption is that overseas investment is in New Zealand's national interest, and hence the new test is similar to Australia's 'not contrary to the national interest' test under the Foreign Investment Review Board regime.

2.40 If a transaction is determined to be contrary to the national interest, consent may be declined, conditions may be imposed on a consent, or the investor may be required to enter into enforceable undertakings with the OIO to mitigate any perceived risks.

## National security and public order regime

2.41 The OIA also contains a national security and public order ("**NSPO**") call-in regime, which applies to investments that do not otherwise require consent and that involve the acquisition of interests in "strategically important business" assets and infrastructure. Notification to the Minister (via the OIO) is mandatory for certain categories of strategically important business, and discretionary for other categories.

2.42 For the purposes of the NSPO regime, the definition of "strategically important business" (see paragraph 2.36 above) is extended to include businesses that develop, produce, maintain or otherwise have access to data sets of "sensitive information" in respect of 30,000 or more individuals (generally accepted as New Zealand individuals only). "Sensitive information" includes genetic, biometric and health information, financial information of individuals used to determine an individual's financial position or credit score, and information that relates to the sexual orientation or sexual behaviour of individuals. This test will often be triggered in certain sectors (such as financial services (e.g. insurance) and health (e.g. medical practices)).

2.43 It is mandatory to notify the OIO of an investment in a business that researches, develops, produces, or maintains military or dual-use technology or is a critical direct supplier to the New Zealand Defence Force or a national intelligence or security agency.

2.44 It is recommended, but not mandatory, to notify the OIO of any other types of national security transactions (e.g. investments in businesses involved in ports or telecommunications or which holds qualifying data sets of "sensitive information").

2.45 The NSPO regime applies regardless of the size of the original interest acquired (except where the target business is a media business or listed issuer) or the value of that interest. Subsequent acquisitions in the "strategically important business" will only be caught by the NSPO regime if the acquisition results in the overseas person acquiring a more than 25%, 50% or 75% ownership or control interest, or a 100% ownership or control interest.

2.46 If a mandatory or voluntary notification is made and the investor receives clearance, the investment will have 'safe harbour' protection and will not be scrutinised again by the OIO. In the case where notification is voluntary, if an investor chooses not to notify the OIO of a national security transaction, the investment may be "called-in" and reviewed by the OIO at any later point. This could result in the transaction being unwound if the Minister of Finance deemed that necessary to protect against risks to New Zealand's national security and public order. As such, it will be up to the investor to weigh the benefit of not notifying a transaction to the OIO with the risk that the transaction be unwound in the future.

2.47 Once a national security transaction is notified or called-in, the Minister will review the transaction for national security and public order risks. This is a higher threshold than the National Interest Test, and, as such, the vast majority of notified call-in transactions should proceed without intervention. However, if the Minister determines that the transaction gives rise, or is likely to give rise, to a significant risk to national security or public order, it may:

(a) impose any conditions on the transaction that it considers appropriate to manage those perceived risks (such as undertakings to ensure the security of sensitive information);

(b) prohibit the transaction from proceeding, if the Minister reasonably considers that the perceived risk cannot be adequately managed through the imposition of conditions; or

(c) if the transaction has already completed, require disposal of the relevant securities owned by the overseas person or associate, if the Minister reasonably considers that the perceived risk cannot be adequately managed through the imposition of conditions.

### Exemptions

2.48 The Regulations exempt specific classes of transactions or persons from the requirement for consent. These exemptions cover a range of instances where the nature of the interest acquired does not warrant regulatory oversight (for example, mortgages in the ordinary course of business, custodian shareholding and transfers of certain types of sensitive land interests between overseas persons). There are also exemptions for intra-group corporate restructurings. Investors can also apply for discretionary specific exemptions.

2.49 In addition to the above, the Regulations provide exemptions or alternative thresholds for overseas persons that are individuals or enterprises with significant business assets from the following countries/separate custom territories: Australia; Brunei; Canada; Chile; China; Japan; Mexico; Singapore; Taiwan; The Republic of Korea; and Vietnam. Generally, the thresholds for an overseas investment in significant business assets for individuals or enterprises from the above countries have increased from NZ$100 million to NZ$200 million. The monetary threshold for Australian non-Government investors is significantly higher (NZ$560 million for the year to 31 December 2022), and is inflation adjusted annually.

# Key Contacts

## Overseas Investment Regime

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# 3 Competition Law

Investing in New Zealand. April 2022

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# 3. COMPETITION LAW

## Introduction

3.1 In New Zealand, the Commerce Act 1986 ("**Commerce Act**") prohibits conduct that restricts or lessens competition. The Commerce Act is administered by the New Zealand Commerce Commission ("**NZCC**"), the regulator that regulates restrictive trade practices and merger control. The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers in New Zealand. Breaches of the Commerce Act can result in significant pecuniary penalties, damages, and injunctions.

## Restrictive Trade Practices

*Anti-competitive contracts, arrangements or understandings*

3.2 The Commerce Act prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. Depending on the effect (or intended effect) on competition, exclusive dealing arrangements, product tying arrangements, refusals to deal, loyalty rebates, or best price agreements may all be considered under this prohibition.

*Cartel contracts, arrangements or understandings*

3.3 As of April 2021, intentionally entering into or giving effect to a contract, arrangement, or understanding ("together **cartel agreement**") with a competitor is a criminal offence, subject to:

(a) prison sentences of up to seven years; and/or

(b) for individuals, a criminal fine of up to $500,000, and for businesses, a criminal fine up to the greater of $10 million; three times the commercial gain from the offending; or 10% of the company's turnover).

3.4 Furthermore, the pre-existing civil prohibition on cartel agreements (which does not require any element of intention) remains in force (subject to civil penalties of up to $500,000 for individuals, and for businesses, civil penalties up to the greater of $10 million; three times the commercial gain from the offending; or 10% of the company's turnover).

3.5 A cartel agreement can include any price fixing, output restriction, or market allocation agreement between competitors. The NZCC is not required to show that the agreement had any effect on competition in a market. Therefore, even a cartel agreement between the two smallest competitors in a market (whether intentional or not), or an attempt to reach a cartel agreement, will breach the Commerce Act.

3.6 Businesses must take care when communicating with competitors, including customers or suppliers who are potential competitors, and be careful when entering vertical relationships with competitors.

3.7 There are some limited exceptions to the cartel prohibition for agreements that occur in the context of a "collaborative activity" between competitors (akin to a joint venture exception), or in the context of vertical supply contracts. However, these exceptions are technical, and so reliance on them needs to be considered carefully. The criminal regime has introduced a defence to criminal (but not civil) liability if the defendant reasonably believed that one of the specific exemptions to cartel liability applied. However, the defence will not apply if the defendant's belief is based on "ignorance, or mistake, of any matter of law". Therefore, to rely on the exception to criminal liability, it is necessary that an individual/business has considered the exceptions (which is likely to require having taken legal advice).

*Misuse of Market Power*

3.8 Companies with a substantial degree of market power must take extra care. The current law prohibits a company with a substantial degree of market power from taking advantage of that power for an anticompetitive purpose ("**purpose-based test**"). Refusing to supply on competitive terms, or aggressive responses to competitors' actions, such as selling below cost, or in some cases bundled discounts, may constitute taking advantage of market power where the NZCC can show that the company would not have acted that way if it were subject to effective competition. An amendment to this purpose-based misuse of market power test is under consideration by the New Zealand Parliament and is expected to be enacted in March or April 2022. The proposed reform would prohibit a firm with a substantial degree of market power from engaging in any conduct that has the purpose, effect or likely effect of substantially lessening competition in a market, aligning the misuse of market power prohibition with the equivalent Australian prohibition that was introduced in 2017.

*Resale price maintenance*

3.9 Under the Commerce Act, it is illegal for a person to set minimum, or specific, prices at which a reseller must resell that person's goods. Resellers must retain their own discretion to resell stock at any prices. However, setting a maximum price is allowed, and recommended resale prices are permitted so long as they are a genuine recommendation (i.e. no steps are taken to induce a reseller to comply with a recommended price point).

*Jurisdiction*

3.10 The Commerce Act extends to international parties who engage in conduct outside New Zealand so long as:

(a) the person is resident in, or carries on business in, New Zealand; or

(b) a person in New Zealand acts at their direction, and the conduct relates to New Zealand; or

(c) where any part of a prohibited act occurs in New Zealand (the Commerce Act deems the whole of that act to have occurred in New Zealand).

3.11 The conduct must affect a "market" in New Zealand, unless there is an allegation of misuse of market power, in which case an Australian market can also be relevant.

## Business Acquisitions

*The prohibition*

3.12 The Commerce Act prohibits business mergers or acquisitions that have, or would be likely to have, the effect of substantially lessening competition in a market in New Zealand. The NZCC considers a substantial lessening of competition to occur if:

(a) the merger removes a competitor that provided a competitive constraint, resulting in the ability for the merged firm to profitably increase prices; or

(b) the merger increases the potential for the merged firm and all or some of its remaining competitors to coordinate their behaviour so that output reduces and/or prices increase across the market.

*Overseas transactions*

3.13 The prohibition can apply to mergers or acquisitions outside of New Zealand, where a merger or acquisition may affect a market in New Zealand irrespective of whether the parties themselves are a resident in, or carry on business in, New Zealand. Therefore, if an overseas business sells into New Zealand, and it is looking to acquire another entity in the same or a related industry that also sells in New Zealand, it is prudent to assess whether competition issues could arise under the Commerce Act.

3.14 There are also mechanisms in the Commerce Act to assist the NZCC to enforce against such overseas transactions, for example, mechanisms whereby the NZCC can obtain orders requiring downstream New Zealand businesses to cease carrying on business in New Zealand, or to dispose of assets, if the High Court declares that an overseas transaction would substantially lessen competition in a market in New Zealand.

*NZCC operates a "voluntary" notification regime*

3.15 Unlike many other jurisdictions, there are no formal market share or revenue thresholds when the NZCC must be notified of an acquisition. Parties can (but are not obliged to) seek the NZCC's clearance for a proposed acquisition. This puts the onus on the parties to self-assess whether a particular acquisition could potentially be regarded as having an adverse impact on competition.

3.16 If parties proceed with an acquisition without seeking the approval of the NZCC, and the NZCC considers that an acquisition could have an adverse impact on competition, the NZCC may choose to open an investigation, and it has a range of enforcement options at its disposal, including taking High Court proceedings to seek an injunction to prevent the acquisition occurring, pecuniary penalties, or divestment of assets.

*Concentration indicators*

3.17 The NZCC has published market share indicators as an initial screen to identify acquisitions that are likely to warrant close consideration. These concentration indicators are where the combined entity will, post-acquisition, have:

(a) a market share over 40% in a non-concentrated market (i.e. where the three largest firms in the market post-acquisition have a combined market share of less than 70%); or

(b) a market share over 20% in a concentrated market (i.e. where the three largest firms in the market post-acquisition have a combined market share of more than 70%).

3.18 The NZCC stresses that these indicators are only initial guides, and ultimately whether an acquisition gives rise to competition concerns will depend on the specific market dynamics.

*Clearances/Authorisations*

3.19 A purchaser may seek formal clearance from the NZCC for an acquisition. Purchasers typically consider seeking formal clearance where an acquisition exceeds the concentration indicators, or where there are other factors that suggest potential material impacts on competition.

3.20 The NZCC will grant clearance for a merger or acquisition where it is satisfied that the transaction would not be likely to substantially lessen competition in the relevant markets. A clearance will provide the applicants with immunity from proceedings under the Commerce Act in respect of the merger or acquisition. Acquisitions cannot be cleared retrospectively so clearance must be obtained prior to execution of a binding agreement that is not conditional on NZCC clearance.

3.21 Alternatively, parties may apply for an authorisation if they consider that the merger or acquisition may substantially lessen competition in a market, but nevertheless is likely to result in public benefits that outweigh that lessening of competition. This typically involves a more complex and lengthy process than a clearance application. Again, authorisation cannot be sought retrospectively.

3.22 Where a transaction has been cleared or authorised, immunity from Commerce Act proceedings is valid for 12 months only. If the transaction is not completed within this timeframe, the parties must apply again for clearance or authorisation, or alternatively bear the risk of Commerce Act scrutiny.

*Due diligence*

3.23 Where a purchaser and target are direct competitors, confidentiality protocols will likely be required to ensure that the exchange of information through due diligence does not give rise to a breach of the Commerce Act.

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# 4 Takeover Regulations

Investing in New Zealand. April 2022

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## 4. TAKEOVERS REGULATION

4.1 The primary rules governing takeover activity in New Zealand are contained in the Takeovers Code ("**Code**") and the Takeovers Act 1993 ("**Takeovers Act**"). The relevant regulator, the Takeovers Panel, has jurisdiction in relation to takeovers which are governed by the Code and has certain powers where it suspects a breach or intended breach of the Code.

4.2 It is also possible to obtain exemptions from the Code through exemption notices issued by the Takeovers Panel in relation to a specific transaction or a class of persons or transactions, where the broad and prescriptive nature of the Code results in unintended or unusual consequences or where compliance with the Code would not be possible.

4.3 In addition to the Code and the Takeovers Act, the Companies Act 1993 ("**Companies Act**") provides for schemes of arrangement which are discussed in paragraph 4.9 below, and there are also a number of additional rules and laws which may be applicable, some of which are discussed below in paragraphs 4.10 and 4.11.

### Takeovers Code

4.4 The Code regulates the change in control of voting rights in "code companies". The Code defines a "code company" to mean a company (as defined below) that:

(a) is a listed issuer that has financial products that confer voting rights quoted on a licensed market (e.g. the NZX Main Board); or

(b) was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in the Code; or

(c) has 50 or more shareholders and 50 or more share parcels and has total assets of at least $30 million or total revenue of at least $15 million.

4.5 For the purposes of the Code, a "company" is a company incorporated under the Companies Act. Therefore, the Code does not extend to overseas companies or other forms of business organisations such as unit trusts. However, the takeover provisions in the NZX Listing Rules ("**Listing Rules**") will apply to those entities which are listed on the NZX as their Home Exchange (which require certain notice and pause requirements).

4.6 The "fundamental rule" in the Code prohibits any person:

(a) from holding or controlling more than 20% of the voting rights in the code company; or

(b) increasing an existing holding or control of 20% or more of the voting rights in a code company.

4.7 The fundamental rule extends to groups of people who act jointly, or in concert, or join together as associates or otherwise indirectly hold or control the voting rights in a company, to prevent avoidance of the code.

4.8 The Code contains exceptions to the fundamental rule. A person may become the holder or controller of an increased percentage of the voting rights in a code company without contravening the fundamental rule:

(a) by an acquisition under a "full offer" made in compliance with the Code (i.e. for all of the voting securities of the code company);

(b) by an acquisition under a "partial offer" made in compliance with the Code (i.e. for less than 100% of the voting securities of the code company);

(c) by an acquisition of voting securities in the code company or in any other body corporate approved by ordinary resolution of the code company's shareholders in accordance with the Code;

(d) by an allotment of voting securities in the code company or in any other body corporate which is approved by ordinary resolution of the code company's shareholders in accordance with the Code;

(e) in accordance with the "5% creep" exception, which, in general terms, enables a person holding more than 50% but less than 90% of the voting rights in a code company to acquire up to an additional 5% in a 12-month period; or

(f) if the person already holds or controls 90% or more of the voting rights in a code company.

4.9 The Code aims to ensure that all shareholders are treated equally in a takeover and are able to make informed decisions as to whether to accept or reject an offer. One way the Code seeks to achieve this aim is to require that certain information is sent to shareholders. For example, when a takeover offer is made, the target code company is required to commission an independent adviser's report on the merits of the offer (a copy or summary of which must be provided to shareholders of the target company along with the target company statement (which contains the board's recommendation to shareholders whether or not to accept the offer) that must be sent by or on behalf of the target company to its shareholders).

4.10 To undertake compulsory acquisition of all the voting securities of a code company, the person must hold or control 90% or more of the voting rights in the code company.

### Schemes of arrangement

4.11 An alternative option to making a full takeover over offer under the Code is to undertake a court-approved scheme of arrangement under Part 15 of the Companies Act. A scheme of arrangement involving a code company is required to be approved by:

(a) 75% of the votes of the shareholders in each interest class entitled to vote and voting on the resolution; and

(b) a majority of the votes of all shareholders entitled to vote (irrespective of whether or not they do in fact vote).

4.12 In effect, if a party only wishes to acquire "all or nothing", this reduces the threshold to acquire 100% of the voting securities from 90% (by way of acceptances under a "full" takeover offer made under the Code, before the compulsory acquisition procedures in the Code can be invoked) to 75% approval of shares voting under the Companies Act provided such votes comprise more than 50% of all votes able to be cast on the resolution. The court must be satisfied that the use of a scheme will not adversely affect the shareholders of the code company (as opposed to using the Code), or the Takeovers Panel must have provided a statement that is has no objection to the scheme.

## Other requirements

4.13 Under the Financial Markets Conduct Act 2013, a person with a direct or indirect interest in 5% or more of a class of quoted voting products (effectively any security which is quoted and which carries voting rights, including securities convertible into such voting securities) of a "listed issuer" is required to disclose when it first obtains the substantial holding, any movement of 1% or more in that holding, and when it ceases to have a substantial holding. Disclosure must be made to NZX Limited (as operator of the licensed market) and to the listed issuer itself. Under a takeover, the offeror, and all other persons with a relevant interest may be required to make substantial product holder filings during the offer period as offerees take up the offer.

4.14 Where a takeover or scheme of arrangement includes the offer of financial products in New Zealand (for example, as consideration for the offer), the disclosure requirements under the Financial Markets Conduct Act 2013 and related regulations will need to be considered, including as to whether an applicable exemption to such disclosure requirements might apply (or a specific exemption may need to be sought).

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# 5 Taxation

Investing in New Zealand. April 2022

# 5. TAXATION

## Introduction

5.1 New Zealand's tax policy settings have been stable during the past decade or so and (with some exceptions) are simpler than is the case in some jurisdictions. The two principal taxes are the income tax (which includes tax on the income of corporations) and the goods and services tax. Excise duties apply to a limited category of goods: certain fuels, tobacco and alcoholic beverages. New Zealand has a unitary (rather than a federal) system of government and all taxes are levied by the central government (i.e. there are no separate state or provincial taxes (other than certain local or regional authority rates levied on the value of real property)).

5.2 New Zealand has a double tax agreement ("**DTA**") network of some 40 DTAs, covering almost all of our major trading partners. DTAs are currently in force with Australia, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Fiji, Finland, France, Germany, Hong Kong, India, Indonesia, Ireland, Italy, Japan, the Republic of Korea, Malaysia, Mexico, the Netherlands, Norway, Papua New Guinea, the Philippines, Poland, the Russian Federation, Samoa, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan (consistently with New Zealand's one China policy, the parties to this DTA are the New Zealand Commerce and Industry Office and the Taipei Economic and Cultural Office in New Zealand), Thailand, Turkey, the United Arab Emirates, the United Kingdom, the United States of America and Vietnam. New Zealand is also negotiating DTAs with certain other jurisdictions.

5.3 New Zealand has no general capital gains tax, although the definition of income includes profits and gains from certain transactions (notably involving personal property, land and financial arrangements) that would otherwise be capital in nature. One of the important cases in which a capital gain is deemed to be income is the so-called "bright-line test" applicable to the proceeds of sale of residential property. A gain made in circumstances where a residential property (other than the person's principal residence) is bought and sold within ten years is deemed to be income even if it would otherwise be a capital gain. A shorter timeframe may apply depending on when the property was acquired or on what type of property is involved.

5.4 New Zealand has no inheritance tax, wealth tax, gift tax, stamp duty or payroll tax. There are no current proposals to introduce such taxes.

5.5 A Government appointed Tax Working Group undertook a review of the tax system, culminating in the release of its final report in early 2019. The report's most significant recommendation was the introduction of a comprehensive tax on capital gains. The Government, however, rejected that recommendation. It is now the policy of both of New Zealand's major political parties not to introduce a comprehensive capital gains tax.

5.6 The income tax rate for companies (resident and non-resident) is 28%. Individuals are subject to taxation at progressive marginal rates, with the top rate (for income in excess of $180,000) being 39%. Trustees (other than of unit trusts, which are taxed as companies) are taxed at 33% on trustee income.

5.7 New Zealand resident individuals are generally subject to New Zealand tax on their worldwide income, with a credit being allowed for foreign tax. Individuals who become New Zealand tax resident for the first time or (in certain cases) after a period of at least 10 years as a non-resident, may qualify for transitional resident status. Transitional resident status applies for (approximately) the first four years during which a person is New Zealand resident, and provides an exemption from New Zealand tax for most non-New Zealand sourced income the person derives during that period.

## Income tax - principal features of corporate taxation

5.8 Companies resident in New Zealand generally pay tax on their worldwide income, the main exception being that a participation exemption applies to dividends received from a foreign company in which the New Zealand resident company holds a voting interest of at least 10%. Non-resident companies are subject to tax on any income derived from New Zealand. Income tax is levied on annual gross income less annual total deductions and any losses brought forward from prior years or offset from companies in the same group. The resulting net amount is the taxable income.

5.9 A full imputation system enables New Zealand resident companies to attach to dividends credits for tax paid by them. Dividends received by a New Zealand resident company from another New Zealand resident company (other than where those companies are wholly owned) are assessable for tax. Imputation credits received with dividends may be used to offset the recipient company's tax liability.

## Income tax - taxation of foreign investment into New Zealand

*Withholding tax on dividends, interest and royalties*

5.10 Dividends, interest and royalties paid to non-residents are subject to New Zealand non-resident withholding tax. An exception for non-resident withholding tax applies to interest paid to a non-resident in connection with a business it carries on through a New Zealand branch. There is also an exception for interest paid to a non-resident carrying on business in New Zealand as a registered bank.

5.11 New Zealand does not have an exemption from interest withholding tax for widely held debt. There is, however, an option for borrowers to reduce the withholding tax rate to 0% by making certain registrations and paying a levy (known as the approved issuer levy (or AIL)) in respect of interest paid to a lender that is not associated with the borrower. The definition of association for this purpose is broad and includes the circumstance in which the borrower is owned by a consortium or other group of lenders that act together in respect of their ownership interests.

5.12 AIL applies at the rate of 2% of the amount of interest paid. It is payable by the borrower and is a levy rather than a tax. Accordingly, it is unlikely to be creditable against foreign tax payable by the lender on its interest receipts.

5.13 For interest and royalties paid to non-residents, the rate of withholding tax under domestic law is generally 15%, although this is typically reduced to 10% under an applicable DTA. In the case of some more recently concluded DTAs, the rate in respect of royalties may be reduced to 5%.

5.14 Dividends paid to non-residents are generally subject to non-resident withholding tax at a rate of 15% (to the extent fully imputed) or 30%, subject to the availability of tax treaty relief (described below). However, the rate of non-resident withholding tax for such dividends may be reduced to 0% where the dividend is fully imputed and where the recipient has a 10% or greater direct voting interest in the payer. In the case of a non-resident holding a less than 10% voting interest, the company paying the dividend may pay a "supplementary dividend" to the shareholder (in which case the company will receive a credit, equal to the amount of the supplementary dividend it pays, against income tax otherwise payable on its taxable income). In the case of a fully imputed dividend, the supplementary dividend paid to the non-resident is intended to have the effect that income tax on the earnings together with withholding tax (at the rate of 15%), do not in aggregate exceed 28% (being the corporate tax rate).

5.15 The withholding tax rates for dividends described above are generally capped at 15% in the case of persons resident in a country with which New Zealand has a DTA. Lower dividend withholding tax rates (typically 5%, or in some cases 0%) apply under certain of New Zealand's DTAs (including those with Australia, Canada, China, Hong Kong, Japan, Mexico, Samoa, Singapore, Turkey, the United States and Vietnam) in the case of dividends paid to a shareholder that is a company that meets the relevant minimum ownership requirement and certain other criteria.

5.16 Withholding taxes may also apply to payments to non-residents in certain other situations, including payments to non-residents for services performed or for the use of personal property in New Zealand, or to the proceeds from a disposal of New Zealand residential land. In the case of payments for services performed or for the use of personal property in New Zealand, the rate of withholding tax is generally 15%. If the payer has not been notified of the non-resident contractor's name and tax file number, this rate may be increased to 20% (if the recipient is a company) or 45% (in other cases). In the case of the proceeds from a disposal of New Zealand residential land, the amount of withholding tax is the lowest of: i) 39% (for individuals) or 28% (for companies) of the profit on disposal; ii) 10% of the disposal price; and iii) if certain criteria are met, the disposal price less amounts required to discharge securities over the land and outstanding local authority rates.

5.17 DTA relief (if available) does not always apply at source in respect of these payments. Therefore, even if an amount may be fully relieved from New Zealand tax under an applicable DTA, the payer may be required to withhold tax nonetheless. A non-resident recipient of such payments may need to obtain an exemption from withholding if available (one ground for an exemption from withholding in respect of payments for services performed or for the use of personal property in New Zealand, is that the payments would be fully relieved from New Zealand tax under a DTA). Alternatively, the non-resident may need to file a New Zealand tax return and seek a refund of the tax withheld.

*Limits on deductibility of related party financing costs*

5.18 New Zealand entities controlled by non-residents are subject to comprehensive transfer pricing and thin capitalisation rules. During the past few years, Inland Revenue has identified related party interest expenditure as one of its most significant compliance priorities in respect of large businesses.

5.19 The thin capitalisation rules limit interest deductions based on a ratio of debt to assets. In the case of inbound investment, interest deductions will be denied to the extent the New Zealand group's ratio of total debt to total assets exceeds both an absolute 60% threshold and a threshold of 110% of the worldwide group ratio.

5.20 Although the transfer pricing rules may apply in respect of most cross-border related party supplies, the rules contain a set of highly prescriptive rules specifically directed at limiting the rate of interest payable on inbound related party debt. In certain circumstances, these rules may require debt to be priced on the assumption that the borrower has a deemed credit rating determined on the basis of the wider group's credit rating even if the deemed credit rating exceeds the borrower's actual credit rating. The rules may also require debt to be priced on a basis that ignores subordination or similar terms of the debt that would otherwise result in a higher arm's length interest rate.

*Base erosion and profit shifting measures*

5.21 New Zealand has enacted a range of reforms intended to implement the OECD's proposals targeting base erosion and profit shifting (BEPS), including strengthening the thin capitalisation, transfer pricing and permanent establishment rules, and measures targeted at hybrid mismatch arrangements. New Zealand has also signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (also known as the multilateral instrument, or MLI), which amends certain of its DTAs to reflect OECD recommendations relating to anti-abuse rules, hybrid mismatches, preventing the avoidance of permanent establishment status, and dispute resolution, to the extent the relevant treaty partner also elects to include the relevant provisions.

## R&D tax credit

5.22 New Zealand has a 15% tax credit that is available, in respect of eligible research and development ("**R&D**") expenditure, to businesses undertaking eligible R&D activities in New Zealand. The R&D tax credit can be applied against tax on the person's taxable income. However, to the extent a person has remaining R&D tax credits after reducing tax on taxable income to zero, the R&D tax credit can be applied to satisfy certain of the person's other tax liabilities (for example, the person's income tax liability for a later year) subject to satisfying continuity of ownership requirements, and if any R&D tax credit remains after this, cashed out (provided the person meets certain criteria and with certain limitations).

## Income tax - taxation of employees

5.23 Income tax is assessed on the gross income of employees. Tax payable by employees (together with certain other amounts including KiwiSaver employee contributions and ACC levies) is collected at source by the employer (this system is known as "pay-as-you-earn" or PAYE).

## Taxation of trusts

5.24 As a general rule, trust income is taxed either as beneficiary income (where distributed or applied for the benefit of beneficiaries within a certain period) or trustee income (to the extent not beneficiary income).

5.25 Where a trust has a New Zealand resident settlor, the trust is in effect treated as resident in New Zealand and its worldwide income is subject to tax in New Zealand. Where there is no New Zealand settlor of a trust (and even if there are New Zealand resident trustees), the income of the trust will generally (and provided the trust meets the disclosure requirements described below) be subject to tax in New Zealand only to the extent the income has a New Zealand source or is derived as beneficiary income by a New Zealand resident beneficiary.

5.26 A set of disclosure rules applicable to foreign trusts was introduced in early 2017. Non-compliance with these disclosure requirements may result in the trust being subject to New Zealand tax on its worldwide income. The main obligations fall on New Zealand resident trustees of foreign trusts (including providing information relating to the settlor, beneficiaries and the trust deed). One consequence of the reforms is that a register of foreign trusts is now administered by Inland Revenue.

## Goods and services tax

5.27 New Zealand imposes a broad-based value added tax referred to as goods and services tax ("**GST**") at the rate of 15% on the supply of all goods and services in New Zealand (subject to rules applying a zero-rate for certain transactions (including exported goods and services and sales of land between GST registered persons), exemptions for financial services and the supply of residential accommodation, and certain other limited exceptions).

5.28 In the case of goods imported into New Zealand, GST is collected by Customs together with any Customs duty. An exception applies in respect of low-value goods (generally defined as goods valued at NZ$1,000 or less). The low-value goods rules require non-resident suppliers to New Zealand consumers to register for and collect GST on low-value goods. The rules also require, in some circumstances, electronic marketplaces and re-deliverers to register for and collect GST.

5.29 Services imported into New Zealand may be subject to a "reverse charge", which requires the New Zealand resident recipient of the imported services to self-assess GST in respect of those services. In addition, certain non-resident suppliers of remote services (for example, certain services provided online) are required to register for and pay GST on services supplied remotely to New Zealand residents from 1 October 2016.

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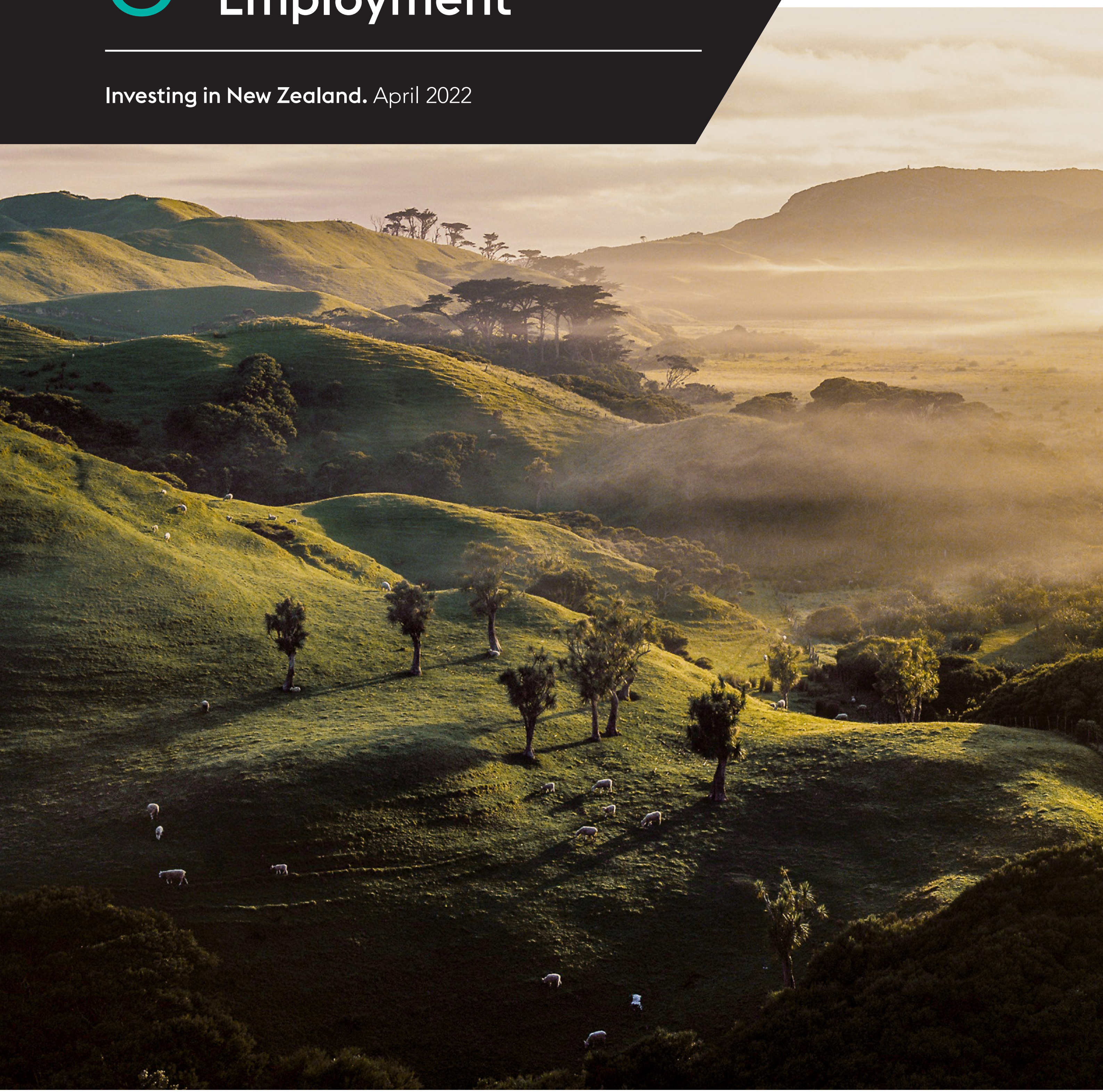
# 6 Employment

Investing in New Zealand. April 2022



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## 6. EMPLOYMENT

### Introduction

6.1 Employment law in New Zealand is governed by a number of statutes and by common law. The Employment Relations Act 2000 is the central piece of employment related legislation and requires all parties to employment relationships (including employees, employers and unions) to deal with each other in good faith.

6.2 Under New Zealand employment law, the effect of an acquisition on existing employment relationships and employees' accrued entitlements differs depending on the nature of the acquisition.

### Asset purchase

6.3 Where a business, or part of a business, is acquired by way of an asset purchase, the employees do not automatically transfer with the business (with an exception, discussed below). Employment with the vendor company can be terminated on the grounds of redundancy and new offers of employment must be made by the purchaser to those employees it wants to employ. Any entitlements triggered by termination of employment will be payable by the vendor to employees. This includes accrued holidays and any contractual entitlement to redundancy compensation. There is no statutory right to redundancy compensation in New Zealand.

6.4 Employers who contractually offer redundancy compensation often include in employment agreements a "technical redundancy clause" which provides that the employer does not need to pay redundancy compensation to employees who are offered employment with the purchaser of the business on the terms required by the clause (often expressed as "on substantial similar terms and conditions"). Employees who are offered employment on such terms but decline the offer are then not entitled to redundancy compensation.

6.5 There are special statutory protections for specified categories of employees (called "vulnerable employees"). These employees primarily work in cleaning, food catering and security services, as well as some other types of work in specific industries. Unlike other employees, vulnerable employees have a right to transfer with the business on their existing terms and conditions of employment and with a recognition of continuous service. If such a transferring employee is a member of a union and is covered by a collective agreement, the purchaser automatically becomes a party to that agreement. If the purchaser does not require the services of such a transferring employee, it is able to make them redundant post-transaction. If requested, a vendor must disclose information about the number of, and costs associated with, vulnerable employees to an interested purchaser.

## Share purchase

6.6 In a share purchase situation, the employing entity remains the same, so employment relationships continue. If, following such an acquisition, the purchaser wishes to vary employees' terms of employment, this can only be achieved with each employee's consent. However, if the purchaser wishes to restructure the newly acquired business, it is free to do so provided it complies with its duty of good faith. This typically requires consultation with employees before any decision is made which may affect the continuity of their employment.

## Accident Compensation Scheme

6.7 New Zealand's Accident Compensation Scheme ("**ACC**") provides comprehensive, no-fault personal injury cover for all New Zealand residents and visitors to New Zealand. It covers physical injuries sustained in New Zealand (by residents or non-residents) or sustained overseas (by persons ordinarily resident in New Zealand).

6.8 If the injury falls within the scope of "personal injury" it is likely covered by the ACC regime. However, injuries caused "wholly or substantially by gradual process, disease, or infection" are specifically excluded unless they are work-related, a treatment injury, or consequential on personal injury for which the person has cover, or are caused by treatment given for a personal injury.

6.9 The key feature of the ACC regime is that, if the personal injury is covered by ACC, the claimant is barred from suing for compensatory damages.

*Employer's Obligations*

6.10 An employer's main financial obligations are the payment of levies in respect of every employee to cover the cost of work accidents and the payment of 80% of wages for the first week an employee has off work as a result of a work-related personal injury.

6.11 Both employers and employees (including the self-employed) are required to pay levies to fund ACC. An employer's levy is determined by its total payroll and the industry it is in. An employee's levy is 1.21% of total earnings and is deducted by an employer with income tax (PAYE).

6.12 Employers can be accepted into the ACC Accredited Employers Programme which grants Accredited Employer status. This allows the employer to manage employee claims for workplace injuries, make cover decisions and determine what employees are eligible to receive. ACC Workplace Safety Management Practices and ACC Workplace Safety Discounts (in certain industries only) are also available if a business can demonstrate sound health and safety practices. The effect of entry into the scheme is that the employer self-funds ACC for its organisation.

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## Health and Safety

6.13 New Zealand has a heavily regulated health and safety regime. The governing piece of legislation is the Health and Safety at Work Act 2015 ("**HSW Act**"), compliance with which is monitored by the government regulator, WorkSafe. The primary duty of care under the HSW Act is that a person conducting a business or undertaking ("**PCBU**") must ensure, as far as is reasonably practicable, the health and safety of any person is not put at risk from work carried out as part of the conduct of the business or undertaking. Fines for breaches of the HSW Act can be significant, with the maximum penalty for a company found to have exposed a worker to harm being NZ$3 million. Directors are also subject to individual obligations and potential criminal liability for breach, including fines and imprisonment.

# Key Contacts

## Employment

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# 7 Corporate Structures

Investing in New Zealand. April 2022

## 7. CORPORATE STRUCTURES

7.1 There are a number of different corporate entities available to overseas investors looking to do business in New Zealand, including:

(a) companies;

(b) trusts;

(c) limited liability partnerships; and

(d) partnerships.

7.2 Certain business associations, other than companies, are also permitted under New Zealand legislation. The Financial Markets Conduct Act 2013 governs the public offer of securities (including shares, bonds and units in unit trusts), building societies are governed by the Building Societies Act 1965, and the Industrial and Provident Societies Act 1908 governs the establishment and operation of that form of business association.

### Branch office or local subsidiary

7.3 Foreign companies typically operate in New Zealand in one of three ways:

(a) registration in New Zealand of the foreign company (or one of its subsidiaries) as a branch; or

(b) the acquisition or incorporation of a New Zealand company (or other corporate vehicle); or

(c) entering into a joint venture (whether incorporated or unincorporated) or partnership with or through a New Zealand entity.

7.4 The most commonly used vehicles are companies.

### Companies

7.5 Companies incorporated in New Zealand under the Companies Act have limited liability. The liability of each shareholder is limited to the amount of share capital they choose to invest in the company.

7.6 A company registered under the Companies Act must have at least one shareholder and one director. At least one director must live in New Zealand or an enforcement country (which currently only includes Australia). Where there is no New Zealand director, the Australia director must also be a director of an Australian incorporated company in order to meet the requirements. There is no requirement to have a company secretary.

7.7 A company may, but is not required to, have a constitution. The company, the board of directors, and each director and shareholder of a company have the rights, powers, duties and obligations set out in the Companies Act, except to the extent that they are modified in accordance with the Companies Act by the constitution of the company.

7.8 A company is deemed to have all the rights and powers of a natural person (except where these are specifically restricted in the constitution). There are certain provisions of the Companies Act that a company's constitution cannot contravene or modify.

### Limited Partnerships

7.9 The limited partnership structure is essentially a hybrid between a company and a partnership. It is a separate legal entity yet is fiscally transparent for New Zealand tax purposes.

7.10 A limited partnership consists of at least one general partner and one limited partner. General partners manage the limited partnership and are liable for the debts and liabilities of the partnership. Limited partners are passive investors who are restricted from participating in the management of the limited partnership (with the exception of some permitted safe harbours). The liability of limited partners is generally limited to their capital contribution.

7.11 A limited partnership can be formed for any purpose, it has an indefinite lifespan if desired, and there are no limits on partner numbers or investment. It must have a written partnership agreement and be registered with the New Zealand Companies Office.

### Other requirements

7.12 All New Zealand-incorporated companies and limited partnerships are required to have a director resident in New Zealand or Australia.

7.13 Information is also required to be provided as to the residential address and the date and place of birth of a company's directors (or general partner, in relation to limited partnerships), including proof of residency and identity. Details of any company's ultimate holding company must also be provided.

### Overseas companies carrying on business in New Zealand

7.14 The Companies Act 1993 ("**Act**") requires that every "overseas company" that "carries on business" in New Zealand must register as an overseas company on the New Zealand Companies Office ("**Companies Office**"), in accordance with the Act.

7.15 Whether a company is deemed to be "carrying on business" in New Zealand is dependent on the extent of the company's New Zealand related activities. A company will be "carrying on business" in New Zealand if it establishes or uses a share transfer office or a share registration office in New Zealand, or administers, manages, or deals with property in New Zealand as an agent, or personal representative, or trustee, and whether it does this through its employees or an agent or in any other manner.

7.16 A company will be more likely to be carrying on business in New Zealand if it:

(a) has a physical presence in New Zealand;

(b) has employees or representatives in New Zealand;

(c) conducts marketing activities in New Zealand or directly solicits business from persons in New Zealand;

(d) provides services to, or contracts with, persons in New Zealand; or

(e) is registered as a financial service provider under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

7.17 Whether a company is deemed to be "carrying on business" is dependent on the extent of its activities in New Zealand. The test is not exhaustive, and relatively minor activity in New Zealand could be sufficient for a company to "carry on business" in New Zealand.

7.18 Prior to "carrying on business" in New Zealand, an overseas company must reserve its name with the Companies Office and must file an application for registration within 10 working days of commencing business in New Zealand. Once the company is registered under the Act, its compliance obligations will include:

(a) notifying the Companies Office of any changes to the constitution, directors, or address within 20 working days of the change occurring;

(b) if it is a "large overseas company" (assets exceeding NZ$20 million or profits exceeding $10 million for the last two years) it must also file certain financial reports; and

(c) an annual return (which confirms that the information registered in respect of the overseas company is correct as at the date of the return).

7.19 Our experts would be happy to assist with your local registration requirements.

# Key Contacts

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# Financial Services & Funds Management

**Investing in New Zealand.** April 2022

## 8. FINANCIAL SERVICES AND FUNDS MANAGEMENT

### Introduction

8.1 The Financial Markets Conduct Act 2013 ("**FMCA**") is the principal statute in New Zealand that regulates the issue and sale of financial products and the provision of certain market services in New Zealand. Financial products include equity securities, debt securities, management investment products and derivatives. The Financial Markets Conduct Regulations 2014 ("**FMCR**") set out additional regulations in respect of the FMCA regime. The FMCA also regulates misleading and deceptive conduct (in trade) in relation to financial products and financial services, dealings of financial products on markets, licensing of entities providing market services, the provision of financial advice and financial reporting.

8.2 An offer of financial products is made in New Zealand if the offer is received by a person in New Zealand, and applies regardless of where any resulting issue or transfer occurs and where the issuer or offeror is resident, incorporated or carrying on business.

8.3 The application of the FMCA is administered by the Financial Markets Authority ("**FMA**") who has broad powers to monitor compliance, investigate and enforce conduct in New Zealand's financial markets. The purpose of the regime is to facilitate the development of a fair, efficient and transparent market which allows investors to be confident in their investments.

### Managed investment schemes

8.4 Managed investment products are interests in a managed investment scheme and are defined as a type of "financial product" under the FMCA.

8.5 The FMCA governs the way managed investment schemes are offered, promoted, issued and sold, and provides for the continued responsibilities of those who offer, issue, manage or supervise managed investment schemes.

8.6 For the purposes of the FMCA, a managed investment scheme is a scheme to which each of the following apply:

(a) the purpose or effect of the scheme is to enable persons taking part to contribute money, or to have money contributed on their behalf, to the scheme as consideration to acquire interests in the scheme;

(b) those interests are rights to participate in, or receive, financial benefits produced principally by the efforts of another person under the scheme; and

(c) the holders of those interests do not have day-to-day control over the operation of the scheme.

### Retail investor and wholesale investor distinction

8.7 In New Zealand, the application of the FMCA differs depending on whether the offer is made to a wholesale or retail investor.

8.8 A wholesale investor is a person who meets established criteria; namely, is an investment business (for example, a business which provides financial services), is involved in investment activity with a value of over NZ$1 million in the previous two years, has net assets exceeding NZ$5 million as at the end of the two most recently completed financial years, is a Government agency, invests more than NZ$750,000 or can demonstrate that they have requisite experience in dealing in financial products. A retail investor is any investor who is not a wholesale investor.

8.9 If a financial product is offered to a retail investor, it will constitute a "regulated offer" and must comply with the disclosure requirements in Part 3 and Part 4 of the FMCA, including:

(a) preparing and lodging a product disclosure statement, which has heavily prescribed content requirements;

(b) preparing and lodging a statement of investment policy and objectives, which must set out the investment governance, management framework, philosophy, strategies, and objectives of the managed investment scheme and its investment funds or portfolios; and

(c) maintaining a register entry of other material information on an online register maintained by the Registrar of Financial Service Providers.

8.10 In addition to the above disclosure requirements, if the managed investment scheme is offered to retail investors in New Zealand, the managed investment scheme must have a manager and an independent supervisor, who must both be licensed by the FMA. The scheme must also have a governing document which contains certain minimum content requirements set out in the FMCA, and there are ongoing compliance requirements, including custodianship requirements, reporting on limit breaks, pricing errors and related party transactions, financial reporting requirements and member reporting requirements (including an annual report).

8.11 If the managed investment scheme is only offered to wholesale investors in New Zealand, the governance and disclosure requirements set out above will not apply. Instead, only the "fair dealing" provisions in the FMCA will apply, which prohibit misleading or deceptive conduct, and the making of false, misleading or unsubstantiated representations, in relation to any dealing in financial products.

### Mutual recognition scheme

*Australian Offerors*

8.12 The FMCA and FMCR contain a recognition regime which applies to offers of financial products made in New Zealand by Australian offerors. Subject to a number of conditions, if an offer of financial products is regulated in Australia and the Australian offeror wishes to offer the financial products in New Zealand, the offer will be exempt from the disclosure and governance requirements of the FMCA, and will be able to use disclosure documents prepared under

Australian law in New Zealand. The Australian offeror will, however, have ongoing filing obligations under the FMCR.

*Asia Funds Passport*

8.13 The Financial Markets Conduct (Asia Region Funds Passport) Regulations 2019 ("**Asia Region Funds Passport Regulations**") provides for a similar recognition regime for funds based in Australia, Japan, Korea and Thailand. The Asia Region Funds Passport Regulations provide that, subject to certain conditions, an overseas fund operator approved by the FMA to register an offer in New Zealand under the Asia Region Funds Passport is exempt from a number of requirements under the FMCA, including:

(a) most of the governance requirements under Part 4, including the manager licensing requirement and the requirement to have a licensed supervisor;

(b) all provisions relating to the transfer of transferable financial products;

(c) financial reporting obligations; and

(d) the licensing requirement for financial advice services, to the extent that:

(i) the operator or foreign passport fund provides a financial advice service in relation to offering managed investment products under a recognised offer; and

(ii) that financial advice service is provided to or through a qualified distributor that is acting in relation to the offer.

8.14 However, the disclosure requirements under Part 3 of the FMCA will still apply to such offers, and the operator of the foreign passport fund will be required to comply with certain terms and conditions and notify specified matters to the FMA.

## Financial Service Providers

8.15 Any person providing financial services in New Zealand must be registered on the Financial Service Providers Register. However, if the financial service provider ("**FSP**") is based offshore and has no place of business in New Zealand and only provides financial services to wholesale clients, then subject to certain exceptions, it will not be required to register. Additionally, if the FSP provides financial services to retail clients, it must also join an approved dispute resolution scheme.

8.16 The definition of FSP is very broad. An FSP is a person who provides or offers financial services, including financial advice services; managing other people's money; giving financial guarantees; offering financial products under the FMCA; acting as an issuer, supervisor or investment manager of any FMCA product; changing foreign currency, or providing forward foreign exchange contracts.

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# 9 General Legislation affecting business activites

Investing in New Zealand. April 2022

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## 9. GENERAL LEGISLATION AFFECTING BUSINESS ACTIVITIES

9.1 Overseas investors must comply with other general legislation affecting business activities, including the:

(a) Fair Trading Act 1986;

(b) Consumer Guarantees Act 1993;

(c) Privacy Act 2020; and

(d) Resource Management Act 1991.

### Fair Trading Act 1986

9.2 The Fair Trading Act 1986 is consumer protection legislation and contains broad provisions prohibiting conduct and representations that are likely to mislead or deceive consumers and requires all representations to be substantiated (except for puffery). It is only possible for businesses to contract out of this Act in limited circumstances, namely where both of the parties are "in trade" (and it is fair and reasonable to do so).

9.3 Civil and criminal action can be taken under the Fair Trading Act. It is enforced by New Zealand's Commerce Commission.

9.4 The Fair Trading Act also prohibits unfair contract terms in standard form consumer contracts. Under the recent reforms to the Fair Trading Act, from 16 August 2022:

(a) the unfair contract regime will be expanded to cover small trade contracts, being where the contract does not comprise or form part of a trading relationship that exceeds an annual value threshold of $250,000 (including GST, if applicable) when the trading relationship first arises; and

(b) an unconscionable conduct regime comes into force to prevent unfair trade practices for "in trade" transactions in New Zealand.

### Consumer Guarantees Act 1993

9.5 The Consumer Guarantees Act 1993 is also consumer protection legislation and it contains a number of obligations on both suppliers and manufacturers in relation to goods or services which are ordinarily purchased for personal or household use. The Consumer Guarantees Act sets out a number of statutory "guarantees" that the goods or services must comply with including as to title, acceptable quality, price and fitness for purpose. It is not possible for businesses to contract out of this Act unless the goods or services have been purchased for "business purposes" (and the contracting out must be fair and reasonable).

## Privacy Act 2020

9.6 New Zealand's privacy laws are largely addressed by the Privacy Act 2020 ("**Privacy Act**"), which came into force on 1 December 2020. Businesses are required to comply with the Privacy Act if they collect, use, share or store personal information of customers, employees or any other persons. "Personal information" means any information about an identifiable individual.

9.7 Key changes introduced by the Privacy Act include (i) extraterritorial application to overseas agencies carrying on business in New Zealand, (ii) a mandatory breach notification system where businesses are required to report privacy breaches that are likely to, or do, cause serious harm, (iii) compliance notices from the Privacy Commissioner requiring businesses to take specified steps in relation to privacy breaches, (iv) sharing of personal information overseas is generally permitted only where businesses have ensured comparable privacy safeguards apply or obtained express authorisation from individuals after advising that comparable privacy safeguards do not apply, (v) new offences prohibiting impersonating individuals to obtain their information and destroying requested documents and (vi) an increase in the maximum fine for an offence to $10,000.

9.8 New Zealand's privacy regime remains less prescriptive and onerous than laws such as the GDPR.

## Resource Management Act 1991

9.9 The Resource Management Act 1991 is New Zealand's principal legislation for environmental management. It determines how natural and physical resources in New Zealand (including land, water and air) can be used, developed or protected, and seeks to promote the sustainable management of those resources in a way which enables people and communities to provide for their social, economic and cultural wellbeing.

9.10 Local and regional councils have powers under the Resource Management Act to formulate policy and planning documents which govern the use and development of the resources within their areas. Councils have the ability to issue resource consents, which give permission (subject to conditions) for an activity that might affect the environment.

## Statutory and regulatory controls

9.11 New Zealand has implemented a range of laws relating to anti-money laundering, countering financing of terrorism, and collection and exchange of tax information, reflecting international standards.

9.12 There are also statutory and regulatory controls imposed in respect of specific industry types. Examples can be found in the primary products field, energy resources, fisheries, forestry, insurance, banking, air services, professional bodies and the development of natural resources. Other industry groups are also governed by legislation, e.g. motor vehicle dealers, real estate agents and private investigators.

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# 10 Business Names, Trade Names, Trade Marks

Investing in New Zealand. April 2022

## 10. BUSINESS NAMES, TRADE NAMES, TRADE MARKS

10.1 There is no business name or trade name registration procedure in New Zealand similar to that existing in many countries. Business or trade names can be protected by registering a trade mark or service mark and using that mark in New Zealand, or by incorporating a local company or registering a branch of an overseas company with the name in question and then establishing goodwill in that name in New Zealand (and relying on the common law right of passing off or misleading and deceptive conduct under the Fair Trading Act 1986, as a means of protection).

10.2 Incorporation of a company or registration of a branch gives protection against incorporation of another company under the same name but it does not prevent another person trading under the name as a business name, or another company registering a similar name.

### Trade marks/service marks

10.3 There is provision under the Trade Marks Act 2002 for registration of trade marks and service marks in New Zealand. Trade mark registration affords protection in respect of the same goods and similar goods (and sometimes similar services) to those in which a mark is registered. New Zealand follows the Nice classification system for classes of goods and services.

10.4 At present, it takes approximately six months to complete registration of a trade mark and service mark. After filing the mark with the Intellectual Property Office of New Zealand ("**IPONZ**"), the application is reviewed and IPONZ will either provide notification of acceptance or a compliance report. If the mark is accepted, then it is advertised for three months in the official monthly journal and third parties may oppose its registration. If there is no opposition, then the mark is registered generally within the next 3-6 months.

10.5 IPONZ will not generally permit registration of trade marks and service marks which are considered to be of a purely descriptive nature, as such marks are considered to lack the distinctiveness necessary for registration.

10.6 Once a trade mark or service mark is registered, unless it is owned by the New Zealand branch or subsidiary, a licence agreement should be entered into between the owner of the mark and the local user. Failure of the registered proprietor and its licensees to use the mark itself over an extended period (currently being three continuous years) in the relevant class of goods, may amount to abandonment of the mark.

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