NEW ZEALAND

Law and Practice

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Russell McVeagh

Contents

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1. Specific Financial Asset Types

1.1 Common Financial Assets

The most common financial assets securitised in New Zealand include auto leases, auto receivables, trade and equipment receivables and other receivables such as revolving credit (including credit cards). Residential mortgage-backed securitisations are also commonly seen in New Zealand, including a registered bank's internal residential mortgage-backed securities (RMBS) programme or covered bond programmes.

1.2 Structures Relating to Financial Assets

In New Zealand, securitisations are usually structured using a trust as the special-purpose entity (SPE), which is intended to be bankruptcy remote from the originator. An independent trustee company will generally act as the trustee, holding the trust assets for a beneficiary (which may be a charitable entity but is usually associated with the originator). A trust manager (generally the originator or an affiliate of the originator) will also be appointed to oversee the day-to-day operations of the trust. The trustee grants security over the trust assets to a security trustee for the benefit of secured creditors (the investors and other parties to the securitisation).

The programme documents include detailed provisions around the operation of the trust and the securitisation, and leave little or no discretion for any of the parties – in particular, the trustee. Where New Zealand securitisations are structured using a trust, a trustee may only exercise its powers in accordance with the trust documentation.

Company SPEs can also be used in the New Zealand market; however, these structures are less common.

1.3 Applicable Laws and Regulations

The operation of a trust SPE, being an express trust, is regulated by the Trusts Act 2019. The trust documentation will usually explicitly or implicitly exclude or modify the application of the Trusts Act 2019.

Company SPEs are regulated by the Companies Act 1993.

Other relevant laws and regulations include the following.

- The originator may structure the SPE in order to elect into the debt funding special purpose vehicle (DF SPV) regime in the Income Tax Act 2007, which would impact the tax treatment of the SPE – see **7.1 Transfer Taxes**.
- Where the SPE is an "overseas person" for the purposes of the Overseas Investment Act 2005, the requirements of that Act will need to be complied with, although there are exemptions for most types of financial assets.
- Any regulatory regime applicable to securitised assets will need to be complied with, for example the Privacy Act 2020 and the Credit Contracts and Consumer Finance Act 2003 (CCCFA) – see **2.5 Servicers**.
- The originator, servicer and SPE will generally need to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA).

1.4 Special-Purpose Entity (SPE) Jurisdiction

Where a trust SPE is used, the trust company would be incorporated in New Zealand and the trust documentation governed by New Zealand law.

A company SPE would be incorporated in New Zealand.

1.5 Material Forms of Credit Enhancement

The most common forms of credit enhancement for securitisations in New Zealand are subordination, cash reserves and over-collateralisation. In addition to credit enhancement, securitisations in New Zealand often have liquidity support in the form of a liquidity facility and the use of reserves (funded on day one and/or by trapping excess spread in the transaction).

Where an RMBS is intended to be eligible for the Reserve Bank of New Zealand's (RBNZ) repurchase facility, the RBNZ imposes requirements in relation to potential credit enhancement within the structure. These are a 5% limit on non-mortgage assets that can be held by the trust and an expectation that no more than 1% of the outstanding pool amount is comprised of non-performing loans or loans with a loan-to-value ratio over 80%.

2. Roles and Responsibilities of the Parties

2.1 Issuers

As mentioned in **1.2 Structures Relating to Financial Assets**, the issuer for a securitisation in New Zealand is most commonly a bankruptcy-remote trust.

2.2 Sponsors

Generally, the originator is the sponsor on a securitisation.

2.3 Originators/Sellers

The originator is the entity that generated the receivables as the original lender of the receivables. Originators in the New Zealand market are typically registered banks and non-bank lenders.

The seller of the receivables to the trust SPE may be the originator, another trust SPE or both.

2.4 Underwriters and Placement Agents

The underwriters and placement agents are financial institutions, commonly banks. Where the originator is itself a bank, it may also act as a dealer/placement agent on the securitisation.

A dealer/placement agent would only be required for a term securitisation.

2.5 Servicers

The originators usually provide the management and collection services with respect to the receivables. In some non-bank securitisations, back-up servicers or standby servicers may also be appointed at the outset of a securitisation.

Where the securitised financial assets are consumer credit contracts (which can include leases) for the purposes of the CCCFA, the servicer will need to be registered under the FSPA in order to transfer the financial assets to the SPE without notice to the underlying obligor.

2.6 Investors

Investors directly lend to an SPE (on a warehouse securitisation) or acquire the notes issued by the SPE.

Typically, investors in New Zealand securitisations are institutional or other sophisticated investors who are able to take part in a wholesale offer – see **4.13 Entities Investing in Securitisation**.

2.7 Bond/Note Trustees

As discussed further in **4.2 General Disclosure Laws or Regulations**, securitisations in New Zealand are generally not public offers and so there is no need for a bond/note trustee or oth-

er supervisor. To the extent that decisions are required of investors during the course of a term securitisation, the programme documents provide a process for investors to make such decisions, usually through a meeting.

2.8 Security Trustees/Agents

In New Zealand, securitisations will have a security trustee (rather than a security agent) that is generally an independent trustee company. The security trustee holds the security on trust for secured creditors of the securitisation (the investors and other parties to the securitisation).

3. Documentation

3.1 Bankruptcy-Remote Transfer of Financial Assets

Please see the descriptions in **1.2 Structures Relating to Financial Assets**, **6.1 Insolvency Laws**, **6.2 SPEs** and **6.3 Transfer of Financial Assets** regarding the use of trusts, trustee companies, trust managers and true sale.

3.2 Principal Warranties

Warranties vary, depending on the role of the party that is giving the relevant warranties.

Most importantly from a sale perspective, an originator will warrant:

- the existence and validity of receivables and related security;
- that it complied with all material laws in relation to the origination process;
- as to key characteristics of the receivables and related security; and
- that the receivables and related security meet defined eligibility criteria.

The most common remedies for breach of such warranties are repurchase by the originator and/or an indemnity or other compensatory payment from the originator.

The warranties given by the trustee of an SPE are focused on (among other things) the validity of the trust, its status as the sole trustee of the trust and its solvency.

3.3 Principal Perfection Provisions

Perfection is required to occur when certain perfection triggers exist. For example:

- insolvency of the originator;
- a termination of the appointment of the originator as servicer where an appropriate substitute has not been appointed; or
- where required by law or a relevant court.

Following such a perfection trigger, the SPE must notify the relevant obligors of the transfer, ensure the related security is transferred into its own name and potentially require the receivables files to be delivered to it.

To the extent the originator's assistance is required to perfect the SPE's title to the receivables and related security, the originator covenants to provide such assistance. In addition, it will grant a power of attorney in favour of the SPE to enable it to undertake any perfection action the originator is required to do.

3.4 Principal Covenants

As with warranties, the covenants given in a securitisation depend on the party's role in the structure.

Usual covenants given by the originator include covenants about how the sale process for future receivables will be undertaken, its repurchase

obligations in the event of a warranty breach and assistance with any perfection process.

Trustee and Trust Manager Covenants

As described in **1.2 Structures Relating to Financial Assets**, the trustee of an SPE will also be subject to restrictions on its activities in order to limit the number of potential creditors and manage insolvency risk, among other objectives. This limitation of trustee discretion is combined with obligations on the trust manager to operate the trust adequately in accordance with the parameters set out in the programme documents. For example:

- determining amounts payable under the waterfalls;
- directing the trustee regarding acquisitions of authorised investments (including new receivables); and
- confirming whether certain actions may trigger a ratings downgrade.

Servicer Covenants

The principal covenants given by the servicer relate to how it will service the portfolio, including:

- collecting the receivables;
- transfer of funds to the SPE;
- holding funds on trust for the SPE;
- compliance with the originator's servicing guidelines; and
- compliance with material laws.

Warehouse securitisations usually have more bespoke covenants (including additional reporting obligations) as required by the particular warehouse lenders.

3.5 Principal Servicing Provisions

Servicing of the relevant portfolio is usually undertaken by the originator acting as servicer. A detailed servicing agreement is agreed at the outset of the securitisation. In addition, the originator's servicing standards are also reviewed by the warehouse lenders or (in the case of rated securitisations) the rating agencies. Under the servicing agreement, the servicer provides both day-to-day management and collection services for the portfolio.

The servicer's appointment can be terminated in certain circumstances, ranging from unremedied breaches of a material covenant to insolvency of the servicer.

In some non-bank securitisations, back-up servicers or standby servicers may also be appointed at the outset of the securitisation.

3.6 Principal Defaults

The usual defaults used in securitisations include:

- failure to pay interest and principal when due (in respect of the most senior class of debt);
- failure to perform obligations which have a material adverse effect;
- insolvency of the SPE;
- withdrawal of material consents; and
- invalidity of key programme documents.

Covered bond programmes have both issuer-level (the registered bank) and SPE-level events of default. In such cases, additional defaults include a failure to meet asset coverage or amortisation tests in relation to the cover pool.

Upon an event of default, the notes or warehouse debt is accelerated and the security over the

assets becomes enforceable. A post-enforcement waterfall is used following such defaults.

Warehouse securitisations typically have a multi-step process prior to a default being triggered, comprising:

- stop-funding events, when the warehouse facility ceases to be available;
- amortisation events, when the warehouse facility must be amortised; and
- events of default, when the warehouse facility is accelerated and the security becomes enforceable.

3.7 Principal Indemnities

A number of indemnities can be given in a securitisation. By way of example, it is common for the originator to undertake to repurchase "ineligible" receivables from an SPE or provide an indemnity where it fails to do so. In addition, the trustee of an SPE will also give indemnities under the programme documents – although in such a case the indemnity is limited to its recourse to the trust assets. It is also common for the trust manager and trustee to indemnify lead managers/dealers to any note issuance.

3.8 Bonds/Notes/Securities

The terms and conditions relating to the notes are typically contained in a note deed poll or securitisation-specific document, such as a series notice or series supplement.

The terms and conditions relating to the notes include:

- form and status of the notes;
- provisions for payment of interest and principal; and
- events of default and consequences of these (see **3.6 Principal Defaults**).

3.9 Derivatives

The most common derivatives used in securitisations are to manage risks arising from the cashflows of the securitised assets, most typically interest rate swaps. These swaps are used to swap the interest rate of the receivables (typically a fixed rate) for the floating interest rate payable on the notes.

Where the currency of the receivables differs from the currency of the notes, currency swaps would also be used.

3.10 Offering Memoranda

As discussed further in **4.2 General Disclosure Laws and Regulations**, securitisations in New Zealand are generally not public offers and so offering memoranda or other offering documentation are not required. However, these are often provided to potential investors in a term securitisation. They typically contain a summary of the securitisation documentation, information about the SPE and originator and identify key risks that may impact the likelihood of the notes issued by the SPE being repaid.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

There are currently no securitisation-specific disclosure laws or regulations in New Zealand.

4.2 General Disclosure Laws or Regulations

The primary legislation that regulates the New Zealand capital markets is the Financial Markets Conduct Act 2013 (FMC Act). The FMC Act applies to any offer of financial products in New

Zealand regardless of where the resulting issue or transfer occurs or where the issuer is resident, incorporated or carries on business. The FMC Act sets out the disclosure requirements for offers of financial products, which includes the debt securities offered in a securitisation.

"Retail" and "Wholesale" Investors

For an offer of financial products to "retail investors" (a regulated offer), among other requirements, a product disclosure statement (PDS) must be prepared and certain information relating to the offer must be contained in a publicly available register entry for the offer.

Securitisations in New Zealand are not marketed to retail investors. Other than a registered bank's internal RMBS and covered bond programmes, the market is dominated by warehouse securitisations and, depending on market conditions, term outs of those warehouse securitisations.

Accordingly, the obligations imposed on regulated offers do not apply. Instead, securitisations are marketed to sophisticated "wholesale investors", in particular:

- "investment businesses";
- "large entities" (those with net assets exceeding NZD5 million or consolidated turnover exceeding NZD5 million in each of the two most recently completed financial years); and
- "government agencies",

each as defined in the FMC Act. Securitisations are not marketed to all categories of wholesale investors, as capturing certain other investors would trigger other regulatory requirements.

Fair Dealing Provisions

An offer that is not a regulated offer will still be subject to the general fair dealing provisions in the FMC Act. Broadly, these fair dealing provisions prohibit an issuer from engaging in conduct that is misleading or deceptive or likely to mislead or deceive in relation to a financial product, from making a false or misleading representation in relation to certain aspects of a financial product, or from making "unsubstantiated" representations.

Contraventions of a fair dealing provision in the FMC Act may give rise to civil liability in respect of which a court or the Financial Markets Authority (FMA) may make certain declarations and orders. Such orders include a pecuniary penalty not exceeding the greatest of:

- the consideration for the relevant transaction;
- three times the amount of the gain made or the loss avoided; and
- NZD1 million in the case of an individual or NZD5 million in any other case.

Regulatory Bodies

The principal regulatory bodies for securitisations are:

- the FMA – whose functions include monitoring compliance with, and investigating conduct that constitutes or may constitute breaches of, financial markets legislation; and
- the RBNZ – which is responsible for the prudential regulation of banks, non-bank deposit takers and insurance providers.

Registered banks in New Zealand are regulated by the RBNZ, and a registered bank's exposure to any securitisations will impact on its capital adequacy requirements, as discussed in **4.3 Credit Risk Retention** and **4.6 Treatment of Securitisation in Financial Entitie** s.

APS 120

In addition, the "big four" New Zealand banks (ANZ Bank New Zealand Limited, ASB Bank Limited, Bank of New Zealand and Westpac New Zealand Limited) are owned by Australian parent banks. These Australian parent banks are subject to the Australian Prudential Regulation Authority's Prudential Standard APS 120 (APS 120) in relation to securitisations. As subsidiaries of these regulated Australian parent banks, the big four New Zealand banks may be required to comply with APS 120.

Covered Bonds

A significant use of securitisation technology in New Zealand for registered banks is through the issuance of covered bonds. Similar to the United Kingdom, New Zealand has a legislative framework for covered bonds which provides legal certainty as to the treatment of cover pool assets in the event of an originator's liquidation or statutory management. However, as this legislation was not passed until 2013, the New Zealand covered bond programmes share certain key features with securitisations, namely a bankruptcy-remote SPE and true sale of the underlying assets.

4.3 Credit Risk Retention

There are no specific laws or regulations in New Zealand with respect to credit risk retention in relation to non-bank issuers. However, the RBNZ does impose limits on the aggregate funding registered banks can provide to non-consolidated associated SPEs under its current capital adequacy framework (see **4.6 Treatment of Securitisation in Financial Entities**).

In addition, as also discussed in **4.2 General Disclosure Laws or Regulations**, the big four banks may be affected by APS 120. For capital-relief securitisations, APS 120 caps the level of holding or funding of non-senior notes issued in a securitisation or provision of other loss positions or credit enhancements.

4.4 Periodic Reporting

As noted in **4.2 General Disclosure Laws or Regulations**, securitisations in New Zealand are structured to avoid being a regulated offer. This also means that the issuer would not be subject to the majority of statutory ongoing governance and periodic reporting requirements set out in the FMC Act.

While there are no specific legislative requirements for periodic reporting, the warehouse programme documents would usually impose such requirements. For term securitisations, periodic reporting is also provided (usually on the payment dates for the notes).

In addition, where an RMBS is intended to be eligible for the RBNZ's repurchase facility, one of the ongoing requirements is to submit a monthly report to the RBNZ. For asset-backed commercial paper or asset-backed securities, originators need to update the RBNZ regularly on the net value of the underlying asset pool and any changes to the assets in that pool.

Registered banks also include disclosures about securitisations/covered bond programmes in their publicly available disclosure statements.

4.5 Activities of Rating Agencies

There are no laws or regulations in New Zealand with respect to rating agencies' securitisation activities.

4.6 Treatment of Securitisation in Financial Entities

The RBNZ prudentially regulates the banking sector in New Zealand. It imposes conditions in

respect of a bank's registration as a registered bank, which include a requirement to comply with capital and liquidity requirements. If a registered bank has not complied with its conditions of registration, the RBNZ can recommend to the government that the bank should have its registration as a registered bank cancelled. Criminal penalties may also apply in respect of a breach of a registered bank's conditions of registration.

New Zealand's capital adequacy framework, with which locally incorporated registered banks are required to comply, sets out how a registered bank is required to account for its securitisation activities in determining its capital adequacy compliance obligations.

A registered bank must consolidate an SPE when determining the banking group for the purposes of the capital adequacy framework if:

- the banking group is required under New Zealand generally accepted accounting practice to consolidate the SPE for the purposes of its group financial statements;
- the SPE is a "covered bond SPV" for the purposes of the New Zealand legislative framework for covered bonds;
- the registered bank or a member of its banking group has provided credit enhancement in the form of a guarantee, or in such a form that the maximum extent of the liability cannot be quantified;
- there is insufficient separation between the bank and the securitisation; or
- the securities issued by the SPE have a shorter maturity profile than the underlying assets, and the registered bank may be required to fund some of the assets when the securities mature.

If a registered bank provides credit enhancement to an SPE but is not required to consolidate the SPE, it still must take this into account in its calculations of capital, for example as a deduction from Common Equity Tier 1 Capital.

The amount of aggregate funding provided to all associated SPEs not consolidated as described above and all affiliated insurance groups must not exceed 10% of the registered bank's Common Equity Tier 1 Capital. Where the 10% limit is breached, the full amount of funding must be deducted from Common Equity Tier 1 Capital.

Non-bank Deposit Takers

The RBNZ also imposes restrictions on related-party exposures and imposes capital requirements on non-bank deposit takers. For these purposes, a non-bank deposit taker must consolidate an SPE for the purposes of its capital and related party calculations if this would be required under New Zealand accounting standards for the purposes of group financial statements.

Deposit Takers Act

The regulation of deposit takers and banks has recently been reviewed and resulted in the Deposit Takers Act 2023 (DTA) which will implement, among other things, capital requirements to be set through standards or as conditions of licences on individual deposit takers once it is fully in force. Consultation on the DTA's application to develop policy, standards and regulations have commenced and will continue ahead of the DTA's full commencement by no later than 2029.

4.7 Use of Derivatives

There are no specific rules in New Zealand regarding the use of derivatives in securitisations.

4.8 Investor Protection

There are no specific investor protection rules applicable to securitisations. However, the fair dealing provisions (described in **4.2 General Disclosure Laws or Regulations**) apply to securitisations.

4.9 Banks Securitising Financial Assets

There are no other specific rules that apply to registered banks that securitise their financial assets, except for the impact of APS 120 (in relation to the "big four" banks) referred to in **4.2 General Disclosure Laws or Regulation** s and **4.3 Credit Risk Retention**.

4.10 SPEs or Other Entities

The most common form of SPE used in securitisations is a trust, as described in **1.2 Structures Relating to Financial Assets**. Companies have also been used, but are less common.

Please see the description in **1.2 Structures Relating to Financial Assets** in relation to the use of trusts, which are generally accepted and well-established for New Zealand securitisations. Trusts were originally used in the New Zealand market for tax reasons, particularly in relation to achieving tax neutrality.

Separately, as discussed in **4.2 General Disclosure Laws or Regulations**, securitisations are not offered to all types of wholesale investor in order to ensure the SPE is not subject to other regulatory requirements.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

Other than selling restrictions to ensure that any offer of notes, and any subsequent sales, are only made to certain categories of wholesale investors, as described in **4.2 General Disclosure Laws or Regulations** and **4.10 SPEs or Other Entities**, there are no particular activities that a securitisation entity would try to avoid.

4.12 Participation of Government-Sponsored Entities

No government-sponsored entities in New Zealand participate in the securitisation market other than the RBNZ through its repurchase facility (which applies to various types of debt securities) or as a potential investor.

4.13 Entities Investing in Securitisation

Typical investors in a securitisation include banks, fixed income managers, insurance companies (including life insurance companies), superannuation funds (such as KiwiSaver funds), hedge funds and government agencies. Any restrictions on these investments will depend on the rules of the particular entity, such as statutory requirements, constitutional documents and/or investment policies.

4.14 Other Principal Laws and Regulations

There are no further details to discuss.

5. Synthetic Securitisation

5.1 Synthetic Securitisation Regulation and Structure

There is no express prohibition on carrying out synthetic securitisations in New Zealand. However, in recent years such transactions have generally not been seen in the New Zealand market.

6. Structurally Embedded Laws of General Application

6.1 Insolvency Laws

In New Zealand, financial assets must be the subject of a true sale by the originator to the relevant SPE in order to insulate the SPE from the financial risk of the insolvency of the originator. If the transfer is not a true sale (and could be characterised as a secured loan), certain creditors of the originator may have recourse to the SPE's assets such that the assets would form part of the originator's insolvent estate.

6.2 SPEs

As mentioned in **1.2 Structures Relating to Financial Assets**, securitisations in New Zealand are usually structured using a trust as the SPE. Companies have also been used, but are less common.

There are a number of risks of some form of consolidation in insolvency proceedings of the originator, the most likely of which are set out below.

Statutory Management

Currently, statutory managers can be appointed under four statutes, depending on whether the originator is a licensed insurer, registered bank, an overseas person with an interest in sensitive assets or is otherwise a "corporation". The equivalent provisions of the DTA use the term "resolution managers" instead, who are appointed by the RBNZ acting as the resolution authority. If a statutory manager is appointed to the originator, there is a risk that the assets of the SPE will be consolidated with the assets of the originator. For this to occur, the SPE must be a subsidiary or an "associated person" of the originator. The definition of an associated person varies depending on the relevant operative statute. Whether the SPE is an associated person of the originator is broadly a question of whether the originator exercises ownership or control over the SPE. It is not possible to assess or address this risk in the abstract – consideration of all the circumstances of the structure of the securitisation is required and a legal opinion from counsel is usually necessary.

Liquidation

Unwinding

In certain circumstances, a liquidator appointed to the originator could unwind the transfer of assets from the originator to the SPE or the granting of security by the SPE to the security trustee. The originator or SPE (as applicable) usually gives various solvency certifications upon the transfer of the assets to the SPE, or the granting of security (as applicable), to mitigate these risks.

Pooling

There is also the risk that a liquidator appointed to the originator may seek a court order to "pool" the SPE's assets together with the originator's assets such that the total pool of assets is available to satisfy the claims of the originator's creditors. This can occur if the SPE is "related" to the originator. This risk can be addressed by ensuring that the affairs of the originator and the SPE are operated in such a manner as to avoid the operation of the pooling provisions of the Companies Act 1993.

Registered Banks

Where the SPE is established in respect of a registered bank's covered bond programme, the analysis is simplified by the legislative framework noted in **4.2 General Disclosure Laws or Regulations**, which means that, if properly structured, the risks of the SPE being caught by the statutory management and liquidation of the originator should not exist.

As noted in **4.6 Treatment of Securitisation in Financial Entities**, the DTA will implement a new regime for the regulation of registered banks (and other deposit takers), including crisis management and resolution of such entities and their associated persons. Full details of such provisions, in particular how they may apply to SPEs, are still to be confirmed.

6.3 Transfer of Financial Assets

The two essential elements of a true sale are an absolute transfer of property (rather than a transfer by way of security) and the payment of a price. In determining whether a transaction is a true sale or is more properly characterised as creating a security interest, it is necessary to first consider the intention of the parties, and second to consider the substance of the transaction taken as a whole. A court will give effect to the intention of the parties unless it reaches the conclusion that the form of the transaction is a sham and the transaction is more properly characterised as the creation of security.

Ultimately, it is a factual matter as to whether a transaction is characterised as a true sale or a secured loan.

Assignment

The transfer of financial assets for a securitisation is generally done via two possible methods:

- in relation to receivables (eg, a mortgage loan), this would be an absolute assignment of a legal thing in action for the purposes of Section 50(1) of the Property Law Act 2007 (an absolute assignment); and
- in relation to certain types of security supporting receivables (eg, the mortgage over land that secures the mortgage loan), this would be an equitable assignment.

Neither of these methods requires notice to the underlying obligors to be effective as a true sale.

Under an absolute assignment, the originator passes on to an SPE all its rights and remedies in relation to the receivables and the power to give a good discharge to the relevant obligor.

It is not necessary for notice to be provided to the relevant obligor before these rights, remedies and powers pass to the SPE. However, the passing of those rights, remedies and powers is subject to any equities in relation to the receivables that arise before the relevant obligor has actual notice of the assignment.

Notice to the relevant obligor is required to "perfect" the assignment and thereby prevent further equities arising that have priority over the SPE's claim. In the case of certain underlying security (eg, a mortgage over land), additional steps are also required to perfect the assignment (such as registration of a transfer in respect of a mortgage over land). The originator usually grants a power of attorney to allow these perfection steps to take place upon certain perfection triggers occurring (as discussed further in **3.3 Principal Perfection Provisions**).

If a transfer does not comply with the above requirements for a true sale, the SPE may face the risk that the receivables are recovered by an insolvency practitioner appointed to the originator (because of the bankruptcy remoteness risks discussed in **6.1 Insolvency Laws** and **6.2 SPEs**).

The Personal Property Securities Act 1999

In contrast, for a secured loan, the secured party would take a security interest over the relevant receivables. This is a much simpler process under the Personal Property Securities Act 1999

(PPSA) than the true sale of a receivable and requires perfection, usually by registration of a financing statement on the Personal Property Securities Register or the taking "possession" of the relevant receivables. However, merely taking security over the receivables exposes the SPE to the bankruptcy risk of the originator (which is described in **6.1 Insolvency Laws** and **6.2 SPEs**), and so is not used in securitisations in New Zealand.

The PPSA does, however, need to be considered when undertaking a securitisation in New Zealand. For example, the security granted by the SPE to the security trustee needs to be perfected (this is usually achieved via registration of a financing statement on the Personal Property Securities Register). In addition, transfers of accounts receivable, chattel paper and leases of greater than one year are deemed to be security interests under the PPSA. Accordingly, the perfection and priority regime of the PPSA needs careful consideration when structuring a securitisation. For example, when transferring chattel paper under a securitisation, the best form of perfection is the SPE taking possession of the underlying chattel paper in order to ensure it obtains the best priority against competing interests in the chattel paper.

6.4 Construction of Bankruptcy-Remote Transactions

There are no other means of constructing a bankruptcy-remote transaction that are commonly used in New Zealand.

A legal opinion would be obtained from counsel to support the true sale characterisation and bankruptcy remoteness of the transfer. The legal opinion may qualify the conclusions based on known facts and matters.

6.5 Bankruptcy-Remote SPE

As mentioned in **6.1 Insolvency Laws**, the transfer of the financial assets to the trust SPE is structured as a true sale to ensure the bankruptcy remoteness of the trust SPE from the originator. See **6.3 Transfer of Financial Assets** for further discussion regarding the true sale. These arrangements will be reflected in the securitisation documents. In addition, the securitisation documentation will include provisions that any recourse to the SPE is limited to the assets held by it (limited recourse provisions) and that no insolvency proceedings may be taken against the SPE (non-petition provisions).

7. Tax Laws and Issues

7.1 Transfer Taxes

In a New Zealand context, financial assets are typically transferred directly from the originator to an SPE as the ultimate transferee (ie, the SPE is not an intermediate entity in the chain of transactions).

For an originator, the transfer of financial assets (other than operating leases) may give rise to tax where there is a disposal of the relevant financial asset.

If the financial asset is a trade receivable, in respect of which income has already been recognised, no further income should arise from the transfer of the trade receivable. If the financial asset is treated, effectively, as a debt instrument for the purposes of the financial arrangements rules contained in the Income Tax Act 2007, the transfer will be treated as a disposal for the agreed consideration. The net difference between the cost of the financial asset (eg, principal advanced) and the consideration for the financial arrangement will give rise to income

where the consideration exceeds the cost (or, where the reverse is the case, will give rise to deductible expenditure).

The tax treatment of the transfer of operating leases is somewhat more complex, as the consideration for the transfer gives rise to income, typically with no offsetting costs basis, and therefore acceleration of the income for the originator.

The DF SPV regime in the Income Tax Act 2007 can be used to ensure that income acceleration (for both debt instruments referred to above and operating leases) does not arise. The DF SPV regime, in short, allows the originator to elect to treat the SPE as transparent for tax purposes, thereby attributing the SPE's property, purposes, activities and arrangements to the originator. The effect is that no tax consequences attach to transactions occurring between the SPE and the originator. In order to use the DF SPV regime, the SPE must be consolidated with the originator for financial reporting purposes.

The originator is able to elect into the DF SPV regime under the Income Tax Act 2007 from the commencement of its securitisation arrangements. Alternately, it can elect into the regime from when it files its tax return for the relevant income year (and the election then has effect for that year).

7.2 Taxes on Profit

SPEs are subject to income tax in relation to the income earned from those financial assets which are subject to securitisation. Typically, the SPE is debt funded in such a manner that its deductions offset substantially all of the income derived. The consequence is that generally no net income (or no material net income) arises for an SPE for New Zealand income tax purposes.

7.3 Withholding Taxes

In relation to withholding taxes, where an SPE is non-resident and acquires financial assets which are interest bearing, and obligors are New Zealand resident, non-resident withholding tax is applicable, for example, where the financial assets constitute residential backed mortgages. There is no practical manner in which the withholding tax can be dealt with. Consequently, for such securitisations, the SPE is generally a resident entity for New Zealand income tax purposes to ensure that non-resident withholding tax is not applicable to interest flows which may arise from the financial assets transferred to the SPE. New Zealand does have a withholding tax for residents, but the SPE will typically be able to avail itself of an exemption for this tax.

7.4 Other Taxes

New Zealand has no stamp duty or other transfer taxes which apply to the transfers of financial assets. Similarly, New Zealand goods and services tax (GST) generally does not apply to the transfer of financial assets as such a transfer is treated as an exempt supply for GST purposes.

No other material tax issues arise in connection with securitisations in New Zealand.

7.5 Obtaining Legal Opinions

Legal opinions are obtained for securitisations and those legal opinions are generally focused on the tax neutrality of an SPE (ie, to ensure that it has no – or materially no – net income on an annual basis from the securitisation). That conclusion is typically reached in relation to securitisations in New Zealand.

The opinion is typically given subject to a range of qualifications, based on the circumstances of the particular structure of the securitisation.

8. Accounting Rules and Issues

8.1 Legal Issues with Securitisation Accounting Rules

Issues may arise in connection with the accounting rules that apply to securitisations in New Zealand. A common issue is whether it is possible for the originator to achieve off-balance sheet treatment. Accounting issues are dealt with by the originator's accounting firm. In the case of registered banks and non-bank deposit takers in New Zealand, the RBNZ's rules also take accounting treatment into account in determining the impact of securitisations on the entity's capital adequacy requirements. This is described in more detail in **4.6 Treatment of Securitisation in Financial Entities**.

8.2 Dealing with Legal Issues

The primary legal issues arising in relation to New Zealand securitisations are addressed elsewhere in this chapter.