NEW ZEALAND

Law and Practice

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Russell McVeagh has New Zealand's leading private credit offering. The broader banking and finance team has seven partners and 27 other qualified lawyers, with virtually all senior lawyers having worked for leading magic circle and/or US firms. No other team in the market has this depth of senior expertise. The team acts for both borrower and private credit lenders and has advised on some of the largest transactions. The team is the go-to adviser for the growing non-bank lending market – including having assisted two of New Zealand's largest private credit managers in establishing new funds – and regularly works with regional and global private equity sponsors on their New Zealand acquisitions (including related financings) and private credit lenders.

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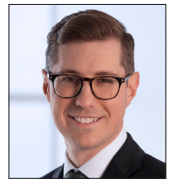

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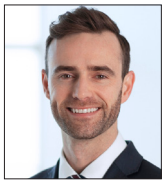

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1. Private Credit Overview

1.1 Private Credit Market

New Zealand has been slow to adopt private credit for corporate borrowers compared with more established markets overseas. It has a well-established non-bank real estate property lending market.

That said, the private credit market has been growing at a steady pace in recent times on two fronts:

- there is strong appetite from offshore private credit funds to lend to New Zealand borrowers. These market participants range from smaller, specialised funds to credit strategies sitting with global financial sponsor platforms; and
- a number of New Zealand based fund managers have raised funds.

Private credit funds tend to focus on the leveraged and sub-investment grade markets. During 2024, there were two competing themes in this space, which led to a steady continuation of private credit lending, but without rapid growth:

- M&A activity was subdued and, as a result, there were limited acquisition financing opportunities for private credit funds; and
- macro-economic conditions led to an increase in distress levels; this caused some borrowers to refinance bank debt with private credit and others to borrow subordinated debt in order to reduce senior debt levels, which presented opportunities for private credit providers.

Sectors that saw significant private credit activity during 2024 include:

- agriculture/horticulture, possibly driven by high interest rates and a flat market for rural property;
- asset finance providers, particularly as holdco debt behind senior securitisation structures;
- tourism, hospitality and retail/consumer discretionary; and
- real estate development; banks remain willing to fund real estate development, but strict pre-sale requirements in a flat housing market have led to a continued focus on private credit funding for developments.

1.2 Interaction With Public Markets

There is no established high yield bond market in New Zealand. While there is an active debt capital market for corporate issuers, this is typically reserved for investment grade companies. Accordingly, private credit tends to not compete with New Zealand's debt capital markets.

1.3 Acquisition Finance

M&A activity over the last 12 months has been comparatively limited. The few large-cap deals that transacted drew significant interest from banks.

Private credit had greater success on mid-market transactions. But banks remain competitive in this market, too. Notably, domestic private equity firms tend to use less leverage than their offshore counterparts, making bank financing more accessible.

1.4 Challenges

Offshore funds remain active in exploring opportunities in New Zealand. However, being a smaller market, deal sizes for New Zealand transac-

tions often do not meet the minimum ticket sizes required by many offshore credit funds.

Local funds are being established to meet the growing demand for private credit solutions. However, fund raising can be challenging. Local institutional investors appear to be less familiar with private credit as an asset class (compared with offshore investors). As a result, the growth rate of funds being managed by local managers is still gaining momentum.

The subdued M&A market has limited opportunities for private capital deployment in recent times. However, general market sentiment appears to anticipate an increase in M&A activity in 2025, which should lead to greater deployment opportunities for private credit.

1.5 Junior and Hybrid Capital

Private capital providers are active across the credit spectrum, including in providing junior/hybrid capital products. Common products include:

- unitranche loans (predominantly provided by offshore funds on larger cap transactions);
- contractually subordinated mezzanine debt; and
- structurally subordinated debt; these transactions were particularly prevalent in 2024 as a means of reducing senior debt at opco level and equity release.

Private credit providers may require equity upside (such as warrants) in addition to typical debt returns (usually for early-stage/venture deals).

1.6 Sponsored/Non-Sponsored Debt

Private credit funds are primarily focused on the business, its cash flows and the return profile (rather than the particular ownership structure). Funds are active in lending to private equity sponsor vehicles, but also to founder-based businesses. Listed companies tend to have lower leverage and, therefore, access to cheaper bank funding, but we have seen listed companies borrow private capital in special cases (usually in distress scenarios and where an equity raise is not available).

1.7 Recurring Revenue Deals and Late-Stage Lending

The New Zealand recurring revenue debt market is growing, and smaller private credit funds (often the credit strategies of PE firms or family offices) are active in this space. However, local banks are also active in supporting pre-profit customers, particularly in the tech space, which can make it difficult for private credit to compete.

1.8 Deal Sizes, Fund Sizes and Fundraising

For New Zealand-based funds, deal sizes tend to be in the range of NZD5 million–NZD30 million, with fund sizes ranging from NZD50 million to NZD300 million. See **1.4 Challenges** for fund raising challenges.

Offshore funds active in this market may undertake a single lend up to NZD400 million (although the number of deals of that size in this market are limited).

1.9 Impending Regulation and Reform

Regulators do not appear to have any particular focus on increasing the regulation on private credit lenders in New Zealand. There are no pending proposals for increased regulation of foreign private credit lenders.

2. Regulatory Environment

2.1 Licensing and Regulatory Approval

New Zealand Private Credit Lenders

Under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA), a New Zealand lender will likely be required to register as a financial service provider in relation to financial services they provide. Registration under the FSPA is straightforward, quick and inexpensive, and is not considered a barrier to entry.

Foreign Private Credit Lenders

A body corporate that is incorporated outside New Zealand that commences "carrying on business" in New Zealand must apply for registration under the Companies Act 1993 ("the Companies Act"). An overseas company that is registered under the Companies Act is not subject to most of the general provisions of the Companies Act, but is subject to some special notification and financial reporting requirements.

A foreign private credit provider may be required to register as an overseas company under the Companies Act, depending on the particular circumstances.

The registration requirements of the FSPA described above will apply to a foreign private credit provider that provides loans to persons in New Zealand. However, an exclusion may be available if the provider does not have a place of business in New Zealand and does not provide the services to any retail client in New Zealand. If the provider is carrying on business in New Zealand (see above), then they will likely be a reporting entity for the purposes of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AMLA). A reporting entity under the AMLA does not receive the benefit of this exclusion.

The above assumes that services/products are provided to certain wholesale investors only and not retail clients, consumers or natural persons.

Private credit providers may be subject to other rules and regulations beyond the scope of this summary.

2.2 Regulators of Private Credit Funds

The Financial Markets Authority is the primary regulator of financial markets in New Zealand.

2.3 Restrictions on Foreign Investments

There are no general restrictions on foreign investment in private credit funds.

In general terms, the Overseas Investment Act 2005 (OIA) (and related regulations) regulates investment by overseas persons in sensitive land (which includes residential land), significant business assets or fishing quota.

New Zealand private credit funds would typically not hold sensitive assets and so foreign investment in a fund would not typically require approval, consent or notification under the OIA. The question ultimately turns on the particular circumstances of the individual investment.

2.4 Compliance and Reporting Requirements

New Zealand Private Credit Lenders

Local funds will be subject to the standard compliance and reporting requirements that apply to all entities of the same type (such as the requirements generally applicable to companies under the Companies Act). Such requirements are not considered to be onerous.

There are limited reporting and compliance requirements under the FSPA, but, again, these are not considered to be onerous.

Local funds will likely be subject to the AMLA, which includes requirements in relation to customer due diligence, suspicious activities reports, record keeping and maintenance of an AML programme and compliance officer.

Other than the general provisions above, there are no statutory compliance and reporting requirements that apply specifically to private credit providers. Other requirements would arise if funds are being raised from retail investors.

Foreign Private Credit Lenders

If a foreign private credit lender is required to be registered as an overseas company under the Companies Act or registered under the FSPA (see **2.1 Licensing and Regulatory Approval**) then it will be subject to limited notification, compliance and financial reporting requirements.

The AMLA may also apply. The AMLA does not specify a territorial scope. However, guidance from the relevant regulators states that:

- an overseas financial institution carrying on business in New Zealand (including if required to be registered under the Companies Act) will be a reporting entity under the AMLA and subject to the general requirements noted above; and
- a financial institution that is not registered or required to be registered under the Companies Act is unlikely to be a reporting entity under the AMLA.

2.5 Club Lending and Antitrust

There are no general restrictions on club lending by private credit providers in New Zealand. Although the Commerce Commission (New Zealand's antitrust regulator) has recently taken interest in the broader banking and finance sector, it does not appear to be specifically focused on club lending arrangements.

That said, there are certain provisions of the Commerce Act 1986 (Commerce Act) that will be relevant to how club lending arrangements are initiated and structured.

In particular, the Commerce Act prohibits contracts, arrangements and understandings that either:

- contain a "cartel provision", being a provision that has the purpose, effect or likely effect of fixing prices, restricting output or allocating markets for goods and services that two or more parties to the agreement supply or acquire in competition with each other; and/or
- have the purpose, effect or likely effect of substantially lessening competition in a market in New Zealand.

The threshold for finding an "understanding" is low, and includes any informal conversations or information exchanges that give rise to an expectation (on the part of the other parties to the understanding) that a particular party will act or refrain from acting in a particular manner.

Nonetheless, the Commerce Act recognises that competitors may have legitimate reasons to collaborate, and, in such cases, the inclusion of a cartel provision in that collaboration may be appropriate. Accordingly, the Commerce Act provides an exception for cartel provisions that are reasonably necessary for the purpose of a "collaborative activity", being an enterprise, venture or other activity in trade that is carried on in co-operation by two or more parties, provided

it is not carried on for the dominant purpose of lessening competition between them. This exception is highly technical, and lenders operating in New Zealand should seek legal advice to ensure that the exception applies for any particular transaction.

As a general rule, lenders engaging in club or syndicated lending in New Zealand need to be careful about pricing and borrower information exchanged with competitors. At a minimum, a comprehensive confidentiality agreement setting out the information that may be disclosed, with whom, and for what purpose, should be put in place with all potential co-lenders before sharing any information.

Certain New Zealand-specific provisions are typically included in New Zealand syndicated facility agreements in relation to New Zealand competition laws.

3. Structuring and Documentation

3.1 Common Structures

Common deal structures for private credit can take the following form:

- a bilateral senior loan;
- a private credit fund participating in a senior syndicated/club facility alongside banks and/or other funds; deals of this nature have become more common due to increased distress levels, making a solely bank refinancing unattainable for some borrowers; these transactions also offer an attractive deployment opportunity for newly established New Zealand-based funds;
- a European-style unitranche, usually with a super-senior RCF provided by a bank; and
- mezzanine debt that is either:
  - (a) contractually subordinated to senior debt; or
  - (b) structurally subordinated holdco debt.

Private credit providers prefer drawn term debt with no amortisation. That said, delayed-draw term facilities for future acquisitions and/or capex are often made available, usually for borrowers backed by sponsors and where there is a clear growth path.

Private credit providers are less likely to provide revolving facilities and, as a result, unitranche loans tend to be coupled with super-senior revolving facilities provided by a bank.

Covenant-lite transactions in the style of term loan Bs are rare (but not unheard of) in New Zealand.

3.2 Key Documentation

The Asia Pacific Loan Market Association (APLMA, the equivalent of the Loan Market Association in the Asia-Pacific region) has produced a suite of standard-form documents that are applicable for use in the Australasian market. The APLMA forms are becoming more commonly used for investment-grade transactions, but less so for leveraged buy-outs (where sponsor-friendly precedents tend to be used) and mid-market transactions.

For transactions that involve different classes of creditors, an LMA-style intercreditor agreement will be needed. A market precedent form of intercreditor for unitranche/super senior revolving credit facility (ssRCF) transactions has developed organically over the last few years. For other transactions, there is no clear market precedent.

Unitranche deals in this market tend to follow the European – rather than US – style.

First out-last out transactions are not common in the New Zealand market, largely due to the lack of depth of creditors and the smaller average deal size by global standards.

In general terms, strong sponsor-backed borrowers continue to demand borrower-friendly terms. However, distressed borrowers needing a private credit solution tend to be term-takers, with private credit providers being able to obtain more lender-friendly terms.

3.3 Restrictions on Foreign Direct Lenders

See **2.1 Licensing and Regulatory Approval**

Foreign lenders are not generally restricted from providing private credit, taking security or enforcing security. However, see **6.4 A Foreign Private Credit Lender's Ability to Enforce Its Rights**.

3.4 Use of Proceeds and Acquisition Financings

There are no regulatory restrictions on the use of proceeds from private credit transactions. Private credit continues to be a key source of funding for both corporate and sponsor-backed acquisitions.

Take-private activity has been limited in recent times, but there are no legal or practical reasons why a take-private could not be funded by private credit.

3.5 Debt Buyback

Unitranche and other larger-cap transactions typically permit debt purchase transactions, subject to certain conditions. Documentation on this point tends to follow the suggested wording in the APLMA form of facilities agreements.

For smaller transactions (typically bilateral transactions), documentation is generally silent on debt buybacks.

3.6 Recent Legal and Commercial Developments

Not applicable.

3.7 Junior and Hybrid Capital

See **3.1 Common Structures** for common junior capital structures.

Junior creditors may lend to the same vehicle as the senior lenders. Real estate deals aside, security is granted in favour of a security trustee for the benefit of all creditors, with an intercreditor agreement entered into between the creditors.

The intercreditor agreement will set out:

- the ranking and order of priority of all creditors;
- permitted payments to each class of creditor;
- turnover trust provisions; and
- the circumstances when the junior creditors can step in to control enforcement.

For real estate transactions, the junior creditor will usually take second lien security (rather than share in a common security pool) with a customary deed of subordination and priority entered into between the creditors. This deed will cover matters similar to those set out in an intercreditor agreement.

Alternatively, a junior creditor could lend at a holdco level. Here, the junior creditors will usually receive first ranking security over all the assets

of the holdco borrower (which would usually be limited to shares in the opco and any receivables under shareholder loans made to that company). The junior creditor will have no direct recourse to the operating business, and will also have no contractual nexus with the opco lenders.

Borrowers that need junior capital tend to be term-takers, so junior private capital tends to be provided on more lender-friendly terms when compared with the terms obtained by sponsors on private-credit-funded LBOs.

3.8 Payment in Kind/Amortisation

Private credit providers often offer payment-in-kind (PIK) debt. PIK is more common for special situations or distressed borrowers, and has become more prevalent due to increasing base rates.

On more leveraged structures, borrowers will be given the option to PIK interest, subject to certain conditions, on the basis that the PIK rate is higher than the cash-pay rate. In senior/mezzanine transactions, there is often a requirement for interest to PIK if certain triggers are hit (such as financial covenants deteriorating below agreed thresholds).

Private credit funds tend not to require amortisation, preferring to keep more of their funds at work for longer, but will require mandatory prepayments for certain events (such as disposals).

Funds that participate alongside banks in senior club/syndicate structures tend to offer terms more consistent with a traditional bank financing (such as amortisation and no call protection).

3.9 Call Protection

Most private credit providers acting in New Zealand require some form of call protection, although the details vary between funds and on a deal-by-deal basis. Some funds require a form of minimum interest (eg, 12 months' worth of interest), whereas others may require the net present value of interest over the remaining non-call period, potentially capped at an agreed percentage of the amount prepaid.

4. Tax Considerations

4.1 Withholding Tax

New Zealand has two types of withholding tax that apply to interest, resident withholding tax (RWT) and non-resident withholding tax (NRWT).

Resident Withholding Tax (RWT)

RWT must be withheld on payments of resident passive income, including interest, made by New Zealand tax residents or non-residents carrying on a taxable activity in New Zealand through a fixed establishment in New Zealand. Resident passive income includes payments to non-residents for the purpose of a business they carry on in New Zealand through a fixed establishment, and offshore registered banks operating through a New Zealand branch (who are not associated with the payer).

Most New Zealand-based private credit funds would have RWT-exempt status, such that RWT is not withheld from interest payments.

Non-Resident Withholding Tax (NRWT)

Subject to certain exceptions, New Zealand-sourced interest paid to non-resident private credit providers will generally be subject to NRWT at the rate of 15%. This rate of tax may be reduced to 10% (or similar concessionary rates) in cases where the payee is resident in a country with which New Zealand has a double tax agreement.

A payer may elect to reduce the rate of NRWT to 0% and instead register for and pay an approved issuer levy (AIL) at a rate of 2% of the gross amount of interest. The AIL regime is not available where interest is derived jointly by a resident and a non-resident or paid between associated persons (unless the approved issuer is a member of a New Zealand banking group), or in instances of "related-party debt".

Most offshore-based private credit funds require New Zealand borrowers to register for, and pay, AIL with no ability for the borrower to deduct the cost of the AIL from interest payments – but this is a deal-by-deal negotiation point.

4.2 Other Taxes, Duties, Charges or Tax Considerations

New Zealand has a goods and services tax (GST), but GST is not charged on the supply of "financial services" (including provision of credit). There are no stamp taxes or other similar duties, charges or tax considerations that apply in New Zealand.

4.3 Tax Concerns for Foreign Lenders

See **4.1 Witholding Tax**.

4.4 Tax Incentives

New Zealand does not have any specific tax incentives that may be accessed by foreign private credit lenders lending into the country.

4.5 Non-Bank Status

There are no additional tax considerations necessary for non-bank lenders.

5. Guarantees and Security

5.1 Assets and Forms of Security

Private credit transactions will almost always be secured.

A typical security package will involve a cross-guarantee and all-asset security being granted by each entity in the borrowing group, together with registered mortgages over any real property. This is often subject to a guarantor coverage test, such that members of the borrowing group owning/contributing between 80% and 95% of the group's assets/EBITDA must grant all-asset security and become guarantors.

For acquisition finance transactions, New Zealand target entities will usually accede to the security package within a week post-closing.

Real Property

Security over interests in land (real estate) is generally taken by a registered mortgage. Although an all-asset security agreement will create a security interest over both personal property and real property, registered mortgages will also be taken where land is a material part of the credit package. Registration is not mandatory, but an unregistered mortgage will generally rank behind registered mortgages and other instruments registered on the title. Registration is a straightforward and largely online process facilitated through LINZ (a government department). Registration costs approx. NZD90–NZD180.

Personal Property

The Personal Property Securities Act 1999 (PPSA) governs security over personal property (being, in general terms, all property other than real property). Security over personal property can be taken by either an all-asset security deed or a specific security deed over certain personal

property assets (such as shares). Security interests usually operate in relation to both current and future assets, as well as any proceeds of the collateral.

The relevant security deed will contain certain required statements to ensure the security "attaches" to the relevant personal property and for such security to be enforceable against third parties. There is no particular form of security agreement that must be used, but it will usually be in the form of a deed.

Security over personal property will be "perfected" once either the secured party has taken possession of the collateral or a financing statement has been registered on the Personal Property Securities Register (PPSR). It is customary for each security interest to be perfected by registering a financing statement on the PPSR. However, a secured party will also take possession of certain types of collateral, such as shares, in order to give the secured party the best protection possible for their collateral.

A PPSR registration includes the names and addresses of the debtor and the secured party, and a description of the collateral. The registration can be made instantly online and costs NZD16.10. The maximum registration period for a financing statement is five years, but it may be renewed at or before the expiry of this period for an additional NZD16.10.

5.2 Floating Charges and/or Similar Security Interests

All-asset security can be taken by a single general security deed.

The introduction of the PPSA removed the distinction between fixed and floating charges.

5.3 Downstream, Upstream and Cross-Stream Guarantees

Typically, private credit providers will require downstream, upstream and cross-stream guarantees from obligors. There are no legal limitations or restrictions on entities providing these guarantees, subject to compliance with corporate benefit and financial assistance rules.

As to corporate benefit, a director of a New Zealand company has a number of duties. These include the duty to act in the best interests of the company or, if the constitution of a wholly-owned company provides, in the best interests of the company's holding company, even though it may not be in the best interests of the company. Directors need to turn their mind to this duty when entering into financial transactions, particularly when contemplating subsidiaries of a borrower who make up part of the security package.

From a practical perspective, lenders will typically require a corporate certificate from a director of each New Zealand guarantor that confirms, among other things, that the guarantee is in the best interests of the company (or, where relevant, its holding company), and that all shareholders of the guarantor have approved the transaction.

As to financial assistance, see **5.4 Restrictions on the Target**.

5.4 Restrictions on the Target

The Companies Act regulates the giving of financial assistance (including the giving of a loan, guarantee or security) to a person for the purposes of, or in connection with, the purchase of a share issued or to be issued by the company, or its holding company, whether directly or indirectly. This restriction is relevant in an acquisition

finance context where members of the target group guarantee or secure the acquisition debt.

The simplest – and least onerous – procedure under which financial assistance may be given is pursuant to Section 107 of the Companies Act. The only two requirements are that:

- all "entitled persons" of the company (usually this means all shareholders) must agree in writing to the financial assistance being given; and
- the board of the company resolves that it is satisfied, on reasonable grounds, that the company will, immediately after the giving of the financial assistance, satisfy the solvency test, namely that:
  (a) it is able to pay its debts as they become due in the normal course of business; and
  (b) the value of its assets (excluding amounts of financial assistance given by the company in the form of loans) is greater than the value of its liabilities, including contingent liabilities.

This method is used for wholly owned companies, and is very straightforward and quick to implement. Other methods are available to approve financial assistance if the Section 107 test is not available, but they are not typically required in an acquisition finance context.

5.5 Other Restrictions

See **7.6 Transactions Voidable Upon Insolvency**.

A secured financier's security may also be subject to any prior ranking security interests – see **5.7 Rules Governing the Priority of Competing Security Interests and/or Claims**.

5.6 Release of Typical Forms of Security

Real Property

A mortgage over real property can be released by the secured creditor signing a one-page instruction form authorising legal counsel to effect a release of the mortgage via the LINZ online platform. Legal counsel will then effect the release on the platform.

Personal Property

Security over personal property is released by the secured creditor signing a short release deed (two-to-three pages). The secured creditor usually arranges for any related PPSR registrations to be discharged within a few days after the release is effective.

5.7 Rules Governing the Priority of Competing Security Interests and/or Claims

New Zealand recognises that multiple security interests may be granted in the same asset.

With respect to real property, the priority of security interests will generally be determined by the order of registration on the title.

With respect to personal property, the rules for priority of competing security interests and claims are set out in the PPSA. The general rules provide that:

- a perfected security interest has priority over an unperfected security interest in the same collateral;
- if competing security interests are all perfected, then priority will usually be given to the secured party that was the first to either register a financing statement or take possession of the collateral.

However, there are specific priority rules within the PPSA which override these general rules. An example is purchase money security interests (PMSIs). A PMSI generally arises where the secured party gives value for the purpose of enabling the debtor to acquire the collateral (eg, a security interest taken in collateral by a seller to secure the obligation to pay the collateral's purchase price, such as retention of title arrangements). A PMSI is given "super priority" status provided that the secured party perfects its security interest within the relevant time period specified in the PPSA.

The PPSA also provides for rules of priority of interests (other than security interests) in collateral. For example, a third-party purchaser of shares has priority over a perfected security interest in those shares if the purchaser gave value, acquired the shares without knowledge of the security interest, and took possession of the shares. For this reason, financiers typically take possession of any shares forming part of the collateral package.

The PPSA expressly recognises that a secured party may subordinate its security interest to any other interest and the New Zealand courts will also uphold contractual subordination provisions.

5.8 Priming Liens and/or Claims

See **5.7 Rules Governing the Priority of Competing Security Interests and/or Claims** in relation to competing interests under the PPSA, such as PMSIs. Lenders will typically permit these arrangements to arise in an uncapped amount (as they generally arise under the necessary supply arrangements to the borrower), so long as they are entered into in the ordinary course of business. Liens arising by operation of law are also excluded from the application of the PPSA and will therefore trump a lender's security.

5.9 Cash Pooling and Hedging/Cash Management Obligations

Private credit lenders will typically permit a borrower to maintain bank accounts with a local bank and to enter into transactional banking facilities, such as overdrafts, hedging and letters of credit. A lender typically acknowledges that a transactional bank may be able to pool cash and set off that cash against overdrafts and other indebtedness owing to them. Rather than have the transactional bank agree otherwise, lenders will instead tightly control the amount any of indebtedness that can be entered into with transactional banks.

Where a transactional/hedge bank requires security, they will typically rank super senior to the senior private credit lender (sharing the same security pool).

5.10 Bank Licensing

See **2.1 Licensing and Regulatory Approval**

New Zealand law recognises and permits a security trustee to hold security interests on behalf of a group of creditors. Under this structure, new creditors can become beneficiaries of the security without needing to re-take security.

Security trustee structures are commonly used on New Zealand financing transactions where there are multiple lenders and/or other creditors.

6. Enforcement

6.1 Enforcement of Collateral by Non-Bank Secured Lenders

New Zealand is considered a "creditor-friendly" jurisdiction. When designing an enforcement strategy, lenders should consider:

- the type of security that the secured lender benefits from (ie, all-asset, specific asset security and/or guarantees);
- the type of collateral being enforced over and the corresponding statutory requirements;
- the rights and obligations under the relevant security agreement;
- whether any statutory security "hardening periods" have lapsed, or whether exceptions or defences are available to protect the secured lender when enforcing within the statutory hardening periods; and
- whether enforcement would be undertaken by the secured lender or via an insolvency appointment (eg, receivers or administrators).

Enforcement of Personal Property

Under the PPSA, secured lenders can enforce security interests in personal property without court involvement in most circumstances. The secured lender is required to issue various notices (some of which can be contracted out of), will be able to release subordinate security interests, and has a duty to get the best price reasonably obtainable at the time of sale.

Enforcement of Real Property

Enforcement of security interests in real property is primarily governed by the Property Law Act 2007 (PLA). Powers (such as taking possession and/or exercising its power of sale) are typically exercisable after the occurrence of a default under a mortgage. Secured lenders should be mindful:

- of the need to issue notices and for those periods to expire before completing a sale of the property;
- of the duty to get the best price reasonably obtainable at the time of sale;
- that a mortgagee can release subsequent ranking security over the real property (which cannot be achieved by a receiver selling real property in the absence of a contractual right to do so); and
- that when the secured lender sells (as mortgagee) real property to itself, it will require a sale via the Registrar or with approval of the High Court.

Guarantees

Unless the secured lender has also taken security over the guarantor's assets, a claim under a guarantee will be an unsecured claim. Common considerations when enforcing guarantees are: i) whether entry into the guarantee was appropriately authorised; ii) whether any applicable financial assistance requirements have been met; iii) release through unauthorised material variations to the principal debt; iv) whether the guarantor has taken independent legal advice; and v) claims of undue influence or duress.

Enforcement can also be implemented through the appointment of an insolvency official, as described in **7.1 Impact of Insolvency Processes**.

6.2 Foreign Law and Jurisdiction

An express choice of foreign law to govern the contract will usually be upheld by the New Zealand courts as the proper law of the contract (such that Courts will refrain from assuming jurisdiction) as long as the choice is genuine and not contrary to public policy. However, New Zealand is not a party to the Hague Choice of Court Convention, and therefore proceedings

will not automatically be stayed in favour of the parties' choice of foreign court and Courts retain the discretion as to whether exclusive jurisdiction should be exercised in favour of the parties' choice of court.

Choice of law clauses will not preclude New Zealand legislation that would still apply to the applicable secured property located in New Zealand (eg, the PLA and the PPSA), and will not typically prevent the commencement of an insolvency proceeding in New Zealand.

New Zealand has adopted the UNCITRAL Model Law, which facilitates the recognition in New Zealand of insolvency proceedings commenced in foreign jurisdictions. The entitlement and extent of recognition will depend on whether the insolvency proceedings are foreign main or non-main proceedings. This is a common way of ensuring that foreign restructurings or insolvencies can be implemented in respect of assets or counterparties located in New Zealand.

Proceedings cannot be commenced against a foreign state except in certain prescribed limited circumstances.

6.3 Foreign Court Judgments

Enforceability of foreign judgments will depend on the country in which the foreign judgment was obtained and the nature of the relief granted in the judgment. A party which has obtained judgment overseas may be able to enforce the judgment in New Zealand:

- if the judgment was given in Australia and is "registerable", by registration of the judgment under the Trans-Tasman Proceedings Act 2010;
- if the judgment was given in a country which New Zealand has a reciprocal agreement, by registration of the judgment under the Reciprocal Enforcement of Judgments Act 1934; and
- under common law principles of comity.

Foreign arbitral awards are generally recognised and can be enforced by entry as a judgment in New Zealand. There are a limited number of grounds on which the New Zealand courts may refuse enforcement of an award (eg, invalidity of the arbitration agreement under its governing law).

6.4 A Foreign Private Credit Lender's Ability to Enforce Its Rights

Overseas Investment Regime

New Zealand's overseas investment regime requires certain foreign investors to obtain consent for certain transactions. This may impact a foreign private credit lender's ability to enforce its rights under a loan or security agreement in two key ways:

- the approval of the Overseas Investment Office (OIO) may be required for a third-party purchaser to acquire certain assets if they fall within the regime; and
- consideration should be given to the permitted security enforcement exemption if the foreign private credit lender proposes to acquire assets that would otherwise require OIO approval.

Farm Debt Mediation

The Farm Debt Mediation Act 2019 (FDMA), which is not possible to contract out of, requires a creditor in relation to "farm debt" to engage in mediation prior to taking enforcement action. This creates a statutory moratorium on enforcement of farm debt for up to 60 working days. The exceptions that permit enforcement sooner include:

- the commencement of a formal insolvency process in respect of the debtor;
- the creditor obtaining an enforcement certificate; and
- the appointment of a receiver by the court in an "event of urgency".

Other typical considerations for foreign private credit lenders include:

- navigating inter-creditor arrangements (including stand-down periods on enforcement, senior and junior release provisions and applying non-cash consideration via disposal waterfalls); and
- choice of jurisdiction to commence any restructuring or enforcement process (including recognition).

6.5 Timing and Cost of Enforcement

The length and cost of an enforcement process will depend on a variety of factors, including the business' complexity and capital structure, cooperation of the debtor and key stakeholders, any mandatory statutory time periods (see **6.1 Enforcement of Collateral by Non-Bank Secured Lenders**; **6.4 A Foreign Private Credit Lender's Ability to Enforce Its Rights**; and **7.1 Impact of Insolvency Processes**), any challenges to enforcement and tax consequences of an enforcement. It is possible to "re-pack" the sale of a business to transact shortly after the appointment of a receiver or administrator (see **7.10 Expedited Restructurings**).

6.6 Practical Considerations/Limitations on Enforcement

When undertaking enforcement in New Zealand, private credit lenders should consider the following practical limitations or considerations:

- the impact of the OIO on any sales process as part of an enforcement (see **6.4 A Foreign Private Credit Lender's Ability to Enforce Its Rights**);
- any value leakage to creditors resulting from those creditors having a higher statutory ranking out of certain collateral (see **7.2 Waterfall of Payments**);
- impacts on the private credit lender's reputation from taking enforcement action, both as regards other credit providers and the debtor community; and
- the need for further liquidity to support the enforcement process, how the funder's position is best protected, and how that interacts with a private credit lenders' investment mandate and structure.

6.7 Claims Against Secured Lenders Post-Enforcement

Common claims against secured lenders enforcing over collateral include:

- failure to discharge the duty to obtain the best price reasonably obtainable at the time of sale (see **6.1 Enforcement of Collateral by Non-Bank Secured Lenders**); this can be mitigated by running a proper sales process, through the appointment of a properly qualified sales agent, obtaining a valuation and taking legal advice;
- entry into possession of the land and becoming a mortgagee in possession resulting in potential claims and fines;
- liability as a shadow director if, notwithstanding a person not being formally appointed as a director, the officially appointed directors of the company typically follow their instructions or directions; lenders should be careful to rely on their contractual rights when imposing limitations on company behaviour; and

- liability under indemnities given to insolvency officials that they appoint.

7. Bankruptcy and Insolvency

7.1 Impact of Insolvency Processes

The three primary insolvency processes available in New Zealand are receivership, voluntary administration and liquidation. Schemes of arrangement can also be used to implement debt restructurings.

Receivership

Receivers are most often appointed to secured property pursuant to rights granted in a security document. This security agreement will include the grant of security over all or part of the assets of the debtor/grantor and, commonly, will provide that a receiver can be appointed to those secured assets on default. Receivers can also be appointed by the High Court pursuant to its inherent jurisdiction (and on its terms) where assets are at risk.

The receiver's primary function is to take control, manage and realise the secured assets for the benefit and in the repayment of the secured creditor. The receiver's powers derive from the Receiverships Act 1993 and the security agreement. These powers commonly include all ability to do anything that the grantor could do regarding the secured assets (and the receivers have associated duties). There is no statutory moratorium that arises upon their appointment.

Voluntary Administration

Voluntary administration is available where there is a prospect of preserving, and implementing the recovery of, the going concern of the debtor company. Administrators can be appointed by the company's board, a creditor with security over all or substantially all of the assets of the company, or a liquidator. An administrator can also be appointed by application to the High Court (including by a creditor) if it is just and equitable to do so, or if the company is or may be insolvent and administration is likely to result in a better return than liquidation. The administration process is subject to the supervision of the High Court. The administrator takes control of the company and largely displaces the role of the directors.

Administration results in an immediate statutory moratorium preventing enforcement action or terminating leases, with limited exceptions. Creditors ultimately vote on whether the company should be liquidated or a deed of company arrangement (DOCA) should be entered into. If neither of those outcomes receive the approval of 50% in number of voting creditors representing at least 75% of the value of voted debt, the company will be returned to its directors. A DOCA is a flexible tool to facilitate a debt restructuring which binds all affected creditors, and a DOCA's terms must deliver a better outcome for creditors than an immediate liquidation.

Liquidation

Liquidation is the process by which the assets of a company are realised and their proceeds distributed to creditors in accordance with the statutory priority under the Companies Act. It almost always results in the deregistration of the company at the end of the liquidation. Liquidators can be appointed to a body corporate (including companies and limited partnerships) by shareholders (by special resolution), the company (on the occurrence of an event in the constitution), or by various stakeholders (including the company, a director and creditors) by application to the High Court. The High Court has a

supervisory jurisdiction in respect of liquidations. Pending the appointment of liquidators, it is possible for interim liquidators to be appointed to a company if the court is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company (with powers limited to that purpose). Liquidators have powers to recover transactions that the company made prior to liquidation (see **7.6 Transactions Voidable Upon Insolvency**), and have investigative powers and corresponding reporting obligations. Liquidation culminates in the liquidators making a distribution to creditors (see **7.2 Waterfall of Payments**).

Schemes of Arrangement

Schemes of arrangement in New Zealand follow the same procedure as schemes of arrangement in Australia and the UK, and can be used to implement compromises between the company and some or all of its creditors. Creditors are divided into classes based on their legal rights against the company, and the scheme will be effective if:

- in respect of each class of creditors (if there is more than one), the scheme is approved by more than 50% in number of creditors representing at least 75% of the value of debt of those creditors voting in that class; and
- the High Court sanctions the scheme.

7.2 Waterfall of Payments

Creditors in a company's insolvency generally rank as follows.

- From realisations of accounts receivable and inventory (excluding qualifying receivable purchasing programmes):
  - (i) First, creditors with perfected PMSIs over those assets;
  - (ii) Second, preferential creditors (eg, employee entitlements up to a statutory cap per employee and the Inland Revenue Department for certain unpaid taxes);
  - (iii) Third, other secured creditors;
  - (iv) Fourth, the costs and expenses of a liquidator and voluntary administrator; and
  - (v) Fifth, unsecured creditors ranking amongst each other on a pari passu basis.
- Realisations from other assets are applied as per the above but excluding preferential creditors (who are treated as general unsecured creditors out of other assets).

There are various statutory and common law rules that impact the above rankings (including any equitable interests, liens or proprietary interests).

7.3 Length of Insolvency Process and Recoveries

There is no standard time to complete an insolvency process. However:

- receivers will retire once they have repaid their appointor's secured debt and may retire earlier if the purpose of the receivership has been satisfied;
- voluntary administration typically lasts for at least 25 working days but this can be extended by order of the High Court; and
- liquidation would typically take much longer (often longer than a year) before distributions are made to creditors and the company is deregistered.

Recoveries depend on various factors. It is common for the realisation value of assets to be lower than the book value of assets recorded prior to insolvency, and creditor recoveries will

be diluted by the costs and expenses of the insolvency process.

7.4 Rescue or Reorganisation Procedures Other Than Insolvency

The other rescue or reorganisation procedures available in New Zealand are informal work-outs and creditors' compromises.

Informal Work-Outs

Informal work-outs are commonplace in the New Zealand market and are implemented via a series of contractual arrangements. Typically, these will be led by the debtor in connection with senior classes of creditors operating under standstill arrangements. Depending on the size and complexity of the business and capital structure, it may become necessary to employ debtor-in-possession statutory processes such as creditors' compromises or schemes of arrangement. New Zealand does not have a process similar to Chapter 11 in the US, although there are examples of Chapter 11 cases being recognised under the UNCITRAL Model Law.

Creditors' Compromise

To restructure its debts, a company may make a proposal to its creditors in according to the procedure in the Companies Act. This process culminates in a meeting of notified creditors who vote on the proposal, which may include a rescheduling of indebtedness and/or a compromise of claims. If approved by the same thresholds as for voluntary administration, all notified creditors will be bound by the compromise. While there is no automatic moratorium on creditor action upon issuance of a proposal, the High Court has jurisdiction to establish a moratorium on the terms it thinks appropriate. Secured creditors cannot be bound by a creditors' compromise except with their consent.

7.5 Risk Areas for Lenders

The key risk areas for lenders in the insolvency of an obligor include the following:

- directors' willingness to work with the company's stakeholders outside of a formal insolvency process can significantly impact the company's insolvency (inability to pay debts) because New Zealand has strict insolvent trading rules;
- the lender's ranking in right of recovery behind other creditors (see **7.2 Waterfall of Payments**);
- removal of control from them by the appointment of an insolvency official (although if a lender is the first ranking secured creditor there will generally be the ability to appoint receivers);
- moratoriums of enforcement action in certain circumstances (see, for example, FDMA at **6.4 A Foreign Private Credit Lender's Ability to Enforce Its Rights** and voluntary administration at **7.1 Impact of Insolvency Processes**);
- the impact of insolvency set-off (see **7.7 Set-Off Rights**);
- voidability of certain transactions or the granting of security (see **7.6 Transactions Voidable Upon Insolvency**).

7.6 Transactions Voidable Upon Insolvency

Certain transactions made by a company prior to its liquidation can be potentially unwound by the liquidator, as follows.

- A charge given by the company where, immediately afterwards, the company was unable to pay its due debts during the relevant period (being six months prior to the liquidation, or two years for related parties).

- A transaction that was entered into during the relevant period (being six months prior to the liquidation or two years for related parties) and at a time that the company was unable to pay its debts due, enabling the counterparty to receive a preferential payment. A creditor's exposure to such a recovery action can be minimised, or entirely avoided, by undertaking a "running account" analysis if a continuing business relationship exists between the debtor and creditor.
- Where the transaction was entered into at a time company was unable to pay its debts due (or was unable to pay due debts as a result of the transaction), a liquidator may recover from the counterparty the difference between the value that they received and the value that the company in liquidation received.
- Transactions for inadequate/excessive consideration with directors and certain other related persons that occurred three years prior to the company's liquidation.
- Dispositions of property that are made by way of gift, with an intention to prejudice creditors, in circumstances when the company cannot pay its due debts and certain other circumstances with a six-year limitation period from the date of the dispositions.
- Distributions to shareholders that were made at a time when the company failed the solvency test. A six-year limitation period applies from when the distribution was made. A "good faith defence" is available to shareholders who did not know that the company failed to meet the solvency test at the time that a distribution was made.

There are certain defences to many of these actions, including the "good faith defence". This requires:

- the payment to have been received in good faith and in circumstances when a reasonable person in the creditor's position would not have suspected, and the creditor did not suspect, that the company was or would become insolvent; and
- the creditor to have given value to the company (which can be given before or after the creditor received payment) or changed its position in the reasonably held belief that the transfer was valid and would not be set aside.

7.7 Set-Off Rights

Section 310 of the Companies Act provides for mandatory and self-executing set-off upon liquidation between an unsecured creditor and the company in liquidation where (subject to limited exceptions) there have been mutual credits, mutual debts, or other mutual dealings between a company and a claimant in the company's liquidation.

In addition, a separate regime in the Companies Act governs the application of set-off under a netting agreement in a company's insolvency.

7.8 Out-of-Court v In-Court Enforcement

There is no "typical" private credit out-of-court restructuring in New Zealand. Informal and out-of-court restructuring techniques include:

- rescheduling debts and amending key terms of finance documents (including granting waivers and agreeing forbearance or stand-still periods;
- debt trading or sub-participation arrangements;
- distressed M&A;

- structured/pre-pack business or asset sales; and
- debt-for-equity transactions and credit bidding.

Common considerations for private credit out-of-court restructuring will include:

- the need for a balance sheet and operational restructuring;
- obtaining an insolvency estimated outcome opinion from a licensed insolvency practitioner to support the financial component of a balance sheet restructuring;
- the ability of the borrower to deliver assets clear of encumbrances without the need for a statutory cramdown mechanism;
- the cash position of the group and the need for, and availability of, new funding;
- risks of challenge to the transaction from stakeholders (which may depend on which stakeholders the restructuring is imposed upon);
- ability for the debtor company/group of companies to deliver major transaction approval if necessary (which is the approval of 75% of the company's shareholders); and
- in contrast, the challenges with maximising returns in an enforcement counterfactual, including if part of a loan-to-own strategy (where OIO considerations may be relevant if there is an overseas private credit lender).

7.9 Dissenting Lenders and Non-Consensual Restructurings

Creditors' compromises, DOCAs under voluntary administrations and schemes of arrangement are procedures which can impose non-consensual restructuring on dissenting lenders/creditors (see **7.1 Impact of Insolvency Processes** and **7.4 Rescue or Reorganisation Procedures Other Than Insolvency** for thresholds required to impose cramdowns). Whilst cross-class cramdown is not available in New Zealand, creditors vote in a single class in voluntary administration (however secured creditors and lessors of property cannot be bound by a DOCA unless they vote in favour of it).

In each procedure, dissenting creditors have available procedures to challenge the compromise that was reached:

- DOCAs can be challenged and subject to termination on various grounds including if the DOCA was unfairly prejudicial or discriminatory against a creditor;
- creditors can apply to the High Court for orders that they are not bound by a creditors' compromise on limited grounds including that the compromise was unfairly prejudicial to that creditor or their class; and
- challenges from a creditors' scheme of arrangement will typically be in relation to class composition, procedural issues, whether the scheme was "fairly put", and if the class of creditors was fairly represented at the scheme meeting.

7.10 Expedited Restructurings

Pre-pack restructurings are permitted in New Zealand, although they are less commonly employed than other jurisdictions because:

- New Zealand does not have a regulatory framework for pre-packs, unlike SIP 16 in the UK;
- careful structuring will be required to implement a pre-packaged sale given a receiver's duties to obtain the best price reasonably obtainable at the time of sale and a voluntary administrator's duty to act in the best interests of all creditors;

- historically, there were challenges for an insolvency practitioner taking an appointment as receiver if they were involved in pre-planning work (although a statutory exception now exists which facilitates this).

Balance sheet restructurings are typically implemented either consensually or via receivership or voluntary administration (or sometimes in tandem). One benefit of voluntary administration is that a balance sheet restructuring can be implemented whilst maintaining the corporate entity (although dissenting secured creditors cannot be crammed down). In contrast, a restructuring via a receivership will typically involve the transfer of assets into a new entity (releasing security that ranks subsequent to the appointor's security).

8. Case Studies and Practical Insights

8.1 Notable Case Studies

No content provided in this jurisdiction.

8.2 Lessons Learned

No content provided in this jurisdiction.

8.3 Application of Insights

No content provided in this jurisdiction.