NEW ZEALAND

Law and Practice

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Russell McVeagh employs approximately 350 staff and partners across its Auckland and Wellington offices. The firm's private equity team is a market leader in New Zealand and has represented some of the largest and most high-profile domestic and offshore private equity funds. The team has significant experience in advising on all aspects of private equity-led transactions, including acquisitions, divestments, bolt-ons, financing, and tax issues associated with structuring and fund formation. Russell McVeagh has a deep understanding of the key drivers and issues faced by private equity sponsors, and collaborates with experts across its full-service practice to manage any issues that arise from complex, high-value private-equity transactions. Russell McVeagh's private equity lawyers work across the specialities to deliver advice on a broad range of issues, to local and international clients ranging from NZX 50 corporates to private equity and fund managers.

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

This chapter provides an overview of the key trends and features of a "private equity transaction" in New Zealand – that is, an acquisition (or disposal) of a target business where the buyer or the seller is a special-purpose vehicle that is ultimately owned by a fund or funds which are managed and/or advised by a private equity fund manager.

The New Zealand Private Capital Monitor 2024 reported that transaction activity in 2023 returned to pre-COVID-19 levels, with significantly more investments than divestments across private equity and venture capital funds.

Overall M&A activity reduced in 2023, with the number of premium private equity transactions significantly decreasing. However, there was a slight increase in the number of mid-market transactions.

Various economic conditions, including the recent (technical) economic recession in New Zealand, high interest rates and general election (further expanded on in **1.2 Market Activity and Impact of Macro-Economic Factors**) contributed to the decrease in pace of M&A activity in the second half of 2022 which continued into 2023 and early 2024. Bid-ask valuation gaps continue to impact transaction volumes with funds focusing on volume growth via operational improvement and funding investor returns through alternative strategies such as partial sales and sales to secondary funds. However, there are promising signs of M&A activity in New Zealand picking up in the latter half of 2024.

As previously noted, whilst 2021 and 2022 were "seller's markets" in New Zealand, with many formal sales processes taking place, this trend reversed in 2023, resulting in an increase in deals implemented by way of private treaty/bilateral process.

While slower than previous years, the current private equity market remains relatively strong, due to the following:

- the availability of quality domestic assets;
- a perception of New Zealand as a relatively safe and stable governmental/regulatory environment; and
- an abundance of "dry powder" (ie, available committed capital) on the part of domestic, regional and international private equity funds.

1.2 Market Activity and Impact of Macro-Economic Factors

In terms of types of transactions, as noted in **1.1 Private Equity Transactions and M&A Deals in General**, as noted above, there has been a reduction in formal sale processes.

From a sector perspective, in recent years there has been a particular increase in transactions in:

- infrastructure (core and core plus) – for example, the acquisitions of Vector Metering and intelliHUB, and the sale of Hiway Group by Riverside to local PE fund Direct Capital;
- healthcare – for example, Pacific Equity Partner's disposition of Evolution Healthcare, Permira-backed I-MED Radiology's acquisition of Hamilton Radiology and Midland MRI, and the acquisition of Habit Health by Five V Capital from Livingbridge; and
- take privates generally – for example, the (at the time of writing) proposed takeovers of The

Warehouse Group by Adamantam Capital and the proposed take private of Arvida Group by Stonepeak.

Notably, renewable energy and telecommunications, media and technology (particularly, artificial intelligence) are sectors that are gaining investor attention.

As mentioned in **1.1 Private Equity Transactions and M&A Deals in General**, transaction activity slowed down in the latter half of 2022 and this has continued into 2023 and early 2024. This is likely due to New Zealand's challenging economic conditions such as the recent technical recession and high interest rates. These challenges were exacerbated by general election uncertainty (New Zealand's election took place in mid-October 2023 and resulted in a change of government).

In particular, the high interest rates have tempered the relative ease of access to financing sources at reasonably favourable lending rates in New Zealand. With high interest rates, less debt is available, in turn impacting leveraged buyouts. However, given New Zealand private equity funds are not typically as highly leveraged as those in other jurisdictions, the decrease in availability of debt has had a lesser impact on M&A activity than has been observed in other jurisdictions.

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

New Zealand's Overseas Investment Regime

New Zealand's overseas investment regime is relatively complex (though well-advised investors can expect to navigate it successfully in most cases). There has been a variety of changes to this legislation in recent times. A full summary of the regime is set out in **3.1 Primary Regulators and Regulatory Issues**.

Focus on ESG

An emphasis by private equity buyers on environmental, social and corporate governance (ESG) matters is currently being seen, prompted by an increased focus by institutional investors such as superannuation funds. This is, and will likely continue to be, a key focus in M&A decision-making, particularly in respect of due diligence going forward.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Primary New Zealand Regulators

Two key questions govern the regulation of share acquisitions in New Zealand.

- Does the acquisition constitute "takeover activity" regulated by the Takeovers Act 1993 and the Takeovers Code (the "Code")?
- Is the acquisition otherwise regulated in New Zealand?

These are summarised as follows.

Does the Acquisition Constitute "Takeover Activity" Regulated by the Code?

What is a Code Company?

The Code regulates the change in control of voting rights in companies ("Code Companies") that:

- are listed on a regulated market, including the New Zealand Stock Exchange (NZX);

- have been listed on a regulated market in the last 12 months; and/or
- have 50 or more shareholders and 50 or more share parcels and is at least medium-sized.

Accordingly, private companies (unless recently delisted or widely held) will generally not constitute Code Companies.

The "fundamental rule" under the Code

The fundamental rule under the Code prohibits any person (or persons acting jointly or in concert, or as associates) from acquiring an interest of 20% or more in a Code Company (a "Control Transaction" and "Control Interest").

Who are the relevant regulators from a Code perspective?

The New Zealand Takeovers Panel (the "Panel") regulates takeovers of Code Companies, the underlying principle of this regulation being that all shareholders (no matter their relative size or influence) have equal, informed opportunities to participate in major share transactions. The Panel has the power to exempt persons from a provision of the Code and/or modify the application of the Code in a particular case. If the target Code Company is listed on the NZX, the NZX also has powers of supervision over a takeover, under the NZX Listing Rules. The Panel and NZX work together collaboratively.

If the target company is dual-listed on the Australian Securities Exchange (ASX), as is reasonably common for NZX-listed companies, the ASX and, potentially, the Australian Securities and Investment Commission, will also have a regulatory role in the matter.

If the proposed Control Transaction is structured by way of a scheme of arrangement (see further in this section), the New Zealand High Court will be required to review and sanction that scheme.

Is the Acquisition Otherwise Regulated?

Commerce Commission

The Commerce Commission New Zealand (NZCC) is New Zealand's regulator of competition, fair trading and consumer-credit contracts. Its main role is to enforce the Commerce Act 1986, alongside a list of additional legislation.

The NZCC works under a voluntary notification regime, meaning that there is no legal requirement for a seller or buyer to notify the NZCC in respect of a potential acquisition. However, notification is encouraged, especially when the relevant transaction could substantially lessen competition in a market. A buyer can apply to the NZCC either for clearance (that is, the NZCC is satisfied the merger will not substantially lessen competition in the market) or for a formal authorisation (allowing an acquisition even if it does substantially lessen competition in a market).

In these circumstances, the sale and purchase agreement for the transaction (SPA) will normally include a condition stating that NZCC approval is required before the transaction can go ahead. Once notified, depending on the level of complexity of the clearance application, the NZCC will typically take between 40 and 130 days to make a decision and issue a statement. The NZCC seeks to be as transparent as possible, which means that its decision and any submissions made are published on its website. However, a party may request that certain information remain confidential.

Financial Markets Authority

The Financial Markets Authority (FMA) is New Zealand's regulator for securities law and finan-

cial reporting. Most of the FMA's work is carried out under the Financial Markets Conduct Act 2013 (FMCA). The FMA generally has a limited practical role in mergers and acquisitions, in that there is no requirement to consult with the FMA in relation to a proposed transaction or seek its consent. However, depending on the nature of the target business and the acquisition (by way of example, the form of consideration to be provided), the FMCA may be relevant.

Overseas Investment Office

Private equity buyers proposing to invest directly or indirectly in New Zealand will need to be aware of the country's inbound foreign direct investment regime contained in the Overseas Investment Act 2005 (OIA) and associated regulations, which is overseen by the Overseas Investment Office (OIO).

New Zealand's overseas investment regime is known as being one of the more complex on a global scale; however, in the vast majority of cases, well-advised buyers can generally expect to navigate it successfully. OIO consent is not always required, but when it is required, the application process is relatively intensive and the time required to obtain consent will need to be factored into the relevant transaction's overall timetable. Where it is determined that OIO consent is required, the SPA will need to be expressly conditional on the receipt of the relevant OIO consent. Current market practice is to file an OIO consent application shortly after signing the SPA. OIO consent can take around two-and-a-half months (or longer, in some cases) to obtain, depending on the nature of the target asset, the consent required and the buyer. The regime is structured to ensure that the OIO has the power to review a relatively large proportion of transactions for the purpose of ensuring New Zealand's interests are adequately protected, but at the same time to encourage beneficial overseas investment. In a very small proportion of cases, the OIO will decline consent if the factors for consent are not met.

Whether a transaction requires consent depends on one or a combination of the value and/or nature of the New Zealand assets that are affected by the transaction. A transaction that will directly or indirectly result in the acquisition of a more than 25% ownership or control interest in a New Zealand business or New Zealand assets will require OIO consent if the gross value of the New Zealand assets or the purchase price for (or which is attributable to) the New Zealand business or assets exceeds NZD100 million. Higher monetary thresholds apply for buyers from countries with trade agreements with New Zealand that meet certain requirements.

OIO consent will also be required if a buyer directly or indirectly acquires a more than 25% ownership or control interest in an entity that holds a qualifying interest in "sensitive land" (what constitutes "sensitive land" is relatively detailed, but broadly speaking, includes any residential land, land directly adjacent to the foreshore, any non-urban land over five hectares and certain forestry rights).

The consent requirement is triggered even if the acquisition occurs offshore, further up the corporate chain. In each case, consent is also required if a buyer proposes to increase an existing more than 25% direct or indirect ownership or control interest in "significant business assets" or "sensitive land" through the 50% and 75% control thresholds, or to 100%. This consent requirement for creep transactions can catch out upstream investors in global businesses that have significant downstream assets or land interests in New Zealand where the buyer

increases its proportionate interest by participating in a non-pro rata fundraising or buy-back transaction.

On average, significant business assets consent takes approximately two months to obtain, and a sensitive-land consent can take between four and five months from submission – since the recent election, the government has tasked the OIO with reducing consenting timeframes, and there are already OIO consents being issued significantly more quickly than in recent years. In the case of regulated offshore transactions and large multinational transactions where the New Zealand business is a small component, the OIO can be persuaded to prioritise the application and consent can often be obtained in six to eight weeks for significant business assets applications.

In addition to the significant business assets and sensitive-land consent pathways, there is a separate "national-interest" test, which grants the Minister of Finance a broad discretion to prohibit or impose conditions on transactions that otherwise require consent, and which are considered contrary to New Zealand's national interest. The national-interest test will mandatorily apply (in addition to the applicable significant business assets or sensitive-land consent requirement) where either the buyer is a "non-New Zealand government investor" or the transaction involves land or assets that are used in a "strategically important business". The definition of a "non-New Zealand government investor" is complex, but in broad terms the test will apply if the buyer is, or its upstream owners are, more than 25%-owned, directly or indirectly, by one or more government-related entities (such as sovereign wealth funds, state-owned enterprises (SOEs), public pension funds and their associated entities) from a single country. This will often apply to private equity funds, depending on the size and composition of their limited partners' base.

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

Reserve Bank

The Reserve Bank of New Zealand (the "Reserve Bank") is New Zealand's regulator of banking, insurance and non-bank deposit-takers. Its main purpose is to promote the maintenance of a sound and efficient financial system. In instances where there is to be a significant acquisition by a New Zealand incorporated registered bank, Reserve Bank approval will be required. This approval can be incorporated into transaction documentation as a condition to the contract being completed.

NZX

On a transaction involving a sale or purchase by an NZX-listed entity, the NZX will have a role in monitoring compliance with the NZX Listing Rules (for example, rules relating to continuous disclosure and approval of material transactions).

Other sector-specific regulation

Depending on the nature of the target business, other New Zealand regulators may be relevant in the context of a transaction.

4. Due Diligence

4.1 General Information

Private equity buyers in New Zealand will typically carry out detailed due diligence investigations.

The extent of this review will vary, however, depending on the following factors:

- the nature of the target business;
- the buyer's existing sector expertise, and the extent to which it is already familiar with the business;
- the proposed level of shareholding to be acquired by the private equity buyer (ie, a minority or control stake);
- the buyer's overall risk appetite and its budget for advisory fees;
- the extent to which detailed seller due diligence has been undertaken and provided to the buyer; and
- whether the buyer is required to obtain warranty and indemnity (W&I) insurance and tax indemnity in the SPA.

Due diligence will typically be undertaken in respect of financial, tax and legal aspects. In some cases (depending on the factors previously outlined), private equity buyers will undertake diligence in respect of commercial, insurance, environmental, engineering (eg, where the target has specific critical tangible assets), ESG, anti-bribery and corruption/anti-money laundering and IT aspects.

A typical legal due diligence review for a private equity buyer will focus on the following areas:

- corporate structure;
- regulatory and compliance matters;
- material contractual obligations (focusing on terms underpinning key revenue streams and the identification of material provisions such as termination rights (including on change of control), exclusivity provisions/restraints of trade and liability under warranties and indemnities);
- finance arrangements (noting that this will probably be a limited review, given existing external debt will be refinanced as part of the transaction);
- real estate;
- employment (focusing on accrued employee benefits, contractual terms for key executives and the involvement of any relevant unions);
- intellectual property;
- information technology; and
- privacy/data protection and litigation and investigations.

4.2 Vendor Due Diligence

As previously noted, with M&A activity declining from the second half of 2022, which has continued into 2023 and early 2024, there has been an increase in deals being implemented by way of private treaty/bilateral process, resulting in longer deal processes and heightened scrutiny by buyers when conducting due diligence.

Prior to this (ie, 2021 and 2022 when M&A activity was high), there were a large number of formal sale processes whereby it was common for a private equity seller to provide seller due diligence (VDD) reports to a shortlisted group of bidders (typically accounting, tax and legal, and often commercial and insurance reports as well).

The provision of a VDD report benefits the seller in that:

- it permits the due diligence process to be truncated (also, the process is more attractive to bidders as it reduces their transaction costs), and reduces workload on management of the business during the buyer due diligence phase;
- key issues that may impact transaction implementation, or the value of the target business, are identified up front and potential solutions can be investigated, or the issue can be explained away; and
- the existence of VDD reports generally assists in ensuring that any W&I underwriting process is straightforward.

The existence of VDD reports, however, does not replace the need for a buyer to conduct due diligence. External buyer advisers will customarily conduct a full review of the VDD, including verification of sample materials and a "gap analysis" (aside from being prudent, this will generally be required as a condition to any bank financing and as part of any W&I underwriting).

Reliance on VDD reports will customarily be given to the successful bidder, via reliance letters provided by the relevant VDD advisers.

5. Structure of Transactions

5.1 Structure of the Acquisition

The typical structure of a private equity acquisition depends on whether the target is public or private.

Non-code Companies

As previously noted in **3.1 Primary Regulators and Regulatory Issues**, a widely held or recently delisted private company may constitute a Code Company, in which case the acquisition structure will generally be the same as for a publicly listed target, as set out in this section (unless an exemption from the Code is granted by the Panel).

Otherwise, an acquisition of a non-Code Company will typically be effected through a negotiated SPA.

Business/asset purchases are fairly rare in this space, as the seller will inevitably wish to divest itself of target business liabilities via a share sale.

As previously noted, whilst during 2021 and 2022 it was a "seller's market" in New Zealand, with many formal sales processes taking place, this trend has reversed with the current economic downturn, meaning that there is an increase in deals implemented by way of private treaty/bilateral process.

In a formal process, competitive tension inevitably impacts on the form of the sale documentation – typically, the SPA will be more seller-friendly than that which might be negotiated in a private treaty sale (in particular, sellers will be very focused on certainty of closing, and will be averse to conditionality – see more in **6.4 Conditionality in Acquisition Documentation**).

Code Companies

A "Code Transaction" will be effected:

- as a takeover offer under the Code ("Takeover Offer") (which may be a full or partial offer);
- by an acquisition or allotment of voting securities above the control threshold which has been "white-washed" by an ordinary resolution of the target;

- pursuant to "creep" provisions for holders of more than 50% and less than 90% (less than an additional 5% in a 12-month period); or
- by a court-approved scheme of arrangement ("Scheme"), approved by 75% of the votes of the shareholders of the Code Company entitled to vote (and 75% approval by any separate interest group).

If a buyer acquires 90% or more of the voting securities of a target, it can rely on compulsory acquisition provisions to acquire the balance of the voting shares.

Increasingly, Schemes are becoming the preferred (though not exclusive) route for private equity public acquisitions, in view of the following factors:

- the lower shareholder-consent threshold to obtain 100% ownership of the target than a takeover (generally, 75% for a Scheme versus 90% for a takeover); and
- Schemes generally permit a longer time-period to obtain any requisite regulatory approvals (eg, OIO or NZCC), although regulators will generally try to adhere to timeframes prescribed by the Code (it is also possible to obtain a limited set of warranties, backed up by W&I, for a Scheme).

It is usual for Control Transactions in New Zealand to be conducted on a consensual, "friendly" basis, as opposed to hostile takeovers (which are very rare). In this context, the buyer and seller will often enter into an agreement, which contains deal protection mechanisms such as "no-talk" and "no-shop" provisions, the requirement for irrevocable undertakings, any break fee arrangements and the key terms of the offer to shareholders (see further **7.1 Public-to-Private**).

5.2 Structure of the Buyer

The buyer in a New Zealand private equity transaction is typically a New Zealand-incorporated special-purpose vehicle (Bidco) established by the private equity buyer specifically for the purpose of the acquisition. Bidco will normally have a holding company and an interposed entity for funding (Finco). Other intermediary special-purpose vehicles may be interposed if required (by way of example, there may be a secondary Finco if it is proposed that mezzanine debt is introduced into the structure). Typically, these companies will all be incorporated in New Zealand and are almost always incorporated as limited-liability companies.

The only capacity in which a private equity fund will enter into transaction documentation is as a party to an equity commitment letter (see further **5.3 Funding Structure of Private Equity Transactions**).

5.3 Funding Structure of Private Equity Transactions

In New Zealand, private equity transactions are generally financed by a mixture of equity funding and senior debt.

Certainty of equity funding is customarily evidenced by an equity commitment letter provided by the private equity fund, customarily enforceable by the seller. This provides comfort to the buyer that there will be committed funds available to Bidco at closing.

Where the private equity fund also intends to use debt, it will typically provide a debt-commitment letter at signing from the relevant lender(s), which will attach either a term sheet or a facility agreement. Despite the current market uncertainty (see further **1.2 Market Activity and Impact of Macro-Economic Factors**), there continues

to be strong lender appetite to participate in financing private equity deals which are backed by quality sponsors. Further, there is a growing number of international and (to a more limited extent) domestic private credit platforms that are providing debt finance to support private equity deals in New Zealand.

Private equity buyers customarily acquire some or all of the shares in a target entity, to ensure it has control of the target business post-completion.

Where a non-control stake of a target is being acquired, this would typically be funded via equity only (senior lenders will be reluctant to advance funding where there is not clear control on the part of the investor, unless it is funded directly into the target business).

5.4 Multiple Investors

Examples of domestic and offshore funds partnering together are becoming more common (by way of example, Pencarrow and Accel-KKR in relation to Seequent and Pioneer and SilverTree in relation to Agility CIS). Consortium bids on larger transactions such as take-privates and deals in the infrastructure space (for example, the recent consortium acquisition of Tilt Renewables via a scheme of arrangement) have also been seen.

Generally, however (given the relatively small size of the New Zealand market, and comparatively lower deal sizes), consortium bids are less common than in other jurisdictions and it is more typical for private equity sponsors to seek sole ownership of portfolio companies. That said, it is not unusual to have co-investment from other investors alongside the private equity fund (generally in the form of a passive stake as a limited partner).

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

Overall, most transactions tend to be undertaken by way of a completion accounts mechanism. Prior to the COVID-19 pandemic and subsequent economic downturn, there was increasing use of locked-box structures in SPAs and, on balance, private equity sellers would have a slight preference for using locked-box arrangements. In the absence of compelling reasons otherwise (see further below) this is generally accepted by private equity buyers (particularly in a competitive bid scenario). Corporate buyers, however, have typically preferred to favour a completion accounts mechanism.

Two key factors are relevant to the consideration of appropriate consideration structures in the current climate:

- if OIO or other regulatory consents are required as a condition to completion of the acquisition, the time-periods required to fulfil that condition may mean that completion is set to occur a significant time after the latest audited accounts (noting that these will customarily be the basis of the locked-box balance sheet referenced in the SPA); and
- with the ongoing impact of COVID-19 and other macro-economic factors (such as inflation), buyers are either demonstrating an ongoing concern around the risk of business disruption between the locked-box date and completion or an unease to assume the economic risk over that period, which would make the position at the locked-box date less reliable.

Where a completion accounts mechanism is used, corporate sellers may be prepared to

accept that a portion of the purchase is placed into escrow (or retained) to cover relevant adjustments. Private equity sellers will resist this, though it may be a matter for negotiation (again, in a competitive bid situation, this would impact negatively on a bid).

In the current climate, where there is significant uncertainty due to potential business disruption (often resulting in significant gaps between a seller's perceived deal value and what a buyer is prepared to pay), increasingly, earn-outs and deferred consideration are being seen as a feature in SPAs. These are, by their nature, complicated arrangements, and care needs to be taken in terms of drafting to ensure any such provision properly protects the commercial position of both parties.

6.2 Locked-Box Consideration Structures

It is reasonably common for locked-box consideration structures to include a requirement for the buyer to pay to the seller an additional amount from the date of the locked box accounts until completion. This will typically be based on an interest rate on the enterprise value or equity value of the target business (to be negotiated) or at a rate reflecting the cost of capital for the target business.

In some circumstances (for example, where there is a long period between the locked-box date until completion due to OIO requirements), the parties may negotiate for the rate to ratchet upwards after a certain time-period.

It is not common to see interest charged on any leakage payment.

6.3 Dispute Resolution for Consideration Structures

It is uncommon to have a separate dispute-resolution regime for locked-box disputes. These are typically only subject to the dispute resolution provisions in the SPA (customarily New Zealand courts).

However, it is common for there to be a requirement that any dispute in relation to completion accounts should be referred to an independent expert for determination (which will be binding on the parties, except in the event of manifest error or omission).

6.4 Conditionality in Acquisition Documentation

This section covers non-Code transactions. For transactions involving Code Companies, see **7.5 Conditions in Takeovers**.

The objective of any seller in New Zealand, whether corporate or private equity will be to have as few conditions as possible.

There are two customary categories of conditions, as follows:

- any conditions required from a legal/regulatory basis – for example, OIO or NZCC consent, or shareholder approval for a listed entity in accordance with the NZX Listing Rules (a Regulatory Condition); and
- assuming a Regulatory Condition is required, the buyer will usually seek protection for the period between the signing and closing of the SPA in the form of a material adverse change (MAC) clause (although in a competitive bid situation, it may look to differentiate its bid by limiting or omitting this concept, depending on the nature of the target business and its appetite for any related risk).

If there is a Regulatory Condition, a seller will typically require that as much of the work (as is possible) required to satisfy that condition is done prior to the signing of the SPA, to minimise the conditional period. By way of example, in a competitive bid situation where the acquisition is subject to OIO approval, the seller will usually expect that the buyer has progressed its application in parallel to the SPA, in order that it can submit this as soon as possible following signing (or alternatively, in advance of signing).

MAC clauses are generally highly negotiated and tied to specific value impacts. Potentially, a MAC may be tied to breach of warranty or breach of a pre-completion covenant. In negotiating a MAC clause, parties will focus carefully on carve-outs relating to force majeure-type events (noting the impact of the pandemic).

Other types of conditions – for example, board/investment committee approval, shareholder approval (other than in a listed company scenario), financing or change-of-control approval in respect of material contracts are very unusual in the private equity transaction space (although they may be negotiated on a case-by-case basis).

6.5 "Hell or High Water" Undertakings

As in other jurisdictions, it is unusual in New Zealand for a private equity buyer to accept a "hell or high water" undertaking in respect of a Regulatory Condition.

This type of undertaking (most typically seen in provisions regarding antitrust) requires a buyer to take whatever steps need to be taken – which could include divestments or compliance with onerous undertakings – to ensure that the relevant regulatory approval is granted. This can be particularly difficult for a private equity fund, which is likely to have a number of different businesses across its portfolio, as to do so would potentially place it in breach of its fiduciary obligations to other investors.

In the scenario of a highly competitive bid, however, a private equity buyer may seek to strengthen its position by accepting a "hell or high water" undertaking (or something close to that) if it has had the benefit of advice and can be comfortable with that position.

If there is a known substantive issue arising in relation to the portfolio, a strategy in relation to this will generally be negotiated upfront.

It should be noted that this can be a complicated issue in the context of an OIO application, given the range of potential undertakings that may be required, particularly where sensitive land is involved; accordingly, it is vital that legal advice is taken on this point.

For the purposes of these undertakings, New Zealand's legal system continues to distinguish between merger control (enforced by the NZCC) and foreign investment conditions (enforced by the OIO).

6.6 Break Fees

Non-code Transactions

In the context of a private company acquisition, it is not usual to see break fees or costs reimbursement. There are occasional exceptions to this, however, as follows:

- a seller may agree to a break fee in the context of an exclusivity breach; or
- a seller may agree to cost coverage in the context of a competitive bid (in lieu of exclusive "preferred-bidder" status, in order to keep several bidders in the race).

However, this is relatively uncommon.

It should be noted that any arrangement in this context needs to be considered carefully in view of the unenforceability of penalty clauses. Generally, this can be dealt with as expressing the payment obligation as a reimbursement of costs, as liquidated damages or as a genuine pre-estimate of loss.

Code Transactions

In Control Transactions which are being conducted on a friendly basis (with deal protections incorporated into an Implementation Agreement or similar) it is common for the target to agree to pay a break fee in respect of any breach of key target obligations, if there is a breach by the target of key obligations (such as director recommendations, no-shop, no-talk, etc), and if the transaction does not complete.

There is no formal guidance from the Panel on this point, but New Zealand tends to follow other jurisdictions and limit any break fee to 1% of the value of the target business.

Reverse break fees are also becoming reasonably common in New Zealand – generally where there is a failure to complete because of the buyer's breach, or failure to obtain a requisite regulatory consent.

As is the case with non-Code transactions, in agreeing any break fee arrangements, consideration must be given to whether these could constitute a penalty.

6.7 Termination Rights in Acquisition Documentation

As is the case with conditionality (see **6.4 Conditionality in Acquisition Documentation**), any seller will wish to minimise any termination rights. Accordingly, termination is usually limited to failure to satisfy any condition precedent (including any MAC).

Note in this context that the buyer will usually ensure that material breach of warranty or pre-closing covenants falls within the ambit of a MAC (by way of example, insolvency). Alternatively, a specific termination right in this regard might be sought.

Outside these termination triggers, and in the absence of a material breach at closing, other termination rights are typically excluded.

The long-stop date generally depends on the nature of the transaction, what is reasonable in the circumstances and the conditions – for example whether OIO consent and/or NZCC clearance is required.

6.8 Allocation of Risk

A private equity seller in New Zealand will normally seek to minimise or exclude altogether any post-completion liability for breaches of warranties and indemnities. Accordingly, warranty and indemnity (W&I) insurance is now a common feature in any proposed transaction by a private equity seller. Private equity buyers are also generally happy to accept W&I insurance, subject to there being some "skin in the game" on the part of the seller (eg, backstop coverage for any gaps in W&I coverage).

Trade sellers may be inclined to bear more risk than their private equity counterparts, and are often more able to do so. That said, W&I insurance is being utilised by different types of sellers (including smaller-sized corporates and family-owned businesses) where there is a desire to ring-fence risk and obtain a clean exit.

Unlike some other jurisdictions, generally, members of management teams in New Zealand will not provide any warranties to the buyer in their personal capacity (unless they are also sellers, in which case they tend to provide the same warranties as the private equity seller, albeit on a limited-recourse basis, given the use of W&I).

Any matters that are known to the buyer (customarily, including those that are deemed to be known via the due diligence disclosure process) will be excluded from warranty protection – to the extent that the buyer seeks protection in respect of disclosed matters, it will need to seek specific indemnification for the matter or make an adjustment to its price.

See further in **6.9 Warranty and Indemnity Protection** and **6.10 Other Protections in Acquisition Documentation** for further details of the allocation of risk between sellers and buyers in New Zealand.

6.9 Warranty and Indemnity Protection

Private equity sellers in New Zealand will generally only directly stand behind fundamental warranties as to title and capacity. These will usually be capped based on the value of the underlying business and will be subject to a time limitation (usually two to three years).

To the extent that the buyer requires further protection in the form of business warranties, as previously noted in **6.8 Allocation of Risk**, this will usually be provided by the seller, but on the basis that the buyer's recourse is solely against the W&I insurance (and not against the seller, in the absence of fraud). The relevant policy will usually cover business warranties and an indemnity for pre-completion tax.

The policy will typically be valid for two to three years for business warranties and six to seven years for the tax indemnity.

The W&I insurer will not generally be liable for warranty claims unless the amount recoverable meets a specified threshold. The generally accepted market position (for both insured and non-insured deals) is that an individual claim must exceed 0.1% of the purchase price and the aggregate amount recoverable must exceed 1% of the purchase price (although insurers are offering de minimis and basket thresholds of 0.05% and 0.5% respectively, or "tipping" or "partial tipping" arrangements in certain circumstances, with a corresponding increase to the premium). Claims will also be subject to an overall cap (these can vary in size, depending on the overall deal size, but are typically in the range of 20 to 40% of the total consideration for the target business).

The W&I policy will contain limitations; as previously noted in **6.8 Allocation of Risk**, it will not cover matters known (or deemed to be known) to the buyer, or matters which arise in and which the buyer becomes aware of in the period between signing and closing and certain of the covered warranties will be subject to knowledge qualifiers. As per other jurisdictions, it is possible to obtain "add-ons" to a W&I policy to address these points (for example, "new breach" cover and "knowledge scrape" provisions) – however, this will generally result in a significant increase to the premium payable.

There are also a number of common exclusions in W&I policies in New Zealand (for example, price adjustment, environmental contamination issues, etc).

To the extent that specific issues are identified as a part of due diligence (by way of example, a specific litigation risk) it may be possible to obtain specific coverage from a W&I insurer in respect of that risk. However, this will be assessed on a case-by-case basis and will generally result in a significant increase in premium.

6.10 Other Protections in Acquisition Documentation

As noted above, W&I insurance is commonly used in private equity transactions in New Zealand. This would customarily cover fundamental and business warranties, and tax matters (warranties and the tax indemnity).

Having escrow or retention mechanisms in place to back the obligations of a private equity seller is not common. The exception to this would be in respect of an indemnity for a known liability (eg, specific litigation risk), and where deal dynamics warrant the seller agreeing to such a mechanism.

6.11 Commonly Litigated Provisions

Generally speaking, New Zealand is not as litigious as other jurisdictions (such as the USA), and disputes are uncommon in private equity transactions.

Disputes arising in relation to leakage under a locked-box mechanism will typically be dealt with between the parties, rather than litigated, and any issues in relation to completion accounts are typically referred to an expert.

Experience shows that the most typical categories of claims under W&I policies are in relation to warranties regarding accuracy of information disclosed, accounts and material contracts.

7. Takeovers

7.1 Public-to-Private

While not as common as private deals, public-to-private transactions are a feature of the private equity deal landscape in New Zealand and may become more frequent as private equity fund managers search for deal opportunities at an under-value in the event of an economic downturn following the COVID-19 pandemic and subsequent economic downturn.

There are two potential structures for a take-private transaction in New Zealand: (i) a contractual Takeover Offer pursuant to the terms of the Code, which may be a full or partial takeover offer; or (ii) a court-approved Scheme, which will also be subject to certain requirements under the Code.

The role of the target company and its board in both a Takeover Offer and Scheme is to provide its shareholders with a recommendation and reasoning on whether to accept or reject a Takeover Offer or whether to vote for or against a Scheme. In respect of a Takeover Offer, although approval of the target board is not necessary, a recommendation typically carries significant weight in terms of assisting shareholders to assess the relevant proposal. In a Scheme, the co-operation of the target company's board is needed for the Scheme to be put before shareholders. Therefore, the role of the target company and its board in both instances is important.

Hostile takeovers are permitted in New Zealand but are very uncommon, particularly with private equity buyers. Private equity bidders customarily wish to effect take-private transactions via a Scheme, which (as noted above) can only be facilitated in a consensual transaction.

Relationship agreements between the bidder and the target in relation to consensual deals are common in New Zealand, regardless of the method of acquisition. To increase the likelihood of a successful transaction from the outset, the bidder would customarily obtain (i) irrevocable undertakings (for a Takeover Offer) or voting undertakings (for a Scheme) from substantial shareholders; and (ii) enter into a bid implementation agreement (for a Takeover Offer) or a scheme implementation agreement (for a Scheme).

See **3.1 Primary Regulators and Regulatory Issues**, which includes a summary on the rules related to public-to-privates in New Zealand.

7.2 Material Shareholding Thresholds and Disclosure in Tender Offers

The primary material shareholding-disclosure threshold and filing obligation under the NZX Listing Rules and FMCA is the "substantial product-holder" notification: persons who obtain voting power of 5% or more in an NZX-listed company must disclose this fact (as well as other details about their interests and their name and address) by filing a "substantial product-holder" notice.

In circumstances where a person's voting power exceeds 5%, a substantial-holding notice must also be filed each time the voting power increases or decreases by 1%.

7.3 Mandatory Offer Thresholds

New Zealand law prohibits the acquisition of a Control Interest (as defined in **3.1 Primary Regulators and Regulatory Issues**) in the issued voting shares in a Code Company, which would result in a person's voting power equalling or exceeding 20%. Acquisitions above this level must be effected through one of the prescribed exceptions.

7.4 Consideration

In a Code Transaction (whether transacted as a Takeover Offer or a Scheme), a bidder may offer any form of consideration, including a cash sum, securities or a combination of cash and securities (which may include "roll-over" equity in a Bidco). New Zealand does not have any minimum price rules.

7.5 Conditions in Takeovers

A Control Transaction implemented by way of a Takeover Offer will be conditional upon a minimum interest threshold – the bidder must offer to acquire a certain percentage of the shares in the target (eg, 90%, so that the target can acquire the target compulsorily, or 51%, so it has voting control).

It is common for both Takeover Offers and Schemes to include other conditions, such as regulatory conditions (NZCC and/or OIO) and a MAC condition. However, in a Takeover Offer scenario, the Panel will limit a buyer's ability to enforce conditions that are within the buyer's sole control or subjective opinion. In a Scheme context, the target is unlikely to agree to any such conditions.

See **6.6 Break Fees**, which includes the circumstances where break fees can be negotiated between the bidder and the target in both non-Code Transactions and Code Transactions.

7.6 Acquiring Less Than 100%

A bidder is able to acquire a target compulsorily if it has obtained a controlling interest in 90% or more of the voting securities in the target.

In the event that greater than 50%, but less than 100%, of the target is acquired, a private equity buyer will largely have control over the target through its ability to control the board.

However, for as long as the target remains listed, it will continue to be subject to the NZX Listing Rules which will, amongst other things, require shareholder approval for certain transactions (including related-party transactions).

A debt pushdown would constitute financial assistance which is regulated by the Companies Act 1993 and/or the NZX Listing Rules (depending on whether the company is private or listed).

7.7 Irrevocable Commitments

Pre-bid undertakings from existing shareholders, whether taking the form of irrevocable undertakings (in relation to a Takeover Offer), voting undertakings (in relation to a Scheme) or public statements of intent, are a common feature of New Zealand takeovers. These are normally obtained prior to the announcement of the Control Transaction.

Any such undertaking may, however, contain the ability for the shareholder to take advantage of any superior offer that may emerge (either absolutely or within a certain increased-value range).

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Equity incentivisation of the management team (usually by way of a management incentive plan (MIP)) is a common feature of private equity transactions in New Zealand due to the desire to ensure management retain “skin-in-the-game”. While each transaction can differ substantially, typically management will hold only a small level of equity ownership in the target, generally 5% to 15%.

8.2 Management Participation

In New Zealand, management equity generally takes the form of options or loan funded shares. Often, these will be realised via a cashless exercise mechanism in the event of an exit. Cash-funded investment by senior managers is also common.

Preferred instruments are not typically used in the management equity structures (these are generally reserved for the private equity buyer) and so management will usually be issued ordinary equity (or a separate class of equity with largely the same rights as ordinary equity).

8.3 Vesting/Leaver Provisions

New Zealand leaver provisions generally contemplate “good” and “bad” leavers consistent with other jurisdictions (eg, the United Kingdom and Australia). In most MIPs, a person will be designated a bad leaver, unless their employment is terminated without cause or they die or are incapacitated. However, customarily the board will retain a discretionary right to permit management to be designated a “good leaver” outside of the prescribed regime.

It is common for MIPs to include vesting provisions, particularly where the participants are being issued equity in the form of either options or ordinary shares. In contrast to other jurisdictions, in New Zealand it is usual for management equity to vest on issuance, however where the management equity being issued is options, typically such options will only become exercisable on an exit or on an exit where a specified value has been achieved.

8.4 Restrictions on Manager Shareholders

MIPs will normally include provisions preventing management shareholders from competing with the target's business.

Any such non-compete clauses are generally limited, geographically and temporally, typically for about 12 months post the relevant manager's exit from the business (although longer periods may be possible, depending on the nature of the transaction and the position held by the manager, as well as the size of the equity stake held by the manager). It is also common for these clauses to extend to a prohibition on soliciting key employees, suppliers and customers of the target. These clauses are generally included in both the MIP documentation and the relevant manager's employment agreement (the latter, to the extent a new contract is put in place contemporaneously with the MIP documentation).

8.5 Minority Protection for Manager Shareholders

Manager shareholders often do not have the benefit of anti-dilution protections. In certain scenarios, such as where the manager shareholders hold a significant majority stake or the management team roll over their existing vested interests in the target, the manager shareholders may be able to negotiate into the shareholders' agreement certain protections (such as veto rights over specific matters that would materially prejudice their interests (eg, amendments to the company's constituent documents)).

However, it would be very unusual for manager shareholders to have meaningful influence over a private equity owner's exit strategy/rights.

9. Portfolio Company Oversight

9.1 Shareholder Control and Information Rights

For wholly-owned portfolio companies, the private equity owner will have complete control over the company.

For portfolio companies that would be wholly-owned by the private equity owner but for a management shareholder group and/or an employee shareholder group holding a minority stake, the private equity owner will generally have substantial control over the company (eg, majority board-appointment rights) and its control will be tempered only by certain minority veto rights set out in the shareholders' agreement as noted in **8.5 Minority Protection for Manager Shareholders**. However, typically, the private equity owner will have full visibility over every aspect of the portfolio company's business.

9.2 Shareholder Liability

In New Zealand, similar to many other jurisdictions, shareholders of a company will generally not be held liable for the company's acts and omissions.

However, the "corporate veil" may be pierced in certain, specific situations, such as:

- a person or entity using the relevant company to avoid existing legal or contractual duties, obligations or liabilities;
- the company being used as a sham or façade, masking the real purpose of the relevant corporate controller; and
- where the relevant shareholder has acted as a shadow director of the company, and therefore will be subject to the same duties and liabilities as a director of the company

(including any duties and liabilities in relation to trading while insolvent).

10. Exits

10.1 Types of Exit

In New Zealand, while transaction- and fund-specific, private equity owners typically hold investments for a period of three to six years.

Private sales (whether by way of formal sales process or a treaty/bilateral process) are the most common form of exit, although private equity-backed IPOs are seen from time to time.

Private equity sellers will often consider both a public and private exit; they will usually make a determination as to which route to pursue at a fairly early stage in the process (and so it is unusual for a true "dual-track" process to be run, whereby an IPO and sale process are run concurrently to conclusion). Potentially, a recapitalisation could be considered at the same time, but "triple-track" processes are uncommon in New Zealand.

It is becoming more common for private equity sellers to reinvest upon exit, where selling to a larger or more global private equity fund. This is typically achieved by rolling into a minority shareholding position in the new holding company, albeit often through a new fund raised by the fund manager.

10.2 Drag and Tag Rights

Almost all shareholders' agreements relating to investments majority-owned by a private equity fund will include drag rights to enable the private equity fund to sell 100% of the investment. The customary drag right threshold for a sale is 75% (assuming the cornerstone private equity fund holds this stake), but can be as low as 50.1%.

The inclusion of drag rights is commonly understood and accepted by minority shareholders (eg, management, co-investors, rolling sellers) on the basis that they understand that they are "along for the ride" and that the private equity fund must exit at some point in order to generate a return for its investors. However, in practise, drag rights are very rarely relied upon by private equity sellers, demonstrating the high level of trust and co-operation which is often developed between the private equity fund manager (and their representatives at the portfolio level) and other shareholders.

Similarly, almost all shareholders' agreements relating to investments that are majority-owned by a private equity fund will feature tag-along rights, although only exercisable where the majority private equity fund shareholder has not exercised its drag rights. These tag rights provide the minority shareholders with the right to tag-along or "piggy-back" on a sale of shares by the majority private equity fund shareholder by requiring the purchaser to buy out their minority shareholding as well. Typically, tag-along rights will only be triggered by a complete exit by the majority private equity fund shareholder, although sometimes will be capable of being triggered on a pro rata basis if a control transaction (ie, at least 50.1% of the shares) is being sold by the majority private equity fund shareholder. Notwithstanding the above, while not overly common, sometimes management incentive plans will preclude management from tagging in the event of an exit by the majority private equity fund shareholder.

Drag rights apply to all shareholders, however tag rights will generally only apply to institutional co-investors.

10.3 IPO

The COVID-19 pandemic (and resulting market disruption and uncertainty) reduced IPO activity throughout 2021 and into 2023. This remains the trend in 2024, given current market uncertainty (see further **1.2 Market Activity and Impact of Macro-Economic Factors**). The market remains cautious and there has not yet been any meaningful increase in capital markets activity.

Voluntary escrow arrangements or, in certain circumstances, mandatory escrow arrangements enforced by the NZX, are almost always a feature of exits undertaken by way of an IPO. These escrow or "lock-up" arrangements may allow for a partial release of shares from escrow after the company's results are announced, and generally will be effective for a period of 12–24 months from the listing date. Where not mandatory, investment banks advising on the IPO will typically advise that, from a pricing and marketability perspective, it is preferable for the private equity seller to agree to some form of escrow or lock-up arrangement.

Relationship agreements between the private equity seller and the target company are a typical feature to see. These relate, amongst other matters, to seats on the board of the company and information rights.