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New Zealand: Law and Practice

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NEW ZEALAND

Law and Practice

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Russell McVeagh is a top-tier law firm in New Zealand with offices in Auckland and Wellington, and a new office due to open in Queenstown in early 2025. The firm advises on the full spectrum of sustainability and ESG law and policy issues. It brings together market-leading experts from specialist areas to provide tailored, practical advice to help organisations with their governance, risk-management, culture and conduct, and compliance needs. The Russell McVeagh team supports businesses with their ESG transition by drawing on its deep experience navigating change in regulated contexts and an extensive network of relationships with both private sector and government stakeholders. Russell McVeagh also leads the market in advising on sustainability-linked and green-based borrowing, and advises on climate-related projects, including in relation to solar, wind and hydrogen renewable power.

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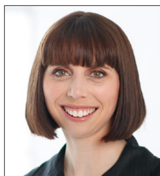

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1. Introduction

1.1 General ESG Trends

New Zealand's legal and regulatory landscape in relation to Environmental, Social and Governance (ESG) matters is continuing to evolve. To date, regulation of ESG issues has been fragmented, and New Zealand has not, to date, introduced comprehensive sustainability frameworks such as those arising out of the European Green Deal. However, New Zealand is an early adopter of mandatory climate-related disclosures and has an established legislative framework in relation to climate change under the Climate Change Response Act 2002 (CCRA).

In that context, one of the most significant developments in 2024 in relation to ESG and sustainability laws and regulations in New Zealand is that reports under New Zealand's recently introduced mandatory climate-related disclosures regime ("CRDs regime") have begun to be published. In 2021, New Zealand introduced the CRDs regime under the Financial Markets Conduct Act 2013 ("FMC Act") for certain large organisations known as "climate-reporting entities" (CREs). CREs are required to prepare and lodge on a public register climate statements that comply with climate standards issued by the External Reporting Board (XRB). The XRB's Aotearoa New Zealand Climate Standards (NZ CS) follow the four themes originally promulgated by the Taskforce of Climate-related Financial Disclosures, being climate-related governance, strategy, risk management and metrics & targets. CREs also have obligations to keep "CRD records". CREs with subsidiaries need to prepare their climate statements on a group basis.

There have been a number of other key developments over the last year regarding ESG and sustainability laws and regulations, many of which result from New Zealand's change of government at the end of 2023 (see **1.2 Environmental Trends**). For example, in 2023, the prior government had commenced a review of the New Zealand Emissions Trading Scheme (NZ ETS) to assess whether changes were needed to provide stronger incentives for businesses to transition away from fossil fuels, while also supporting carbon removals. A key issue for this review was considering the role that removals from forestry have in the NZ ETS. However, this review has now been abandoned by the new government.

In September 2024 a cross-party Parliamentary Select Committee published a report in relation to an inquiry into climate change adaptation. This report is a first step towards the development of a legislative framework for climate change adaptation (including in relation to managed retreat) in New Zealand.

Details of other changes in ESG laws and regulations are set out below, including in relation to modern slavery (see **1.3 Social Trends** and **4.1 Soft Law Becoming Hard Law**), directors' duties (see **1.4 Governance Trends** and **2.3 Role of Directors and Officers**), and stock exchange listing rules (see **2.2 Differences Between Listed and Unlisted Entities**).

1.2 Environment Trends

Under the CCRA, New Zealand has a relatively stable overarching climate change architecture, including a "net zero by 2050" target (for all gases other than biogenic methane) and a framework for the government to produce emissions budgets and associated emissions reduction plans. The CCRA also provides for the government to produce a rolling series of reports and plans in relation to climate change adaptation. It also establishes an independent Climate Change Commission, responsible for advising the gov-

ernment in relation to climate change mitigation and adaptation.

While the CCRA architecture enjoys a high degree of political consensus, there remain substantial differences between New Zealand's major political parties on the details of how New Zealand should respond to ESG issues. The current government has progressed a number of key changes in relation to climate change and environmental regulation, including:

- producing a draft second emissions reduction plan under the CCRA, which is due to be finalised by the end of 2024;
- commencing a cross-party inquiry into climate change adaptation;
- discontinuing the prior government's review of the NZ ETS;
- committing to pricing agricultural emissions by 2030 (the prior date had been 2025);
- reversing the prior government's ban on offshore oil and gas exploration;
- reversing the prior government's reform of the Resource Management Act 1991, which included reforms relating to climate change mitigation and adaptation as well as natural capital more generally;
- commencing a review of New Zealand's emissions reduction target for biogenic methane (currently set at a 24-47% reduction from 2017 levels by 2050); and
- announcing that it is working with the private sector on a sustainable finance framework, including the development of a sustainable finance taxonomy.

In 2023 and 2024, there were a number of significant case law developments in relation to the "E" in ESG. These include the following.

- In February 2024, the Supreme Court of New Zealand (Supreme Court) issued its much-awaited decision in Smith v Fonterra [2024] NZSC 5, the first case to be brought in New Zealand seeking to hold private parties liable in tort for damage caused by climate change. The Supreme Court determined that the claim can proceed to trial. The question before the Supreme Court was simply whether the claim ought to be struck out (on the basis that it raised no reasonably arguable cause of action), so the decision does not determine whether the defendants are in fact liable to Mr Smith. However, the case is significant because it leaves open the possibility of corporates facing tort-based liability in New Zealand in respect of greenhouse gas emissions produced by their activities.
- In late 2023, the Court of Appeal of New Zealand heard an appeal against the High Court of New Zealand's decision in Lawyers for Climate Action New Zealand Incorporated v the Climate Change Commission [2023] NZCA 443, which relates to the approach adopted by the Climate Change Commission in its May 2021 advice to the government in relation to emissions reduction pathways. A decision in the claim is awaited.
- Following trends overseas, two significant greenwashing claims have been lodged in the High Court (see **6.3 Greenwashing v Greenbleaching**).

1.3 Social Trends

New Zealand already has well-developed legal frameworks for certain components of the "S" in ESG, including in relation to health and safety and employment law. However, other aspects of the "S" in ESG are less developed, or are undergoing evolution, as described further below.

In New Zealand, ESG is often considered as encapsulating matters relating to *te ao Māori* (a holistic world view that emphasises the interconnectedness between people and the environment) and *tikanga Māori* (customs and protocols), which are unique to New Zealand and reflect the worldview, culture and practices of New Zealand's indigenous Māori population. While te ao Māori and tikanga Māori intersect with all aspects of ESG, these concepts are included here as part of the "S" in ESG, given their critical importance to the social fabric of New Zealand life.

While New Zealand law has for some time recognised matters relating to te ao Māori and (in particular) matters relating to the application of Te Tiriti o Waitangi (the Treaty of Waitangi) between Māori and the Crown, the legal recognition of tikanga and te ao Māori is evolving. Two important developments in the last year have implications in the ESG space:

- In September 2023, the New Zealand Law Commission released its study paper "He Poutama", which addresses how tikanga and state law might best engage in a way that mains their individual coherence and integrity. It is an influential report that is likely to shape the way that ESG matters are considered by courts, individuals and businesses in the years to come in New Zealand.
- The Supreme Court's decision in Smith v Fonterra [2024] NZSC 5 briefly considered matters relating to tikanga in the context of a climate-related claim. The decision did not set out detailed principles for the implications of tikanga in the climate change context. However, the Supreme Court noted that the trial would need to grapple with the fact that the claimant purports to bring proceedings not only on behalf of himself, but also as *kaitiaki* (guardian) acting on behalf of the *whenua* (land), *wai* (water) and *moana* (ocean) as entities in their own right.

In July 2023, the prior Government announced plans to establish a modern slavery regime, including a public register to require transparency over organisations' supply chains. This proposal would have required organisations with more than NZD20m in revenue to report on their actions to address the risk of exploitation in their operations and supply chains. Since the 2023 General Election, work in relation to the introduction of specific modern slavery legislation in New Zealand has not been progressed, and comments made by the responsible Minister in July 2024 suggest that this is not a priority for the current Government in the short term.

In relation to case law, in late 2023 the High Court issued its decision in The Christian Church Community Trust v Bank of New Zealand [2023] NZHC 2523. This case followed an earlier decision of the Employment Court, which had found that certain members of the Gloriavale Christian Community were employees from the age of six years old, that ready access to child labour was a significant factor in the success of the Gloriavale Christian Community business model, and that those members were subject to rigorous, and sometimes violent, supervision while working as children. The 2023 case considered the question of whether BNZ was entitled to stop providing banking services to the commercial and charitable entities associated with the Gloriavale Christian Community, in light of BNZ's Group Human Rights Policy. This case is significant, as it is the first time the New Zealand Courts have been asked to consider the circumstances in which a bank can terminate a banking relationship as a result of human rights concerns. The High Court found that it was seri-

ously arguable that BNZ had a contractual discretion rather than an absolute right to terminate, and that it was seriously arguable that BNZ had failed to act reasonably in deciding to cease the provision of banking services to the plaintiffs. It accordingly granted an injunction that prevented BNZ from terminating the banking relationship. This case is subject to appeal.

1.4 Governance Trends

New Zealand has an established framework of governance laws for companies, including (most significantly) through the Companies Act 1993 and, for listed issuers, the NZX Listing Rules. Amongst other things, the Companies Act 1993 sets out in legislation the duties that directors of New Zealand companies owe to companies and their shareholders.

Further details in relation to key recent developments in the regulation of ESG governance are set out in **1.6. Market Participants**.

In addition to those developments, many New Zealand organisations are required to report publicly on matters relevant to the "G" in ESG under the CRDs regime, which requires CREs to report on matters relating to their governance of climate-related risks and opportunities. This has led to many organisations adopting a more sophisticated approach to governance in this area (eg, by maturing risk management systems, embedding regular governance reporting on ESG matters and working towards integration of ESG with core business strategy). This is also contributing to businesses expanding their consideration of ESG matters – for example, nature-related risks have gained more prominence in director and management discussions, in part due to increasing recognition that directors may need to both consider and respond to nature-related risks as part of discharging their directors' duties.

1.5 Government and Supervision

Regulators play an important role in monitoring and enforcing New Zealand ESG laws and regulations. For example, the Financial Markets Authority (FMA) and the New Zealand Commerce Commission (Commerce Commission) are responsible for monitoring and enforcing key ESG laws and regulations.

In addition, the Environmental Protection Authority is responsible for enforcement of the NZ ETS and other environmental laws.

From a supervisory perspective, the Reserve Bank of New Zealand (RBNZ) is the prudential regulator and supervisor of the New Zealand banking sector. One of the RBNZ's key statutory objectives is promoting the stability of New Zealand's financial system. The RBNZ considers that this objective requires it to assess the material risks of the entities that it regulates to understand the resilience of the financial system to shocks, including risks relating to climate change. Accordingly, the RBNZ has provided guidance to the banking sector about the management of climate-related risks and undertook a climate stress test in 2023 to assess the resilience of major New Zealand banks to plausible long-term climate-related challenges.

1.6 Market Participants

Most sectors of the New Zealand economy are likely to be affected by ESG laws and regulations in the coming years, with examples below.

- The CRDs regime applies to most large financial institutions and large listed issuers. Organisations not directly captured by the CRDs regime may also be indirectly affected

by being in the "value chain" of CREs, as the regime indirectly incentivises CREs to work with their suppliers on initiatives responding to their climate-related risks and opportunities.
- In addition, the NZ ETS prices emissions across all sectors of the economy (other than agriculture). As such, most New Zealand businesses are impacted by emissions pricing, either directly through participation in the NZ ETS, or indirectly through the cost of goods and services. Any future changes to the NZ ETS will therefore impact a wide range of stakeholders.
- The financial sector is likely to continue to be affected by ESG laws and regulations, including any sustainable finance taxonomy that emerges.

1.7 Geopolitical Developments

Geopolitics and politics are both important determinants of the approach to ESG in New Zealand.

New Zealand is party to a range of international treaties on ESG-related issues, including the United Nations Framework Convention on Climate Change and the Paris Agreement. This obligation requires New Zealand to prepare, communicate and maintain successive nationally determined contributions (NDCs) towards delivering on the goals of the Paris Agreement. New Zealand's first NDC (as updated in October 2021) equates to a 41% reduction in net emissions by 2030 from gross emissions in 2005. The second NDC is due in 2025 for the period starting from 2031.

While meeting New Zealand's first NDC is likely to involve a combination of domestic measures and the purchase of offshore mitigation, the government has indicated that it wishes to prioritise domestic reduction initiatives to mitigate the extent to which New Zealand needs to "write a cheque" to offshore jurisdictions to meet the first NDC.

In addition to multilateral treaties, New Zealand is also party to bilateral free trade agreements that impose obligations on it in relation to ESG. For example:

- a new free trade agreement between NZ and the European Union (EU) includes a number of environmental provisions. It includes an obligation to effectively implement the UNFCC and the Paris Agreement, including commitments with regards to NDCs; and
- the free trade agreement between NZ and the United Kingdom, which entered into force in May 2023, also includes sustainability obligations. This agreement requires the parties to encourage private and public sector entities operating in its territory to take appropriate steps to prevent modern slavery in their supply chains.

Exports play an important role in the New Zealand economy and, accordingly, geopolitical factors that affect New Zealand's exports are very significant in relation to progress on ESG. For example, New Zealand exporters may be affected by regulations such as carbon border adjustment mechanisms, and these international dimensions are an increasingly important driver for decarbonisation of New Zealand exports. New Zealand's imports are also impacted by geopolitical developments, although New Zealand's high levels of renewable electricity insulate it to some extent from shocks associated with oil and gas supply.

Domestic politics also influence the direction of travel on ESG. One key challenge for New

Zealand is that it has a relatively short (three-year) electoral cycle, which means that achieving certainty in ESG-related policies is particularly challenging. Cross-party consensus building on key issues is accordingly critical. As noted in **1.2 Environment Trends**, this cross-party consensus building means that New Zealand does, at least, have a relatively stable climate change legislative architecture, although policy priorities differ significantly across the major political parties.

2. Corporate Governance

2.1 Developments in Corporate Governance

We see several key areas of development in the next 12 months, as follows.

- It is expected that the approach to climate-related governance will continue to evolve, following the introduction of the CRDs regime. One noticeable trend we have seen is the increase in the number of issuers with sustainability committees as standing committees of the board. Thirty percent of the 20 largest entities on the NZX50 now have a standing sustainability committee. We expect climate-related governance to remain a key area of focus in the next 12 months.
- In August 2024, the government announced its intention to progress a package of reforms modernising the Companies Act 1993 and other related corporate governance legislation. This will include a review by the Law Commission of directors' duties and related issues of director liability, sanctions and enforcement more generally. This review may also revisit the amendment to s131 of the Companies Act, introduced in 2023, which states that directors may have reference to ESG factors when determining the best interests of the company (as discussed further in **2.3 Role of Directors and Officers**) and reconsider liability for directors under the CRDs regime (which is currently automatic).

2.2 Differences Between Listed and Unlisted Entities

Entities with securities listed on the NZX must comply with the NZX Listing Rules, which set out a range of governance requirements. Amongst other things, the NZX Listing Rules require issuers to comply with the recommendations in the NZX Corporate Governance Code ("the Code"), on a "comply or explain" basis. This means that issuers of equity securities must provide a corporate governance statement, usually included in the issuer's annual report, on the extent to which it has followed the recommendations of the Code. If an issuer has not followed a recommendation, its statement must identify that recommendation and outline the reasons why the recommendation was not followed and what (if any) alternative governance practice was adopted.

In 2023, the Code was amended to include (amongst other matters) specific recommendations in relation to non-financial reporting, as follows.

- *Gender diversity goals* S&P/NZX20 Index issuers are now recommended to have a measurable objective on gender diversity for board composition, which cannot be less than a target of 30% female and 30% male, within a specified period, which the issuer may determine. This is aligned with changes made in Australia to the Australian Securities Exchange (ASX) Code in 2019, in relation to issuers on the S&P/ASX 300 Index. Issuers (particularly S&P/NZX50 issuers with more

than 50 employees) are also encouraged to disclose gender pay gap information, and to consider diversity beyond gender (eg, ethnicity, cultural background, sexual orientation, age, skills etc) when designing their diversity policies.

- *ESG Reporting* the Code now recommends that issuers provide annual non-financial reporting disclosures on ESG factors and practices. ESG reporting can be presented as part of an issuer's corporate governance report or in a standalone report. The commentary also encourages issuers to disclose the process by which it has ensured its non-financial disclosures are accurate, and whether these have been externally audited. The NZX has issued an ESG Guidance Note, which is designed to assist issuers to implement this recommendation. This includes suggestions as to what issuers may want to report on, including the relevance of ESG factors to their business models and strategy, the ESG risks faced by the business and how they can identify, monitor and manage those risks (noting the overlap of these points with the CRDs regime). While the NZX Corporate Governance Code and ESG Guidance Note do not mandate a particular approach to ESG reporting, many New Zealand issuers adopt international frameworks such as Integrated Reporting and the Global Reporting Initiative.

2.3 Role of Directors and Officers

ESG requirements have become an important component of directors' roles and responsibilities in New Zealand, particularly following the introduction of the mandatory CRDs regime and the Companies (Directors Duties) Amendment Act 2023.

The Companies (Directors Duties) Amendment Act 2023 was passed in August 2023. This sought to clarify the director's duty to act in the best interests of the company, in Section 131 of the Companies Act 1993. The amended duty now includes the words:

"To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters)".

The intention of the proposed reform was to make it clear that directors may consider a wide number of factors when making decisions and should be expected to embed ESG factors into their decision-making as part of their duty to act in good faith and in the best interests of the company. However, the amendment does not appear to impose any additional obligations on directors, as it was already considered clear that directors were not limited in their decision-making to consider profit maximisation and most directors already consider ESG factors in their decision-making. The reform is likely to have more of a "signaling" rather than substantive effect, and could be repealed as part of the package of reforms referred to in **2.1. Developments in Corporate Governance**.

2.4 Social Enterprises

Unlike other overseas jurisdictions that have specific legal business forms for social enterprises (eg, the Public Benefit Corporation in the United States and the Community Interest Company in the United Kingdom), there is no specific legal structure for social enterprises in New Zealand.

Instead, social enterprises and not-for-profits can choose from a wide range of entity structures used for business in New Zealand, which

may be for-profit or not-for-profit. Common structures include a limited liability company or a trust, with or without charitable status.

Obtaining charitable status requires an entity to have an established "charitable purpose" and to apply for registration on the Charities Register. Once registered, the entity will need to comply with on-going obligations under the Charities Act 2005, including the requirement to complete an annual return and file financial statements.

2.5 Shareholders

The increasing importance of ESG considerations for shareholders could give rise to future shareholder activism. However, as set out further in **6.2 Climate Activism**, shareholder activism has played a lesser role in New Zealand than it has in some other jurisdictions in relation to bringing ESG-related claims.

One recent example of shareholder activism was a public campaign by the New Zealand Shareholders Association (NZSA) in relation to shares of its members held in Colonial Motor Company, an NZX listed company. The NZSA indicated that it had planned to vote against all of the company's resolutions at the 2023 annual general meeting to encourage the company to improve its ESG governance disclosures and compliance with the Code.

3. Sustainable Finance

3.1 Progress in Green Financing

While the New Zealand government recognises the role that mobilising finance has in the climate transition, few specific legal steps were taken over the last year to promote sustainable finance in New Zealand.

One key development over the past 12 months has been progress on the development of a sustainable finance taxonomy for New Zealand. In early 2024, the government announced the establishment of an independent technical advisory group (ITAG) led by the Centre for Sustainable Finance, to recommend design principles for a New Zealand taxonomy. The potential development of a taxonomy was signaled in New Zealand's first National Adaptation Plan published in August 2022, which indicated that a taxonomy could help protect against greenwashing and (if aligned with best practice) support greater investment in New Zealand's climate-resilient projects.

If introduced, a sustainable finance taxonomy would classify which economic activities are aligned to a sustainable, low-emissions future, with a view to directing investment to the activities required for the transition.

The ITAG has now published its recommendations for the development of the taxonomy, which includes recommendations relating to the principles, purpose and outcomes of the taxonomy. The recommendations report suggests prioritising five sectors, including agriculture, transport, construction/real estate, energy and industrial manufacturing, and aligning with other benchmark taxonomies such as Australia and the EU. The ITAG recommends that the taxonomy be voluntary in its initial phase, with an expectation that it could become mandatory over time following a phase-in approach or grace period. The exact nature of the obligations that could eventually become mandatory are, as yet, unclear. While a key focus of the taxonomy will likely be debt markets, the ITAG recommends that it be designed for a broader range of applications.

Outside of the sustainable finance taxonomy work outlined above, the FMA has consulted on regulatory tweaks designed to grow green bond issuance in New Zealand. This is described further in **3.3. Access to Green Financing**.

3.2 Sustainable Finance Framework

New Zealand does not have a specific regulatory framework for raising and providing sustainable finance. Rather, entities looking to raise or provide finance are required to comply with New Zealand's more general laws relating to financial markets. The primary piece of legislation regulating the offering of, and dealing in, financial products in New Zealand is the FMC Act.

The FMC Act defines "financial products" as including an equity security, a debt security, a managed investment product or a derivative. Sustainability-linked, social and green bonds are caught by this definition, as well as ESG-related investment funds and superannuation schemes. In relation to offers, an issuer of financial products is required to publish a product disclosure statement (PDS) setting out key details in relation to the offer (unless it is able to rely on an exclusion, for example for wholesale investors or for "QFP" offers of financial products of the same class as quoted financial products). For all offers, there are general "fair dealing" prohibitions in the FMC Act on false or misleading conduct and the making of unsubstantiated representations which govern the content of other communications in relation to the offer.

While not mandatory, in practice an important source of guidance for sustainable and green lending in New Zealand are the standards and frameworks published by (amongst others) the Asia Pacific Loan Market Association (APLMA). For example, the APLMA's sustainability-linked loan principles describe the standards against which key performance indicators and targets in sustainability-linked loans should be set, benchmarked and disclosed. Other relevant guidelines include APLMA principles for green loans and social loans, the International Capital Markets Association's principles for green, social, sustainable and sustainability-linked bonds and guidelines for sustainability bonds, Climate Bonds Initiative guidance and standards and guidance from the Sustainable Agriculture Finance Initiative.

3.3 Access to Green Financing

At a general level, to date it has been relatively straightforward for large New Zealand corporates to access the market for sustainable and green finance. Indeed, a large proportion of major corporates in New Zealand now have sustainable or green-borrowing finance frameworks and/or one or more sustainable or green finance products in place, so the focus is now shifting from market establishment to maturing the approach.

Over the past couple of years, the sustainable finance market in New Zealand has been maturing, with more focus on small and medium enterprises (SMEs). SMEs are an important part of the New Zealand economy, but historically have had less access to sustainable finance products than larger organisations. Several New Zealand banks have also set and publicly disclosed sustainable finance targets, which is further incentivising innovation in the products offered as the banks work towards their goals.

On the investor side, the FMA has said that consumers are increasingly prioritising non-financial characteristics when making investment decisions, which means that there is opportunity to grow the sustainable finance market. However, a lack of a comprehensive framework for

the way that sustainable investments ought to be described has contributed to confusion for retail investors, and there is scope to grow understanding through the development of a sustainable finance taxonomy described in **3.1. Progress in Green Financing**.

Some of the products available in the New Zealand market are as follows.

- *Green, social, sustainable, and sustainability-linked (GSSS) bonds* these include both use-of-proceeds bonds, where the proceeds are committed to a project that the issuer considers to have a sustainability benefit, and bonds linked to the issuer's progress as against pre-agreed sustainability performance targets. Private issuance of green bonds over the past few years has been comparatively slow and concentrated in a small pool of issuers, owing in part to regulatory complexity associated with retail issuance of these products. The authors are only aware of one sustainability-linked bond having been issued in-market. In April of 2024, the FMA consulted on proposals to reduce the regulatory burden on issuers of green bonds by exempting issuers of certain sustainable bonds from disclosure requirements where the bonds have identical rights, privileges, limitations and conditions to existing quoted bonds (except for a different interest rate, redemption date, and GSSS status). The consultation has closed but no decisions have yet been announced.
- *Green and sustainability - linked loans* the market for sustainability - linked loans in New Zealand is already mature, and there are challenges with continuing to grow this market as a result of several factors including establishment costs and challenges meeting audit/assurance requirements. Nevertheless, there remains scope for diversification in the green loan market.
- *Managed funds* in line with trends overseas, there has been a proliferation of ESG-related investment funds in recent years, reflecting increased consumer appetite for these sorts of products. There is, however, some confusion in the retail market about ESG-related labels, and the FMA has signaled a regulatory focus on greenwashing in the context of managed funds. This is contributing to fund managers maturing the approach to labelling of their funds.

3.4 Stranded Assets and Non-bankables

Like many international counterparts, New Zealand banks and other financial institutions are focused on portfolio decarbonisation initiatives. The CRDs regime is a key driver in this space, as large New Zealand financial institutions are required to report on their Scope 3 (including financed) emissions and the steps they are taking to respond to their climate-related risks and opportunities.

However, tensions arise between the imperative for decarbonisation and broader impacts on New Zealand's economy and society. For example, a sudden shift away from financing traditional New Zealand industries, including agriculture, would have significant effects on New Zealand's economy, as well as having social impacts for many New Zealanders. As such, the general market approach to date has been for the large banks to set emissions-reduction targets and work directly with their clients on proactive steps they can take to manage the transition to a low-emissions, climate-resilient future rather than withdrawing banking services (although most major banks do have some exclusions). The authors understand that some lenders also have caps

and collars to manage their ongoing exposure to high-emission industries.

One recent development in this space is that a Parliamentary Select Committee has launched an inquiry into banking competition in New Zealand, and its terms of reference include considering the effect of any bank lending policies relating to borrowers' emissions that result in additional lending costs and/or lending restrictions. The terms of reference also include ascertaining whether bank environmental and sustainability policies have, or are likely to result in, further increases in lending rates to the agriculture and horticulture sectors. This aspect of the inquiry appears to respond, at least in part, to concerns raised by some stakeholders that the large banks' membership of the Net Zero Banking Alliance may be restricting access to capital for some sectors. The inquiry is still underway and no conclusions on this point have yet been reached.

3.5 Challenges Ahead

Key challenges in the sustainable finance market in New Zealand over the coming years include the following:

- litigation and regulatory risk associated with greenwashing, especially in the absence of clear regulatory parameters around when ESG-related labels will be false and/or misleading; and
- likely challenges associated with the implementation of the sustainable finance taxonomy once developed.

A further challenge in the New Zealand market is one of scale. For example, the small size of New Zealand's investment opportunities creates challenges for the provision of bonds to provide funding to low-carbon projects.

4. ESG Due Diligence

4.1 Soft Law Becoming Hard Law

Soft law instruments are not directly enforceable in New Zealand. However, there has been a recent increase in hard law relating to sustainability following the conclusion of the Paris Agreement, with notable examples including the passage of the Zero Carbon Act in 2019 and the introduction of mandatory climate-related disclosures. In addition to these regulatory developments, soft law has the potential to influence judicial reasoning both in the interpretation of domestic statutes and in the development of the common law, and in that way to contribute to the evolution of hard law. The authors expect soft law to continue to be referred to in this way.

4.2 Towards Vertical Responsibilities

As investing with ESG goals in mind becomes more widespread in New Zealand, companies (particularly those that are publicly listed) are coming under increasing pressure to have, and demonstrate that they have, sustainable and ethical value chains.

New Zealand does not have a modern slavery regime that requires upstream due diligence of its supply chain, and it is not clear whether one will emerge under the current government (see **1.3 Social Trends**). However, it is generally considered that a business must have an understanding of its supply chain and be in a position to substantiate any public claims that it makes about its supply chains. Advisors are encouraging companies in New Zealand to think about how to map human rights and environmental risks and what action they might take if negative impacts were identified as part of a due diligence process.

The CRDs regime also has implications for company value chains. The NZ CS explicitly note that CREs must consider the exposure of their value chains to climate-related risks and opportunities, and CREs are also required to report on their Scope 3 (value-chain) emissions. While this regime does not impose direct due-diligence obligations on CREs, in practice, it is influencing organisations to take steps to investigate and respond to climate-related issues in their value chains.

4.3 Partner Selection

The above factors are influencing the choices that companies make in working with supply-chain partners. For example, many New Zealand organisations are considering modern slavery in their supply chains and managing climate-related risks and opportunities in their value chains.

New Zealand is heavily involved in international trade. Given that New Zealand companies are dependent on global supply chains (both imports and exports), overseas trends in selecting supply-chain partners tend to be quickly integrated into New Zealand business practice. Accordingly, there is an increasing trend amongst New Zealand businesses to make decisions on supply-chain partners with reference to ESG factors. New Zealand exporters are facing ESG-related regulations in some jurisdictions that they export to, and large international customers are also demanding a greater focus on ESG. In turn, this is influencing the approach New Zealand businesses are taking to management of their own supply chains.

Increasingly, contracts contain ESG compliance clauses which require supply-chain partners to comply with ESG information disclosure obligations or minimum thresholds, driven by factors such as customer demand and reporting obligations.

4.4 ESG in M&A Due Diligence

Specific ESG due diligence by purchasers in the mergers and acquisitions context is typically quite limited. Purchasers do not generally conduct specific ESG due diligence over and above general environmental and resource management law due diligence. One major exception to this is forestry transactions, in relation to which NZ ETS obligations are a critical component of due diligence.

While ESG due diligence is not currently a major focus for most New Zealand transactions, it is possible that there will be an increasing focus on ESG due diligence as buyer expectations continue to evolve. Similarly, where a transaction involves overseas warranty and indemnity insurers, or there are strong domestic ESG due diligence laws, we expect that ESG due diligence is likely to be a bigger factor.

It is possible that, as ESG law and regulation continues to evolve in New Zealand (including as a result of the CRDs regime), the focus on ESG factors in due diligence may increase.

5. Transparency and Reporting

5.1 Key Requirements

New Zealand's mandatory CRDs regime applies (broadly) to the following CREs:

- registered banks, credit unions, and building societies with total assets of more than NZD1 billion;
- managers of registered investment schemes with greater than NZD1 billion in total assets under management;

- licensed insurers with greater than NZD1 billion in total asset or annual gross premium revenue greater than NZD250 million;
- listed issuers of quoted equity securities where the market price of all of the issuer's equity securities exceeds NZD60 million; and
- listed issuers of quoted debt securities, where the face value of the issuer's quoted debt exceeds NZD60 million.

Provided an entity meets the definition of a CRE, the reporting requirements themselves are generally the same for each type of entity (including groups of entities) above. One major exception to this is that managers of registered schemes are required to report in respect of each scheme they manage rather than in respect of the manager as an entity. Most scheme managers are required to prepare their scheme-level disclosures on a fund-by-fund basis (although common information may be presented at a scheme level).

In addition, the NZX Listing Rules require certain listed entities to make ESG disclosures on a "comply or explain" basis (see **2.2 Differences Between Listed and Unlisted Entities**).

5.2 Transition Plans and ESG Targets

Under the CRDs regime, CREs are required to disclose the transition plan aspects of their strategy. The XRB's climate standards define "transition plan" as an aspect of an entity's overall strategy that describes an entity's targets, including any interim targets, and actions for its transition towards a low-emissions, climate-resilient future. In the first year of reporting, CREs had the option of relying on a first-year exemption from the disclosure requirements relating to transition planning and it is possible that this will be extended for a second year.

The XRB has published some high-level guidance to support CREs getting started on transition plans, and it is expected that additional guidance will be released to support disclosure in this area.

There is no direct legal obligation on organisations in New Zealand to commit to targets. However, the CRDs regime requires CREs to disclose the targets they use to manage climate-related risks and opportunities, and their performance against those targets. The CRDs regime is a disclosure regime and does not require organisations to set one or more targets; however, in practice, it is a powerful incentive for organisations to carefully consider their approach to target-setting. The challenge for organisations in this area is ensuring that their climate-related targets are ambitious enough to reflect the scale of the climate crisis, while ensuring that the targets are achievable to minimise the risks of greenwashing allegations being made.

5.3 Regulation of ESG Labels

New Zealand does not have a specific regulatory regime relating to ESG labelling and sustainability claims. However, these matters are covered by New Zealand's suite of general consumer protection and financial markets laws, as set out further below.

Fair Trading Act 1986

The Fair Trading Act 1986 (FTA) is the primary regulatory framework prohibiting misleading conduct by businesses. The key provision is Section 9 of the FTA, which prohibits any person, in trade, from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. In addition, the FTA includes a range of more specific prohibitions on certain types of misleading conduct (eg, conduct that is liable to mislead the public as to the nature, manufac-

turing process, characteristics, suitability for a purpose, or quantity of goods or services. The FTA also prohibits making unsubstantiated representations in trade which are representations made without reasonable grounds, irrespective of whether they are false or misleading.

While there have not been a significant number of ESG-related cases under the FTA to date, there is an established body of case law under the FTA as to when statements will be considered to be misleading. In particular, whether a statement is false or misleading is a question of fact, considered from the perspective of what a "reasonable person" would understand the claim in question to mean. It is the overall impression that counts, and statements can be misleading either by the express words used or by implication. The use of imagery can contribute to an overall misleading impression if not carefully used.

In 2020, the Commerce Commission (the regulator responsible for enforcement of the FTA) issued "Environmental Claims Guidance" to assist businesses to better understand their obligations under the FTA when making claims about the environmental impact of a good or service. While relatively high level, the guidelines cover a range of green claims, including recyclable, "free-of", sustainable, biodegradable, renewable energy, carbon offset/neutral and organic claims. The guidelines also remind businesses that claims must be accurate, up to date and based on credible evidence at the time they are made, and that consideration should be given to the entire contents of a product and its lifecycle before making an environmental claim.

Fair Dealing

Part 2 of the FMC Act provides for fair dealing in relation to financial products and financial services. The fair dealing provisions of the FMC Act prohibit, in trade:

- engaging in conduct that is misleading or deceptive or likely to mislead or deceive in relation to any dealing in financial products, or the supply or possible supply of a financial service or the promotion by any means of the supply or use of financial services; and
- engaging in conduct that is liable to mislead the public as to the nature, characteristics or suitability for a purpose, or quantity of financial products or services.

The fair dealing provisions also prohibit the making of false, misleading, or unsubstantiated representations, in trade, in connection with any dealing in financial products, the supply or possible supply of financial services, or the promotion by any means of the supply or use of financial services.

As a general rule, the principles relevant to misleading statements in the FMC Act context are consistent with those developed under the FTA.

Climate-Related Disclosures

Under the CRDs regime, CREs are required to prepare climate statements that comply with climate standards issued by the XRB. One of the climate standards, NZ CS 3, includes a principle of "accuracy", which provides that "[i]nformation is accurate if it is free from material error or misstatement".

Since the CRDs regime is new, the courts have not to date considered the application of the accuracy principle. However, it is likely to invoke similar principles to the prohibitions against misleading statements and unsubstantiated representations in the FTA and FMC Act more broadly.

5.4 Supervision

The Financial Markets Authority (FMA) is New Zealand's conduct regulator for financial markets. In relation to ESG, the FMA is responsible for monitoring and enforcement of the FMC Act, including in relation to the CRDs regime and the fair dealing provisions.

Outside of the financial markets context, the primary regulator of sustainability marketing claims in New Zealand is the Commerce Commission, which is responsible for the enforcement of (amongst other things) the FTA.

In addition, NZX (as the licensed market operator of New Zealand's securities exchange) is responsible for monitoring and enforcing the rules under which the NZX's markets operate. This function is carried out by NZ RegCo, which is an independently governed entity. Part of this function includes enforcing compliance with the NZX Listing Rules and the Code, which requires certain issuers to make non-financial disclosures on a "comply or explain" basis, as set out in **2.2 Differences Between Listed and Unlisted Entities**.

The Advertising Standards Authority is the advertising industry's self-regulator for responsible advertising and enforces the Advertising Standards Code (and relevant sector-specific codes). The Advertising Standards Code includes principles relating to greenwashing, including a general principle that advertisements must not mislead or be likely to mislead, deceive or confuse consumers. If an advertisement is found to be in breach of the Advertising Standards Code, the ASA can order that it be changed or removed, although compliance is voluntary.

5.5 Enforcement

The penalties for non-compliance with the CRDs regime and for false or misleading ESG disclosures are potentially significant.

In relation to the CRDs regime, the CRE is primarily liable for breaches of the relevant requirements. However, directors also have automatic liability for non-compliant disclosure, and civil liability may also be imposed on any person "involved in a contravention". Certain defences to liability are available under the FMC Act.

The principal civil sanctions available under the FMC Act include pecuniary penalty orders and compensatory orders. The maximum pecuniary penalty is NZD1 million in the case of an individual or NZD5 million in any other case. The purpose of compensatory orders is to compensate aggrieved persons (and this could include investors).

The FMA has confirmed that it is taking a "broadly educative and constructive approach" towards compliance with Part 7A of the FMC Act in the first years of the CRDs regime, but misleading disclosures or failure to report are likely to attract enforcement action.

In relation to the fair dealing provisions in the FMC Act, a breach of these provisions may also give rise to civil liability. Again, both compensatory and pecuniary penalty orders are available. The maximum pecuniary penalty is the greatest of: i) the consideration for the relevant transaction; ii) three times the amount of the gain made or loss avoided by the person who contravened the provision; and iii) NZD1 million (for individuals) or NZD5 million (in any other case).

In some circumstances, criminal liability can also arise under the FMC Act. For example, CREs

(and their directors) commit an offence if they knowingly fail to comply with an applicable climate standard. The FMC Act also provides for a general offence of knowingly making false or misleading statements. The FMC Act provides for a range of penalties for the FMC Act offences described, including significant fines (up to NZD500,000 in the case of an individual or up to NZD2.5 million in any other case) and terms of imprisonment (up to five years).

Civil and criminal liability can also arise for breaches of the FTA. In relation to criminal liability, the maximum penalty is NZD200,000 for an individual and NZD600,00 for a business (per offence). In addition, businesses that breach the FTA can be required to pay compensation to affected consumers and certain other enforcement mechanisms (eg, injunctions) are also available.

5.6 Expected Progress

Companies are likely to make substantial progress in meeting their reporting obligations as New Zealand's CRDs regime beds in, market practice evolves and expertise continues to improve.

There remain, however, a number of substantial challenges, including in relation to:

- data availability and quality, for example with respect to financed emissions;
- resource constraints in implementing the regime;
- assurance of greenhouse gas emissions disclosures (assurance of these disclosures is currently required from Year 2);
- quantification of the financial impacts, climate-related risks and opportunities, in circumstances where these impacts are (in many cases) highly uncertain;
- alignment with international reporting frameworks, particularly for organisations with parent companies or other group structures that mean that they are required to report in multiple jurisdictions;
- a wide degree of variation in the approach to compliance across the market; and
- varying degrees of buy-in at the board level for climate-related disclosures.

6. Climate and ESG Litigation

6.1 Instruments for ESG Litigation

It is relatively straightforward to commence ESG-related cases against companies in New Zealand.

One way to attempt to start an ESG-related claim in New Zealand is to make a complaint to one of the regulators responsible for enforcement of a relevant regime, such as the FMA or Commerce Commission. These complaints could be made by a competitor. However, these regulators have limits on their resourcing, and there is no guarantee that any individual complaint will be progressed.

Accordingly, it is also possible to take claims directly to the New Zealand courts. One key issue for claimants in considering whether to take such a claim will be whether the claimant has standing to sue the relevant counterparty. Some types of claims, for example, will only be able to be brought by shareholders in a defendant company. However, other avenues (such as claims under the FTA) are more easily brought by other stakeholders.

6.2 Climate Activism

Activists and NGOs are increasingly important in the New Zealand ESG litigation landscape.

Over the past couple of years, several significant pieces of litigation have been commenced by activist and NGO groups. This includes several judicial review challenges against government decision-making on climate change issues (see, for example, **1.2 Environment Trends** for our discussion of Lawyers for Climate Action New Zealand Incorporated v Commerce Commission). Lawyers, acting on a pro bono basis or as part of a climate action collective, have played a significant role in bringing climate-related cases to the New Zealand courts in recent years. While, to date, most of the claims brought by activist groups or NGOs in New Zealand have not succeeded at trial, these pieces of litigation have a wider significance in influencing both public perception and corporate action on climate change and other ESG issues.

One dynamic of the New Zealand market that distinguishes it from some other jurisdictions is that many New Zealand corporates are owned by offshore (especially Australian) parent companies or have other ownership structures that are different from a traditional diversified shareholder model. As such, shareholder activism has played a lesser role in New Zealand than it has in some other jurisdictions in relation to bringing ESG-related claims.

6.3 Greenwashing v Greenbleaching

Both the FMA and the Commerce Commission have signalled a regulatory focus on greenwashing. To date, formal enforcement action has focused predominantly on product-level claims (such as claims relating to the extent to which products can be recycled or composted) rather than entity-level claims (such as claims relating to the approach that an entity is taking to climate action). However, both regulators are sharpening their focus in this area and have been using a range of regulatory and non-regulatory tools to engage with the market. For example, the FMA undertook a review of integrated financial products relating to managed funds in July 2022 and, while the review fell short of finding instances of greenwashing, the FMA did identify "weaknesses in information disclosure".

In the private litigation sphere, while no greenwashing cases have been brought by investors, two significant cases have recently been lodged, as follows.

- In late 2023, a group of NGOs lodged proceedings in the High Court seeking declarations that Z Energy has breached the FTA by misleading New Zealanders with its public claims on emission reduction and climate change mitigation. For example, the claim alleges that claims made that Z was "in the business of getting out of the petrol business" and associated claims about its progress on emissions reductions were false and/or misleading.
- In September 2024, Greenpeace New Zealand lodged proceedings in the High Court against Fonterra (a major dairy co-operative and one of New Zealand's largest companies) in relation to claims made on "grass-fed" claims on its butter packaging.

Both of the above cases are yet to proceed to trial.

6.4 A Turbulent Future Ahead

ESG-related proceedings are likely to grow in New Zealand, in line with developments overseas. Over the past few years, ESG-related cases in New Zealand have gradually proliferated, and there are now several major ESG-related cases that are awaiting hearing or decision in the New Zealand courts. Further, it is possible that developments such as the Supreme Court

allowing Smith v Fonterra to proceed to trial will increase the attractiveness of New Zealand as a jurisdiction that is potentially open to the development of the law relating to ESG.

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