Russell McVeagh

Investing in New Zealand 2024

Russell McVeagh

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Introduction

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

The information in this guide is correct as at April 2024.

If you're looking to invest or do business in New Zealand, we're here to help you navigate each step of the process. Please reach out to one of our experts listed in this Guide or visit our website here.

Why invest in New Zealand:

Ease of doing business:

New Zealand is ranked 1st among 190 economies in the ease of doing business index, according to the latest World Bank annual ratings.

Time Zone advantage:

New Zealand's time zone is 12 hours ahead of GMT.

Competitive Tax system:

New Zealand is ranked third on the Tax Foundation's International Tax Competitive Index 2023.

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

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About Russell McVeagh

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

All of our practice groups are respected as leaders in the market. We assist clients with their most complex, challenging and high-profile transactions. You can find out more about our expertise on our website.

We employ approximately 350 staff and partners across our Auckland and Wellington offices, and our lawyers are the best in their fields and recognised internationally for their expertise.

Our specialist lawyers broadly operate in the following teams:

- Mergers and Acquisitions and Corporate Advisory, including inbound Overseas Investment
- Banking and Finance
- Competition, Regulatory and Public Law
- Real Estate and Construction
- Environment, Planning and Natural Resources
- Litigation
- Employment
- PPP/Infrastructure
- Tax
- Technology
- Intellectual Property
- Privacy, Cybersecurity and Data Protection

It is important to us that we deliver on our commitment to contribute to our communities, to ensure an open and collaborative workplace where our people can thrive, and to understand and manage our environmental impact. Our 2023 ESG Overview - Our Contribution to Aotearoa New Zealand | Tō tātou ki Aotearoa aims to capture and share our firm's progress in these areas.

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New Zealand
Key statistics*

Total Population
5.12
Million

Auckland region
1.70
Million

Tauranga
0.16
Million

Hamilton
0.18
Million

Wellington region
0.54
Million

Christchurch
0.39
Million

Queenstown Lakes district
0.05
Million

Dunedin
0.13
Million

*Provisional 30 June 2022 data. Source: StatsNZ

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New Zealand
Key statistics*

GDP
$405
Billion

Top Exports

December 2023 quarter

Milk Powder, Butter & Cheese: **$5.4B**

Travel: **$3.7B**

Wood products: **$1.3B**

Meat: **$2.0B**

Total exports
$65.9
Billion

Exports by country
(NZD)

- China ($18.4B)
- United States ($8.0B)
- Australia ($7.8B)
- Japan ($3.7B)
- South Korea ($2.4B)

Total imports
$77.9
Billion

Imports by country
(NZD)

- China ($16.3B)
- Australia ($8.5B)
- United States ($7.6B)
- South Korea ($5.8B)
- Japan ($5.2B)

*December 2023 year. Source: StatsNZ

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01.

Introduction to New Zealand

Legal system

New Zealand's current legal system dates from 1840 when representatives of Māori and the Crown signed the Treaty of Waitangi. Since then, New Zealand has built a common law legal system. That said, the legal system and many New Zealand institutions reflect the special status of Māori as guaranteed by the Treaty of Waitangi.

As well as legislation enacted by Parliament, regulations made by the executive and bylaws made by local councils, the law is also made up of the common law, which is developed by judges as they make decisions in different cases. Parliamentary legislation (statutes) will always override common law. The courts interpret acts of Parliament, but unlike in some common law systems (such as Canada or the United States) the courts cannot invalidate an act.

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The court system is a hierarchy of courts that includes two appeal courts (the Court of Appeal and the Supreme Court). The decisions of higher courts bind lower courts in the hierarchy. The rule of precedent requires legally similar cases to be decided in the same way to ensure consistency and certainty in the application of the law.

System of government

New Zealand is an independent unitary state and a multi-party democracy. An unbroken history of regular elections dates back to 1854. New Zealand adopted a "Westminster" system of government when it was a British colony and does not have a written constitution or a federal system. New Zealand currently recognises King Charles III as head of state (like 15 other countries).

Legislation is made by a single unicameral Parliament. All 120 members of Parliament ("**MPs**") are elected every three years using a Mixed-Member Proportional ("**MMP**") electoral system, which was adapted from Germany's electoral system. MMP means that many political parties are represented in Parliament. After three-yearly Parliamentary elections, political parties will negotiate to form a Parliamentary majority. Controlling a majority in Parliament allows a government to be formed. A parliamentary majority is usually formed by two or more parties entering coalition and/or confidence and supply arrangements. Since the introduction of MMP, all governments have been led by either the centre-right National Party or the centre-left Labour Party.

A system of Cabinet government with collective decision making by Ministers sits at the heart of executive government. The model is similar to Australia, Canada, Germany, Japan, and the United Kingdom. The head of government is the Prime Minister, who chairs Cabinet meetings. Ministers oversee portfolios and direct the public service. The Prime Minister and Ministers must sit as MPs, and they are accountable to Parliament for the performance of their duties and their departments.

Meanwhile, a politically-neutral public service supports the Prime Minister and Ministers. The public service advises Ministers and implements Ministers' decisions. A chief executive (sometimes known as a Secretary or a Director-General) manages each department. The public service does not change with governments. Public service neutrality means officials, including department heads, must serve the Prime Minister and Ministers equally loyally and professionally irrespective of the political parties in power.

The courts are an independent branch of government. Judges determine cases by interpreting and applying the law with evidence presented in court, without pressure or influence from other judges, or decisions of the other branches of government. Judges are appointed by the Governor-General on the advice of the Attorney-General (who, according to constitutional convention, will act independently from the Government when recommending an appointment). Judges have immunity from being sued for decisions made in their capacity as a judge, and are protected from the removal of office (except on certain grounds and following a removal process through the Judicial Conduct Commissioner).

Government in New Zealand is open, accessible and accountable with a stable regulatory environment. All laws and key government decisions are usually made after public consultation where any interested person is welcome to make a submission. However, Parliament can where necessary, legislate quickly with minimal public input.

The small size of New Zealand and its government makes it easy to gain access to and communicate with Ministers, their officials and Members of Parliament. Also, the political parties in Parliament comprising the Opposition, and the need for Ministers to answer to Parliament, ensures that the Government is held continuously accountable for its actions.

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

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

Investing in New Zealand

From 1984, New Zealand underwent an intense period of economic and financial liberalisation, including embracing rules-based free trade. Government subsidies were removed, import regulations liberalised, tariffs slashed, exchange rates freely floated (ie no exchange controls remain in place), price controls eliminated, marginal rates of taxation reduced, and central bank independence instituted. New Zealand is now almost entirely unprotected by import controls and subsidies. Its agricultural sector is a world-leader in innovation, quality and efficiency and it manages to thrive against larger countries with very limited assistance from the Government.

New Zealand has strong trade relationships with Asia, the Pacific, the Americas, and the European Union. It advocates for free trade, the removal of anti-competitive restrictions, and the removal of all trade-distorting subsidies. As a founding member of the UN, the GATT, and the WTO, New Zealand has always supported a rules-based approach to international relations and trade.

Over the years, New Zealand has also negotiated a network of WTO-compliant pluri- and bi-lateral free trade agreements. Significantly, in April 2008 New Zealand became the first developed country to conclude a free trade agreement with the People's Republic of China. In 2024, it is expected that over 70% of New Zealand's trade will be covered by free trade agreements.

New Zealand has become an attractive destination for overseas investment because it is one of the most open deregulated, and least corrupt, economies in the world. It offers a stable economic and political environment and is recognised as being one of the easiest countries in the world to do business. Since October 2015, New Zealand has also implemented an "Investment Attraction Strategy" to attract more high-quality foreign business investment to New Zealand.

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

New Zealand has entered the following free trade agreements and economic partnerships

- NZ - Australia Closer Economic Relations (1983);
- NZ - Thailand Closer Economic Partnership (2005);
- Trans-Pacific Strategic Economic Partnership (P4) with Brunei Darussalam, Chile and Singapore (2006);
- NZ - China Free Trade Agreement (2008, upgraded in 2022);
- NZ - Malaysia Free Trade Agreement (2010);
- Hong Kong China - New Zealand Closer Economic Partnership (2011);
- Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (2013);
- Korea - New Zealand Free Trade Agreement (2015);
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) with Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, United Kingdom, and Viet Nam (2018);
- Pacific Agreement on Closer Economic Relations (PACER) Plus, ratified to date by Australia, Cook Islands, Kiribati, Niue, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu (2020);
- NZ-Singapore Closer Economic Partnership (2020);
- Digital Economy Partnership Agreement (DEPA) Modules with Chile and Singapore (2021);
- Regional Comprehensive Economic Partnership (RCEP), with the 10 Association of Southeast Asian Nations (ASEAN) countries along with Australia, China, Japan and Korea (2022);
- New Zealand - United Kingdom Free Trade Agreement (2022);
- ASEAN - Australia-New Zealand Free Trade Agreement (AANZFTA) (2023); and
- New Zealand and European Union Free Trade Agreement (2024).

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02.

Overseas Investment Regime

Introduction

The Overseas Investment Act 2005 ("**OIA**") and the Overseas Investment Regulations 2005 ("Regulations") establish the framework for the overseas investment regime in New Zealand. The Overseas Investment Office ("**OIO**") oversees the regime and is responsible for assessing, and in many cases deciding, applications from overseas investors who intend on making investments in New Zealand that are caught by one of the various pathways under the OIA. New Zealand's overseas investment regime is one of the most complex in the world, however, well advised investors can expect to navigate it successfully in the vast majority of cases.

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The regime seeks to find the appropriate balance between encouraging beneficial overseas investment in New Zealand and protecting New Zealand's interests. OIO consent is not always required, but when it is required the application process is relatively intensive, and the time required to obtain consent (which can be anywhere from six weeks to six months, or longer) will need to be factored into the relevant transaction's settlement timetable.

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

- "significant business assets";
- "sensitive land" (which includes residential land, farm land and certain forestry rights); or
- fishing quotas.

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

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

Overseas Persons

Under the OIA, an overseas person includes:

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

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

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

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

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

Significant Business Assets

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

- in the case of an acquisition of securities, an overseas person acquires a more than 25% ownership or control interest, or increases an existing more than 25% ownership or control interest to a 50% or 75% or more ownership or control interest, or to a 100% ownership or control interest, in the target entity, and:
    - the target is a New Zealand entity and the value of the securities acquired or the consideration provided for those securities, exceeds $100 million; or
    - the value of the target entity's assets in New Zealand, and the New Zealand assets of the target entity's more than 25% direct and indirect owned and controlled entities (regardless of where they are established) exceeds $100 million; or
    - the target entity has a more than 25% direct or indirect ownership or control interest in one or more New Zealand entities, which, directly or indirectly through their more than 25% owned or controlled entities (regardless of where they are established) have assets anywhere in the world the value of which exceeds $100 million; or

- an overseas person acquires assets in New Zealand and the total consideration provided (in aggregate in respect of related or linked transactions) exceeds $100 million; or
- an overseas person establishes a business in New Zealand where the business is carried on for more than 90 days in any year, and the total expenditure expected to be incurred, before commencing the business, in establishing the business, exceeds $100 million.

The $100 million threshold referred to above may be set at a higher amount (currently $200 million) if the overseas person is domiciled in a country that has obligations to New Zealand under various international agreements, as set out on page 18 – under Exemptions. In addition, the above thresholds are significantly higher for Australian "non-government" entities ($618 million for the year to 31 December 2024, adjusted upwards annually for inflation).

Investor Test

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

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

- The "relevant overseas person(s)" are the entity making the investment (eg the purchaser of the qualifying interest in sensitive land or business assets) and any upstream entities that will make or control key decisions in respect of the investment (such as the decision to enter into the transaction, any future decision to divest the investment, material capital and operating expenditure in respect of the investment, and day to day decision-making in respect of the investment).
- The "individuals with control" in respect of an overseas investment are the individuals who control the "relevant overseas person(s)" – usually the board of directors of those persons, and may also include members of executive management with the power to make material decisions in respect of the investment.

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

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

Character factors

- has not been sentenced to imprisonment for a term of five years or more (at any time);
- has not been sentenced to imprisonment for a term of 12 months or more (within the last 10 years);
- if not an individual, has not been convicted of an offence for which the person has been sentenced to pay a fine;
- has not been ordered by a court to pay a civil pecuniary penalty in respect of a contravention of any enactment;
- has not had a penalty imposed for a contravention of the OIA or the Regulations;
- has not been the subject of any other proceedings commenced against the person for any offence, or contravention of an enactment, that carries a penalty corresponding to those listed above;
- has not entered into an enforceable undertaking or an equivalent agreement with any regulator in respect of any contravention or alleged contravention of any enactment.

Capability factors

- is not prohibited from being a director, promotor, or manager of a company;
- has not been liable to pay a penalty for tax avoidance or evasion; and
- does not have outstanding unpaid tax of $5 million or more.

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

Sensitive Land

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

Qualifying interests include (but are not limited to) freehold title, leases with a total term (including rights of renewal and historic interests) of three years or more (for residential land) or 10 years or more (for other sensitive land) and certain profits à prendre with a total term of 10 years or more. Easements are exempted interests in most cases, which means, for example, that easements secured for the purposes of wind farms should not require OIO consent. However, where the rights granted under an easement are so extensive or invasive that, in fact, the owner has relinquished enjoyment and control of the underlying land, OIO consent may be required – this may be the case for many large-scale solar projects due to the pervasiveness of the panels over the land.

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

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

- residential land being land that is categorised as "residential" or "lifestyle" in the relevant local authority's District Valuation Roll, and residential flats;
- non-urban land (eg farming or other agricultural or horticultural blocks) of more than five hectares; and
- land adjoining a variety of other types of land of a certain size (eg national parks, historic places, foreshore or land subject to heritage orders).

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

Benefit Test

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

The seven categories of benefit factors are:

1. Economic benefits – for example (but not limited to): the creation of new jobs (or retention of jobs which would otherwise be lost); the introduction of new technology or business skills; increased productivity; increased export receipts; increased processing of primary products; and a reduced risk of illiquid assets.
2. Environmental benefits – for example (but not limited to): protection of indigenous flora and fauna; improved water quality; and erosion control.
3. Public access – to the sensitive land, or to the features giving rise to the sensitivity.
4. Protection of historic heritage – in or on the relevant land.
5. Advancing one or more significant government policies.
6. An increase in the oversight or participation (effectively interpreted by the OIO as ownership interests) by New Zealanders in the investment.
7. Other benefits that are likely to arise from the investment but which do not fit within one of the other factors.

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

- the current state of the relevant land/assets, and how they are currently being used by the present owner;
- what the investor plans to do with the assets over a certain (eg three to five year) time horizon; and
- the net benefits to New Zealand that will arise from the investment when compared to the current state and use of the land/assets, with particular reference to the benefit factors above that are relevant to the investment and the investor's investment plans.

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

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

Residential land

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

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

- if an individual, they will commit to reside, and become a tax resident, in New Zealand; or
- housing supply will be increased as a result of the investment; or
- the residential land is being acquired for conversion to a non-residential use; or
- the residential use is incidental to a relevant business use; or
- that the acquisition will be beneficial to New Zealand (ie meet the Benefit Test described above).

Farm land

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

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

In order to ensure that New Zealanders have been given sufficient opportunity to purchase the relevant farm land, farm land must generally be advertised on the open market *before* the overseas person enters into a transaction or arrangement (which includes the entry into binding heads of agreement) to acquire that land, although exemptions can be applied for in certain limited circumstances.

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

- the economic benefit factors (in particular, the creation or retention of jobs, introduction of technology or business skills, increased export receipts, and increased processing of primary products benefit factors), and the oversight or participation by New Zealanders benefit factor are required to be given high relative importance; and
- the investor must show that the benefit to New Zealand will be, or is likely to be, "substantial" (which in practice is a materially higher threshold).

Fishing quotas

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

Forestry

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

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

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

In August 2022 the Government passed the Overseas Investment (Forestry) Amendment Act 2022 into law, which now requires an overseas investor looking to acquire land for conversion to production forestry to apply for consent under the standard Benefit Test. Previously, overseas investors looking to acquire land for forestry conversions could seek approval via a stream-lined special forestry test. Under the standard Benefit Test, overseas investors must show the investment is likely to result in a benefit to New Zealand measured against the seven benefit factors listed on page 13. However, investments in farm land for the purpose of forestry conversion have proved difficult under recent policy settings, and there have been a number of recent decisions where such investments have been declined consent by the OIO on the grounds of failure to establish sufficient benefits to New Zealand arising from the investment. The more productive that the farm land to be acquired is (based on Land Use Capability ("LUC") classifications, which are used to classify all rural land in New Zealand), the more difficult it will be to satisfy the benefit to New Zealand test (ie the more substantial the benefits offered will have to be).

National Interest Test

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

The National Interest Test mandatorily applies where the investment:

- relates to land or assets used in a "strategically important business"; or
- will result in one or more "non-New Zealand government investors" from a single country acquiring a more than 25% direct or indirect ownership or control interest in the target business or assets.

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

The "non-New Zealand government investor" definition is complex, but in broad terms an entity will be considered a non-New Zealand government investor if it is, or its upstream owners are, more than 25% owned or controlled, directly or indirectly, by one or more government related entities (such as sovereign wealth funds, SOEs, public pension funds (national/federal, state or municipal) and/or their associated entities) from a single country. Due to the way the test applies at an entity level, even relatively widely held private equity funds and similar passive investment vehicles can be caught by this definition, thereby attracting the application of the National Interest Test.

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

- has foreign government or associated involvement that is below the 25% threshold but grants that government (or its associates, or both) disproportionate levels of access or control to sensitive New Zealand assets;
- would grant an investor significant market power within an industry or result in vertical integration of a supply chain; or
- is potentially inconsistent with government objectives, for example environmental or economic objectives.

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

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

New Zealand's current center-right coalition Government, which came to power in late 2023, has stated that it will amend the OIA to limit Ministerial decision-making to OIO applications that engage national security concerns. This should result in greater delegation to the OIO of decision-making on applications for consent to which the National Interest Test applies.

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National security and public order call-in regime

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

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

It is mandatory to notify the OIO of an investment in a business that researches, develops, produces, or maintains military or dual-use technology or is a critical direct supplier to the New Zealand Defence Force or a national intelligence or security agency. The dual-use technology provisions in particular can be problematic to interpret and apply in practice in certain sectors, particularly because it will catch various types of technology widely used in civilian contexts, such as encryption software.

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

The NSPO regime applies regardless of the size of the original interest acquired (except where the target business is a media business or listed issuer) or the value of that interest. Subsequent additional or incremental increases in the investor's ownership and/or control interest in the "strategically important business" will only be caught by the NSPO regime if the acquisition results in the overseas person reaching or exceeding a 25%, 50% or 75% ownership or control interest, or reaching a 100% ownership or control interest.

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

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

- impose any conditions on the transaction that it considers appropriate to manage those perceived risks (such as undertakings to ensure the security of sensitive information);
- prohibit the transaction from proceeding, if the Minister reasonably considers that the perceived risk cannot be adequately managed through the imposition of conditions; or
- if the transaction has already completed, require disposal of the relevant securities owned by the overseas person or associate, if the Minister reasonably considers that the perceived risk cannot be adequately managed through the imposition of conditions.

Exemptions

The Regulations exempt specific classes of transactions or persons from the requirement for consent. These exemptions cover a range of instances where the nature of the interest acquired does not warrant regulatory oversight (for example, mortgage security over land granted or enforced in the ordinary course of business, custodian/nominee shareholdings, transfers of certain types of sensitive land interests between overseas persons and issues of redeemable preferences shares that are redeemable only for cash and do not carry voting rights). There are also exemptions for intra-group corporate restructurings.

Investors can apply for bespoke discretionary specific exemptions in circumstances where compliance would be impractical, inefficient, unduly costly or unduly burdensome and/or to allow for exemptions that are minor or technical. However, such exemptions are rare and, when applied for, are closely considered by the OIO.

In addition to the above, the Regulations provide exemptions or alternative thresholds for overseas persons that are individuals or enterprises with significant business assets from the following countries/separate custom territories: Australia; Brunei; Canada; Chile; China; Japan; Mexico; Singapore; Taiwan; The Republic of Korea; and Vietnam. Generally, the thresholds for an overseas investment in significant business assets for individuals or enterprises from the above countries are $200 million instead of the usual $100 million. The monetary threshold for Australian non-Government investors is significantly higher ($618 million for the year to 31 December 2024), and is inflation adjusted annually.

Watch this space

The new centre-right coalition Government has made it a priority to further reduce "red tape" and speed up application processing times in key areas to provide further confidence to, and encourage investment from, overseas investors, and has already begun implementing changes.

As its first move, the Government has announced that it will introduce legislation amending the OIA to encourage new housing supply, by making it easier for overseas investors to invest in Build to Rent ("**BTR**") developments. It will do so through a new streamlined consent pathway that will allow investors to purchase land with the intention of constructing a new BTR development. A new Bill is expected in mid-2024.

In addition, the Government has issued a new Ministerial Directive Letter, which has immediate effect and directs the OIO to consider investment that supports housing supply and the continued operation of existing large-scale housing development as a benefit when assessing any investment in such a development under the Benefit to New Zealand test. It also states that the "reduced risk of illiquid assets" economic benefit factor under the OIA may be sufficient, in and of itself (ie without any other benefits resulting from the investment), to satisfy the Benefit to New Zealand test and therefore allow the investment to be granted consent under the OIA. These changes support both initial investment in BTR developments and the subsequent exit by the developers to a long-term owner/manager.

Shortly thereafter, the Government issued a new Ministerial Delegation letter, which delegates to the OIO all "sensitive land" and fishing quota decisions that currently require Ministerial approval. This should materially speed up "sensitive land" consent decisions, while at the same time de-risking the timetable for these decisions.

Also of note, changes to the way the OIO processes low risk applications has meant that the time required to obtain consent for significant business asset consent applications has reduced to around half the 35 working day statutory timeframe in a number of cases involving low risk transactions and investors.

Given the coalition Government's other objectives of accelerating investment in energy and infrastructure, we expect that this review of the regime may extend to other aspects of the legislation that need tweaking to remove unnecessary hurdles to beneficial inbound investment and encourage investment in key sectors.

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03.

Corporate Structures

Introduction

Businesses in New Zealand are usually operated by an individual as a sole trader or through one of the following structures:

- companies (both limited liability and unlimited liability);
- trusts;
- partnerships (both limited and ordinary); and
- unincorporated joint ventures.

Foreign companies typically operate in New Zealand in one of the following ways:

- registration in New Zealand of the foreign company (or one of its subsidiaries) as a branch; or
- operating through a New Zealand incorporated company (or other corporate vehicle).

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The choice of structure is often dependent upon factors such as:

- the taxation treatment; and
- the extent to which information about it will be publicly available.

Companies

Companies are the most common business structure utilised in New Zealand. Companies in New Zealand are incorporated under the Companies Act 1993 ("**Companies Act**").

A company must have at least one shareholder and one director. All directors must be natural persons, not disqualified, and at least one director must live in New Zealand or an "enforcement country" (which currently only includes Australia). Where there is no New Zealand director, the Australian director must also be a director of an Australian incorporated company in order to meet this requirement. There is no requirement to have a company secretary.

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

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

A company must have a registered office in New Zealand but a physical place of business in New Zealand is not required.

The liability of shareholders may be either limited or unlimited. The majority of companies have shareholder liability limited to any amount unpaid on a share held by each shareholder (if any). Shares are issued at fair value (which changes depending upon the company's performance) as opposed to a par value. A company may have different classes of shares.

Certain steps or approvals must be followed by a company when undertaking certain activities. Some activities (such as making a distribution to shareholders or giving financial assistance to acquire shares) require specific resolutions to be passed and certificates given by directors and a solvency test to be met. Some activities (such as a "major transaction", being an acquisition or disposal valued at more than half the company's assets before that transaction) require a "special resolution" (in essence, a 75% vote of shareholders or higher majority if prescribed by the company's constitution).

A company must maintain specific records (including a share register and minute book) and file an annual return with the New Zealand Companies Office ("**Companies Office**"), which, amongst other things, confirms the details of its directors, shareholders and registered office.

"Large" companies are required by the Financial Reporting Act 2013 ("**FRA**") to be audited subject to limited exceptions. Whether or not a company has to file its financial statements with the Companies Office is determined by the FRA and the Companies Act. Audited financial statements need to be filed with the Companies Office by every "large" company in which the shares that in aggregate carry the right to exercise 25% or more of the voting power at a meeting of the company are held by:

- a subsidiary of a company incorporated outside New Zealand;
- a body corporate incorporated outside New Zealand; or
- a person not ordinarily resident outside New Zealand.

Limited Partnerships

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

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

A limited partnership can be formed for any purpose, it has an indefinite lifespan if desired, and there are no limits on partner numbers or investment. It must have a written partnership agreement and be registered with the New Zealand Companies Office. The partnership agreement is not made publicly available nor the identity of limited partners.

Joint Ventures

Joint ventures are typically entered into by two or more business entities for a limited time to carry out a specific project. The relationship between the participants in a joint venture is usually set out in a contract between them. Unincorporated joint ventures are not recognised as separate legal entities (and often what the participants call an unincorporated joint venture is in fact a partnership). If the joint venture is incorporated, then the laws applicable to that body corporate (usually an incorporated company) will apply.

Trusts

Some businesses in New Zealand (particularly land-owning businesses) are run by the trustees of a trust, the beneficiaries of which are usually discretionary and include the family members of the trust's settlor. These are often referred to as trading trusts. There is no register for these trusts and no filing requirements with the Companies Office.

Other Structures

Although certain other structures exist (for example, industrial and provident societies) they are not an available option for most businesses.

It is possible for a foreign business to operate through an agent in New Zealand, although the nature of the agency requires careful consideration as it may bring the foreign business into New Zealand's regulatory framework and into New Zealand's tax regime.

Other requirements

All New Zealand incorporated companies and the general partner of limited partnerships (assuming the general partner is a company) are required to have a director resident in New Zealand or Australia.

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

Overseas companies carrying on business in New Zealand

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

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

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

- has a physical presence in New Zealand;
- has employees or representatives in New Zealand;
- conducts marketing activities in New Zealand or directly solicits business from persons in New Zealand;
- provides services to, or contracts with, persons in New Zealand; or
- is registered as a financial service provider under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

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

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

- notifying the Companies Office of any changes to the constitution, directors, or address within 20 working days of the change occurring;
- if it is a "large overseas company" (assets exceeding $20 million or profits exceeding $10 million for the last two years) it must also file certain financial reports; and
- an annual return (which confirms that the information registered in respect of the overseas company is correct as at the date of the return).

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04.

Business Names, Trade Names and Trade Marks

Introduction

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

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

Trade marks/service marks

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

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

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

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

> ***"The team are incredibly commercial and always provide highly valued, strategic advice that appropriately captures and addresses the concerns of our business. Their understanding of what we're trying to achieve and their overall level of pragmatism (which extends to billing, client service, file management etc) sets them apart from other legal service providers."***
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05.

Takeovers Regulation

Introduction

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

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

In addition to the Code and the Takeovers Act, the Companies Act 1993 ("**Companies Act**") provides for schemes of arrangement which are discussed below (see 'Schemes of arrangement'), and there are also a number of additional rules and laws which may be applicable, some of which are discussed below (see 'Other requirements').

Takeovers Code

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

- is a listed issuer that has financial products that confer voting rights quoted on a licensed market (eg the NZX Main Board); or
- was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in the Code; or
- has 50 or more shareholders and 50 or more share parcels and has total assets of at least $30 million or total revenue of at least $15 million.

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

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

- from holding or controlling more than 20% of the voting rights in the code company; or
- increasing an existing holding or control of 20% or more of the voting rights in a code company.

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

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

- by an acquisition under a "full offer" made in compliance with the Code (ie for all of the voting securities of the code company);
- by an acquisition under a "partial offer" made in compliance with the Code (ie for less than 100% of the voting securities of the code company);
- by an acquisition of voting securities approved by ordinary resolution of the code company's shareholders in accordance with the Code;
- by an allotment of voting securities which is approved by ordinary resolution of the code company's shareholders in accordance with the Code;
- in accordance with the "5% creep" exception, which, in general terms, enables a person holding more than 50% but less than 90% of the voting rights in a code company to acquire up to an additional 5% in a 12-month period; or
- if the person already holds or controls 90% or more of the voting rights in a code company.

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

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

Schemes of arrangement

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

- 75% of the votes of the shareholders in each interest class entitled to vote and voting on the resolution; and
- a majority of the votes of all shareholders entitled to vote (irrespective of whether or not they do in fact vote).

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

Other requirements

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

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

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06.

Taxation

Introduction

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

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

New Zealand has no general capital gains tax, although the definition of income includes profits and gains from certain transactions (notably involving personal property, land and financial arrangements) that would otherwise be capital in nature. One of the important cases in which a capital gain is deemed to be income is the so-called "bright-line test" applicable to the proceeds of sale of residential property. A gain made in circumstances where a residential property (other than the person's principal residence) is bought and sold within either 10 years or five years (depending on when the property was acquired and what type of property is involved) is deemed to be income even if it would otherwise be a capital gain.

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

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

The income tax rate for companies (resident and non-resident) is 28%. Individuals are subject to taxation at progressive marginal rates, with the top rate (for income in excess of $180,000) being 39%. Trustees (other than of unit trusts, which are taxed as companies) are similarly taxed at 39% on trustee income from the 2024-2025 tax year. Trusts with trustee income of $10,000 or less continue to be taxed at 33%, and disabled beneficiary trusts are taxed at a flat rate of 33%. New Zealand resident individuals are generally subject to New Zealand tax on their worldwide income, with a credit being allowed for foreign tax. Individuals who become New Zealand tax resident for the first time or (in certain cases) after a period of at least 10 years as a non-resident, may qualify for transitional resident status. Transitional resident status applies for (approximately) the first four years during which a person is New Zealand resident, and provides an exemption from New Zealand tax for most non-New Zealand sourced income the person derives during that period.

Income tax - principal features of corporate taxation

Companies resident in New Zealand generally pay tax on their worldwide income, the main exception being that a participation exemption applies to dividends received from a foreign company in which the New Zealand resident company holds a voting interest of at least 10%.

Non-resident companies are subject to tax on any income derived from New Zealand. Income tax is levied on annual gross income less annual total deductions and any losses brought forward from prior years or offset from companies in the same group. The resulting net amount is the taxable income.

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

Income tax - taxation of foreign investment into New Zealand

Withholding tax on dividends, interest and royalties

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

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

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

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

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

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

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

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

Limits on deductibility of related party financing costs

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

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

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

Base erosion and profit shifting measures

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

R&D tax credit

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

Income tax - taxation of employees

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

Taxation of trusts

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

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

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

Goods and services tax

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

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

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

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07.

Property

New Zealand's Land Registration System

New Zealand's land title system is based around a centralised government-backed register – which is a form of the Torrens System also used in Australia, Canada and Ireland.

The register is publicly searchable for individual Records of Title which provide a survey description of the relevant land and state the current registered owner, the type of estate held (eg freehold or leasehold), and all current interests registered against the land (eg easements, land covenants and mortgages).

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New Zealand's land title register system is held in an electronic database maintained by the government department Land Information New Zealand/Toitū Te Whenua. Legal practitioners engage with the register through an online portal named Landonline – including to transfer ownership on settlement, to register a new interest against a record of title, or to subdivide an existing record of title. The digitalised nature of the system allows for these processes to be completed efficiently and securely.

The most common types of title are fee simple (or freehold) titles, and leasehold titles. Unit Titles are also common, especially in urban areas. This is a form of strata title granting exclusive rights to part of a building (eg an apartment) along with shared rights to use common areas (eg elevators).

Unregistered Interests

Certain types of unregistered interests in land are common in New Zealand. For example, many commercial leases are unregistered (for reasons set out below), and utility companies often hold unregistered easements while infrastructure is built, later converting these to registered easements.

As a general rule, an unregistered interest in land will be defeated by any registered interest, and, unless the future owner of the land is aware of the unregistered interest, it will not bind a future owner once the land is transferred.

Separately, certain infrastructure may be situated on land by way of rights implied by legislation. These rights may not be noted on the title.

Māori Land

The New Zealand legal system recognises that certain land owned by Māori is held in collective ownership, in accordance with Māori custom. As a result, Māori Land may have many recorded owners, or alternatively, the land may be held for the benefit of its owners by a trust or incorporation established under Te Ture Whenua Māori Act 1993.

Māori Land is subject to special protections. Generally, the freehold interest cannot be transferred, however, lesser rights can usually be acquired, including leasehold interests and forestry rights. Obtaining an interest in Māori Land may require consent of the Māori Land Court, a statutory body that exists to promote the retention, use, development, and control of Māori Land by its owners and future generations.

Overseas Investment Regime

As an offshore individual or entity, investing in land in New Zealand, or acquiring certain interests in land (including some leases) may require the prior consent of New Zealand's Overseas Investment Office. Both direct investment and indirect investment (above a certain threshold) is captured. As such, legal advice should be sought at an early stage of any transaction involving New Zealand-based assets. New Zealand's overseas investment regime is discussed in further detail in Chapter 2.

Acquiring Real Estate

Contracts for the sale and purchase of real estate must be in writing and signed to be enforceable.

Sale and purchase agreements are typically based on a standard form of contract known as the ADLS Sale Agreement (being the Agreement for Sale and Purchase of Real Estate approved by the Auckland District Law Society Incorporated and the Real Estate Institute of New Zealand).

While the ADLS Sale Agreement is generally used as a starting point for land transactions, various conditions and further terms will be inserted into the contract depending on the given circumstances. Common conditions include due diligence, subdivision (where part of a record of title is being acquired, discussed further below), and board approval.

Importantly, to ensure compliance with New Zealand law, certain sale agreements must be conditional on Overseas Investment Office consent, as explained further in Chapter 2.

Commercial Leases

As with sale contracts, there is a general requirement that to acquire a leasehold interest, the arrangement must be documented, in writing and signed (with an exception for leases with a term of less than one year, and certain leases without a fixed term).

Leases are generally documented using a Deed of Lease although this is frequently preceded by an Agreement to Lease, especially where there are conditions to be met before the lease term begins, such as landlord works to the premises.

Leases are often based on standard form documentation, with amendments to cater for the specific premises. Common lease forms include:

- The ADLS Lease, produced by the Law Association (formerly the Auckland District Law Society Incorporated);
- The PCNZ Retail Lease (previously the BOMA retail lease) produced by the Property Council of New Zealand;
- The PCNZ Office Lease produced by the Property Council of New Zealand;
- The BOMA International Standard Industrial Lease produced by the Building and Managers Association International; and
- The Deed of Lease for Rural Land produced by Federated Farmers of New Zealand.

Institutional landlords may also present their own standard lease terms as a starting point for negotiations.

Most commercial leases in New Zealand are not registered. This is generally for reasons of confidentiality (as the register is publicly searchable) and due to the time and cost of formally surveying the premises (which is a requirement for registration).

For overseas investors, acquiring certain leasehold interests will require consent from New Zealand's Overseas Investment Office, as detailed in Chapter 2.

Seismic

New Zealand is subject to frequent seismic activity due to its location on multiple fault lines. As a result, the seismic resilience of buildings (and other improvements on the land) is a key consideration for both property investors and tenants.

New buildings must be constructed in accordance with Building Code requirements, including in respect of structural design. Existing buildings can also be assessed by engineers to determine the degree to which they meet current Building Code requirements, often referred to as the "New Building Standard or NBS". This earthquake rating for buildings is described as a percentage of NBS.

If an existing building is assessed as being lower than 34% NBS, it can be classified as an earthquake prone building under the Building Act 2004. Earthquake prone buildings are placed on an online public register, with owners required to strengthen or demolish the building at their own cost. The timeframe for completing those works depends on the building's use and location, with areas of higher seismic risk having a shorter timeframe.

Building occupiers generally require a substantially higher earthquake rating when taking into consideration their responsibilities under health and safety legislation – with many institutional tenants requiring an earthquake rating above 67% or 80% NBS.

In February 2024, the Government released a new draft seismic design standard (TS 1170.5) ("**Draft Design Standard**") that is expected to replace the current NBS. The Draft Design Standard significantly increases seismic design requirements in some parts of New Zealand – anecdotally moving standards much closer to those in other areas of high seismicity, such as parts of Japan and the western United States.

While the Draft Design Standard will only apply to new building design (and will not affect the current NBS standard that will continue to be utilised for assessing earthquake prone buildings), of key interest will be the market's response towards existing buildings designed under current NBS or earlier standards, as these will likely have a lower relative NBS rating.

Subdivision

Subdividing land contained within a record of title requires engagement with New Zealand's planning laws set out in the Resource Management Act 1991 ("**RMA**").

The RMA requires that each local Council maintain a District Plan, which contains the local planning rules, including in relation to subdivision. Under the RMA, subdivision is presumed to be restricted (and will require an application for a "resource consent" from Council in order to subdivide) unless it is explicitly permitted by a district plan rule. Council will consider resource consent applications against the subdivision rules in the District Plan. A resource consent can be granted subject to certain conditions (including a requirement for physical works to be undertaken as part of the subdivision).

Building Regulations

Buildings (and other built structures) are regulated under the Building Act 2004.

A building consent is required prior to undertaking any building work (which includes new construction, as well as some alterations and demolition works). A building consent solely relates to ensuring that building work is undertaken in accordance with the standards set out in the New Zealand Building Code. Building work may separately require a resource consent under the RMA, which relates to local planning controls. Both the building consent and resource consent are obtained from the local Council.

On completion of any building work, a Code Compliance Certificate should be obtained from the local Council, confirming that the building works were completed in accordance with the building consent.

If a building contains certain specified systems (which includes fire sprinkler systems and alarms, lifts and escalators, emergency lighting, and mechanical ventilation and air conditioning systems), the owner must maintain a compliance schedule for those systems and procure an annual Building Warrant of Fitness confirming the specified systems are compliant.

Compulsory Acquisition

The Public Works Act 1981 ("**PWA**") sets out a pathway for central or local government to acquire private property for the purpose of completing public works (eg roading, schools and infrastructure).

The relevant acquiring authority will first seek to reach agreement with the owner to acquire the affected property (or an interest in the property, such as a lease or easement). If agreement cannot be reached, the PWA includes a process for the acquiring authority to compulsorily acquire the property (or interest) sought.

An underlying principle of the PWA is that a landowner is entitled to full compensation for their land to ensure that their financial position is no better or worse than before the compulsory acquisition took place.

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08.

Forestry

Introduction

Approximately 2 million hectares of land in New Zealand is utilised for plantation forestry, with the vast majority planted in radiata pine. In addition to traditional forestry activities, New Zealand's forests are recognised as having an important role in mitigating the effects of climate change and helping New Zealand achieve its international climate commitments.

New Zealand has a comprehensive Emissions Trading Scheme ("**ETS**"), under which plantation forests are "carbon sinks" and the primary source of "carbon credits", known as New Zealand Units ("**NZUs**"), which can be utilised to meet obligations under the ETS. This has resulted in a renewed interest in New Zealand forestry assets over recent decades.

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Investing in Forestry

Investors can obtain interests in forestry assets, or the carbon benefits of forestry, in a number of ways:

- **Freehold and Leasehold Interests:** Investors can acquire a fee simple (freehold) or leasehold interest in forestry land, including the trees on the land.
- **Forestry Rights:** A land owner may grant a forestry right over their land to enable an investor to plant, manage and harvest forestry on the land over a specified period (ie one or more forestry rotations), effectively separating the ownership of the trees from the underlying land. One benefit of a forestry right is that the forestry right holder's interest can be registered against the record of title to the land without a requirement for the land to be formally surveyed, as is the case for registered leasehold interests.
- **Carbon Leases:** A carbon lease allows a forest owner (whether the owner of a freehold, leasehold, or forestry right interest) to transfer their right to participate in the ETS (and collect NZUs in respect of the carbon sequestered) to a third party. The forest owner retains their interest in the trees and resulting forest produce.
- **Off-take Agreements:** This is an agreement between a forest owner and an emitter under which the emitter obtains rights to purchase future NZUs at an agreed price. This allows an emitter to secure a supply of NZUs that the emitter can then use to offset future emissions. An off-take agreement may include a financing arrangement under which the emitter advances funds to the forest owner to establish the forest.

Overseas Investment Regime

Investing in forestry may require the consent of New Zealand's Overseas Investment Office. An overview of New Zealand's overseas investment regime is included at Chapter 2.

New Zealand Emissions Trading Scheme

Overview

The Climate Change Response Act 2002 ("**CCRA**") established New Zealand's ETS. The ETS is centred around NZUs that are traded on a "carbon market" (known as the "secondary market") between registered market "participants". In general terms:

- forest owners registered in the ETS can earn NZUs from the Government for the carbon sequestered by the trees on their land;
- forest owners registered in the ETS will be liable to surrender NZUs to the Government if the land is deforested (and not replanted within a certain time) and, in some cases (depending on the carbon accounting method used), when the forest is harvested; and
- certain emitters in other industries must surrender NZUs to the Government in respect of their carbon emissions, requiring these emitters to procure NZUs.

In order to obtain NZUs to be surrendered, participants (including both forest owners and emitters) can buy NZUs from each other on the secondary market, or purchase NZUs from the Government at quarterly auctions. These quarterly auctions allow the Government to regulate the price of NZUs by adjusting the number of NZUs released to the market each quarter.

Forestry participation in the ETS is monitored and enforced by Te Uru Rākau - The New Zealand Forestry Service, being a division of the Ministry of Primary Industries ("**MPI**").

Forestry in the ETS

The CCRA distinguishes between land that was forest land before 1 January 1990 ("**Pre-1990 Forest Land**"), and land was first established as forest after 31 December 1989 ("**Post-1989 Forest Land**").

The obligations are very different for each category. However, the common feature is that forest owners must surrender NZUs to cover their carbon emissions, as determined under the CCRA.

Pre-1990 Forest Land

Participation in the ETS is mandatory for owners of Pre-1990 Forest Land. Pre-1990 Forest Land can be harvested and replanted without attracting liability. However, if more than 2 Ha of non-exempt Pre-1990 Forest Land is "deforested" in a five year period (ie there is a change in land use), the forest owner (whether a freehold or leasehold owner, or a forestry right holder) must:

- surrender NZUs (ie "pay" for their emissions); or
- apply to offset their deforestation prior to deforesting, by establishing an equivalent forest elsewhere.

When forestry was brought into the ETS, owners of Pre-1990 Forest Land received a one-off allocation of NZUs under the Forest Allocation Plan. This was intended to mitigate the impact of the ETS deforestation rules, by offsetting the decrease in land value due to the decreased land-use flexibility.

Participants in the ETS do not receive NZUs for Pre-1990 Forest Land. The rationale is that these forests existed prior to the first commitment period of the Kyoto Protocol (2008 – 2012), and therefore do not contribute to New Zealand's efforts to reduce carbon emissions. There is liability for deforesting Pre-1990 Forest Land, as doing so will increase New Zealand's carbon emissions and affect New Zealand's ability to meet the commitments under the Paris Agreement.

In most cases, liability for Pre-1990 Forest Land will run with the land. Both parties to a land transfer should have a clear understanding of the land's ETS status (which is usually - but not always - registered in notices on the record of title), and the effect that any harvesting (whether before or after settlement) will have on the incoming owner's ETS liability. If the new owner intends to clear the land and convert it to another use, the new owner will be required to pay any associated carbon liability (ie by surrendering NZUs).

Post-1989 Forest Land

Post-1989 Forest Land owners (including leaseholders, or forestry right holders) may voluntarily become ETS participants, registering their forest as either:

- "Standard Forestry" if regular rotational forestry; or
- "Permanent Forestry" which requires the forest is not harvested for at least 50 years.

Two different "carbon accounting methods" are used to calculate the NZUs earned by a forest. These are:

- "Stock Change" where owners accumulate NZUs while their forest grows, but will need to account for liability by surrendering NZUs when they harvest their forest; and
- "Averaging" which takes into account the NZUs accumulated, and the NZUs that must be surrendered, over the full cycle from planting to harvest. NZUs are only earned up to the "average" level, in effect offsetting the peak NZUs accumulated during the forest's growth, against the NZUs that must be surrendered on harvest.

All permanent forestry uses the stock change method of carbon accounting. Standard forestry might use either stock change or averaging, depending on when the forest was registered in the ETS, whether it is first rotation forest, and whether the owner may have elected to change carbon accounting method. All standard forestry registered in the ETS from 1 January 2023 uses the averaging carbon accounting method.

Where a new lease or forestry right is taken over Post-1989 Forest Land, the documentation should be clear on which party will be the ETS participant in respect of the land. If post-1989 Forest Land is bought or sold (or registered forestry rights or leases are assigned) participation in the ETS must be transferred between the relevant parties. Participants can withdraw from the ETS at any time, but must first surrender the NZUs received for the land.

Accordingly, in any forestry transaction, it is important to determine which party is (or will be) the ETS participant, and to account for any future liability to surrender NZUs that will be assumed by that participant.

Regulation of Forestry Activities

Planning Controls

Planning controls in New Zealand are generally administered at a regional or local level, with the relevant Council issuing a "resource consent" for certain activities, in accordance with the planning framework established by the Resource Management Act 1991.

In 2018 the Government introduced nationally consistent planning controls for forestry activities, which were updated in 2023. The current National Environmental Standards for Commercial Forestry ("**NES-CF**") imposes national standards and consent requirements for the following forestry related activities: afforestation, pruning and thinning to waste, earthworks, river crossings, forest quarrying, harvesting, mechanical land preparation and replanting. Its purpose is to provide a nationally consistent approach to forestry activities.

Where there is an existing resource consent held for plantation forestry, this will continue to authorise the activity until the consent has been completed, lapses or expires. Following this, the plantation forestry activity must be performed in accordance with the NES-CF. This is the case for both regional and land use consents.

Further information in relation to the Resource Management Act 1991 and New Zealand's system of planning controls can be found in Chapter 9.

Health and Safety

Forestry is one of the most dangerous industries in New Zealand. Health and safety considerations are seen as a high priority both within the forestry industry, and by the Government's health and safety regulator, WorkSafe.

Further information on New Zealand's health and safety legislation can be found in Chapter 15.

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09.

Resource Management

Resource Management Act 1991

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

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Regional and district plans promulgated under the RMA by district, regional and territorial authorities (ie councils) operate as "rulebooks" that specify objectives, policies and rules relating to land use, natural hazards, biodiversity, use of contaminated sites and the use of hazardous substances.

Plans categorise activities as either permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited. Permitted activities can be undertaken "as of right", whereas other activities require a "resource consent" to be obtained from the relevant authority for the activity to be carried out lawfully (with the exception of the few activities classified as prohibited). Councils have the ability to issue resource consents, which give permission (subject to conditions) for an activity that might affect the environment. The onus is on the owner/occupier to ensure their activities have the necessary consents.

Land use and subdivision consents are attached to the land and transfer automatically to the new owner when land is sold. These activities are under the jurisdiction of district or city councils. Land uses are permitted (can be undertaken without consent) unless rules within a relevant plan or national environmental standard require consent to be obtained.

Other consents (ie water permits and discharge permits) are not automatically transferred when land is sold. These activities are under the jurisdiction of regional councils. These activities are not permitted without resource consent unless identified as a permitted activity under a relevant plan or national environment standard.

The RMA provides for the liability of a business and its owners, where legislative provisions, plan rules and/or conditions of resource consents are contravened. Liability may arise under the RMA if, for example, activities were undertaken by the Target Group without, or in breach of, any resource consents required to undertake its operations. Under the enforcement mechanisms of the RMA, councils can issue abatement and infringement notices requiring unconsented activities to cease or seek orders from the Environment Court that require a person or entity to do a particular thing to remedy an actual or potential breach of the RMA.

Systemic reform of the resource management legislative framework has been a significant policy issue over the last five years for all political parties, and is signalled as a key priority by the new Government, with a long term replacement for the RMA expected to be progressed over the next three years. The Government has signalled that it seeks to replace this with a new framework that is much more enabling of development. That reform process will provide significant opportunities for input from stakeholders over the coming years on the direction and form of the new framework.

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10.

Capital Markets

Introduction

New Zealand's capital markets are primarily regulated by the Financial Markets Conduct Act ("**FMCA**") and the Financial Markets Conduct Regulations ("**FMCR**") under the supervision of the Financial Markets Authority ("**FMA**") and, if the securities are quoted on one of the exchanges operated by New Zealand's primary market operator, NZX Limited ("**NZX**"), the NZX listing rules ("**Listing Rules**").

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FMCA

The FMCA regulates offers of securities (which are referred to as "financial products") to the public in New Zealand. The four categories of financial product are: debt securities, equity securities, managed investment products and derivatives. The FMCA imposes disclosure and governance (for offers of debt securities and managed investment products) obligations on offerors of financial products. It also prohibits misleading and deceptive conduct and conduct constituting insider trading and market manipulation.

Territorial Scope

An offer of financial products is made in New Zealand if the offer is received by a person in New Zealand, regardless of where any resulting issue or transfer occurs and where the issuer or offeror is resident, incorporated or carrying on business. However, this will not be the case if the offeror of the financial products can demonstrate that they have taken all reasonable steps to ensure that persons in New Zealand (other than those to whom an applicable exclusion under the FMCA applies) may not accept the offer.

Retail vs Wholesale

There is a distinction in the FMCA between offers of financial products to wholesale and retail investors. Offers to wholesale investors are subject to less onerous regulatory requirements (in particular, disclosure requirements) than offers to retail investors.

A wholesale investor includes a person who falls within at least one of the following categories:

- "investment businesses";
- people who meet specified "investment activity" criteria;
- "large" entities (those with net assets of at least $5 million or consolidated turnover over $5 million in each of the two most recently completed financial years);
- "government agencies";
- "eligible investors" – who are people who certify that they are eligible to invest without the formal disclosure that would be provided in a product disclosure statement based on prior investing experience; and
- persons paying a minimum of $750,000 for the financial products on offer.

If a person is not a wholesale investor, then they are treated as a retail investor for the purposes of the FMCA. An offer of financial products to at least one retail investor is known as a "regulated offer" and will be subject to regulatory requirements that are heavily prescribed under the FMCA and FMCR.

Disclosure Requirements

The disclosure obligations for regulated offers of financial products include:

- preparing and lodging a product disclosure statement ("**PDS**") – this document will contain the key terms of the offer as well as other information prescribed under the FMCA and FMCR – a PDS is similar to what most jurisdictions would call a prospectus; and
- creating a register entry on the Disclose Register – the Disclose Register is an electronic database maintained on the New Zealand Companies Office website containing the details of regulated offers made in New Zealand. The register entry must contain all material information not contained in the PDS.

An offer made under an exclusion in the FMCA may still be subject to some disclosure requirements, depending on the nature of the exclusion.

Quoted Financial Product Exclusion

The FMCA contains an exclusion from the regulated offer disclosure requirements for same class quoted financial products ("**QFP**"). This exclusion allows issuers to offer equity securities, debt securities or managed investment products of the same class as financial products that are quoted on a licensed market without having to comply with the disclosure requirements that apply to a regulated offer. The issuer must instead issue a "cleansing notice" to the market (which includes a confirmation that the issuer is complying with its continuous disclosure and financial reporting obligations), as well as a document setting out the terms and conditions applicable to the financial product.

Mutual Recognition Regime

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

Class Exemptions

There are also some specific class exemptions which are issued by the FMA – for example, to allow New Zealand investors to participate in rights offers or exchange offers where they are shareholders in a company listed outside of New Zealand.

Governance Requirements

Regulated offers of debt securities and managed investment products must also meet the governance requirements set out in the FMCA and FMCR. These include:

- in the case of debt securities, having a trust deed for the debt securities and a licensed supervisor appointed under the trust deed; and
- in the case of managed investment products, having a governing document and both a licensed manager and licensed supervisor.

Fair Dealing

The FMCA also contains fair dealing rules that apply to all offers of financial products regardless of whether the offer is made to retail or wholesale clients. These rules prohibit misleading or deceptive conduct, and the making of false, misleading or unsubstantiated representations, in relation to any dealing in financial products.

Insider Trading

The FMCA prohibits a person in New Zealand who has material information relating to a listed issuer that is not generally known to the market from trading in financial products, disclosing that material information to another person, and advising someone to hold or acquire financial products. There are various exceptions or defences to these prohibitions, including Chinese wall defences, exceptions for underwriters and exceptions for information gleaned from one's own research and investigation.

Market Manipulation

The FMCA also prohibits a person from engaging in conduct that misleads (or attempts to mislead) the market. This includes spreading false market information or giving false impressions of market conditions.

Substantial product holder disclosure

If a person has a "relevant interest" in listed voting securities at, or exceeding 5%, the person must immediately make disclosure using the prescribed form to both the NZX and the listed issuer. Thereafter, the person must disclose any change in the nature of their holding and any 1% movement in their holding.

NZX

NZX operates the primary regulated exchange in New Zealand. The NZX has two main exchange boards: the NZX Main Board (for listed equities and funds) and the NZX Debt Market. NZX's rules and policies are contained in the Listing Rules, which govern how the NZX markets operate and the conduct of the NZX market participants.

The Listing Rules contain the eligibility requirements for issuers who wish to be listed on the NZX and for the quotation of securities on the relevant exchange board. They also prescribe ongoing requirements for listed issuers, which includes reporting and continuous disclosure obligations.

Foreign Exempt Issuers

An issuer that is already listed on a recognised foreign exchange may be eligible for Foreign Exempt Issuer status. A Foreign Exempt issuer is deemed to comply with the Listing Rules as long as:

- the issuer remains listed on its home exchange; and
- all of the financial products of the issuer quoted on the NZX or NZDX remain quoted on its home exchange.

The foreign exchanges that are currently recognised by the NZX for the purposes of the Foreign Exempt Issuer regime are:

- Australian Securities Exchange (for equity securities, debt securities and funds);
- Hong Kong Exchanges and Clearing Limited (for equity securities);
- London Stock Exchange Group (for equity securities);
- NASDAQ Stock Market (for equity securities);
- Singapore Exchange (for equity securities); and
- TMX Group Inc (for equity securities).

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11.

Financial Services and Funds Management

Introduction

The Financial Markets Conduct Act 2013 ("**FMCA**") is the principal statute in New Zealand that regulates the issue and sale of financial products and the provision of certain market services in New Zealand. "Financial products" include equity securities, debt securities, managed investment products and derivatives.

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The Financial Markets Conduct Regulations 2014 ("**FMCR**") set out additional regulations in respect of the FMCA regime. The FMCA also regulates misleading and deceptive conduct (in trade) in relation to financial products and financial services, dealings of financial products on markets, licensing of entities providing market services, the provision of financial advice and financial reporting.

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

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

Managed investment schemes

Managed investment products are interests in a managed investment scheme and are defined as a type of "financial product" under the FMCA. The FMCA governs the way managed investment schemes are offered, promoted, issued and sold, and provides for the continued responsibilities of those who offer, issue, manage or supervise managed investment schemes.

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

- the purpose or effect of the scheme is to enable persons taking part to contribute money, or to have money contributed on their behalf, to the scheme as consideration to acquire interests in the scheme;
- those interests are rights to participate in, or receive, financial benefits produced principally by the efforts of another person under the scheme; and
- the holders of those interests do not have day-to-day control over the operation of the scheme.

Retail investor and wholesale investor distinction

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

A person is a wholesale investor if the person:

- is an investment business (for example, a business which provides financial services);
- is involved in investment activity with a value of over $1 million in the previous two years;
- has net assets exceeding $5 million as at the end of the two most recently completed financial years;
- is a Government agency;
- invests more than $750,000; or
- can demonstrate that they have requisite experience in dealing in financial products.

A retail investor is any investor who is not a wholesale investor.

If an interest in a managed investment scheme is offered to a retail investor, it will constitute a "regulated offer" and must comply with the disclosure requirements in Part 3 and Part 4 of the FMCA, including:

- preparing and lodging a product disclosure statement, which has heavily prescribed form and content requirements;
- preparing and lodging a statement of investment policy and objectives, which must set out the investment governance, management framework, philosophy, strategies, and objectives of the managed investment scheme and its investment funds or portfolios; and
- maintaining a register entry of other material information on an online register maintained by the Registrar of Financial Service Providers.

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

If the managed investment scheme is only offered to wholesale investors in New Zealand, the governance and disclosure requirements set out above will not apply. Depending on the category of wholesale investor, there may be a requirement to include a warning statement in every document provided to the investor that contains the key terms of the offer of the financial products. In addition, the "fair dealing" provisions in the FMCA will also apply, which prohibit misleading or deceptive conduct, and the making of false, misleading or unsubstantiated representations, in relation to any dealing in financial products.

Mutual recognition scheme

Australian Offerors

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

Asia Funds Passport

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

- most of the governance requirements under Part 4, including the manager licensing requirement and the requirement to have a licensed supervisor;
- all provisions relating to the transfer of transferable financial products;
- financial reporting obligations; and
- the licensing requirement for financial advice services, to the extent that:
  - the operator or foreign passport fund provides a financial advice service in relation to offering managed investment products under a recognised offer; and
  - that financial advice service is provided to or through a qualified distributor that is acting in relation to the offer.

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

Financial Service Providers

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

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

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12.

ESG and Climate Change

Introduction

Like in many other jurisdictions, environmental, social and governance ("**ESG**") issues are receiving increasing attention in New Zealand. While the term "ESG" can capture a wide range of matters (some of which are relevant to other sections of this guide), in this section we provide an overview of how New Zealand regulates matters relating to climate change and ESG reporting.

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Overarching framework under the Climate Change Response Act 2002

The foundation of New Zealand's climate law is the Climate Change Response Act 2002 ("**CCRA**"), which sets out the overarching framework for the regulation of climate change in New Zealand.

The CCRA underwent substantial amendments in 2019, which saw New Zealand become one of the first countries in the world to legislate a domestic "net zero" target. This target is for New Zealand to reach net zero emissions of all greenhouse emissions other than biogenic methane by 2050. New Zealand also has a separate biogenic methane target, which is to achieve a 10% reduction against 2017 levels by 2030 and a 24-47% reduction by 2050.

In addition to setting the domestic emissions reduction targets, the CCRA:

- sets out a framework for the setting of emissions budgets by the Government of the day (on a five-yearly basis) and the preparation of national emissions reduction plans setting out the policies that will be implemented to achieve the emissions budgets;
- in relation to climate change adaptation, sets out a framework for the preparation of national climate change risk assessments and national adaptation plans; and
- establishes the Climate Change Commission, an independent Crown entity responsible for advising the Government on matters relating to climate change mitigation and adaptation and monitoring progress towards mitigation and adaptation goals.

Emissions Trading Scheme

Introduced in 2008, the ETS is the primary policy tool for emissions reduction in New Zealand. The ETS is a market-based system that operates by charging emitters for the greenhouse gases they emit.

The ETS is generally referred to as applying to "all sectors" and "all gases", however, a notable exception is that agricultural emissions are presently required to be reported, but are not priced, under the ETS.

Organisations captured by the ETS (known as "participants") are required to acquire and surrender to the Government one "New Zealand Unit" ("**NZU**") for every tonne of carbon dioxide equivalent greenhouse gases emitted. NZUs can be acquired at quarterly auctions, on the secondary market, or in some cases through free allocation by the Government. In addition, participants can "earn" NZUs through removal activities, which most significantly includes afforestation. Please see Chapter 8 for more information on how forestry assets can earn NZUs.

While the prior Government had signalled an intention to reform the ETS, including by considering whether the current like-for-like treatment of NZUs earned through forestry with other types of NZUs should continue, indications are that the current Government will not implement substantial reforms.

Mandatory climate-related disclosures regime

New Zealand has introduced mandatory climate-related reporting under the FMCA for certain large organisations, requiring them to report annually on their climate-related risks and opportunities for reporting periods commencing on or after 1 January 2023. The regime applies to large (determined by relevant thresholds) listed issuers, banks, insurers, managers of registered investment schemes, building societies and credit unions.

Entities captured by the regime, known as "climate-reporting entities" ("**CREs**") are required to prepare and lodge climate statements, in line with climate standards issued by the External Reporting Board ("**XRB**"). The ultimate aim of these standards is to support the allocation of capital towards activities that are consistent with a transition to a low-emissions, climate-resilient future and entities are required to report on matters relating to their climate-related governance, strategy, risk management, and metrics and targets.

While the XRB developed the climate standards broadly in line with the recommendations of the Taskforce on Climate-Related Financial Disclosures and with an eye on the development of other relevant international regimes, to date New Zealand has not adopted the IFRS Sustainability Disclosure Standards recently issued by the International Sustainability Standards Board ("**ISSB**"). We predict that the next few years will see a focus on convergence with relevant international standards, including through the XRB's post-implementation review of the regime scheduled to commence in 2025.

Resource management system

The Resource Management Act 1991 ("**RMA**") is an important aspect of New Zealand's response to climate change. All persons exercising powers and functions in relation to physical and natural resources are required to have particular regard to the effects of climate change. Following a recent amendment, the RMA also requires matters relating to climate change mitigation to be considered in the exercise of rule-making and consenting functions under the RMA. While the previous Government had signalled an intention to introduce a Climate Adaptation Bill to deal with so-called "managed retreat" (the strategic relocation of assets away from intolerable risk), this piece of legislation has not been introduced and its future under the current Government is unclear.

You can find more information about the RMA in Chapter 9 (Resource Management).

ESG reporting for listed companies

Companies with equity securities listed on New Zealand's stock exchange ("**NZX**") are required to follow the recommendations set out in the NZX Corporate Governance Code or explain why the relevant recommendation was not followed. The NZX Corporate Governance Code includes a recommendation that issuers provide annual non-financial disclosure, including in relation to ESG matters. The NZX has issued an ESG Guidance Note, which is designed to assist issuers to implement this recommendation. The ESG Guidance Note 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. 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.

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13.

Competition Law

Introduction

In New Zealand, the Commerce Act 1986 ("**Commerce Act**") prohibits anti-competitive acquisitions, conduct and arrangements. The Commerce Act is administered by the New Zealand Commerce Commission ("**NZCC**"). The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers in New Zealand. Breaches of the Commerce Act can result in significant prison sentences, criminal fines, civil pecuniary penalties, damages, and/or injunctions.

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Restrictive Trade Practices

Anti-competitive contracts, arrangements, understandings or covenants

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

Cartel contracts, arrangements, understandings or covenants

Contracts, arrangements, understandings, or land covenants containing cartel provisions are prohibited. Intentionally entering into or giving effect to a contract, arrangement or understanding, or intentionally giving or requiring a covenant that contains a cartel provision (together "**cartel agreement**") with a competitor is a criminal offence, subject to:

- prison sentences of up to seven years for individuals; and/or
- a criminal fine of up to $500,000 for individuals, and for businesses, a criminal fine up to the greater of $10 million; three times the commercial gain from the offending; or 10% of the company's turnover.

There is also a civil prohibition on cartel agreements (which does not require any element of intention), with penalties of up to $500,000 for individuals, and for businesses, civil penalties up to the greater of $10 million, three times the commercial gain from the offending, or 10% of the company's turnover.

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

Businesses must take care when communicating with competitors, including customers or suppliers who are also potential competitors. Businesses must also take care when imposing land covenants that seek to restrict competition and enforcing land covenants against competitors.

There are some limited exceptions to the cartel prohibition, including for cartel agreements that occur in the context of a "collaborative activity" between competitors (akin to a joint venture exception), or in the context of vertical supply contracts.

However, these exceptions are technical, and so reliance on them needs to be considered carefully. The criminal regime has introduced a defence to criminal (but not civil) liability if the defendant reasonably believed that one of the specific exemptions to cartel liability applied. However, the defence will not apply if the defendant's belief is based on "ignorance, or mistake, of any matter of law". Therefore, to rely on the exception to criminal liability, it is necessary that an individual/business has considered the exceptions (which is likely to require having taken legal advice).

Misuse of market power

Companies with a substantial degree of market power must take extra care. It is illegal for a firm with a substantial degree of market power to engage in any conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market. This means that a business with market power must not only ensure that it does not have an anti-competitive purpose for its conduct, but also that its conduct will not have an anti-competitive effect.

Resale price maintenance

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

Jurisdiction

The Commerce Act extends to international parties who engage in conduct outside New Zealand that affects a "market" in New Zealand so long as:

- the person is resident in, or carries on business in, New Zealand; or
- a person in New Zealand acts at their direction, and the conduct relates to New Zealand; or
- where any part of a prohibited act occurs in New Zealand (the Commerce Act deems the whole of that act to have occurred in New Zealand).

Authorisation of restrictive trade practices

From 5 April 2023, the Commission obtained the power to grant authorisation for all restrictive trade practices, including any conduct that would otherwise be subject to the misuse of market power prohibition and cartel prohibition, where it considers the practice would result in a public benefit (such as efficiencies, environmental, or health and safety benefits) that outweigh the negative impacts on competition. The Commission also has the power to grant "provisional" authorisation (ie interim authorisation) for restrictive trade practices while its full authorisation decisions are pending.

Business acquisitions

The prohibition

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

- the merger removes a competitor that provided a competitive constraint, resulting in the ability for the merged firm to profitably increase prices (known as "unilateral effects");
- the merger increases the potential for the merged firm and all or some of its remaining competitors to coordinate their behaviour so that output reduces and/or prices increase across the market (known as "coordinated effects");
- the merged firm will acquire an unmatched portfolio of products that it can use to lessen competition in the market by bundling or tying products together across that portfolio, typically where the acquirer has a "must have" product in its portfolio (known as "conglomerate effects"); or
- the merged firm is obtaining an upstream or downstream business that it can use to lessen competition by cutting off access to inputs or customers from its competitors, typically where the acquirer has "market power" in one of those markets (known as "vertical effects)".

Overseas transactions

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

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

NZCC operates a "voluntary" notification regime

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

If parties proceed with an acquisition without seeking the approval of the NZCC, and the NZCC considers that an acquisition could have an adverse impact on competition, the NZCC may choose to open an investigation, and it has a range of enforcement options at its disposal, including taking High Court proceedings to seek an injunction to prevent the acquisition occurring, pecuniary penalties, or divestment of assets. The maximum pecuniary penalty for individuals is $500,000. On 5 May 2022, the maximum pecuniary penalty for anti-competitive mergers for businesses was increased to the greater of $10 million, three times the commercial gain, or 10% of turnover.

Concentration indicators

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

- a market share over 40% in a non-concentrated market (ie where the three largest firms in the market post-acquisition have a combined market share of less than 70%); or
- a market share over 20% in a concentrated market (ie where the three largest firms in the market post-acquisition have a combined market share of more than 70%).

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

Clearances/Authorisations

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

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

Alternatively, parties may apply for an authorisation if they consider that the merger or acquisition may substantially lessen competition in a market, but nevertheless is likely to result in public benefits (such as efficiencies, environmental, or health and safety benefits) that are sufficient to outweigh the competitive harm. This typically involves a more complex and lengthy process than a clearance application. Again, an authorisation cannot be sought retrospectively.

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

Due diligence

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

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> Competition law client feedback,
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14. Consumer and Privacy Law

Privacy Act 2020

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

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Key changes introduced by the Privacy Act include:

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

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

> ***"In terms of what makes this practice unique, it's the deep understanding the team have of the regulatory landscape and relationships with regulators in this space."***
>
> Data Protection Cyber Security client feedback, Legal 500 Asia Pacific 2024 Guide

Consumer Law

Fair Trading Act 1986

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

Civil and criminal action can be taken under the Fair Trading Act. It is enforced by the NZCC.

The Fair Trading Act also prohibits unfair contract terms in standard form consumer contracts and "small trade contracts" (being where the contract does not comprise or form part of a trading relationship that exceeds an annual value threshold of $250,000 (including GST, if applicable) when the trading relationship first arises).

Consumer Guarantees Act 1993

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

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15.

Employment

Introduction

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

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

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Asset purchase

Where a business, or part of a business, is acquired by way of an asset purchase, the employees do not automatically transfer with the business (with an exception, discussed below). Employment with the vendor company can be terminated on the grounds of redundancy and new offers of employment must be made by the purchaser to those employees it wants to employ. Any entitlements triggered by termination of employment will be payable by the vendor to employees unless agreed otherwise. This includes accrued holidays and any contractual entitlement to redundancy compensation.

There is no statutory right to redundancy compensation in New Zealand.

Employers who contractually offer redundancy compensation often include in employment agreements a "technical redundancy clause" which provides that the employer does not need to pay redundancy compensation to employees who are offered employment with the purchaser of the business on the terms required by the clause (often expressed as on "substantially similar" or "no less favourable" terms and conditions). Employees who are offered employment on such terms but decline the offer are then not entitled to redundancy compensation.

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

Share purchase

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

Accident Compensation Scheme

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

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

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

Employer's Obligations

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

Both employers and employees (including the self-employed) are required to pay levies to fund ACC. An employer's levy is determined by its total payroll and the industry it is in. An employee's levy is 1.39% of total earnings and is deducted by an employer with income tax (PAYE).

Where eligible, employers can be accepted into the ACC Accredited Employers Programme which grants Accredited Employer status. This allows the employer to manage employee claims for workplace injuries, make cover decisions and determine what employees are eligible to receive. The effect of entry into the scheme is that the employer self-funds ACC for its organisation.

Health and Safety

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

> ***"Russell McVeagh has a great team with great knowledge, and they provide very clear and concise guidance and advice."***
>
> Employment law client feedback,
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16.

Dispute Resolution

Introduction

In New Zealand, disputes are resolved through the court system or an alternative dispute resolution process such as mediation or arbitration.

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Dispute resolution client feedback,
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Court system

There are four main levels in the New Zealand Court system. The Courts with generalist jurisdiction, including in relation to most commercial matters, are:

- Te Kōti ā Rohe | the District Court. The District Court has jurisdiction to hear disputes with a monetary value of up to $350,000. A single judge sitting alone generally hears a proceeding in the District Court.
- Te Kōti Matua | the High Court. It is the highest court in which proceedings can be initiated. The High Court has jurisdiction to hear disputes with a monetary value over $350,000. It also hears appeals from decisions of the District Court and other specialist courts and tribunals below it. A single judge sitting alone generally hears a proceeding in the High Court.
- Te Kōti Pīra | the Court of Appeal. The Court of Appeal has jurisdiction to hear appeals from the High Court. A panel of three judges generally hears an appeal in the Court of Appeal.
- Te Kōti Mana Nui | the Supreme Court. The Supreme Court is New Zealand's highest and final court. It has jurisdiction to hear and determine any case on which it grants leave, generally on appeal from the Court of Appeal. The judges must be satisfied that it is necessary in the interests of justice for the court to hear and determine the issue to grant leave to appeal. A panel of five judges generally hears an appeal in the Supreme Court.

There is a variety of specialist courts and tribunals at the equivalent of the District Court or High Court level or below. Two of those more frequently encountered in commercial matters are the Environment Court and the Employment Court.

Generally, there is a single right of appeal from the decision of any New Zealand court or tribunal and any further appeal requires leave, though this varies depending on the court and the nature of the proceeding.

Enforcement of foreign judgments

There are four formal methods of enforcing foreign judgments in New Zealand. The country from which the judgment was obtained, the date of the judgment, and the subject matter will determine which regime will apply:

- Judgments obtained in an Australian court may be enforced under the Trans-Tasman Proceedings Act 2010. This Act relates to all Australian judgments, except those relating to specifically excluded matters, and allows for streamlined enforcement in New Zealand as if the judgments had been obtained from a New Zealand court.
- Money judgments obtained in Commonwealth courts may be enforced under the Senior Courts Act 2016. This Act provides for money judgments to be registered with the New Zealand High Court and become enforceable as if obtained from a New Zealand court, subject to certain criteria.
- Foreign judgments from non-Commonwealth countries with which New Zealand has a reciprocal agreement may be enforced under the Reciprocal Enforcement of Judgments Act 1934. The countries to which this Act applies are set out within the Act and subsequent Orders in Council. The Act provides for money and non-money judgments to be registered in the New Zealand High Court and enforced as if obtained from a New Zealand court, subject to certain criteria.
- Judgments from countries with which New Zealand has no reciprocal agreement for enforcement (notably China, Russia, and the USA) may be enforced under the common law. This will require proceedings based on the foreign judgment to be issued in a New Zealand court. After obtaining a judgment that is enforceable in New Zealand, it is open to a judgment creditor to pursue any of the available enforcement options.

The question of the enforcement of a New Zealand judgment outside of New Zealand is determined by the law of the jurisdiction in which the judgment is sought to be enforced.

Alternative dispute resolution

Disputes are often resolved through alternative (ie non-court) processes in New Zealand. Mediation and arbitration are the most common alternative dispute resolution mechanisms in New Zealand.

Mediation

An independent and impartial mediator facilitates negotiation between the parties to explore whether the parties can find a mutually acceptable solution. The mediator remains neutral and cannot impose an outcome on the parties. If the parties are unable to reach a decision on how to resolve the issue, the matter remains unresolved. If the parties agree, the agreement may be recorded in writing by way of a binding and enforceable settlement agreement.

Arbitration

An independent and impartial arbitrator hears the dispute and makes a binding award which can be enforced through the courts. The Arbitration Act 1996 governs arbitral proceedings in New Zealand. It is modelled on the UNCITRAL Model Law on International Commercial Arbitration. Unlike (generally) the Court process, the arbitration process is confidential. The High Court has jurisdiction to hear appeals against, or set aside, arbitral awards in limited circumstances.

New Zealand is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). A valid arbitral award made in New Zealand can be enforced in any country which has also ratified the New York Convention, and vice versa.

> ***"They are strong from top to bottom, and there has been no issue they have not been able to handle immediately."***
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> Dispute resolution client feedback,
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17.

Restructuring and Insolvency

Introduction

New Zealand has long been regarded a creditor-friendly jurisdiction. New Zealand's varied corporate restructuring and insolvency toolkit includes a number of debtor-in-possession, court and insolvency procedures that can be used by debtors or creditors to restructure a business and/or maximise the return to stakeholders. These procedures are complemented by a strong rule of law and a licensed insolvency practitioner regime.

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Informal options for debt restructuring

There are a range of informal techniques available to implement a debt restructuring which seeks to address the distress of a particular business. These can be employed separately, in combination with each other, or in combination with one or more of the insolvency processes outlined below. They include:

- rescheduling debts and amending other key terms of finance documentation;
- granting waivers of breaches of finance documents and/or agreeing a period of forbearance or standstill;
- debt trading or similar arrangements such as sub-participation;
- distressed M&A;
- structured or pre-pack business or asset sales (noting that New Zealand has no regulatory framework for pre-packs, unlike SIP 16 in the United Kingdom); and
- debt for equity transactions and credit bidding.

Directors of companies must also be aware that several specific duties apply when a company is facing financial difficulties. While New Zealand has no formal "safe harbour" for directors, they have time to take professional advice and explore realistic options that are available for a company. The duties of particular relevance near insolvency are that:

- directors must not cause or allow the business of the company to be carried on in a manner likely to create substantial risk of serious loss to its creditors; and
- directors cannot agree to the company incurring a new obligation unless they believe on reasonable grounds that the company will be able to perform the obligation when required.

Unlike some other countries, there are no restrictions on enforcing ipso facto clauses in contracts (which provide for the termination of a contract on the insolvency of a party). Depending on the terms of the contract, a carefully devised restructuring can avoid triggering such provisions.

Receivership

Receivers are most often appointed to secured property under a security agreement. This security agreement will include the grant of security over all or part of the assets of the grantor and, commonly, will provide that a receiver can be appointed to those secured assets on default. Although receivers can also be appointed by the High Court pursuant to its inherent jurisdiction (and on its terms), this is rare in New Zealand and is typically only used where assets are at risk.

The receiver's primary function is usually to manage and realise the secured assets (as agent for the grantor) for the benefit and in the repayment of the secured creditor. The receiver's powers derive from the default powers in the Receiverships Act 1993 and the security agreement under which they are appointed. These powers will commonly include an ability to do anything that the grantor could do regarding the secured assets (and the receivers have associated duties). A receivership generally ends when secured assets are realised or the security is otherwise redeemed through repayment in full. Unless it is in liquidation or voluntary administration, the company will then return to the control of its directors.

Voluntary administration

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

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

Creditors' compromise

A debtor company seeking to restructure its debts may make a proposal to its creditors in accordance with the procedure set out in Part 14 of the Companies Act 1993. This debtor-in-possession process culminates in a meeting of notified creditors who vote on the debtor company's proposal, which may include a rescheduling of indebtedness and/or a compromise of claims. If approved by the same thresholds as for voluntary administration, all notified creditors will be bound by the compromise. While there is no automatic moratorium on creditor action when a proposal is issued to creditors, the High Court has jurisdiction to establish a moratorium on the terms it thinks appropriate.

Schemes of arrangement

Debt restructurings can be implemented by scheme of arrangement, which follow the same procedure as schemes of arrangement in Australia and the United Kingdom. Whilst members' schemes are commonly used to implement complex corporate transactions, they have been rarely used in New Zealand to implement compromises between creditors. Creditors are split into classes based on their legal rights against the company, and the scheme will be effective if:

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

Liquidation

Liquidation is the process by which the assets of a company are realised and their proceeds distributed to creditors in accordance with the statutory priority under the Companies Act 1993. For that reason, it almost always results in the deregistration of the company at the end of the liquidation. Liquidators can be appointed to a body corporate (including companies and limited partnerships) by shareholders (by special resolution), the company (on the occurrence of an event in the constitution), or by various stakeholders (including the company, a director and creditors) by application to the High Court. As with voluntary administration and creditors' compromises, the High Court has a supervisory jurisdiction in respect of liquidations. Pending the appointment of liquidators, it is possible for interim liquidators to be appointed to a company if the court is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company (with powers limited to that purpose).

Liquidation culminates in the liquidators making a distribution to unsecured creditors on a (largely) rateable *pari passu* basis, after paying the liquidators' costs and expenses and the claims of secured creditors. Some classes of creditors (for example, employees and the Commissioner of Inland Revenue), have limited preferential status over other creditors.

Cross-border insolvencies

New Zealand has incorporated the UNCITRAL Model Law on Cross-Border Insolvency into domestic legislation under the Insolvency (Cross-border) Act 2006 ("**ICBA**"), largely without amendment. The ICBA facilitates the local recognition of foreign insolvency proceedings. This supplements the pre-existing principle of comity which is based on private international law and has been developed by the common law. Relief for foreign insolvency proceedings differs depending on whether the proceedings were commenced in the country where the company has its centre of main interests (which results in automatic relief, such as a stay on execution and proceedings) or a country where it has an establishment, conducting non-transitory economic activity (where relief is discretionary).

Further, a foreign court with jurisdiction over an insolvency proceeding may request the aid of the High Court under the ICBA. There is also provision in the ICBA for the High Court to co-operate with foreign courts or foreign representatives either directly or through an insolvency administrator.

Finally, the High Court has jurisdiction to place a company incorporated outside of New Zealand into liquidation. This power is discretionary, but typically requires connection with New Zealand.

> ***"Russell McVeagh's restructuring and insolvency practice is hugely experienced, well resourced and is instructed in most of the major cases in this area. They are at the top of the market in this field in New Zealand."***
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> Restructuring and Insolvency client feedback, Legal 500 Asia Pacific 2024 Guide

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