The Mergers & Acquisitions Review

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Chapter 38

NEW ZEALAND

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I OVERVIEW OF 2007/2008 M&A ACTIVITY

During 2007 M&A activity in New Zealand remained very strong, continuing the trend from 2006. Offshore investment funds and private equity firms, in particular, were very active, which had an impact on the overall total value of transactions for 2007. There was a high level of activity in the mid-market sector, which traditionally makes up the majority of New Zealand M&A activity.

The international 'credit crunch' began to affect New Zealand M&A activity towards the end of 2007. While it probably brought an end to some of the larger leveraged deals that private equity houses had been looking at, it did not have a significant impact on the small to medium-sized deals. However, there was a sharp decline in overall reported M&A activity during the first half of 2008. Thomson Financial statistics show that announced New Zealand M&A transactions during the first quarter of 2008 were down by 44 per cent to 65 deals, compared with 114 in the first quarter of 2007.

Significant M&A transactions during 2007 included the NZ$2.24 billion purchase of Yellow Pages Group by a private equity consortium consisting of CCMP Capital Asia and Teachers' Private Capital, the private investment arm of the Ontario Teachers' Pension Plan, and Fletcher Building Limited's purchase of US-based Formica Corporation for US$750 million.

II GENERAL INTRODUCTION ON THE LEGISLATIVE M&A FRAMEWORK

The primary legislation regulating M&A transactions in New Zealand is the Takeovers Code, made under the Takeovers Code Approval Order 2000, and the Companies Act

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1993. There are several other statutes and regulations relevant to M&A transactions, including the Takeovers Act 1993, Commerce Act 1986, Overseas Investment Act 2005, Securities Markets Act 1988 and the Securities Act 1978.

The listing rules of New Zealand Exchange Limited ('NZX'), the only registered stock exchange operating in New Zealand, may be relevant if a party to an M&A transaction has securities listed on an NZX market.

i Takeovers Code

The Takeovers Code and the Takeovers Act regulate and confer jurisdiction on the Takeovers Panel to regulate public company takeovers using the rules of the Takeovers Code. The application of the Takeovers Code is limited to 'code companies'. The Takeovers Code creates a general rule known as the 'fundamental rule' that governs the holding or controlling of voting rights in code companies.

A code company must be a New Zealand-incorporated company that has securities that confer voting rights quoted on NZX, or an unlisted company that has 50 or more shareholders.

The fundamental rule (Rule 6 of the Takeovers Code) provides that, subject to certain exceptions, a person (either solely or together with its 'associates') cannot become the holder or controller of more than 20 per cent of the voting rights in a code company or increase an existing holding of 20 per cent or more of the voting rights in a code company.

The exceptions to the fundamental rule take the form of a full or partial takeover offer that complies with the Takeovers Code, selective shareholder-approved acquisitions or allotments of voting securities or, for a majority shareholder, through the 'creep provisions' in the Code.

Once a person becomes the holder or controller of 90 per cent or more of the voting rights in a code company, the compulsory acquisition provisions under Part 7 of the Takeovers Code can be used to purchase any outstanding shares compulsorily.

ii Companies Act

The Companies Act 1993 is the primary legislation governing company law in New Zealand. The main provisions of the Companies Act that are relevant to M&A transactions are set out in Parts 13 and 15, relating to amalgamations and schemes of arrangement respectively.

Under Part 13, two or more companies incorporated in New Zealand can amalgamate and continue as one company. That company may be one of the amalgamating companies, or it may be a new company. Shareholders of each amalgamating company must approve an amalgamation proposal by a special resolution passed by 75 per cent or more of votes cast at a shareholders' meeting. Once an amalgamation becomes effective, the surviving company succeeds to all the property, rights, powers and privileges of each amalgamating company, as well as all of its liabilities and obligations.

Under Part 15 of the Companies Act, an application may be made to the High Court to approve a merger under a scheme of arrangement. Shareholder resolutions must be passed by a majority as fixed by the High Court (usually a majority of 75 per cent or more of votes cast at a shareholders' meeting). When all resolutions are passed

by the requisite majority and other preconditions are satisfied, an application is made to the High Court for the final orders approving the scheme of arrangement (which will bind all shareholders of the applicant company).

Any 'major transaction' entered into by a New Zealand company must be approved by a special resolution of shareholders of the company. Any acquisition or disposal of assets of a company will be a 'major transaction' if those assets have a value of more than half the value of the company's assets before the acquisition or disposal.

Minority shareholders who vote against a major transaction or an amalgamation proposal approved by special resolution have the right to require the company to purchase their shares at a fair and reasonable price under the buyout rights procedure contained in the Companies Act.

iii *Commerce Act*

In New Zealand, competition law is governed by the Commerce Act 1986, which prohibits the acquisition of assets of a business or shares in a company if that acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

There is no compulsory requirement for parties to notify the New Zealand Commerce Commission of a merger or acquisition. Instead, a party can voluntarily apply for clearance to complete a merger or acquisition. Clearance will be granted by the Commerce Commission if it is satisfied that the merger or acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

iv *Overseas Investment Act*

Foreign investment in New Zealand is regulated by the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. Under this legislation, an 'overseas person' is required to obtain consent for certain transactions which involve an overseas investment in 'sensitive land' or an overseas investment in significant business assets in New Zealand.

An 'overseas person' includes a person who is neither a New Zealand citizen nor ordinarily resident in New Zealand, a body corporate that is incorporated outside New Zealand or a body corporate that is 25 per cent or more owned by a body corporate incorporated outside New Zealand or by any other overseas person.

In general, consent is required in respect of any acquisition by an overseas person, or an 'associate' of an overseas person, of:

a securities of a person, where as a result of the acquisition the overseas person or the associate (either alone or together with its associates) will have a 25 per cent or more ownership or control interest in that person, or will increase an existing 25 per cent or more ownership or control interest in that person, if the value of the securities or consideration provided or the value of the assets of that person (together with its 25 per cent or more owned entities) exceeds NZ$100 million;

b property or assets in New Zealand used in carrying on business in New Zealand if the total value of the consideration provided exceeds NZ$100 million;

c a freehold interest or leasehold interest (for a term of three years or more) in sensitive land; or

d securities of a person who owns or controls any such interest in sensitive land if, as a result of that acquisition, the overseas person or the associate (either alone or together with its associates) will have a 25 per cent or more ownership or control interest in that person, or will increase an existing 25 per cent or more ownership or control interest in that person, or that person becomes an overseas person.

'Sensitive land' includes non-urban land that has an area greater than five hectares, land on certain specified New Zealand islands, the foreshore or seabed, land that is held for conservation purposes and land that is a historic place or subject to a heritage order.

The Overseas Investment Office has delegated authority to consider most applications for consent. All applications for consent outside the Overseas Investment Office's delegated authority are required to be determined by the Minister of Finance and the Minister of Land Information acting jointly.

There are additional procedures to be followed in respect of an application for consent involving 'farmland' or 'special land'. Farmland or shares in a company that owns farmland must be offered for acquisition on the open market to persons who are not overseas persons. In the case of some transactions involving 'special land' (i.e., the foreshore, seabed, riverbed or lakebed), the Crown has a right of first refusal to purchase special land that is the subject of a consent application.

An application for consent is assessed against the factors specified in the legislation. These factors include whether the overseas person, or persons with control of the overseas person, has relevant business acumen and experience, whether they are financially committed to the investment and whether they are of good character. In the case of an application for an overseas investment in sensitive land, the consent will only be granted if the Overseas Investment Office or Ministers considering the application are satisfied that the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) assessed according to a range of factors specified in the legislation.

iii *Securities Markets Act*

The Securities Markets Act 1988 contains provisions that govern insider trading, market manipulation, disclosure of substantial security holdings and continuous disclosure requirements in respect of public issuers of securities.

In broad terms, the substantial security holder rules require a person to notify a public issuer and NZX when they begin to have a 'relevant interest' in 5 per cent or more of any class of listed voting securities of that public issuer. Subsequent notices must be given following any change of 1 per cent or more in the number of voting securities to which any disclosed relevant interest relates, or any change in the nature of a relevant interest already disclosed. A notice must also be given when a person ceases to be a substantial security holder.

iv Securities Act

The Securities Act 1978 regulates offers of securities to the public in New Zealand. The general scheme of the Act requires an issuer to register a prospectus and issue an investment statement in respect of a public offer of securities (including an offer made in connection with a takeover offer, an amalgamation or a scheme of arrangement). Each document must comply with specific disclosure requirements set out in the Act or the Securities Regulations 1983, although there are class exemptions applicable to an amalgamation and a takeover offer.

v Australia and New Zealand mutual recognition of securities offerings

New Zealand and Australia have recently implemented a regime for the mutual recognition of securities offerings between the two countries. This regime allows an issuer to extend an offer of securities that is being made lawfully in one of the countries to investors in the other country without having to comply with most of the substantive requirements of the foreign jurisdiction's fundraising laws. The practical effect is that one offer document may be used in both countries, reducing compliance costs and improving integration between the two markets.

vi NZSX Listing Rules

The NZSX Listing Rules may be relevant to an M&A transaction if any party to the transaction is listed on NZX. The parts of the NZSX Listing Rules that are most likely to be relevant to an M&A transaction are those relating to continuous disclosure to the market of material information and those requiring shareholder approval for major transactions or related party transactions entered into by a listed entity.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAWS AND THEIR IMPACT

i Truth in takeovers provisions

A series of amendments to the Takeovers Act and to the Takeovers Code have come into effect over the last 12 months. The most significant amendments involve the introduction of 'truth in takeovers' provisions. These provisions give the Takeovers Panel broad powers to deal with any statement or information that is false in a material respect or materially misleading and is made or disseminated in relation to any takeover or other transaction that is regulated by the Takeovers Code. Other amendments have enhanced the Takeovers Panel's enforcement powers generally, and the penalties and remedies for any breach of the Takeovers Code have been expanded.

ii Takeovers Panel's reform proposals for schemes of arrangement and amalgamations

Over the last two years, the Takeovers Panel has expressed its concern about the perceived increase in the use of amalgamations and schemes of arrangements under the Companies Act as an alternative to a takeover offer made under the Takeovers Code, and the Panel has been pressing for legislative reform to address its concerns.

Of particular concern to the Takeovers Panel seems to be the ability for parties to take advantage of the lower level of shareholder approval required to give effect to an amalgamation or scheme of arrangement than would be the case if the Takeovers Code applied to the same transaction. In addition, the Takeovers Panel has stated that it considers that the statutorily mandated shareholder protections set out in the Takeovers Code, such as those relating to the provision of information, timing of events, independent advice and participation, are denied to shareholders when the amalgamation or scheme of arrangement provisions of the Companies Act are used to effect a change in control of a code company.

The Takeovers Panel is currently finalising its recommendations to the government on this issue. In the meantime, the Takeovers Panel has indicated that it will seek to be heard when the court is making orders in respect of the approval thresholds for schemes of arrangements involving code companies.

iii Overseas investment in strategically important infrastructure

An amendment to the Overseas Investment Regulations in March 2008 changed the factors to be considered in relation to an application for consent that concerns strategically important infrastructure on sensitive land. Consideration must now be given to whether a proposed overseas investment in sensitive land that includes strategically important infrastructure will, or is likely to, assist New Zealand to maintain control of that strategically important infrastructure.

This change was controversial when it was announced, as it came into immediate effect and at a time when the Overseas Investment Office was processing the Canada Pension Plan Investment Board's application for consent to acquire 40 per cent of the shares in Auckland International Airport Limited, the publicly listed company that owns New Zealand's largest international airport. That application was declined and the Ministers stated in their decision that, in their view, the proposed investment was not likely to assist in maintaining New Zealand control of the strategically important infrastructure of Auckland International Airport Limited.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Foreign investors played a significant role in New Zealand M&A activity during 2007. Offshore companies and private equity firms, largely from Australia and North America, continued the 2006 trend of pursuing New Zealand assets.

Foreign investors are involved mainly in medium-sized and large M&A transactions. Many M&A deals in New Zealand involve relatively small privately held businesses and transactions involving those businesses are often limited to New Zealand parties.

i Trans-Tasman transactions

M&A activity in 2007 saw an increasing number of Trans-Tasman transactions. The New Zealand market benefited from a very active Australian M&A market, with a significant number of Australian target companies also having operations in New Zealand. Recent examples are the merger of Suncorp-Metway Limited and Promina Group Limited,

Wesfarmers Limited's acquisition of Australian-based retailer Coles Group Limited, Kirin Holdings Company Limited's acquisition of Australasian dairy company National Foods Limited, and the Airline Partners Australia consortium's unsuccessful proposal to acquire Qantas Airways Limited.

ii Private equity

Private equity firms, particularly Australian-based firms, were very active in the New Zealand M&A market during 2007. For instance, Ironbridge Capital, Next Capital, Archer Capital, Pacific Equity Partners, Catalyst and CCMP Capital Asia all completed transactions in New Zealand during 2007.

The level of activity of private equity firms in the New Zealand market has reduced significantly in the first part of 2008, along with M&A activity generally, although the recent acquisition of Borders Group's Australasian book stores by A&R Whitcoulls (which is owned by private equity firm Pacific Equity Partners) demonstrates that acquisitions by private equity firms are able to be completed despite the current slowdown in M&A activity.

iii Offshore transactions by New Zealand companies

A small group of New Zealand companies were active in offshore M&A markets, with the size of those transactions ranging from mid-size acquisitions such as those completed by Mainfreight Limited and Rakon Limited, through to larger transactions undertaken by Fletcher Building Limited and Rank Group Limited.

New Zealand building products manufacturer, Fletcher Building Limited, one of New Zealand's largest listed companies, acquired US-based Formica Corporation for US$750 million from private equity investors Cerberus Capital Management, LP and Oaktree Capital Management, LLC. Privately owned Rank Group Limited acquired the packaging and consumer businesses of US-based Alcoa for US$2.7 billion. This transaction followed Rank Group Limited's other recent acquisitions in the packaging sector of Swiss packaging company SIG Holding AG and US-based companies Blue Ridge Paper Products Inc and Evergreen Packaging Inc.

V SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND HOT INDUSTRIES

i Significant transactions

The purchase of Yellow Pages Group by a private equity consortium consisting of CCMP Capital Asia and Teachers' Private Capital, the private investment arm of the Ontario Teachers' Pension Plan, for NZ$2.24 billion was the largest acquisition of a New Zealand business completed in 2007. The deal is also New Zealand's largest-ever leveraged buyout transaction.

Private equity firm Ironbridge Capital was successful during 2007 in acquiring all the shares in NZX listed media company CanWest MediaWorks NZ Limited through two separate takeover offers. However, not all 'public-to-private' deals were successful over the period. In March 2008, Crescent Capital Partners failed in its takeover bid for NZX-

listed Abano Healthcare Group Limited after it did not receive sufficient acceptances to take its stake to the 50 per cent level required under the Takeovers Code.

NZX-listed technology companies Provenco Group and Cadmus Technology completed their merger in May 2008. The merger is one of the few examples of a completed merger of two NZX-listed companies under the Part 13 amalgamation provisions of the Companies Act, rather than through a court-approved scheme of arrangement.

ii Infrastructure transactions

A significant number of M&A transactions or proposals during 2007 and 2008 have concerned the infrastructure sector.

Among the most prominent proposals over the period were two separate proposals made to acquire a stake in Auckland International Airport Limited, which owns New Zealand's largest airport. In July 2007, Dubai Aerospace Enterprise (DAE) Limited entered into a merger agreement with Auckland International Airport Limited that would have seen it take a majority shareholding in a new airport company under an amalgamation. The merger agreement was terminated by mutual agreement. In December 2007, the Canada Pension Plan Investment Board made a partial takeover offer to acquire 40 per cent of the shares in Auckland International Airport Limited. While Auckland International Airport shareholders voted to approve the bid and more than the required number of acceptances were received, the takeover bid did not proceed when the Canada Pension Plan Investment Board's application for consent under the Overseas Investment Act was declined.

Infratil Limited, an NZX-listed investor in infrastructure and utility assets, acquired Alliant Energy New Zealand Limited, which owned a 23 per cent interest in listed electricity retailer TrustPower Limited, for NZ$432 million. That transaction enabled Infratil Limited to gain a majority shareholding in TrustPower.

In June 2008, the New Zealand government completed the NZ$665 million purchase of New Zealand's sole train operator from Australian-listed Toll Holdings Limited.

In July 2008, Cheung Kong Infrastructure Holdings Limited, a major global infrastructure owner and operator, acquired Vector Limited's Wellington electricity distribution network for NZ$785 million.

iii Trends – auction sales, vendor due diligence and deal delays

The trend of conducting M&A transactions by auction sales continued in 2007, and in competitive sale processes, it has become common for vendors to provide vendor due diligence reports to assist bidders. Successful bidders, and their financiers, are typically able to rely on the contents of those due diligence reports, subject to reaching agreement on the terms of a reliance letter.

The high level of M&A activity and an active property sector were reflected in the high number of consent applications lodged with the Overseas Investment Office. This resulted in delays in obtaining consent, extending the time between document execution and completion of overseas investment transactions.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

During the first half of 2007, the New Zealand acquisition finance market was very active, highlighted by continuing pressure on lending terms and the introduction into the New Zealand market of innovative structures for LBO debt.

In the latter part of 2007, and continuing into the first half of 2008, the New Zealand debt funding market followed international trends with a significant reduction in M&A activity and a return to terms significantly more favourable to lenders.

i Pressure on lending terms

Prior to the downturn in M&A activity and the effects of the credit crunch, borrowers were able to successfully negotiate more flexibility in the scope of restrictive covenants. The value of baskets increased and borrowers commonly were given the ability to carry-forward and carry-back unused amounts. Lender voting majorities were also eroded and 'yank-the-bank' or 'snooze-and-lose' provisions became increasingly common. While financial covenants were relaxed to some extent, a full covenant package was still usual and long-term covenant-lite loans did not reach the New Zealand market (although short-term covenant-lite interim loans did).

Private equity firms actively sought New Zealand acquisition opportunities in competition with trade buyers. This competition for assets affected the financing documentation process. Firm commitments to lend at bid stage, including detailed long form term sheets and the use of interim loan agreements to demonstrate certainty of funds became a more common feature of the New Zealand market. In addition, as borrowers and sponsors were often required to bid without a finance condition (or sought to do so to increase the attractiveness of their bid), increasingly borrower-friendly 'certain funds' provisions became common.

ii Structural changes

The New Zealand market adopted some of the new innovative structures that were common in overseas deals, such as the trend away from amortising debt, an increase in the second-lien market and the increasing use of PIK ('payment in kind').

While the trend in New Zealand has been towards more of the debt being in the Tranche B bullet and less in an amortising Tranche A, the New Zealand market did not move as aggressively as some overseas markets in allowing all of the loan to be repaid by a bullet payment at facility termination.

Second-lien or 'first-loss' debt became common in New Zealand and is now an established piece of most New Zealand leveraged buyouts. It is usually structured as 'Tranche D'/'First Loss' and therefore paid second after the senior debt on enforcement. Often these tranches are structured as short-term bridge debt to be replaced by a listed (subordinated) retail capital bond (usually within 12 to 18 months). In such cases, should the listed bond not be achievable, the subordinated facility will usually term out.

Subordinated debt has long been a feature of the New Zealand debt markets and therefore, while terms are likely to tighten, it is expected that senior or subordinated structures will continue to be used in New Zealand. However, the opportunities for non-bank issuers to seek funding from the retail subordinated bond market have reduced

significantly since July 2007, due to global credit market conditions, compounded by the impact of numerous local finance company failures.

Recent deals have also seen PIK loans or notes appearing as a separate piece within the subordinated debt structure. While PIK loans have become common in New Zealand, 'PIK toggle', meaning the borrower has the option to switch between PIK and cash-pay interest during the life of the loan, has been less common.

VII EMPLOYMENT LAW

i Transfer of employment

Under the Employment Relations Act 2000, every collective employment agreement and individual employment agreement must contain an 'employee protection provision' that provides protection for employees affected by a restructuring. This includes outlining a process that the employer must follow in negotiating with a new employer about the restructuring, and specifies which matters relating to the employees' employment should be under negotiation. However, except for 'vulnerable employees' (who are now covered by a new amendment to the Employment Relations Act discussed below), affected employees can only elect to transfer to a new employer once an offer of employment is made.

Where an employee who elects to transfer to a new employer is a member of a union and bound by a collective employment agreement, the new employer automatically becomes a party to the collective agreement in respect of that employee and will be bound by its terms.

ii Introduction of KiwiSaver

KiwiSaver is a recent government initiative that provides the opportunity for individuals to establish savings accounts for retirement, and for which minimum contributions are required from participating employees and their employers.

Under the KiwiSaver Act 2006, all new employees are automatically enrolled in KiwiSaver. However, there is an exemption from this requirement in respect of employees who are acquired by a purchaser in an asset sale (although for existing KiwiSaver employees who are acquired, any obligations imposed by the KiwiSaver Act will be taken over). There is a requirement for a new employer to provide the New Zealand tax authority with notification that it will not be enrolling such employees in reliance on this exception.

A number of changes to the KiwiSaver legislation came into force on 1 April 2008. Most significant for employers is the requirement, from 1 April 2008, for an employer to make compulsory employer contributions to employees' KiwiSaver schemes (or to a complying superannuation fund to which the employer contributes). Compulsory employer contributions are an additional 1 per cent of an employee's gross salary or wages for the year starting 1 April 2008, rising by 1 per cent each year, to a total of 4 per cent of an employee's gross salary or wages on and from 1 April 2011.

iii Continuity of employment affected by restructuring for 'vulnerable employees'

In 2007, legislation was enacted to provide continuity of employment to a specified category of 'vulnerable employees' in the event of a transaction structured by way of an asset sale that affects the continuation of their employment. In that event, vulnerable employees can elect to transfer to a new employer on their existing terms and conditions of employment. 'Vulnerable employees' include those employed in cleaning or food catering services or orderly or laundry services roles in the health or age-related residential care sectors; and those employed in cleaning services or food catering services for all other places of work.

VIII TAX LAW

In the 2007/2008 period, the government introduced a number of tax and regulatory measures, some of which were aimed at attracting more foreign investment into New Zealand.

i Reduction of the corporate tax rate

The New Zealand corporate tax rate was reduced from 33 per cent to 30 per cent from the beginning of the 2008/2009 income year (31 March for standard balance date taxpayers). The new 30 per cent rate also applies to certain widely held savings vehicles and unit trusts (treated as companies for New Zealand tax purposes).

A key reason for the reduction of the rate was to make New Zealand more attractive for foreign investment, especially when, in comparison, Australia has a corporate tax rate of 30 per cent.

ii Stapled securities

In February 2008, the government announced that amendments would be made to the Income Tax Act 2007 that would change the tax treatment of debt securities that are 'stapled' to a share. Generally, a debt security and a share will be 'stapled' when they cannot be transferred separately. Under the law as amended, a debt security that is stapled to a share will be treated as equity for New Zealand tax purposes. As a result, deductions for interest payments on the debt security will no longer be available.

When enacted, the proposed changes are to apply from 25 February 2008 (the date of the announcement). Companies that issued stapled securities before this date will continue to be able to deduct interest paid on the debt portion of the security.

iii Limited partnerships

New Zealand has recently enacted new limited partnership legislation to encourage growth in New Zealand's venture capital and private equity industries. Limited partnerships will be treated as a hybrid of a partnership and a company with separate legal status for general law purposes. However, for tax, flow-through treatment will apply based on each partner's partnership share.

iv Research and development encouraged

A new research and development tax credit of 15 per cent of the amount of qualifying research and development expenditure is now available to New Zealand businesses that carry out research and development in New Zealand. The credit is refundable in cash so it also benefits companies in a loss position.

v Proposed changes to the taxation of foreign profits from controlled foreign companies

New Zealand's international tax rules are to be amended to exempt the active income of New Zealand-controlled companies situated offshore. It is proposed that income derived by New Zealand-resident individuals through an active CFC ('controlled foreign company') will be exempt while passive income of a CFC, such as interest and dividends, will continue to be taxable to New Zealand owners on an attributed basis. Generally, CFCs with less than 5 per cent passive income will still be able to meet the 'active business' test.

Legislation enacting these changes is not expected to become effective until the beginning of the 2009/2010 income year.

IX COMPETITION LAW

i Treatment of mergers by New Zealand Commerce Commission

New Zealand has a voluntary merger clearance regime whereby parties contemplating a merger can seek clearance from the Commerce Commission for the merger. The Commerce Commission will grant a clearance if it is satisfied the merger will not, or will not be likely to, substantially lessen competition in any market.

The time taken to investigate and determine clearance applications has steadily increased over the last three to four years from around four weeks to nine weeks – with more complex applications taking even longer. There has been a concern about the lengthening time frame. The Commerce Commission has responded by instituting a best practice review of its merger processes that it hopes will assist it to streamline its processes, enabling it to deliver faster outcomes, particularly for straightforward merger clearances.

The Commerce Commission is also undertaking a review of its merger guidelines, with a discussion paper due for publication later in 2008.

More generally, the government is undertaking a review of the merger clearance and authorisation regime. This has involved input from stakeholders over the last 18 months and a discussion paper is due to be published in 2008. It is not expected that fundamental changes to the merger clearance regime will result from this review.

ii Cases of interest

A recent Court of Appeal decision in relation to New Zealand Bus Limited's acquisition of the remaining shares in Mana Coach Services Limited examined the potential liability of a vendor in respect of a transaction that the Court determined would have the effect of substantially lessening competition in a market. The judgment represents the Court of Appeal's first decision on that issue. The Court of Appeal overturned the High Court's

decision imposing ancillary liability on the vendor for aiding, abetting or conspiring with the purchaser, or being knowingly concerned in, or party to, the contravention of the Commerce Act. The two judgments that dealt with this issue did so on different terms although both appear to narrow the scope for vendor liability.

The other notable case during the period related to the Commerce Commission's concurrent decisions declining clearance for each of Woolworths Australia and Foodstuffs (New Zealand's two major supermarket chains) to acquire NZX-listed The Warehouse Group Limited (a large general merchandise retailer).

The Commerce Commission declined to grant clearance for either company to acquire The Warehouse Group Limited. Both parties appealed successfully to the High Court, which overturned the Commerce Commission's decision. The Commerce Commission appealed the High Court's decision to the Court of Appeal, which ruled in favour of the Commerce Commission in August 2008. Woolworths Australia has announced an intention to seek leave to appeal that decision to the New Zealand Supreme Court.

X FUTURE DEVELOPMENTS AND OUTLOOK

While there are few signs that the current downturn in M&A activity is set to change in the near term for large transactions, the increased level of activity in the third quarter of 2008 and recent media statements indicate that New Zealand and foreign companies are continuing to look for acquisition opportunities in New Zealand.

The current year is expected to remain busy in the mid-market sector as some businesses in that sector look to restructure, grow and expand. This sector of the market is also expected to show growth in the medium term as an increasing number of business owners reach retirement age and decide to sell their businesses.

Private equity houses are expected to continue to be active where quality assets are offered for sale and vendor price expectations have adjusted, but it is unlikely that in the short term New Zealand's M&A market will see a return to the same level of private equity activity that characterised the first half of 2007. This is likely to present more opportunities for trade buyers.

The current slowing of the New Zealand economy coupled with the increase in cost of funds is likely to lead to some M&A activity driven by financial restructurings and sales of underperforming or non-core assets. This is starting to be seen in the third quarter of 2008.

It is expected that there will be further integration of the New Zealand and Australia economies, and Trans-Tasman transactions will continue to be an important part of the New Zealand M&A market.