DOING BUSINESS IN NEW ZEALAND

JULY 2017
FOREWORD

About this guide

This guide is designed to provide those interested in exploring business opportunities in New Zealand with a concise overview of New Zealand law as it relates to business and investment. Beginning with an introduction to New Zealand’s government and legal systems, the guide includes an introduction to New Zealand’s overseas investment regime, company law, securities and takeover laws, tax regime, property and employment law, to name a few topics.

Each section of this guide has been prepared by Bell Gully practitioners experienced in the area or areas of law covered by it. However, this publication is only a guide and should not be relied upon as a substitute for obtaining comprehensive, fact-specific legal advice.

The guide sets out the law as at 1 July 2017 unless otherwise indicated.

We hope you find this guide informative. If you would like more detailed information or advice on doing business in New Zealand, please contact us.

About Bell Gully

Bell Gully is one of New Zealand’s leading law firms. Our team of over 200 lawyers (including 44 partners) combines market-leading banking and finance, corporate, commercial, dispute resolution, property and tax capability along with a wide array of specialist skills.

Our range of expertise and experience is extensive. We work with many of New Zealand’s leading companies and major public sector agencies on diverse projects ranging from the most complex and ambitious, to day-to-day operational issues.

Our clients are market leaders and household brands, including Air New Zealand; ANZ Bank; Asahi Group; Danone Asia; Fisher & Paykel Finance; Fletcher Building; Frucor Beverages; Goodman Fielder; Meridian Energy; Origin Energy; PricewaterhouseCoopers; Goldman Sachs; JP Morgan; Rank Group and Vodafone.

We provide a fully integrated service for international investors in New Zealand, and can advise at every stage of a proposed investment. Our experts can assist in obtaining consent under the Overseas Investment Act, investment structures, equity and debt financing, employment, tax, resource management issues and immigration requirements. We also advise international clients on core commercial contracts such as supply, service, manufacturing, franchise, reseller and distribution agreements.

You can read more about Bell Gully online at www.bellgully.com.

DISCLAIMER

This guide has been prepared for clients and professional associates of Bell Gully. Whilst every effort has been made to ensure accuracy, the information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases. If advice concerning individual problems or other expert assistance is required, the services of a competent professional adviser should be sought.

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1 A BRIEF INTRODUCTION TO NEW ZEALAND

Overview

Since 1984, the New Zealand economy and regulatory framework have undergone radical changes. The New Zealand economy was once highly regulated, centrally controlled and sheltered from international market forces by import controls, tariffs and subsidies. Today, New Zealand has a deregulated, decentralised economy directly exposed to international competition.

Over the past three decades, successive New Zealand Governments have reformed New Zealand’s trade rules by removing many barriers to imports, ending most subsidies, and ensuring that the rules relating to overseas investment are designed to encourage productive overseas investment in New Zealand.

New Zealand is consistently ranked by the World Bank and others as one of the most business-friendly countries in the world.

The government and legal system

New Zealand’s political system

New Zealand is an independent sovereign state and a member of the British Commonwealth of Nations. Parliament is triennially democratically elected. New Zealand does not have a written constitution.

New Zealand is not a federal state. All legislation is passed by a single chamber, the House of Representatives, which is the highest law making body in the country. In 1993, New Zealanders voted to change their electoral system from “First Past the Post” to a “Mixed Member Proportional” representation system.

New Zealand’s legal system

New Zealand is a common law jurisdiction. The law is developed from case law (the decisions of the courts) and from statutes enacted by the New Zealand Parliament. Case law may be superseded by statute.

Investing in New Zealand

Investment incentives

As part of its economic philosophy, the New Zealand Government believes that overseas investors will be attracted to New Zealand because of sound, consistent economic policies, good rates of economic growth and a stable political system.

New Zealand does not provide incentives for people to invest in approved activities or in specific geographic areas. There are no internal free trade zones for the encouragement of overseas investment.

Overseas investment controls

Like most other countries, New Zealand has overseas investment controls that require overseas persons to obtain approval before they can invest in the country in certain types of assets. The principal controls on overseas investment are governed by the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005.

General controls

An overseas investor is required to comply with the general law of New Zealand in the same way as a New Zealand investor. For example, the Companies Act 1993 (regulating companies), the Partnership Act 1908 and the Limited Partnerships Act 2008 (regulating partnerships), the Commerce Act 1986 (regulating competition or antitrust law) and the Reserve Bank of New Zealand Act 1989 (regulating banking) affect overseas and New Zealand investors in the same way.

Foreign exchange regulations

New Zealand has revoked all foreign exchange controls. Accordingly, there are no such restrictions on the transfer of capital, profits, dividends, royalties or interest into, or from, New Zealand.
2 HOW TO START A BUSINESS IN NEW ZEALAND

Undertaking a business in New Zealand

Businesses in New Zealand may be conducted through any of the following structures:

- companies,
- partnerships and limited partnerships,
- joint ventures,
- trusts, and
- sole proprietorships.

An overseas company establishing a business presence in New Zealand usually:

- incorporates or acquires a local company (creating a local subsidiary); or
- registers as an overseas company and carries on business in New Zealand through a branch office; or
- establishes a joint venture or partnership (including a limited partnership).

The choice of an appropriate structure will depend upon the facts, including the nature of the business or investment and the resulting tax consequences in New Zealand or otherwise. Specific advice as to the appropriate structure should be sought on a case-by-case basis.

Introduction to New Zealand company law

The Companies Act provides for the incorporation of a limited or unlimited liability company and regulates the management, operation and liquidation of companies incorporated in New Zealand. The Companies Act does not distinguish between public and private companies. The most common type of company is a company limited by shares. This guide discusses only this type of company.

Unless the constitution of a company specifies otherwise, the liability of each shareholder of a limited company is limited to the amount of share capital that the shareholder has agreed to contribute to the company. When a shareholder has paid all of the money payable on its shares, that shareholder has no additional liability to contribute to the capital of the company.

Under the Companies Act, there is no limitation on the number of shareholders a company may have, or on its ability to raise money from the public (although this process is regulated under the Financial Markets Conduct Act 2013 (the FMC Act) – see section 6). Commercially, companies can be classified as listed (i.e., their shares are quoted on a licensed market such as the NZX Main Board or the NXT Market – see section 6) or unlisted (i.e., their shares are not quoted).

Incorporating a company in New Zealand

Incorporating a company in New Zealand is a relatively simple process. Application is made to the Registrar of Companies (the Registrar) online, as detailed below. When the Registrar is satisfied that the prescribed documents are in order and the formalities prescribed have been complied with, the Registrar will incorporate the company. On registration, the Registrar gives a certificate that the company is incorporated and, in the case of a company limited by shares, that the liability of the company is limited.

**Step 1: Reservation of company name**

- An application for reservation of a company name is made to the Registrar online.
- The Registrar must refuse to reserve names that the Registrar considers would contravene another New Zealand statute, are identical or almost identical to the name of another company, or are offensive.
- Once granted, a name reservation remains in force for 20 working days from the date of the reservation. A name reservation is provisional and does not give any proprietary right to the reserved name. The Registrar can revoke a reservation at any time.
### Step 2: Application for registration

The application lodged online and must include:

- the name of the proposed company and the name reservation number;
- the full name and address of each applicant;
- the full name and residential address of each director and each shareholder;
- the number of shares to be issued to each shareholder;
- the company’s registered office, address for service, and an address for communication; and
- a constitution (optional).

### Step 3: Consents of shareholder(s) and director(s)

- Every company must have at least one shareholder and one director. Each director must be at least 18 years of age.
- Shareholders are required to consent to being a shareholder and to taking the shares specified in the consent. Directors are required to consent to act as a director and certify that they are not disqualified from being appointed to hold the office of director.
- The Companies Act requires all New Zealand-registered companies to have one New Zealand resident director, or, alternatively, one director who lives in Australia and is also a director of a company incorporated in Australia.
- The shareholder and director consent forms will be provided by the Companies Office once an application for incorporation has been completed.

### Step 4: Additional consent and identity verification documents requested by the Companies Office

- Where an application to incorporate a company or add directors meets certain criteria, the Companies Office will require additional evidence regarding the proposed directors and/or shareholders prior to registration.
- Additional evidence that may be requested includes:
  - proof of residency for every person named as a director of the proposed company (e.g., a certified copy of a utilities bill); and
  - proof of identity (e.g., a certified copy of the director’s passport).

A company may commence trading from the date of incorporation.

### Constitution

A company is not required to have a constitution. If a company doesn’t have a constitution, the rights, powers, duties and obligations of the company, the board, each director and each shareholder will be governed by the Companies Act. A company will need to have a constitution if there are provisions in the Companies Act that shareholders wish to negate, add to, or alter in accordance with the Companies Act. However, a constitution must not contravene, or be inconsistent with, the provisions of the Companies Act.

### New Zealand company administration requirements

#### Financial reporting obligations

Generally, companies incorporated in New Zealand that have overseas shareholders are required to prepare and register audited financial statements within five months after the company’s balance date if:

- 25% or more of the voting shares in the company are held by:
  - a subsidiary of a company incorporated outside New Zealand; or
  - a company incorporated outside New Zealand; or
  - a person not ordinarily resident in New Zealand; and
- the company is ‘large’ (within the meaning of that term under the Financial Reporting Act 2013).

A ‘large’ company with less than 25% overseas ownership must prepare financial statements, but is under no obligation to register those statements with the Registrar.

There are some exceptions to these requirements, including, for example, where group financial statements have been registered by the company’s parent company with the Registrar.

If a company is categorised as an “FMC reporting entity” under the FMC Act (for example, where it has issued shares under a regulated offer to retail investors) it must prepare and register its audited financial statements within four months after the company’s balance date with the Registrar.
Companies which are not ‘large’, but have 10 or more shareholders must also prepare financial statements unless the company opts out of compliance by meeting the requisite voting requirements.

If a company does not have to prepare financial statements under the Companies Act, it may still be required to prepare special purpose financial statements for tax purposes.

**Annual return**

Each year (except in the year of incorporation) companies must file an annual return that includes:

- the address of the registered office of the company,
- the address for service and the postal address of the company,
- a summary of share capital,
- particulars of directors,
- a list of shareholders, and
- the date of the last annual general meeting.

**Annual report**

In addition to an annual return, all ‘large’ companies must provide an annual report on the affairs of the company within five months of the balance date (or for an FMC reporting entity, within four months of the balance date). The company must send to all shareholders (not less than 20 working days before the date fixed for the company’s annual general meeting) a copy of the annual report or a notice advising shareholders that they have a right to receive a copy of the annual report, and stating how the shareholder can receive the annual report by electronic means. The annual report must include copies of the financial statements and any auditors report required and, subject to agreement by all shareholders to the contrary:

- the directors’ report,
- particulars of entries in the company’s interests register,
- the total amount of donations made by the company,
- the total remuneration and other benefits received by directors,
- the amount payable to the auditor,
- details of directors, and
- the numbers of employees receiving benefits over NZ$100,000 (in bands of NZ$10,000).

Companies can opt out of their annual report obligations if they do not have to prepare financial statements and their shareholders (who together hold at least 95% of the voting shares) agree that the annual report need not be prepared.

**Use of name**

Once a company has been incorporated, it must have its name stated in legible characters in all written communications and on every document issued or signed by the company that creates a legal obligation.

**Branch offices of overseas companies**

The Companies Act is also the main piece of legislation governing overseas companies operating in New Zealand.

**Registering a branch**

The Companies Act requires every overseas company that “carries on business in New Zealand” to register as an overseas company under the Companies Act.

An “overseas company” is a company that is incorporated outside New Zealand. Generally, the provisions of the Companies Act relating to companies incorporated in New Zealand do not apply to overseas companies (with the exception of some of the financial reporting requirements).

An overseas company may not commence business in New Zealand unless the name of the overseas company (as it is registered in its country of incorporation) has been reserved.

Within 10 working days of commencing business in New Zealand, the Companies Act requires an overseas company to deliver to the Registrar an application for registration in the prescribed form that is signed by or on behalf of the overseas company. The application must:

- state the name of the overseas company and the full names and residential addresses of its directors;
- state the address of the principal place of business in New Zealand of the overseas company and the name and address of at least one person resident or incorporated in
New Zealand authorised to accept service of documents on behalf of the overseas company;
- state the proposed annual return filing month and the company’s balance date;
- state the date which the company commenced carrying on business in New Zealand;
- attach the notice of name approval; and
- attach evidence that the company is incorporated outside New Zealand and a copy of the instrument constituting or defining the constitution of the company and, if these documents are not in English, a certified translation.

Overseas companies that are incorporated in Australia do not need to file their constitution (or articles of association), evidence of incorporation or director details with the Registrar due to information sharing facilities implemented by the New Zealand Companies Office and the Australian Securities and Investment Commission.

### Continuing statutory obligations for an overseas company carrying on business in New Zealand

The continuing statutory obligations of an overseas company carrying on business in New Zealand are set out below.

<table>
<thead>
<tr>
<th>Updating details</th>
<th>Changes in company details or changes to documents that have been filed with the Registrar must generally be notified to the Registrar within 20 working days. However, a change to the name of an overseas company must be notified within 10 working days of the change of name.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual return</td>
<td>Each year (except in the year of its registration), during the month specified by the Registrar, every overseas company carrying on business in New Zealand must lodge an annual return in the prescribed form with the Registrar. The annual return sets down the name and number of the overseas company together with the country in which it is incorporated.</td>
</tr>
<tr>
<td>Use of name</td>
<td>An overseas company must have its name and its country of incorporation on all written communications and on every document issued or signed that creates a legal obligation.</td>
</tr>
</tbody>
</table>

The financial statements of an overseas company must comply with generally accepted accounting practice as recognised in New Zealand, and must be audited by a ‘qualified auditor’. However, the Registrar has the power to exempt overseas companies from these requirements if it is satisfied that the financial reporting and audit requirements of the overseas company’s home jurisdiction are substantially the same as, or sufficiently equivalent to, those in New Zealand.

<table>
<thead>
<tr>
<th>Registration of financial statements</th>
<th>A ‘large’ overseas company must ensure that, within five months after the company’s balance date, copies of its financial statements or group financial statements, together with a copy of the auditor’s report on those financial statements (if any), are filed with the Registrar. New Zealand branch financial statements must also be registered if the New Zealand branch is ‘large’.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual filing fee</td>
<td>An annual filing fee is payable each time the overseas company delivers copies of its financial statements to the Registrar.</td>
</tr>
</tbody>
</table>

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1. As noted above for New Zealand companies, there are some exceptions to this requirement, including, for example, where group financial statements have been registered by the company’s parent company with the Registrar.

2. An overseas company or a New Zealand branch is ‘large’ if as at the balance date of each of the two preceding accounting periods: (a) total assets of the entity and its subsidiaries (if any) exceed NZ$20 million; or (b) total revenue of the entity and its subsidiaries (if any) exceeds NZ$10 million.
Partnerships

General
Two or more individuals or companies may carry on a business as a partnership. Under the Partnership Act a general partnership subsists between persons who carry on a business in common with a view to profit, without incorporating. The Partnership Act and the common law regulate partnerships.

A general partnership is not a separate legal entity and each partner is liable jointly and severally for the liabilities of the partnership. In addition, the acts of every partner in carrying on the business of the partnership will bind the partnership and the other partners.

It is usual to have a comprehensive partnership agreement to avoid certain provisions in the Partnership Act which would apply in the absence of a specific agreement to the contrary.

Limited Partnerships
The Limited Partnerships Act provides for the registration of limited partnerships in New Zealand. A limited partnership is a partnership with at least one general and one limited partner. General partners transact the business of the partnership and are liable for the liabilities of the limited partnership to the extent that they cannot be met by the limited partnership itself. Limited partners are passive investors and are liable only to the extent of their capital contribution of the partnership.

In essence, a limited partnership is a mix of a company and a partnership in that it is a body corporate (with separate legal personality from its owners) for legal purposes, but is fiscally transparent for tax purposes.

Each limited partnership must have a written partnership agreement.

Establishing a Joint Venture
The term "joint venture" is used in New Zealand to mean a commercial arrangement between two or more parties who combine together to invest capital or resources in a particular project.

Joint ventures are a common form of business association in New Zealand, and generally either take the form of an incorporated joint venture (as a separate legal entity) or an unincorporated joint venture (a purely contractual arrangement).

Incorporated joint venture (JVC)
- When a company is used to undertake a joint venture, the structure and operation of the joint venture may be dealt with in the joint venture company’s constitution and/or by way of a separate shareholders’ agreement.
- A JVC is the most commonly used legal form for joint ventures where an on-going business is to be conducted. In New Zealand, JVCs typically take the form of a company limited by shares.

As in the case of a partnership, the parties to an unincorporated joint venture enter into a written joint venture agreement. Whether any particular unincorporated joint venture is a partnership is a question of fact. Generally speaking, most unincorporated joint ventures, unless carefully structured, are partnerships.

There is no distinct body of law in New Zealand governing unincorporated joint ventures that are not partnerships. The assets of an unincorporated joint venture are owned by the joint venture parties as tenants in common in the proportions agreed between them. The joint venture agreement entered into for an unincorporated joint venture usually includes similar provisions to those in a partnership agreement.

An investment in a joint venture by an overseas person may be subject to the Overseas Investment Act 2005 and Overseas Investment Regulations 2005 (see section 3). Other statutes also may be relevant depending on the investment.

Further information
Please contact a member of Bell Gully’s Corporate and Commercial team if you need any specific advice in relation to the matters set out in this section or any other advice regarding starting a business in New Zealand.
3 OVERSEAS INVESTMENT REGIME

Introduction

The principal restrictions on an overseas person setting up or acquiring a New Zealand business are contained in the Overseas Investment Act 2005 (OI Act) and the Overseas Investment Regulations 2005 (OI Regulations). This legislation applies to all types of investment.

Broadly speaking, an “overseas person” is a person who is not a New Zealand citizen nor ordinarily resident in New Zealand, a company that is incorporated outside of New Zealand or a company, partnership or other body corporate that is 25% (or more) owned or controlled by an overseas person or persons. The OI Act and the OI Regulations prescribe the circumstances where an overseas person is required to obtain consent before investing in New Zealand. Consent is not always required.

Whether or not consent is required will depend on:

- the amount of money involved;
- the type of investment proposed; and
- the sector in which the investment is to be made.

There are important exemptions to the requirement to obtain consent.

The Overseas Investment Office (OIO) is responsible for approving applications by overseas persons to invest in New Zealand. The OI Act and the OI Regulations confer a broad discretion on the OIO to grant consent, with or without conditions, or to refuse consent to an application. The OIO operates under the Minister of Finance in all situations and for applications involving sensitive land and fisheries, the Minister of Land Information and the Minister of Fisheries respectively are also responsible.

Types of investments

The OI Act requires consent for a transaction if it involves an overseas investment in:

- “significant business assets”;
- “sensitive land” (including farm land); and
- fishing quota.

If consent is required, it must be obtained before a transaction is given effect. An agreement for the acquisition of shares can be entered into provided that it is conditional upon OIO consent being obtained. A takeover offer can be made to shareholders conditional upon OIO consent being obtained.

Overseas investment in significant business assets

If an overseas person plans to acquire securities in a New Zealand business; set up a New Zealand business; or purchase assets in New Zealand; or an overseas person has a 25% or more ownership or control interest in a New Zealand company and wishes to increase that ownership or control interest, then provided the transaction does not involve the acquisition of “sensitive land” or an interest in fishing quota, OIO consent will only be required if:

- the amount to be paid for the securities exceeds NZ$100 million;
- the total value of the shares on issue exceeds NZ$100 million; or
- the gross value of the target company’s assets exceeds NZ$100 million.

If the proposed investment is expected to exceed NZ$100 million (whether by one transaction or through a series of related transactions) then the investment will be considered an overseas investment in “significant business assets” and OIO consent will need to be obtained.
Australian investors

The OI Regulations provide an exception for Australian investors for “significant business assets” transactions (but not sensitive land or fishing quota transactions).

An Australian non-Government investor is defined as a person or entity that is:

- an Australian individual; or
- an Australian entity that either carries on substantive business operations in Australia or is more than 75% owned or controlled by Australian or New Zealand individuals.

An Australian Government investor is either:

- the Australian Government; or
- an entity or a branch located in Australia and which is 25% or more owned or controlled by the Australian Government.

Threshold for Australian investors

- NZ$501 million for Australian non-government investors; and
- NZ$105 million for Australian government investors.

Overseas investment in “sensitive land”

Consent will be required for an overseas person to purchase or acquire an interest (for greater than three years) in land which is “sensitive”, either directly or through the purchase of securities in a company that owns land (with the overseas person owning or controlling more than 25% of the company) which, together with any associated land meets any of the thresholds set out in the table below.

“Sensitive land”

When the land (or any associated land):

- exceeds five hectares and is non-urban land (being farm land or any land other than land in an urban area that is used for commercial, industrial or residential purposes); and
- the foreshore and/or seabed or certain named islands;
- exceeds 4,000 m² and:
  - is part of the bed of a lake;
  - is part of certain named islands;
  - is held for conservation purposes, is provided as a reserve, a public park, for recreation purposes or as a private open space;
  - is subject to a heritage order or a requirement for a heritage order under the Resource Management Act 1991 or by Heritage New Zealand Pouhere Taonga under the Heritage New Zealand Pouhere Tanonga Act 2014; or
  - is subject to a heritage order or a requirement for a heritage order, is an historic place, historic area, wahi tapu (sacred to Maori) site or for which there is an application or proposal for registration under the Heritage New Zealand Pouhere Tanonga Act 2014;
- exceeds 2,000 m² and adjoins the foreshore; or
- exceeds 4,000 m² and adjoins certain land, such as a lake bed.

A consent may be granted subject to conditions.

Overseas investment in commercial fishing

In addition to the OI Act and the OI Regulations, overseas investment in commercial fishing in New Zealand is controlled by the Fisheries Act 1996 and certain sections of the Fisheries Act 1983 (together, the Fisheries Act).

The Fisheries Act regulates commercial fishing of most species of fish within the territorial waters of New Zealand. Generally speaking, all important commercial species of fish are regulated by the Fisheries Act.

New Zealand operates a quota management system to achieve sustainable management of its fisheries resources.

Fishing quotas are issued under the Fisheries Act. A fishing quota entitles the holder to fish commercially for the species and quantity of fish set down in the annual catch entitlement derived from the fishing quota. No commercial fishing for a species controlled by the Fisheries Act can be undertaken within the territorial waters of New Zealand by persons who do not own fishing quota, without obtaining approval.
The OI Act, the OI Regulations and the Fisheries Act prohibit an overseas person from having an interest in fishing quota or rights or interests in a business (where the overseas person owns 25% or more securities) that owns or controls (directly or indirectly) an interest in a fishing quota.

The OIO also has responsibility for administering the overseas person provisions of the Fisheries Act. In determining whether to grant permission to an overseas person to acquire an interest in any fishing quota, the OIO will have regard to similar considerations as those outlined below for determining matters under the OI Act and the OI Regulations.

Factors considered by the OIO

Criteria for overseas investment in significant business assets
When considering a non-land application, the OIO will grant consent if it is satisfied that the overseas person meets, or if that person is not an individual, all the individuals with control of the relevant overseas person collectively meet, the relevant thresholds set out below.

OIO will grant approval if it is satisfied that all of the individuals with control of the overseas person:
- have the necessary business experience and acumen;
- have demonstrated financial commitment to the investment;
- are of good character; and
- are not individuals of the kind listed in sections 15 and 16 of the Immigration Act 2009, for example, being a person who has been convicted of an offence for which that person has been sentenced to imprisonment for a term of five years or more.

Criteria for investment in “sensitive land”
When considering an application for an overseas investment in “sensitive land”, in addition to the criteria used for overseas investment in “significant business assets”, the OIO must be satisfied that, either:
- the overseas person is, or if that person is not an individual, all the individuals with control over the overseas person are, New Zealand citizen(s), ordinarily resident in New Zealand or intending to reside in New Zealand indefinitely; or
- the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) and, if the relevant land includes non-urban land that either alone or together with any associated land exceeds five hectares, that the benefit will be, or is likely to be, “substantial and identifiable”.

Factors for assessing whether a transaction will benefit New Zealand
In assessing whether a transaction will result in a benefit to New Zealand, consideration must be had to:
- whether the overseas investment will, or is likely to, result in the following within, and to the benefit of, New Zealand:
  - the creation of new, or the retention of existing, jobs; or
  - the introduction of technology or business skills; or
  - increased export receipts; or
  - added market competition, greater efficiency or productivity, or enhanced domestic services; or
  - the introduction of additional investment for development purposes; or
  - increased processing of New Zealand’s primary products;
- whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, trout, salmon, and wildlife and game, and for providing, protecting, or improving walking access to those habitats by the public;
- whether there are or will be adequate mechanisms in place for enhancing historic heritage within the relevant land (for example, by compliance with existing covenants, conditions for conservation (including maintenance and restoration) and access, agreement to support registration of any historic place or area, wahi tapu or wahi tapu area, or agreement to execute a heritage covenant);
- whether there are or will be adequate mechanisms in place for providing, protecting or improving walking access over the relevant land or a relevant part of that land by the public; and
- if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether it has been offered to the Crown in accordance with the OI Regulations.
Applicants must apply a “counterfactual test” when addressing the benefit criteria set out above. This test requires a comparison of what is likely to happen with the overseas investment, and what is likely to happen without the overseas investment. When preparing an application, applicants must include submissions on what they consider is the likely state of affairs if the overseas investment is not made (for example, continuation of status quo or acquisition by another investor) and assess what would happen “with and without” the overseas investment. It is only the additional benefits from the overseas investment that are relevant when applying the benefit criteria.

The relevant Ministers or the OIO determine the importance to be given to each factor. Depending on the nature of the investment, certain factors will normally be important while others will normally be less important.

**Criteria for “special land”**

Where the relevant land that is the subject of the overseas investment is or includes foreshore, seabed, river bed or a lake bed, it is deemed to be “special land” under the OI Act (being a subset of “sensitive land”). The special land must first be offered by the current owner back to the Crown in accordance with the procedures set out in the OI Act and the OI Regulations. If the Crown accepts the offer, it can only acquire the part of the “sensitive land” that constitutes “special land”. The Crown will only acquire “special land” if it considers Crown ownership of the “special land” to be in the public interest. In determining whether it is in the public interest, the Crown will consider any recognised attitude of New Zealanders (or a group of New Zealanders) towards the “special land”.

**Criteria for farm land**

The OI Act defines “farm land” as land exclusively or principally used for the purpose of agriculture, horticulture, or pasture; or the keeping of bees, poultry or livestock. The OIO cannot approve the purchase of farm land by an overseas person unless the farm land has first been offered on the open market in New Zealand in accordance with the procedures set out in the OI Regulations. The OIO has confirmed that forest plantations are not farm land and therefore they do not need to be advertised. Exemptions from the farm land advertising criterion are available in limited circumstances.

**Criteria for overseas investment in fishing quota**

In addition to the criteria used for overseas investment in “significant business assets”, the following criteria must be considered for overseas investment in fishing quota:

- whether the interest in the fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register; and
- whether the granting of consent is in the “national interest”.

**National interest**

In assessing whether or not an overseas investment in fishing quota is in the national interest, consideration must be given to all the factors listed under the heading “Criteria for investment in sensitive land” in this section, and also the following factors:

- whether the overseas investment will, or is likely to, result in increased processing of New Zealand fish, aquatic life or seaweed; and
- any other factors set out in the OI Regulations or that the Minister of Finance and the Minister of Fisheries think fit, having regard to the circumstances and nature of the application.

**Investment plan**

The OIO requires an investment plan for investments in “sensitive land” that addresses the “benefits to New Zealand” factors listed under the heading “Criteria for investment in sensitive land” in this section. At a minimum, this includes:

- reports identifying whether each of the specified factors are likely to be addressed, including (if applicable) detail on and conservation plans for indigenous vegetation/fauna, wildlife, historic heritage and walking access; and
- a report that identifies the nature of any current business undertaken on the land (including current productivity and gross annual income, operating expenses and net surplus) and provides counterfactual analysis, including submissions on the likely state of affairs if the overseas investment is not made.
Procedural matters

Preparation of application

If a transaction requires consent under the OI Act, an application for consent prepared in accordance with the requirements set out in the OI Act must be submitted to the OIO.

All applications to the OIO must be:

• made using the relevant OIO application template;
• signed by every applicant; and
• accompanied by the prescribed fee.

Applicants are required to use the OIO’s application templates to ensure all the relevant information is provided, and to help the OIO process the application faster. The templates can be found on the OIO website.

Submission of application

The OIO undertakes to do an initial assessment of each application within five working days of an application being received. The initial assessment is simply to ensure the application contains sufficient information for the application to be considered by the OIO and the prescribed fee has been paid. If the application is accepted, the OIO will register it and start assessing the application.

Additional information

In considering an application, the OIO may request further information. Any information provided will form part of an OIO application. There is no additional fee required to be paid to the OIO when additional information is provided.

Decision

An application is decided by:

• in the case of a “sensitive land” decision, the Minister of Finance and the Minister for Land Information (although some decisions are delegated); and
• in the case of a “significant business assets” decision, by the OIO (under delegation from the Minister of Finance).

The OIO may consult with any third party (for example, Heritage New Zealand or the Department of Conservation) and may also receive submissions from third parties. Such consultation or submissions will extend the time taken by the OIO to consider an application.

An early decision is more likely where all relevant information is made known to the OIO at the time of application. What is relevant varies with the investment being undertaken. However, sufficient information should be given to enable the OIO to evaluate the proposal.

The OIO communicates its decisions to overseas applicants in a ‘Notice of Decision’. The notice:

• sets out whether consent is granted and, if so, lists the conditions imposed on that consent; and
• asks the applicant to review, and approve the public release of, a decision sheet prepared by the OIO which summarises the OIO’s decision.

Timeframe

There is no statutory timeframe within which a decision in relation to an application for OIO consent must be made. The OIO has previously provided guidelines for how long a consent is expected to take, but has recently removed these. Instead, it will inform an applicant at the beginning of a process how long it expects to take.

Current averages are around two to four months for significant business assets applications and three to six months for sensitive land applications (although timeframes are highly variable and are affected to a high degree by the speed with which applicants provide requested information).

The OIO does not give priority to a particular application, except in very exceptional circumstances (for example, to accommodate other statutory timeframes, such as those under the Takeovers Code). Any request for priority must include a detailed explanation for the urgency.

Application fees

The fee is NZ$32,000.00 for applications relating to overseas investments in “significant business assets” only (which can be determined by the OIO).
The fee for applications relating to overseas investments in “sensitive land” only ranges from NZ$22,500.00 to NZ$49,000.00 depending on the nature of the sensitive land and the value of the consideration.

The fee for applications relating to overseas investments in “sensitive land” and “significant business assets” (i.e., where consent is sought simultaneously) where the application can be determined by:

- the Ministers, rather than the OIO, is NZ$54,000.00; or
- the OIO, rather than the Ministers, is NZ$52,000.00.

Further information

Please contact a member of Bell Gully’s Corporate and Commercial or Property teams if you require any specific advice in relation to the matters set out in this section or any other overseas investment law advice.
4 PROPERTY

Commercial properties

Generally, overseas persons are free to purchase a commercial building in New Zealand without any need for consent from a regulatory body. However, if:

- the value of, or consideration to be paid for, the commercial building (either alone or together with other assets to be acquired) exceeds NZ$100 million (or NZ$501 million in the case of Australian non-government purchasers); or
- the commercial building is situated on, or adjoins, “sensitive land” (as discussed in section 3),

OIO consent is required under the OI Act and the OI Regulations (as discussed in section 3).

Overseas persons are free to lease or rent commercial buildings in New Zealand unless:

- the commercial building is situated on, or adjoins, “sensitive land”; and
- the lease is for a term of three years or more (including rights of renewal),

in which case OIO consent will be required.

Residential properties

An overseas person is free to purchase a residence or holiday house in New Zealand without any prior regulatory consent, provided the property does not fall within the definition of “sensitive land” (as discussed in section 3, particularly in relation to coastal land over 2,000 m² or land on certain islands).

Sale and purchase of land

Under New Zealand law, agreements for the sale and purchase of land must be in writing and signed by the parties or their representatives. An agreement for the sale and purchase of land may be unconditional or subject to conditions for the benefit of either party.

Changes in land ownership are registered on an electronic property registration system (Land Information New Zealand, or LINZ). This is a centralised system which can be searched by the public. Tax information is also collected at the time of registration of the property transfer, and in certain limited circumstances an overseas person who is selling land within two years of purchasing it may be required to pay residential land withholding tax at the time of the sale.

Leasing of land

Leases of land must be in writing and signed by the parties or their representatives. Leases are not typically registered at LINZ.

Resource Management Act 1991

Environmental law in New Zealand is regulated primarily by the Resource Management Act 1991 (the RMA). Under the RMA, all uses of land, air and water are regulated by local and regional government.

A consent process has been established for approval of any development proposal. Applications for resource consents must be made to local authorities in accordance with the RMA. Following the consent process, the relevant local authority may grant consent (with or without conditions). Applicants, or any person who makes a submission in relation to an application (if an application is publicly notified), have a right of appeal to the Environment Court.

Building Act 2004

The Building Act 2004 (the Building Act), in conjunction with the Building Code, regulates the building of houses and other buildings. It requires that building consent be obtained from local authorities in relation to proposed construction of new buildings and alterations of existing buildings.
The Building Act includes provisions designed to improve the likelihood of existing buildings withstanding earthquakes. Under the Building Act, a building is generally considered to be "earthquake prone" if it has less than one third of the seismic strength required for a new building constructed under current standards. The local authority can require the owner of an earthquake prone building to carry out seismic upgrade works to the building so that it is no longer earthquake prone. The cost of such work is typically to the land owner’s account.

**Treaty of Waitangi Act 1975**

Under the Treaty of Waitangi Act 1975, the Waitangi Tribunal hears land claims relating to historical breaches by the Crown of the Treaty of Waitangi. Generally, Maori land claims only relate to land owned by the Crown or Crown entities.

**Personal Property Securities Act 1999**

The Personal Property Securities Act 1999 (the PPS Act) set up a regime whereby priority is determined not by whom holds title to personal property, but by the timing of creation and “perfection” of “security interests”. Under the PPS Act, “personal property” is broadly defined and most assets owned or used by a business can become subject to a security interest (excluding interests in land).

The general scheme of the PPS Act is that a person looking to acquire personal property is able to search on the Personal Property Securities Register (PPSR) under the name of the vendors to check whether or not the property being sold is encumbered by a security interest. The PPSR is maintained and searchable online at www.ppsr.govt.nz.

Under the PPS Act, a security interest in personal property is “perfected” when the party holding the security interest registers a “financing statement” on the PPSR against the debtor.

**Further information**

Please contact a member of Bell Gully’s Property team if you require any specific advice in relation to the matters set out in this section or any other property law advice.
5 BANKING AND FINANCIAL SERVICES

Reserve Bank of New Zealand

The Reserve Bank is New Zealand’s central bank. Operating autonomously from the New Zealand government, it is primarily a policy organisation with three main roles:

- formulating and implementing monetary policy to maintain price stability;
- promoting the maintenance of a sound and efficient financial system; and
- meeting the public’s currency needs.

There are two key elements to the Reserve Bank’s purpose:

- undertaking bank registration and supervision; and
- maintaining a capacity to respond to financial distress or bank failure, where a bank’s financial condition poses a serious threat to the financial system.

Registered banks

The Reserve Bank Act requires banks operating in New Zealand to be registered. There are currently 24 banks registered in New Zealand, most of which are owned by overseas entities.

No person or entity may use a name or title that includes the words “bank”, “banker” or “banking” without registration or authorisation from the Reserve Bank. Registered banks are subject to prudential supervision by the Reserve Bank.

For registration as a registered bank in New Zealand:

- the entity’s business must substantially consist of the borrowing or lending of money, or the provision of other financial services; and
- the entity must demonstrate an ability to carry on their business in a prudent manner, and must have appropriate standing and repute in the financial markets.

Applicants for registration who are incorporated overseas are required to have the approval of their home supervisor to conduct banking business in New Zealand, and must meet the prudential requirements imposed on them by their home supervisor.

The Reserve Bank will consider the following criteria when reviewing an application for registration as a registered bank:

- the applicant and its owner’s standing in the financial market;
- the applicant’s incorporation and ownership structure;
- the size and nature of the applicant’s business or proposed business, or any part of it;
- the applicant’s ability to carry on its business or proposed business in a prudent manner;
- the suitability of the directors and senior managers for their positions with the applicant;
- the legal requirements of the applicant or its owner’s country of domicile;
- the nature and extent of financial and other information disclosed to the public by the applicant, if it is an overseas person or a subsidiary of an overseas person; and
- any other matters that may be relevant.

Non-bank deposit takers

“Non-bank deposit takers” (NBDTs) are entities that offer debt securities to the New Zealand public and are in the business of borrowing and lending money, or providing financial services, or both. This includes finance companies, credit unions and building societies (but excludes registered banks).

The NBDT Act requires NBDTs to be licensed by the Reserve Bank, and subjects them to a range of prudential obligations.

- The Reserve Bank formulates, administers and enforces prudential requirements, generally monitors the NBDT sector, looks to detect imminent failures and has the power to intervene if required.
- The FMA formulates, administers and enforces NBDTs’ disclosure requirements.
- Trustees have primary responsibility for supervising NBDTs pursuant to their trust deed.
Regulations require that (among other things):

- NBDTs must have a NZ Dollar long-term issuer rating given by an approved rating agency;
- NBDTs’ trust deeds must include a requirement to maintain a minimum capital ratio;
- NBDTs’ trust deeds must include a maximum limit (equal to or less than 15% of tier one capital) on aggregate credit exposures to related parties; and
- NBDTs trust deeds must include quantitative liquidity requirements that are appropriate to the NBDT’s business, and that take into account the liquidity of the NBDT and its borrowing group.

Financial advisers

The Financial Advisers Act contains a regime for the regulation of “financial advisers”.

“Financial adviser services” include giving financial advice, providing investment planning services, and providing discretionary investment management services.

“Broking services” include the receipt, holding, payment, or transfer of client money or client property by a person acting as an intermediary for a client.

The Financial Advisers Act regulates “financial advisers” by:

- requiring providers of financial adviser services or broking services to be registered, and to comply with conduct obligations;
- requiring providers of financial adviser services to be authorised by the FMA, and to comply with a Code of Professional Conduct; and
- imposing disclosure and additional conduct obligations on financial advisers and brokers who provide services to retail clients.

The rules apply to a financial adviser service or broking service received by a client in New Zealand, regardless of the location or domicile of the person providing the service. Some rules also apply to services received by clients outside New Zealand if they are provided by a person who is “ordinarily resident” in New Zealand, or is incorporated, or has a place of business in New Zealand.

Financial service providers

Financial service providers must:

- maintain registration on a central online register; and
- join an approved industry-based dispute resolution scheme, or a government-established reserve scheme, if the financial service is provided to a “retail client”.

The Financial Service Providers Act applies to financial service providers who are:

- “ordinarily resident in New Zealand” or who have a place of business in New Zealand; or
- who are, or are required to be, a “licensed provider” under a licensing enactment.

“Financial service” includes any of the following:

- a financial adviser service;
- a broking service (including a custodial service);
- acting as a deposit taker;
- being a registered bank;
- keeping, investing, administering, or managing money, securities, or investment portfolios on behalf of other persons;
- providing credit under a credit contract;
- operating a money or value transfer service;
- issuing and managing means of payment;
- giving financial guarantees;
- being an issuer or offeror of financial products;
- acting as an issuer, supervisor or investment manager in respect of regulated products or financial products;
- acting as a custodian in respect of a registered scheme or a discretionary investment management service provided by a DIMS licensee;
- operating a financial product market;
- changing foreign currency;
- trading financial products or foreign exchange on behalf of other persons;
Insurers

The Insurance (Prudential Supervision) Act contains a regime for the licensing and prudential supervision of insurers by the Reserve Bank. The Reserve Bank supervises licensed insurers on an on-going basis, and is empowered to investigate insurers and to take action to manage insurers in distress.

Every person who carries on insurance business in New Zealand must hold a licence granted by the Reserve Bank. The criteria for obtaining a licence include requirements relating to:

- financial strength rating;
- the ability of the insurer to carry on its business in a prudent manner;
- solvency;
- statutory funds (for life insurers);
- fitness and properness;
- risk management;
- incorporation, ownership, governance and financial strength; and
- certain other miscellaneous matters, including requirements specific to overseas insurers.

The words “insurance”, “assurance”, “underwriter”, “reinsurance” or similar are not permitted to be included in an entity’s name, unless they are carrying on insurance business in New Zealand (and complying with the applicable laws).

Additional licensing and other requirements

Discretionary investment management services, fund managers, derivatives issuers, supervisor trustees, crowd-funding providers, peer-to-peer lenders, financial product market operators and auditors are also subject to various licensing and other requirements, depending on the circumstances.

Anti-money laundering and countering financing of terrorism

Entities operating in or in connection with New Zealand are also subject to New Zealand’s anti-money laundering and countering of financing of terrorism laws.

Further information

Please contact a member of Bell Gully’s Banking team if you require any specific advice in relation to the matters set out in this section or any other banking and financial services law advice.
6 SECURITIES AND TAKEOVER LAWS

Offers of financial products

The FMC Act and the Financial Markets Conduct Regulations 2014 (the FMC Regulations) regulate all offers of financial products in New Zealand, whether or not the financial products are issued by a New Zealand issuer or an overseas issuer.

The term “financial products” is very broad and covers debt, equity, managed investment products and derivatives.

Offer document requirements for regulated offers

Generally, issuers of financial products are required to provide prospective investors with a product disclosure statement (PDS) to allow them to make an informed decision about the investment, unless a relevant exclusion applies to the offer.

The content, format and length of a PDS for a regulated offer are prescribed by the FMC Act and the FMC Regulations, and are tailored to the particular type of financial products being offered. Material information relating to the offer that is not required to be in the PDS must be lodged on an online offer register (the Disclose Register) together with the PDS.

Other offer requirements

The FMC Act has a reasonably flexible approach to the promotion of regulated offers but there are some specific rules that apply to advertisements both before and after a PDS has been lodged on the Disclose Register. The Act also contains restrictions on unsolicited offers of financial products.

Issuers of regulated offers of debt securities or managed investment products must comply with governance and licensing obligations under the FMC Act.

Exclusions to the Product Disclosure Statement requirement

An offer of financial products does not require a PDS if the offer is excluded under the FMC Act, or the FMA grants general or specific relief for certain offers.

Common disclosure exclusions provided by the FMC Act include:

- offers to wholesale investors, such as:
  - a person whose principal business is an investment business;
  - a person who meets certain investment criteria relating to portfolio or trading size;
  - persons who invest in offers with a minimum NZ$750,000 subscription requirement;
  - a person who is “large”, being someone who has net assets exceeding NZ$5 million or total consolidated turnover exceeding NZ$5 million in the two most recently completed financial years;
- offers to close business associates;
- small offers of debt or equity securities to no more than 20 investors in a 12-month period, raising less than NZ$2 million;
- offers to employees under some share employee purchase schemes;
- offers to existing shareholders under a dividend reinvestment plan; and
- some rights issues/entitlement offers made to existing shareholders of NZX listed companies.

There are also a range of specific exclusions potentially available to overseas issuers. This includes, for example, where the offer is:

- part of the consideration for a takeover bid or scheme of arrangement; or
- to existing New Zealand security holders (for example, under a rights issue or an entitlement offer).

However, even where one of these exclusions applies, the issuer may still have specific obligations which it must comply with, including that any document or other conduct in relation to the offer must not be misleading or deceptive or contain any false statements.
There are both criminal and civil consequences of breaching the disclosure obligations in the FMC Act.

Trans-Tasman offers
New Zealand has entered into a mutual recognition scheme with Australia which allows an issuer in Australia or New Zealand to offer specified financial products in both countries using one disclosure document prepared under regulation in its home country.

Capital markets
In New Zealand, NZX Limited (NZX) operates four principal markets for trading financial products:
- NZX Main Board (NZSX);
- NZX Alternative Market (NZAX), which no longer accepts listing applications;
- NXT Market; and
- NZX Debt Market (NZDX).

NZX also operates the NZX Derivatives Market, which includes the Global Dairy Futures and Options Market and the Equity Derivatives Market.

NZSX is New Zealand’s principal market for equity securities. It is designed for large and established companies, and carries the most stringent admission and continuing obligations requirements. Listing on the NZSX is ideally suited to companies with revenues in excess of NZ$50 million per annum.

The NXT Market (which was launched in 2015, and will eventually result in the NZAX being closed) is a lower cost market designed for small to medium sized companies worth between NZ$10 million to NZ$100 million.

A range of investment debt securities, such as corporate and government bonds and fixed income securities, are listed on the NZDX.

NZX is regulated by the FMA (the market conduct regulator for New Zealand’s financial markets) and must report to the FMA on its compliance with its obligations under the FMC Act to, amongst other matters, operate its markets in a fair, orderly and transparent manner.

Listing on a market
A company that wishes to be listed and to have its securities quoted on the markets operated by NZX must apply (through an organising broker) to the NZX for listing. Before a company is listed, it must agree to comply with the listing rules of the relevant NZX market (the NZX Listing Rules).

Overseas companies can have a primary listing on the NZX by meeting the same requirements that apply to New Zealand incorporated companies. In certain situations, a company which is already listed on a “recognised” overseas exchange can also list on the NZX as a Dual Listed Issuer or an Overseas Listed Issuer. Dual listed companies are required to comply with both NZX’s Listing Rules and the rules applicable to the overseas exchange. Overseas Listed Issuers must comply primarily with the rules of their home exchanges and are exempt from most of NZX’s Listing Rules.

Disclosure of substantial shareholdings in listed companies
Under the FMC Act, if an investor directly or indirectly acquires 5% or more of the shares in a company whose shares are quoted on the NZSX or NZAX, the investor must file a substantial product holder notice in the prescribed form with the company concerned and with the NZX. The notice must include information about the investor and the shares in which it has the interest. After a substantial product holder notice is filed, public disclosure of changes in the investor’s shareholding equal to 1% or more of the total shares on issue is also required. A notice given to the NZX will be available to the public through the NZX website.
Takeovers and schemes of arrangement

The two primary ways in which an investor can acquire a holding of more than 20% in a New Zealand listed company are by a takeover offer and a scheme of arrangement.

Takeovers Code

The Takeovers Code is the principal source of regulation of takeovers in New Zealand. The Takeovers Code seeks to ensure that shareholders are treated equally and, after appropriate disclosure, are able to make informed decisions on whether to accept or reject a control transaction for a “code company”.

The Takeovers Code applies to voting securities in “code companies”. A code company is a New Zealand incorporated company that has, or in the last 12 months had, voting securities quoted on the NZSX, the NZAX or the NXT Market, or has 50 or more shareholders and 50 or more share parcels. The Takeovers Code does not apply to listed entities that are not companies (such as listed managed investment schemes or unit trusts).

The fundamental rule in the Takeovers Code is that a party cannot obtain more than 20% of the voting rights in a code company, or increase an existing holding of 20% or more of the voting rights in a code company, other than in compliance with the Takeovers Code.

It is not possible to contract out of the Takeovers Code. Rule 5 of the Takeovers Code provides that the Takeovers Code has effect notwithstanding any provision in any agreement, any provision in the constitution of the company or any special resolution by shareholders.

The New Zealand Takeovers Panel is responsible for enforcing the Takeovers Code.

Off-market takeover offer

The most commonly used route for crossing the 20% threshold or increasing a holding of 20% or more pursuant to the Takeovers Code is by an off-market takeover offer. Under this route, a bidder makes an offer to all shareholders of the target company on the same terms in an offer document. Shareholders accept the offer by signing and returning their acceptance form. These offers (other than some partial offers) must be conditional on the bidder receiving acceptances which will result in it holding more than 50% of the voting shares (and are often conditional on the bidder reaching 90%).

At 90% the bidder can achieve 100% through compulsory acquisition.

Other methods of crossing the 20% threshold

The Takeovers Code includes a number of exceptions to the fundamental rule allowing voting securities in a code company to be acquired above the 20% threshold:

<table>
<thead>
<tr>
<th>Shareholder-approved allotment or acquisition</th>
<th>Shareholders can approve a bidder acquiring voting securities to cross the 20% threshold or to increase an existing holding above 20% either pursuant to a new issue by the target or by acquisition from other shareholders. Neither the bidder nor its associates can vote on that transaction (nor the seller or its associates in an acquisition).</th>
</tr>
</thead>
<tbody>
<tr>
<td>5% per year creep</td>
<td>A shareholder who already holds or controls between 50% and 90% of the voting rights in a code company is permitted to acquire up to an additional 5% in any 12 month period (based on its lowest holding at the start of that 12 month period).</td>
</tr>
<tr>
<td>Compulsory acquisition</td>
<td>If a shareholder holds 90% or more of a code company, it can compulsorily acquire the balance.</td>
</tr>
</tbody>
</table>

For further information regarding the takeover regime in New Zealand, including a detailed description of the types of takeover offers and bid procedures, please refer to Bell Gully’s compendium publication: New Zealand Takeovers Guide.

Schemes of arrangement

An alternative acquisition structure for a New Zealand listed company is a scheme of arrangement. Under section 236 of the Companies Act, the court has broad powers to order that a reorganisation of the share capital of a company will be binding on the company and any other person (e.g., shareholders and creditors) that the court thinks fit.

Accordingly, schemes may be used to effect a wide range of corporate restructures, including transfers of all (or a specified proportion) of each shareholders’ securities to a bidder, cancellations of existing securities and issues of new securities to a bidder.
A scheme has an “all or nothing” outcome, and a bidder will have the certainty of knowing that it will either acquire 100% control if successful or nothing if it is not successful.

Where a court-approved scheme of arrangement would affect the voting rights in a listed company (or any other code company), then:

- the scheme needs approval by both:
  - 75% of the votes cast by shareholders in each interest class entitled to vote and voting; and
  - a simple majority (50.01+%) of the votes of shareholders entitled to vote (i.e., more than half of the votes attached to all shares on issue, whether they are voted or not); and
- either the Takeovers Panel must issue a “no objection statement” or the target must satisfy the court that its shareholders will not be adversely affected by the transaction being undertaken by way of scheme rather than takeover.

In addition, the court has a general discretion whether or not to approve the scheme. A court may refuse to sanction a scheme (or convene the appropriate scheme meeting) if it considers the scheme will potentially prejudice securityholders, creditors or other parties, even if the requisite levels of securityholder approval have been obtained at the scheme meeting.

The flexible structure of a scheme can be an advantage over the relatively prescriptive regime for takeover offers, and allows a bidder to incorporate additional complexities into a scheme (such as the transfer or demerger of specified assets or liabilities or the reduction of a target's capital).

As with takeover offers, schemes of arrangement can be made conditional upon the occurrence or non-occurrence of specified events or circumstances. It is common for schemes to be proposed subject to the receipt of necessary regulatory approvals, or there being no material adverse change in the financial position of the target.

Any of a company, a shareholder or a creditor can apply to the court for a scheme to be ordered. However, because of the central role of the target and its board in convening the meeting of its securityholders, it is generally considered essential for a scheme to be proposed and supported by the target company.

As a result, schemes of arrangement invariably proceed on a friendly rather than hostile basis, with targets and bidders entering into a formal implementation agreement setting out the terms upon which a scheme will be proposed to securityholders and supported by a target’s directors.

Further information
Please contact a member of Bell Gully’s Corporate and Commercial team if you need any specific advice in relation to the matters set out in this section or any other securities or takeover laws advice.
7 COMPETITION LAW

General

Introduction
In New Zealand, competition law is governed by the Commerce Act. The Commerce Act aims to promote competition in New Zealand markets for the long-term benefit of consumers.

Certain conduct and business arrangements that have the purpose or effect of lessening competition within New Zealand are prohibited. The restrictive trade practices provisions in the Commerce Act concern the manner in which businesses compete with each other. Separate provisions regulate business acquisitions that lessen competition.

The New Zealand Commerce Commission (the Commission) is the regulatory body that oversees compliance with the Commerce Act.

Market definition
The effect that an acquisition or restrictive trade practice has on a market may depend on how narrowly or broadly that market is defined. Generally, the narrower the market definition, the greater the effect an acquisition or a practice will have. The Commission has tended to adopt narrow definitions when considering the effects of an acquisition or a practice on competition.

Extra-territorial effect
The Commerce Act’s ambit includes conduct that occurs outside New Zealand by a party resident, or carrying on business, in New Zealand, to the extent that conduct affects a market in New Zealand. The Commerce (Cartels and Other Matters) Amendment Bill will (if passed) extend the jurisdiction of the Commerce Act to include as contraventions activities which only partially occur in New Zealand.

Business acquisitions

Certain business acquisitions prohibited
The Commerce Act prohibits the acquisition of assets of a business or shares if that acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

This determination involves an analysis of the market concerned.

Two broad steps that must be taken when assessing whether an acquisition substantially lessens competition:

- The market must be defined. The Commission defines markets in terms of five possible dimensions: product; geographical extent; functional level (e.g., manufacture, wholesale, retail); consumer dimension and time (e.g., seasonal, peak/off-peak). Demand-side and supply-side substitutions are key considerations when the Commission defines the boundaries of the market.
- The impact of the merger on competition in the market must be assessed. The Commission will review whether the acquisition will increase the scope for the exercise of unilateral and co-ordinated market power.

Concentration indicators
The Commission has published guidelines detailing how it will assess whether an acquisition will substantially lessen competition. Within those guidelines, it sets out concentration indicators based on market shares.
The Commission’s view on when an acquisition is unlikely to breach the Commerce Act:

- where the combined market share of the three largest firms is below 70% and the market share of the combined entity is less than 40%; or
- where the combined market share of the three largest firms is above 70% and the market share of the combined entity is less than 20%.

Even if an acquisition falls outside the concentration indicators, it still may not substantially lessen competition in the relevant market.

Generally, an acquisition that falls outside the concentration indicators may not breach the Commerce Act if:

- there are low barriers to entry or expansion in the market; and/or
- buyers or suppliers can exercise countervailing power against the merged entity; and/or
- there is limited or no opportunity for co-ordinated behaviour between market participants (i.e., limited or no opportunities for collusion and discipline in the market).

If an acquisition falls within the concentration indicators, in some circumstances there may still be a substantial lessening of competition. If the acquisition is close to the concentration indicators, the application of the above factors to the relevant market should be considered.

Seeking clearance or authorisation from the Commission

In New Zealand there is no compulsory requirement to notify the Commission of acquisitions. Instead businesses can voluntarily submit proposed acquisitions to the Commission for review.

Businesses that believe a proposed acquisition may result in a substantial lessening of competition in a market should seek clearance or authorisation from the Commission before proceeding.

Clearance will be granted by the Commission when it is satisfied that the acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

Once an application for clearance is registered, the statutory timeframe for the Commission to make a decision is 10 working days (although this period is invariably extended at the Commission’s request). Recent experience suggests a period of at least 40 to 60 working days should be provided for.

Alternatively, a business may apply for authorisation when an acquisition may have the effect of substantially lessening competition.

Authorisation will only be granted if the Commission is satisfied that the detriments from any substantial lessening of competition are outweighed by sufficient public benefits. Once an application for authorisation is registered, the Commission has 60 working days in which to make a decision (or longer if the Commission and the applicant agree). Again, extensions are often requested.

The Commission has developed a new streamlined authorisation process which is intended to enable it to make decisions on certain straightforward authorisation applications within 40 working days.

If an acquisition proceeds in accordance with a clearance or authorisation within 12 months from the date on which it is issued, the acquisition is protected from challenge under the Commerce Act by either the Commission or a third party.

Restrictive trade practices

The restrictive trade practices provisions in the Commerce Act can be broadly classified as prohibiting either:

- collective anti-competitive behaviour; or
- unilateral anti-competitive behaviour.

Some restrictive trade practices can also be authorised, on a similar basis to that set out above for acquisitions.
Collective anti-competitive behaviour

There are three broad categories of collective behaviour that are prohibited by the Commerce Act.

Collective behaviour

The Commerce Act prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. This prohibition is broad, incorporating prohibitions that may not be caught by other more specific provisions in the Commerce Act. Whether an agreement has an anti-competitive effect depends on an analysis of both the market and the impact the agreement has had, or is likely to have, on the market.

For the purposes of restrictive trade practices, the contract, arrangement or understanding need not be a formal (i.e., legally enforceable) agreement. In some cases an informal agreement, or even those concluded with a "wink or a nod", may suffice.

Collective boycotts

This restriction prohibits competitors from entering into exclusionary provisions or collective boycotts.

Competitors cannot get together and threaten a supplier to, for example, stop supplying a rival business. Similarly, a group of suppliers could not threaten a business to stop buying from a competing supplier.

Exclusionary provisions or collective boycotts must also have either the purpose, effect or likely effect of substantially lessening competition in a market. It is a defence if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.

Price fixing

Contracts, arrangements or understandings among competitors that have the purpose, effect or likely effect of fixing, controlling or maintaining prices are prohibited under the Commerce Act. This prohibition also applies to fixing, controlling or maintaining discounts, credit and rebates.

Price fixing can occur in seemingly innocuous situations. Benchmarking agreements, formulae for ascertaining price and arrangements regarding terms of credit all potentially give rise to price fixing if agreed to by competitors. A breach occurs irrespective of whether the arrangement is successful.

Once price fixing is established, the agreement is deemed to have the purpose, effect or likely effect of substantially lessening competition.

The Commerce (Cartels and Other Matters) Amendment Bill will (if passed) introduce a new cartel prohibition designed to capture a wider range of "cartel" conduct. As currently drafted, the provision specifically prohibits price fixing, output restrictions and market allocation. It will replace the current price fixing and collective boycott provisions.

Unilateral anti-competitive behaviour

There are two types of unilateral behaviour prohibited by the Commerce Act, being resale price maintenance and taking advantage of market power.

Resale price maintenance

Suppliers cannot fix the price at which goods may be sold by other businesses. A supplier will be maintaining the resale price if it:

- specifies a minimum price or an actual price;
- takes or threatens to take action against a reseller who sells below a minimum price; or
- restricts the ability of resellers to discount (e.g., "discounts must not be greater than 20% off the recommended retail price").

Taking advantage of market power

A company with a substantial degree of market power must not take advantage of its market strength for an anti-competitive purpose.

Generally, a firm will have a substantial degree of power in a market if it can operate in a market substantially independently of its competitors. The anti-competitive purposes are:

- restricting the entry of a person into a market;
- preventing or deterring a person from engaging in competitive conduct; or
- eliminating a person from a market.
Penalties

Restrictive trade practices
In relation to restrictive trade practices, an individual may be penalised up to NZ$500,000. In the case of a body corporate, the penalty can be up to the greater of NZ$10 million, three times the value of any commercial gain resulting from the contravention, and 10% of the New Zealand turnover of the body corporate and all its interconnected body corporates if the commercial gain cannot be established.

The courts are required to impose a monetary penalty of up to NZ$500,000 on an individual who breaches the Commerce Act in the absence of good reasons to the contrary. Other provisions that increase the risk to individuals include:

- companies are prohibited from indemnifying a current or former director, employee or agent for penalties or costs incurred in defending a breach of the price fixing prohibition (unless successfully defended); and
- by order of the court, individuals can be banned from involvement in the management or promotion of a company for up to five years for engaging in price fixing or a collective boycott.

Business acquisitions
Pecuniary penalties for breaching the business acquisition provisions are a maximum of NZ$500,000 for individuals and NZ$5 million for a body corporate.

Further information
Please contact a member of Bell Gully’s Competition team if you require any specific advice in relation to the matters set out in this section or any other competition law advice.
8 CONSUMER LAW

Fair Trading Act 1986

The Fair Trading Act 1986 (the Fair Trading Act) operates as consumer protection legislation by prohibiting certain conduct and practices in trade.

Specifically, the Fair Trading Act prohibits:

- conduct that is misleading or deceptive or likely to mislead or deceive;
- conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of goods;
- conduct that is liable to mislead the public as to the nature, characteristics, suitability for purpose, or quantity of services;
- false or misleading representations in relation to goods and services;
- unsubstantiated representations in relation to goods and services; and
- unfair contract terms in standard form consumer contracts.

Conduct is misleading or deceptive if it causes people to form a mistaken belief or impression.

In most cases, intention is irrelevant. A person can breach the Fair Trading Act even though they had no intention to mislead or deceive. There is also no need to show that a person has in fact been misled or deceived. In other words, a person may breach the Fair Trading Act even though they did not intend to mislead, and no-one has in fact been misled.

Any representation or claim made by a business about a good or service must be able to be substantiated by the business at the time it is made, if consumers would expect it to be backed up by evidence. This is the case regardless of whether the claim is express or implied, and regardless of whether the claim is later found to be correct.

Unfair terms

The Fair Trading Act also prohibits unfair terms in standard form consumer contracts. The definition of “consumer contract” is wide and includes some contracts between businesses for consumer goods. A term is “unfair” if a Court determines that it creates a significant imbalance in the rights and obligations of the parties to the contract, that it is not reasonably necessary to protect the legitimate business interests of the party that would be advantaged, and that the other party would suffer a detriment if the term was applied, enforced or relied on.

The Fair Trading Act sets out mandatory disclosure and cancellation requirements for extended warranty agreements and all agreements for consumer goods or services that are entered into as a result of an “uninvited direct sale” on the phone or in a consumer’s home or workplace.

The Fair Trading Act also provides for the establishment of consumer information standards and product and service safety standards. New Zealand currently has four consumer information standards – for care labelling, fibre content labelling, country of origin labelling for footwear and clothing and used motor vehicles. There are currently six product safety standards – for toys for children under three years of age, bicycles, cigarette lighters, children’s nightwear and limited daywear having reduced fire hazard, cots and baby walkers.

An action under the Fair Trading Act may be brought by private persons or by the Commerce Commission, being the public enforcement authority under the Fair Trading Act. A breach of the Fair Trading Act may constitute a criminal offence. Commercial entities can be liable to a fine of up to NZ$600,000, and individuals to a fine of up to NZ$200,000. The courts also have power to award damages, issue infringement notices, void contracts, vary contracts, issue injunctions to prevent conduct recurring, order the refund of money or the return of goods, order that corrective statements be published and declare that unfair terms in standard form consumer contracts are unenforceable.
Parties are permitted to contract out of certain sections of the Fair Trading Act in some circumstances if they are both in trade.

**Consumer Guarantees Act 1993**

The Consumer Guarantees Act 1993 (the Consumer Guarantees Act) is another source of consumer protection legislation in New Zealand, which applies to suppliers and manufacturers of goods and services that are ordinarily acquired for personal, domestic or household use or consumption.

### Consumer Guarantees regime

The Consumer Guarantees Act provides consumers with a regime of guarantees in relation to the supply of goods and services, such as guarantees as to title (ownership), acceptable quality, repairs, spare parts, fitness for a particular purpose, compliance with a description or sample and that goods will not be sold at more than a reasonable price (where the price is not specified).

The Consumer Guarantees Act provides consumers with remedies against both suppliers and manufacturers for goods or services that fall short of the guarantees specified in the Consumer Guarantees Act. For example, if a failure can be remedied then the consumer may require the supplier to do so. If the supplier fails to do so, the consumer may have the failure remedied elsewhere at the supplier’s expense or reject the goods. If the failure cannot be remedied or is of a substantial character, the consumer may reject the goods outright or obtain damages from the supplier as compensation for the reduction in value of the goods. In addition, the consumer may obtain damages from the supplier for any reasonably foreseeable loss or damage which the consumer suffers as a result of the goods failing to comply with a guarantee under the Consumer Guarantees Act.

In general, parties are not permitted to contract out of the guarantees in the Consumer Guarantees Act. However, in some circumstances, it is permissible to contract out of the Consumer Guarantees Act if both parties are in trade. It is an offence to purport, represent or attempt to contract out of the Consumer Guarantees Act in other circumstances.

### Privacy Act 1993

The Privacy Act 1993 (the Privacy Act) covers situations in which personal information about identifiable individuals is collected by any business entity. The Privacy Act contains a number of Information Privacy Principles which provide the substantive requirements in relation to dealing with personal information. These principles include matters such as where and from whom personal information may be collected from, appropriate storage of personal information, accuracy and correction of personal information and the uses to which personal information may be put. The Privacy Act is currently the subject to proposed reform.

### Gambling Act 2003

If a promotional activity constitutes “gambling” for the purposes of the Gambling Act 2003 (the Gambling Act), the promotion must comply with the provisions of this Act. There are no licensing requirements for sales promotion schemes that constitute gambling. There are some licensing requirements for other types of gambling, including fundraising for charitable purposes.

A person conducting gambling must inform participants (at the time and place of sale of tickets) of the retail value and characteristics of any non-cash prize offered.

### Definition of “gambling”

“Gambling” means paying or staking consideration, directly or indirectly, on the outcome of something seeking to win money when the outcome depends wholly or partly on chance, and includes:

- a sales promotion scheme;
- bookmaking; and
- betting, paying, or staking consideration on the outcome of a sporting event.

It is usually the first element above which determines whether any particular promotion constitutes “gambling” for the purposes of the Gambling Act. Promotions where people do not have to pay or buy anything to enter are not “gambling” and accordingly are not required to satisfy the requirements in the Gambling Act.
If a promotion constitutes “gambling”, it is prohibited and illegal unless it is a “sales promotion scheme”. A promotion will be a “sales promotion scheme” if it is intended to promote the sale of goods or services and the criteria set out in the table below apply.

**Sales promotion scheme**

A promotion that is intended to promote the sale of goods or services will be a “sales promotion scheme”:

- if participation in the promotion requires a person to purchase the goods or services being promoted for a price not exceeding the usual retail price;
- the date or period on or over which the outcome of the promotion will be determined is clear to the participant at the time and place of sale;
- the person is not required to pay direct or indirect consideration other than to purchase the goods or services promoted (with the exception that if entry is made by usual postage or text, standard costs of sending a message may be incurred by an entrant); and
- the outcome is determined randomly or wholly by chance; or partly by chance and partly by the application of some skill or knowledge.

It is prohibited to offer instant prizes in conjunction with any sales promotion scheme which involves a text message or web-based entry mechanism. Instead the outcome must be determined by a draw after all participants have entered.

It is illegal to publish in New Zealand a form of communication that:

- publicises or promotes gambling that is outside New Zealand or a gambling operator who is outside New Zealand; or
- is reasonably likely to induce persons to gamble outside New Zealand.

In practice therefore, while it is possible to run a sales promotion scheme in New Zealand from overseas, it would be nearly impossible to attract participants from New Zealand to participate because of the prohibition on advertising overseas promotions in New Zealand.

The Gambling Act provides for penalties for anybody who participates in unauthorised gambling (i.e., both promoters and participants). Fines can be imposed of up to NZ$50,000 for organisations, and up to NZ$20,000 for individuals. Individuals involved in promoting unauthorised gambling may also face imprisonment for a maximum of one year.

### Unsolicited Electronic Messages Act 2007

The Unsolicited Electronic Messages Act 2007 (the **UEM Act**) prohibits the sending of unsolicited commercial electronic messages with a New Zealand link, unless the recipient has consented to receipt of such messages.

“Commercial electronic messages” are defined under the UEM Act as electronic messages (such as emails and text messages) that market or promote goods, services, land or a business or investment opportunity. A commercial electronic message is “unsolicited” and therefore prohibited if the recipient has not consented to receiving it.

**New Zealand link**

A “New Zealand link” exists where:

- the message originates in New Zealand;
- the sender is an individual that is physically in New Zealand, or a business that is centrally managed from New Zealand when the message is sent;
- the computer, server or device that accesses the message is located in New Zealand;
- the recipient is physically in New Zealand or is an organisation carrying on business in New Zealand when the message is accessed; or
- the message is sent to an electronic address that ends in “.nz” or begins with an international access code directly followed by “64”.

All commercial electronic messages are also required by the UEM Act to include accurate sender information and a functional unsubscribe facility which may be used by recipients (at no cost) to require that they no longer be sent such messages.

### Industry specific consumer law

Industry specific consumer law may also apply, such as obligations relating to consumer credit contracts under the Credit Contracts and Consumer Finance Act 2003.

### Further information

Please contact a member of Bell Gully’s Corporate and Commercial team if you require any specific advice in relation to the matters set out in this section or any other consumer law advice.
9 CONTRACTS

Contracts with overseas persons

New Zealand does not have a separate legal regime for contracts involving overseas-owned or controlled entities that carry on business in New Zealand. Once an overseas investor has received any necessary consents to invest in New Zealand, the overseas investor and its New Zealand business are subject to the same regulations and legislation that apply to New Zealand investors and to their companies and businesses.

Determining applicable law

The New Zealand Courts apply common law conflict of law principles when determining which country’s law applies to dealings between New Zealand-based businesses and overseas entities. Generally speaking, the parties to a contract are free to decide which country’s law shall govern the contract.

The New Zealand Courts will not give effect to the choice of law of the parties unless the choice is reasonable, genuine, made in good faith and legal.


General contractual issues

In contracts between commercial parties governed by New Zealand law, generally the provisions of New Zealand’s consumer protection legislation, such as the Consumer Guarantees Act (as discussed in section 8) and the Credit Contracts and Consumer Finance Act 2003, will not apply as between the parties and the parties will be free to decide the terms of their commercial arrangements.

However, a range of other commercial legislation, including the PPS Act (as discussed in section 4) and the Carriage of Goods Act 1979, may be relevant depending on the nature of the contract.

Settlement of disputes

The parties to a contract can decide to submit any dispute to Court or to arbitration. Any choice to submit to arbitration must be in writing.

Further information

Please contact a member of Bell Gully’s Corporate and Commercial team if you require any specific advice in relation to the matters set out in this section or any other contract law advice.

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3 This statute is being replaced by the Contract and Commercial Law Act 2017 in September 2017.
10 INTELLECTUAL PROPERTY

Overview

Rights to intellectual property (IP) are generally territorial in nature. That is, with the exception of copyright, IP rights in one country do not automatically confer rights in another country.

The New Zealand Government operates a central intellectual property register through the Intellectual Property Office of New Zealand (IPONZ). IPONZ is responsible for the granting of registration of intellectual property rights.

The process of registration is relatively straightforward and, in general, cost effective, and allows for ease of enforcement against third parties. Registered protection should be sought in New Zealand, where possible.

New Zealand also recognises certain unregistered intellectual property rights, based on prior or current use.

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Registered trade marks

A trade mark is a symbol used to identify goods or services of a particular business. The best way to protect a trade mark in New Zealand is to register it under the New Zealand Trade Marks Act 2002. Registration confers the exclusive right to use a trade mark for the goods or services covered under the registration. It also confers protection against use of a similar trade mark in relation to the same or similar goods or services to those covered by the registration.

Registered trade marks can include (for example):

- **Words (including invented words)**
- **Logos**
- **Signatures**
- **Shapes**
- **Colours**
- **Smells**
- **Sounds**
- **Labels**

The initial registration period in New Zealand runs for 10 years from the date that the application is filed with IPONZ. Following this, the registration is renewable every 10 years for an indefinite period upon payment of the renewal fee.

Once a trade mark is registered a registrant can use the ® symbol to alert third parties to its rights.

Unregistered trade marks

It is possible to build up a property right in a trade mark without registering it. If a trade mark is not registered, the owner may be able to rely on the common law tort of passing off or take proceedings for misleading and deceptive conduct under the Fair Trading Act to enforce rights in the mark. However, this will necessitate the owner demonstrating it has an established “right” in the mark through use. Specifically the owner needs to prove that:

- it has goodwill or reputation in the trade mark (which will be difficult if the trade mark has not been used or has been used for only a short time);
- the “infringer”, by adopting a confusingly similar mark, is misrepresenting its product or service as connected to the owner; and
- damage has occurred or is likely to occur to the business of the owner of the trade mark (required only under a claim of passing off).
If a trade mark is not registered, the ™ symbol should be used to identify the owner’s rights.

Copyright

There is no system for copyright registration in New Zealand. Copyright arises automatically in an original work from the time it is created. New Zealand is party to a number of international conventions and agreements relating to copyright. This means that many copyright works created overseas are recognised in New Zealand; and copyright works created in New Zealand will be recognised in many overseas jurisdictions.

Copyright protects original and creative works, which include:

- artistic works, including photographs, graphic work, designs and screen displays, and simple industrial drawings;
- literary works, including documents, computer programmes and compilations;
- films and sound recordings;
- communication works, including transmissions of sound, visual images or other information for reception by members of the public, (e.g., broadcast or cable programmes); and
- other works, including dramatic, musical and computer-generated works and films.

Copyright gives the owner of an original work exclusive rights to exploit the work, including the right to prevent the copying or misuse of that work.

The first owner of a copyright work is usually the author of the work, unless the copyright work is created in the course of employment or has been commissioned by another person for payment. In those circumstances, the employer or the person who commissioned the work will be the copyright owner, unless there is an agreement to the contrary.

Copyright generally lasts for 50 years after the death of the author. However, copyright in computer-generated works, and other works that cannot be said to have an author, lasts for 50 years from the year of creation. For communication works, copyright expires 50 years from the end of the calendar year in which the work is first communicated to the public.

Patents

A patent is an exclusive statutory right to exclude third parties from using, selling, or importing a patented invention. The term of a patent is up to 20 years.

To obtain a patent registration in New Zealand, an invention must:

- be new (not published or used anywhere in the world);
- contain an inventive element (not obvious); and
- be useful (have a practical application, and should work).

Certain inventions are excluded from protection. These include:

- where the commercial exploitation of the invention is contrary to "public order" or morality;
- computer programs (‘as such’);
- methods of human medical treatment;
- diagnostic methods practised on humans;
- processes for cloning humans;
- using human embryos for industrial or commercial purposes; and
- plant varieties.

Printed circuit layouts

If an idea involves an original layout design for an integrated circuit board then it may be protected as a layout design under the New Zealand Layout Designs Act 1994.

This protection lasts for up to 15 years and is similar to copyright. No registration is required.

As with copyright, the first owner is the maker of the layout design, unless they are an employee acting under their terms of employment or the layout design is commissioned by another party for payment.
Design rights

Design rights are a special form of intellectual property that relate to the external appearance of an article.

Registering a design under the New Zealand Designs Act 1953 grants the registrant an exclusive right to prevent unauthorised parties from making, importing, selling or hiring an article covered by the registered design.

Registering a design

To qualify for registration, the design must:

- apply to the shape, configuration or surface pattern or ornament of the article;
- be applied to an article by an industrial process or means;
- have eye appeal;
- not be purely functional; and
- be new or original, meaning that it has not been used in New Zealand or described in any publication that is available in New Zealand prior to the date of application.

The full term of a design registration is 15 years. A design is registered initially for five years, and may be renewed twice at the end of five and 10 years from the application date.

Design applications are filed with IPONZ and go through an examination process to ensure they meet the requirements for registration.

As copyright also protects designs – although not to the same extent as a registered design – in practice, owners of designs in New Zealand may choose to rely on copyright, rather than seek design registration.

Further information

Please contact a member of Bell Gully’s Intellectual Property team if you require any specific advice in relation to the matters set out in this section or any other intellectual property law advice.
11 INTERNATIONAL TRADE

Importation

As part of the New Zealand government’s policy on exposing the economy to international competition, New Zealand moved to using tariffs as the principal trade policy measure. Subsequently tariff protection has been substantially liberalised and parallel importation of nearly all goods has been allowed.

Government policy is to reduce and simplify tariff rates, although it has held off moving to a zero tariff regime and the rate of duty on some goods (clothing and footwear in particular) is still relatively high by world standards.

New Zealand is a member of the General Agreement on Tariffs and Trade (GATT) and is a signatory to the World Trade Organisation’s agreements (the WTO Agreements) on technical barriers to trade, subsidies and countervailing duties, anti-dumping, customs valuation and intellectual property.

Additional costs of importation

Apart from tariffs, New Zealand has no taxes, levies or other charges which apply exclusively to imported products. Goods and Services Tax (GST) is payable on most goods sold in New Zealand, and is also charged on the cost, insurance and freight (CIF) value plus duty on all goods imported into New Zealand.

Goods that would be subject to excise duty (i.e., alcohol, tobacco and fuels) when manufactured in New Zealand are subject to an equivalent duty on importation into New Zealand.

GST is normally payable when the goods are cleared through customs but payment can be deferred when the importer participates in the deferred duty payment arrangements operated by Customs New Zealand (Customs).

GST is discussed further in section 14.

Regulation of importers

Importers must get all shipments of business and commercial goods cleared by Customs. In order to lodge an import entry clearance request with Customs, importers must ensure they are registered with Customs (and have a Unique User Identifier), and are registered with the Electronic Commerce Network. Some goods, including agricultural products, chemicals, foods and medicines, may require additional import permits or registrations with other Government departments.

International influences on New Zealand Law

Dumping and countervailing duties

With the elimination of import controls and the reduction in tariffs, imported goods can compete against New Zealand-made goods in the New Zealand market. While international trade has been liberalised, the New Zealand government has decided that New Zealand business should not be put at risk by unfair competition from overseas suppliers.

To this end, the Trade (Anti-Dumping and Countervailing Duties) Act 1988 was enacted to regulate the dumping of products on the New Zealand market. This Act (as amended) is based on the WTO Agreements on “anti-dumping and countervailing duties”. However, the government has shown that from time to time it will suspend the application of anti-dumping duties to specific goods in order to lower the domestic market price on those goods (as evidenced by the 2014 amendment suspending anti-dumping duties on some residential building materials for three years). Further, this year the Act was amended to empower the government to suspend the application of anti-dumping duties in the public interest (e.g. where doing so would improve the quality of goods supplied to the market or consumer choice) and in the event of a natural disaster or national emergency.

Closer economic relations between New Zealand and Australia

In 1983, New Zealand and Australia signed an agreement setting out a timetable for establishing closer economic relations (CER) and a free trade zone between the two countries. This was so successful that the initial timetable was brought forward. Today the CER is widely recognised as the most comprehensive bilateral free trade agreement (FTA) in the world.

For New Zealand goods to be exempt from tariffs and duties when imported into Australia, the goods must have either been wholly manufactured, produced or have originated in New Zealand or, where the goods consist of materials from third party countries, the goods
must have been processed or manufactured so that the tariff classification of the goods has changed from that of the imported materials.

As a result of CER, anti-dumping duties are not available between New Zealand and Australia. Instead, competition law is intended to deal with unfair trade practices between the two countries with expanded jurisdiction to cover Trans-Tasman markets.

Agreements such as the Trans-Tasman Mutual Recognition Arrangement and the Joint Food Standards system have allowed manufacturers to produce goods at a single standard for both Australia and New Zealand.

**WTO, APEC and ASEAN**

New Zealand is active in promoting free trade at international bodies such as the WTO, Asia-Pacific Economic Co-operation (APEC) and Association of South East Asian Nations (ASEAN).

### The FTA between New Zealand, Australia and ASEAN (AANZFTA) promotes free trade between:

- New Zealand;
- Australia;
- Brunei Darussalam;
- Cambodia;
- Indonesia;
- Laos;
- Malaysia;
- Myanmar;
- Philippines;
- Singapore;
- Thailand; and
- Vietnam.

**China, Malaysia, Hong Kong, Singapore, Thailand and Korea**

New Zealand has entered into bilateral FTA’s with China, Malaysia and the Republic of Korea, and closer economic partnership arrangements with China-Hong Kong Special Administrative Region, Singapore and Thailand.

**Gulf Co-operation Council**

New Zealand and the Gulf Co-operation Council, which comprises Bahrain, Oman, Kuwait, Saudi Arabia, the United Arab Emirates and Qatar, have successfully concluded negotiations for a FTA and now wait for a legal verification process to be completed before a formal agreement is signed.

**Other trade relationships**

FTA talks are under way with India and the EU. New Zealand has also entered into Mutual Recognition Agreements with some APEC members and the EU. However, negotiations for an FTA with Russia-Belarus and Kazakhstan have been suspended.

**P4 and TPP**

New Zealand, Brunei Darussalam, Chile and Singapore are party to a Trans-Pacific Strategic Economic Partnership Agreement (P4). In February 2016, the parties to P4 signed an agreement with Australia, Japan, Malaysia, Peru, the United States of America, Vietnam, Mexico and Canada to expand P4 into a broader Trans-Pacific Partnership (the TPP) with the object of securing a considerable free trade bloc. However, following President Trump’s withdrawal of the United States from the TPP in January 2017, the future of the TPP is now very uncertain. At the time of this guide, the New Zealand Government and a number of the other remaining 11 parties have signalled that they are keen to pursue a modified TPP without the United States.

**International Sale of Goods Convention**

New Zealand has adopted the Convention (as also discussed in section 9). The Convention regulates the formation of international sales contracts and regulates the rights, obligations and remedies of the buyer and seller under these contracts.

### The Convention applies to contracts for the sale of certain goods when:

- both buyer and seller are located in countries that are signatories to the Convention; or
- where the party contracting with the New Zealand entity is from a country which is not a signatory to the Convention but the contract for sale is governed by New Zealand law.
However, the Convention will not apply if the seller and purchaser agree.

Overseas persons trading with New Zealand should establish whether or not the overseas country has adopted the Convention and decide whether they want the Convention to apply.

**Agricultural products**

To maintain New Zealand’s agriculture base, strict requirements governing the importation of materials that may be detrimental to the agricultural economy are in place. Certain products require clearance from the Ministry for Primary Industries and must comply with the Biosecurity Act 1993 and the Hazardous Substances and New Organisms Act 1996.

**Packaging requirements**

Certain materials may not be used as packaging for goods imported into the country. These include soil, peat, hay and other grasses, moss, sacking or hessian and any material which may have been in contact with animals or soil or which was produced as an agricultural waste product.

Some packaging materials such as plywood or wooden packing cases, cargo pallets and crates must be free from bark and visible signs of infection by fungal attack or insects if they are to be used for imported goods.

**Labelling requirements**

New Zealand has laws regulating the labelling of certain goods. For example, food and drugs must comply with the labelling requirements set out in the Regulations under the Food Act 2014 and the Medicines Act 1981. In addition, the Fair Trading Act generally prohibits misleading and deceptive conduct and false representations in trade (as also discussed in section 8). For example, importers should ensure that the country of origin of the goods is clearly and accurately identified.

The Consumer Information Standards (Country of Origin (Clothing and Footwear) Labelling) Regulations 1992 require that the country of origin be placed on certain articles of clothing and footwear.

The Consumer Guarantees Act also imposes statutory guarantees on goods ordinarily acquired for personal, domestic or household use or consumption (as also discussed in section 8).

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**Further information**

Please contact a member of Bell Gully’s Corporate and Commercial team if you require any specific advice in relation to the matters set out in this section or any other international trade law advice.
12 IMMIGRATION

Visa requirements

New Zealand continues to encourage migration, and its immigration policy offers a number of routes to employment and residency, depending on applicants’ skills and abilities to benefit New Zealand.

Visas may be available for those coming to take up employment, and there are a range of schemes available to those intending to invest, set up a business, or settle permanently in New Zealand.

Demand from prospective migrants has been strong and immigration policies change frequently.

Work visas

If you are not a New Zealand citizen or Australian citizen / permanent resident, you will need a work visa to work in New Zealand.

Work visas can be issued for periods of up to three years from the date of your arrival and may be able to be extended, depending on circumstances.

If you are coming to New Zealand to invest in, or set up, a business, there are a number of “business residency” and “work to residency schemes” that may be more appropriate (see below).

Application

- The time required to process a work visa application varies depending on where you reside. Applicants will need to:
  - satisfy health and character requirements;
  - provide evidence of a job offer; and
  - in some cases, provide evidence that his / her employer is unable to fill the position from the New Zealand labour market.

Medical

If you intend to be in New Zealand for six months or more you may be required to provide a chest x-ray certificate. All people entering New Zealand for 12 months or more will be required to undergo a full medical and chest x-ray certificate from an approved panel doctor.

At the time of submitting your application, medical certificates and x-rays must be less than three months old.

Character

If you intend to stay in New Zealand for longer than 24 months, police certificate(s) from your country of citizenship and from any countries in which you have lived for five or more years since the age of 17 will be required.

At the time of submitting your application, police certificates must be less than six months old.

English language

English language requirements for each category vary and change from time to time.

Offers of employment

You will need to provide evidence of an offer of employment, which must contain a full job description, including:

- job title;
- address of place of employment;
- type of work;
- duties and responsibilities involved;
- details of pay and conditions;
- any qualifications, registration, experience or training required;
- duration of the job; and
- how long the offer will remain open for.
If there is a known regional shortage of your skills or occupation, this can help to streamline and expedite the work visa process.

**Employers’ evidence**

Employers may need to supply evidence about their genuine efforts to find suitable New Zealanders and why they are unable to employ or readily train suitable New Zealanders for the position.

**Family members**

Accompanying partners and children may be able to be included in the principal applicant’s application.

**Specific purpose or events visas**

You can be considered for a specific purpose or events visa if you intend to come to New Zealand for a specific purpose or event. These could include:

- senior or specialist business people on short-term secondments who have a job offer either in a substantial New Zealand company or a New Zealand subsidiary of an overseas company; or
- a business person seconded to New Zealand as an intra-corporate transferee to take up a position in a multi-national company as:
  - an executive; or
  - a senior manager; or
  - specialist personnel.

**Application for residency through the business categories**

The New Zealand Government’s Business Migration Policy is designed to attract migrants who will contribute to the country’s economic growth by increasing the country’s skills base, encourage enterprise and innovation, and foster international linkages.

**Ways of migrating to New Zealand as a business migrant:**

- by obtaining an Entrepreneur Work Visa;
- by meeting the criteria in the Investor category;
- through the ‘Employees of Relocating Businesses’ category; or
- through the ‘Work to Residence’ policies.

**Entrepreneur Work Visa**

An Entrepreneur Work Visa allows for self-employment in New Zealand and enables experienced business people to grow or establish a high growth innovative business in New Zealand which has export potential. Successful applicants are granted a work visa for up to three years. If the applicant can show they have successfully run their business for at least two years, they can then make an application for residence under the Entrepreneur category.

To apply for an Entrepreneur Work Visa, you must:

- meet the prerequisite pass mark;
- have a satisfactory business plan;
- have, in addition to investment capital, sufficient funds for your maintenance and accommodation and that of any spouse or partner and/or dependent children included in the application;
- meet health, character and English language requirements; and
- satisfy Immigration New Zealand (INZ) that you are genuinely interested in establishing a business in New Zealand.

**Investor category**

This policy is for investors who want to gain residence in New Zealand and is divided into two categories:

- Investor Plus (Investor 1 Category); and
- Investment (Investor 2 Category).
Investor 1 Category

- The Investor 1 Category requires approved applicants to make an acceptable investment of NZ$10 million in New Zealand.
- Applicants willing to invest at least 75% of their funds in growth oriented investments (bonds and philanthropic investments will not qualify) are able to spend the requisite 88 days in New Zealand over the 3 year investment period.
- Applicants who are not willing to do so must spend a minimum of 44 days in New Zealand in each of the last two years of the three year investment period.
- There is no requirement for the principal applicant or family members to meet English language requirements.

Investor 2 Category

To be eligible to apply under the Investor 2 Category you must first submit an ‘Expression of Interest’ to INZ and:

- be aged 65 years or younger;
- have a minimum of three years business experience;
- have NZ$3 million of investment funds invested in New Zealand in acceptable investments for at least four years;
- have an English speaking background, or an International English Language Testing System test report with an overall band score of four (principal applicant) or three (partner/spouse and children aged 16 or over), or be a competent user of English. (Note: family members who do not meet the English language requirements can pre-purchase ESOL tuition); and
- be prepared to spend a minimum of 146 days in New Zealand in each of the last three years of the four year investment period or, for applicants who willing to invest at least 75% of their funds in growth oriented investments (bonds and philanthropic investments will not qualify) spend 438 days over the 4 year investment period.

Applicants under both categories must meet health and character requirements.

Employees of Relocating Businesses category

The Employees of Relocating Businesses category grants residence to key employees of businesses relocating to New Zealand who would not otherwise qualify under other categories.

Applicants and any family members included in your application must meet health, character and English language requirements.

A key employee is an employee of the business whom the chief executive officer of the relocating business reasonably considers will be essential to the operation of the relocated business in New Zealand.

‘Work to Residence’ category

INZ also operates a ‘Work to Residence’ policy which provides residence in New Zealand through the following policies and schemes:

- Talent Policy (Accredited Employers) – employment with accredited employers;
- Talent Policy (Arts, Culture and Sport) – for people with exceptional talent in a field of art, culture, or sport; and

Further information

Please contact a member of Bell Gully’s Immigration and Tax team if you require any specific advice in relation to the matters set out in this section or any other immigration law advice.
13 EMPLOYMENT

Introduction

The general employment laws of New Zealand apply to workers from overseas who are employed in New Zealand. Statute and the common law regulate all employment agreements in New Zealand.

The Employment Relations Act 2000 (the Employment Relations Act) is the principal statute regulating employment in New Zealand. There are other statutes regulating holidays, parental leave, minimum wages, health and safety, privacy, human rights, and minimum working conditions.

Employment agreements

Under the labour relations system in New Zealand, an employee can agree to enter into an individual employment agreement with their employer. Alternatively, employees can join a trade union, which may then negotiate a collective agreement with the employer. Collective agreements are usually limited to a particular workplace, although some industries have multi-employer collective agreements.

Collective bargaining

The Employment Relations Act promotes collective bargaining and supports the role of trade unions in labour relations in New Zealand. Only unions are able to negotiate collective agreements (on behalf of their members) with employers. There is an obligation on employers and unions to negotiate in good faith. However, there is no longer an obligation to conclude a collective agreement or to continue bargaining when there is a deadlock in negotiations with a union.

All employment agreements must be in writing and must contain certain provisions provided for in the Employment Relations Act. Most agreements are indefinite and continue until the agreement is terminated by either party. However, both casual and fixed term employment arrangements are recognised by the law (with fixed term agreements being specifically regulated by statute).

Good faith obligations

All parties to an employment relationship, whether they are employers, employees or unions, owe a duty of good faith to the other party in that employment relationship. This duty is imposed by statute and requires parties to not mislead or deceive each other, to be active and constructive, and to be responsive and communicative in their employment relationship.

An employer that is planning to make a decision that may have an “adverse effect” on the continuation of an employee’s employment has to follow certain requirements in order to comply with this duty of good faith. An adverse effect includes the termination of an employee’s role, or a significant change in their position, due to a restructure or sale of a business. An employer must give the employee information about its planned decision (subject to confidentiality requirements) and an opportunity to comment before a decision is made.

Termination of an employment relationship

**General rule**

- An employee can end an employment relationship by resigning (giving notice as required by their employment agreement).
- An employer must have “cause” for terminating an employment relationship.
- Common reasons why an employment relationship might be terminated include serious or repeated misconduct, poor performance, redundancy, or medical incapacity.
- When terminating the relationship, an employer must follow a full and fair process.

For a dismissal to be justifiable, the employer must have acted in a way that a “fair and reasonable” employer could have acted in the circumstances. An employer must have “cause” for terminating an employment relationship, and must also follow a full and fair process when terminating an employee’s employment. An employee can bring a personal grievance against their employer if they believe their dismissal was unjustifiable, or if they believe they have been subject to an unjustified disadvantage.
An employee and employer can agree to enter into a 90-day trial period at the beginning of the employment relationship. During the trial period, the employer may dismiss the employee and the employee is not entitled to bring a personal grievance claim in respect of the dismissal. The employer will still be subject to some statutory good faith obligations.

**Redundancy**

There is no statutory requirement to pay redundancy compensation in New Zealand. Redundancy payments will only be payable if they are expressly provided for in an employment agreement.

**KiwiSaver**

KiwiSaver is a voluntary superannuation scheme that all employers must offer to their employees. The scheme is governed by the KiwiSaver Act 2006. Under the scheme, employees who participate in KiwiSaver must contribute at least 3% of their gross salary or wages to the superannuation scheme of their choice. Employers must also contribute 3% on behalf of each participating employee.

**Health and Safety**

**Health and Safety at Work Act**

The Health and Safety at Work Act 2015 (HSW Act) is the primary statute regulating workplace health and safety in New Zealand. A business must ensure, “so far as is reasonably practicable”, the health and safety of workers who work for the business, including by providing and maintaining a safe working environment and facilities, ensuring that plant used by workers is safe for use, ensuring that risks to health and safety are eliminated or (where that is not reasonably practicable) minimised, and developing procedures for emergencies. A breach of the HSW Act is a criminal offence.

Where there are multiple duty holders who owe overlapping duties to the same workers, those businesses must consult, cooperate and coordinate their activities. Officers (including legal directors and those in senior governance roles) each owe a “due diligence” duty to take reasonable steps to ensure their business is meeting its health and safety obligations. Businesses and individuals are exposed to significant penalties under the HSW Act, including fines and imprisonment.

**Accident compensation**

The Accident Compensation Act 2001 provides entitlements to persons who suffer a personal injury which is covered by the statute. The scheme is essentially a no-fault scheme aimed at compensating and rehabilitating injured people. This Act also prohibits legal claims for compensation arising out of personal injury.

The scheme is very broad based and covers almost all forms of physical personal injury. The cost of the scheme is paid for by levies from employers and employees, and road use taxes. Compensation can cover a person’s loss of earnings due to the injury, the cost of healthcare treatment and rehabilitation, and funeral expenses and death benefits for dependents.

**Employing an overseas person**

All overseas nationals who are not New Zealand residents must have an appropriate visa to work in New Zealand. Australian citizens and permanent residents will not need to apply for a visa before travelling to New Zealand, and can be granted a New Zealand resident visa when they arrive, provided that they meet the character and entry permission requirements. Depending on the type of visa, the process may take some time, therefore any application should be dealt with as soon as possible.

Generally speaking, work visas will be granted if it can be established that the prospective employee has the required skills and experience that New Zealand needs and that there are no New Zealanders available to do the work. In some circumstances, local labour market checks will be required.

It is an offence for an employer to employ an offshore person who does not have an appropriate visa to work in New Zealand.

Section 12 provides further information on New Zealand immigration requirements.

**Further information**

Please contact a member of Bell Gully’s Employment and Workplace Safety team if you require any specific advice in relation to the matters set out in this section or any other employment law advice.
14 TAXATION

Introduction

In New Zealand, income tax is levied under the Income Tax Act 2007. Income tax for individual and corporate taxpayers is levied on annual gross income from all sources, less annual total deductions and any losses carried forward. This net amount is the taxable income.

Gross income broadly includes items that would be regarded as income in commercial terms and includes all gains on financial instruments and short-term or planned profits on land or share transactions. Allowable deductions are all expenses incurred in gaining the income or in carrying on business for the purpose of gaining income. Individuals, companies and trusts are subject to different taxing regimes.

Incomes of husbands and wives are treated separately for tax purposes. Partnerships (including limited partnerships) are not taxed in their own right but individual partners are taxed on their share of partnership income. Trust income is taxable to either the trustees or the beneficiaries depending on the outcome of rules determining who derives the relevant income.

To be subject to tax in New Zealand, the entity must be:

- resident in New Zealand, in which case their worldwide income is taxable in New Zealand; or
- non-resident but deriving income from a source in New Zealand.

Where income does not fall into either of the above categories, but is derived by a foreign entity that is considered to be under the control of New Zealand residents, the New Zealand residents may be taxed on the passive income of that foreign entity.

Where applicable, New Zealand allows a tax credit for foreign tax paid equal to the lesser of that foreign tax paid or the New Zealand income tax payable on the relevant portion of the total income. These rules may be modified by the application of particular Double Tax Agreements (DTAs) that New Zealand has with other countries.

There is no capital gains tax in New Zealand. However, some classes of transaction, which could be capital in nature, are subject to tax. These include:

- particular sales of land and personal property;
- gains on any financial arrangement, including forgiveness of debt; and
- a specified percentage of the value of certain foreign investments owned by New Zealand residents (in some cases annual increases in the value of such investments are taxable).

Taxpayers will generally make an annual return of income for a year ended 31 March. The exception to this balance date is where the taxpayer (other than an individual) is given approval to adopt a different balance date for business reasons.

New Zealand has a consumption-based tax called “GST”. GST is levied on goods and services supplied in New Zealand (with a few exceptions, including financial services and domestic rents).

Corporate income tax

A New Zealand resident company is taxable on its worldwide income at the rate of 28%. An overseas company is taxable at the same rate, but only in respect of its income that has a New Zealand source.

New Zealand has a full dividend imputation system under which tax paid by New Zealand resident companies can be allocated as imputation credits to dividends paid to shareholders.

New Zealand resident shareholders are able to offset these imputation credits against their tax liability in respect of those dividends. Depending on a non-resident’s percentage interest in the company, these imputation credits may either reduce the rate of non-resident withholding tax on some or all of the dividend to 0%, or reduce non-resident withholding tax...
otherwise payable on dividends. Fully imputed dividends paid to non-residents can be effectively paid free of non-resident withholding tax.

Certain New Zealand resident companies are able to maintain an Australian franking credit account (similar to a New Zealand imputation account). This allows tax paid in Australia by New Zealand resident companies to be allocated as franking credits to dividends paid to shareholders.

Where a New Zealand resident company receives dividends from a foreign company, the dividend is usually exempt from New Zealand tax.

To ensure that overseas-owned companies pay the appropriate level of tax on their New Zealand-sourced profits, a transfer pricing regime exists. In order to comply with this regime, it is recommended that taxpayers maintain the appropriate transfer pricing records. There are also thin capitalisation rules for foreign-controlled (e.g., 50% or more ownership) companies operating in New Zealand. These rules also apply to all types of trusts, where 50% or more of the trust’s settlements are made by non-residents. Generally, interest will be fully deductible where the debt-to-asset ratio does not exceed 60%.

When certain conditions are met, a company can carry forward its tax losses and set them off against future taxable income. To maintain the right to carry forward losses, a 49% continuity of ownership test must be satisfied. The test must be satisfied from the beginning of the year in which the loss was incurred to the end of the year in which the loss is offset against taxable income.

New Zealand resident group companies may transfer losses provided that certain conditions are met. A 66% commonality of ownership must be maintained, from the beginning of the year in which the loss was incurred to the end of the year in which the loss is offset against taxable income.

**Personal income tax**

New Zealand residents are taxed on their worldwide income. Non-residents are liable to New Zealand tax only on income deemed to be derived from New Zealand. Individuals are taxed for the year ended 31 March. Those required to file returns must do so by 7 July in each year.

### Individuals will be resident in New Zealand for tax purposes if:

- they have a permanent place of abode in New Zealand, whether or not they have any permanent place of abode outside New Zealand (in very general terms, a permanent place of abode is a fixed or habitual home);
- they are physically present in New Zealand for more than 183 days in aggregate in any 12-month period; or
- they are absent from New Zealand in the service of the New Zealand government.

In most situations, if an individual is resident in more than one country at the same time, DTAs will govern in which country the person will be resident for tax purposes.

Individuals on short-stay secondments may be exempt from New Zealand tax if they are not present in New Zealand for more than 183 days, their overseas employer is resident in a country with which New Zealand has a DTA, and their remuneration is not borne by the non-resident’s place of business in New Zealand.

Where New Zealand does not have a DTA with the employer’s country of residence, the individual cannot be in New Zealand for more than 92 days in aggregate in any 12-month period if they wish to remain exempt from New Zealand tax.

New Zealand also has a new migrants tax regime, which effectively exempts new migrants who become New Zealand tax residents from tax on their foreign sourced income (other than employment income) for a four year period. However, New Zealand sourced income is taxable during this period.

### Rates of tax applying to individuals:

<table>
<thead>
<tr>
<th>INCOME</th>
<th>RATES OF TAX</th>
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</thead>
<tbody>
<tr>
<td>NZ$0 to NZ$14,000</td>
<td>10.5%</td>
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<tr>
<td>NZ$14,001 to NZ$48,000</td>
<td>17.5%</td>
</tr>
<tr>
<td>NZ$48,001 to NZ$70,000</td>
<td>30%</td>
</tr>
<tr>
<td>NZ$70,001 or more</td>
<td>33%</td>
</tr>
</tbody>
</table>
An independent earner rebate also exists for certain people who earn between NZ$24,000 and NZ$48,000. From 1 April 2009, the rebate has been $10 per week and abates at 13 cents for each dollar of income above NZ$44,000.

An attribution rule is in place to ensure that, in defined circumstances, the income from the personal services of an individual is attributed to that individual, rather than being diverted to an associated person, such as a company, that pays tax at a lower rate.

Specifically, the attribution rule will apply when a provider of personal services interposes an intermediary between himself or herself and the person to whom the services are provided, so as to escape the top 33% marginal tax rate. Income is allocated to the provider of the service, rather than the intermediary.

**Income derived from trusts**

Income derived by trusts is separated into trustee and beneficiary income. Trustee income is defined to mean all income derived by a trustee other than income distributed to beneficiaries as beneficiary income. Income retained by the trust and taxed as trustee income is taxed at the rate of 33%.

Beneficiary income is income that is distributed in the same income year in which it is derived by the trust, or within the later of six months from the end of that income year and the date by which the trustee files (or should have filed) the income tax return for the income year. Beneficiary income is taxed at the particular rate of tax applying to the beneficiary concerned. Income of minor beneficiaries is taxed at a flat rate of 33%.

Foreign trusts are also subject to New Zealand tax rules if the settlor is resident in New Zealand. Taxable distributions from certain foreign trusts (i.e., non-complying trusts) are taxed at a penal rate of 45%, so as to discourage New Zealand resident settlors from diverting what would otherwise be taxable income. Non-resident beneficiaries of foreign trusts are only taxed on income derived from New Zealand.

**Non-resident withholding tax**

Dividends, interest and royalties paid by a New Zealand resident company to non-residents are subject to non-resident withholding tax (NRWT).

<table>
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<tr>
<th>Rates of NRWT:</th>
<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Dividends</strong></td>
<td>30% but reduced to 15% for fully imputed dividends derived from portfolio holdings (i.e., less than 10%) and 0% for fully imputed dividends derived from non-portfolio holdings</td>
</tr>
<tr>
<td><strong>Interest and royalties</strong></td>
<td>15%</td>
</tr>
</tbody>
</table>

These rates may be reduced if New Zealand has entered into a DTA with the country of residence of the recipient.

NRWT on dividends, cultural royalties and interest paid to a non-associated person is a final tax on that income. In other cases, NRWT is a minimum tax in which case the recipient must file a New Zealand tax return in respect of the income received. Expenses attributable to that income are deductible and the balance of income is then subject to tax at standard rates.

If a non-resident owns less than 10% of the shares in a New Zealand company that pays a fully imputed dividend, a supplementary dividend can be paid by the company. This effectively refunds the 15% NRWT payable on the dividend.

Where a non-resident company operates a branch in New Zealand, it is subject to tax on branch profits at the rate of 28%. No withholding tax is imposed on profits remitted by a branch operation to its non-resident head office or on dividends paid by that head office to the company’s shareholders.

If interest is payable on debt which is registered under the Approved Issuer Regime, an approved issuer levy equal to 2% of the interest payable by the borrower can be paid in lieu of NRWT. In certain circumstances in respect of widely-held bonds, this levy will be reduced to 0%. The approved issuer regime only applies where loans are between non-associated parties and those loans are not otherwise treated as related party debt.

Where a payment is made by a New Zealand resident company to a non-resident contractor, non-resident contractors tax (NRCT) must be withheld, at the rate of 15% of the payments. The NRCT is an interim liability and the non-resident must lodge a tax return to determine its final tax liability. Credit will be given for any NRCT withheld.
Inland Revenue Department will issue an exemption from this liability if, for example, by operation of a DTA no New Zealand tax is ultimately payable. An exemption can also be obtained if the non-resident posts a bond or demonstrates that it has at least two years’ tax compliance without default.

**Tax obligations of employers**

Employers must deduct PAYE tax (pay as you earn) from payments of wages or salaries made to employees. The PAYE is deducted on account of the employee’s final tax liability for an income year. The employee is able to obtain a refund or be required to pay additional tax depending on the amount deducted.

New Zealand has an accident compensation and rehabilitation insurance scheme, ACC (as discussed in section 13), which abrogates the right to sue for damages for accidental injuries. Both the employer and employee must pay a levy towards this compensation scheme.

Employees pay an earners’ premium which is currently 1.45% of earnings per annum. The employer levy is calculated on the total salaries paid to employees, with a maximum leviable earnings per employee of NZ$118,191. Different industries have different employer levy rates.

Employers who provide non-cash benefits to employees by reason of employment pay Fringe Benefit Tax (FBT). These benefits include company vehicles, low-interest loans and subsidised goods. FBT is payable quarterly at the rate of 49.25%, 42.86%, 21.21% or 11.73% (depending on the employee’s marginal tax rate) on the taxable value of fringe benefits provided to employees during the calendar quarters. FBT is deductible, resulting in a maximum after-tax expense to the employer of 33%.

Employers have the option of paying FBT for the first three-quarters of the income year at either a flat 49.25% rate or a 42.86% rate on all fringe benefits provided. There is an adjustment in the fourth quarter for attributed fringe benefits, with the FBT rate based on the marginal tax rate of the employee to whom the benefits have been attributed.

Any contributions made by an employer to a registered superannuation scheme is deductible to the employer but subject to a withholding tax levied at the rate of 10.5%, 17.5%, 30% or 33% depending on the employee’s annual salary or wages.

Schemes that are retirement schemes under the Financial Markets Conduct Act 2013 are treated as trusts for tax purposes. Earnings of the scheme are generally taxed at the rate of 28% and benefits paid to beneficiaries are currently exempt, whether they are in the form of a lump sum or a pension. As discussed in section 13, employers must deduct KiwiSaver employee contributions from payments of wages and salaries made to employees who are members of a KiwiSaver scheme (unless the employee is taking a contribution holiday). Existing employees may opt into KiwiSaver at any time. New employees are automatically enrolled in KiwiSaver but may opt out within a specified time period.

Employers must also make a compulsory employer KiwiSaver contribution. KiwiSaver employer contributions or contributions to a complying superannuation fund made by an employer are deductible to the employer and are subject to the withholding tax described above.

**Goods and services tax (GST)**

GST is charged at a rate of 15% on the supply of most goods and services. The supply of financial services and the supply of residential rental accommodation are the principal exemptions from GST. GST is intended to be borne by the final consumer of goods and services.

Businesses are able to register for GST and claim a credit for any GST they incur in conducting their business (input credits) while charging GST on their sales (output tax). Where output tax exceeds input credits, the difference is payable to the Inland Revenue Department. Conversely, where the credit claimed on inputs exceeds the GST payable on outputs, the Inland Revenue Department refunds the difference.

GST is charged on exported goods and the provision of services to non-residents at 0%, provided certain criteria are satisfied. GST is levied by New Zealand Customs at 15% on all goods imported into New Zealand.

Certain supplies of land are charged with GST at a rate of 0%. Certain supplies of business-to-business financial services (among other goods and services) are also charged with GST at a rate of 0%, as opposed to being exempt from GST. A reverse charge mechanism means that certain supplies of imported services give rise to a charge, in respect of GST, levied on the importer.
A person can register for GST provided that they conduct or intend to conduct a taxable activity. A taxable activity is any activity carried on continuously or regularly involving the supply of goods and services to another person for money or money’s worth. Registration is compulsory when taxable supplies made in New Zealand have exceeded or are likely to exceed NZ$60,000 in any 12-month period.

GST is imposed (at 15%) on the supply of remote services by non-residents to private New Zealand consumers, if the value of the non-resident’s New Zealand supplies exceeds NZ$60,000 per annum. These rules apply to supplies of digital content and other digital services provided cross border into New Zealand. However, GST is not imposed on supplies of remote services by non-residents to GST registered persons that use those services in the course of their taxable activity.

All GST-registered entities are required to file regular returns of the GST collected by them. In most situations, returns are made every two months. Where supplies are in excess of NZ$24 million per annum, returns are required monthly.

**Tax compliance**

Taxpayers are required to comply voluntarily with the New Zealand tax system. They are encouraged to make honest and accurate returns of income.

New Zealand has a resident withholding tax (RWT) regime that applies to interest and certain dividend payments paid by New Zealand residents to other New Zealand residents (and, in the case of interest, non-residents that have a fixed place of business in New Zealand) and to certain distributions made by Maori authorities.

The RWT is deducted by the payer of interest or dividends and remitted to the Inland Revenue Department unless the recipient holds an exemption from RWT. The recipient obtains a tax credit for the amount deducted. RWT on interest payments is deducted by the payers at the rate indicated by the recipient, being 10.5%, 17.5%, 30% or 33% of the gross amount of interest paid or credited, if the person is a natural person or trustee of a testamentary trust and has provided the payer with their Inland Revenue Department tax file number. RWT on interest payments is deducted at a rate of 17.5%, 30% or 33% if the recipient is the trustee of an ordinary trust and not a testamentary trust. RWT on interest payments is deducted at the rate of 28% or 33% at the election of the recipient, of the gross amount of interest paid or credited, if the recipient is a company (not being a corporate trustee) and has provided the payer with their Inland Revenue Department tax file number.

Where a tax file number is not provided, or a recipient does not indicate a deduction rate, RWT is deducted at the rate of 33% for a natural person or trustee, or 33% for a company (or 28% where a company does not elect a rate, but provides a valid tax file number).

RWT is deducted at the rate of 33% from gross dividends paid. Any imputation credits allocated to the dividend are taken into account in calculating the RWT. An election may be made to exclude a fully imputed dividend paid to a New Zealand resident company from the RWT regime.

Tax is also payable under a provisional tax payment system. Provisional tax is payable by taxpayers, including individuals who are not salary and wage earners who have an income tax liability for a particular year exceeding NZ$2,500. Provisional tax is paid in three instalments over an income year, with the payment dates depending on the balance date of the taxpayer.

Taxpayers who are required to file tax returns must disclose all income liable to tax in their New Zealand income tax returns. Taxpayers must also disclose certain inter-related financial arrangements. There are also requirements to disclose interests in controlled foreign companies, foreign investment funds and foreign trusts.

Individuals who derive their income from salary or wages that have been subject to the correct deductions under the PAYE rules are not generally required to file annual tax returns. There are exceptions for individuals who earn over a de minimis threshold amount of income from other sources, including interest and dividends.

Further information

Please contact a member of Bell Gully’s **Tax team** if you require any specific advice in relation to the matters set out in this section or any other tax law advice.
## 15 GLOSSARY

<table>
<thead>
<tr>
<th>AANZFTA</th>
<th>Free trade agreement between New Zealand, Australia and the Association of South East Asian Nations</th>
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<tbody>
<tr>
<td>APEC</td>
<td>Asia-Pacific Economic Co-operation</td>
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<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<tr>
<td>Building Act</td>
<td>Building Act 2004</td>
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<tr>
<td>CER</td>
<td>Closer economic relations</td>
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<td>CIF</td>
<td>Cost, insurance and freight</td>
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<td>Commerce Act</td>
<td>Commerce Act 1986</td>
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<td>Commission</td>
<td>New Zealand Commerce Commission</td>
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<td>Companies Act</td>
<td>Companies Act 1993</td>
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<td>Consumer Guarantees Act</td>
<td>Consumer Guarantees Act 1993</td>
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<td>Customs</td>
<td>Customs New Zealand</td>
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<td>DTAs</td>
<td>Double Tax Agreements</td>
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<td>Employment Relations Act</td>
<td>Employment Relations Act 2000</td>
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<td>Fair Trading Act</td>
<td>Fair Trading Act 1986</td>
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<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>FBT</td>
<td>Fringe Benefit Tax</td>
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<td>Financial Service Providers Act</td>
<td>Financial Service Providers (Registration and Dispute Resolution) Act 2008</td>
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<td>Fisheries Act</td>
<td>Fisheries Act 1996 and the Fisheries Act 1983</td>
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<td>FMA</td>
<td>Financial Markets Authority</td>
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<td>FMC Act</td>
<td>Financial Markets Conduct Act 2013</td>
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<td>FMC Regulations</td>
<td>Financial Markets Conduct Regulations 2014</td>
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<td>Free trade agreement</td>
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<td>Gambling Act 2003</td>
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</table>
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