



NEW ZEALAND BUSINESS LAW: A GUIDE FOR TRADING AND INVESTING

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Introduction

About this Guide

This guide to New Zealand Business Law provides an overview of some key legal considerations for investing in or trading with a New Zealand business.

The information contained in this guide is accurate as at November 2016. However, laws and government policy change and this guide is necessarily generalised. Specific legal advice should be obtained before making business decisions. We would be very happy to assist.

Why do business in New Zealand?

New Zealand consistently receives high rankings for its attractiveness to investors, including the recent World Bank's Doing Business 2016 publication that placed New Zealand in first place for overall ease of doing business. New Zealand Trade and Enterprise's website provides a comprehensive list of reasons for investing in New Zealand ([Reason to invest](#)). New Zealand's stable economic, legal and political environment provides reassurance of fair and equitable treatment, as does its reputation for anti-corruption ([Transparency](#)) and adherence to the rule of law ([Rule of Law](#)). In November 2016, New Zealand topped a global prosperity index based on factors such as economic quality, business environment, governance, education, health, personal freedom and environment.

New Zealand's free trade agreements with Australia, Brunei, Cambodia, Chile, China, Indonesia, Hong Kong, Lao's, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, and its involvement in the Trans-Pacific Partnership which liberalises trade and investment between 12 Pacific Rim nations, including the United States, also make New Zealand an attractive place to invest.

Who is Anthony Harper?

Anthony Harper is recognised as one of New Zealand's leading commercial law firms, with offices in Auckland and Christchurch. Our legal expertise and innovative approach to client service has rewarded us with longstanding partnerships with a wide range of New Zealand and international clients. With a string of high profile corporate transactions Anthony Harper has earned praise from many sources. We are recommended in influential global guides and directories including the Asia Pacific Legal 500, Chambers and Partners and Asia Law Profiles.

We are specialists in a range of legal areas and industries: banking and finance, construction, corporate advisory, cross border investments, employment, food and beverage, health and safety, hotels and hospitality, insolvency and corporate recovery, insurance, intellectual property, litigation, logistics and transport, property, resource management, retail, retirement villages, technology and trusts and asset planning.

For further information or guidance on any of the topics covered in our guide, or any other aspect of doing business in New Zealand, please contact one of our practice leaders.



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HEADS OF PRACTICE



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1 ESTABLISHING A BUSINESS

1.1 Business structures

There are a number of different structures which can be used to establish a business in New Zealand.

The most commonly used are:

- (a) establishing a branch office for an overseas company
- (b) setting up a (or purchasing an existing) New Zealand registered company.

Other options include trusts and partnerships (including limited partnerships).

1.2 Establishing a branch of an overseas company

Registration required if carrying on business in New Zealand

In order for an overseas company to carry on business in New Zealand, it must apply to be registered under the Companies Act 1993 as an "overseas company". The first step is to reserve the company's name. This is to ensure that there is not already a company in New Zealand with that name, or a substantially similar name. As part of the application process, the overseas company must notify the Registrar of:

- (a) its principal place of business in New Zealand (i.e. its branch office)
- (b) the full names and residential addresses of the directors of the overseas company
- (c) the full name and address of one or more persons who are resident or incorporated in New Zealand and are authorised to accept service of documents in New Zealand on behalf of the overseas company.

It will also be necessary to provide documents evidencing the overseas company's incorporation, together with its constitutional documents (translated where necessary). There is a specific exception for companies incorporated in Australia: where the necessary documentation is already registered with the Australian Securities and Investment Commission ("**ASIC**"), it does not need to be provided to the New Zealand Registrar.

Compliance requirements

An overseas company carrying on business in New Zealand must ensure its full company name and its country of incorporation are stated clearly on all written communications sent by, or on behalf of, the company (e.g. letters, advertising materials, emails) and on all documents signed by the company.

An overseas company must not change its name without first reserving the new name with the Registrar. Further, if there is a change in the directors (or their residential addresses), principal place of business, or constitution of the overseas company, the Registrar must be notified within 20 working days. Like all companies incorporated in New Zealand, an overseas company registered in New Zealand must complete an "Annual Return" once a year confirming the key information about the company (e.g. address details and directors of the company). Australian overseas companies are permitted to file a simplified annual return and are exempt from providing notice of changes to the key information mentioned above.

An overseas company is required to prepare, have audited and register annual financial statements with the New Zealand Companies Office if the company is "large".

An overseas company is "large" if as at the balance date of each of the two preceding accounting periods:

- Total assets of the entity and its subsidiaries (if any) exceed NZ\$20 million
- Total revenue of the entity and its subsidiaries (if any) exceeds NZ\$10 million.

Specific financial statements for the overseas company's New Zealand business must also be registered if that New Zealand business itself is "large".

1.3 New Zealand companies

Incorporation

The process to incorporate a new subsidiary company in New Zealand is simple and straightforward. The process can be completed "on line" and a new company registered within a matter of hours of lodging the required documentation.

To incorporate a company, the requirements are to:

- (a) reserve the company name
- (b) provide a registered office address and address for service (these are often the same). If the new company does not have a physical business presence in New Zealand, a solicitor or accountant may be willing to provide this service for the company;
- (c) have at least one shareholder (there are no particular share capital restrictions – a total share capital of \$1 would suffice) and one or more directors. At least one director must be resident in New Zealand (or Australia, if also a director of a company registered in Australia). The director(s) and shareholder(s) will each need to sign a consent form for registration
- (d) disclose the directors' date and place of birth to the Companies Registrar (this is not made publically searchable)
- (e) disclose the identity of the new company's ultimate holding company (if any). An ultimate holding company is a body corporate which is not itself a subsidiary of another company, and which controls the new company, whether through shareholding or otherwise (e.g. by controlling the makeup of the company's board of directors).

It is not necessary (although it is often desirable) to adopt a constitution. This can be done at the same time as incorporation, or at a later date.

Compliance requirements

Following registration, the subsidiary must call an annual general meeting of shareholders within 18 months, and thereafter no later than 6 months following its balance date. Matters to be dealt with at an annual general meeting may be dealt with by way of resolution in lieu of the meeting, subject to shareholders holding at least 75% (or in some cases, 95%) of the company's shares having consented to the same.

As with a branch registered as an "overseas company", a New Zealand subsidiary will be required to file an annual return and register it with the Companies Office. Certain types of New Zealand companies are required to publically disclose their financial statements (or group financial statements), namely:

- (a) "large companies" (where the total assets of the company and its subsidiaries (if any) exceed \$60 million and/or the total revenue of the company and its subsidiaries (if any) exceeds \$30 million, in each case for the previous two accounting periods)
- (b) "large overseas companies" (which carry on business in New Zealand and which qualify as

large under the parameters referred to in section 1.2 above)

- (c) companies with more than 10 shareholders who do not opt out, or companies with fewer than 10 shareholders who opt in, to the financial reporting regime
- (d) "public entities" (Government agencies and other public bodies).

The financial statements must be audited in certain circumstances. It is important that new companies understand the financial reporting requirements not just for themselves but also (if relevant) their group companies and ultimate holding company. Detailed advice should be sought both to ensure compliance and manage any disclosure of financially sensitive information.

In certain circumstances, it may be preferable to acquire an existing NZ registered company. This would be done in almost all cases through the acquisition of shares in that existing company. There are certain matters which will need to be considered including:

- (a) whether Overseas Investment Office consent will be needed
- (b) whether the approval of the Commerce Commission is needed
- (c) whether the Takeovers Code is relevant.

These matters are considered later in this guide.

1.4 Limited partnerships

Limited partnerships provide the tax "flow-through" treatment of partnerships with the limited liability protection of companies. In New Zealand, they are governed by the Limited Partnerships Act 2008.

A limited partnership is a separate legal entity and is formed by registration with the Companies Office. It must have at least one general partner who is resident in New Zealand and one limited partner (and a person may not be both a general partner and a limited partner at the same time) but there is no upper limit on the number of either class of partner. A general partner may become a limited partner and vice versa.

Partnership agreement

The Limited Partnerships Act requires that the limited partnership has a written partnership agreement which provides for certain specified matters. There is significant flexibility under the Act for limited partnerships to be self-governed by the terms of the partnership agreement.

Role and liability – general partners

General partners are the agents of the limited partnership and are responsible for the active, day-to-day management of the limited partnership. They may invest in the limited partnership, but are not required to.

A general partner is liable for the debts and liabilities of the limited partnership to the extent the limited partnership cannot pay. Where there is more than one general partner, each general partner is jointly and severally liable. A general partner's liability is however typically managed by using a limited liability company as a general partner, which has no assets and which does not "trade".

Role and liability – limited partners

Limited partners are passive investors, cannot bind the limited partnership and are restricted from participating in the management of the partnership, other than certain specified "safe harbour" activities.

The liability of each limited partner is limited to the amount of that partner's capital contribution to the limited partnership. However, if a limited partner participates in the management of the limited partnership, they can expose themselves to the same liability as a general partner.

Termination

There is no limit as to the duration of a limited partnership but termination events can be built into the partnership agreement if a set duration is desired. A limited partnership can be terminated under the following circumstances:

- (a) an event or the expiry of a period of time when, under the partnership agreement, the limited partnership terminates
- (b) a resolution is made by the limited partnership that the limited partnership be terminated
- (c) there is either no general or limited partner in the limited partnership for 10 working days or more
- (d) the limited partnership agreement has lapsed for 10 working days or more.

When a termination event has occurred the limited partnership may pass a resolution to appoint a liquidator to the limited partnership or any partner, creditor or the Companies Registrar may make application to the Court to place the limited partnership in liquidation.

An application can also be made by certain parties to deregister a limited partnership on certain grounds.

Registration

An application to register a limited partnership is made by completing the prescribed form and filing it with the Companies Office. Once registered, the limited partnership's name will appear on the Limited Partnerships Register. A limited partnership has similar administration requirements to a company, including:

- the limited partnership must satisfy a solvency test before making distributions
- minutes of meetings, partner details, capital accounts and accounting records must all be kept
- changes to details of name, address and partners (including new partners) must be notified to the Companies Office.

Overseas limited partnerships

Overseas limited partnerships must apply to be registered under the Limited Partnerships Act within ten working days of commencing to carry on business in New Zealand. Registration information requirements include the name of the overseas limited partnership (which may not be identical or almost identical to another company, limited partnership or overseas limited partnership already registered), country of origin, details of the NZ person authorised to accept service of documents for the overseas limited partnership and details of the general partner(s).

Why use a limited partnership structure?

- **Tax:** The "flow through" tax treatment of limited partnerships can be advantageous by removing a second layer of tax often struck in company structures. Unlike normal companies, partnership gains and losses can be attributed directly to the partners, whose personal tax status will determine the extent to which this is beneficial.
- **Liability:** The limited partnership has the same personal limitation of liability status as a company.

- *Privacy:* While all details of both general and limited partners are required to be provided to the Companies Office, only the details of the general partner are a matter of public record, enabling investors to remain confidential if so desired (although note that in order to comply with New Zealand's international anti-money laundering obligations, the Companies Registrar can obtain information on the beneficial ownership and control of limited partnerships). The partnership agreement itself is not a matter of public record.

1.5 Taxation

New Zealand's tax system principally comprises:

- income tax (including resident and non-resident withholding tax)
- a broad based consumption tax called goods and services tax ("**GST**").

New Zealand does not have a general capital gains tax (although some specific types of transactions may give rise to income tax on capital gains), nor any stamp duty, gift duty or death duty.

There will be a number of tax considerations which will need to be taken into account when considering which business structure to use, and when thinking about carrying on a business or deriving other sources of income in New Zealand. If taxable activities are undertaken both in New Zealand and abroad, then double tax agreements (or tax treaties) may reduce the incidence of double taxation between countries.

Anthony Harper has close links with specialist tax advisers who can advise on taxation issues which may arise.

2 CONTRACT LAW

2.1 Freedom of contract

Under New Zealand law, parties are generally free to contract with whom they like and to decide the terms of the arrangements between themselves. There does exist a backdrop of legislation which impacts on this freedom in certain circumstances, e.g. the Illegal Contracts Act 1970 makes contract terms which compel unlawful activity to be unenforceable. However, overall, New Zealand courts respect the ability of parties (particularly commercial parties) to decide for themselves what their rights and obligations should be.

Other than a small number of New Zealand contracts that must be in writing (e.g. sale of land, employment contracts), oral agreements between commercial parties are generally considered to be a binding and enforceable. However, we strongly recommend that any agreement involving more than trivial value is reduced to writing to avoid future uncertainty.

2.2 Governing law

A contract made in New Zealand need not be governed by New Zealand law. Parties are free to state that the contract is governed by another country's law, which may be their own or a neutral country.

A New Zealand court will generally apply the selected law, even if it is not New Zealand law, to a dispute as long as there is no compelling reason for it not to do so (e.g. if the parties attempt to circumvent a mandatory New Zealand law).

If no governing law is stated in the contract, the courts will apply the laws of the country which has the most genuine connection to the subject matter.

2.3 Implied terms

Along with contractual terms specifically agreed between the parties, New Zealand law may imply certain terms. Implied terms may be by custom (e.g. the parties have customarily acted in a certain way for such a period that they must have intended that the custom should form part of the contract) or to make a contract workable (e.g. something so obvious that it must have been intended).

Certain statutes also imply terms into specific types of agreements. For example, the Sale of Goods Act 1908 implies warranties that the seller has a right to sell the goods and that they are fit for purpose. Most of these implied terms can be contracted out of, although careful drafting is advised to ensure this is properly done.

3 OVERSEAS INVESTMENT REGIME

3.1 General

The policy of the New Zealand Government is to encourage foreign investment, but consent is required for certain transactions involving the acquisition of securities, business assets or interests in land by an "overseas person".

The rules around investment by overseas persons are set out in the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. The regime is administered by the Overseas Investment Office ("OIO"). Information on the OIO and its functions can be found at [Overseas Investment](#).

The acquisition by an overseas person (or an associate of an overseas person) of:

- (a) "sensitive land" or an interest in "sensitive land" (including farm land and "special land")
- (b) "significant business assets"
- (c) fishing quota

will require consent from the OIO (and in some cases, Government Ministers) before the acquisition is given effect.

3.2 Who is an overseas person?

An overseas person is defined as:

- (a) an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand
- (b) a partnership, body corporate or trust where an overseas person or persons have 25% or more ownership or control (or similar requirements are met)
- (c) a company incorporated outside New Zealand, or in which an overseas person or persons have 25% or more of any class of share, or the power to control 25% or more of the company's governing body, or 25% or more of the voting rights, or the right to exercise control over 25% or more of voting rights.

The acquisition of significant business assets and sensitive land are discussed below. However, fishing quotas will not be discussed given the broad and general nature of this guide. If you require specialist advice on that topic please contact us.

3.3 Significant business assets

The acquisition of significant business assets is (broadly):

- (a) the acquisition of 25% or more of the shares in an existing business if the amount paid for the shares, or the value of the New Zealand assets of that business, exceeds NZ\$100 million
- (b) the acquisition of property (including goodwill and other intangible assets) of an existing New Zealand business if the amount paid for those assets exceeds NZ\$100 million
- (c) the establishment of a new business in New Zealand if the total amount spent in establishing that business exceeds NZ\$100 million.

The threshold for Australian non-government investors is NZ\$501 million (for the year commencing 1 January 2017, adjusted annually to reflect GDP movements) rather than NZ\$100 million.

Investor test criteria

In determining whether to grant consent, the OIO will test the application against the core investor test criteria, which broadly relate to business acumen, financial commitment, good character and immigration rules. We can provide further details on the consent criteria, and the application to particular business asset acquisitions, on request.

3.4 Sensitive land

An overseas investment in sensitive land is the acquisition by an overseas person, or an associate of an overseas person, of:

(a) a freehold interest, or a leasehold interest for a term of three years or more (including rights of renewal); or

(b) a 25% or more shareholding in a company that has such a freehold or leasehold interest,

in land which:

- exceeds 5 hectares and is not in an urban area
- is situated on particular islands
- includes the foreshore or seabed, or is greater than 0.2 hectares and adjoins the foreshore
- exceeds 0.4 hectares and includes the bed of a lake, any land which 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 is an historic place or exceeds 0.4 hectares and adjoins similar types of land as above.

Determining whether land is "sensitive" is complex and professional advice should be obtained.

Farm land

Non-urban land includes farm land, being land used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry, or livestock. Farm land must first be offered to the New Zealand public for acquisition (and be available on the open market for at least 20 working days) before OIO consent may be granted.

The requirement that farm land be offered on the open market does not prevent that land from being the subject of the sale to an overseas buyer. The vendor is not required to accept an offer from the open market, but the procedure must be complied with before consent can be granted.

Special land

If any sensitive land includes "special land", being foreshore, seabed, riverbed or lakebed, that special land must first be offered to the Government (although the Government can only acquire it if consent is granted to the overseas investment and the transaction proceeds).

Benefit to New Zealand

In addition to the investor test criteria noted above at section 3.3, where an application involves sensitive land, unless the overseas person is, or is controlled by, New Zealand citizens resident in New Zealand, Ministers must also consider the benefit of the transaction to New Zealand, which involves an analysis of certain environmental and economic factors. We can provide further details on the consent criteria if necessary.

3.5 Timing

The OIO advises that, while there is no statutory timeframe within which an application for consent must be decided, the OIO aims to have 90% of applications for consent (where no special land is involved, nor third party consultation is required) assessed within 50 working days of the date of registration of the application (after an initial 5 working day "quality assurance" check of the application).

4 PURCHASING LAND IN NEW ZEALAND

4.1 Titles system

Titles to freehold land, known as Computer Freehold Registers, are recorded on an electronic land register, enabling real-time searching and registration of dealings with land. Interests affecting the land, such as mortgages, registered leases and easements are recorded on the title. Each title refers to a parcel of land (or "lot") which is shown on a registered survey plan. A copy of the relevant parts of the survey plan is part of each Computer Freehold Register instrument.

This "Torrens" system enables a buyer and their lawyer to rely on a single electronic title document, instead of paper deeds. The government guarantees indefeasibility of title (meaning an owner's title can't be nullified or overridden).

A freehold (or "fee simple") title is the most common and superior type of land-holding, and makes up the majority of national housing and commercial property stock.

Leases of freehold land can be registered and a leasehold title issued. Such leasehold titles can be transferred and mortgaged, although registration of leases is only common in cases of very long-term leases of unimproved land (often called a "ground lease"). Leasehold titles to residential property are generally rare at a national level, but are common in some particular areas, such as newer waterside developments on the outskirts of Auckland's central business district. In these instances, the ground lease terms need to be considered carefully.

The Unit Titles Act is New Zealand's condominium or apartment-type law. Each unit has a "unit title", which is a freehold strata title. The owner automatically becomes a member of a body corporate. The body corporate holds the common property of the development (i.e. communal spaces, facilities, building roof and exterior). The body corporate must maintain and insure the common property and it is entitled to levy annual fees to each unit owner, calculated with reference to the size of each unit. The body corporate is usually professionally managed.

"Cross-leases" are regularly encountered in the larger cities, usually in the cases of smaller residential properties where 2 or 3 dwellings (called "flats") sit on one lot and share common driveway access. This was a title structure used extensively between the 1960's and 1990's, which involves the flat owners jointly owning the total underlying lot, but granting each other exclusive leases of their respective flat areas. Cross-leases have fallen out of favour in new developments, as the arrangements can be fraught with issues around extensions to flats causing defects to the leasehold titles as well as problems with common property maintenance and insurance. Purchase of a cross lease dwelling requires particular care in due diligence.

In some rare instances land may be subject to Maori claim or buy-back rights.

4.2 How land is bought and sold in New Zealand

A real estate agent is usually the first point of contact for a buyer when looking to buy a property in New Zealand. The agent acts for the seller in the marketing of the property, although agents can also be engaged to assist buyers. The agent may also assist with the preparation of a contract when a buyer is found, although on more complex sales (including commercial property or farms) the contract is arranged in conjunction with the parties' lawyers.

Sales by tender are common for sales of farm land and premium commercial or residential property. Auctions have become increasingly popular for sellers of residential properties in recent years, particularly in Auckland, where there is high buyer demand and increasing property prices due to lack of supply. In other cases property deals are by negotiation.

4.3 The form of the contract

Most contracts for sale and purchase of land are based upon a standard-form contract jointly published by the Real Estate Institute of New Zealand and the Auckland District Law Society. This form is well known to all agents and lawyers, which reduces transaction times and costs, as it

remains only for them to consider amendments to it.

Unlike the practice in the United Kingdom and many other countries, the contract is entered into as soon as a price is agreed, subject (if necessary) to buyer's conditions about such things as finance or a satisfactory building inspection. The seller usually can't withdraw from the contract after it is signed.

Before becoming committed to a property purchase, a buyer should be satisfied with the following due diligence matters:

- (a) its ability to finance the purchase
- (b) its ability to get suitable insurance for the property (which has been a particular issue in the Christchurch area since the 2010 and 2011 earthquakes)
- (c) there being no issues in the title to the property, including easements and restrictive covenants which may affect the use of the property
- (d) a Land Information Memorandum from the local Council ("LIM" - a summary of the local Council's records concerning the property) showing no compliance or natural hazard issues
- (e) all necessary consents are obtained, particularly Overseas Investment Office ("OIO") consent (for foreign buyers), if required
- (f) if there is a lease on the property, that the terms of the lease are satisfactory.

In certain circumstances, advice from other consultants may be appropriate; for instance an accountant (as to tax structures), a building surveyor (as to soundness of buildings), a planner (as to restrictions imposed by local government bodies), a farming consultant (for going-concern rural land), and/or environmental/geotechnical experts for land intended for development.

In the case of auctions or tenders, a buyer will need to be satisfied with all due diligence matters before the auction or tender closing date, as such contracts are usually expected to be free of buyer's conditions.

The extent to which a seller will sign a conditional contract may depend on the state of the market and the number of people interested in the particular property. It is common for the buyer to pay a 10% deposit to the real estate agent, either at the time of signing the contract or upon satisfaction of any conditions. If paid at the time of signing, it must be held on trust by the agent until the agreement is unconditional, or refunded to the buyer in full if the contract is ended because of non-satisfaction of a condition.

4.4 Transfers and settlement

Transfers of land ("conveyancing") must be handled by lawyers or registered conveyancers, who are able to electronically submit dealings to the land registry system. This typically happens immediately after the monetary completion (or "settlement") has occurred, which is also usually handled between the parties' lawyers.

Where a buyer is borrowing money from a bank for the purchase, the bank will usually also instruct the buyer's lawyer to arrange signing of the loan and security documents. A mortgage to the bank will generally be registered by the buyer's lawyer in conjunction with the transfer. On particularly high-value or complex purchases, the bank may choose to instruct its own lawyers.

Buyers' lawyers cannot complete transfer or mortgage dealings without verifying the identity of their clients. For an overseas buyer this will involve, at a minimum, production of a valid passport. If the buyer is not present in New Zealand the task of identity verification will be delegated by the lawyer to another responsible person in the relevant country, such as a lawyer or notary public, who must attend on the client in person. These steps, and others, are intended to prevent fraudulent property dealings and international money laundering.

4.5 Tax information

There are no stamp duties effecting transfers.

Since 1 October 2015, every buyer and seller of property must complete a Tax Statement, the information on which must be uploaded to the government before the transfer can be registered. An exemption as to some parts of the Tax Statement applies where the property will be the buyer's main home. There is a detailed test about what a "main home" is. If this exemption doesn't apply, the buyer must provide a New Zealand Inland Revenue Department tax number ("IRD number") in its Tax Statement. If they do not have an IRD number, they will have to get one. In addition, any party who is a tax resident in another country must give the name of that country and a tax identification number for it. This is all largely an information gathering exercise by the New Zealand government, intended to generate data about (among other things) foreign investment in New Zealand's property market, especially the competitive Auckland residential market, and to allow tax information sharing between New Zealand and other nations.

It is important to note that the requirements for applying for an IRD number include having a bank account in New Zealand. In establishing an account the bank will be required to undertake identity verification and anti-money laundering checks in accordance with international protocols.

The information provided in a Tax Statement also assists the government to enforce taxation of capital gains on property. While there is no universal capital gains tax applying to the sale of property, gains will be taxable in the hands of habitual property investors or where the IRD considers the property to have been bought with the intention of resale for profit. Since 1 October 2015 the intention to resell is assumed where any property is bought and sold within 2 years, although some limited exemptions exist, including where the house has been the seller's main home.

4.6 Councils and rates

All city and district Councils (local government authorities) charge local land taxes ("rates") to all property owners, to fund local infrastructure services. These are established with reference to the approximate value of the property. The rates for a typical Auckland house, for instance, may be several thousand dollars a year; and higher for premium property, or lower for apartments and in smaller towns and cities.

The Councils are also the government authorities for all planning and building matters. Their powers and duties are prescribed by national laws and regulations.

4.7 Tenanting investment properties

Residential tenancies are subject to the terms and conditions provided by the Residential Tenancies Act 1984. There is a standard-form tenancy agreement required by that Act. Periodic tenancies are most common in the residential market, meaning the tenancy can be ended at any time by landlord or tenant subject to certain notice periods (being longer where the landlord gives the notice). Fixed-term tenancies, where used, are typically for 1 year, with no automatic renewal right for the tenant. Most property maintenance and repair costs are met by the landlord, except where the tenant has been negligent. Rates are paid by the landlord.

Commercial property leases are typically prepared by the landlord's lawyers. The lease forms vary, although the commercial lease published by the Auckland District Law Society is well known and widely used. Commercial leases are most commonly on "net lease" terms, where the tenant pays all routine property outgoings, including rates; however "gross lease", or all-inclusive, terms are common in the Wellington commercial property market. The Property Law Act implies certain terms into all commercial leases, however there are no statutory automatic rights of renewal favouring tenants.

Most real estate agencies offer property management services to overseas owners.

4.8 Sensitive land and the overseas investment regime

As discussed at section 3 above, the acquisition of interests in property by an overseas person may require regulatory consent. We recommend that foreign buyers obtain legal advice as to whether OIO approval is required before entering into any contract involving land in New Zealand. If there is no opportunity to take legal advice then the contract should be made subject to the buyer obtaining OIO approval if required.

5 ENVIRONMENT AND RESOURCE MANAGEMENT

5.1 The Resource Management Act

The principal piece of environmental legislation in New Zealand is the Resource Management Act 1991. The Act has a broad purpose, being the sustainable management of natural and physical resources. Sustainable management is defined as managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while:

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

In practice, sustainable management is achieved through, first, a hierarchy of planning documents and, secondly, through the mechanism of the resource consent process.

Planning Documents

Planning documents include, in order of hierarchical importance:

- (a) National Policy Statements
- (b) Regional Policy Statements
- (c) Regional Plans
- (d) District Plans.

The Act incorporates a fixed process for the development of these planning instruments, with a particular focus on enabling wide rights of consultation and community participation.

Resource consents

Regional and District Plans group activities into the categories of permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited. Resource consents are required for controlled, restricted discretionary, discretionary and non-complying activities. Resource consents cannot be granted for prohibited activities. Each resource consent application must include an assessment of effects of the proposal on the environment, the nature and complexity of which will vary depending on the scale of a particular project. In making decisions on applications for resource consents, the consent authority tends to focus on an evaluation of the "actual and potential effects" on the environment of allowing the activity and whether or not granting consent would be consistent with the policy provisions of any relevant planning instrument.

A particular feature of the Act is devolved decision making, whereby the New Zealand Government has consistently taken the philosophical approach that decisions on environmental management are best made by those directly impacted, i.e. local authorities (councils). In certain circumstances where, for example, large infrastructure projects of national significance are proposed, central Government can intervene and direct that a decision be made either via a call-in process, or by the Environmental Protection Authority.

5.2 Mineral exploration and extraction

New Zealand is mineral rich and mineral exploration and extraction is an important contributor to the New Zealand economy.

Prospecting for, or exploration or mining of, Crown-owned minerals (whether on land or off-shore) requires a permit issued by New Zealand Petroleum & Minerals pursuant to the Crown Minerals Act

1991 and associated regulations and Minerals Programmes. The Crown minerals regulatory regime also sets out extensive ongoing reporting and other compliance obligations (including royalties payable to the Government).

The Crown (New Zealand Government) owns all petroleum (oil and gas), gold, and silver in New Zealand and has rights to all minerals in the Exclusive Economic Zone (being offshore between 12 and 200 nautical miles) and the Extended Continental Shelf (when the shelf extends beyond the EEZ out to a maximum of 350 nautical miles). The Crown also owns about half of all other minerals in New Zealand (including coal). The rest is privately owned. Specific professional advice should be sought to determine the ownership of on-shore minerals other than petroleum, gold and silver.

In addition to a permit, for anything more than "minimum impact activity" (e.g. surveying and hand sampling) any necessary land access arrangements must be put in place by contract and resource consents are likely to be required under the Resource Management Act 1991 or marine consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

5.3 Hazardous substances

The importation, manufacture, storage, transport, handling, labelling and disposal of "hazardous substances" is regulated in New Zealand, principally under the Hazardous Substances and New Organisms Act 2006 and associated regulations and notices, although other industry specific regulations may also be relevant. Licences and permits may be required for staff, installations and containers.

5.4 Climate change and the Emissions Trading Scheme

What is the Emissions Trading Scheme (ETS)?

As a signatory to the Kyoto Protocol, New Zealand has international obligations to reduce its greenhouse gas emissions. The Emissions Trading Scheme ("**ETS**") is a market-based approach for reducing emissions of greenhouse gases. It does so by putting a price on emissions and then charging certain sectors of the economy for the greenhouse gases they emit.

Who monitors the ETS?

The Environmental Protection Authority is the administering agency for the ETS and runs the New Zealand Emission Unit Registry, which records the units (sometimes called "carbon credits") held by participants. The primary unit of trade in the ETS is a New Zealand unit ("**NZU**") ((one unit = one tonne of carbon dioxide released into the atmosphere)). Since 1 June 2015⁴, the ETS became a domestic scheme in which only NZUs, New Zealand issued Assigned Amount Units ("**NZ AAUs**") and Second Commitment Period Certified Emission Reductions ("**CERs**") are eligible to be used to meet ETS obligations. Further information on these units can be found at [Environmental Protection Authority](#), or by contacting us for advice.

Who participates?

The sectors which are automatically included in the ETS are: forestry, transport fuels, electricity production, industrial processes, synthetic gases, agriculture and waste. People carrying out these activities are required to participate in the ETS.

Most participants are required to meet their obligations under the scheme by surrendering emission units. Surrendering a unit means it cannot be used again, for example, it cannot be given to another participant.

Compliance

The Climate Change Response Act 2002 contains significant penalties for failure to comply (including criminal conviction and potential imprisonment). The offences are strict liability and therefore it is important to be aware of ETS obligations if you are engaging in an industry where participation is mandatory, and affected parties should seek specialist advice.

6 Capital Markets

6.1 NZX

NZX Limited ("**NZX**") operates the only registered securities exchange in New Zealand. There are three main markets forming the exchange:

- (a) NZSX (NZX Main Board) – this is the main market for equity securities
- (b) NZAX (NZX Alternative Market)/NXT (NXT Market) – this is a lower cost, more flexible market for small to medium, fast-growing businesses
- (c) NZDX (NZX Debt Market) – for corporate and government bonds and fixed income securities.

Listings are no longer being accepted on the NZAX, which has been replaced with the NXT Market.

It is possible for an overseas company to have a "dual primary listing" on both an NZX market and an overseas exchange. A company with a full listing on certain overseas exchanges can also register an "overseas listing" on an NZX market meaning that it will not have to comply in full with the NZX Listing Rules.

There are listing rules for each of the three markets described above which can be found on the NZX website ([NZX Regulation](#)).

6.2 Financial markets regulation

The Financial Markets Authority ("**FMA**") is the regulatory authority responsible for monitoring the capital markets in New Zealand and ensuring compliance with financial markets legislation relating to securities, financial reporting, and the provision of financial advice.

The FMA is also responsible for enforcing the insider trading, market manipulation and other dealing misconduct provisions under the Financial Markets Conduct Act 2013 ("**FMC Act**") and its associated regulations. The "insider trading" rules prohibit individuals and entities with price-sensitive information about the securities of a listed company (where that information is not generally available to the public) from trading in those securities. It also encourages "fair dealing" in relation to financial products and services, by prohibiting misleading or deceptive conduct, the making of false or misleading representations, the making of unsubstantiated representations or offers of financial products in the course of unsolicited meetings.

6.3 Offering securities in New Zealand

The FMA regulates the offering of securities in New Zealand in accordance with the FMC Act.

In general terms, securities may only be offered to the public in New Zealand if the issuer has prepared and lodged a product disclosure statement which complies with the FMC Act. The types of securities that are regulated are debt securities, equity securities, managed investment products and derivatives.

The FMC Act sets out some exceptions from the requirement for a product disclosure statement, such as offers made to "close business associates" or "wholesale investors" (including large or professional investors), certain offers under employee incentive schemes and smaller offers to raise up to NZ\$2m from up to 20 investors in a 12 month period.

Serious penalties apply for an offer of securities in breach of the FMC Act, including potential criminal liability. Accordingly, professional advice should be sought on any proposed issue of securities in New Zealand.

6.4 Takeovers Code

The Takeovers Code is designed to protect minority shareholders where there is a substantial change in control of a Code company. The Code applies to all companies listed on the NZX and to unlisted companies with 50 or more shareholders and 50 or more share parcels.

The "Fundamental Rule" contained in the Code is that a person (and its associated parties) must not acquire more than 20% of the voting securities in a Code company (or increase their control if they already hold more than 20%). In order to avoid a breach of the Fundamental Rule, it is necessary to comply with one of the following exceptions:

- (a) a full or partial takeover offer to acquire shares from all shareholders in the Code company (a full offer being an offer to purchase all shares held, and a partial offer being an offer to acquire a specified percentage of shares from each shareholder)
- (b) an acquisition or allotment of securities that is approved by an ordinary resolution of the shareholders of the Code company who are not involved in the proposed acquisition or allotment
- (c) the "creep" exception, which allows a person holding between 50% and 90% of the voting securities on issue to increase their voting percentage by up to 5% in any 12 month period
- (d) through "compulsory acquisition" where a person already holds 90% of the voting securities in the Code company (in this case the majority holder can force the remaining shareholders to sell their shares to it, and the minority shareholders can also force the majority shareholder to buy them out)
- (e) where an exemption is granted by the Takeovers Panel.

Before any heads of agreement or other contracts are entered into to acquire an interest in a New Zealand company it is important to check if compliance with the Takeovers Code is necessary. Further information can be found at [Takeovers](#).

6.5 Financial services regulation (financial service providers and financial advisers)

The Financial Advisers Act 2008 provides a regulatory regime for financial advisers and brokers (including those that advise on financial products, provide an investment planning service or make investment management decisions on behalf of another person). That Act sets authorisation or registration requirements, disclosure obligations and minimum standards of professionalism, competency and conduct.

All persons carrying on the business of providing a "financial service" must be registered on the Financial Service Providers Register and must belong to a dispute resolution scheme if they provide services to "retail clients". The purpose of this database is to enable members of the public to access information about the name and address of a financial service provider and the name of the dispute resolution scheme (if applicable) the provider belongs to. The registration requirement is also intended to ensure certain people are prevented from being involved in the management of financial service providers, such as those with specific criminal convictions

A "financial service" includes (among other matters):

- (a) a financial adviser service (giving financial advice or investment planning in the ordinary course of business)
- (b) keeping, investing, administering, or managing money, securities, or investment portfolios on behalf of other persons
- (c) being a registered bank
- (d) providing credit under a credit contract (defined broadly)

- (e) giving financial guarantees
- (f) participating in an offer of securities to the public either as an issuer of the securities or as the promoter (including as a trustee, unit trustee, superannuation trustee or manager)
- (g) operating a money or value transfer service or foreign exchange
- (h) acting as an insurer
- (i) entering into derivative transactions or futures contracts.

Registration is relatively straight forward, but there are significant penalties if any person who is in the business of providing a financial service is not registered. A fine of up to NZ\$300,000 for body corporates, and imprisonment or a fine of up to NZ\$100,000 for individuals, may be imposed for failure to register. A director who knowingly fails to prevent the offence also commits an offence.

6.6 No currency restrictions

New Zealand does not have any restrictions on the buying and selling of foreign currency, nor on the repatriation of capital or earnings of a New Zealand business to overseas investors (although there may be tax implications).

7 EMPLOYMENT

7.1 The employment relationship

Establishing and maintaining good faith relationships is the basis of employment law in New Zealand. It is also a requirement of the Employment Relations Act 2000 which is the key piece of legislation in this area.

Types of employment agreements

Every employee in New Zealand must have a written contract called an employment agreement. This can be either an individual agreement or a collective agreement.

There are some provisions that must be included in employment agreements by law, and there are also a number of minimum conditions that must be met regardless of whether they are included in employment agreements. Employment law also provides a framework for negotiating additional entitlements.

Collective employment agreements/unions

Employers can enter into collective employment agreements with unions representing a group of two or more employees. Unions are regulated societies in New Zealand and are currently the only party allowed to enter into collective agreements with employers. Employees can choose whether or not to join a union, and it is unlawful for an employer (or anyone else) to put unreasonable pressure on an employee to join or not join a union.

Fixed term agreements

Fixed term agreements are used when an employer has a genuine reason based on reasonable grounds to offer a fixed term. This must be explained at the start of the employment relationship. The terms must be recorded in the employment agreement and set out how the employment will end and why. This could be, for example, as a result of the completion of seasonal work or a particular project. Such workers have the same rights as other employees, except that their jobs will finish at the end of the fixed term.

Part-time/casual employees

Part-time employees (who simply work fewer hours than full-time employees) are regarded as permanent employees and have the same rights as full-time employees on that basis.

Casual employees, on the other hand, work intermittently on an "as and when" required basis. Although casual employees also generally derive the same rights as permanent employees, the way in which annual holidays, sick and bereavement leave are applied can vary for these employees.

Leave entitlements

New Zealand law provides for a minimum statutory leave entitlement of four weeks' holiday, 11 public holidays, five days' sick leave and three days' bereavement leave each year. There is no long service leave available as a matter of right in New Zealand. If an employer wishes to offer more than the minimum statutory entitlements, this should be incorporated into an employee's employment agreement as necessary.

Employees may be eligible for paid and unpaid parental leave if they meet certain criteria. The paid leave is funded by the Government, not employers. In most instances, employers must keep jobs open for employees on parental leave.

Employees may also be entitled to other types of leave, for example if they've been injured in a work accident (see Accident Compensation Corporation below) or are training in the armed forces.

Trial period and probationary period

Employers can make an offer of employment that includes either a trial period or a probationary period. Although of similar application, these clauses have a slightly different effect.

A trial period gives an employer the ability to assess the suitability of an employee for a period of 90 days. The employer can then choose to terminate the employee's employment before or at the end of the 90 day period, without the risk of an employee bringing a personal grievance against the employer for unjustified dismissal. However, an employee can raise a personal grievance on other grounds (as opposed to unjustified dismissal), such as discrimination, harassment or unjustified action by the employer. The 90 day trial period must be mutually agreed in writing and is subject to certain language being used.

A probationary period allows an employer to assess the suitability of an employee for a particular role but places greater obligations on an employer in terms of satisfying employment requirements should there be any issues with performance. However, unlike a trial period, probationary periods can be for longer than 90 days and employees can bring a personal grievance claim if they feel they have been unjustifiably dismissed.

Employees on both trial periods and probationary periods are entitled to all other minimum employment rights.

7.2 Ending the employment relationship

There are several ways in which employment relationships can be ended, including retirement or resignation, dismissal and redundancy. There is no ability to end a permanent employment agreement "at will" in New Zealand.

There is no set age to retire from work in New Zealand, and employers cannot require employees to retire just because of their age. Employees may hand in their resignation at any time, provided they give reasonable notice in accordance with their employment agreement.

There must be a good reason for a dismissal and the dismissal must be carried out fairly, which will depend on the circumstances. The test whether a dismissal is justified is whether an employer has acted in the way in which a fair and reasonable employer would have done in the circumstances. Any relevant provisions in the employment agreement must be followed.

An employer must have a genuine work-related reason for a redundancy. The employer cannot use redundancy as a way of dismissing an employee for reasons relating to the employee personally (such as their performance). The employer must provide information to employees when they are considering changes that will affect their jobs. Generally, there is no right to redundancy compensation unless employers and employees or, where relevant, their union have agreed to it.

7.3 Employment problems/personal grievances

Every collective and individual employment agreement must contain a clear explanation of the processes for resolving employment relationship problems. A problem includes anything that may harm an employment relationship, including relationships between an employer and employees, as well as among employees.

Some of these problems may be the basis of a "personal grievance" which requires specific treatment under New Zealand legislation. Personal grievances can be brought against an employer for a number of reasons such as actions giving rise to an unjustified dismissal, or if an employer has acted unjustifiably in the event of a redundancy. An employee must raise a personal grievance within 90 days of the action complained of.

The employer and employee have the option of trying to resolve the problem through mediation before applying to the Employment Relations Authority for determination (a judicial-based forum in New Zealand), followed by the Employment Court (the next level of judicial determination).

7.4 Transfer of employees on sale of business

Employers have some specific legal obligations where a business is sold or transferred, or work is contracted out. Most employers must follow the procedures set out in the compulsory "employee protection" clause contained in the employment agreement to protect employees in these types of situations.

Employers who employ staff performing certain catering, cleaning, caretaking, laundry and orderly work have special obligations that provide continuity of employment protection to employees during restructuring.

7.5 Health and safety

The Health and Safety at Work Act 2015 imposes duties upon persons conducting a business or undertaking ("**PCBU**"), and officers of the PCBU, to ensure the health and safety of workers and workplaces.

Under the Act, a PCBU has the primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, and workers whose activities in carrying out work are influenced or directed by the PCBU. Further, a PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person. Under the Act, "worker" includes, among other things, employees, contractors and subcontractors. "Workplace" is defined as any place that a worker is likely to go. In this way, a PCBU may owe duties to those outside of the strict employment relationship itself

Where more than one PCBU owes duties with regard the same matter under the Act, each PCBU with the duty must, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other PCBUs.

Officers must proactively manage workplace health and safety and have a positive duty to exercise due diligence to ensure the PCBU complies with its health and safety obligations. An "officer" includes directors and others in a position to occupy significant management influence (including the chief executive). A failure of an officer to comply with this due diligence duty could result in prosecution and a fine. Further, an officer can face a term of imprisonment but only in circumstances where he or she was found to have been reckless as to the risk of death or serious injury or illness.

7.6 Other obligations

KiwiSaver

KiwiSaver is a voluntary work-based savings initiative to help New Zealanders with their long-term saving for retirement. There are various obligations imposed on an employer for managing the scheme including providing employees with required information, making deductions from their remuneration and making the required contributions should an employee choose to join the scheme. Members of KiwiSaver are obliged to make a minimum 3% contribution of their gross salary or wages, and employers must make a 3% contribution on behalf of all participating employees. Failure to comply with these obligations can lead to penalties.

PAYE (Pay As You Earn)

PAYE is the system set up by income tax legislation for taxing the income of employees. It must be deducted from most payments made to employees, and paid to the Inland Revenue Department. It applies to all wages, salaries, and extra payments (for example, bonuses and lump sums).

Minimum Wages and records

Generally the adult minimum wage prescribed by regulation must be paid to employees aged 16 years and over. Wage time, holiday and leave records must be maintained in accordance with statute.

ACC (Accident Compensation Corporation)

ACC is a "no fault" scheme which covers any accident that occurs in New Zealand, including workplace accidents. Put simply, ACC is a form of statutory "insurance" administered by a Government agency (the Accident Compensation Corporation) that addresses any compensation and income lost as a result of an accident, whatever the cause. Employers are legally required to pay annual levies for all employees employed by it based on the nature of the profession and the number of employees. Employees also pay ACC premiums which are deducted along with PAYE. When an employee is injured in the workplace, the employer is obliged to pay the first five days the employee is absent. If it is not a workplace accident, then the employer is not obliged to do so.

The 'quid pro quo' of this no fault compensation scheme is that court proceedings for damages from personal injury are generally prohibited in New Zealand.

Discrimination

An employer is prohibited from discriminating against an employee in their employment in relation to race, gender, religious belief, sexual orientation, and other prescribed grounds. Discrimination in the employee's employment may constitute grounds for a personal grievance under the Employment Relations Act.

Foreign workers

An employer must not employ a person who is not entitled to work in New Zealand, i.e. is not a New Zealand resident nor a holder of the requisite visa. An employer who hires such a worker could be subjected to a fine of up to \$50,000, even if he or she did not know that the employee was not entitled to work in New Zealand.

7.7 Independent contractors

Another type of relationship can be utilised to engage workers separate to the employment relationship: an independent contractor relationship arising between a principal and contractor. Contractors are commonly engaged under an independent contractor agreement or a "contract for services" and do not derive the same rights and benefits as employees do under the applicable legislation in New Zealand.

Normally it is relatively straightforward as to whether a person is engaged under an employment agreement or an independent contractor agreement. However, the types of agreements entered into between the parties are not necessarily conclusive of the nature of the relationship between them. They can be challenged by either party by making an application to the Employment Relations Authority or the Employment Court which will examine the situation using a number of tests in order to determine the real nature of the relationship.

8 CONSUMER LAWS

8.1 Fair Trading Act

The Fair Trading Act 1986 is administered by the Commerce Commission (although in most cases is enforceable by anyone) and covers conduct relating to the promotion and sale of goods and services.

Broadly, it prohibits conduct in trade which is misleading or deceptive (or likely to mislead or deceive), the provision of false information, the making of unsubstantiated representations, and unfair trade practices. It also provides for the disclosure of certain consumer information and promotes product safety.

The Fair Trading Act does not compel businesses to provide information on its goods or services to consumers in all circumstances, but it ensures that any information that is provided to consumers is accurate and prohibits the withholding of important information so consumers can be confident that information they receive when making decisions is reliable and accurate.

Unfair contract terms (defined in wide terms) are also prohibited from being included or relied upon in "standard form consumer contracts".

The Act's broad ambit, mandatory application (it cannot generally be avoided by contract), and potentially severe penalties (including fines up to NZ\$200,000 for individuals and NZ\$600,000 for body corporates, as well as management banning orders) mean that anyone supplying goods or services in New Zealand ought to be aware of the Act.

8.2 Consumer Guarantees Act

The Consumer Guarantees Act 1993 sets minimum guarantees about goods and services ordinarily purchased for personal or household use, from sellers in trade.

Guarantees in relation to goods include that they will be of acceptable quality, delivered in a timely manner (if relevant), comply with description/sample, and be reasonably fit for any particular purpose the consumer makes known and for any particular purpose for which the supplier represents they are or will be fit.

Guarantees in relation to services include that they will be performed with reasonable care and skill, fit for the purpose supplied for and completed within a reasonable time.

Sellers cannot contract out of their obligations under the Consumer Guarantees Act except in relation to goods or services which are supplied and acquired by parties in trade and it is fair and reasonable to contract out. The Act sets out various remedies for consumers against suppliers and manufacturers when the guarantees are not complied with.

8.3 Credit Contracts and Consumer Finance Act

The Credit Contracts and Consumer Finance Act 2003 governs the lending of money to consumers. It is designed to assist consumers in making informed choices and to provide a more "level playing field" for consumers.

The Act covers a range of transactions where money is loaned for personal use, including:

- (a) consumer credit contracts where a borrower is given credit for personal use, such as through a mortgage, credit card, arranged overdraft, hire purchase, personal or cash loan
- (b) consumer leases, where someone is leasing goods for personal use and either has an option to purchase the leased goods, or the term of the lease is over one year

- (c) buy-back transactions, where a homeowner transfers their home (or an interest in their home) to a transferee, who typically pays their debts or gives them money. The former homeowner (the occupier) has the right to continue living in the home and to buy it back at some time in the future.

Lenders are required to disclose key information about a contract in a clear and accurate manner, including in relation to the lender's fees (which must be reasonable). Oppressive requirements on borrowers are prohibited, as are oppressive enforcement measures.

Borrowers are entitled to cancel their contract in the first few days after receiving disclosure and have the right to repay what they owe on their contract early. They are also able to ask lenders to change their contract if they are suffering unexpected hardship.

Lenders in relation to consumer credit transactions (other than consumer leases) must comply with certain lender responsibility principles requiring lenders to exercise the care, diligence and skill of a responsible lender when advertising; before agreeing to provide credit or finance or taking guarantees; and in all subsequent dealings with borrowers and guarantors. Further, specific duties apply. A "Responsible Lending Code" has been developed as a guide to how to comply with the principles. A court can take a failure to comply with the principles into account in deciding whether a lender has acted oppressively (which, if found, allows the entire transaction to be re-opened and varied or set-aside) and can make orders for (among other things) refunds, compensation and exemplary damages

8.4 Privacy Act

Information privacy in New Zealand is protected by the Privacy Act 1993, which governs the collection, handling and use of personal information. Any "agency" (being a person or body of persons, public or private, incorporated or unincorporated but subject to specific exceptions) which collects personal information must comply with the 12 Information Privacy Principles set out in the Privacy Act. Individuals who feel that there has been a breach of these principles with respect to their information may lodge a complaint with the Privacy Commissioner, who will decide whether or not to investigate. The Privacy Commissioner is obliged to act as a conciliator in bringing about a settlement between the individual concerned and the agency, but may ultimately refer an unsettled complaint to the Human Rights Tribunal. Other than the principle which relates to free access of individuals to their own personal information, none of the Information Privacy Principles are enforceable in court.

9 COMPETITION LAW: COMMERCE ACT

9.1 Restrictive trade practices

The purpose of the Commerce Act 1986 is to promote competition in markets. The Act prohibits agreements which substantially lessen competition in a market, such as agreements to fix prices, carve out market conduct or abuse a dominant market position.

Co-ordinated conduct prohibited by the Commerce Act includes:

- (a) agreements that substantially lessen competition in a market
- (b) agreements that exclude or restrict dealings with a competitor
- (c) agreements that fix, maintain or control prices (cartels).

Unilateral conduct prohibited by the Commerce Act includes:

- (a) taking advantage of a substantial degree of market power in a market for an anti-competitive purpose
- (b) specifying a price (or a minimum price) for the sale of its goods by another.

In assessing whether competition has been substantially lessened, the Courts will consider whether other market participants can compete effectively (for example by setting their own prices, standards of quality and output volumes) and how hard it is for new competitors to enter the market.

The Commerce Commission can investigate complaints regarding anti-competitive practices. There are a number of actions it may take where it believes the Act has been breached, including issuing warnings or bringing a prosecution in the High Court. Significant financial penalties apply for engaging in restrictive trade practices - up to NZ\$500,000 for individuals, and for body corporates: the greater of NZ\$10 million, or three times the value of any commercial gain from the contravention (if ascertainable) or 10% of the turnover of the body corporate (together with its related bodies corporate).

At the time of writing, The Commerce (Cartels and Other Matters) Amendment Bill ("**Bill**"), is before Parliament, which focusses on deterring "hard core cartel behaviour". This encompasses provisions, contained "in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:

- (a) price fixing
- (b) restricting output
- (c) market allocating.

The Bill provides three exemptions to what would otherwise be cartel behaviour, being vertical supply contracts, joint buying agreements and collaborative activities. Joint ventures are likely to be seen as "collaborative activities", provided that any "cartel" activity is reasonably necessary for the purpose of the collaborative activity and it will not have, or would not be likely to have, the effect of substantially lessening competition in the market. Where certainty is required, the Bill also introduces a clearance regime similar to the Commerce Commission's business acquisition regime (see below). Competitors can prospectively apply to the Commission for clearance.

The proposed reforms will bring New Zealand's cartel regime into greater alignment with trading partners (particularly Australia), although a proposal to criminalise such behaviour has recently been dropped.

9.2 Business acquisitions

Mergers and acquisitions of business assets or shares where such transactions would, or would be likely to, have the effect of substantially lessening competition in a market are prohibited. The Commerce Commission provides guidance called "concentration indicators" which are used to identify mergers which are less likely to raise competition concerns. A merger is unlikely to require a clearance application where, post-merger:

- (a) the three largest firms in the market have a combined market share of less than 70%, and the merger firm's combined market share is less than 40%
- (b) the three largest firms in the market have a combined market share of 70% or more, and the merger firm's combined market share is less than 20%.

If a clearance or authorisation is given by the Commerce Commission for the acquisition of assets of a business or shares, then no action may be taken against the acquisition by the Commission or any other party while that clearance or authorisation is in force.

The penalties for proceeding with a prohibited acquisition include divestment orders and penalties of up to NZ\$500,000 for individuals and NZ\$5 million for body corporates.

9.3 Clearances and authorisations

A clearance may be granted in respect of an acquisition where the Commission is satisfied that the acquisition will not, or will not be likely to, have the effect of substantially lessening competition in a market. A party seeking clearance (which is voluntary) must complete the standard application form and provide this to the Commission, which will then commence an investigative process, gathering relevant information. The Commerce Act prescribes a 10 working day period from receipt of the application for reaching a decision, however this may be extended if the parties agree. As the application is deemed to be declined if no decision is made within the prescribed period, the decision period is frequently extended (often significantly so in more complex applications). The Commission may only grant a clearance when it is satisfied, on the balance of probabilities, that the acquisition would not result in a lessening of competition. Parties have a right to appeal to the High Court if a decision is made not to grant clearance.

An authorisation may be granted where a proposed acquisition will or will be likely to result in a substantial lessening of competition, if the Commission finds that the public benefit directly related to the acquisition outweighs any detriment. Benefits need not be solely economic and may, for example, be social or environmental. Product innovation, improved export earnings and international competitiveness and the avoidance of corporate failure are examples of benefits which the courts have recognised in the past.

The process for granting an authorisation is much the same as that for a clearance, however once the Commission has received the application form and completed its investigation, it will then issue a draft determination. This sets out its initial view and invites submissions from interested parties. This will usually be followed by a conference where interested parties may present to the Commission, before further analysis and determination is carried out. The Act provides for a 60 working day timeframe from receipt of the application for reaching a decision, unless a longer period is agreed. As with clearances, there is a right of appeal where authorisation is declined, but unlike clearances, authorisations are rarely granted.

Authorisations may also be granted to what would otherwise be a prohibited restricted trade practice where it can show that the conduct brings benefits which outweigh the potential harm arising from a loss of competition. Again, the authorisation process can be lengthy and complex.

10 CREDITOR PROTECTION: SECURITY OVER PERSONAL PROPERTY

The Personal Property Securities Act 1999 sets out a regime (similar to that used in North America and Australia) for creating and enforcing security interests in personal property.

Personal property is essentially all property other than land (and a few other specific exceptions). A **security interest** is defined broadly to include any interest in personal property, created or provided by a transaction that, in substance, secures payment or performance of an obligation, without regard to the form of the transaction and without regard to the person who has title to the collateral. Security interests also include retention of title arrangements and leases of goods for a term of more than one year (or an indefinite term).

In order to protect a secured party's priority to personal property against claims from other secured creditors of the debtor, the security interest must "attach" to the personal property and a secured party must "perfect" the security interest in the personal property.

Attachment occurs when the debtor enters into a valid security agreement. In order to be valid, the security agreement must:

- (a) be signed or agreed to in writing by the debtor
- (b) contain a description of the personal property to be secured so that it is reasonably capable of identification
- (c) create the security interest or charge over the personal property.

Generally, perfection of the security interest occurs when the secured party registers a financing statement on the Personal Property Securities Register ("**PPSR**"). The PPSR is an online register controlled by the Registrar of Personal Property Securities.

The Act sets out priority rules and enforcement options for secured parties. Priority is determined by order of perfection, although there are a number of specific priority rules which modify this general rule.

11 INTELLECTUAL PROPERTY

Intellectual Property laws are well established in New Zealand. A patent system was enacted in New Zealand only 20 years after the signing of the Treaty of Waitangi (1840). Since then, New Zealand has become a signatory to several international treaties and conventions in relation to intellectual property, including the Patent Co-operation Treaty, the Paris Convention, the Berne Convention, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The Intellectual Property Office of New Zealand is responsible for the registration and administration of trade marks, patents, designs and plant variety rights.

11.1 Trade marks

Registration of a trade mark under the Trade Marks Act 2002 confers the exclusive right to use the mark in relation to the registered goods and services. Like most of its trading partners, New Zealand uses the Nice Classification System to identify and correctly classify goods and services into one of 45 classes.

But there are a few important differences in local New Zealand requirements and trade mark practice – for instance, where a trade mark is, or appears to be, a derivative of a Maori sign, the application will be forwarded to the Maori Trade Marks Advisory Committee for further consideration in the examination stage.

The trade mark register is publicly available and registration lasts for a term of 10 years (from the date of application or convention priority date) and can be renewed every 10 years.

11.2 Patents

A patent granted under the Patents Act 1953 grants the registered proprietor of an invention the exclusive right to make, use and sell the patented invention during the term of the patent (a monopoly). Patents are granted for a maximum term of 20 years, provided renewal fees are paid.

In order for an invention to be patented it must meet certain criteria. It must be new, inventive and useful. It cannot be obvious to someone with a good knowledge and experience of the subject. It must be capable of being made and used in some kind of industry.

Although there are a few narrow exceptions, as a general rule it is essential that the invention is not disclosed prior to filing. Because each patent claim is assessed against everything that is published or in use before the priority date (this information is called the "prior art base"), prior disclosure of (or "commercially working") the invention could jeopardise patentability.

Not all inventions are patentable. Inventions which are excluded from patent protection in New Zealand include:

- (a) scientific theories or mathematical formulae
- (b) art works and literature
- (c) business schemes or ways of presenting information
- (d) computer programs
- (e) methods of human medical treatment
- (f) diagnostic methods practised on humans
- (g) processes for cloning humans
- (h) using human embryos for industrial or commercial purposes
- (i) plant varieties.

11.3 Designs

Design relates to the visual appearance of an article. A registrable design in New Zealand is defined as the new or original features of shape, configuration, pattern or ornament that are applied to an article by any industrial process or means.

To be registrable, the design must:

- (a) not be published in New Zealand before the filing date. This means that you should keep the design confidential and not publish the design at least until after you have filed the application to register. In particular do not show your design on a website or in publicity pamphlets until after you have made your application
- (b) consist of new or original "features of shape, configuration, pattern or ornament" that are applied to an article by any industrial process or means
- (c) have features that appeal to and are judged solely by the eye
- (d) not be purely functional or relate to a method or principle of construction.

The term of a design registration is 15 years maximum (provided renewal fees are paid at five and 10 years from the application date).

11.4 Copyright

Copyright is not registrable in New Zealand. Rather, copyright is an automatic unregistered right that comes into existence every time an original work is created, published and performed.

To qualify, the work has to be **original** and fall into one or more of the following categories:

- (a) *literary works* including text like emails, training manuals, novels and song lyrics; tables and compilations including multimedia works, and computer programs
- (b) *dramatic works* including dance, mime and film scenarios or scripts
- (c) *musical works* including the score and sheet music
- (d) *artistic works* including paintings, drawings, diagrams, maps, models, photographs and sculptures
- (e) *sound recordings* separate to the actual music or story
- (f) *films* for any genre or format, separate from the underlying script, music or broadcast
- (g) *communication works* including radio and television broadcasts and internet webcasts
- (h) *typographical arrangements of published editions* covering the layout of the edition derived from a complete or partial literary, dramatic or musical work.

Owners of such original works are granted rights under the Copyright Act 1994, such as the right to make copies adaptations, issue copies to the public and perform/play/show the work in public.

The term of copyright for most works is generally 50 years beyond the death of the author. However, that protection period is shortened for artistic works that have been industrially applied, and for publisher's copyright (typographical layout of a published edition).

Authors and directors have certain "moral rights" in addition to the economic rights provided under the Copyright Act 1994. These rights include:

- (a) the right to be identified as the author of a work (the right of attribution)
- (b) the right to object to derogatory treatment of the work (the right of integrity)
- (c) the right not to have a work falsely attributed to them.

12 THE NEW ZEALAND LEGAL SYSTEM

12.1 Government

The New Zealand system of government is derived from the English one and comes from two main sources, the common law and statute law.

The common law is a body of law made up from judicial decisions made in New Zealand. Additionally, other decisions made in jurisdictions such as the United Kingdom, Australia, United States and Canada are sometimes relevant and often used to assist the Courts to make decisions in novel or emerging areas of law. Statute law is the law made by New Zealand's Parliament.

An integral feature of the New Zealand system is the separation of power among three different branches of Government. The division of power seeks to ensure that no one branch can act unconstitutionally. The three branches are the legislature, the executive and the judiciary.

Legislature (Parliament)

The role of the legislature is to make law. The legislature consists of New Zealand's Parliament which has developed from the British parliamentary system known as the Westminster system of government and is the highest law making body in New Zealand. Parliament consists of two parts.

The first is the head of state of New Zealand (Queen Elizabeth II) who is represented by the Governor-General. The Governor-General is appointed by the Queen, on the Prime Minister's recommendation, for a term of five years. The Governor-General exercises the Queen's royal powers and his or her main constitutional function is to invite the leader of the majority political party to form a government. The Governor-General is required by constitutional convention to follow the advice of government ministers. This means that the Governor-General does what the Government advises him or her to do. (Although there are some situations where the Governor-General may be required to exercise independent judgment, this has not happened for a long time.)

The second is the New Zealand Parliament. It has one chamber, called the House of Representatives. The House consists of 120 members of parliament (MPs) who are elected to the House for a three year term. New Zealanders aged 18 and over elect the MPs by voting in elections every three years. The House's responsibilities include to debate and pass legislation, provide a Government, supply money and represent the views of the people of New Zealand.

Executive (PM, Cabinet and public sector)

The role of the executive is to initiate and administer law. The executive is made up of the Prime Minister, the Cabinet (which consists of ministers who are members of the governing party or parties in Parliament and is presided over by the Prime Minister) and the public sector.

Judiciary

The role of the judiciary is to apply the law. The independence of the judiciary is an important principle of the New Zealand constitution. As a result, freedom from political interference is an essential feature of the judiciary's position within the New Zealand legal system. It is the judge's role to apply the law to every case that comes before the Court. Judges, however, also develop law by deciding what legislation passed by Parliament means by interpreting it. Judges are appointed by the Governor-General. All judges are lawyers with at least seven years' experience, and usually have many more. See below for more information on New Zealand's court system.

New Zealand's constitution

New Zealand does not have a single written constitution. The Constitution, which is the foundation of our legal system, is drawn from a number of important statutes, judicial decisions and customary rules known as constitutional conventions.

The Rule of Law

The Rule of Law also forms a significant part of the New Zealand Constitution. The principles of the Rule of Law encompass ideas such as:

- (a) the powers exercised by MPs and officials are based on legal authority
- (b) minimum standards of justice exist to which the law must conform
- (c) the law should have safeguards against the abuse of wide discretionary powers
- (d) unfair discrimination should not be allowed by the law
- (e) a person should not be deprived of his or her liberty, status or other substantial interest without the opportunity of a fair hearing before an impartial Court or Tribunal.

The Treaty of Waitangi

The Treaty of Waitangi was signed in 1840, as an agreement between the British Crown and a large number of Maori. Today the Treaty is widely accepted to be a constitutional document, which establishes and guides relationships between the Crown, New Zealand and Maori.

12.2 The court system

New Zealand has a hierarchical Court system which has jurisdiction to hear both criminal and civil claims. New Zealand also has a specialist family court, environment court, employment court, youth court and Maori land court.

The New Zealand processes closely resemble those of England and Australia. With a small number of exemptions, civil cases are determined by a judge sitting alone and not with a jury. However, juries are common in serious criminal trials.

12.3 Arbitration

Parties are able to resolve their disputes by arbitration without interference of the Courts, pursuant to the Arbitration Act 1996. The Act is based on the Model Law on International Commercial Arbitration (UNCITRAL) and gives effect to various international protocols and conventions. New Zealand is also a signatory to the New York convention on the recognition and enforcement of foreign arbitral awards. Arbitral awards from other state parties are recognised and enforceable in New Zealand.

13 USEFUL RESOURCES

| Government Agency | Type of information | Website |
|---|--|--|
| Ministry of Business, Innovation and Employment | Broad range of information about doing business in New Zealand, as well as more detailed information on specific sectors and industries and Government procurement | www.mbie.govt.nz |
| Parliamentary Counsel Office | NZ legislation, bills and legislative instruments | www.legislation.govt.nz |
| Companies Office | Search for, and register, information about New Zealand and overseas companies. Link to registers on other entities such as limited partnerships and the financial service providers register (see overviews at section 1 and, for financial services regulation, section 6.5) | www.companiesoffice.govt.nz/companies |
| Overseas Investment Office | Overseas investment in New Zealand (see overview at section 3 above) | www.linz.govt.nz/regulatory/overseas-investment |
| Ministry for the Environment (climate change and resource management) | Environment (including climate change) and resource management information (see overview at section 5 above) | www.mfe.govt.nz |
| Environmental Protection Authority | Environment (including administration of NZ's emissions trading scheme) and resource management (including hazardous substance regulation outside the workplace – Worksafe is responsible within the workplace) (see overview at section 5 above) | www.epa.govt.nz |
| New Zealand Petroleum & Minerals | Crown minerals prospecting, exploration and mining (see overview at section 5.2 above) | www.nzpam.govt.nz |

| Government Agency | Type of information | Website |
|---|--|--|
| Financial Markets Authority | Financial markets, including financial services (see overview at section 6 above) | www.fma.govt.nz |
| NZX Limited | Registered securities exchange (see overview at section 6.1 above) | www.nzx.com |
| Takeovers Panel | Takeovers of Code Companies (see overview at section 6.4 above) | www.takeovers.govt.nz |
| Worksafe | Health and safety regime (see overview at section 7.5) | www.worksafe.govt.nz |
| Immigration New Zealand | Visa requirements (see overview at section 7.6 above) | www.immigration.govt.nz |
| Commerce Commission | Consumer and competition laws (see overviews at sections 8 and 9) | www.comcom.govt.nz |
| Personal Property Securities Register | Search for, and register, security interests in personal property (see overview at section 10 above) | www.ppsr.govt.nz |
| Intellectual Property Office of New Zealand | Current ownership, and applications for registration, of trade marks, patents, designs and plant variety rights (see overview at section 11) | www.iponz.govt.nz |
| New Zealand Parliament | Parliament and parliamentary business (see overview at section 12 above) | www.parliament.nz |