Investing in New Zealand's renewable energy sector

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Contents

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Introduction

Immense opportunity exists for investment in New Zealand's renewable energy industry.

New Zealand is striving to reduce all greenhouse gases (except biogenic methane) to net zero by 2050. It is a signatory to the COP28 pledge to triple the world's renewable energy generation capacity and double global energy efficiency by 2030, and the recently elected Government has a domestic target of doubling renewable generation by 2050. In addition to these targets, it is estimated that New Zealand will need to increase its electricity supply by close to 70% by 2050 to meet domestic needs, as the New Zealand economy electrifies. In real terms, industry indicates this equates to approximately 400–500MW of new generation capacity needed every year through 2050 (a rate of development never seen in this country before). To support all this new generation, it is estimated at least NZD22 billion of investment in the distribution network is needed this decade.

Accordingly, the opportunity for investing in renewable energy projects and the associated infrastructure needed is immense, with long-term returns.

New Zealand has great impetus to supplement its existing renewable energy resources (these are primarily geothermal and hydropower). This has resulted in a strong pipeline of wind and solar power projects, currently in various stages of development throughout the country.

The accelerated transition to a low emissions economy has also prompted the exploration and advancement of progressive initiatives including green hydrogen projects, offshore wind farm exploration, biofuels development, and the proposed investment in ancillary infrastructure. This is coupled with significant regulatory reform intended to promote domestic and foreign investment in renewable energy and decarbonisation initiatives as part of New Zealand's accelerated energy transition.

> "The accelerated transition to a low emissions economy has also prompted the exploration and advancement of progressive initiatives.

Changing regulatory environment will affect investment in the energy industry

The Government is committed to turbocharging renewable energy development, including solar, wind and geothermal, so New Zealand can double its supply of affordable, clean energy and become a lower emissions economy. Its focus is on creating the market and regulatory conditions to encourage electrification.

This presents opportunities for investors but requires a keen eye on policy and regulatory developments.

Key actions proposed by the Government include:

- Streamlining consenting and permitting processes for significant infrastructure and development projects by the introduction of Fast Track Approvals legislation.
- Issuing a new National Policy Statement for Renewable Electricity Generation.
- Ensuring that energy settings allow for the exploration of natural geological hydrogen in New Zealand.
- Repealing the ban on offshore oil and gas exploration and supporting the development of technology to produce hydrogen from natural gas without producing carbon dioxide.
- Streamlining the rules and regulations governing electricity transmission and distribution infrastructure.
- Developing a regulatory framework for offshore wind farms, to be aligned with Australia.
- Planning for transitional low carbon fuels, including the infrastructure needed to increase the use of methanol and hydrogen.

The market is changing in response to policy shifts towards electrification, but other influences are also at play. Environmental and social governance factors are becoming priorities in business, and listed companies and banks are now required to make climate-related disclosures.

Introduction

Current market indicators are positive signs for investors in renewable energy

New Zealand has obvious competitive advantages in the production of lower cost renewable energy than many other countries. This unlocks significant opportunities for New Zealand to attract energy-intensive businesses and to export low-emission energy to the rest of the world.

A number of large international data centre developments have recently been announced and new under-sea fibre cables are planned, linking Christchurch, Dunedin and Invercargill with Australia, Indonesia, Singapore and Los Angeles.

Developers and investors have shown increased interest in offshore wind farm developments, following trends seen in the UK and Australia. For example, the Government's pension fund (the NZ Super Fund) has partnered with Copenhagen Infrastructure Partners to explore a 1GW offshore wind farm off the coast of Taranaki. Several other feasibility studies for similarly scaled offshore wind farms have been announced. The Government has indicated its intention to have a regulatory regime for offshore wind developments in place in 2024.

Domestic and international banks and institutional investors are keen to explore opportunities to help finance new renewables projects to contribute to additional capacity and develop the clean energy value chain. Financiers are familiar with and adopt international project financing structures and are keen to partner with sponsors. Foreign investment is generally welcomed in New Zealand, and all levels of government are keen to promote business, economic development, and employment growth.

New Zealand regularly ranks highly in the Index of Economic Freedom, compiled by the Heritage Foundation, which in 2023 ranked New Zealand sixth in the world on the economic freedoms measured. New Zealand has also been ranked as the third least corrupt country by Transparency International in its latest Corruption Perceptions Index.

New Zealand's economic growth prior to the global pandemic was consistently strong. The country's robust primary sector means that it is positioned to weather the ensuing economic disruption better than many other developed nations.

These factors highlight that, notwithstanding regulatory change, global uncertainty and downstream issues, New Zealand's business environment is sound. Aspects including clear property rights and high levels of trust and transparency provide a positive basis for sustained growth.

New Zealand's electricity system

Transitioning to a low emissions economy

The changes required to achieve New Zealand's commitment to achieve net zero emissions by 2050 present both opportunities and challenges in the electricity industry.

To decarbonise the wider economy, heating and transportation will need to be electrified. Development of large quantities of new renewable electricity generation, at pace, will be key to achieving New Zealand's transformation goals.[1] To facilitate this, and as our system becomes more decentralised with generation assets and distributed energy resources (DER) increasingly deployed within local networks, significant investment will also be required in the network infrastructure itself.

New Zealand's regulatory framework

The country's regulatory framework is made up of generic legislation as well as legislation that is specific to the electricity sector.

Specific legislation includes:

Commerce Act 1986
Contains a special regulatory regime for large electricity lines businesses (including Transpower).

Electricity Act 1992
A framework for the supply of electricity and the electricity industry, and for regulation and control of electrical workers.

Electricity Industry Act 2010
A framework for the regulation of the electricity industry.

Electricity Industry Participation Code 2010 (Code)
A set of rules made and administered by the Electricity Authority, covering nearly every aspect of the industry.

1. See Market Design Advisory Group (MDAG), 2022, Price discovery under 100% renewable electricity supply, available at: https://www.ea.govt.nz/assets/dms-assets/29/01-100Renewable-Electricity-Supply-MDAG-Issues-Discussion-Paper-1341719-v2.4.pdf

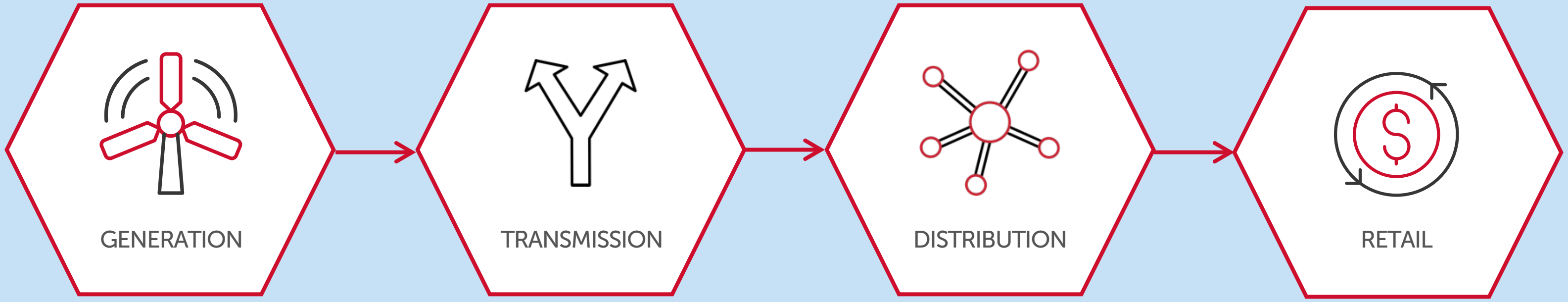
Electricity system

There are four components of the electricity system: generation, transmission, distribution and retail. Competition in the industry is promoted under the Code by provisions that:

- Prohibit a person who is involved in a distributor from being involved in a generator where that may create incentives and opportunities to inhibit competition
- Restrict relationships between a distributor and a generator or a retailer, where those relationships may not otherwise be at arm's-length.

The Electricity Authority may grant an exemption to allow involvement in both an electricity lines business and electricity supply business on application.

Four key components of New Zealand's electricity system



Generation

The majority of New Zealand's electricity is generated by hydro dams, with the largest dams located in the South Island. Other sources include wind farms, geothermal power stations and thermal power stations, which run on coal, gas or diesel. Solar farms and co-generation comprise a small percentage of generation. In 2022, approximately 87% of electricity generation came from renewable sources, 10% from natural gas and 3% from coal.

Four major companies produce most of the country's electricity, and the Government has a major shareholding in three of these companies. The pipeline for new electricity supply is starting to improve, with solar energy playing an increasing role (with substantial overseas developer involvement).

Independent developers will be valuable for increasing market competition and delivering the additional renewable generation that New Zealand requires.

Transmission

The national transmission grid is owned and operated by Transpower, which is owned by the Government. Transpower is also the national 'system operator' and is responsible for managing the electricity system so that there is a continuous balance between supply and demand.

The national grid transmits high voltage electricity from generators to regional distribution (lines) companies, and to some large industrial users directly connected to the grid. Transpower is responsible for new national grid investments and all transmission development processes.

Generation companies directly connected to the national grid must enter into an agreement with Transpower, either on a negotiated basis or consistent with the benchmark agreement set out in the Code. Generators cannot buy or reserve capacity on the transmission system – Transpower commits any spare capacity on a first ready, first served basis.

Distribution

There are 27 distribution companies providing and maintaining the local lines that carry electricity from the national transmission grid to consumers in their regional network. The Code sets out the application and approval process for connecting a new generation facility directly to a local distribution network (known as 'embedded generation' or 'distributed generation').

New Zealand's electricity is mostly generated in large centralised power stations and transmitted via the national grid, however the number of distributed generation installations is increasing and is expected to play an important role in the future.

Retail

Retailers purchase electricity from the wholesale market and sell it to consumers, typically with the cost of transmission and distribution services built into the price.

New Zealand has a highly vertically-integrated electricity market. The four main generators are also the four main retailers (commonly known as 'gentailers').

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New Zealand has a commitment to achieve net zero emissions by 2050.

Wholesale market

Wholesale spot market

Spot prices are calculated every half-hour and vary depending on supply and demand, and the location on the national grid (reflecting the cost of transmitting electricity from its source, often remote, to its destination).

Generators competing in the spot market submit "offers" to produce a quantity of electricity for minimum price in a given half-hour trading period. The system operator ranks the offers and determines the lowest cost combination of generation and transmission losses to satisfy indicated demand, then instructs generators when and how much electricity to produce. The offer price of the highest-priced generator actually required for each half-hour determines the prices for a trading period. Generators who have been dispatched by the system operator are paid for their output produced in a trading period, at the final price for that trading period at the node to which they are connected.

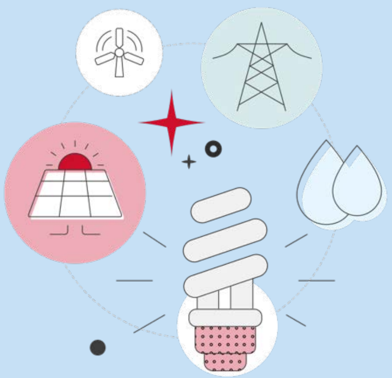
Spot prices can be highly volatile, with significant variations over time and by location. Typically, when hydro storage reduces (such as in a dry year scenario), the spot price increases due to higher cost thermal generation being called on.

Managing spot price risk

Financial or hedge contracts are used to insulate participants against spot price risk. Hedge contracts do not involve the physical delivery of electricity but instead provide for payments to be made between the contract buyer and seller, depending on the difference between the final nodal spot price and the fixed contract price, and the contract volume (which may be fixed or variable).

Different products are available in the hedge market. Over-the-counter contracts are negotiated directly between buyers and sellers and tend to be favoured as they can be tailored to cover any time period, any node, and with prices and quantities that may vary. In contrast, futures contracts are highly standardised products that are traded on the Australian Securities Exchange (ASX) futures market.

An increasingly active power purchase agreement (PPA) market is emerging for independent renewable energy generators. These PPAs tend to involve 10 to 15 year commitments and fixed pricing, however the intermittency of variable renewable energy (such as wind and solar) generally doesn't match the load profile of demand and the variability needs to be managed (often by the buyer).



Future focus areas

To achieve net zero emissions by 2050 in New Zealand, the Electricity Authority is focused on projects that include:

- **Managing peak winter electricity demand:** Improving the reliability of New Zealand's electricity supply by ensuring there is enough electricity at times of increased demand.
- **Distributed generation connection:** Promoting efficient investment in distributed generation.
- **Distribution networks regulatory reform:** Improving competition and innovation on distribution networks to support a low-emissions economy.
- **Price signals:** Improving the efficiency of transmission pricing to send better signals to consumers about the cost of using the grid and promote more efficient investment.
- **Promote demand-side responses:** Enabling growth of intermittent generation and realising the benefits of real-time pricing.
- **Ancillary services review:** Enabling greater uptake of new technologies to support dynamic management of the power system.

Foreign investment rules

New Zealand's foreign investment law attempts to balance the encouragement of foreign investment with the view that it is a privilege for overseas persons to invest in the country.

The regulatory regime reflects this approach by applying a level of control to discourage undesirable investment. Overseas persons who propose to acquire, or acquire control of, sensitive assets in New Zealand will need to apply for consent under the Overseas Investment Act 2005 (OIA) and the Overseas Investment Regulations 2005 (OIR) (being the legislation governing New Zealand's foreign direct investment (FDI) regime).

New Zealand's FDI regime is administered by the Overseas Investment Office (OIO). The OIO is responsible for screening transactions, and for monitoring compliance with any conditions of consent granted under the OIA. In some cases, consent must be granted by government ministers if certain special classes of transactions are involved.

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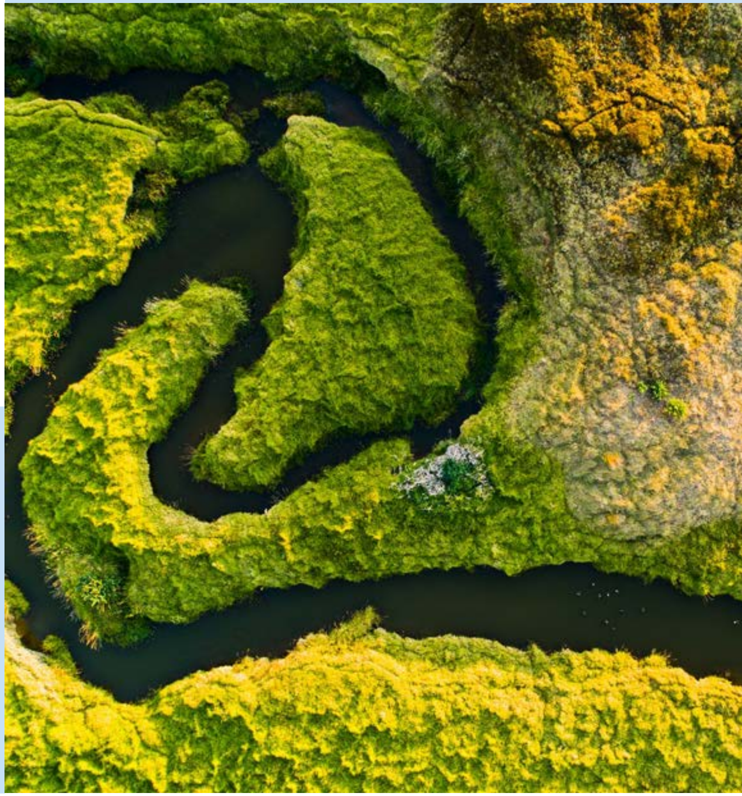
Transactions requiring consent of the Overseas Investment Office

In general, there are four broad categories of investments requiring consent under the OIA which may apply to the renewable energy sector, and which are explained in more detail over the following pages:

- significant business assets transactions
- sensitive land transactions
- national interest transactions
- call-in transactions.



Overseas persons

New Zealand's FDI regime applies to certain investments by "overseas persons" or "associates" of overseas persons.

An overseas person is broadly defined, but in general terms it includes any natural persons that are not New Zealand citizens or ordinarily residents in New Zealand, and entities that are incorporated outside of New Zealand or in which overseas persons have a more than 25% interest.

Significant business asset transactions

An overseas investment in significant business assets is:

- The acquisition of rights or interests in securities of a person (E) where, as a result of the acquisition, the overseas person or their associate (either alone or together with its associates) has a more than 25% ownership or control interest in E or an increase in an existing more than 25% ownership or control interest in E that is an "incremental increase" (see further detail below) and where, in each case, the value of the securities or the consideration provided, or the gross value of the assets of E or E and its more than 25% subsidiaries, exceeds NZD100 million.
- The establishment of a business in New Zealand where the business is carried on for more than 90 days in any one year (whether consecutively or in aggregate) and the total expenditure expected to be incurred in establishing the business exceeds NZD100 million (this an important limb to consider for renewables projects); or
- The acquisition of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand where the total consideration paid or payable for the assets exceeds NZD100 million.

For renewables projects it is important for overseas persons to know the total project costs so they can consider whether the expenditure incurred in "establishing the business" exceeds NZD100 million (and therefore requires consent).

Different monetary thresholds apply to certain overseas investment in significant business assets (but not sensitive land) for New Zealand's more significant trading partners. For example, consent will not be required for:

- Certain Australian non-government investors, where the value of the New Zealand assets in the business does not exceed (as at 1 January 2024) NZD618 million or, for certain Australian government investors, where the value of the New Zealand assets in the business does not exceed (as at 1 January 2024) NZD129 million[2].
- Certain investors from member countries of certain significant regional trade agreements (including Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, Vietnam, the Republic of Korea, Hong Kong, China, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, the United Kingdom and Northern Ireland), where the value of the New Zealand assets in the business does not exceed (as at 1 January 2020) NZD200 million.

2. These thresholds increase annually with inflation.

Sensitive land transactions

Land is considered "sensitive" if it has certain features such as location, size, use (e.g. residential land) or historical significance.

Consent is required if an overseas person or an associate of an overseas person wishes to acquire:

- an estate or interest in sensitive land; or
- rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an estate or interest in sensitive land and, as a result of the acquisition:
  - the overseas person or the associate (either alone or together with its associates) has a more than 25% ownership or control interest in A; or
  - the overseas person or the associate (either alone or together with its associates) has an increase in an existing more than 25% ownership or control interest in A that is an "incremental increase" (see further detail below); or
  - A becomes an overseas person in qualifying circumstances.

An interest in land includes freehold, and other qualifying interests such as leasehold and forestry rights.

National interest transactions

An overseas investment consent application will be subject to a mandatory national interest assessment where a non-New Zealand government investor or investors (from the same country) would directly acquire sensitive assets or a more than 25% ownership or control interest in the target, or the investment is in a "strategically important business".

For most greenfields renewable projects the "national interest" regime should not be an issue. However, once an electricity generation project is complete, then the resulting business will be a "strategically important business" going forward if it:

- is a generator (as defined in section 5 of the Electricity Industry Act 2010) with a total capacity (as defined in section 73 of that Act) exceeding 250MW; or
- provides electricity lines services (as defined in section 54C of the Commerce Act 1986).

The Government also has a broad discretion to determine a transaction to be a national interest transaction, even if it does not meet the above requirements.

'Call-in' transactions

A 'call-in' transaction is essentially a transaction that involves a strategically important business, but that is not otherwise subject to the consent process on the basis that it is not a significant business asset or sensitive land.

The call-in category was introduced so that overseas investment in such strategically important business could be screened for national security and public order concerns (as opposed to the more fulsome national interests test under a national interest transaction).

The regime required mandatory notification of certain classes of strategically important businesses and permits voluntary notification for others – with the benefit of voluntary notification being that the transaction cannot be called in later (e.g. after settlement).

Incremental investments

For existing investment in renewables projects and for future additional investment by overseas persons, consent is required for certain significant business asset and sensitive land transactions if the overseas person or the associate (either alone or together with its associates) has an increase in an existing more than 25% ownership or control interest in a person (A) that:

- results in an ownership or control interest in A that equals or exceeds the relevant ownership or control interest limit (i.e. 25%, 50%, 75%, or 100% depending on the existing ownership or control interest); or
- is in securities of A of a different class to the class in which their existing interest is held; or
- gives the overseas person or the associate (either alone or together with its associates) any or more disproportionate access to or control of a strategically important business. Disproportionate access generally means being more than a passive shareholder.

It is important for minority investors to be aware of these rules particularly where an investor might take up non-pro rata share issues (such as placements) in the future.

International transactions

Transactions involving the acquisition of an offshore entity which owns, either itself or through its subsidiaries, sensitive land or significant business assets in New Zealand (described as 'international transactions' by the OIO) may require consent under the OIA despite the transaction taking place outside of New Zealand.

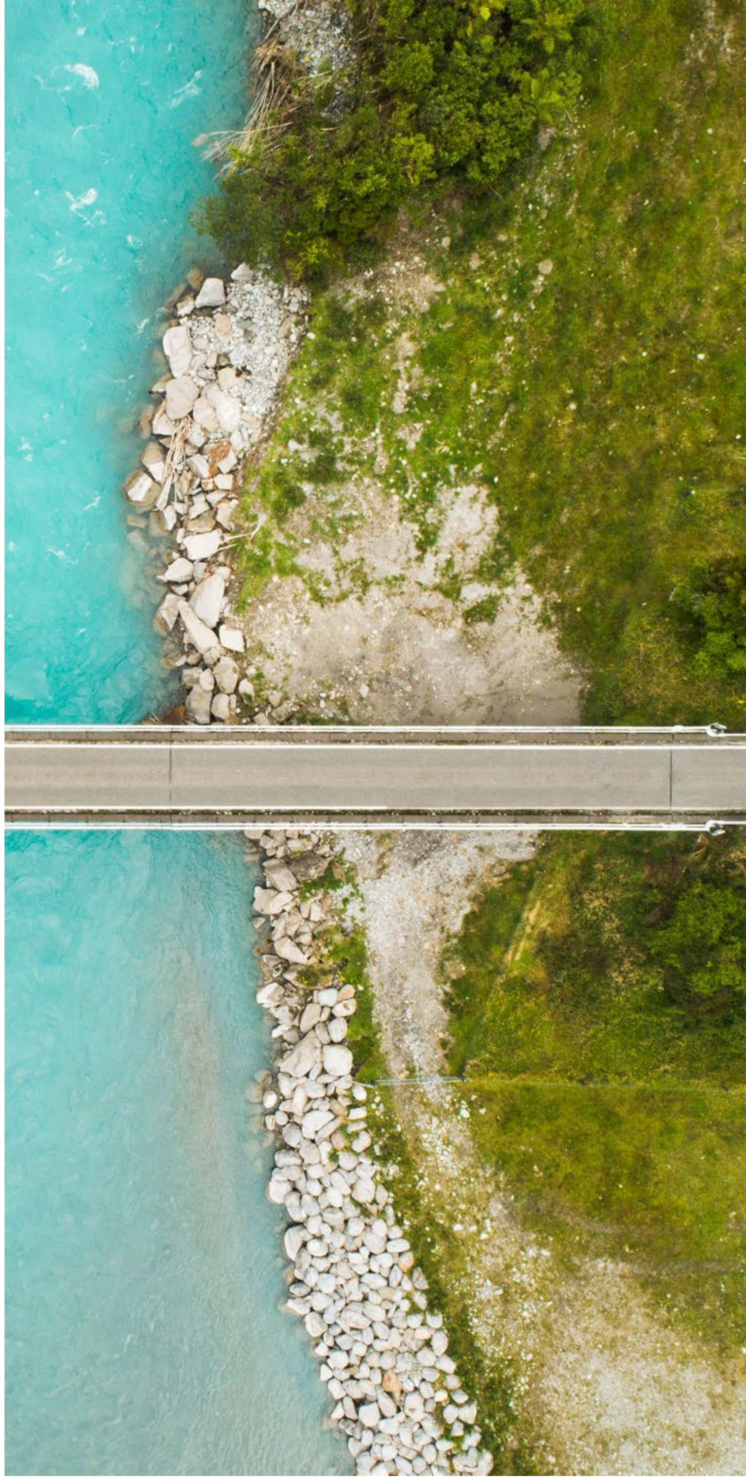
It is important for overseas investors to be aware of these rules so that any foreign transactions that have no direct relevance to New Zealand are considered under the FID rules.

Exemptions to obtaining Overseas Investment Office consent

Certain transactions are exempt under New Zealand's OIR from the consent of the OIO. These transactions include certain:

- transactions where there is internal restructuring but no change in the ultimate beneficial ownership
- financing transactions, particularly the enforcement of a security arrangement
- underwriting and sub-underwriting transactions
- small increases in shareholding where there is already OIO consent in place (shareholder creep)
- transactions by Australian and Singaporean investors in residential (but not otherwise sensitive) land.

The OIA also gives the relevant Minister(s) discretionary power to exempt any transaction, person, interest, right, or assets from the requirement for consent or from the definition of overseas person or associate or associated land (although this discretion is likely to be exercised only in exceptional circumstances).



Criteria for transaction consent

For consent to be granted, the overseas persons must satisfy certain prescribed thresholds depending on the class of transaction for which they are seeking consent. In summary, these are:

National interest test

Applies to national interest transactions

The national interest test is a 'backstop tool' to manage significant risks associated with transactions reviewed under the OIA (except call-in transactions – see page 12). The test's starting point is that the overseas investment is in New Zealand's national interest.

Relevant Minister(s) have broad discretion to decide whether an overseas investment may be contrary to New Zealand's national interest on a case-by-case basis after considering national security, public order and international relations, competition, economic and social impact, alignment with New Zealand's values and interests, broader policy settings and the character of the investor.

National security and public order test

Applies to call-in transactions

A call-in transaction will be assessed as to whether there is a significant national security or public order risk associated with the call-in transaction. The test is expected to be rarely used, and while its application is minimal at the moment, we expect it to be a subset of the national interest test.

Investor test

Applies to all significant business asset and sensitive land transactions

The 'investor test' prescribes 12 character and capability factors:

- The character factors include: convictions resulting in imprisonment, corporate fines both in New Zealand and overseas and being ineligible to come to New Zealand.
- The capability factors include: prohibitions on being a director, promoter or manager of a company, penalties for tax avoidance or evasion, and unpaid tax of NZD5 million or more.

The investor test is met when none of the 12 factors are established or, if a factor is met, the decision-maker is satisfied that this does not make an investor unsuitable to own or control a sensitive New Zealand asset.

Benefit to New Zealand test

Applies to sensitive land transactions
There are additional and more onerous criteria which apply to an investment in sensitive land. Where land is sensitive for reasons other than being residential land, the main consent pathway is for the applicant to demonstrate that the investment in sensitive land will benefit New Zealand.

The benefit to New Zealand test is met if the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) when considering factors like economic benefit, environmental benefit, public access, protection of historic heritage, advancing Government policy, oversight benefit and consequential benefit.

Timeframes

The OIR prescribes timeframes for the assessment of all overseas investment applications. Each total timeframe includes a 15 working day initial assessment and varies for each application, ranging from 35 working days for significant business assets, 55 to 100 working days for sensitive land.

Corporate structures

One of the early considerations of any investor or developer in renewables projects in New Zealand is the corporate structure of the project vehicle.

The New Zealand regulatory environment supports all common corporate structures such as companies, overseas companies (branches), limited partnerships, partnerships, trusts and unincorporated joint ventures. However, the most common structures employed in New Zealand renewables projects are the company and the limited partnership.

We outline the company and limited partnership structures below.

Companies

Incorporation

Company law is regulated by the provisions of the Companies Act 1993. A company has the full capacity of a natural person, subject to the Companies Act 1993 and its constitution (if any). Incorporation entitles the company to carry on business anywhere in New Zealand. To incorporate a company, the company must:

- have a registered office and an address for service at a physical address in New Zealand
- have at least one share
- have at least one director and one shareholder (who may be the same person)
- have at least one director who either lives in New Zealand, or lives in Australia and is a director of a company registered in Australia
- provide ultimate holding company information (if applicable) to the Registrar of Companies.

Each company is allocated a unique identifying number on incorporation. Generally, companies can be incorporated and trading within one to three business days.

Governance

The Companies Act 1993 requires a board of directors, or the sole director if there is only one, either to manage a company or direct and supervise its business. For renewable projects companies with multiple equity investors, it is common for equity investor appointee directors to be present on the board.

The Companies Act reserves to shareholders certain fundamental decisions that affect ownership. Shareholders appoint directors to manage the company or supervise its managers. Shareholders can dismiss directors, too.

Only shareholders can:

- adopt or change the company constitution
- authorise major transactions
- approve amalgamations with another company; and/or
- accept proposals that the company be put into liquidation.

The company's constitution (referred to as "articles" in some jurisdictions), together with the Companies Act 1993, regulates how the company operates. When there is no constitution, the role of the Companies Act 1993 expands to set the rules.

For renewable projects companies with multiple equity investors, a shareholders' agreement often operates

When considering which corporate structure to employ for the project, participants need to identify the corporate structure that will:

Deliver the most tax efficient outcome for investors (particularly foreign investors) – see Financing renewable energy generation projects on page 19.

Support project finance where needed – see Financing renewable energy generation projects on page 18.

Deliver appropriate governance, controls and liability position for investors.

alongside the constitution in regulating the conduct and governance of the company. Typically, the constitution empowers the company and its board to undertake a wide range of activities that are not permitted under the Companies Act unless permitted by the constitution.

Due to the constitution being a public document, most shareholder controls are contained in a shareholders' agreement that binds the company and is not a public document. The shareholders' agreement will usually provide for:

- appointment of directors
- decisions reserved for shareholders
- voting thresholds
- pre-emption rights for new equity issues and transfers
- tag and drag provisions (if any)
- project withdrawal
- change of control and share transfer provisions
- provisions for resolving deadlock.

Limited partnerships

Incorporation

The Limited Partnerships Act 2008 provides for limited partnerships, which are similar in nature to limited partnerships in other jurisdictions. Like a company (and unlike a traditional partnership), a limited partnership is a separate legal entity.

A limited partnership must have at least one general partner and one limited partner. A person or entity may not be both a general partner and a limited partner of the same limited partnership at the same time.

Limited liability

General partners are responsible for the management of the limited partnership and each general partner is jointly and severally liable for the unpaid debts and liabilities of the limited partnership incurred while that person is a general partner, to the extent the limited partnership cannot pay those debts or liabilities.

However, in most cases in New Zealand the general partner will be a company which in practice shields the general partner's shareholders from liability.

Limited partners' liability for the debts or other liabilities of the limited partnership will generally be limited to the amount of any unpaid committed capital. This limited liability may be lost in certain limited circumstances where a limited partner involves itself in the management of the limited partnership, in which case it will have unlimited liability as if a general partner with respect to the relevant transactions.

The legislation sets out 'safe harbours' – that is, activities that do not constitute taking part in the management of a limited partnership. A limited partner who undertakes 'safe harbour' activities will not be deemed to be liable as a general partner for that reason.

Limited partnership agreements

A limited partnership must have a limited partnership agreement between the limited partnership and all of its partners. Limited partnerships are formally registered in a similar manner to companies. However, the limited partnership agreement is not registered and details of limited partners (although required to be filed) may not be searched by the public. Details of general partners are filed and selected information is publicly available.

Tax

For New Zealand tax purposes, a limited partnership is not a tax paying entity and is treated as fiscally transparent (subject to certain limits on utilisation of tax losses). The loss limitation rules specific to limited partnerships limit the amount of deductions a limited partner can claim to the amount they have at risk with their investment in the limited partnership (e.g. capital contribution plus any limited partnership obligations they have agreed to guarantee). Deductions denied in one income year may be able to be carried forward and claimed in a subsequent income year. There are also anti-streaming rules which prevent the streaming of particular items of income or expenditure to individual limited partners.

Limited partnerships are also subject to the general tax implications of carrying on a partnership business (for example, the tax treatment of partners and partnership property on entry to and exit from the partnership, and disposals of partnership property). A limited partnership and each of its partners will need to be registered for income tax purposes. As part of this registration process, the limited partnership and/or the partners may need to provide proof of a fully functional New Zealand bank account to the New Zealand tax office, or otherwise demonstrate that customer due diligence has been completed by a New Zealand reporting entity.

Additional requirements

Additional requirements of limited partnerships include that the limited partnership must have at least one general partner that is one of the following:

- An individual living in New Zealand or Australia, and if in Australia, that individual must be a director of an Australian company
- A limited partnership that has at least one general partner who lives in New Zealand, or who lives in Australia and is a director of a company incorporated in Australia
- A partnership governed by the Partnership Law Act 2019 that has at least one general partner who lives in New Zealand, or who lives in Australia and is a director of a company incorporated in Australia
- A New Zealand company registered under the Companies Act 1993 (the most common option)
- An overseas company registered under the Companies Act 1993 that has at least one director who lives in New Zealand, or who lives in Australia and is a director of a company incorporated in Australia.

Governance

General partners are responsible for the management of the limited partnership. Limited partners do not involve themselves in the management of the limited partnership – they are passive in nature.

For renewables projects equity investors are infrequently passive and will require the levels of controls (both positive and negative) that they would expect if the project vehicle was a company. To achieve this level of control for investors, often investors will own a percentage of the general partner (where a shareholders' agreement can be put in place with the controls mentioned above) and in some cases the limited partnership will have an advisory committee made up of investor appointees.

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The most common structures employed in renewables projects are the company and the limited partnership.

Financing renewable energy generation projects

Renewable energy generation projects are in the spotlight of sponsors and financiers, who are active and keen to explore opportunities.

Domestic and offshore entities are looking to invest more capital in renewable energy capacity and technology, in particular on – and offshore – wind, solar, hydrogen and other new renewable generation projects including biofuels.

Raising project finance in New Zealand

A sponsor may fund a project from its own internal cash flows, by raising additional corporate debt, or raising project finance – a structure whereby the project's financiers will lend against the project on a limited recourse basis based on forecast cash flows and risks attached to the project. This structure limits a sponsors' exposure to the project debt and the risk of project failure beyond their initial equity investment, while avoiding restrictions imposed under other financing arrangements.

Project financing on a non-recourse basis is common in New Zealand. New Zealand and Australia's major banks are active in project financing, and often a debt syndicate will include offshore sponsors' other relationship banks and institutional investors. The debt tenor typically allows for a period after anticipated project completion to demonstrate successful operations before the project needs to be refinanced.

Project vehicle

There are several different structures that are available to enable sponsors to invest in and fund a project in New Zealand. However, in most cases the project vehicle will be either a company established under the Companies Act 1993 or a limited partnership established under the Limited Partnerships Act 2008 (see our section on Corporate structures for renewable projects on page 15).

Almost exclusively, the project vehicle is set up specifically for a project or a portfolio of projects, with no other assets or business beyond the projects themselves so that financial risk is tied directly to the project vehicle and the project (or portfolio).

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New Zealand's and Australia's major banks are active in project financing, and often a debt syndicate will include offshore sponsors' other relationship banks and institutional investors.

Tax considerations

There are important differences between the taxation of a company and the taxation of a limited partnership that should be considered when choosing the legal form of the project vehicle. These include:

Fiscal transparency / opacity:

A company is opaque for income tax purposes and pays tax on its taxable income at the corporate tax rate of 28%. For this reason, companies may not be an efficient choice of vehicle for tax-exempt investors. By contrast, a limited partnership is transparent for income tax purposes, meaning its partners, rather than the limited partnership itself, are deemed to derive the income earned by the limited partnership in proportion to their partnership interests. This can be beneficial where the limited partner has a lower marginal tax rate or is able to offset losses.

Tax treatment of distributions:

Because companies are opaque for income tax purposes, distributions can be taxable, subject to factors including whether or not the distribution is a "return of capital" or a dividend, in the case of a dividend, whether it is "imputed", and, in the case of a dividend paid to a non-resident investor, whether treaty relief applies. Distributions will need to be carefully structured to minimise double tax. By contrast, as a limited partnership is transparent for income tax purposes, there should generally be no New Zealand tax on distributions to its partners.

Tax treatment of the sale of interests in the project vehicle:

The sale of shares in a corporate project vehicle may be tax-free depending on the profile of the investor and their intentions when they acquired the shares. Often, an investor would claim capital account treatment on sale of their shares (i.e. no New Zealand income tax). By contrast, the sale of a limited partnership interest is treated as a sale of the attributed share of the limited partnership's underlying assets. Depending on the nature of the assets and the application of certain safe harbours, the sale of a limited partnership interest can be subject to tax.

Funds also need to be contributed in accordance with any OIO approvals (see our section on Foreign investment rules on page 10) obtained for the proposed transaction.

Project finance structure

- Project finance transactions in New Zealand are typically structured like transactions in offshore common law markets. The assessment as to whether financiers will lend against the project on a limited recourse basis will typically consider similar issues to those in offshore markets. The transaction features at the forefront of the financiers' bankability assessment will include:
- In the construction phase:
  - **Counterparties:** Financiers expect the project vehicle to engage known and creditworthy counterparties, and for those counterparties and the project sponsors to have sufficient financial strength, technical competence and track records to support their obligations. Sponsors will need to demonstrate their ability to coordinate project workstreams and manage technical, operational and financial challenges, and marshal the project towards financial close.
  - **Contract structure:** Financiers have a strong preference for a fixed price lump sum EPC contract with a single contractor, with no price escalations or cost overruns. Those terms minimise risks which may arise where the design and works are being undertaken by a series of consultants and contractors under the management of the project vehicle, incentivises the contractor and ensures cost overruns are the responsibility of the contractor.
  - **Completion requirements:** Financiers want to ensure that there is a fixed date for commercial operation with minimum grounds entitling the contractor to extend that date.
  - **Compensation:** Financiers will expect liquidated damages in an amount sufficient to cover the project vehicle's costs of servicing the project debt and operating costs during any period of the delay. If the project does not meet the performance criteria, then financiers will expect to see performance liquidated damages in an amount sufficient to compensate for the decrease in revenue generating capacity.
  - **Performance security:** Financiers will want to see that appropriate parent guarantees and performance and defects liability bonding are in place and from institutions with acceptable credit ratings. Performance security may also be required from independent suppliers of turbines, inverter or tracking systems, PV panels or other key materials.
- In the operations phase the main issues relate to the operation and maintenance arrangements, and the generation of revenue. In addition, financiers will need to assess electricity market and pricing risk. Financiers prefer to see guaranteed cash flow from the project in the form of long-term power purchase agreements with creditworthy counterparties under which electricity generated by the project is sold for a fixed price sufficient to repay the project debt. While financiers may have to accept that it may not be possible for all electricity generated by the project to be the subject of a power purchase agreement, merchant sales to the grid at the prevailing market price may limit the quantum of the project debt.

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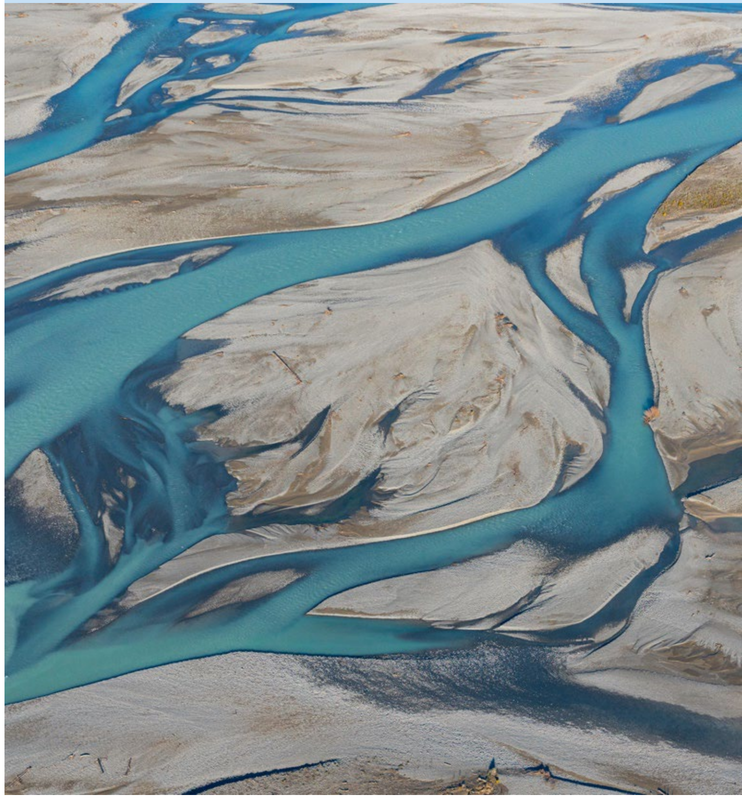

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What security do financiers require?

The key financiers’ requirement is that the project must be capable of being transferred intact to a new project vehicle. Project financiers will also expect full flexibility to sell project assets (although in a renewables project the benefit in doing so is likely to be limited). Financiers will typically expect:

- Security over the equity interests in the project vehicle (commonly achieved by establishing a New Zealand company or limited partnership as the holding vehicle of the project vehicle, with that holding vehicle giving security over all its assets, including its equity interests in the project vehicle, and avoiding the need for the sponsors to grant security).
- Security over all assets of the project vehicle (physical assets, interests in land, rights under contracts, bank accounts and money in them, rights under consents).
- Direct agreements with key project counterparties, which allow financiers to step into the applicable project documents and to negotiate with the counterparty to them to avoid termination before the opportunity to rectify matters ends.
- Rights in relation to the performance security and guarantees granted to the project vehicle by its key contractors.

The Personal Property Securities Act 1999 governs the creation, enforceability and priority of security interests in personal property, and security over personal property will typically take the form of a general security deed, which will be perfected by registering a financing statement in the Personal Property Securities Register which is a simple, quick and inexpensive process.

The Land Transfer Act 2017 and the Property Law Act 2007 govern the creation and enforceability of security over land and interests in land. Financiers typically expect to take a registered mortgage given the importance of site-specific factors relating to the natural resources responsible for electricity generation, however it is possible security over land may take the form of an unregistered charge contained in a general security deed.

Refinancing and transactional exit

Term debt has traditionally been the most common refinancing product, although sustainability-based instruments are becoming more common and appetite for green bonds is expected to increase given NZX’s support and that renewable energy is a recognised asset class for green bond issuance. Sponsors and project entities will need to pay early attention to ESG matters (for example, by ensuring ESG certification as a condition to financial close) to maximise the refinancing strategies available.

Sponsors should also consider exit strategies upfront, especially the tax implications. These implications depend on the form of the project vehicle and the tax profile of the investor.

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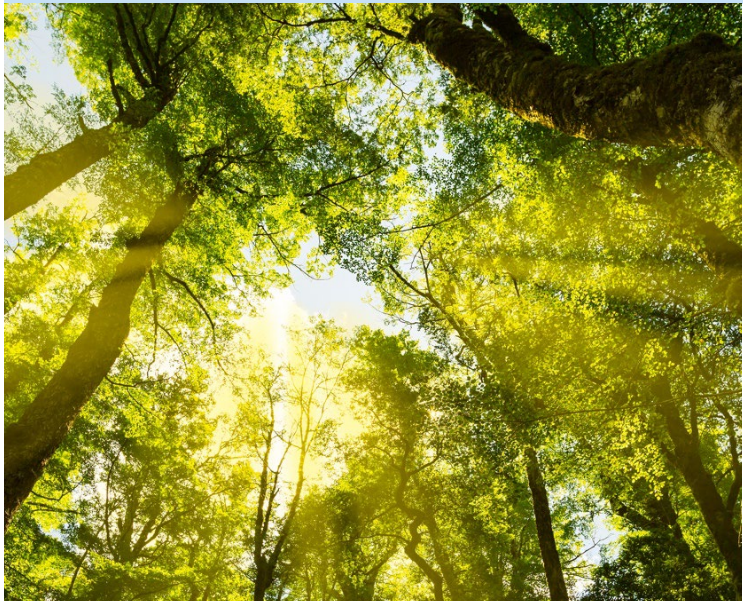

Environment and resource management law

New Zealand's environment and resource management laws provide for the sustainable use, development and protection of natural and physical resources, while recognising the importance of New Zealand's unique biodiversity and environment.

They are critical to understand for any investor looking to develop renewable energy in New Zealand and this is one area where there are significant changes on the horizon.

Onshore and inshore environmental management (within 12 nautical miles offshore of New Zealand)

The Resource Management Act 1991

The Resource Management Act 1991 (RMA) is the principal environmental and development statute in New Zealand. The jurisdiction of the RMA extends out to 12 nautical miles offshore of New Zealand (the outer limit of New Zealand's territorial sea and the outer limit of the Coastal Marine Area under the RMA).

The RMA establishes a comprehensive regime for dealing with resource management issues and sets out the roles and responsibilities of decision-makers. It also introduces a hierarchy of planning documents, including:

- National policy statements and environmental standards
- Regional policy statements and plans
- District plans.

These documents contain rules that determine whether resource consents (environmental approvals) may be required for certain activities. They also contain objectives and policies against which applications for resource consents must be assessed. Any new projects on land and in the coastal marine area that might affect the environment, ranging from construction of wind farms to hydro dams, will likely require resource consent under the RMA.

The five main types of resource consent are:

- Land use consents
- Subdivision consents
- Coastal permits
- Water permits
- Discharge permits.

Land use consents and subdivision consents are granted for an unlimited term, unless otherwise specified in the consent. Coastal, water and discharge permits can be granted for a term of up to 35 years. Resource consents are often subject to detailed conditions. Conditions may specify site design and management of operational effects, ongoing monitoring and reporting and financial contributions towards infrastructure.

The National Policy Statement for Renewable Electricity Generation 2011 (NPSREG) sets out an objective and policies to enable the sustainable management of renewable electricity generation under the RMA. Despite the introduction of the NPSREG it can still be challenging to obtain resource consents for renewable energy projects.

Generally, the greater the adverse effects of the proposed activity on the environment, the greater the complexity in the processing and determination of resource consent applications. The time and cost involved in obtaining resource consents will also increase with more complex applications.

Consenting challenges for renewables projects most commonly arise from the activity's adverse effects on the environment. For example, wind farms can have local adverse effects on landscapes and solar farms can have adverse glare effects which can strongly feature in consenting processes. These effects need to be carefully managed. Early engagement with stakeholders and affected parties is an important part of that process.

The positive effects of a project on the environment, including social and cultural benefits are also a relevant consideration in consenting. However, questions have been raised about whether the current framework gives enough priority to the benefits of renewable energy and the contribution it makes towards New Zealand's emissions reduction targets.

In April 2023, the former Labour Government opened consultation on revisions to the NPSREG and other related national instruments that would have provided stronger policy direction on the national benefits of renewable energy and a more streamlined consenting process for significant projects. The Government has indicated an intention to "double renewable energy production" and it has commenced its own investigations into a new NPS on Renewable Electricity Generation. The content of this is still uncertain.

Fast track consenting

Renewables projects may be able to take advantage of an alternative "fast track" consenting process. Fast track consenting was originally introduced in 2020 as a temporary measure to provide a streamlined consent pathway for projects that would support New Zealand's recovery from the economic and social impacts of COVID-19 and/or would reduce New Zealand's net emissions of greenhouse gases.

Fast track consenting has since been carried over into permanent legislation. At present, project owners may apply to the Environmental Protection Authority for referral to use a fast track consenting process under the now-repealed Natural and Built Environment Act 2023 (NBEA). Eligible projects include electricity transmission networks, wind or solar energy generation and renewals of consents for any renewable energy generation, including hydro-electricity.

Resource consent applications are considered by a specially appointed Expert Consenting Panel. There is no public notification of the activity, but the Panel can invite specified persons to make submissions. In determining the application, the Panel must consider various matters, including any adverse or positive environmental effects and the extent to which the activity is consistent with "the preferred state of the future environment" as identified in the relevant planning documents. Appeal rights are limited.

While this process may be useful to project owners wishing to proceed immediately, there may be value in delaying the application until the Government's new permanent fast track consenting regime enters into force.

In March 2024 the Government released a draft Fast Track Approvals Bill that is intended to provide a fast-track 'one-stop shop' for environmental approvals, enabling project owners to apply for and obtain, in one process, all of the environmental approvals needed for a project. For example, alongside resource consents, the process could be used to apply for land access arrangements under the Crown Minerals Act 1991, archaeological authorities under the Heritage New Zealand Pouhere Taonga Act 2014 and concessions under the Conservation Act 1987.

The Bill will include a list of projects which will be automatically referred through the fast-track process, and other projects will be able to apply for entry provided that they meet the purpose of the Act, which is the delivery of infrastructure and development projects with significant regional or national benefits. Ineligible activities include offshore renewable energy projects and decommissioning where these would begin before proposed new offshore renewable energy permitting legislation comes into force (discussed on page 25). Significantly, the Bill explicitly indicates that a project may be eligible even if it includes an activity prohibited by a regional or district plan under the RMA.

Consultation on the bill is in progress, and the Select Committee is due to report back in September 2024.

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Resource management system reforms

The previous Labour Government made significant progress towards reform of New Zealand's resource management system, including passing new legislation which would have come into force on a staged basis over the next 10 years. This legislation was repealed by the Government in December 2023.

The Government has signalled that it will develop new legislation to replace the RMA during its tenure, but the details of that work are uncertain at present.

Contaminated land

In New Zealand, liability for contamination and cleaning up contaminated sites is commonly addressed under the RMA by:

- regulating discharges of contaminants into the environment (including land, water and air) through requirements to obtain and comply with resource consents, unless the discharge is expressly allowed by a National Environmental Standard, other regulations or a rule in a regional or district plan
- casting a wide net for parties who may be liable for offences for breaching the RMA.

Recent renewable energy projects have faced challenges in this regard following discharges into waterways from civil works required to develop the civil infrastructure supporting new wind farms.

The RMA defines contaminated land as "land that has a hazardous substance in or on it that (a) has significant adverse effects on the environment; or (b) is reasonably likely to have significant adverse effects on the environment".

Local councils have a mandate to control the effects of contaminated land and to control activities that cause land to become contaminated.

Other environmental regulation

Investors and operators in New Zealand also need to consider issues relating to any other statutory or planning authorisation outside of the realms of the RMA.

For example, special authorisation is required for trade waste discharges under local government bylaws and, in situations where hazardous chemicals are being stored or handled at a particular site, certificates may be required and other controls will apply under the Health and Safety at Work Act 2015. Archaeological authorities may also be required to modify or destroy, or cause to be modified or destroyed, the whole or any part of an archaeological site which may be on a development site under the Heritage New Zealand Pouhere Taonga Act 2014, and concessions or other permissions from the Department of Conservation may be required if a project requires access to conservation land under the Conservation Act 1987.

Offshore environmental management (beyond 12 nautical miles offshore of New Zealand)

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) provides for the management of the environmental effects of activities beyond the outer limit of New Zealand's territorial sea in New Zealand's Exclusive Economic Zone (EEZ) and Continental Shelf (CS).

The EEZ Act regulates numerous activities in the EEZ and CS, including:

- discharges of harmful substances
- the dumping of waste or other matter
- marine structures, submarine cables and submarine pipelines
- deposition on the seabed
- the disturbance of the seabed or subsoil
- removal of non-living natural material from the seabed or subsoil.

Renewables projects, such as offshore wind farms are not identified specifically, but would be captured by several (if not all) of the above activities.

The EEZ Act establishes a comprehensive environmental consenting regime, similar to that which applies within the coastal marine area and on land under the RMA. A consent granted under the EEZ Act is called a marine consent. Unlike the RMA, there is no national direction that seeks to enable renewable energy projects, such as the NPSREG.

A key challenge for offshore consenting is a lack of information about the offshore environment and new technologies which may be employed there. The decision-making framework for the Act acknowledges this. When making decisions on marine consent applications, decision-makers are required to take into account the best available information, consider any uncertainty or insufficiency in the available information and exercise caution when information is uncertain or insufficient.

Similarly to the RMA, a marine consent may be granted for a term of up to 35 years and are often subject to detailed conditions. Conditions may specify site design and management of operational effects, ongoing monitoring and reporting and financial contributions towards infrastructure.

Regulations made under the Act fill the gaps in the regulation of the EEZ and continental shelf. However, they do not override other existing legislation which continues to apply and includes the following:

- The Fisheries Act 1996 which regulates the environmental effects of fishing
- The Health and Safety at Work Act 2015 which addresses the management of health and safety risks and inspections of offshore petroleum structures
- Marine Protection Rules under the Maritime Transport Act 1994 which addresses marine pollution from oil spills
- The Marine Mammals Protection Act 1978 which makes provision for the protection, conservation, and management of marine mammals within New Zealand and within New Zealand fisheries waters
- The Wildlife Act 1953 which seeks to protect and control wild animals and birds
- The Biosecurity Act 1993 which provides for the management of biosecurity risks in the EEZ.

New regulatory settings for offshore renewable energy

In late 2023, the Ministry of Business, Innovation and Employment (MBIE) sought feedback on proposed regulations to enable renewable energy development at sea. The consultation document indicated that, based on previous feedback, the Government had taken in principle decisions to proceed with a feasibility permitting approach. Following the change of government, work is underway to confirm the final approach.

If taken forward, developers could apply for permits to undertake feasibility studies for offshore energy in specific areas. Those developers would then receive a sole first right to apply for later consents to construct and operate offshore energy infrastructure (under the RMA, EEZ Act or other legislation) in those areas.

This feasibility permitting system would have a significant impact on the ability to undertake offshore energy projects, and the make-up of New Zealand's future offshore energy sector.

Climate change

International commitments

New Zealand is a party to the United Nations Framework Convention on Climate Change (UNFCCC), which enables countries to collectively consider how to address climate change. Convention parties regularly meet to progress and implement the Convention. New Zealand's commitments to reducing greenhouse gas emissions are governed by the Paris Agreement. The Paris Agreement is the global agreement on climate change that was adopted by the UNFCCC parties in December 2015 and took effect in 2020. It commits all countries, including New Zealand, to limit the planet's average temperature rise to below 2^{0}C, compared to pre-industrial levels and pursue efforts to limit temperature rise to 1.5^{0}C. New Zealand has a Nationally Determined Contribution under the Paris Agreement which sets a headline target of a 50% reduction of net emissions below our gross 2005 level by 2030.

Domestic commitments

New Zealand also has domestic emissions reduction targets which are set out in the Climate Change Response Act 2002. The domestic targets are:

- Net-zero emissions of all greenhouse gases other than biogenic methane by 2050
- 24% to 47% of 2017 levels of biogenic methane emissions by 2050, including a 10% reduction by 2030.

A framework was established by the Climate Change Response (Zero Carbon) Act 2019 to achieve these targets. This includes the establishment of the Climate Change Commission, which will advise and report to the Government on its functions of undertaking a risk assessment, setting five-year emissions budgets, and preparing risk assessments, emissions reduction plans and national adaptation plans.

In conjunction with these budgets, the Government issued the first Emissions Reduction Plan in 2022, which sets out the Government's strategy to achieve the emissions reductions needed to achieve the emissions budgets. The Plan contains approximately 300 actions across a broad range of sectors including transportation, planning and infrastructure, energy and resources, agriculture, forestry, and waste management.

Planning is underway on the second emissions reduction plan ("ERP2"), which will cover the emission budget for the years 2026 to 2030 and will be published before the end of 2024. A public consultation on ERP2 is expected in mid-2024.

New Zealand Emissions Trading Scheme

An Emissions Trading Scheme (ETS) was established in New Zealand in 2008. Historically, the ETS has been the main tool for ensuring New Zealand meets its international obligations to reduce greenhouse gas emissions.

The ETS has a number of mandatory participants that largely include those high up the production chain. The ETS covers forestry, liquid fossil fuels, industrial processes, stationary energy, waste and agriculture sectors. These sectors' entry into the ETS was staggered until 1 January 2015. The agricultural sector has not yet fully participated in the ETS and under the current Government, does not look likely to do so.

Under the ETS, mandatory participants that emit greenhouse gases are required to pay for all greenhouse gas emissions. The 'currency' of the ETS is a New Zealand Unit (NZU). A participant is required to surrender one NZU per tonne of greenhouse gas emitted. Participants from some sectors received a free allocation of NZUs when the ETS was introduced as compensation for the impact of the scheme. Activities that remove greenhouse gases from the atmosphere, such as forestry, may earn NZUs.

The ETS incentivises investment in renewable energy ahead of fossil fuels by requiring emitters to surrender NZUs to account for the emissions from their operating activities.

The Government has set its first three emissions budgets for 2022–2035:

Budget 1 2022–25
290 megatonnes
of carbon dioxide equivalent greenhouse gases
72.4 megatonnes/year

Budget 2 2026–30
305 megatonnes
of carbon dioxide equivalent greenhouse gases
61 megatonnes/year

Budget 3 2031–35
240 megatonnes
of carbon dioxide equivalent greenhouse gases
48 megatonnes/year

Meet our renewable energy team

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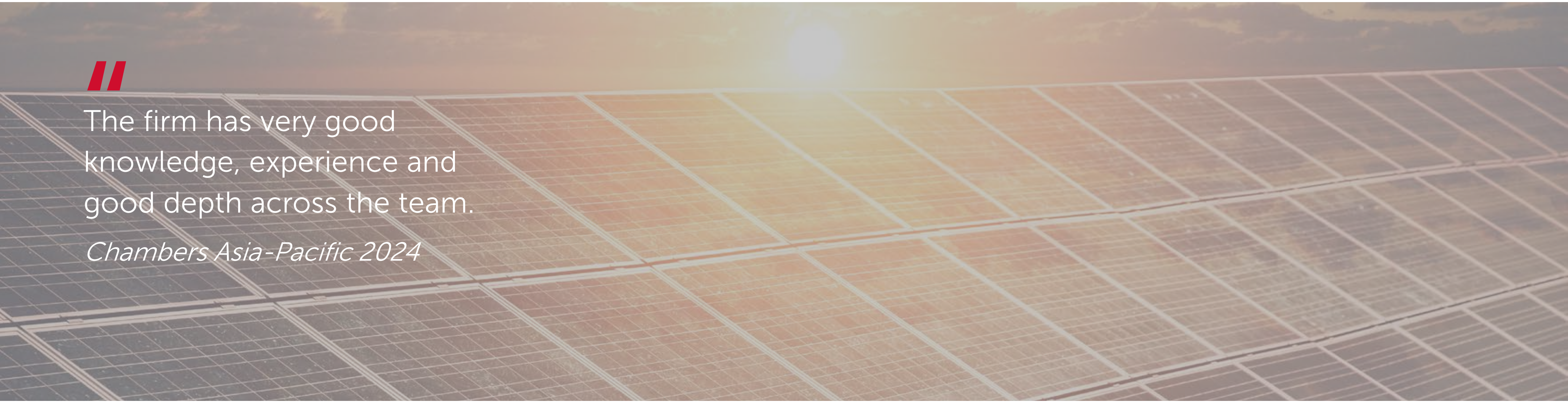

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The firm has very good knowledge, experience and good depth across the team.

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