Investing in New Zealand 2023

A guide for
international business

MinterEllisonRuddWatts.

Contents

About us

We'll help you charter new territory using our local and international expertise.

We do this by listening and working alongside our clients and international law firms to gain a deep understanding of their goals and business needs, and providing practical and innovative commercial solutions.

As a leading, full-service law firm, you will have access to internationally recognised, experienced legal and business advisers across a wide range of practice areas and industry sectors. We have experts in every aspect of foreign investment and trade, ensuring that you can get on with business while we take care of the legal details.

We act for corporates, businesses, and individuals seeking to invest in or expand their operations in New Zealand. Our in-depth understanding of the Overseas Investment Act and strong working relationships with the Overseas Investment Office (OIO) (and other regulators) benefits our clients investing in or entering the New Zealand market.

Working together to provide a seamless service for international investors, we can help with:

- Investment structures and financing
- Overseas Investment Office (OIO) applications
- International mergers and acquisitions
- Employment issues
- Immigration requirements
- Financial regulator approvals
- Tax compliance
- Intellectual Property strategy and protection
- Environment and Resource Management requirements
- Real estate investments, including, commercial, industrial, agricultural and forestry
- Considerations for engaging with local iwi and other stakeholders

We work to provide a seamless experience for our clients, here in New Zealand and around the world. We have had a strategic alliance with Australia's largest firm, MinterEllison, for the past 30 years. Our teams collaborate to provide trusted, seamlessly integrated solutions to our clients, across Australia, New Zealand and the broader Asia Pacific region, especially where clients need a trans-Tasman solution. At the same time, we work independently with other law firms in Australia and around the world, when it best serves our clients' interests.

minterellison.co.nz

Market recognition

Ranked Tier 1 for 12 practice areas

38 ranked lawyers

First equal for New Zealand firms

The Legal 500 Asia Pacific

Ranked Band 1 for Corporate/Commercial, Construction, Energy and Natural Resources, Financial Services and Public Law

36 ranked lawyers

Chambers Asia Pacific

Best provider to Financial and Insurance Services in Australasia

Beaton Client Choice Awards 2022

New Zealand Deal Firm of the Year

Australasian Law Awards 2022 and 2020

Firm of the Year and Firm of the Year for Gender Diversity and Talent Management

Euromoney Women in Business Awards 2021

Employer of Choice

New Zealand Law Awards 2021

Diversity champions

34%

Partners identifying as female

40%

Females on the board, including the Chair

69%

Senior lawyers identifying as female

Committed to achieving 40:40:20 by 2025 for gender

A key aim detailed in our *Sustainability Strategy.*

Leader in diversity reporting

First New Zealand law firm to report gender and ethnicity pay gaps and publish them with *Mind the Gap.*

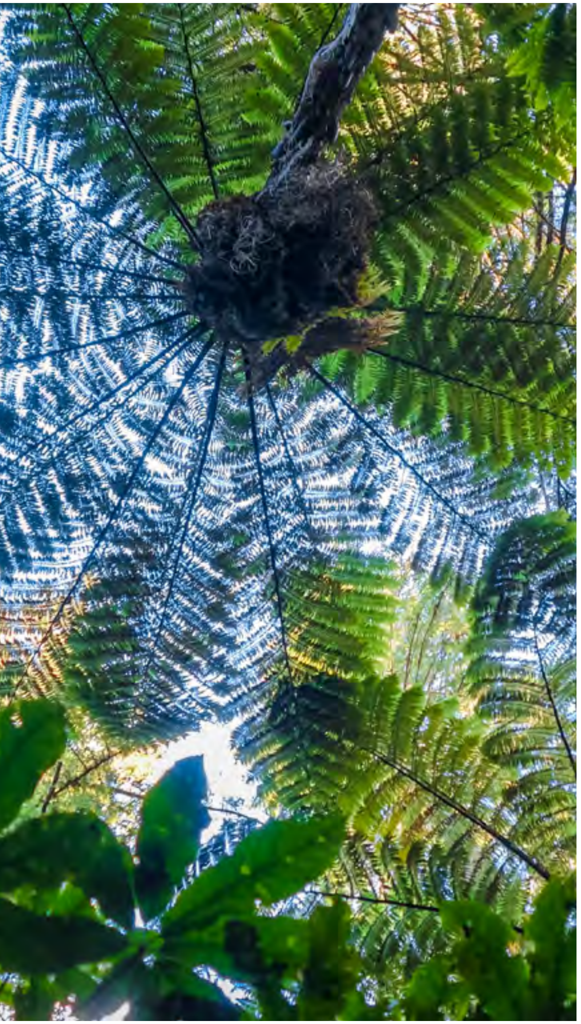
Major partner of Global Women

A non-profit organisation that promotes, encourages, and facilitates the development of women in leadership positions – and a founding partner of the *Global Women's Champions for Change Initiative.*

Demonstrating our commitment to LGBTTQIA+ inclusive culture

Living wage accredited since 2021

> "New Zealand is an open and competitive economy with a population of around five million people.



Introduction to New Zealand

New Zealand is an open and competitive economy with a population of around five million people.

New Zealand's economy is trade-oriented with the agricultural, horticultural, forestry, mining and fishing sectors all playing an important role in the export sector and employment nationally. The primary sector dominates New Zealand's merchandise exports, particularly animal products such as dairy and meat, a trend that has remained largely unchanged over the past decade. Overall, the primary sector contributes more than 60% of New Zealand's merchandise exports.

In the December 2022 Situation and Outlook for Primary Industry's report, the Ministry for Primary Industries predicted an increase in food and fibre export revenue to NZD55 billion, an increase of 4 percent from the previous year, with the sector continuing to drive New Zealand's economic recovery post COVID-19.

The country's robust primary sector means that it is positioned to weather the ensuing economic disruption better than a number of other developed nations.

Foreign investment is generally welcomed, 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 in the top five countries in the world on the economic freedoms measured.

The strength and durability of the country's economy can largely be attributed to the following factors:

- a strong primary sector that is quick to respond to global opportunities;
- an increase in the flexibility of the economy, creating a more dynamic economy able to respond to market shifts and manage significant economic shocks;
- a sound and sustainable macroeconomic framework, which reduces economic volatility and allows businesses (and households) to plan for greater certainty; and
- greater efficiency of the local and central government sector.

Notwithstanding global uncertainty and downstream issues, New Zealand's business environment is sound. Aspects including a reasonably predictable policy environment, clear property rights, and high levels of trust and transparency provide a positive basis for sustained growth.

For comprehensive professional advice on investing or doing business in New Zealand, speak to our experts.

Reasons to invest in New Zealand

New Zealand offers numerous advantages for smart investment, from a highly skilled workforce to strategic connections with Asia-Pacific and global markets.

A competitive and transparent tax system

With its competitive and low compliance tax system, the US-based Tax Foundation's latest International Tax Competitiveness Index ranks New Zealand's overall tax system as third in the developed world for its competitiveness, second for property taxes and sixth for its individual (ie personal) taxes.

In New Zealand there is no payroll tax, no social security tax, no stamp duties, no estate tax, and no general capital gains tax (although it can apply to some specific investments). Interacting with public tax authorities is also easy and transparent.

A time zone advantage

New Zealand is 12 hours ahead of the United Kingdom, and between two and six hours ahead of Australia and many major Asian cities. The country is perfectly located for multinational companies to service customers through the night including the United States, the United Kingdom, and wider Europe.

Home to Australasia's fastest growing city

Since 2010, New Zealand and Auckland's economic growth has outperformed most developed countries. Auckland makes up more than a third of New Zealand's population and is projected to go from around 1.7 million in 2023 to 2 million by the early 2030s (medium projection).

To support New Zealand's growing population and globally competitive industries, new business, commercial and industrial areas and services are being built in Auckland and nationwide – all of which investors can benefit from.

A global talent hub

Investors can tap into New Zealand's highly educated and experienced workforce. With Australasia's largest recruitment bases of highly skilled employees, and a large pool of private and public sector researchers, the country's labour market is both flexible and mobile.

The gateway to booming Asia-Pacific markets

With Asia shaping global trade and investment flows, New Zealand is a strategic place to set-up business serving the Asia-Pacific and western economies, while also gaining preferential access to international markets (for example Australia, China, Singapore, Hong Kong, Indonesia, Malaysia, Thailand and Vietnam). This is due to the Free Trade Agreements New Zealand has signed with major Asia-Pacific economies.

Globally connected

In the post-pandemic era, New Zealand is rebuilding itself as a major destination for international air travel with a growing number of international airlines flying in and out of Auckland Airport. Deep water ports serve global and regional shipping lines, however at increased cost due to the current global supply chain crisis.

A highly developed financial hub

New Zealand has one of the most developed financial systems in the world. Here you can be first on the stock market (the country's stock exchange is the first to open each trading day). Several major trading banks and numerous other banking institutions are based here, along with agents and sales offices representing many international banks. The Reserve Bank of New Zealand supervises the country's banking system to ensure the country remains financially stable.

A fair labour environment an competitive costs

New Zealand's labour laws support business owners and employees and offer highly competitive wage rates and low on-costs and overheads – all crucial advantages over comparable investment locations. The country's pay as you earn (PAYE) tax deductions are easy to complete and include income tax and accident compensation cover.

System of government

New Zealand's founding document is the Treaty of Waitangi (Te Tiriti o Waitangi), first signed on 6 February 1840, between Māori chiefs representing various iwi (tribes) and representatives of HM Queen Victoria of The United Kingdom of Great Britain and Ireland.

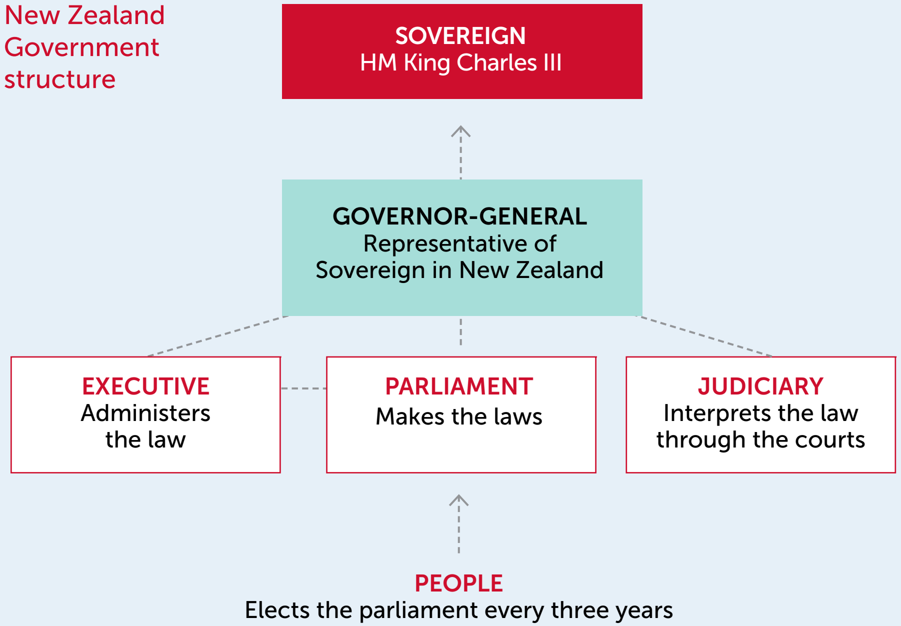
The Treaty resulted in the declaration of British sovereignty over New Zealand by Lieutenant Governor William Hobson in May 1840, and guaranteed certain rights to Māori, including the rights of a British subject.

New Zealand became fully independent during the 20th century. The final practical constitutional link to Britain of New Zealand's Parliament was removed by the Constitution Act in 1986. The Treaty remains an important document in New Zealand's constitution recognising the special position of Māori as indigenous people.

Today, New Zealand's Government is formed from a democratically elected House of Representatives. The Government advises the Sovereign (Head of State) HM King Charles III as King of the Realm of New Zealand. By convention, the Sovereign is the source of all executive legal authority in New Zealand and acts on the advice of the Government.

Power is distributed across three branches of Government – Parliament, the Executive, and the Judiciary. Parliament makes the laws, the Executive (Ministers of the Crown, also known as the Government) administers the law, and the judiciary interprets the law through the courts. New Zealand is a common law country, meaning law is developed and shaped through the decisions of the judiciary.

New Zealand Government structure



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New Zealand currently has a Labour-led Government.
Rt Hon. Chris Hipkins, leader of the Labour Party, is the current Prime Minister of New Zealand."

Parliament and Government

New Zealand Parliament makes law through a process of examining, debating and passing bills. Each Bill goes through several stages, giving Members of Parliament (MPs) and the public the chance to share their views.

Parliament has a single chamber, the House of Representatives (the House). This means that for a Bill to be become law it needs to be passed by the House, currently made up of 120 MPs. The Governor- General, currently Her Excellency The Right Hon Dame Cindy Kiro, is the Sovereign's representative in New Zealand and carries out a formal constitutional function by signing Acts into law once they have been passed by the House.

Every three years, Parliament is elected using the Mixed Member Proportional (MMP) system, which replaced the previous First Past the Post (FPP) system in 1996.

MMP works using two votes. The first is the 'party vote', which determines each party's share of seats in Parliament, and the second is the 'electorate vote', which determines who will represent each geographical electorate in Parliament. A majority of seats is required to govern, which can be made up by a single majority party or a group/coalition of parties. After an election, the party (or group/coalition of parties) with the majority of seats in the House forms a Government. The leader of the largest party in Government will generally become the Prime Minister and lead a Cabinet of around 20 ministers. In practice, the Prime Minister acts as the leader of the nation.

The MMP system allows for minor parties to have a place in Government. Since the introduction of MMP, each of the two largest parties, the centre-right National Party and the centre-left Labour Party have consistently required the support of smaller parties to form a Government.

New Zealand is a common law country, meaning law is developed and shaped through the decisions of the judiciary. Following the general election in October 2020, New Zealand currently has a Labour-led Government. Rt Hon. Chris Hipkins, leader of the Labour Party, is the current Prime Minister of New Zealand. The next general election will be held on 14 October 2023.

The Government is built on a coalition arrangement between the Labour Party and the Green Party.

Complementing the roles of the Executive Government and Parliament, the judiciary applies the law by interpreting the legislation passed by Parliament. It hears and decides cases by applying the relevant law and undertakes judicial review of administrative decisions. The judiciary is independent and generally operates under an open system. Most courts are public and New Zealanders are free to comment on the outcomes of any dispute resolution process. This feature aims to enhance public confidence and accountability in the process.

The court of final appeal is the Supreme Court of New Zealand, which was established by the Supreme Court Act 2003 and replaced the Judicial Committee of the Privy Council based in the United Kingdom. The Supreme Court is made up of six judges and is presided over by the Chief Justice.

New Zealand's international trade profile

With a population of over five million, trade is essential to New Zealand's continued prosperity and is a fundamental component of the Government's broader economic policies, designed to promote higher sustainable growth. New Zealand has one of the more open economies in today's global trading system.

New Zealand's top export and import partners include China, Australia, the United States, Japan, South Korea, Singapore, Germany, and the United Kingdom. New Zealand's export profile continues to be dominated by primary commodities, with dairy, meat and forestry products constituting the top three export categories.

New Zealand is committed to an open, rules-based international trading system and is an active participant in the World Trade Organization (WTO). Its market access commitments are among some of the most extensive and liberal in the WTO. New Zealand is party to a range of regional, bilateral and multilateral free trade agreements (FTAs), which ensure parties' preferential access to each other's markets.

Some of the most notable FTAs are summarised below.

Agreements in force

Arguably the most notable of New Zealand's trade agreements is the Comprehensive and Progressive Agreement for Trans-Pacific Partnerships (CPTPP). Parties to this agreement are New Zealand, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore Vietnam and the United Kingdom.

These economies have a combined population of over 500 million people and account for over 14% of world GDP. They are the destination for over 30% of New Zealand's goods exports, and the source of over 65% of New Zealand's Foreign Direct Investment (FDI). The CPTPP will eliminate tariffs on almost all New Zealand exports to participating countries, delivering an estimated tariff savings of NZD222 million annually. The CPTPP also aims to address non-tariff barriers to trade by decreasing compliance costs, reducing the time required for goods to clear customs, and promoting clarity and predictability around parties' customs processes.

In 2008, New Zealand became the first developed country to enter into an FTA with China. Since then, China has become New Zealand's largest trading partner, with annual two-way trade of over NZD38 billion. Negotiations to upgrade this FTA concluded in November 2019. The upgrade was signed in January 2021 and came into force on 7 April 2022. It improves New Zealand's access into China's services market, as well as access for certain New Zealand goods (including tariff elimination, over a 10-year implementation period, for 99% of New Zealand's wood and paper exports to China). To reflect changing trade rules and business practices, the upgraded FTA includes new chapters on competition policy, e-commerce, government procurement and environment and trade.

New Zealand's top import and export partners

- China
- United States
- Australia
- Japan
- United Kingdom
- Singapore
- South Korea
- Germany

New Zealand concluded negotiations with the United Kingdom (UK) in 2022 and entered into an FTA with the UK on 31 May 2023. The UK is New Zealand's sixth largest trading partner, with annual two-way trade of nearly NZD6 billion. This agreement provides significant duty-free quota access for the agricultural sector with all quotas and tariffs for beef, sheep meat, butter and cheese removed after 5–15 years. This FTA also includes new provisions concerning the Māori economy and climate change, with a Māori Trade and Economic Cooperation chapter and a climate change with commitments to uphold the Paris Agreement and eliminate fossil fuel subsidies.

Also of note is New Zealand's long-standing Closer Economic Relations Agreement with Australia (CER), which eliminated almost all barriers to trade in goods and services between the countries. The 1988 CER Protocol on Trade in Services achieved free trade in nearly all services.

The 2013 CER Investment Protocol has reduced compliance costs and provided greater legal certainty for trans-Tasman investors by providing higher thresholds at which foreign investments are screened. In combination, these agreements ensure that New Zealand and Australia have one of the most open economic relationships between any two countries, with both countries moving progressively towards much closer integration of policies, laws and regulatory regimes through processes of coordination, mutual recognition and harmonisation.

In addition, New Zealand has entered into trade/economic cooperation agreements with Malaysia, South Korea, the Association of Southeast Asian Nations (ASEAN), Hong Kong (China), Singapore, Thailand and Chinese Taipei, all of which reinforce the relatively open nature of the New Zealand economy. New Zealand is also a party to the Trans-Pacific Strategic Economic Partnership (P4), along with Brunei Darussalam, Chile and Singapore.

The Digital Economy Partnership Agreement (DEPA) is a partnership between New Zealand, Singapore and Chile (three of the P4 members) that helps exporters and SMEs take advantage of opportunities arising from growth of digital trade. The DEPA came into force in January 2021 and is a vehicle for the parties to cooperate on digital economy issues by, for example, promoting paperless trade and the use of cross-border e-invoicing. While the current commitments are aspirational and there are only three parties, the DEPA has the potential to increase in significance.

It is possible that, just as the CPTPP had its genesis in the P4, the DEPA may create momentum and, in time, grow to include more countries. Already, Canada and the Republic of Korea have expressed their interest in DEPA, Korea formally requesting to join the agreement in late 2021.

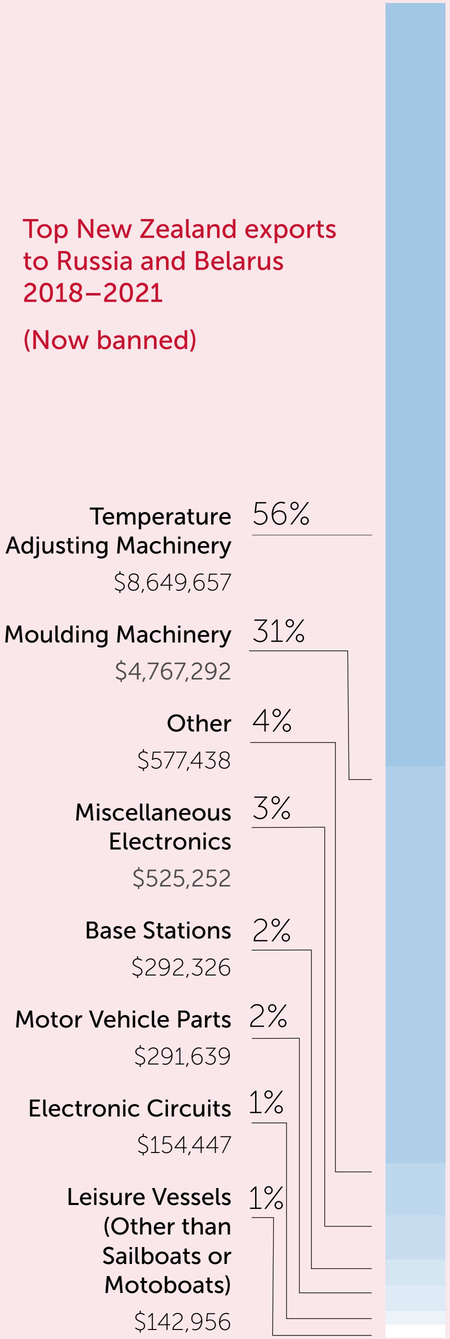
Onboarding additional parties would allow for the creation of more meaningful rules for international digital trade.

New Zealand is party to the new Regional Comprehensive Economic Partnership (RCEP) that came into force at the start of 2022. The fifteen signatories to the RCEP are the 10 members of ASEAN (i.e. Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) as well as Australia, China, Japan, South Korea and New Zealand. These countries have a combined population of 2.3 billion, a third of the world's population, and account for 30% of global GDP. The agreement delivers a single set of rules to cover all 15 markets, with the aim of making trade simpler and reducing compliance costs for exporters. While New Zealand already had FTAs with all signatories, the RCEP further reduces tariff barriers for New Zealand exporters to Indonesia. It also delivers improved market access for New Zealand services exporters and investors in some RCEP markets that go beyond existing FTAs.

New Zealand concluded negotiations with the European Union (EU) in June 2022. It is now expected that the NZ-EU FTA will be ratified the agreement by late-2023 at the earliest. The EU is New Zealand's largest source of imports and third largest export market. Two-way trade between New Zealand and the EU (excluding the UK) is worth around NZD20 billion annually.

Top New Zealand exports to Russia and Belarus 2018–2021

(Now banned)



The NZ-EU FTA removes tariffs and other barriers to trade, while also promoting adherence to environmental and labour standards. Notably, the NZ-EU FTA eliminates tarrifs for kew New Zealand exports, including kiwifruit, wine, apples mānuka honey and manufactured goods, as well as almost all fish and seafood, and other horticulture products. The FTA includes a Māori Trade and Economic Cooperation chapter to enhance the ability for Māori to access the benefits from the FTA, including through the development of business links between Māori and EU enterprises (with a particular emphasis on SMEs), and focusing on science, research and innovation.

Agreements under negotiation

The EU is New Zealand's largest source of imports and third largest export market. Two-way trade between New Zealand and the EU (excluding the UK) pre-COVID was worth around NZD18 billion annually. New Zealand is seeking a FTA that removes tariffs and other barriers to trade, while also promoting adherence to environmental and labour standards. Talks around this FTA with the EU have been in the works since 2017, but progress is set to pick up this year. With the conclusion of the French Presidential election, significant negotiation efforts are underway to reach an agreement and it is now expected that the NZ-EU FTA will be concluded in 2022.

New Zealand Autonomous Sanctions Regime

In March 2022, New Zealand introduced its first autonomous sanctions regime. Under the Russia Sanctions Act 2022, the New Zealand Government can impose sanctions via regulations targeting individuals and entities (persons), assets and services associated with Russia's military actions in Ukraine. The New Zealand Ministry of Foreign Affairs and Trade maintains a list of all sanctions targets.

Exports to Russia and Belarus have also been targeted, and there is a prohibition on New Zealand persons exporting various products to Russia or Belarus, except for humanitarian purposes. While these prohibitions will nominally affect exports of products falling under 261 HS codes, their practical affect will be more modest.

This is because New Zealand only exported products to Russia and Belarus falling under 42 of these HS codes in the calendar years 2018–2021. Historical import data from Statistics New Zealand suggests that New Zealand exporters of certain machinery, electronics, base stations, motor vehicle parts, and leisure vessels will be most affected by these export prohibitions.

Key contacts

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Establishing a business presence

Trading with New Zealand

It is possible to do business with New Zealand companies without setting up a formal business structure in New Zealand.

The following key issues will require consideration:

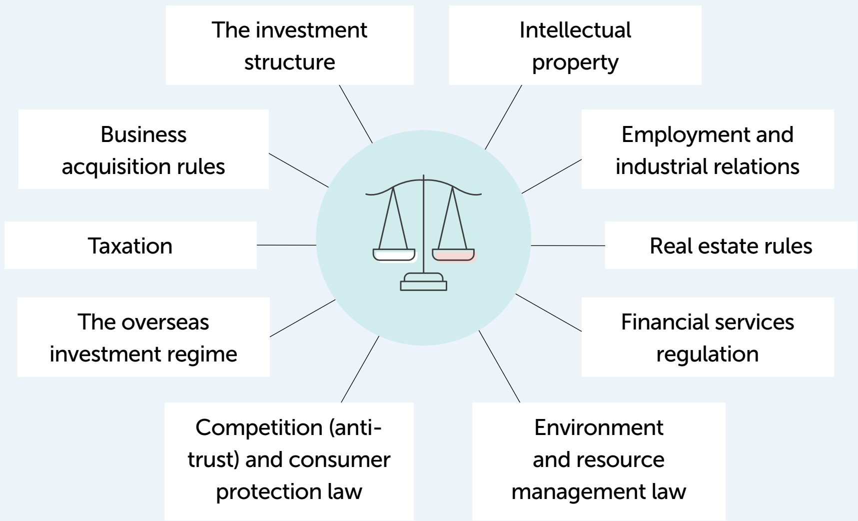
- New Zealand tariffs apply to a limited range of goods imported from overseas. If, however, a local manufacturer is licensed to produce the goods in New Zealand, the issue of tariffs will only apply to any imported components.
- Agency and distribution agreements can be entered into freely and are not the subject of specific regulation. The terms of any agreement with agents and distributors must therefore carefully address all aspects of the relationship.
- Other legal issues that may arise include:
  - protection of intellectual property rights;
  - the law that the parties choose to govern the contract, the relevant forum for enforcing the contract and the possible impact of the United Nations Convention on Contracts for the International Sale of Goods (New Zealand is a party to that Convention);
  - security for payment, including title retention and the potential requirement to register any such interest in accordance with the Personal Property Securities Act 1999 in order for it to be valid;
  - dispute resolution and the relevant forum for settling disputes;
  - currency of payment and protection against exchange rate fluctuations; and
  - potential product liability claims.

There are no exchange controls at the border. Persons arriving or leaving New Zealand must declare if they are carrying in excess of NZD10,000 cash or foreign currency equivalent in cash or cash equivalent.

New Zealand maintains an anti-money laundering and countering financing of terrorism regime intended to meet the requirements of the international Financial Action Task Force. That regime has been strengthened by the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. This creates significant obligations, particularly for financial institutions, casinos, and other reporting entities. Civil and criminal penalties exist for any persons who provide or collect funds for terrorist acts, or who are involved in, or engage in, money laundering.

United Nations Security Council sanctions are implemented in New Zealand law by regulations made under the United Nations Act 1946. That Act provides the New Zealand Government with discretion to impose or remove sanctions by Order in Council of the Governor-General. In March 2022, New Zealand introduced its first autonomous sanctions regime. Pursuant to the Russia Sanctions Act 2022, the New Zealand Government can impose sanctions via Regulations targeting individuals and entities (persons), assets and services associated with Russia's military actions in Ukraine. The New Zealand Ministry of Foreign Affairs and Trade maintains a list of all sanctions targets.

When establishing a business presence in New Zealand, consideration should be given to the following matters under New Zealand law:



Trading in New Zealand

In general, foreign investors do not need to set up a New Zealand registered company or other legal entity to conduct business in New Zealand. However, a foreign company conducting business in New Zealand must register on the overseas register administered by the New Zealand Companies Office if they are "carrying on business in New Zealand" for the purposes of the Companies Act 1993.

If the Companies Act 1993 requirement of "carrying on business in New Zealand" is, or is expected to be, triggered by the investor's New Zealand activities, then the investor might want to consider setting up a new entity in New Zealand.

Foreign companies usually establish a business presence in New Zealand either by:

- establishing or acquiring a New Zealand subsidiary company; or
- establishing a branch office.

Other options for structuring an investment in New Zealand include using a limited partnership, partnership or unit trust. The decision on what corporate form to adopt will generally depend more on commercial and perhaps taxation considerations, rather than strict legal considerations.

New Zealand's Free Trade Agreements

New Zealand is committed to an open, rules-based international trading system and is an active participant in the World Trade Organization (WTO). Its market access commitments are among some of the most extensive and liberal in the WTO. New Zealand is party to a range of regional, bilateral, and multilateral free trade agreements (FTAs), which ensure parties' preferential access to each other's markets.

Of note, New Zealand concluded negotiations with the United Kingdom (UK) in 2022. The UK is New Zealand's sixth largest trading partner, with annual two-way trade of nearly NZD6 billion. The NZ-UK FTA was signed on 28 February 2022 and will come into force when both parties have ratified the agreement, likely by mid 2023.

New Zealand concluded FTA negotiations with the European Union (EU) in June 2022. It is now expected that the NZ-EU FTA will be ratified by both parties by late 2023.

The EU is New Zealand's largest source of imports and third largest export market. Two-way trade between New Zealand and the EU (excluding the UK) is worth around NZD20 billion annually. New Zealand is seeking a FTA that removes tariffs and other barriers to trade, while also promoting adherence to environmental and labour standards.

New Zealand's most notable FTAs (including FTAs concluded but not yet in force) are described in detail in our section on 'New Zealand's international trade profile'.

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Investment structures

Foreign companies usually establish a business presence in New Zealand either by:

- establishing or acquiring a New Zealand subsidiary company; or
- establishing a branch office.

Other options for structuring an investment in New Zealand include using a limited partnership or partnership.

Companies and branches

Companies

Company law is regulated by the provisions of the Companies Act 1993. The activities of companies listed on a licensed market operated by NZX Limited are also regulated by the relevant listing rules and other legislative requirements.

Any person, either alone or together with another person, may apply to incorporate a company under 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, an application must first be made to reserve the company's name with the New Zealand Registrar of Companies. A name cannot be reserved which is identical to, or almost identical to, the name of another registered company.

Certain names are protected or restricted by legislation and may need approval from relevant authorities before they can be reserved (for example, names including the words 'bank' or 'royal').

An online application in the prescribed form must be made to the Registrar of Companies to incorporate the company under the reserved name. 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; and
- provide ultimate holding company information (if applicable) to the Registrar of Companies.

The directors of a company must provide their date and place of birth to the Registrar of Companies. This information will not be publicly available (however see our comments below under 'Expected "Corporate Governance (Transparency and Integrity) Reform Bill"').

Income tax, goods and services tax and employer registration for tax purposes can be applied for at the same time as company incorporation (although the company may need to provide proof of its fully functional New Zealand bank account, or otherwise demonstrate that customer due diligence has been completed by a New Zealand reporting entity to the New Zealand tax office before these applications will be processed). Alternatively these registrations can be applied for following incorporation, once the company has opened a New Zealand bank account.

Each company is allocated a unique identifying number on incorporation. Generally, provided that all necessary information is available, companies can be incorporated within one to three business days.

There are criminal sanctions for breaches of certain directors' duties.

The Registrar of Companies has powers to investigate and remove companies from the Register of Companies, along with the power to warn the public about suspect companies by placing a warning note on the Register.

Branch office

A foreign company can establish a branch in New Zealand by registering on the overseas register under the Companies Act 1993.

Registration is compulsory if the foreign company is "carrying on business in New Zealand". The Companies Act 1993 does not clearly define what activities constitute "carrying on business". For this reason, it is advisable for foreign companies to seek professional advice prior to commencing business in New Zealand.

Main legal issues

The decision on whether to establish a subsidiary or branch office will generally depend on commercial and taxation considerations, rather than legal considerations.

The following table sets out the main legal and taxation differences between incorporating a company in New Zealand and doing business through a branch office registered in New Zealand.

SUBSIDIARY COMPANY		BRANCH OFFICE
■ separate legal entity incorporated with the Registrar of Companies and given a unique identifying number ■ liabilities remain with the subsidiary in the absence of guarantees and like arrangements, or if the subsidiary trades while insolvent in which case liability may be placed on directors	COMPANIES LAW	■ not a separate legal entity (ie a branch office is part of the foreign company) ■ registered with the Registrar of Companies as an overseas company and given a unique identifying number ■ liabilities remain with the foreign company ■ must not commence business until the name of the foreign company has been reserved
■ if a foreign company acquires an existing subsidiary company that has certain land or assets in New Zealand, or if the foreign company establishes a new subsidiary company to acquire certain land or assets in New Zealand, prior approval may be required under the Overseas Investment Act 2005 before completing the transaction	OVERSEAS INVESTMENT REGULATIONS	■ approval may be required before certain land or assets in New Zealand are acquired by the branch office
■ resident for New Zealand tax purposes ■ taxed on all net income wherever sourced at the corporate tax rate of 28% ■ dividends paid by the subsidiary will be subject to New Zealand non-resident withholding tax (NRWT) at a rate of 30% which may be reduced by domestic law or under an applicable double taxation agreement to 15%, 5%, or 0%	TAXATION	■ taxed on all net income attributable to the branch at the corporate tax rate of 28% ■ may be affected by a double taxation agreement ■ no New Zealand tax on repatriation of branch office profits to head office
■ subsidiary's interest deductions will be limited if the debt percentage (being the ratio of debt to net assets, being assets net of non-debt liabilities) of its New Zealand group is greater than 60% and exceeds 110% (or 100% in some instances) of the debt percentage of its worldwide group	DEBT TO EQUITY FUNDING RATIO	■ branch's interest deductions will be limited if the debt percentage (being the ratio of debt to net assets, being assets net of non-debt liabilities) of its New Zealand group is greater than 60% and exceeds 110% (or 100% in some instances) of the debt percentage of its worldwide group
■ financial institutions must report significant cash transactions and transfers and any suspicious activities	EXCHANGE CONTROLS	■ restrictions and reporting requirements apply to transactions between a company's branch and head office
■ must lodge annual returns with the Registrar of Companies ■ may be required to file audited financial statements of the company (including subsidiaries) with the Registrar of Companies depending on the value of its (and its subsidiaries) assets, revenue and degree of overseas ownership ■ may be required to hold a shareholder meeting (or pass a resolution in lieu of meeting) each year ■ required to maintain certain registers (eg directors, shareholders) and company records	ONGOING ADMINISTRATIVE RESPONSIBILITIES	■ must lodge annual returns with the Registrar of Companies ■ may be required to file audited financial statements (for its New Zealand operations and separately for the foreign company (and its subsidiaries) of which the branch is a part) with the Registrar of Companies depending on the value of its global (including subsidiaries) and New Zealand assets and revenue ■ the branch is not required to hold annual shareholder meetings or maintain registers under New Zealand law

Limited partnerships

The Limited Partnerships Act 2008 provides for limited partnerships, which are similar in nature to limited partnerships in other jurisdictions.

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

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. 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 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.

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 (however see our comments below under 'Expected "Corporate Governance (Transparency and Integrity) Reform Bill"'). Details of general partners are filed, and selected information is publicly available. A limited partnership is a separate legal entity.

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.

The Registrar of Companies has investigative powers, and the power to warn the public about suspect limited partnerships by placing a warning note on the Register of Limited Partnerships.

"A limited partnership must have a limited partnership agreement between the limited partnership and all of its partners"

Additional requirements of limited partnerships include:

- Each limited partnership must have at least one general partner who either lives in New Zealand, or lives in Australia and is a director of a company that is registered in Australia (Resident General Partner Requirement);
  - that is a limited partnership and that limited partnership has at least one general partner who meets the Residential General Partner Requirement;
  - that is a partnership governed by the Partnership Law Act 2019 and that has at least one partner who meets the Residential General Partner Requirement;
  - that is a company registered under the Companies Act 1993 (and so is subject to equivalent director rules, as noted in the 'Companies' section above); or
  - that is an overseas company registered as such under the Companies Act 1993 and that has at least one director who meets the Resident General Partner Requirement.
- Individuals who are general partners must comply with certain qualification requirements.
- Individuals who are general partners must provide their date and place of birth to the Registrar of Companies. This information will not be publicly available.

Partnerships

In New Zealand, a partnership is the relationship which exists between persons carrying on a business in common, with a view to profit.

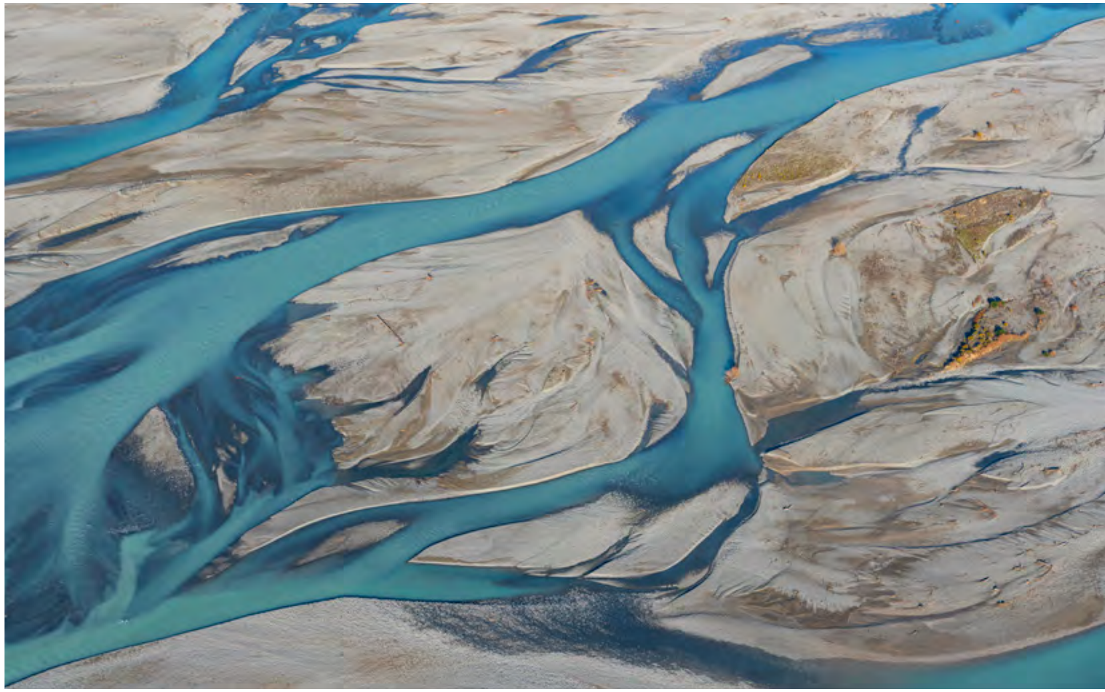
Partnerships (other than limited partnerships) are regulated by the Partnership Law Act 2019, together with the terms of any agreement between the partners.

Because a partnership (other than a limited partnership) is not a separate legal entity:

- each partner is the agent of the other partners and may make contracts, undertake obligations, and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business;
- arrangements between partners will protect partners in their relationship with each other. Third parties without knowledge to the contrary, however, are protected from actions committed by partners beyond their authority;
- each partner is personally liable, for the liabilities of the partnership. The liability of each partner is unlimited;
- the property of the partnership is owned by the partners personally as joint owners; and
- each partner is liable personally, jointly and severally, for torts committed by the partners.

A partnership and each of its partners will need to be registered for income tax purposes. As part of this registration process, the 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. A partnership must submit a joint return of income to the New Zealand Inland Revenue disclosing its income, allowable deductions and the distribution of profits to partners, although the partnership itself will not be assessed for income tax. The partners individually must submit a separate return of income to Inland Revenue and pay tax on their share of partnership profits.

A partnership, other than a limited partnership, does not have to be formally registered.



Other structures

In addition, there are a number of other investment structures that are used, particularly in the financial services sector, eg managed investment schemes formed as unit trusts qualifying as a PIE. More information can be found in the Taxation chapter on page 29 and Financial services chapter on page 66.

Expected "Corporate Governance (Transparency and Integrity) Reform Bill"

In March 2022, the Government announced a proposal to introduce a new beneficial ownership register for limited partnerships and companies. The Ministry of Business, Innovation and Employment (MBIE) also published Cabinet's decision that the New Zealand Companies Office should create a unique 'corporate role-holder identifier' (CRI) for individuals that are or become directors of companies, general partners of limited partnerships, or beneficial owners of these entities.

With respect to the proposed beneficial ownership register, Cabinet agreed that companies and limited partnerships should be required to provide to the Registrar of Companies certain information about their beneficial owners. In relation to this, a modified definition of "beneficial owner" is proposed to be used for the Companies Act 1993 and Limited Partnerships Act 2008, focusing on persons who have "significant control" over a company or limited partnership.

Some information on beneficial owners, directors and general partners is proposed to be made publicly available on the companies and limited partnerships register (full legal name, date of and basis for becoming a beneficial owner or date of appointment, address for service, and chains of beneficial ownership). However, other sensitive details (date of birth, email address, and corporate information of other entities the person is a beneficial owner of) will be on a non-public corporate role-holder register. Government agencies and AML reporting entities may however be able to access information not available to the public under certain conditions.

The proposal is aimed at increasing transparency, reducing the use of these corporate structures for illicit purposes, supporting work to counter foreign interference, and aligning with international standards (among other things). To support these aims, companies and limited partnerships will be expected to take reasonable steps to ascertain who their beneficial owners are and provide key identifying information about the beneficial owner to the Registrar of Companies.

The CRI proposal requires individuals who apply for CRI to provide their date of birth and email address and both relevant entities and individuals to comply with ongoing maintenance obligations. It is intended that being able to identify a person who holds (or has held) the above-noted roles for more than one entity will make it easier for businesses, creditors and consumers to undertake due diligence, and for enforcement agencies to detect potential unlawful activities.

As at April 2023, the Bill has not yet been introduced to Parliament and is thought unlikely to be considered before the 2023 Election in New Zealand.

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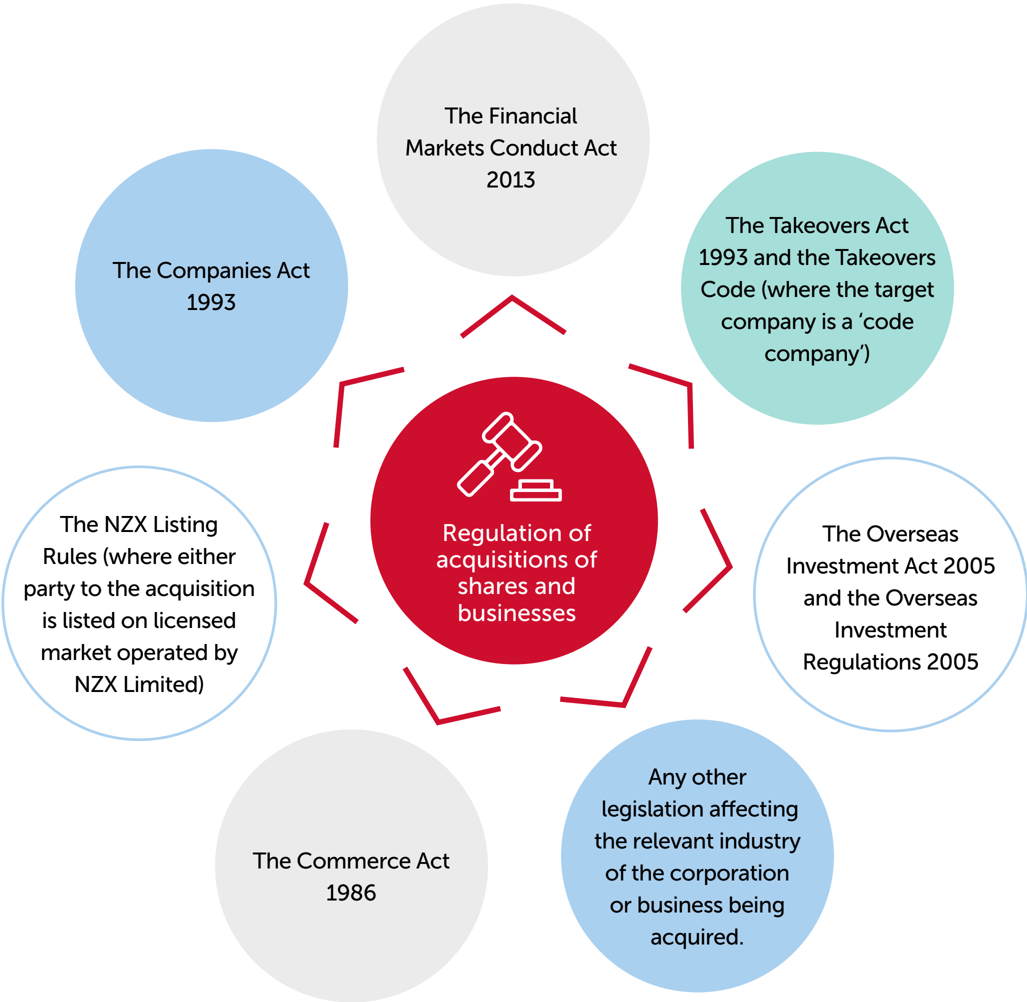
Acquisitions of companies and businesses



Matters which may need to be considered

Under the Companies Act 1993 the following factors need to be considered:

- if the acquisition is a 'major transaction' for a party (generally a transaction worth more than 50% of the market value of a company's assets), and that party is registered under the Companies Act 1993, the acquisition will require the approval by way of a 'special resolution' of the shareholders of that party;
- generally, a company can only give financial assistance to a person to acquire shares in the company if the board has previously resolved that the company should provide the assistance, that giving the assistance is in the best interests of the company and of benefit to shareholders not receiving it, that its terms and conditions are fair and reasonable to the company and to shareholders not receiving the assistance, and that the company can satisfy the solvency test; and
- the acquisition by a company of its own shares is regulated, and the Companies Act 1993 requires that the solvency test, amongst other matters, be satisfied; and
- dealings by directors in the securities of companies which are not listed are restricted.

The solvency test requires that a company be able to pay its debts as they become due in the normal course of business and that the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

Securities laws

Where an investment into New Zealand is made and securities (whether newly issued or previously allotted) are offered as payment, New Zealand's securities laws may apply. In general, unless an exemption or exception applies, these laws require the preparation of disclosure documents (e.g. a product disclosure statement) in respect of the securities being offered. As in other jurisdictions, non-compliance with New Zealand's securities laws can result in significant civil and criminal penalties.

Therefore, persons or companies investing in New Zealand and offering securities as payment need to be mindful that disclosure documents may need to be prepared in respect of those securities.

In some circumstances, Australian investors can take advantage of Part 9 of the Financial Markets Conduct Regulations 2014 which provides for a mutual recognition scheme between New Zealand and Australia allowing issuers to extend offers of equity or debt securities and certain other products in their trans-Tasman counterpart country without needing to prepare a separate offer document under the other country's laws.

Certain minor procedural requirements must be met to rely on the mutual recognition scheme including following the initial registration under the scheme.

Under the Financial Markets Conduct Act 2013:

- A person is a 'substantial product holder' in a listed issuer if the person has a 'relevant interest' in 5% or more of any class of quoted voting products of a listed issuer. A listed issuer includes a company listed on the NZX.
- Every person who is or becomes a substantial product holder, or who ceases to be a substantial product holder, must give notice of that fact to the listed issuer and to the NZX.
- A substantial product holder must notify the listed issuer and the NZX of changes of 1% or more in the number of quoted voting products in which the holder has a relevant interest, and/or of changes in the nature of the holder's relevant interest.
- The language used in the definition of 'relevant interest' is very wide, extending to many interests in addition to registered ownership and beneficial ownership.
- An 'information insider' cannot trade in quoted financial products (which includes quoted and certain unquoted derivatives) of a listed issuer in New Zealand. This is a person who is in possession of information about a listed issuer which is not publicly available, but which, if it were, a reasonable person would expect to materially affect the price of the listed issuer's quoted financial products. The information insider must also know or ought to know they have inside information. Similarly, information insiders may not advise or encourage others (directly or indirectly) to trade or continue holding financial products of that listed issuer, or disclose such information to other people, if that person knows, ought reasonably to know or believes that those people will or are likely to trade or advise or encourage others to trade or continue to hold the listed issuer's quoted financial products.

Company thresholds

5%

Threshold for notification by substantial product holders of relevant interests in quoted voting products of listed issuers as required by the Financial Markets Conduct Act 2013.

20%

Threshold level of holding or control of voting rights in a code company, including associates. To acquire more than 20% or increase a 20% stake in that company, the acquirer will need to comply with the *Takeovers Code* and/or get court approval.

25%

The level of overseas ownership needs to be more than 25% to be deemed an overseas person under the Overseas Investment Act 2005.

49%

Minimum continuous shareholding for carry-forward of accumulated tax losses, subject to the application of the business continuity test.

50%

Threshold level of foreign ownership for the thin capitalisation rules and association for purposes of the transfer pricing rules.

66%

Minimum continuous shareholding for carry-forward of imputation credits.

Minimum commonality of shareholding for tax grouping (allowing offset of tax losses within the tax group).

75%

Required majority for special resolution under the *Companies Act 1993* (unless a company's constitution specifies a higher majority).

90%

Required threshold for compulsory acquisition of minority holding in a code company under the *Takeovers Code.*

100%

Wholly owned subsidiary, consolidation for tax purposes.

- A person making statements or disseminating information about a listed issuer in New Zealand which they know, or ought reasonably to know, is false in a material aspect or is materially misleading, and which is likely to influence trading, price, or the exercise of voting rights of that listed issuer's quoted financial products (which includes quoted and certain unquoted derivatives) is prohibited.

It is also prohibited to take or omit to take action which the person knows, or ought reasonably to know, will, or is likely to have, the effect of creating or causing the creation of a false or misleading appearance of trading or otherwise the supply, demand, price or value of the quoted financial products of a listed issuer in New Zealand.

The Takeovers Act 1993 and the Takeovers Code apply to 'code companies'. A code company is a company that:

- is (or was in the prior 12 months) listed on a licensed market (e.g. the NZX) and has quoted voting securities on issue; or
- has 50 or more shareholders and 50 or more share parcels and is at least medium-sized (being a company and subsidiaries that have at least NZD30 million in assets or NZD15 million in revenue in the most recent financial year).

Under the Takeovers Code, no person can:

- become the holder or controller of more than 20% of the voting rights in a Code Company (taking into account shares in the Code Company held by 'associates'); or
- increase an existing holding or controlling interest of 20% or more of the voting rights in a Code Company, except by means of:
  - an acquisition under a 'full offer' or 'partial offer' in accordance with the Takeovers Code;
  - an acquisition or allotment approved by an ordinary resolution of the shareholders of the Code Company in accordance with the Takeovers Code excluding the acquirer, disposer, allottee and their associates;
  - a 'creeping' acquisition, which allows a shareholder who already holds or controls more than 50%, but less than 90% of the voting rights in a Code Company, to acquire up to an additional 5% of the voting rights in a 12 month period by reference to the lowest shareholding in that 12 month period;
  - a compulsory acquisition, which allows a shareholder who already holds or controls 90% or more of the voting rights in a Code Company, to compulsorily acquire the remaining voting rights in the Code Company, subject to certain timeframes under the Takeovers Code. If these timeframes expire, further voting rights can be acquired by agreement but not compulsorily; and
  - a scheme of arrangement approved by the Court under the Companies Act 1993.

Under the NZX Listing Rules, companies (and subsidiaries of companies) listed on the NZX cannot enter into certain major transactions and transactions involving related parties without the prior approval of the shareholders of that listed company.

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Foreign investment rules

New Zealand's foreign investment law attempts to balance the encouragement of foreign investment in New Zealand with the view that it is a privilege for overseas persons to invest in the country. The regulatory regime reflects this general policy approach by applying a level of control to discourage undesirable investment.

New Zealand's foreign investment regime is set out in the Overseas Investment Act 2005 (OIA) and the Overseas Investment Regulations 2005 (OIR) and is administered by the Overseas Investment Office (OIO), with certain key investment classes requiring ultimate approval by a Government Minister.

The OIA requires 'overseas persons' and their 'associates' to obtain OIO consent for certain investments in New Zealand (see below for investment categories).

Overseas persons

As noted above, the FDI regime applies to certain investments by 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 bodies corporate that are incorporated outside of New Zealand or in which overseas persons have a more than 25% interest. The definition also captures unincorporated entities such as trusts, partnerships, and managed investment schemes, if there is more than 25% overseas influence or ownership in those entities.

An associate is very broadly defined and includes any person that participates in the overseas investment or any other matter as a consequence of any arrangement or understanding with the overseas person.

Transactions requiring consent of the Overseas Investment Office

In general, there are four broad categories of investments for which consent under the OIA must be sought, and which are explained in more detail below:

- significant business assets transactions;
- sensitive land transactions;
- fishing quota transactions; and
- call-in transactions.

The first three of these may be escalated to include a "national interest" assessment where foreign Governments and strategically important businesses are involved (see below for further details).

Transactions involving the acquisition of an offshore entity which owns, either itself or through its group, significant business assets, sensitive land, fishing quota or certain strategically important businesses 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. This means that international transactions may require OIO approval in New Zealand.

An overseas person is required to obtain the consent of the OIO before it gives effect to any transaction set out above, and the transaction must be conditional on OIO consent. Failure to do so is an offence, and can attract civil and criminal penalties, including forced divestment of the assets.

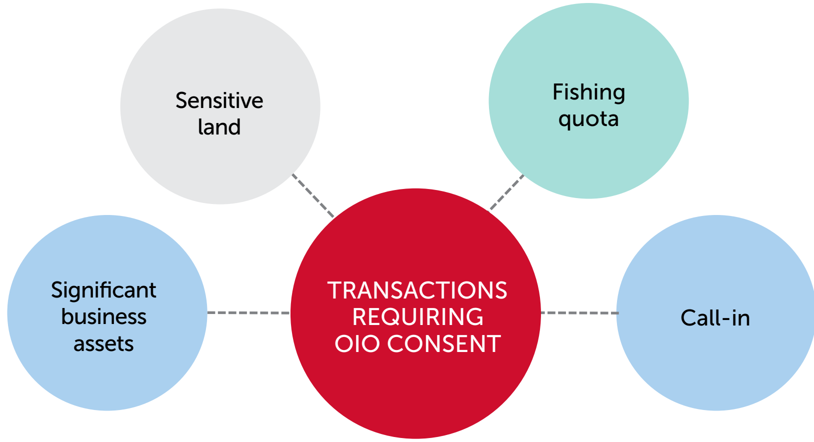
Significant business asset transactions

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 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 setting up the business exceeds NZD100 million; or
- 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.

Different thresholds apply to certain overseas investments in significant business assets (but not sensitive land) by certain of 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 2023) NZD586 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 2023) NZD123 million (note these thresholds increase annually with inflation); and
- certain investors from member countries of certain significant regional trade agreements (including UK, Canada, Chile, Japan, Singapore, Korea), where the value of the New Zealand assets in the business does not exceed (as at 1 January 2023) NZD200 million.



Sensitive land transactions

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
  - becomes an overseas person in qualifying circumstances.

Land is sensitive if it has certain features such as location, size, use (e.g. residential land) or historical significance, and an 'interest in land' includes freehold and certain leasehold interests. The definition is broad and can apply in unexpected circumstances.

Fishing quota transactions

Although not covered in detail under the OIA, the Fisheries Act 1996 regulates overseas investments in fishing quota. There will be an overseas investment in fishing quota if an overseas person, or an associate of an overseas person, acquires:

- an interest in fishing quota; or
- rights or interests in securities of a person (A) if A owns or controls (directly or indirectly) an interest in fishing quota 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
- becomes an overseas person in qualifying circumstances.

Fishing quota is, in general terms, a right for commercial parties to catch a certain amount of fish annually.

Incremental increase investments

Consent is required for incremental increases 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 (D) that:

- results in an ownership or control interest in D that equals or exceeds the relevant ownership or control interest limit (i.e. 50%, 75%, or 100% depending on the existing ownership or control interest);
- is in securities of D 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 SIB (see below). Disproportionate access generally means being more than a passive shareholder.

National interest transactions

If consent is required for a significant business asset, sensitive land or fishing quota transaction, then consent may also be required as a national interest transaction. This may occur if a non-New Zealand government investor or investors are involved in the transaction above certain thresholds (whether directly or as upstream investors) or in most cases where a "strategically important business" is involved. Additionally, the assessment can be imposed if it is considered that the transaction could be contrary to New Zealand's national interest.

Strategically important businesses (SIB) are ones that have been deemed to be of national significance such that they require additional vetting by the OIO. These include certain critical direct suppliers, military or dual-use technology, ports or airports, electricity, water, telecommunications, significant media businesses, certain financial institutions, financial market infrastructure, irrigation schemes and, for call-in transactions, holders of certain sensitive information.

As noted above, the Government also has the power to determine a transaction to be a national interest transaction, notwithstanding that it does not meet the strict requirements under the OIA. In this respect, the Government has issued a Ministerial Directive Letter as to when this discretion is likely to be exercised. Factors that could escalate a transaction to a national interest assessment include if the proposed investment:

- could pose risks to New Zealand's national security or public order;
- would grant an investor significant market power within an industry or result in vertical integration of a supply chain;
- has foreign government or associated involvement that was below the more than 25% ownership or control interest threshold for automatic application of the national interest test, but granted that government (and/or its associates) disproportionate levels of access to or control of sensitive New Zealand assets;
- would have outcomes that were significantly inconsistent with or would hinder the delivery of other Government objectives;
- raises significant Treaty of Waitangi issues; or
- relates to a site of national significance (e.g. significant historic heritage).

'Call-in' transactions

A 'call-in' transaction is essentially a transaction that involves a strategically important business, but is not a significant business asset, sensitive land or fishing quota transaction. Normally, such transactions would not be subject to screening under the OIA. Therefore, the call-in transaction 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). Given this focus the call-in transaction is expected to be rarely used.

The regime applies if any securities are acquired in a SIB (or there is an "incremental increase", which here includes a 25% control limit), with relaxed thresholds for listed entities ($\geq$10%), unless disproportionate access or control is acquired, and media businesses (>25%). Further, acquisitions of New Zealand assets used in carrying on a SIB are also caught, but the exact triggers are more complex.

If the regime applies, its application is mandatory for certain critical direct suppliers and military or dual-use technology, and is voluntary for all other SIBs. The benefit of a voluntary filing is that the transaction cannot be called in later (i.e. after settlement) and is generally recommended.

Exemptions to the requirement to obtain consent of the Overseas Investment Office

Certain transactions are exempt under the OIR from the requirement to obtain the consent of the OIO. These transactions include, among other things and under certain circumstances:

- certain transactions where there is internal restructuring but no change in the ultimate beneficial ownership;
- certain financing transactions, particularly the enforcement of a security arrangement;
- certain underwriting and sub-underwriting transactions;
- certain transactions involving the acquisition of residential apartments that are purchased off the plans, or hotel units for hotel use; and
- certain transactions by Australian and Singaporean investors in residential (but not otherwise sensitive) land.

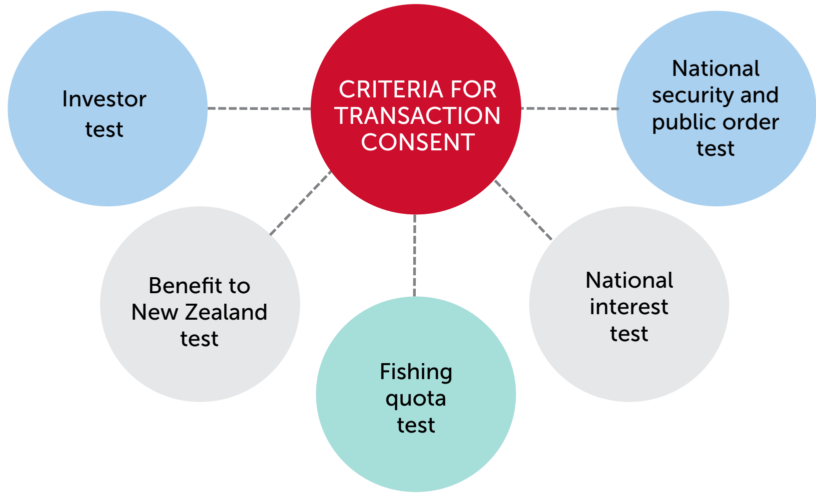
The OIA also gives the relevant Minister(s) a discretionary power to exempt any transaction, person, interest, right, or assets from the requirement for consent or from the definition of overseas person or associate or associated land (although this discretion is likely to be exercised only in exceptional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

Criteria for transaction consent

In order 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:

- **Investor test:** applies to all significant business asset, sensitive land and fishing quota transactions;
- **Benefit to New Zealand test:** applies to sensitive land transactions;
- **Fishing quota test:** applies to the special nature of fishing quota;
- **National interest test:** applies to national interest transactions; and
- **National security and public order test:** applies to call-in transactions.



Investor test

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

There are additional and more onerous criteria which apply to an investment in sensitive land. In the case of land which 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 is to the benefit of 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) to the extent required below, as determined by the relevant Ministers by reference to seven prescribed benefit factors. These factors relate to economic benefit, environmental benefit, public access, protection of historic heritage, advancing Government policy, oversight benefit and consequential benefit. As part of their determination, the relevant Ministers must:

- assess the benefit to New Zealand (or any part of it or group of New Zealanders) by comparing the likely result of the overseas investment against the existing state of affairs as at the time the overseas investment transaction is entered into or the time the application is made, whichever occurs first; and
- take a proportionate approach to whether the benefit test is met, by taking into account whether that benefit is proportionate to the sensitivity of the land, and the nature of the overseas investment transaction.

Where an overseas person is seeking to acquire residential (but not otherwise sensitive) land, there are four residential land specific pathways to obtain consent. One pathway requires the overseas person to demonstrate that the property is for personal use and they reside or intend to reside in New Zealand permanently. Another pathway requires the overseas person to show that they intend to build houses for sale to the public on the land. The two other pathways relate to residential land acquired incidentally to a business purpose or for non-residential use.

Fishing quota test

An overseas person seeking consent for the acquisition of fishing quota must meet the following criteria:

- the investor test;
- the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) to the extent required under the benefit to New Zealand test in the bullet points above, as determined by the relevant Ministers under the Fisheries Act 1996 by reference to certain benefit factors similar to those under the benefit to New Zealand test;
- if applicable, the national interest test under the OIA is met; and
- the interest in fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register.

National interest test

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 25). The test's starting point is that the overseas investment is in New Zealand's national interest.

However, the relevant Minister has broad discretion to decide an overseas investment is contrary to New Zealand's national interest on a case by case basis after considering certain factors including, 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

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.

As noted above, this is expected to be rarely used, and while guidance is minimal at this stage on its application, we expect it to be a subset of the national interest test. Specifically, "national security, public order and international relations" factors mentioned above. Guidance states that the following non-exhaustive list of factors are likely to inform an assessment of whether significant risks are present:

- the nature of the investor (e.g. state or private);
- the level of control granted by the proposed investment and any impacts that may arise from such control; and
- whether the proposed investment is likely to grant the investor access to strategically important businesses or their assets.

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 pathway, ranging from 35 working days for significant business assets, 55 to 100 working days for sensitive land and 200 working days for fishing quota. The OIR prescribes instances where the timeframe may be paused or extended by 30 days. A longer time frame can also be applied if that is agreed with the applicant. For a call-in transaction, an initial assessment takes 15 working days, at which point it is either cleared or a full assessment will take place. The full assessment takes 40 working days and may be extended for up to 30 working days.

To encourage timeliness, the OIO is required to publicly report on performance against assessment timeframes. However, if timeframes are not met this does not mean applications will proceed automatically.

In addition, there is no penalty applied to the OIO for not completing an assessment within timeframes, and there are no grounds for compensation or other legal relief for applicants.

Offences and penalties

Potential investors should note that it is an offence under the OIA to:

- give effect to investments without gaining consent required by the OIA;
- knowingly or recklessly enter into a transaction, execute an instrument, or take any other step, for the purpose of or having the effect of, in any way, directly or indirectly, defeating, evading, or circumventing the operation of the OIA;
- resist or obstruct or deceive any person who is exercising, or attempting to exercise, any power or function under the OIA or the OIR;
- knowingly or recklessly make a false or misleading statement or material omission in any communication with the OIO or in any information provided to the OIO or in relation to the OIA or the OIR, or in any information provided to the Commissioner of Inland Revenue for tax purposes; and
- fail to comply with the OIA or the OIR, or a notice, requirement, or condition given or imposed under the OIA or the OIR.

In general, a person who commits an offence under the OIA may be liable to imprisonment for a term not exceeding 12 months (in the case of individuals), or to a range of civil penalties or fines, which may include a fine of NZD500,000 (in the case of individuals) or NZD10 million (in any other case).

Where a person breaches the OIA or the OIR, or fails to comply with any condition of, any approval or exemption granted under the OIA or the OIR, the OIO has a range of enforcement powers available, including seeking a Court order requiring disposal of the rights or interest in securities or sensitive land for which consent was obtained.

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Taxation

New Zealand imposes taxation on the worldwide income of persons (including companies and unincorporated bodies) resident in New Zealand for taxation purposes, and on the New Zealand-sourced income of non-residents.

Income can have a New Zealand source even if paid outside New Zealand. Accordingly, companies and individuals doing business in, or with New Zealand, should be aware that income could become subject to New Zealand taxation, even though they may not have an established place of business in New Zealand.

There are double taxation agreements (DTAs) between New Zealand and a number of countries. If an investor is eligible for relief under a DTA, they are generally only subject to New Zealand tax on their business profits if they have a 'permanent establishment' in New Zealand.

However, New Zealand may impose limited withholding taxes on dividends, interest and royalties paid to the investors even if they do not have a permanent establishment in New Zealand.

Residence

A company is a resident of New Zealand for tax purposes if:

- it is incorporated in New Zealand;
- it has its head office in New Zealand;
- it has its centre of management in New Zealand; and/or
- the directors exercise control of the company from New Zealand (acting in their capacity as directors, whether or not decision-making by directors is confined to New Zealand).

An individual is a resident of New Zealand for tax purposes if they:

- have a permanent place of abode in New Zealand (whether or not they have a permanent place of abode elsewhere); and/or
- are in New Zealand for more than 183 days in any 12-month period (the 183 days does not have to be consecutive and part days count as whole days).

Countries with which New Zealand has a double taxation agreement

A protocol to amend the existing DTA has been signed but is not yet in force

Negotiations are currently taking place to amend existing DTA

Negotiations are currently taking place to replace the existing DTA

New Zealand is also currently negotiating to enter into DTAs with Luxembourg, Portugal, Saudi Arabia, and Slovak Republic.

Australia
Austria
Belgium
Canada
Chile
China
Czech Republic
Denmark
Fiji
Finland

France
Germany
Hong Kong
India
Indonesia
Ireland
Italy
Japan
Korea
Malaysia

Mexico
Netherlands
Norway
Papua New Guinea
Philippines
Poland
Russian Federation
Samoa
Singapore
South Africa

Spain
Sweden
Switzerland
Taiwan
Thailand
Turkey
United Arab Emirates
United Kingdom
United States of America
Vietnam

Principal rates of taxation in New Zealand:

NATURAL PERSON

Taxable income NZD	Marginal tax rate
0–14,000	10.5%
14,001–48,000	17.5%
48,000–70,000	30%
70,001–180,000	33%
180,001+	39%

COMPANIES

Taxed at the flat rate of

28%

TRUSTS

Taxed on trustee income at the flat rate of

33%*

* 39% as at 1 April 2024

Source of income

The determination of the source of particular items of income is dependent in most cases on the particular facts. New Zealand income tax law also lays down rules that apply in several instances to deem income to have a New Zealand source. This includes where contracts are performed in New Zealand.

Taxable income and rates of tax

Taxable income is generally computed in the same manner for both individuals and companies. It is necessary to calculate the gross income and deduct from it any allowable deductions and any available losses to arrive at the taxable income on which tax is charged. The resulting tax liability can be satisfied by way of tax credits to the extent that they are available.

In principle, capital gains are not subject to tax in New Zealand, although a number of types of capital gain can be included in a person's taxable income in certain instances (for example where land or personal property was acquired for the purpose of disposal or under specific bright-line rules that tax certain disposals of residential property).

The deductions allowable are generally all those expenditures and losses incurred in gaining or producing the taxpayer's gross income, or necessarily incurred in carrying on business for that purpose. Certain expenditure is not deductible, including that of a capital, private or domestic nature.

Certain tax deductions can be claimed by a taxpayer notwithstanding that they may be of a capital nature, such as depreciation and interest.

The standard taxation year runs from 1 April to 31 March. There is an ability to adopt an alternative tax balance date, for example to align the financial and tax balance dates of a New Zealand subsidiary company with those of an overseas parent or group.

Portfolio Investment Entity regime

The portfolio investment entity (PIE) regime encourages taxpayers to make investments through a managed fund, unit trust or company. Taxpayers investing in this way will potentially pay less tax than they would by investing directly.

An entity that satisfies the requirements to be a PIE is able to elect to enter into the PIE regime. The most common type of PIE is the multi-rate PIE. All PIEs are not taxable on gains from trading in shares in New Zealand and certain Australian companies. Tax is paid on any income derived by a multi-rate PIE on the investors' behalf by the PIE at the rate of either 0%, 10.5%, 17.5% or 28%, which reflects the tax rates for individuals but with a lower top tax rate.

For individuals, tax paid by the multi-rate PIE generally represents the final tax, and they do not generally need to pay any further tax to reflect their personal tax liability in respect of income derived through the PIE. There are also rules to ensure that the benefit of tax credits and other tax benefits are passed on to investors by the multi-rate PIE.

If it meets certain criteria, a PIE may qualify as a foreign investment PIE. There are two categories of foreign investment PIE, both of which generally provide a zero-rate of tax for non-resident investors. These are:

- the zero-rate PIE; and
- the variable-rate PIE.

These categories were intended to make New Zealand more attractive to non-resident investors and ensure that foreign investment PIEs could compete with funds in traditional offshore centres that invest internationally in more traditional offshore centres.

There are restrictions regarding the types of investment that can be held by foreign investment PIEs. A zero-rate PIE must invest primarily offshore and only hold minimal investments in New Zealand, except that up to 5% of the PIE's income can be New Zealand sourced interest and up to 1% of the PIE's income can be from New Zealand equity.

A variable-rate PIE is able to invest in both New Zealand and offshore markets. The general principle applying to the New Zealand investments of a variable-rate PIE is that a non-resident investor should be placed in a no worse position than if he or she had invested directly. Non-resident investors will pay no New Zealand tax in relation to income derived by the variable rate PIE from outside of New Zealand. Tax will be payable in relation to the PIE's New Zealand-sourced income at variable rates depending on the nature of the income and the tax treaty position with the investor's country of residence. The following rates of tax will generally apply to the variable-rate PIE:

- 0% for foreign-sourced income
- 0% on dividends derived from a New Zealand company that are fully imputed
- 1.44% on New Zealand-sourced financial arrangement income (being the deductible approved issuer levy rate)

In order for the zero-rate or lower variable rates of tax to apply, a non-resident must elect to be a 'notified foreign investor' by notifying the PIE that they wish to be treated as such. Certain requirements must be met in order for the election to be valid, including that the election cannot be made by a controlled foreign company, a non-portfolio foreign investment fund, or a non-resident trustee of a trust other than a foreign trust.

Limited Partnerships

For New Zealand tax purposes, a limited partnership is fiscally transparent for income tax purposes. Instead, income and expenditure of the limited partnership are attributed to its limited partners, in proportion to their respective shares. However, a limited partnership is not limited for other tax types, e.g., GST and employer obligations.

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 respect to their investment in the limited partnership. Losses denied in one income year may be able to be carried forward and claimed in a subsequent income year.

Anti-streaming rules 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).

Look-through companies

A 'look-through company' (LTC) regime may apply to a corporate entity that is a New Zealand resident body corporate (under both New Zealand law and DTAs) with five or fewer look-through counted owners.

All shares in the LTC must have uniform entitlements to distributions, although shareholders may have different voting rights. The shares must be held by natural persons, trustees or another LTC, and generally cannot be held by charities or Māori authorities. In order to be a LTC, all look-through counted owners must make certain elections to Inland Revenue. Some limits apply in relation to foreign shareholders and foreign-sourced income derived by a LTC.

The taxation of a LTC is generally the same as that for a limited partnership in that the LTC is taxed as a flow-through entity and not as a company.

The income, expenditure, tax credits and other tax items of a LTC are allocated to shareholders in accordance with their effective look-through interests, which will generally be determined by calculating a shareholder's average percentage shareholding in the LTC throughout the year. Profits of the LTC are taxed at the shareholder's marginal tax rate, with the LTC's losses able to be offset against the shareholder's other income. However, where the ownership interests in the LTC are held more than 50% by non-residents, the foreign income that can be earned by the LTC will be limited to the greater of NZD10,000 and 20% of the LTC's gross income in the relevant year. If this limit is exceeded, the company will no longer be eligible to be an LTC and will be taxed as an ordinary company.

Branch offices

A non-resident company carrying on business in New Zealand through a branch, or a permanent establishment, is subject to New Zealand income tax at the rate of 28% on the net taxable income attributable to that branch.

The tax treatment of the New Zealand branch may be affected by a double taxation agreement. However, there is no New Zealand tax on repatriation of branch office profits to the head office.

Imputation

New Zealand imposes tax on company distributions under an 'imputation system'. Dividends are generally taxable but can be imputed with the tax paid by the company. This tax is then allowed as a credit to shareholders against their own tax liability. Imputed dividends pass between resident companies in a manner that also transfers the imputation credit. Dividends paid between New Zealand resident companies which are 100% commonly owned are exempt from tax in most cases.

Non-resident withholding taxes

Dividends

When a New Zealand resident company pays a dividend to a non-resident shareholder, the dividend is subject to non-resident withholding tax (NRWT) at the rate of 30%, unless a reduced rate can be applied under the domestic rules or a relevant DTA.

A 0% NRWT rate will generally apply if the dividend is "fully imputed" (i.e. where credits are attached to the dividend for income tax paid by the company) and:

- paid to a non-resident who has a 10% or greater direct voting interest in the company; or
- paid to a non-resident that does not have a direct voting interest in the company of 10% or more and would, upon application of a relevant DTA, be subject to NRWT at a rate of less than 15% had the dividend had no imputation credits attached.

Alternatively, if a company fully imputes a dividend paid to a non-resident who has a less than 10% direct voting interest in the company, a 15% NRWT rate will generally be applied. The company may also choose to pay a supplementary dividend, funded by a tax credit equal to the amount of NRWT on the dividend, so that the non-resident receives the same net amount as if there was no NRWT.

For dividends that are not fully imputed, the rate of NRWT can be reduced to 15% where a DTA exists between New Zealand and the recipient's country of tax residence. Some tax treaties permit a further reduction to 5%, and a limited number of treaties (such as New Zealand's treaties with Australia, the United States and China) allow a 0% NRWT rate to apply.

The company paying the dividend is required to withhold and account for NRWT. NRWT is a final tax in the case of dividends (i.e. the non-resident recipient of the dividend will have no additional New Zealand income tax liability).

Royalties

Royalties are deemed to have a source in New Zealand if they are paid by a New Zealand resident (unless paid in respect of a business carried on outside New Zealand by the New Zealand resident through a fixed establishment outside New Zealand) or are paid by a non-resident and are deductible for New Zealand tax purposes.

In the absence of any DTA applying, royalties derived by non-residents and that have a New Zealand source are subject to NRWT at the rate of 15%.

The person paying the royalty is required to withhold and pay the NRWT to Inland Revenue.

NRWT is a final tax if the royalty is a 'cultural royalty', paid for the use or production of any artistic, literary, dramatic, or musical work, in which copyright subsists. NRWT is an interim tax (meaning that the recipient of the royalty payment may have further New Zealand income tax liability for the payment they receive) where the royalty is an industrial or commercial royalty or is payment for knowhow.

In the case of residents of countries with which New Zealand has a DTA, New Zealand withholding tax is generally limited to an amount not exceeding 10% of the gross royalty income, unless the royalties are connected with a New Zealand branch (although this depends on the DTA, for example the DTA between New Zealand and Malaysia limits tax to 15% and the DTA between New Zealand and Australia limits tax to 5%).

Interest

Interest paid by a New Zealand resident borrower to a non-resident lender that is not a registered bank in New Zealand and does not lend through a branch in New Zealand is subject to NRWT. The borrower is required to withhold and pay the NRWT to Inland Revenue.

NRWT applies as a final tax, unless the lender and the borrower are 'associated'.

- In the case of two companies, they will generally be associated if there is a group of persons who:
- have a 50% or greater voting interest in both companies;
- have a 50% or greater common market value interest in both companies; or
- control both companies by any other means.

Where the lender and the borrower are associated, NRWT is not the final tax and the non-resident receiving the interest remains liable for New Zealand income tax at their marginal tax rate, less any allowable deductions for expenditure incurred in producing this income. The non-resident lender may be allowed a credit for the NRWT already paid by the borrower (subject to any applicable DTA and the domestic laws of the lender's home jurisdiction).

NRWT generally applies at 15% but may apply at 10% if DTA relief applies.

In addition, if the lender and borrower are not associated and the applicable registrations are completed, the NRWT rate can be reduced to 0% by the payment of an approved issuer levy, equal to 2% of the amount of the interest payment, to Inland Revenue.

Thin-capitalisation rules

The interest paid by the New Zealand taxpayer is usually allowed as a deduction against gross income. Accordingly, there may be advantages in financing a New Zealand subsidiary by way of debt rather than equity capital. However, thin capitalisation rules can limit tax deductions for interest.

Thinly capitalised New Zealand companies, which are 50% or more controlled by a single foreign shareholder and its associated persons or by a 'non-resident owning body', are effectively denied a tax deduction for interest to the extent that the debt percentage exceeds certain safe harbours.

This is generally where the company's New Zealand group's debt percentage (i.e. the ratio of debt to net assets, being assets less non-debt liabilities) is greater than 60%, and exceeds 110% of the debt percentage of the worldwide group to which the New Zealand group belongs. This is reduced to 100% where the New Zealand group is controlled by a non-resident owning body. The permissible ratio can be increased for a company which is part of a group that is highly leveraged on a worldwide basis. Similar rules also apply to trusts and direct investment by a foreign investor (i.e. branches and permanent establishments). There is a concession for companies that enter into financial arrangements with third parties for the purpose of on-lending.

However, the concession does not apply to foreign-owned banks, which are subject to a separate and more complex thin capitalisation regime.

Further 'outbound' thin capitalisation rules may apply to New Zealand tax residents with controlled foreign company (CFC) or foreign investment fund (FIF) investments.

These rules apply where a New Zealand tax resident holds more than 10% of its assets outside of New Zealand, has borrowed to fund its investment in the CFC or the FIF (and its finance costs exceed NZD1 million), and the debt percentage of the New Zealand tax resident's New Zealand group and worldwide group both exceed a certain prescribed level.

The prescribed debt percentage is 75% for the New Zealand group, and 110% of the debt percentage of the worldwide group to which the New Zealand group belongs.

Where the outbound thin capitalisation rules apply, a New Zealand resident will be denied a tax deduction for its finance costs (i.e. interest payments), to the extent that it exceeds both of the prescribed safe harbour thresholds.

Interest on debt calculated by reference to the borrower's profits or stapled to equity is generally non-deductible expenditure for the borrower and is treated as a dividend (i.e. taxable income) when received by the investor.

Transfer pricing rules

New Zealand applies the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) to cross-border transactions between related parties.

Where the "arm's length" principle is not satisfied, Inland Revenue has the power to re-characterise transactions and substitute an amount of consideration between related parties with an "arm's length" amount.

Certain simplified transfer pricing measures can be applied in respect of low value adding intra-group services, small value loans, and small wholesale distributors.

There is no express legislative requirement for taxpayers to prepare and submit transfer pricing documentation to Inland Revenue.

However, the onus of proof is on taxpayers to establish that their pricing is on arm's length terms, so taxpayers are strongly encouraged to prepare and regularly update documentation and benchmarking studies.

Local group entities of foreign headquartered multinationals that are subject to country-by-country (CbC) reporting requirements are not required to file CbC reports with Inland Revenue. However, CbC reporting requirements do apply for multinationals headquartered in New Zealand with an annual group turnover of more than EUR750 million.

Inland Revenue has a seven-year period to amend an assessment for transfer pricing matters, if it has notified the taxpayer of an audit or investigation within four years.

Interest limitation rules

Interest payments by New Zealand borrowers to cross-border related parties are only deductible to the extent that they are consistent with the interest limitation rules.

If applicable, these rules limit the interest rate that can be applied to such debt by capping the credit rating of the New Zealand borrower when pricing the relevant interest rate.

The New Zealand borrower will be denied a deduction for the portion of interest payments that exceed the amount permitted under the interest limitation rules.

Under the interest limitation rules, typically the credit rating of the New Zealand borrower must be determined by the credit rating of its ultimate parent (unless there is no identifiable parent, in which case the credit rating will be capped to a minimum of BBB-).

These restrictions will not apply where the New Zealand borrower is not a 'Base Erosion and Profit Shifting (BEPS) risk' entity, being an entity:

- with a debt percentage of 40% of more, and the debt percentage is more than 110% of the debt percentage of its worldwide group; or
- that has borrowed from a related party lender that is resident in a different tax jurisdiction to its ultimate parent, and that tax jurisdiction has a tax rate of less than 15%.

Any non-standard or exotic loan features (such as subordination, or debt with an excessive term) that would artificially inflate the interest rate will also be disregarded when determining the interest rate that can be applied to the cross-border related party debt.

Existing significant third-party debt can also be used to determine an appropriate interest rate, and safe harbour interest rates are available for debt of less than NZD10 million.

Losses

Provided that shareholder continuity requirements are met, a company can carry forward its New Zealand tax losses indefinitely and can offset those losses against future taxable income. The right of a company to carry forward tax losses can be lost if a continuity of ownership test is not met. The test requires that 49% or more of all voting (and in some cases market value) rights are beneficially owned by the same persons from the beginning of the year of loss to the end of the year of offset (although part-year offsets are also allowed).

A business continuity test also applies for the carry forward of tax losses.

Under this test, a company can carry forward tax losses even if shareholder continuity is not maintained, unless there is a major change in the business within five years following a change in ownership. Assessing whether a "major change" has occurred involves looking at the extent to which new assets, activities and operations are used by the business in generating income.

The business continuity test applies to losses incurred from the 2013/14 income year onwards.

Losses can also be transferred between companies that are members of the same group, provided that certain ownership tests and other conditions are met. A 66% commonality of ownership from the beginning of the year of loss to the end of the year of offset is required (although part year offsets are also allowed).

Any losses arising on residential investment properties are ring-fenced and can only be offset against income from residential property investments.

Foreign-sourced income

New Zealand residents are subject to tax on their worldwide income, with any double taxation generally being relieved by means of a foreign tax credit system. New Zealand residents holding interests in certain types of overseas entities may be subject to New Zealand tax on deemed income from those entities, regardless of whether it is distributed or not, under CFC or FIF regimes. These regimes establish methods to calculate any such income and impose New Zealand tax on it.

A CFC is a foreign company which (broadly) is controlled by five or fewer New Zealand residents, or in which a New Zealand resident has a 40% or greater control interest. The CFC regime may subject a New Zealand taxpayer who holds an interest in a CFC to tax on attributed (deemed) income from that CFC, if the CFC generates 'passive income'. CFCs that generate less than 5% of their total (gross) income from passive sources (i.e. dividends, interest or royalties) generally qualify to be 'non-attributing active CFCs' and the CFC rules do not otherwise apply to them. Dividends derived by New Zealand companies from active CFCs are exempt from New Zealand tax. There are a number of tests prescribed to calculate whether a CFC qualifies as a non-attributing active CFC (and is therefore excluded from the CFC income attribution rules) or is a passive CFC (and is therefore subject to the attribution rules).

In addition, thin capitalisation rules apply to ensure that CFC investments are not excessively debt funded with interest deductions being claimed in New Zealand.

The FIF regime applies to foreign portfolio share investments (ie investments of less than 10% in foreign companies). New Zealand residents will generally be entitled to apply the 'fair dividend rate' method to determine how deemed income arises for their FIF investment (although other methods are available). Under the fair dividend rate method, deemed income equal to 5% of the opening market value of the New Zealand resident's total offshore share portfolio arises at the start of the tax year. The fair dividend rate method does not allow for losses to be claimed for tax purposes, but some New Zealand resident investors may be entitled to switch FIF methods and use the comparative value method which provides the ability to claim losses. The regime works on a 'pooled investment' approach for applicable investments and not on an investment-by-investment approach. This means all such investments must be grouped together when performing the fair dividend rate calculation. There are certain investments that the FIF regime does not apply to, including total pooled investments with a cost of NZD50,000 or less (where held by a natural person), investments in certain Australian resident companies listed on the Australian Stock Exchange, certain Australian unit trusts, certain employee share schemes, certain Australian superannuation schemes, and investments in some New Zealand start-up or venture capital companies that migrate offshore to gain access to finance. Additionally, there is an active income exemption (as in the CFC regime) for non-portfolio interests in FIFs. A non-portfolio interest in a FIF is where there is an interest of 10% or more.

Tax on residential property transactions

Non-residents and New Zealanders buying and selling any property other than their main home are required to provide a New Zealand IRD number as part of the land transfer process.

Non-resident buyers and sellers are required to provide their tax identification number from their home country, along with current identification such as a passport.

Bright-line rules

Gains made from residential property will be subject to tax on sale (under the 'bright-line test') if the property was acquired on or after:

- 29 March 2018 and sold within five years of acquisition; or
- 27 March 2021 and sold within ten years of acquisition (except if the property is a new build, in which case the five year bright-line test will be relevant).

Relevant exceptions may apply where the property is:

- the seller's main home;
- inherited from a deceased estate; or
- transferred as part of a relationship property settlement.

Limits may apply to restrict a person's ability to rely on the main home exception.

For example, a vendor cannot use the main home exclusion more than twice in the two-year period prior to the date of a land transfer. The exclusion will also be unavailable where a person or group of persons has a regular pattern of buying and selling their main home.

Rollover relief is also available for certain legal changes to land ownership that do not trigger the bright-line rules, such as to and from certain family trusts or a conversions between tenancy and common and joint tenancy.

Residential Land withholding tax

A withholding tax also applies for non-residents selling residential property subject to the 'bright-line' test, known as residential land withholding tax (RLWT). This means that tax on any profit from the sale of a residential property that is subject to the 'bright-line' test is collected from non-resident sellers at the point of sale, based on the assumption that such tax was owed. The non-resident seller may then need to show that the tax was not owed in order to get a refund.

Financing costs for residential property investments

From 1 October 2021, interest deductions are denied for residential properties acquired after 27 March 2021.

Interest deductions for residential property financing is being phased out over four years for properties "acquired" before 27 March 2021.

These rules do not apply to:

- new builds acquired as residential investment properties;
- certain build-to-rent dwellings; and
- property developers, dealers or builders (who pay tax on sale).

Tax disclosures to the Overseas Investment Office

Overseas investors that want to acquire significant New Zealand assets or sensitive land are required to make specific upfront tax disclosures to New Zealand's Overseas Investment Office (OIO). These disclosures include requiring applicants to:

- provide a description of their plan for the significant business assets, including details of any significant capital expenditure likely to be made over a three-year period;
- detail their tax residence, and that of any holding companies;
- provide information about the capital structure for the investment, including debt and equity funding and the possible involvement of any hybrid arrangements;
- indicate the likely nature and extent of any transfer pricing arrangements;
- state whether any double tax agreements are relevant;
- indicate whether the applicant is likely to apply to Inland Revenue for a ruling or advance pricing agreement with respect to any aspect of the investment;
- indicate whether they have been liable to penalties in respect of an "abusive tax position" or "evasion" in New Zealand or any other jurisdiction; and
- indicate whether, at the time that they are applying to the OIO, the overseas investor has any outstanding unpaid tax of NZD5 million or more due and payable in New Zealand or any other jurisdiction.

Goods and services tax

Goods and services tax (GST) at the rate of 15% applies generally to the supply of goods and services by GST registered businesses in New Zealand. Significant exceptions include supplies of financial services and supplies of residential accommodation which are generally exempt from GST.

Exports of goods and the provision of services to non-residents which are consumed outside of New Zealand may be zero-rated (i.e. GST is charged at the rate of 0%). Certain supplies made within New Zealand may also be zero-rated – for example, the supply of an interest in land or the supply of a 'going concern' between GST-registered persons.

Non-residents may also be liable for GST. For example, a non-resident supplier of 'remote services' to New Zealand resident consumers may be required to register and account for GST on those services.

A non-resident may also be subject to GST on supplies of goods to New Zealand, for example on importation of the goods into New Zealand if they are the importer of record.

Non-residents are required to register and account for GST if they:

- supply 'low value' goods to New Zealand consumers – that is goods that are valued at NZD1,000 or less; and
- make, or expect to make, more than NZD60,000 of supplies to New Zealand consumers in any 12-month period.

Non-resident operators of electronic marketplaces can be required to register and return GST. These rules will apply when remote services are supplied to New Zealand resident customers or goods are delivered in New Zealand.

A non-resident business that receives goods or services in New Zealand but does not make taxable supplies in New Zealand can voluntarily register for GST (subject to meeting certain criteria). This GST registration allows the non-resident to claim back the GST that it has paid on supplies received in New Zealand.

Goods and services tax (GST)

15%

Other taxes

New Zealand operates a no-fault, Accident Compensation Corporation insurance scheme (ACC) covering all persons (including non-residents) injured in New Zealand. Compensation for workplace and non-workplace accidents is provided by the New Zealand Government. This compensation is funded by levies imposed on employers, employees and motorists.

Fringe benefit tax (FBT) is payable by all employers on any non-cash benefits provided in connection with the employment relationship, to employees or persons associated with employees.

A fringe benefit may take the form of private use or enjoyment of a motor vehicle (or the availability of a motor vehicle for such use), employment-related loans, subsidised transport, contributions to certain insurance or superannuation schemes, or any benefit of any kind received by an employee.

FATCA reporting obligations

The United States (US) Foreign Account Tax Compliance Act (FATCA) aims to reduce and detect non-compliance by US taxpayers. FATCA is incredibly broad and (despite being a US based regime) impacts a number of New Zealand businesses and entities.

New Zealand has signed an Intergovernmental Agreement (IGA) with the US in relation to FATCA. Under the IGA, any entity that is classified as being a New Zealand Financial Institution (NZFI) will need to register with the US Internal Revenue Service, carry out due diligence in respect of the accounts it maintains, and report certain information to Inland Revenue.

New Zealand entities that are not NZFIs may also be affected by FATCA. In the course of doing business with a NZFI (such as a bank), such entities may need to provide FATCA-related information to the NZFI or may have information about their accounts reported to Inland Revenue as part of that NZFI's FATCA compliance.

AEOI reporting obligations

The OECD's Automatic Exchange of Information (AEOI) initiative is effectively a global version of FATCA, aiming to combat offshore tax evasion and increase voluntary tax compliance. AEOI involves an annual exchange of information between participating governments, with the relevant information being collected and reported by financial institutions in accordance with the terms of the Common Reporting Standard (CRS).

NZFIs are required to comply with the CRS customer due diligence, information collection and reporting obligations to facilitate New Zealand's exchange of information with other tax authorities on an ongoing basis. As a result, if an NZFI identifies an account holder as being a foreign tax resident (or in some instances, as being controlled by a foreign tax resident) information about that person and the account may be supplied to Inland Revenue and on-provided to the person's country of tax residence.

Employers will generally pay FBT on a quarterly basis (although an employer may elect to pay FBT on an annual basis).

Various approaches can apply when calculating an employer's FBT liability. Generally, FBT can be imposed at the maximum rate (being a flat tax of 63.93%) or a rate that reflects the employee's marginal rate of tax on cash remuneration.

Employers who elect to pay FBT on an annual basis can either pay FBT at the flat rate of 63.93% or use the alternate rate calculation process.

Local body revenues are raised through rates levied on landowners. There is no stamp duty or other similar document taxes in New Zealand.

Tax concessions

Transitional residency

Under the transitional resident tax exemption, natural persons who become tax residents in New Zealand for the first time (or after a 10-year absence from New Zealand are exempt from New Zealand taxation on foreign sourced income for up to 48 months of their tax residency (this excludes foreign sourced employment income or income from services).

Donations

New Zealand offers incentives to encourage donations to charities and non-profit organisations. The concessions are similar to those offered in the United Kingdom and Australia, with the ability of natural persons to receive refundable tax credits, and for companies to receive tax deductions, up to the amount of their annual net income.

A voluntary payroll giving regime also exists, which allows employees to have their charitable donations deducted from their pay by their employers. This regime aims to make charitable giving easier for employees.

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Competition (anti-trust) and consumer protection law

In New Zealand, competition and consumer protection law is largely regulated by the Commerce Act 1986 (Commerce Act), the Fair Trading Act 1986 (FTA), the Consumer Guarantees Act 1993 (CGA), and the Credit Contracts and Consumer Finance Act 2003 (CCCFA).

The Commerce Act was closely modelled on the provisions of Australia's Trade Practices Act 1974 (which was renamed the Australian Competition and Consumer Act 2010 on 1 January 2011) which was, in turn, influenced by US anti-trust law.

The Commerce Act:

- prohibits cartels and other anti-competitive arrangements;
- prohibits anti-competitive conduct by persons with substantial market power;
- regulates mergers and acquisitions; and
- governs the imposition of price control on particular goods and services.

The New Zealand Commerce Commission (NZCC) is responsible for administering and enforcing the Commerce Act. However, only the Courts can impose penalties for breaches of the Commerce Act.

The NZCC may grant clearances for mergers or acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The NZCC may grant an authorisation, on public benefit grounds, for a proposed acquisition or for certain conduct that would otherwise result in a substantial lessening of competition.

Competitive provisions

Anti-competitive conduct

The Commerce Act contains a broad prohibition on contracts, arrangements or understandings which have the purpose, effect, or likely effect of substantially lessening competition in a market.

The Commerce Act also contains a number of specific prohibitions. For example, the following conduct is anti- competitive and illegal:

Cartel conduct

It is illegal to enter into or give effect to a cartel provision. A cartel provision is a provision in an arrangement between competitors in the supply or acquisition of goods or services that has the purpose, effect or likely effect of:

- price fixing;
- restricting output; or
- market allocating.
- Exceptions to the cartel prohibition exist for collaborative activities and vertical supply contracts and an exception to the price fixing prohibition exists for joint buying and promotion agreements.

Misuse of market power

It is illegal for a person with substantial market power to engage in conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market.

This amended provision came into effect on 5 April 2023.

The new provision – which aligns New Zealand law with Australian law – focuses on both the purpose and the effect of the conduct rather than only on its purpose and removes the requirement that the firm 'take advantage' of its market power by engaging in the conduct.

Mergers and acquisitions

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

The acquisition of a foreign company by another foreign company may be subject to the Commerce Act if the acquisition affects a market in New Zealand.

The NZCC can apply to the High Court for a declaration where an overseas person acquires a controlling interest in a New Zealand company and the acquisition is likely to substantially lessen competition. If a declaration is granted the Court can require the New Zealand company to cease trading within six months, dispose of shares or other assets specified by the Court, or take any other action the Court considers is consistent with the purpose of the Commerce Act.

Consumer protection

The consumer protection provisions of the FTA, CGA and CCCFA aim to protect consumers by:

- prohibiting conduct which is likely to be misleading or deceptive. This prohibition is extremely broad and includes not only the making of untrue claims or statements, but also omitting to give all relevant details;
- implying warranties into sales transactions with consumers. The CGA implies warranties into sales transactions relating to the quality and standard of goods and services supplied. These warranties cannot be excluded from supply transactions other than where goods or services are acquired for commercial purposes, and this is stated in the supply contract; and
- requiring creditors who enter into consumer credit contracts to provide consumers with a written disclosure statement containing specific information about the terms of the contract. The CCCFA places restrictions on the means of applying interest and provides rules and guidelines for fees, payments, credit-related insurance, repayment waivers, extended warranties and cancellation. The CCCFA also includes lender responsibility principles and a responsible lending code. Lenders must exercise the care, diligence, and skill of a responsible lender in all its dealings with borrowers and guarantors, make reasonable enquiries, help borrowers and guarantors make an informed decision, act reasonably and ethically, and comply with the repossession and licensing rules.

The FTA contains a number of specific provisions aimed at protecting consumers, including:

- a prohibition on unfair contract terms in standard form consumer and small trade contracts;
- a requirement that any extended warranties must include a comparison of the protection available under the CGA and those provided by the extended warranty;
- a prohibition against unsubstantiated representations, namely making certain representations in trade, unless a person has reasonable grounds for that representation at the time of the representation; and
- a prohibition against unconscionable conduct in trade.

Specific industry regulation

The NZCC also administers certain sector-specific regulations which apply to electricity line businesses, gas pipelines, telecommunications companies, airports, and the dairy industry.

Penalties for breaching the Commerce Act and Fair Trading Act

The penalties for breaching the Commerce Act are substantial. The maximum penalty (per offence) for a corporation breaching the restrictive trade practice provisions or the business acquisition provisions of the Commerce Act is the greater of NZD10 million, three times the value of any commercial gain resulting from the contravention or, if the commercial gain cannot be readily ascertained, 10% of group turnover. Companies that intentionally engage in cartel conduct can be convicted of an offence and face criminal fines of the same magnitude.

Individuals convicted for intentionally engaging in cartel conduct in breach of the Commerce Act could face a penalty of imprisonment of up to seven years or a criminal fine of up to NZD500,000 or both. Individuals can also incur civil penalties of up to NZD500,000 (per offence) for breaching the other restrictive trade practices provisions of the Commerce Act.

A breach of certain provisions of the FTA exposes a corporation to a maximum penalty of NZD600,000 per offence. Individuals may face penalties of up to NZD200,000 per offence for breaching the FTA.

In addition, other remedies such as compensatory damages, exemplary damages, injunctions, divestment orders and orders excluding individuals from management may be awarded by a court.

Leniency and cooperation

The NZCC operates a Cartel Leniency and Immunity Policy to encourage the reporting of cartels. Under the policy, leniency from NZCC initiated proceedings will be granted to the first eligible person involved in a cartel to inform and cooperate fully with the NZCC provided the following conditions are met:

- the applicant must be the first person in the cartel to approach the NZCC;
- all relevant available information must be provided to the NZCC;
- the applicant must admit their role in the cartel;
- the applicant must fully and truthfully cooperate with the NZCC on a continuing basis;
- the applicant must not have coerced other participants to take part in the cartel conduct;
- individuals must appear as a witness if required by the NZCC and body
- corporates must encourage current and former directors, officers, or employees to give evidence if required; and
- the applicant must confirm that their involvement in the cartel has ceased, unless the NZCC requires cartel participation to continue for evidentiary purposes; and confidentiality in respect of the leniency application must be maintained.

Only the Solicitor-General can grant immunity from criminal prosecution to a person engaged in cartel conduct. The NZCC will recommend that the Solicitor-General grants immunity to an applicant for leniency and immunity if it is satisfied that the applicant has met the conditions for leniency and:

- some or all of the cartel conduct is likely to be prioritised for further investigation; and
- there is a prospect that criminal proceedings may be brought in relation to the prioritised conduct.

The Solicitor-General will apply their own criteria in deciding whether to grant criminal immunity, including the criteria set out in the Solicitor-General's Prosecution Guidelines.

An application for immunity and/or leniency by a business requires an admission that the notified conduct is conduct it is liable for, due to the actions of the business's directors, officers, contractors, agents, or employees (rather than independent, isolated acts by individuals).

A business applying for Immunity and/or Leniency must:

- provide the names of all current and former directors, officers, contractors, agents or employees of the business who were involved in the conduct and the current position held by each individual;
- provide the registered names of all wholly owned and solely controlled companies that were involved in the conduct and that it intends to benefit from derived immunity and/or leniency;
- identify one individual in the organisation or an external lawyer as the primary contact point for all matters related to the investigation; and
- commit to giving NZCC unfettered access (to the best of their ability) to its personnel, information, and documents, and swiftly respond to NZCC queries.

The Cartel Leniency Policy incorporates a marker system, allowing leniency applicants to preserve their position at the front of the line for a limited time while they collect further information to submit a formal leniency application to the NZCC. An applicant may be eligible for leniency even if the NZCC is already aware of or investigating a particular cartel if the information provides the NZCC with sufficient evidence to warrant initiating proceedings.

The NZCC may exercise its discretion to take a lower level of enforcement action against subsequent leniency and immunity applicants in exchange for information and continuing co-operation under the policy.

If an applicant is not eligible for leniency, the Cartel Leniency and Immunity Policy provides for an 'Amnesty Plus' regime where an applicant reports another separate (new) cartel. They may then secure leniency for the new cartel and increased cooperation discounts for the first cartel.

Where the applicant is a business, any immunity and/or leniency that is subsequently granted will usually extend to any current or former director, officer or employee of that business involved in the cartel conduct. This is known as 'derived immunity/derived leniency'. All persons who benefit from derived immunity and/ or derived leniency must continue to meet similar conditions to the applicant. If derived immunity and/ or derived leniency does not capture all of the cartel conduct that an individual has participated in and disclosed to the NZCC, the NZCC will usually grant leniency and consider recommending immunity for all of the individual's involvement in the cartel conduct.

The NZCC also has a general Cooperation Policy which operates in relation to the rest of the Commerce Act, the CCCFA, Dairy Industry Restructuring Act 2001, Electricity Industry Reform Act 1998 (EIRA) and FTA (the EIRA limits the ability of electricity generators to be involved in distribution and vice versa; the NZCC has the ability to grant exemptions). Under this policy, the NZCC may take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete cooperation.

The Commerce Act implications for business conduct and transactions can often be complex. Consequently, it is advisable to seek professional advice on the issue before carrying on business in New Zealand or entering into a transaction which may affect a market in New Zealand.

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Intellectual property

Much of New Zealand's intellectual property legislation has undergone reform in recent years and meets its international obligations under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and there are currently reviews of copyright and ancillary intellectual property laws that are likely to progress through 2023.

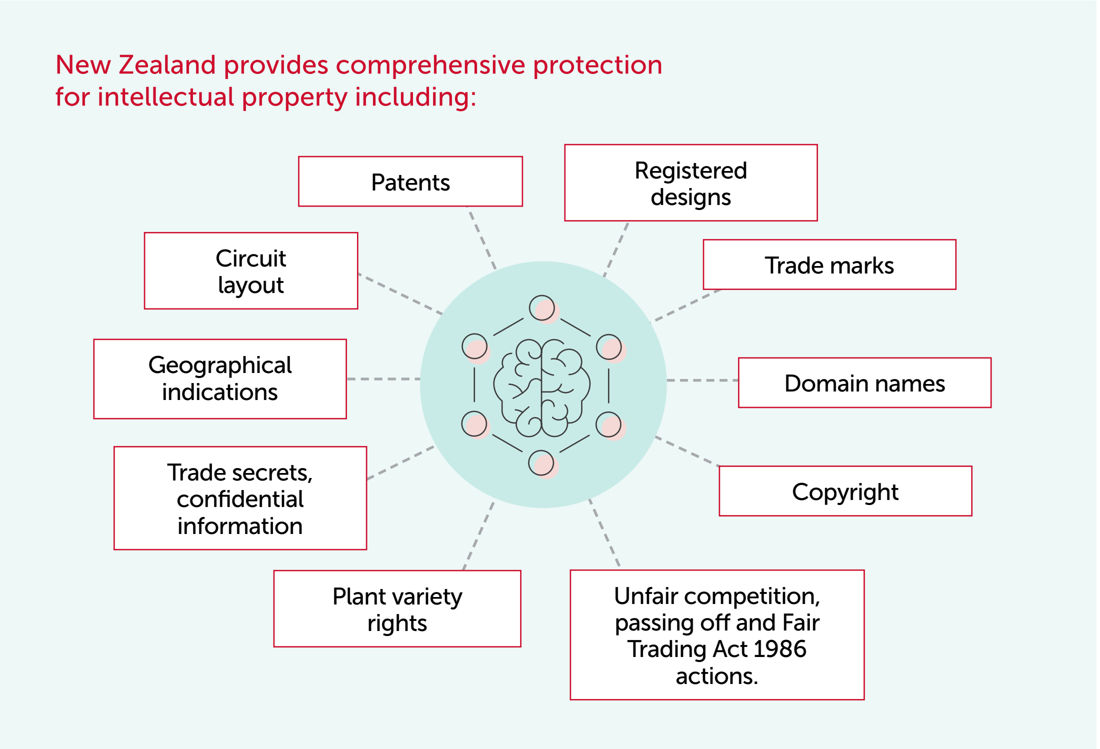
Copyright

Copyright protects the expression of ideas, not the ideas themselves. It is the exclusive right to reproduce or to otherwise deal with original literary, artistic, dramatic or musical works, together with other protected subject matter, such as films, sound recordings, and computer programs. It is governed by the Copyright Act 1994, under the Berne Convention, and registration in New Zealand is not possible. Copyright arises automatically on the creation of a qualifying work if relevant parameters are met.

For copyright to exist, the product/object in question must fall into a category of work under the Copyright Act 1994 and be original. In order for a work to be original, there must have been a sufficient exercise of skill, judgment and labour put into the work. Generally, the original copyright in a work will be owned by the person who actually performs or creates the work. Exceptions include where a contract is used to change the default ownership position, work produced in the normal course of employment, and for some works produced under commission.

New Zealand's copyright regime is unusual, in that protection is extended to industrially applied designs, although the term of this copyright is generally limited to 16 years. For other works, copyright generally subsists for 50 years following the death of the author/creator of the work. For films, sound recordings and broadcasts, the 50-year term runs from the end of the year the work is made or, if made available to the public, from the end of the year it is made available to the public. Recent free trade agreements with the UK and the EU, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the CPTPP) require this term to be extended to 70 years.

New Zealand adheres to a range of international conventions, including the Berne Convention, providing reciprocal copyright protection with other member countries.



The Government is currently undertaking a review of the Copyright Act 1994. The purpose of the review is to ensure New Zealand's copyright regime:

- provides incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so;
- permits reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand;
- is effective and efficient, including:
- providing clarity and certainty;
- facilitating competitive markets;
- minimizing transaction costs; and
- maintaining integrity and respect for the law; and
- is consistent with the New Zealand Crown's obligations under Te Tiriti o Waitangi (Treaty of Waitangi).

The review is currently paused at the public consultation stage, but the Government intends to consult publicly on potential options for change to the copyright regime and seek further feedback on objectives through the next public consultation process.

Trade marks

New Zealand protects trade marks under the Trade Marks Act 2002 (including a statutory registration regime), under the Fair Trading Act 1986 and through the tort of passing off.

A registered trade mark can be a sign, logo, colour, smell, sound, or shape (provided that it can be represented graphically) that is used by a business to identify and distinguish its goods or services from those of others in the market.

Registration gives the owner the exclusive use of that trade mark for specified goods and services. For a trade mark to be registered, it must have a distinctive character (which can be acquired through use) and not be confusingly similar to any previously registered or unregistered trade marks, unless registered with consent of the owner of those other marks. More limited protection is also provided against use of similar marks, and protection extends to similar goods and services. In certain circumstances protection is also provided for well-known marks even when used for dissimilar goods or services.

Registration is for a period of 10 years from the date of registration. Registrations can then be renewed for further periods of 10 years. Registrations are vulnerable to removal for non-use on the application of a third party if there is a continuous period of non-use for three or more years post registration.

In New Zealand, generally, the first person to use the trade mark or, in the absence of use or reputation in New Zealand, the first person to file an application to register the mark, is entitled to be registered as the owner of that trade mark. Applications can be challenged if a third party has sufficient reputation in New Zealand.

We recommend that businesses expanding to New Zealand check the ability to use a mark in New Zealand without infringing third party rights and register the trade mark in New Zealand. Australia should be considered in this context also, as for many businesses Australia and New Zealand are treated as one market. It is also important that agreements including distribution, franchise, licence, joint venture, and agency agreements with local New Zealand parties clearly cover ownership of trade marks in New Zealand. Licensed use should be authorised and controlled by the registered proprietor of the trade marks to maintain the validity of registered trade marks.

A registered trade mark is not infringed through use of the registered trade mark for comparative advertising in accordance with honest practices. Another defence for registered trade mark infringement is through use of the registered trade mark with legitimate parallel imports put on the market internationally by the trade mark owner, or with the trade mark owner's express or implied consent, or under the owners control.

The Madrid Protocol has been in force in New Zealand since 2012. This means that 'international' trade mark applications (based on New Zealand national trade marks) can be filed with the Intellectual Property Office of New Zealand (IPONZ). Importantly, IPONZ is also able to receive international registrations filed with the World Intellectual Property Organization (WIPO) designating New Zealand. Locally qualified lawyers need to be appointed to handle objections to New Zealand designations of international applications.

Unregistered brands can be protected through the FTA and the tort of passing off if there is a misrepresentation and deception or confusion arising from use or the likelihood of it. Copyright also protects logos, product and some slogans and strap lines. It is generally important that brands and trading names are cleared for use to ensure they do not infringe the registered or unregistered rights of a third party, and, where possible, trade marks are registered. Registering a trade mark provides a defence to a claim of infringement of another registered trade mark (but not to claims under the FTA or passing off).

"We recommend businesses expanding to New Zealand check the ability to use a mark in New Zealand without infringing third party rights and register the trade mark in New Zealand."

Patents

New Zealand law on patents is governed by the Patents Act 2013 (which came into force fully on 13 September 2014).

A patent application can be filed with a provisional specification (followed by a complete specification), or a complete specification. The term of a patent, if granted, runs for 20 years from the date of filing of the complete specification, provided renewal payments are made when due.

For a patent application to be successful, the invention (subject to some specifically excluded inventions) must:

- be industry applicable;
- contain an inventive step that is 'non-obvious'; and
- be new or novel.

A patent application can also be filed in New Zealand for protection overseas through the Patent Cooperation Treaty (PCT). Under the PCT system, a patent application can be made that designates other countries that participate in the PCT, simultaneously seeking protection for the invention in designated countries.

Since a Court of Appeal decision in 2000, Swiss-type claims, for example, 'The use of composition X in the manufacture of a medicine for treating disease Y', have been allowed in New Zealand.

Also, under the Patents Act 2013, there is a regulatory review exception to establish that a patent is not infringed by acts done for the purposes of developing and submitting information required under New Zealand law or the law of any other country that regulates the manufacture, construction, use, importation, hire, sale or disposal of any product.

The 2013 Act includes examination requirements for the grant of patents and increased opportunities to challenge patents both pre- and post-grant. Key elements of the 2013 Act include:

- patent applications must now demonstrate:
- absolute (international) novelty, rather than the historic requirement of novelty only in New Zealand;
- patentability to the balance of probabilities (demonstrating that the invention is patentable); and
- utility (demonstrating that the invention has specific, credible and substantial usefulness); and
- third parties may ask the Commissioner to re-examine granted patents; and
- exclusion categories to patentability have been introduced.

Patenting of some computer programs is allowed. Computer programs 'as such' (where the alleged invention lies solely in it being a computer program) will not be patentable, but inventions involving computer programs, for example 'embedded software' (i.e. software used in the electronics of machinery), will be patentable – as long as the usual criteria for patentability are met.

Amendments have been made to the 2013 Act to align it to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. These include the provision of a grace period for disclosure made in the one-year period immediately preceding the patent date. Disclosure of matter constituting an invention during this time, by or with the consent of certain persons including the patentee, will now not

Registered designs

New and original features of shape, configuration, pattern, or ornament, as they are applied to an article, may be registered under the Designs Act 1953.

Design registration gives the owner the exclusive right to use that design in New Zealand. 'Use' of the design includes the exclusive rights to make, import/sell or hire the article to which the design has been applied or license out the design. Registered protection is for an initial period of five years, renewable for two additional five-year periods so the possible total protection is 15 years. To be registrable in New Zealand, a design must have 'local novelty', meaning that the design must not have been published or publicly used in New Zealand before the date of the application.

In New Zealand, industrial designs (e.g. designs which are industrially applied) may also be protected through copyright law. The period of protection given to industrial designs under the Copyright Act 1994 is 16 years. One advantage of design registration over copyright protection is that the certificate of registration serves as evidence in court of ownership of the design.

Where relevant, we recommend consideration is given to protecting industrial designs as registered trade marks as well, where the logo or shape marks include a design aspect.

Major Events Management Act 2007

The Major Events Management Act 2007 is intended to counter the problem of ambush marketing that undermines official events and provides a framework of controls that can be enforced once the Minister for Economic Development 'declares' an event to be a Major Event for the purposes of the Act. Protection periods are then established, within which the statutory controls are in effect. Knowingly breaching the provisions of the Act can lead to a penalty of up to NZD150,000.

Domain names

The Domain Name Commissioner is responsible for oversight and regulation of the '.nz' domain namespace. Domain names within the '.nz' namespace are registered on a first come, first-served basis subject to another party having prior rights for the same second level domain. Registration can be done through an authorised registrar, which registers the domain name on the Shared Registry system. Registration of a domain name does not create any proprietary rights in the name.

The Domain Name Commission has now made available a method to transfer domain names from removed companies by transferral to a former director or shareholder.

The Domain Name Commission has a policy that allows 'non-commercial entities' to withhold certain details from records, including address and telephone number. Name, email address and general location details will still be available.

Disputes about who should be the registrant of a domain name have often been handled by court action, including by claims for breach of the Fair Trading Act 1986 and through passing off actions. Since 2008, the Domain Name Commission has offered a Dispute Resolution Service (DRS) to assist with disputes of this nature. Anyone who wishes to make a complaint about the registration of a '.nz' domain name may use this system. The DRS aims to provide timely resolutions to disputes, meaning that there are tight timeframes involved in the process.

Complainants must demonstrate that they have rights to a name that is identical or similar to the domain name in dispute and the registration of the domain name by the current registrant is unfair. This means that the domain name was registered or acquired in a manner which took unfair advantage of, or was unfairly detrimental to the Complainant's rights, or that the domain name is likely to be used in this manner. To succeed, the complainant must prove that 'on the balance of probabilities' both factors are present.

The DRS operates three tiers of resolution:

- The first is informal mediation (applicable only if there is a response to a complaint).
- The second is expert determination.
- The third arises if an appeal is lodged, where a panel of three experts is appointed to make a final decision.

The mediation process is free to use, but if an expert determination is required, then the person making the complaint must pay a fee. A further fee is required if an appeal is lodged.

Circuit layouts

Protection is provided for circuit layouts and integrated circuits under the Layout Designs Act 1994. The protection is provided by the creation of copyright-style intellectual property rights in original circuit layouts, or integrated circuits made in accordance with a circuit layout. This protection lasts 15 years from the date that the layout design was made, or for ten years after the design was first commercially exploited, if this occurred within five years of its creation.

No provision is made for registration of the rights, and the owner has the exclusive right to copy the layout, make an integrated circuit in accordance with the layout, and exploit the layout commercially in New Zealand.

Trade secrets and confidential information

Trade secrets and confidential information are protected under New Zealand law.

When preparing a contract, careful consideration should be given to the protection of trade secrets and confidential commercial information. In the absence of an express contract (in which all elements of the contract are specially stated), some protection is given by a long-established principle of equity, whereby a person may be forced to respect the circumstances of a confidence. Nevertheless, it is prudent to make specific provision for confidentiality in all agreements.

Plant varieties

Plant varieties are protected in New Zealand under the recently-enacted Plant Variety Rights Act 2022 ("PVR Act"). The PVR Act has amended and modernised plant variety legislation to address the significant advances in plant breeding techniques and international developments since the enactment of the previous act, the Plant Variety Rights Act 1987. Under the PVR Act, a grant may be made only if the Commissioner is satisfied that the plant variety is new, distinct, homogenous, and stable.

The new PVR Act:

- ensures the regime is consistent with New Zealand's international obligations;
- modernises the regime consistent (where appropriate) with other intellectual property legislation; and
- seeks to achieve the right balance between strengthening plant breeders' rights to encourage innovation (consistent with our international obligations) and preserving the interests of growers, consumers, Māori and other interested groups to achieve a net benefit to New Zealand as a whole.

Geographical indications

New Zealand provides protection for Geographical Indicators (GIs) by the general provisions of the Fair Trading Act 1986 and the tort of passing off. GIs are geographical names that identify goods as originating in a territory, region or locality, where a given quality, reputation or other characteristic of the goods is essentially attributable to those geographical origins.

The Geographical Indications (Wine and Spirits) Registration Act 2006 (Registration Act) introduced a legislative framework that brings New Zealand into line with its obligations under the TRIPS Agreement in relation to wine and spirits.

The Registration Act provides a definition of 'geographical indication' to ensure that only those GIs that meet the TRIPS Agreement definition may be registered under the Registration Act. It also establishes a registration system for GIs for wines and spirits and streamlines the process for registering GIs.

The Registration Act has been significantly amended by the Geographical Indications (Wine and Spirits) Registration Amendment Act 2016, which came into force on 27 July 2017. Most notably, GIs have been introduced for wine and spirits, and the Registration Act now includes a regime for the registration of place names for wines and spirits. New Zealand and foreign place names are registrable. GI registrations are effective for a period of five years and can be renewed for a further 10 years. GIs and trade marks are mutually exclusive, subject to some exceptions.

Protection for GIs for other goods and non-registered GIs will continue to be dealt with under the Fair Trading Act 1986 and the tort of passing off.

New Zealand is signatory to international trade agreements that impact the GI regime, including the Regional Comprehensive Economic Partnership (RCEP) and The Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). New Zealand also recently negotiated a Free Trade Agreement with the EU, which could further affect the GI regime. The Government has requested public feedback on the Geographical Indications (Wine and Spirits) Registration Act 2006 as part of reforms needed to meet negotiated terms of the free trade agreement with the EU. The initial submissions phase closed in February 2023. The submissions will be used to advise Government on amendments to the Registration Act, including a recommendation on whether to extend the current GIs registration regime to non-wines and spirits products.

Resale Right for Visual Artists Bill

On 28 March 2023, the Government introduced the Resale Right for Visual Artists Bill, to fulfil obligations under the EU and UK free trade agreements.

The Bill sets out an artist resale royalty right, which entitles eligible artists to receive a 5% royalty payment for resales of original visual artwork of NZD500 to NZD5,000 on the secondary professional art market.

The Bill is before Select Committee, which is scheduled to report on 31 July 2023. The Bill is currently drafted to come into force on 1 December 2024 at the latest.

Unfair competition/controls over misrepresentations

The general law and some statutes such as the Fair Trading Act 1986 and the Commerce Act 1986 provide a basis for restraining some forms of unfair competition. For example, the Fair Trading Act 1986 can be used to prevent one trader misrepresenting that his goods or services are those of another or the attributes of goods or services. Industry-specific legislation also covers the advertising or sale of certain products, for example, medicines and medical devices, and there is increased vigilance from regulators through the COVID-19 period of claims for treatments.

The Government has recently repealed certain elements of the Commerce Act 1986 relating to intellectual property. Previously, section 36(3) provided that a business did not take advantage of market power simply by enforcing a statutory IP right (eg a patent, trademark, copyright). Also, section 45(1) provided that the Act's other prohibitions did not apply to the entering into of IP agreements (such as licences, settlement and co-existence agreements) in so far as they contain a provision that authorises something that would otherwise be prohibited by an IP right, or giving effect to such provisions.

From 5 April 2023, these protections were removed. Businesses cannot enter into new IP agreements that contain provisions that substantially lessen competition in a market (prohibited by s 27) or are cartel provisions (prohibited by s 30). Cartel provisions are provisions in agreements with competitors that fix prices, restrict output and/or allocate markets. Businesses have a further year to ensure compliance for existing agreements.

In addition, businesses with substantial market power are now prohibited from enforcing their statutory IP rights in a way that has the purpose and/or effect of substantially lessening competition in a market

Technical amendments

On 4 June 2019, the Government released a Proposed Intellectual Property Laws Amendment Bill, through which it intends to make 'technical' amendments to the Patents Act 2013, the Trade Marks Act 2002, the Designs Act 1953, and associated regulations.

Following submissions, the Government provided recommendations for amendments to these Acts to Cabinet and is now in the process of drafting a Bill to implement the recommendations.

> "The general law and some statutes such as the Fair Trading Act 1986 and the Commerce Act 1986 provide a basis for restraining some forms of unfair competition."

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Employment and industrial relations

Employment relationships in New Zealand are governed by minimum entitlement legislation, written employment agreements and common law.

Employment Relations Act 2000

The principal legislation is the Employment Relations Act 2000 (ERA). Underpinning New Zealand's employment relations system is a statutory obligation on employers, employees, and unions to deal with each other in 'good faith' in most employment matters, including (but not limited to) bargaining for employment agreements, discussing any proposal which may affect employees' employment, allowing workplace access to union representatives and making employees redundant. This duty of good faith contains several specific requirements that parties must comply with.

Under the ERA, employment relationships for all employees in New Zealand are governed by either:

- an individual employment agreement (IEA), being a contract between an employer and a single employee; or
- a collective agreement (CA), being a contract between one or more employers and one or more unions, which binds members of the union(s) who come within the agreement's coverage clause.

Both IEAs and CAs must contain certain minimum terms, which are set out in the ERA and incorporated by other legislation. In all other respects, terms of employment are for negotiation between the employee (or the union or other representative on the employee's behalf) and the employer.

For example, entitlements to redundancy payments, penal or overtime rates, and long service leave are matters for negotiation.

There are several procedural requirements that must be followed when performing certain actions under, or bargaining for, an IEA or CA.

In addition, the Fair Pay Agreements Act 2022 introduced a new (additional) framework for bargaining between employers and unions for agreements that can set minimum employment standards for all employees in an industry or occupation. Fair pay agreements can exist alongside IEAs and CAs, and any terms in a fair pay agreement that are more favourable

"Employment relationships in New Zealand are governed by minimum entitlement legislation, written employment agreements and common law."

to an employee would override the terms of the IEA or CA. This new framework came into effect in late 2022, but (as at the time of writing) no fair pay agreements have been concluded yet.

Under the ERA, any dismissal or other action by an employer must meet the statutory test of justification – the employer's actions, including how the employer acted, must be what a 'fair and reasonable' employer could have done in all the circumstances at the time the dismissal or other action occurred. The ERA also sets out a (non-exhaustive) list of factors that the Employment Relations Authority and the Employment Court will consider when applying the statutory justification test. A dismissal or other action by an employer will not be considered unjustifiable merely because of procedural defects (provided they were minor and the employee was not treated unfairly or placed under duress).

The ERA also provides protection for employees when their employer's business is restructured, and their work will be performed by or on behalf of a new employer. Certain categories of employee (such as those engaged in the cleaning or food catering industries and/or carrying out specified types of work) are considered 'vulnerable' in the context of restructuring. When the employer's business is restructured, those 'vulnerable' employees have the right to elect to transfer to the new employer(s) on identical terms and conditions of employment. The CAs and IEAs of other employees must contain employee protection provisions. These provisions must set out the procedures that the employer will follow when negotiating with the new employer in relation to the effects of the restructuring upon affected employees.

Underpinning New Zealand's employment relations system is a statutory obligation on employers, employees, and unions to deal with each other in 'good faith' in most employment matters, including (but not limited to) bargaining for employment agreements, discussing any proposal which may affect employees' employment, allowing workplace access to union representatives and making employees redundant.

Employment relationship problems

All employment agreements must include a plain language explanation of the services available for the resolution of employment relationship problems. Mediation provided by the Ministry of Business, Innovation and Employment (MBIE) is required in almost all situations as the first forum for dispute resolution. Failing resolution at mediation, formal legal proceedings relating to employment disputes, grievances and other employment relationship problems are determined by the Employment Relations Authority (ERA) and the Employment Court (EmpC).

Employees can take claims against their employers for several reasons including (but not limited to) unjustified dismissal, unjustified disadvantage, discrimination, or sexual or racial harassment.

In addition, 'disputes' may be pursued in respect of the interpretation, application or operation of an IEA or a CA.

Employees working under the control of a business/organisation other than their employer can apply to the ERA or EmpC to join the other business/organisation as a party to a personal grievance they have raised. If joined as a party, the other business/organisation may be liable for a portion of any remedies awarded to the employee.

> "All employment agreements must include a plain language explanation of the services available for the resolution of employment relationship problems."

Fixed-term and casual agreements

Most employees are employed on a permanent basis (that is, for an ongoing and indefinite period). However, in some circumstances, employers can enter into fixed-term or casual employment agreements with employees. In respect of fixed-term employment, specific requirements, set out in the ERA, must be complied with. In particular, the employer must have genuine reasons based on reasonable grounds for engaging the employee on a fixed-term, rather than a permanent basis (e.g. specific project work or covering parental leave), and the employee must be advised of these reasons.

Where a fixed-term agreement is entered into, the employer must ensure that the agreement is signed by the employee before they commence work, and that the agreement includes a written description of the way in which the employment will end and the reasons for this. A failure to comply with all ERA requirements will mean that the employer cannot rely on the fixed-term provisions to end the employment relationship and the employee can seek to be treated as a permanent employee.

Employees may also be employed on a casual basis. There is no definition of 'casual' employment in the ERA, but case law has developed a number of characteristics to assist in identifying a casual employment arrangement. These include that the employee works irregular hours on an intermittent basis (i.e. only on an 'as and when required' basis), and that there is no obligation on the employer to provide work, or for the employee to accept work.

Employee unions

Where an employer employs a non-union member whose work is covered by the coverage clause of a CA, the employee must be employed on the same terms and conditions as the CA for the first 30 days of employment. In addition, within the first 10 days of employment, the employer must provide the employee with a prescribed form which is used to indicate to the employer whether the employee intends to join the union.

Union membership is voluntary. It is unlawful to discriminate against employees or prospective employees due to their union membership status.

Under current law, employees may only strike, and employers may only lock-out employees, in relation to collective bargaining for a CA which will bind the employees concerned (provided that at least 40 days have passed since the bargaining was initiated), or in some other strictly limited situations (e.g. relating to health and safety). Strike action in response to a dispute under an existing (non-expired) CA, sympathy strikes, or political strikes are unlawful.

Union representatives may enter the workplace without consent, provided the employees are covered under, or bargaining towards a CA. In other circumstances, union representatives must obtain consent from the employer. The employer must not unreasonably withhold consent.

Independent contractors

Businesses can engage independent contractors to provide services where this is appropriate. The provisions of the ERA and other minimum employment-related entitlements will not apply to a (genuine) independent contractor.

In determining whether a person is genuinely an independent contractor or an employee, the courts will look at the real nature of the relationship, as it operates in practice. While relevant, any contractual or other documentation that purports to define the relationship will not be determinative.

There are several indicators that will be considered in determining the real nature of the relationship. In limited situations, industry practice may also be used as a measure of the real nature of the relationship. If the real nature of the relationship between the parties is more akin to an employment relationship, then it is likely that the provisions of the ERA and other employment related legislation (including annual and sick leave) could apply.

Holidays, sickness, bereavement, and family violence

The Holidays Act 2003 provides for 12 specified public holidays to be taken as paid days of holiday if an employee ordinarily works on those days.

If an employee works on a public holiday that is a normal day of work for that employee, they are entitled to be paid at least time and a half of their normal pay for the hours worked and also to receive an alternative paid holiday days. If an employee works on a public holiday that is not a normal day of work, they are entitled to at least time and a half for the hours worked, but no alternative holiday.

The Holidays Act 2003 clarifies how to calculate what an employee should be paid in circumstances where it is impracticable to assess what an employee would have been paid on a public holiday, alternative holiday, sick leave day, bereavement leave day or family violence leave day. An employee and an employer may also agree, in writing, to transfer the observance of a public holiday to another working day.

All employees are entitled to a minimum of four weeks paid annual leave after each year of continuous employment with the same employer (including part-time employees). Timing of annual holidays is to be agreed between the employer and the employee, but the employer must not unreasonably withhold consent to a request for annual leave. The employer can direct the employee to take annual leave on 14 days' notice if agreement is not reached.

An employee can request to 'cash up' to one week of annual leave per year, but the employer does not have to agree to do so. This cannot be a term or condition of employment and the employer cannot raise the possibility of 'cashing up' with the employee.

When an employee leaves a job, they are entitled to be paid accrued holiday pay upon termination.

After six months' employment with the same employer, an employee is entitled to a minimum of 10 paid sick leave days during each subsequent 12-month period of employment. This sick leave covers sickness or injury of the employee, the employee's spouse or partner, or someone who depends on the employee for care, and can be accumulated from year to year up to a maximum of 20 days.

After six months' employment an employee is also entitled to bereavement leave. Bereavement leave is of either one or three days duration per bereavement, depending on the proximity of the relationship between the employee and the deceased.

After six months' employment, an employee can access up to 10 days' paid leave if the employee is affected by family violence.

For casual employees, annual holidays may be paid with the employee's pay if their employment is so intermittent or irregular that it is impracticable for the employer to provide the employees with four weeks' annual leave. A casual employee may also be entitled to paid sick leave (depending on whether the requirements under the Holidays Act 2003 apply). Annual holidays may also be paid with the employee's pay for an employee employed for a fixed term of less than 12 months.

The complexity of the Holidays Act 2003 has led to widespread non-compliance in recent times. To address the complexities in the Act, the Government established a "Holidays Act Taskforce". The Taskforce reported back with 22 recommendations, which were accepted by the Government, but legislation to replace the current Act has not yet been introduced.

Parental leave

To be eligible for parental leave, an employee needs to have worked for the same employer for at least six months before the expected date of delivery or adoption and for an average of at least 10 hours per week.

There are four types of unpaid leave which can be taken:

- primary carer's leave;
- partner's leave;
- extended leave; or
- negotiated carer leave.

Where the employee has been employed at least 12 months, an employer can be required to hold an employee's job open for up to 52 weeks in total while parental leave is taken (or up to 26 weeks, if employed for more than six months but less than 12 months).

Eligible employees and self-employed people are also entitled to up to 26 weeks of Government funded payments during their parental leave, paid at the lesser of the employee or self-employed person's average weekly earnings/ordinary weekly pay or a prescribed amount. Instead of paid parental leave, employees and self-employed people may choose to take a parental tax credit. This entitlement can be transferred to an employee or self-employed person's spouse or partner.

Flexible working arrangements

Employees have the right to request flexible working arrangements from their employer.

Any employee may make a request (in writing) for a variation to their working arrangements. Any such request must include particular details set out in the ERA.

The ERA outlines the circumstances in which an employer may refuse an employee's request for flexible working arrangements. An employer may decline the request if it is unable to rearrange the workplace to accommodate the request without having a negative effect on the business. An employer must decline the request if the employee is bound by a collective agreement, the request relates to working arrangements to which the collective applies, and the employee's requested working arrangements (if accepted) would be inconsistent with the collective agreement.

An employer must consider the employee's request for flexible working arrangements and advise the employee of the outcome as soon as possible (but no later than one month after receiving the request). If the request is refused, the employer must notify the employee of the refusal and the reason(s) for it and must specify and explain the grounds relied upon relating to the effect on the employer's business (if any). The ERA also sets out a process for resolution of disputes relating to requests for flexible working arrangements.

Wages or salary

Subject to certain taxation and other legislation under the Wages Protection Act 1983, an employer must pay the entire amount of any wages/salary to an employee without deduction, unless the deduction is requested, or consented to, by the employee. Wages/salary must be paid in cash unless otherwise agreed to by the employee. Most wages/salaries are paid to employees by direct credit (and the employment agreement needs to specify this mode of payment).

The Minimum Wage Act 1983 allows minimum wages to be set by Order in Council. This Act also provides for a 40-hour, five-day week (not including overtime), but this can be varied by agreement between the employee and the employer.

The minimum wage, as at 1 April 2023, is NZD22.70 per hour, before tax, for an 'adult worker' (an employee aged 16 years and over and who is not a 'trainee' or 'new entrant'). Workers who are aged either 16 or 17 years of age and who meet certain employment history criteria will also be entitled to the 'adult' minimum wage.

Workers who are 'starting out', or who are undergoing particular types of training, will be entitled to a minimum wage no less than 80% of the 'adult' minimum wage (i.e. NZD18.16 per hour, before tax).

KiwiSaver work-based saving scheme

The KiwiSaver Act 2006 introduced a voluntary, work-based savings scheme in New Zealand. The purpose of the scheme is to encourage New Zealanders to save and help improve their financial wellbeing, particularly in retirement. The scheme is administered by the New Zealand Inland Revenue Department through the 'pay as you earn' (PAYE) system. The Inland Revenue Department forwards employee participants' contributions to their KiwiSaver scheme for investment. The KiwiSaver Act 2006 applies to all employers who are New Zealand residents or carry on business from a fixed establishment in New Zealand (as defined in particular sections of the Income Tax Act 2007).

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More information about KiwiSaver can be found at the KiwiSaver information website: ird.govt.nz/kiwisaver

As KiwiSaver is a work-based savings plan, employers play an important role. From an administrative standpoint, employers are required to give new employees, and other existing employees who are interested, a KiwiSaver information pack (provided by the Inland Revenue). Employers pass on employees' details to the Inland Revenue to enable them to be enrolled and deduct KiwiSaver contributions from employees' gross income. Employers also hand out investment statements for their preferred KiwiSaver provider, if they have one. If an employer does not comply with their obligations under the KiwiSaver Act 2006, they may be liable to pay a monetary penalty.

Employers are required to make compulsory employer contributions to KiwiSaver for employee members. The employer contribution is only for those employees who are enrolled in KiwiSaver and actually making contributions themselves. The current rate of compulsory employer contributions is 3% of the employee's gross salary or wages and the employee also has a minimum 3% contribution rate. The definition of 'gross salary or wages' is very wide, and includes bonuses, commission, overtime, extra salary, gratuity or other remuneration of any kind.

Trial and probationary periods

Under the ERA, employers with fewer than 20 employees are able to include an agreed trial period in their employment agreements with new employees. A trial period must be agreed to by the employee (in a signed employment agreement) before their employment commences and can be for a maximum period of up to 90 days.

There are very strict requirements that an employer must comply with to ensure that such a trial period provision is valid. During the agreed trial period, the employer may terminate the employment relationship at any time and the employee will have no recourse to any of the ordinary procedures that exist under the ERA in respect of unjustified dismissal (provided the strict legal requirements are satisfied).

Employees will, however, still be able to bring a claim against their employer which is not based on unjustified dismissal (for example unjustified disadvantage, discrimination, or sexual or racial harassment).

Employers with 20 or more employees may include probationary period provisions in their employment agreements. Probationary periods last for the amount of time stipulated in the employment agreement. During the probationary period the employer must inform the employee if there are any issues with their performance and give the employee support and training to improve to the required standard. If the employee is still not performing to the required standard at the end of the probationary period the employer must follow a fair process to dismiss the employee, and the employee must be provided their contractual notice period. Unlike statutory trial periods, if the employee is dismissed during a probationary period the employee will have recourse to ordinary procedures to bring a claim for unjustified dismissal.

Health and safety

The Health and Safety at Work Act 2015 (HSW Act) imposes duties on persons in a workplace.

The HSW Act replaces the previous duties owed by employers and principals (under the now repealed Health and Safety in Employment Act 1992) with a broader duty owed by "persons conducting a business or undertaking" (PCBUs). PCBUs owe duties, so far as is reasonably practicable, to ensure the health and safety of workers who work for the PCBU, or whose activities are influenced or directed by the PCBU (e.g. people who work for a contractor or subcontractor hired by the PCBU). PCBUs must also ensure, so far as is reasonably practicable, that no other person's health and safety is put at risk from work carried out by or for the PCBU.

There are also duties imposed on:

- PCBUs who manage or control workplaces;
- PCBUs who design, manufacture, import, supply, install or construct plants, substances or structures;
- directors and officers of PCBUs (in particular, the HSW Act imposes an obligation on directors and officers to exercise due diligence to ensure that the PCBU complies with its duties); and
- workers and other people in a workplace (e.g. visitors).

The HSW Act provides a three-tiered hierarchy of offences. For the most serious category of offences, the maximum penalty is NZD3 million for an organisation, NZD600,000 or imprisonment for up to five years for a director, officer, or self-employed person, and NZD300,000 or imprisonment for up to five years for any other individual.

"

It is important for anyone planning to establish or acquire a business in New Zealand to ascertain the current terms in all relevant employment agreements, the content of existing workplace policies and practices, any contingent liability on the employer and the requirements of New Zealand's employment legislation."

Accident compensation

All employers are required by law to contribute to a government-controlled ACC insurance fund in respect of personal injuries suffered at work. These entitlements are available to employees on a 'no fault' basis. Similar funds also cover personal injuries incurred outside of work. The legislation prohibits actions for damages as a result of personal injury.

The ACC fund provides rehabilitation, weekly compensation, lump sum compensation for permanent impairment and funeral grants, survivors' grants, weekly compensation for dependents and childcare payments. Employers are required to provide an employee with the first week's compensation, consisting of 80% of his or her salary for work related injuries.

As an alternative to contributing under the general ACC scheme, employers can apply for entry to the ACC Partnership Programme. Under this programme employers provide for their own insurance cover for workplace injuries. In return for 'standing in the shoes of ACC' and taking on these responsibilities, the employers pay a significantly reduced ACC levy. Any employer can apply for entry, although it is more suited to large employers who can meet the specified criteria set by ACC.

General

Many aspects of employment law in New Zealand are governed to some extent by case law. In particular, case law sets out the process employers are required to follow in respect of disciplinary procedures, dismissals and termination for poor performance or redundancy. In some cases, these steps are relatively stringent. It is important that all employers in New Zealand have a good understanding of the legal principles set down in current case law.

There is also other employment relations legislation which we have not discussed specifically here (e.g. human rights, privacy and whistle-blowers legislation).

It is recommended that any employer establishing a business in New Zealand obtains a full description of the relevant legal obligations which apply to employers.

It is also important for anyone planning to establish or acquire a business in New Zealand to ascertain the current terms in all relevant employment agreements, the content of existing workplace policies and practices, any contingent liability on the employer and the requirements of New Zealand's employment legislation.

Where there is any likelihood of a conflict of laws, all employment agreements and other contractual documentation (e.g. confidentiality agreements) should expressly indicate the law which is to govern the agreement and the employment relationship.

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Real estate rules

New Zealand has a modern public register of land ownership and interests that provides certainty and security to all parties holding interests in land. Investing in interests in land in New Zealand often requires prior approval of the Overseas Investment Office depending on the type of land involved.

Land law in New Zealand

New Zealand operates a system of land title by public register known as the "Torrens System". A public register of all land titles and interests on land is kept by central government. Registration of legal land ownership and land interests is compulsory. The land register system is fully computerised. All land titles and interests are stored in a computer-based national register and, since 2009, all land dealings must be completed online through Land Information New Zealand's website: linz.govt.nz. Lawyers must still be used to register transfers of land titles and also for the registration of land title interests. Land in New Zealand is privately owned by individuals, companies, the government and other entities. Most land is 'freehold' or 'fee simple' ownership in perpetuity. A record of title is issued for each parcel of land. The record of title records the name(s) of the registered owner, the status of the land, the technical description of the allotment number(s) of the land and any other rights or interests recorded against that land parcel (e.g. restrictive covenants and easements).

Foreign investment rules

There are restrictions in the Overseas Investment Act 2005 (OIA) and the Overseas Investment Regulations 2005 (OIR) on foreign investment in certain land in New Zealand.

OIO consent needs to be obtained by an overseas person who wishes to acquire an interest in sensitive land (which includes all residential land).

Land is sensitive if it has certain features such as location, size, use or historical significance, and an 'interest in land' includes freehold, and other qualifying interests such as leasehold and profits-a-prendre. Where the interest to be acquired is leasehold, only leases for ten years or more (including rights of renewal) constitute sensitive land. However, if the underlying land is classed as residential the qualifying duration is three years or more (including rights of renewal). Any type of land can be sensitive land, including commercial/industrial, farmland, forestry land and coastal property. All residential land is sensitive land.

An overseas person buying an interest in sensitive land must obtain OIO consent (unless an exemption applies).

Determining whether land is sensitive land can be complex, and some recent law changes are significant. The OIO does have helpful diagrams and guides to explain what land is sensitive, but we recommend obtaining legal advice before signing any contracts relating to land or premises to ensure regulatory compliance.

> "Determining whether land is sensitive land can be complex, and some recent law changes are significant."

We refer you to page 23 on New Zealand's foreign investment rules more generally, where there are also details on the

Residential land

In 2018, the New Zealand Government changed the law to make all residential property sensitive land under the OIA. As a result, overseas persons may only acquire residential land if they:

- hold a permanent resident visa for New Zealand and have been actually living within the country for a specified period of time; or
- obtain consent from the OIO; or
- satisfy specific rules relating to development of the land and adding to New Zealand's housing supply or conversion of the land to non-residential use.

It is also possible to apply for a 'standing consent' in advance of a future acquisition in respect of residential land if the overseas person meets certain criteria.

Australian and Singaporean citizens do not need to obtain consent to acquire residential land, provided that the residential land is not sensitive for any other reason.

The rules and different tests that apply are complex to work through. Some helpful information about buying residential land can be found on the Land Information New Zealand's website under Overseas Investment, but we recommend obtaining legal advice before signing any contracts to buy residential land. The foreign investment rules have been discussed on pages 23–28, where there is additional information on who is an overseas person, acquisitions that do not require consent and details of penalties and offences.

National Security and Public Order (NSPO) notification regime which applies to transactions involving 'strategically important businesses' that would not otherwise require OIO consent but potentially pose a risk to national security and public order.

There are significant penalties and offences for non-compliance, and the OIO can order an overseas person to divest of land acquired in breach of the rules.

OIO consent criteria

For proposed purchases involving sensitive land (other than residential land), the overseas person must meet criteria additional to those set out on page 24. The overseas person must supply evidence to the OIO of either intending to reside in New Zealand indefinitely or that the proposed investment is of benefit to New Zealand, having regard to seven benefit factors including the following two:

Economic benefits, such as:

- create or retain jobs;
- introducing technology or skills;
- increase productivity; and
- increase export receipts.

Environmental benefits, such as:

- protection of native wildlife;
- protection of native plants;
- erosion control; and
- improve water quality.

The proposed investment will be assessed by the OIO against all seven factors to determine which are relevant, and their relative importance. The benefit must be considered under each relevant factor (e.g. number of jobs) deducting any directly comparable aspects of the current state (e.g. existing jobs) and any negative impact of the proposed investment (e.g. reduction in jobs).

The OIO applies a 'counterfactual test' when assessing the likely benefits to New Zealand. This test requires the overseas person to prepare a comparison between what is likely to happen as a result of the overseas investment and the current situation.

Leasing commercial office space

New Zealand has an active commercial office leasing market with a range of leasing stock of varying grades available in commercial centres. Commercial terms such as term, rental, rent reviews, lease inducements, rent free periods, contributions to fit-out and other benefits can be negotiated directly with landlords. Landlords often specify the form of deed of lease, which is usually one of several industry standard lease forms with specific amendments. Commercial leases are usually not registered on the public land register.

Rent can include or exclude the tenant's share of operating expenses for the building, such as: Council rates, lighting/power/water for the common areas and services etc.

Commercial office space is generally leased for medium periods (three to seven years), with tenants having rights to renew for further terms. Leases for a single long-term period such as 20 years are not common in the commercial office market. Rent reviews are normally undertaken periodically within lease periods and are often based on market rates, inflation adjusted increases or fixed percentage increases.

Some material leasing rights and obligations, such as the process for cancellation of leases are prescribed by legislation.

New Zealand is very prone to seismic activity and the safety of buildings is an important consideration for tenants and prospective tenants of premises, both in terms of the well-being of their people and the liability of the business and its directors and managers. The country has been categorised into different seismic risk areas – for example, Wellington and Christchurch are in high-risk areas and Auckland is in a low-risk area. All buildings can be assessed to give them a seismic rating that is intended to reflect how well the building would perform in an earthquake, and most landlords have obtained seismic assessments. Prospective tenants should seek expert advice on what due diligence they should do on seismic risk before they enter into an agreement to lease.

If the land being leased is sensitive land, then the foreign investment rules may require overseas persons to obtain regulatory consent from the Overseas Investment Office (OIO) before entering into the lease. In most cases leases of commercial offices in an urban area do not involve sensitive land but overseas persons should seek expert advice to check each proposed lease before they enter into an agreement to lease.

Forestry

In 2018, changes to the OIA brought forestry rights within the ambit of the foreign investment rules. Previously, the foreign investment rules did not apply to forestry rights. Despite this, it was common for investments in the forestry sector to trigger the need for OIO consent due to such investments amounting to the acquisition of significant business assets and/or including the acquisition of sensitive land.

There is now a streamlined approval pathway for overseas persons investing in existing forestry to obtain OIO consent, which is available regardless of whether the investment is a forestry right or a land acquisition. Under the special forestry test, the overseas person needs to commit to using the land exclusively, or nearly exclusively for forestry activities, continuing certain existing arrangements (including domestic log supply), in addition to a commitment to replanting, but it is not required to evidence any 'added benefit' resulting directly from the investment.

There are also certain exemptions from the need to obtain OIO consent, including for small investments.

There is provision for an overseas person to apply for 'standing consent' in advance of a future acquisition if the person meets certain criteria.

The streamlined forestry test is no longer available for overseas investors planning to convert farms to new production forests. A law change on 16 August 2022 means that forestry conversions are now subject to the full 'benefit to New Zealand' test.

Farmland

Under the foreign investment rules, farmland is land which is used for agricultural, horticultural, or pastoral purposes, for the keeping of bees, poultry, or livestock. This definition does not include forestry activities or forestry rights but does include farmland acquired to develop new forestry.

Before the OIO will give consent to a farmland acquisition, the farmland (or interest in farmland) must have been offered for sale on the open market to New Zealanders. In November 2021, the OIO introduced new strengthened advertising requirements which must be satisfied before a transaction is entered into with an overseas person.

When assessing an application for investment in rural land (non-urban land of five hectares or more) and deciding whether to allow an investment to proceed, the OIO must be satisfied that the benefit of the investment to New Zealand will be substantial in terms of economic benefits and/or in the extent to which New Zealanders have oversight or can participate in the investment going forward.

Practical issues for overseas investors in New Zealand

In our experience, specific issues which overseas persons should be aware of include:

- A large amount of supporting financial and personal information and details are required of overseas directors and shareholders of not only the investing entity, but also of its ultimate controlling parent company. The OIO requires details of ownership structures in order to clearly identify the ultimate individuals who own and/or control the investment entity undertaking the New Zealand investment.
- Even where the application passes the OIO's initial quality assurance assessment, the OIO will still do its own independent checking and will request further information and details as it sees necessary. These further information requests can delay the approval process.
- Structuring the timeframe of the acquisition to allow it to remain unconditional until OIO consent is granted. Processing times for applications to acquire sensitive land generally range from 55 to 100 working days. Complicated applications can take longer. We recommend allowing a six-month timeframe.
- OIO consent to any purchase usually contains specific conditions which the purchaser must fulfil post completion. These could include offering employment opportunities, investment in Research and Development, or ongoing free public access to natural resources/features on the land. The OIO monitors and requires reporting on these post-purchase conditions. There are penalties for non-fulfilment.
- All information provided to the OIO is subject to the Official Information Act 1982 and can be requested for public release by any person. There are grounds to withhold personal information and information that might cause commercial prejudice to parties, but the starting point is that information will be released unless parties can demonstrate strong grounds to withhold information.
- All relevant financial, business, and personal information including statutory declarations and lodgement fees must now be included in the initial application otherwise the application will not pass the OIO's preliminary quality assurance assessment, in which case the OIO will not start processing the application until the missing information is provided.
- The investment plan and 'counterfactual' OIO benefits analysis must clearly demonstrate what the overseas person can add to the New Zealand economy and industry sector.

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Environment and resource management law

New Zealand's environment and resource management law provides for the sustainable management of natural and physical resources, while recognising the importance of New Zealand's unique biodiversity and environment.

Summary of relevant laws and regulations

The Resource Management Act 1991 (RMA) is the principal environmental and development statute in New Zealand. The RMA establishes a comprehensive regime for dealing with resource management issues and sets out the roles and responsibilities of decision-makers, including:

- District and Regional Councils, and Unitary Councils (which have the combined functions of District and Regional Councils)
- Minister for the Environment
- Minister of Conservation
- Environment Court (a specialist Court with jurisdiction established under the RMA)
- Environmental Protection Authority

Various other statutes may also be applicable to resource management issues, such as the:

- Local Government Act 2002 (bylaws)
- Hazardous Substances and New Organisms Act 1996 (waste management, regulation of dangerous and hazardous substances)
- Health and Safety at Work Act 2015 (regulation of hazardous substances)
- Waste Minimisation Act 2008 (solid waste management)
- Building Act 2004
- Conservation Act 1987
- Reserves Act 1977
- Public Works Act 1981
- Climate Change Response Act 2002 and associated regulations (greenhouse gas emissions and the emissions trading scheme)
- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (environmental management in New Zealand's Exclusive Economic Zone and Continental Shelf)
- Kāinga Ora–Homes and Communities Act 2019
- Urban Development Act 2020 (facilitation of complex urban developments)

Resource consents

The RMA introduces a hierarchy of governing documents, including:

- National policy statements
- National environmental standards
- National planning standards
- Regional policy statements
- Regional plans
- District plans

These documents contain rules that determine whether resource consents may be required to undertake certain activities. They also contain policies against which applications for resource consents must be assessed. Generally, the greater the adverse effects of the proposed activity on the environment, the greater the complexity in the processing and determination of applications for resource consent. The time and cost involved in obtaining resource consents will also increase with more complex applications.

The five main types of resource consent are:

- land use consents;
- subdivision consents;
- coastal permits;
- water permits; and
- 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.

Offences

Major offences occur when there are, amongst other things, breaches of:

- duties and restrictions concerning activities on land, within beds of rivers and lakes and the coastal marine area, the use of water, and discharges of contaminants;
- resource consents;
- enforcement orders; or
- abatement notices.

Minor offences relate to other matters such as obstructing an enforcement officer or breaching a summons.

Penalties

Offences under the RMA are criminal in nature and are heard in the District Court by an Environment Court Judge.

The RMA imposes a strict liability regime, and it is, therefore, not necessary for the prosecution to establish that the defendant intended to commit an offence. Generally, once responsibility for the act or omission in question is established, then (subject to the limited statutory defences established by the RMA), conviction follows.

Major offences carry a maximum fine of NZD300,000 or a term of imprisonment not exceeding two years for a natural person, and a maximum fine of NZD600,000 for a legal person. In circumstances where the offence is a continuing one, the offender can be subject to a further fine not exceeding NZD10,000 for each day the offence continues. If a court is satisfied that the offence was committed in the course of producing a commercial gain, the court may, in addition to imposing the above penalties, order that the person pay an amount up to three times the value of any commercial gain relating to the commission of the offence.

To date, maximum fines imposed under the RMA have not approached the upper limit, although terms of imprisonment are occasionally imposed (e.g. in a prosecution relating to deliberate acts by a repeat offender).

Liability of principals or directors

Where an offence is committed by a person acting as an agent, contractor, or employee, the principal is also liable on the same terms and to the same extent as if the offence had been committed personally by the principal.

Where the defendant is a corporate entity, it is possible for its directors and/or management to face liability for the acts of the company. However, the RMA does provide some defences for directors and management.

Resource management system reforms

Following a comprehensive review of the resource management system by the Resource Management Review Panel, the Government announced it would be undertaking reform in line with the Panel's recommendations.

The Government is in the process of developing three new Acts:

- A Natural and Built Environments Act (NBEA), which will replace the RMA and introduce a new resource management system based on environmental limits (bottom lines), outcomes and targets.
- A Strategic Planning Act (SPA), which will require the development of long-term spatial strategies in each region.
- A Climate Adaptation Act (CAA), which will address decisions on managed retreat and establish an adaptation fund.

The NBEA and SPA Bills were introduced to Parliament in November 2022. It is anticipated that these two bills will be passed before the New Zealand general election in October 2023. We expect that the CAA Bill will be introduced later this year or early next year.

The NBEA and SPA Bills propose significant changes to the resource management system including:

- The introduction of the concept of te Oranga o te Taiao, which relates to the health of the natural environment and its ability to sustain life;
- A national planning framework that provides greater direction on national matters, imposes mandatory environmental limits, and seeks to meet environmental outcomes; and
- Combining regional and district plans to create natural and built environment plans that are region specific and must give effect to the national planning framework.

The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 is a recent material change to the RMA. It came into force in December 2021.

- This Amendment Act requires territorial authorities to implement certain policies in the National Policy Statement for Urban Development 2020 (NPS-UD), which require greater development capacity in urban areas.
- The Act also requires territorial authorities to implement medium density residential standards (MDRS) into the residential zone provisions of most residential zones in New Zealand's main urban centres. The MDRS will allow three dwellings of up to three storeys on a site without the need for a land use consent (subject to compliance with density standards).
- Tier 1 territorial authorities in New Zealand's major urban centres have notified plan changes using a streamlined process to give effect to intensification policies in the NPS-UD and incorporate the MDRS. Tier 2 territorial authorities are also required to notify plan changes to give effect to intensification policies.

An alternative option for obtaining resource consent was available until recently under the COVID-19 Recovery (Fast-track Consenting) Act 2020:

- The processes under this Act was intended to be faster than the RMA route, and applications are assessed against both the RMA and the purpose of this Act, which includes supporting New Zealand's recovery from the economic and social impacts of COVID-19, and reducing New Zealand's net emissions of greenhouse gases – and so better enables consideration of the benefits of renewable energy.
- The Act has a 'sunset clause' and will be repealed on 8 July 2023. However, the Ministry for the Environment has indicated that there is not enough time for new applications to progress through the process before the Act is repealed.

- An amended version of this process is proposed to be carried over under the new resource management system for activities defined as “eligible activities”.

Contaminated land liability

In New Zealand, liability for contamination or cleaning up contaminated sites is most commonly addressed under the RMA by way of:

- 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; and
- casting a wide net for parties who may be liable for offences for breaching the RMA. 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. Regional councils have limited powers to enter land and undertake inspections and investigations of contamination. They also have the ability to take enforcement action if there is a breach of the RMA or of the conditions of a resource consent, or to require a person to do something “necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier.”

The RMA does not presently specify:

- whether regional council power with respect to such sites can be exercised in relation to pre-1 October 1991 contamination; or
- which party (polluter, owner, occupier, or all parties) should be properly targeted when the regional council is exercising its powers.

The Resource Management (National Environmental Standards for Assessing and Managing Contaminants in Soil to Protect Humans) Health Regulations 2011 came into force on 1 January 2012. The Standards require landowners to assess contamination levels of potentially contaminated sites before undertaking a change in land use, subdivision, or earthworks. The responsibilities under the Standards attach to the land, so a current landowner will need to comply with the Standards regardless of whether they were responsible for the contamination.

Health and Safety at Work Act 2015 and Hazardous Substances and New Organisms Act 1996

Businesses in New Zealand also need to consider issues and potential 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 and, in situations where hazardous chemicals are being stored or handled at a particular site, a Location Test Certificate may be required under the Health and Safety at Work Act 2015 (HSW Act).

The HSW Act regime covers specific substances which are classified according to their potential hazardous properties. Those properties include:

- explosiveness;
- flammability;
- oxidisation;
- corrosiveness; and
- toxicity.

The regulation of hazardous substances outside of the workplace is managed under the Hazardous Substances and New Organisms Act 1996 (HSNO Act).

New organisms are managed and regulated by the HSNO Act. Authorisation is required for introduction or development of new organisms, including:

- organisms that became extinct before 29 July 1998;
- organisms with approval to be in containment;
- organisms with approval to be released with controls;
- genetically modified organisms;
- organisms that were deliberately eradicated from New Zealand;
- organisms present in New Zealand before 29 July 1998 in contravention of the Animals Act 1967 or the Plants Act 1970; and
- risk species.

The Environmental Protection Authority (EPA) is responsible for the assessment and regulatory approval process for hazardous substances and new organisms. When the EPA receives an application for a hazardous substance approval, WorkSafe NZ makes sure the rules sufficiently protect the health and safety of people at work.

Climate Change

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. New Zealand ratified the Kyoto Protocol, which committed the country to set internationally binding emission reduction targets for a commitment period of 2008 to 2012.

An emissions reduction target for the period 2013 to 2020 was under the UNFCCC rather than under the Kyoto Protocol. From 2021 onwards, New Zealand's commitment to reducing greenhouse gas emissions is governed by the Paris Agreement.

New Zealand's commitments under the Paris Agreement include:

- having an emissions reduction target that is regularly updated;
- regularly reporting on emissions and the tracking towards targets;
- providing financial support to developing countries' mitigation and adaption efforts; and
- maintaining a plan for adaption.

The Emissions Trading Scheme

The New Zealand Emissions Trading Scheme (ETS) is one of the main tools ensuring New Zealand meets its international obligations to reduce greenhouse gas emissions. It 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, except the agricultural sector, which will fully enter the ETS from 2025 unless an alternative pricing mechanism is developed to manage agricultural emissions outside of the ETS.

The Minsters for Climate Change and Agriculture have outlined a proposed alternative pricing system that will create a farm-level split-gas levy that prices biogenic methane and nitrous oxide separately. If the farm-level pricing cannot be achieved by 2025, a processor-level levy may be implemented as a transitional measure. The Government intends to make final decisions on the alternative pricing system and introduce legislation to give effect to those decisions in 2023.

If the alternative pricing system is not implemented, agricultural emissions will be priced under the ETS from 2025 by:

- requiring farmers to start mandatory reporting on agricultural livestock emissions (at a farm level) from 1 January 2024;
- requiring payment for emissions from agricultural livestock emissions (at a farm level) and fertiliser emissions (at processor level, i.e. fertiliser manufacturers and importers as opposed to users) from 1 January 2025 (unless deferred by Order in Council); and
- increasing the free allocation of units available to the agriculture sector from 90% to 95%, which will soften the payment obligation.

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 may earn NZUs under the ETS.

New Zealand Government emission budgets

Emissions budget 1
2022–2025

290
megatonnes*
72.4 megatonnes / year

Emissions budget 2
2026–2030

305
megatonnes*
61 megatonnes / year

Emissions budget 3
2031–2035

240
megatonnes*
48 megatonnes / year

*carbon dioxide
equivalent greenhouse gasses

Domestic emissions reduction targets and response

The Climate Change Response Act 2002 sets an emissions reduction target of net-zero by 2050 for all greenhouse gases (except biogenic methane emissions, which are required to be reduced by 24–47% of 2017 emissions by 2050) and establishes the Climate Change Commission, which will advise and report to the Government on its functions of undertaking a risk assessments, setting five-year emissions budgets, and preparing emissions reduction plans and national adaptation plans to achieve the 2050 targets.

In May 2022, the Government set its first three emissions budgets for 2022–2035 which are designed to ensure New Zealand's long term greenhouse gas emissions targets can be met:

- Emissions Budget 1 (2022–2025): 290 megatonnes of carbon dioxide equivalent greenhouse gasses (72.4 megatonnes per year).
- Emissions Budget 2 (2026–2030): 305 megatonnes (averages 61 megatonnes per year).
- Emissions Budget 3 (2031–2035): 240 megatonnes (48 megatonnes per year).

In conjunction with setting the first three emissions budgets, the Government issued the first Emissions Reduction Plan, 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. The Plan provides an indication of what the future could hold for these sectors and identifies opportunities for interested parties to be involved in further consultation to give effect to planned actions.

In April 2023 the Climate Change Commission released its draft advice to inform the Government's second emissions reduction plan. The advice canvasses three key matters:

- Focusing on reducing gross emissions rather than offsetting emissions through forestry;
- Specific recommendations for to reduce emissions in different sectors including agriculture, construction, energy, transport, and waste; and
- Enhancing the research, science, innovation, and technology system, accelerating climate funding and finance, and fostering a more circular economy and sustainable bioeconomy.

The Government has also released a National Adaptation Plan for 2022–2028. The plan responds to a national climate risk assessment which considered how New Zealand may be affected by climate change related hazards. Four priorities are set out in the plan:

- enabling better risk-informed decisions;
- driving climate-resilient development in appropriate places;
- laying the foundations for a range of adaptation options including managed retreat; and
- embedding climate resilience across Government policy.

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Financial services

Over the past 40 years, the financial services sector has proven to be one of the most productive, fastest growing, and largest contributors to economic growth in New Zealand.

Financial services in the New Zealand economy

The latest Statistics NZ data shows the financial and insurance services sector contributed approximately NZD18.1 billion to GDP in the year ending March 2021.

The traditional financial services industry continues to play an important role, now more than ever, in adapting to assist New Zealanders and other industries and businesses to build financial resilience.

"New Zealand's financial system is well placed to support the economy in the face of a rising interest rate environment. Banks' capital and liquidity positions are strong, and profitability and asset quality remain high. Recent stress tests demonstrate banks' resilience to scenarios involving rising unemployment and interest rates, and declining house prices."

Source: Reserve Bank of New Zealand (RBNZ) Financial Stability Report, November 2022

At the same time, strong innovation, particularly in fintech and digital (block-chain based) assets and currencies, is driving growth opportunities both domestically and for exported services. According to the Technology Investment Network's 2022 report, fintech is now the second largest tech sub-sector by revenue, within the tech sector, itself New Zealand's second biggest export earner. The New Zealand Council of Financial Regulators (COFR) provides an official forum for fintech-related regulation to support the sector.

Investment structures

Most financial services businesses take the form of either New Zealand companies or branches of overseas entities, while widely used investment strutures include unit trusts (qualified as PIEs) and limited partnerships. In each case, the regulatory environment should be carefully considered as it may apply to overseas entities offering products or services to clients in New Zealand, as well as those looking to establish new, or invest in existing, businesses. However, if all New Zealand clients are "wholesale", in most cases, there are exclusions form licensing and other obligations.

For further information on the Financial Markets Conduct Act 2013 (FMCA) – the main piece of New Zealand's securities law – please refer to our FMCA Roadmap.

Registered and overseas banks

Part 4 of the Banking (Prudential Supervision) Act 1989 (BPS Act) provides that, subject to certain exceptions, no person may carry on any activity directly or indirectly in New Zealand (whether through an agent or otherwise) using a name that includes the word 'bank' or a related word unless it is a registered bank, exempted or authorised by the RBNZ.

Registered banks are subject to the full regulatory oversight of the RBNZ. Essentially, the registration regime is a form of licensing, and each New Zealand registered bank is required to comply with certain conditions of registration. Applications for registered bank status involve significant interaction with the RBNZ and overseas banks must also have the approval of, and comply with, the prudential requirements of their home supervisor to conduct banking business in New Zealand.

RBNZ consent is required before a person acquires 'significant influence' over an

Current financial services trends

- The great re-opening of New Zealand
- Proliferation of new cryptocurrencies and digital assets, including non-fungible tokens
- Impact of Russia's invasion of Ukraine
- A wave of law reforms pressing ahead
- Firming up of the FMA's regulatory approach

existing registered bank, or to increase that level of significant influence beyond the level permitted under an existing consent. When consent is sought, the Reserve Bank has the power to specify the level of influence a person may have and impose any terms and conditions on the consent as it thinks fit.

An alternative for overseas banks without a place of business in New Zealand and licensed in another jurisdiction, who wish to carry out certain types of wholesale banking, lending, financial advisory, capital market and foreign exchange, or derivatives activities in New Zealand, is to utilise the RBNZ's class authorisation notice. The notice conditions include prior notice being given to the RBNZ before the class authorisation notice is relied upon.

The conditions also stipulate the use of certain restricted words in a name or title, among other things.

Non-bank deposit takers

Like banks, non-bank deposit takers (NBDTs) also play a role in supporting the resilience of the financial services industry.

The RBNZ also acts as the prudential regulatory authority for NBDTs in accordance with the Non-bank Deposit Takers Act 2013 (NBDT Act). A NBDT will include anyone that is not a registered bank but who (a) makes an offer of debt securities to retail investors; and (b) carries on the business of borrowing and lending money, or providing financial services, or both. Relief can be obtained for overseas banks in some circumstances.

An NBDT must be licensed as a non-bank deposit taker by the RBNZ. They must also obtain an independent credit rating, have and comply with specific governance requirements and a risk management programme, restrict related party exposures, and meet capital adequacy and liquidity requirements, among other things. They are also required to have a New Zealand trustee and trust deed, unless exempted.

RBNZ consent is required before giving effect to a transaction that will result in a person increasing their 'level of influence' over a NBDT, such that the person will have the ability to appoint 25% or more members of the governing body or have a qualifying interest in 20% or more of the voting securities.

Consent will also be required if the person's influence extends beyond the permitted threshold under an existing consent or, if, at the time the NBDT became licensed the NBDT already met the threshold described above, beyond the level existing at that time. When consent is sought, the RBNZ has the power to impose any terms and conditions on the consent as it thinks fit.

Proposed reforms for bank and NBDT regulation

Subsequently, in April 2021, the NZ Government announced that it would introduce new legislation to help protect New Zealanders' money held by financial institutions. A new Act will replace parts of the BPS Act and the NBDT Act and create a single regulatory regime for all bank and non-bank deposit takers (such as building societies and finance companies).

The Deposit Takers Bill was introduced into Parliament in September 2022, and it was recently reviewed by the Finance and Expenditure Committee.

Three key outcomes the Deposit Takers Bill is expected to achieve are:

1. Creating a single regime for all deposit takers (i.e. banks and NBDTs).
2. The creation of a Depositor Compensation Scheme — to protect deposits.
3. Strengthening the supervisory and enforcement powers of the RBNZ to allow it to act before deposit takers are in trouble.

The Deposit Takers Bill is expected to come into force as law after receiving Royal Assent in mid-to late 2023. After the Act comes into force, there will be a transition period to allow both the RBNZ and regulated entities time to adapt to the new regime. The RBNZ has indicated that it will take some years for it to develop and consult on the secondary legislation that will implement the regulatory requirements for the new regime, and complete a licensing process for deposit takers to operate under the regime.

Insurers

Insurance providers are an important part of the financial services industry, providing protection to businesses and individual customers so they can thrive without the burden of unforeseen loss or damage.

All insurers and reinsurers carrying on insurance business in New Zealand must be licensed under the Insurance (Prudential Supervision) Act 2010. Licence obligations include, among other things, maintaining solvency and filing solvency statements (in accordance with standards prescribed by

the RBNZ) and obtaining, publishing, and disclosing to New Zealand policy holders and the RBNZ current financial strength ratings from an approved rating agency.

In addition, where a person would become a holding entity of a licensed insurer, or would obtain 'control' of a licensed insurer as a result of a proposed transaction (i.e. have the power to exercise, or control the exercise of 50% or more of the voting rights), they must notify the RBNZ of the transaction. After notification, the RBNZ will consider whether, if the proposed transaction takes effect, it would still be satisfied that the licensed insurer meets the initial licensing criteria.

Insurance intermediaries are regulated separately, primarily under the Insurance Intermediaries Act 1994 (IIA). The IIA imposes certain requirements on 'insurance intermediaries' and 'brokers'.

It also prescribes how payments made to intermediaries affect the respective liabilities of insurers and the insured. It is not, however, a registration or licensing regime and does not impose onerous conditions (although a broker must maintain one or more insurance broking accounts with a financial institution in New Zealand). However, the IIA is expected to be replaced when the Insurance Contracts Bill is enacted.

Upcoming changes – Insurance contracts law reform

In February 2022, the Ministry of Business, Innovation and Employment (MBIE) released a consultation draft of the Insurance Contracts Bill for public feedback.

The Bill follows a public consultation on proposed reforms to insurance contracts law in late 2019. The Bill aims to address shortcomings in insurance contracts regulation identified in MBIE's 2019 consultation. Submissions on the Bill closed in May 2022, and MBIE is currently considering the feedback received in relation to it.

The Bill proposes to:

1. Make fundamental changes to the duty of disclosure.
2. Open up insurance contracts to the unfair contract terms regime in the Fair Trading Act 1986.
3. Introduce new obligations upon insurers in relation to the presentation of consumer insurance contracts.
4. Modernise the ability of third parties to make claims upon the liability insurance of persons they are suing, including providing broad powers to request information.
5. Consolidate New Zealand's disparate insurance legislative regime into (nearly) a single statute (consequently, repealing a number of pieces of legislation, including the IIA).

Other upcoming changes for banks, licensed NBDTs and licensed insurers – Conduct of Institutions

The Financial Markets (Conduct of Institutions) Amendment Act 2022 (COFI Act), amends the FMCA, amongst other enactments, to ensure that the specified financial institutions (which includes registered banks, licensed NBDTs and licensed insurers) and their intermediaries comply with a principle of fair conduct and associated duties and regulations.

The COFI regime will come into force in early 2025. It has generally been welcomed by the sector as it will provide clarity for financial institutions, and continue to strengthen consumer confidence.

The measures the Government is introducing include:

- a new conduct licensing system for banks, insurers and NBDTs (through regulations);
- a new regime requiring banks, insurers and NBDTs to meet high standards of customer treatment;
- clarifying the fair conduct principle by inserting a number of factors relevant to the requirement to treat consumers fairly;
- inserting sections that require certain content to be included in fair conduct programmes, which was previously to be prescribed through regulation;
- requiring that financial institutions publicly disclose a high-level summary of their programme (as opposed to the previous requirement to disclose the entire fair conduct programme publicly);
- clarifying the threshold for non-compliance with the fair conduct programme (financial institutions must take all reasonable steps to comply with their fair conduct programme);
- including a list of matters for the Minister to have regard to before recommending regulation or prohibition of incentives;
- narrowing the range of intermediaries that the power to regulate or prohibit incentives can apply to. Intermediaries under such regulation are only those involved in the chain of distribution; and
- reducing the extent obligations apply to intermediaries.

The COFI Act allows regulations to prohibit sales incentives based on volume or value targets, e.g. soft commissions such as overseas trips, bonuses for selling a certain number of financial products, leader boards and performance management based on sales volumes. Insurers and brokers should consider whether and to what extent this will affect their current remuneration structures.

Retail Payment System Act 2022

The Retail Payment System Act 2022 received Royal Assent in May 2022. Most of the Act came into effect from the date of Royal Assent. This means that the Commerce Commission's new powers are already in force.

The Act aims to reduce merchant service fees, these being fees paid by merchants to their acquirer (usually their bank) when their customers make credit or debit card payments. The overall objective of the new regime is to ensure the retail payments system delivers long-term benefits to merchants and consumers through efficient retail payment networks and competition in the supply of retail payment services. The Cabinet Paper on the Payment System Bill notes for instance that "New Zealand merchants continue to pay more than their Australian counterparts for accepting credit cards and online debit cards", partly due to the lack of efficient competition in aspects of the retail payments system. The Commerce Commission is the regulator of the new regime.

"
New Zealand's financial market regulation is well regarded internationally."

The FMCA and FMA licensed service providers

New Zealand's financial market regulation is well regarded internationally. It is known for its innovative and adaptable culture while still ensuring protections are in place to support fair, efficient, and transparent financial markets. The FMCA regulates offers of 'financial products', which include four discrete categories – debt securities, equity securities, managed investment products and derivatives. The FMCA also regulates certain market services as described in the following paragraphs.

Certain disclosure obligations will apply if an offer is a 'regulated offer' of financial products (i.e. essentially arising where the offer involves retail investors).

The FMCA also implements fair dealing rules for financial products and services (which will apply in relation to both retail and wholesale clients) and creates registration and governing document requirements for regulated offers of debt securities and managed investment schemes.

The FMCA also creates a licensing regime overseen by the Financial Markets Authority (FMA) for managers of registered managed investment schemes (but only in respect of retail offers), derivative issuers to retail counterparties, providers of discretionary investment management services to retail clients, financial advice providers to retail clients, equity crowd-funding and peer-to-peer lending platform providers, and trustees of certain superannuation schemes. The FMA also administers the licensing and oversight of trustees/supervisors under the Financial Markets Supervisors Act 2011.

Under the FMCA, the holder of a market services licence must report to the FMA, as soon as practicable, when it becomes aware that a change of control has occurred in respect of itself. Those seeking to acquire a licensed business in the course of an M&A transaction should be aware of these reporting requirements and ensure compliance with them. The notification may trigger consideration by the FMA of the extent to which the acquisition may impact on the ability of the target to continue to comply with its licence conditions. Whether the target is in good standing with the FMA at the time, and the identity of the acquirer, its capability, and its standing with its home regulator will all be relevant.

Managed investment product issuers

If a managed investment scheme is offered to retail investors in New Zealand, it will need to be registered in New Zealand under New Zealand law and have a licensed fund manager and licensed supervisor. If the scheme is offered in New Zealand solely to wholesale investors, it will not need to be registered or licensed.

Registered managed investment schemes are highly regulated and have specific registration, disclosure, and governance requirements under the FMCA. The manager of the scheme must be licensed by the FMA and an independent supervisor (i.e., a trustee) licensed by the FMA must be appointed. A licensed manager, or their authorised body, is required to send a report to the FMA if it becomes aware that a transaction or other arrangement has been, or will likely be, entered into that has or will result in a person obtaining or losing control of the licensed manager (or the authorised body), i.e. resulting in a change in holding company or change in who has the capacity to determine the outcome of decisions about the entity's financial and operating policies.

Derivatives issuers

Issuers who make regulated offers of derivatives are required to be licensed by the FMA. Derivatives issuers (whether licensed or not) are also subject to requirements relating to holding derivatives investor money and property for both retail and wholesale clients.

Licensed derivatives issuers are subject to the same change of control reporting condition as licensed managers (see 'Managed investment product issuers' above).

If the derivatives are offered in New Zealand solely to wholesale investors, the issuer will not need to be licensed.

Discretionary Investment Management Services (DIMS)

DIMS provided to retail clients are regulated under the FMCA. DIMS providers must be licensed by the FMA, and comply with prescribed disclosure, custodial, record-keeping and reporting requirements.

Licensed DIMS providers are subject to the same change of control reporting condition as licensed managers (see 'Managed investment product issuers' above).

If a DIMS service is offered in New Zealand solely to wholesale investors, the provider will not need to be licensed.

Financial advice and client money or property service providers

The FMCA regulates "financial advice services" and "client money or property services" (which includes custodial services).

Among other things, the regime imposes a licensing requirement on persons (which includes any entity) who provide a "financial advice service" to retail clients (namely engaging one or more persons to give "regulated financial advice" to clients on the person's behalf or giving regulated financial advice on their own account (for example, via an entity's website, other written material or digital solutions)). Giving financial advice to wholesale clients does not require a licence.

Regulated financial advice, given to retail or wholesale clients in New Zealand, is subject to various statutory duties including to exercise due care and skill and give priority to the client's interests, which will apply to the provider.

> "The FMCA regulates "financial advice services" and "client money or property services" (which includes custodial services)."

For persons carrying on the business of providing, or offering to provide, "client money or property services", general conduct obligations (in respect of both retail and wholesale clients) and trust account obligations (in respect of retail clients and specified wholesale clients) will apply under the FMCA.

Overseas persons that provide a financial advice service and/or client money or property service to New Zealand clients will need to consider the requirements in respect of each service.

Equity crowdfunding and peer-to-peer lending providers

The FMA has used its power under sub-part 5 of Part 6 of the FMCA to license prescribed intermediary services, to create useful alternative models to capital raising and investment.

Getting an equity crowd funding licence allows a licensee to create a facility (usually via a website) by means of which offers of shares in a company can be made without Part 3 disclosure where the principal purpose of the facility is to facilitate the matching of companies who wish to raise funds with many investors who are seeking to invest relatively small amounts.

Holding a peer-to-peer lending licence allows the licensee to provide a facility (again, usually via a website) by means of which offers of debt securities can be made (i.e., borrowers can look for loans) without making Part 3 disclosure where the principal purpose of the facility is to facilitate the matching of lenders with borrowers who are seeking loans for personal, charitable, or small business purposes.

Mandatory climate-related disclosures for large NZX-listed entities and financial institutions

New Zealand's new mandatory climate-related disclosure (CRD) regime, under Part 7A of the Financial Markets Conduct Act 2013 (FMCA), is already in force and acts as a model for other countries and intergovernmental bodies wishing to develop their own climate reporting requirements and standards as part of their response to the climate crisis.

The CRD regime captures around 200 large NZX-listed entities and large financial institutions (registered banks, credit unions, licensed insurers and licensed fund managers). These entities are required to prepare and lodge climate statements in accordance with climate standards issued by the External Reporting Board. These are broadly aligned with the TCFD recommendations and ISSB proposals. Importantly, the required analysis to make the disclosures is expected to lead to significant changes in how business is conducted.

The requirements apply from the relevant entity's accounting periods beginning on or after 1 January 2023. Entities also need to obtain assurances on greenhouse gas emissions disclosures, but only from the accounting period beginning 27 October 2023.

Financial service providers

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA), requires financial service providers to:

- register on the online Register of Financial Service Providers; and
- for those who provide financial services to retail clients in New Zealand, sign up to an approved dispute resolution scheme.

The FSPA applies to persons who are in the business of providing a financial service and:

- provide the financial service to clients in New Zealand, unless:
  - the financial service provider does not provide the service to any retail client in New Zealand and does not have a 'place of business' in New Zealand; or
  - the service provided to persons in New Zealand is less than any prescribed threshold (which varies depending on whether a person has been in the business of providing a financial service to persons in New Zealand for less than six months, between six and 12 months, or 12 months or more); or
- are required to be licensed under the licensing enactments stated above or are registered under the FSPA by or under any other enactment;
- provide the service in the prescribed circumstances; and
- are a reporting entity to which the AML/CFT Act applies.

Despite the territoriality provisions above, there is an exemption which provides that an overseas entity will not be required to be registered on the FSP Register (even if it provides the service to retail clients) to the extent it meets certain criteria (which includes having no place of business in New Zealand and not distributing any communications to the public in New Zealand or any section of the public in New Zealand for the purpose of promoting the supply of the service to persons in New Zealand).

The Registrar and the FMA also actively monitor and will take steps to de-register overseas businesses who seek to register in New Zealand for optical purposes without a real substantive presence in New Zealand.

Note that if you are considering an acquisition of a New Zealand registered entity, notification requirements for changes of owner and director may apply after the event.

AML/CFT Act 2009

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) is a FATF Recommendations based regime which imposes obligations on 'reporting entities' to have in place procedures and processes to detect, deter, manage, and mitigate money laundering and the financing of terrorism.

The AML/CFT Act does not contain express provisions setting out its extra-territorial scope. Guidance issued by the three governmental supervisors, Department of Internal Affairs (DIA), FMA and RBNZ, states that an overseas person carrying on business in New Zealand and engaged in one or more of the activities listed in the AML/CFT Act in the ordinary course of that business will be a 'reporting entity' under the AML/CFT Act. This may apply whether or not it is also required to be registered under the Companies Act 1993, and without a New Zealand place of business.

Reporting entities are defined by reference to a list of activities which include carrying on in the ordinary course of business the activities of financial institutions, designated non-financial businesses or professions, high value dealers, casinos, and the TAB (a government owned betting agency).

A 'financial institution' includes most aspects of banking, life insurance, funds management, financial advice and broking, value and money transfer and providing means of payment.

Designated non-financial businesses or professions include company and trust formation and service providers, lawyers, accountants, and real estate agents.

High value dealers are entities that, in the ordinary course of business, buy and sell specified goods, with a value of NZD10,000 or more, for cash.

Guidance from the DIA states that virtual asset service providers carrying out certain virtual asset activities (VASPs) are financial institutions and must comply with the AML/CFT Act, as reporting entities. These virtual asset activities encompass virtual asset exchanges, virtual asset wallet providers, virtual asset broking, initial coin offering providers and providers of investment opportunities in virtual assets.

Upcoming changes to the AML/CFT Act

Following the release by the FATF of their Mutual Evaluation of New Zealand in April 2021, which noted that some improvements to the New Zealand AML/CFT regime were necessary to bring them up to the high FATF standards, the Ministry of Justice conducted a thorough review of the AML/CFT Act.

The Minister of Justice tabled the resulting report in Parliament in early November 2022, and announced proposals to strengthen the AML/CFT regime to both "combat the harmful effects of money laundering and financial terrorism" and "make it easier for small businesses and consumers to comply". Changes are to be made both by regulations that are in draft as at the date of this summary, and changes to the Act to in the next two years. Among changes expected to the AML/CFT regime are greater clarity around VASPs, and territorial scope.

Relationship with Privacy Act 2020

The Privacy Act 2020 applies to overseas agencies carrying on business in New Zealand. This statute has a similar test for carrying on business as the Companies Act, AML/ CFT Act and FSPA – referring to carrying on business in New Zealand, and therefore overseas persons should consider the application of these legal regimes together.

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Entry into New Zealand

The New Zealand border is now fully open to non-New Zealand citizens and residence visa holders. COVID-19 related pre-departure tests and proof of vaccination are no longer required for entry.*

New Zealand's immigration law is set out in the Immigration Act 2009 and in Immigration New Zealand's Operational Manual, made pursuant to the Immigration Act 2009.

The Immigration Act 2009 provides for two main categories of visa: residence class visas and temporary entry class visas. Residence class visas consist of permanent resident and resident visas. Entry class visas consist of temporary, interim, and limited visas.

New Zealand has a universal visa system. This means that all foreign nationals will require a visa to be in New Zealand unless a visa waiver applies. A visa is required to travel to, enter, and stay in New Zealand.

Visiting New Zealand

A visitor's visa is required for entry into New Zealand by any person other than:

- a New Zealand citizen or residence visa holder;
- an Australian citizen or resident who holds a current Australian permanent residence visa or a current Australian resident return visa;
- a person who is exempt from the requirement to hold a visa to be in New Zealand; or
- a citizen of a country which has a visa waiver agreement with New Zealand (if visiting New Zealand for three months or less, or six months if from the United Kingdom). However, the person will instead need to request and pay for a New Zealand Electronic Travel Authority ('NZeTA') before travelling to New Zealand.

**The information in this article is correct as at 29 May 2023. With ongoing changes in immigration settings and rules, the information contained in this article is subject to change.*

Working in New Zealand

Any person who is not a New Zealand or Australian citizen or resident or subject to an exemption, and wants to work in New Zealand, must hold a valid work visa.

A work visa may be granted if the person meets health and character requirements.

They must then also meet the work and skill requirements that are set out in the various categories that a person may apply under, to work in New Zealand.

People wanting to work temporarily in New Zealand can apply under many categories, including specific purpose or event, post-study, working holiday and further categories relating to seasonal work in horticulture and viticulture.

The essential skills work visa and the long-term skill shortage list work visa have been replaced by the accredited employer work visa (AEWV). This is a temporary work visa that is an employer-led (rather than employee-led) visa application process.

Unless an exemption applies for an AEWV, the role will need to pay at least New Zealand median wage to qualify. The employer will need to be accredited with Immigration New Zealand. There are four different levels of accreditation, and the correct level of accreditation will depend on the number of migrants the employer is seeking to recruit and the type of business the employer operates.

The duration of a work visa varies depending on which work visa is being applied for, but generally the maximum duration is three years.

There are special categories for people (for example, crews of foreign fishing vessels, or members of approved exchange schemes) who need to meet a special set of criteria before the work visa or permit will be granted.

Entrepreneur work visa

An entrepreneur work visa is applicable to those interested in establishing a business in New Zealand. It enables the holder to move to New Zealand and buy or establish a business. An entrepreneur work visa is often required when applying for residence in New Zealand under the Entrepreneur Residence Category.

An entrepreneur work visa is a three-year work visa in two stages: a Start-up stage and a Balance stage.

1. **Start-up stage** – if an entrepreneur work visa is approved, the holder will initially be given a 12-month work visa, enabling them to buy or establish a business in New Zealand.

2. **Balance stage** – this is for the remaining 24 months of the visa. The balance of the visa will be granted once Immigration New Zealand is satisfied that steps have been taken to establish the business.

To be approved for an entrepreneur work visa, the applicant must:

- make a minimum capital investment of NZD100,000 (excluding working capital), unless this requirement is waived;
- meet or exceed 120 points on a scale which awards points for factors relating to the likely success of the proposed business and its value to New Zealand;
- have a business plan;
- have obtained professional or occupational registration in New Zealand (if it would be required for the proposed business);
- not have been involved in bankruptcy or business failure within the five years preceding the date the application is made;
- not have been involved in business fraud or financial impropriety;
- provide evidence of ability to finance the business;
- satisfy a business immigration specialist that they have sufficient business experience and a genuine intent to set up the business in New Zealand;
- meet health and character requirements; and
- meet English language requirements.

The entrepreneur work visa also offers a pathway to residence – see page 77 for more detail.

Residence in New Zealand

Every person who wishes to immigrate to New Zealand needs to apply for residence. Residence entitles the person to live, study and work indefinitely in New Zealand.

The main categories for residency applications are Business/Skilled Migrant, Work to Residence, Family, and International/Humanitarian. The Business/Skilled category has a minimum English language level requirement. There are also health and character requirements for all categories.

Skilled Migrant category

To be granted residency under the Skilled Migrant category, an applicant must be under 55 years of age and score at least 100 points to register an expression of interest. Expressions of interest are then collected into a pool over a certain period and ranked. The usual process is that those with over 180 points are selected from the pool and invited to apply for residency.

When asked to apply for residency, applicants are required to provide proof of the claims made in their expression of interest. The application will be assessed based on the proof provided by the applicant and on their ability to settle successfully and make a real contribution to New Zealand's social and economic development.

An expression of interest will remain in the selection pool for six months after it is submitted. If the expression of interest has not been selected within six months, it will be withdrawn from the pool. However, an applicant may lodge another application.

In the Skilled Migrant category, bonus points are awarded for the following:

POINTS	BONUS POINTS
AGE	Awarded based on the age bracked applicant falls within. Younger age brackets attract more points.
OFFER OF EMPLOYMENT OR CURRENT EMPLOYMENT IN NEW ZEALAND	Awarded if employment is in an area of absolute skills shortage, a region outside Auckland, above the high remuneration threshold, or their partner has employment or an offer of employment in New Zealand.
WORK EXPERIENCE	Awarded for having at least 2 years' work experience in New Zealand.
QUALIFICATIONS	Awarded for a recognised New Zealand qualification, a qualification that is in an identified future growth area or an area of absolute skills shortage, partner qualifications, and has close family support in New Zealand.
PARTNER'S ENGLISH LANGUAGE SKILLS	Awarded if Partner works in, or has been offered, skilled employment, or has a recognised qualification.

Business categories

There are three main business categories used for the purpose of residency applications, as follows:

1. **Investment Category** (comprising the Active Investor Plus and Global Impact);
2. **Entrepreneur Residence Category**; and
3. **Employees of Relocating Businesses Category.**

The objective of the business immigration policy is to attract migrants who will contribute to New Zealand's economic growth by increasing the country's skills base, encourage enterprise and innovation, and foster international linkages.

Investment category

The Investor 1 Category and the Investor 2 Category visas have been replaced by the Active Investor Plus visa.

Active Investor Plus visa

Those investing a minimum of NZD15 million in an 'acceptable investment' over a four-year period. The key features are:

- no age limit;
- English language requirements apply;
- applicants have 6 months from approval in principle to transfer and invest funds in New Zealand.
- applicants must spend at least 117 days in New Zealand as a holder of a resident visa during the 4 year investment period; and
- applicants can apply for permanent residence after 4 years of keeping the investment funds in New Zealand.

An acceptable investment for the Active Investor Plus visa is an investment of funds that:

- is not for the personal use of the applicant;
- is invested in New Zealand in New Zealand currency; and
- is invested in either one of more of the following:
  - listed equities;
  - philanthropy;
  - managed funds; or
  - direct investments

Entrepreneur Residence category

The Entrepreneur Residence Category enables migrants to be granted residence if they can demonstrate they have been actively participating in business and contributing to New Zealand's economic growth. There are two ways of qualifying for residence under the Entrepreneur Residence Category: the two-year option and the six-month option.

- Two-year option – those who have successfully established or purchased a business in New Zealand and have been self-employed in that business for at least two years on another visa.
- Six-month option – this option provides a faster track to residence for applicants who have been running a high-value business for at least six months on an Entrepreneur Work visa (have made a capital investment of at least NZD500,000 in their business and have created at least five ongoing and sustainable full-time jobs for New Zealand citizens or residents).

Employees of Relocating Businesses category

This category aims to promote New Zealand as a place in which to invest and relocate businesses. To be considered under this category the owner(s) of the relocating business must demonstrate that the business will operate in New Zealand and be of benefit to New Zealand. The applicant must be a key employee of that business and must not be eligible for any other kind of New Zealand resident visa.

More information on the current requirements for entry to and work in New Zealand can be found at Immigration New Zealand's website: immigration.govt.nz/

Family category

The objective of this category is to strengthen families and communities and contribute to New Zealand's economic transformation and social development.

This category is available to those applicants who:

- are in a genuine and stable marriage, civil union or de facto relationship with a New Zealand citizen;
- are a parent of an adult child whose primary place of established residence is New Zealand and who is a New Zealand citizen or resident; or
- are a dependent child of a New Zealand citizen or resident.

Residence from work policy

This policy provides a pathway to gaining residence in New Zealand for applicants who have been employed by an accredited employer in a role on the 'Green List' or in a role that is highly paid.

There are three main categories used for the purpose of residency applications, as follows:

- Straight to Residence visa – applicants must be working for an accredited employer or have a job offer from one and the role is on Tier 1 of the Green List (and meet the requirements set out in the Green List for that role);
- Work to Residence visa (from September 2023) – applicants must have worked for an accredited employer for 24 months in a role on Tier 2 of the Green List (and meet the requirements set out in the Green List for that role); and
- Highly Paid Residence visa (from September 2023)– applicants must have worked for an accredited employer for 24 months in a role that is paid at least twice the median wage.

Applicants must still meet health, character requirements, and English language requirements.

Tax residency

New Zealand imposes taxation on the worldwide income of individuals resident in New Zealand for tax purposes.

An individual is a resident of New Zealand for tax purposes if they:

- have a permanent place of abode in New Zealand (whether or not they have a permanent place of abode elsewhere); and/or
- are in New Zealand for more than 183 days in any 12-month period (the 183 days does not have to be consecutive and part days count as whole days).

Natural persons who become residents in New Zealand for the first time (or after a 10-year absence from New Zealand) are exempt from New Zealand taxation on foreign sourced income for up to 48 months of their tax residency (this excludes foreign sourced employment income or income from services).

More information on the taxation of New Zealand residents can be found on page 29.

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