

Doing Business in Aotearoa New Zealand

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1. Introduction

- (a) Hamilton Locke (NZ) Limited (**Hamilton Locke**) is a full service corporate and commercial law firm advising on both New Zealand and cross-border transactions with expertise including corporate and commercial, litigation and dispute resolution, commercial property, construction and development, and private client services. Hamilton Locke in Australia and in New Zealand work collaboratively across the region, bringing together expertise from local New Zealand and international law firms.
- (b) Hamilton Locke have produced this guide to provide a high-level summary on a number of key topics that investors should be aware of when investing and doing business in New Zealand. This guide is current as at July 2023.
- (c) Specific advice on the details of any investment proposal should be sought from Hamilton Locke by anyone considering investing in New Zealand. This guide should not be relied upon as a basis for making investment and business decisions, as government policy, legislation, interpretation of the law and circumstances may change.

2. About New Zealand

2.1 Legal and political system

- (a) New Zealand is an independent self-governing democracy and a member of the British Commonwealth of Nations. Its formal Head of State is the British monarch, who is represented in New Zealand by the Governor-General. Both remain politically neutral by convention and act on the advice of government ministers.
- (b) New Zealand does not have a written constitution and is not a federal state. Legislation is passed by an independent and democratically elected Parliament consisting of one house, the House of Representatives. Members of Parliament are elected every three years using a mixed member proportional electoral system. Following each election, an executive government is formed (usually comprising a coalition of political parties represented in Parliament). The leader of the government is the Prime Minister, who appoints and controls Cabinet.
- (c) New Zealand has a common law legal system, meaning that much of the law is developed by the courts. The courts have no power to strike down legislation. Judges are appointed by the government, and there is a strong culture of judicial independence.

2.2 Economy

- (a) The economy is largely deregulated and open, with a strong commitment to free trade. New Zealand is renowned for its streamlined regulatory system that encourages sustainable growth, job and wealth creation and entrepreneurial success. Its private sector players and government agencies work together to foster a vibrant start-up network – providing support for both investors and companies.
- (b) New Zealand's market is dominated with the agricultural, horticultural, forestry, mining and fishing sectors. The economy has a strong primary sector such as agriculture, predominantly in the exports of animal products (such as dairy and meat) as well as timber.

- (c) New Zealand's proximity to many major Asian countries (both in terms of distance and time zone) and the network from Free Trade agreements provide New Zealand with a unique opportunity for potential foreign investors. New Zealand's major trading partners include Australia and the United States as well as eastern Asian countries such as China, Japan and South Korea.
- (d) Overseas investment is welcomed, subject to some limited controls (principally focusing on land) outlined in the following section.

3. Restrictions on overseas investment

3.1 Introduction

- (a) Certain investments in New Zealand property and business assets by an "overseas person" are restricted by the *Overseas Investment Act 2005 (OIA)* and the *Overseas Investment Regulations 2005 (Regulations)*. The OIA prescribes the circumstances where an overseas person is required to obtain consent before investing in New Zealand.
- (b) The Overseas Investment Office (**OIO**) assesses and approves applications by an overseas person wanting to invest in New Zealand. The OIO has broad discretion to grant consent, with or without conditions, or to refuse consent to an application. The approval of the OIO is not always required and will depend on the type of investment, the amount of money involved, and the sector that the overseas person wishes to invest in. If consent is required, it must be obtained before a transaction is given effect and any agreements entered into in relation to that transaction must be conditional on obtaining OIO approval.
- (c) An "overseas person" is a person who is:
 - (i) not a New Zealand citizen and not ordinarily resident in New Zealand;
 - (ii) a body corporate that is incorporated outside New Zealand; or
 - (iii) a company, partnership, body corporate, or trust that is more than 25% owned or controlled by an overseas person.
- (d) Australian and Singaporean citizens, and Australian and Singaporean permanent residents who are ordinarily resident in New Zealand, do not need consent to purchase land that is categorised as 'residential' (but not otherwise sensitive land).

3.2 What is restricted

- (a) There are two main categories of investment in respect of which the OIA requires that consent be obtained by overseas persons:
 - (i) significant business assets; and
 - (ii) sensitive land.

3.3 Significant business assets

- (a) An overseas investment in "significant business assets" occurs when an overseas person or their associate acquire (whether by one transaction or a series of related transactions):

- (i) rights or interests in securities of a person where:
 - (A) it results in more than 25% ownership or control interest in a New Zealand company, or;
 - (B) it results in an increase of an existing more than 25% ownership or control interest,

and the value of the securities or consideration provided, or the value of the New Zealand company's assets (including its more than 25% subsidiaries) in New Zealand, exceeds NZ\$100 million; or
- (ii) establishes a business in New Zealand where:
 - (A) the business is carried on for more than 90 days in any year; and
 - (B) the total expected expenditure to be incurred , before commencing the business, in establishing the business exceeds NZ\$100 million; or
- (iii) acquires property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand, where the total value of consideration provided exceeds NZ\$100 million.
- (b) For investors of certain jurisdictions (including Australia and others with which New Zealand has free trade/investment agreements), higher alternative monetary thresholds may apply. These are specified in the Regulations.

3.4 Sensitive land

- (a) Consent is required where an overseas person or their associate acquires an estate or interest in "sensitive land", being any land listed in section 3.4(c), and if that estate or interest is:
 - (i) freehold; or
 - (ii) if it is residential land, any interest in land for at least 3 years; or
 - (iii) if it is sensitive but not residential land, any interest in land for at least 10 years.
- (b) Consent will also be required if an overseas person or their associate acquires ownership or control interest in an entity **(A)** which owns or controls (directly or indirectly) such estate or interest in land specified in section 3.4(a), and that acquisition results in:
 - (i) the overseas person or their associate gaining more than 25% ownership or control interest in A; or
 - (ii) the overseas person or their associate increasing their existing more than 25% ownership or control interest; or
 - (iii) A becoming an overseas person.
- (c) "Sensitive land" is any land which:
 - (i) exceeds five hectares and is non-urban land; or
 - (ii) is residential land; or

- (iii) is part of the foreshore or seabed, or is on islands other than the North or South Islands; or
- (iv) exceeds 0.4 hectares; and:
 - (A) is part of certain named islands; or
 - (B) is land held for conservation purposes under the *Conservation Act 1987*; or
 - (C) is land that is or proposed to be used as a reserve, as a public park, for recreation purposes, or as open space; or
 - (D) subject to a heritage order, or a requirement for a heritage order; or
 - (E) is a historic place, historic area, wahi tapu, or wahi tapu area (sacred Māori land) that is registered or where there is an application for registration; or
- (v) exceeds 0.2 hectares and adjoins the foreshore; or
- (vi) exceeds 0.4 hectares and adjoins any of:
 - (A) a lake bed; or
 - (B) land held for conservation purposes or any scientific, scenic, historic or nature reserve (if that land exceeds 0.4 hectares in area); or
 - (C) land that is a regional park, a reserve, a public park, or other sensitive area under section 37 of the OIA; or
 - (D) land that adjoins the sea or a lake, exceeds 0.4 hectares and is either an esplanade reserve, recreation reserve, road or Māori reservation; or
 - (E) land that exceeds 0.4 hectares and is subject to a heritage order or a requirement for a heritage order, is a historic place, historic area, wahi tapu or wahi tapu area that is registered or for which there is an application or a proposal for registration.

3.5 Process, fees and timing

- (a) An application for consent must be prepared in accordance with the OIA and submitted by way of a letter to the OIO signed by all applicants, accompanied by supporting information/documentation and the prescribed fee. The fees charged by the OIO depends on the nature of the investment that is the subject of the application, designed to align with the timing and complexity of the assessment process. For example, significant business assets only applications have a total fee of \$38,800, whilst applications involving combined investment categories and/or Ministerial decisions may cost up towards \$150,000.
- (b) Statutory timeframes apply to the OIO's decision-making process in respect of an overseas investment application. As a rule of thumb, the consent process will require at a minimum 30 working days and up to 100 working days depending on the type investment in respect of which consent is being sought. This period may be longer depending on any pauses or extensions during the assessment period (for example, if the OIO requires additional information, where the project is complex or third-party consultation is required).

3.6 Application pathways and assessment criteria

- (a) Depending on the nature of the proposed overseas investment, different pathways with their assessment criteria apply. The core tests that apply are:
 - (i) investor test;
 - (ii) national interest assessment; and
 - (iii) benefit to New Zealand test.

Investor test

- (b) Generally, all applicants are subject to the investor test regardless of the application pathway. The investor test is designed to assess whether an investor is unsuitable to own or control sensitive New Zealand assets and comprises two categories: character and capability.
- (c) The character factors include:
 - (i) convictions resulting in imprisonment or significant fines;
 - (ii) corporate fines (both in New Zealand and overseas); and
 - (iii) ineligibility to come to New Zealand.
- (d) The capability factors include:
 - (i) prohibitions on being a director, promotor or manager of a company;
 - (ii) penalties for tax avoidance or evasion;
 - (iii) unpaid tax of \$5 million or more.

National interest assessment

- (e) The national interest assessment allows the Minister of Finance to consider whether proposed overseas investments that require consent are contrary to New Zealand's national interest exercising broad discretion whilst considering a range of factors including:
 - (i) national security, public order and international relations;
 - (ii) market structure;
 - (iii) economic and social impact;
 - (iv) alignment with New Zealand's values and interests;
 - (v) the character of the investor; and
 - (vi) overseas government involvement.
- (f) National interest assessment is mandatory for certain overseas investments that involve:
 - (i) strategically important business (**SIB**) assets/land (for example, military or dual-use technology, ports/airports, major financial institutions, important infrastructure providers (electricity, water or telecommunications)); or
 - (ii) foreign governments.

- (g) The Minister also has the discretion to apply the national interest assessment to overseas investments, including where the Minister considers that the overseas investment:
 - (i) may pose risks to national security or public order;
 - (ii) could give significant market power or vertically integrate a supply chain;
 - (iii) could give disproportionate access or control to a foreign government or its associates; or
 - (iv) is potentially inconsistent with Government objectives.

Benefit to New Zealand test

- (h) The benefit to New Zealand test is applied to transactions involving sensitive land that do not fall within another pathway. In broad terms, the benefit test will be met where:
 - (i) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders); and
 - (ii) if the relevant land is (or includes) residential land, the relevant Ministers are satisfied that the conditions imposed on the consent will be, or likely to be, met.
- (i) Whether the investment will be beneficial to New Zealand is determined by assessing the applications against 7 factors covering economic benefits, benefits to the natural environment, public access, protection of historic heritage, advancing a significant government policy, oversight or participation by New Zealanders, and consequential benefits.

3.7 Notification regime

- (a) Even where a proposed overseas investment is not subject to the approval process under the OIA, the investor may be required to notify the OIO under the national security and public order (**NSPO**) notification regime.
- (b) Under the NSPO regime, Ministers can assess and manage risks posed by overseas investments that would not usually be subject to OIO screening. These involve investments in SIBs or their assets.
- (c) Whether the notification is discretionary or mandatory depends on the type of SIB the proposed transaction relates to.

3.8 Conclusion

- (a) Given the potential time and cost associated with a proposed transaction or investment that either requires OIO approval or triggers the application of the NSPO notification regime, we recommend that investors seek appropriate advice at an early stage in order to determine whether the OIA's notification or approval requirements apply to the investment and, if so, ensure that appropriate steps are taken to comply with New Zealand's OIA regime in a way which facilitates the planning and implementation of the proposed transaction.

4. Starting up a business in New Zealand

4.1 Corporate structures

- (a) There are four common structures in which overseas investment can be undertaken in New Zealand:
 - (i) registering a branch of an overseas company;
 - (ii) incorporating a New Zealand company;
 - (iii) establishing a New Zealand limited partnership; or
 - (iv) merging with or taking over an existing New Zealand company.

4.2 Registering a branch of an overseas company

- (a) An overseas company can establish a branch in New Zealand by registering on the overseas register under the *Companies Act 1993* (**Companies Act**). However, the provisions of the Companies Act relating to companies incorporated in New Zealand do not generally apply to overseas companies.
- (b) An overseas company wishing to register a branch in New Zealand must reserve the same name as registered in its country with the Registrar of Companies (**Registrar**) and file a registration application within 10 working days of commencing business in New Zealand. The application must be in the prescribed form, signed by or on behalf of the overseas company, and include:
 - (i) the names and current residential addresses of the directors of the overseas company;
 - (ii) the address of the overseas company's principal place of business in New Zealand;
 - (iii) the name and address of at least one person in New Zealand who is authorised to accept service of documents on behalf of the overseas company;
 - (iv) the notice of name reservation; and
 - (v) evidence that the company is incorporated outside New Zealand and a copy of the instrument constituting or defining its constitution (in English).
- (c) Australian companies benefit from information sharing facilities implemented by the New Zealand Companies Office and the Australian Securities and Investments Commission (**ASIC**). Such companies are only required to provide:
 - (i) the company's Australian company number (ACN);
 - (ii) an active email address;
 - (iii) the notice of name reservation (that name being identical to the company's name as it is registered with ASIC);
 - (iv) the physical address of the overseas company's principal place of business in New Zealand and the name and address of at least one person (resident or incorporated in New Zealand) who is authorised to accept service of documents on the company's behalf in New Zealand; and

- (v) an address for communications with the Registrar (being postal or physical).

4.3 Incorporating a company

- (a) The Companies Act regulates the activities of companies in New Zealand and provides for the incorporation of either limited or unlimited companies. A company that is limited by shares will, unless the constitution of the company specifies otherwise, limit the liability of each shareholder of the company to the amount of share capital that the shareholder has agreed to contribute to the company.
- (b) Application for incorporation:
 - (i) a company must have at least one shareholder and one director. All newly incorporated companies are required to have at least one director who lives in New Zealand or an approved enforcement country. At this point in time the only approved enforcement country is Australia. If the director lives in Australia, the director must also be a director of an equivalent registered company in Australia.
 - (ii) the Act will also require all directors to disclose their date and place of birth to the Registrar. This information will remain confidential to the Registrar.
 - (iii) there is no restriction on the size of the company share capital, and the Companies Act does not distinguish between public and private companies. However, consideration and terms of issue for shares must be fair and reasonable to the company and all existing shareholders.
 - (iv) the applicant must first apply to the Registrar in the prescribed form and pay a fee to reserve a company name. Once granted, a name reservation will remain in force for 20 working days from the date of the reservation. There is no proprietary right in the reserved name, so it may be revoked at any time by the Registrar. However, trademarks can be applied for: see paragraph 10.1.
 - (v) once the name has been approved and reserved with the Registrar, the following incorporation documents must be filed with the prescribed fee:
 - (A) notice of name reservation;
 - (B) consent of the shareholder(s) and director(s);
 - (C) a copy of the constitution if the company is to have one;
 - (D) further details such as the name and residential address of each director and shareholder, the number of shares to be issued and the details of the New Zealand registered office and address for service of documents; and
 - (E) certain other miscellaneous requirements.
 - (vi) such applications and filings are mostly completed online through the Companies Office website.
- (c) New Zealand companies are required to disclose prescribed information about their ultimate holding company (if any). The prescribed information includes the name, country of registration, registration number (if any) and address of the registered office of the ultimate holding company. An ultimate holding company is a company

that controls a New Zealand company, whether by ownership of shares in that company or otherwise.

4.4 Establishing a limited partnership

- (a) A limited partnership may be registered under the *Limited Partnerships Act 2008*. It allows for a degree of the limited liability protection of a company combined with fiscal transparency for tax purposes (“flow through” tax treatment).
- (b) A limited partnership consists of at least one general and one limited partner. General partners manage the business of the partnership and are liable for the debts and liabilities of the partnership to the extent that they cannot be met by the partnership itself. Limited partners are passive investors and must not participate in the management of the partnership. Limited partners are only liable to the extent of their capital contribution to the partnership.
- (c) Limited partnerships are required to have a written limited partnership agreement. Limited partnerships are required to provide certain information to the Registrar of Companies, which will remain confidential. Limited Partnerships must have a general partner who is a natural person who lives in New Zealand or an enforcement country (currently only Australia is an enforcement country). Every general partner that is a natural person and every general partner’s director, partner, or general partner who is a natural person will be required to provide their full name and address, and their date and place of birth. All general partners that are not natural persons will be required to provide their name and address.

4.5 Merging with or taking over an existing New Zealand company

- (a) An overseas company that is considering merging with or acquiring a New Zealand company must be aware of the restrictions on such actions contained in the Takeovers Code (**Code**) (in addition to commercial, tax and overseas investment issues). Please also refer to Chapter 6 on Competition Law and Chapter 8 on Securities Law for more information.
- (b) The Code aims to enable all shareholders to take part in the takeover process on the basis of equal treatment and, after full disclosure, to be able to make informed decisions as to whether to accept or reject an offer. The Takeovers Panel administers and enforces the Code under the *Takeovers Act 1993*. Specific advice should be sought on any proposal that considers merging with or acquiring a New Zealand company.
- (c) The Code regulates the conduct of takeovers of Code Companies (which includes listed companies or companies with more than 50 shareholders).
- (d) The Code prevents any person from holding more than 20% of the voting rights in a Code Company. The exceptions to this 20% threshold include:
 - (i) “full offers” made in compliance with the Code;
 - (ii) “partial offers” made in compliance with the Code;
 - (iii) acquisitions of voting securities in the Code Company or any other Body Corporate approved by ordinary resolution of the Code Company shareholders in accordance with the Code;
 - (iv) allotments of voting securities in a Code Company which is approved by an ordinary resolution of the Code Company’s shareholders in accordance with the Code;

- (v) the “5% creep” exception, which enables a shareholder who already holds between 50% and 90% of the voting rights in a Code Company to acquire an additional 5% in any 12-month period; or
 - (vi) compulsory acquisitions if the shareholder already holds or controls 90% or more of the voting rights in the Code Company.
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5. Competition law

- (a) Competition law in New Zealand is governed by the *Commerce Act 1986* (**Commerce Act**). The Commerce Act aims to promote competition in New Zealand markets for the long-term benefit of consumers.
- (b) The Commerce Act can extend to conduct which occurs outside New Zealand if it affects a market in New Zealand. It is administered and enforced by the New Zealand Commerce Commission.
- (c) Business acquisitions
 - (i) The Commerce Act prohibits mergers and acquisitions (whether by asset or share purchase) which have, or would likely have, the effect of substantially lessening competition in a market in New Zealand.
 - (ii) There is no compulsory notification regime, but parties may voluntarily apply to the Commerce Commission for a clearance (granted where the transaction is not anti-competitive) or an authorisation (granted where the transaction is anti-competitive but will result in a net public benefit). A clearance or authorisation will protect the transaction from challenge by the Commerce Commission or third parties. The Commerce Commission processes most applications for clearance within three months. Complex clearance applications and authorisation applications can take up to twelve months.
 - (iii) The maximum civil pecuniary penalty for breach is \$500,000 for an individual or the greater of \$10m, three times any commercial gain, or 10% of group turnover for a body corporate.
- (d) Restrictive trade practices
 - (i) The Commerce Act prohibits certain collective practices such as entering into or giving effect to agreements which substantially lessen competition in a market. Price-fixing or cartel conduct is per se anti-competitive.
 - (ii) The Commerce Act also prohibits certain unilateral conduct, such as taking advantage of substantial market power or engaging in resale price maintenance.
 - (iii) The maximum penalty for breach is \$500,000 for an individual or the greater of \$10m, three times any commercial gain, or 10% of group turnover for a business. Directors and other individuals can also be liable.
 - (iv) Recently, the law has been amended to provide for an exemption for competitors to collaborate so long as such arrangements were not entered into for the main purpose of reducing competition. The Commerce Commission will assist entities who want to use this exemption to ensure they collaborate lawfully.

- (e) Regulated goods or services

The Commerce Act also establishes a complex regime for the regulation of certain monopoly goods and services (including those supplied by airport, electricity line or gas pipeline businesses).

6. Consumer law

Overseas investors must comply with New Zealand legislation designed for the protection of consumers. The two principal pieces of consumer protection legislation are the *Fair Trading Act 1986 (FTA)* and the *Consumer Guarantees Act 1993 (CGA)*. Further consumer protection legislation includes the *Privacy Act 1993*, *Gambling Act 2003*, *Unsolicited Electronic Messages Act 2007* and the *Credit Contracts and Consumer Finance Act 2003*. Specific advice should be sought on all matters affecting New Zealand consumers before entering into or doing business in New Zealand. The majority of consumer legislation in New Zealand cannot be contracted out of.

6.1 Fair Trading Act 1986

- (a) The FTA applies to anyone “in trade” by prohibiting:
- (i) conduct that is misleading or deceptive or likely to mislead or deceive;
 - (ii) conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of goods;
 - (iii) conduct that is liable to mislead the public as to the nature, characteristics, suitability for purpose, or quantity of services;
 - (iv) conduct that is misleading in relation to the availability, nature, terms or conditions, or any other matter relating to employment that is or may be offered to a person;
 - (v) terms of standard form contracts that are unfair;
 - (vi) false or misleading representations in relation to goods and services; and
 - (vii) unsubstantiated representations.
- (b) Conduct is misleading or deceptive if it causes people to form a mistaken belief or impression. Intention to mislead or deceive is irrelevant, and there is no need to show that a person has in fact been misled or deceived.
- (c) A representation is unsubstantiated if at the time when it is made the party making the representation had no reasonable grounds for the representation, irrespective of whether or not it can be proven to be true at a later date.
- (d) The FTA also protects consumers in their homes and workplaces from uninvited direct sales of goods or services. Those who employ such sales methods are subject to strict requirements to a customer in relation to disclosure and rights in respect of cancellation of an agreement.
- (e) Terms of standard form consumer contracts may be “unfair” to a consumer. Standard form contracts are contracts that are standardised, non-negotiated, and for goods and/or services used primarily for household, personal or domestic use. Insurance contracts are governed under a different act. The Commerce Commission is the only party that may apply to the courts for a declaration that a term of a standard contract

is unfair after which the term must not be relied upon or enforced. A term will be declared "unfair" if it:

- (i) causes significant imbalance between the parties;
 - (ii) is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
 - (iii) causes some detriment to the other party if it was to be applied, enforced or relied upon.
- (f) There are also certain types of terms that will not be declared unfair. These include terms that:
- (i) define the main subject matter of the contract;
 - (ii) set the upfront price payable under the contract, to the extent that the terms are transparent; or
 - (iii) are required or expressly permitted by any enactment.
- (g) The FTA also regulates consumer information standards and product safety and service standards, and prohibits certain practices such as falsely applying trademarks, bait advertising, pyramid selling schemes and not providing prizes as offered.
- (h) Prosecution by the Commerce Commission for a breach of the FTA may result in a penalty of up to NZ\$600,000 for a business and up to NZ\$200,000 for an individual (per offence).
- (i) Civil proceedings brought by a person for a breach of the FTA may result in the court awarding damages, voiding or varying the contract, ordering the refund of money or return of goods, ordering the publishing of a corrective statement, issuing an injunction to prevent the conduct reoccurring, or other orders as it sees fit.

6.2 Consumer Guarantees Act 1993

- (a) The CGA applies to suppliers and manufacturers of goods and services that are ordinarily acquired by consumers for personal, domestic or household use or consumption. It excludes anyone acquiring the goods and services for resupply in trade or consumption in the process of production or manufacture. It is not possible to contract out of the CGA outside of the situation where all the parties to the transaction are in trade, and any attempt to do so can attract liability for penalties of up to NZ\$200,000 for a corporate entity and NZ\$60,000 for an individual. A supplier may contract out of the CGA if the goods or services have been acquired by a purchaser for "business purposes" and there is an agreement between the parties in writing, including all of the relevant goods and/or services being acquired in trade, which is fair and reasonable.
- (b) The CGA provides a regime of statutory guarantees that the goods or services must comply with. These include guarantees as to title, acceptable quality, fitness for purpose, compliance with a description and/or sample, that where the price has not been determined no more than a reasonable price is charged, and that repairs and spare parts are reasonably available. Services must be carried out with reasonable care and skill and completed within a reasonable time. The consumer is not liable to pay more than a reasonable price for the service and the services must be fit for the purpose made known to the supplier by the customer.

- (c) The remedies available to the consumer against the supplier or manufacturer will depend on the circumstances, and may include remedy of the failure, cancellation of the contract, damages as compensation for the reduction in value, or damages for any reasonably foreseeable loss or damage which the consumer suffers as a result of a failure to comply with the CGA.

6.3 Credit Contracts and Consumer Finance Act 2003

- (a) If supplying goods and/or services to consumers for primarily personal, domestic or household purposes on credit, then the *Credit Contract and Consumer Finance Act 2003 (CCCFA)* may apply. The CCCFA helps to protect consumers buying goods or services on credit by making requirements as to the form and terms of the agreement, disclosure of certain information, the provision of a five-day cooling off period within which the consumer can cancel the contract, and how in what circumstances goods may be repossessed. Further information can be found on the Commerce Commission website (www.comcom.govt.nz).
- (b) Prosecution by the Commerce Commission for a breach of the CCCFA may result in a penalty of up to NZ\$600,000 for a business and up to NZ\$200,000 for an individual (per offence). The Commerce Commission may also issue infringement notices for more minor breaches of some disclosure and repossession rules, requiring lenders to pay a fee of NZ\$1,000. If convicted, it may result in a penalty of up to NZ\$30,000 for a business and NZ\$10,000 for an individual.

7. Offers of Financial Products (Securities Law)

7.1 Offering financial products in New Zealand

- (a) The FMCA regulates offers of financial products in New Zealand, including how financial products are promoted and sold, and the ongoing responsibilities of relevant market participants. It also regulates the provision of certain financial services. The Financial Markets Authority (**FMA**) is the government body responsible for overseeing the operation of financial markets. The FMA seeks to:
 - (i) promote and facilitate the development of fair, efficient, and transparent financial markets; and
 - (ii) promote the confident and informed participation of businesses, investors, and consumers in the financial markets.
- (b) The FMCA covers four types of financial products: debt, equity, managed investment products, and derivatives. Where the definitions do not sufficiently provide for a financial product that would otherwise be within the broad definition of “security”, the FMA has the power to designate that security as a type of financial product. This ensures that the regime is flexible enough to deal with novel product types in the market and to prevent avoidance.
- (c) There are two types of offers of financial products under the FMCA: regulated and non-regulated offers. Regulated offers are offers of financial products to one or more investors where no disclosure exemption applies (e.g. offers to the public). Non-regulated offers are made only to investors eligible to participate in the offer in reliance on one of the disclosure exemptions in the FMCA (e.g. offers to wholesale investors).
- (d) Where an offeror makes a regulated offer of financial products in New Zealand, the offeror will typically be required to produce a disclosure document called a product disclosure statement (often referred to as a PDS) and register the offer on an online

public register of offers. A PDS records the essential information retail investors require to make informed decisions regarding the financial products available for investment. The register contains prescribed particulars about the offer and other disclosure material. Issuers of regulated financial products are also subject to more stringent ongoing financial reporting obligations.

- (e) Disclosure exemptions for offers of financial products for issue or sale generally apply where offers are:
 - (i) made to particular classes of persons, including:
 - (A) wholesale investors;
 - (B) close business associates of the offeror;
 - (C) relatives of the offeror;
 - (D) persons that received the offer through a licensed intermediary or DIMS licensee;
 - (E) persons under an employee share purchase scheme;
 - (F) persons under a dividend reinvestment plan; or
 - (G) persons that are not required to provide consideration for the financial product;
 - (ii) of a certain nature, including:
 - (A) small offers;
 - (B) small schemes offers;
 - (C) transfers of controlling interest offers where 5 or fewer investors participate;
 - (D) offers of quoted financial products;
 - (E) offers of certain types of derivatives;
 - (F) offers of certain financial products by registered banks;
 - (G) offers of certain interests in retirement villages; or
 - (H) renewal or variation offers; and
 - (iii) made by issuers of a certain nature, including:
 - (A) the Crown;
 - (B) the Board of Trustees of the National Provident Fund;
 - (C) the Reserve Bank;
 - (D) Housing New Zealand Corporation;
 - (E) the Māori Trustee; or
 - (F) the Public Trust.

7.2 Ongoing Obligations

- (a) The FMCA imposes fair dealing obligations on all persons dealing in financial products or supplying financial services. This prohibits misleading or deceptive conduct, as well as false, misleading or unsubstantiated representations. A person cannot be fined for the same conduct involving financial products or financial services under the FMCA and the FTA.
 - (b) The FMCA also establishes conduct and governance obligations for issuers, supervisors and managers of regulated debt and managed investment products (as applicable). These include prescribing mandatory provisions for trust deed and governing documents, and clearly delineating the roles of issuers, supervisors, managers and financial product holders.
-

8. Banking and finance

8.1 Reserve Bank of New Zealand

- (a) The Reserve Bank of New Zealand (**Reserve Bank**) is New Zealand's central bank. It is regulated by the *Reserve Bank of New Zealand Act 1989 (RBA)*. The Reserve Bank is owned by the New Zealand Government but operates autonomously.
- (b) The functions of the Reserve Bank include:
 - (i) formulating, implementing and managing monetary policy, with the intention of achieving and maintaining price stability;
 - (ii) promoting a sound and efficient financial system;
 - (iii) issuing New Zealand's currency;
 - (iv) advising the Government on all matters relating to monetary policy, banking credit and overseas exchange;
 - (v) licensing and prudential supervision of banks and insurers; and
 - (vi) carrying out other functions, and exercising other powers, such as regulating non-bank deposit takers.

8.2 Registered banks

- (a) All banks operating in New Zealand must be registered. There are 27 banks currently registered in New Zealand. Many of these are owned by well-known Australasian and international banks.
- (b) If a financial institution wishes to operate and use the term "bank" in its title, it must first apply to the Reserve Bank for authorisation. The RBA contains the criteria that the Reserve Bank must consider when determining an application. These include amongst other things:
 - (i) the applicant's standing in the financial market;
 - (ii) the incorporation and ownership structure of the applicant;
 - (iii) the size and nature of the applicant's business or proposed business;
 - (iv) the ability of the applicant to carry out its business in a prudent manner; and
 - (v) the suitability of the applicant's current management.

- (c) Once a bank is registered, its conduct will then be subject to prudential supervision by the Reserve Bank.

8.3 Financial institutions

- (a) New Zealand has a wide range of financial institutions including banks, private savings banks, merchant banks, finance companies, trust and mortgage companies, building societies, stock and station agents, small loan companies and insurance companies.
- (b) A non-bank financial institution that is in the business of borrowing and lending money or providing financial services (or both) and offers debt securities to the public, is also regulated by the Reserve Bank. Various restrictions are imposed as to corporate governance, compliance with credit rating requirements, capital adequacy requirements and related party transactions.

8.4 Financial Advisers and Financial Service Providers

- (a) The *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (FSPA) created a registration-based system that sets out obligations for individuals and organisations in the financial service and advice industry.
- (b) The FSPA was enacted to set up a registration system for financial service providers and to improve consumer access to redress. The FSPA only applies to those financial service providers who are in the business of providing a financial service (although this may not be the only, or even the principal, business of that person). A party who is in the business of providing a financial service must be registered for each financial service it provides and where services are provided to retail clients the party must be a party to an industry-based dispute resolution system. The FSPA applies to those ordinarily resident in New Zealand or who has a place of business in New Zealand, regardless of where they may provide the financial services from.

9. Property

9.1 Buying commercial property in New Zealand

An overseas person may purchase commercial property in New Zealand without obtaining consent from the OIO provided:

- (a) the value of consideration to be paid for any commercial building (alone or together with its New Zealand assets and/or commercial properties) does not exceed NZ\$100 million; and
- (b) the property is not situated on nor adjoins sensitive land (as discussed in section 3.4 of this Guide).

9.2 Sale and purchase of land

- (a) To be enforceable, contracts for the sale and purchase of land must be in writing and signed by the parties or their authorised agents. Contracts are signed at the beginning of the transaction, and there is no exchange of contracts procedure, as in other jurisdictions, needed to create legally binding obligations.
- (b) For this reason, an agreement for the sale and purchase of land may be subject to conditions set by the parties. The party having the benefit of a condition must use its best endeavours to satisfy the condition unless the agreement states otherwise. If the conditions cannot be satisfied within the given timeframe, either party may avoid the

agreement by giving written notice to the other party, and any deposit paid shall generally be returned to the purchaser.

- (c) Conditions may include the buyer raising finance, the buyer being satisfied with local authority information, building inspection reports, or resource management issues, or the seller entering into an agreement for sale and purchase for a substitute property. Once conditions have been fulfilled the parties are legally bound to complete the sale on the settlement date.
- (d) Changes in land ownership are registered electronically against the title. This is a centralised registration system which can be searched by the public for a nominal fee. Titles, once registered, are government guaranteed so there is no need for buyers to take title insurance in New Zealand.
- (e) Unless the vendor and purchaser agree, buildings and other attachments that are permanently attached to the land will pass with the sale of the land.
- (f) Lending restrictions apply to the purchase of residential property in New Zealand in the form of loan to value ratio (**LVR**) restrictions which determine how much a bank can lend against residential property. Generally, purchasers of their first residential property in New Zealand are required to have a LVR of 80% or less in order to receive loans from New Zealand financial institutions and for any subsequent residential property a LVR of 60% or less. In some circumstances exemptions to LVR restrictions will apply.

9.3 Leases

- (a) An overseas person may rent a commercial building without requiring consent from the OIO, unless the term of the lease is for ten years or more (including rights of renewal) and the commercial building is situated on or adjoins sensitive land.
- (b) An overseas person may also rent a residential land without requiring consent from the OIO, so long as the total term of any interest in the land is less than 3 years.
- (c) The lease terms are agreed between the landlord and tenant as the contracting parties, however numerous rights and obligations are also implied by statute, primarily under the *Property Law Act 2007*.

9.4 Building Act 2004

- (a) Building in New Zealand is regulated by the *Building Act 2004 (BA)*, various building regulations and the Building Code. The BA provides for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards to ensure that buildings are safe, durable and contribute to the health and wellbeing of the people who use them.
- (b) A building consent must be obtained from local authorities in relation to any proposed construction, alteration, demolition or removal of a building. Works must be completed in accordance with the building consent in order for a code of compliance certificate to be issued by the local authority.

9.5 Resource Management Act 1991

- (a) The *Resource Management Act 1991 (RMA)* is the principal environment and planning legislation in New Zealand. Under the RMA, local and regional government agencies regulate all uses of land, air, water and other natural resources.

- (b) The purpose of the RMA is to promote the sustainable management of natural and physical resources. To that effect a consent process has been established for approval of any development proposal or activity.
- (c) Any application for a resource consent made to local authorities must be in accordance with the RMA and must follow the procedures set out in publicly notified plans. A consent application may be required to be publicly notified and involve public participation before the relevant local authority decides to grant consent. Any person who makes a submission on an application (if the application is publicly notified) has a right of appeal to the Environment Court. Resource consent applications are assessed on a case-by-case basis, with consent often being granted subject to conditions as determined by the local authority.

9.6 Māori land claims

- (a) The Waitangi Tribunal was established by the Treaty of *Waitangi Act 1975* to hear Māori claims relating to the loss of land and resources as a result of historical breaches by the Crown of the Treaty of Waitangi. Māori land claims may not be lodged relating to privately owned land and affect only land owned by the Crown or Crown Entities. All claims relating to actions of the Crown prior to 21 September 1992 have been filed and are currently being worked through. Only new claims, being an action or omission of the Crown occurring on or after 21 September 1992 may be subsequently filed.
- (b) The Tribunal has the power to make recommendations to the Government on how to address those historical breaches. Redress includes but is not limited to the return of land to local iwi (Māori groups) and financial compensation.
- (c) Some private land titles are noted with a memorial recording that the land, when Crown land, would be subject to a claim and therefore purchased by the Crown for market value at some future time. No land in New Zealand has to date been the subject of a repurchase decision.

9.7 Personal property

The *Personal Property and Securities Act 1999* (**PPSA**) provides for the establishment of a national electronic register called the Personal Property and Securities Register (www.ppsr.govt.nz) (**PPSR**). The PPSR is where individuals and businesses can register a legal claim or security interest to personal property. Personal Property includes chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments. Under the PPSR the priority of a security interest is established by the timing of “perfection” of that security interest. “Perfection” takes place on the registering of a financing statement on the PPSR. The public may conduct a search under the name of a vendor to identify whether that personal property is encumbered by a security interest. A security interest may be registered on the PPSR if a valid agreement between borrower and lender creates a security interest in personal property. Security interests include hire purchase agreements, long term leases, retention of title clauses and loans which have personal property as security.

10. Intellectual property

10.1 Registrable intellectual property

- (a) Trade marks
 - (i) A trade mark is a unique identifier, often referred to as a “brand” or “mark” that is used to distinguish the goods and/or services of a person. Trade

marks include words, logos, colours, shapes, sounds, smells, or any combination of these.

- (ii) A trade mark may be registered under the *Trade Marks Act 2002*, and once registered the proprietor has the exclusive right to use the trade mark in relation to the goods and/or services covered under the registration. A trade mark registration only affords protection in respect of the class or classes of goods or services for which the mark is registered. However protection is afforded against the use of a similar trade mark in relation to the same or similar goods or services to those covered by the registration. A trade mark must be distinctive and may not be descriptive of the goods or services it relates to.
- (iii) The initial registration period for a trade mark is 10 years with subsequent renewal periods of 10 years being available upon payment of renewal fees. Once a trade mark is registered the ® symbol can be used to alert third parties to an owner's rights.
- (iv) New Zealand has adopted the Madrid Protocol for international trade mark registration. The Madrid Protocol provides a single procedure for the registration of a mark in any country/region that is party to the Madrid Protocol. This represents a one-stop approach to obtain broad geographic trademark protection in export markets. Presently, 122 countries have adopted the Madrid Protocol.

(b) Patents

- (i) A patent is a statutory right under the *Patents Act 2013* giving exclusive use of an invention for up to 20 years. A patent can be bought, sold, transferred or licensed like any other property.
- (ii) There is a large scope of inventions that can be patented, including but not limited to:
 - (A) a new product;
 - (B) a new process of manufacturing;
 - (C) an improvement to an existing product or process;
 - (D) a new method or process relating to the testing or control of an existing manufacturing process;
 - (E) new chemical compounds or compositions;
 - (F) biotechnological matter;
 - (G) electrical devices and circuits;
 - (H) a second pharmaceutical use for a known chemical compound or composition;
 - (I) improvements in computer technology.
- (iii) To be patentable in New Zealand, an invention must:
 - (A) be capable of industrial application (be able to be made or used in some kind of industry);

- (B) involve an inventive step, i.e. “non obvious”;
 - (C) be new or novel (i.e. not already used, displayed or otherwise made available in New Zealand);
 - (D) be useful (i.e. has a specific, credible, and substantial utility).
- (iv) Renewal fees are required to be paid throughout the life of a patent and if unpaid within six months of when they are due will cause a patent to lapse.
- (c) Designs
 - (i) A design registrable under the *New Zealand Designs Act 1953* are defined as the new or original features of shape, configuration, pattern or ornament that applied to an article by an industrial process or means. A registered design protects the external appearance of a manufactured article giving the registrant the exclusive use to make, sell, import, or distribute the article in New Zealand.
 - (ii) To be registrable, the design must:
 - (A) be confidential, in that it has not been published in New Zealand before the filing date;
 - (B) consist of new or original features of shape, configuration, pattern or ornament;
 - (C) be applied to an article by an industrial process or means;
 - (D) be appealing to the eye; and
 - (E) not be purely functional or relate to a method or principle of construction.
 - (iii) Designs that are not registrable include:
 - (A) a design which is a method or principle of construction;
 - (B) designs applied to works of sculpture (except mass production, casts or models);
 - (C) designs applied to wall plaques and medals; and
 - (D) designs applied to printed matter primarily of literary or artistic character.
 - (iv) The protection of a design registration is 15 years, with renewal fees being charged at 5 and 10 years from the application date.

10.2 Unregistrable intellectual property

- (a) Copyright
 - (i) The *Copyright Act 1994* (**Copyright Act**) protects original “works” by giving the owner the exclusive rights to exploit the work including the right to copy the work, issue copies to the public, play, perform or show the work in public, communicate the work, adapt the work and authorise others to use the work.

- (ii) Copyright protection comes into existence automatically when an original work is put into material form. No registration is necessary. Copyright protects the following works:
 - (A) literary works, including written works, tables and compilations and computer programs software;
 - (B) dramatic works, including dance, mime, film scenarios or scripts;
 - (C) artistic works, including designs, drawings, moulds, sculptures and architectural works or simple industrial drawings;
 - (D) musical works, sound recordings, films;
 - (E) communication works, including radio and TV broadcasts and internet transmissions; and
 - (F) typographical arrangements of published editions.
 - (iii) Copyright does not protect ideas or information itself but the expression of ideas.
 - (iv) The Copyright Act also gives certain “moral rights” to individual creators, such as to be identified as the author of a work, to object to derogatory treatment of a work, and not to have a work falsely attributed to them. The Copyright Act also gives performers some limited rights to control the recording and live transmission of their performances.
 - (v) The length of copyright protection varies and is:
 - (A) 50 years after the end of the calendar year in which the author died for a literary, dramatic, musical or artistic work;
 - (B) 50 years from the end of the calendar year in which a sound recording or film was made; and
 - (C) 50 years from the end of the calendar year in which a communication work was first communicated to the public.
 - (vi) A publisher’s copyright in works lasts for 25 years from the end of the calendar year in which the work was first published. Industrially applied three-dimensional works are protected for 16 years.
- (b) Unregistered trade marks
- It is possible to obtain a proprietary right in a trade mark that is unregistered through use. Such rights are enforced by action under the *Fair Trading Act 1986* or the tort of passing off. These are discussed further below. A trade mark that is not registered should use the symbol TM. No action may be brought under the *Trade Marks Act 2002* to enforce the rights of an owner of an unregistered trade mark.
- (c) Confidential information
- New Zealand law protects information such as trade secrets, formulae, processes or other confidential business information from being communicated or used by a party if the information was communicated in circumstances that imparted an obligation of confidence.

(d) Business names

There is no register of business names in New Zealand and registering a company name will not prevent another party from using that name. However the Companies Office will not grant approval of a name if it is identical (or nearly identical) to an existing company name. Registration of a company's name does not grant a name entitlement or right, nor the protection of a trade mark.

(e) Domain names

Businesses can reserve and use New Zealand domain names such as “.co.nz”, “.net.nz”, “.kiwi” and “.nz”. There is a dispute resolution service provided by the Domain Name Commission to resolve disputes concerning domain names and protect businesses against “cybersquatting”.

(f) Passing off / Fair Trading Act 1986

- (i) Where the use of unregistered intellectual property (such as a trade mark) is misleading or confusing, or likely to mislead or confuse an action can be brought under the *Fair Trading Act 1986* to prevent a party using the intellectual property.
- (ii) Similarly the civil action of passing off protects the goodwill of a business where it can show that it has goodwill or reputation in the intellectual property, and that damage has been caused or is likely to be caused to the business by another party's use or misuse of that intellectual property.

11. Immigration

- (a) New Zealand has a variety of options for those wishing to move to New Zealand either temporarily or permanently to work, invest or establish a business.
- (b) Immigration policy changes frequently and this guide only looks briefly at some of the options for overseas persons wishing to migrate to New Zealand. We recommend that you obtain specific advice on the current policies and procedures before applying.
- (c) Further and more detailed information on the application process and requirements can be found at the Immigration New Zealand website at www.immigration.govt.nz and all forms can be downloaded from this website.

11.1 Working temporarily in New Zealand

- (a) Anyone who is not a New Zealand or Australian citizen or resident requires a work visa to work in New Zealand. A work visa will allow you to work in New Zealand for a period of up to three years and may be applied for before travelling to New Zealand.
- (b) Temporary work visas may be applied for by people who:
 - (i) have a job offer from a New Zealand employer;
 - (ii) are skilled in occupations that are in demand in New Zealand;
 - (iii) are coming to New Zealand for a specific purpose or event (including senior or specialist business people on short term secondments);
 - (iv) are between 18 and 30 and wish to work whilst on holiday in New Zealand;

- (v) want to gain work experience after studying in New Zealand;
 - (vi) are students who want to work;
 - (vii) want seasonal work in horticulture and viticulture industries;
 - (viii) are nationals from China, Vietnam, Indonesia and the Philippines who are qualified and experienced in specific occupations;
 - (ix) are skilled young workers between 20 to 35 who wish to obtain skilled employment in New Zealand; or
 - (x) want to join a partner here and work.
- (c) The requirements for the various categories of working visas vary, however all applicants must be of good character and hold a valid passport which expires later than three months after the proposed date of departure. Applicants may be required to meet health, character and English language requirements.

11.2 Work to live permanently in New Zealand

- (a) A resident's visa is required to live permanently in New Zealand to work, invest or establish a business. There are four main categories for residency applications:
- (i) highly skilled migrant;
 - (ii) work to residence (leading to residence from work);
 - (iii) business (including investor and entrepreneur visa); and
 - (iv) family.
- (b) For the purpose of this guide we have only made brief comments below on residency obtained through an application made in one of the business categories. Further information on these and the other categories is available on the Immigration New Zealand website.
- (c) New Zealand's business migration categories are designed to attract migrants who will contribute to the economic growth, capital and business expertise of New Zealand. All business migrants and their spouses/dependents must meet health, character and English language requirements. Further to the Skilled Migrant and Work to Residence categories, business migrants have the following alternative options set out below.
- (d) **Entrepreneurs**
- To qualify for the **Entrepreneur** category a business migrant must be able to show that they have successfully established and worked in a business in New Zealand for two years which contributes to New Zealand's economic development.
- (e) **Investors**
- People wishing to invest funds in a business in New Zealand can apply for residence under the **Active Investor Plus Visa** category. Migrants must invest at least NZ\$15 million in New Zealand for a period of four years. In addition, the applicant must spend at least 117 days in New Zealand during the four-year investment period.

- (f) Employees of a relocating business

Key employees of a business relocating its operations to New Zealand can apply for a work permit and later a residents permit as an employee of a relocating business.

12. Labour and employment

12.1 Introduction

- (a) Employment law in New Zealand is governed by a number of statutes and by common law. The principal piece of legislation is the *Employment Relations Act 2000* (ERA) which aims to promote good faith in the dealings of the parties to the employment relationship. The statutes regulate the minimum wage, holidays and leave, superannuation, parental leave, health and safety, human rights, workplace injury, and privacy.
- (b) New Zealand employment law applies to workers from overseas employed in New Zealand. Any person who is not a New Zealand or Australian citizen or resident is required to have a visa to work in New Zealand.

12.2 Good faith obligations

- (a) All parties to the employment relationship have a duty to act in good faith to the other parties in that employment relationship and must not do anything, either directly or indirectly, to mislead or deceive another party. They must be active and constructive, and responsive and communicative in their employment relationship.
- (b) Good faith is a necessary requirement for the bargaining of any collective or individual employment agreement. Also, if an employer is proposing to take an action or make a decision that will have an adverse effect on the employment of a person the employer must (subject to confidentiality requirements) give the employee information about its proposed action or decision and consult with the employee prior to any decision being made.

12.3 Sale and purchase of a business

The effect of a sale or purchase of a business on existing employment relationships will differ depending on the nature of the sale or purchase.

- (a) Asset purchase
 - (i) Where a business is acquired by way of an asset purchase, employment with the vendor will terminate and new offers of employment must be made by the purchaser if it wants the employees to remain. As well as complying with its good faith and consultation requirements the vendor must negotiate with a proposed purchaser about who will be offered employment and on what terms and conditions.
 - (ii) Any accrued and redundancy entitlements shall be payable by the vendor unless the employment contract provides for a technical redundancy. Where the contract provides for a technical redundancy the vendor does not need to pay redundancy compensation to employees who are offered employment by the purchaser on the terms as set out in the technical redundancy provision. There will usually be a requirement for the purchaser to offer employment to such employees on the same terms and conditions as in their contract with the vendor. Employees who are offered employment on such terms but decline the offer are not entitled to redundancy compensation. In the absence

of a technical redundancy provision, the parties can agree that any offer of employment from the purchaser is conditional on the transferring employee waiving any redundancy entitlement in exchange for continuous employment in the business.

- (iii) Special statutory protections exist for specified “vulnerable employees”, primarily in cleaning and food catering industries, as set out in the ERA. Vulnerable employees have a right to transfer with the business on their existing terms and conditions of employment and including their current entitlements. The purchaser must negotiate any redundancy entitlements with a vulnerable employee should they not require their services.

(b) Share purchase

In a share sale and purchase the employing entity remains the same. Therefore, the employment relationships continue in existence on the same terms and conditions. All employment related liabilities are acquired by the purchaser so care should be taken to ensure that the full extent of those liabilities are either disclosed during the due diligence process or covered by the warranties from the vendor. A purchaser who wishes to restructure the business may do so provided it complies with its duty of good faith. There is no statutory right to redundancy compensation in New Zealand, redundancy payments shall only be payable if they have been provided for in the employment agreement.

(c) Employee Share Purchase Schemes

The FMCA broadly views employee share purchase schemes as any scheme or arrangement under which employees, directors or in some cases contractors may acquire shares issued by the business. It creates an exemption for employee share purchase schemes which means that such schemes will not need the full disclosure documentation and companies will not need to register audited financial accounts. This allows employers to offer an employee share scheme on a more flexible and cost effective basis than before.

12.4 Human rights obligations

- (a) The *Human Rights Act 1993* imposes a number of obligations on employers, including the obligation to not discriminate against employees on any of the following grounds:
 - (i) sex;
 - (ii) marital status;
 - (iii) religion or ethnic beliefs;
 - (iv) colour;
 - (v) race;
 - (vi) ethnic or national origins;
 - (vii) disabilities;
 - (viii) age;
 - (ix) political opinion;
 - (x) employment status;

- (xi) family status;
 - (xii) sexual orientation.
- (b) For example, it is unlawful to require an employee to retire by reason of that person's age, and care must be taken when setting up voluntary retirement schemes.

12.5 Employment agreements

- (a) All employment agreements must be in writing, however they may be individual or collective. In order to be part of a collective agreement employees can join a trade union that then negotiates a collective agreement with their employer.
- (b) Most agreements continue until the agreement is terminated by one of the parties. However a fixed term employment agreement is possible provided that the employer and the employee agreed at the outset of the relationship when the employment would end and there are specific and genuine reasons for having a fixed term.

12.6 Zero hour contracts

"Zero hour contracts" are prohibited in the New Zealand labour market. Employers are required at law to record an employee's guaranteed hours of work in the employment agreement. Employers must comply with the agreed hours and cannot cancel a shift without giving reasonable notice or paying reasonable compensation to the employee. In addition, employers cannot require employees to be available to work more than the guaranteed hours unless the parties have agreed to an availability provision being included in the employment agreement. Employers must have genuine reasons based on reasonable grounds for the availability provision and must pay the employee reasonable compensation for the number of hours the employee is required to be available.

12.7 Accident compensation

- (a) The *Accident Compensation Act 2001* provides a statutory, no fault scheme, under which persons who suffer a personal injury will have the costs of their injury covered by the Accident Compensation Corporation (**ACC**). A claimant is barred from bringing any legal action in respect of the injury.
- (b) The scope of personal injuries covered is broad, and includes most physical injuries. This scheme is funded from a number of sources including levies on employers, employees and road use taxes. The employer's levies are determined by the amount of earnings paid, estimated to be paid, or deemed to have been paid by that employer to its employees.
- (c) Compensation may be for loss of earnings, health care treatment, cost of rehabilitation, independence allowance for disability, funeral expenses and death benefits for dependents.
- (d) In addition, ACC provides cover for everyone in New Zealand, including visitors. If someone is injured due to an accident whilst visiting New Zealand, ACC will help to cover the costs of treatment and support for as long as that person is in the country. Earnings related compensation is not available where the visitor's income is derived outside New Zealand.

12.8 KiwiSaver

- (a) At present there is no compulsory scheme for retirement savings in New Zealand other than a government funded national superannuation fund that provides a pension to every person aged 65 and above who has resided in New Zealand for 10 years or more.

- (b) KiwiSaver is a voluntary superannuation scheme governed by the *KiwiSaver Act 2006*. All employers must offer this to their employees and all new employees (other than temporary employees) must be automatically enrolled in the scheme. There is a six-week period in which any employee may opt out of the scheme. Under the scheme employees must contribute at least 3% of their gross earnings. Employers are also required to contribute 3%.

12.9 Termination

- (a) An employee can end an employment relationship by giving notice in accordance with the specified period in their employment agreement. However, an employer can only terminate an employee's indefinite employment agreement for "cause" and only after following the prescribed legal process. Reasons for termination include redundancy, misconduct, poor performance or incapacity.
- (b) An employer must act in a way that a fair and reasonable employer could have acted in the circumstances and carefully follow certain processes for a dismissal to be justifiable. If an employee believes that the dismissal was unjustifiable or that they have been subject to an unjustified disadvantage or that the prescribed legal process has not been followed they may bring a personal grievance against the employer within 90 days of the date of the alleged action giving rise to the grievance, coming to the notice of the employee (whichever is the later).
- (c) Employers of businesses with less than 20 employees may use a '90-day trial period' with new employees. To implement this, the employer and employee must agree on a written 90-day trial period at the beginning of the employment relationship. Such agreements must be signed before an employee starts work. The employer can end the employment relationship during the trial period without following the normal process or facing a personal grievance claim. However, the employer is still subject to the statutory obligation of good faith.

12.10 Independent contractors

- (a) The ERA only applies where there is an employment relationship. A person may provide services to a company as an independent contractor. An independent contractor is responsible for the payment of his or her own income tax, ACC levies, and (if applicable) Goods and Services Tax. They do not have holiday or leave entitlements and may not bring a personal grievance against the employer for dismissal (termination provisions will be stipulated by the contract between them).
- (b) However, this applies to genuine contractor agreements, and if in substance there is an employment arrangement, it is irrelevant how the parties describe their relationship. The Courts use a mixture of tests to determine the real nature of the relationship. These tests are:
 - (i) the control test (whether the employer retains control of the work);
 - (ii) The integration test (is the individual integrated into the organisation of the employer);
 - (iii) the economic reality test (is the individual truly independent of the organisation and performing the services as a person on his or her own account).
- (c) As there is a lack of certainty as to whether a relationship will be determined by the Courts to be one of employment or independent contractor the parties are required to carefully consider the nature of the relationship. An employer may apply to the

Employment Court under section 6(5) of the ERA for a declaration that an individual is an employee or an independent contractor.

12.11 Working conditions

- (a) The *Health and Safety at Work Act 2015 (HSWA)* came into force in April 2016 and is based on the Australian model for health and safety. The HSWA provides that a person conducting a business or undertaking (**PCBU**) has the primary duty of care to workers. The definition of PCBU is intentionally broad to include the wide array of modern working arrangements. A PCBU must ensure, as far as is reasonably practicable, that the workplace is without risk to health and safety.
- (b) The HSWA also imposes duties on officers of the PCBU. "Officers" include directors, partners, people with positions comparable to directors, and other persons with substantial decision making responsibilities. Officers must be proactive in exercising due diligence to ensure that the PCBU complies with its duties and obligations. The due diligence duty requires that officers take reasonable steps to:
 - (i) acquire and maintain knowledge of work health and safety matters;
 - (ii) understand the hazards associated with the company's operation;
 - (iii) ensure the PCBU has sufficient resources to eliminate or minimise health and safety risks; and
 - (iv) ensure the PCBU has appropriate processes to manage health and safety risks.
- (c) While at work, a worker has a number of duties under the HSWA. The statutory definition of "worker" extends to employees, contractors, subcontractors, volunteers and other individuals carrying out work for the PCBU. A worker is required to:
 - (i) take reasonable care of their own health and safety;
 - (ii) take reasonable care that his/her acts or omissions do not adversely affect the health and safety of other people;
 - (iii) cooperate with workplace health and safety policies and procedures; and
 - (iv) comply with instructions given by the PCBU.
- (d) Any other persons accessing a workplace also have similar duties applied to them.
- (e) The HSWA has a three-tier penalty regime. Fines range from NZ\$100,000 to NZ\$600,000 for officers and NZ\$500,000 to NZ\$3,000,000 for body corporates depending on the seriousness of the offence. In addition, officers may face up to five years imprisonment. Officers may be convicted for a breach of the HSWA irrespective of whether the PCBU is convicted of an offence.

13. Taxation

13.1 Introduction

- (a) The principal taxation legislation in New Zealand is the *Income Tax Act 2007* and the *Goods and Services Tax Act 1985*. The tax year in New Zealand runs from 1 April to

31 March. The New Zealand tax system includes the following direct and indirect taxes:

- (i) income tax;
 - (ii) resident and non-resident withholding tax;
 - (iii) goods and services tax;
 - (iv) import tariffs and miscellaneous excise duties; and
 - (v) miscellaneous other taxation such as ACC levies, and local authority rates on property.
- (b) Stamp duty, gift duty and death duties are not payable in New Zealand. There is no general capital gains tax, however profit and gains from certain transactions (such as from land trading, personal property, financial arrangements and some of the value of certain foreign investments) that are capital in nature are subject to tax.
- (c) Specialist regimes regulate the taxation of different entities such as trusts, unit trusts, partnerships, limited partnerships, joint ventures and portfolio investment entities.
- (d) Hamilton Locke recommends that expert taxation advice should be taken before any investment is made in New Zealand.

13.2 Income tax

- (a) Income tax is imposed on the worldwide income of individuals and companies resident in New Zealand. For non-residents deriving income from a source in New Zealand, only the New Zealand income is subject to income tax.
- (b) Depending on who derives the relevant income of a trust, taxation is payable either by the trustees or beneficiaries of a trust. In a partnership the individual partners are taxed on their share of partner income and the partnership itself is not taxed in its own right.
- (c) Income tax is payable on the net amount of a person's annual gross income from all sources, less the annual total deductions and any losses carried forward. Gross income includes all gains on financial instruments and short term or planned profits on land and share transactions. Deductions include bad debts and any expenses incurred in earning the income.
- (d) Where foreign taxes have been imposed, a credit is available in most circumstances being equal to the lesser of that foreign tax paid or the New Zealand income tax payable on that portion of total income. These rules may be modified by the double tax agreements that New Zealand has entered into with specific countries.
- (e) Corporate income tax
- (i) A company resident in New Zealand is taxable on its New Zealand and worldwide income at a rate of 28%. A non-resident company is taxable in respect of income that it derives from a New Zealand source at the same rate. A company is regarded as resident in New Zealand if:
 - (A) it is incorporated in New Zealand;
 - (B) it has its head office in New Zealand; or

- (C) it has its centre of management in New Zealand or control in New Zealand.
- (ii) New Zealand has a full imputation system that enables resident companies to attach imputation credits to dividends paid to shareholders in respect of income tax which has been paid by the company on its profits. New Zealand resident shareholders are then able to use these credits to offset against their tax and liability in respect of those dividends. Imputation credits are not generally available to non-resident shareholders, however they may be applied to reduce or exclude the payment of non-resident withholding tax on the dividend effectively nullifying the impact of non-resident withholding tax.
 - (iii) Dividends received by a New Zealand company from a foreign investment are usually exempt from New Zealand tax.
 - (iv) It may be possible for a company to carry forward its tax losses from one year to another to set off against future taxable income. A 49% continuity of ownership test must be satisfied from the beginning of the year in which the loss was incurred to the end of the year in which the loss is offset against taxable income in order to carry forward tax losses.
- (f) Personal income tax
- (i) Individuals are resident in New Zealand for tax purposes if they have a permanent place of abode in New Zealand or are present in New Zealand for more than 183 days within a 12 month period or they are absent from New Zealand in the service of the New Zealand Government. New Zealand residents are taxed on their worldwide income, and non residents are liable to pay income tax on income derived from New Zealand. Double tax agreements will govern in which country the person will be resident for tax purposes if an individual is resident in more than one country at a time.
 - (ii) New migrants who become New Zealand tax residents are effectively exempt for four years from tax on their foreign sourced income. However their New Zealand sourced income is still taxable during this period.
 - (iii) The rates of income tax applying to individuals from 1 April 2023 to 31 March 2024 are:

Income NZ\$	Rates of tax
0 to 14,000	10.5%
14,001 to 48,000	17.5%
48,001 to 70,000	30%
70,001 to 180,000	33%
180,000 or over	39%

- (iv) Assessable income includes salary and wages, bonuses, other employment benefits or remuneration and investment income. Tax is deductible through the Pay As You Earn (**PAYE**) System and non-cash benefits are subject to fringe benefit tax.

13.3 Foreign Account Tax Compliance Act (FATCA)

- (a) The Foreign Account Tax Compliance Act (**FATCA**) is United States (**U.S.**) legislation that aims to reduce tax evasion by U.S. citizens, U.S. tax residents, and U.S. entities. Under FATCA, U.S. citizens or U.S. tax residents, with specified foreign financial assets that exceed certain thresholds, must report those assets to the United States Internal Revenue Service (**IRS**), whether they live in the U.S. or not.
- (b) New Zealand has signed an Intergovernmental Agreement (**IGA**) with the U.S. in relation to FATCA. This serves to simplify FATCA due diligence and reporting requirements in New Zealand. Reporting institutions are required to comply with the due diligence and reporting obligation and will not enter an agreement with the IRS but must instead report the information they collect directly to Inland Revenue (although registration with the IRS is still necessary).

13.4 Goods and services tax (GST)

- (a) New Zealand has a consumption based tax called goods and services tax (**GST**) that is charged at 15% on the supply of most goods and services in New Zealand. Exceptions include financial services and domestic rents. The burden of GST is passed until it reaches the final consumer.
- (b) A person carrying on a business activity where the actual or expected taxable supplies are more than NZ\$60,000 in any 12 month period must register with the Inland Revenue and account for GST. A person can voluntarily register for GST even if under this threshold provided that they conduct or intend to conduct a taxable activity.
- (c) Businesses can claim GST input tax credits on goods and services acquired for the principal purpose of making taxable supplies while charging GST on their sales. Where the GST charged on sales exceeds the input credits the difference is payable to the IRD and conversely a refund will be payable by the IRD where the credit inputs exceed the GST charged on sales.
- (d) GST is charged and collected by New Zealand Customs at 15% on all goods imported into New Zealand. However, customs will not collect import duty and GST where the total amount of the item is NZ\$1,000 or less. Such GST may be recoverable as an input tax credit where the goods are imported for the purpose of sale within New Zealand and the importer is registered for GST with the subsequent sale of the goods being subjected to GST. Provided certain criteria are satisfied GST is charged at a rate of 0% on exported goods and a provision of services to non-residents.
- (e) If applicable criteria are met, GST at a rate of 0% will be charged on certain land sales and the supply of business to business exempt supplies (for example financial services). Services imported into New Zealand may be subject to a reverse charge mechanism under which GST is levied on the importer.
- (f) All GST entities are required to file regular returns of the GST collected by them.

13.5 Property tax

Ordinarily there is no tax payable on property transactions. However, the “intention test” requires tax to be paid on all property purchased with the intention or purpose of resale.

(a) “Bright-line” test

- (i) The “bright-line” test was introduced to supplement the intention test. The bright-line test requires tax to be paid on any gain from residential land:
 - (A) purchased on or after 1 October 2015 but before 29 March 2018 and sold within two years; and
 - (B) purchased on or after 29 March 2018 and sold within five years.
 - (C) purchased after 27 March 2021 and sold within ten years.
- (ii) Where a property is sold outside the specified period, the bright-line test will not apply. However, the seller’s gain on the sale may still be taxable under the intention test.
- (iii) The bright-line test does not apply to the following:
 - (A) the sale of a person’s main home (so long as the main home is owned personally and not via a company or a trust structure);
 - (B) the sale of inherited property; or
 - (C) the transfer of property under a relationship property agreement (prior postnuptial agreements).

(b) Residential land withholding tax

- (i) Residential land withholding tax (**RLWT**) is a tax deducted from residential property sales. RLWT may apply where:
 - (A) the seller is an offshore RLWT person; and
 - (B) the residential land is sold within five years of acquisition if the entire property qualifies as a new building or within 10 years for all other properties (for properties acquired after 27 March 2021).
- (ii) An “offshore RLWT” person is any of the following:
 - (A) an individual:
 - (1) that is a New Zealand citizen who is currently outside of New Zealand and has been so continuously for the last three years;
 - (2) that holds a New Zealand residence class visa who is currently outside of New Zealand and has been so continuously for the last twelve months; or
 - (3) that is not a New Zealand citizen and does not have a residence class visa.
 - (B) a non-individual that is incorporated or registered outside New Zealand, or constituted under foreign law; or

- (C) a company, trust, or limited partnership that is 25% or more owned or controlled by an offshore RLWT person.
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14. Anti-Money Laundering and Countering Financing of Terrorism

14.1 Overview of the Anti-Money Laundering and Countering Financing of Terrorism Act

- (a) New Zealand, like many OECD countries, has in place legislation to prevent money laundering and the financing of terrorism. The primary legislation is the Anti-Money Laundering and *Countering Financing of Terrorism Act 2009 (AMLCFT Act)*. The objectives of the AMLCFT are:
 - (i) to detect and deter money laundering and the financing of terrorism;
 - (ii) to maintain and enhance New Zealand's international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the Financial Action Task Force (an international organisation); and
 - (iii) to contribute to public confidence in the financial system.
- (b) The AMLCFT Act seeks to achieve these objectives by prohibiting all those people and businesses within its jurisdiction from doing business with anyone that may seek to money launder or finance terrorism, and by requiring that any actual or attempted suspicious transactions be reported to the relevant authorities.
- (c) The AMLCFT Act applies to "reporting entities" which includes lawyers, conveyancing practitioners, accountants, real estate agents, additional gambling operators, businesses that trade in high-value goods, financial institutions, casinos, certain financial advisers, and trust and company service providers.
- (d) Overseas entities engaged in certain financial activities in the ordinary course of business in New Zealand are also required to comply with AMLCFT Act.
- (e) Reporting entities are required to undertake the following:
 - (i) risk assessments;
 - (ii) appoint a compliance officer;
 - (iii) institute a compliance programme;
 - (iv) vet and train staff, domestically and internationally;
 - (v) reviews and audits;
 - (vi) customer due diligence;
 - (vii) record keeping;
 - (viii) annual reports; and
 - (ix) reporting suspicious transactions.
- (f) Reporting entities are required at law to report any suspicious transaction or proposed transaction to the Commissioner of Police as soon as practicable, but no later than three working days after forming your suspicion. A transaction or proposed transaction is suspicious if it is or may be relevant to the:
 - (i) investigation or prosecution of any person for a money laundering offence;

- (ii) enforcement of the *Misuse of Drugs Act 1975*;
 - (iii) enforcement of the *Terrorism Suppression Act 2002*;
 - (iv) enforcement of the *Proceeds of Crime Act 1991*;
 - (v) enforcement of the *Criminal Proceeds (Recovery) Act 2009*; or
 - (vi) investigation or prosecution of an offence within the meaning of s243(1) of the *Crimes Act 1961*.
- (g) All branches and subsidiaries (including overseas) must comply with AMLCFT requirements. Designated business groups can be set up to help reduce compliance costs and repetition of work within a group of entities.
- (h) Obligations can still be fulfilled by some other “equally effective means”. However, in order to be able to rely on such means as a defence to an act or omission in violation of the AMLCFT Act you must advise your AMLCFT supervisor of your intention to do so by notice in writing.
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15. Further information – contact Hamilton Locke

For further information and assistance, please contact Hamilton Locke on 64 9 300 3196 or see <https://hamiltonlocke.com.au/our-team/> for details of Hamilton Locke’s team.

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