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World Ready

Guide to Doing Business

New Zealand

Prepared by Lex Mundi member firm,
Simpson Grierson

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Simpson Grierson

Doing Business in New Zealand

December 2017

www.simpsongrierson.com

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Introduction

This guide introduces you to New Zealand's business and trading environment, with particular focus on legal and regulatory matters. The information in this guide is in summary form, and is intended as an introductory guide only. The information is accurate as at 1 December 2017, and will be updated regularly.

This is a general guide only and is not to be relied upon. Detailed advice should be obtained to cover a specific fact situation.

If you would like help with your business activities in New Zealand, please contact us.

SIMPSON GRIERSON

Simpson Grierson is one of New Zealand's leading commercial law firms, and also one of the largest. We have over 330 staff, including 50 partners and more than 180 other legal staff, in our Auckland, Wellington, and Christchurch offices.

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Our website is at www.simpsongrierson.com

We welcome any queries you may have about your New Zealand business venture.

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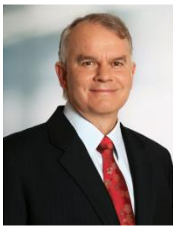

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New Zealand in a Nutshell

New Zealand is made up of two main islands (the North and South Islands), Stewart Island (at the bottom of the South Island), and some smaller outlying islands. The combined area of these islands is 268,000 square kilometres (similar to the size of Japan, Great Britain, or Colorado).

New Zealand is a culturally diverse nation, with a population of approximately 4.8 million. English is the everyday language. Maori is the other official language, but is not spoken widely. We have no official religion.

We have a culture of innovation and adaptability, and New Zealanders are famous for their "can-do" attitude. Although geographically isolated, travel is deeply embedded in the New Zealand psyche. Many New Zealanders work overseas at some stage in their lives, and many return home inspired by what they have seen.

The New Zealand dollar is the unit of currency. The dollar is freely floated against all major currencies.

The capital city and seat of government is Wellington (at the bottom of the North Island). The largest city is Auckland (at the top of the North Island).

New Zealand is proud of its reputation as one of the least corrupt nations for conducting business.

New Zealand has a largely temperate climate. The warmest summer months are typically January to March. New Zealand's traditional summer holiday period is over Christmas and the New Year. Many businesses close for two weeks over that period.

Public holidays are:

New Year:	1 and 2 January
	Waitangi Day: 6 February
Easter:	Friday and Monday of Easter weekend (dates vary)
Anzac Day:	25 April
Queen's Birthday:	First Monday in June
Labour Day:	Last Monday in October
Christmas Day:	25 December
Boxing Day:	26 December
Anniversary Day:	Each province observes an anniversary day (dates vary)

Flying direct, it takes about 23 hours to fly from Auckland to London, 12 hours to Los Angeles, San Francisco, Beijing or Hong Kong, 10 hours to Singapore or Tokyo, and three hours to Sydney or Melbourne.

The scenery in New Zealand is superb, varied, and unobscured by pollution. Much of the country is sparsely populated, and we generally enjoy an exceptional quality of life.

For more general information about New Zealand, Tourism New Zealand, and New Zealand Trade and Enterprise have created a helpful website at www.newzealand.com. See also Investment New Zealand at www.investmentnz.govt.nz.

Business Landscape

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2.1 GOVERNMENT

New Zealand is a parliamentary democracy and constitutional monarchy in the British "Westminster" tradition. The New Zealand government is led by the Prime Minister, although Her Majesty Queen Elizabeth II is New Zealand's official head of state. The Governor-General is the Queen's personal representative in New Zealand and fulfils constitutional, ceremonial, and community leadership roles.

2.2 LEGAL SYSTEM

The legal system is based on the English common law system. Many New Zealand statutes are based on English and/or Australian statutes.

The court system is hierarchical, with the courts of first instance being the District Court and the High Court. There are rights of appeal from the District Court to the High Court, from the High Court to the Court of Appeal, and from the Court of Appeal to the Supreme Court. The Supreme Court is New Zealand's final appeal court. There are also a number of specialist courts and tribunals, including the Environment Court, the Employment Court, and the Employment Relations Authority.

Arbitration is an increasingly common means of resolving disputes. Arbitration is governed by the Arbitration Act 1996 (based on the UNCITRAL Model Law) unless the parties agree otherwise. If parties have agreed to submit a dispute to arbitration, the court must uphold that agreement and stay any court proceedings that are within the scope of an arbitration agreement. The High Court will enforce an arbitral award as though it was a judgment of the Court.

2.3 PRINCIPAL REGULATORS

(a) The **Overseas Investment Office** administers foreign investment policy, in accordance with relevant overseas investment legislation (see section 3 of this guide);

(b) The **Financial Markets Authority** and the **Reserve Bank of New Zealand** are the main regulators of financial markets, services, investments, insurance and other financial products. The Financial Markets Authority is also the co-regulator (with NZX Limited) of the New Zealand Stock Exchange (see section 6 of this guide);

(c) The **Commerce Commission** enforces anti-trust and consumer protection legislation, and the legislation specific to the telecommunications, dairy, and electricity industries (see section 8 of this guide); and

(d) The **Accident Compensation Corporation** administers New Zealand's no-fault accident compensation regime (described below).

2.4 MONETARY POLICY

New Zealand's monetary policy is operated by the **Reserve Bank of New Zealand** (the central bank). The Reserve Bank is required to formulate and implement monetary policy with the aim of achieving and maintaining price stability. Under current policy the Reserve Bank must aim to keep inflation within a 1-3% range on average over the medium term. As at 1 December 2017, the Official Cash Rate is 1.75% and has not moved over the preceding 12-month period. **Treasury** acts as the New Zealand government's principal adviser on financial and economic issues.

Business Landscape – continued

2.5 FOREIGN EXCHANGE CONTROLS

There are no restrictions on the flow of capital or earnings of a New Zealand business to overseas investors. Profits, dividends, interest, royalties, or management fees can be moved freely either into or out of New Zealand, although payments out of New Zealand may be subject to non-resident withholding tax (see section 7 of this guide).

No special licences or permits are required to buy or sell foreign currency, unless the person is in the business of changing foreign currency (see section 2.8 of this guide).

2.6 REGISTERED BANKS

Registered banks may conduct banking operations in New Zealand, and there is a relatively open policy on the entry of new registered banks to the market.

The banks with the largest presence in New Zealand are:

(a) ANZ Bank New Zealand Limited;

(b) ASB Bank Limited;

(c) Bank of New Zealand;

(d) Westpac New Zealand Limited; and

(e) Kiwibank Limited (owned by and operated through New Zealand's national postal operator).

Of these, all but Kiwibank are owned by larger Australian banks.

2.7 "NO FAULT" ACCIDENT COMPENSATION SYSTEM

New Zealand has a statutory no-fault accident compensation scheme providing cover for most individuals who suffer a personal injury by accident in New Zealand. The scheme (which originated in the Accident Compensation Act 1972) is set out in the Accident Compensation Act 2001 (**ACC Act**).

The ACC Act covers personal injuries suffered by any person in New Zealand, including visitors, whether the injury occurs at work or otherwise.

The ACC Act prohibits legal claims for compensation arising out of or relating to most types of personal injury suffered in New Zealand as a result of an accident.
A wide range of cover is available under the ACC Act for most types of personal physical injury suffered as a result of an accident. Means of compensation include payments for loss of earnings, medical treatment, rehabilitation costs, disability allowances, and death benefits for dependants. Accident compensation benefits are available to visitors who are injured in New Zealand, although earnings related compensation is not available where the visitor's income is derived outside New Zealand.

The accident compensation scheme is funded largely through levies on employers, employees, and taxes on vehicle registration and petrol. The scheme is administered by the Accident Compensation Corporation.

2.8 REGULATION OF FINANCIAL SERVICES INDUSTRY

People in New Zealand who are in the business of providing a "financial service" must be registered on the Financial Service Providers Register. Financial services include acting as an insurer, issuing (or participating in an issue of) securities to the public, providing credit under a credit contract, changing foreign currency, providing brokering services, giving financial guarantees, being a licensed non-bank deposit taker or a registered bank and providing "financial adviser services".

All providers of "financial adviser services" and "brokers" are regulated by a financial advisers' regime. A provider of a "financial adviser service" is someone who in their ordinary course of business gives "financial advice" to a client, provides a "discretionary investment management service" to a client, or provides an "investment planning service" to a client.

Business Landscape – continued

The financial advisers' regime:

(a) imposes professional conduct and competency requirements on both financial advisers and brokers;

(b) imposes disclosure obligations on certain financial advisers and brokers;

(c) imposes trust accounting obligations on brokers;

(d) requires all providers of "financial adviser services" and brokers to be registered;

(e) requires people who provide retail clients with "financial adviser services" in relation to complex financial products to be authorised or, in some cases, operate through a "qualifying financial entity";

(f) requires people who provide financial adviser services or broking services to retail clients to be members of an approved dispute resolution scheme; and

(g) provides a regime to regulate financial advisers and brokers.

2.9 MONEY LAUNDERING

Money laundering is illegal in New Zealand. The money laundering rules are set out in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**AML/CFT Act**). Breach of these rules can give rise to both civil and criminal liability.

The anti-money laundering regime imposes a number of counter-money laundering and anti-terrorism measures (including customer due diligence, reporting, record-keeping duties, and surveillance and enforcement powers). Currently the AML/CFT Act applies to financial institutions (broadly defined) and casinos.

The application of the AML/CFT Act is to be extended to certain other businesses and professions, such as accountants (from 1 October 2018), lawyers and conveyancing practitioners (from 1 July 2018), real estate agents (from January 2019), businesses that deal in high value goods (eg auctioneers and bullion dealers) (from August 2019) and trust or company service providers that are not already reporting entities (from 1 July 2018).

2.10 CONTRACT LAW

There is relatively little regulation of contracting in New Zealand. Parties are generally free to contract on their own terms.

Contract law in New Zealand is largely made up of common law principles, subject to certain statutory parameters. For example:

(a) certain statutory consumer protection measures will apply irrespective of the terms of the contract (see section 8 of this guide);

(b) credit contracts with consumers are regulated by the Credit Contracts and Consumer Finance Act 2003;

(c) certain contracts must be in writing (including those involving interests in land, employment, and mortgages);

(d) the newly enacted Contract and Commercial Law Act 2017 (which incorporates previously existing contract statutory law into one piece of legislation, refreshing the language in the process):

   (i) allows parties to cancel a contract for misrepresentation (in certain circumstances, and provided that the terms of the contract do not provide for their own cancellation regime), and gives the courts power to grant a wide variety of relief;

Business Landscape – continued

(ii) allows the courts to grant relief in limited circumstances if a party can establish that it entered a contract due to a genuine mistake; and

(iii) provides that a contract is generally unenforceable against a minor (being a person under the age of 18 years), but enables the Court to enquire into the fairness and reasonableness of the contract so entered into and make orders.

Contract law applies to overseas-owned entities in the same way as it applies to New Zealand entities, although overseas-owned entities may need to obtain consents necessary under the overseas investment rules to enter into certain contracts (described briefly in section 3 of this guide). There are no separate requirements for contracts involving New Zealand entities that are foreign owned.

The governing law of a contract between an overseas-owned entity and a New Zealand entity will be determined by the terms of the contract, interpreted in light of the usual common law "conflict of laws" principles.

Overseas Investment Regulation

3.1 REGULATION OF FOREIGN INVESTMENT IN NEW ZEALAND

Foreign investment in New Zealand is generally encouraged, although there are certain rules in place designed to ensure that sensitive New Zealand assets (land in particular) are protected.

The overseas investment rules are set out in the Overseas Investment Act 2005 (**Overseas Investment Act**) and the Overseas Investment Regulations 2005 (**Overseas Investment Regulations**) and are administered by the Overseas Investment Office (**OIO**). The OIO screens all defined categories of "overseas investments" and then monitors "sensitive" assets to ensure they are being managed appropriately going forward.

3.2 WHEN IS OIO CONSENT REQUIRED?

The OIO (and, in some cases, the Ministers of Finance and Land Information (**Ministers**)) must consent to an acquisition by an "overseas person" of "sensitive land", "significant business assets" or fishing quota. Consent must be obtained before the transaction is carried out.

(a) What is an "overseas person"?

An "overseas person" includes:

- an individual who is not a New Zealand citizen or resident;
- an overseas registered company; and
- a New Zealand registered company with 25% or more of its shares held by an overseas person or persons.

(b) What is "sensitive land"?

An acquisition of "sensitive land" includes the acquisition of a freehold interest, or a leasehold interest of more than three years, in:

- non-urban land areas greater than 5 hectares;
- land on certain specified islands; or
- other parcels of land that are classified as "sensitive" due to their inclusion of, or proximity to, waterways, parks, conservation areas, or areas of historic significance.

An acquisition of "sensitive land" will include an investment in a business which owns or leases sensitive land. Acquiring rights or securities of a person that controls "sensitive land" in circumstances which cause that person to become an "overseas person" will also trigger the need for OIO consent, even if that acquisition is immaterial. This needs to be taken into account when investing in any company.

The new Labour government has indicated that it plans to amend the Overseas Investment Act to classify existing houses as “sensitive” to prevent anyone who is not either a New Zealand citizen or resident from purchasing existing houses.

(c) What are "significant business assets"?

An acquisition of "significant business assets" includes:

- a transaction in which the investor buys 25% or more (or increasing a 25% or more stake) of a business where the consideration paid for the New Zealand part of the investment exceeds NZ$100 million (or, in the case of an investment by an "Australian non-government investor", NZ$516 million);

- a transaction in which the investor buys 25% or more (or increasing a 25% or more stake) of a business where the value of the New Zealand assets of the business exceed NZ$100 million (or, in the case of an investment by an "Australian non-government investor", NZ$516 million);
- a transaction in which the investor acquires any property in New Zealand (including goodwill and other intangible assets) for more than NZ$100 million (or, in the case of an investment by an "Australian non-government investor", NZ$516 million); or
- establishing a business in New Zealand, before commencing the business in establishing that business, where the expenditure incurred exceeds NZ$100 million (or, in the case of an investment by an "Australian non-government investor", NZ$516 million).

The NZ$100 million threshold in each of the above types of investment would increase to NZ$200 million for non-government investors from countries in the formal Trans-Pacific Partnership if and when the Trans-Pacific Partnership Agreement is given effect to in New Zealand (although Australian investors will retain their existing higher threshold).

(d) Is it possible to obtain an exemption?

The Overseas Investment Regulations automatically exempt certain specific transactions from the requirement for OIO consent. It is also possible to apply for an exemption in certain limited circumstances.

The new Labour government has introduced additional exemptions which came into force on 1 February 2017 with the intention of removing some obstacles to foreign investment.

(e) New exemptions

The most notable of the new exemptions created by the Overseas Investment Amendment Regulations (No 2) 2016 (and which now form part of the Overseas Investment Regulations) apply where:

- an overseas person acquires a re-grant of a previously consented lease which is expiring or has recently expired. This exemption only applies where the new lease contains substantially the same terms as the original lease and that it is being re-granted to the same person who will conduct the same or substantially the same activity on that land; and
- an overseas person acquires an interest in a particular class of sensitive land from another overseas person, in circumstances in which that land has been the subject of a previous OIO consent. This exemption only applies to specific less significant classes of sensitive land and will not apply to any non-urban land of over five hectares or to any land which includes conservation land or a reserve.

Where either of these new exemptions applies, the overseas person is required to notify the OIO:

(a) that it is relying on the relevant exemption; and

(b) that the ongoing conditions of the original OIO consent have been complied with.

Overseas Investment Regulation – continued

3.3 WHAT IS INVOLVED IN OBTAINING OIO CONSENT?

(a) Application

The process starts with the investor submitting an application to the OIO (on a prescribed form) along with an application fee. Template application forms are available from the OIO but, because every investment is different, the OIO recommends investors seek legal advice for an application at an early stage.

(b) Timing

The OIO no longer provides up front guidance on the number of working days it expects it will take to process an application. Once an application is submitted to the OIO, the OIO checks that all of the information it has requested has been provided. If the application is accepted, the OIO will advise the applicant how long it expects it will take to assess the application.

In recent times, it has typically taken three to four months to process an application for "significant business assets" and up to nine months for an application for "sensitive land".

(c) Matters in a consent application

The application for consent focuses on whether the overseas person:

- has relevant business acumen and experience;
- is financially committed to the investment; and
- is of good character.

If the investment involves an interest in sensitive land, the applicant must also demonstrate that the purchase will, or is likely to, bring a net benefit to New Zealand. Where the sensitive land is non-urban and over 5 hectares, the net benefit must be "substantial and identifiable". The OIO looks at a number of factors when assessing such an acquisition, including particular "economic benefits" such as whether the investment will:

- create new job opportunities;
- create new technology, or introduce new managerial or technical skills;
- develop new export markets or increased market access;
- add to competition, and create greater efficiency or productivity;
- enhance services available in New Zealand;
- introduce into New Zealand additional investment for development purposes; or
- increase processing of primary products.

Other factors which the OIO regularly considers include:

- whether mechanisms are in place to protect or enhance indigenous vegetation and wildlife, historic heritage, and walking access;
- whether refusal of consent would result in an adverse effect on New Zealand's image/trade relations or a breach of international obligations;
- whether the overseas person plans other significant investment or has previously undertaken investment in New Zealand;
- whether the investment gives effect to and/or advances government policy or enhances ongoing viability of other investments undertaken;
- whether New Zealand's economic interests will be adequately promoted by the overseas investment; and

Overseas Investment Regulation – continued

- whether there are opportunities for New Zealand oversight or involvement (eg New Zealand directors or a New Zealand head office).

The application for consent should address all of these factors and explain those factors that are relevant and irrelevant to the proposed investment. The applicant will also be asked to provide an investment plan and supporting statements detailing how it will manage any sensitive land going forward.

To assess a number of the above factors relevant to determining the benefit of an investment, the OIO applies a "with or without" test. This test requires a comparison of what is likely to happen with the proposed investment and what is likely to happen without the proposed investment ("the counterfactual"). There is a rebuttable presumption that, without the proposed investment, the sensitive land will be acquired by a competent and adequately funded New Zealand purchaser. The onus is on the overseas person to show the OIO that this is unlikely to be the case. This test is the result of a High Court ruling in early 2012 regarding a legal challenge to the decision of the OIO to grant consent to an overseas investor.

(d) Special rules for farm land, waterways and foreshore

If an overseas person wishes to acquire farm land, or shares in a company owning farm land, that land must be marketed for sale in New Zealand for 20 working days (to persons who are not overseas persons) before the OIO is able to consent to the purchase by an overseas person.
The Crown has a right of first refusal to purchase certain land which constitutes the beds of certain waterways or foreshore and seabed land.

(e) Special rules for large areas of farm land

The following factors are given high importance by the OIO if an overseas person wishes to invest in a large area of farm land (ie 10 times the average farm size of the relevant type of farm):

- whether the investment will result in the economic benefits listed above (i.e. creation of new job opportunities etc);
- whether New Zealand's economic interests will be adequately promoted by the overseas investment; and
- whether there are opportunities for New Zealand oversight or involvement (eg New Zealand directors or a New Zealand head office).

(f) Ongoing monitoring of compliance

The OIO monitors the activities of the overseas person post-acquisition to ensure that the investor is complying with the law, any representations made in its application for consent, and any conditions of consent imposed by the OIO. The overseas person is required to report on compliance.

Immigration

There are a number of options available for non-New Zealanders wishing to work and live in New Zealand on a permanent or temporary basis. Current immigration policy focuses on migrants who can add economic value and enhance the creative industries in New Zealand.

For further information on current immigration policies, guides, and forms, please see Immigration New Zealand's website (www.immigration.govt.nz).

New Zealand has a visa framework. A visa is an authority for an individual to travel to, or stay in, New Zealand.

4.1 WORK VISAS

A person who is not a New Zealand citizen, or does not hold a New Zealand residence class visa, special temporary visa, or military visa, must have a work visa to work in New Zealand.

Work visas allow for work in New Zealand for a limited period, generally up to three years, from the date of arrival in New Zealand (but up to five years for certain essential skills workers). For someone seeking to settle permanently in New Zealand, or set up a business, residency is likely to be more appropriate (discussed briefly below).

Australian citizens, or holders of a current Australian permanent residence visa, generally do not need a work visa to work in New Zealand.

There are a number of categories under which work visas are available, including Essential Skills Work, Specific Purpose or Event, and Supplementary Seasonal Employer Work. There is a Long Term Skill Shortage List and an Immediate Skill Shortage List that identifies particular skills needed. There is also a Canterbury Skill Shortage List which identifies particular skills needed for the Christchurch rebuild following the earthquakes. People with the particular skills will be able to obtain a temporary work visa without Immigration New Zealand conducting the usual labour market check. These categories of work visa are described in more detail on Immigration New Zealand's website (www.immigration.govt.nz).

To qualify for a work visa, under any category, the applicant must satisfy basic health and character requirements and have a passport that is valid for at least three months past the date the applicant is due to leave New Zealand. The applicant must provide evidence of a genuine plan to work in New Zealand.

As well as satisfying these requirements, the applicant must also satisfy the specific requirements of the category under which they are applying. For example, if applying under the Essential Skills Work category, the applicant must have a job offer from a New Zealand employer who is either approved to recruit foreign workers or able to prove that there are no suitable New Zealand candidates for the job.

4.2 ENTREPRENEUR WORK VISA

The Entrepreneur Work visa (previously the Long Term Business visa) enables experienced business people, who want to be self-employed, to buy or establish their own business in New Zealand.

To be approved for an Entrepreneur Work visa applicants must:

(a) make a minimum capital investment of NZ$100,000 (excluding working capital), unless this requirement is waived;

(b) 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;

(c) have a business plan specific to the proposed business;

Immigration – continued

(d) not have been involved in bankruptcy or business failure within the five years preceding the date on which the application is made;

(e) not have been involved in business fraud or financial impropriety; and

(f) meet Immigration New Zealand's health and character requirements for residence and English language requirements.

If an application for an Entrepreneur Work visa is approved, the applicant will initially be granted a 12 month work visa to enable the applicant to buy or establish a business in New Zealand (start up stage). The applicant can be granted the balance of the Entrepreneur Work visa, an additional 24 months, if the applicant can show that the applicant has taken steps to establish its business (balance stage).

The Entrepreneur Work visa is often the first step on the pathway to applying for residency in New Zealand under the Entrepreneur Residence category (described below).

4.3 NEW ZEALAND RESIDENCY

The two most commonly used categories of business-related residency applications are the Skilled Migrant and Business Migrant categories.

(a) Skilled Migrant

The Skilled Migrant category is designed to ensure that people migrating to New Zealand have the skills the country needs. This category works on a points system – applicants will be invited to apply for residency only if they have enough points. Points are earned on the basis of qualifications, work experience, age, or job offers in New Zealand. Applicants must also satisfy health and character requirements, be English-language proficient, and be aged 55 years or under. To gather enough points, it is generally critical to have a skilled job offer.

(b) Business Migrant

There are several different ways in which a Business Migrant may apply for residency in New Zealand. The most common ways are to apply under the Entrepreneur Resident category or the Investor category.

- *Entrepreneurs*

  There are two sub-categories under the Entrepreneur Resident category: two years and six months.

  Under the Entrepreneur Resident (two years) category, applicants must establish or purchase a business that benefits New Zealand significantly and be "self-employed" in that business for at least two years. Applicants do not need to hold a Long Term Business visa or an Entrepreneur Work visa to apply for residency under this category.

  An Entrepreneur Resident (six months) category has been introduced that offers a faster path to residence for applicants who (among other things) create at least three full time jobs and invest NZ$500,000 in their business. This capital requirement can be waived in some circumstances. This category requires that the business has been operating for at least six months and that the applicant has been self-employed in that business for six months and is still self-employed in that business. Applicants need to hold a Long Term Business visa or Entrepreneur Work visa to apply under this category.

Immigration – continued

Applicants for the Entrepreneur Resident visa must satisfy health and character requirements and have the required English language skills.

- *Investors*

  There are two sub-categories under the Investor category: Investor 1 and Investor 2. Under the Investor 1 category, the applicant must invest NZ$10 million in New Zealand for three years. There are health and character requirements, but no requirements as to age, business experience, or English language proficiency.

  Under the Investor 2 category, the applicant must invest NZ$3 million in New Zealand for four years. The applicant must meet health and character requirements, be under 66 years of age, have at least three years of recognised business experience, and have the required English language skills.

  For each of the Investor 1 and Investor 2 categories, the applicant has 12 months to transfer their nominated investment funds and invest them in an acceptable investment in New Zealand, though this timeframe can be extended.

The above is a general summary only of the current immigration categories. The immigration categories can and do change. We recommend that anyone who seeks to live or work in New Zealand should start by reading the relevant guides and forms available on the Immigration New Zealand's website (www.immigration.govt.nz), and should seek expert advice before embarking on the application process.

Structuring the Business

5.1 COMMON BUSINESS STRUCTURES

Commonly, offshore entities establish a New Zealand business by using one of the following structures:

(a) establishing a local subsidiary company (or purchasing an existing local company); or

(b) registering a branch of an overseas company.

Recently, limited partnerships have become more widely used by offshore entities to set up business in New Zealand (particularly in the venture capital and private equity industry).

5.2 ESTABLISHING A LOCAL SUBSIDIARY COMPANY

Incorporating a company in New Zealand is generally a quick and simple process. It can be done online (at the Companies Office website www.companies.govt.nz). Once the company's name has been reserved and appropriate documents are lodged, incorporation can be confirmed within a matter of hours (although this process may be delayed where the proposed director(s) and/or shareholder(s) are based overseas – see 5.2(c) below).

The basic incorporation requirements are as follows:

(a) The registered office (and address for service) must be in New Zealand. A solicitor or accountant can provide the company's registered office. The company does not need to have a physical place of business in New Zealand.

(b) The company must have at least one shareholder (holding at least one share) and at least one director who lives in New Zealand, or who lives in Australia and is a director of a company registered in Australia. Signed consents (in the prescribed form) of both the director(s) and shareholder(s) are required for the incorporation process. The date, place of birth and residential address of each proposed director, and details of the proposed company's ultimate holding company (if any), must be provided to the Companies Office. The date and place of birth for each director is required for the application for incorporation, but will not be made publicly available. Similar residency requirements also apply to general partners of limited partnerships. If the director lives in Australia and is also a director of an Australian company, that Australian company's ACN number may also need to be provided.

The residency requirements outlined above do not apply to a branch of an overseas company registered in New Zealand as a result of "carrying on business" in New Zealand (described below).

(c) If the proposed director(s) and/or shareholder(s) are based overseas, the Companies Office may require additional evidence to verify the identity of the director(s) and shareholder(s) and to confirm their consent to own and manage the company. Evidence typically includes the original copies of the director and shareholder consents referred to above, certified copies of passports (or another specified form of identification), and proof of residency (such as an original or certified utilities account). If a proposed shareholder is an overseas entity, the Companies Office may require a copy of the entity's certificate of incorporation and a certified copy of the resolution made by the entity when agreeing to become a shareholder of the company. An indicative list of additional consent and identity verification documentation that

Structuring the Business – continued

may be required can be viewed on the Companies Office website (http://edit.companies.govt.nz/companies/about-us/enforcement/additional-consent-and-identity-verification). In addition, if the New Zealand company has an ultimate holding company, additional information will need to be provided to the Registrar of Companies regarding the ultimate company's name, country of registration, registration number or code (if applicable), the registered office of the ultimate holding company, and any other prescribed information (if relevant).

(d) There is no need for a formal constitution (New Zealand's equivalent to articles of association or corporate bylaws). The rights and obligations set out in the Companies Act 1993 (**Companies Act**) apply by default. A company is free to adopt a constitution modifying certain rules which would otherwise apply under the Companies Act. A well-drafted constitution is usually desirable, to permit a number of corporate activities (eg share buy-backs, issue of redeemable shares, indemnification and/or insurance of directors) not otherwise authorised under the Companies Act.

5.3 FILING REQUIREMENTS FOR A LOCAL SUBSIDIARY COMPANY

Any company incorporated in New Zealand (ie a local subsidiary company) is required to undertake the following filing and ongoing annual compliance requirements:

(a) filing an annual return to the Companies Office confirming certain company particulars (including the registered office, directors, ultimate holding company (if any), and shareholders of the company);

(b) holding an annual meeting of shareholders (or passing a written resolution of shareholders in lieu of holding an annual meeting); and

(c) preparing annual financial statements that comply with generally accepted accounting practice as recognised in New Zealand if the company is (a) an "FMC Reporting Entity"; (b) a "large" or public company; (c) a company with 10 or more shareholders that has not "opted out" of compliance; or (d) a company with fewer than 10 shareholders that has "opted in" to compliance. The annual financial statements must also be filed with the New Zealand Companies Office if the entity in question is an "FMC Reporting Entity" or a "large" company with 25% or more overseas ownership.

An "FMC Reporting Entity" includes issuers of regulated products (including financial products), all registered banks, buildings societies, and credit unions, and certain entities licensed by the Financial Markets Authority. However, companies issuing voting shares in themselves that have fewer than 50 shareholders or 50 share parcels are excluded from this definition.

A New Zealand company that has 25% or more overseas ownership must prepare, have audited and file annual financial statements with the New Zealand Companies Office if it is "large". Such company will be "large" if one of the following applies:

(a) as at the balance date of each of the two preceding accounting periods, the total assets of the company and its subsidiaries (if any) exceed **NZ$20 million**; or

(b) in each of the two preceding accounting periods, the total revenue of the company and its subsidiaries (if any) exceeds **NZ$10 million**.

Any auditor who audits the financial statements of an FMC Reporting Entity is required to hold a licence issued by (or, in the

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case of audit firms, be registered with) the Financial Markets Authority. Auditors of other companies required to prepare financial statements must be "qualified" auditors (as defined in the Financial Reporting Act 2013).

It is not necessary to prepare separate "parent company" financial statements, as well as "group" financial statements. If a company has one or more subsidiaries, then it is sufficient to only prepare financial statements in respect of the company's corporate group.

The tax rules which apply to New Zealand companies are explained in section 7 of this guide.

5.4 ESTABLISHING A NEW ZEALAND BRANCH OF AN OVERSEAS ENTITY

An overseas company "carrying on business" in New Zealand must register as an "overseas company" with the New Zealand Companies Office.

The term "carrying on business" is not exhaustively defined in the Companies Act. In every case the question is to be decided on its facts, in light of all the surrounding circumstances. Relevant factors to consider in determining whether an overseas company is "carrying on business in New Zealand" include the following:

(a) having a physical place of business in New Zealand;

(b) having employees in New Zealand;

(c) maintaining bank accounts in New Zealand;

(d) having a degree of regular involvement in transactions in New Zealand; or

(e) having some form of "permanence" in New Zealand.

In isolation the existence of one of these factors may not necessarily be sufficient for finding that a business is carried on in New Zealand. However, the more of these (or other) factors that exist, the more likely it is that a business is being carried on in New Zealand. Prior to registering a New Zealand branch for an overseas company, the Companies Office may require evidence (referred to above at 5.2(c)) to verify the identity of the director(s) and shareholder(s) of the overseas company.

An overseas company carrying on business in New Zealand must file an annual return to the Companies Office confirming certain company particulars.

An overseas company carrying on business in New Zealand must prepare, have audited and file annual financial statements with the New Zealand Companies Office if it qualifies as an "FMC Reporting Entity" (discussed above), or is a "large" overseas company. An overseas company will be "large" if one of the following applies:

(a) As at the balance date of each of the two preceding accounting periods, the total assets of the company and its subsidiaries (if any) exceed **NZ$20 million**.

(b) In each of the two preceding accounting periods, the total revenue of the company and its subsidiaries (if any) exceeds **NZ$10 million**.

The financial statements of an overseas company must be audited by a "qualified auditor" and comply with generally accepted accounting practice as recognised in New Zealand. An overseas company may file financial statements prepared in accordance with the financial reporting requirements of the overseas company's country of incorporation if the Registrar of Companies is satisfied that:

(a) the financial statements comply with the requirements of the law in force in the country where the overseas company is incorporated; and

Structuring the Business – continued

(b) those requirements are substantially the same as those in New Zealand.

The same exception can apply to audit and assurance standards (ie where the Registrar is satisfied that the auditing and assurance standards of the overseas company's country of incorporation are substantially the same as, or sufficiently equivalent to, to those in force in New Zealand).

As with New Zealand companies, overseas companies do not need to prepare separate "parent" financial statements if "group" financial statements have been prepared in respect of the corporate group. However, regardless of whether parent or group financial statements are prepared, the financial statements must include specific statements prepared in respect of the overseas company's (or group's) New Zealand business, as if that business were conducted by a company or group of companies formed and registered in New Zealand.

Overseas companies can also seek specific exemptions from New Zealand's financial reporting requirements, which may be issued by Registrar of Companies from time to time.

The tax rules applicable to overseas companies which operate a branch in New Zealand are explained in section 7 of this guide.

5.5 PURCHASING A BUSINESS IN NEW ZEALAND

An overseas entity seeking to acquire a local company, or the assets of a local company, will need to confirm:

(a) whether consent from the OIO will be necessary (explained in section 3 of this guide); and/or

(b) whether the acquisition will have the result of substantially lessening competition in the relevant market, and so require the approval of the Commerce Commission (explained in section 8 of this guide).

No stamp duty is payable on the transfer of shares, assets (including goodwill), or land in New Zealand.

If a transaction involves the acquisition of assets (and not shares), goods and services tax may be payable (explained in section 7 of this guide).

5.6 AGENCY ARRANGEMENTS

An entity that conducts only a small amount of business in New Zealand may wish to appoint a local agent rather than establishing a branch or subsidiary.

Agency appointments can be informal, capable of termination on short notice, or can be recorded in a more comprehensive written agreement. New Zealand agency law will typically govern the relationship unless the parties agree to the contrary.

A local agent may benefit from employment rights depending upon the nature of the relationship and the terms of the appointment of the agent. Care is required to ensure that any agency arrangement does not, over time, result in the relevant entity being deemed to be carrying on business in New Zealand (in which case the requirement to register in New Zealand would be triggered).

5.7 LIMITED PARTNERSHIP

New Zealand's limited partnership regime is based on the limited partnership regimes operating in the United States (the "Delaware Model") and the United Kingdom. It is governed by the Limited Partnerships Act 2008 (**Limited Partnerships Act**).

Key features of a limited partnership (**LP**) include:

(a) it enjoys separate legal personality;

(b) it must have at least one general partner and one limited partner (who cannot be the same person at the same time);

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(c) it must have at least one general partner who lives in New Zealand (and, if the general partner is a New Zealand company, then the company must have at least one director who lives in New Zealand, or lives in Australia and is a director of a company registered in Australia);

(d) the general partner is responsible for the day to day management of the LP, and is liable for all of the LP's debts and liabilities, to the extent the LP cannot pay those debts and liabilities;

(e) subject to paragraph (f) below, the limited liability partner (generally a "silent" investor) is liable only to the extent of its capital contribution to the LP;

(f) limited partners (who wish to preserve their limited liability status) must not be involved in the management of the LP, although there are certain specified activities in the Limited Partnerships Act, in which the limited partners may participate but still retain their limited liability protection;

(g) it can have an indefinite lifespan (if desired); and

(h) it is subject to "flow-through" tax treatment, where the profits and losses of the LP flow through to the partners in proportion to their capital contribution to the LP.

A limited partnership is effective upon registration with the New Zealand Companies Office. It must have, and will be governed by, a partnership agreement (which does not need to be filed publicly) and by the Limited Partnerships Act.

A limited partnership must file an annual return to the Companies Office confirming certain limited partnership particulars.

A limited partnership that qualifies as "large" (or one which opts in to compliance) will need to prepare annual financial statements. Those statements may need (subject to the limited partnership agreement and whether the limited partnership has opted in to compliance) to be audited and/or distributed to all partners, together with the auditor's report (if any).

6

Capital Markets and Takeovers

6.1 OVERVIEW OF PUBLIC MARKETS

New Zealand has a small, but well-developed, capital market, on which securities are actively traded. NZX Limited (**NZX**) operates New Zealand's only registered securities exchange. NZX operates three main markets:

(a) New Zealand Stock Market (**NZSX**), the premier equities market;

(b) the new NXT Market, for smaller and growing companies, which recently replaced the New Zealand Alternative Market (**NZAX**)(with NZAX no longer accepting listing applications); and

(c) New Zealand Debt Market (**NZDX**), for corporate and government bonds and fixed-income securities.

On 27 June 2017, NZX announced that it was reviewing its current equity market structure, following market feedback. The announcement indicated that a likely outcome of that review will be to consolidate all of NZX's key equity markets (the Main Board, NXT and NZAX) in to a single market. NZX is currently undergoing a consultation process in relation to this proposal.

There are three ways by which a company can list on one of the NZX markets:

(a) A "primary listing" is designed for companies which are listed on one of the NZX markets only.

(b) A "dual primary listing" enables companies to have a full listing on an NZX market as well as an overseas exchange.

(c) An "overseas listing" allows companies with a full listing on an overseas exchange (which is their home exchange) to list on an NZX market – but does not require the company to comply with the majority of the NZX Listing Rules (and for this reason is different to a dual primary listing).

6.2 REGULATORS OF MARKET ACTIVITY

The key regulators of New Zealand's capital markets are the Financial Markets Authority (**FMA**), NZX, and the Takeovers Panel.

FMA was established on 1 May 2011. It took over the functions of the Securities Commission, the Government Actuary, and the Commissioner for Financial Advisers, and certain functions of the Companies Office and the (then) Ministry for Economic Development (now, the Ministry of Business, Innovation, and Employment). FMA is responsible, among other things, for administering the law in relation to offers of securities to the public in New Zealand and market conduct (including insider trading and market manipulation) which is governed by the Financial Markets Conduct Act 2013 (**FMC Act**) and associated regulations.

NZX operates and is co-regulator (with FMA) of New Zealand's registered securities exchange, comprising both equity and debt markets (NZSX, NXT, and NZDX respectively). Listed companies are required to comply with the applicable listing rules.

Accredited market participants must comply with the NZX Participant Rules.

The Takeovers Panel administers the conduct of takeover activity in relation to "code companies" in accordance with the Takeovers Code (issued under the Takeovers Act 1993) (**Takeovers Code**).

Capital Markets and Takeovers – continued

6.3 ISSUING SECURITIES IN NEW ZEALAND

As a general rule, under the FMC Act, securities may only be offered in New Zealand if the issuer of the securities has prepared and lodged a product disclosure statement that complies with the requirements of the FMC Act and associated regulations.

If securities are offered and allotted in breach of the FMC Act, the issuer may be required to pay compensation or face pecuniary penalties. There is also potential criminal liability for breaches of the FMC Act.

A security will be considered as being offered in New Zealand if the offer is received by a person in New Zealand, unless an issuer can demonstrate that it took all reasonable steps to ensure that persons in New Zealand may not accept an offer.

6.4 EXCLUSIONS FROM THE OFFER DOCUMENT REQUIREMENTS

Offers made to certain persons will not trigger the requirements for a product disclosure statement. The principal exclusions are offers made to any of the following persons:

(a) "close business associates" of the issuer or its directors;

(b) a "wholesale investor" – being a person who:

- is an "investment business";
- meets the "investment activity criteria" – a person who, over a certain period of time, has owned a portfolio of securities of a value of at least NZ$1 million, carried out one or more transactions to acquire securities where the amount payable under the transactions is at least NZ$1 million (in aggregate), or been employed or engaged in an investment business and participated materially in the investment decisions;
- is "large" – a person (including the entities controlled by that person) with net assets or consolidated turnover exceeding NZ$5 million for the two most recently completed financial years; or
- is required to pay a minimum subscription price of at least NZ$750,000 for securities, including, if relevant, amounts previously paid for securities (of the same class) of the issuer.

In addition to the wholesale investor exclusion, there are a number of other exemptions from the disclosure requirements of the FMC Act including in relation to offers under employee incentive schemes, offer to raise small amounts of capital (being, NZ$2 million from 20 investors in any 12 month period) and offers of controlling interests where there are five or fewer investors. FMA is also able to grant individual exemptions from the requirements of the FMC Act.

6.5 TAKEOVERS REGIME

New Zealand's takeovers regime is governed by the Takeovers Code. This regime focuses on protecting minority shareholders in a takeover situation.

The regime applies to any "code company", being a company that is listed on a New Zealand stock exchange (or has been listed in the previous 12 months), or has 50 or more shareholders and 50 or more share parcels.

The Takeovers Code's "Fundamental Rule" prohibits any person and its associates from either acquiring more than 20% of the voting securities in the code company, or increasing the percentage of securities it holds or controls where the person holds or controls more than 20% of the voting securities.

Exceptions to the Fundamental Rule are:

(a) a full or partial offer made in accordance with the provisions of the Takeovers Code;

Capital Markets and Takeovers – continued

(b) an acquisition or allotment approved by an ordinary resolution of shareholders of the code company in accordance with the provisions of the Takeovers Code;

(c) an increase, by up to 5% a year, by a person holding between 50% and 90% of shares on issue in a code company;

(d) a requirement by a person holding 90% or more of the shares on issue in a code company to the remaining shareholders to sell their shares through the compulsory acquisition provisions in the Takeovers Code; and

(e) acquisitions permitted under an exemption granted by the Takeovers Panel.

6.6 PRIVATE EQUITY AND VENTURE CAPITAL

New Zealand's private equity and venture capital industry has grown substantially in recent years. A variety of private equity and venture capital funds (both overseas and New Zealand based) are actively involved in the New Zealand market.

Since the introduction of the limited partnership regime (discussed briefly in section 5 of this guide), a number of funds have been established as limited partnerships (rather than limited liability companies or unincorporated joint ventures). Several "angel" investor networks, focused on investing in early state companies with high growth potential, operate throughout New Zealand.

The New Zealand government actively supports the private equity and venture capital industry by co-investing with private investors through the New Zealand Venture Investment Fund.

More information about the New Zealand private equity and venture capital market is available from the New Zealand Private Equity & Venture Capital Association Inc's website (www.nzvca.co.nz).

Tax

The principal means of taxation in New Zealand are income tax (including withholding tax) and goods and services tax. There is no general capital gains tax and there are no gift, stamp, or estate duties.

7.1 INCOME TAX GENERALLY

(a) Scope of income tax

New Zealand income tax is imposed on the world-wide income of New Zealand residents. Income of non-residents is also subject to income tax to the extent that income has a New Zealand source (although the liability may be reduced by operation of an applicable double tax agreement (**DTA**) (discussed below)). "Income" includes most receipts on revenue account as well as some gains that would be classified as capital gains in other jurisdictions.

(b) Income tax rates

The current graduated tax rates for individuals for income (including personal services income) are as follows:

- 10.5% for income up to NZ$14,000 per annum;
- 17.5% for income between NZ$14,001 and NZ$48,000 per annum;
- 30% for income between NZ$48,001 and NZ$70,000 per annum; and
- 33% for income in excess of NZ$70,000 per annum.

All forms of employment income are taxable on a gross basis. No deductions are allowed for expenditure incurred in deriving employment income. Employers withhold tax from salary and wage payments under the Pay As You Earn (PAYE) system. In addition, as of 1 April 2017 employers also have the ability to use the PAYE rules to satisfy an employee's tax liability in relation to benefits received under employee share schemes.

Self-employed individuals pay tax at the same rates, but on a net basis - they are allowed deductions for expenditure incurred in deriving their income.

Companies (including New Zealand subsidiaries and branches of foreign companies) and other business taxpayers are taxed on their net income after allowable deductions. The current company tax rate is 28%.

Trustees are taxed on their net income at 33%. However, net trust income treated as beneficiary income is taxed at the beneficiary's marginal tax rate. New Zealand's trust tax rules are primarily based on the residence of the settlor:

- non-New Zealand sourced income of New Zealand resident trustees of certain trusts with no New Zealand resident settlor is exempt (provided certain registration and ongoing disclosure requirements are met); and
- in some situations, New Zealand resident settlors of trusts can be liable for tax on income derived by non-resident trustees.

(c) Income tax residence

Individuals are resident in New Zealand for income tax purposes if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode overseas. Further, an individual is resident if he/she spends more than 183 days in aggregate in any 12 month period in New Zealand, regardless of whether or not he/she has a permanent place of abode in New Zealand. Resident tie-breaker provisions also apply for the purpose of DTAs.

Tax – continued

A company incorporated in New Zealand is automatically resident in New Zealand for income tax purposes. A company incorporated outside New Zealand is tax resident in New Zealand if its head office, centre of management, or the place from which the directors exercise control of the company (whether or not exclusively) is in New Zealand.

If a company is resident in New Zealand, and also resident under the domestic laws of the country with which New Zealand has a DTA (discussed further below), the "tie-breaker" provision in that agreement will determine where the company is considered resident for the purposes of applying the DTA.

7.2 COMPANY INCOME TAX

(a) Imputation system

The dividend imputation system allows companies to pass on the benefit of income tax paid at company level as credits attached to dividends distributed to shareholders. ("Dividend" is widely defined and includes most benefits provided by a company to a shareholder or any associate of a shareholder.)

Imputation credits can be used by New Zealand resident shareholders to offset their income tax liabilities (including the liability for the dividend paid). Credits attached to dividends paid to one company by another can be used to offset the recipient company's tax liability and credited to that company's imputation credit account for subsequent distribution to the recipient company's shareholders.

Non-resident withholding tax (**NRWT**) on dividends paid to a non-resident shareholder by a resident company is zero-rated to the extent that the dividend is fully imputed, and the non-resident shareholder has:

- a 10% or more direct voting interest in the resident company; or
- less than a 10% direct voting interest in the resident company and the DTA-limited New Zealand tax rate on the dividend is less than 15%.

Non-resident shareholders with a less than 10% interest in the resident company receiving an imputed dividend may receive a supplementary dividend under the foreign investor tax credit (**FITC**) regime, providing effective relief from NRWT on the dividend. In relation to non-imputed dividends paid to non-resident shareholders (eg dividends sourced from a capital profit of the New Zealand resident company), NRWT may in some cases apply. However, most of New Zealand's DTAs will limit the rate of NRWT to 15% (the domestic law rate for non-imputed dividends being 30%) and, in some cases, to 5% or 0%.

(b) Inter-company dividends

Most inter-company dividends are taxable. However, those received by one New Zealand resident member of a wholly-owned group from another are exempt. Also, those received by a New Zealand company from a foreign company are generally exempt.

(c) Branch taxation

New Zealand branch operations are liable to income tax on branch profits at the rate of 28%, unless New Zealand has a DTA with the jurisdiction in which the head office is located, and the New Zealand branch is not a "permanent establishment" for the purposes of that agreement, which would be unlikely. Branches are taxed on their net income, after allowable deductions. Any loss or expenditure deducted must be directly attributable to the branch operations.

Tax – continued

Income tax paid by branches is a final tax. No withholding tax is payable on subsequent repatriation of the tax-paid profit overseas. Any tax-free capital gains realised by the branch can be repatriated overseas without any New Zealand tax cost.

NRWT is imposed on the payment of royalties (broadly defined under the New Zealand legislation), and NRWT or an approved issuer levy (**AIL**) on payment of interest, by a branch operation to non-residents.

(d) Thin capitalisation

New Zealand's thin capitalisation regime can apply where either a branch or a New Zealand resident subsidiary owned by non-residents is debt funded (whether by associated or non-associated party debt, and whether from onshore or offshore). Under this regime, the branch or New Zealand resident subsidiary will be denied a deduction for interest to the extent that its New Zealand group's ratio of debt to assets exceeds 60%, and 110% of the branch or subsidiary's world-wide group debt to assets ratio.

The thin capitalisation rules previously applied only if a single non-resident (or group of associated non-residents) controlled the New Zealand investment. However, from 1 April 2015, the rules extend to New Zealand companies (and trusts) controlled by groups of non-residents "acting together", despite not being associated in any legal sense.

In addition, as part of New Zealand's response to the OECD's base erosion and profit-shifting (BEPS) project, the government has indicated that it will introduce further changes to the thin capitalisation rules involving the introduction of a cap on the deductible interest rate in cross-border associated party lending in addition to the existing debt to asset ratio cap. The transfer-pricing rules would not apply if the interest rate was within the proposed cap.

A similar set of thin capitalisation rules applies to inhibit excessive gearing of New Zealand resident entities relative to the gearing of their Controlled Foreign Companies (**CFCs** – see below).

(e) Transfer pricing

New Zealand has a comprehensive transfer pricing regime dealing with cross-border transactions between associated parties. The objective of the transfer pricing regime is to prevent New Zealand tax-paying entities reducing their New Zealand tax burden by inflating deductions or reducing income through non-arm's length transactions with non-resident associates.

In addition, as a further BEPS measure, the government has indicated it will introduce changes to update and strengthen New Zealand's transfer pricing rules, including rules that would disregard legal form if it does not align with the actual economic substance of the transaction and allow transactions to be restructured or disregarded if such arrangements would not be entered into by third parties operating at arm's length.

(f) Taxation of offshore subsidiaries

New Zealand has a "branch equivalent" CFC regime. The CFC regime applies where five or fewer New Zealand residents (with associated parties' interests combined) directly or indirectly control more than 50% of a foreign company, or if a single New Zealand resident controls 40% or more of such a company and no non-resident (who is not associated with the New Zealand resident) controls the same or a greater percentage.

Tax – continued

New Zealand has an "active"/"passive" income distinction in its CFC rules. Only "passive" income of CFCs (such as certain interest and dividends, royalties, and some rent) is attributed to New Zealand resident CFC shareholders. The CFC rules are complex, with a number of exemptions and qualifications. In particular, no attribution of "passive" CFC income is required provided the CFC's gross "passive" income is less than 5% of its total gross income. Further, there is a general exemption from the CFC regime for CFCs that are resident and subject to tax in Australia.

Under a similar regime, income tax is imposed under various attribution and deemed rate of return methods on non-CFC foreign investment fund (**FIF**) interests held by New Zealand residents. The FIF rules in respect of ("non-portfolio") interests of 10% or more in overseas companies incorporate an "active"/"passive" distinction and an Australian exemption as in the CFC rules. In addition, interests in some Australian listed companies and other Australian entities are exempted – these include companies that are listed on an approved index under the Australian Stock Exchange market rules or one of the Listed Investment Company indices (the approved index list comprises ASX All Ords, ASX 200, ASX Listed Investment Companies, ASX 50). The list of exempt companies will be issued annually in May and will relate to the previous income year and apply to taxpayers who have an income year ending 31 March.

FIF interests held by individuals and family trusts costing less, in aggregate, than NZ$50,000 will also generally be exempt.

The FIF rules previously applied to some interests held by New Zealand residents in overseas superannuation funds but, as a result of recent amendments, this is no longer the case. Foreign superannuation interests are now generally subject to a stand-alone regime under which tax is levied on a proportion of amounts withdrawn, determined by reference to the length of time the holder has been a New Zealand tax resident.

7.3 UNIT TRUSTS, SUPERANNUATION FUNDS, AND OTHER MANAGED INVESTMENT VEHICLES

Unit trusts are deemed to be companies for income tax purposes and taxed as above. Widely-held superannuation funds are generally subject to tax at 28% on their net income. Employer contributions to superannuation schemes are subject (with certain exceptions) to a superannuation contribution withholding tax.
Some widely-held unit trusts, superannuation funds, and other investment vehicles are able to elect into the portfolio investment entity (**PIE**) tax regime. PIE status has certain tax benefits including an ability for the PIE's income to be taxed by reference to investors' marginal tax rates (with a 28% cap) and an exemption from tax on New Zealand and some Australian share trading revenues. Further, for PIEs meeting certain criteria, New Zealand tax on foreign-sourced income attributable to non-resident investors is exempt, while tax on certain New Zealand-sourced income is imposed at concessionary rates. A PIE otherwise pays tax at 28% on all income, including foreign-sourced income, attributable to non-resident investors in the PIE.

7.4 WITHHOLDING TAXES

(a) Resident withholding tax (RWT)

Interest and dividend income paid to a New Zealand resident taxpayer is subject to RWT (unless the recipient holds a

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valid certificate of exemption, and subject to certain other exemptions).

RWT is deducted at the following rates:

- 10.5%, 17.5%, 30%, or 33% on interest paid to individuals;
- 28% or 33% on interest paid to companies; and
- 33% on all dividends (except to the extent imputed).

(b) Non-resident withholding tax (NRWT)

New Zealand sourced dividends, interest, and royalties paid to non-residents are subject to NRWT.

The rate of NRWT is:

- 30% in respect of dividends, other than "fully imputed" dividends, for which (as discussed in section 7.2(a)) either the rate is 0% or NRWT is relieved by the FITC regime (and the rate is in any event capped at 15% in most of New Zealand's DTAs and, in some cases, less);
- 15% in respect of interest (capped at 10% in most DTAs and, in some cases, 0%) unless the non-resident has a New Zealand branch, and subject to the AIL regime (below); and
- 15% in respect of royalties (subject to 5%, 10%, or 15% caps, in DTAs).

Under recent changes, NRWT is sometimes payable in relation to interest as it accrues (rather than when it is paid) where the lender and the borrower are associated parties, and the borrower is entitled to a deduction for the interest on an accrual basis.

Where a New Zealand tax resident borrows from a non-resident, non-associated lender, the New Zealand resident may, by completing certain registrations, utilise the AIL regime. The AIL regime requires both registration of the borrower as an approved issuer and registration of the loan as a registered security. Under this regime, if the New Zealand resident borrower pays the 2% AIL in respect of the gross interest payment, NRWT is zero-rated. In addition, even if the interest would not otherwise be subject to NRWT (because the non-resident lender has a New Zealand branch), under certain DTAs it can still be beneficial for the New Zealand borrower to pay AIL, depending on the circumstances. AIL is a duty payable by the New Zealand resident borrower and so is not likely to be creditable in a non-resident lender's home jurisdiction. The levy is deductible to the borrower for income tax purposes. The AIL regime is not available if the non-resident derives the interest jointly with a New Zealand resident.

Recently enacted changes tighten the tests for "association" for application of the AIL regime. In particular, the changes make the regime unavailable in cases of improper substitution of AIL for NRWT on related party interest, including certain back-to-back loan arrangements and groups of non-resident lenders "acting together". In addition, the changes introduce additional registration requirements in order to register a loan as registered security.

AIL may itself be zero-rated in relation to payments of interest under certain widely-held bonds issued in New Zealand.

(c) Residential land withholding tax (RLWT)

A new RLWT regime applies from 1 July 2016 where an offshore person is subject to the "bright-line" test for residential land sales (see paragraph 7.6 below). Under the new regime, the

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conveyancer or solicitor involved in the sale would be required to withhold the RLWT, being (generally) the lower of 33% of the gain on sale (or 28% for companies), and 10% of the purchase price and the amount required to clear amounts owing to certain secured creditors.

(d) Other Withholdings

Various other withholdings are required from payments such as directors' fees, honoraria, salespersons' commission, and non-resident contractors' fees.

7.5 THE DTA NETWORK

New Zealand has entered into DTAs with 40 trading partners and is continuing to develop its treaty network by negotiating new DTAs with trading partners, as well as revising existing DTAs. The DTAs are designed to remove the double taxation (ie tax applying in two jurisdictions in respect of the same income) which would, in their absence, be suffered by New Zealand residents investing overseas and non-residents investing in New Zealand. DTAs have been entered into with Australia, Austria, Belgium, Canada, Chile, China, the 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, the United Arab Emirates, the United Kingdom, the United States of America, and Vietnam.

As a member of the OECD, New Zealand has adopted the OECD Model Convention as the basis of its DTAs, although it has made a number of reservations to the model.

New Zealand has also entered into 21 Tax Information Exchange Agreements (**TIEA**) with Anguilla, Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, Cook Islands, Curacao, Dominica, Gibraltar, Guernsey, Isle of Man, Jersey, Marshall Islands, Netherland Antilles, Niue, San Marino, Sint Maarten, St Christopher and Nevis, St Vincent and the Grenadines, the Turks and Caicos Islands, and Vanuatu. However, the agreements with Bermuda and St Christopher and Nevis are not yet in force.

New Zealand is also a signatory to the multilateral *Convention on Mutual Administrative Assistance in Tax Matters* (**Convention**). The Convention is designed to assist with the detection and prevention of tax evasion, by allowing cooperating tax authorities to request information from one another. It will also enable tax authorities to seek assistance in collecting outstanding tax debts from absconding taxpayers who move overseas.

Unlike New Zealand's DTAs and TIEAs, the Convention is multilateral, with 115 current signatories.

Similarly, New Zealand is a signatory to the OECD's *Multilateral Competent Authority Agreement*, an important step in New Zealand's implementation of the new global standard on Automatic Exchange of Information (**AEOI**), aimed at cracking down on tax evasion. The AEOI initiative will involve the collection, reporting and exchange of information with New Zealand's treaty partners.

Legislation has been enacted to incorporate the AEOI standard into New Zealand's domestic law. Under the AEOI standard, resident financial institutions will be required to conduct specified due diligence procedures on financial accounts to identify those held (or in certain circumstances controlled) by non-residents and report such information to Inland Revenue. This information will then be shared with other jurisdictions under tax treaty exchange of information provisions.

The due diligence requirements of reporting financial institutions commenced 1 July 2017 and must be completed by 30 June 2018 or 30 June 2019 (depending on the size of the account). There will be an annual reporting requirement for financial institutions on 30 June (for the 12 month period up to the previous 31 March). The first exchange of information between jurisdictions is anticipated to occur by 30 September 2018.

New Zealand has entered into an intergovernmental agreement (**IGA**) with the United States in relation to FACTA. Domestic legislation giving effect to the IGA has also been enacted.

Lastly, the New Zealand government signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (**MLI**) on 8 June 2017 and has begun the domestic process for ratification. The MLI is a multilateral international treaty that will modify existing bilateral DTAs to address base erosion and profit shifting concerns.

7.6 NO CAPITAL GAINS TAX

There is currently no general capital gains tax in New Zealand. However, gross (taxable) income includes amounts derived from certain transactions which would be taxed as capital gains in other jurisdictions. These transactions include the following:

(a) profits from the sale of land in certain circumstances, lease incentives, and surrender payments as well as lease transfer payments in certain circumstances;

(b) profits from the sale of any personal property acquired with the purpose of sale or pursuant to a profit-making scheme;

(c) profits from the sale of residential land purchased and sold (or otherwise transferred) within two years (known as the "bright-line" test), unless an exception applies, including an exception for the transfer of property used predominantly, for most of the time that the seller has owned it, as their main home;

(d) certain royalty payments; and

(e) certain gains in the value of "financial arrangements" under the accruals regime.

While there is currently no general capital gains tax in New Zealand, the government is in the early stages of establishing a tax working group to review certain features of New Zealand's tax system, including the lack of a general capital gains tax on land and other assets. The government has proposed that any changes to the taxation of capital gains as a result of the tax working group's review would only take effect from 1 April 2021.

In addition, the government has indicated that it will extend the two year "bright-line" test (mentioned above) to five years.

7.7 GOODS AND SERVICES TAX (GST)

GST is a value added tax imposed on supplies of goods and services in New Zealand by a GST registered person. The rate of GST is generally 15% of the value of a supply.

A supplier of goods and/or services must be registered for GST if the annualised value of taxable supplies made by that supplier exceeds or is likely to exceed NZ$60,000 in a 12 month period. Additionally, a person may register voluntarily, provided they carry on a taxable activity (or intend to carry on a taxable activity from a specified date). Voluntary registration is also available to certain non-residents not carrying on a taxable activity in New Zealand, provided certain requirements are met.

GST charged by registered persons on supplies of goods or services is known as "output tax". A registered person reduces output tax charged on supplies made in a taxable period by GST paid by the registered person in the course of making those supplies ("input tax"). The net amount is paid to Inland Revenue or claimed as a refund.

Tax – continued

The importation of goods is subject to 15% "import GST", subject to a de minimis threshold (discussed below). Further, in some circumstances, a New Zealand recipient of imported services must account for GST to Inland Revenue under the "reverse charge" rules.

Currently, import GST on imported goods is not levied when the combined amount of duty and import GST payable is less than NZ$60 (ie import GST is generally not levied on imported goods valued at less than NZ$400). However, the government has indicated that it will review the current de minimis threshold with a view to extend import GST to low-value imported goods that fall below the current threshold.

In addition, under new rules enacted in 2016, non-resident suppliers (including “electronic marketplaces”) of “remote services” (for example, digital services and intangibles) are required to register for GST if the total value of supplies made to New Zealand resident consumers exceeds NZ$60,000 in a 12-month period.

Some supplies, most importantly supplies of financial services, are exempt from GST (although some supplies of financial services will be treated as zero-rated supplies). In addition, certain supplies (including sales of businesses as going concerns) are zero-rated (ie GST is reduced to 0%).

Most transactions between two GST-registered persons that have a land component are also required to be zero-rated for GST purposes, provided certain criteria are met.

The main difference between exempt and zero-rated supplies is that a registered person making zero-rated supplies may claim input tax deductions for GST paid in the course of making those supplies, whereas a maker of exempt supplies may not

GST returns must be filed every one, two, or six months, depending on the level of turnover of the business. If a non-resident supplier of digital services and intangibles is GST registered, GST returns must be filed every three months.

7.8 OTHER TAXES

(a) Fringe Benefit Tax (FBT)

FBT is payable by employers on the value of most non-cash benefits provided to their employees, eg motor vehicles, low interest loans. The FBT rate generally depends on the marginal tax rate of the employees.

(b) ACC levies

New Zealand employers are charged a levy under New Zealand's universal no-fault accident compensation regime. The rate of the levy depends on the nature of the employer's business activity. Self-employed persons also pay these levies. An additional levy is also paid by employees. The employee levy is paid through the PAYE system.

(c) Customs and excise duties

Import duty applies to the importation of many goods, subject to various preferential rules of origin under free trade arrangements with various trading partners. Excise and excise equivalent duties apply to the manufacture and importation of petroleum, alcohol, tobacco, and other products.

Trade Practices

8

8.1 OVERVIEW

New Zealand's trade practices regime is principally provided for in the following three statutes:

(a) Commerce Act 1986 (**Commerce Act**);

(b) Fair Trading Act 1986 (**Fair Trading Act**); and

(c) Consumer Guarantees Act 1993 (**Consumer Guarantees Act**).

8.2 COMMERCE ACT

The Commerce Act sets out the competition law principles in New Zealand. The Commerce Act is enforced by the Commerce Commission.

(a) Restrictive trade practices

The following restrictive trade practices are prohibited:

- contracts, arrangements, or understandings which have the purpose, effect, or likely effect of "substantially lessening competition" in a relevant market;
- contracts, arrangements, or understandings that contain a cartel provision, being a provision that has the purpose, effect or likely effect of price fixing, restricting output or market allocating (certain collaborative activities, vertical supply contracts and joint buying and promotion arrangements may be exempt from this);
- taking advantage of a substantial degree of power in a market for an anti-competitive purpose; and
- resale price maintenance (when a supplier controls retail pricing).

(b) Acquisitions that substantially lessen competition

The general rule is that mergers and acquisitions that would have, or would be likely to have, the effect of substantially lessening competition in a market are prohibited.

"Market" is a market in New Zealand for goods and services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

Concentration indicators

The Commerce Commission has adopted certain "concentration indicators" to give guidance as to whether a business acquisition is **unlikely** to substantially lessen competition in a market. These are where post-merger either:

- the three largest firms in the market have a combined market share of less than 70%, and the merged entity will have less than 40% of market share; or
- the three largest firms in the market have a combined market share of 70% or more, and the merged entity will have less than 20% of the market share.

"Vertical" acquisitions (whether upstream or downstream) are also subject to the Commerce Act, although there are no similar concentration indicators available for such acquisitions.

Clearance

New Zealand has a voluntary notification and clearance regime. Parties contemplating an acquisition may apply for clearance if they are in doubt as to whether or not the acquisition will result in a substantial lessening of competition.

Trade Practices – continued

Clearance for an international merger given by offshore anti-trust regulators does not protect the transaction in New Zealand. If the merger involves a New Zealand business, and the transaction may result in a substantial lessening of competition in the relevant New Zealand market, parties should consider whether it is appropriate to seek clearance from the Commerce Commission.

The Commerce Commission can also seek a declaration from the High Court that:

- an overseas person has acquired a controlling interest in a New Zealand body corporate through an acquisition outside New Zealand of the assets of a business or shares; and
- the acquisition of that controlling interest has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

If such a declaration is granted, the Commerce Commission can also apply for various orders against the New Zealand body corporate in which the controlling interest has been acquired, including orders to cease carrying on business in New Zealand, dispose of shares or other assets, or take some other action that the court considers is consistent with the purpose of the Act.

Authorisation

If the merger will result in a substantial lessening of competition, the parties can apply to the Commerce Commission for authorisation. However, authorisation is very rarely granted as the parties must convince the Commerce Commission that the public benefits associated with the merger outweigh the anti-competitive harm.

(c) Penalties for breach

If parties choose to proceed with an acquisition without seeking prior clearance or authorisation, and the Commerce Commission considers that the acquisition would substantially lessen competition, the Commission is able to seek an injunction (preventing the acquisition going ahead), a "cease and desist" order, and/or a divestment order. Pecuniary penalties can also be ordered: up to NZ$500,000 for an individual and up to NZ$5 million for a company.

Large financial penalties can also be ordered for engaging in restrictive trade practices. Penalties for an individual can be up to NZ$500,000. Penalties for a company can be up to the greater of:

- NZ$10 million;
- three times the value of any commercial gain resulting from the contravention; or
- 10% of the turnover of the company (and all of its interconnected companies).

8.3 FAIR TRADING ACT

The Fair Trading Act applies generally in New Zealand. It seeks to:

(a) prohibit conduct in trade that is misleading or deceptive (or likely to mislead or deceive), and to prohibit conduct that is unfair; and

(b) require disclosure of consumer information which relates to the supply of goods and services and which promotes product safety.

There are some generally stated prohibitions against misleading and deceptive conduct in trade and false or misleading misrepresentations in trade. Whether the conduct in question was deliberate or

Trade Practices – continued

accidental is largely irrelevant to any question of breach.

The Act also prevents businesses from:

(a) making **unsubstantiated claims** about a product or service. A claim can be unsubstantiated even if that claim is true; and

(b) including **unfair contract terms** in standard form consumer contracts. Courts will have the power, on application from the Commerce Commission, to make a declaration that a term is unfair.

There are also specific rules concerning:

(a) employment advertising;

(b) pyramid selling schemes;

(c) bait advertising;

(d) offering gifts and prizes; and

(e) referral selling.

Product safety standards apply to specific products (such as the supply of baby walkers, cots, and bicycles).

The Commerce Commission is responsible for administering the Fair Trading Act. It actively monitors business conduct in New Zealand to check compliance, and has the power to bring proceedings for breach in its own right. Breach carries civil and criminal liability.

8.4 CONSUMER GUARANTEES ACT

The Consumer Guarantees Act sets out a series of guarantees which apply to all sales to consumers of goods or services in New Zealand of a type ordinarily acquired for personal or household use.

The guarantees create a minimum standard of quality that businesses selling such goods or services must meet, including:

(a) being of acceptable quality;

(b) being fit for a particular purpose (when the consumer has informed the supplier about that purpose);

(c) matching a description;

(d) ensuring spare parts are available;

(e) complying with a sample or demonstration model (where relevant); and

(f) timely delivery.

A consumer may seek redress from either the supplier or manufacturer of goods or services that do not meet the statutory guarantees.

Suppliers of goods or services cannot contract out of the Consumer Guarantees Act unless goods or services are being sold for business purposes.

International Trade

Goods can flow into New Zealand fairly freely, and New Zealand's export markets are extensive and broadening. New Zealand is particularly focused on securing free trade agreements with key trading partners.

9.1 IMPORTING GOODS

Goods can be imported into New Zealand easily. No import licences are required, although tariffs arise on a range of products (tariffs being New Zealand's main trade protection mechanism). Tariffs are still fairly high in relation to some goods, such as clothing and footwear. New Zealand is a party to the General Agreement on Tariffs and Trade (**GATT**).

No other charges apply exclusively to imported products, although GST is generally charged on all imported goods over NZ$400 (normally payable when the goods are cleared through customs). GST is discussed in section 7 of this guide.

Parallel imports of nearly all goods are permitted.

9.2 PRODUCT LABELLING

Goods sold in New Zealand, whether imported or manufactured locally, must comply with relevant labelling requirements. For example:

(a) All products must comply with the general requirements of the Fair Trading Act that labelling cannot mislead or deceive, or be likely to mislead or deceive;

(b) Food must comply with the requirements of the Food Act 2014 and the Animal Products Act 1999, the Australia New Zealand Food Standards Code, and the Weights and Measures Act 1987;

(c) Drugs must comply with the requirements of the Medicines Act 1981, Misuse of Drugs Act 1975 and associated regulations; and

(d) Supplements must comply with the requirements of the New Zealand Food (Supplemented Food) Standard 2016 and the Dietary Supplements Regulations 1985 (as relevant).

9.3 ANTI-DUMPING

Dumping of products on the New Zealand market is regulated by the Dumping and Countervailing Duties Act 1988.

9.4 TRADE BETWEEN AUSTRALIA AND NEW ZEALAND

Agreements entered into between Australia and New Zealand in 1983 – called Australia and New Zealand Closer Economic Relations (**CER**) – have resulted in free trade between Australia and New Zealand of goods and services, and the parties have agreed to increase trade freedom in other areas.

The Joint Food Standards allow food products to be manufactured in Australia or New Zealand to a single standard. The Trans Tasman Mutual Recognition Regime allows a product produced in, or imported into, and legally sold in Australia to be sold in New Zealand and vice versa. Mutual recognition of securities offerings was achieved in June 2008.

The New Zealand and Australian governments signed an Investment Protocol in February 2011 which came into effect on 1 March 2013. The new protocol makes it easier for Australians to undertake large-scale investments in New Zealand where there is no "sensitive land" involved (see section 3 of this guide). In particular, the threshold for "significant business asset" regulatory consent requirements has increased from NZ$100 million to NZ$501 million for an "Australian non-government investor".

International Trade – continued

9.5 OTHER TRADE AGREEMENTS

New Zealand is a strong proponent for free trade, and has entered into a number of trade agreements with its trading partners.
New Zealand has closer economic partnership agreements with Singapore, Thailand, and Hong Kong. New Zealand also has free trade agreements with Malaysia, the People's Republic of China, Korea, Chile, and each of the member states of the Association of South East Asian Nations (**ASEAN**).

New Zealand is one of 11 countries (also including Australia, Chile, Singapore, Vietnam, Canada and Japan) who are parties to the proposed Comprehensive and Progressive Agreement for the Trans-Pacific Partnership, or CPTTP, which aims to create a regional free trade agreement among member countries (previously called the Trans-Pacific Partnership). The United States has withdrawn from the Agreement. The 11 remaining countries have agreed on the core elements, but, as 1 December 2017, the Agreement has not been signed.

New Zealand is also negotiating, among others, a free trade agreement with India.

9.6 INTERNATIONAL SALE OF GOODS

New Zealand is a party to the United Nations Convention on Contracts for the International Sale of Goods 1980, effective (in New Zealand) in 1995.

The Convention regulates all aspects of international sales contracts, including contract formation and the rights, obligations, and remedies of both buyer and seller. The Convention applies to contracts for the sale of particular goods when both parties are from countries that are parties to the Convention, or where the party contracting with a New Zealand entity is from a country that is not a party to the Convention, but the contract is governed by New Zealand law. Parties can, however, specifically (by contract) exclude the Convention.

Intellectual Property Rights

10

10.1 OVERVIEW

New Zealand has a well-developed system of intellectual property rights, which are governed by statute, case law, and international agreements.

Trade marks, patents, designs and plant variety rights can be registered with the Intellectual Property Office of New Zealand, which maintains a register of these rights and interests.

New Zealand is a signatory to a number of intellectual property treaties and conventions, including the Paris Convention, the Patent Co-operation Treaty, the Berne Convention, TRIPS (Trade-Related Aspects of Intellectual Property Rights), the Singapore Treaty, and the Madrid Protocol.

10.2 TRADE MARKS

Trade marks can be registered in 45 classes of goods or services consistent with the internationally adopted Nice Classification System (10th edition).

A trade mark registration is valid for a term of 10 years from the date of application. Registration can then be renewed, in perpetuity, for successive 10 year periods. A trade mark can be removed from the register for non-use if it is not used for a continuous period of three years.

As the Madrid Protocol is in force in New Zealand, entities in Madrid Protocol countries can file international trade mark registrations designating New Zealand as a country to which trade mark protection would extend. New Zealanders can also file international registrations designating one or more overseas Madrid Protocol countries.

10.3 COPYRIGHT AND DESIGNS

New Zealand copyright law protects original works, including original artistic, literary, dramatic, or musical works (in all their various forms), from being copied. The period of protection for literary, dramatic, musical, and artistic works under New Zealand law is the life of the author plus 50 years. Other works, such as sound recordings, films, communication works, and computer-generated works, generally are protected for 50 years from the end of the year in which the work was made or made available to the public.

For industrially applied works, protection lasts for 16 years (or 25 years in some cases), depending on the nature of the work. There is no form of registration of copyright in New Zealand.

In addition to copyright protection, the appearance of an article can be protected by registering a new and original design under the provisions of New Zealand's design legislation. The maximum period of protection for designs is 15 years.

10.4 PATENTS

New Zealand patent law provides a system for the filing, examination, and grant of protection for patent applications. To be granted, a patent application must meet the definition of "invention". This requires that the proposed invention:

(a) be a manner of manufacture;

(b) be new; and

(c) involve an inventive step.

The period of protection for patents in New Zealand is a maximum of 20 years.

The long-awaited Patents Act 2013 came fully into force in September 2014, after the passing of the Patents Regulations 2014. The

Intellectual Property Rights – continued

legislation updates New Zealand's patent law and brings it into line with international trends.

Under the Patents Act 2013, patentability is examined in accordance with absolute (or worldwide) novelty, instead of the previous "local novelty" standard. Both inventive step and utility are examined. Pre-grant opposition processes are available at any time before grant, and a potential opponent can request re-examination both before and after grant. A patent must be inventive "on the balance of probabilities".

10.5 PASSING OFF AND THE FAIR TRADING ACT

The common law tort of "passing off" and provisions of the Fair Trading Act 1986 also provide general protection against misleading conduct in the course of trade. The misleading use of trade marks, get-up and other indicia which cause damage to another trader's reputation or goodwill may accordingly give rise to liability. Section 8 of this guide contains more detail about the Fair Trading Act.

10.6 OTHER RIGHTS

New Zealand legislation also specifically addresses, and provides protection for, the following intellectual property rights:

(a) plant varieties;

(b) layout designs;

(c) geographical indications (not yet in force, although a Bill which proposes amendments to the present legislation is currently before Parliament, and is expected to be passed in early 2017); and

(d) ambush marketing.

11 Employee Relations

11.1 OVERVIEW

New Zealand has a reasonably flexible system of employment law, regulated by a combination of statute and common law. The emphasis in New Zealand legislation is on freedom of contract, with employees being protected by a "minimum floor" of statutory rights.

11.2 EMPLOYMENT RELATIONS ACT

The Employment Relations Act 2000 (**ERA**) is the key statute regulating employment law in New Zealand. It governs the employment relationship for all persons employed within New Zealand. The ERA covers collective, individual, and fixed-term employment agreements, collective bargaining and union related issues, flexible working arrangements, and personal grievances.

On 1 April 2016 changes to employment-related legislation, including the ERA, came into force.

The majority of the changes made concerned the introduction of new "employment standards". The changes address zero hour contracts (availability provisions), restrictions on secondary employment clauses, and provisions for compensation where shifts are cancelled.

Some aspects of employment relations provided for by the ERA are unique to New Zealand, including those explained briefly below.

(a) Duty of good faith

The duty of good faith requires the parties to:

- not mislead or deceive each other;
- be active and constructive; and
- be responsive and communicative in their employment relationship.

An employer proposing to make a decision that will, or may, have an adverse effect on the continuation of an employee's employment (such as a restructure or sale of the business) must give each affected employee information about the relevant proposal, and an opportunity for that employee to comment on the proposal before any decision is made.

(b) Unions

Unions are entitled to represent their members in relation to any matter involving their collective interests, including negotiating a collective employment agreement and representing their members' individual rights (eg at mediation and in court actions).

Union membership is voluntary but, if an employee wants to be involved in a collective agreement and to bargain collectively, he/she must be a member of a union.

If an employee is not a member of a union, each employee will negotiate an individual or fixed-term employment agreement with his/her employer.

(c) Trial period

Employers are able to engage new employees on a trial period of up to 90 calendar days, provided this is recorded in the new employee's employment agreement and the employment agreement is signed by the new employee before commencing employment. During this trial period, an employee may be dismissed with notice and cannot raise a personal grievance on the grounds of unjustified dismissal. The employee may, however, raise a personal grievance on other grounds,

Employee Relations – continued

such as disadvantage, discrimination or harassment.

The recently elected Labour government has indicated that within the first 100 days in government, it intends to amend the law regarding trial periods. Under the proposed amendments, employees must be given reasons for dismissal, and disputes will be heard by a referee with the power to make a final and binding decision (that cannot be appealed) within 3 weeks of a claim being lodged.

(d) **Employee protection provision**

All employment agreements must contain an "employee protection provision". This is designed to protect employees in situations where business undertakings are sold, transferred, or contracted out. Absence of such a provision may affect the employer's ability to implement a business transaction.

11.3 TERMINATING EMPLOYMENT

As a general rule, employment may only be terminated for cause in New Zealand. There is no concept of termination "at will". Cause for terminating employment includes poor performance, repeated misconduct, serious misconduct, redundancy, medical incapacity, incompatibility, and frustration of contract.

The test of whether the dismissal or action causing disadvantage is justifiable is set out in the ERA. The employer must have acted in the way a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. Any dismissal or action taken by an employer must be procedurally fair and the ERA stipulates the minimum process steps required.

An employee can bring a personal grievance claim if he or she has been unjustifiably dismissed or disadvantaged in his or her employment.

11.4 REDUNDANCY COMPENSATION

There is no compulsory redundancy compensation regime in New Zealand. It is a matter of contract between the employee and employer as to whether an employer is required to pay compensation if the employee is made redundant.

11.5 EMPLOYING AN OVERSEAS PERSON

All New Zealand citizens and residents are eligible to work in New Zealand. Otherwise, a person must hold a work visa (issued by Immigration New Zealand). A work visa entitles the holder of the visa to be in New Zealand, or within the exclusive economic zone of New Zealand, for the sole purpose of undertaking the employment specified in the permit. (See section 4 of this guide.)

11.6 KIWISAVER

Participation in superannuation schemes is not compulsory in New Zealand. Employees are eligible to participate in KiwiSaver – a voluntary, work-based retirement savings initiative (governed by the KiwiSaver Act 2006). Participants in KiwiSaver must contribute a minimum of 3% of their gross salary or wages to a superannuation scheme of their choice, and employers must make a contribution of 3% on behalf of all participating employees.

11.7 ACCIDENT COMPENSATION

New Zealand has no workers' compensation scheme. Workplace accidents are instead covered by the ACC Act (discussed briefly in section 2 of this guide). Personal injury costs are met by the ACC and not the employer.

Both employers and employees contribute towards the costs of the accident compensation scheme through levies.

11.8 WORKPLACE HEALTH AND SAFETY

Workplace health and safety laws have recently undergone a major overhaul in New Zealand.

Employee Relations – continued

The new Health and Safety at Work Act 2015 (**Act**) came into force on 4 April 2016, which replaced the Health and Safety in Employment Act 1992.

The Act's key focus is on ensuring everyone in the workplace takes responsibility for health and safety at work.

The Act introduces a number of new concepts, such as a person conducting a business or undertaking (**PCBU**), which has the primary duty of care under the Act. Despite its name, a PCBU will usually be a business entity rather than an individual person. The PCBU must ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, workers whose activities are influenced or directed by the PCBU, and other persons.

Officers of the PCBU have personal liability and must exercise due diligence to ensure the PCBU complies with its duties under the Act. An officer will generally be anyone who is able to direct the conduct of the whole of the PCBU, such as a director or chief executive.

New regulations have also been passed to accompany the Act, with the first tranche of regulations coming into force along with the Act on 4 April 2016. The regulations cover key areas such as asbestos, major hazard facilities, mining and quarrying operations, general risk and workplace management and worker engagement, participation and representation.

Regulations for work involving hazardous substances are in development and are expected to be finalised in the first half of 2017, coming into effect by the end of 2017.

The second tranche of regulations is expected to follow within two years of the Act coming into force. This second tranche will focus on hazardous work, plant and structures, geothermal operations, quarries, and any residual issues in relation to the management of hazardous substances in the workplace.

The changes to health and safety in the workplace are significant and will impact all workplaces.

11.9 PAY EQUITY

In April 2017 the New Zealand government entered into a historic pay equity settlement with government-funded service sectors of aged residential care, home support and disability services.

The settlement will likely have an effect on the private sector, who may need to increase wages in line with the government to avoid pay equity claims and retain good employees.

The new government has indicated that within the first 100 days in government, it intends to implement changes to the Equal Pay Act 1972 as set out in the report from the Joint Working Group on Pay Equity Principles to give all women in female-dominated workforces access to collective bargaining and court processes to settle their claims.

11.10 OTHER LEGISLATION

Other legislation regulates holidays, parental leave, minimum wage, privacy, superannuation, minimum working conditions, and human rights.

11.11 UPCOMING CHANGES

In addition to the intended changes described above, the new government has indicated that within the first 100 days in government it intends to make a number of other changes to employment laws, with further changes within the first 12 months. These are described in Labour's Workplace Relations Policy.[1]

1 http://www.labour.org.nz/workplace_relations_policy

Real Property and Resource Management

12.1 PURCHASING LAND IN NEW ZEALAND

There is currently no restriction on who can own land in New Zealand, subject to any requirement for OIO approval (discussed in section 3 of this guide). Foreign individuals and companies can purchase land without a local partner.

However, the new Labour government has indicated that it plans to amend the Overseas Investment Act to classify existing houses as “sensitive” to prevent anyone who is not either a New Zealand citizen or resident from purchasing existing houses.

12.2 LAND OWNERSHIP BASED ON REGISTRATION

Land ownership in New Zealand is based on a land registration system (called the "Torrens System"). Central to this system is a public register which records all material facts about any given land title, including ownership, registered mortgages, and caveats. Once information is accepted for registration, the validity of information appearing on that register is guaranteed. A purchaser of land in New Zealand is therefore able to rely on the information recorded on that public register.

12.3 SALE OF LAND

Purchasing land in New Zealand is relatively straight-forward. Many agreements to sell land are recorded on standard form documentation.

The general law of contract applies once a sale and purchase agreement has been entered into between the parties. Once the parties enter into an agreement to sell and purchase land, the purchaser's offer becomes legally binding between the parties. The seller cannot (without breaching the contract) then accept a higher offer from another purchaser following entry into this agreement. However, conditions for the benefit of either party can be included in an agreement.

No stamp duty is payable on the transfer of land in New Zealand.

Gains made on the sale of residential property on or after 1 October 2015, such property also having been purchased on or after 1 October 2015, are subject to income tax if the sale occurs within two years of the purchase (called the bright-line period). There are a few significant exemptions from the bright-line period, including (most importantly) any property that the taxpayer has used as their main home. Under related new rules, "offshore persons" (as defined) and many New Zealand residents buying and selling any real property will need to obtain and provide an IRD number and have a New Zealand bank account.

As referred to in section 7.4(c), in a related compliance measure applying from 1 July 2016, a new residential land withholding tax will be required to be withheld from the purchase price paid to an "offshore RLWT person" (as defined) disposing of residential land (acquired on or after 1 October 2015) within the bright-line period. The concept of an "offshore RLWT person" is broad, and will include, for example, a New Zealand incorporated company with more than 25% of shareholder decision-making rights held offshore or with more than 25% offshore directors. In limited circumstances, an RLWT certificate of exemption will be available to an offshore RLWT person. RLWT will be an interim withholding tax, not a final tax. The vendor will be able to file an interim tax return before the end of the tax year, if it believes the RLWT exceeds the tax payable.

Real Property and Resource Management – continued

12.4 RESOURCE MANAGEMENT OVERVIEW

Use and development of resources, from an environmental perspective, is controlled by the Resource Management Act 1991 (**RMA**). The RMA focuses on the sustainable management of New Zealand's natural and physical resources, including land, water, coastal, and air resources.

12.5 ENVIRONMENTAL CONTROLS UNDER THE RMA

Planning rules (relating to activities and development) are provided for in publicly notified statutory planning documents administered by local authorities.

Activities controlled by the RMA include:

(a) use of land and water;

(b) subdivision and historic places;

(c) use and development of coastal resources;

(d) discharges to air, land, or water; and

(e) hazardous wastes.

Activities are classified into a hierarchy of activity types and this classification determines whether a resource consent is required for any proposed activity (eg subdivision or use of a waterway).

12.6 RESOURCE CONSENTS

Resource consents can take the form of land use consents, subdivision consents, water permits, coastal permits, and discharge permits, depending on the nature of the proposed activity.

Consents are granted by the relevant local authority. The level of discretion that the local authority may exercise, and the stringency of the tests an applicant must meet in order to obtain consent, depends on the nature of the consent sought. The local authority also has wide powers to impose conditions on any resource consent it grants.

The consenting process starts with an application to the relevant local authority (in the required form and with all necessary supporting information). The local authority will then decide whether the owners of adjacent land should be served a copy of the application, and whether the general public should be notified of the application. The RMA clearly guides the local authority on how to make these decisions. Any person who is served a copy, or notified, of the application may make submissions in respect of that application.

Both applicants for resource consents, and those who make submissions in respect of an application, have a right of appeal to the Environment Court from a local authority's decision on a resource consent application. A hearing in the Environment Court is "de novo" – meaning that the court takes the place of the council and determines the whole application completely afresh, on the basis of the evidence before it.

Alternatively, an applicant may request that an application proceeds directly to the Environment Court. The tests for public participation and matters of discretion, when deciding an application referred directly to the Environment Court, are the same. However, the first instance council hearing process is avoided.

12.7 PENALTIES FOR BREACH

A person who breaches the RMA (eg by undertaking an activity not permitted by the relevant planning document and without a resource consent) commits an offence. Non-compliance with the RMA is a strict liability offence. A person, if convicted of an offence, can be subject to a maximum fine of NZ$300,000 plus NZ$10,000 per day for continuing offences, and a prison term of no

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more than two years. A company, if convicted of an offence, can be subject to a maximum fine of NZ$600,000 plus NZ$10,000 per day for continuing offences.

Liability is not limited to the party that actually commits the offence. The RMA extends liability to any party who allows the offence to take place. Therefore if a body corporate, trust, company employee, or contractor is convicted of an offence against the RMA, a director, trustee, or any person concerned in the management of that party can also be held liable for that offence.

13 Taking Security over Personal Property

13.1 OVERVIEW

The regime for creating and enforcing security interests over personal property is set out in the Personal Property Securities Act 1999 (**PPSA**). This regime is similar to that operating in North America and Australia.

The PPSA impacts financing and corporate insolvency in New Zealand and anyone who deals with personal property in New Zealand.

13.2 APPLICATION OF THE PPSA

The PPSA applies to all "security interests" in "personal property".

(a) Security interests

A security interest under the PPSA is an interest created or provided for by a transaction that in substance secures payment or performance of an obligation, regardless of the form of the transaction and who has title to the property.

The PPSA also deems the following transactions to be security interests:

- leases of goods for a term of more than one year;
- transfers of accounts receivable or chattel paper; and
- commercial consignments,

even if the lease, transfer or consignment may not secure payment or performance of an obligation.

(b) Personal property

Personal property is virtually all property other than land (and several other specific exceptions) and includes:

- chattel paper (eg hire purchase agreement);
- documents of title (eg bill of lading);
- goods (eg consumer goods, inventory and equipment);
- intangibles (eg trademarks, copyright and patents);
- investment securities (eg shares);
- money; and
- negotiable instruments (eg cheques).

13.3 PRIORITY UNDER THE PPSA

To protect a secured party's priority to personal property in New Zealand against claims from other parties, a security interest must "attach" to the personal property and a secured party must "perfect" its security interest in the personal property.

In order for a security interest to attach to personal property, the security interest must be created or provided in an enforceable security agreement. To be enforceable, a valid security agreement must:

(a) be signed or asserted to in writing or electronically by the debtor;

(b) contain a description of the personal property to be secured so that it is reasonably capable of identification; and

(c) contain appropriate language creating or providing for the security interest.

Perfection of a security interest is generally achieved by registering a financing statement on the online Personal Property Securities Register. Priority between competing securities is determined by order of perfection.

Taking Security over Personal Property – continued

There are a number of specific priority rules under the PPSA which modify this general rule.

13.4 ENFORCEMENT

The PPSA provides remedies to a secured party (subject to the rights of other parties with priority). Security agreements can modify and negate some of the enforcement provisions under the PPSA, and can provide for remedies in addition to those provided for under the PPSA.

14

Corporate Insolvency Law

14.1 FUNDAMENTAL PRINCIPLES

Corporate insolvency law in New Zealand is governed primarily by statute and common law. The two fundamental principles derived from these sources are that:

(a) creditors are generally ranked in a hierarchy, comprising:

- secured creditors;
- preferential unsecured creditors;
- unsecured creditors; and
- shareholders;

(b) distributions to unsecured creditors are based on the proportion of debt owed (*pari passu*).

14.2 OPTIONS FOR CREDITORS AND DEBTOR COMPANIES

If a New Zealand company appears to be suffering financial difficulty, the debtor and creditors have a number of options to consider. Options include:

(a) an unsecured creditor making an application to the High Court for the company to be put into **liquidation**;

(b) the debtor company's shareholders passing a special resolution (or, rarely, directors passing a resolution) to put the company into **liquidation**;

(c) a secured creditor appointing **receivers** over the company's charged assets or specific charged assets;

(d) some or all of the creditors entering into a **creditors' compromise** with the debtor; and

(e) a third party **administrator** being voluntarily appointed by the debtor company's directors, by a qualifying secured creditor, or by the court.

Very rarely, the government will appoint **statutory managers** in respect of companies, by making an Order in Council. This is only likely to occur where there is a need to protect the public or creditor interests in circumstances of large scale fraud or corporate collapse.

14.3 LIQUIDATION – PART 16 COMPANIES ACT

If the company is insolvent, a creditor may apply for the company to be put in liquidation.

Typically the first step in winding up a company is to serve a demand on the company pursuant to section 289 of the Companies Act (**statutory demand**). The statutory demand obliges the debtor company to repay the debt, enter into a creditors' compromise, or otherwise enter into an agreement with the creditor in respect of the debt within 15 working days of service.

If the debtor company fails to comply, or does not apply to the High Court of New Zealand to set aside the demand within 10 working days of service, it is deemed to be unable to pay its debts. On this basis, the creditor can apply to the Court for orders:

(a) putting the company into liquidation; and

(b) appointing a liquidator chosen by the creditor.

In addition to this procedure:

(a) creditors can similarly apply for appointment of an interim liquidator, although this is less common in New Zealand; and

(b) the company's shareholders, or directors (if the company's constitution permits) can also resolve to put it in voluntary liquidation and appoint a liquidator of their choice.

Corporate Insolvency Law – continued

The liquidator's powers are far reaching and include:

(a) taking over control of the company and its assets;

(b) realising the company's remaining assets, including choses in action (for example, claims against debtors of the company or claims against the company's directors);

(c) requesting documentation from, and examining under oath, company directors, shareholders, lawyers or accountants;

(d) clawing back **voidable transactions** made to a creditor within (usually) two years prior to liquidation, where the creditor has received more than it would have received in the liquidation and in that regard an undue preference over other creditors; and

(e) issuing proceedings relating to transactions at an undervalue.

In the course of the liquidation, the liquidator may convene a creditors' meeting and is obliged to prepare and register regular (six-monthly) reports. Creditors are to file their claims (proofs of debt) to the liquidator within the stipulated timeframe and have recourse (by Court application) if they are unhappy with the liquidator's decision.

Once the company's assets have been realised, the liquidators make a distribution to unsecured creditors on a rateable (*pari passu*) basis. Some limited classes of creditors (for example, employees and the Commissioner of Inland Revenue) have preferential status ahead of unsecured creditors, up to set amounts.

At the conclusion of the liquidation, the company will be removed from the Register of Companies.

14.4 RECEIVERSHIP – RECEIVERSHIPS ACT 1993

In New Zealand, receivers are usually appointed by prior agreement between a secured creditor and the debtor company. Often, the parties will have entered into a General Security Agreement (**Security Agreement**) providing for a security interest and with wide default provisions. In the event of default, the creditor can appoint a receiver over all or some of the company's assets.

The receiver's primary function is to realise the assets secured by the Security Agreement, solely for the benefit of the secured creditor. During the course of the receivership, receivers stand in the shoes of the debtor company, in that they are typically empowered to do anything the company could do in the course of fulfilling their functions. It is possible for multiple receivers to be appointed at the same time, pursuant to different Security Agreements. It is also possible for a company to be in a concurrent receivership and liquidation.

The receivership is at an end once the relevant secured assets have been realised. The company will then return to the control of its directors, unless the company is already in liquidation.

14.5 CREDITORS' COMPROMISE – PART 14 COMPANIES ACT

A debtor company wishing to avoid being put into liquidation may make a repayment proposal to its creditors in accordance with the procedure set out in part 14 of the Companies Act, offering creditors less than the entire debt owed to them. Creditors then file their proofs of debt and a meeting is convened so that the proposal can be voted on.

If more than 50% of the creditors in number representing 75% of the value of debt voted at the meeting are in favour of the proposal, the compromise is passed and all creditors are bound by the terms of the compromise. Creditors can oppose the compromise being binding on them (by Court application) on the basis of undue prejudice.

In addition to compromises under part 14 of the Companies Act, part 15 of the Companies Act provides for Court-approved arrangements and compromises.

14.6 VOLUNTARY ADMINISTRATION – PART 15A COMPANIES ACT

A voluntary administration may be appropriate if the debtor company has prospects of recovery. Similar in nature to a creditors' compromise under part 14 of the Companies Act, the voluntary administration regime has the additional advantage of an immediate statutory moratorium that prevents creditors from taking enforcement action while the company is in voluntary administration (with limited exceptions).

Typically, the debtor company appoints an administrator and, after an initial creditors' meeting, a "watershed meeting" is convened within 25 working days of the appointment. At the watershed meeting, the creditors may vote on whether to enter into a Deed of Company Arrangement (**DOCA**). A DOCA is a compromise reached between the debtor company and its creditors, which can allow the company to continue trading. Alternatively, the creditors can also vote to return the company to the control of the directors, or resolve that the company be placed into liquidation.

If the DOCA is executed, all affected creditors (including secured creditors who voted in favour of it) are bound by its terms, subject to relief being granted by the High Court.

15 Climate Change and Emissions Trading

15.1 OVERVIEW

New Zealand has an emissions trading scheme (**ETS**) that requires "participants" to account for emissions or removals of greenhouse gases. This has been developed as part of New Zealand's response to climate change and was originally aligned with the Kyoto Protocol.

ETS participants must surrender emission units to the government for emissions of greenhouse gases. Credits can be claimed for certain qualifying removals of greenhouse gases.

The ETS also permits a wide range of persons (individuals and corporates) to open an account in the New Zealand Emission Unit Register (**EUR**) and to trade accepted emission units through the EUR.

The ETS is subject to regular review and change. Key areas of likely upcoming change are discussed in section 15.7 below, and as relevant in other sections below.

15.2 PARTICIPANTS

ETS participants liable to account for emissions are generally entities that are high up the supply chain. Emissions are accounted for by way of surrender or receipt of units (depending on whether there is an emission or a removal). Eligible unit types are discussed further below.

Participants are either mandatory or voluntary.

(a) Mandatory participants

Mandatory participants who must surrender emission units for greenhouse gases include (subject to thresholds):

- importers of transport fuels (or those removing transport fuels from a refinery);
- importers and miners of coal and natural gas;
- those using geothermal fluid or combusting used oil, waste oil, used tyres or waste for generating electricity or industrial heat;
- those refining petroleum where the refining involves the use of intermediate crude oil products for energy or feedstock purposes;
- those using significant quantities of crude oil or other liquid hydrocarbons (other than transport fuels) after 1 January 2014;
- producers of iron, steel, aluminium, clinker, burnt lime, glass, or gold;
- those responsible for deforestation of pre-1990 forest;
- persons operating electrical switchgear that uses sulphur hexafluoride;
- persons importing or manufacturing some hydrofluorocarbons and perfluorocarbons (known as synthetic greenhouse gases) in bulk; and
- persons operating a waste disposal facility.

The agriculture sector also participates but has reporting obligations only.

(b) Voluntary participants

The ETS allows for voluntary participants, as well as mandatory participants. Voluntary participants may be emitters of carbon (in which case they will have surrender obligations) or may undertake removal activities (in

Climate Change and Emissions Trading – continued

which case they will be entitled to receive emission units). In both cases, they must meet certain criteria and thresholds.

Significant purchasers of transport fuels, coal, and natural gas can opt in to the ETS as voluntary participants, assuming surrender obligations and taking direct responsibility for compliance, rather than paying under a contractual pass-through basis.

Voluntary participants who may receive emission units from the ETS include those responsible for post-1989 forests and those carrying out other qualifying removal activities.

Other entities may also be entitled to receive emission units, even though they are not "participants" under the ETS. Businesses in certain "emissions intensive trade exposed" industries can qualify for free annual allocations of emission units.

15.3 DOWNSTREAM EFFECTS

The design of the ETS assumes that participants will pass on ETS compliance costs to downstream customers. In this way behaviour across the whole of the New Zealand economy will respond to the cost of carbon. The ability to manage these costs provides an opportunity for competitive advantage.

There are many ways ETS costs can be managed; most businesses will adopt a suite of options forming their own trading strategy.

15.4 ELIGIBLE UNITS FOR SURRENDER AND TRADE

New Zealand has its own unit of trade, the New Zealand Unit, or NZU. NZUs are issued by the New Zealand government for use within the New Zealand ETS.

Units recognised under the Kyoto Protocol are generally no longer valid for surrender by participants to meet their compliance obligations under the ETS or for trading purposes in the New Zealand ETS.

15.5 TRADING DOCUMENTS

There is no standard form contract for emissions trading in New Zealand. It is important that trading documents are tailored to meet the requirements of the parties and the nature of the deal.

Forms of documentation from the International Swaps and Derivatives Association (**ISDA**) and from the International Emissions Trading Association (**IETA**) are the preferred options for long term active trading. However, the ISDA and IETA documentation relating to emissions trading need to be tailored carefully for New Zealand issues.

15.6 OTHER POLICIES

Forests established after 1 January 1990 may be able to join the Permanent Forest Sinks Initiative (**PFSI**), and earn emission units under this policy. The PFSI incentivises the establishment of permanent forests on previously unforested land. The ability to deforest is limited to deforestation on a continuous canopy cover basis.

Following a review of the ETS in 2015 and 2016, it has been announced that work is being done on how to align the administration of the PFSI with the ETS, so there are likely to be some administrative changes for the PFSI in the future.
Off-setting is permitted for pre-1990 forests in the ETS. This means that landowners of pre-1990 forest land can convert their forest to another land-use without deforestation liabilities, as long as an equivalent new forest is planted elsewhere in a manner that meets off-setting criteria.

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15.7 CHANGE

The "one for two" transitional provisions in the legislation (ie some sections were only required to surrender one emission unit per two tonnes rather than per one tonne of CO_2 equivalent emissions) are being phased out from 1 January 2017, increasing surrender obligations in equal steps until full surrender obligations are reached in January 2019. Free allocation (for emissions intensive trade exposed industry) ratios reduce in a like manner.

Further change to the ETS may be expected. The Ministry for the Environment has released the following in-principle decisions about changing the ETS, following a review of the ETS carried out in 2015/2016:

- auctioning of units will be introduced, to align the ETS to New Zealand's climate change targets
- the use of international units by participants will be limited, when the ETS reopens to international carbon markets
- a different price ceiling will be developed to eventually replace the current $25 fixed price option
- decisions will be made on the supply settings in the NZ ETS over a rolling five-year period.

A package of options for post-1989 forestry accounting and forestry operational improvements will also be developed, with input from the sector and other interested parties, including a Climate Change Forestry Reference Group that has been established.

Ministers will also be receiving advice on when and how free allocation of units might be reduced.

There will be consultation about these changes. Further, the changes were announced prior to the 2017 election, and the change in government may also mean that other priorities are identified for New Zealand's response to climate change.

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