大成 DENTONS KENSINGTON SWAN

Doing business in New Zealand

Legal guidelines and information

2021

Contents

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Introduction

New Zealand at a glance

2021

New Zealand is a small country, made up of two main islands, with a total land area of 268,021 square kilometres. It is similar in size to Japan or Britain with a population of 5.1 million.[1] The official languages are English, Maori and New Zealand sign language. Wellington is the capital city, while Auckland is the most populous.

New Zealand has a common law system inherited from England. The system is similar to that found in many British Commonwealth countries and comprises of statute law made by Parliament, supplemented by a collection of common law or case law made by the courts.

The New Zealand Court system has four tiers; District Court; High Court; Court of Appeal and Supreme Court. In additional to the Courts, New Zealand has a large number of specialist tribunals and bodies.

Due to its geographic location and the size of its population, New Zealand is a trade dependent economy, is reliant on Foreign Direct Investment and is a big proponent of a free and open market.[2] Around 60% of its economic activity is made up from international trade.[3]

Key major industries are agriculture (pastoral farming), horticulture and tourism, with technology as a fast growing emerging sector. On a global scale New Zealand is the 12th largest agriculture exporter by value, the 2nd largest dairy exporter by value, the biggest sheep meat exporter and second biggest wool exporter. Other major industries include forestry, natural resources and fishing.[4]

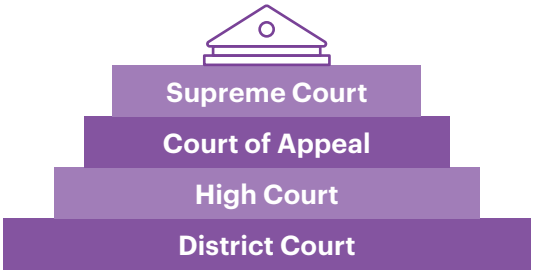
Vital statistics

Population
5.1 million

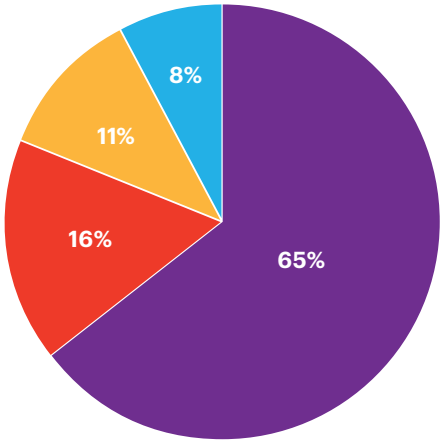
Area
268,021 km²

GDP
NZD$322 bn
As at December 2020[5]

Court system



New Zealand Sectors by GDP (2019)[6]



- Services
- Government, education and health
- Manufacturing
- Primary (agriculture, mining, fishing, forestry)

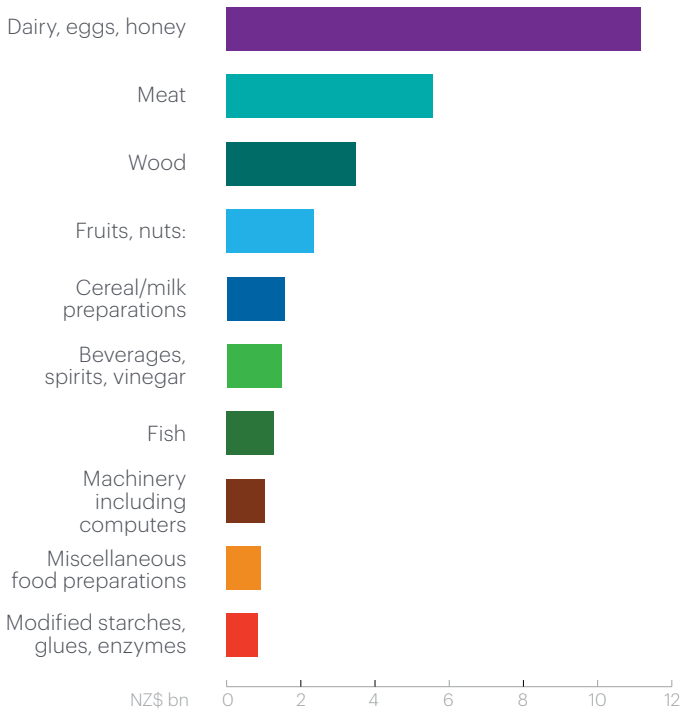
New Zealand is ranked #1
in the world for ease of doing business, starting a business, getting credit and registering property.[7]

[1] https://www.stats.govt.nz/indicators/population-of-nz
[2] https://www.mfat.govt.nz/en/trade/nz-trade-policy/
[3] https://www.mfat.govt.nz/en/trade/nz-trade-policy/
[4] https://www.mfat.govt.nz/en/trade/nz-trade-policy/
[5] https://www.stats.govt.nz/indicators/gross-domestic-product-gdp
[6] http://sectorsdashboard.mbie.govt.nz
[7] https://www.doingbusiness.org/en/ranking

Numerous factors contribute to the good economic and investment opportunities in New Zealand:

- a stable and globally competitive economy
- wide range of free trade agreements
- pro-competitive regulation
- a simple and efficient tax regime
- an open political system
- the New Zealand Government finances research and development
- the New Zealand Government implements trade and immigration policies that encourage foreign investment
- a highly advantageous time zone for doing business globally
- close geographic proximity to Asia
- temperate climate, high rainfall, clean waters and fertile land conducive to agriculture and horticulture
- skilled workforce
- low costs to do business; i.e. export compliance costs, the average wage and lower facility costs, and the small domestic market there is an ideal test bed for new products.

New Zealand's Top 10 Exports in 2019[8]

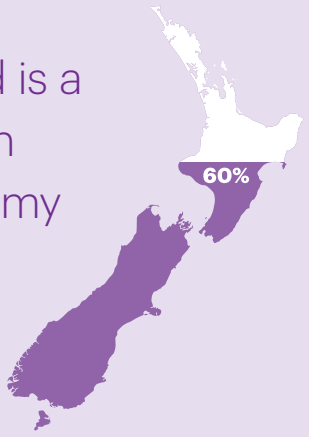


15 free trade agreements with Asian Countries

5th out of 160 countries for business friendliness[10]

Due to location and population size New Zealand is a trade dependent economy and reliant on Foreign Direct Investment (FDI). Around 60% of its economy is made up from international trade.

FDI totalled NZ$113 bn in 2019[9]



[8]http://www.worldstopexports.com/new-zealands-top-10-exports/
[9]https://www.stats.govt.nz/news/foreign-direct-investment-in-new-zealand-continues-to-increase
[10]Source: Forbes Best Countries for Business, 2019

Dentons Kensington Swan 'provides excellent technical legal advice, while being commercially pragmatic'.

Legal 500 Asia Pacific 2021

For more information contact

Charles Spillane
Chief Executive
D +64 9 375 1111
M +64 27 499 4895
E charles.spillane@dentons.com

Hayden Wilson
Chair & Partner
D +64 4 915 0782
M +64 21 342 947
E hayden.wilson@dentons.com

大成DENTONS KENSINGTON SWAN

Investing in New Zealand

2021

Investing in New Zealand

4 professionals

4 partners

Specialists in:

Acquisition of business assets and sensitive land for forestry, dairying, pastoral, lifestyle and residential development purposes

Pre-investment planning

OIO applications and notifications

Variations to existing consents or consent conditions

Ranked with:

TOP RANKED
Chambers
Asia-Pacific
2021
Dentons

"Full-service firm with significant expertise in advising international clients on investments in New Zealand, especially those involving Chinese and Japanese entities."

Chambers and Partners Asia Pacific

Key points on investing in New Zealand

- New Zealand welcomes overseas investment that is beneficial to our country.
- The Overseas Investment Office ('**OIO**') assesses applications from overseas investors to ensure they meet the criteria set out in the Overseas Investment Act 2005 (the '**OIA**').
- Overseas people wanting to invest in sensitive land, significant business assets and fishing quota in New Zealand must get consent under the OIA ('OIA Consent') before they do so.
- Certain transactions that do not require consent under the OIA may still need to be notified to the OIO if the overseas investment is an investment into a strategically important business.
- An overseas person includes an associate of an overseas person and an overseas organisation (e.g. entities that are incorporated outside New Zealand or more than 25% foreign-owned).

The detail

When consent by the OIO is required

You may need to apply to the OIO for consent if you are an overseas person wishing to acquire:

- sensitive land or an interest in sensitive land (for example, buying shares in a company that owns sensitive land); or
- significant business assets worth more than NZ$100 million; or
- fishing quota or an interest in fishing quota.

General guide to investing in New Zealand under the OIA.

Investing in New Zealand	New Zealanders and residents who live in New Zealander, and New Zealander-owned companies or trusts	New Zealand residents who live overseas, and businesses that are more than 25% overseas owners or controlled	Australian and Singaporean citizens and permanent residents who live in New Zealand	Other overseas people (including international entities)
Buying a home to live in	✓ Okay to buy	! Consent required	✓ Okay to buy	X Won't get consent
Developing residential land	✓ Okay to buy	! Consent required	✓ Okay to buy	! Consent required
Buying forestry	✓ Okay to buy	! Consent required	! Consent required	! Consent required
Investing in significant business assets over $100 million	✓ Okay to buy	! Consent required	! Consent required	! Consent required
Investing in other sensitive land	✓ Okay to buy	! Consent required	! Consent required	! Consent required
Investing in strategically important business involved with military or dual-use technology	✓ Okay to buy	Must notify	Must notify	Must notify
Investing in another type of strategically important business	✓ Okay to buy	Must notify	Must notify	Must notify

Acquisition of significant business assets

An investment by an overseas person into a significant business asset exceeding NZ$100 million (unless an alternative monetary threshold applies) will require OIA Consent, regardless of whether there is one transaction or a collection of related transactions.

Examples of investments in significant business assets include:

- the acquisition of more than 25% ownership or control interest (such as shares and securities) in a New Zealand business;
- the acquisition of property (including goodwill and other intangible assets) in a New Zealand business;
- the establishment of a business in New Zealand; or
- an increase in the overseas person's existing more than 25% ownership or control interest in significant business assets to more than 50%, 75%, or 100%.

ALTERNATIVE MONETARY THRESHOLDS

Certain non-government investors from countries with overseas investment treaties with New Zealand have the benefit of higher monetary thresholds before consent is required for an investment in significant business assets. Those thresholds, for the 2021 calendar year, are as follows:

- Australia: NZ$552 million
- Brunei, Canada, Chile, Japan, Mexico, Singapore, Vietnam, the Republic of Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Hong Kong and China: NZ$200 million

Acquisition of sensitive land or an interest in sensitive land

You may be required to obtain OIA Consent for an acquisition of 'sensitive land', which includes:

- the purchase of freehold land;
- the lease of residential land for a term of three years or more (including any rights of renewal); or
- the lease of non-residential 'sensitive land' for a term of 10 years or more (including any rights of renewal).

The following table details what is considered sensitive land under the OIA:

Land is sensitive if it is or includes this type of land	...and exceeds an area threshold of
Residential land (but excluding residential tenancies of less than five years)	Any
Non-urban land	5 hectares
Land on islands specified in Part 2 of Schedule 1 of the OIA	0.4 hectares
Land on other islands (other than the North or South Island)	Any
Foreshore or seabed/marine and coastal area	Any
Adjoining the foreshore or seabed/marine and coastal area	0.2 hectares
Bed of a lake (or adjoined)	0.4 hectares
Land held for conservation purposes (or adjoined)	0.4 hectares
A reserve, a public park, land for recreation purposes, or an open space	0.4 hectares
Land subject to a heritage order (or adjoined)	0.4 hectares
A historic place, historic area, wahi tapu, or wahi tapu area that is entered on the New Zealand Heritage List/ Rārangi Kōrero (or adjoined)	0.4 hectares
Land that is set apart as Māori reservation (or adjoined)	0.4 hectares
Land adjoining areas owned by iwi or a hapū and managed in accordance with the Conservation Act 1987	0.4 hectares
Land adjoining Te Urewa land, the Whanganui River, or the Maungatautari Mountain Scenic Reserve	0.4 hectares

The significant business assets and sensitive land consent requirements are separate. That is, if an overseas investment transaction is below the 'significant business assets' threshold, but involves sensitive land, then consent is still required.

National interest test

Certain transactions that are already screened under the OIA will be subject to a 'national interest test'. Such transactions may include:

- an investment in 'strategically important businesses'– such as businesses in military or dual-use technology, ports or airports, electricity, water, telecommunications, media businesses with significant impact and financial market infrastructure, businesses involved in an irrigation scheme, and critical direct suppliers to intelligence or security agencies;
- certain levels of investment by an overseas investor that are made by, or associated with, a foreign government; or
- other investments which have been identified by the relevant Minister as posing material risks to New Zealand's national interest.

Under the national interest test, the relevant Minister will be able to decline consent to an overseas investment transaction that it regards as contrary to New Zealand's national interest.

Criteria for investment in significant business assets

To obtain consent for an investment in significant business assets, the relevant overseas persons and all individuals with control of those relevant overseas persons (excluding those individuals who are New Zealanders) must satisfy two groups of 'character and capability' factors (collectively referred to as the '**Investor Test**'). These factors include disclosing:

CHARACTER FACTORS

- convictions resulting in imprisonment or significant fines
- corporate fines both in New Zealand and overseas
- being ineligible to come to New Zealand

CAPABILITY FACTORS

- prohibitions on being a director, promotor, or manager of a company
- penalties for tax avoidance or evasion
- unpaid tax of $5 million or more

If an overseas investor has previously satisfied the investor test and its circumstances have not changed, then the investor test component of its consent application will not need to be reassessed.

Criteria for investment in sensitive land

To obtain consent for an overseas investment in sensitive land (other than residential land), the same Investor Test must be satisfied.

In most cases, the applicant must also demonstrate that the investment will, or is likely to, benefit New Zealand (the '**Benefit Test**'). If the relevant land includes non-urban land over five hectares, then the benefit must be 'substantial and identifiable' (i.e. more than just likely to benefit New Zealand). There are more streamlined and targeted pathways available (e.g. the 'special forestry test') for obtaining consent to an overseas investment in residential land or forestry land.

The Benefit Test involves assessing the proposed investment against various specified factors. These factors include economic benefits (such as the creation of job opportunities, increased export receipts and added market competition), environmental benefits and other miscellaneous benefits.

Benefits will be weighted using various considerations such as the size of the benefit that is likely to occur. For example, the creation of 100 jobs in New Zealand is likely to be given a greater weight than the creation of one job. To obtain consent, an investment from an overseas investor must deliver benefits over and above those that a likely New Zealand investor would otherwise be able to deliver.

The Overseas Investment Amendment Act 2021 has introduced a new, more streamlined, Benefit Test. The new test is expected to come into force late 2021 or early 2022. Notably, the new Benefit Test will replace 18 of the current 21 rigid benefit categories with three new broader benefit categories, allowing regulators to take a more flexible approach to assessing benefits.

Special land

Some sensitive land may also contain 'special land', such as qualifying foreshore, seabed, riverbed or lakebed. Special land must first be offered back to the Crown before OIA Consent can be granted.

The Crown will accept the offer if it considers that Crown ownership of the land is in the interests of the public. If the Crown accepts this offer, it is only entitled to the part of the land which is "special".

Farm land

If the relevant sensitive land is or includes 'farm land', it would first need to be advertised for acquisition on the open market in New Zealand, in accordance with the procedure set out in Overseas Investment Regulations. 'Farm land' includes land used for agricultural, horticultural or pastoral purposes, or for the keeping of bees, poultry, or livestock.

Standing consent

Overseas persons who are large developers of residential land or forestry investors or operators may apply for a standing consent. A standing consent covers a predetermined number of transactions and may have a use-by date. The advantage of having a standing consent is that it will allow an overseas investor to acquire property without having to obtain consent in relation to each specific investment, if that investment falls within the parameters of the standing consent. This in turn gives the standing consent holder a competitive advantage when tendering for a property, as they would be able to submit an offer that is not conditional on OIA Consent and thus putting them on the same playing field as domestic investors.

Fishing quota or an interest in fishing quota

Fishing quotas are issued under the Fisheries Act 1996 ('the Fisheries Act') and are the total quantity you are allowed to commercially catch of certain fish species.

Except where approval has been obtained, no commercial fishing may be undertaken within the territorial waters of New Zealand by any person who does not own a fishing quota.

OIA Consent will be needed for an overseas person to gain an interest in a fishing quota, or rights or interests in a foreign-controlled business that owns or controls an interest in a New Zealand fishing quota. In determining whether to grant permission to an overseas person to acquire an interest in any fishing quota, the OIO must have regard to those factors set out in section 57H of the Fisheries Act.

The national security and public order ('NSPO') notification regime

The NSPO regime applies to overseas investments in strategically important businesses that do not otherwise require OIA Consent. Notification to the OIO is mandatory for investment in some industries, and voluntary for others.

Notification of a transaction is mandatory if the target business involves dual-use technology or is a critical direct supplier to New Zealand intelligence or security agencies. Transactions subject to the mandatory notification regime must receive Ministerial clearance before they can be given effect to.

Notification of other types of overseas investments in strategically important businesses is voluntary and can be done either before or up to 6 months after the transaction is given effect to.

Making an application for consent

All applications to the OIO must be made in writing via the OIO's online application forms.

The OIO will consider the application initially to verify that all the correct information has been provided and ask for the relevant application fee to be paid. If the application is accepted, it will be registered with OIO and they will begin their assessment.

The timeframe is highly variable. As a general indication, an application in relation to significant business assets could take 3 months or more, and in relation to sensitive land (other than residential or forestry land) could take 6 months or more. In the case of urgency (for example a takeover), the OIO does make every effort to make a decision within the applicant's timing requirements.

Investment planning

The OIO will require an investment plan for particular investments, particularly those in sensitive land. These investment plans must detail the benefits to New Zealand that are expected to come out of the investment or acquisition.

Careful planning in advance of making an investment in New Zealand is crucial. An overseas investor is required to provide a large amount of information about their proposed investment and the persons who will control the investment. Compared to consent applications, notifications demand less information but the OIO would still expect to see, at a minimum, basic information about the investment (e.g. the acquisition structure) and details of the people who will control the investment in the notification. Early preparation and engagement of legal advice will help you to mitigate the risk of delays, and provide more comfort regarding the viability of your proposed transaction.

How we can help you

For more information contact

Chris Parke
Partner
D +64 9 375 1157
M +64 21 382 596
E chris.parke@dentons.com

- Acquire or invest in significant business assets and sensitive land for forestry, dairying, pastoral, lifestyle and residential development purposes.
- Pre-investment planning and structuring your investment.
- Prepare OIO applications and notifications, and liaise with the OIO throughout the application or notification process.
- Apply for variations to an existing consent or consent conditions.
- Respond to enforcement matters where significant business assets or sensitive land has been acquired without consent, or if there has been a breach of an existing consent.

大成 DENTONS KENSINGTON SWAN

Corporate law in New Zealand

2021

Corporate law in New Zealand

9 partners

12 professionals

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Corporate Structuring

Private Equity and Capital Raising

Corporate Governance

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"Full-service firm with significant expertise in advising international clients on investments in New Zealand, especially those involving Chinese and Japanese entities. Advises on M&A, corporate restructuring, joint ventures and equity transactions. Represents clients in a variety of areas including infrastructure, transportation, manufacturing and finance. Also able to provide strategic corporate governance advice."

Chambers Asia Pacific 2021

Key points about corporate law in New Zealand

Overseas entities proposing to set up business in New Zealand have four main structures available to them

- Register a branch
- Form a subsidiary company
- Acquire an existing New Zealand company
- Form a partnership, including a limited partnership

The most effective way for an overseas company to operate in New Zealand will depend upon the nature of its intended business activities in New Zealand, the method of cooperation intended to be formed between the overseas company (or its New Zealand registered entity) and local partners, as well as each method's respective tax consequences.

The detail

Registered branch

An overseas company wishing to register a branch in New Zealand must:

- reserve its name with the Registrar of Companies, and
- file an application for registration within ten working days of commencing business in New Zealand.

Australian companies wishing to register a branch in New Zealand benefit from:

- an information sharing arrangement between the Companies Office and the Australian Securities and Investments Commission ('ASIC'), and
- reduced compliance requirements on an ongoing basis.

Forming and registering a subsidiary company

Companies incorporated in New Zealand are registered under the Companies Act 1993 ('the Act'). Some of the major features of the Act are set out below.

DIRECTORS AND SHAREHOLDERS

A company must have:

- a name;
- at least one director living in New Zealand or living in an enforcement country and being a director of a company incorporated in that enforcement country. At present only Australia has been confirmed as an enforcement country; and
- at least one shareholder. Unlike for directors, there is no residency requirements for shareholders. The rights and powers of the shareholders are laid out in the Act as modified by the company's constitution (if it has one). Shareholders' liability is generally limited to the price payable for the shares for which they subscribe. The same person can be both shareholder and director.

CONSTITUTION

Under the Act there is no distinction between a public or private company. Additionally, there is no obligation to have a constitution. If no constitution is adopted, then the provisions of the Act govern the conduct of the affairs of the company.

Most companies elect to have a constitution in order to take advantage of certain powers not otherwise permitted under the Act, such as the ability to take out directors' and officers' liability insurance.

Each company must maintain registers of shareholders, directors, directors' interests, and certificates given by directors and such other company records as directors' and shareholders' resolutions and financial statements, all of which must be kept at the company's registered office unless otherwise approved by the Registrar of Companies.

CAPITAL

Under the Act, shares have no par value and there is no concept of nominal capital. There may be different classes of shares.

Financial assistance to purchase shares and, if expressly authorised by the constitution, share buybacks are permitted if certain procedural requirements are followed.

One procedural requirement is the directors must certify that the company passes the solvency test. Creditors are protected from inappropriate reduction of capital by the need for the directors of the company to certify that the company will remain solvent at the time distributions are made to shareholders. Directors may be personally liable if a distribution is made when the company cannot pass the solvency test.

MANAGEMENT

In New Zealand, the ownership and management of the company are distinctly separate. A director must be a natural person, and a shareholder can be a natural person or a legal entity. A natural person shareholder does not necessarily have to be a director, and vice versa.

The board of directors is responsible for managing the company's business affairs. The board must keep minutes of their meetings.

Subject to a company's constitution, the Act sets out the methods by which a company may enter into contracts and other obligations. This method is dependent on the type of obligation and the form of the contract.

There is no requirement for a company seal and most companies do not execute documents under seal.

Directors duties are set out in the Act. Where expressly allowed by a company's constitution, the Act also permits directors of wholly-owned subsidiaries or joint venture companies to take into account the interests of the holding company or the shareholder, in priority to the interests of the company itself.

PUBLIC DISCLOSURE

The Act and the Financial Reporting Act 2013 prescribe the requirements for companies to prepare, have audited and file with the Registrar of Companies financial statements. The requirement to audit and file will differ between companies depending on factors such as the level of overseas ownership of the company, the size and scale (measured on the basis of revenue and value of assets) of the company and other relevant factors.

Generally speaking, most New Zealand incorporated companies that are owned by large overseas persons and have a substantial business presence will need to prepare and file audited financial statements.

SHAREHOLDER RIGHTS

Under the Act, unless the constitution provides otherwise, shareholders have pre-emptive rights on the issue of new shares but not in respect of the transfer of shares. However, it is common for constitutions of closely held companies to incorporate pre-emptive rights on the transfer of shares.

Companies cannot undertake transactions with a value exceeding 50% of the gross assets of the company without approval by a special resolution (which requires the vote of at least 75% of shareholders). In such cases, dissenting minority shareholders whose dissenting votes have been recorded may require the company to purchase their shares.

Acquire an existing New Zealand company

SHARE SALE VERSUS AN ASSET SALE

Before commencing an acquisition it is important to decide on how the acquisition is structured. The two most common types of structures are:

- acquisition of the shares in the target business; or
- acquisition of the assets of the target business.

A share purchase is typically a simpler transaction as all contracts, employees and assets remain with the target business with only the ownership of the business' shares changing. However, the downside to a share purchase is that a purchaser has to acquire all the assets of the business (and also the business' liabilities) and is unable to 'cherry-pick' those it wants. There are a range of factors to consider when structuring an acquisition so it is important to consult your legal and financial advisors before entering into a transaction.

MERGER OR TAKEOVER PROPOSAL

An overseas person considering merging with or buying a New Zealand company must be aware of the restrictions on business acquisitions contained in the Commerce Act 1986 and the Overseas Investment Act 2005 ('OIA'). If the New Zealand company is listed on the New Zealand Stock Exchange, or has more than 50 shareholders, the Takeovers Code is also likely to apply.

THE TAKEOVERS CODE

The Takeovers Code ('Code') regulates the conduct of takeovers in New Zealand. The Code applies to companies ('Code Companies') which meet one of the following:

- are listed on the New Zealand Exchange ('NZX').
- were listed on the NZX and have ceased to be listed for less than 12 months before the date of the relevant event referred to in the Code.
- have 50 or more shareholders who hold voting rights, and have 50 or more share parcels in a company that in the most recently completed accounting period and either or both of the following is true: The total assets of the company and its subsidiaries is at least NZ$30 million and/or the total revenue of the company and its subsidiaries is at least NZ$15 million.

The main feature of the Code ('fundamental rule') restricts the ability of a person and that person's 'associates', to increase or acquire voting rights in a Code Company beyond 20%.

Under the Code:

- a person who holds or controls less than 20% of the voting rights in a Code Company cannot acquire an increased percentage of voting rights if such an acquisition would put that person and their associates over the 20% threshold, unless such acquisition is by way of one of the permitted exceptions listed in the Code (and summarised below)
- a person already holding or controlling more than 20% of the voting rights of a Code Company cannot acquire an increased percentage of voting rights other than by way of one of the permitted exceptions
- once a person holds 90% or more of the shares in a Code Company, they become a 'Dominant Owner'. Upon becoming a Dominant Owner:
  - The Dominant Owner has the right to acquire all the outstanding shares
  - The outstanding security holders have the right to sell their shares to the Dominant Owner.

The Code does not distinguish between voluntary or involuntary increases in voting rights. Therefore, a person whose voting rights cross the 20% threshold by involuntary means (e.g., a non-pro rata buyback, transfers by operation of law, or an undersubscribed rights issue), will be in the same position as if they had actively purchased shares, although some general exemptions allow a period for the holder to reduce their holding back to where it was. The Takeovers Panel is able to grant exemptions from the Code where appropriate.

CODE PERMITTED EXCEPTIONS

- A full offer to acquire all the voting and non-voting equity securities in a Code Company will comply with the Code so long as the offer is fair and reasonable between all classes of shares held in the company.
- A partial offer to acquire a specific percentage of all voting securities will comply with the Code so long as the offer will have the effect of the offeror owning more than 50% of the voting rights in the company. A partial offer must be for the same percentage in each share class and be fair and reasonable between all share classes.
- Shareholders of the target company may resolve by ordinary resolution to approve a particular issue of new shares or the acquisition of existing shares that would otherwise be restricted by the Code. The intended purchaser, and any other interested person, are not permitted to take part in the vote.
- Where a person has an existing holding of between 50% and 90% of voting rights, they are permitted to increase their holdings by up to 5% of the total voting rights in any one 12-month period. The maximum increase permitted is calculated from the lowest percentage of voting rights held by that person in that 12-month period.

The Code sets out more fully the procedure as to what is required to be in the offer, what the target company must do upon receipt of the offer, and certain restrictions upon the offeror and the target company during this process.

Partnership and limited partnerships

PARTNERSHIP

The definition of 'partnership' is provided in the Partnership Law Act 2019, as the relationship that subsists between persons (which can be companies) who carry on a business in common with a view to profit. The relationship between shareholders or members of certain entities, including a limited partnership, is not a partnership.

Unlike companies, a partnership is not considered a separate legal entity. Each partner is liable jointly and severally for the liabilities of the partnership with no limited liability. This means that a claim made against a partnership can be enforced against any partner in the partnership.

The partnership relationship is ordinarily documented by way of a partnership agreement, which is governed by the Partnership Law Act 2019 and common law. Partners can, in writing, contract out of certain general provisions in the Partnership Act.

LIMITED PARTNERSHIPS

The Limited Partnership Act 2008 introduced a limited partnership model into New Zealand similar to those in some Australian states, Delaware, and the Channel Islands. Effectively, the model provides investors with the protection of limited liability, with some of the flow-through tax and confidentiality advantages of a partnership.

A limited partnership must be registered with the Companies Office and must be composed of at least one general partner and at least one limited partner, both of which can be companies.

General partners are:

- responsible for the management of the general partnership.
- jointly and severally liable with the limited partnership for the debts and liabilities and for any wrongs or omissions of the partnership. General partners' liability for the debts and liabilities is limited (subject to the partnership agreement) to the debts and liabilities that the limited partnership cannot pay.

Limited partners are:

- passive investors and are not entitled to take part in management outside certain specified activities.
- not liable for the debts and liabilities of the limited partnership, provided that they do not take part in the management of the limited partnership.

Both general and limited partners may make capital contributions to the limited partnership.

How we can help you

For more information contact

Chris Parke
Partner
D +64 9 375 1157
M +64 21 382 596
E chris.parke@dentons.com

Structure your investment in the way that best suits your business model and investment plans.

Advise on compliance and best practice, on all aspects of a merger or acquisition, from initial planning to post-completion, including undertaking due diligence, negotiating terms, providing regulatory advice (including consent applications to the Overseas Investment Office under the OIA), enabling ongoing project management, as well as helping you understanding shareholder rights and negotiate and resolve disputes.

Our Takeovers Code experts provide specialist advice to companies, investors, stock brokers, and other market participants. We can help you to understand your obligations, whether you're a Code Company, a substantial product holder, a holder of voting rights, or an offeror.

Navigate the Financial Markets Conduct Act and ongoing compliance with relevant listing rule and market participant requirements to become listed on the NZX.

大成 DENTONS KENSINGTON SWAN

Competition and Anti-trust law in New Zealand

2021

Competition and Anti-trust law in New Zealand

3 partners

5 professionals

Specialists in:

Conduct advice

Merger advice

Clearance applications

Authorisation applications

Dealing with investigations

Litigation

Ranked with:

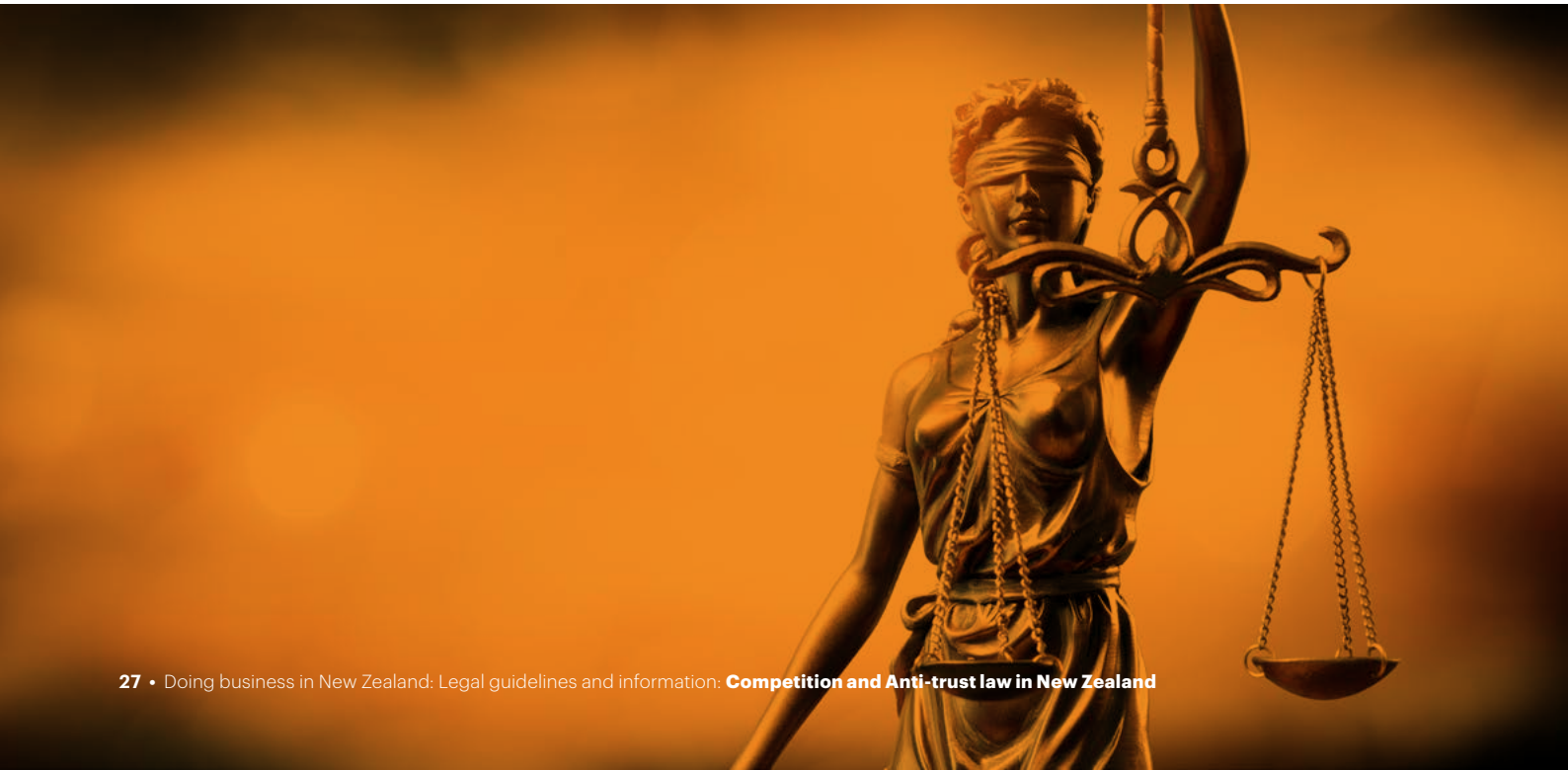
The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"They are obviously skilled at what they do, but it is the holistic approach they bring that sets them apart from other firms"

Legal 500 Asia Pacific 2021

Key points about competition law in New Zealand

- Competition law is governed in New Zealand by the Commerce Act 1986.
- The purpose of the Commerce Act is to promote competition in markets for the long-term benefits of New Zealand consumers. To this end, the Act sets out a number of prohibitions on various forms of anti-competitive behaviour, and provides for significant financial penalties for a breach of those provisions.
- The Commerce Commission is the regulatory body that administers and enforces the Commerce Act.



The detail

Mergers and Acquisitions

The Commerce Act sets out the rules which apply to mergers and acquisitions affecting markets in New Zealand. The Act prohibits an acquisition of shares or business assets which would result in a substantial lessening of competition in any market.

The Commission has published guidelines indicating that competition is unlikely to be substantially lessened where, should an acquisition proceed, either of the following conditions exist:

- in markets where the three largest firms (post-transaction) comprise less than 70% of the market, the merged firm would have a market share of less than 40%
- in markets where the three largest firms (post-transaction) comprise more than 70%, the merged firm would have a market share of less than 20%.

Obtaining Commission Approval

Parties to a proposed acquisition have a choice as to whether to apply for and implement their proposal in accordance with the prior approval of the Commission, or to proceed without approval. Applications are voluntary.

Obtaining the prior approval of the Commission provides protection against the Commission or any other person taking legal action under the Commerce Act provided the merger or acquisition is completed within 12 months from the date of the Commission's approval.

The Commission is able to issue one of two types of approval to a proposal:

- A 'clearance', which is a confirmation that the acquisition is not unlawful (i.e. that it will not result in a substantial lessening of competition in any market).
- An 'authorisation', which is an approval to a situation which would otherwise be prohibited. An authorisation will only be granted if the Commission is satisfied that there is enough public benefit in the acquisition to outweigh the detriments of the substantial lessening of competition caused by it.

The normal time frame for the Commission to decide on an application for clearance is about eight weeks. An application for authorisation will usually take at least three months.

The maximum penalty for a company for a breach of the business acquisition provisions of the Commerce Act is a fine of NZ$5 million. The maximum penalty for an individual is a fine of NZ$500,000.

In addition, the High Court may order a person or company to dispose of specified assets or shares acquired in breach of the Commerce Act.

Individuals or companies may also take private legal action, for example, by applying for an injunction to stop an acquisition or seeking damages for loss suffered as a result of an acquisition.

Restrictive trade practices

The Commerce Act prohibits the following *collective* restrictive trade practices:

- **Practices substantially lessening competition**—The Commerce Act prohibits a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in the market. This section is very broad in its application and it is not necessary for there to be a legally binding contract for there to be a breach.
- **Cartel provisions**—The Commerce Act also prohibits the entering into, or giving effect to, a contract, arrangement or understanding containing a cartel provision. A cartel provision is a provision that has the purpose, effect or likely effect, of:
  - price fixing—where competitors fix, control, or maintain the price of a product or service
  - restricting output—where competitors prevent, restrict or limit the production, supply or acquisition of a particular good or service
  - market allocating—an example of market allocating is where competitors allocate a market between themselves, for example according to geographical area.

From April 2021, it will be a criminal offence for individuals involved in cartels. This will bring New Zealand into line with overseas jurisdictions with similar criminal regimes.

The Commerce Act prohibits the following *unilateral* restrictive trade practices:

- **Taking advantage of market power**—Where a company has substantial market power, it must not take advantage of that market power for an anti-competitive purpose. The Commerce Act prohibits a company with a substantial degree of market power from taking advantage of that power to:
  - restrict the entry of a competitor
  - prevent or deter a competitor engaging in competitive conduct
  - eliminate a competitor from the market.

  An example of where an abuse of market power might arise is predatory pricing. This is where a business sells its products below market value in order to chase its competitors out of the market due to an inability to compete.
- **Resale price maintenance**—Suppliers cannot fix the price of their goods sold by other retailers. Furthermore a supplier cannot enforce a minimum price for resale (whether by specifying a minimum price or by setting restrictions on the ability to discount).

Penalties for restrictive trade practices

The Commission has a range of enforcement options available to it depending on the extent and severity of a breach and the public interest involved. In some cases the Commission will merely issue a warning; in more serious cases prosecution in the High Court can occur.

An individual can face penalties of up to NZ$500,000 per breach. For companies, the penalty 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 any interconnected companies).

How we can help you

For more information contact

David Campbell
Partner
D +64 9 375 1115
M +64 21 678 753
E david.campbell@dentons.com

- Understanding and reviewing the Commerce Act compliance requirements for your business.
- Employee/management training materials for Commerce Act compliance.
- Drafting or reviewing of contracts with competitors.
- Drafting or reviewing supply agreements.
- Assisting in responding to Commission investigations.
- Bringing or defending a claim under the Commerce Act.

大成 DENTONS KENSINGTON SWAN

Contracting in New Zealand

2021

Contracting in New Zealand

9 partners

11 professionals

Specialists in:

Distribution, supply and customer contracts

Terms of trade

Distribution and licensing arrangements

Intellectual property implications

Commercial and online channels

Ranked with:

TOP RANKED Chambers Asia-Pacific 2021 Dentons

The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"The corporate and commercial practice at Dentons Kensington Swan is 'willing to walk the extra mile to strive to understand our business concerns and needs', remarks one client."

Legal 500 Asia Pacific 2021

Key points about contract law in New Zealand

- Contract law is at the heart of all commercial transactions in New Zealand.
- New Zealand's contract law has its origins in common law, but has been subject to progressive legislative codification, particularly since the middle of the 20th century.
- The Contract and Commercial Law Act 2017 ('CCLA') is the central piece of legislation applying to contracts that are subject to New Zealand law but there remains many matters which are covered on by the common law rules, in other words "judge made law".
- The CCLA applies in full to all contracts entered into after 1 September 2017. Except for certain minor changes in legal effect, the CCLA also applies to contracts made before 1 September 2017.

The detail

Choice of Law for International Contracts

Determining which country's law is applicable to an international contract can have important implications for when and how a contract was formed, whether the parties had capacity to enter into the contract, whether the contract conferred benefits on third parties and even whether the contract was formally valid for the particular transaction.

A choice of law made by the parties in their contractual arrangements will generally be respected by the Courts, provided that the choice is genuine and legal, and does not need to be avoided for reasons of public policy.

When the parties have not expressly chosen an applicable law, the Courts will need to determine what law applies based on the details of the contract and the surrounding circumstances. The Court will seek to establish which legal system has the closest and most real connection with the contract in question. The Court may consider factors such as where the contract was concluded, where performance of the contract was to occur, where the parties reside and the subject matter of the contract. Any substantive dispute between the parties will generally not be able to be resolved until the applicable law has been determined. For this reason, it is advisable to include a choice of law clause in all international commercial agreements.

The United Nations Convention on Contracts for the International Sale of Goods

New Zealand is a party to the United Nations Convention on Contracts for the International Sale of Goods ('CISG'). The CISG is an international treaty that has been signed by over 90 states. The purpose of the CISG was to harmonise the law applying to contracts for the international sale of goods.

Generally speaking, the CISG will apply to contracts for the international sale of goods where both of the parties have their place of business in contracting states or where the rules of private international law lead to the application of the law of a contracting state. This means that, even if the parties have not made any choice of law, the CISG may automatically be the law applying to their contract. It is however possible to contractually agree to expressly exclude the application of the CISG.

Before entering into an international commercial contract, it is important to consider which law should or would apply to the contract in question. We can help your business to ensure that the law applicable to the contract is certain and that it is consistent with the commercial needs and expectations of the parties.

Settlement of disputes

The default dispute resolution mechanism for international commercial transactions is international litigation. Where the parties have not specified which country's courts will have jurisdiction over matters arising from the contract, a New Zealand Court will first need to determine whether or not it has jurisdiction to hear a particular matter. Therefore, it is generally preferable to ensure that any international commercial agreement has a well-drafted choice of forum or alternative dispute resolution clause.

An international commercial contract can also specify that one or more method of international dispute resolution mechanisms will be used to resolve any disputes which arise under the contract, for example mediation or arbitration. The New Zealand Courts will generally honour such clauses and refuse jurisdiction where the parties have chosen an alternative method of dispute resolution. However, it is important to ensure that such clauses are drafted carefully to avoid any potential for a dispute about what the applicable dispute resolution mechanism is.

How we can help you

For more information contact

Hayley Miller
Partner
D +64 9 915 3366
M +64 21 870 477
E hayley.miller@dentons.com

Drafting, reviewing and modifying international commercial contracts to avoid common pitfalls that can be costly later down the track.

Drafting, negotiating and advising on a range of commercial arrangements, including distribution, supply and customer contracts and terms of trade.

Resolving commercial disputes of all sizes.

大成 DENTONS KENSINGTON SWAN

Consumer protection in New Zealand

2021

Consumer protection in New Zealand

4 partners

9 professionals

Specialists in:

The Fair Trading Act

Consumer Guarantees Act and other consumer legislation

Reviewing marketing collateral for compliance with both the Fair Trading Act and Advertising Standards Codes

Ranked with:

TOP RANKED Chambers Asia-Pacific 2021 Dentons

The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"Dentons Kensington Swan advises a diverse client base on legal issues surrounding public and private sector procurement, consumer law, electronic commerce, technology product compliance, privacy and data protection."

Legal 500 Asia Pacific 2021

Key points about consumer protection in New Zealand

Consumers in New Zealand are protected by five key pieces of legislation:

- Fair Trading Act 1986
- Consumer Guarantees Act 1993
- Credit Contracts and Consumer Finance Act 2003
- Privacy Act 2020
- Unsolicited Electronic Messages Act 2007

The detail

Fair Trading Act 1986 ('FTA')

The FTA promotes trading which is fair, honest, and transparent. It applies to the supply of goods or services in 'trade'. The FTA prohibits:

Deceptive or misleading conduct: Consumers must not be misled or deceived about the nature, manufacturing process, characteristics, suitability to purpose, or quantity of goods or services.

False, misleading and unsubstantiated representations: Representations made to consumers about goods or services must not be false or misleading. Representations made without reasonable grounds, even if they are believed to be true (or are in fact true), will also breach the FTA.

Unfair contract terms: Standard form consumer contracts cannot contain terms which a court declares to be unfair to consumers. Unfair terms will not be enforceable. 'Consumer' contracts are those for the supply of goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption.

Unfair practices: The FTA lists a number of activities which are considered to be unfair and which are prohibited. The listed activities include pyramid selling schemes, bait advertising, and requiring payment for unsolicited goods or services.

CONTRACTING OUT

In most cases, the FTA cannot be contracted out of. In some business-to-business transactions, contracting out is possible in writing if both parties are 'in trade' and the goods or services are both supplied and acquired 'in trade' and it is fair and reasonable to do so.

Other matters dealt with under the FTA include:

- compliance with safety standards for certain products and services offered to consumers, to prevent or reduce risk of injury to a person;
- compliance with consumer information requirements for certain products offered to consumers;
- layby sale agreements and disclosure requirements to consumers;
- extended warranties; and
- auctions.

PENALTIES FOR BREACHING THE FTA

- a maximum fine for breach by an individual of NZ$200,000 per offence, or for a business of NZ$600,000 per offence;
- compensation to affected consumers;
- injunctions; and
- management banning orders.

Consumer Guarantees Act 1993 ('CGA')

- Provides consumers with a number of guarantees that apply to goods or services purchased from a supplier in trade.
- Has a broad scope defining a consumer as a person who acquires goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, provided that the person does not represent themselves as acquiring the goods or services for resupplying in trade or for use in manufacture or production.
- Applies to certain business-to-business transactions, giving the business consumer the benefit of the same guarantees as an individual consumer.
- The guarantees generally cannot be contracted out of, but as with the FTA, there is a limited exception for parties to a business to business transaction where the goods or services are purchased for business purposes and it would be fair and reasonable to contract out of the CGA.

The CGA implies guarantees for goods supplied that:

- the supplier has the legal the right to sell the goods and the goods are free of security interests;
- the goods supplied are of acceptable quality;
- the goods supplied are fit for a particular purpose made known by the consumer or represented by the supplier;
- the goods supplied match the supplier's description of the goods or any sample;
- the goods are sold at a reasonable price where the price is not pre-determined;
- repairs and spare parts are reasonably available; and
- goods are delivered at the time agreed (or within a reasonable time) if the supplier is to deliver the goods.

The CGA implies guarantees for services supplied that the services must:

- be performed with reasonable care and skill;
- be fit for a particular purpose that the consumer makes known to the supplier;
- be completed within a reasonable time where the time has not pre-determined; and
- be for a reasonable price where the parties have not pre-determined the price.

LIABILITIES AND PENALTIES

Where goods do not comply with a guarantee, a consumer may seek redress against the supplier or, in the case of goods supplied, the manufacturer or importer, at the consumer's election. If the failure is capable of remedy, the consumer must first give the supplier (or otherwise) the right to rectify the breach. If the failure is minor, the supplier can choose to either repair the goods, replace the goods or refund the consumer. If the supplier refuses to repair faulty goods or fails to do so within a reasonable time, the consumer may have them repaired elsewhere and recover the costs from the supplier. If the failure cannot be remedied or cannot be put right within a reasonable time, or is substantial, the consumer may reject the goods or cancel the service contract, or obtain damages for any reduction in value of the good or service.

In addition, the consumer can also claim for any reasonably foreseeable other loss that results from the failure.

Credit Contracts and Consumer Finance Act 2003 ('CCCFA')

- Places strict requirements on lenders who provide credit to consumers for personal or domestic use under credit contracts and consumer leases, and buy-back transactions of land.
- Requires lenders to comply with the 'lender responsibility principles' which include:
  - exercising care, diligence and skill in advertising credit services or before entering into credit arrangements with a borrower;
  - making reasonable inquiries into a borrower's requirements and objectives;
  - considering a borrower's repayment abilities;
  - assisting a borrower to make an informed decision; and
  - treating a borrower reasonably and in an ethical manner.

PENALTIES

Lenders can be fined up to NZ$200,000 for individuals and NZ$600,000 for businesses for breaching the CCCFA. Courts can also reopen 'oppressive' contracts which are unjustly burdensome or breach reasonable standards of commercial practice.

Privacy Act 2020 ('Privacy Act')

- Governs the collection, storage, use and disclosure of personal information by requiring compliance with thirteen Information Privacy Principles ('IPPs').
- 'Personal information' is broadly defined as 'information about an identifiable individual.' The Privacy Act applies to agencies, which include any person or body of persons, whether corporate or unincorporated and whether in the public sector or private sector (unless an exception applies). It applies to New Zealand agencies as well as overseas agencies carrying on business in New Zealand.

The IPPs, among other things, specify that an agency:

- must not collect personal information unless it is necessary for a lawful purpose connected with a function or activity of the agency (and not require identifying information if the purpose does not require it);
- must collect personal information from the individual concerned (unless an exception applies);
- should take reasonable steps to ensure the individual is aware of the collection of personal information, and other information in relation to the collecting agency and the purpose for such collection, who the information will be disclosed to, the consequences (if any) for the individual if the information is not provided, and the individuals rights of access to, and correction of, information ;
- may only collect personal information by lawful means, and by fair and not unreasonably intrusive means (particularly in the case of children or young persons);
- ensure that the personal information is protected by reasonable security safeguards to protect the information from loss, unauthorised access, use, modification or disclosure and other misuse;
- on request from an individual, give confirmation of whether or not the agency holds, and give access to, their personal information, and also advise the individual that they may request correction of any personal information If the agency does not correct the information it must attach a statement of correction to the information if the individual has provided it;

- must not use or disclose personal information without taking reasonable steps to ensure that the information is accurate, up to date, complete, relevant and not misleading;
- must not to keep personal information longer than necessary;
- should only use or disclose personal information for the purposes it was collected for, unless the individual consents or another of the exceptions applies;
- may only disclose personal information to a foreign entity in certain circumstances, essentially where the information will be protected by similar safeguards to those provided under the Privacy Act; and
- may only use unique identifiers when it is necessary, may not use a unique identifier assigned by another agency, and must take reasonable steps to protect unique identifiers from misuse.

The Privacy Act requires mandatory reporting of privacy breaches where it is reasonable to believe the breach has caused serious harm or is likely to do so.

PENALTIES

Breach of any of the IPPs is grounds for a complaint to the Privacy Commissioner. The Privacy Commissioner may investigate the complaint and may refer matters to the Director of the Human Rights Review Tribunal, who may award remedies such as damages, a declaration that the actions interfere with privacy, a compliance order, costs, or other relief deemed appropriate. The Privacy Commissioner may issue compliance notices and binding decisions on access requests. Fines of up to NZ$10,000 may be imposed for offences.

Unsolicited Electronic Messages Act 2007 ('UEMA')

An individual or organisation ('**person**') must comply with the UEMA when sending emails (and SMS messages) to consumers. The UEMA prohibits the sending of unsolicited commercial electronic messages. Essentially, in order to send commercial electronic messages, the person must first obtain consent from the recipient. Consent can either be:

- express (for example by way of a 'tick the box' opt in when a person provides their contact details);
- inferred (from the conduct, business and other relationships of the person concerned); or
- deemed (where an email address has been published by a person in a business or official capacity, they have not expressly said they do not wish to receive unsolicited electronic messages and the message sent to that address is relevant to the business or duties of the person in a business or official capacity).

'Electronic messages' that are subject to the UEMA include emails, faxes, instant messages, SMS (txt), multimedia messages, and other mobile phone messages, but not voice calls or voice messages. 'Commercial' electronic messages are defined to include 'electronic messages that market or promote goods, services, land, an interest in land, or a business or investment opportunity'.

Common electronic messages that are not considered 'Commercial' electronic messages include those that:

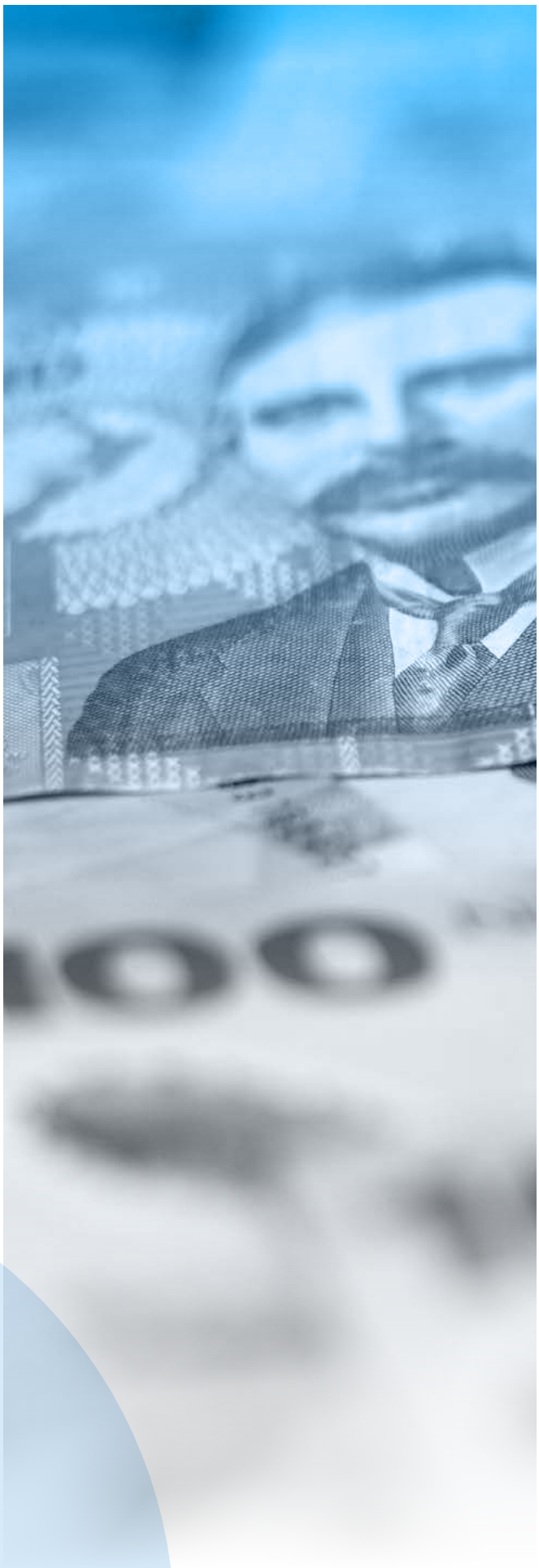
- provide a quote or estimate of goods or services, if that quote was requested by the recipient;
- facilitate or confirm a commercial transaction which was previously agreed to with the person sending the message; or
- provide notification of factual information about a subscription, membership, account, loan, or similar relationship involving the on-going purchase or use by the recipient of goods or services offered by the person who authorised the sending of the message or the recipient's on-going subscription, membership, account, loan, or similar relationship.

The person, when sending a commercial electronic message, must also:

- identify itself clearly as the sender of each commercial electronic message; and
- include a functional unsubscribe facility in all commercial electronic messages which is functional and valid for at least 30 days after the principal message is sent.

PENALTIES

An individual can be liable to pay a penalty not exceeding NZ$200,000 in respect of a civil breach and an organisation can be liable to pay a penalty not exceeding NZ$500,000. The Department of Internal Affairs ('**DIA**') is active in this space, and if a complaint is made it is very likely to be investigated.



How we can help you

For more information contact

Hayley Miller
Partner
D +64 9 915 3366
M +64 21 870 477
E hayley.miller@dentons.com

FTA and CGA

- Draft or review your consumer contracts and terms of trade
- Draft or review your business-to-business contracts
- Review your marketing material
- Advise you on your obligations under the FTA and CGA
- Defend a claim for an alleged breach of the FTA
- Provide training on the CGA and FTA to avoid staff breaching it.

CCCFA

- Draft or review your credit contract terms, consumer leases or buy-back agreements
- Advise you on advertising requirements under the CCCFA
- Draft or review your disclosure statements to borrowers
- Register and enforce security interests
- Defend a claim for an alleged breach of the CCCFA
- Provide training on the CCCFA to avoid staff breaching it.

Privacy Act

- Advise you on how to safely hold, collect, store, use and disclose information
- Draft or review your Privacy Notices for New Zealand and Australian law; and GDPR
- Prepare templates and guidance on data audits and privacy impact assessments
- Prepare policies for various aspects of privacy compliance, for example, in relation to HR matters, front-line staff, breach protocols and procedures
- Assist you in responding to requests for information.

UEMA

- Advise you on whether your methods of obtaining consent to send commercial electronic messages are adequate for the purposes of the UEMA
- Prepare internal policies and provide training on the UEMA to avoid staff breaching it
- Assist you in responding to investigations by the DIA.

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Employment and Health & Safety Law in New Zealand

2021

Employment and Health & Safety Law in New Zealand

3 partners

10 professionals

Specialists in:

Occupational Safety and Health

Employment relations

Investigations

Collective bargaining

Dispute resolution

Ranked with:

TOP RANKED Chambers Asia-Pacific 2021 Dentons

The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"In demand for its depth of expertise in health and safety regulatory compliance, including dealing with investigations by regulatory bodies. Advises on various aspects of employment law, including restructurings, contractual issues and performance management, as well as having extensive litigation experience. Has a strong presence in the public sector and represents major New Zealand public sector employers. Active in post-employment restraint, including breach of confidentiality and settlement agreements. Growing practice in misconduct, bullying, pay equity and sexual harassment allegations. Represents multinational companies and offers noteworthy expertise in the construction industry."

Legal 500 Asia Pacific 2021

Key points about employment law in New Zealand

Employment relationships in New Zealand are structured around binding contracts negotiated and entered into between employers and employees, but with their terms and the legal framework extensively regulated by legislation.

The detail

The Employment Relations Act

The Employment Relations Act 2000 ('**the Act**') is the principal statute that governs all employment relationships and agreements. The key features of the Act are:

- the underlying duty of good faith, which is a crucial element of the employer/employee relationship, including bargaining for individual and collective employment agreements;
- unions have rights of access to workplaces in relation to union matters and workplace safety;
- employers must hold a copy of signed employment agreements, and maintain accurate and up-to-date wage and time records;
- minimum entitlements and standards must be included in employment agreements;
- certain categories of 'vulnerable employees' have special protections if an employer sells, transfers, or contracts out all or part of its business (which may include a right to transfer to a new employer);
- workers may request flexible working arrangements, and employers must consider requests in good faith; and
- all employees may raise a 'personal grievance' if they consider the employer has breached its obligations, and these can be pursued as legal claims.

There are a number of other statutes which contribute to the landscape of employment law, among which are the Minimum Wage Act 1983, the Human Rights Act 1993 (which contains laws against discrimination on a range of protected characteristics), the Holidays Act 2003 and the Health and Safety Work Act 2015.

TERMINATION

Generally, an employer cannot terminate employment except for cause, for example where the employee's position is redundant, or for poor performance or misconduct.

Any termination must be the act of a fair and reasonable employer, both substantively and procedurally. This generally requires employers to investigate any concerns, to raise concerns with the employee, and provide the employee an opportunity to respond (with a representative or support person present if they wish). The employer should genuinely consider the employee's response prior to making a decision.

An employee can terminate an employment relationship by resigning, provided that they give notice as required by their employment agreement.

REDUNDANCY

Restructuring the business may result in an employee being dismissed. Employers are entitled to make employees redundant as part of their right to manage their business as they see fit (provided they act fairly and reasonably).

DISPUTE RESOLUTION AND PERSONAL GRIEVANCES

Employees can raise a personal grievance against their employer on a number of grounds, including where they believe that they have been subject to an unjustified disadvantage, or if they have been unjustifiably dismissed.

The Act encourages employers and employees to attend mediation to resolve any disputes in the first instance. If unsuccessful at mediation, the parties can file proceedings in the Employment Relations Authority, which makes decisions based on the merits of a case. If a party is dissatisfied with an Authority determination, they can appeal to the Employment Court.

The Employment Relations Authority and the Employment Court can order a range of remedies, including reinstatement to the employee's former position, payment of lost wages, and compensation for injury to feelings or loss of another benefit. Reinstatement is the primary remedy under the Act, and so where an employee asks to be reinstated, the Authority or Court will respect that wish where practicable and reasonable to do so.

COLLECTIVE BARGAINING

The Employment Relations Act actively promotes collective bargaining, however individual agreements are permitted and are common outside traditionally unionised industries.

Unions have exclusive rights to represent their members in matters relating to the collective interests of the workers, including collective bargaining. In accordance with specific procedural requirements, unions may call employees out on strike to garner leverage during collective bargaining, or in relation to health and safety concerns.

Union membership is optional, and employees who are not members will remain on individual employment agreements.

Union members can also be employed on individual employment agreements, provided the terms are no less favourable than those of the collective agreement.

DISCRIMINATION

Employers have a number of obligations under the Human Rights Act 1993, including not to discriminate against employees on any of the following grounds:

- Sex
- Marital status
- Religious or ethical beliefs
- Race
- Ethnic or national origins
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation

Discrimination claims will commonly arise out of situation involving:

- Job applications
- The drafting of terms and conditions of employment
- The provision of training
- Promotions or transfers
- Termination of an employee's employment
- The retirement of an employee

INDEPENDENT CONTRACTORS IN NEW ZEALAND

Independent contractors are responsible for their own tax obligations and not entitled to the rights and protections provided to employees. However, the status of an independent contracting arrangement can be challenged, and it is the 'true nature' of the relationship rather than that which is ostensibly set out in any agreement which will be assessed by the courts. An employment relationship may be determined to exist for tax and entitlement purposes even if that was not intended by either party.

Key points about Health and Safety in New Zealand

The Health and Safety at Work Act 2015 ('**HSWA**'), imposes obligations on a range of people and entities in respect of work, workplaces, and people in or near places of work.

The business or other organisation that is doing the work is known as a PCBU.

The PCBUS and any other persons with management or control of a workplace (whether they are an employer or not), are primarily responsible for the health and safety of the workplace and those within it, or otherwise affected by the work.

Each PCBU must ensure, so far as is reasonably practicable, that the health and safety of workers, and others within the vicinity of the place of work, is not put at risk. PCBUs that exercise certain activities, for example, if they are involved in the design, manufacture or supply of plant, substances and structures, have further specific obligations in relation to those activities.

Further, individuals in senior governance and leadership positions with significant influence over the management of a PCBU have personal duties as officers. Officers must exercise due diligence to ensure that the PCBU complies with its health and safety duties described above. The extent of the officer's duty depends on the nature of the business, and the officer's position and responsibilities within it.

Workers have duties to take reasonable care for their own health and safety, the safety of others, and to comply with a PCBU's reasonable health and safety instructions, policies and procedures.

WorkSafe New Zealand is the New Zealand health and safety regulator. Failure to comply with duties under the HSWA is a criminal office, investigated by WorkSafe and prosecuted in the District Court. The Act provides strong penalty provisions, with fines of up to NZ$3million for companies, and up to NZ$600,000 and/or five years' imprisonment for individuals.

Accident compensation

New Zealand has a comprehensive no-fault system of compensation provided by the Accident Compensation Act 2001 ('**ACA**'). Those who suffer personal injuries are entitled to cover under the Act, regardless of whether the accident occurred in the workplace. However, they are barred from claiming damages arising from their injury. Most physical injuries are covered, however mental injuries are only covered in very limited circumstances. The bulk of benefits provided under ACA constitute payments for medical treatment and weekly compensation.

The scheme is administered by the Accident Compensation Corporation (**ACC**) and funded by levies paid by employers, employees, and self-employed people. Employers have two categories of obligations in respect of compensation:

1. The payment of levies into the work account in respect of every employee to cover the cost of work accidents; and
2. The payment of 80% of wages to the injured employee for the first week an employee has off work as a result of an accident.

The levies that an employer must pay depend on the category of work undertaken. The levy determined by ACC may be adjusted in light of an audit of a particular employer's safety management practices and the Accident Compensation (Earners' Levy) Regulations 2015. This is intended to promote good health and safety practices. ACC is required to consult the public before implementing any changes in rates and regulations, and before making any recommendations to the Government.

Deductions for tax, Accident Compensation premiums, and 'KiwiSaver'

Employers are required to deduct PAYE (Pay As You Earn) tax from employees' remuneration. This includes deductions for income tax and accident compensation premiums (representing employee contributions to fund ACC cover).

With limited exceptions, employers are also obliged to enrol employees into a compulsory pension savings scheme called 'KiwiSaver', and to make deductions from employee remuneration for that purpose as well as offering an employer contribution. Currently, employees must contribute a minimum of 3% of their salary or wages, with the employer also required to make a 3% contribution on top.

Other than the employer ACC levy, and the minimum employer contribution to KiwiSaver, New Zealand does not currently have any payroll or other employment tax which employers have to pay over and above an employee's salary and wages.

Employers must account for PAYE to the Inland Revenue Department. Failure to do so can attract penalties, and may amount to a criminal offence.

Independent Contractors in New Zealand

It is possible for individuals to be engaged as contractors rather than employees. Such individuals are recognised as being in business in their own right and having an arms-length relationship with those engaging them. Consequently they do not receive employment entitlements. For tax, ACC, levies, and holidays entitlements, it is important to accurately distinguish between employees and independent contractors.

The Act states that a written agreement is not necessarily conclusive in answering this question, however it indicates the intention of the parties. Those using contractors should bear in mind that if the status of the agreement is challenged, the Employment Relations Authority will look at the 'real nature' of the relationship.

Jurisdiction and overseas employers

Foreign companies may employ staff in New Zealand but are required to be registered on the Companies Office Overseas Register if they are carrying out business in New Zealand and intend on hiring employees for that purpose.

Overseas companies need to be aware that their activities in New Zealand could lead to classification as a permanent establishment, requiring them to meet business tax obligations on any income-earning activity.

Generally, employers may choose which law applies to any employment agreement. However, notwithstanding any different choice of law, employees who are based in New Zealand will generally be entitled to the minimum standards and benefits extended by domestic employment legislation.

It is the employer's responsibility to ensure that all of its employees are legally entitled to work in New Zealand. Employees who are not citizens or residents will generally need a work visa. Such visas may limit the type of work undertaken by the worker and the length of any work in New Zealand. Foreign employees are generally subject to the same employment laws and tax requirements as domestic staff.

Employment risks in a COVID world

Employers who manage a large number of seasonal staff, particularly those employers who offer staff accommodation need to be aware of their health and safety obligations to employees in light of the Covid pandemic. It is important that all employers remain prepared for operating at each Alert Level.

Further, a novel line of claims has arisen with regard to the approach taken with previous lockdowns. A recent decision by the Employment Court confirmed that essential service workers who did not work during the lockdown were not entitled to receive the minimum wage. However, this case could be appealed and there is continuing uncertainty as to employee's wage entitlements who could not work during the lockdown could be entitled to their full wages.

How we can help you

For more information contact

Charlotte Parkhill
Partner
D +64 9 914 7259
M +64 21 191 8881
E charlotte.parkhill@dentons.com

We have a large specialist employment law team with deep experience and expertise in assisting businesses at the point they are considering their first employee or contractor engagements in New Zealand, and then in supporting their actual set up. Please feel free to contact us to discuss your plans and how we can help.

大成 DENTONS KENSINGTON SWAN

Intellectual Property in New Zealand

2021

Intellectual Property in New Zealand

3 partners

8 professionals

Specialists in:

Brand Development and Protection

Enforcement of IP Rights and Dispute Resolution

Commercialisation and Licencing

Media and Entertainment

Social Media and Advertising

Copyright and Designs

Technology

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The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"The 'excellence of technical ability is evident' in the IP group at Dentons Kensington Swan 'but also its client service, ability to communicate and to understand the real world applications of trade marks'. The firm has one of the largest trade mark filing and prosecution practices of any full-service firm in New Zealand, though it also handles a diverse mix of a contentious and commercial IP matters for international companies making inbound investments and domestic companies expanding abroad."

Legal 500 Asia Pacific 2021

Key points about intellectual property in New Zealand

New Zealand has a strong and sophisticated system of registrable and unregisterable intellectual property ('IP') rights, governed by international agreements, statute and case law.

The Intellectual Property Office of New Zealand is responsible for the registration of certain types of intellectual property rights in New Zealand. It operates an online register of these rights and interests.

A number of unregistered IP rights are also recognised in New Zealand.

Can be registered in New Zealand

- Patents
- Trade marks
- Designs
- Plant variety rights
- Company names
- Domain names

Cannot be registered in New Zealand

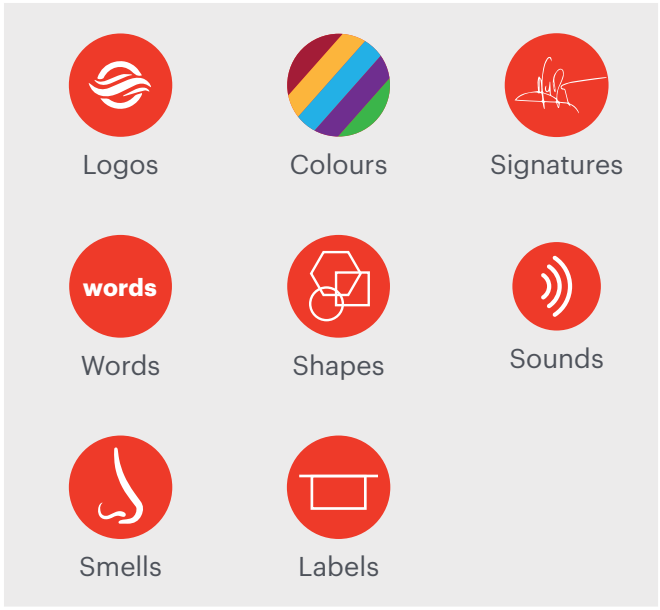
- Copyright
- Trade secrets and know how
- Unregistered trade marks
- Confidential information
- Printed circuit layout designs

The detail

Registered trade marks

A trade mark is a sign used to identify the goods and/or services of the owner. The best way to protect a trade mark in New Zealand is to register it. A trade mark registration gives the owner the exclusive right to use the mark for the registered goods and/or services.

Registered trade marks can include:



Trade marks can be registered for goods and services in 45 classes under the Trade Marks Act 2002. A trade mark registration lasts for 10 years from the date of application but can then be renewed every 10 years for an unlimited period (on payment of renewal fees).

Registration gives the trade mark owner the right to take action for trade mark infringement against others using the same or confusingly similar trade marks.

Once a trade mark is registered the owner can use the ® symbol next to it, to show it is registered.

Unregistered trade marks

Unregistered trade marks can be very valuable. The owner of an unregistered mark may be able to bring an action for passing off against competitors who have adopted a confusingly similar mark in trade, or are otherwise attempting to appropriate the goodwill of an established trade mark or get-up. Such actions can also be brought under the 'misleading or deceptive conduct' provisions of the Fair Trading Act 1986.

The owner of an unregistered trade mark can use the ™ symbol next to it, to show it is a trade mark.

Business/company names

Registering a company under a particular name in New Zealand does not prevent another party from using that name, but it does stop registration of an identical name by another company. Registering or reserving a company name does not provide a defence to trade mark infringement and does not give the company the right to use the name as a trade mark.

Confidential information

New Zealand law also protects secret processes, formulae, or other genuinely confidential business information from being used or disclosed if obtained in confidence and used or disclosed without the consent of the owner/provider of the information. If confidential information is to be disclosed to a third party, it is always recommended that a confidentiality agreement be signed before the information is disclosed.

Copyright

There is no registration system for copyright in New Zealand. An original work will automatically qualify for copyright protection once created.

Copyright protects certain original works, including:

- Written works
- Artistic works
- Musical works
- Works of sculpture
- Sound and video recordings
- Television broadcasts
- Cable broadcasts

New Zealand is party to many international agreements on copyright, which means that many copyright works created overseas are recognised in New Zealand, and many copyright works created in New Zealand are recognised in other countries.

In New Zealand, copyright protection for three dimensional product designs that could have been protected by design registration is available. For industrially applied works, protection lasts for 16 years (or 25 in some cases), depending on the nature of the work.

In addition to copyright protection, the appearance of an article can be protected by registering a new and original design.

Registered designs

Design rights protect the external appearance of an article (including its pattern or ornamentation) and give the owner the right to prevent others from making, importing, selling or hiring an article covered by the registered design. The best way to protect a design in New Zealand is to register it. To be capable of registration, the design must be new and not purely functional. Designs can be registered for up to 15 years.

Domain names

Businesses can register various New Zealand domain names including 'co.nz', '.kiwi', and '.nz'. There are no restrictions on the number of domain names a business can register.

The Domain Name Commission provides a dispute resolution service for 'cyber-squatting', which is similar to domain name dispute resolution services in other jurisdictions. The Courts have also protected businesses against cyber-squatting, on the basis of passing off and breach of the Fair Trading Act 1986.

Parallel importation

Importers can parallel import genuine goods, through unauthorised distribution channels, from foreign countries without infringing the copyright or trade mark rights of the New Zealand IP rights holder. Care must be taken in the use of copyright works and claims in the marketing of the goods.

It is illegal to import counterfeit goods, made without the owner's consent, into New Zealand.

Patents

Patents are available for new products, processes, and methods of manufacture. A granted patent gives the owner the exclusive right to stop others from using, selling or importing a patented invention. The maximum term of a patent is 20 years.

To be able to register a patent in New Zealand, the invention must:

- Be new (not known or used anywhere in the world);
- Contain an inventive step; and
- Have an industrial application.

If an invention does not meet these criteria, it is not usually patentable. It is important not to publicly disclose a new invention before seeking patent protection for it.

How we can help you

For more information contact

Jenni Rutter
Partner
D +64 9 914 7251
M +64 21 225 9474
E jenni.rutter@dentons.com

- Registering your intellectual property (including trade marks, designs, plant variety rights, company names and patents).
- Enforcing your intellectual property rights against others.
- Auditing your IP to make sure there are no gaps in your protection.
- Lodging Customs Notices to help prevent counterfeit goods entering the market.
- Drafting confidentiality and intellectual property agreements for you.

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Corporate insolvency law in New Zealand

2021

Corporate insolvency law in New Zealand

3 partners

5 professionals

Specialists in:

Receiverships

Administrations

Liquidations

Restructuring solutions

Creditors' compromises

Debt recovery

Securities enforcement

Priority disputes

Advice on director liability

Voidable transactions

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IFLR 1000 RECOMMENDED FIRM 30th EDITION

The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"The team took the time to understand all of the complexities of the situation. They asked the "right" questions to unearth important information that wasn't initially provided. With their experience and expertise, they were able to help us come up with solutions that we wouldn't have come to on our own or with any other legal team."

"They came across as genuinely wanting to help us achieve the desired outcome and this made us feel very supported during such a difficult time. They were compassionate with us but had "teeth" when it came to executing on instructions. They were clear experts in their respective areas of the law and this was brought to bear with us achieving an overwhelmingly positive outcome."

Legal 500 Asia Pacific 2021

Key points about corporate insolvency law in New Zealand

There are three key procedures which are used in corporate restructurings and insolvencies in New Zealand:

- Liquidation
- Receivership
- Voluntary administration

Other options available in New Zealand include formal and informal compromises and business debt hibernation. In rare circumstances, statutory management may also be appropriate.

The detail

Liquidation

A liquidator is appointed to wind up the affairs of a company. The principal duty of a liquidator is to take possession of, protect, realise, and distribute the assets (or their proceeds) of the company to its creditors and to distribute any remaining surplus to the company's shareholders or whomever else is entitled to such surplus.

The process of liquidation is governed by Part 16 of the Companies Act 1993. A liquidator can be appointed by the High Court, by special resolution of shareholders, by a resolution of directors upon the occurrence of an event specified in the company's constitution, or by resolution of the creditors passed at the watershed meeting. Once a company is in liquidation, an unsecured creditor cannot, without the permission of either the court or the liquidator, start or continue any legal proceedings against the company or its property, or start or continue to enforce rights against the property of the company.

Liquidation does not prevent secured creditors from exercising their rights, although certain preferential creditors are paid before general security holders from the proceeds of inventory and accounts receivable.

A liquidator will investigate the affairs of the company (to the extent that funding allows) and may bring claims for the purpose of recovering additional funds to increase the overall dividend to creditors. The liquidator must give regular reports to every known creditor, shareholder, and to the Registrar of Companies. A liquidation is complete when the liquidator sends a final report and various other documents to all creditors, shareholders and the Registrar of Companies.

Receivership

Receivership is the appointment of a receiver under the terms of a security agreement to manage or realise secured assets for the benefit of the security holder that appointed the receiver. In some circumstances, receivers can also be appointed by the Court.

The legislation governing receiverships in New Zealand is the Receiverships Act 1993. In a private receivership, assets are realised by the receiver for the benefit of the secured creditor who made the appointment of the receiver, but certain preferential creditors are paid before general security holders from the proceeds of inventory and accounts receivable. A receiver is required to give public notice of their appointment and must provide reports during and at the end of the receivership.

Voluntary administration

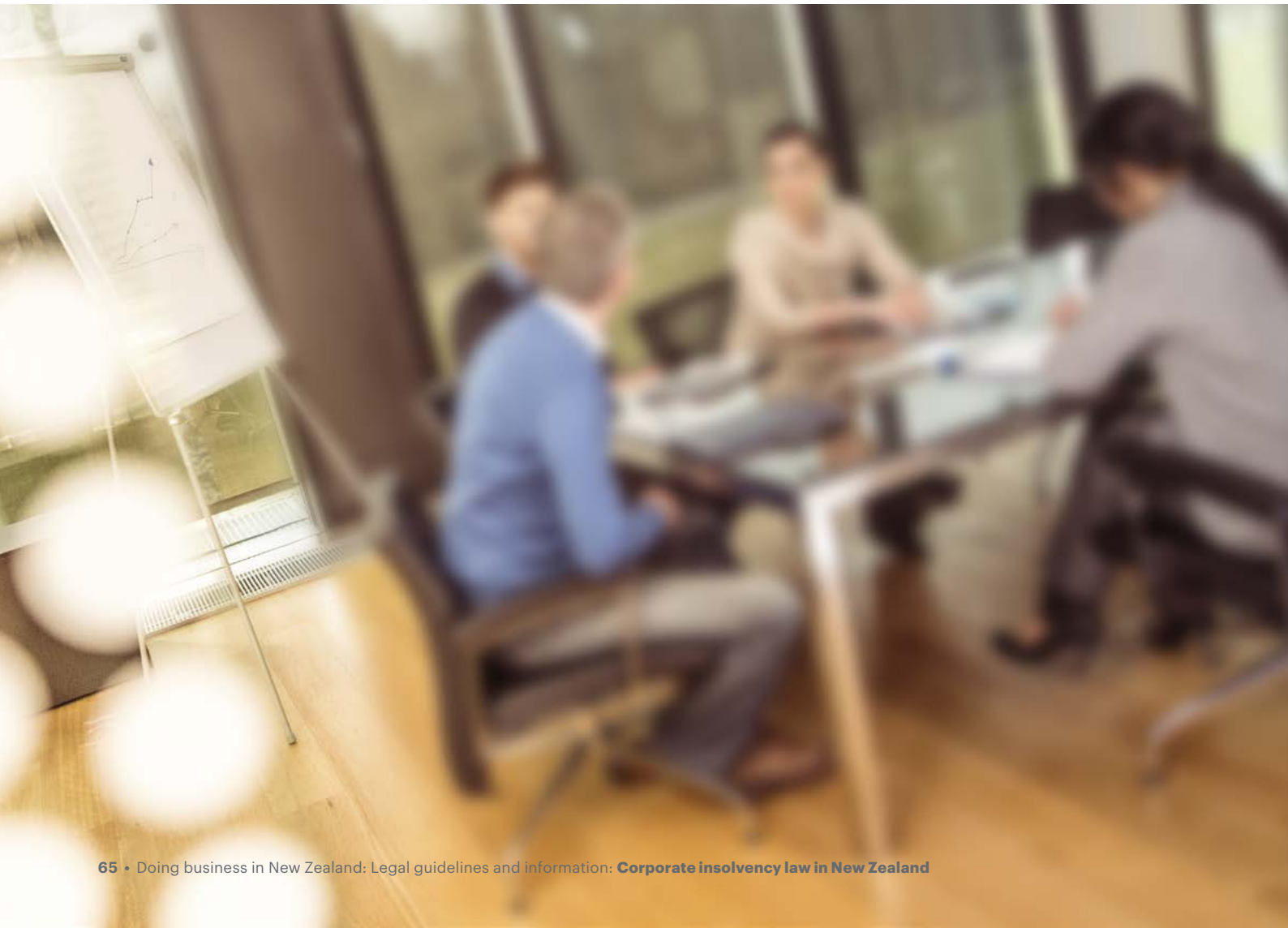
Voluntary administration involves the appointment of an administrator to assess a company's affairs and options going forward.

Voluntary administration is governed by Part 15A of the Companies Act 1993. The objective of voluntary administration is to provide for the affairs of an insolvent company, or one that may become insolvent, to be administered in a way that:

- maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- if it is not possible for the company or its business to continue in existence, would result in a better return for the company's creditors than would result from an immediate liquidation.

An administrator may be appointed by the Court, a liquidator (if the company is in liquidation), the company's directors, or a secured creditor holding a charge over the whole, or substantially the whole, of the company's property. If a company is in liquidation, the appointment of an administrator will suspend the liquidation. The appointment of an administrator does not remove a receiver from office.

Once an administrator has been appointed, a moratorium comes into force, preventing anyone from bringing or continuing proceedings against the company or enforcement processes in relation to the company's property without the administrator's consent or court permission (with some exceptions). This is to give the company breathing space to allow the administrator time to assess whether the company should enter into a deed of company arrangement (an agreement setting out how the company will be run and how it will pay creditors), be placed into liquidation, or come out of administration.



How we can help you

For more information contact

James McMillan
Partner
D +64 9 375 1154
M +64 27 432 2570
E james.mcmillan.nz@dentons.com

Our team are specialists in all areas of restructuring and insolvency, including:

- Acting for insolvency practitioners in relation to all aspects of their appointments, including advising on priority disputes and PPSA issues.
- Acting for creditors in relation to claims and other matters.
- Acting for directors and business owners on liability issues.
- Advising foreign creditors and foreign insolvency practitioners on cross-border insolvency issues, and assisting them with recovery of assets in New Zealand.

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Financial markets in New Zealand

2021

Financial markets

3 partners

12 professionals

Specialists in:

Managed Funds and Financial Products

Insurance

Financial Advice

Licensing and Regulation

Fintech

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IFLR 1000 RECOMMENDED FIRM 30th EDITION

The LEGAL 500 ASIA PACIFIC RECOMMENDED CHAMBERS 2021

"Dentons Kensington Swan 'provides excellent technical legal advice, while being commercially pragmatic'. The firm has a strong domestic and trans-Tasman client base, which includes large and boutique funds. It has also been closely involved in Financial Markets Conduct Act reforms, notably the proposed Financial Markets Services Legislation Amendment, and it frequently assists clients with innovative projects in the emerging fintech market. A significant proportion of the firm's work stems from Australia and other offshore markets."

Legal 500 Asia Pacific 2021

Key points about financial markets and services in New Zealand

- The Financial Markets Conduct Act 2013 ('FMCA') and its regulations are the primary pieces of law regulating the offering of, and dealing in, financial products and financial services (including financial advice from March 2021) in New Zealand.
- A license from the Financial Markets Authority ('FMA') is required for offering certain financial products, and for providing some types of financial advice to retail clients.
- Unless an exclusion or exemption applies, there are numerous disclosure obligations and fair dealing obligations in the FMCA that all offerors of financial products and services must comply with.
- From 15 March 2021, the Financial Services Legislation Amendment Act 2019 ('FSLAA') will introduce a new regulatory and licensing regime into the FMCA for the provision of financial advice and broking services, which will replace the existing Financial Advisers Act 2008. Under the new regime, all persons providing regulated financial advice must comply with statutory conduct duties, with additional duties and licensing obligations for financial advice providers.
- Persons providing financial services and having a place of business in New Zealand will usually need to be registered on the Financial Service Providers Register ('FSPR') in accordance with the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ('FSPA'). Those dealing with retail clients will also generally need to join an approved dispute resolution scheme. Financial advice for retail clients in New Zealand can only be provided by persons who are registered to do so on the FSPR, and from 15 March 2021 can only be provided by persons licensed to do so under the FMCA.

The detail

Regulation of financial product offerings

A financial product is an equity security, a debt security, a managed investment product, or a derivative. These terms cover the offer of traditional investment products such as shares, bonds, investment syndicates, investment funds, and superannuation/KiwiSaver schemes.

The rules are designed to ensure that retail investors are given sufficient information to make informed investment decisions, and have protections around governance (particularly for managed investment products).

Who must be licensed under the FMCA?

- managed investment scheme managers
- derivatives issuers
- discretionary investment management service (DIMS) providers who offer their products or services to retail investors
- (from 15 March 2021) providers of regulated financial advice.

The licensing process is administered by the FMA. It involves a thorough and detailed assessment of the provider's business and systems as well as the capability and suitability of its directors and senior management.

Exceptions to licensing under the FMCA are precisely defined and include:

- offers to various categories of wholesale investors and wholesale clients
- offers through licensed intermediaries (which includes crowdfunding platforms and peer-to-peer lending providers)
- employee share purchase schemes and 'small' offers
- offers of financial products of a same class as a quoted financial product.

There are a number of more specific exemptions to licensing, such as for registered banks and for some incidental offers in New Zealand by overseas listed companies.

Product disclosure statements

Regulated offers of financial products must be made by way of a product disclosure statement ('PDS') which complies with the FMCA and its regulations. The PDS must be provided to each investor and lodged online with the Registrar of Financial Service Providers before the regulated offer can be made.

Restrictions on the content of a PDS, as well as general representations and advertisements relating to financial products, include prohibitions on:

- false or misleading conduct
- making unsubstantiated representations
- offering financial products in unsolicited meetings or telephone calls.

In addition, the Registrar must be supplied with all required information and documents for the online register of financial product offers. The regulations prescribe the information and reports which must be provided in those documents, including historical and in some cases prospective financial information.

Any issuer of a regulated product is required to keep accounting records and have annual financial statements, which must be lodged with the Registrar and audited by a qualified auditor.

Secondary markets for financial products

The PDS regime does not normally apply to the secondary markets for financial products (i.e. financial products that have previously been allotted), although there are some exceptions to this, such as where the original allotment was made for the purpose of a subsequent offer that is made within 12 months.

Dealings in financial products in the secondary markets require:

- the licensing of financial product markets (i.e. exchanges), and their supervision and regulation by the FMA
- the making of conduct rules for licensed markets operated by licensed market operators
- the continuous disclosure of material information by listed entities
- the continuous disclosure of substantial holdings (5% or more) and movements (of 1% or more) in listed entities
- the continuous disclosure of directors' and senior managers' dealings and 'relevant interests' in listed entities, irrespective of size
- prohibitions on, and remedies for, insider trading in quoted financial products issued by listed entities
- a market manipulation regime, which includes a prohibition on practices which give a false or misleading appearance with respect to the extent of active trading in, or the supply, demand, price, or value of, financial products traded on a licensed market
- rules relating to the trading of derivatives.

Regulation of financial services and financial advice

The relevant provisions of the FMCA have extraterritorial effect and cover services or advice provided from outside New Zealand into New Zealand.

The provision of 'financial services' is usually limited to financial service providers that are registered on the FSPR. A financial service includes (but is not limited to) any financial adviser service, brokering service, being a registered bank, acting as issuer or supervisor or regulated products, acting as an insurer, acting as a custodian, or being a licensed non-bank deposit taker. To be registered, a provider needs to participate in an approved dispute resolution scheme (if it provides services to retail clients), and must not be disqualified from registration.

Providers of financial services face disqualification from registration if a controlling owner, director, or senior manager:

- is an undischarged bankrupt
- is subject to a management banning order
- has been convicted of certain offences
- has convictions or banning orders under overseas law.

The FSPR is a publicly searchable electronic register.

Registration on the FSPR is generally only possible when the financial service provider is resident in New Zealand or has a place of business in New Zealand.

Registration can be stopped where the registration has, will have, or is likely to have, the effect of creating a false or misleading appearance of the extent of financial services provided in or from New Zealand, or of the extent of regulation by New Zealand law. An existing registered provider can be deregistered in the same circumstances.

From 15 March 2021 any person or entity providing financial advice to retail clients must be licensed by the FMA as a financial advice provider. A provider may give advice itself or through a financial adviser or a nominated representative. There is a two year transitional period from March 2020 under which a provider can continue to operate with a transitional licence, prior to requiring a full licence under the new regime.

Financial advice providers are required to make upfront disclosure of information to clients, especially about fees and remuneration.

Specific duties that apply to all persons providing regulated financial advice include:

- giving priority to clients' interests if there is a conflict between the interests of the client and the interests of the person giving the advice
- exercising the care, diligence, and skill that a prudent person engaged in the profession of giving regulated financial advice would exercise in the same circumstances
- not recommending that an individual acquire a financial product that contravenes the FMCA or its regulations
- making prescribed information available when required to do so by the regulations
- not making information available where it contains false or misleading statements.

Financial advice providers who have engaged advisers or nominated representatives face additional duties, including to:

- take all reasonable steps to ensure that all persons engaged to provide financial advice on the provider's behalf comply with the conduct duties
- implement processes and controls to, amongst other restrictions, limit the nature and scope of the advice given.

In each case, limited conditional exemptions are available for offshore-based providers.

Anti-money laundering and countering financing of terrorism ('AML/CFT').

Financial service providers operating in New Zealand also need to be aware of their obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

The AML/CFT regime requires overseas entities engaged in business in New Zealand to:

- undertake and prepare a written risk assessment of the risk of money laundering and the financing of terrorism that it may reasonably expect to face in the course of its business
- establish, implement, and maintain an AML/CFT compliance programme under the administration of a dedicated compliance officer
- have the risk assessment and compliance programme audited at least every two years
- carry out various levels of customer monitoring and due diligence, identity verification, and suspicious activity and prescribed transaction reporting.

Conduct of financial institutions regime

Following extensive conduct and culture reviews by the FMA and the Reserve Bank of New Zealand, the New Zealand government is currently working towards implementing a conduct licensing regime (though amendments to the FMCA), with a particular focus on banks, insurers, and licensed non-bank deposit takers. A range of duties will likely apply to financial institutions under the regime, including to obtain a conduct license, develop and comply with a fair conduct programme, and ensure relevant intermediaries comply with conduct obligations. Initial consultation on the proposals occurred in 2019 and 2020, although implementation is not expected until at least 2021.

How we can help you

For more information contact

Catriona Grover
Partner
D +64 4 498 0816
M +64 21 775 330
E catriona.grover@dentons.com

Assisting with capital raisings, restructuring of capital holdings, dealing in financial products (including substantial product holder notification obligations), and wholesale investor validations.

Assisting fund managers with licensing and regulatory compliance and conduct obligations, product development, governing documents, outsourcing, ISDA arrangements, institutional investment arrangements, product administration, and disclosure.

Advising on regulatory reforms and compliance obligations for financial adviser services, including discretionary investment management services.

Advising both established providers and new entrants on the design, implementation, and regulation of new FinTech products and services, including crowd funding platforms, robo-advice services, integration of technology into the offer and administration of financial products and services, and other disruptive technologies.

Advising on prudential supervision and regulatory compliance obligations, as well as policy drafting, administration, and marketing.

Acting for supervisors of investment funds and proportionate ownership scheme offerings, and advising on custodial and corporate trustee arrangements.

Advising on AML/CFT obligations, including risk assessments, compliance programmes, suspicious transaction/activity reports, customer due diligence and identity verification requirements, and regulator inquiries.

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Banking and Finance in New Zealand

2021

Banking and Finance in New Zealand

1 partner

3 professionals

Specialists in:

Acquisition Financing
Trade and Receivables
Retirement Village Financing
Project Financing
Property Financing
Securitisations
Regulatory
Syndicated
Financial Product Development
Debt Capital Markets
Structured finance

Ranked with:

The Legal 500 Asia Pacific Recommended Chambers 2021

TOP RANKED Chambers Asia-Pacific 2021 Dentons

"Extensive experience in structured finance arrangements and corporate finance transactions. Acts for a broad client base of major New Zealand and Chinese banks, as well as other lenders active across the region."

Chambers Asia Pacific 2021

Key points about Banking and Finance in New Zealand

- The Reserve Bank of New Zealand ('Reserve Bank') is New Zealand's central bank.
- Banks operating in New Zealand must be registered with the Reserve Bank.
- Certain non-bank deposit takers ('NBDTs') operating in New Zealand must be licensed by the Reserve Bank.

The detail

Reserve Bank of New Zealand

The banking industry in New Zealand is prudentially supervised by the Reserve Bank. The Reserve Bank's powers are set out in the Reserve Bank of New Zealand Act 1989 (the 'Act'). In general, the Reserve Bank:

- formulates and implements monetary policy to maintain price stability and support sustainable employment;
- promotes the maintenance of a sound and efficient financial system; and
- supplies and manages the New Zealand currency.

Fundamental to the Reserve Bank's roles are managing the registration and prudential supervision of banks, and monitoring the financial system with the intention of preventing, or mitigating the consequences of, institutional distress or failure.

Bank registration

All banks operating in New Zealand must be registered with the Reserve Bank. There are currently 27 registered banks in New Zealand, most of which are subsidiaries or branches of overseas-incorporated banks.

Only an entity whose business substantially consists of borrowing or lending money, or the provision of financial services, may be registered as a bank in New Zealand. In general, for registration, the Reserve Bank will have regard for:

- Qualitative criteria: the applicant's financial standing and its ability to prudently manage its business; and
- Quantitative criteria: evidence of the applicant's ability to meet the qualitative criteria, and of its ability to consistently carry on business in a prudent manner on an ongoing basis following registration.

In addition, applicants that are incorporated overseas are required to have the approval of their home supervisor to conduct banking business in New Zealand. The applicant must also meet the prudential requirements imposed on it by its overseas home supervisor.

Any person or entity carrying on any activity in New Zealand and that includes 'Bank', 'Banker', or 'Banking' in its name must be a registered bank or authorised to use that name by the Reserve Bank or otherwise exempt under the Act.

Non-bank deposit takers

An NBDT is an entity which is not a registered bank but which offers debt securities (a deposit-taker) and carries on the business of borrowing and lending money, or providing financial services, or both.

NBDTs are prudentially regulated by the Reserve Bank under the Non-bank Deposit Takers Act 2013 ('NBDT Act') and associated regulations.

In general, the NBDT Act requires every NBDT which makes a regulated offer of debt securities to retail investors to be licensed. If a licence is granted, it may be subject to conditions imposed by the Reserve Bank.

How we can help you

For more information contact

Liz Lim
Partner
D +64 9 909 6341
M +64 21 190 2909
E liz.lim@dentons.com

We represent some of the largest financial institutions and corporate trustees in New Zealand and globally on matters including:

- Corporate financing, including acquisition finance, property development, trade finance, and receivables financings
- Asset and asset based financing
- Specialist retirement village development financing
- Debt capital markets
- Financial services regulatory advice
- Consumer finance and PPSA advice
- New product structuring and development, including assisting major NZ and international banks with developing corporate finance, transactional banking, trade finance, receivables financing products
- Structured finance arrangements including securitisations
- Restructuring.

大成DENTONS KENSINGTON SWAN

Superannuation in New Zealand

2021

Superannuation in New Zealand

2 partners

8 professionals

Specialists in:

KiwiSaver

Superannuation Schemes

Workplace Savings Schemes

Ranked with:

The Legal 500 Asia Pacific Recommended Chambers 2021

TOP RANKED Chambers Asia-Pacific 2021 Dentons

"Highly recommended team with expertise in managed funds, superannuation and advising offshore funds in relation to New Zealand investments."

Chambers Asia Pacific 2021

Key points about superannuation in New Zealand

- A government-funded superannuation entitlement is available to most persons living in New Zealand provided they meet the eligibility requirements below.
- Individuals can choose to supplement their entitlement through private superannuation schemes and/or voluntary retirement savings scheme KiwiSaver
- If an employee is contributing to their KiwiSaver scheme, their employer is required to contribute at least 3% of the employee's gross salary or wages.

The detail

Government-funded superannuation

To meet the main requirements to receive a government-funded superannuation entitlement, an applicant must:

- **65** be 65 years of age or over
- be a New Zealand citizen, permanent resident or hold a residence class visa
- be ordinarily a resident in New Zealand at the time of the application
- **10** have resided in New Zealand for 10 years or more (subject to offset against any foreign pension entitlements) since attaining the age of 20 years[1]
- **5** have resided in New Zealand, the Cook Islands, Niue or Tokelau for 5 years or more since attaining the age of 50 years.

A separate fund, the New Zealand Superannuation Fund, assists funding the pension obligation through Government contributions. The fund is managed and administered by a Crown entity known as the Guardians of New Zealand Superannuation.

Private superannuation

At present, there is no compulsory scheme for retirement savings in New Zealand.

Some employers establish or support staff superannuation schemes to provide retirement benefits to their employees. Employees who are not members of such schemes are able to make their own provision for retirement through a myriad of private savings products and retail superannuation schemes.

To offer a private scheme to retail clients the scheme must be registered with the Financial Markets Authority.

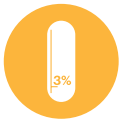
KiwiSaver

KiwiSaver is a voluntary retirement savings regime.

The scheme involves the automatic enrolment of new employees in one of a limited number of approved schemes (called 'default schemes'), with an ability for those employees to 'opt out' within a limited period following commencement of their new employment, and the ability for existing employees and others to 'opt in'.

Anyone eligible to join KiwiSaver is entitled to join any one of a number of KiwiSaver schemes by making an active choice of scheme, including a default scheme.

Employees who are KiwiSaver members currently have to contribute at least 3% of gross salary or wages, but may contribute more at 4%, 6%, 8%, or 10% levels.



Employers are currently required to make a minimum contribution of 3% of gross salary or wages for each of their employees who are KiwiSaver members.

KiwiSaver members who are not employees do not have any fixed level of required contribution.

Savings are generally locked in to KiwiSaver until the member reaches 65 years of age. KiwiSaver members are generally free to move their savings from one KiwiSaver scheme to another at any time, but may only be a member of one scheme at a time.

Contributions and investment returns are taxed but retirement income is not.

[1]The New Zealand Superannuation and Retirement Income (Fair Residency) Amendment Bill 2018 is currently in the process of Select Committee. If passed into law, this will raise the residency requirement from 10 years to 20 years.

How we can help you

For more information contact

Catriona Grover
Partner
D +64 4 498 0816
M +64 21 775 330
E catriona.grover@dentons.com

Dentons Kensington Swan's Banking and Financial Markets team has extensive experience in all aspects concerning superannuation and KiwiSaver schemes in New Zealand. We are committed to providing practical advice to assist your business in relation to any of the above schemes.

We can advise both trustees and administrators of workplace savings schemes and managers of KiwiSaver schemes on:

- regulatory compliance obligations
- scheme administration
- disclosure issues.

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Immigrating to New Zealand

2021

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"They provide pragmatic, solutions-focused advice. They have taken the time to understand my business, so they are able to partner with me to achieve outcomes."

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COVID-19

Due to COVID-19, the New Zealand **borders are currently closed** to people who are not New Zealand citizens or residents unless an exemption applies. The **exemption categories are limited** to critical workers, critical purpose visitor visa's, essential health workers, partnership of temporary visa holders and for people in exceptional humanitarian circumstances.

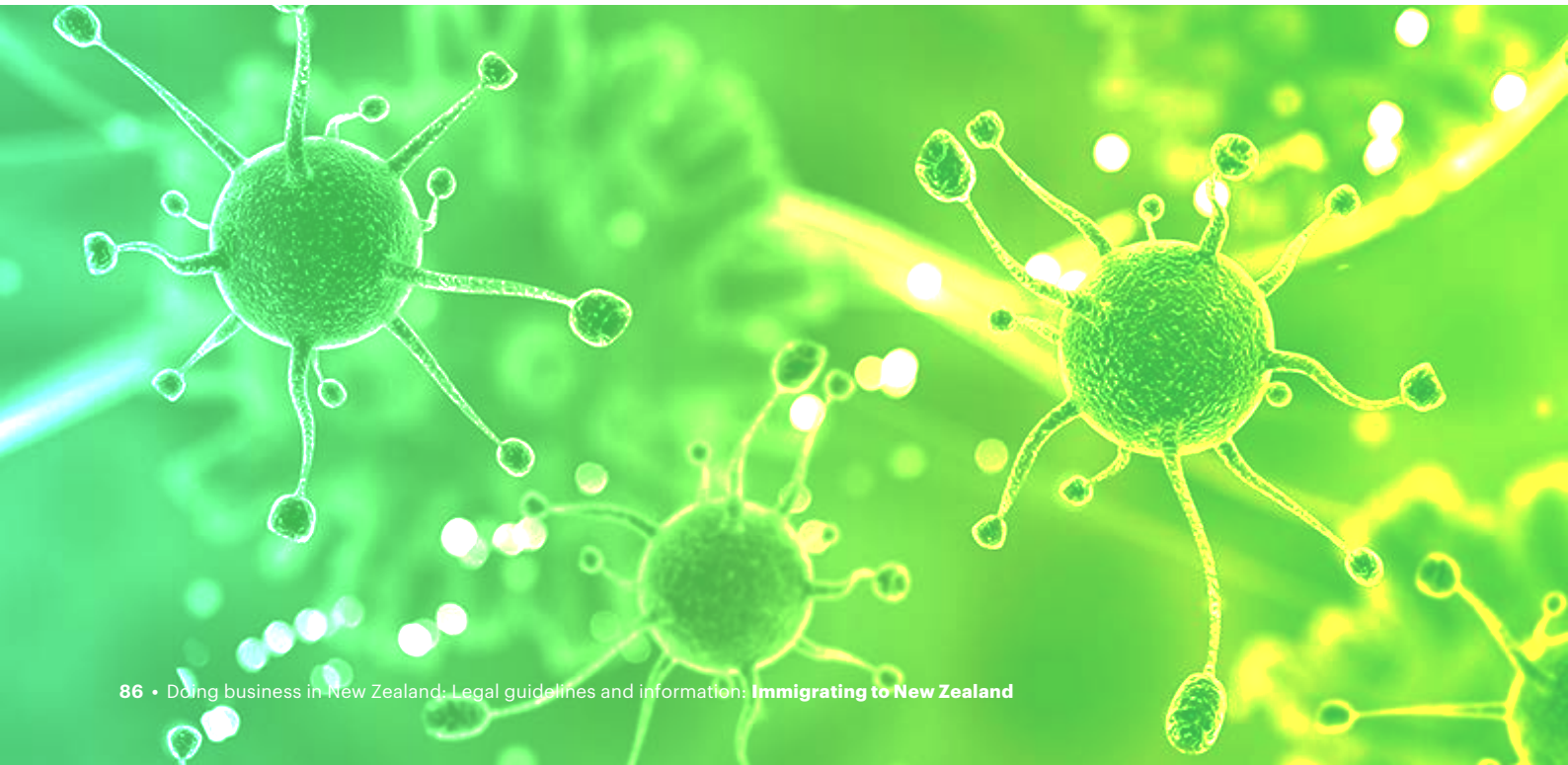
Critical worker exemptions

Requests for critical workers must be made by employers, not individual workers. There are three categories of critical worker visas: workers needed for a short term role (less than six months); workers needed for a long term role (more than six months); and workers for an approved class. Each category have a different set of criteria which must be met for an exemption to be granted.

Entering New Zealand

If you successfully obtain a border exemption, you must legally complete at least 14 days of managed isolation or quarantine. This must be booked before your departure to New Zealand. You will be tested for COVID-19 during your stay and depending on where you travel from, you may be required to be tested for COVID-19 before departing to New Zealand.

The requirements for travel into New Zealand are changing often. Please check the INZ website for up to date information (https://www.immigration.govt.nz). Note that the information outlined below is subject to you obtaining a border exemption as most visas have been suspended temporarily.



Key information to know about moving to New Zealand

New Zealand welcomes new migrants, with priority given to people who will contribute to the country by bringing valuable skills or qualifications, setting up a business, or making a financial investment.

There are also opportunities for family reunification by allowing residents and citizens to sponsor family members for residence. Anyone who is not a New Zealand resident or Australian national needs a visa to come to New Zealand.

If you are looking to set up a business in New Zealand, recruit from overseas, or move to, and work in New Zealand, your decision will be governed by immigration laws and policies.

The detail

Studying in New Zealand

If you are planning on studying full-time in New Zealand for **more than three months**, you will need a student visa. You are entitled to study in New Zealand for **up to four years**, provided you have an offer from an **approved education provider or student exchange scheme**.

Working in New Zealand temporarily

ESSENTIAL SKILLS WORK VISA*

This category of temporary work visa gives a New Zealand employer the flexibility to **fill a 'skilled' vacancy for a period of time** where it **has not been able to find local employees** available to do the work. A work visa under this category does **not** include a pathway to residency.

The pay level or salary of the occupation will determine the duration of the visa with the **minimum duration being six months and the maximum duration being three years.**

In addition to meeting **health and good character requirements**, the individual will need to be **suitably qualified** for the position.

SPECIFIC PURPOSE OR EVENT CATEGORY

Employers are able to recruit business people who are coming to New Zealand for a **specific purpose or event**, including business people, such as senior or specialist business people, on short term intra-group secondments who have a job offer either in a substantial New Zealand business or a New Zealand subsidiary of an overseas business.

This category of work visa is particularly useful when there is an **urgent need for an employee** of a multinational group to carry out work in New Zealand on a particular project. However, there are specific criteria that the employee must satisfy in terms of their **seniority and/or specialist knowledge of the employer's business**.

WORKING HOLIDAY

If an individual is aged between **18 and 35 years**, they may be eligible to experience life in New Zealand on a working holiday.

SEASONAL WORK IN THE HORTICULTURE AND VITICULTURE INDUSTRIES

New Zealand has several different policies for people who want to do seasonal work including planting, maintaining, harvesting, or packing crops in the horticulture and viticulture industries.

NATIONALS OF CHINA, VIETNAM AND THE PHILIPPINES

There are special visa categories for nationals from China, Vietnam, and the Philippines who are qualified and experienced in specific occupation and have a New Zealand job offer in that occupation.

**From 1 November 2021, the Essential Skills Work Visa, Talent (Accredited Employer) Work Visa, Long Term Skill Shortage Work Visa and the Silver Fern Job Search and Practical Experience Visa will be replaced by the new employer-led Accredited Employer Work Visa (AEWV). The AEWV application process will introduce three 'checks' which must be passed for a migrant worker to be employed. These checks are the employer check, the job check and the migrant worker check. To pass the employer check, all employers wishing to hire a migrant under the AEWV will need to be accredited. Employers will require either standard or high-volume accreditation, which will depend on the number of migrant workers the employer wishes to have on AEWV's at any one time. Further information regarding the latter checks is expected over the coming months.*

Work to live permanently in New Zealand

There are a number of options available to people who wish to live and work in New Zealand permanently.

SKILLED MIGRANT VISA

The Skilled Migrant category is for people who have the skills, qualifications, and experience New Zealand needs and who want to live and work permanently in New Zealand.

The system is points-based, allowing potential employees aged 55 years and under, and with reasonable English speaking ability, to claim points based on their skill level, work experience and qualifications.

WORK TO RESIDENCE*

An applicant, aged 55 and under, may be eligible to apply for a work visa for up to 30 months under the Long Term Skill Shortage List Work category. The Long Term Skill Shortage List can be found on Immigration New Zealand's website. Once the applicant has worked for two years in New Zealand in an occupation that is on the List, they may apply for residence.

If the occupation is not on the Long Term Skill Shortage List, the applicant may be able to apply for a work visa for up to 30 months under the Talent (Accredited Employers) Work category. When the employee has worked in New Zealand for two years for an Accredited Employer, the applicant can apply for residence.

Employer Accreditation allows certain employers who have been 'approved' by Immigration New Zealand to recruit migrant workers without first proving that no New Zealanders are able to fill the position. Overseas workers are then able to apply for work visas under the Talent (Accredited) Employers Work Policy. There are strict conditions governing how an employer gains accreditation, and the minimum terms and conditions of employment that may be offered to an employee under this category.

EMPLOYEE OF A RELOCATING BUSINESS

If you're a key employee of a business that is relocating its operations to New Zealand, you can apply for a work visa, and later a resident visa under the Employee of a Relocating Company category.

Entrepreneur Work Visa

This visa is available if you intend to **buy or establish a business in New Zealand**, and be **actively involved** in that business. You must meet certain requirements, including making a **minimum capital investment of NZ$100,000**, and providing a **detailed and credible business plan**.

Investor Category Visas

People wishing to make **large investments in a business in New Zealand** can apply for residence under one of two Investor Categories. Applicants may include their partners and dependent children (aged 24 and under) in their applications.

Investor Plus (Investor 1 Category):

- For migrants investing at least **NZ$10 million** in New Zealand in 'acceptable investments' for a period of three years. Applicants must reside in New Zealand for at least 44 days in each of the last two years of the three year period. Applicants who invest 25% of their investment in growth investments only need to spend a minimum of 88 days over three years.
- Applicants must also meet Immigration New Zealand's health and character requirements, but there is no requirement for the applicant to be able to understand or speak English.

Investor (Investor 2 Category):

- For migrants investing at least **NZ$3 million** in New Zealand in 'acceptable investments' for four years
- To qualify, the principal applicant must be under 65 years of age, have at least three years' business experience, and will be required to meet the English speaking requirements set out under Immigration New Zealand's instructions. Applicants are required to spend 146 days per year in New Zealand, or 438 days at any time over the four year investment period if they have invested a minimum of NZ$750,000 in growth investments. Applicants must also meet Immigration New Zealand's health and character requirements.

Holders of either category of visa may live, work and study in New Zealand. They may also apply for permanent residency, if all the visa conditions are met.

Temporary retirement

If you are **66 years of age or over**, you may wish to retire temporarily in New Zealand.The Temporary Retirement Visa is for two years (renewable for further periods provided you continue to meet relevant criteria). You will need to invest NZ$750,000 in New Zealand for a period of two years (investment criteria apply), show that you have NZ$500,000 of maintenance funds as well as an annual income of NZ$60,000. You will also need to meet standard health and character requirements, and hold comprehensive travel and/or health insurance for the duration of your stay.

Family categories

Many people already settled in New Zealand wish to have their close family join them. Further, family members may wish to come to New Zealand to be close to their relatives. There is a range of family policies facilitating partners, dependent children, parents, siblings, or adult children of New Zealand citizens or residents to come to live in New Zealand.

For more information contact

Henry Brandts-Giesen
Partner
D +64 9 375 1109
M +64 21 532 770
E henry.giesen@dentons.com

How we can help you

It is important that you only seek immigration advice from those who are legally able to provide it pursuant to the Immigration Advisers Licensing Act 2007. Our experienced immigration team are able to provide further guidance to the above summary. Please get in contact if you want to hire migrant workers, apply for a visa yourself, or apply for residency. Additionally, further information is available on the Immigration New Zealand website (www.immigration.govt.nz).

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Buying property in New Zealand

2021

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Commercial property and development

Overseas Investment

Construction

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The Legal 500 Asia Pacific Recommended Chambers 2021

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"Prominent practice with experience across the commercial property space, highlighted for its impressive public sector work and its work with the New Zealand government. Adept at representing investment funds and educational institutions on a range of real estate matters, including property acquisitions and building projects. Attracts a substantial amount of cross-border work through China and other markets in the Asia-Pacific region."

Chambers Asia Pacific 2021

Key points about buying property in New Zealand

- All titles in New Zealand are registered at Land Information New Zealand ('LINZ'), and their accuracy is guaranteed by the government.
- When purchasing property, it is common to use a standard form base contract customised for the particular property.
- Agreements for sale and purchase of property are usually conditional on the purchaser carrying out a due diligence investigation and being satisfied with the property after that investigation.
- Overseas investors (or New Zealand entities with at least 25% overseas control) will be subject to restrictions on acquiring land in New Zealand.
- Investors need to be aware of certain rules when purchasing property in New Zealand, including government consents for certain purchases, the seismic rating system, and tax implications when investing in residential property.

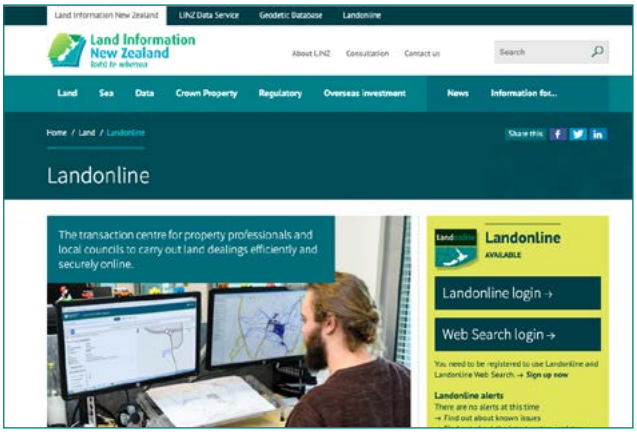
The detail

New Zealand has a well-established and transparent land ownership system. Investing and trading in real estate assets has always played a key role in New Zealand's economy. Equally important for those acquiring or establishing a business in New Zealand is to understand the accommodation requirements for the business regardless of the sector in which it operates.

Registered title system

New Zealand operates under the Torrens land registration system. All legal interests in land under the system are created by registration under the Land Transfer Act 2017 and are recorded against the title to the land.

A copy of the title register to the land is readily accessible and carrying out this search is often the first step in reviewing what affects the land. New Zealand has converted almost all titles, plans, and instruments into an electronic format, through a system run through LINZ called LandOnline. LandOnline allows up to date searching and electronic registration of land transactions.



The three most common forms of title in New Zealand are:

Form of title	Key points
Freehold	Purchase of freehold title gives you outright ownership of the land in question. This may also be referred to as fee simple. These terms are used interchangeably.
Leasehold	Purchase of leasehold gives you the benefit of a long-term lease of the property. Commercial leases are not usually registered.
Unit Titles	• A form of strata or sectional title ownership. • Purchase of unit titles gives you title to a defined part of a larger property. • These are a common form of title for apartment buildings. • They are subject to certain rules under the Unit Titles Act 2010.

Particular care should be taken when acquiring leasehold or unit title property, as well as other less common forms of title.

Māori land

In many instances Māori land ownership and use is governed by the Te Ture Whenua Māori Act 1993. This Act contains a range of restrictions on the disposal of various types of Māori owned land which can make dealing with Māori land very complicated.

Contracts for sale and purchase of property

To be enforceable, a contract for sale and purchase of property must;

- be in writing, and
- signed by the parties (or their authorised agents).

There is a high reliance on standard form documents for transacting more straightforward assets. Contracts are often tailored to reflect the commercial terms and nature of the assets involved.

In New Zealand it is common to undertake a relatively limited due diligence process before entering into a contract, which will then include more detailed conditions for the parties to satisfy before the agreement becomes unconditional and settlement occurs. Subject to the satisfaction of conditions, written agreements are binding.

Typical conditions include due diligence, the satisfaction of regulatory consents, building inspection, valuation, obtaining finance, and board or CEO approval.

Overseas Investment Act

Overseas investors (whether individuals or corporate entities with 25% or more overseas control) need government consent under the Overseas Investment Act 2005 which has recently been amended by the Overseas Amendment Act 2018 - and the Overseas Investment Regulations 2011 (together, '**OIA'**), when acquiring "sensitive" land, or any other asset for consideration of more than NZ$100 million. As of 22 October 2018, residential land in New Zealand is automatically 'sensitive' land requiring consent, which is effectively restricted to people who are actually resident in New Zealand and will live in that property. Certain consent exemptions apply to Australian and Singaporean investors.

The OIA sets out a procedure for overseas investors to seek consent to acquire sensitive land, which (in addition to residential land) includes specified types and sizes of land that have particular natural or historic significance. For example:

- Farm land;
- Lake bed;
- Historic land;
- Conservation land;
- Heritage ordered land;
- Reserve land, public parks, land used for recreational purposes or open spaces;
- Māori reservation land;
- Foreshore or seabed land;
- Land on numerous New Zealand Islands; and
- Land adjoining to any of the above.

Land is also considered sensitive because it is residential. Residential land includes both "residential" land in its normal meaning, but also "lifestyle" land. A review of the relevant district plan will determine what the land is classified as. If the land is sensitive because it is residential, then certain other investment exemptions potentially apply. In order to obtain consent, an investor needs to meet one or more of the following tests:

- the commitment to reside in New Zealand test;
- the increased housing test;
- the non-residential use test;
- the incidental residential use test; or
- the benefit to New Zealand test.

The OIA also provides exemptions for investing in sensitive land, including:

- Periodic leases;
- Residential tenancies of less than five years;
- Off the plans large apartment developments;
- Hotel units; and
- Forestry rights.

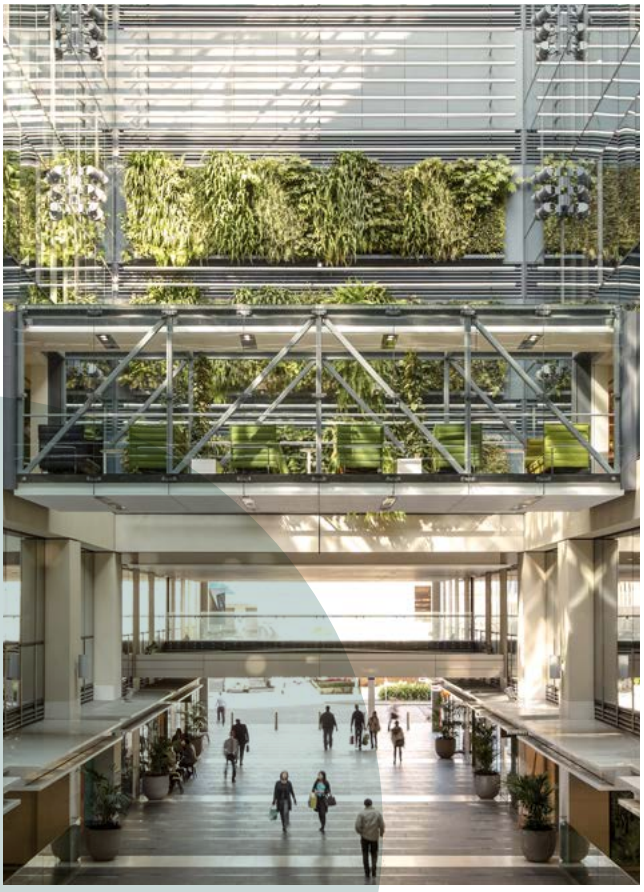
The OIA is managed and enforced by the Overseas Investment Office. The OIA sets out numerous powers and penalties for contravening the OIA.

Seismic rating of commercial buildings

Following several major earthquakes in New Zealand over the past decade, purchasers of commercial buildings are advised to include the seismic rating of those buildings in their due diligence investigation.

While all new buildings are required to be constructed to at least 100% of the current building code, older buildings are unlikely to have been constructed to that standard. Recent amendments to the Building Act have brought in changes to manage earthquake prone buildings. One of those initiatives included creating a register of earthquake-prone buildings. Purchasers need to be aware that older buildings with seismic ratings of less than 34% of the current building code are classified as "earthquake prone" and strengthening works will be required by statute. Notices may be issued by the Council requiring work to be completed.

Any strengthening works completed will usually be at a cost to the landowner. There are other alternatives, such as demolition – although it is important to ascertain whether the building is subject to a Historic Places Order, preventing demolition.



Tax considerations for residential properties

Income tax must be paid on the sale of residential properties purchased on or after 27 March 2021 where the property is sold within ten years of purchasing it, unless the property was:

- used as the owner's main home,
- inherited from a deceased estate, or
- sold as part of a relationship breakdown.

Residential properties purchased between 29 March 2018 and 26 March 2021, are subject to the same tax if sold within 5 years of purchase, and between 1 October 2015 and 28 March 2018 if sold within two years of purchase, unless one of the exceptions set out above apply. The government has indicated that 'new builds' (which are yet to be defined, and are the subject of a consultation period, the result of which will apply retrospectively from 27 March 2021) will continue to be subject to a 5 year bright-line period.

Residential land withholding tax ('**RLWT**') applies where the seller is an offshore acquisition person or entity and the land is sold within the period stated above. RLWT also applies to sales by New Zealand entities that are more than 25% owned or controlled by offshore persons. The seller's lawyer is required to deduct the RLWT and pay it to Inland Revenue on the seller's behalf.

Building and developing property

Building work and the use of buildings is regulated by the Building Act 2004. New buildings, as well as most additions or alterations to existing buildings, will require a building consent.

After completion of building work under a building consent, a code compliance certificate will need to be obtained. It is important to check when purchasing a property that any building work carried out has had the relevant code compliance certificate issued. Landowners should hold records of any work or maintenance completed, and any inspections undertaken.

Most properties, other than stand-alone residential homes, are also required to hold a building warrant of fitness. These are issued annually and confirm that the building complies with certain Building Act criteria, which for the most part relate to health and safety.

Both code compliance certificates and building warrants of fitness can be checked during a due diligence investigation by reviewing a Land Information Memorandum ('**LIM**') report for the property.

Resource Management Act and district plans

The Resource Management Act 1991 ('**RMA**') is the primary source of environmental law in New Zealand. Under the RMA, territorial authorities have responsibility for the control, use, development and protection of land. Territorial authorities are also required to have district plans which contain rules relating to land use and subdivision activities in that authority's area.

The RMA and district plans can have major implications for property developments and other construction projects. A large development may require multiple consents under the RMA before its commencement.

Leasing

The physical day-to-day operations of most businesses in New Zealand are carried out under a lease of the land and buildings that the business occupies. The lease terms are negotiated between the contracting parties, being in this case the landlord and the tenant. However, there are also numerous other rights and obligations implied into leases by statutes, principally under the Property Law Act 2007.

There is a high reliance on standard lease forms, at least as a starting point, with tailored special conditions to reflect the particular premises and the commercial terms. Most leases are for a specified term and may allow the tenant the right to renew for an additional term or terms.

When acquiring an existing business that occupies premises on a leasehold basis, it is very likely that the lease will include terms controlling the transfer of the lease to the buyer. These terms often cover both the acquisition of business assets where shares are being acquired or there is an effective change of management or control.

Residential tenancies

Residential tenancies are governed by the Residential Tenancies Act, which imposes minimum standards for properties, and processes for managing and terminating tenancies. These requirements and processes are strictly enforced.

How we can help you

For more information contact

Matthew Ockleston MRICS
Partner (Real Estate Business Unit Leader)
D +64 9 915 3350
M +64 21 582 429
E matthew.ockleston@dentons.com

Businesses acquiring or disposing of property interests need input from advisers who know the industry as well as the law – advisers who can identify the many risks, and manage them in a way that is commercially appropriate, legally sound, and cost-effective.

Dentons Kensington Swan's real estate team has a wealth of experience in all aspects of property and real estate law. Our team works closely with clients to get a good understanding of their business and their present and future needs.

We are supported by colleagues in other teams, such as environment and planning, construction, infrastructure, health and safety, public law, finance, and dispute resolution.

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Construction and Major Projects in New Zealand

2021

Construction and Major Projects in New Zealand

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Construction Contracts Act

Dispute Resolution

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"Dentons Kensington Swan brings together expertise in construction, projects, environmental law, planning, finance and China-related matters to provide strategic advice on major projects across the country. The work of the infrastructure group encompasses consenting, property acquisitions, procurement and dispute resolution. Frequently involved in major PPP projects, it acts for a diverse range of clients, among them special purpose vehicles, design and construct contractors, operators, facilities maintenance contractors and equity funders."

Legal 500 Asia Pacific 2021

Key points about construction and major projects in New Zealand

Building and construction projects are almost always carried out in New Zealand under a negotiated contractual arrangement, the form of which will be determined by the type, size and complexity of the particular project. Building and construction contracts are governed by the general law of contract subject to specific legislative controls, primarily under the Resource Management Act 1994, Health and Safety at Work Act 2015 (both dealt with in other sections of this guide), Building Act 2004, and the Construction Contracts Act 2002.

The detail

Procurement

Tender processes are commonly used by principals (particularly public agencies) and head contractors to create a competitive bid environment. Traditional contracting models still prevail in the market although in recent years, some large-scale infrastructure projects have been procured under a public private partnership (PPP) structure or on the basis of other alliancing models.

Standard Form Contracts

The New Zealand Standard (NZS) suite of contracts are the most commonly used construction contracts in the market, primarily: NZS 3910 (traditional 'build only'); NZS 3916 (design and build); and NZS 3917 (fixed-term or maintenance). These are often tailored to specific projects through the inclusion of special conditions. There are also other standard forms including the NZIA's SCC1 2018 contract and a Master Builders contract.

Building Act 2004

All building work in New Zealand must comply with the Building Code (contained in Schedule 2 to the Building Act). The Code prescribes minimum performance standards which a building must meet and methods by which a builder can establish compliance. The Building Act also:

- requires work affecting the structural integrity or weathertightness of a building to be carried out or supervised by a Licensed Building Practitioner;
- implies warranties relating to the performance of contract works into all residential building contracts.

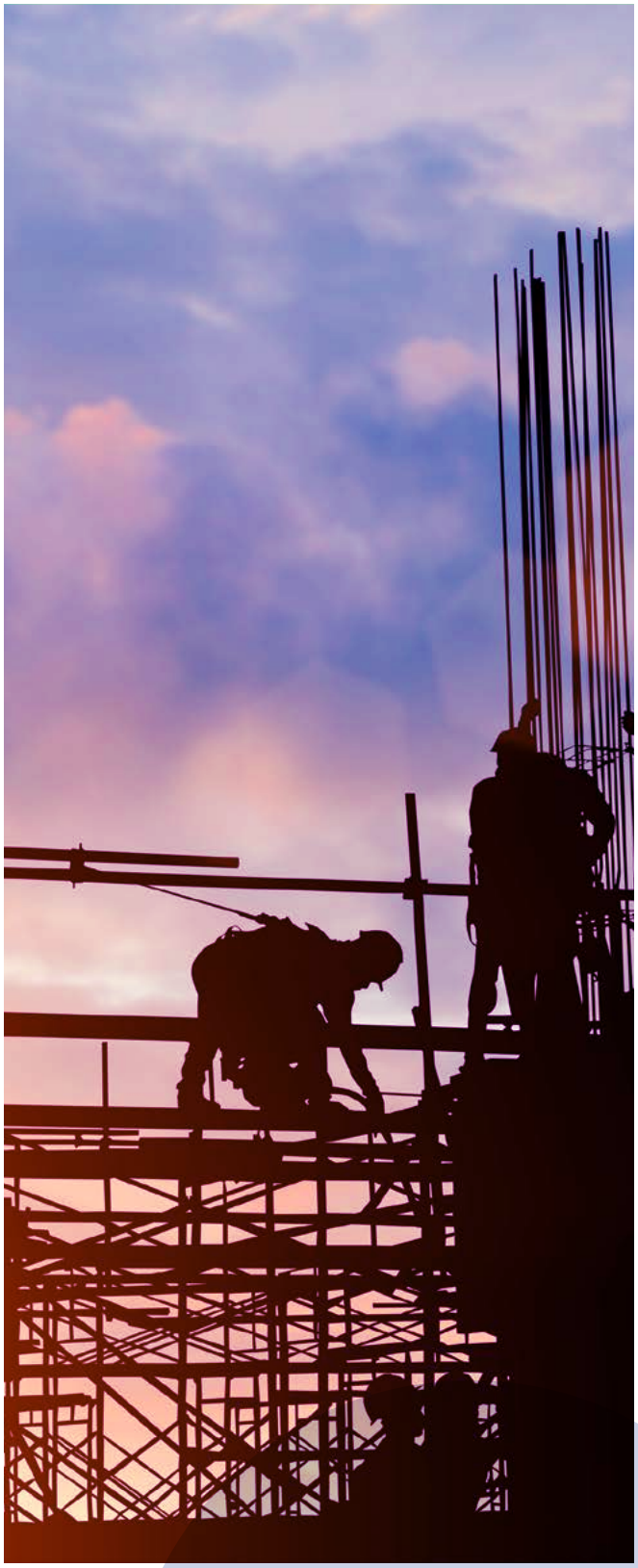
Payment Security

The *Construction Contracts Act 2002* (CCA) is designed to assist contractors in securing their right to payment via:

- statutory rights to progress payments;
- right to claim as a statutory debt due amounts owing;
- right to obtain a charging order (or lien) over a construction site;
- rendering invalid 'pay-if-paid' and 'pay-when-paid' clauses;
- right to suspend work for unjustified non-payment;
- all retentions to be held on trust or via a financial instrument.

Tortious Liability

New Zealand recognises an extra-contractual duty of care on the part of contractors, subcontractors, suppliers and consultants (amongst others) to owners and subsequent purchasers with respect to building defects, including weathertightness requirements, and the parties responsible can be sued in tort for breaching this duty of care.



Duration of Liability

Legal proceedings must be commenced within the relevant statutory limitation period which, in short, requires a claim to be brought within 6 years from the date of the act or omission in question. However, if the claimant has 'late knowledge' of the damage, the claim can be brought outside the 6 year limitation period provided it is lodged within three years of discovery of the damage. In relation to 'building work' covered by the Building Act, this is subject to an overarching 10 year long-stop period.

Seismic activity

The *Building (Earthquake-prone Buildings) Amendment Act 2016* (EPB Act) was passed in response to the numerous seismic events that have occurred in New Zealand since 2010. In short, it requires building owners to carry out strengthening work to commercial and apartment buildings identified by territorial authorities (and confirmed via an engineering assessment) as prone to collapse in a moderate earthquake.

Dispute Resolution

Statutory adjudication of disputes under the CCA is by far the most popular mode of dispute resolution, however construction contracts will usually provide for arbitration as the final step. Dispute Review Boards remain relatively uncommon in New Zealand, save on some larger public projects. New Zealand has no specialist construction law courts. Mediation also remains a popular mechanism for resolving disputes.

How we can help you

For more information contact

Stuart Robertson
Partner
D +64 9 375 1151
M +64 21 846 775
E stuart.robertson@dentons.com

	Negotiating, advising on standard form documentation and drafting bespoke contracts of all procurement models to minimise client risk.
	Advising on residential and commercial building projects and a wide range of infrastructure projects such as road and rail projects, social infrastructure projects such as schools, prisons and social housing developments, and water and energy projects.
	Advising on large-scale joint venture projects and complex procurement processes such as PPP's, project alliances and early contractor involvement (ECI) arrangements.
	Providing strategic project delivery advice and contract administration support, including to secure the right to payment through contractual means and under the CCA.
	Preparing and defending commercial and residential claims brought by way of CCA adjudication, arbitration and in the Courts.

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2021

Environment and Planning Law in New Zealand

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Energy

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"Dentons Kensington Swan is 'incredibly responsive, collaborative and proactive'. The environment, infrastructure and planning practice brings together specialist partners and expertise from the firm's finance, corporate, property and Asia business groups. The firm advises on strategic projects throughout New Zealand, notably in the transport, water, energy and social infrastructure sectors. Its work spans consenting and property acquisitions, procurement, PPPs, project delivery and dispute resolution."

Chambers Asia Pacific 2021

Key points about environment and planning law in New Zealand

- The Resource Management Act 1991 (RMA) is the primary source of environmental law in New Zealand and sets out the framework for managing both our natural and built environment.
- The RMA is mostly administered by local government through the use of resource consents (which are essentially permits authorising particular uses or activities).
- Regional and district plans contain rules that govern the use of natural resources and changes to the built environment, and are administered by the relevant regional and territorial authority.
- Central government drives the direction of some of the key issues addressed in regional and district plans through national policy statements and national environmental standards.
- The RMA has a range of penalty and enforcement provisions. Many of these are strict liability offences. The maximum fines for offences under the RMA is NZ$600,000 for companies and NZ$300,000 for individuals (or, for individuals, a prison sentence of up to two years).
- The Emissions Trading Scheme is New Zealand's current main climate change tool. In 2019 the Government passed the Climate Change Response (Zero Carbon) Amendment Act ('Carbon Zero Act') which amended New Zealand's existing climate change legislation to transition the country to a low emissions, climate-resilient economy.
- Historic heritage is primarily regulated by the RMA and the Heritage New Zealand Pouhere Taonga Act 2014. Resource consents or archaeological authorities may be required where historic heritage is affected by a proposed development.

The detail

The Resource Management Act 1991

The Resource Management Act 1991 (RMA) regulates the use of land, water and air in New Zealand. The purpose of the RMA is to promote the sustainable management of natural and physical resources.

Functions under the RMA are divided as follows:

- Regional councils have responsibility for the control of matters relating to water and the discharge of contaminants;
- Territorial authorities (or district councils) have the responsibility for the control, use, development and protection of land, and the control of subdivision and noise; and
- Regional and territorial authorities share the responsibility for natural hazards and hazardous substances.

There are also several unitary authorities in New Zealand which perform the roles of both regional councils and territorial authorities.

The functions under the RMA are largely administered by the relevant council through permitted activities or resource consents that are granted or declined under district and regional plans.

Planning rules

Under the RMA, regional councils also have a policy statement, which sets the basic direction for environmental management in the region.

Regional councils are also required to have regional plans which contain rules relating to issues such as:

- the use and development of the coastal marine area;
- discharges to air, land or water; and
- contaminated land.

Every territorial authority is required to have a district plan which contains objectives, policies, and rules relating to land use and subdivision activities in the district. In addition, there are various national environmental standards relating to specific matters such as telecommunications facilities, electricity transmission, land contamination, forestry, and air quality.

Activities and developments are classified into a hierarchy of activity types and this determines whether a resource consent is required for any proposed activity. District and regional plans classify activities as:

- Permitted (do not require resource consent in order to undertake the activity);
- Controlled activities (cannot be declined but conditions can be imposed to mitigate effects);
- Restricted discretionary, discretionary, and non-complying (require resource consent and, if granted, will often be subject to specific conditions to mitigate any adverse environmental effects); and
- Prohibited (cannot be consented).

Resource consents

Resource consents are required for activities that contravene a rule in a district plan, or are not provided for as a permitted activity in a regional plan.

Types of resource consents include land use consents, subdivision consents, water permits, coastal permits, and discharge permits. Resource consents contain conditions that the consent holder must comply with and may include construction conditions as well as ongoing requirements and obligations post construction. Land use consents 'run with the land' so are not required to be transferred to a new owner of the property.

Other types of consents will generally require a transfer if there is a new owner of the relevant property, often subject to Council approval. While land use consents do not generally expire, other consents such as water, coastal and discharge permits are granted for a fixed term and require renewal.

The consenting process

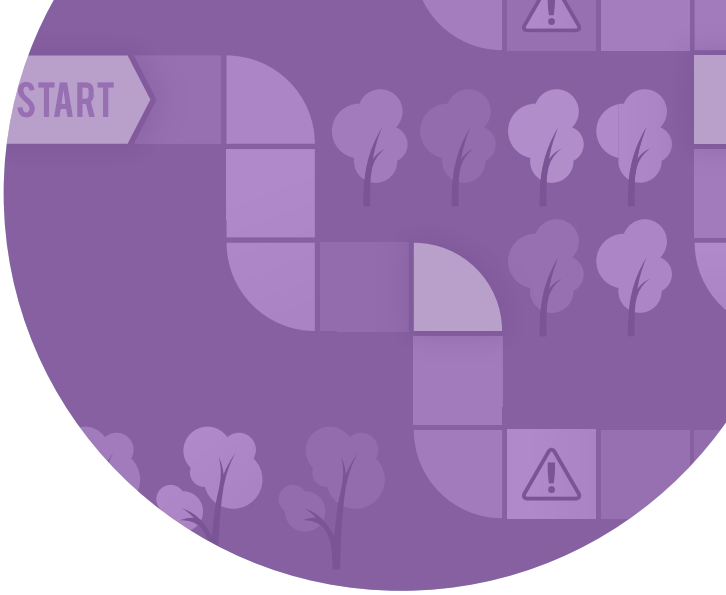
This process starts with an application to the relevant authority in the form specified under the RMA (and accompanied by an assessment of environmental effects). The local authority will decide whether the owners of adjacent land should be notified of the application and/or whether public submissions should be invited and a hearing held. If an application is publicly notified this will impact on the duration and complexity of the consenting process.

The RMA and the regional and district plans provide guidance to the local authority on how to make a decision on notification and on whether to grant consent for an application. The amount of discretion that the local authority may exercise, and the legal tests an applicant must meet in order to obtain consent, will depend on the nature of the consent sought (and whether it is envisaged by the relevant planning rules). The local authority can also impose conditions on any resource consent it grants in order to address any adverse effects on the environment.

There is a right of appeal to the Environment Court for both the applicant and, where an application is notified, for submitters. There is also a right of appeal from the Environment Court's decision to the High Court but on points of law only.

Alternative consenting pathways

In addition to the process set out above, there are several alternative pathways available to obtain a resource consent:



1 The direct referral process allows for the resource consent application to be decided by the Environment Court in the first instance, rather than the relevant council. This pathway effectively bypasses the council level hearing and results in a hearing before the Environment Court. The application is publicly notified and members of the public have the right to lodge submissions. This process can be used to streamline the consenting pathway for large and complex applications which would likely end up in the Environment Court on appeal after a council decision in any event. There is a right to appeal the Environment Court's decision to the High Court, but this right is limited to points of law.

2 A resource consent application may also be referred to a Board of Inquiry if the Minister for the Environment decides it is a nationally significant project. All submissions on the proposal will be considered by the board and they will make a final decision on the matter. It is possible to appeal the board's decision to the High Court, however appeals are limited to points of law.

3 The Covid-19 Recovery (Fast Track Consenting) Act 2020 also provides for fast-track resource consenting and/or designations processes for eligible projects. Eligible projects include those which will economically benefit communities or industries affected by Covid-19, which would progress faster using the new processes and will result in significant public benefits. A list of specific projects that can use this pathway is included in the Act, but anyone with an eligible project can also apply to the Minister for the Environment to use this process. Projects are considered by an expert panel under shorter timeframes, without a public submissions process or a hearing and appeals are limited to points of law.

Existing use rights

The RMA provides for "existing use rights" that allow the continued use of land in a way that contravenes a rule in a district plan where that use was lawfully established before the relevant rule was put in place. In addition to showing that an activity has been lawfully established, the environmental effects of the land use must also be the same as (or similar to) what they were before the rule became operative and the land use cannot have been discontinued for a period of more than 12 months. Activities that have existing use rights are not required to obtain resource consent.

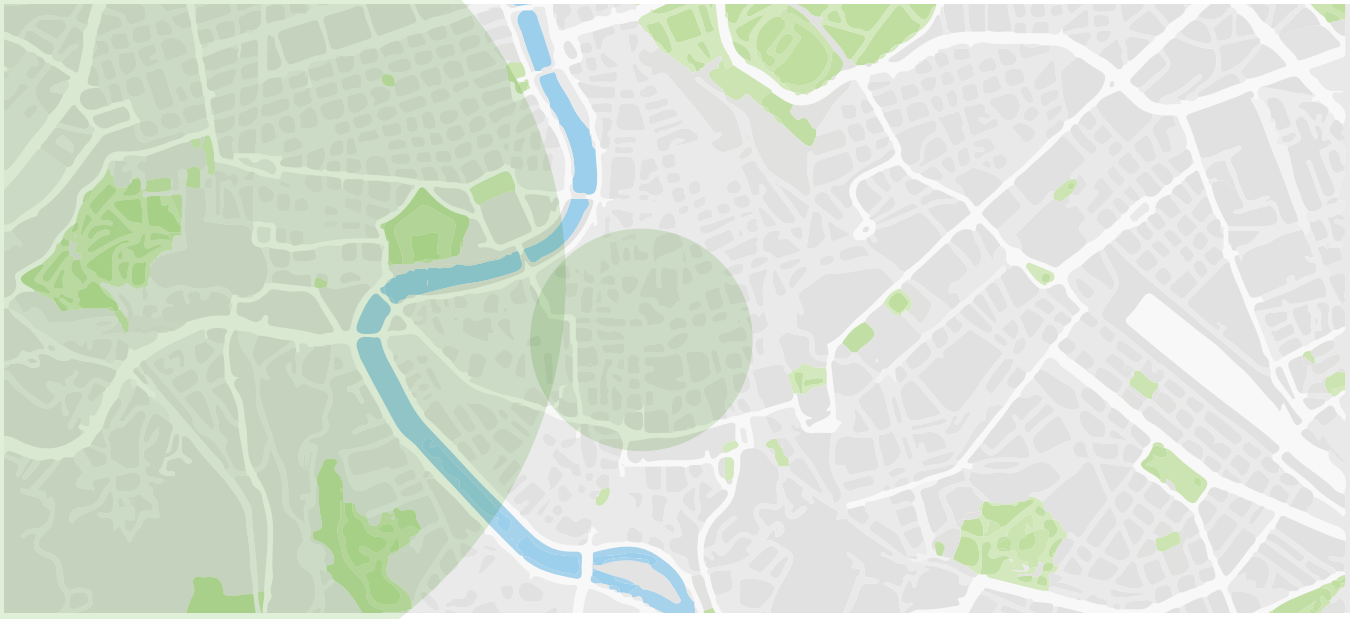
In terms of regional plan rules, activities that were permitted, or were lawfully carried on without a resource consent, but which become controlled, discretionary or non-complying activities as a result of a new rule in a regional plan, may be continued for a limited period provided that the environmental effects of the land use must also be the same as they were before the rule became operative and the land use cannot have been discontinued for a period of more than six months. An application for a resource consent must be made within six months of the rule becoming operative. Where an application for resource consent has been lodged, the activity can continue until such time as the final decision is issued.

Designations

Designations are a mechanism that allow Ministers of the Crown, local authorities, and network utility operators (who have the status of 'requiring authorities' under the RMA) to identify, acquire and develop land for a public work or infrastructure. Designations are often used for public infrastructure such as transport networks, airports, telecommunication, and electricity and education facilities.

A designation will create a 'spot zone' over a particular site within a district plan. This 'spot zone' sets out the parameters of the work to be undertaken on the site without the need for land use consent (although regional plan consents are still required) and subject to compliance with any conditions on the designations. Designations are secured by lodging a 'notice of requirement' with the relevant district council. The process for considering notices of requirement is similar to resource consent applications except that the district council makes a recommendation on the notice of requirement and the requiring authority issues the decision. Submitters have a right of appeal to the Environment Court on the decision issued by the requiring authority.

A designation also restricts third parties from carrying out work on the designated land that will prevent or hinder the project or work to which the designation relates, without first obtaining the approval of the requiring authority.

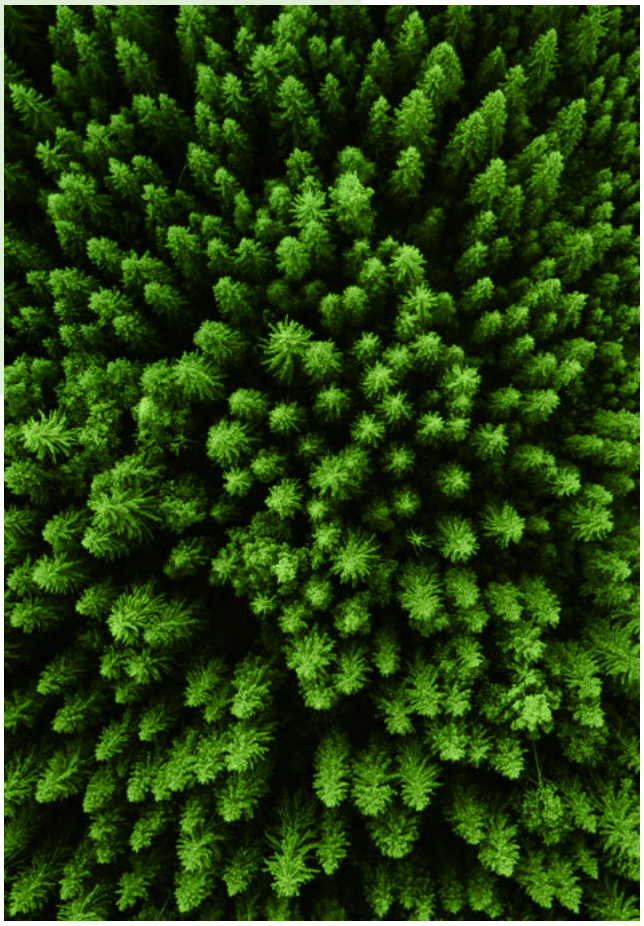


National Environment Standard for Plantation Forestry (NES-PF)

The NES- PF came into force in May 2018 and aims to manage the environmental effects of plantation forestry activities in New Zealand through one set of rules that apply to forestry activities. Regional and district councils across New Zealand are now required to apply the rules in the NES-PF in relation to plantation forests. The NES-PF prevails over district or regional plan rules except where the NES-PF specifically allows more stringent plan rules.

In addition to addressing plantation forestry activities, the NES-PF regulations address afforestation, pruning and thinning of trees and slash, earthworks associated with forestry, river crossings, forestry quarries and harvesting of logs.

Some forestry activities have been classified as permitted activities under the NES-PF meaning that a resource consent is not required for these activities (although permitted activity standards need to be met and/or management plans put in place for some activities). Other activities require resource consent which must be obtained from the relevant council.



Liability

Under the RMA, the Environment Court can require a person to do something in order to avoid, remedy, or mitigate an actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier. Therefore, if you are purchasing land that may be affected by historic contamination issues, it is important to investigate this thoroughly and, if necessary, include appropriate indemnities or warranties in the sale and purchase agreement.

Historic contamination issues may arise in purchases of land where there have been industrial activities carried out in the past. Examples could include forestry and timber processing sites, and quarries on farm land. The RMA creates many strict liability offences, which mean that it is not necessary to prove that a person intended to commit an offence, or was reckless or negligent.

There are several prosecution options available to councils in the case of contaminated land, including:

- Issuing infringement notices;
- Abatement notices and enforcement orders; and
- Criminal offences.

Infringement notices are issued for minor cases of pollution and the penalty will usually be a low level fine. The infringement fees range from NZ$300 to NZ$1,000 depending on the offence under the RMA.

An abatement notice or enforcement order will be issued by the Environment Court and will require the recipient to comply with the RMA. This means that the recipient will need to cease the activity immediately and potentially remediate the situation. These notices and orders are issued for more serious contamination and recipients have a right to appeal. Criminal offences under the RMA carry a maximum fine for individuals of NZ$300,000 plus NZ$10,000 per day for continuing offences, and a prison term of no 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.

Examples of criminal offences include:

- Contravening the provisions of an enforcement order or abatement notice
- Developing land without a resource consent; and
- Taking, damming or diverting fresh inland coastal water without a resource consent.

Historic heritage

In New Zealand, heritage is primarily regulated by the RMA and the Heritage New Zealand Pouhere Taonga Act 2014 ('HNZPTA').

The HNZPTA makes it unlawful for any person to modify or destroy any archaeological site without the prior authority of Heritage New Zealand. If you wish to do any work that may affect an archaeological site, you must obtain an authority from Heritage New Zealand before you begin. An archaeological site is defined as any place in New Zealand (including buildings, structures or shipwrecks) that was associated with pre-1900 human activity, where there is evidence relating to the history of New Zealand that can be investigated using archaeological methods. If a previously unknown site is uncovered during earthworks, work must stop and an archaeological authority will be required to in order to continue.

District councils or unitary authorities can include rules in their district plans which seek to protect a range of historic heritage resources. District plan rules commonly schedule and map heritage buildings and archaeological sites, and require resource consent to be obtained for activities which have an adverse impact on them.

Climate change policy in New Zealand

Internationally, New Zealand signed up to the Paris Agreement and is committed to reducing greenhouse gas emissions by 30% from 2005 levels by 2030.

In 2020, New Zealand committed to a 2050 domestic target of net zero emissions of all greenhouse gases other than biogenic methane, and a reduction of biogenic methane emissions by 24% to 47% below 2017 by 2050.

The New Zealand Emissions Trading Scheme ('ETS'), a cap and trade scheme, is one of the government's main tools to ensure New Zealand meets these targets. The ETS creates a financial incentive for participants to invest in technologies and practices that reduce emissions. It also encourages forest planting by allowing eligible foresters to earn New Zealand emissions units. The ETS covers some sectors (forestry, stationary energy, liquid fossil fuels, waste) but not others (agriculture is included nominally, but without any surrender obligations).

In 2020 the government made changes to the ETS by introducing, among other things, a cap on emissions so as to allow it to reduce the total emissions from the scheme, and the ability for the government to auction NZ emissions units every year.

The ETS is not the only tool used to reduce greenhouse gas emissions.

The New Zealand government is in the process of adopting its first three emissions budgets. Emissions budgets will account for both ETS and non-ETS emissions, and will be used to determine New Zealand's progress in reaching its targets. These are 5-year budgets, the first three of which will be put in place by the end of 2021 and will cover the period until 2035. They are based on advice provided by an independent Climate Change Commission established in 2019 to advise the government on the policies needed to achieve its targets.

Legislative reform proposals

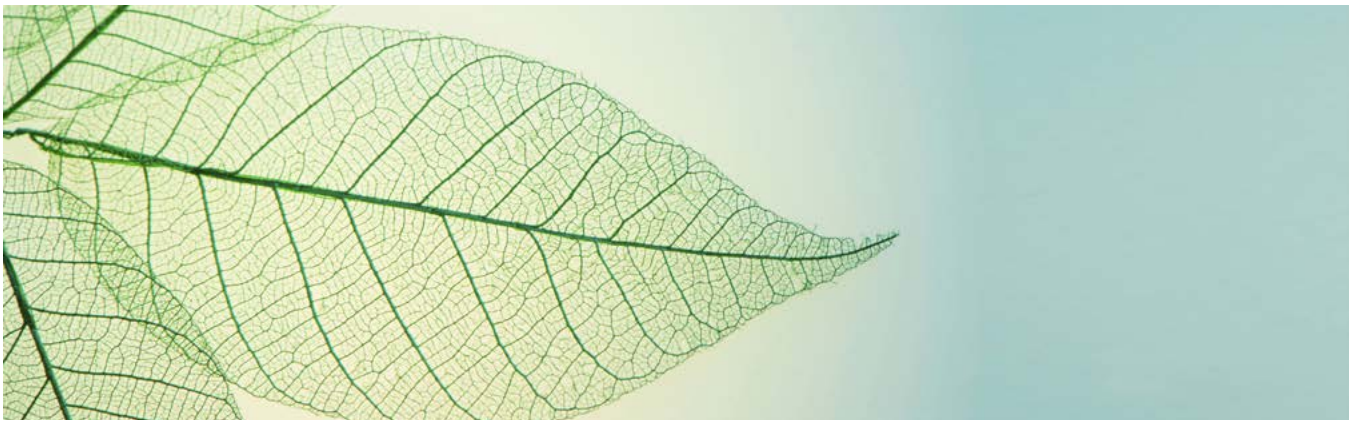
The Government is currently reviewing the RMA and is aiming to introduce at least one piece of new legislation by the end of 2021. Further information is available here https://www.mfe.govt.nz/rmreview.

How we can help you

For more information contact

Nicky McIndoe
Partner
D +64 4 915 0818
M +64 27 350 9021
E nicky.mcindoe@dentons.com

- Obtaining planning authorisations for large scale major infrastructure projects right through to smaller developments like single residential houses;
- Guiding you through the consenting process, from providing you with strategic advice in the early stages of your project to appearing for you in court if necessary;
- Seeking changes to regional and district plans both in terms of the zoning of properties and changes to the planning rules; or
- Conducting due diligence investigations to help you accurately assess environmental risks and your responsibilities under the RMA.



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