



# Anthony

Doing Business in New Zealand

*Anthony Harper*

# Anthony Harper

---

## DOING BUSINESS IN NEW ZEALAND

### Introduction

#### What is this Guide for?

This guide to Doing Business in New Zealand has been prepared to give persons with an interest in investing in a New Zealand business or venture an overview of some of the key considerations in making such an investment. The information contained in this guide is of a general nature and is not a substitute for the need to obtain substantive legal advice before making an investment. However, it should give potential investors an idea of the basic concepts that need to be considered.

#### Who is Anthony Harper?

Anthony Harper is recognised as one of New Zealand's leading commercial law firms, with offices in Auckland and Christchurch. Our legal expertise and innovative approach to client service has rewarded us with longstanding partnerships with a wide range of New Zealand and international clients. With a string of high profile corporate transactions Anthony Harper has earned praise from many sources. The influential Asia Pacific Legal 500 recommends Anthony Harper for its banking and finance, corporate and M & A, property and insolvency expertise.

*For further information or guidance on any of the topics covered in our guide, please contact Malcolm Hurley at [Malcolm.hurley@ah.co.nz](mailto:Malcolm.hurley@ah.co.nz) or David Gould [david.gould@ah.co.nz](mailto:david.gould@ah.co.nz).*

---

## ESTABLISHING A BUSINESS

### **Business structures**

There are a number of different structures which can be used to establish a business in New Zealand.

The most commonly used are:

- (a) establishing a branch office for an overseas company; or
- (b) setting up a (or purchasing an existing) New Zealand registered company.

Limited Partnerships have been available in New Zealand since 2008 and they are steadily increasing in popularity.

There will be a number of tax considerations which will need to be taken into account when considering which business structure to use, and when thinking about carrying on a business or deriving other sources of income in New Zealand. If taxable activities are undertaken both in New Zealand and abroad, then double tax agreements (or tax treaties) may reduce the incidence of double taxation between countries.

Anthony Harper has close links with specialist tax advisers who can advise on any complex taxation issues which may arise.

### **Establishing a branch of an overseas company**

In order for an overseas company to carry on business in New Zealand, it must apply to be registered under the Companies Act 1993 as an "Overseas Company". The first step is to reserve the company's name. This is to ensure

that there is not already a company in New Zealand with that name, or a substantially similar name. As part of the application process, the overseas company must notify the Registrar of:

- (a) its principal place of business in New Zealand (i.e. its branch office);
- (b) the full names and residential addresses of the directors of the overseas company; and
- (c) the full name and address of one or more persons who are resident or incorporated in New Zealand and is authorised to accept service of documents in New Zealand on behalf of the overseas company.

It will also be necessary to provide documents evidencing the overseas company's incorporation, together with its constitutional documents (translated where necessary). There is a specific exception for companies incorporated in Australia. Where the necessary documentation is already registered with the equivalent of the Registrar of Companies in Australia, it does not need to be provided to the New Zealand Registrar.

An overseas company carrying on business in New Zealand must ensure its full company name and its country of incorporation are stated clearly on all written communications sent by, or on behalf of, the company (e.g. letters, advertising materials, emails) and on all documents signed by the company.

In terms of ongoing compliance, an overseas company must not change its name without first reserving the new name with the Registrar. Further, if there is a change in the directors, principal place of business, or constitution of the overseas company, the Registrar must be notified within 20 working days. Like all companies

incorporated in New Zealand, an overseas company registered in New Zealand must complete an "Annual Return" once a year confirming the key information about the company (e.g. address details and directors of the company). An overseas company will also be required to file financial statements with the Registrar which will become publicly available. Generally, these accounts will need to cover the New Zealand "branch" operation as well as the overseas company's activities outside New Zealand, and will likely need to be audited.

## **Companies**

The process to incorporate a new subsidiary company in New Zealand is simple and straightforward. The process can be completed "on line" and a new company registered within a matter of hours of lodging the required documentation.

To incorporate a company, the requirements are to:

- (a) reserve the company name;
- (b) provide a registered office address and address for service (these are often the same). If the new company does not have a physical business presence in New Zealand, a solicitor or accountant may be willing to provide this service for the company; and
- (c) have at least one shareholder and one or more directors. The director must be a person, but the shareholder would usually be the overseas company. The director does not need to be resident in New Zealand (although this may affect the tax residency of the company). The director(s) and shareholder(s) will each need to sign a consent

form for registration.

It is not necessary (although it is often desirable) to adopt a constitution. This can be done at the same time as incorporation, or at a later date.

As with a company registered as an "Overseas Company", a New Zealand subsidiary will be required to file an annual return and register it with the Companies Office.

In certain circumstances, it may be preferable to acquire an existing NZ registered company. This would be done primarily through the acquisition of shares in that existing company. There are certain matters which will need to be considered including:

- (a) whether Overseas Investment Office consent will be needed;
- (b) whether the approval of the Commerce Commission is needed; and
- (c) whether the Takeovers Code is relevant.

These matters are considered later in this guide.

## **Limited partnerships**

Limited partnerships in New Zealand are governed by the Limited Partnerships Act 2008.

A limited partnership is a separate legal entity and is formed by registration at the Companies Office. It must have at least one general partner and one limited partner (and a person may not be both a general partner and a limited partner at the same time) but there is no upper limit on the number of either class of partner. A general partner may become a limited partner and vice versa.

### *Partnership agreement*

The Limited Partnerships Act requires that the limited partnership has a written partnership agreement which provides for certain specified matters. There is significant flexibility under the Act for limited partnerships to be self governed by the terms of the partnership agreement.

### *Role and liability – general partners*

General partners are the agents of the limited partnership and are responsible for the active, day-to-day management of the limited partnership. They may invest in the limited partnership, but are not required to.

A general partner is liable for the debts and liabilities of the limited partnership to the extent the limited partnership cannot pay. Where there is more than one general partner, each general partner is jointly and severally liable. A general partner's liability is however typically managed by using a limited liability company as a general partner, which has no assets and which does not "trade".

### *Role and liability – limited partners*

Limited partners are passive investors, cannot bind the limited partnership and are restricted from participating in the management of the partnership, except that they may undertake certain "safe harbour" activities which are expressly stated not to be active management of the partnership.

The liability of each limited partner is limited to the amount of that partner's capital contribution to the limited partnership. However, if a limited partner participates in the management of the limited partnership, they can expose themselves to the same liability as a general partner.

### *Termination*

There is no limit as to the duration of a limited partnership but termination events can be built into the partnership agreement if a set duration is desired. A limited partnership can be terminated under the following circumstances:

- (a) an event or the expiry of a period of time when, under the partnership agreement, the limited partnership terminates;
- (b) a resolution is made by the limited partnership that the limited partnership be terminated;
- (c) there is either no general or limited partner in the limited partnership for 10 working days or more; or
- (d) the limited partnership agreement has lapsed for 10 working days or more.

When a termination event has occurred the limited partnership may pass a resolution to appoint a liquidator to the limited partnership or any partner, creditor or the Registrar may make application to the Court to place the limited partnership in liquidation.

An application can also be made by certain parties to deregister a limited partnership on certain grounds.

### *Registration*

An application to register a limited partnership is made by completing the prescribed form and filing it with the Companies Office. Once registered, the limited partnership's name will appear on the Limited Partnerships Register. A limited partnership has similar administration requirements to a company. The limited partnership must satisfy a solvency test before making distributions. Minutes of meetings, partner details, capital accounts and accounting records must all be kept and

changes to details of name, address and partners (including new partners) must be notified.

Financial statements and an annual return must also be prepared. However, the Act does not require that these be audited, registered or made public (though other legislation may affect this position). It is worth noting that if the general partner is a foreign controlled New Zealand company or an overseas company which is considered to be carrying on business in New Zealand by virtue of it being a general partner, this company will be required to file audited financial statements, as usual, which may need to include the limited partnership.

---

## PURCHASE OF A NEW ZEALAND BUSINESS

### **Overseas investment regime**

The acquisition of securities, business assets or interests in property by an overseas person is regulated by the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. The regime is administered by the Overseas Investment Office ("OIO"). Information on the OIO and its functions can be found at [www.linz.govt.nz/overseas-investment](http://www.linz.govt.nz/overseas-investment).

The acquisition by an overseas person (or an associate of an overseas person) of:

- (a) sensitive land or an interest in sensitive land;
- (b) farm land;
- (c) significant business assets; or
- (d) fishing quota,

will require consent from the OIO before the acquisition is given effect.

An overseas person is defined as:

- (a) an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand;
- (b) a partnership, body corporate or trust where an overseas person or persons have 25% or more ownership or control (or similar requirements are met); or
- (c) a company incorporated outside New Zealand, or in which an overseas person or persons have 25% or more of any class of share, or the power to control 25% or more of the company's governing body, or 25% or more of the voting rights, or the right to exercise control over 25% or more of voting rights.

The acquisition of sensitive land and farm land will be considered later in this guide. However, fishing quotas will not be discussed given the broad and general nature of this guide. If you require specialist advice on that topic please contact us.

The acquisition of significant business assets is:

- (a) the acquisition of rights or interests in securities by an overseas person (or an associate of an overseas person) if as a result of the acquisition the overseas person has a 25% or more ownership or control interest in the relevant company or an increase in an existing 25% or more ownership or control interest in the relevant company and the value of the securities or consideration provided, or the value of the assets of the company or the company together with its 25% or more subsidiaries, exceeds NZ\$100 million;

- (b) the acquisition of property (including goodwill and other intangible assets) if the property is located in New Zealand, used in carrying on business in New Zealand and the total value of consideration provided exceeds NZ\$100 million.

In determining whether to grant consent, the OIO will test the application against the core investor criteria, which broadly relate to business acumen, financial commitment and character. We can provide further details on the consent criteria if necessary.

The OIO advises that, while there is no statutory timeframe within which an application for consent must be decided, the OIO aims to make a decision on high quality, straightforward applications, where no third party consultation is required or “special land” is involved, within 30 to 50 working days of the date of registration of the application. “Special land” is land which includes foreshore, lakebed or riverbed.

## **Commerce Act/Competition issues**

### *Fundamental test*

The Commerce Act 1986 prohibits proposed mergers and acquisitions of business assets or shares where such transactions would, or would be likely to, have the effect of substantially lessening competition in a market.

No person may acquire assets of a business or shares if, as a result of the acquisition, that person or another person would be, or would be likely to be, in a dominant position in a market in New Zealand.

However, if a clearance or authorisation is given by the Commerce Commission for the acquisition of assets of a business

or shares, then no action may be taken against the acquisition by the Commission or any other party while that clearance or authorisation is in force.

### *Clearances and authorisations*

A clearance may be granted in respect of an acquisition where the Commission is satisfied that the acquisition will not, or will not be likely to, have the effect of substantially lessening competition in a market. A party seeking clearance must complete the standard application form and provide this to the Commission, which will then commence an investigative process, gathering relevant information. The Commerce Act prescribes a 10 working day period from receipt of the application for reaching a decision, however this may be extended if the parties agree. The Commission may only grant a clearance when it is satisfied, on the balance of probabilities, that the acquisition would not result in a lessening of competition. Parties have a right to appeal to the High Court if a decision is made not to grant clearance.

An authorisation may be granted where a proposed acquisition will or will be likely to result in a substantial lessening of competition, if the Commission finds that the public benefit directly related to the acquisition outweighs any detriment. The process for granting an authorisation is much the same as that for a clearance, however once the Commission has received the application form and completed its investigation, it will then issue a draft determination. This sets out its initial view and invites submissions from interested parties. This will usually be followed by a conference where interested parties may present to the Commission, before further analysis and determination is carried out. The Act provides for a 60 working day timeframe from receipt of

the application for reaching a decision, unless a longer period is agreed. As with clearances, there is a right of appeal where authorisation is declined.

The benefits resulting from an acquisition need not be solely economic and may, for example, be social or environmental. Product innovation, improved export earnings and international competitiveness and the avoidance of corporate failure are examples of benefits which the courts have recognised in the past.

---

## PURCHASING LAND IN NEW ZEALAND

### **Titles system**

New Zealand uses the Torrens land registration system, under which most parcels of land are recorded on a separate Computer Register (previously known as a certificate of title). The Computer Register records the dimensions and location of the land, the owner and any other interests affecting the land such as mortgages, charges and easements.

Computer Registers are recorded on an electronic register, enabling real time searching and registration of dealings with land.

The Torrens system enables a buyer and their solicitor to rely on a single title document, instead of a succession of title deeds. The Computer Register is guaranteed by the Government to be true and correct as at the time of viewing and a buyer may rely on the details contained within it.

Once a property is purchased and the name of the buyer is recorded on the Computer Register, valid ownership exists. This cannot be challenged by an

assertion that a defect in a prior deed renders the current title void.

The three most common types of estate in New Zealand are fee simple estates, cross leases and unit titles. An estate in fee simple is practically the equivalent of full ownership of the land and provides the owner with the largest number of rights that are enforceable by law. Cross leases are most commonly found in the large cities of New Zealand. These were an historical device for providing separate titles to two or more owners on one parcel of land, without requiring a legal subdivision of the land. A cross lease structure involves shared ownership of the fee simple estate, subject to long term (normally 999 years) leases of parts of that land to the respective registered 'owners'. Unit (strata) titles are common in larger blocks of flats or apartments, and for multi-storey buildings where there is some form of co-operation between the property owners. Each owner has a separate title to the particular unit they own. The common areas in such building, as well as external structures, are maintained and managed by a body corporate. Unit owners contribute a specified amount to the body corporate to cover maintenance, insurance and administration costs.

### **How land is bought and sold in New Zealand**

A real estate agent is usually the first point of contact for a purchaser when looking to buy a property in New Zealand. The real estate agent acts for the vendor in the marketing of the property, and assists with the preparation of a contract when a purchaser is found.

Sales by auction or tender are common for sales of farm land. They



have become increasingly popular for vendors of residential properties in recent years, due to high buyer demand and increasing property prices. However, most properties in New Zealand are still sold by negotiation between a vendor and a purchaser, instead of by way of auction or tender.

### **The form of the contract**

Most contracts for the purchase of land in New Zealand are based upon a standard form contract approved by the Real Estate Institute of New Zealand and the Auckland District Law Society. This provides both parties with greater certainty, and serves to reduce legal costs.

Unlike the practice in the United Kingdom and many other countries, the contract is entered into from the outset. However, it is often conditional on various matters being satisfied by the purchaser, and sometimes by the vendor.

Before becoming committed to a property purchase, a buyer should be satisfied with the following matters:

- (a) the ability to finance the purchase;
- (b) that there are no legal impediments revealed from the title to the property, including easements and restrictive covenants which may affect the use of the property;
- (c) that the records held by the local authority for the property do not reveal any problems;
- (d) that all necessary consents relevant to the purchase are obtained, particularly OIO consent, if that is required; and
- (e) if there is a lease on the property, that the terms of the lease are satisfactory.

In certain circumstances, advice from other professionals/consultants may be appropriate. For instance:

- (f) a builder's report may be required to ensure that existing buildings are sound;
- (g) a geotechnical report may be required to ensure that any earthquake activity has not destabilised the ground;
- (h) if the property is being purchased for development, the purchaser may want to undertake due diligence involving reports from planners, architects, geotechnical engineers, surveyors and other professionals;
- (i) a report from a farm consultant may be appropriate for rural purchases; and
- (j) an environmental assessment may be appropriate in some circumstances (although this is generally of less concern in 'clean and green' NZ).

In the case of auction sales, a purchaser will need to be satisfied with all matters before the date of the auction, because a successful bidder will be bound to purchase the property from the fall of the hammer. Similarly, before submitting a tender, a purchaser should be satisfied in respect of these matters, although if OIO consent is required, the tender should be conditional on such consent being obtained.

Where the property is purchased from the vendor pursuant to a negotiated contract, an offer can be submitted that is conditional on the purchaser or its solicitor being satisfied with particular matters within a specified timeframe. This gives a purchaser the certainty of knowing that if no issues are found, then they will be able to confirm the

conditions as being satisfied, without another buyer taking the property. Under such a conditional contract, if necessary consents cannot be obtained, or if a problem is revealed by the Computer Register (title) or a Land Information Memorandum ("LIM") report (produced by the local authority) or other investigations, then the purchaser can cancel the contract.

The extent to which a vendor will agree upon a conditional contract may depend on the number of people interested in the particular property, although general practice in New Zealand is that most contracts will be subject to the purchaser's solicitors being satisfied as to the title to the property and matters disclosed by a LIM.

It is common for the purchaser to pay a deposit to the real estate agent, which is usually around 5-10% of the purchase price. This is commonly paid on signing, or when the agreement becomes unconditional – if a deposit is paid at the time of signing, but conditions are not satisfied, then the deposit is normally refunded to the purchaser in full.

It is recommended that all foreign buyers should obtain legal advice as to whether OIO approval is required before entering into any contract. If there is no opportunity to take legal advice then the contract should be made subject to the buyer obtaining OIO approval.

### **Sensitive land and the overseas investment regime**

As noted above, the acquisition of interests in property by an overseas person is regulated.

The regime is administered by the Overseas Investment Office ("OIO").

Information on the OIO and its functions can be found at [www.lin.govt.nz/overseas-investment](http://www.lin.govt.nz/overseas-investment).

The policy of the Government is to encourage foreign investment. However, some types of land are deemed by the Overseas Investment Act to be 'sensitive land', and a purchase by an overseas buyer of such land requires OIO consent to be obtained pursuant to the Overseas Investment Regulations.

Consent applications are usually successful. However, the consent requirements are becoming increasingly stringent, and it is important that legal advice is obtained when considering a consent application. It is worth noting though that for many residential and commercial purchases, consent won't be required.

Consent is required for an overseas person to purchase sensitive land, either directly or through the purchase of shares in a land owning company.

An overseas investment in sensitive land is the acquisition by an overseas person, or an associate of an overseas person, of:

- (a) an interest in land, if the land is sensitive and the interest acquired is a freehold estate (fee simple) or a lease for a term of three years or more (including rights of renewal); or
- (b) rights or interests in securities of a company, if that company owns or controls (directly or indirectly) an interest in land above and, as a result of the acquisition the overseas person or the associate (either alone or together with its associates) has a 25% or more ownership or control interest in that company, the overseas person

or the associate (either alone or together with its associates) has an increase in an existing 25% or more ownership or control interest in the company or the company becomes an overseas person.

Broadly, land is sensitive if it is a particular type and exceeds the area threshold prescribed for that type. For example, sensitive land includes land that:

- (a) exceeds 5 hectares and is not in an urban area;
- (b) is situated on particular islands;
- (c) includes the foreshore or seabed, or is greater than 0.2 hectares and adjoins the foreshore;
- (d) exceeds 0.4 hectares and includes the bed of a lake, any land which is held for conservation purposes, is provided as a reserve, a public park, for recreation purposes or as a private open space, is subject to a heritage order or is an historic place or exceeds 0.4 hectares and adjoins similar types of land as above.

Non-urban land includes farm land, which is defined as land used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry, or livestock. Farm land must first be offered to the New Zealand public for acquisition (and be available on the open market for at least 20 working days) before OIO consent may be granted.

The requirement that farm land be offered on the open market does not prevent that land from being the subject of the sale to an overseas buyer. Nothing in the Regulations requires a vendor to accept an offer from the open market, but the procedure must be complied with before consent can be granted.

As noted earlier, while there is no statutory timeframe within which an application for consent must be decided, the OIO aims to make a decision on high quality, straightforward applications, where no third party consultation is required or “special land” is involved, within 30 to 50 working days of the date of registration of the application. “Special land” is land which includes foreshore, lakebed or riverbed.

In determining whether to grant consent, the OIO will test the application against the core investor criteria, which broadly relate to business acumen, financial commitment and character. Where the application involves sensitive land, the OIO is required to consider the benefit of the transaction to New Zealand, which involves an analysis of certain environmental and economic factors. We can provide further details on the consent criteria if necessary.

---

## CAPITAL MARKETS

### **Securities Act**

The Securities Act 1978 (and the regulations made under that Act) governs the offer of securities to the public in New Zealand. The general rule is that securities may only be offered to members of the public if the issuer of the securities has first put in place a registered prospectus and investment statement containing prescribed information about the securities being offered. If the offer of the securities is in New Zealand the restrictions apply regardless of where the actual allotment of securities takes place or whether the offeror is a New Zealand resident.

A security means any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person, and includes:

- (a) an equity security (an interest in or right to share in, or in the share capital of, a company);
- (b) a debt security (an interest in, or right to be paid, money which is deposited with or lent to another person);
- (c) a unit in a unit trust;
- (d) an interest in a superannuation scheme;
- (e) a life insurance policy;
- (f) a participatory security (a security offered by a partnership that invites investment from members of the public).

An “offer” includes an invitation, and any proposal or invitation to make an offer. Therefore any communication which relates to, or is connected with, a proposed investment in securities must be carefully considered as the provisions of the Securities Act may be triggered.

Determining who is, and who is not, a “member of the public” can, in some cases, be a difficult task. Legal advice should always be sought if there could be an offer of securities to the public. The definition of “the public” includes “any section of the public however selected”. A person is not excluded from being a member of the public simply because he or she is an employee, client or shareholder of the company issuing the securities.

If a company offers securities to the public without a registered prospectus and investment statement being in place, the allotment of those securities may be void. In that case, the issuer may have to repay the monies paid by

subscribers for securities, together with interest. The Act also carries criminal penalties in some cases. Directors can be personally liable for the repayment.

There are exemptions from the requirements under the Act to put a registered prospectus and investment statement in place before offering securities to the public. The main exemptions are:

- (a) relatives and close business associates of the issuer or the directors of the issuing company;
- (b) individuals whose principal business is the investment of money or who habitually invest money in the course of their business;
- (c) where the required subscription price is a minimum of NZ\$500,000;
- (d) persons certified as “wealthy” (net assets of at least NZ\$2 million or an annual gross income of NZ\$200,000 or more in the two preceding financial years); and
- (e) persons certified as experienced in investing money or in the industry or business to which the security relates.

There are also a number of specific exemptions, and some designed specifically for the offer of securities in New Zealand by overseas companies to avoid dual compliance by an issuer who is already required to comply with similar or tighter controls overseas.

If a security can be formally listed, the only recognised exchange is operated by NZX Limited. There is also an unregulated trading platform called “Unlisted” which is an internet-based securities trading service that provides a low cost, easy way for small to medium sized companies to trade their shares.

## **NZX**

NZX Limited (“NZX”) operates the only registered securities exchange in New Zealand. There are three main markets forming the exchange:

- (a) NZSX (New Zealand Stock Market)
  - this is the main market for equity securities;
- (b) NZAX (New Zealand Alternative Market) – this is a lower cost, more flexible market for small to medium, fast-growing businesses; and
- (c) NZDX (New Zealand Debt Market)
  - for corporate and government bonds and fixed income securities.

It is possible for an overseas company to have a “dual primary listing” on both an NZX market and an overseas exchange. A company with a full listing on certain overseas exchanges can also register an “overseas listing” on an NZX market meaning that it will not have to comply in full with the NZX Listing Rules.

There are listing rules for each of the three markets described above which can be found on the NZX website (<https://www.nzx.com/market-supervision>).

## **Financial market regulation**

The New Zealand capital markets have recently seen the introduction of a new financial markets regulator, the Financial Markets Authority (“FMA”). The FMA is responsible for monitoring the capital markets in New Zealand and ensures compliance with financial markets legislation relating to securities, financial reporting, and the provision of financial advice.

The FMA is also responsible for enforcing the insider trading, market

manipulation and other dealing misconduct provisions of the Securities Markets Act 1988. The “insider trading” rules prohibit individuals and entities with price-sensitive information about the securities of a listed company (where that information is not generally available to the public) from trading in those securities. There are also provisions to prohibit false or misleading statements by individuals and entities about trading in the securities of a listed issuer.

## **Takeovers Code**

The Takeovers Code is designed to protect minority shareholders where there is a substantial change in control of a Code company. The Code applies to all companies listed on the NZX and to unlisted companies with 50 or more shareholders.

The “Fundamental Rule” contained in the Code is that a person (and its associated parties) must not acquire 20% or more of the voting securities in a Code company (or increase their control if they already hold 20% or more). In order to avoid a breach of the Fundamental Rule, it is necessary to comply with one of the following exceptions:

- (a) a full or partial takeover offer to acquire shares from all shareholders in the Code company (a full offer being an offer to purchase all shares held, and a partial offer being an offer to acquire a specified percentage of shares from each shareholder);
- (b) an acquisition or allotment of securities which is approved by an ordinary resolution of the shareholders of the Code company who are not involved in the proposed acquisition or allotment;

- (c) the “creep” exception, which allows a person holding between 50% and 90% of the voting securities on issue to increase their voting percentage by up to 5% in any 12 month period;
- (d) through “compulsory acquisition” where a person already holds 90% of the voting securities in the Code company (in this case the majority holder can force the remaining shareholders to sell their shares to it, and the minority shareholders can also force the majority shareholder to buy them out); or
- (e) where an exemption is granted by the Takeovers Panel.

**Financial services regulation (financial service providers and financial advisers)**

The Financial Advisers Act 2008 provides a regulatory regime for financial advisers and brokers. That Act sets minimum standards of professionalism, competency and conduct. The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires that all persons carrying on the business of providing a financial service must be registered on the Financial Service Providers Register and must belong to a dispute resolution scheme if they advise retail clients.

The Financial Advisers Act provides for a number of different categories of financial adviser. The rights and obligations of each category vary depending on the type of advice given and products offered. The Act requires financial advisers and brokers to take an appropriate degree of care in providing services to investors and prohibits certain conduct.

The Financial Advisers Act also:

- (a) stipulates a required level of disclosure by financial advisers and brokers to retail clients to ensure that clients can make informed decisions about whether to use a particular financial adviser or broker and, in the case of an adviser, whether to follow that adviser’s advice;
- (b) imposes competency requirements on certain financial advisers who deal with retail clients to ensure that financial advisers have the experience and expertise necessary to identify the right financial product for a client’s needs and risk profile; and
- (c) ensures that financial advisers are held accountable for the services that they provide to retail clients and that conflicts of interest are managed appropriately.

All persons who are “in the business of providing a financial service” are required to be registered on a searchable online database, and where such financial service is provided to “retail clients”, to be a member of an approved dispute resolution scheme. The purpose of this database is to enable members of the public to access information about the name and address of a financial service provider and the name of the dispute resolution scheme (if applicable) the provider belongs to.

A “Financial Service” includes (among other matters):

- (a) a financial adviser service (giving financial advice or investment planning in the ordinary course of business);

- (b) keeping, investing, administering, or managing money, securities, or investment portfolios on behalf of other persons;
- (c) being a registered bank;
- (d) providing credit under a credit contract;
- (e) giving financial guarantees;
- (f) participating in an offer of securities to the public either of as an issuer of the securities or as the promoter (including as a trustee, unit trustee, superannuation trustee or manager);
- (g) operating a money or value transfer service or foreign exchange;
- (h) acting as an insurer; or
- (i) entering into derivative transactions or futures contracts.

Being “in the business of providing a financial service” means carrying on a business of providing or offering to provide a financial service (whether or not the business is the provider’s only business or principal business). There are a number of exceptions to whether a person will be regarded as being “in the business of providing a financial service”. The exemptions include certain professions such as lawyers, conveyancers, chartered accountants and real estate agents who are providing a service in the ordinary course of their business, certain government departments and not-for-profit entities offering free financial services.

There are significant penalties if any person who is in the business of providing a financial service is not registered. A fine of up to \$300,000 may be imposed for failure to register. A director who knowingly fails to prevent the offence also commits an offence.

Before a financial service provider can apply for registration, it must join an approved dispute resolution scheme if it provides financial services to “retail clients”. A retail client is any person who receives a financial service who is not a “wholesale client”. A wholesale client is one who, for example, receives a financial service as a part of their own business of providing a financial service, persons whose principal business is the investment of money, large companies or certain Crown entities.

For each scheme there is an annual membership fee payable and if a complaint is made, further fees will be incurred, usually dependent on the level to which the complaint escalates.

Once a financial service provider has joined a dispute resolution scheme, it can register online. The Registrar of Financial Service Providers will carry out a criminal records check on each of the individuals named in the application for registration (the director, controlling owner and senior manager). This will take two to five working days and, provided the checks are clear, registration will then be complete. A financial service provider has an obligation to update its details annually and to notify the Registrar if they become disqualified from providing financial services.

---

## EMPLOYMENT

### *Employment relationship*

Establishing and maintaining good faith relationships is the basis of employment law in New Zealand, for both collective and individual arrangements. It is also a requirement of the Employment Relations Act 2000 which is the key piece of legislation in this area.

### *Types of employment agreements*

Every employee in New Zealand must have a written contract called an employment agreement. This can be either an individual agreement or a collective agreement.

There are some provisions that must be included in employment agreements by law, and there are also a number of minimum conditions that must be met regardless of whether they are included in employment agreements. Employment law also provides a framework for negotiating additional entitlements.

### *Collective employment agreements/unions*

Employers can enter into collective employment agreements with unions representing a group of two or more employees. Unions are regulated societies in New Zealand and are currently the only party allowed to enter into collective agreements with employees. Employees have the right to decide whether or not to join a union, and it is unlawful for an employer (or anyone else) to put unreasonable pressure on an employee to join or not join a union.

Once employees have joined a union, employers must, if asked, enter into

bargaining for a collective agreement with that union. Bargaining can cover a range of issues, but it will normally include the coverage of the agreement, either by the work performed or the workers involved, and the term of the agreement.

### *Individual employment agreements*

Individual employment agreements contain an employee's terms and conditions which are agreed between the parties, provided they are not inconsistent with legislation, as mentioned above.

### *Fixed term agreements*

Fixed term agreements are used when an employer has a genuine reason based on reasonable grounds to offer a fixed term. This must be explained at the start of the employment relationship. The terms must be recorded in the employment agreement and set out how the employment will end and why. This could be, for example, as a result of the completion of seasonal work or a particular project. Such workers have the same rights as other employees, except that their jobs will finish at the end of the fixed term.

### *Part-time/casual employees*

Part-time employees (who simply work fewer hours than full-time employees) are regarded as permanent employees and have the same rights as full-time employees on that basis.

Casual employees, on the other hand, work intermittently on an "as and when" required basis. Although casual employees also generally derive the same rights as permanent employees, the way in which annual holidays, sick and bereavement leave are applied can vary for these employees.



### *Leave entitlements*

New Zealand law provides for a minimum statutory leave entitlement of four weeks' holiday, 11 public holidays, five days' sick leave and three days' bereavement leave each year. There is no long service leave available as a matter of right in New Zealand. If an employer wishes to offer more than the minimum statutory entitlements, this should be incorporated into an employee's employment agreement as necessary.

Employees may be eligible for paid and unpaid parental leave if they meet certain criteria. The paid leave is funded by the Government, not employers. In most instances, employers must keep jobs open for employees on parental leave.

Employees may also be entitled to other types of leave, for example if they've been injured in a work accident (see Accident Compensation Corporation below) or are training in the armed forces.

### *Trial period and probationary period*

Employers can make an offer of employment that includes either a trial period or a probationary period. Although of similar application, these clauses have a slightly different effect.

A trial period gives an employer the ability to assess the suitability of an employee for a period of 90 days. The employer can then choose to terminate the employee's employment before or at the end of the 90 day period, without the risk of an employee bringing a personal grievance against the employer for unjustified dismissal. However, an employee can raise a personal grievance on other grounds (as opposed to unjustified dismissal), such as discrimination, harassment or

unjustified action by the employer.

A probationary period allows an employer to assess the suitability of an employee for a particular role but places greater obligations on an employer in terms of satisfying employment requirements should there be any issues with performance. However, unlike a trial period, probationary periods can be for longer than 90 days.

Employees on both trial periods and probationary periods are entitled to all other minimum employment rights.

### **Ending the employment relationship**

There are several ways in which employment relationships can be ended, including retirement or resignation, dismissal and redundancy.

There is no set age to retire from work in New Zealand, and employers cannot require employees to retire just because of their age. Employees may hand in their resignation at any time, provided they give reasonable notice in accordance with their employment agreement.

There must be a good reason for a dismissal and the dismissal must be carried out fairly, which will depend on the circumstances. Any relevant provisions in the employment agreement must be followed.

An employer must have a genuine work-related reason for a redundancy. The employer cannot use redundancy as a way of dismissing an employee for reasons relating to the employee personally (such as their performance). The employer must provide information to employees when they are considering changes that will affect their jobs. Generally, there is no right

to redundancy compensation unless employers and employees or, where relevant, their union have agreed to it.

### **Employment problems/personal grievances**

Every collective and individual employment agreement must contain a clear explanation of the processes for resolving employment relationship problems. A problem includes anything that may harm an employment relationship, including relationships between an employer and employees, as well as among employees.

Some of these problems may be the basis of a "personal grievance" which requires specific treatment under New Zealand legislation. Personal grievances can be brought against an employer for a number of reasons such as actions giving rise to an unjustified dismissal, or if an employer has acted unjustifiably in the event of a redundancy. An employee must raise a personal grievance within 90 days of the action complained of.

The employer and employee have the option of trying to resolve the problem through mediation before applying to the Employment Relations Authority for determination (a judicial-based forum in New Zealand), followed by the Employment Court (the next level of judicial determination).

### **Transfer of employees on sale of business**

Employers have some specific legal obligations where a business is sold or transferred, or work is contracted out. Most employers must follow the procedures set out in the compulsory "employee protection" clause contained

in the employment agreement to protect employees in these types of situations.

Employers who employ staff performing certain catering, cleaning, caretaking, laundry and orderly work have special obligations that provide continuity of employment protection to employees during restructuring.

### **Other obligations**

Employers in New Zealand also have other obligations in respect of their employees, including those set out below.

*KiwiSaver* - KiwiSaver is a voluntary work-based savings initiative to help New Zealanders with their long-term saving for retirement. There are various obligations imposed on an employer for managing the scheme including providing employees with required information, making deductions from their remuneration and making the required contributions should an employee choose to join the scheme. Failure to comply with these obligations can lead to penalties.

*Health and safety* - Employers are obliged to provide safe workplaces with proper training, supervision and equipment, to everyone who has access to the workplace. This duty includes actively monitoring the workplace to identify, assess and manage hazards appropriately. Employees must take reasonable care to keep themselves safe, and to avoid causing harm to other people by the way they do their work.

*PAYE (Pay As You Earn)* - PAYE is the system set up by the Income Tax legislation for taxing the income of employees. It must be deducted from most payments made to employees, and paid to the Inland Revenue

Department. It applies to all wages, salaries, and extra payments (for example, bonuses and lump sums).

*Wages and records* - Generally, the adult minimum wage must be paid to employees aged 16 years and over. Minimum pay rates are usually reviewed each year by the New Zealand Government. Employers can't pay employees differently if the only difference is whether they are male or female. There are legal requirements for paying wages and keeping wage, time, holiday and leave records in New Zealand.

*ACC (Accident Compensation Corporation)* - ACC is a "no fault" scheme which covers any accident that occurs in New Zealand, including workplace accidents. Put simply, ACC is an "insurance" that addresses any compensation and income lost as a result of an accident, whatever the cause. Employers are legally required to pay annual levies for all employees employed by it based on the nature of the profession and the number of employees. Employees also pay ACC premiums which are deducted along with PAYE. When an employee is injured in the workplace, the employer is obliged to pay the first five days the employee is absent. If it is not a workplace accident, then the employer is not obliged to do so.

### **Independent contractors**

For completeness, we also make note of another type of relationship that exists separately from the employment relationship, that of an independent contractor relationship arising between a principal and contractor. Contractors are commonly engaged under an independent contractor agreement or a "contract for services" and do not

derive the same rights and benefits as employees do under the applicable legislation in New Zealand.

Normally it is relatively straightforward as to whether a person is engaged under an employment agreement or an independent contractor agreement. However, the types of agreements entered into between the parties are not necessarily conclusive of the nature of the relationship between them. They can be challenged by either party by making an application to the Employment Relations Authority or the Employment Court which will examine the situation using a number of tests in order to determine the real nature of the relationship.

---

## **ONGOING OPERATIONAL MATTERS**

### **Fair Trading Act**

The Fair Trading Act 1986 is administered by the Commerce Commission and covers conduct relating to the promotion and sale of goods and services. Broadly, it prohibits conduct in trade which is misleading or deceptive, the provision of false information and unfair trade practices. It also provides for the disclosure of certain consumer information and promotes product safety.

The Fair Trading Act does not compel businesses to provide information on its goods or services to consumers in all circumstances, but it ensures that any information that is provided to consumers is accurate and prohibits the withholding of important information so consumers can be confident that information they receive when making decisions is reliable and accurate.

## **Consumer Guarantees Act**

The Consumer Guarantees Act 1993 sets minimum guarantees about goods and services ordinarily purchased for personal or household use, from sellers in trade.

Guarantees in relation to goods include that they will be of acceptable quality, comply with description/sample, and be reasonably fit for any particular purpose the consumer makes known and for any particular purpose for which the supplier represents they are or will be fit.

Guarantees in relation to services include that they will be performed with reasonable care and skill, fit for the purpose supplied for and completed within a reasonable time.

Sellers cannot contract out of their obligations under the Consumer Guarantees Act except in relation to goods or services which are purchased for the purposes of a business. The Act sets out various remedies for consumers against suppliers and manufacturers when the guarantees are not complied with.

## **Credit Contracts and Consumer Finance Act**

Another area of law designed to protect New Zealand consumers is the Credit Contracts and Consumer Finance Act 2003. This Act requires a creditor who enters a “consumer credit contract” to provide a written disclosure statement to consumers containing certain specified information about the terms of the contract.

The Act also allows consumers to have the terms of a credit contract varied for “hardship” reasons and gives power to the courts to examine and, if appropriate,

vary the terms of an “oppressive” contract. A credit contract is defined as a contract under which credit is or may be provided. Credit is provided where someone is given the right to defer payment of a debt, or incur a debt and defer its payment. A credit contract also includes the right to defer payment for the purchase of property, goods or services (for example, a hire purchase agreement).

The Act also places restrictions on the way the creditor can apply interest on the contract and sets out rules and guidelines for fees, payments, extended warranties and cancellations.

Penalties include statutory damages, fines of up to \$30,000, and prohibition from providing consumer credit. The Commerce Commission is responsible for the enforcement of the Act.

## **Commerce Act (anti-competitive practices and pricing controls)**

### *Anti-competitive practices*

The purpose of the Commerce Act 1986 is to promote competition in markets. Therefore that Act prohibits agreements which substantially lessen competition in a market, such as agreements to fix prices, carve out market conduct or abuse a dominant market position.

Co-ordinated conduct prohibited by the Commerce Act includes:

- (a) agreements that substantially reduce competition in a market;
- (b) agreements that exclude or restrict dealings with a competitor; and
- (c) agreements that fix, maintain or control prices (cartels).

Unilateral conduct prohibited by the Commerce Act includes:

- (a) a business or individual taking

advantage of their dominant market position for an anti-competitive purpose; and

- (b) a business or individual specifying a minimum price for the sale of its goods by another.

In assessing whether competition has been substantially lessened, the Courts will consider whether other market participants can compete effectively (for example by setting their own prices, standards of quality and output volumes) and how hard it is for new competitors to enter the market.

The Commerce Commission can investigate complaints regarding anti-competitive practices. There are a number of actions it may take where it believes the Act has been breached, including issuing warnings or bringing a prosecution in the High Court.

It is possible for a business to apply for an authorisation from the Commission to prevent any further action being taken, where it can show that although in breach of the Act, the conduct brings benefits which outweigh the potential harm arising from a loss of competition. This process can however be lengthy and complex.

### *Pricing controls*

The Act prohibits price fixing agreements between competitors which set the price of goods or services or interfere with how a price is reached. Price fixing agreements are also known as cartels. A cartel comes into existence when businesses agree to act together for an anti-competitive purpose, rather than competing with each other. Price fixing affects competition by making goods and services more expensive, lessening choices available to consumers and often reducing innovation, quality and investment.

The Act specifically prohibits any contract, arrangement or understanding between parties who are in competition with one another which has the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services.

Types of prohibited agreements include:

- (a) price fixing: agreements which set a minimum price, eliminate or reduce discounts, adopt a formula to calculate price, or increase or maintain prices;
- (b) bid rigging: agreements between competitors as to who should win a bid. The effect of such agreements is that consumers are unaware that these bidders are not actually competing with each other to offer the lowest price;
- (c) market sharing: where competitors agree to divide up markets between themselves (for example allocating geographical regions, products or customers to each other); and
- (d) output restrictions: where competitors agree to limit or lessen the output of certain goods or services so as to limit production, and then maintaining or increasing prices.

Some exceptions to price fixing arrangements apply under the Act, including where two or more businesses are in a joint venture or there is a partnership arrangement between individuals.

## **Creditor protection: Personal Property Securities Act and security interests**

The Personal Property Securities Act 1999 sets out a regime for creating and enforcing security interests in personal property. Personal property is essentially all property other than land (and a few other specific exceptions). A security interest under the Personal Property Securities Act is an interest in personal property, created or provided by a transaction that, in substance, secures payment or performance of an obligation, without regard to the form of the transaction and without regard to the person who has title to the collateral.

In order to protect a secured party's priority to personal property, the security interest must "attach" to the personal property and a secured party must "perfect" the security interest in the personal property.

Attachment occurs when the debtor enters into a valid security agreement. In order to be valid, the security agreement must:

- (a) be signed or agreed to in writing by the debtor;
- (b) contain a description of the personal property to be secured so that it is reasonably capable of identification; and
- (c) create the security interest or charge over the personal property.

Generally, perfection of the security interest occurs when the secured party registers a financing statement on the Personal Property Securities Register ("PPSR"). The PPSR is an online register controlled by the Registrar of Personal Property Securities.

The Act sets out priority rules and enforcement options for secured parties. Priority is determined by order of perfection, although there are a number of specific priority rules which modify this general rule.

## **Intellectual property**

The Intellectual Property Office of New Zealand is responsible for the registration and administration of trade marks, patents, designs and plant variety rights.

New Zealand is a signatory to several international treaties and conventions in relation to intellectual property, including the Patent Co-operation Treaty, the Paris Convention, the Berne Convention, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

### *Trade Marks*

Registration of a trade mark under the Trade Marks Act 2002 confers the exclusive right to use the mark in relation to the registered goods and services. New Zealand uses the Nice Classification System so trade marks can be registered in one or more of the 45 classes of goods and services under that system.

The register is publicly available and registration lasts for a term of 10 years (from the date of application or convention priority date) and can be renewed every 10 years.

### *Patents*

A patent granted under the Patents Act 1953 grants the registered proprietor of an invention the exclusive right to use and license the invention during the term of the patent (a monopoly). Patents are granted for a maximum term of 20 years, provided renewal fees are paid.

To be eligible for registration of a patent, an invention must be industrially applicable, contain a “non-obvious” inventive step and be new or novel. It is essential that the invention is not disclosed prior to filing.

### *Designs*

A design means features of shape, configuration, pattern, or ornament applied to an article by any industrial process or means, which appeal to and are judged solely by the eye and which are not solely functional or a method or principle of construction. To be registrable under the Designs Act 1953, a design must be new and original and must not have been published in New Zealand before the filing date. The term of a design registration is 15 years maximum (provided renewal fees are paid at five and 10 years from the application date).

### *Copyright*

Copyright is not registrable in New Zealand. Copyright protection automatically exists in any original work which is, among other works, a literary, dramatic, musical, or artistic work, a sound recording, film or communication work. Owners of such original works are granted rights under the Copyright Act 1994, such as the right to make copies, adaptations, issue copies to the public and perform/play/show the work in public.

The term of copyright is generally 50 years from when the work was made in the case of sound recordings and films and 50 years from the death of the author in the case of literary, dramatic, musical and artistic works.

## **Goods and Services Tax**

Goods and Services Tax (GST) is a consumption tax which is charged on the supply of most goods and services in New Zealand at a rate of 15%. Businesses are responsible for charging GST where appropriate and collecting it on behalf of the government. GST on business purchases and expenses may be claimed back. It is important to seek tax advice on GST registration and GST records and returns.

---

## THE NEW ZEALAND LEGAL SYSTEM

### **Government**

The New Zealand system of government is derived from the English one and comes from two main sources, the common law and statute law.

The common law is a body of law made up from judicial decisions made in the United Kingdom and in New Zealand. Additionally, other decisions made in jurisdictions such as the United Kingdom, Australia, United States and Canada are sometimes relevant and often used to assist the Courts to make decisions in novel or emerging areas of law. Statute law is the law made by New Zealand’s Parliament.

An integral feature of the New Zealand system is the separation of power among three different branches of Government. The division of power seeks to ensure that no one branch can act unconstitutionally. The three branches are the legislature, the Executive and the Judiciary.

The role of the legislature is to make law. The legislature consists of New Zealand’s Parliament which has developed from the British

parliamentary system known as the Westminster system of government and is the highest law making body in New Zealand. Parliament consists of two parts. The first is the head of state of New Zealand (Queen Elizabeth II) who is represented by the Governor-General. The Governor-General is appointed by the Queen, on the Prime Minister's recommendation, for a term of five years. The Governor-General exercises the Queen's royal powers and his or her main constitutional function is to invite the leader of the majority political party to form a government. The Governor-General is required by constitutional convention to follow the advice of government ministers. This means that the Governor-General does what the Government advises him or her to do. (Although there are some situations where the Governor-General may be required to exercise independent judgment, this has not happened for a long time.) The second is the New Zealand Parliament. It has one chamber, called the House of Representatives. The House consists of 120 members of parliament (MPs) who are elected to the House for a three year term. New Zealanders aged 18 and over elect the MPs by voting in elections every three years. The House's responsibilities include to debate and pass legislation, provide a Government, supply money and represent the views of the people of New Zealand.

The role of the Executive is to initiate and administer law. The Executive is made up of the Prime Minister, the Cabinet (which consists of ministers who are members of the governing party or parties in Parliament and is presided over by the Prime Minister) and the public sector.

The role of the Judiciary is to apply the law. The independence of the Judiciary

is an important principle of the New Zealand constitution. As a result, freedom from political interference is an essential feature of the Judiciary's position within the New Zealand legal system. It is the judge's role to apply the law to every case that comes before the Court. Judges, however, also develop law by deciding what legislation passed by Parliament means by interpreting it. Judges are appointed by the Governor-General. All judges are lawyers with at least seven years' experience, and usually have many more.

### *New Zealand's Constitution*

New Zealand does not have a single written constitution. The Constitution, which is the foundation of our legal system, is drawn from a number of important statutes, judicial decisions and customary rules known as constitutional conventions.

### *The Rule of Law*

The Rule of Law also forms a significant part of the New Zealand Constitution. The principles of the Rule of Law encompass ideas such as:

- (a) the powers exercised by MPs and officials are based on legal authority;
- (b) minimum standards of justice exist to which the law must conform;
- (c) the law should have safeguards against the abuse of wide discretionary powers;
- (d) unfair discrimination should not be allowed by the law; and
- (e) a person should not be deprived of his or her liberty, status or other substantial interest without the opportunity of a fair hearing before an impartial Court or Tribunal.



### *The Treaty of Waitangi*

The Treaty of Waitangi was signed in 1840, as an agreement between the British Crown and a large number of Maori. Today the Treaty is widely accepted to be a constitutional document, which establishes and guides relationships between the Crown, New Zealand and Maori.

### **The Court system**

New Zealand has a hierarchical Court system which has jurisdiction to hear both criminal and civil claims. New Zealand also has a specialist family court, environment court, employment court, youth court and Maori land court.

The New Zealand processes closely resemble those of England and Australia. With a small number of exemptions, civil cases are determined by a judge sitting alone and not with a jury. However, juries are common in serious criminal trials.

In addition, parties are able to resolve their disputes by arbitration without interference of the Courts, pursuant to the Arbitration Act 1996. The Act is based on the Model Law on International Commercial Arbitration (UNCITRAL) and gives effect to various international protocols and conventions. New Zealand is also a signatory to the New York convention on the recognition and enforcement of foreign arbitral awards. Arbitral awards from other state parties are recognised and enforceable in New Zealand.

---

## ENVIRONMENT AND RESOURCE MANAGEMENT

### **The Resource Management Act**

The principal piece of environmental legislation in New Zealand is the Resource Management Act 1991. The Act has a broad purpose, being the sustainable management of natural and physical resources. Sustainable management is defined in section 5(2) of the Act as managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while:

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
- (d) In practice, sustainable management is achieved through, first, a hierarchy of planning documents and, secondly, through the mechanism of the resource consent process.

### *Planning Documents*

Planning documents include, in order of hierarchical importance:

- (a) national Policy Statements;
- (b) regional Policy Statements;
- (c) regional Plans; and
- (d) district Plans.

The Act incorporates a fixed process for the development of these planning instruments, with a particular focus on enabling wide rights of consultation and community participation.

#### *Resource consents*

Regional and District Plans group activities into the categories of permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited. Resource consents are required for controlled, restricted discretionary, discretionary and non-complying activities. Resource consents cannot be granted for prohibited activities. Each resource consent application must include an assessment of effects of the proposal on the environment, the nature and complexity of which will vary depending on the scale of a particular project. In making decisions on applications for resource consents, the consent authority tends to focus on an evaluation of the 'actual and potential effects' on the environment of allowing the activity and whether or not granting consent would be consistent with the policy provisions of any relevant planning instrument.

A particular feature of the Act is devolved decision making, whereby the New Zealand Government has consistently taken the philosophical approach that decisions on environmental management are best made by those directly impacted. In certain circumstances where, for example, large infrastructure projects of national significance are proposed, Central Government can intervene and direct that a decision be made either via a call-in process, or by the Environmental Protection Authority.

Over the term of its existence, the Act has undergone a number of refinements largely aimed at streamlining the development of planning documents and the consenting process. Despite its flaws, it continues to be a robust piece of legislation and one that is likely to remain largely unchanged in the foreseeable future.

### **Climate change and the Emissions Trading Scheme**

New Zealand has committed to reducing its green house gas emissions to 1990 levels under the Kyoto Protocol during the first commitment period from 2008 until 2012. The Emissions Trading Scheme ("ETS") is New Zealand's method for achieving this. From 2013 onwards there is no international agreement on targets for reducing emissions although the indication from the current New Zealand Government is that the ETS will continue.

Participants in the ETS must monitor, report on and account for greenhouse gas emissions they produce. The method for "accounting" is an obligation to purchase and surrender "units" (NZUs or other Kyoto units purchased overseas), in proportion to the levels of emissions produced (one unit = one tonne of carbon dioxide released into the atmosphere).

The cost of purchasing units is an incentive to the emissions producer to adopt less polluting techniques and technologies. These costs can, in large part, be passed onto consumers.

In many cases "participation" in the ETS will be mandatory. However, units can also be "produced" by engaging in practices which 'capture' carbon

(e.g. growing trees). Participation in the ETS due to 'emissions removal' activities is voluntary and allows participants to potentially sell the units they have generated for a profit.

Units are held in an account in the participant's name via an online registry and all transfers in and out of a participant's account are recorded. A security interest may be registered on the PPSR against a participant's ETS account.

Units are tradeable on the commercial market domestically as well as internationally (subject to certain requirements). The price of carbon (i.e. the average price of a unit) will therefore be determined by supply and demand.

The Climate Change Response Act 2002 contains significant penalties for failure to comply (including criminal conviction and potential imprisonment). The offences are strict liability and therefore it is important to be aware of ETS obligations if you are engaging in an industry where participation is mandatory, to ensure you do not inadvertently breach that Act.

The New Zealand ETS (unlike schemes in some other jurisdictions) is designed to cover "all sectors, all gases". Entry into the ETS for each sector is staggered:

Sector	Voluntary Reporting	Mandatory Reporting	Full Obligations (surrender units)
Forestry			1 January 2008
Liquid fossil fuels		1 January 2010	1 January 2010
Stationary energy		1 January 2010	1 January 2010
Industrial processes		1 January 2010	1 January 2010
Synthetic gases	1 January 2011	1 January 2012	1 January 2013
Waste	1 January 2011	1 January 2012	1 January 2013
Agriculture	1 January 2011	1 January 2012	1 January 2015

---

## Sources

**Ministry of Justice:**

[www.justice.govt.nz](http://www.justice.govt.nz)

**Auckland District Law Society:**

[www.adls.org.nz](http://www.adls.org.nz)

**Intellectual Property**

**Office of New Zealand:**

[www.iponz.govt.nz](http://www.iponz.govt.nz)

**Commerce Commission:**

[www.comcom.govt.nz](http://www.comcom.govt.nz)

**Companies Office:**

[www.companies.govt.nz](http://www.companies.govt.nz)



