TAX MANAGEMENT
PORTFOLIOS™

FOREIGN INCOME

Business Operations in New Zealand

by

Vivian Cheng
Chapman Tripp
Wellington, New Zealand

and

David Patterson
Patterson Legal
New Zealand

Vivian Cheng, B.C.A. (Hons), LL.B. (Hons), is a Partner at Chapman Tripp, Barristers and Solicitors.

David Patterson, B.C.A., LL.B. (Hons), LL.M. (Harvard), is a tax specialist and founder of Patterson Legal.

They specialize in structuring commercial transactions and taxation law, focusing on corporate and international taxation.

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Business Operations in New Zealand

PORTFOLIO DESCRIPTION

Tax Management Portfolio, *Business Operations in New Zealand*, No. 7270-2nd, contains the basic information that will enable a foreign business to determine the best method of conducting its operations in New Zealand from both the tax and the general legal points of view. It analyzes in detail New Zealand income taxation as applied to individuals and corporations. This analysis also includes considerations concerning the establishment of a business entity in New Zealand and operations through a branch office as compared with a subsidiary. In addition to a detailed explanation of the New Zealand system of income taxation, the Portfolio discusses New Zealand company law, tax treaties, and indirect taxation.

The Worksheets in the Portfolio provide various checklists, including a guide to making an application under the Overseas Investments Act 2005, and lists of incorporation procedures under the Companies Act of 1993, with further guidelines included concerning the operational obligations of companies and branch registration. The Worksheets also include a selected list of tax forms and guides (available from the Inland Revenue Web site) for corporations, partnerships, estates and trusts, and include forms for the PAYE and Fringe Benefit Tax regimes, in addition to various withholding forms.

This Portfolio may be cited as Patterson and Cheng, 7270-2nd T.M., *Business Operations in New Zealand*.

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DETAILED ANALYSIS

I. New Zealand — General Background

A. Political Organization

While New Zealand does not have an entrenched constitutional document like that of the United States or Australia, the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990 form the basis of New Zealand's constitution.

The Constitution Act 1986 contains New Zealand's most important statutory constitutional provisions. This Act regulates the four arms of government: the Sovereign; the Executive; the Legislature; and the Judiciary.

The Bill of Rights Act 1990 (the "Bill of Rights Act") protects certain fundamental rights and freedoms in New Zealand. These rights include freedom of religion, of speech and of assembly; the right to protection against discrimination; the right of access to a lawyer when arrested; and the right to a fair trial. Unlike its U.S. equivalent, the Bill of Rights Act is not supreme law. The Act itself is an ordinary statute and may be amended or repealed by a simple majority in Parliament. The courts do not have the power to strike down legislation on the basis that it is inconsistent with the rights and freedoms set out in the Act.[1] However, Section 6 prescribes that, when the courts are interpreting legislation, "wherever an enactment can be given a meaning that is consistent with the rights and freedoms … that meaning shall be preferred to any other meaning." Section 5 is also relevant in determining whether there is an inconsistency. That section states that (subject to Section 4) the rights and freedoms in the Act are subject only to reasonable limits prescribed by law, "as can be demonstrably justified in a free and democratic society."

In *Hansen v. R*,[2] the New Zealand Supreme Court described the operation of Sections 4, 5, and 6 of the Bill of Rights Act. Where the consistency of a statutory provision with the Bill of Rights Act is in question, the court must first ascertain Parliament's intended meaning for the provision and whether that meaning is inconsistent with a right or freedom contained in the Act.[3] If there is an inconsistency, the court will determine whether it is justified in a free and democratic society.[4] If the provision is, on its conventional interpretation, an unjustified limitation on the rights and freedoms described in the Bill of Rights Act, the court will then consider whether the provision can be interpreted consistently with the Bill of Rights Act under Section 6. This may, for example, require the court to give the provision an expansive interpretation.[5] The limitation on a right must be exercised reasonably. If there is no way to interpret the provision to be consistent with the Bill of Rights Act, then the court must apply Parliament's intended meaning.[6]

At the heart of New Zealand's political system is the Parliament of New Zealand. Parliament is comprised of the Sovereign (normally represented by the Governor-General)[7] and an elected House of Representatives. The election is by popular vote. In 1993, the "first past the post" system was replaced by a mixed member proportional (MMP) system, which is a type of proportional voting system, ensuring that the make-up of parties in Parliament reflects the vote at a national level. The principal functions of Parliament are to enact laws, to provide a government, and to control the collection and distribution of public finance.

The other main ruling organ is the Government. After a general election, the Governor-General invites the leader of the party holding the greatest number of seats in the House of Representatives to form a Government. The leader of this party becomes the Prime Minister if the party with the greatest number of seats has a majority in the House of Representatives or is able to form a coalition Government. On the new Prime Minister's advice, the Governor-General appoints a number of parliamentary members to preside as ministers over various areas of government administration, called portfolios, with responsibility for daily executive decisions.

B. New Zealand's Legal System

1. Statute Law

New Zealand operates a single legal system that applies to all people equally. The legal system is based on common (i.e., judge-made) law and draws heavily on its English roots. The law of New Zealand consists of the common law, statute law enacted by the New Zealand Parliament, a small number of

[1] Bill of Rights Act 1990, s. 4. However, in *Attorney-General v. Taylor* [2018] NZSC 104, the Supreme Court recognized the courts' jurisdiction to make formal declarations of inconsistency where an enactment was inconsistent with the Bill of Rights Act. The recently enacted New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 provides for the procedures to be followed in response to such declarations, which largely involve the relevant Minister bringing the declaration to the attention of the House of Representatives and providing a report advising on the Government's response to the deadline.

[2] *Hansen v. R* [2007] 3 NZLR 1 (SC).

[3] *Hansen v. R* [2007] 3 NZLR 1 (SC) at [92].

[4] *Hansen v. R* [2007] 3 NZLR 1 (SC) at [92].

[5] See, *Flickinger v. Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA); *Callahan v. Superintendent of Mount Eden Prison* [1992] 1 NZLR 541 (CA).

[6] Bill of Rights Act 1990, s. 4.

[7] Appointment to the Office of Governor-General is made by The King (in his capacity as King of New Zealand) on the advice of the Prime Minister to The King. The Prime Minister's advice is usually the result of a decision made by Cabinet; hence the appointment of the Governor-General is made by the executive of the Government of the day. As a matter of convention, the Leader of the Opposition is also consulted on the appointment. Responsibilities of the Governor-General include appointing ministers and judges, dissolving Parliament, granting assent to legislation, issuing writs for elections and bestowing honors. All the Governor-General's duties are carried out in the name of The King. In a very few cases, the Governor-General may exercise a degree of personal discretion under what are known as the "reserve powers" (and even then convention usually dictates what decision should be made). The Governor-General's most important role is the appointment of a Prime Minister following an election or accepting the resignation of an incumbent Prime Minister. Other reserve powers are the powers to dismiss a Prime Minister, to force a dissolution of Parliament, to refuse a Prime Minister's request for an election and to refuse assent to legislation.

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U.K. statutes still in force in New Zealand, regulations, bylaws[8] and other forms of subordinate legislation.

Legislation is enacted by Parliament. Proposed legislation is placed before the House of Representatives in the form of draft legislation known as "bills." Bills receive three readings before they are forwarded to the Governor-General for Royal Assent. Following Assent, a bill becomes an Act of Parliament and part of the law of New Zealand. The current Parliamentary Standing Orders of the House (last amended in August 2020) set out the procedure for progress of a bill through Parliament. The process starts when a bill is introduced to the House for members to read and consider. On first reading, no sooner than three days after a bill's introduction, there is chance for debate. After a vote is taken, the bill can be defeated or may progress to Select Committee stage. Under normal circumstances, the Select Committee must report back to Parliament within six months. When the report has been presented, the second version of the bill will be available. If the bill survives its second reading, it will be sent to debate by a Committee of the Whole House. The Committee of the Whole House presents an opportunity to debate the bill in detail and produce a final form for the third reading. After it has been read for a third time, there may be debate summing up the bill, in its final form. The amended bill is put to a final vote. If the bill is passed, it must receive Royal Assent before it becomes an Act.

2. Court System

The highest court of New Zealand is the Supreme Court of New Zealand, which usually sits in Wellington. The Supreme Court was established under the Supreme Court Act 2003, which came into force on January 1, 2004. The Supreme Court Act 2003 and the Judicature Act 1908 have now been replaced by the Senior Courts Act 2016.

The Supreme Court began hearing appeals on July 1, 2004. Before the Supreme Court was established, New Zealand's highest court was the Judicial Committee of the Privy Council, which sits in London. The Privy Council may still hear appeals from proceedings in very limited circumstances.[9] Its jurisdiction is now practically limited to historic contemporary appeals. The next highest court is the Court of Appeal, which sits in Wellington, followed by the High Court and the District Courts. The operation of the Supreme Court, Court of Appeal and High Court is explained in the Senior Courts Act 2016, while the operation of the District Courts is covered by the District Court Act 2016. Both Acts were implemented in March 2017 following a consolidation and modernization of the statutes affecting the court system.

All courts exercise both criminal and civil jurisdiction. New Zealand also has specialist courts and tribunals, including the Employment Court, Family Courts, Disputes Tribunals and the Taxation Review Authority. Decisions from specialist courts and tribunals are generally subject to statutory rights of appeals to courts of general jurisdiction, and may also be judicially reviewed in the High Court in the normal way.

Whether a criminal proceeding is commenced in the District Courts or the High Court will depend upon the seriousness of the offense. Civil proceedings will be heard by the High Court if the amount in issue is more than NZ $350,000. Issues involving lesser amounts can be heard in the District Courts from which there is a right of appeal to the High Court. High Court decisions may be appealed to the New Zealand Court of Appeal. If the appeal is a second appeal, the appellant must apply for leave from the High Court. If leave is refused by the High Court, the Court of Appeal may also grant leave to appeal. Court of Appeal decisions may generally be appealed to the Supreme Court only if the Supreme Court itself grants leave to appeal.[10] Decisions of higher courts are binding on lower courts.

C. New Zealand's Arbitration System

Arbitration is a common form of alternative dispute resolution in New Zealand. New Zealand's arbitration system is governed by the Arbitration Act 1996 ("Arbitration Act").

Commercial parties can refer disputes to arbitration, pursuant to:

(i) An arbitration clause in an existing contract; or

(ii) A bespoke arbitration agreement between them, subject to certain limitations.[11]

The purpose of the Arbitration Act is to promote consistency between international arbitral regimes, including the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 ("the UNCITRAL Model Law,") and New Zealand's domestic regime.[12]

1. Arbitration Act 1996

The Arbitration Act recognizes the confidentiality of arbitral proceedings and prohibits disclosure of confidential information subject to limited exceptions.[13]

The Act distinguishes between:

(i) Domestic arbitration, where both parties are based in New Zealand; and

(ii) International arbitration, where:

- The parties are situated in different States; or
- The place of arbitration is outside the State in which the parties have their business; or
- The subject matter of the arbitration is outside the State in which the parties have their business.[14]

Schedule 1 of the Arbitration Act is based closely on the UNCITRAL Model Law and applies as a default to all arbitra-

[8] A bylaw is a rule or regulation made by a local council. A council can make a bylaw where an Act of Parliament empowers it to do so. The Local Government Act 2002 bestows a range of bylaw-making powers. It also sets out the process that must be followed when passing bylaws (no matter which Act they are made under). This is called the Special Consultative Procedure.

[9] Senior Courts Act 2016, schedule 5, part 1, cl. 3.

[10] See, Senior Courts Act 2016, s. 74, for criteria for granting "leave to appeal."

[11] Arbitration Act 1996, s. 10.

[12] Arbitration Act 1996, s. 5.

[13] Arbitration Act 1996, ss. 14A – 14I.

[14] Arbitration Act 1996, Schedule 1, art. 1(3).

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tion proceedings, whether domestic or international, seated in New Zealand (with the ability for parties to opt out).[15]

Schedule 1 contains default provisions including provisions relating to:

(i) The appointment and challenge of arbitrators;

(ii) The procedure for the arbitration, including jurisdictional challenges and interim orders; and

(iii) The basic expectations in relation to due process.

Over and above the UNCITRAL Model Law, Schedule 1 of the Arbitration Act provides that commercial arbitration agreements may be made orally,[16] and any sum awarded is, as a default, to carry interest.[17] The High Court can order that any money payable under an arbitral award be paid to the Court or otherwise secured, pending the determination of an application to set aside that award.[18]

Schedule 2 of the Arbitration Act contains additional optional rules beyond those contained in the UNCITRAL Model Law. Schedule 2 applies to all New Zealand-seated arbitrations unless the parties opt out.[19] However, it applies to international arbitrations seated in New Zealand only if the parties agree that it should so apply.[20] Notably, Schedule 2 provides for the appeal of questions of law to the High Court (otherwise, there is no appeal mechanism from an arbitral award).[21]

2. Enforcement of Arbitral Awards

New Zealand has a strong reputation as a jurisdiction supportive of arbitration, including the enforcement of arbitral awards.

New Zealand is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention.") Schedule 1 of the Arbitration Act governs the enforcement of arbitral awards in New Zealand and is closely based on Chapter Eight of the UNCITRAL Model Law,[22] which was drafted to give effect to the New York Convention.[23]

As a party to the New York Convention, domestic and foreign awards are both readily enforced in New Zealand. All arbitral awards, domestic or foreign, must be recognized as binding and enforced as a judgment, on application in writing to the High Court.[24]

The limited grounds for refusing recognition or enforcement of an arbitral award in New Zealand[25] mirror the grounds set out in the New York Convention.[26] Claimants wishing to have an arbitral award recognized or enforced in New Zealand must bring proceedings within six years from the date on which the award became enforceable in the country in which it was heard.[27]

New Zealand is also party to the Washington Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)) and the Geneva Conventions on arbitration (the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927)).

[15] Arbitration Act 1996, s. 6(1)(a). The articles of the Model Law dealing with the staying of litigation proceedings where there is a valid arbitration agreement covering the dispute (arts. 8 and 9), and the recognition and enforcement of arbitral awards (arts. 35 and 36), are also included in Schedule 1 and apply to foreign-seated arbitrations: Arbitration Act 1996, s. 7.

[16] Arbitration Act 1996, Schedule 1, art. 7(1).

[17] Arbitration Act 1996, Schedule 1, art. 31(5).

[18] Arbitration Act 1996, Schedule 1, art. 34(5).

[19] Arbitration Act 1996, s. 6(2)(b).

[20] Arbitration Act 1996, s. 6(2)(a).

[21] Arbitration Act 1996, Schedule 2, art. 5.

[22] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985, art. 35 ("Recognition and enforcement") and art. 36 ("Grounds for refusing recognition or enforcement").

[23] Explanatory note by the UNICTRAL secretariat on the Moden law on International Commercial Arbitration Chapter 8 at 24.

[24] Arbitration Act 1996, Schedule 1, art. 35.

[25] Arbitration Act 1996, Schedule 1, art. 36.

[26] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), art. V.

[27] Limitation Act 2010, s. 35(1).

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II. Operating a Business in New Zealand

A. Foreign Investment Regulation

Foreign investment in New Zealand is monitored by the Overseas Investment Office (OIO) under delegated authority from the Minister of Finance. The OIO and the Ministry of Business, Innovation, and Employment are the appropriate initial points of contact for potential overseas investors in New Zealand. These two agencies provide liaison facilities with other government departments.

1. General

The OIO administers the Overseas Investment Act 2005 (OIA) and the Overseas Investment Regulations 2005 (the "2005 Regulations"), both of which entered into force on August 25, 2005, and have been amended multiple times since entering into force. The OIA and the 2005 Regulations incorporate the controls on overseas investment in New Zealand and represent a shift from the previous act and regulations. The OIA states that it is a privilege for overseas persons to own or control sensitive New Zealand assets and thus requires overseas investments in those assets to satisfy certain criteria in advance and also imposes conditions on those overseas investments. In practical terms, that has meant a tightening of control on investment in certain land in New Zealand deemed to be "sensitive land" under the OIA. The OIA and the 2005 Regulations are discussed in 3., below.

Overseas investors should be aware that the OIA and the 2005 Regulations have been through a reform program with a number of significant amendments occurring between October 2018 and November 2021. Of particular significance is the introduction of a national interest test that allows relevant Ministers to decline consent for certain transactions that they consider are contrary to New Zealand's national interest. Additionally, Ministers are now able to "call-in" certain transactions for review, despite those transactions not otherwise requiring consent. The national interest test and call-in power are discussed further below in 3.

Note: Overseas investors should note that applying for consent under the OIA, particularly if the transaction concerned involves "sensitive land," can be a time-consuming and bureaucratically challenging process. It is important to obtain legal advice early to determine whether a transaction requires consent under the OIA and to work through the application process.

The OIA includes very broad anti-avoidance provisions that will catch any action that has the effect of, directly or indirectly, defeating, evading or circumventing the operation of the OIA.

2. Overseas Investment Office

The OIO is a regulatory body established under the OIA, with the regulator being the chief executive of the Land Information New Zealand, of which the OIO is a part. The OIO administers New Zealand's overseas investment laws. The OIO's primary role is to assess applications for consent from overseas persons who intend to acquire sensitive New Zealand assets. The OIO also has a range of ancillary functions, which include monitoring compliance with conditions of consent, issuing guidelines where necessary, compiling and making available records and statistics relating to overseas investment in New Zealand, and enforcing the OIA.

3. Applying for Consent

While foreign investment is welcomed in New Zealand, in some circumstances an overseas person must obtain consent under the OIA before investing in New Zealand assets. There are two broad classes of assets for which overseas persons may require consent to invest in: sensitive land, and significant business assets. If consent is required, the overseas person must apply to the OIO, who will apply a range of criteria to the application when deciding whether to grant consent.

This section sets out:

(i) The definition of an overseas person;

(ii) When transactions will require consent (including discussion of exemptions from the consent requirements); and

(iii) The OIO's consent criteria.

Note: Given the complexity of New Zealand's overseas investment laws, overseas investors should obtain legal advice to determine whether an investment will require consent.

a. Who Is an Overseas Person?

The OIA applies to "overseas persons" and "associates of overseas persons." Overseas persons are people who are themselves overseas persons (for example, an individual that is not a New Zealand citizen or ordinarily resident in New Zealand, or a company incorporated overseas), or a person who is 25% or more owned or controlled by an overseas person or persons.

Recent OIA amendments have modified the definition of "overseas person" in respect of NZX listed issuers and managed investment schemes.

NZX listed issuers (noting that the definition of listed issuers excludes persons who are listed issuers only because their debt securities are approved for trading on a licensed market) are only overseas persons where:

(i) An overseas person has, or two or more overseas persons cumulatively have, a beneficial entitlement to, or a beneficial interest in, more than 50% of the securities of the listed entity; or

(ii) At least one overseas person (alone or together with its associates) has a beneficial entitlement to, or a beneficial interest in, 10% or more of any class of the listed issuers securities that confer control rights, if the cumulative interests of any overseas person that has such an interest gives those persons cumulatively the right to control the composition of 50% or more of the listed entity's governing body, or exercise or control the exercise of more than 25% of the voting power at a meeting of the listed entity.

Managed investment schemes that are New Zealand listed issuers are overseas persons if 50% or more of the value of the managed investment products are invested on behalf of overseas persons, or more than 25% of the value of the managed investment products that entitle holders to vote are beneficially owned by or on behalf of overseas persons who each beneficially own 10% or more of those products (alone or together with their associates).

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A person associated with an overseas person, such as a New Zealand citizen who is an agent of an overseas person, may also require consent to invest in sensitive New Zealand assets. The associate provisions are intended to extend consent requirements to situations where overseas investments are indirectly owned or controlled by an overseas person and operate as an anti-avoidance mechanism.

Persons may be subject to the associate provisions where they:

(i) Are controlled by an overseas person, or are subject to an overseas person's direction;

(ii) Are an agent, trustee or representative of an overseas person, or act on behalf of the overseas person, or are subject to the overseas person's direction, control or influence;

(iii) Act jointly with an overseas person in relation to the overseas investment or any other matter;

(iv) Participate in an overseas investment or any other matter as a consequence of any arrangement or understanding with the overseas persons.

b. Transactions that Require Consent

The OIA divides the regulation of overseas investment into two distinct areas, those being transactions that involve sensitive land under the OIA and those that involve significant business assets (though the two areas in practice may overlap).

(1) Transactions Involving Sensitive Land

(a) When Will Overseas Persons Require Consent to Invest in Land?

An overseas person or its associate will require consent to acquire an interest in land when:

(i) The land is "sensitive" as defined in the OIA; and

(ii) The interest to be acquired is a freehold estate, or a lease or any other interest (including certain forestry rights) for a total term of three years or more (including rights of renewal) with respect to residential land or ten years or more (including rights of renewal) for otherwise sensitive land.

Further, consent is also required for an "overseas person" or its associate to acquire rights or interests in securities of a person if that person owns or controls an interest in land and as a result of that transaction:

(i) The overseas person or the associate (either alone or together with its associates) has more than 25% ownership or control interest in person;

(ii) 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 that:

- Results in an ownership or control interest that equals or exceeds a control interest limit (being 50%, 75% or 100%);
- Is in securities of a different class to that in which the overseas person's or associate's existing interest is held;
- Gives the overseas person or the associate (either alone or together with its associates) any or more disproportionate access to or control of a strategically important business asset; or

(iii) That person then falls within the definition of an "overseas person."

(b) What Is Sensitive Land?

The definition of "sensitive land" under the OIA is complicated and, as such, requires careful analysis and advice.

Briefly, land will be considered sensitive if it is, or includes:

(i) Residential land;

(ii) Non-urban land over five hectares;

(iii) Foreshore or seabed;

(iv) Land on islands other than the North or South Island;

(v) Land over 0.4 hectares that is: a lakebed; land held for conservation purposes; land to be used as a reserve, as a public park, for recreation purposes, or as open space; subject to a heritage order or a requirement for a heritage order under the Resource Management Act 1991 or by Heritage New Zealand Pouhere Taonga under the Heritage New Zealand Pouhere Taonga Act 2014; land that is set apart as a Māori reservation and that is *wahi tapu* (i.e., a Māori historic or cultural site) under section 338 of the Te Ture Whenua Māori Act 1993; or a historic place or area or *wahi tapu* that is entered on the New Zealand Heritage List or for which there is an application that is notified under section 67(4) or 68(4) of the Heritage New Zealand Pouhere Taonga Act 2014; or land that is set apart as a Māori reservation and that is *wāhi tapu* under Section 338 of the Te Ture Whenua Māori Act.

In some instances, land that adjoins certain types of sensitive land will also be sensitive.

(i) Residential Land

In 2018, the OIA was amended to extend the meaning of "sensitive land" to include residential land and, as such, consent is now required for an overseas person or its associate to acquire residential land in New Zealand (unless an exception applies).

Residential land means:

(i) Land that has a property category of residential or lifestyle in, or for the purpose of, the relevant district valuation roll; and

(ii) Includes a residential flat in a building owned by a flat-owning company (regardless of whether the building is on land within a property category referred to in (i), above), and, for that purpose, references in the OIA to interest include a license to occupy that flat, within the meanings of Section 121A of the Land Transfer Act 1952 or Section 122 of the Land Transfer Act 2017.

(ii) Forestry Land

The grant or acquisition of "profit a prendre" is now regulated by the OIA, meaning the acquisition of forestry rights can

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require certain consents under the OIA. Generally, overseas investors buying fewer than 1,000 hectares of forestry rights per calendar year are exempt from needing consent. For forestry investments that require consent, there are also specific consent pathways intended to make it easier for foreign investors to invest in New Zealand forestry.

(iii) Associated Land

In addition, land may also be sensitive land because it is "associated" with other land already owned or controlled by the investor. Under the OIA, land ("Land A") is "associated land" with respect to other land ("Land B") if:

- Land A adjoins Land B or, in the case of land on a listed island, Land A and Land B are on the same island;
- A person owns or controls, or will (as the result of any transaction entered into or to be entered into) own or control (directly or indirectly), an interest in Land A (other than an exempted interest); and
- The same person, or an associate of that person, owns or controls, or will (as the result of any transaction entered into or to be entered into) own or control (directly or indirectly), an interest in land B (other than an exempted interest).

(iv) Fresh or Seawater Areas

One further category of land that investors in New Zealand must be aware of is "fresh or seawater areas." A fresh or seawater area is defined in the OIA as a marine or coastal area, the bed of a lake, or the bed of a river. If an investor wishes to acquire any land that is sensitive land under the OIA, and that sensitive land includes any fresh or seawater areas, the fresh or seawater areas must be offered to the Crown by the investor. The Crown will assess the fresh or seawater areas and elect either to decline the offer or proceed with the acquisition following the guidelines in the 2005 Regulations.

There is a period of 12 months from settlement within which to assess the land and make an initial decision. Decisions are generally expected to be made within six months. If the Crown decides to acquire the fresh or seawater areas, the investor can claim compensation. The land may be surveyed by the Crown before new titles are issued. Investors should note that the Crown may acquire only that part of the sensitive land that is fresh or seawater areas, and that acquisition by the Crown may not proceed unless the investor actually completes the acquisition of the sensitive land.

(v) Farmland

Where a proposed acquisition involves farm land (land that is used exclusively or principally for agricultural, horticultural or pastoral purposes, or for the keeping of bees, poultry or livestock), that farm land must first have been offered by the vendor on the open market to persons who are not overseas persons in accordance with the procedures set out in the 2005 Regulations before any agreement to sell to an overseas person is entered into. Exemptions from this requirement may be obtained, but only in special circumstances and at the discretion of the relevant Minister. The farm land advertising requirements also apply to the acquisition of securities in an entity that owns or controls farm land.

(2) Transactions Not Involving Sensitive Land — Significant Business Assets

The OIA requires an overseas person to obtain consent in the following cases:

(i) The acquisition by an overseas person, or an associate of an overseas person, of rights or interests in securities of a person (A), if:

(I) As a result of the acquisition, the overseas person or the associate (either alone or together with its associates) has a more than 25% ownership or control interest in A or an increase in an existing 25% or more ownership or control interest in A if the total expenditure expected to be incurred, before commencing the business, in establishing that business exceeds NZ$100 million; and

(II) The value of the securities or consideration provided, or the value of the assets of A, or A and its more than 25% subsidiaries, exceeds NZ$100 million;

(ii) The establishment by an overseas person, or an associate of an overseas person, of a business in New Zealand (either alone or with any other person) if:

(I) The business is carried on for more than 90 days in any year (whether consecutively or in aggregate); and

(II) The total expenditure expected to be incurred, before commencing the business, in establishing that business exceeds NZ$100 million; or

(iii) The acquisition by an overseas person, or an associate of an overseas person, of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand (whether by one transaction or a series of related or linked transactions) if the total value of consideration provided exceeds NZ$100 million.

Changes to the 2005 Regulations have increased the NZ$100 million threshold for Australian non-Government and Australian Government investments. The thresholds are adjusted each year in accordance with formulae in the 2005 Regulations. The applicable thresholds for the 2023 calendar year are:[28]

(i) NZ$586 million, if the investor is an Australian non-government investor; and

(ii) NZ$123 million, if the investor is an Australian government investor.

Changes to the 2005 Regulations have also increased the NZ$100 million threshold to NZ$200 million for investors from member countries of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) trade agreement and certain other nations (as a result of most favored nation provisions in various other international agreements to which New Zealand is a party). Currently, the countries or territories that have ratified the CPTPP agreement and have the benefit of this higher threshold are Australia, Brunei, Cana-

[28] Available at https://www.linz.govt.nz/news/2022-12/update-threshold-australian-investors.

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da, Chile, China, Hong Kong, Japan, the Republic of Korea, Malaysia, Mexico, Singapore, Taiwan and Vietnam.

c. Exemptions from Consent Requirements

The 2005 Regulations set out a range of exemptions. An overseas person is not required to apply for consent for a transaction that qualifies for an exemption. The provisions relating to exemptions are complex and legal advice should be obtained before relying on an exemption.

In the case of either a land or a non-land transaction, consent will not be required if it is:

(i) The acquisition by an overseas person of securities or rights or interests in securities or property:

- From another member of the same group, being a group that comprises an overseas person and persons that are directly or indirectly at least 75% owned by that overseas person, as part of a reconstruction or reorganization of that group; or
- From an overseas person that directly or indirectly owns at least 75% of that overseas person.

(ii) The acquisition by an overseas person (A) of property from another overseas person (B) where one of the following applies:

- A owns 100% of the securities in B;
- B owns 100% of the securities in A that are owned by overseas persons; or
- Another person (C) owns 100% of the securities in A and B that are owned by overseas persons, and owns a proportion of the total securities in A and B that are owned by overseas persons.

(iii) The acquisition by a company incorporated under the Companies Act 1993 of its own shares if:

- The acquisition does not alter the proportions in which shares in the company are held by the shareholders or the relative voting rights of the shareholders; or
- The shares are acquired under Sections 112 to 122C or Section 118 of that Act.

(iv) The acquisition by an overseas person of securities or property in an amalgamated company under an amalgamation effected under the Companies Act 1993, if the overseas person has the same direct or indirect interest in or rights to the assets of that amalgamated company as that overseas person had in relation to those assets prior to the amalgamation.

(v) Transactions with respect to minor increases in ultimate ownership and control by overseas persons or associates of overseas persons, if consent has already been granted for those overseas persons to own or control sensitive assets. Note the rules around the application of this exemption need to be carefully worked through for the exemption to apply.

(vi) The acquisition by an overseas person of redeemable preference shares that are redeemable only in cash and that do not entitle the holder to exercise voting rights, unless the dividend payable is in arrears.

(vii) The transfer of securities or rights or interests in securities, or property from a trustee to an overseas person who is a trustee of the same trust on the appointment of a new trustee or the retirement of a trustee, or on the resettlement of a trust, if that appointment, retirement, or resettlement does not result in the trust becoming an overseas person.

(viii) The transfer by a trustee, executor, or administrator of the will or of the estate of a deceased person to an overseas person who is a beneficiary of securities or rights or interests in securities or property under that will or estate or under a trust established by that will or estate.

(ix) The transfer by a trustee of a trust to an overseas person who is a beneficiary of securities or rights or interests in securities or property under that trust if:

- The trust is an overseas person;
- The acquisition of those securities or rights or interests in securities or property by the trust has been previously consented to under the OIA; and
- The transfer is not contrary to any conditions of that consent.

(x) The acquisition by an overseas person of securities or rights or interests in securities or property under an arrangement (a "security arrangement") that:

- In substance secures payment or the performance of an obligation (regardless of the form of the transaction or the identity of the person who has title to the securities or rights or interests);
- Is entered into by the parties in good faith and in the ordinary course of business; and
- Requires that the securities or rights or interests be retransferred to the original transferor or extinguished on the payment or performance of the obligation.

(xi) The acquisition by an overseas person of securities or rights or interests in securities or property as a result of the overseas person enforcing a security arrangement in good faith.

(xii) The reacquisition by an overseas person of securities or rights or interests in securities or property as a result of the discharge of a security arrangement.

(xiii) The acquisition by an overseas person of two or more security arrangements to which paragraph (ix) (above) applies if they are acquired together as a portfolio or bundle, in good faith, and without the intention of making an investment that would otherwise require consent without obtaining consent.

(xiv) The acquisition of securities or rights or interests in securities or property from the investment of funds by an overseas person carrying on in New Zealand the business of life insurance if:

- The investment of the funds is made for the benefit of policy holders at least 75% of whom are New Zealand

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citizens or persons ordinarily resident in New Zealand; and

• The investment is of funds held in the overseas person's life insurance fund within the meaning of Section 15 of the Life Insurance Act 1908 if the overseas person carries on any other business; or statutory fund(s) within the meaning of Section 6(1) of the Insurance (Prudential Supervision) Act 2010.

(xv) The acquisition of securities or rights or interests in securities or property by or on behalf of an overseas person that is the trustee of a superannuation scheme (within the meaning of Section 6(1) of the Financial Markets Conduct Act 2013) from the investment of all or part of the assets of the scheme for the benefit of members at least 75% of whom are New Zealand citizens or persons ordinarily resident in New Zealand.

(xvi) The acquisition by an overseas person of securities or rights or interests in securities or property if:

• The securities or rights or interests are, or will be as a result of the acquisition, relationship property (as defined in Section 8 of the Property (Relationships) Act 1976) of the overseas person and the overseas person's spouse, civil union partner, or de facto partner; and

• The overseas person's spouse, civil union partner, or de facto partner is not an overseas person.

(xvii) The acquisition by an overseas person of securities or rights or interests in securities or property as a result of a division of relationship property under the Property (Relationships) Act 1976.

(xviii) The underwriting by an overseas person of an issue of securities if that person:

• Is a person whose ordinary business includes entering into bona fide underwriting or sub-underwriting contracts with respect to offers of securities;

• Acquires the securities as a result of entering into a bona fide underwriting or sub-underwriting contract in the course of that person's ordinary business;

• Holds the securities for less than six months; and

• Does not exercise any voting rights attached to those securities.

(xix) The acquisition, by an overseas person who is a custodian, of any right or interest in custodial property to be held by that custodian on trust for, or on behalf of, another person.

(xx) The acquisition of a lesser interest in land (such as a leasehold interest) where the investor already owns the freehold interest in the relevant land.

d. Residential Exemptions

Developers of multistory buildings with 20 or more dwellings can apply to the OIO for an exemption certificate for their development that will allow overseas persons to purchase apartments without requiring consent under the OIA, but on the condition that they do not occupy the apartment. Australian and Singaporean investors are also generally exempted from the requirements of the OIA when purchasing residential (but not otherwise sensitive) land.

There are also exemptions from the requirement to obtain consent for residential land in certain circumstances for network utility operators, diplomatic premises, and charitable entities.

e. Other Exemptions

Exemptions are also available for "specified persons," who are overseas persons only because of their direct or indirect connection with the parties listed in Schedule 3 or 4 of the 2005 Regulations. Those listed parties are respectively selected portfolio investors and New Zealand controlled parties.

f. Consent Criteria

The OIO applies a range of tests when deciding whether or not to grant consent, which vary depending on the type of transaction. The key tests include:

(i) The investor test (applied to all transactions);

(ii) The residential land outcomes test (applied to any transaction involving residential land);

(iii) The benefit to New Zealand test (applied only to sensitive land transactions); and

(iv) The national interest test (applied to transactions of national interest, which can be either land or non-land transactions).

Additionally, the relevant Minister has a power to "call-in" certain transactions that do not otherwise require consent. These tests and the call-in power are discussed further below.

(1) Investor Test

The investor test is designed to allow the OIO to determine whether investors are unsuitable to own or control any sensitive New Zealand assets. All applications for consent are subject to the investor test (subject to exemption certificate applications that may be applied for to allow for the sale of residential land to overseas investors). The OIO will consider factors relating to the character and capability of the overseas person, or any individual with control of the overseas person.

Regarding character, the OIO will consider the following, whether in New Zealand or any other jurisdiction:

(i) Whether the overseas person has at any time, been convicted of an offence resulting in imprisonment for a term of five years or more;

(ii) Whether the overseas person has at any time in the preceding 10 years, been convicted of an offence for which the person was imprisoned for a term of more than 12 months;

(iii) If the overseas person is not an individual, whether it has at any time in the previous 10 years, been convicted of an offence for which it is sentenced to pay a fine;

(iv) Whether the overseas person has been ordered, in the preceding 10 years, by a court or equivalent overseas court, to pay a civil pecuniary penalty in respect of a contravention of any enactment;

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(v) Whether at any time, a court has imposed a penalty on the overseas person for contravention of the OIA or regulations;

(vi) Whether any proceedings have begun against the overseas person relating to any of the grounds set out above;

(vii) Whether the overseas person has entered, in the previous 10 years, into an enforceable undertaking with any regulator in respect of a contravention or alleged contravention of any enactment; or

(viii) Whether the overseas person is an individual of the kind referred to in Section 16 of the Immigration Act 2009 (certain persons not eligible for visas or entry permission under that Act).

Regarding capability, the OIO will consider:

(i) Whether the overseas person is prohibited from being a director or promoter of, or concerned in the management of an incorporated or unincorporated body under the Companies Act 1993, the Financial Markets Conduct Act 2013, or the Takeovers Act 1993;

(ii) Whether the overseas person is subject to a banning order under the Financial Markets Conduct Act 2013 or Takeovers Act 1993 or is subject to an order under section 108 of the Credits and Consumer Finance Act;

(iii) Whether the overseas person has become liable, in the preceding 10 years, to pay a penalty in respect of an abusive tax position, evasion or similar act under the Tax Administration Act 1994 or an equivalent enactment in another jurisdiction; or

(iv) Whether the overseas person has an outstanding unpaid tax of NZ$5 million or more payable in New Zealand or an equivalent amount due and payable in another jurisdiction.

A person may apply separately for an assessment of whether they pass the investor test. If the investor test has already been passed, subsequent assessments will only consider any changes that have occurred.

(2) Residential Land Tests

For investments in sensitive land that is residential land, the investor can obtain consent if it meets one or more of the following tests:

(i) The commitment to reside in New Zealand test (is the investor moving to New Zealand to become resident in New Zealand?);

(ii) The increased housing test (will the investor be increasing the number of dwellings on the land and selling all dwellings?);

(iii) The non-residential use test (will the residential land be used by the investor for a non-residential use?);

(iv) The incidental residential use test (is the residential use of the land by the investor incidental only to the investor's core business?).

(3) Benefit to New Zealand Test

The benefit to New Zealand test is applied only to some sensitive land transactions, i.e., applications relating only to significant business assets will not need to address the benefit to New Zealand test.

The OIO applies a "counterfactual test" when assessing the benefit to New Zealand. Recent amendments have made it clear that the counterfactual test is to be applied by comparing the likely result of the acquisition with the existing state of affairs.

The benefit to New Zealand test involves consideration of a set of broad factors, including whether the investment will:

(i) Result in economic benefits to New Zealand;

(ii) Result in benefits to the natural environment;

(iii) Result in continued or enhanced public access to the sensitive land;

(iv) Result in continued or enhanced protection of historic heritage in or on the relevant land;

(v) Give effect to or advance a significant Government policy;

(vi) Involve oversight of, or participation in, the overseas investment or any relevant overseas person by persons who are not overseas persons;

(vii) Result in other consequential benefits to New Zealand.

It should be noted that different types of investments in land may satisfy either the benefit to New Zealand test, or an alternative test (such as the commitment to reside in New Zealand test). See Section 16 of the OIA for further detail on alternative tests.

(4) National Interest Test

The recent amendments to the OIA included the introduction of a national interest test, which allows the Government to deny consent to a transaction that is deemed contrary to New Zealand's national interest. The national interest test may be applied to both land and non-land transactions.

Transactions are deemed to be transactions of national interest if they involve:

(i) A non-New Zealand government investor acquiring an interest in sensitive land, property or fishing quota, or a 25% or more ownership or control interest in an entity that owns or controls sensitive land, property or fishing quota;

(ii) A non-New Zealand government investor acquiring a 25% or more ownership or control interest in New Zealand significant business assets;

(iii) An overseas person acquiring an interest in "strategically important businesses." Strategically important businesses include: entities with access to, or control over military or dual-use technology; businesses that are critical direct suppliers; significant ports or airports; electricity generation, distribution, metering or aggregation businesses; water infrastructure; telecommunications infrastructure or services; businesses that are financial institutions or in-

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volved in financial market infrastructure; media businesses that have an impact on New Zealand plurality; or businesses involved in irrigation schemes.

Additionally, there is a catch-all provision that allows the Minister discretion to consider any other application for consent where they consider the transaction of national interest.

Furthermore, the Minister may exempt any relevant government enterprise from being a non-NZ government investor.

As noted above, the Minister can decline consent to a transaction if they consider that the transaction is contrary to New Zealand's national interest. Furthermore, the Minister may impose conditions on any consent that may be granted. National interest is not defined in the Act; the Minister has a broad discretion to decide on a case-by-case basis whether a transaction would be contrary to the national interest.

Because this test is relatively new and also because of the national security matters that are considered in applying this test (which are kept confidential from applicants), there is minimal visibility as to how the test will be applied. However, a national interest guidance has been released, which notes various factors the Minister may consider, including:

(i) National security, public order and international relations;

(ii) Competition; and

(iii) Economic and social impact.

(5) Call-in Power

Amendments to the OIA with effect from June 7, 2021, also introduced a "call-in" power alongside the national interest test. The call-in power allows the government to scrutinize, block or impose conditions on "call-in transactions." A transaction will be a call-in transaction if:

(i) It is an overseas investment in strategically important business assets, being:

(I) An investment in a media business with significant impact, as a result of which an overseas person acquires a more than 25% ownership or control interest in the business, or an increase in an existing more than 25% ownership or control interest which results in an ownership or control interest that equals or exceeds the control interest limit (being 25%, 50%, 75% or 100% as relevant);

(II) An investment in a listed issuer, as a result of which an overseas person has a beneficial entitlement or interest in 10% or more of the entity, an increase in an existing 10% or more ownership or control interest that results in an ownership or control interest that equals or exceeds the control interest limit (being 25%, 50%, 75% or 100% as relevant), or disproportionate access to or control of the entity; or

(III) Any other investment in a strategically important business (see categories listed above) that results in the overseas person or the associate (either alone or together with its associates) having any ownership or control interest in the strategically important business or an increase in an existing 10% or more ownership or control interest that results in an ownership or control interest that equals or exceeds the control interest limit (being 25%, 50%, 75% or 100% as relevant); and

(ii) It is an investment in property used in carrying on a strategically important business:

(I) In the case of acquiring property used by a critical direct supplier, if that supply considers the acquisition may impact its ability to provide contracted services to an intelligence or security agency.

(II) In the case of acquiring property used by a media business with a significant impact, if the value of the property acquired is more than 15% of the value of all property owned by the media business.

(III) In any other case, if acquiring the property would result in the overseas person or associates becoming a strategically important business, or being capable of being a strategically important business.

(iii) The transaction does not otherwise require consent (whether it does not meet the thresholds for consent, or whether it qualifies for an exemption).

Note: Temporary COVID-19 Emergency Notification Regime

The call-in power described above came into force after the expiration of a temporary COVID-19 emergency notification regime. The emergency notification regime effectively requires notification of all transactions that do not require consent, regardless of their dollar value, where an overseas person acquires a 25% or more interest in a business (or increases an interest above certain thresholds) or acquires assets equal to more than 25% of the business' assets. The Minister has the power to impose conditions on, block, or unwind transactions that are notified.

The emergency notification regime now only applies to transactions entered into before June 7, 2021.

The emergency notification regime may be reinstated by recommendation from the Minister.

4. Penalties

Penalties apply in the case of a breach of the OIA and the 2005 Regulations. An investor who fails to apply for consent where consent is required is liable on conviction, in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding NZ$300,000, and in the case of a body corporate, to a fine not exceeding NZ$300,000.

The same penalties apply for attempting to defeat, evade or circumvent the OIA, or resisting, obstructing or deceiving the OIO or any other person who is exercising or attempting to exercise any power or function under the OIA. The High Court has the power, on application from the OIO, to order disposal of any property (which includes a right or interest in any security, an interest in land, an interest in fishing quota or any other property or any rights or interests in any other property).

Additionally, the High Court has the power to order a person to pay a civil pecuniary penalty if that person has contravened the OIA, committed an offence under the OIA, failed to comply with a notice issued by the OIO, failed to comply with

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a condition of consent, or is involved in contravening the OIA. A pecuniary penalty is not to exceed the highest of:

(i) In the case of an individual, NZ$500,000, or NZ$10 million in any other case;

(ii) Three times the amount of any quantifiable gain (for example, the increase in the value since acquisition) by the person in relation to the property to which the consent, exemption, or exemption certificate relates or for which a consent should have been obtained;

(iii) The cost of remedying the breach of condition;

(iv) The cost of remedying the breach of a term of a prohibition order or a direction order; or

(v) The loss suffered by a person in relation to a breach of condition.

However, a person cannot be ordered to pay both a fine (as discussed above) and a civil pecuniary penalty.

5. Ongoing Monitoring

If consent is granted for an acquisition, it is usually granted subject to various conditions with which the applicant must comply. The OIO will monitor compliance with those conditions of consent. It has the power to require further information from the consent holder and to require the consent holder to provide a statutory declaration of compliance with consent conditions. Any contravention of consent conditions can result in a fine of up to NZ$100,000, or a civil pecuniary penalty as set out in 4., above.

B. Currency and Exchange Controls

New Zealand's currency unit is the New Zealand dollar. Since March 4, 1985, the value of the New Zealand dollar has been determined by a floating exchange rate, which in turn is a product of market forces. The Reserve Bank of New Zealand, by either injecting or withdrawing money from the money supply, has the power to influence the exchange rate during periods of volatility. On August 11, 2022, the United States/New Zealand exchange rates were approximately:

NZ$ = US$0.6283 (buying); and

NZ$ = US$0.6522 (selling).

There are no restrictions on the buying and selling of foreign currencies whether by New Zealand residents or nonresidents. The New Zealand banking system offers a full range of foreign exchange services including spot, forwards, futures, options and more sophisticated derivative products. Issuers of derivatives to retail clients must be licensed.

There are no restrictions on the repatriation of capital or earnings of a New Zealand business to overseas investors. This repatriation includes the remittance of dividends, profits, interest, royalties or management fees. In many cases, however, nonresident withholding tax will need to be deducted from the amount of those payments. For more information about nonresident withholding tax, see VI.C.1., below.

A person who wishes to physically transport across the New Zealand border NZ$10,000 or more in physical cash or bearer negotiable instruments (e.g., checks, bearer bonds or money orders) is required to report that movement to New Zealand customs under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AMLA).

Further, the AMLA requires a reporting entity (which comprises a range of financial institutions and other entities) to assess the risk of money laundering that may occur in the course of its business, report suspicious transactions, comply with customer due diligence procedures and to maintain records. For more information about the AMLA, see II.G., below.

C. Trade and Commerce Regulation

This section deals with the regulation of New Zealand's trade and commercial activity. In general, these activities are regulated by statute.

1. Imports and Exports

a. Licenses and Quotas

New Zealand does not currently apply import quotas, and there are no requirements to obtain import or export licenses. There are, however, a number of products whose importation and exportation is restricted and, in some cases, permits or approvals may be required. The Ministry of Primary Industries will need to verify certain goods to ensure they meet the requirements of the destination country.

Under the Customs and Excise Act 2018, the Governor-General has the power, at the recommendation of the Minister, to prohibit the importation or exportation of any specified goods or specified class of goods. There are a number of Customs Import and Export Prohibition Orders in place under this authorization that restrict the importation and exportation of various products. These include certain fisheries products, pounamu, endangered species, dangerous goods, objectionable material, certain dogs, medicines, explosives including fireworks and hazardous substances. A consolidated list of prohibitions and restrictions is provided by New Zealand Customs but due diligence should always be conducted to ensure up-to-date information is obtained.[29]

The Imports and Exports (Restrictions) Act 1988 provides the Governor-General, if he or she is satisfied that it is necessary in the public interest or to give effect to an international obligation, with the power to prohibit or restrict by Order in Council the importation of any goods or class of goods. Under this legislation, the Import and Export (Restrictions) Prohibition Order (No. 2) 2004 is in place and imposes restrictions on the exportation of various chemicals and wastes, and on the importation of wastes. In doing so, it gives effect to the Stockholm Convention on Persistent Organic Pollutants, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Permits to import and export must be obtained from the Environmental Protection Authority.

[29] Available at: https://www.customs.govt.nz/business/import/import-prohibited-and-restricted-imports/prohibitions-and-restrictions/.

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New Zealand also has an Export Controls Regime administered by the Ministry of Foreign Affairs and Trade.[30] Exports of goods, software and technology are controlled and require an export permit if they are listed on the New Zealand Strategic Goods List, or if they are subject to "catch-all" provisions. The goods on the Strategic Goods List are those found in the control lists produced by the four export control regimes of which New Zealand is part — the Wassenaar Arrangement, the Australia Group, the Nuclear Suppliers Group and the Missile Technology Control Regime. The Strategic Goods List includes both military and dual-use goods and technology.

b. Customs Duties and Other Taxes

The collection of customs duties, levies and taxes by the New Zealand Customs Service on imported and exported goods is governed by the Customs and Excise Act 2018 and the Tariff Act 1988, while the collection of goods and services tax (GST) by Inland Revenue on the supply of low-value goods to New Zealand consumers is governed by the Goods and Services Tax Act 1985 and the Tax Administration Act 1994.

Goods subject to excise and excise-equivalent duties are set out in the Excise and Excise Equivalent Duties Table in the "Working Tariff Document of New Zealand," (the "Working Tariff Document") available from the website of the New Zealand Customs Service.[31] Excise duties are levied on a limited range of items, notably alcohol, fuel and tobacco.

All goods imported into New Zealand must be classified using the tariff classifications set out in the Tariff of New Zealand. These classifications are based on the International Convention on the Harmonized Commodity Description and Coding System (HS), developed by the World Customs Organization (WCO). Tariff rates are generally low, with some goods attracting no tariff at all, while others attract a 5% or 10% duty.

Preferential tariff rates apply to goods originating from a range of jurisdictions under various free trade agreements (FTAs), including but not limited to the ASEAN countries, Australia, Canada, Chile, China, European Union Member States, Hong Kong, Korea, Mexico, Peru, Taiwan, the United Kingdom and Pacific Island Countries. The full list of the tariff rates, including the preferential rates, can be found in the Working Tariff Document.[32] The Working Tariff Document was most recently updated on May 1, 2024 to include the European Union-New Zealand FTA.

Tariff concessions may be granted for various reasons, including if this would assist in reducing the cost of imported goods, for example where suitable alternative goods are not locally produced or manufactured. A consolidated list of tariff concessions can be found in the "Consolidated List of Approvals."[33]

Offshore suppliers of low-value goods (goods with a customs value of NZ$1,000 or less) to New Zealand consumers are required to register for and pay GST at a rate of 15% on the value of such supplies. The value of the supply on which GST is payable includes amounts paid by the recipient for related services such as shipping and insurance (whereas the customs value used to determine whether the goods exceed the NZ$1,000 threshold does not include the cost of related services). Offshore suppliers are only required to register for and return GST when their total taxable supplies to New Zealand consumers exceed NZ$60,000 in a 12-month period. Offshore suppliers have the option to also charge GST on their supplies of goods valued at over NZ$1,000 provided at least 75% of their total supplies to New Zealand consumers fall under the NZ$1,000 threshold. While these rules do not apply to supplies made to New Zealand businesses, offshore suppliers that primarily sell goods to consumers can elect to also charge GST on low-value business supplies. In certain circumstances, electronic marketplaces and re-deliverers have an obligation to return GST rather than the underlying supplier. New Zealand Customs has ceased to collect any form of duty (including the Import Entry Transaction Fee (IETF) and associated Biosecurity System Entry Levy (BSEL)) on consignments valued at NZ$1,000 or less, except for tobacco products or alcoholic beverages. New Zealand Customs also no longer collects GST on items imported in consignments with a combined value over NZ$1,000 provided GST has been charged on the items at point of sale and Customs has been notified in advance. However, Customs will still collect other duties (such as any applicable tariff duty and the IETF and BSEL) for consignments over NZ$1,000 in these circumstances.

c. Documentation

A person bringing goods into New Zealand for commercial use must submit an "import entry" or Electronic Cargo Information (ECI) to clear the goods within 20 days of the goods arriving. Generally, a New Zealand customs broker or freight forwarder will clear the goods on an importer's behalf, or the importer may use the Electronic Data Interchange (EDI) software. In some cases, the New Zealand Trade Single Window (TSW) may also be used. An "import entry" applies to goods valued at NZ$1,000 or more, and provides full details of the goods to be brought into New Zealand, including the goods' tariff classification, as set out in the Working Tariff Document. A person importing or exporting goods worth more than NZ$1,000 must obtain a supplier code and (in the case of a New Zealand entity) a client code from New Zealand Customs. Registration is also required for the TSW.

An ECI may be used for goods valued at less than NZ$1,000. This provides summary details of the goods and the goods' tariff classification is not required.

An importer wishing to claim preferential tariffs under one of New Zealand's FTAs must meet the origin requirements under the relevant agreement.

The Customs and Excise Act 2018 prescribes the following methods for the valuation of goods on importation, which must be used in hierarchical order: transaction value, identical goods method, similar goods method, deductive value, computed valued, and residual basis of valuation. Application can be made for a binding valuation ruling that determines which val-

[30] Available at: https://www.mfat.govt.nz/en/trade/trading-weapons-and-controlled-chemicals/which-goods-are-controlled/.

[31] Available at: https://www.customs.govt.nz/business/tariffs/working-tariff-document.

[32] Available at: https://www.customs.govt.nz/business/tariffs/working-tariff-document.

[33] Available at: https://www.customs.govt.nz/business/tariffs/consolidated-list-of-approvals-20-june-2024/.

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uation method is to be used for imported goods. Binding rulings may also be sought on tariff classification, excise classification, country of origin, any concessions that goods qualify for or the interpretation of the rules of origin for an item.

Electronic clearance is required for all exports from New Zealand (other than for some postal items). An "export entry" must be submitted for goods with a free on board (FOB) value of NZ$1,000 or more, goods being exported under the "Secure Exports Scheme" (SES) or goods on which a drawback on duty paid is being claimed. An ECI may be used for goods valued at less than NZ$1,000, but only if the EDI software is being used. Export entries and ECIs must be submitted no later than 48 hours before the goods concerned are loaded for export.

An "export entry" provides full details of goods to be exported from New Zealand, including the goods' tariff classification.[34] As with an "import entry," the person exporting the goods must have a client code and a supplier code.

Import/export entries and ECI are legally binding documents and must be completed accurately. Otherwise, the person importing or exporting the goods is at risk of financial penalties under the Customs and Excise Act 2018.

Offshore suppliers who are required to register for and return GST (because their total taxable supplies to New Zealand consumers exceed NZ$60,000 in a 12-month period) have the option to file simplified "pay only" GST returns with Inland Revenue. These GST returns are required to be filed following the end of their taxable periods (the duration of a taxable period is, by default, two months, with the return due date being the 28th day of the month following the end of the taxable period (except for the GST returns for the taxable periods ending March 31 and November 30, which are due by May 7 and January 15)) using Inland Revenue's online myIR service.

2. *General Regulation of Business*

The Commerce Act 1986 ("Commerce Act") promotes competition in markets within New Zealand for the long-term benefit of New Zealand consumers.[35] Like many competition or antitrust statutes, when boiled down to its simplest, the Commerce Act envisages three fundamental types of conduct that harm competition:

(i) Unilateral behavior (single-firm conduct) by a firm with a substantial degree of market power that has the purpose, effect or likely effect of substantially lessening competition;

(ii) Joint behavior (via contracts, arrangements and understandings) that substantially lessens competition, including cartel conduct; and

(iii) Acquisitions (of shares or assets) that substantially lessen competition.

Additionally, the Commerce Act provides for the regulation of the price and quality of goods or services in markets where there is little or no competition. In practice, the Commerce Commission (the "Commission") regulates certain businesses involved in the provision of electricity, gas, airport and telecommunication services. The Commission also has sector-specific regulatory responsibilities in relation to dairy (milk pricing), retail fuel and groceries.

The Commerce Act has been amended to give the Commission the power to carry out competition studies in markets where it considers it is in the public interest to do so.

In general, the Commerce Act extends extra-territorially to engaging in conduct outside New Zealand to the extent such conduct affects a market in New Zealand. Specific provisions provide for extended enforcement powers in the case of extra-territorial conduct.

For purposes of the Commerce Act, the term "market" means a market in New Zealand for goods or services, as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for those goods and services.[36]

Under the Commerce Act, the Commission has extensive powers to obtain information, seize documents and goods, and require persons to give evidence if the Commission considers it necessary or desirable for the purpose of carrying out its functions and exercising its powers under the Commerce Act.[37] The Commission may also request information on a voluntary basis.[38]

Fines and criminal penalties may be imposed for obstructing the Commission or for noncompliance with its statutory investigative powers.[39]

a. *Unilateral Behavior*

The Commerce Act prohibits unilateral restrictive trade practices, including the misuse of market power and resale price maintenance.

As of April 2023, firms with a substantial degree of market power are prohibited from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in the market concerned or any other market in which the firm supplies or acquires goods or services.[40]

This effects-based test replaced the previous "taking advantage of market power" test — a change long-advocated for by the Commission on the basis it would better identify anti-competitive single-firm conduct. The Commission expects that the threshold for enforcement will now be lower. The Commerce Act prohibits resale price maintenance where a supplier of goods enforces or attempts to enforce a minimum price at which the reseller must on-sell those goods.[41] Suppliers are permitted to issue recommended retail prices for goods and services. These must be genuine "recommendations" and suppliers may not enforce any minimum price.[42]

The maximum penalties for breaches of this kind are NZ$500,000 in the case of an individual, and in the case of a body corporate, the greatest of NZ$10 million, three times the value of any commercial gain resulting from the contravention,

[34] Available at: https://www.customs.govt.nz/business/tariffs/working-tariff-document.

[35] Commerce Act 1986, s. 1A.

[36] Commerce Act 1986, s. 3(1A).

[37] Commerce Act 1986, ss. 98, 53ZD.

[38] Accordingly, the recipient can choose whether or not to respond to the voluntary request for information.

[39] Commerce Act 1986, s. 103.

[40] Commerce Act 1986, s. 36.

[41] Commerce Act 1986, s 37.

[42] Commerce Act 1986, s. 39.

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or 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).[43]

b. Joint Behavior

The Commerce Act also prohibits multilateral restrictive trade practices, including entering into or giving effect to cartel provisions, and conduct that has the purpose or effect (or likely effect) of substantially lessening competition in a market.[44]

The Commerce Act prohibits persons from entering into contracts, arrangements or understandings that contain a cartel provision, or from giving effect to a cartel provision. A cartel provision is a provision that has the purpose, effect or likely effect of:

(i) Price fixing (fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of the price for goods and services, or any discount, allowance rebate or credit in relation to goods or services);

(ii) Restricting output (preventing, restricting or limiting, or providing for the prevention, restriction or limitation of the production, capacity, supply or acquisition of goods or services); or

(iii) Market allocating (allocation of customers or geographic areas).

The cartel provisions also extend to land covenants (i.e., restrictions on land titles to prevent the land being used to compete with the landowner's business).

There are limited exceptions, principally for collaborative activities (for which there is a voluntary clearance regime),[45] vertical supply contracts,[46] and joint buying and promotion agreements.[47]

Any cartel provision will generally be unenforceable under the Commerce Act.[48] Cartel conduct has also been criminalized effective April 2021.[49] The key element of the criminal offence is the requirement to show an "intent" to engage in cartel conduct.[50] The maximum fines are the same as the maximum pecuniary penalties that may be imposed under the civil cartels regime, with the additional sanction of up to seven years imprisonment in the case of individuals.[51] However, so far, the Commission has launched only one criminal cartel prosecution and, as of writing, the prosecution has not yet come to trial. As such, the boundaries of the criminal prohibition remain somewhat uncertain.

The Commerce Act prohibits a person from entering into, or giving effect to a provision of, a contract or arrangement, or arriving at an understanding that has or is likely to have the effect of substantially lessening competition in a market.[52] However, a person may apply to the Commerce Commission for an authorization for such behavior.[53] Authorization applicants must show that the provision in question results in benefits to the New Zealand public (typically, economic efficiencies) which outweigh any lessening of competition.[54]

The maximum penalties for breaches of this kind are NZ$500,000 in the case of an individual, and in the case of a body corporate, 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 body corporate and all of its interconnected bodies corporate (if any).[55]

c. Mergers or Acquisitions

The Commerce Act prohibits mergers or acquisitions that would have, or would be likely to have, the effect of substantially lessening competition in a market.[56] A party may make a voluntary application for clearance from the Commission before carrying out its acquisition. If successful, the party obtains statutory immunity from the relevant provisions for 12 months following the date on which the clearance is granted.[57] A party that considers that its acquisition will be likely to result in a lessening of competition in a market, but is nonetheless efficient, can apply for an "authorization."[58] The Commission must be satisfied that the public benefit (measured in terms of total welfare) that will arise from the acquisition outweighs the detriments.[59]

Engaging with the Commission is voluntary, but the Commission may investigate on its own initiative if parties fail to apply for clearance or authorization. To aid parties in determining whether to engage with the Commission, the Commission has published non-binding "concentration indicators" for when a merger is less likely to raise competition concerns or require a clearance or authorization.[60]

d. Price and Quality Controls and Market Studies

Part IV of the Commerce Act allows price controls to be imposed on a firm by the government under a regulated market solution.[61] Price control (or other controls such as controls on quality or terms of supply) may be imposed if the Minister of Commerce and Consumer Affairs is satisfied that there is little or no competition in a market, and it is in the public interest that controls are enforced.[62] The Commission may report, or be asked to report, on any such matters.[63]

This regulatory power is usually used in the situation of infrastructure assets or "natural monopolies" such as utilities markets. Currently, under Part IV of the Commerce Act, price and quality controls are imposed on gas pipeline businesses and electricity lines companies.[64] Fibre telecommunications services are subject to a similar regime under Part 6 of the

[43] Commerce Act 1986, s. 80(2B).
[44] Commerce Act 1986, ss 27 and 30.
[45] Commerce Act 1986, s. 31.
[46] Commerce Act 1986, s. 32.
[47] Commerce Act 1986, s. 33.
[48] Commerce Act 1986, s. 30C.
[49] Commerce (Criminalisation of Cartels) Amendment Act 2019.
[50] Commerce Act 1986, s. 82B.
[51] Commerce Act 1986, s. 82B.
[52] Commerce Act 1986, ss. 27 and 28.
[53] Commerce Act 1986, s. 58.
[54] Commerce Act 1986, s. 61(6).
[55] Commerce Act 1986, s. 80(2B).
[56] Commerce Act 1986, s. 47.
[57] Commerce Act 1986, s. 66.
[58] Commerce Act 1986, s. 67.
[59] Commerce Act 1986, s. 67(3)(b).
[60] New Zealand Commerce Commission, *Mergers and Acquisitions Guidelines*, at 3.50–3.51.
[61] Commerce Act 1986, ss. 52 and 52B.
[62] Commerce Act 1986, ss. 52G and 52M.
[63] Commerce Act 1986, s. 52H.
[64] Commerce Act 1986, Part 4, Subparts 9 and 10.

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Telecommunications Act 2001. Some international airports are subject to an information disclosure regime.[65] The dairy/milk industry, retail fuel industry and grocery industry are also subject to regulation administered by the Commission under sector-specific statutes.[66]

Under Part 3A of the Commerce Act (enacted in 2018), the Commission may carry out competition studies (known as "market studies") relating to specific goods or services if the Commission or the Minister considers it to be in the public interest to do so.[67] The Commission will prepare a report based on its findings and may make recommendations, including changes to legislation, government policies or practices, the imposition of information disclosure requirements, the imposition of monitoring regimes for certain matters within the market and requirements that certain persons within the market change their behavior.[68] To date, the Commission has completed market studies into retail, fuel, groceries and residential building supplies, which have prompted the imposition of sector-specific regulatory regimes.[69] This year, the Commission concluded its market study into personal banking services and released its final report on August 20, 2024. The Government vowed to respond with urgency to all fourteen recommendations made by the Commission in its final report.[70]

e. Fair Trading

The Fair Trading Act 1986 (the "Fair Trading Act") extends to "engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand" when the conduct relates to relevant New Zealand activities.[71] The Fair Trading Act covers misleading and deceptive conduct, unconscionable conduct, unsubstantiated representations, false representations, unfair practices, consumer information, product safety and the safety of services.

The Commerce Commission is responsible for enforcing the Fair Trading Act; however, businesses and consumers may also take legal action under the Act via a mixture of criminal and civil liability provisions.

Part I of the Fair Trading Act prohibits misleading or deceptive conduct, or any conduct likely to mislead or deceive, by any person in trade. The standard of conduct that is "likely to" mislead is objective. In assessing whether conduct is misleading or deceptive, one must consider the public audience at which the conduct is aimed, including, as one judge has put it, "the astute and the gullible, the intelligent and the not-so-intelligent, the well-educated as well as the poorly educated."[72] The Act also prohibits "unconscionable conduct" on the part of a person in trade.[73] When considering whether a trader's conduct is unconscionable, a court may have regard to a list of considerations set out by the Act, focusing on the circumstances, the terms of any agreement and the behavior of the parties.[74]

Specific prohibitions apply to conduct that could mislead the public as to the nature, characteristics (including price), suitability for a purpose, or quantity of either goods or services, or as to the nature of the manufacturing process as far as goods are concerned.[75] There is a similar prohibition regarding employment matters,[76] false or misleading representations in relation to land (real estate)[77] and a variety of other specific types of representations. There is uncertainty in the case law on such provisions, including in relation to the use of "puffery," comparative advertising, fine print disclaimers, literal truths or silence on important points, honestly held opinions or forecasts, and ambiguities in advertising and endorsements.

The Fair Trading Act also prohibits the inclusion of "unfair contract terms" in standard form consumer and certain trade contracts.[78] A court may identify any contract as "standard form" if, *inter alia*, there was no effective opportunity to negotiate its terms, and/or if one party had most or all of the bargaining power in relation to the transaction concerned.[79] In determining whether a term in that contract is "unfair," the courts must consider factors such as:

(i) The balance of the parties' rights and obligations under the contract;

(ii) Whether the term is reasonably necessary to protect any legitimate interests of the party receiving the benefit of the term; and

(iii) Whether any detriment would flow from its enforcement.[80]

The unfair contract term regime applies to "small trade contracts" and "grocery supply contracts." The Commerce Commission can, either on its own or at the request of a party to an agreement, apply to the court for a declaration that a term in a standard form consumer or trade contract is an unfair term. However, any person (including a grocery supplier) may apply directly to the court for a declaration of the same in relation to a grocery supply contract.[81]

A contract may be considered a "small trade contract" if each party to the agreement is engaged in trade, the contract is not a consumer contract, and the annual value of the contracting parties "trading relationship" is below NZ$250,000.[82] A "trading relationship" includes both a contract containing the purported unfair terms, and any other current or prospective contract between the parties on the same or substantially similar terms.[83]

[65] Commerce Act 1986, Part 4, Subpart 11.

[66] Dairy Industry Restructuring Act 2001; Fuel Industry Act 2020; and Grocery Industry Competition Act 2023.

[67] Commerce Act 1986, ss. 50, 51, and 51A.

[68] Commerce Act 1986, s. 51B.

[69] It should be noted that the regulation of the residential building supplies sector is still in the early stages.

[70] Hon Nicola Willis and Hon Andrew Bayly, *Delivering more competitive banking for Kiwis* (August 20, 2024). Available at: https://www.beehive.govt.nz/release/delivering-more-competitive-banking-kiwis.

[71] Fair Trading Act 1986, s. 3(1).

[72] *Taco Company of Australia Inc. & Anor v. Taco Bell Pty Ltd & Ors* (1982) 2 TPR 48.

[73] Fair Trading Act 1986, s 7.

[74] Fair Trading Act 1986, s 8.

[75] Fair Trading Act 1986, ss. 10 and 11.

[76] Fair Trading Act 1986, s. 12.

[77] Fair Trading Act 1986, s 14.

[78] Fair Trading Act 1986, ss. 26A and 46I.

[79] Fair Trading Act 1986, s. 46J.

[80] Fair Trading Act 1986, s. 46L.

[81] Fair Trading Act 1986, s. 46I.

[82] Fair Trading Act 1986, s 26C and 26D(3).

[83] Fair Trading Act, s 26D(2).

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A contract may be considered a "grocery supply contract" if each party to the agreement is engaged in trade, the contract is not a consumer contract, the contract is a contract between at least one regulated grocery retailer and at least one supplier, the contract relates to the acquisition of goods with respect to which the end user is a consumer, and the annual value of the contracting parties' trading relationship is below NZ$1,000,000.[84] In relation to grocery supply contracts, the unfair contract regime applies only to agreements entered into, renewed or amended on or after July 10, 2023.

There is a partial exemption from the Fair Trading Act for the dissemination of news by genuine news media publications and broadcasters.[85] However, this may not protect infomercials, advertisements, product endorsements, or the provision of other trade-related information.

The Fair Trading Act allows for the imposition of civil and criminal penalties. Penalties include corrective advertising orders, fines, orders to refund or repay consumers, and injunctions. The current maximum penalty is NZ$200,000 for individuals and NZ$600,000 for companies.[86]

In the case of pyramid selling schemes, the maximum penalty is NZ$600,000 for both individuals and companies, and the court may also order payment of the value of any commercial gain derived from the offending scheme.[87]

The Fair Trading Act provides that the Commerce Commission may authorize any of its employees to search, under a court-issued warrant, any place named in the warrant for the purpose of ascertaining whether a person has contravened the Fair Trading Act.[88]

f. Securities Regulation

The securities market in New Zealand is regulated by the Financial Markets Authority under the Financial Markets Conduct Act 2013 (FMCA). The FMCA regulates how financial products are created, promoted and sold, and sets out the ongoing responsibilities of those that offer, deal in and trade them. "Financial products" comprise debt securities, equity securities, managed investment products and derivatives.[89]

The requirements under the FMCA are broad. Unless an exclusion in Schedule 1 applies, an offer of financial products for issue requires disclosure to an investor under Part 3 of the FMCA, including:[90]

(i) Issuance of a product disclosure statement (PDS) that provides key information to investors about the financial product.

(ii) Lodging of the PDS on an online register of offers of financial products together with other material information and documents that are of relevance to investors. This information must be kept up to date while the offer is open.

(iii) Supply to the Registrar of Financial Service Providers of all information that the register entry (if any) is required to contain under the FMCA.[91]

Disclosure exclusions for offers of financial products for issue in Schedule 1 include, among others, issuing securities of the same class as those already quoted, issuing securities under employee share schemes and issuing securities to wholesale investors.[92]

The FMCA also contains overarching "fair dealing" provisions that apply to all offers of financial products and the provision of financial services. Under the fair dealing provisions set out in Part 2 of the FMCA, it is an offense to engage in misleading or deceptive conduct in relation to financial products or services or to make false or misleading representations, or unsubstantiated representations in relation to financial products or services. Insider trading and market manipulation are prohibited under Part 5 of the FMCA.

Criminal offenses under the FMCA are limited to more serious breaches, and require proof of knowledge or recklessness. With regard to civil liability, the FMCA contains a "presumption of loss." If there has been a contravention of the disclosure obligations under the FMCA and an investor has lost money, the loss is deemed to be a result of the contravention, unless another cause is proven. The civil liability provisions are subject to certain defenses. They extend to the issuer, directors, and other persons who have been involved in a contravention of the FMCA.

3. Licensing and Franchising in New Zealand

Unlike some jurisdictions, New Zealand does not specifically regulate franchising agreements or require special authorization under the Commerce Act 1986. Franchising is, generally speaking, perceived as pro-competitive and allows for, in most cases, economic efficiency rather than restricting the freedom of individual traders. However, franchising arrangements may violate the Commerce Act under the generic restrictive trade practices provisions discussed above if:

(i) They contain a contract, arrangement or understanding with the purpose or likely effect of substantially lessening competition in a market (as above, this could include third-line forcing, exclusive dealing or other restraints); and/or

(ii) "Recommended price" arrangements which go further than that, and in fact operate to control prices.

Franchise arrangements are not exempt from the prohibition on "cartel provisions" in the Commerce Act (i.e., price fixing, restricting output and market allocation). To be lawful, such provisions also need to fall within one of the exceptions, principally, those for "collaborative activities," vertical supply contracts, or joint buying/promotion.

Many of the issues around franchising turn upon identifying the correct definition of the relevant market, which requires a case-by-case assessment, depending on the particular issue.

[84] Fair Trading Act 1986, ss. 26C and 26D.
[85] Fair Trading Act 1986, s. 15.
[86] Fair Trading Act 1986, s. 40.
[87] Fair Trading Act 1986, ss. 40(1A) and 40A.
[88] Fair Trading Act 1986, s. 47.
[89] FMCA, s. 7.
[90] FMCA, ss. 39–40.
[91] FMCA, ss. 48 and 57.
[92] FMCA, sch. 1.

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a. Patents

The Patents Act 2013 ("Patents Act") provides standard protection for patents. The purpose of the Patents Act is to provide a patent system that promotes innovation and growth by striking a balance between the interests of inventors, patent owners, and society as a whole.[93] Patents are granted after the Intellectual Property Office of New Zealand (IPONZ) examines an application for a patent. A patent gives the patentee exclusive rights to exploit the invention and authorize others to do so. Patentees also have the right to bring an infringement proceeding. The relief available for an infringement includes an injunction and, at the patentee's option, either damages or an account of profits. Patents last for 20 years from the patent date.[94]

Following the introduction of the Patents (Trans-Tasman Patent Attorneys and Other Matters) Amendment Act 2016, New Zealand patent attorney registration is regulated by a single Trans-Tasman administrative body.

b. Trademarks, Trade Names, and Designs

The Trade Marks Act 2002 (the "Trade Marks Act") establishes a "trade mark registration system" that provides rights of exclusive use and ownership. Any person "claiming to be the owner of a trade mark" may apply for registration,[95] provided: there is no prior use or assertion of proprietorship; the applicant currently uses, or has a sufficiently definite intention to use, the mark; and no fraud or breach of duty is involved.[96] In New Zealand, applicants may register a mark under multiple classes of goods and services in one application.

An application for registration may be rejected by the Commissioner on "absolute" grounds (for example, where the mark is likely to deceive or confuse the public) or 'relative grounds' (for example, where the mark contains a person's name without the person's consent).[97] Where a mark is identical to a registered trademark, and is used in relation to the same or similar goods and services, there is a presumption that the use of the mark is confusing or deceptive (and, therefore, an infringement). Where a mark is similar to the registered mark, it must be proven that it would be likely to confuse or deceive to be rejected.[98]

Remedies for registered trademark infringement include interim or permanent injunctions, damages or an account of profits, or the "erasure, removal or obliteration" of the offending signs from infringing goods in the infringing person's control (or, if that is not practicable, the destruction of the goods themselves).[99]

There are a number of statutory defenses available to an infringing party, including use for "comparative advertising"[100] or where the infringing party was using its own name or the name of its place of business.[101] However, infringing parties will often challenge the registered trademark's validity directly, or seek to prove insufficient similarity between the marks. New Zealand also indirectly permits "parallel importing" under section 97A of the Trade Marks Act.[102]

Finally, the Trade Marks Act sets out a number of criminal offences. It is an offence to: counterfeit a registered trademark; falsely apply a registered trademark to goods or services; make or possess an object specifically designed to create counterfeit trademarks; or import, sell or possess (for purposes of trade or manufacture) goods to which the person concerned knows a registered trademark is falsely applied.[103]

Design registration is governed by the Designs Act 1953, which provides protection for the *appearance* of an article (i.e., shape, configuration, pattern or ornament)[104] and grants exclusive rights in favor of the registered proprietor.[105] For a design to be registered in New Zealand, the design must be "new or original,"[106] which is taken by courts to mean sufficiently "novel."[107] New Zealand applies a "local novelty" test — a design that has not been disclosed (via publication or public use) in New Zealand may be registered, regardless of whether it has been disclosed in other countries.

In determining whether a design has infringed a registered design, courts will apply both a "side-by-side test" and an "imperfect recollection test." The side-by-side test involves an eye comparison between the article complained of and representations of the registered article in the application for registration.[108] The imperfect recollection test aims to reflect the reality that articles will often not be compared side-by-side and is assessed from the perspective of a consumer who has viewed a registered design, walked away, returned and must then determine whether the design is the one the consumer viewed earlier.[109] Courts will also consider the "actual use" of a design when determining if a design is sufficiently similar.[110] Remedies for infringement include interim/permanent injunctions, delivery of the infringing product and an account of profits.

Non-registered trademarks and designs may be protected at common law, under the tort of "passing off" and under Sections 9 and 16 of the Fair Trading Act. Section 9 prohibits general conduct in trade that is, or is likely to be, misleading or deceptive. Section 16 specifically prohibits forgery and the false application of trademarks likely to mislead or deceive. The Fair Trading Act defines a forgery as the making of a trademark "so nearly resembling" another mark that it is likely to mislead or deceive, without the consent of the proprietor of the mark.[111] It also prohibits the falsification of any genuine trademarks whether by alteration, effacement or otherwise.[112]

[93] Patents Act 2013, s. 3.
[94] Patents Act 2013, s. 18.
[95] Trade Marks Act, s 32(1).
[96] *Newnham v Table for Six (1996) Ltd* (1998) 44 IPR 269 (HC) at 278.
[97] Trade Marks Act, ss 17 – 30.
[98] Trade Marks Act 1986, s 89.
[99] Trade Marks Act, ss 106 – 109.
[100] Trade Marks Act, s 94.
[101] Trade Marks Act, s 95.
[102] Trade Marks Act, s 97A.
[103] Trade Marks Act, s 120 – 123.
[104] Designs Act 1953, s 5.
[105] Designs Act 1953, s 11.
[106] Designs Act 1953, s 5(2).
[107] *Sutton v Bay Masonry Ltd* HC Tauranga CIV-2003-470-260, 28 May 2004.
[108] *UPL Group Ltd v Dix Engineers Ltd* [1989] 3 NZLR 135, (1988) 2 TCLR 687 (CA).
[109] *Valor Heating Co Ltd v Main Gas Appliances Ltd* [1973] RPC 871 (Ch).
[110] *Samsung Electronics (UK) v Apple Inc* [2012] EWHC 1882 (pat).
[111] Fair Trading Act 1986, s 16(2)(a).
[112] Fair Trading Act 1986, s 16(2)(b).

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c. Industrial Know-how

There is no statutory protection of know-how in New Zealand outside the patents and copyright legislation, but as in other common law jurisdictions, know-how and trade secrets are protected under the law of confidence. A court may grant civil remedies for a breach of confidence.

It is an offence under the Crimes Act 1961 (the "Crimes Act") to dishonestly, and without claim of right, take, obtain or copy any document, model or other depiction (or a copy of a document, model or other depiction) of any thing or process containing or embodying any trade secret, knowing that it embodies a trade secret.[113] The Crimes Act defines a trade secret as any information that:

(i) Is or has the potential to be used industrially or commercially;

(ii) Is not generally available in industrial or commercial use;

(iii) Has economic value or potential economic value to the possessor of the information; and

(iv) Is the subject of all reasonable efforts to preserve its secrecy.[114]

d. Copyrights

The relevant legislation is the Copyright Act 1994 (the "Copyright Act"). Under the Copyright Act, it is not necessary to register a copyright; rather a copyright comes into existence automatically in any original works of the following description:

(i) Literary, dramatic, musical or artistic works (which include photographs, multimedia and computer programs);

(ii) Sound recordings;

(iii) Films;

(iv) Communication works; and

(v) Typographical arrangements of published editions.

General protection for "communication works" came into force on October 31, 2008, under the Copyright (New Technologies) Amendment Act 2008. This encompasses broadcasts and cable programs as well as internet transmissions.

Ordinarily, the person who is the author of a work is the first owner of any copyright in the work. However, where certain works have been commissioned, or if the author of a work is an employee, the owner of the copyright is the person who commissioned the work, or the employer as the case may be (subject to any agreement to the contrary between the parties).[115]

The Copyright Act also provides for "moral rights," which accrue to authors of copyrighted works regardless of where the ownership of the copyright lies.[116] Moral rights include the right to be identified as the author of a work, the right to object to "derogatory treatment" of a work, and the right not to be falsely attributed as the author of a work. Moral rights are not assignable, although they may be waived.[117]

Copyright in most works continues for 50 years after the end of the calendar year of the date of the author's death, the date of manufacture, or the date of public availability, whichever is applicable.[118] Copyright in a typographical arrangement of a published edition continues for 25 years after the end of the calendar year in which the edition was first published.[119] Copyright in an artistic work that has been industrially applied is limited to 16 years from the date of industrial application or, in the case of a work of artistic craftsmanship, 25 years from the date on which the object is made.[120]

Copyright protection in works extends to all countries that are parties to the International Convention for the Protection of Literary and Artistic Works (the Berne Copyright Union), the Universal Copyright Convention, and the Trade Related Aspects of Intellectual Property (TRIPS) Agreement.

New Zealand has also acceded to the Convention for the Protection of Producers of Phonograms against Un-Authorized Duplication, the WIPO Performances and Phonograms Treaty, and the WIPO Copyright Treaty.

Copyright infringement falls into two categories — primary and secondary.[121] Primary infringement occurs where a party commits a "restricted act" (such as copying a work, performing or showing a work in public, broadcasting or adapting a work) with respect to the whole, or a substantial part, of a work. The secondary infringement provisions deal with "indirect" actions, such as importing, possessing or dealing with an already infringing copy.

There are limited "fair dealing" defenses available for copying a work for research, private study, criticism, review or educational purposes.[122]

Infringement of copyright is actionable either by the owner or by the exclusive licensee in copyright.[123] The forms of relief available include damages, injunctions, account of profits, *ex parte* orders, and the delivery of goods. Copyright owners also may lodge notices with Customs that, if accepted, will result in the seizure of imported pirated copies (similar border protection is available with respect to goods bearing signs that infringe registered trademarks). In certain cases, criminal penalties will apply to copyright infringement.

Under an amendment to the Copyright Act in 1998, parallel importing of works protected by copyright is permitted. A similar permission for trademark goods was introduced in the 2002 trademark legislation.

Amendments to the copyright law[124] extended copyright protection to Electronic Rights Management Information and prevent trafficking in devices that circumvent Technological Protection Measures applied to copyright works to commit copyright infringement.

[113] Crimes Act 1961, ss 230(1)(a) and 230(1)(b).
[114] Crimes Act 1961, s 230(2).
[115] Copyright Act 1994, s. 21.
[116] Copyright Act 1994, s. 94.
[117] Copyright Act 1994, ss. 107 and 118.
[118] Copyright Act 1994, s. 22(1).
[119] Copyright Act 1994, s. 25.
[120] Copyright Act 1994, s. 75.
[121] Copyright Act 1994, Part 2.
[122] Copyright Act 1994, ss. 42 and 43.
[123] Copyright Act 1994, ss. 120 and 123.
[124] Copyright (New Technologies) Amendment Act 2008.

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Note: The Ministry of Business, Innovation and Employment is currently undertaking a review of the Copyright Act, to ensure the regime remains fit for purpose in a rapidly changing technological environment. The review is broad in scope, encompassing the nature of rights under the Copyright Act, exceptions and limitations thereto, and assignment, licensing and enforcement thereof. The Ministry of Business Innovation and Employment is currently analyzing issues raised during public consultation and expects to undertake further consultation in the future. The Copyright Act will be amended by the CPTPP. However, provisions in the CPTPP relating to the Copyright Act will only enter into force on ratification, by all signatories, of the CPTPP, which the United States has yet formally to rejoin.

4. Sale of Goods and Consumer Protection

a. Implied Terms

The Contract and Commercial Law Act 2017 ("Contract and Commercial Law Act") replaced the Sale of Goods Act 1908. The Contract and Commercial Law Act applies to contracts of a sale of goods, that is, all personal chattels including emblements,[125] growing crops, things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale, and computer software. The term "goods" does not include money or choses in action. Contracts for the sale of motor vehicles by dealers are governed by the Motor Vehicle Sales Act 2003.

The Contract and Commercial Law Act implies a number of warranties into any sales transaction. The degree of warranty depends on the type of sale, such as by sample or description. These warranties may be contracted out of or varied by express agreement between the parties, in the course of dealing or by usage.[126]

The Fair Trading Act also may be used to imply warranties into sales made by traders. It covers misleading or deceptive conduct and false representations by traders, including those of their sales staff, advertising materials, and displays. Express disclaimers may only be effective if they are clearly visible or if they are included in the final contract, which expressly asserts precedence over all previous representations and conduct. Fine print should not be used to conceal important information which would be critical to the purchasing decision — it can run the risk of being misleading if it contradicts messages in bold type, or substantially changes them.

b. Credit Contracts, Hire Purchase Contracts

The Credit Contracts and Consumer Finance Act 2003 (CCCFA) applies to consumer credit contracts (as defined in the CCCFA), consumer leases of goods (entered into for personal, domestic or household purposes) and buy-back transactions of land. The CCCFA repealed the Credit Contracts Act 1981 and the Hire Purchase Act 1971 as of April 1, 2005, and applies to every credit contract, consumer lease and guarantee made after its commencement, and to every buy-back transaction of land regardless of when it was entered into.[127] Parties may not contract out of the CCCFA, and thus warranties implied into credit sales (previously dealt with under the Hire Purchase Act 1971 Section 51) cannot be negated.[128]

The CCCFA requires a creditor to make a disclosure of key information to a debtor at the commencement of, and on an ongoing basis during, the term of the credit contract.[129] A debtor may cancel the credit element of the contract within three days of initial disclosure, or at any time before initial disclosure is made.[130] The CCCFA also contains provisions relating to debtor hardship and oppressive contracts and creditor behavior.

A number of changes to the CCCFA entered into effect in 2021 under the Credit Contracts Legislation Amendment Act 2019, the Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020, and the Credit Contracts and Consumer Finance Amendment Regulations 2020. Previously, lender responsibilities were "principle based." Now, lenders are held to minimum standards for affordability and suitability assessments,[131] and responsible advertising.[132] Directors and senior managers have new responsibilities to ensure subordinate lenders are complying with their duties and obligations under the Act, including assessing whether the lender has appropriate compliance procedures in place, identifying deficiencies in such procedures and remedying those deficiencies.[133]

In early 2024, the Government announced plans to reform certain aspects of New Zealand's financial services regulation, including the CCCFA. The current review aims to:

(i) Assess the effectiveness of the CCCFA's high-cost credit provisions; and

(ii) Address any potential areas of under-performance, including the liability settings and the disclosure obligations.

The CCCFA provides substantial penalties for any breach, including statutory damages, regardless of loss by the debtor, and imprisonment.

c. Safety and Standards

Part II of the Fair Trading Act 1986 provides, first, for regulations to be issued prescribing consumer safety standards and, second, that existing standards (for example, by Standards New Zealand) may be similarly declared as a consumer safety standard. The standards may relate to information that must be disclosed and to the form and manner in which that information is to be disclosed. There is an exemption for goods intended for use out of New Zealand when the goods are suitably labeled for that purpose.

Parts III and IV of the Fair Trading Act establish a similar regime prescribing product and service safety standards. The Minister of Commerce and Consumer Affairs may declare goods to be "unsafe goods" and no person may supply, offer, or

[125] Vegetable chattels produced annually by labor and industry.
[126] Contract and Commercial Law Act 2017, s. 197.
[127] Credit Contracts and Consumer Finance Act 2003, s. 141.
[128] Credit Contracts and Consumer Finance Act 2003, s. 135.
[129] Credit Contracts and Consumer Finance Act, s. 17(1).
[130] Credit Contracts and Consumer Finance Act, s. 27(1).
[131] Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020, reg 4AA – 4AO.
[132] Credit Contracts and Consumer Finance Amendment Regulations 2020, reg 4AAAP – 4AAB.
[133] Credit Contracts and Consumer Finance Act 2003, s 59B.

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advertise any such goods.[134] The Minister may also issue a compulsory product recall notice to force a supplier to recall goods that do not comply with product safety standards or that may cause injury to any person. Suppliers may also be forced to repair or replace such goods or to refund their purchase price.[135] The importation of contravening goods is prohibited.[136]

d. Consumer Guarantees Act 1993

The Consumer Guarantees Act 1993 (CGA) provides consumers with certain warranties relating to the supply of goods or services, in trade, acquired for personal, domestic, or household use. The CGA applies to sales, hire purchases, hires, exchanges, and gifts.

The CGA sets minimum statutory guarantees with respect to the quality and fitness of goods and standards of service. These warranties take precedence over the various implied conditions in the Contract and Commercial Law Act; however, the Contract and Commercial Law Act may provide customers with remedies for goods or services outside the scope of the CGA, or where the CGA has been properly excluded in writing in an inter-business transaction.[137] Where statutory guarantees are not complied with, the CGA gives consumers rights of redress against retailers, manufacturers and suppliers.

Third parties who acquire goods from a consumer may enforce rights as if they were the original consumer. Third parties have the same rights against the supplier and manufacturer as the original purchaser. However, this does not apply to second-hand goods, unless they are being sold in New Zealand for the first time.

A supplier may contract out of the CGA only if the consumer acquires the goods or services for business purposes. Should a manufacturer give a guarantee in addition to the guarantees implied under the CGA, the manufacturer is responsible for that particular guarantee. The customer may choose to file a claim against either the supplier or the manufacturer of goods. It is a breach of the Fair Trading Act for consumer contracts to include any wording that could be interpreted as purporting to contract out of the CGA when this is, in fact, not permitted. The Commerce Commission does not enforce the CGA, but may assess whether businesses are in breach of the Fair Trading Act by virtue of misleading consumers as to their rights under the CGA.

5. Privacy

The Privacy Act 2020 (the "Privacy Act") regulates the collection, use, storage and dissemination of personal information by both the public and private sector. Personal information is any information about an identifiable individual.

The Privacy Act establishes a set of 13 privacy principles. The Privacy Commissioner (the New Zealand data protection regulator) promotes these principles, investigates breaches of the principles and imposes penalties. A complaints procedure for individuals (as an individual or by class action) is available with respect to breaches of the privacy principles.

Essentially, the privacy principles provide that an agency may only collect personal information directly from the individual concerned for a lawful purpose connected with its function. An individual must be made aware of the proposed use of the personal information when it is collected from him or her and is entitled to access to, and correction of, that personal information. Generally, personal information may not be used or disclosed for purposes other than those for which it was collected, nor may it be disclosed to other agencies without the individual's consent, unless the use or disclosure has been authorized by the individual in question, or other defined exceptions apply.

If an agency (A) holds personal information on behalf of another agency (B), for purposes of the Privacy Act, the information is to be treated as being held by B and not A. However, the information is to be treated as being held by A as well as B if A uses or discloses the information for its own purposes.[138]

The Privacy Act also mandates a "data breach response procedure." A privacy breach occurs when an organization or individual (either intentionally or accidentally):

(i) Provides unauthorized or accidental access to someone's personal information;

(ii) Discloses, alters, loses or destroys such information; or

(iii) Loses access to such information, whether temporarily or permanently.[139]

Where a privacy breach has caused, or is likely to cause, anyone serious harm, the responsible agency must notify the Privacy Commissioner as soon as practicable after becoming aware of the breach.[140] The agency must also notify the affected people or, if that is not reasonably practicable, give public notice of the breach. A failure to comply with the Privacy Act carries a maximum financial penalty of NZD$10,000.[141]

The principles relating to access to, and the correction of, personal information apply to information held outside New Zealand. The Privacy Act applies to actions taken by overseas agencies in the course of carrying on business in New Zealand with respect to personal information collected or held by them. An agency must not disclose personal information to a recipient outside New Zealand unless the disclosing agency believes, on reasonable grounds, that the information will be subject to safeguards comparable to the protections under the Privacy Act. However, for this purpose, an agency is not taken to "disclose" information by providing it to a third party solely for purposes of enabling the third party to process the information on behalf of the agency.[142]

The Privacy Commissioner may develop and issue industry codes of practice that regulate the application of privacy principles within an industry. The Privacy Act also creates a regime under which specified agencies may share, access and match personal information in consultation with the Privacy

[134] Fair Trading Act 1986, s. 31.
[135] Fair Trading Act 1986, s. 32.
[136] Fair Trading Act 1986, s. 33.
[137] Consumer Guarantees Act 1993, s. 43.

[138] Privacy Act 2020, s11.
[139] Privacy Act 2020, s 112.
[140] Privacy Act 2020, Part VI. Note, the Commissioner has communicated an expectation of a 72-hour response time as a starting point.
[141] Privacy Act 2020, ss 118 and 212. Note, the Human Rights Review Tribunal may consider any matter under the Privacy Act, and can make binding decisions and award damages or costs over NZD$10,000.
[142] Privacy Act 2020, s 11.

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Commissioner, primarily for purposes of facilitating the provision of public services and functions (for example, to detect social security fraud).[143]

While the Privacy Act focuses on information privacy or data protection, the Privacy Commissioner may generally inquire into any matter that may affect individual privacy.[144]

Separately, a tort of invasion of privacy is emerging in New Zealand law and has been found to exist in narrow circumstances.[145] It appears somewhat similar to the American tort of public disclosure of private facts. Additionally, the tort of intrusion upon seclusion has been affirmed in New Zealand.[146] Other regulators, such as the Broadcasting Standards Authority, hear privacy complaints in relation to broadcasting and the press.

D. Immigration Regulations

New Zealand's immigration policy is administered under the Immigration Act 2009 (the "Immigration Act") by the Immigration division of the Ministry of Business, Innovation and Employment. The policy is designed to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals. To achieve this purpose, the Immigration Act encourages the entry of skilled labor, entrepreneurs, and investors with resources and capital to contribute to the economy, and protects the employment opportunities of permanent residents. The government determines from time to time the skills required. Persons having business skills and capital are also considered favorably. Additional policies assist entry on humanitarian grounds and for migrants, refugees and protected persons.

The Immigration Act provides for the Minister of Immigration to publish from time to time government policy relating to the rules and criteria under which eligibility for the issue or grant of visas and permits is to be determined. The Immigration Act also provides for the promulgation of government policy in relation to residence visas and residence permits specifically, and the right to appeal to the Immigration and Protection Tribunal, where a decision to refuse a residence visa or permit is not in accordance with the relevant law.

The classes of visas that may be issued under the Immigration Act are: residence class visas (consisting of permanent resident visas and resident visas); temporary entry visas (consisting of temporary visas, limited visas and interim visas) and transit visas (required for certain persons intending to be in New Zealand only as transit passengers for a period not exceeding 24 hours[147]).[148]

The Immigration Act also enables holders of temporary visas to visit, work and study in New Zealand. A visitor visa entitles the holder to be present in New Zealand during the length of the permit for any lawful purpose other than to work or to study for more than three months in any 12-month period. Visitor visas may be granted for a period not exceeding nine months and extended for a further three months in special cases.

A work visa entitles the holder to be present in New Zealand, or within the exclusive economic zone of New Zealand, during the length of the visa, for the purpose of undertaking employment.

The Chief Executive of the Ministry of Business, Innovation and Employment, or any other immigration officer designated by the Chief Executive, may make deportation orders with respect to any person who unlawfully remains in New Zealand.[149] Any person who is liable for deportation may appeal to the Immigration and Protection Tribunal on the grounds that his or her stay in New Zealand is not unlawful or that he or she remains in New Zealand on exceptional humanitarian grounds.[150] A person who has been served a deportation order may provide information about their personal circumstances, requiring the immigration officer to consider cancelling the order. However, the ultimate decision is at the absolute discretion of the immigration officer.[151]

The Immigration Act sets out special procedures for persons whose security status cannot be immediately ascertained on their arrival in New Zealand.[152]

To reduce tax barriers to the recruitment of highly-skilled workers to New Zealand, the ITA provides for a 48-month tax exemption of most foreign income of new migrants and returning New Zealanders who have been nonresident for tax purposes for 10 years or more.[153] A complementary change has also improved the New Zealand tax treatment of new migrants and returning New Zealanders who hold interests in foreign, employment-related superannuation schemes.

New Zealand has also introduced investor and entrepreneur residency categories. Each of these provides for a standard, fast-tracked application process. Eligibility depends on financial contribution to New Zealand's economy and, in the case of the entrepreneur category, fulfillment of a job-creation condition.

E. Labor Relations

The Employment Relations Act 2000 (ERA) is the statute governing employment in New Zealand.

The ERA came into force on October 2, 2000. It aims to promote good faith in the employer-employee relationship as well as the right of workers to bargain collectively. While union membership is not compulsory — employers and employees may bargain individually — all collective agreements must be negotiated and concluded by a union.

Under the ERA, New Zealand's employment law framework is generally "employee friendly." The legislation is designed to protect employees from what is considered to be an inherent imbalance of power between employer and employee, and to ensure that employers comply with natural justice principles before adversely impacting employees.

The Employment Relations Amendment Act 2016 entered into force on April 1, 2016 and introduced a raft of changes. Under those changes, zero-hours contracts are no longer en-

[143] Privacy Act 2020, Part VII.
[144] Privacy Act, s 17(1)(i).
[145] *Hosking v. Runting* [2005] 1 NZLR 1 (CA).
[146] *C v. Holland* [2012] 3 NZLR 672 (HC).
[147] Immigration Act 2009, s. 86.
[148] Immigration Act 2009, s. 70.
[149] Immigration Act 2009, s. 175.
[150] Immigration Act 2009, s. 154.
[151] Immigration Act 2009, s. 177.
[152] Immigration Act 2009, part 9.
[153] ITA, s. HR 8.

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forceable (unless strict conditions are fulfilled). The Amendment Act introduced an "availability provision" that requires the employee and the employer to agree to hours during which the employee will be available for work outside normal working hours. An employer that requires such availability must provide guaranteed hours of work, which are set out in the employment contract, as well as compensation for the period of availability beyond those guaranteed hours. This change aims to ensure hours of work are agreed to between the parties while maintaining flexibility where desired.

The 2016 changes introduced obligations to pay reasonable compensation to shift workers where a shift is cancelled without reasonable notice (as set out in the reasonable notice period), and not to prohibit an employee from taking on secondary employment in the employment contract, unless the prohibition is for "genuine reasons based on reasonable grounds." A genuine reason to prohibit secondary employment may include protection of the employer's commercially sensitive information, intellectual property or commercial reputation.

The Employment Relations Amendment Act 2018, which came into force in December 2018, introduced changes to collective bargaining and remedies that reversed many of the changes that had been introduced under the previous government. The changes reflected the trend for the Labor party to increase the strength of collective bargaining and collective agreement concepts.

Following the 2023 general election, a three-party coalition government was formed by the National Party, the ACT Party and New Zealand First Party. The change in government immediately led to a shift in the labor relations framework, with more legislative change likely across the three-year term.

For example, in June 2022, the Labor Party government brought the Fair Pay Agreements Act 2022 into force, introducing industry-wide collective bargaining. While a number of fair pay agreements were initiated in the first year of the legislation (including by unions representing bus drivers, hospitality workers and supermarket workers), the Fair Pay Agreements Act 2022 was repealed by the current government in 2023 before any fair pay agreements were concluded.

The coalition government also changed the laws regarding trial periods to allow employers of all sizes to enforce 90-day trial periods. Prior to this change, only employers with less than 20 employees could use trial periods, with employers employing 20 or more workers only being able to, by default, rely on probationary period clauses (which, unlike trial periods, do not provide for a bar on unjustified dismissal personal grievances).

Trial periods, when used correctly, provide a statutory bar to most unjustified dismissal personal grievances, allowing more flexibility in the labor market. However, employees subject to a trial period can still raise a personal grievance for discrimination, sexual or racial harassment and unjustified disadvantages. The good faith regime also applies during a trial period.

The courts take a very narrow approach to the validity of trial periods and there are a number of conditions that have to be fulfilled for a trial period to be deemed valid, including requirements that:

(i) A trial period must be agreed to in writing before the employee commences work;

(ii) A trial period must include a valid notice period; and

(iii) The employee must be given a reasonable opportunity to seek advice on the employment agreement containing a trial period.

The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023 allows sexual harassment personal grievances to be raised within 12 months following the date on which the relevant action occurred or came to the notice of the employee, whichever is later.

1. Good Faith

One of the key principles in the ERA is that parties to an employment relationship must deal with each other in good faith, and not do anything, either directly or indirectly, to mislead or deceive each other. They must be "active and constructive," as well as "responsive and communicative" in their dealings.

The ERA also requires parties to bargain in good faith. Employers and employees/unions must, at a minimum, come to the bargaining table, listen, and respond to what the other party puts forward. Parties cannot refuse to enter into a collective agreement but, at present, there is no requirement to conclude the agreement, provided the parties have acted in good faith during the bargaining process. Further, an employer proposing to make a decision that may have an "adverse effect" on its employees must (subject to genuine confidentiality requirements) provide information about the decision and consult with their employees in good faith before the decision is made.

2. Consultation

Where an employer is proposing to make a decision that may have an impact on an employee's employment, the employer should consult with the employee prior to making the decision. Examples of situations where an employer should consult with employees include:

(i) Where a possible redundancy situation exists;

(ii) Where the employer is proposing changing any of the employee's terms and conditions of employment; and

(iii) Where the employer is introducing, amending, or removing policies which may have an impact on the employee's employment.

A consultation process involves:

(i) Meeting with the employee affected to inform him or her of the proposed changes *before* a decision is made on whether the company will proceed with the changes;

(ii) Providing the affected employee with an opportunity to give his or her feedback and comments on the proposal; and

(iii) Considering the employee's feedback with an open mind before making a decision on whether and how to proceed.

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3. Sale of Business/Contracting Out

As well as complying with the good faith/consultation requirements described above, in a sale, merger or contracting out situation, an employer must negotiate with the proposed purchaser/new employer in relation to their employees. Such negotiations must include discussion about who will be offered employment with the new employer, and on what terms and conditions. Employee consultation on a sale of business or contracting out should generally take place in advance of a sale and purchase agreement being concluded.

The ERA also contains special protection for "vulnerable employees" (primarily cleaning and food catering workers, as well as some other types of workers in specified sectors). The ERA provides that vulnerable employees are entitled to transfer to the new employer as of right, and to bargain for redundancy payments with the new employer if their services are not required.

4. Dispute Resolution

The ERA encourages mediation as the primary means of settling employment disputes. If mediation is unsuccessful, the parties may have their dispute decided by the Employment Relations Authority, an investigative body. If still unsatisfied, parties have a right of appeal to the Employment Court.

Very often employment disputes are solved in mediation, and do not proceed to litigation.

5. Strikes and Lockouts

The only lawful strikes or lockouts are those that relate either to bargaining for a collective agreement (with a union) or to health and safety issues.

When a strike occurs, an employer can only use its existing employees to perform the work of the striking employees, and then only if the existing employees agree to perform the work. External workers may only be employed when the work is necessary for health and safety reasons.

6. Union Access

A union representative has a right to access a workplace at reasonable times, in a reasonable manner, for purposes related to union business. Union business includes recruiting members.

7. Equal Opportunities

The Human Rights Act 1994 ensures that an employer cannot discriminate based on an employee's (or prospective employee's) sex, marital status, religious beliefs, ethical belief, color, race, ethical national origin, disability, age, political opinion, employment status, family status, sexual orientation or union involvement.

8. Minimum Working Conditions

a. Wages

A minimum wage was established by the Minimum Wage Act 1983. As of September 2024, the minimum hourly wage rates in New Zealand are NZ$23.15 for an adult and NZ$18.25 for "starting-out" employees and trainees. The Minimum Wage Amendment Act 2016, which also came into effect on April 1, 2016, provides for greater enforcement options when employers breach the minimum wage for each hour worked.

b. Holidays and Leave

In addition to up to 12 paid statutory holidays, the Holidays Act 2003 entitles employees to at least four weeks paid annual leave after 12 months of continuous employment.

After six months' continuous employment, an employee is entitled to a minimum of 10 days' sick leave when he or she is sick or when his or her spouse, or someone who depends on him or her for care is sick or injured. Employees can carry over up to 20 days of accumulated sick leave from year to year.

After six months' continuous employment, an employee is also entitled to three days' bereavement leave on the death of an immediate family member (including in the case of the death of a baby by miscarriage or stillbirth) and one day's bereavement leave in all other circumstances in which the employer accepts that the employee has suffered a bereavement.

After six months' continuous employment, an employee is also entitled to up to 10 days' family violence leave if they are affected by family violence. Such employees are also entitled to short-term flexible working arrangements to assist them in addressing the effects of family violence. An employer can lawfully request evidence of the fact that an employee is affected by domestic violence.

The Holidays Amendment Act 2016 came into force on April 1, 2016. The Act bolstered the enforcement options available to a labor inspector where an employer has breached the Act. While, previously, only labor inspectors were able to claim penalties for such breaches, the changes allow employees to claim penalties as well. The current government has announced that changes to the Holidays Act will be proposed in September 2024 and a consultation draft bill outlining the proposed amendments is expected to be published shortly. The government has signaled a move away from the original recommendations made by the Holidays Act Taskforce in 2019. While the contents of the draft bill are not yet known, it is understood that the proposed changes will be aimed at simplifying the Act's requirements to lessen the compliance burden on employers.

c. Parental Leave

The Parental Leave and Employment Protection Act 1987 provides for parents and spouses/partners to take specified periods of parental leave (unpaid) on the birth of a child or in any other case where the parents and/or spouses/partners assume primary care of a child under six years old. An employer must keep the employee's position open while they are on parental leave. Parental leave includes the following:

(i) Primary carer leave of 26 weeks. It should be noted that if two or more people are eligible for primary carer leave, only one person may be nominated as the primary carer.

(ii) Extended leave of up to 26 or 52 weeks (depending on whether the employee has continuously served the current employer as of the expected date of birth or assumption of primary responsibility for the child for a period of between six and 12 months, or more than 12 months).

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(iii) Special leave of 10 days prior to the beginning of primary carer leave for reasons connected with pregnancy (for example, antenatal checks).

(iv) Up to two weeks (unpaid) partner leave.

Primary carers are entitled to receive Government-funded parental leave for up to 26 weeks. The maximum weekly payment is currently NZ$754.87 (gross) per week or 100% of the parent's previous weekly earnings, whichever is lower. To be eligible, a parent must have been in paid employment for at least an average of 10 hours per week over any of 26 weeks of the 52 weeks just before the birth or adoption of a child. Eligible parents who have multiple employers can combine their hours and income from each job. The Government will pay additional parental leave payments of up to 13 weeks if a baby is born prematurely (before 37 weeks).

Subject to the fulfillment of statutory conditions, parental leave payments are available to people with non-standard working arrangements. This includes casual, seasonal, temporary and fixed-term employees and workers with more than one employer, as well as workers who have recently changed jobs.

Parental leave payments and leave entitlements have also been extended to a wider group of primary carers. Employees who are not the primary carer of a child may now request a period of leave although employers are not required to consent.

"Keeping in Touch" days allow employees (on mutual agreement) to work up to 64 hours during the 26-week paid leave period.

An employee who has taken parental leave must give notice to the employer at least 21 days before their parental leave finishes stating whether or not they intend to return to work.

9. KiwiSaver

An employer must automatically enroll all new employees in KiwiSaver, the New Zealand Government's superannuation savings initiative, unless they are employed for less than 28 days. An employer is also required to give new employees IR's information pack about KiwiSaver. However, employees may choose to opt out of the scheme. The employer is required to contribute 3% of an employee's pay to KiwiSaver (this can be paid on top of an employee's salary, or, if so provided in the employment agreement, as part of an employee's total remuneration package).

10. Accident Compensation and Health and Safety

Health and safety in the workplace and workplace accidents are dealt with by the Accident Compensation Act 2001 (ACCA) and the Health and Safety at Work Act 2015 (HSWA).

The ACCA provides a no-fault, insurance-based scheme for managing personal injury that aims to minimize both the overall incidence and overall impact of injury in the community. The ACCA came into force on April 1, 2002, and replaced the Accident Insurance Act 1998.

The Accident Compensation Corporation (ACC), which is owned by the New Zealand Government, has a primary function of promoting measures to reduce the incidence and severity of personal injury. In addition, the ACC is the cornerstone of the no-fault compensation scheme, providing accident insurance for people who suffer personal injuries as a result of accidents. No civil action may be brought in New Zealand courts for death or personal injury arising out of an accident occurring in New Zealand. Compensation for up to 80% of (before tax) earnings lost as a result of an accident (subject to a relatively low maximum amount) is paid by the ACC to accident victims and medical and rehabilitation support expenses are reimbursed. Lump sum compensation is paid in some circumstances. The Accident Compensation Regime is effectively a compulsory insurance scheme funded by premiums paid by employers, the self-employed, earners, motor vehicle owners, health care professionals and the Government.

As from July 1, 2024, people who had been receiving weekly compensation for more than 26 weeks had their payments increased by 4.14%. This increased:

(i) The gross minimum rate of weekly compensation payable to a full-time earner to NZ$740.80 per week; and

(ii) The gross maximum rate of such weekly compensation to NZ$2,350.62 per week.

Other grants affected by these changes, include funeral grants, survivor grants and weekly childcare payments.

Comment: The Accident Compensation Regime applies only within New Zealand. If an accident victim brings suit in another jurisdiction and persuades the courts of that jurisdiction that some other law should apply, then the domestic legislation in New Zealand would not necessarily bar the claim. Also, workers compensation insurances operated by overseas investors should not necessarily be cancelled based on the New Zealand Accident Compensation Regime and the bar on litigation. The bar does not operate with respect to claims made in overseas jurisdictions.

The HSWA entered into force on April 4, 2016. This legislation was the largest overhaul in New Zealand's health and safety regime in 20 years. In practical terms, most of the duties to prevent harm in the workplace under the HSWA are the same as the previous Health and Safety in Employment Act 1993 (HASEA); however, the HSWA puts more emphasis on promoting a culture of health and safety in the workplace. The HSWA significantly increases the penalties for breaches of health and safety obligations and requires officers of a company or business (including directors and some senior management) to take due diligence to ensure the health and safety of others. This is a new requirement, as under HASEA, officers could only be liable if they knowingly breached, or acquiesced to a breach of, the legislation. The HSWA requires employers to engage with workers and have meaningful worker participation in health and safety matters that affect them. It also creates obligations of collaboration and consultation between businesses that have overlapping duties, for example, on sites where there are multiple contractors. The standards set in the HSWA are high, involving obligations by the employer to take "all practicable steps." Through the HSWA, WorkSafe New Zealand (the workplace health and safety regulatory agency) seeks to promote a safety culture, evidenced by actions, which in turn ensures that work is safer. WorkSafe oversees compliance with and enforcement of the HSWA.

Health and safety reform is also being considered by the new government. The Minister for Workplace Relations and Safety has commenced a period of public consultation to understand businesses' views on the potential changes, which are reportedly aimed at making health and safety requirements

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more clear, effective, flexible, durable and proportionate to the risks, and balancing risks with the costs.

F. Financing the Business

New Zealand operates a very open regime. For businesses operating in New Zealand, there are no exchange controls, licensing, approval or similar regulatory restrictions.

Borrowers may raise finance on- and off-shore and in the currency of choice. Banks are actively engaged in the provision of short and medium-to-long term debt to the consumer, commercial and corporate sectors. Market forces determine the level of interest rates.

Equity finance is available through the issuing of shares and listing on the New Zealand Exchange's main board (NZSX).

Non-bank lending enterprises are also increasingly frequently providing private credit facilities for businesses in New Zealand. Not being subject to the regulatory restraints and the higher capital requirements applicable to banks (and other deposit takers,) they are often in a position to offer finance at lower interest rates.

G. Anti-Money Laundering and Countering Financing of Terrorism Act 2009

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AMLA) applies to all "reporting entities," which includes "financial institutions" to the extent their activities fall within a prescribed list of activities set out in the AMLA. "Financial institutions" is defined broadly by including persons who, in the ordinary course of business, accept deposits or other repayable funds from the public, transfer money and invest, administer or manage funds on behalf of other persons.[154]

The AMLA also includes "designated non-financial businesses or professions" as a category of reporting entities. "Designated non-financial businesses or professions" include law firms,[155] accounting practices, conveyancers, real estate agents, and trust and company service providers who carry out specified activities.

The AMLA requires a reporting entity to, among other things:

(i) Undertake an assessment of the risk of money laundering and the financing of terrorism that it may reasonably be expected to face in the course of its business.

(ii) Establish, implement and maintain a compliance program that includes internal policies, controls and procedures to detect, manage and mitigate money laundering and the financing of terrorism. The compliance program must be administered and maintained by a designated compliance officer (who must be an employee of the reporting entity).[156]

(iii) Conduct customer due diligence ("know your customer") on its customers and the beneficial owners of customers (including any person acting on behalf of a customer).

(iv) Undertake ongoing customer due diligence and account monitoring where it has a business relationship with the customer.

(v) Keep transaction, identity, verification, suspicious activity and other records for a period of at least five years.

(vi) File suspicious activity reports and prescribed transaction reports with the New Zealand Police in accordance with its obligations under the AMLA.

1. Verification of the Identity of Certain Persons

The AMLA has three levels of initial customer due diligence (CDD) ("standard," "simplified" and "enhanced"). Each level of CDD has specific information collection and identification verification requirements, depending on the level of risk involved with the customer and the transaction. The AMLA requires reporting entities to conduct CDD on:

(i) A customer;

(ii) Any beneficial owner[157] of a customer; and

(iii) Any person acting on behalf of a customer.

The "standard" CDD requirements under the AMLA oblige a reporting entity to obtain identity information and take reasonable steps to verify the full name, date of birth, address and company identifier or registration number of a customer and/or a beneficial owner of a customer, and if (applicable) the beneficial owner's relationship to the customer. Further, where the customer is a "legal person," a reporting entity must also obtain information on, and verify according to the level of risk involved, the customer's legal form and proof of existence, ownership and control structure, and powers that bind and regulate the customer.[158]

The entity must undertake "standard" CDD if:

(i) It establishes a business relationship with a new customer;

(ii) A customer seeks to conduct an occasional transaction or activity through the reporting entity;

[154] Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s. 5(1).

[155] Importantly for law firms, the AMLA ensures they are not required to disclose any privileged information and introduced a defense for a failure to submit a suspicious activity report on the basis that the reporting entity believed on reasonable grounds that the information was a privileged communication.

[156] AMLA, s. 56(2) and 56(3). The designated compliance officer must be an employee of the reporting entity unless the reporting entity has no employees, in which case any person may be appointed as the compliance officer.

[157] AMLA, s. 5. "Beneficial owner" means any individual who has effective control of a customer or a person on whose behalf a transaction is conducted, or owns more than 25% of the customer or person on whose behalf a transaction is conducted. The Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011 have been amended to make it clear that a "beneficial owner" includes a person with ultimate ownership or control of the customer, whether directly or indirectly, and a person on whose behalf the transaction is conducted that is a customer of a customer, but only if the person has ultimate ownership or control of the customer directly or indirectly.

[158] Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, regs. 11 and 11A. The Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011 also require additional information be obtained depending on the legal form of the customer (e.g., company, trust or limited partnership).

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(iii) In relation to an existing customer, and according to the level of risk involved, there has been a material change in the nature or purpose of the business relationship and the reporting entity considers that it has insufficient information about the customer; or

(iv) It becomes aware that an existing account is anonymous (in which case the entity must conduct the CDD as soon as practicable).

A reporting entity must also obtain information on the nature and purpose of the proposed business relationship between the customer and the reporting entity, and sufficient information to determine whether the customer should be subject to "enhanced" CDD.

There is no automatic requirement for reporting entities to conduct standard CDD with respect to existing customers[159] unless, and according to the level of risk involved, there has been a material change in the nature or purpose of the business relationship and the reporting entity considers it has insufficient information about the customer.

"Simplified" CDD requires a reporting entity to also obtain information on the nature and purpose of the proposed business relationship between the customer and the reporting entity. The reporting entity may undertake "simplified" CDD when it establishes a business relationship with a listed issuer,[160] certain public authorities or regulated institutions,[161] or where the listed issuer, public authority or regulated institution conducts an occasional transaction or activity through the entity, or if regulations require it to do so.

The "enhanced" CDD requirements oblige a reporting entity to obtain, in addition to the "standard" and "simplified" CDD requirements, information relating to the customer's source of wealth or source of funds[162] and any additional information prescribed by the regulations. For example, where the customer is a discretionary or charitable trust with more than 10 beneficiaries, the reporting entity must obtain a description of each class or type of beneficiary and, for a charitable trust, the objects of the trust. The reporting entity must undertake "enhanced" CDD in certain circumstances, including when:

(i) A business relationship is established with:

- A trust or other vehicle for holding personal assets;
- A nonresident from a country with insufficient measures for tackling money laundering and the financing of terrorism;[163] or
- A company with nominee shareholders or shares in bearer form;

(ii) An occasional transaction or activity is conducted with any of the above;

(iii) A customer seeks to conduct, through the reporting entity, a complex, unusually large transaction or unusual pattern of transactions that have no apparent or visible economic or lawful purpose;

(iv) The reporting entity considers the level of risk involved warrants an enhanced CDD;

(v) The customer or any beneficial owner is a politically exposed person;

(vi) The relationship, transaction or activity involves new or developing technologies or products that might favor anonymity; or

(vii) The reporting entity has grounds to report a suspicious activity[164] or the reporting entity is required to make a suspicious activity report and the activity concerned is:

- Otherwise exempt from CDD requirements; and
- Conducted by an existing customer or a customer engaging in an occasional transaction or activity.

In these circumstances, the enhanced CDD must be conducted as soon as is practicable.

2. Ongoing Customer Due Diligence and Account Monitoring

A reporting entity must conduct ongoing CDD and undertake account monitoring to:[165]

(i) Ensure that the business relationship and the transactions relating to the business relationship are consistent with the reporting entity's knowledge about the customer and the customer's business and risk profile; and

(ii) Identify any grounds for reporting a suspicious activity.

When conducting ongoing CDD and undertaking account monitoring, the reporting entity must have regard to the type of CDD conducted when the business relationship with the customer was established, and the level of risk involved.

When conducting ongoing CDD and undertaking account monitoring, a reporting entity must do at least the following:

(i) Regularly review the customer's account activity and transaction behavior; and

[159] AMLA, s. 5(1). "Existing customer" in relation to a reporting entity, means a person who was in a business relationship with the reporting entity immediately before any provisions of the AMLA began to apply to the reporting entity.

[160] Financial Markets Conduct Act 2013 (FMCA), s. 6. "Listed issuer" means a person that is a party to a listing agreement with a licensed market operator in relation to a licensed market (and includes a licensed market operator that has financial products quoted on its own licensed market), or a person to which the above used to apply, in respect of any action or event or circumstance to which the FMCA applied at that time.

[161] These include governmental departments, local authorities, the New Zealand Police, State Enterprises, registered banks, licensed insurers and other public authorities, and financial institutions.

[162] Reporting entities must have policies, procedures and controls that set out when the reporting entity must collect the source of funds information and/or the customer's source of wealth information (Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, reg. 15H).

[163] Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, reg. 15. A country with insufficient measures for tackling money laundering and the financing of terrorism includes a country identified by the Financial Action Task Force as being a high-risk jurisdiction subject to a call for action.

[164] Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, reg. 12AA.

[165] AMLA, s. 31.

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(ii) Regularly review any customer information obtained or, in relation to an existing customer, any customer information the reporting entity holds about the customer; and

(iii) Address any additional matters, as prescribed by the regulations (including updating customer information and taking reasonable steps to verify the information, the extent of which must be considered based on when CDD was last undertaken in relation to the customer and the adequacy of the information held).[166]

3. Reporting of Suspicious Activities

The AMLA obliges reporting entities to report "suspicious activities" to the Police Commissioner as soon as practicable but no later than three working days of the suspicion being formed,[167] where:[168]

(i) A person conducts or seeks to conduct a transaction through a reporting entity;

(ii) A reporting entity provides or proposes to provide a service to a person;

(iii) A person requests a reporting entity to provide a service or makes an inquiry to the reporting entity in relation to a service;

(iv) Any person is being investigated or prosecuted for a money laundering offense, or an offense within the meaning of Section 243(1) of the Crimes Act 1961; or

(v) The Misuse of Drugs Act 1975, the Terrorism Suppression Act 2002, the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009 is being enforced.

The reporting entity must report the suspicious activity as prescribed in Schedule 1 to the Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011.

4. Annual Reporting

The AMLA obliges a reporting entity to provide an annual report to the relevant supervisor.[169] An annual report must be in the prescribed form, take into account the results and implications of the required audit (see II.G.5., below) and contain the information prescribed by the Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011.

5. Anti-Money Laundering/Countering Financing of Terrorism Audit

The AMLA obliges reporting entities to have their AML risk assessment and compliance programs audited every three years.

An audit must be carried out by an independent person, appointed by the reporting entity, who is appropriately qualified to conduct the audit. A person appointed to conduct an audit is not required to be a chartered accountant or qualified to undertake financial audits, and he or she must not have been involved in the establishment, implementation or maintenance of the reporting entity's AML/CFT program (if any), or the undertaking of the reporting entity's risk assessment (if any).

A reporting entity must provide a copy of any audit to its supervisor on request.

6. Need to Retain Records

The AMLA provides that reporting entities must keep such records as are reasonably necessary to enable each transaction to be readily reconstructed at any time. The records must specify:

(i) The nature of the transaction;

(ii) The amount of the transaction and currency involved;

(iii) The date on which the transaction was conducted;

(iv) The parties to the transaction;

(v) Where applicable, the facility through which the transaction was conducted and any other facilities (whether or not provided by the reporting entity) directly involved; and

(vi) The name of the officer or employee or agent of the reporting entity who handled the transaction, if that person has any face to face dealings in respect of the transaction with any of the parties to the transaction and has formed a suspicion that would require the transaction to be reported.

The reporting entity must keep transaction records for at least five years after the transaction is completed, or for a longer period if specified by the entity's AMLA supervisor or by the Police Commissioner.

Similarly, records reasonably necessary to enable the nature of the evidence used for the purposes of verifying the identity of any facility holder must be retained. These must be kept for a period of at least five years after the business relationship ends or the occasional transaction[170] occurred, or after completion of the wire transfer.

Records relevant to the establishment of the business relationship and any other records (for example, account files, business correspondence and written findings) relating to, and obtained during the course of, a business relationship that are rea-

[166] Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, reg. 15J.

[167] AMLA, s. 40(3).

[168] AMLA, s. 39A. See, also, Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Amendment Regulations 2017 and Anti-Money Laundering and Countering Financing of Terrorism (Prescribed Transactions Reporting) Regulations 2011.

[169] There are three AML supervisors — the Reserve Bank of New Zealand, the Financial Markets Authority and the Department of Internal Affairs. Each of them regulates different types of reporting entities, and a reporting entity will be allocated to the most appropriate supervisor for supervision.

[170] AMLA, s. 5: "Occasional transaction" means a cash transaction that occurs outside of a business relationship and is equal to or over the applicable threshold value (whether carried out in a single operation or several operations that appear to be linked), and includes a transaction or class of transactions declared by regulations to be an occasional transaction for purposes of the AMLA. It excludes check deposits and a transaction or class of transactions declared by regulations not to be an occasional transaction for purposes of the AMLA. "Cash" is defined to mean either physical currency or bearer-negotiable instruments.

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sonably necessary to establish the nature and purpose of, and activities relating to, the business relationship, must be kept for at least five years after the end of the reporting entity's business relationship with the customer.[171]

In addition to the records previously mentioned, the reporting entity must keep other records, risk assessments, Anti-Money Laundering/Countering Financing of Terrorism compliance programs and audits for a period of at least five years after the date on which they ceased to be used on a regular basis.

The AMLA requires that a reporting entity also keep a copy of any suspicious activity reports it makes for at least five years after the report is made, or any longer period specified by the AML/CFT supervisor. A reporting entity must take all practicable steps to ensure that every record retained by that reporting entity under the AMLA, and every copy of that record, is destroyed as soon as practicable following the expiry of the period for which the reporting entity is required to retain that record. However, a reporting entity may retain records for a longer period if there is a lawful reason for retaining them. Lawful reasons include the need to comply with any other law, the need to enable a reporting entity to carry on its business, or the detection, investigation or prosecution of any offence.[172]

7. Obligation to Report Imports and Exports of Cash

The AMLA requires that every person who moves cash into or out of New Zealand or receives cash from outside New Zealand equal to or above the amount of NZ$10,000 to:[173]

(i) Make a report in writing in the prescribed form, to be completed in accordance with regulations (if any);

(ii) Specify to Customs the nature and amount of each type of cash and the overall total of cash held; and

(iii) Provide to Customs a report containing personal and contact details of both the person moving the cash and the recipient of the cash.

These requirements apply to both accompanied and unaccompanied cash.

8. Obligation to Submit Prescribed Transaction Reports

The AMLA also requires that all reporting entities report to the Police Commissioner, via "prescribed transaction reports," international wire transfers where the amount involved is equal to or in excess of NZ$1,000, and domestic physical cash transactions equal to or in excess of NZ$10,000.[174] Records of submitted prescribed transaction reports must also be retained.[175]

[171] AMLA, s. 51(1)(a) and (c) and Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, reg. 15N.

[172] AMLA, s. 54.

[173] AMLA, s. 68 and 69, and the Anti-Money Laundering and Countering Financing of Terrorism (Cross-border Transportation of Cash) Regulations 2010, reg. 5(1).

[174] AMLA, s. 48A. See, also, AMLA, s. 5, which defines "prescribed transaction" and Anti-Money Laundering and Countering Financing of Terrorism (Prescribed Transactions Reporting) Regulations 2016, reg. 6, which sets the prescribed thresholds.

[175] Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011, reg. 15N.

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III. Forms of Doing Business in New Zealand

A. Principal Business Entities

1. Sole Proprietorship

A business fully controlled and operated by one person is a sole proprietorship and that person is termed a sole trader. A sole proprietorship requires no additional registration or formalities before it commences trading. It ceases to operate once the sole trader decides to stop operating the business or on the death or bankruptcy of the sole trader.

Sole traders are entitled to all the profits from the business and they bear all the risks of the business. Sole traders have unlimited and personal liability for business debts and obligations.

2. Company

Companies are limited liability, incorporated entities. The Companies Act 1993 ("Companies Act") came into force for all New Zealand companies on July 1, 1994. See, further, III.B., below.

3. Partnership

a. General Partnership

The law governing general partnerships in New Zealand follows the principles of English law and is contained in both the Partnership Law Act 2019 and common law. Each partner of a partnership is liable for all the debts and obligations of the partnership and an agency relationship exists among the partners. Partnerships between corporations are permitted. See, further, III.C.1., below.

b. Limited Partnership

The limited partnerships regime came into force in New Zealand on May 2, 2008, through the Limited Partnerships Act 2008 (LPA). The LPA repealed Part 2 of the Partnership Act 1908 as it related to special partnerships and transitional provisions were provided for special partnerships that wanted to transition to a limited partnership. Since the commencement of the LPA, it has not been possible to renew existing special partnerships. See, further, III.C.2., below.

4. Foreign Companies

A foreign company wishing to operate in New Zealand can:

(i) Establish a subsidiary;

(ii) Become a New Zealand company; or

(iii) Establish a branch in New Zealand.

To become a New Zealand company and thus abandon its country of incorporation, the overseas company must transfer its registration to, and apply to register the company on, the New Zealand register under Part 19 of the Companies Act (Sections 344–349). Establishing a subsidiary or becoming a New Zealand company results in either the subsidiary or the overseas company being incorporated in New Zealand.

An overseas company can also establish a New Zealand branch to look after its New Zealand operations rather than create a subsidiary or transfer its incorporation. This results in the company's New Zealand operations being governed by New Zealand law, while the company remains incorporated under a foreign jurisdiction. In this case, the overseas company that carries on business in New Zealand must be registered as a branch on the New Zealand overseas register.[176]

An overseas company must register as an overseas company carrying on business in New Zealand within 10 working days of commencing business in New Zealand.[177] The name of the overseas company must be reserved prior to the company commencing business.[178]

5. Other Entities

Other forms of doing business in New Zealand include unincorporated contractual joint ventures, trusts and unit trusts. Additionally, incorporated societies have some similar attributes to companies. See, further, III.E., below.

B. Companies

1. Formation

a. Purpose Clause

Subject to general law, a company has full capacity, rights, powers and privileges to carry on or undertake any business or activity, perform any act or enter into any transaction, both within and outside New Zealand.[179]

A company may include in its constitution a provision that restricts the capacity, rights, powers and privileges of the company.[180]

b. Corporate Name

Before an application for incorporation may be made, an application must be made for approval of the name of the proposed company. A name will not be approved if:[181]

- Its use would contravene an enactment;
- The proposed name is identical or almost identical to the name of an existing company or a name that has been already reserved;
- It is offensive in the opinion of the Registrar.

Note: Applicants should ensure that there is no conflict with a registered trademark and that there is no potential breach of the Fair Trading Act 1986 or the law of passing off.

The name of a limited liability company must end with the word(s) "Limited" or "Tāpui (Limited)."[182] Use of the letters "Pty," "Inc," or "plc" will not normally be approved.

Once the name has been reserved, the applicant has 20 working days to complete the registration of the company with

[176] Companies Act, s. 334(1). See, further, under III.D.
[177] Companies Act, s. 334(1).
[178] Companies Act, s. 333(1).
[179] Companies Act, s. 16(1).
[180] Companies Act. s. 16(2).
[181] Companies Act, s. 22(2).
[182] Companies Act, s. 21.

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that name, otherwise the name reservation expires and must be re-reserved.[183]

c. Incorporators

In New Zealand, any person may register a company by completing an application to the Companies Office and paying the appropriate fee. This can be done on the Companies Office website.[184] For an overview of the application process, see "Incorporation Procedure" under III.B.1.f. For the application fee, refer to Worksheet 6.

d. Articles of Incorporation

In New Zealand, what in other jurisdictions are referred to as "articles of incorporation" and/or "by-laws" are known as a "constitution."

A company may, but is not required to, have a constitution.[185] If a company does not have a constitution, it will be governed solely by the provisions of the Companies Act.[186]

There are three types of provisions in the Companies Act:

(i) Mandatory;

(ii) Presumptive; and

(iii) Optional.

Mandatory provisions apply to every company and may not be altered by a constitution (for example, the requirements that a company must have a name and at least one share, one shareholder and one director).

Presumptive provisions apply to a company unless the constitution provides otherwise (for example, preemptive rights apply with respect to the issue of shares, unless modified by the constitution of the company).

Optional provisions do not apply to a company unless specified in its constitution (for example, by expressly conferring on a company the right to purchase and hold shares issued by the company).

Some of the matters that a company may wish to incorporate in its constitution include:

(i) Negation of preemptive rights on the issue of shares;

(ii) The power to purchase and hold its own shares;

(iii) Specification of preemptive rights on share transfers;

(iv) If the company is a wholly-owned subsidiary, specification to the effect that the directors may act in the best interests of the company's parent (where the company is not a wholly-owned subsidiary, this requires prior agreement of the other shareholders);

(v) If the company is carrying out a joint venture between the shareholders, specification to the effect that a director may act in the best interests of a shareholder or shareholders (rather than in the best interests of the company);

(vi) Specification of the company's ability to indemnify and arrange insurance for its directors;

(vii) Alteration of the provisions in the first schedule to the Companies Act concerning shareholder meetings (where permitted by the Companies Act); and

(viii) Replacement or alteration of the provisions set out in the third schedule to the Companies Act concerning directors' meetings.

e. Share Capital

A company must, after the registration of the company (see III.B.1.f., below, for the incorporation procedure), issue to the shareholder or shareholders the number of shares specified in the application for registration.[187]

Unless otherwise specified in its constitution, a share in a company (an "ordinary share") will confer equal voting rights and the rights to an equal share in dividends and surplus assets of the company on liquidation.[188] The company constitution can specify other share classes. Commonly utilized classes are "preference shares" and "redeemable shares."

In the case of a listed company, any variation of the rights attached to company shares must abide by the listing rules of the exchange (in New Zealand, the NZX Main Board Listing Rules).

f. Incorporation Procedure

An application for incorporation of a New Zealand company may be completed online.[189] The applicable registration fee must also be paid. An applicant wishing to complete an application online must set up an online services account with the Companies Office (via the RealMe login service).

An application must provide the following details:[190]

(i) The full names, residential addresses, and date and place of birth of the directors of the proposed company;

(ii) The full names and residential addresses of the shareholders of the proposed company;

(iii) The number of shares to be issued to each shareholder;

(iv) Information about the proposed company's ultimate holding company;

(v) The address of the registered office of the proposed company; and

(vi) The address for service of the proposed company.

The Companies Office may require proof of residential address in certain circumstances. Accepted evidence is a certified hard copy of a letter to a named director sent to their residential address and which has been received in the last three months (such as a utilities bill, property agreement or bank statement).

Each proposed shareholder must consent to being a shareholder in the prescribed form and to taking the class and number of shares specified in that form.[191] Each proposed director

[183] Companies Act, s. 22(3)(b).

[184] Available at: https://companies-register.companiesoffice.govt.nz/help-centre/starting-a-company/incorporating-a-company/.

[185] Companies Act, s. 26.

[186] Companies Act, s. 28.

[187] Companies Act, s. 41(a).

[188] Companies Act, s. 36.

[189] Available at: https://companies-register.companiesoffice.govt.nz/.

[190] Companies Act, s. 12(2).

[191] Companies Act, s. 12(1)(d).

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must consent to being a director and must certify that he or she is not disqualified from holding office as a director.[192] These consents must accompany the application.

If the company is to have a constitution (a constitution is optional),[193] a copy of the constitution must accompany the application.[194] Also, a name reservation form must accompany the application.[195] The registration process must be completed within 20 working days of the name of the company being reserved, unless this deadline is extended for a further 20 working days.[196]

The existence of the company begins on the date that the certificate of incorporation is issued.

g. Costs of Incorporation

See the Worksheets.

h. Shareholders

Subject to the Companies Act and the constitution (if there is one), the directors of a company have all the powers of management of the company.[197] If shareholders exercise any powers reserved to the directors, they may be deemed to be directors and will be subject to the duties owed by directors in exercising those powers.[198]

Shareholders must exercise the powers reserved to shareholders by ordinary resolution at a meeting of shareholders[199] or by a special resolution in lieu of a meeting,[200] unless otherwise specified in the company's constitution or the Companies Act. The following powers must be exercised by a special resolution:[201] the adoption, alteration or revocation of the constitution; the liquidation of the company; approval of an amalgamation; and approval of a major transaction.[202]

Additionally, where a company proposes to take an action that affects the rights attaching to shares, that action must first be approved by a special resolution of each "interest group"[203] (namely a group of shareholders whose affected rights are identical and whose rights are affected by the proposed action in the same way).[204]

Shareholders may raise, review, and pass resolutions relating to the management of the company at meetings of the shareholders. However, unless the constitution provides otherwise, the resolutions are not binding on the board.[205]

The Companies Act provides a right to minority shareholders who dissent from certain actions of the company (such as entering into a major transaction or altering the rights attaching to shares) to have their shares purchased by the company, or through the company, in certain circumstances.[206]

i. Directors

All companies must have at least one director.[207] A director must be a natural person over the age of 18 who is not an undischarged bankrupt and is not prohibited from being a director or promoter or being concerned in the management of a company in New Zealand or elsewhere.[208] There is no restriction on the nationality of a director.

However, from May 2014 every new company incorporated in New Zealand must have at least one director who is resident in New Zealand (or who is resident in Australia and also a director of an Australian-incorporated company).[209] Existing companies had until the end of October 2014 to meet this requirement.

The appointment and removal of directors is by ordinary resolution of the shareholders, unless the constitution provides for an alternative procedure.[210] Directors are given all powers to manage the company, except to the extent limited by the constitution of the company.[211]

The Companies Act provides a broad definition of "director" that includes persons other than those who have been appointed as directors, including:

- A person who is entitled to control the exercise of powers that, apart from the constitution of the company, would be exercised by the board of directors;
- A person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board; and
- A person in accordance with whose directions or instructions the board of the company may be required, or is accustomed, to act.[212]

Directors' duties include the duty to exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances, taking into account:

(i) The nature of the company;

(ii) The nature of the decision; and

(iii) The position of the director and the nature of the responsibilities undertaken by him or her.[213]

Directors must also act in the best interests of the company.[214] The court may also grant leave to a shareholder or director to bring a derivative action (proceedings in the name and

[192] Companies Act, s. 12(1)(c).
[193] Companies Act, s. 26.
[194] Companies Act, s. 12(1)(f).
[195] Companies Act, s. 12(1)(e).
[196] Companies Act, s. 22(3)(b).
[197] Companies Act, s. 128.
[198] Companies Act, s. 126(2).
[199] Companies Act, ss. 104, 105, 120, and 121.
[200] Companies Act, s. 122.
[201] Companies Act, s. 106.
[202] Companies Act, s. 129(2). In brief, a major transaction is: the acquisition or disposal, or the agreement (including a contingent agreement) to acquire or dispose of, assets the value of which is more than half the value of the company's assets before the transaction; or the acquisition of rights or interests or the incurring of obligations or liabilities (including contingent liabilities) the value of which is more than half the value of the company's assets before the transaction.
[203] Companies Act, s. 117(1). For an inclusive list of the relevant rights, see Companies Act, s. 117(2).
[204] Companies Act, s. 116(1).
[205] Companies Act, s. 109(3).
[206] Companies Act, ss. 110–115.
[207] Companies Act, s. 150.
[208] Companies Act, s. 151.
[209] Companies Act, s. 10(d).
[210] Companies Act, ss. 153(2) and 156.
[211] Companies Act, s. 128(2) and 128(3).
[212] Companies Act, s. 126(1).
[213] Companies Act, s. 137.
[214] Companies Act, s. 131.

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on behalf of the company).[215] This is subject to the proviso that, where the constitution permits, directors of subsidiary or joint venture companies may act in the best interests of the company's holding company or shareholders, respectively.[216]

A director will be liable to the company for breaches of duties owed to the company. A director may be personally liable to the shareholders if the director breaches a duty owed to the shareholders[217] and may be criminally liable for breaching some of the provisions of the Companies Act.[218] In certain circumstances, a company, if permitted by its constitution, and with the approval of the directors, may take out professional indemnity insurance for directors and employees.[219]

Directors must disclose any interests in shares issued by the company, and any interests in transactions to which the company is a party. A director may vote on a transaction in which he or she is interested, unless this is prohibited by the constitution (or, in the case of a listed company, by any applicable listing rules).[220]

j. Pre-Incorporation Contracts

A company may ratify a pre-incorporation contract within a period to be stated in the contract, or if no period is specified, within a reasonable time after incorporation.[221] If the company does not ratify the contract, a party to the contract may apply to the Court for an order granting appropriate relief.[222]

Where a contract on behalf of the company to be formed is signed, there is an implied warranty (unless expressed otherwise) that the company will be formed within a time specified in the contract (and if no time is specified, then within a reasonable time after the contract is made) and that it will ratify the contract within the time specified in the contract (and if no time is specified, then within a reasonable time after the company is incorporated).[223]

2. Operation

a. License

There are no national business licenses required in New Zealand for the mere purpose of operating a business. However, there are certain sectors which are regulated by relevant regulatory authorities and require registrations or licenses, such as for financial service providers. Furthermore, licensing may be required with regional councils, who regulate health and safety standards, building permits and other licensing requirements. This may apply, for example, in order to open a café or restaurant.

Further information may be obtained from the relevant regional council or regulatory authority.

b. Amendment of Articles

A special resolution is required to adopt, alter, or revoke the constitution of a company. A special resolution must be approved by 75% (or more, if the constitution so provides) of the votes of those shareholders entitled to vote and voting on the issue. The adoption, alteration, or revocation of a constitution must be notified, in the prescribed form, to the Registrar of Companies within 10 working days.[224]

c. Increases and Reductions of Capital Stock

(1) Issuing New Shares

Subject to the constitution of the company, shares may be issued by the board of directors at any time, in any number, to any person, and with any conditions as set out in the company's constitution or in their terms of issue.[225] Provided they are fair and reasonable to the company and to all existing shareholders, shares may be issued on any terms and for any consideration decided by the board.[226]

The consideration paid to the company on the issue of shares is known as the issued or subscribed capital, although it is not technically defined as such under the Act because the distinction between subscribed capital and other capital is irrelevant for company law purposes in New Zealand. For income tax purposes, however, it may be important to maintain the distinction (see V.B.3.c., below).

If the new shares to be issued are to be ranked equally or prior to shares already issued in terms of voting or distribution rights, the new shares must first be offered to existing shareholders in proportion to their current shareholding (unless the constitution provides otherwise). The offer must remain open for a reasonable amount of time.[227]

Details of any issue of new shares must be notified to the Registrar of Companies within 10 working days.[228]

(2) Share Subdivisions

This occurs when existing shares are divided into smaller parcels, so that the total number of company shares increases and the individual value of each share decreases, but the total value of all the shares on issue remains the same. This is treated differently for tax purposes from the acquisition of new shares issued by a company.

(3) Share Consolidations

A share consolidation is the opposite of a share subdivision. A large number of shares are consolidated into smaller parcels, where the value of each individual share increases but the total overall value remains the same. A share consolidation usually occurs where there are a small number of shareholders but an unnecessarily large number of shares.

[215] Companies Act, s. 165.
[216] Companies Act, s. 131. For other duties, see Companies Act, ss. 132–138, 145, 148, and 149.
[217] Companies Act, s. 169.
[218] Companies Act, s. 373.
[219] Companies Act, s. 162.
[220] Companies Act, ss. 140–144.
[221] Companies Act, s. 182(2).
[222] Companies Act, s. 184.
[223] Companies Act, ss. 183.
[224] Companies Act, s. 32.
[225] Companies Act, s. 42.
[226] Companies Act, s. 47.
[227] Companies Act, s. 45.
[228] Companies Act, s. 43.

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d. Acquisition of Own Shares

A company may purchase or otherwise acquire its own shares if it is expressly permitted to do so by its constitution.[229] Shares thus acquired are deemed to be cancelled on acquisition unless they constitute treasury stock.[230] For shares acquired by the company to be treasury stock, the constitution must expressly permit the company to hold its own shares, the board must resolve not to cancel the shares on acquisition and the company may not hold more than 5% of the shares of that class on issue.[231] While a company holds its own shares, rights in those shares are suspended and the company may not vote on the shares, or receive dividends or any other distribution.[232]

e. Corporate Officers

All companies must have at least one director.[233] An individual cannot be a director of a company if he or she is (among other things):

(i) Under 18 years of age;

(ii) An undischarged bankrupt;

(iii) Prohibited from being a director, a general partner, or a promoter of an entity under New Zealand law or overseas law;

(iv) Subject to a property order made under Sections 30 or 31 of the Protection of Personal and Property Rights Act 1988; or

(v) Prohibited by the company's constitution.[234]

The Companies Act provides a broad definition of "director" that includes individuals other than those who have been appointed as directors, including:[235]

(i) An individual who is entitled to control the exercise of powers that, apart from the constitution of the company, would be exercised by the board of directors;

(ii) An individual to whom a power or duty of the board has been directly delegated by the board with that individual's consent or acquiescence, or who exercises the power or duty with the board's consent or acquiescence; and

(iii) An individual in accordance with whose directions or instructions the board may be required, or is accustomed, to act.

Directors' duties owed to the company include:

(i) The duty to act in good faith and in (what the director believes) to be the best interests of the company, subject to the constitution permitting directors of wholly-owned subsidiaries or joint venture companies to act in the best interests of the company's parent or shareholders, respectively;[236] and

(ii) The duty to exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances, taking into account the nature of the company, the nature of the decision, and the position of the director and the nature of responsibilities undertaken by him or her.[237]

Directors' duties owed to the shareholders include:

(i) The duty to take reasonable steps to ensure the share register is properly kept and that share transfers are promptly entered on it;[238] and

(ii) The duty to enter his or her interests in the interests register if he or she is interested in a transaction or proposed transaction with the company.[239]

A director will be liable to the company for a breach of a duty owed to the company, and liable to the shareholders for a breach of a duty owed to the shareholders.

Note: Two criminal offenses came into effect on July 3, 2014. A director is liable to imprisonment for a term not exceeding five years, or a fine not exceeding NZ$200,000, if:

(i) He or she acts in bad faith toward the company, believing his or her conduct is not in the company's best interests, and knows that his or her conduct will cause serious loss to the company;[240] or

(ii) The company incurs a debt while insolvent or becomes insolvent as a result of incurring the debt, the director knows the company is or will become insolvent, and his or her failure to prevent the company from incurring the debt is dishonest.[241]

f. Shareholders' Meetings

A company must call an "annual meeting" of shareholders no later than six months after the company's balance date, and no later than 15 months after the previous annual meeting.[242] A new company does not have to hold its first annual meeting in the calendar year of its registration, but must hold its first meeting within 18 months after its registration.[243]

If the company is obligated to prepare an annual report under Section 208 of the Companies Act (see the Worksheets for details on what must be included in the annual report), then the company's directors must send to the shareholders, either:

(i) A copy of the annual report that sets out the details of the recent affairs of the company (and various other matters); or

(ii) A notice containing prescribed statements detailing how the annual report can be obtained (including by electronic means) at least 20 working days before the annual meeting.[244]

If a notice is sent in lieu of the annual report, a shareholder may request a copy of the annual report within 15 working days

[229] Companies Act, s. 59(1).
[230] Companies Act, s. 66(1).
[231] Companies Act, s. 67A.
[232] Companies Act, s. 67B.
[233] Companies Act, s. 150.
[234] Companies Act, s. 151(2).
[235] Companies Act, s. 126.
[236] Companies Act 1993, s. 131.
[237] Companies Act 1993, s. 137.
[238] Companies Act, s. 90.
[239] Companies Act, s. 140.
[240] Companies Act, s. 138A.
[241] Companies Act, s. 380(4).
[242] Companies Act, s. 120(1).
[243] Companies Act, s. 120(2).
[244] Companies Act, s. 209.

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of receiving the notice and the board of directors must send a copy to the shareholder as soon as practicable and free of charge.[245]

A shareholder may waive his or her right to receive any or all of the documents from the company (however, a shareholder may not waive both the right to receive a copy of the annual report and the right to receive the notice referred to above).[246] If shareholders who together hold at least 95% of the voting shares agree, the annual reporting obligations of the company may be reduced in certain respects.[247]

A company does not have to hold an annual meeting if everything required to be done is done by a written resolution of shareholders in lieu of an annual meeting. The resolution must be signed by at least 75% of the shareholders who would be entitled to vote on that resolution at an annual meeting and who together hold at least 75% of the votes entitled to be cast on that resolution (or, in each case, a higher percentage if specified in the constitution).[248] Within five working days of a resolution passed in lieu of an annual meeting, the company must send a copy of the resolution to every shareholder who did not sign the resolution.[249]

A special meeting of shareholders may be called at any time by the board of directors or any other person authorized by the constitution to call the meeting.[250] The board of directors must call a special meeting on written request of shareholders that hold not less than 5% of the voting rights that may be cast on the issue to be considered at the meeting.[251]

The First Schedule to the Companies Act contains provisions governing procedures at shareholders' meetings, some of which may be varied by a company's constitution.

g. Directors' Meetings

Except to the extent that it is varied by the constitution of a company, the Third Schedule to the Companies Act regulates the procedures governing meetings of the board of directors. The Third Schedule allows directors to meet by audio, or audio and visual communication, provided there is a quorum.[252]

A quorum is a majority of the directors (unless otherwise specified in the company's constitution). A resolution in writing signed by all directors entitled to receive notice of meetings is as valid as if it had been passed at a duly convened meeting.[253] Every director has one vote. The chairperson does not have a casting vote.[254]

A director who is interested in a transaction must disclose to the board of directors, and cause to be entered in the interests register, the nature and monetary value or extent of his or her interest in a transaction.[255] A director who fails to disclose his or her interest in these circumstances commits an offense and is liable on conviction to a fine not exceeding NZ$10,000.[256]

Non-disclosure of an interest may mean that a transaction entered into by the company in which a director of the company is interested may be voided by the company prior to the expiration of three months after the transaction is disclosed to all the shareholders.[257] Nevertheless, the company may not void such a transaction where it has received fair value under that transaction.

h. Books and Records

The Companies Act mandates that various records must be kept by a company at its registered office. Section 189 provides that a company must keep the following documents:

(i) The constitution of the company;

(ii) Minutes of all meetings and resolutions of shareholders within the last seven years;

(iii) A directors' interests register;

(iv) Minutes of all meetings and resolutions of directors and directors' committees within the last seven years;

(v) Certificates given by directors under the Companies Act within the last seven years;

(vi) The full names and addresses of the current directors;

(vii) Copies of all written communications to all shareholders or all holders of the same class of shares during the last seven years, including annual reports made under Section 208 of the Companies Act;

(viii) Copies of all financial statements and group financial statements required to be completed by the Companies Act or any other enactment for the last seven completed accounting periods of the company;

(ix) The accounting records required by Section 194 of the Companies Act for the current accounting period and for the last seven completed accounting periods of the company; and

(x) The share register of the company.

If these records are not kept at its registered office, the company must ensure that notice is given to the Registrar of Companies as to where the records are being held.

The board of a company has the responsibility to ensure that accurate accounting records are kept. These records must enable the company to ensure financial statements can be prepared to comply with New Zealand Generally Accepted Accounting Principles (GAAP) and are able to be audited.[258]

Each year, companies must file with the Registrar of Companies an annual return providing information prescribed in

[245] Companies Act, s. 209A.

[246] Companies Act, s. 212. Pursuant to this section, shareholders may also choose to waive rights to receive other documents from the company.

[247] Companies Act, s. 211(3).

[248] Companies Act, s. 122(1).

[249] Companies Act, s. 122(5).

[250] Companies Act, s. 121(a).

[251] Companies Act, s. 121(b).

[252] Companies Act, Schedule 3, cl. 3(b).

[253] Companies Act, Schedule 3, cl. 7(1).

[254] Companies Act, Schedule 3, cl. 5(2).

[255] Companies Act, s. 140. Broadly, a director is "interested" in a transaction if he or she is party to, or will or may derive a material benefit from, the transaction; has a material financial interest in another party to the transaction; is the parent, child, spouse, civil union or de facto partner of someone who will or may derive a material financial benefit from the transaction; or is otherwise directly or indirectly materially interested in the transaction. Companies Act, s. 139.

[256] Companies Act, s. 140(4) and s. 373(2).

[257] Companies Act, s. 141.

[258] Companies Act, s. 194(1).

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the Fourth Schedule to the Companies Act.[259] Company details such as the certificate of incorporation, constitution (if there is one), names and residential addresses of directors, registered office and address for service are available to view online at https://companies-register.companiesoffice.govt.nz/, under the relevant company's file.

i. Financial Statements

(1) Financial Reporting Act 2013

The Financial Reporting Act 2013 ("2013 Act") came into force on April 1, 2014, repealing and replacing the Financial Reporting Act 1993, subject to certain transitional provisions.

The 2013 Act comprehensively restates and rationalizes the financial reporting obligations applying to companies, overseas companies, limited partnerships, and other forms of business organizations. The purpose of the 2013 Act is to:[260]

(i) Continue the External Reporting Board[261] and define its functions and powers;

(ii) Provide for the issue of financial reporting standards and auditing and assurance standards;

(iii) Provide for auditor qualifications and other standard provisions relating to financial reporting duties under other enactments; and

(iv) Provide for standard provisions relating to climate-related disclosure duties under the Financial Markets Conduct Act 2013 (FMCA).

For accounting periods commencing after April 1, 2014, the following companies must prepare and register audited financial statements under the Companies Act:[262]

(i) Large[263] New Zealand incorporated companies;

(ii) Large overseas companies[264] and large subsidiaries of overseas companies that "carry on business" in New Zealand;[265]

(iii) Companies with 10 or more shareholders, or large companies, unless the shareholders opt out by a shareholder resolution approved by at least 95% of the votes entitled to be cast on the issue;[266] and

(iv) Companies with fewer than 10 shareholders, where shareholders holding at least 5% of the voting shares opt in.[267]

An entity is not "large" with respect to any accounting period if it was an "inactive" entity for that period and, within five months following the end of that period, the entity delivers to the Registrar a declaration as to its inactive status.[268]

An entity is "inactive" if, during the accounting period, it has not derived (or been deemed to derive) any income, has no expenses, has not disposed of (or been deemed to dispose of) any assets and, at the end of the accounting period, has no subsidiaries or all of its subsidiaries are inactive entities with respect to that accounting period.[269]

Every company or overseas company to which the financial reporting requirements in the Companies Act apply must complete financial statements within five months after the entity's balance date.[270]

Where the company has subsidiaries, group financial statements must generally be prepared (instead of company financial statements), subject to certain exceptions. The financial statements must be dated and signed by two directors, or by one director if he or she is the sole director.[271]

With respect to a reporting entity that is an overseas company, financial statements are required to include the financial statements for its New Zealand business if the New Zealand business is "large."[272] These financial statements are to be prepared as if that business were conducted by a company formed and registered in New Zealand. This requirement means that financial statements must be completed for the New Zealand business of an overseas company separately from the financial statements of the company itself. Where a group comprises a reporting entity that is an overseas company and its subsidiaries, separate financial statements must be completed for the New Zealand business of the group as if the members of the group were companies formed and registered in New Zealand.[273]

Exemptions are available in some circumstances. If the Registrar of Companies notifies a reporting entity that is incorporated or constituted outside New Zealand that the Registrar is satisfied that the financial statements of the company comply with the requirements of the law in force in the reporting entity's country of incorporation and those requirements are substantially the same or sufficiently equivalent to those of the Companies Act, then the overseas financial statements are taken to comply with the content requirements of the Act.[274]

The financial statements must comply with GAAP.[275]

Where the Companies Act requires that financial statements be audited, the audit report must comply with the relevant requirements of the Companies Act.[276]

Those companies subject to the financial statement requirements in the Companies Act must file their audited financial statements and any group financial statements with the

[259] Companies Act, s. 214.

[260] Financial Reporting Act 2013, ss. 11–12.

[261] The External Reporting Board is a Crown entity for the purposes of s. 7 of the Crown Entities Act 2004. Financial Reporting Act 2013, s. 11.

[262] Companies Act, s. 200.

[263] Financial Reporting Act 2013, s. 45(1). A New Zealand incorporated company is "large" if it and its subsidiaries had either total assets of more than NZ$66 million on the two most recent balance dates or total revenue in each of the two preceding accounting periods exceeding NZ$33 million.

[264] Financial Reporting Act 2013, s. 45(2). An overseas company or subsidiary of an overseas company is "large" if it and its subsidiaries had either total assets of more than NZ$22 million on the two most recent preceding balance dates or total revenue in each of the two preceding accounting periods exceeding NZ$11 million.

[265] The concept of "carrying on a business" is referred to in further detail at E., below.

[266] Companies Act, ss. 207I and 207J.

[267] Companies Act, s. 207K.

[268] Financial Reporting Act 2013, s. 45(3).

[269] Financial Reporting Act 2013, s. 45(3)–45(5).

[270] Companies Act, s. 201.

[271] Companies Act, s. 202.

[272] Companies Act, s. 204.

[273] Companies Act, s. 204.

[274] Companies Act, s. 203.

[275] Financial Reporting Act 2013, s. 9.

[276] Companies Act, ss. 206–207C.

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Registrar of Companies within five months after the balance date.[277]

The auditor's report must be sent by the auditor to the Registrar and External Reporting Board within seven working days after the signing of the report if the report indicates that the requirements of the Companies Act have not been met.[278]

The Registrar may grant an exemption to large overseas companies from preparation, audit and registration requirements if compliance is unduly onerous or burdensome and if the company is required to comply with satisfactory requirements under its own laws. The exemption must not be broader than what is reasonably necessary to address the matter that gave rise to the exemption. The exemption may be granted on any terms and conditions that the Registrar thinks fit.[279] Where an exemption is granted by the Registrar, the Registrar will publish in the New Zealand Gazette (the official newspaper of the New Zealand government) a notice of exemption, including the Registrar's reasons for granting the exemption.[280]

(2) Financial Markets Conduct Act 2013

The substantive financial reporting requirements for issuers of financial products and other financial markets participants are contained in Part 7 of the FMCA.

Part 7 applies to "FMC reporting entities," which are:[281]

(i) Issuers of regulated products;[282]

(ii) License holders under Part 6 of the FMCA (except independent trustees of restricted schemes);

(iii) Licensed supervisors;

(iv) NZX listed issuers;

(v) Licensed market operators (other than overseas operators);

(vi) Recipients of money from conduit issuers;

(vii) Registered banks;

(viii) Licensed insurers;

(ix) Credit unions; and

(x) Building societies.

Every FMC reporting entity must complete financial statements in accordance with GAAP within four months after the entity's balance date. The financial statements must be dated and signed by two directors, or by one director if he or she is the sole director.[283]

Every FMC reporting entity that has, on the entity's balance date, one or more subsidiaries must complete group financial statements (instead of company financial statements) in accordance with GAAP within four months after the entity's balance date. The group financial statements must be dated and signed by two directors, or by one director, if he or she is the sole director.[284]

An overseas company that is an "FMC reporting entity" is no longer permitted to use financial statements prepared under overseas GAAP unless specified in an exemption notice. The financial statements must include, in addition to the financial statements of the overseas company, financial statements for the overseas company's New Zealand business (or the group's New Zealand business) prepared as if that business were conducted by a company formed and registered in New Zealand.[285]

FMC reporting entities are required to have their financial statements or group financial statements audited by a qualified auditor (appropriately licensed or registered).[286] The audit report must meet the requirements of all applicable auditing and assurance standards.

If the auditor's report indicates that the requirements set out in Part 7 of the FMCA have not been complied with, the auditor must, within seven working days after signing the report, send a copy of the report and a copy of the financial statements or group financial statements to the Financial Markets Authority, External Reporting Board (and to the supervisor in the case of an issuer of debt securities or a manager of a registered scheme).[287]

FMC reporting entities must file their audited financial statements and any group financial statements with the Registrar of Companies within four months after the balance date of the entity. An FMC reporting entity that contravenes this section commits an offense and is liable on conviction to a fine of up to NZ$50,000.[288] Every manager of a registered scheme is also required to lodge the financial statement of the unit.[289]

It is a criminal offense under the FMCA for an FMC reporting entity and every director of that entity to knowingly fail to comply with financial reporting standards, such as the preparation of financial statements and group financial statements. A person who commits an offense is liable on conviction, in the case of an individual, to imprisonment for up to five years and to a fine of up to NZ$500,000 (or both), and in any other case, to a fine of up to NZ$2.5 million.[290]

j. Dividends and Other Distributions of Profits

A distribution is defined broadly as a direct or indirect transfer of money or property (other than the company's own shares) to, or the incurring of a debt to or for the benefit of, a shareholder in relation to shares held by the shareholder. This includes the payment of dividends, the acquisition of its own shares by a company, a distribution of indebtedness and the giving of financial assistance for the purchase of shares.[291]

[277] Companies Act, ss. 207D–207E. Documents filed with the Registrar of Companies are available to view online on the relevant company's file at www.companiesoffice.govt.nz/companies.

[278] Companies Act, s. 207C.

[279] Companies Act, s. 207L.

[280] Companies Act, s. 207L(5)–(6).

[281] FMCA, s. 451.

[282] Section 452 of the FMCA provides an exception where a company that issues equity securities is not treated as an FMC reporting entity if it has fewer than 50 shareholders or fewer than 50 parcels of shares that are voting parcels, and the company would be an FMC reporting entity by reason only of being an issuer of equity securities that are both voting products and regulated products.

[283] FMCA, s. 460.

[284] FMCA, s. 461.

[285] FMCA, s. 461B.

[286] FMCA, s. 461D.

[287] FMCA, s. 461G.

[288] FMCA, s. 461H.

[289] FMCA, s. 461H(1A).

[290] FMCA, s. 461I.

[291] Companies Act, s. 2(1).

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Generally, the board of a company authorizes distributions by the company. The board determines the timing of the distributions, the amount of distribution, and the shareholders that the distributions are made to.[292] However, the board's power to authorize distributions is subject to any restrictions in the company's constitution and the board must believe on reasonable grounds that the solvency test will be satisfied.

Under the solvency test, a company must, immediately following the distribution:

(i) Be able to pay its debts as they fall due in the normal course of business; and

(ii) Have assets greater in value than its liabilities, including contingent liabilities.[293]

3. Amalgamations

An amalgamation occurs where two or more companies merge to continue doing business as one company. The resulting company may be a new company or one of the amalgamating companies.[294] The effect of the amalgamation is that the assets, obligations and liabilities of the amalgamating companies are merged.

Part 13 of the Companies Act governs amalgamations. Companies subject to the Takeovers Code (see III.B.4., below) may not merge by way of a Part 13 amalgamation. Effecting amalgamations will generally require a resolution from each of the amalgamating companies,[295] unless the amalgamating company is wholly-owned by the other amalgamating company (a short form amalgamation).[296]

Amalgamations (including in respect of companies subject to the Takeovers Code) may also be effected by way of a court-approved scheme of arrangement under Part 15 of the Companies Act.

4. Takeovers

Takeovers are primarily regulated by the Takeovers Act 1993 (the "Takeovers Act"), the Takeovers Panel and the Takeovers Code (the "Code").[297]

The key objectives of the Code include ensuring that all shareholders of a target company are treated fairly and equally, and are all offered the opportunity to participate in a takeover offer.[298]

The Code cannot be contracted out of[299] and the Takeovers Panel monitors compliance with its provisions.[300]

The Code applies to all "Code Companies," which are companies that:

(i) Are party to a listing agreement with the NZX and have securities that confer voting rights quoted on the NZX (or met these requirements at any time during the period of 12 months before a date or the occurrence of an event referred to in the Code); or

(ii) Have 50 or more shareholders and 50 or more share parcels, and are at least "medium-sized." A company is "medium-sized" if:

(I) The company has completed one or more accounting periods, and either or both of the following statements are true:

i. The total assets of the company and any subsidiaries are worth at least NZ$30 million (as at the last day of the company's most recently completed accounting period);

ii. The total revenue of the company and any subsidiaries was at least NZ$15 million (in the most recently completed accounting period); or

(II) The company has not completed its first accounting period and on the last day of the most recently completed month, the total assets of the company and any subsidiaries are worth at least NZ$30 million.[301]

The Code is based on a "fundamental rule" that prohibits a person becoming the owner or controller of 20%[302] or more of the voting rights in a Code Company, except in compliance with the Code.[303] The Code allows a person to increase his/her voting rights above the 20% threshold by:

(i) Obtaining shareholder approval;[304]

(ii) Making a full offer;[305]

(iii) Making a partial offer;[306]

(iv) "Creeping acquisitions" of up to 5% per annum (if the person already holds or controls more than 50% but less than 90% of the voting rights in the target company);[307]

[292] Companies Act, s. 52.

[293] Companies Act, s. 4.

[294] Companies Act, s. 219.

[295] Companies Act, s. 221(1).

[296] Companies Act, s. 222(1).

[297] The Schedule to the Takeovers Regulations 2000 sets out the Code. It should be noted that, while the Code sets out the takeover procedure that must be followed with respect to a company to which the Code applies, the offeror should also consider whether antitrust issues under the Commerce Act 1986 may arise as a result of the merger. Where the offeror is a nonresident company (or is 25% or more owned or controlled by nonresidents), consent for the acquisition may be required from the OIO under the OIA and the Overseas Investment Regulations 2005.

[298] Takeovers Act, ss. 20(1)(c) and 21(c).

[299] The Code, rule 5.

[300] The Takeovers Panel is a body established under the Takeovers Act, with its members appointed by the Minister of Commerce and Consumer Affairs. In addition to formulating the Code, the Takeover Panel's key functions include developing amendments to the Code, monitoring compliance with the Code, enforcing the Code and promoting public understanding of the law and practice relating to takeovers. For further information on the Takeovers Panel and its role, see www.takeovers.govt.nz.

[301] The Code, rule 3A.

[302] The percentage held or controlled by a person will include voting securities held or controlled by persons "acting jointly or in concert" and "associates" of the offeror. The Code, rule 6(2). An "associate" of another person includes: a person acting jointly or in concert; a person who acts, or is accustomed to act, in accordance with the wishes of the other person; a related company; a person with a business, personal, or ownership relationship such that the person should, under the circumstances, be considered an associate; and a "third person" associate (i.e., where one person is an associate of another person who in turn is an associate of a third person, the first and third persons will be regarded as associates if the relationship between any of them or all three is such that the first person should be regarded as an associate of the third person). The Code, rule 4.

[303] The Code, rule 6.

[304] The Code, rules 7(c), 7(d), and 15–19A.

[305] The Code, rules 7(a) and 8.

[306] The Code, rules 7(b) and 9–14.

[307] The Code, rule 7(e).

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(v) Compulsory acquisition (if the person already holds or controls 90% or more of the voting rights in the target company);[308] or

(vi) Obtaining an exemption granted by the Takeovers Panel.[309]

In addition, the Code seeks to protect against discriminatory and coercive takeover offers by mandating that the same terms and price per security must be offered to all security holders holding the same class of security.[310] This is to ensure that all shareholders are treated equally and fairly.

Any company that seeks to offer different terms to shareholders of the same class must either come under a class exemption,[311] or apply for an individual exemption from the Takeovers Panel.

The Takeovers Panel regularly publishes guidance material in business language on its website.[312]

a. Shareholder Approval

A specific acquisition or issue of shares may be approved by shareholders in the target company by an "ordinary resolution" (a simple majority of the shareholders voting on the issue).[313] Persons acquiring or disposing of the shares cannot vote on the matter.[314]

b. Full Offer

A full offer is an offer for all shares (whether voting or nonvoting) of the target company.[315] Where the target company has different classes of shares, the offer must be fair and reasonable as between those classes.[316]

If, on the date of the offer, the offeror's holding is 50% or less, the offer must be conditional on the offeror receiving acceptances that will result in the offeror holding more than 50% of the shares in the target company.[317]

c. Partial Offer

A partial offer is an offer for less than all of the voting shares in the target company.[318] The partial offer must be extended to all shareholders in the target company (other than the offeror) and made for a specified percentage of those voting shares not held by the offeror.[319]

Where there is more than one class of shares, the offer must be made for the same percentage of each class of shares.[320]

If the offeror's existing holding is 50% or less, the offer must be for shares that will result in the offeror holding more than 50% of the voting rights in the target company (or a lesser amount if the approval of the offerees is obtained).[321] If the offeror receives more acceptances than the level of shareholding sought, then the Code provides for the acceptances to be scaled back.[322]

d. Creeping Acquisitions

Where a person holds or controls more than 50% but less than 90% of the shares in the target company, that person may acquire further shares of up to 5% of their lowest holding in any 12-month period.[323]

e. Compulsory Acquisitions

Where a person becomes a "dominant owner" (i.e., holds or controls 90% or more of the target company),[324] that person is entitled to acquire all of the outstanding shares.[325] Similarly, the minority shareholders may require the dominant owner to purchase their shares.[326]

Within 20 working days of becoming a dominant owner, the dominant owner must send an acquisition notice containing information prescribed by the Code to the minority shareholders.[327] When a person becomes a dominant owner, that person must also notify the target company and the Takeovers Panel of that fact (and the NZX if the target company is listed).[328]

f. Exemptions

Exemptions from compliance with the 20% threshold in the Code may be granted to any individual persons, transactions or offers, or classes of persons, transactions or offers.[329]

g. Offers

(1) Period and Conditions

An offer must remain open for at least 20 working days but may not remain open for longer than 60 working days.[330] An

[308] The Code, rule 7(f).

[309] Takeovers Act, s. 45(1).

[310] The Code, rule 20.

[311] For example, in the situation where shareholders may receive an unmarketable parcel of shares from a scrip offer, the Takeovers Code (Unmarketable Parcels) Exemption Notice may apply.

[312] Available at: http://www.takeovers.govt.nz/.

[313] The Code, rules 3(1), 7(c), and 7(d).

[314] The Code, rule 17(1). If the vote relates to an issue of shares, then the allottee and its associates cannot vote for the approval of the allotment. The Code, rule 17(2).

[315] The Code, rules 8(1) and 8(2).

[316] The Code, rule 8(3). Where nonvoting securities are included in the offer, the consideration and terms offered for the nonvoting securities must be fair and reasonable in comparison to those offered for the voting securities and as between classes of nonvoting securities. The Code, rule 8(4).

[317] The Code, rule 23(1).

[318] The Code, rule 9(1).

[319] The Code, rules 9(2) and 9(3).

[320] The Code, rule 9(4).

[321] The Code, rules 10 and 23.

[322] The Code, rules 12 and 13.

[323] The Code, rule 7(e).

[324] The Code, rule 50.

[325] The Code, rule 52.

[326] The Code, rule 53.

[327] The Code, rules 54, 55.

[328] The Code, rule 51.

[329] Takeovers Act, s. 45(1). Certain transactions or arrangements could potentially result in an inadvertent breach of the Code. For instance, transactions involving lenders or receivers exercising their rights, or underwriters purchasing securities to take up a shortfall in relation to a public offering, could result in the 20% threshold being breached and the compliance requirements being triggered. Other examples include share buybacks, pro rata rights issues, dividend reinvestment schemes and transfers by operation of law. The Takeovers Code (Class Exemptions) Notice (No. 2) 2001 and the Takeovers Code (Professional Underwriters) Exemption Notice 2004 exempt such transactions, provided certain conditions are met.

[330] The Code, rule 24. The offer period may be extended by a variation of the offer, but generally may not be extended longer than 60 working days beginning with the date of the offer. The Code, rule 24A. There is an exception for a full offer that was conditional at the outset as to the level of acceptances,

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offer may be subject to any conditions, except those that depend on the judgment of the offeror or the fulfilment of which is within the power or control of the offeror.[331]

An offeror may not allow an offer to lapse by unreasonably relying on a condition of the offer or by relying on a condition that restricts the operation of the target's business in the ordinary course of the target's business.[332]

However, if an offer is conditional, then the offer must specify a date by which it is to become unconditional.[333] An offer may be withdrawn only with the consent of the Takeovers Panel.[334]

(2) Consideration

There are no restrictions on the consideration that may be offered, except that the same consideration must be offered for all shares belonging to the same class, and if there are different classes of shares, the consideration must be fair and reasonable between the classes.[335]

In a compulsory acquisition scenario, the minority shareholders must be offered the same consideration as that offered under the original offer that took the dominant owner over the 90% threshold.[336] However, this only applies if the acceptances received under the original offer were for more than 50% of the shares under the offer.[337]

Where acceptances were 50% or less, the consideration offered must be a cash sum certified by an independent adviser as fair and reasonable, or the same cash sum or cash alternative provided as consideration under the offer for equity securities of the same class that took the dominant owner over the 90% threshold.[338] However, if the dominant owner receives a certain level of objections to the sum offered, then the matter must be referred to an independent expert appointed by the Takeovers Panel.[339]

(3) Variations

An offer may be varied only to increase an existing component or components of the consideration, to include a cash component in the consideration, to include a cash alternative (if the directors of the target company have provided prior written approval), to extend the offer period or, if the offer period is extended, to vary the date specified as the date by which the offer is to become unconditional.[340]

If the variation increases the consideration offered, the offeror must provide the increased consideration to each person whose shares are taken up, including those who accepted the offer before the variation.

If a cash alternative is added or the variation is made to existing alternative consideration options, any offeree may accept any of the varied alternatives, whether or not they had accepted the offer before the variation.[341]

The offerees, the target company and the Takeovers Panel (and the NZX if the target company is listed) must all be notified of any such variation.[342]

Unless the offer is a full offer and the offer period is extended or is unconditional as to the level of acceptances, an offer cannot be varied later than the tenth working day before the end of the offer period.[343]

h. Defensive Tactics

The Code prohibits the target company from adopting defensive tactics that could result in an offer being frustrated or shareholders being denied an opportunity to decide on the merits of an offer.[344] However, the prohibition does not apply where those defensive tactics:[345]

(i) Have been approved by an ordinary resolution of the target company;

(ii) Are permitted under a contractual obligation or an implementation of a proposal approved by the directors where the obligation or proposal was entered into before the target company received the takeover notice or became aware that the offer was imminent; or

(iii) Have been approved by the Takeovers Panel.

The prohibition does not prevent the directors from encouraging competing *bona fide* offers from other persons.[346] Nor does it require a target company to take positive steps to facilitate an offer by, for example, permitting due diligence access.

i. Acquisitions During Offer Period

There are restrictions on a takeover offeror, its related companies, persons acting jointly or in concert with the offeror,

where the condition has been satisfied or waived, which allows the period to be extended for up to 40 working days beginning on the day that the offer becomes unconditional as to a minimum level of acceptances. The Code, rule 24B.

[331] The Code, rule 25(1). It should be noted that this restriction also includes conditions that are dependent on associates of the offeror.

[332] The Code, rule 25(1A).

[333] The Code, rule 25(2). This date may be changed to a later specified date if the offer is varied. The Code, rules 25(3), and 27(e). The latest specified date must not be later than 10 working days, or, if the acquisition requires statutory approval, 20 working days, after the end of the offer period. The Code, rule 25(3A).

[334] The Code, rule 26(1).

[335] The Code, rules 8(3), 8(4), 9(5), 20, and 22.

[336] The Code, rules 56, 56A, and 57. If the offer provided for alternative consideration options, a minority shareholder may nominate one of those options as the consideration. Failure to do so means the default consideration specified in the offer document applies. If the offer provided for alternate consideration without a default consideration, and a minority shareholder does not nominate one of the options, the consideration containing the greatest cash component must be provided.

[337] The Code, rule 56(2).

[338] The Code, rule 57(1). It should be noted that the "fair and reasonable" value of a share must be calculated by assessing the value of all the shares in the class and then allocating that value *pro rata* among all the shares in that class. The Code, rule 57(4).

[339] The Code, rules 57(2), 57(3), and 58(1).

[340] The Code, rule 27.

[341] The Code, rules 31 and 32.

[342] The Code, rule 28. If the offer is subject to conditions that have not been satisfied or waived and the variation extends the offer period, the notice must specify the date by which the offer is to become unconditional. In the case of a variation of an existing alternative consideration option or the addition of a cash alternative, the notice must prominently set out the relevant rights and obligations of the offerees under the Code, be accompanied by a form for acceptance of the variation and be accompanied by any documents necessary to revest in the offeror any consideration that must be returned by the offeree. The Code, rule 28.

[343] The Code, rule 29.

[344] The Code, rule 38(1).

[345] The Code, rule 39.

[346] The Code, rule 38(2).

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or any related director, acquiring equity securities in the target company other than under the takeover offer during the offer period.

If the consideration paid in an acquisition exceeds the cash consideration or cash alternative consideration in the takeover offer, the offer is deemed to be varied so that the cash consideration or cash alternative consideration under the offer is equal to the consideration paid for the acquisition.[347]

j. Takeover Offer Procedure

The following steps must be followed by the target company and the offeror for a full or partial takeover offer:

(i) Notification of Offer: the offeror must send the target company notice in writing stating that the offeror intends to make an offer under the Code, together with certain information prescribed by the Code.[348]

If the offer will include an offer of securities to which the Financial Markets Conduct Act 2013 applies, the notice must be accompanied by a copy of every relevant document necessary to comply.[349]

If the target company is a listed company, the offeror must send to the NZX a copy of the documents sent to the target company.[350]

(ii) Notification Obligations of the Target Company: on receiving a takeover notice, the target company must, if it is listed on the NZX, inform the NZX in writing that a takeover notice has been received, and send to the NZX a copy of the notice and its accompanying documents.[351]

If the target company is not listed, it must do all that is reasonably practicable to ensure that all persons who will be offerees under the offer are informed in writing that a takeover notice has been received, the identity of the offeror, the main terms and conditions of the proposed offer, and that a copy of the notice and any of the documents that accompanied it are available from the target company and the offeror free of charge on request.[352]

The target company must send the offeror a "class notice" (a written notice containing a description of each class of its voting and non-voting equity securities in the case of a full offer, or each class of its voting securities in the case of a partial offer) within two working days after receiving a takeover notice.[353]

The target company must also send the offeror a copy of the target company's securities register and a list of all shareholders, along with their e-mail addresses.[354]

(iii) Notice of Record Date: the offeror must send the target company written notice specifying the record date for the offer. The record date must be on or after the eighth working day before the date of the offer and the notice must be sent on or before the second working day before the record date.

The offeror may change the record date to a later date before the takeover offer is sent to the offerees.[355]

(iv) Independent Adviser's Report: the directors of the target company must obtain a report from an independent adviser on the merits of the offer.[356]

Where the offer relates to different classes of shares, the independent adviser must certify that the offer is fair and reasonable between the classes.[357]

The report must be sent to the prospective target company at the same time as the takeover notice is sent. A further report may be required for certain variations to the offer.[358]

(v) Offer Document: between 10 and 20 working days after the takeover notice is sent to the target company, but within three working days after the date of the offer, the offeror must send the offer to the offerees.[359]

Subject to limited exceptions, the offer must be in writing and on the same terms and conditions as those set out in the takeover notice.[360]

(vi) Dispatch Notice: at the same time as the offer is dispatched, the offeror must notify the target company (and the NZX if the target company or offeror is listed) that the offer documents have been sent to the offerees (the "dispatch notice"), provide a copy of the offer documents to them, and deliver the dispatch notice and the offer document to the New Zealand Registrar of Companies for registration.[361]

(vii) Target Company Statement: within 10 working days of receiving the takeover notice or dispatch notice, the tar-

[347] The Code, rules 35–37.

[348] Takeovers Code, rule 41. This information is set out in Takeovers Code, Schedule 1 and includes the price and terms of the offer, details of the shares held in the target company by the offeror and its related companies, confirmation that the offeror has resources sufficient to meet the consideration to be paid on full acceptance of the offer, and a statement regarding the general nature of any material changes likely to be made by the offeror to the business activities of the target company and its subsidiaries.

[349] The Code, rules 41(2) and 41(3), as amended by the Takeovers Code Approval Amendment Regulations 2007, s. 20.

[350] The Code, rule 41A.

[351] The Code, rule 42(1).

[352] The Code, rule 42(2).

[353] The Code, rule 42A. The class notice must contain sufficient information about each class of equity security (in the case of a full offer) or voting security (in the case of a partial offer) to enable the offeror to formulate an offer and an independent adviser to provide a report, and include the terms of issue of each relevant class of security and the number of those securities on issue in each class, as of the date of the class notice.

[354] The Code, rule 42B.

[355] The Code, rule 43A.

[356] The Code, rules 18 and 21. Where the offer relates to a proposed acquisition or issue for which shareholder approval is sought by the offeror, the directors must also provide a written statement as to whether they recommend approval or disapproval of the proposed acquisition or issue or whether they are unable to make, or are not making, a recommendation. The Code, rule 19.

[357] The Code, rule 22, as amended by the Takeovers Code Approval Amendment Regulations 2007, s. 10. The independent adviser's report must contain the information set out in Schedule 3, including the identity of the adviser, the adviser's qualifications and expertise and a statement that the adviser has no conflict of interest that could affect his ability to provide an unbiased report.

[358] The Code, rule 30.

[359] The Code, rule 43B.

[360] The Code, rule 44.

[361] The Code, rule 45.

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get company must send a statement including certain information prescribed by the Code to the offeror.[362]

Copies of this statement must be sent to every offeree and the NZX (if the target company or the offeror is listed) and delivered to the New Zealand Registrar of Companies for registration.[363]

(viii) Disclosure to Takeovers Panel: a copy of all documents sent by the offeror to the target company (other than its securities register) or the NZX and all documents sent by the target company must be forwarded to the Takeovers Panel.[364]

The target company must send a copy of its securities register to the Takeovers Panel if the Panel so requests.

There are separate procedures for compulsory acquisitions and for meetings approving acquisitions or allotments.[365]

k. Misleading or Deceptive Conduct

The Code prohibits a person from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive, where the conduct relates to any transaction or event governed by the Code or the conduct is incidental or preliminary to any transaction or event that is or is likely to be governed by the Code.[366]

"Engaging in conduct" includes failing to do an act or making it known that an act will or will not be done.[367]

The Takeovers Act also prohibits false or materially misleading statements or information that induces persons to deal in financial products of a Code company or affects the vote of a person regarding a transaction or event regulated by the Code.[368]

A person may be subject to criminal liability for false or materially misleading statements.[369]

5. Dissolution

A company may be put into liquidation, and consequently dissolved, by:

(i) A special resolution of the shareholders;

(ii) The board of directors upon the occurrence of an event specified in the constitution;

(iii) The High Court, on the application of the company, a director or shareholder (or entitled person), a creditor, the administrator (if the company is in administration), the Financial Markets Authority (if the company is a financial markets participant), the Registrar or the Reserve Bank of New Zealand (if the company is a licensed insurer); or

(iv) A resolution of the creditors passed at "a watershed meeting."[370]

The Registrar must remove a company from the register if:

(i) The company amalgamates successfully with another company;

(ii) The company has ceased to carry on business and there is no other reason for it to continue in existence;

(iii) The company has been put into liquidation and no liquidator is acting or a final report is not received by the Registrar from the liquidator by six months after the liquidation is completed;

(iv) A liquidator sends or delivers to the Registrar the final report and statements with respect to a liquidation;

(v) The shareholders (by special resolution) resolve or the directors (in accordance with the constitution) request that the company be removed from the register;

(vi) The company has failed to pay the fee prescribed for the application for registration of the company; or

(vii) The company has failed to comply with other obligations under the Companies Act where such failure is recognized as grounds for removal.[371]

A request that a company be removed from the New Zealand register may be made on the grounds that:

(i) The company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and the Companies Act; or

(ii) The company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the High Court under Section 241 of the Companies Act for an order putting the company into liquidation.[372]

Overseas companies registered in New Zealand may terminate registration by giving three months' public notice of cessation of business, and a final cessation notice to the Registrar of Companies after the three months have expired.[373]

6. Liquidation

A company may be put into liquidation by:[374]

(i) A special resolution of the shareholders;

(ii) The board of directors upon the occurrence of an event specified in the constitution;

(iii) The court, on the application of the company, a director, a shareholder (or other entitled person), a creditor, the

[362] The Code, rule 46(1)(a). This information is set out in Schedule 2 and includes details of the target company, the shareholdings of its directors and senior officers and their associates, the number of shares held by any person holding 5% or more of the target company, a recommendation made by the directors that the offer be accepted or rejected, together with reasons (or a statement that the directors are unable to make or are not making a recommendation), and a summary of the independent adviser report on the merits of the offer or a copy of the full report.

[363] The Code, rule 46.

[364] The Code, rule 47.

[365] The Code, rules 15 to 19B and 50 to 63.

[366] The Code, rule 64.

[367] The Code, rule 64.

[368] Takeovers Act, s. 44B.

[369] Takeovers Act, s. 44C.

[370] Companies Act, s. 241. A watershed meeting is the meeting of creditors called by the administrator to decide the future of the company and, in particular, whether the company and the deed administrator should execute a deed of company arrangement. Companies Act, s. 239AS.

[371] Companies Act, s. 318(1).

[372] Companies Act, s. 318(2).

[373] Companies Act, s. 341.

[374] Companies Act, s. 241(2).

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administrator (if the company is in administration), the Financial Markets Authority (if the company is a financial markets participant), the Registrar, or the Reserve Bank of New Zealand (if the company is a licensed insurer); or

(iv) A resolution of the creditors passed at a "watershed meeting."

7. Reorganization ("Voluntary Administration")

The "voluntary administration" scheme was introduced as Part 15A of the Companies Act on November 1, 2007. It allows companies to be temporarily protected from creditor claims while the company's future is determined by the creditors and the appointed administrator.

The purpose of the scheme is for the company to be administered in a manner that maximizes the company's chances to continue its existence or, if its existence is no longer tenable, to obtain a better return for the company's creditors and shareholders than would result from immediate liquidation.[375]

During the process, an administrator is appointed to take full control of the company's business and affairs. The administrator will work with the creditors to attempt to find a way to save the company or its business.

The administrator may be any natural person, who is a licensed insolvency practitioner under the Insolvency Practitioners Regulation Act 2019, and who is not disqualified under the Companies Act,[376] and may be appointed by:

(i) The company itself through a board resolution, if the directors voting for the resolution believe that the company is insolvent or likely to become insolvent;[377]

(ii) A liquidator or interim liquidator if they believe the company is insolvent or likely to become insolvent;[378]

(iii) A secured creditor that holds an enforceable charge over the company's property;[379] or

(iv) A court, on application of a creditor, liquidator (if the company is in liquidation), the Financial Markets Authority (if the company is a financial markets participant) or the Registrar.[380]

The administration period for the company begins when the administrator is appointed in accordance with Part 15A.[381]

Section 239E of the Companies Act provides a variety of ways that administration may end for a company, the most common of which are:[382]

(i) Execution of a deed of company arrangement by the company and the deed administrator;

(ii) Resolution by company's creditors that administration should end; or

(iii) Appointment of a liquidator by company's creditors through a resolution passed at the watershed meeting.

C. Partnership

1. General Partnership

A partnership is defined by the Partnership Law Act 2019 ("Partnership Act") as "the relationship that exists between persons carrying on business in common with a view to profit."[383]

It excludes the relationship between the shareholders or members of:

(i) A company registered under the Companies Act;

(ii) A limited partnership registered under the Limited Partnerships Act 2008;

(iii) An association registered as a body corporate under any Act; or

(iv) A body corporate or other association formed or incorporated by or under any Act, letters patent or Royal Charter.[384]

a. Formation

The existence of a partnership does not require a formal written partnership agreement. A partnership may be deemed to exist in law even if the persons involved have not yet signed a partnership agreement.

Three statutory rules, as well as relevant case law, govern the determination of the existence of a partnership. The three statutory rules are:[385]

(i) A joint tenancy, tenancy in common, joint property, or partial ownership of property does not of itself create a partnership, whether or not profits are shared.

(ii) The sharing of gross returns does not of itself create a partnership.

(iii) Receipt of a share of profits of a business is *prima facie* evidence of a partnership but receipt of such a share or payment contingent on, or varying with the profits of the business, does not of itself make a partnership.

b. Administration

The following rules apply to relations between a partnership and third parties:

(i) Every partner (A) is an agent of the firm and other partners in relation to the partnership business. Every partner has the power to bind the firm and will do so if the act the partner executes is done for carrying on in the usual way business of the kind carried on by the firm, unless:

- A has no authority to act for the firm in the particular matter; and
- The person with whom A is dealing:
  - — Knows that A has no authority; or

[375] Companies Act, s. 239A.
[376] Companies Act, s. 239F.
[377] Companies Act, s. 239I.
[378] Companies Act, s. 239J.
[379] Companies Act, s. 239K.
[380] Companies Act, s. 239L.
[381] Companies Act, s. 239D.
[382] Companies Act, s. 239E(1).
[383] Partnership Act, s. 8.
[384] Partnership Act, s. 9.
[385] Partnership Act, ss. 12–15.

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— Does not know or believe A to be a partner.[386]

(ii) Acts relating to the business of the firm and undertaken in the firm's name, whether by a partner or person otherwise authorized, bind the firm and all partners.[387]

(iii) A partner pledging the credit of the partnership for private purposes, not connected with the ordinary course of the firm's business, does not bind the partnership.[388]

(iv) Partners are jointly and severally liable for partnership debts.[389]

Subject to any partnership agreement, the following internal rules apply to determine the interests, rights and duties of partners:[390]

(i) All the partners share equally in the capital and profits of the business and must contribute equally to losses sustained by the firm;

(ii) The firm must indemnify every partner with respect to payments made and personal liabilities incurred by him/her in the ordinary and proper conduct of the firm's business or anything necessarily done for the preservation of the business or property of the firm;

(iii) Any amount paid beyond the amount of capital agreed to be contributed will earn interest at the rate of 5% per annum from the date of the payment;

(iv) Every partner may take part in the management of the partnership business;

(v) No partner will be entitled to remuneration for acting in the partnership business, nor will any partner be entitled to interest on capital contributed (except as provided in (iii), above);

(vi) No person may be made a partner without the consent of all existing partners;

(vii) Any dispute as to ordinary matters of the partnership business may be decided by a majority vote, but changes in the nature of the partnership business must be agreed to by all existing partners; and

(viii) The partnership's records are to be kept at the principal place of business of the partnership, and every partner is entitled to inspect and copy any of them.

c. Accounting

Partners must render true accounts and full information with respect to matters related to the partnership to any partner and his or her legal representative.[391]

Each partner must account to the firm for any personal benefits derived, without the consent of the other partners, from partnership transactions or from the use of the partnership property, name or business connections.[392]

Partners may not, without the consent of the other partners, compete with the business of the partnership by operating a business of the same nature as that of the partnership.[393]

d. Dissolution

Dissolution of a partnership may take place:[394]

(i) On the expiration of a fixed term (if a fixed term has been agreed on).

(ii) At the end of a single venture or undertaking (if the partnership was entered into for a single venture or undertaking).

(iii) On any partner giving notice (if no fixed term has been agreed on).

(iv) On the death or bankruptcy of any partner.

(v) If a partner allows his or her share in the partnership to be charged under the Partnership Act for his or her separate debts and the other partners then decide to dissolve the partnership.

(vi) If any event occurs that makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

(vii) On application by a partner to the District Court or the High Court. The court may declare a partnership dissolved if:

- A partner is a mentally impaired person who, in the opinion of the court, permanently lacks, wholly or partly, the competence to manage his or her own affairs;
- A partner is in any other way permanently incapable of performing the partner's part of the partnership agreement;
- A partner is guilty of conduct that, in the opinion of the court having regard to the nature of the business, is calculated prejudicially to affect the carrying on of the partnership business;
- A partner:
  - — Willfully or persistently breaches the partnership agreement; or
  - — Otherwise acts in matters relating to the partnership business in such a manner that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with the partner;
- The partnership business can only be carried on at a loss; or
- Circumstances have arisen that, in the opinion of the court, make it just and equitable to dissolve the partnership.

If a partnership that was entered into for a fixed term is continued after that term has ended, without a new express

[386] Partnership Act, ss. 17 and 18.
[387] Partnership Act, s. 20.
[388] Partnership Act, s. 21.
[389] Partnership Act, s. 22.
[390] Partnership Act, ss. 44–52.
[391] Partnership Act, s. 54.
[392] Partnership Act, s. 55.
[393] Partnership Act, s. 56.
[394] Partnership Act, ss. 66, 67, and 69–72.

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agreement, the rights and duties of the partners remain the same as they were at the end of the fixed term.

A partnership is presumed to be continued if the partnership business is continued by the partners (or those partners who habitually acted in the business during the fixed term), without any settlement or liquidation of the partnership's affairs.[395]

A partner may be expelled by majority decision if there is express power to this effect in the partnership agreement.[396]

Where no fixed term or duration of the partnership has been agreed to, a partner may retire at any time on giving notice to all other partners.[397]

2. *Limited Partnership*

The limited partnership regime came into force in New Zealand in 2008 through the Limited Partnerships Act 2008 (LPA). The LPA repealed Part 2 of the Partnerships Act 1908 as it related to special partnerships, and transitional provisions were provided for special partnerships that wanted to transition to limited partnerships.[398]

From the commencement of the LPA, existing special partnerships could not be renewed. New Zealand's limited partnership regime is a hybrid of partnership and company law.

A New Zealand limited partnership is a separate legal person.[399] Any person, including a corporation sole,[400] body corporate, unincorporated body, partnership governed under the Partnership Act or another limited partnership, may be a partner of a limited partnership.

The limited partnership is made up of two classes of partner: general and limited.

A limited partnership must have at least one general and one limited partner at all times, and they must be different legal persons. A partner may not be both a general partner and a limited partner at the same time. However, a partner may change its status from a general partner to a limited partner (and vice versa).[401]

General partners are responsible for the management of the limited partnership, whereas limited partners are passive investors not entitled to take part in the management outside specified "safe harbors."

a. *Formation*

A limited partnership is formed on registration with the Registrar of Companies[402] and will be of unlimited duration, subject to the limited partnership agreement, until deregistered pursuant to the LPA. On registration, the limited partnership must have a written limited partnership agreement. Section 10 of the LPA sets out the minimum content required. A limited partnership agreement is not a public document.

Amendments to the LPA require at least one general partner to be a New Zealand resident (if a natural person) or otherwise connected to New Zealand (for example, a New Zealand company) or, in some circumstances, an "enforcement country" — currently Australia.[403]

b. *Role of General and Limited Partners*

The role of the general partner is to manage the limited partnership, and is similar to that of a director of a company. A general partner has joint and several liability with the other general partners and the limited partnership for all the debts and obligations of, and omissions or wrongs committed by, the limited partnership.[404]

The general partner's liability is residual, as the assets of the limited partnership are called on to meet liabilities first. The general partner also has a number of specific administrative responsibilities under the LPA.

The role of limited partners is more circumscribed. A limited partner is a passive investor in the limited partnership and, consistent with that, is prohibited from taking part in the management of the business.[405]

A limited partner is not an agent of the general partners, limited partnership or other limited partners and has no authority to bind the partnership. The liability of the limited partner is limited to its capital contribution provided it adheres to the "no management rule."

Subject to the limited partnership agreement, general and limited partners are entitled to make capital contributions to a limited partnership. Partners who contribute to the limited partnership are entitled to a share in the partnership interest, which may be assigned or transferred in accordance with the limited partnership agreement.

A limited partnership interest is classified as a managed investment product under the Financial Market Conducts Act 2013.

All distributions of money or property to any partner must be authorized by each general partner, who must be satisfied on reasonable grounds that immediately after payment of the distribution, the limited partnership will be solvent.[406]

Partners who receive an unauthorized distribution are liable to repay distributions where they received the distribution knowing the solvency test was not satisfied, although a defense of partial solvency may apply.[407]

The general partner is liable for any amount of an unauthorized distribution which is not recovered from the partner who received it.[408]

c. *Safe Harbours*

The first Schedule to the LPA sets out "safe harbour" activities in which a limited partner may engage without breach-

[395] Partnership Act, s. 68.
[396] Partnership Act, s. 53.
[397] Partnership Act, s. 66.
[398] LPA, s. 122.
[399] LPA. s. 11.
[400] A corporation sole is an entity that has a single incorporated office occupied by a single natural person. They are used in New Zealand, for example, by Commissioners who are themselves the corporation and function as their own board.
[401] LPA, ss. 8(2), 24.
[402] LPA, s. 7.
[403] LPA, s. 8(4).
[404] LPA. ss. 26–27.
[405] LPA, s. 20.
[406] LPA, s, 42. This is the same test used to test the solvency of a company in the Companies Act, s. 4(1).
[407] LPA, ss. 44 and 45.
[408] LPA s. 43.

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ing the "no management rule." Breaching the "no management rule" is not an offense; however, a limited partner will lose its limited liability with respect to a third party that is able to satisfy the test set out in Section 30(1) of the LPA.

The risk to limited partners is substantial in comparison to general partners, as the liability of a limited partner to third parties under Section 30, once established, is not merely residual. The limited partner is jointly and severally liable with the limited partnership for claims made by other partners for breach of the rule in terms of Section 20(1).

Limited partners who breach the "no management rule" may also be liable for claims by other partners and/or third parties for breach of statute or as a result of acting as an unauthorized agent.

d. Administration

The general partner is responsible for the management of the limited partnership.[409] The general partner also has certain fiduciary obligations in relation to the limited partnership.

These oblige the general partner to:[410]

(i) Render true accounts and full information of all things affecting the limited partnership to the limited partnership, to any partner, or to the legal representative of any of them; and

(ii) Account to the limited partnership for any profit derived by the general partner without the consent of the limited partnership from —

(I) Any transaction concerning the limited partnership; or

(II) The use by the general partner of the name or of any property or business connection of the limited partnership; and

(iii) Account for and pay to the limited partnership any profit made by the general partner in a business if —

(I) The business is of the same nature, and competes with, the business of the limited partnership; and

(II) The business is carried on by the general partner without the consent of the limited partnership.

These fiduciary obligations can be varied or negated by the partnership agreement.

e. Dissolution

A limited partnership will terminate on the occurrence of a terminating event in accordance with the LPA or the limited partnership agreement. Following a terminating event, a limited partnership must either wind up or liquidate.

After a terminating event, the general partner's authority to bind the limited partnership is limited, and the rights and obligations of the partners continue only so far as is necessary to wind up affairs and complete unfinished transactions. No further rights and obligations of the partners continue after a terminating event.[411]

[409] LPA, s. 19.
[410] LPA, s. 49.
[411] Subject to LPA 2008, ss. 87(1) and 87(2).

D. Branch of a Foreign Corporation ("Overseas Companies")

Section 2(1) of the Companies Act defines an "overseas company" as a "body corporate that is incorporated outside New Zealand." An overseas company is required to register under the Companies Act if it "carries on business in New Zealand."

Whether a company is carrying on business is essentially a question of fact, in which all the circumstances surrounding the company and its activities should be taken into account.[412]

The Companies Act deems certain activities to be, or not to be, "carrying on business," but in the absence of an activity falling within a deeming provision, the question is one of degree.

Legal advice should be sought in relation to the particular circumstances of the company.

1. Registration

See the Worksheets.

2. Liability

The Companies Act imposes a number of obligations on overseas companies. These include the obligation to:

(i) Notify the Registrar of any alteration to the constitution, directors, principal place of business or person authorized in New Zealand to accept documents on behalf of the overseas company;[413]

(ii) File annual returns to the Registrar each year;[414] and

(iii) Give public notice of any intent to cease business activities in New Zealand and give notice to the Registrar in the prescribed form, and not earlier than three months after giving notice to the public, of the date that the company will cease to carry on business in New Zealand.[415]

An overseas company that fails to provide the information specified in paragraphs (i) and (ii), above, commits an offense and is liable on conviction to a fine not exceeding NZ$10,000.[416]

Every overseas company carrying on business in New Zealand is also required to ensure that its full name (or a generally recognized abbreviation of a word or words that are not misleading) and the name of the country in which it is incorporated are clearly stated in all written communications sent by or on behalf of the company, as well as on all documents issued or signed by or on behalf of the company that evidence or create a legal obligation of the company.[417]

[412] Companies Act, s. 332.
[413] Companies Act, s. 339.
[414] Companies Act, s. 340.
[415] Companies Act, s. 341.
[416] Companies Act, s. 373(2).
[417] Companies Act, s. 338.

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3. Books and Records

Overseas companies carrying on business in New Zealand must complete and forward to the Registrar of Companies an annual return in the prescribed form.[418]

Large overseas companies operating in New Zealand are subject to the financial reporting requirements under Part 11 of the Companies Act (see III.B.2.i.(1), above). These companies must prepare and register financial statements under the Companies Act.

An overseas company or a branch in New Zealand is considered large if on the ending balance date for each of the two previous accounting periods it and its subsidiaries had more than:[419]

(i) NZ$22 million in total assets; or

(ii) NZ$11 million in total revenue.

E. Other Business Entities

1. Joint Ventures

A joint venture is a contractual association of persons for a particular trading endeavor with a view to mutual profit, with each participant contributing money, property, or skill. Joint venture arrangements are used particularly for petroleum, mining and other technical projects.

Despite its popularity, the concept is not explicitly recognized as a legal entity or a standard legal relationship. A joint venture is not itself a legal entity, and it is the participants themselves who possess the legal standing necessary to enter into contracts, incur liabilities, and make profits.

Unlike a partnership, a joint venture may restrict the liability of the participants, as between themselves and to third parties, to several liability in proportion to each participant's ownership in the joint venture.

Joint venture agreements commonly include an express provision negating the existence of a partnership. This is intended to avoid the consequences of partnership, such as joint and several liability, the agency relationship of each partner to the others, the extent of fiduciary obligations between partners, and detailed tax accounts.

The existence of a partnership may be found by the courts, notwithstanding an express provision in the joint venture agreement to the contrary.

The joint venture agreement should include all the necessary legal rules for defining the relationships of the parties. The enterprise will generally intend to produce a specific asset, such as petroleum, energy, or a scientific study result, which becomes the property of the parties in shares or as tenants in common. The participants should not be described as, nor be held out to others as, "partners."

Joint ventures provide significant flexibility in relation to taxation issues as each participant's tax position is viewed in isolation. The tax advantages would be negated by incorporating a joint venture company to carry on the venture's business.

2. Trusts

Trusts are created by trust deeds and can be utilized for business purposes. Such trusts are called trading trusts. The trustees are responsible for business operations and hold the business assets in trust for beneficiaries. The beneficiaries are not liable for the debts of the trust. However, as the legal owners, trustees are personally liable for obligations and debts incurred on behalf of the business.

Although directors and shareholders of a trustee company may not be directly liable to creditors for the debts of the trust (unless personally guaranteed), directors are liable to the trustee company for any breaches of directors' duties under the Companies Act.[420]

Trusts are a flexible legal form. They do not need to be registered and are regulated, to an extent, by the Trusts Act 2019.

3. Unit Trusts

A unit trust is defined (for tax purposes) as any scheme or arrangement made for the purpose or having the effect of providing facilities for the participation by subscribers, purchasers or contributors, as beneficiaries under a trust, in income or gains (whether in the nature of capital or income) arising from the money, investments and other property that are for the time being subject to the trust.[421] This definition includes any superannuation scheme that is not registered under the FCMA.

Unit trusts are "managed investment schemes" in terms of the FMCA. Where the offer to at least one of the investors requires disclosure under the FMCA,[422] such a trust is generally subject to the requirements of that Act as to, for example, the duties imposed on the manager of the trust and the requirement for a third party licensed supervisor (i.e., a trustee) to be appointed with respect to the trust.[423] Unit trusts can be listed on the New Zealand Stock Exchange.

Unit trusts that are registered under the FMCA or have been or will be constituted with the intention of being registered under the FCMA must also comply with all aspects of the Trusts Act 2019, except as otherwise provided by the FMCA.[424]

4. Incorporated Societies

The Incorporated Societies Act 1908 governs all incorporated societies in New Zealand. Incorporated societies have some similar attributes to companies. They are separate legal entities and their members have limited liability. Their officers are similar in function to directors. However, members do not share in the assets or profits of the society.

Until October 5, 2023 (when the new Incorporated Societies Act 2022 came into full effect), a society could become incorporated under the Incorporated Societies Act 1908 if it had more than 15 persons associated with it for a lawful purpose other than pecuniary gain. However, individual persons were not deemed to be associated with the society for a pecuniary

[418] Companies Act, s. 340.
[419] Financial Reporting Act, s. 45(2).
[420] Companies Act, ss. 131–137.
[421] Income Tax Act 2007, s. YA 1.
[422] FMCA, Part 3.
[423] FMCA, Part 4.
[424] FMCA, s. 155A.

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gain because the society itself made pecuniary gains without those gains being divided or received by its members.

From October 5, 2023, all new societies must register or, in the case of existing societies, re-register under the Incorporated Societies Act 2022, to be an incorporated society. The registration period under the new legislation will run until April 2026, and any society that has not registered during this period will cease to exist.[425]

The Incorporated Societies Act 2022 was passed in April 2022, with some parts taking effect on April 6, 2022, but the majority will come into effect in the near future.[426]

There is a transition period of several years to allow societies enough time to prepare for the new regime. Some changes to the regime include:

(i) A society may be incorporated if it has more than 10 members;[427]

(ii) All new members of a society will be required to consent to becoming members;[428]

(iii) A society must have a governing body (a committee) consisting of at least three people, each an officer of the society and the majority being members of the society and/or representatives of bodies corporate that are members of the society;[429]

(iv) A society must file an annual return;[430]

(v) Officers are subject to broadly defined duties modelled on directors' duties under the Companies Act;[431]

(vi) The dispute resolution processes must be recorded in a society's constitution;[432]

(vii) Unless it qualifies as "small," a registered society is required to use External Reporting Board accounting standards in its annual financial statements;[433] and

(viii) The constitution of a society must contain a range of details including (among other things) the name and purpose of the society, membership procedures and the composition, roles, functions, powers and procedures of the society's committee.[434]

F. Transfer of Registration Under the Companies Act

An overseas company can generally become registered under the Companies Act after applying to the Registrar, in the prescribed form, provided the registration is permitted by the law of the country in which the company is incorporated, the company has complied with the requirements of that law in relation to the transfer of its incorporation, and the transfer is approved by the shareholders (subject to certain requirements).

The company must satisfy the solvency test before becoming registered.[435]

A company may be removed from the New Zealand Companies Register in connection with becoming incorporated under the law of another country provided the shareholders so approve by special resolution, the company gives public notice and the company satisfies the solvency test.[436]

[425] Incorporated Societies Act 2022, s 2(2).

[426] The Incorporated Societies Act 2022 is expected to be fully in force by October 2023 following the development of regulations for the Act. Consultation on the regulations closes on 22 November 2022.

[427] Incorporated Societies Act 2022, s. 8(1).

[428] Incorporated Societies Act 2022, s. 76.

[429] Incorporated Societies Act 2022, s. 45.

[430] Incorporated Societies Act 2022, s. 109.

[431] Incorporated Societies Act 2022, ss. 54–61.

[432] Incorporated Societies Act 2022, s. 26(1)(j).

[433] Incorporated Societies Act 2022, ss, 102–107.

[434] Incorporated Societies Act 2022, s, 26.

[435] Companies Act, ss. 345–347.

[436] Companies Act, ss. 350–356.

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IV. Principal Taxes

A. Sources of Authority in Tax

1. Legislative

a. Organization of the Tax Law

The "Inland Revenue Acts" are statutes administered by Inland Revenue (IR). The key Inland Revenue Acts are:

(i) Income Tax Act 2007 (ITA);

(ii) Goods and Services Tax Act 1985 (GST Act);

(iii) KiwiSaver Act 2006;

(iv) Stamp and Cheque Duties Act 1971;

(v) Tax Administration Act 1994 (TAA); and

(vi) Taxation Review Authorities Act 1994.

The ITA, GST Act, and the TAA will be further discussed below.

The Customs and Excise Act 2018 is not an Inland Revenue Act because it is administered by the New Zealand Customs Service, not IR. Nevertheless, it is part of the tax law as it levies customs and excise duties on various goods. See II.C.1.b., above.

(1) Income Tax Act 2007

The ITA came into force on April 1, 2008. Section BB 1 of the ITA imposes income tax on taxable income, at the rate or rates of tax fixed by an annual taxing statute, to be payable to the Crown under the ITA and the TAA. It is the third rewrite of the income tax legislation since the Income Tax Act 1976.

Subsections ZA 3(3) and (4) of the ITA confirm that the ITA in its current form is intended to be a rewrite of the Income Tax Act 2004, and that the provisions in the ITA are to have the same effect as the corresponding provisions in the Income Tax Act 2004.

Where a section of the ITA is unclear or gives rise to absurdities, that section's predecessors must be relied upon to interpret its meaning. However, the ITA's predecessors cannot be relied upon in cases of identified policy changes listed in Schedule 51 to the ITA, or where there has been an amendment taking effect on or after April 1, 2008.

(2) Goods and Services Tax Act 1985

The GST Act imposes a consumption tax on goods and services supplied in New Zealand and on goods imported into New Zealand. See IV.D., below.

(3) Tax Administration Act 1994

The TAA authorizes IR and its officials to administer the New Zealand tax system, and imposes obligations on taxpayers to pay the correct amount of tax on time, keep all necessary information, file and/or provide necessary returns and statements, and cooperate with IR to allow IR to exercise its powers under the Inland Revenue Acts.

b. Other Legislative Documents that Can Be Used to Interpret the Law

(1) Regulations

A regulation is a type of subsidiary legislation that is made by a body or a person under powers granted by Parliament.[437] Regulations include an Order in Council made under a statute that varies or extends the scope or provisions of a statute.[438]

Regulations made under the ITA aid in interpreting the ITA provision to which the regulation relates.

Where tax laws contain obvious errors or produce outcomes that are inconsistent with policy intent, two special regulation-making powers (referred to as "remedial powers") provide:

- A power of modification, which allows the Governor General to modify the application of provisions of the Inland Revenue Acts on the recommendation of the Minister of Revenue; and
- A power of exemption, which allows the Commissioner to grant exemptions from provisions of the Inland Revenue Acts.

(2) Legislation Act 2019

Sections 13, 14, and 15 of the Legislation Act 2019 provide statutory definitions of 35 words to remove Parliament's need to define those words in each statute where necessary.

c. Legislative Process

Broadly, a bill passed by the House of Representatives ("House") becomes law when the Governor-General assents to it and signs it. The steps are as follows:

(i) The Leader of the House[439] will introduce the bill and arrange for copies to be circulated to the Members of Parliament (MPs). There are no speeches at introduction.

(ii) The bill is given its first reading, and an initial debate of the bill takes place.

(iii) Unless the passage of the bill is an urgent matter, the bill is referred to a select committee. The select committee examines the bill and may recommend amendments, seek opinions on it from other committees, or divide the bill. Tax bills are usually referred to the Finance and Expenditure Committee.

(iv) Once the select committee has reported back, the bill is subject to a further debate in the House.

(v) The House passes the Bill by a majority vote, and on the Governor-General's assent, the Bill becomes an Act.

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[437] J.F. Burrows and R.I. Carter, *Statute Law in New Zealand* (5th ed) 2015 LexisNexis Wellington, p. 14.

[438] Legislation Act 2019, s. 147.

[439] The "Leader of the House" is a Minister (but not the Prime Minister) who is responsible for initiating the Government's legislative business in the House of Representatives.

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d. Constitutional Challenge

In New Zealand, the doctrine of parliamentary sovereignty allows Parliament power to pass and repeal laws at will. No governmental or judicial body may review and/or invalidate laws passed by Parliament.

2. Administrative

a. Determinations

The Commissioner of Inland Revenue (CIR) may, or in certain cases must, issue determinations about the following tax matters:

- Financial arrangements;
- Depreciation;
- Livestock;
- Horticultural plants; and
- Other tax issues at the CIR's discretion (such as concessions on tax treatment in response to disaster events).

Determinations may be binding on the persons subject to the tax matters determined upon. The CIR can, at any time, make a determination that varies, cancels, restricts, or extends in scope an earlier determination, or cancel a current determination.

A taxpayer can apply to the CIR for a determination relating to financial arrangements,[440] and must provide the materials as outlined in Regulation 3 of the Income Tax (Determinations) Regulations 1987.

b. Interpretation Guidelines and Interpretation Statements

Interpretation guidelines and interpretation statements do not carry the force of law and may not necessarily bind IR.

Interpretation guidelines provide the CIR's approach to interpreting a general area of law in respect of which there are tax implications. For example, IG 16/01: *Determining employment status for tax purposes (employee or independent contractor?)* issued in March 2016 guides taxpayers in determining a person's employment status for tax purposes.

Interpretation statements set out the CIR's view of tax laws in relation to particular circumstances, but only where a public ruling (see IV.A.2.d., below) cannot be issued. For example, the CIR's views on applying the definition of "resident" for GST purposes can be found in the *Interpretation Statement: GST — Definition of a resident* (IS 21/07).

c. Operational Statements

The CIR can provide a view of how tax law is to be interpreted and applied in respect of certain matters. The views are intended to be preliminary in the absence of a public ruling or an interpretation statement. The CIR may not necessarily be bound by its operational statements.

[440] TAA, s. 90 and ss. 90AB to 90AE.

d. Binding Rulings

Binding rulings are IR's interpretation of how a tax law applies to a particular arrangement or a particular person's factual circumstances. An "arrangement" means a contract, agreement, plan, or understanding, whether enforceable or not, and all steps and transactions by which it is carried into effect and includes facts the CIR considers material or relevant as background or context.[441]

Binding rulings are (as the name suggests) binding upon the CIR and give certainty to the taxpayer regarding the effect of tax laws on their arrangement or factual circumstances over a specified period. A binding ruling cannot be relied on for periods outside of the ruling period. There are five types of binding rulings: private rulings, product rulings, public rulings, short-process rulings and status rulings.

A private ruling gives a single taxpayer, or a group of taxpayers, certainty regarding:

- How tax law applies to an arrangement the taxpayer(s) may or will enter into;
- The status of the taxpayer(s) (for example, whether the taxpayer is a New Zealand resident or has a permanent establishment in New Zealand); or
- The taxpayer(s)' purpose in certain limited circumstances (for example, the taxpayer's intention with regards to disposing of land).

A private ruling must be applied for by a taxpayer and will not be published on the IR website (although an anonymized summary of it may be published as a "Technical Decision Summary" by IR for taxpayers' information only). The private ruling can only apply to the person(s) named in the ruling.

The private ruling will cease to apply if the details of the arrangement or the circumstances of the taxpayer are materially different than those set out in the ruling or any of the assumptions and conditions in the ruling cease to be satisfied.[442]

Where the taxpayer applying for the private ruling had gross income for the previous tax year of NZ$20 million or less and the private ruling relates to a matter concerning a tax, duty, or levy that is expected to amount to less than NZ$1 million, a simplified application process and lower fees apply. This is referred to as a short-process ruling.

A product ruling gives an interpretation of how tax law applies to "consumers" of a particular "product," i.e., an arrangement entered into by more than one person on identical terms. The product ruling will be published on the IR website and in the Tax Information Bulletin. IR will only issue a product ruling if:

- It is unfeasible for a taxpayer to seek a private ruling on the arrangement; and
- The characteristics of the parties to the arrangement do not affect the content of the ruling.

[441] TAA, s. 3(1).

[442] *Question We've Been Asked* QB 18/07 sets out IR's views on when an arrangement will be "materially different" from the arrangement identified in a private or product ruling.

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A public ruling gives an interpretation of how tax law applies to a specific type of arrangement that has a wide general application. Public rulings are published on the IR website and in the Tax Information Bulletin. A taxpayer does not have to apply a ruling, but if they do so, IR is bound to follow it.

A status ruling gives an interpretation of whether an amendment or repeal of a taxation law affects a private or public ruling in place.

e. Standard Practice Statements

A standard practice statement illustrates how IR will exercise its statutory discretion when administering the Inland Revenue Acts (see IV.A.1.a., above), but may not be binding on IR.

f. Questions We've Been Asked ("QWBA")

"Questions we've been asked" are issued by the Tax Counsel Office (TCO), an independent department within IR. They are intended to answer inquiries that may be of general interest to taxpayers, but are not intended to be final statements of law and may not be binding upon IR.

g. Revenue Alerts

The CIR issues a revenue alert to provide information about tax issues of concern to IR. A revenue alert will identify:[443]

- a scheme, arrangement, or a particular transaction, which the CIR believes may be contrary to law or inconsistent with policy;
- the common features of the scheme, arrangement, or transaction; and
- IR's current view and approach.

h. CIR's Statements

The purpose of a CIR statement is to inform taxpayers of the CIR's position and the operational approach being adopted on a particular tax matter.

i. Operational Positions

The CIR may publish operational positions that outline his or her position on a tax matter prior to a change in tax law.

3. Courts

A taxpayer may file proceedings against the CIR in the Taxation Review Authority (TRA) or the High Court. The TRA is not a court, but a commission of inquiry with jurisdiction to hear and determine objections which the TAA authorizes the TRA to hear and determine.[444]

A taxpayer filing proceedings in the High Court must draft and file a statement of claim and a notice of proceeding.

As stated under I.B.2., above, there are two appellate courts in New Zealand:

(i) The Court of Appeal; and

(ii) The Supreme Court,

both of which usually sit in Wellington.

The Supreme Court is the highest court of New Zealand and began hearing appeals on July 1, 2004. Before the Supreme Court was established, New Zealand's highest court was the Judicial Committee of the Privy Council, which sat in London.

The Privy Council may still hear appeals from certain proceedings existing before January 1, 2004.

The New Zealand judiciary is bound by the doctrine of *stare decisis*, where they must accept and apply law laid down by courts of higher authority. Decisions of New Zealand courts of equivalent standing are persuasive but not binding.

B. Income Tax

Individuals, companies, local authorities and unincorporated bodies are all liable for New Zealand income tax.

Income tax is imposed on:

(i) The worldwide income of all New Zealand tax residents, subject to some exceptions;[445] and

(ii) The New Zealand-sourced income of nonresidents,[446] although this liability may be reduced under a double taxation agreement.

C. Estate and Gift Tax

New Zealand no longer imposes estate duty or gift taxes.

D. Goods and Services Tax

The rate of Goods and Services Tax (GST) levied on taxable goods and services supplied in New Zealand is 15%. GST-registered persons must account for GST on a periodic basis.

For a discussion of New Zealand's GST, see V.C.3., below. See also the VAT Navigator.

E. Capital Investment Tax

New Zealand does not impose a capital investment tax.

F. Payroll Tax

New Zealand does not have a payroll tax, although under the Pay As You Earn (PAYE) regime, employers are required to deduct tax at source from all salaries, wages, and extra emoluments paid or provided to their employees.

The amount of the deduction depends on the gross salary or wage paid to the employee. This tax is credited against the employee's income tax obligation, although in many cases the withholding operates as a final tax. For a discussion of PAYE, see X.D.1., below.

G. Trade Tax

New Zealand does not impose a trade tax.

H. Net Worth Tax

New Zealand does not impose a net worth tax.

[443] See at: www.ird.govt.nz/technical-tax/revenue-alerts/.
[444] Taxation Review Authorities Act 1994, s. 13A.
[445] ITA, s. BD 1.
[446] ITA, ss. BD 1 and YD 4.

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I. Local Taxes

"Rates" are the only tax levied by local authorities and are their main source of income. Rates are levied on the value of land within a local authority's jurisdiction.

Pursuant to the Local Government (Rating) Act 2002, differential rates may be charged on different classes of property. Accordingly, commercial and industrial property owners ordinarily bear a disproportionate rating burden, as they are perceived to be heavier users of local authority services. As each local authority has autonomy in setting the level of rates in its jurisdiction, there is a considerable variation in the level of rates levied by different local authorities.

J. Withholding Taxes

New Zealand has a number of withholding taxes that require payers of certain types of income to withhold prescribed amounts of tax before paying the income to the recipient. While withholding taxes are primarily collection mechanisms, they are also often final taxes.

Failure to withhold the right amount can lead to the payer and recipient being jointly liable for the tax shortfall.

The primary withholding taxes in New Zealand are the following:

(i) Residential withholding tax (RWT) on resident passive income such as dividends and interest paid to residents and certain nonresidents with a connection to New Zealand.

The RWT deducted will be included as income of the taxpayer deriving the resident passive income, but will give rise to a refundable credit that is offset against the taxpayer's income tax liability for the income year, then against any unsatisfied income tax liability for the previous income year and finally against any unsatisfied income tax liability for any succeeding income year. Any excess is to be refunded.

(ii) Nonresident withholding tax (NRWT) on nonresident passive income such as New Zealand-sourced dividends, interest and royalties paid to nonresidents without a sufficient connection to New Zealand.

NRWT will generally be a final tax for the taxpayer deriving the nonresident passive income, but will be a minimum tax (i.e., if the taxpayer's net income tax liability with respect to the nonresident passive income exceeds the NRWT withheld, the taxpayer's liability is increased to the larger amount) with respect to interest where the parties are associated and non-cultural royalties.

(iii) Residential land withholding tax (RLWT) on the sale by certain offshore vendors of residential land in New Zealand within five years (if the land was acquired on or after March 29, 2018) or 10 years (if the land was acquired on or after March 27, 2021) of acquisition.

The vendor is liable to pay an amount of RLWT with respect to the sales proceeds, but the vendor's conveyancer will generally be treated as the vendor's agent for purposes of RLWT and must deduct RLWT from the sales proceeds before forwarding them to the vendor.

The vendor will be treated as having received the RLWT deducted, but will have a refundable credit for the RLWT in the income year in which disposal occurs.

(iv) Nonresident contractors' tax (NRCT) on payments to nonresident contractors for services performed in New Zealand. For a discussion of NRCT, see VI.C.2.b., below.

Comment: Approved issuer levy (AIL) can be paid in respect of certain interest payments that are subject to NRWT in order to reduce the applicable rate of NRWT to 0%. AIL is technically not a withholding tax as there is no legislative ability to deduct the amount of AIL paid from the gross interest payment, although the parties may contractually agree to allow the payer of interest to do so. See IV.K.4., below for a discussion of AIL.

K. Other

1. Accident Rehabilitation and Compensation Levies

New Zealand operates a no-fault accident compensation scheme whereby persons suffering from accidental injuries need not prove fault before receiving compensation. Anybody accidentally injured in New Zealand (including nonresidents) is covered by the scheme, regardless of fault, circumstances, place, time, or injury. Moreover, the scheme abolishes any civil right, either at common law or under statute, to claim damages for personal injury.

The scheme provides for some financial assistance to be given to help with medical expenses, loss of earnings, and compensation for dependents in the case of death. All compensation is paid by the Accident Compensation Corporation (ACC).

ACC is funded by:

(i) Levies paid by all employers, self-employed persons, and private domestic workers for work-related accidents. The amount of the levy for the self-employed and private domestic workers is set by regulation. The amount of the levy for employers is determined by the industry risk class applying to the employer, and can be adjusted upwards or downwards depending on the individual employer's safety management practices;

(ii) Levies paid by self-employed persons, private domestic workers, and employees for non-work-related accidents;

(iii) A residual claims levy paid by employers, self-employed persons, and private domestic workers to cover claims outstanding prior to the introduction of the Accident Insurance Act 1998; and

(iv) Funds set aside by Parliament to fund compensation for injuries to non-earners.

Instead of paying a levy for its employee's work-related accidents, an employer may elect to join the "Accredited Employers Programme." Under this program, an employer pays no levy, or a reduced levy, in return for providing all or some of its employees' work-related statutory compensation entitlements. An employer wishing to join the program must satisfy a number of criteria, including possessing a minimum level of safety expertise and financial solvency.

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2. Insurance Premium Tax

Insurance premiums (other than life insurance premiums) paid to a nonresident insurer are subject to a 30% tax calculated on 10% of the gross premiums. This tax is paid by the insured person as agent for the nonresident insurer.

Generally, double tax agreements leave the imposition of the insurance premium tax unaffected. However, the New Zealand-Netherlands[447] and the New Zealand-Switzerland[448] tax treaties operate to eliminate the tax. The CIR requires persons paying insurance premiums to Swiss residents free of withholding tax to disclose this in their annual returns.[449]

3. Gambling Taxes

Betting taxes are levied on lotteries and gambling, although winnings are generally not taxed. Since July 1, 2024, a 12% offshore gambling duty applies to online gambling provided by offshore operators to New Zealand residents.[450]

4. Approved Issuer Levy (AIL)

New Zealand has a concessionary regime known as the AIL regime, which applies in respect of interest paid to a nonresident lender in circumstances where that interest would otherwise be subject to NRWT. The AIL regime allows the borrower to reduce the rate of NRWT that would otherwise apply to 0% by paying AIL in respect of the interest paid. To utilize the concession:

(i) The payer of the interest must apply to IR to be registered as an "approved issuer" and to register the transaction in respect of which the interest is payable as a "registered security;"

(ii) The interest must not be derived by the nonresident lender jointly with a New Zealand resident;

(iii) Except in certain circumstances, the lender and borrower must not be associated persons.

Comment: Even where the above requirements are met, AIL cannot be paid in certain circumstances where a third party is interposed between a lender and borrower that are associated persons, or where the lender is part of a group of nonresidents acting together to control the borrower.

AIL applies at the rate of 2% of the interest paid, or 0% where the interest is paid in respect of certain widely held bonds denominated in New Zealand dollars.[451] Where interest qualifies for the 0% AIL rate, that interest can effectively be paid to a nonresident lender without any New Zealand tax.

AIL is a charge imposed on the payer of the interest and cannot be deducted from the interest paid unless agreed between the parties.

AIL is deductible for New Zealand income tax purposes if the normal criteria for the deductibility of expenditure are satisfied, in which case the after-tax cost of AIL will be 1.44% of the gross interest paid (compared to a corporate income tax rate of 28%).

As AIL is imposed on the borrower and is not income tax imposed on the nonresident lender, the nonresident lender generally will not be able to claim a credit against its tax payable in its country of residence.

5. Employer Superannuation Contribution Tax (ESCT)

The Employer Superannuation Contribution Tax (ESCT) is payable on an employer's cash contributions to an employee's superannuation scheme that exceeds the exemption threshold. ESCT is imposed on a progressive scale at rates ranging from 10.5% to 39% depending on the employee's marginal tax rate.

The net amount of the employer's cash contribution, after the deduction of ESCT, is paid into the superannuation fund on behalf of the employee.

[447] Convention between the Government of the Kingdom of The Netherlands and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on October 15, 1980 (the "New Zealand-Netherlands tax treaty").

[448] Convention between New Zealand and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed on June 6, 1980 (the "New Zealand-Switzerland tax treaty").

[449] ITA, s. HD 17.

[450] Gambling Duties Act 1971, ss. 12S to 12X.

[451] SCDA, s. 86IB. To qualify for the 0% AIL rate, the bonds must: be denominated in New Zealand dollars; be a regulated offer for purposes of the Financial Markets Conduct Act 2017 or offered to the public for purposes of the Securities Act 1978; not be an asset-backed security; have registry and paying agent activities conducted through one or more fixed establishments in New Zealand; and either be listed on a registered exchange or satisfy a widely held test.

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V. Taxation of Domestic Corporations

A. What Is a Domestic Corporation

For income tax purposes, a company includes:[452]

- A body corporate or other entity that has a legal existence separate from that of its members, whether incorporated or created in New Zealand or elsewhere;
- A listed limited partnership;
- A foreign corporate limited partnership; and
- A unit trust.

A company is tax resident in New Zealand if it:

- Is incorporated in New Zealand;
- Has its head office in New Zealand;
- Has its "center of management" in New Zealand; or
- Is controlled by its directors in New Zealand.

Comment: The first test for residence, involving the incorporation of a company in New Zealand, is a matter of fact and very straightforward. However, applying the three remaining tests can be complex, so IR has issued an interpretation statement on the matter.

The following guidance is from IR's interpretation statement.[453]

A taxpayer company will have its head office in New Zealand if there is a physical place from which its business is conducted and this is the place where the business's administration and management are carried out.

Factors indicating that a company's head office is in New Zealand include:

(i) Whether the company's senior management operates from an office in New Zealand;

(ii) Whether the major strategic and policy decisions are made in New Zealand;

(iii) Whether specialized functions (for example, of an advisory nature) are carried out from an office in New Zealand; and

(iv) Whether the company staff consider the office to be the head office.

The "center of management" test focuses on the center of management of the entire company. If a company that operates in several countries has a center of management in New Zealand, but that center only relates to the company's New Zealand operations, then the company will not be a New Zealand tax resident under the "center of management" test.

In determining where the center of management of a company is, acts of management at various levels may be relevant. The test is not limited to consideration of the company's formal management structures, but rather focuses on how the company is managed in reality.

The director control test would be satisfied if a taxpayer company's directors exercise control over the company in New Zealand. If the company's directors exercise control only in the course of directors' meetings, then the company will be a New Zealand tax resident if the meetings take place in New Zealand.

However, if the directors exercise their powers in the course of meetings held outside New Zealand, the fact that New Zealand directors participate in telephone conferences from New Zealand does not mean the directors are exercising control of the company from New Zealand (provided a majority of directors are outside New Zealand at the time of the meetings).

B. Corporate Income Tax

1. Taxation of Worldwide Income

A New Zealand tax resident company ("NZ company") is subject to New Zealand tax on its income, regardless of the income's source (i.e., whether it is New Zealand-sourced or foreign-sourced).

2. Accounting and Calculation of Taxable Income

a. Accounting Periods

The tax year is April 1 through March 31, and generally a company's income year is the same as its tax year. The CIR may specifically approve a tax year ending on the date corresponding with the company's income year, instead of using the standard March 31 balance date provided by the TAA (a "nonstandard income year") if, for example, the nature of the company's business makes a March 31 ending balance date inappropriate (for example, in the case of seasonal work) or a subsidiary wishes to align its ending balance date with that of its parent company.[454]

Generally, a nonstandard income year will be aligned with the company's financial accounting year.

b. Calculation of Taxable Income

A taxpayer's liability for income tax is calculated on "taxable income." The method of calculating a taxpayer's taxable income is set out in Part B of the ITA. For a diagram of the process to calculate taxable income, see the Worksheets. The diagram illustrates the global/gross approach established by the core provisions.

A taxpayer must first determine its "annual gross income" and "annual total deductions" for the income year, which are respectively the taxpayer's total assessable income and total allowable deductions allocated to the relevant income year.

"Annual total deductions" are deducted from "annual gross income" to arrive at the "net income" or "net loss" of a taxpayer for that income year.

If a taxpayer has a "net loss" for the income year, their "net income" for the year is zero and their "net loss" is included in their "tax loss" amount that may be used to offset their net income in a future year or made available to another taxpayer to offset that taxpayer's net income.

[452] ITA, s. YA 1.

[453] Inland Revenue, *Tax Residence* (IS 16/03).

[454] Inland Revenue, *Requests to change a balance date* (SPS 24/01).

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A taxpayer's "taxable income" is then determined by reducing the taxpayer's "net income" by any available "tax loss" amount of the taxpayer.

The taxpayer's income tax liability is calculated by multiplying its "taxable income" by the applicable tax rate (28% for companies).

If the result of this calculation is positive or zero, that amount is the income tax liability of the taxpayer. If the result is negative, the taxpayer's income tax liability is zero.

The taxpayer may use its tax credits to satisfy its income tax liability following rules set out in Section LA 4 of the ITA. If the taxpayer's income tax liability is more than the total of its credits, the difference is the taxpayer's "terminal tax," which must be paid to complete the satisfaction of its income tax liability.

c. Accounting Methods

To determine a taxpayer's "annual gross income" and "annual total deductions," every amount of income and every deduction for an amount of expenditure or loss must be allocated to an income year.

The ITA contains specific rules for the allocation of income and deductions.

(1) Allocation of Income

An amount of income is allocated to the income year in which the income is "derived," unless a provision in Part C or Part E requires allocation on some other basis. There are two main methods for determining when an amount of income has been "derived" for purposes of allocating income to the relevant income year:

(i) The cash (or receipts) method; and

(ii) The accruals (or earnings) method.

There is also a third, less common, method that is a middle ground between the two main methods, called the profit emerging method.

Under the cash accounting method, a taxpayer derives income when it is actually received, either in the form of cash or its equivalent. The Court in *CIR v. The National Bank of New Zealand*[455] stated the cash method mainly applies to salary and wage earners, barristers, and doctors.[456]

Under the accrual accounting method, a taxpayer derives income when all the events determining the right to receive that income have occurred. It is not, therefore, the actual receipt of cash that is important, but the right to receive the income.

The accrual method applies to most business taxpayers. The focus on the right to receive income was demonstrated in *Hawkes Bay Power Distribution Limited v. CIR*.[457] The High Court held that the electricity that the taxpayer had supplied, but had neither metered nor billed at balance date, gave rise to "derived" income and was therefore assessable on the basis that:

- The income earning process was completed when the electricity was supplied and consumed by the customers. It was at that point that a legally enforceable right to the income from the supply of electricity arose;
- The amount of electricity supplied and consumed up to the balance date could be reasonably estimated; and
- It was important to match the cost of supplying electricity against the taxpayer's revenue to gain a true reflection of the taxpayer's income for the year.

The profit emerging method can be utilized where there are amounts owed in installments at the end of an income year (the "receivables"). Each receivable is split between its merchandise content and the gross profit content. For any receivables on hand at the end of the income year, only the merchandise content is returned as assessable income for that income year. The gross profit content is returned in the following income year when the receivable is due.

The Court of Appeal in *CIR v. Farmers' Trading Co. Ltd*[458] held that the profit emerging method should not be used in relation to credit sales where title to the consumer goods passed immediately upon sale.

(2) Allocation of Deductions

An amount of expenditure is deductible in the income year in which the expenditure is "incurred," unless a provision in Parts D to I provides for an allocation on some other basis. "Incurred" is not defined in the ITA.

The test developed by the case law focuses on whether the taxpayer is "definitively committed" to the expenditure. In determining whether that test is satisfied:

- Where the expenditure arises under an agreement, then it is vital to look to the terms of the arrangement to establish what is the event that gives rise to liability, and at what point in time an existing obligation to fulfil that liability arises;
- Where the event which gives rise to the liability has already happened as at year-end, but is just not known to the taxpayer, then it is permissible to adopt a reasonable estimate to determine the extent of that liability. Establishing that a liability is capable of reasonable estimation is considered to be part of the test of whether that liability has been "incurred;"
- In determining whether a liability is contingent or vested but defeasible, theoretical contingencies are to be ignored. The question must be viewed in the light of all the surrounding circumstances and not just on the terms of the agreement that gave rise to the liability (which might appear to include a contingency, but which in practice is not in any practical sense likely to impede liability).

The Privy Council in *CIR v. Mitsubishi Motors NZ Limited*[459] confirmed that an expenditure is incurred when a taxpayer has either paid or become definitively committed to that expen-

[455] (1976) 2 NZTC 61,150.

[456] Inland Revenue, *When is income from professional services derived* (IS 16/06) sets out a number of factors based on case law that should be considered when determining when income from professional services is derived, and whether the cash basis or accrual basis method is appropriate for certain businesses or professions.

[457] (1998) 18 NZTC 13,685.

[458] (1982) 5 NZTC 61,200.

[459] (1995) 17 NZTC 12,351.

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diture. A taxpayer becomes definitively committed to certain expenditures when a legal obligation to make payment in the future exists.

In that case, Mitsubishi provided evidence that 63% of new cars sold in a given year contained defects that Mitsubishi would be required to repair under warranty in future years. The Privy Council accepted Mitsubishi was definitively committed to pay the estimated warranty costs at the time the cars were sold. Consequently, it was held that this expenditure was deductible in the year the vehicles were sold rather than the year the defects were repaired.

d. Corporate Tax Rate

The basic rate of tax applying to a New Zealand company is 28%.

Note: While the maximum individual income tax rate is increased to 39% from April 1, 2021, the corporate tax rate remains at 28%.

Comment: It is sound tax policy to have as far as possible alignment between the top individual marginal tax rate and the company tax rate. A significant rate differential creates a tax incentive for the retention of earnings within companies, rather than their distribution to shareholders. Under the 39% rate, the rate differential of 11% is the highest it has been in over 20 years.

3. Calculation of Gross Income

a. General

While most receipts would fall into the ITA's definition of income, the term is not exhaustively defined. Section CA 1(2) of the ITA provides that the income of a person includes any amount that is included as income under ordinary concepts. If an amount is income under ordinary concepts, then it is taxable and the specific deemed inclusions (discussed below) are not relevant (see *Duff v. CIR*).[460]

In determining whether an amount is income under ordinary concepts, regard must be had to case law. The High Court in *Reid v CIR*[461] accepted that the following characteristics are indicative of receipts of an income nature:

(i) Income is something that comes in;

(ii) Income imports the notion of periodicity, recurrence and regularity; and

(iii) Whether a particular receipt is income depends upon its quality in the hands of the recipient.

The ITA lists various items, or classes of income, and deems them to be gross income. Amounts deemed to be income include:

(i) Any amount derived from any business (including any increase in the value of trading stock on hand at the time of a transfer or sale of the business), but excluding any capital gain amount;

(ii) Any amount derived from the sale or other disposition of any personal property where the taxpayer's business includes dealing in that property, or if the property was acquired with the purpose of sale or other disposal;

(iii) Any amount derived from carrying out any undertaking or scheme that was entered into with the purpose of making a profit;

(iv) All attributed foreign income under the controlled foreign company (CFC) regime (see V.B.3.e., below);

(v) All foreign investment fund (FIF) income (see V.B.3.e., below);

(vi) Certain amounts derived from the sale or other disposition of land (see V.B.3.d., below);

(vii) Rents; fines; premiums; certain lease inducement, surrender, and transfer payments; and other revenues (including payments for goodwill) derived by the owner of land from any lease, license, or easement affecting the land, or from the grant of any right to take profits;[462]

(viii) All royalties, including payments for the supply of scientific, technical, industrial or commercial knowledge and information (see V.B.3.h.(3), below);

(ix) Interest (see V.B.3.h.(4), below), dividends (see V.B.3.c., below), annuities and pensions;

(x) Income derived under financial arrangements (see V.B.3.h.(1), below);

(xi) Certain amounts for which a deduction has been claimed by a taxpayer that is subsequently recovered by the taxpayer in some way (for example, depreciation recovery income and an amount received by a taxpayer for bad debts previously written off);

(xii) An amount derived from the extraction, removal, or sale of minerals, flax, or timber, or the sale of any right to take timber; and

(xiii) Income from any other source whatsoever.

Comment: Item (xiii) is a general catch-all provision for income from sources other than those described above.

b. Capital Gains

The general rule is that capital gains are not taxable in New Zealand.

(1) Capital/Revenue Distinction

The term "capital" is not expressly defined in the ITA and is therefore given its plain and ordinary meaning. Although the courts have developed a number of criteria to assist in distinguishing between capital and income receipts, there is no definitive test and it is ultimately a matter of common sense in the particular circumstances.

Courts have often grappled with the issue of whether a gain is a capital gain or taxable income. For example, the taxpayer in *Rangatira v. CIR*[463] was an unlisted public company that for many years had an investment policy of capital maintenance (i.e., it invested on a long-term basis in well perform-

[460] (1982) 5 NZTC 61,131.
[461] (1983) 6 NZTC 61,624.
[462] See *Vector Ltd v. CIR* [2016] NZCA 396.
[463] (1996) 17 NZTC 12,727.

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ing companies) and the ability to provide regular dividends to the shareholders (which were mostly charitable trusts). From 1983 through 1991, the taxpayer made 41 sales transactions, and almost all of these sales were made for specific reasons unconnected with making profits. The increase in sales activity prompted the CIR to argue that from April 1, 1983, the taxpayer had changed its policy from investing in shares to dealing in shares. The Privy Council considered the real issue was whether the gains from the share sales were derived from a "business" of buying and selling shares, and held that this was a question of fact so that the High Court's decision (that the taxpayer was not carrying on a business of dealing in shares) was one that it was entitled to reach. The High Court had found for the taxpayer in finding that its gains on sales were nontaxable capital gains because the sales in dispute were not part of the taxpayer's business.

(2) Specific Inclusions in Income

Although capital gains are not generally taxable in New Zealand, the ITA has diluted the capital/revenue distinction by expressly deeming certain capital gain amounts to be income. For example, the following amounts are deemed to be gross income despite the fact that they would ordinarily be classed as a capital receipt:

(i) Amounts derived as consideration for giving a restrictive covenant;

(ii) Amounts derived from the disposal of a patent; and

(iii) Certain amounts derived from the disposal of land.

c. Dividend Income

A dividend derived by a NZ company (together with any imputation credits attached and RWT deducted or paid in respect of the dividend) is included as gross income.

(1) What Is a Dividend?

The term "dividend" is widely defined as a "transfer of value" from a company to a person if the cause of the transfer is a shareholding in the company. A "transfer of value" occurs when the company provides money or money's worth to a person and, if the shareholder provides any money or money's worth to the company under the same arrangement, the market value of what the shareholder provides is less than what the company provides. A transfer of value is caused by a shareholding in the company if the recipient is a shareholder or an "associated person" of a shareholder, and the company makes the transfer because of that shareholding.

Comment: This would include, for example, an in specie distribution of property to a shareholder for less than market value consideration and the provision of a loan to a shareholder at below market interest rates.

The ITA specifically includes the following transfers of value (among others) as "dividends:"

(i) A "bonus issue in lieu" (i.e., an issue of shares where the shareholder can elect instead to receive a cash dividend), the amount of the dividend being the money or money's worth offered as an alternative;

(ii) A share issued under a "profit distribution plan" (i.e., a scheme whereby a company issues shares to some or all of its shareholders and those shareholders have an option to have some or all of those shares repurchased by the company), the amount of the dividend being the amount offered by the company for the repurchase of the share;

(iii) An issue of shares by a company where the company elects for the share issue to be taxed as a dividend (this mechanism can be used as a way of distributing imputation credits to shareholders — see V.B.6.c., below);

(iv) All amounts (money or money's worth) paid by a company to its shareholder for the acquisition by the company of its own shares, or for the redemption or cancellation of its shares, or other reduction in or return of share capital in the company (subject to exceptions — see V.B.3.c.(2)(b) to (e), below);

(v) Certain non-cash benefits provided by a company to shareholder-employees;

(vi) Interest arising under profit-related debentures, which are debt instruments where the interest rate is determined by reference to the issuer's profits or dividends.

(2) What Is Not a Dividend?

(a) General

The following receipts (among others) are specifically excluded from the definition of a dividend:

(i) Any nontaxable bonus issue.

(ii) Certain amounts paid by a company to a shareholder for the repurchase, redemption or cancellation of the shareholder's shares in the company (see V.B.3.c.(2)(b) to (d), below).

(iii) Certain amounts paid by a company to a shareholder on the liquidation or emigration of the company (see V.B.3.c.(2)(e) and (f), below).

(iv) Any amount that constitutes a fringe benefit on which the company is subject to fringe benefit tax.

(v) A transfer of value between companies if the transfer consists of making property available for less than market value, the transfer is not a loan, and in the income year in which the transfer occurs, the total amount of transfers of value that would otherwise be dividends is NZ$10,000 or less.

(vi) A transfer of value made from a parent company to a subsidiary company, provided the subsidiary company does not have a voting interest in the parent company and no person has a direct voting interest in both the parent company and the subsidiary company.

(vii) An issue of a right to subscribe for a share, or to sell a share in the company to the company.

(viii) Any amount distributed by a FIF to a shareholder where the shareholder has a FIF interest and has calculated FIF income using either the comparative value method, the deemed rate of return method, the cost method or the Fair Dividend Rate (FDR) method (see V.B.3.e.(2)(c), below).

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(ix) Any amount paid by a company to repurchase shares issued to a shareholder under a profit distribution plan when the shareholder has exercised its option to have the shares repurchased by the company (this is on the basis that the issue of the shares has already been taxed as a dividend).

Generally, a dividend received by a NZ company from a nonresident subsidiary or another NZ company in the same wholly-owned group of companies is not subject to tax.[464] See V.B.3.i., below.

(b) Return of Capital: On-market Share Repurchase

An amount distributed by a company to a shareholder for the on-market cancellation of a share in the company is not a dividend for the shareholder. However, to the extent to which the amount distributed exceeds the "available subscribed capital" (ASC) per share calculated under the ordering rule, the company must reduce its imputation credit account balance accordingly. If necessary, the company must pay further income tax to maintain a credit balance in its imputation credit account. The effect is to ensure that the shareholder selling its shares on-market to the company does not receive a dividend, but that the company pays tax with respect to the amount in excess of the ASC per share cancelled as though it were a dividend.

A company's ASC is broadly the total consideration received by the company for the issue of its shares, less any consideration paid by the company on any prior share cancellations that did not give rise to a dividend. Special rules apply to limit the amount of ASC that arises from certain transactions, including (among others) a share-for-share exchange, debt forgiveness, and an amalgamation.

Note: The "ordering rule" provides that the ASC per share is equal to the ASC of all shares of the same class as the share, divided by the number of shares of the same class as the share being cancelled. This is in contrast to the "slice rule," which provides that the ASC per share is equal to the ASC of all shares of the same class as the share, divided by the number of shares of the same class as the share on issue. The concept of "shares of the same class" is critical in determining ASC: it is specifically defined, and shares that, for company law purposes, would be of the same class may be in different classes for tax purposes.

(c) Return of Capital: Off-market Share Repurchase

An amount distributed by a company to a shareholder for the off-market cancellation of a share in the company will not be a dividend to the extent to which the amount distributed does not exceed the ASC per share calculated under the ordering rule, provided the amount distributed to the shareholder is not in lieu of the payment of a dividend and one of the following criteria is satisfied:

• The cancellation is a pro rata cancellation that results in either a 15% capital reduction (being a share cancellation payment not less than 15% of the market value of all shares in the company (not being "non-participating redeemable shares")), or a 10% capital reduction where the CIR has previously notified the company of his or her decision that the cancellation is not an in lieu payment of a dividend;

• The cancellation is a non-pro rata cancellation that results in a 15% interest reduction (being at least a 15% reduction in aggregate direct voting interests by the shareholder, and where a "market value circumstance" exists, then in addition, at least a 15% reduction in the shareholder's market value interests);

• The cancellation is a cancellation of non-participating redeemable shares;

• The cancellation is a non-pro rata cancellation and the company is an unlisted trust or group investment fund.

Any amount paid to the shareholder in excess of the ASC per share calculated under the ordering rule will be a dividend.

(d) Treasury Stock Acquisitions

An amount distributed by a company to acquire its own shares from a shareholder will not be a dividend if the shares are not cancelled and the acquisition is a non-pro rata cancellation. However, in certain circumstances the acquisition may result in a reduction of the company's ASC and/or its imputation credit account balance.

(e) Liquidation of a Company

An amount distributed by a company to its shareholders on the company's liquidation will not be a dividend to the extent to which the amount distributed does not exceed the aggregate of the company's ASC and "available capital distribution amount" (ACDA).

A company's ACDA is, broadly, the total realized and unrealized capital gains of the company, less any realized or unrealized capital losses derived by the company. Special rules apply to determine the ACDA of a company. For example, certain 'tainted' capital gains and capital losses are specifically excluded for the purpose of calculating a company's ACDA. 'Tainted' capital gains and losses arise from the sale of a capital asset between companies that have at least 85% common ownership at the time of sale, with the original owners still retaining at least 85% interest in the asset at the time of liquidation. The effect is that 'tainted' capital gains will not be able to be distributed to shareholders tax-free on the liquidation of the company.

On a company's liquidation, determining the amount that will be taxable from an amount that is not taxable is a complex task. Therefore, in considering whether to buy shares in a New Zealand company, from the company itself or from an existing shareholder, it can be important for a purchaser to know what the company's ASC and ACDA are, and to monitor the ASC and ACDA while the shares are held.

Note: Notwithstanding the above, a distribution of a company's ACDA on the liquidation of the company will be subject to NRWT to the extent the distribution is to an associated nonresident corporate shareholder of the liquidating company.

(f) Emigration

When a company ceases to be a New Zealand tax resident (e.g., the company's place of incorporation or director control shifts from New Zealand to another jurisdiction), immediately before emigration, the company is treated as:

[464] ITA, s. CW 9.

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(i) Disposing of its property at market value; and

(ii) Making a distribution to its shareholders of an amount that would be available for distribution if the company had gone into liquidation.

The deemed distribution will be treated as a dividend to the extent it exceeds the ASC and (unless the shareholder is a nonresident associated corporate shareholder) ACDA of the emigrating company.

The corporate emigration rules also apply in certain circumstances where a New Zealand resident company starts being treated under a double taxation agreement as not being a New Zealand resident.[465] The provisions ensure that New Zealand can tax the accumulated income and gains of a company before it starts being treated under a double taxation agreement as not being a New Zealand resident and the double taxation agreement restricts or removes those taxing rights.

d. Income from the Disposal of Land

Any amount derived from the sale or other disposition of land or any interest in land will be income of the taxpayer if:

(i) The taxpayer acquired the land with a purpose or intention of selling or disposing of it, or otherwise buys and sells the land in the ordinary course of its business.

(ii) The taxpayer sold the land within its applicable bright-line period and the land sold is residential land (with concessions available to a taxpayer who predominantly used the property as his or her main home and rollover relief available for transfers between associated persons).

As from July 1, 2024, the bright-line period is generally two years. The former 10 year rule (reduced to five years for qualifying new buildings) applied to property acquired on or after March 27, 2021 and can still apply if the agreement for the disposal of the property was entered into prior to July 1, 2024.

(iii) The taxpayer or an associated person carried on a business relating to land (for example, dealing in land, developing land, dividing land into lots or erecting buildings) at the time the land was acquired and the land sold was acquired for purposes of that business or was disposed of within 10 years of its purchase.

(iv) The taxpayer sold the land within 10 years of acquisition and at least 20% of the profit resulted from zoning or other favorable town-planning changes.

(v) The taxpayer carried out a scheme involving subdivision or development of the land (the work not being of a minor nature) that commenced within 10 years of acquisition.

(vi) The taxpayer carried out a scheme involving a major subdivision or development of the land (not being a subdivision or development under (v)) irrespective of the time elapsing between purchase and sale.

Comment: The following cases demonstrate the manner in which (v) and (vi) are to be applied:

(i) *Cross v. CIR*,[466] which clarified the meaning of "scheme" and the date on which a scheme is deemed to commence. There can be only one commencement date for a scheme, notwithstanding that development is planned to be carried out in stages. The date of commencement is when the first step in carrying out an existing scheme takes place.

(ii) *Smith v. CIR*,[467] which reached similar conclusions to *Cross v. CIR* in holding that a subdivision scheme may be commenced without any physical work being done.

(iii) *Holdaway v. CIR*,[468] which gave extensive consideration to the calculation of profit on the sale of sections. The court concluded that the commencement date for calculating the value of sale proceeds was the date the scheme was commenced and not the date of subsequent valuations.

The land sales rules contain various exclusions for land used as a residence, business premises, farm or agricultural land, or for the purposes of producing rental income. Where one of the exclusions apply, an amount received from a disposal of land that would otherwise be taxable under one of the provisions above is not income.

e. Income from Foreign Sources

(1) General

A NZ company can derive three types of foreign-source income:

(i) Classes of income that are not treated as being derived in New Zealand under ITA, Section YD 4 (see VI.B., below);

(ii) Attributed foreign income under the CFC regime (see V.B.3.e.(2)(b), below); and

(iii) FIF income (see V.B.3.e.(2)(c), below).

(2) Controlled Foreign Corporation and Foreign Investment Fund Regimes

(a) Introduction

Subject to certain exceptions, a NZ company is taxed on foreign-source income derived through an offshore entity that is either a CFC or a FIF, even though that income has not been received by the New Zealand company. Since 2009, the CFC regime has been significantly "weakened" by the introduction of an active/passive distinction.

(b) Controlled Foreign Corporations

A nonresident company is a CFC for its entire accounting period if at any point during the period[469] it fulfills at least one of the following criteria:

• A group of five or fewer New Zealand tax residents, together with their associates, have a combined controlling

[465] ITA, s. FL 3.

[466] (1985) 7 NZTC 5,054 (HC), *affirmed on appeal in* (1987) 9 NZTC 6,101 (CA).

[467] (1987) 9 NZTC 6,118.

[468] (1985) 7 NZTC 55,104.

[469] ITA, s. EX 1(3).

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interest in the company of more than 50%. A control interest is determined by reference to percentage interests in paid-up capital, nominal capital, voting rights, income participation, and total net assets of the nonresident company (whichever is higher);

• A single New Zealand tax resident owns 40% or more of the nonresident company, so long as no non-associated nonresident owns a greater or equal interest; or

• There is a group of five or fewer New Zealand tax residents who can control the exercise of the shareholder decision-making rights for the nonresident company, thereby controlling the company's affairs.

A nonresident company will not be a CFC if the nonresident company is a "foreign portfolio investment entity (PIE) equivalent" (see IX.E., below) and one of the New Zealand tax resident owners is either a PIE, an entity that qualifies for PIE status or a life insurance company.

A NZ company must include as its income its proportionate attributed share of all net passive income of a CFC. Net passive CFC income broadly comprises rent, royalties, certain income related to telecommunications services, income from offshore insurance businesses, life insurance policies, disposals of revenue account property, base company services income, certain dividends and interest, less related expenses.

The NZ company calculates its proportionate attributed share of the CFC's net passive income by identifying its income interest in the CFC and applying that income interest to the net passive CFC income. The NZ company is allowed a foreign tax credit for any foreign tax paid on the CFC's net passive income. The company is also allowed to offset its attributed CFC income against attributed CFC losses. Both foreign tax credits and CFC losses are ring-fenced by jurisdiction, and may be carried forward subject to the NZ company passing a continuity of ownership test.

The CFC regime does not apply to the following interests:

(i) An ownership interest in an Australian tax resident CFC, if the CFC's tax liability is not reduced by any special exemptions and the CFC is neither a unit trust nor a unit trust taxed as a company under Australian law;

(ii) An income interest of less than 10% in a CFC. Such an interest may fall within the FIF regime as described in (c), below.

(iii) An ownership interest in a CFC, if the CFC passes the active business test. Broadly, a CFC will pass the active business test if its passive income is less than 5% of its total income.

(c) Foreign Investment Funds

A FIF, in relation to a New Zealand shareholder, is a nonresident company that is either not a CFC, or is a CFC in which the shareholder holds an interest of less than 10%.

The FIF regime does not apply to the following interests (among others) of a New Zealand shareholder:

(i) Shares in an Australian company listed on an approved index under the ASX Operating Rules, provided the shares are not stapled to any other interest;[470]

(ii) Units in an Australian unit trust, provided the unit trust has a New Zealand proxy that deducts resident withholding tax (RWT) from its distributions to New Zealand tax residents and meets certain asset turnover and distribution thresholds;[471]

(iii) A direct income interest of 10% or more in an Australian tax resident FIF that is subject to tax in Australia if the FIF's tax liability is not reduced by any special exemptions, the FIF is either not a unit trust or is a unit trust taxed as a company under Australian law, and the New Zealand company is not a portfolio investment entity, a superannuation scheme, a unit trust, a life insurer, or a group investment fund;[472]

(iv) An interest in certain New Zealand venture capital companies that have migrated to a "grey list country,"[473] or an interest in a grey list company that controls a venture capital New Zealand company.[474]

An interest to which the FIF regime does apply is referred to as a "FIF interest."

When a NZ company calculates its FIF income from holding a FIF interest, it has five calculation methods available to it. Some of the methods may only be used in certain circumstances, so the company's choice of method is usually restricted. The available methods are set out in (i) to (v), below.

When a NZ company uses the fair dividend rate method, cost method, comparative value method or deemed rate of return method to calculate its FIF method, any dividends the NZ company receives from the FIF are not taxed separately.

(i) Fair Dividend Rate Method

The Fair Dividend Rate Method ("FDR method") is the default method for calculating FIF income but cannot be used if the FIF interest is a non-ordinary share (e.g., certain debt-like instruments or shares offering a guaranteed return). Under the FDR annual method, the NZ company is deemed to derive FIF income each income year equal to 5% of the market value of the FIF interests held at the beginning of the income year.

If the FDR method is used, a NZ company is not separately taxed on any profit or loss on disposal of the FIF interest, unless the FIF interest was both acquired and sold within the income year, in which case income arises under a "quick sale adjustment" equal to the lower of 5% of cost or the actual gain.

Widely held investment funds and other similar entities may apply the FDR method to their foreign currency hedges entered into for FIF interests taxed under the FDR method, or ASX-listed shares not subject to the FIF regime and held on capital account.

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[470] ITA s. EX 31. Note that from the 2017–2018 income year, the exemption applies to shares in companies listed on the ASX irrespective of whether they are also listed on an ASX approved index.

[471] ITA, s. EX 32.

[472] ITA, s. EX 35.

[473] "Grey list countries" are Australia (excluding the Territory of Norfolk Island), Canada, Germany, Japan, the United Kingdom, the United States (excluding its possessions and territories), Norway, and Spain.

[474] ITA, ss. EX 36–EX 37.

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(ii) Cost Method

A NZ company with a FIF interest can use the cost method if it is eligible to use the FDR method but the FDR method is impractical because the market value of the FIF interest cannot be determined except by independent valuation. Under the cost method, the NZ company is deemed to derive FIF income each income year equal to 5% of the cost of the FIF interests held at the beginning of the income year, with the cost base increasing by 5% each year. Every five years the NZ company may reset the cost base of its FIF interests on the basis of an independent valuation or by using the net asset value of the FIF in publicly available audited accounts.

If the cost method is used, a NZ company is not taxed on any profit or loss on disposal of the FIF interest, unless the FIF interest is both acquired and sold in the income year in which case income arises under a "quick sale adjustment" equal to 5% of cost.

(iii) Comparative Value Method

A NZ company with a FIF interest can only use the comparative value method if the FIF interest is a non-ordinary share (e.g., certain debt-like instruments or shares offering a guaranteed return). Under the comparative value method, the NZ company is deemed to have FIF income or loss each income year equal to any change in the value (whether realized or not) of its FIF interest during the income year, plus distributions received.

(iv) Deemed Rate of Return Method

A NZ company with a FIF interest can use the deemed rate of return method if the NZ company is required to use the comparative value method, but it would be impractical for it to do so because the market value of the FIF interest is not readily available. Under the deemed rate of return method, the NZ company is deemed to derive FIF income each income year equal to a deemed rate (which is set by the Governor-General every year and is currently 5.86%) of the "book value" of the FIF interest (broadly the original cost of the FIF interest, with the cost base increased each year by the amount of FIF income in the prior income year).

Under this method, if the NZ company sells the FIF interest, it must perform a wash-up calculation, i.e., if the NZ company receives an amount on sale that exceeds the aggregate FIF income (after deducting aggregate FIF losses) that had been derived with respect to that interest, the excess amount is FIF income.[475]

(v) Attributable FIF Income Method

A NZ company with a FIF interest can use the attributable FIF income method to calculate its FIF income (or loss) only if:

(i) The NZ company can provide to the CIR (if requested) sufficient information to enable the CIR to check the NZ company's calculations under the attributable FIF income method;

(ii) The FIF is a company;

(iii) The NZ company holds an interest of 10% or more in the FIF; and

(iv) The NZ company is not a portfolio investment entity.

Under the attributable FIF income method, the NZ company will:

(i) Be taxed on its share of the "passive" income (generally speaking, dividends, interest, royalties, rent and income from insurance) derived by the FIF (and potentially the passive income derived by other entities in which the FIF holds an interest) if that passive income is at least 5% of the FIF's gross income; and

(ii) Not pay tax in relation to any "active" income (income that is not passive income) derived by the FIF.

f. Stock Options

A NZ company that owns a stock option will be taxed on its disposal of a stock option if:

(i) The stock option was part of its trading stock;[476]

(ii) The disposal took place as part of its profit-making undertaking or scheme;[477]

(iii) It had acquired the stock option for the purpose of disposal;[478] or

(iv) Its business is to deal in property of that kind.[479]

Exercise of a stock option would not be subject to tax, though sale of the stock acquired would be taxed in the circumstances referred to above.

g. Cryptoassets

The amounts that a person receives from selling, trading or exchanging cryptoassets are taxable in most cases under the general rules for the taxation of income from business or trade-like activities in Subpart CB of the ITA.

Persons that purchase cryptoassets with a view to selling, disposing of or exchanging them at a later time will be taxable on the sale proceeds under Section CB 4 (as amounts derived from the disposal of personal property acquired for the purpose of disposal).

Even if Section CB 4 does not apply, IR's view is that any disposal of cryptoassets will generally be taxable under one of the following:

(i) Section CB 1 (amounts derived from business activities);

(ii) Section CB 2 (amounts derived from disposal of trading stock); or

(iii) Section CB 3 (amounts derived from a profit-making undertaking or scheme).

[475] ITA, s. EX 60.

[476] ITA, ss. CB 1–CB 2.
[477] ITA, s. CB 3.
[478] ITA, s. CB 4.
[479] ITA, s. CB 5.

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h. Other Inclusions in Gross Income

(1) Financial Arrangement Income

The financial arrangements rules apply to virtually any arrangement that involves a deferral of the passing of consideration, unless the arrangement is expressly excluded as an "excepted financial arrangement."

The rules require all expected gains under a "financial arrangement," whether of an income or capital nature, to be taxed on an accrual basis over the term of the arrangement using a range of specified spreading methods, with any other gains taxed on a realized basis under a wash-up mechanism. As the entire economic gain from a financial arrangement is taxed under these rules, they represent a departure from New Zealand's system of only taxing items of income.

The rules were introduced principally to eliminate the ability of taxpayers to defer income tax liabilities with respect to debt instruments (and debt substitutes) by delaying the recognition of income.

As the rules broadly aim to match the timing of income and expenditure under a financial arrangement, they often result in tax becoming payable before receipt of the income in respect of which the tax arises.

(a) What Is a Financial Arrangement?

A financial arrangement is defined as an arrangement (including a debt or debt instrument) under which a person receives money in consideration for a person providing money to any person:

(i) At a future time; or

(ii) When an event occurs in the future or does not occur (whether or not the event occurs because notice is or is not given).

"Money" in this context includes money's worth (whether convertible into money or not) and the right to money.

An "excepted financial arrangement" that is not part of a wider financial arrangement is excluded from the definition of "financial arrangement." The main "excepted financial arrangements" are:

(i) A short-term option or agreement for the sale and purchase of property (unless either party to the arrangement elects otherwise);

(ii) A stock option;

(iii) A share;

(iv) A lease other than a finance lease;

(v) A share lending arrangement;

(vi) An emission unit;

(vii) A cryptocurrency (unless the cryptocurrency is economically equivalent to a debt arrangement, i.e., as a consequence of ownership, the owner receives, or is entitled to receive, during the period of ownership amounts that are determined by reference to the quantity or value of the cryptocurrency, on a basis that is known by the owner in advance, and not by reference to the profits of a business activity); and

(viii) An option over cryptocurrency.

(b) Taxation of Financial Arrangements

The financial arrangements rules operate by taxing the difference between the consideration received under and from a financial arrangement, and the consideration paid for the financial arrangement. All interest, premiums, discounts, and foreign exchange gains and losses are taxable.

The difference between the consideration received and the consideration paid under a financial arrangement is spread over the life of the financial arrangement.

The party earning under the financial arrangement recognizes the amount as assessable income.[480] The party paying under the financial arrangement may claim a deduction for the amount paid (which is deemed to be interest) if the tests for the deductibility of interest are met (see V.B.4.f., below).

The amount to be returned as income (or deducted as interest) is, where possible, calculated using the "yield-to-maturity" method or a commercially acceptable alternative.[481] If a NZ company has total borrowings and lendings that do not exceed NZ$1.85 million, it may use the straight-line method to calculate income and expenditure from its financial arrangements, even where it produces a materially different result from the yield-to-maturity method.

A NZ company engaged in a business that includes dealing in financial arrangements, or has a financial arrangement that is an exchange-traded option, a forward contract for foreign exchange, or a futures contract, can use a market valuation method.

Many NZ companies have adopted International Financial Reporting Standards (IFRS). A NZ company that adopts IFRS for financial reporting purposes will generally use the IFRS timing rules for tax purposes, rather than the financial arrangements rules.

At the conclusion of the financial arrangement, a base price adjustment is performed to ensure the full economic gain or loss from the arrangement has been taken into account for tax purposes.[482]

The financial arrangements rules, as originally enacted, resulted in unintended tax consequences applying to agreements for the sale and purchase of property or services. The tax consequences were eliminated by exempting short-term transactions (those settled within 93 days) from the financial arrangements rules.

For other transactions for the sale and purchase of property or services, rules were introduced to ensure only a certain imputed "interest" element of the consideration for the property or services is subject to tax.

The mechanism used to determine the "interest" element is to compare a "lowest agreed price" with the actual price paid. The lowest agreed price is the price the parties would have agreed upon had the parties paid the entirety of the price at the point at which the first right in the property passed under the contract, and it is determined at the contract entry date.

[480] ITA, s. CC 3(1).
[481] ITA, ss. EW 16 and EW 19.
[482] ITA, ss. EW 29–EW 31.

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Comment: The complexity of the financial arrangements rules makes it very important for parties to a property transaction in which there is a delay between possession and settlement to pay special attention to the financial arrangements rules. Parties should generally, at the time they enter into a contract, agree on a lowest price in their contract documentation.

(2) Portfolio Investment Entity Income

A NZ company that holds interests in a portfolio investment entity (PIE) must include in its tax return the PIE's income attributed to it in proportion to its ownership interest. See IX.E., below, for a discussion on the PIE regime.

(3) Royalty Income

A royalty derived by a NZ company will be included in its assessable income, even if the royalty could be categorized as a capital receipt under general common law principles.[483]

"Royalty" includes payments for the use of, or the right to use, a copyright, patent, design or model, plan, secret formula or process, a mine or quarry, film, videotape, and the supply of scientific, industrial, or commercial knowledge or information.

Comment: A royalty does not include the outright sale of intellectual property for a fixed lump sum.[484]

(4) Interest Income

All interest derived by a NZ company will be included in its assessable income.[485]

"Interest" means any payment made to the person for money lent to any person, excluding a repayment of the money lent (i.e., loan principal).

If the NZ company is not required to recognize the interest under the financial arrangements rules, the interest will be included as assessable income of the NZ company in the income year in which it is treated as derived under ordinary principles.

i. Exclusions from Gross Income

The ITA exempts some classes of income from tax in Subpart CW and excludes other classes from tax in Subpart CX.

The difference between exempt income and excluded income is that an expenditure incurred in the deriving of exempt income is generally not deductible,[486] whereas an expenditure incurred in the deriving of excluded income is deductible.

(1) Exempt Income

The ITA exempts some classes of income from tax in Subpart CW.

A NZ company may derive the following classes of exempt income:

(i) A dividend paid by a nonresident company to a NZ company shareholder will be exempt income to the NZ company, unless the dividend is:

- From a less-than-10% interest in certain non-attributing FIFs (such as Australian listed companies; see V.B.3.e.(2)(c), above);
- Deductible for the payer in the foreign jurisdiction; or
- From a fixed-rate foreign equity.

(ii) A dividend paid by a company that is part of the same wholly-owned group as the NZ company at the time the dividend is derived, provided the company paying the dividend is a New Zealand tax resident and does not only derive exempt income.

(2) Excluded Income

An example of excluded income is an amount derived by the NZ company from a transaction or arrangement with another company that is part of the same tax consolidated group, provided the amount would not be income if the group were one company.

4. Deductible Expenditure

A critical step in determining a taxpayer's net income is identifying and calculating allowable deductions. To be deductible, an amount of expenditure must generally satisfy the general permission and not be excluded under any of the general limitations. The general permission and general limitations are discussed in V.B.4.a. to V.B.4.c., below.

After the general test for deductibility has been considered, the next step is to consider the application of specific deduction provisions. These provisions may exclude or modify the right to a deduction otherwise allowable under the general deductibility test, or authorize a deduction not otherwise permitted. These provisions are discussed in V.B.4.d. to V.B.4.q., below.

a. General Permission

The general permission states that a deduction is permitted for an amount "to the extent that" it is an expenditure or loss incurred by the taxpayer in deriving the taxpayer's gross income, or necessarily incurred by the taxpayer in the course of carrying on a business for the purposes of deriving the taxpayer's gross income.

The key elements in the test to determine whether an amount is an allowable deduction are:

(i) There must be an expense or a loss;[487]

(ii) The expense or loss must have been "incurred" (see V.B.2.c.(2), above); and

(iii) The expenditure must be incurred in the production of gross income, or in carrying on a business that produces gross income;

Comment: In *CIR v. Banks*,[488] the Court of Appeal held that this requires a statutory nexus to exist between the expenditure incurred and the assessable income or carrying on of a business of the taxpayer. Determining whether the

[483] ITA, s. CC 9.
[484] See *DGB Productions Ltd v. CIR* (1996) 17 NZTC 12,446.
[485] ITA, s CC 4.
[486] ITA, s DA 2.
[487] See *CIR v. Inglis* (1992) 14 NZTC 9,180, where the Court of Appeal held that "loss" included a loss on the sale of shares.
[488] [1978] 2 NZLR 472 (CA).

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necessary relationship exists requires considering the true character of the expenditure and its relevance to the taxpayer's income-earning process. This includes considering the scope of the taxpayer's income-earning process and the factual situation at the time the expenditure was incurred.

Comment: The leading case on the meaning of "business" is *Grieve v. CIR*.[489] The Court of Appeal held that, for an enterprise to be "in business" for income tax purposes, only an intention to make a profit is required. An objectively justified prospect of making a profit is not needed. However, the prospect of making a profit is one of the criteria by which intention to make a profit is evaluated.

(iv) Apportionment of expenditure is required between the amount properly attributable to the production of gross income and the amount attributable to other purposes.

b. General Limitations

Notwithstanding that the general permission is satisfied, no deduction is allowed for an amount of expenditure or loss to the extent to which it is:

(i) Of a capital nature;

(ii) Of a private nature;

(iii) Incurred in deriving exempt income;

(iv) Incurred in deriving income from employment;

(v) Incurred in deriving nonresident passive income; or

(vi) Incurred in deriving nonresidents' foreign-sourced income.

c. Capital Limitation

The most common of the general limitations is the capital limitation, which precludes a deduction for expenditure that is capital in nature.

The ITA does not define "capital," but the term derives its meaning from case law.

Cases have formulated a number of tests for determining whether an expenditure is of a revenue or a capital nature.

Some of the more important tests are:

(i) The need in relation to which, or the occasion on which, the expenditure arises, and the context in which it is made;

(ii) Whether payments are made out of fixed or circulating capital;

(iii) Whether the payments are made "once and for all" to produce assets or advantages of an enduring nature;

(iv) How the expenditure in question is treated under the ordinary principles of commercial accounting;

(v) Whether the expenditure relates to the structure of the business or to the income earning process; and

(vi) Whether, if there had been a profit rather than a loss, the profit would have been assessable income to the taxpayer.

In *Mainzeal Holdings Ltd v. CIR*,[490] the Court of Appeal held that fees paid by a parent company to support a subsidiary in financial difficulty were of a capital nature and therefore not deductible. The fee was paid by way of an agreement by the parent to meet the subsidiary's costs, in exchange for a share of the profit from future sales of the subsidiary's properties.

The Court stated that whether the expenditure was capital or revenue in nature depended on what the expenditure was calculated to effect from a practical and business point of view.

For the fees to be deductible, the parent did not have to show a reasonable prospect of profit, but a genuine intention to profit had to exist. As the parent could not show an actual intention to make a profit from its agreement with the subsidiary, the payments could not be regarded as part of its business as a property developer and were not deductible.

In *CIR v. McKenzies New Zealand Ltd*,[491] the CIR claimed that an expense incurred by the taxpayer in obtaining a release from an onerous lease was of a capital nature. The Court of Appeal held that the lease was a capital asset of the taxpayer, and that payment for its surrender was a capital expenditure. The payment did not merely terminate future rental payments, it terminated the lease itself.

In *CIR v. NZ Forest Research Institute Ltd*,[492] the taxpayer purchased a business. As part of the consideration for the business, the taxpayer assumed certain obligations that the vendor owed to its employees (comprising accrued holiday pay and other leave entitlements).

The Privy Council held that the taxpayer's payments to the employees were capital expenditures. Their Lordships' decision was based on the grounds that expenditures incurred in meeting another person's obligations undertaken in return for a capital asset is a capital expense, even though the payments would have been deductible if paid by the vendor.

Comment: A number of specific deduction provisions override the capital limitation by expressly allowing a deduction for an amount that is capital in nature. For example, section DB 23 of the ITA allows a deduction for expenditures incurred as the cost of revenue account property.

"Revenue account property" is defined as including "property that, if disposed of for valuable consideration, would produce income for the person other than income under section EE 48 (Effect of disposal or event), FA 5 (Assets acquired or disposed of after deductions of payments under lease), or FA 9 (Treatment when lease ends: lessee acquiring asset)."

Section DB 23 ensures that deductibility is not excluded by reason of the prohibition on expenditure of a capital nature.

[489] (1984) 6 NZTC 61682.

[490] (2001) 20 NZTC 17,409.

[491] *Commissioner of Inland Revenue v McKenzies (NZ) Ltd* [1988] 2 NZLR 736 (CA).

[492] *CIR v. NZ Forest Research Institute Ltd*, [2000] BTC 245.

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d. Organizational Expenses

Organizational expenses[493] are unlikely to be deductible under the ITA as they are expenditure of a capital nature. See V.B.4.c., above.

e. Travel and Entertainment Expenses

The CIR's view is that, if a NZ company provides an allowance to its employee for expenses incurred in travelling between home and work, the NZ company generally cannot deduct that allowance.[494]

For an expense incurred when travelling between home and work to be deductible, the NZ company must establish:[495]

(i) The need for work to be performed partly at the employee's home (hence the need for travel) arises from the nature of the work; and

(ii) The travel is in the course of performing work.

If a NZ company provides an allowance to its employee for travel expenses incurred in the course of the employee discharging his or her employment duties, the NZ company can generally deduct that allowance.

If the NZ company also covers the employee's companion's travel expenses, in most cases the companion's travel expenses will not be deductible for the NZ company, unless the companion supports the employee in a material way in the business undertaken by the NZ company.

The companion supports the employee if he or she has some knowledge of the business being undertaken, or he or she possesses a special skill or expertise relevant to the business.[496]

Deductions for travel expenses incurred in New Zealand are restricted by Sections DD 1 to DD 11 of the ITA. Sections DD 1 to DD 11 apply to restrict deductions for entertainment expenditures generally (under which certain forms of travel expenses fall).

Under Sections DD 1 to DD 11, a NZ company can only deduct 50% of the amount of expenditures incurred on the following forms of entertainment:

- Corporate boxes;
- Holiday accommodation;
- Pleasure craft;
- Food and beverages provided off business premises;
- Food and beverages provided on business premises at a party or a social function or at a function that only employees of a certain seniority may attend; and
- Food and beverages consumed while travelling, and the travel is mainly for the purpose of enjoying entertainment.

Sections DD 4 to DD 8 of the ITA list expenditures that are excluded from the 50% rule. The exclusions include:

- Employee tea breaks;
- Promotional events open to the public; and
- Samples of goods and services.

A NZ company must also consider fringe benefit tax (FBT). For example, if the NZ company provides the private use or enjoyment of a motor vehicle owned, leased, or rented by the NZ company to an employee (the "fringe benefit"), the NZ company is taxed on the fringe benefit. For a detailed discussion of FBT, see V.C.8., below.

f. Interest

(1) Deductibility of Interest

Sections DB 6 and DB 7(1) of the ITA allow a deduction for almost all interest expense incurred by a NZ company that:

(i) Is not a qualifying company;

(ii) Does not derive exempt income other than dividends, income exempted under Section CW 58 (Disposal of companies' own shares), income exempted under Section CW 59C (Life reinsurance claims from reinsurer outside New Zealand) and/or income exempted under Section CW 60 (certain stake money); and

(iii) Is not part of a wholly-owned group where a member of the group derives exempt income other than the exempt income described in (ii).

Otherwise, generally, an NZ company can only deduct interest expense if it either is incurred in deriving the company's gross income or is necessarily incurred in carrying on a business for purposes of deriving the company's gross income.

Section DB 8(1) of the ITA allows a deduction for interest expense incurred by any NZ company when the interest paid relates to the acquisition of shares by the NZ company in another company in the same group of companies.

Section DB 8 is necessary because intercompany dividends paid between wholly-owned companies in New Zealand are exempt from tax, so there is no direct nexus between the interest expense and the production of gross income.

Sections DB 10 and DB 10B deny deductions for interest payable under a profit-related debenture[497] or a stapled debt security,[498] as these instruments are generally treated for tax purposes as equity instruments.

Notwithstanding any other provision in the ITA, Subpart DH contains interest limitation rules that limit the ability to deduct interest expenditure in relation to disallowed residential property (defined to exclude "excepted residential land," which includes, among other things, boarding establishments, hotels, motels, inns, hostels, rest homes and, from April 1, 2023, "build-to-rent land").

[493] These are a category of expenses that have relevance in New Zealand although they are not defined under New Zealand law. However, they are defined by 26 U.S. Code s. 248 as meaning any expenditure which is: (i) incident to the creation of a company; (ii) chargeable to capital account; and (iii) of a character which, if expended incident to the creation of a company having a limited life, would be amortizable over such life.

[494] Inland Revenue, *Tax Information Bulletin* (Vol. 16, No. 10), at p. 31.

[495] Inland Revenue, *Tax Information Bulletin* (Vol. 16, No. 10), at p. 31.

[496] Inland Revenue, *Question We've Been Asked: Income Tax — Deductibility of a Companion's Travel Expenses* (QB 13/05).

[497] A "profit-related debenture" is defined in s. FA 2(4) as meaning a debenture with a rate of interest set by reference to either the profits of, or dividend payable by, the company issuing the debenture.

[498] A "stapled debt security" is defined in s. YA 1 as meaning a debt security that is stapled to a share that is not a fixed-rate share.

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The interest limitation rules introduced on October 1, 2021 will be substantially repealed with effect from April 1, 2025. The ability to claim interest deductions has been phased back in, with 80% of deductions being allowed as from April 1, 2024 and 100% being allowed as from April 1, 2025 onwards.

(2) Thin Capitalization Regime

New Zealand has a thin capitalization regime. The regime is unusual by international standards as it applies to both related and unrelated party debt. It is therefore more in the nature of an interest allocation regime.

The purpose of the thin capitalization regime is to:

(i) Limit the extent to which nonresident investors can fund their New Zealand operations with excessive debt that would allow them to reduce their New Zealand tax liabilities (the "inbound thin capitalization rules");

(ii) Limit the extent to which a NZ company investing offshore can fund its New Zealand operations with excessive debt that would allow it to reduce its New Zealand tax liabilities (the "outbound thin capitalization rules"); and

(iii) Act as a backstop to the transfer pricing regime (see XIV.A., below).

The inbound thin capitalization rules apply to a NZ company if any of the following persons or groups of persons have an ownership interest of 50% or more in (or control by any other means of) the NZ company:

(i) A nonresident;

(ii) A "nonresident owning body," which is a group of two or more members of the NZ company, each of whom are either nonresidents or subject to the inbound thin capitalization rules, and who hold ownership interests in the NZ company such that the NZ company:

• Owes the members debt that is in proportion to each member's ownership interest;

• Is not widely held and is funded under an arrangement between the members concerning debt; or

• Owes debt to its members in a way recommended to, or implemented for, the members as a group by a person.

The inbound thin capitalization rules also apply to:

(i) A nonresident individual;

(ii) A nonresident company (unless a New Zealand tax resident has a direct ownership interest in the company of 50% or more and no nonresident has a direct ownership interest of 50% or more when the nonresident's interest is added to that of an associate's);

(iii) A trust settled as to 50% or more (of the total value of all settlements) by:

• A nonresident or an associate of the nonresident; or

• Ignoring settlements made by the trustee and the trustee's powers of appointment or removal:

— A person subject to the inbound thin capitalization rules; or

— A group of persons, each subject to the inbound thin capitalization rules, who act together;

• A trust if a person subject to the inbound thin capitalization rules has the power to appoint or remove a trustee of the trust (other than for the purpose of protecting a security interest).

The outbound thin capitalization rules apply to a NZ company with:

(i) An income interest in a CFC;

(ii) A FIF interest for which the NZ company uses the attributable FIF income method or to which the exemption for non-portfolio FIFs resident in Australia applies (see V.B.3.e.(2)(c), above); and

(iii) An ownership interest of 50% or more in (or control by any other means of) a NZ company described in (i) or (ii), above.

There is a special set of rules for determining ownership of a company for the purpose of the thin capitalization regime.[499]

(a) Thin Capitalization Regime as It Applies to Entities Other than New Zealand Registered Banks and Their Banking Groups

The thin capitalization regime has the effect of denying interest deductions to the extent a New Zealand company is considered to have excessive debt. A NZ company subject to the inbound thin capitalization rules will have excessive debt if the debt percentage of its New Zealand group for the income year exceeds both:[500]

(i) 60%; and

(ii) 100% or 110% of the NZ company's worldwide group debt percentage.[501]

A NZ company subject to the outbound thin capitalization rules will have excessive debt if:

(i) The ratio of the total group assets for its New Zealand group to the total group assets for its worldwide group is less than 90%;[502] and

(ii) The debt percentage of its New Zealand group for the income year exceeds both:[503]

a. 75%; and

b. 110% of the New Zealand company's worldwide group debt percentage.

A NZ company's debt percentage is calculated based on its New Zealand group. A complex set of rules applies for determining the identity of a New Zealand group.

The debt percentage is calculated, on a consolidated basis under New Zealand generally accepted accounting principles (GAAP), by dividing the group's total interest-bearing debt

[499] ITA, ss. FE 38 to FE 41.

[500] ITA, s. FE 5(1)(a).

[501] Where an NZ company is owned or controlled by a group of nonresidents acting together, the worldwide group debt percentage limit is reduced to 100% on the basis that the NZ company will not have an identifiable parent. ITA s. FE 5(1)(ab).

[502] ITA, s. FE 5(1B).

[503] ITA, s. FE 5(1)(b).

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(from both unrelated and related lenders) by the sum of the group's total assets less non-debt liabilities (excluding certain non-debt liabilities, which are broadly deferred tax liabilities that will not be payable at a future time).

Debt is generally defined as the outstanding balance of all financial arrangements (see V.B.3.h.(1), above, for the definition of a financial arrangement), including specified leases (i.e., the predecessors to finance leases) and finance leases that provide funds to the NZ company and (broadly) on which interest is charged.

Assets may be valued using either financial accounts, net current values, or a combination of these. The NZ company's debt percentage may be calculated, at the NZ company's option, on a daily average, a three-month average, or at the end of the year.

The worldwide group debt percentage is calculated by dividing the worldwide group's debt by the worldwide group's total assets. The worldwide total assets are measured using similar rules to those applied to the calculation of the New Zealand debt percentage. When calculating total worldwide debt, the NZ company must exclude debt with respect to which:

(i) There is a person who is not a member of the worldwide group and holds 5% or more of direct ownership interests in a member of the group, or is a settlor of a trust having a trustee that is a member of the group (the "owner");

(ii) The owner or its associate is party to the debt, guarantees or provides security, or indirectly funds the debt; and

(iii) The debt is not traded on a recognized exchange.

The worldwide group comprises:

(i) The NZ company and its New Zealand group;

(ii) Nonresidents required to be included with the NZ company in the consolidated financial statements under either:

a. New Zealand GAAP;

b. An equivalent standard for a consistent and non-distorting financial reporting that is:

I. Set in the country where the ultimate controlling nonresident resides; or

II. Applied in preparing the international group's consolidated accounts;

(iii) The ultimate controlling nonresident and any nonresident required to be included with the ultimate controlling nonresident in the consolidated financial accounts under either GAAP or the standard referred to in (ii).b.I, above;

(iv) Any nonresident (not being a company) who owns 50% or more of the NZ company; and

(v) Any person associated with the nonresident referred to in (iv), above.

The thin capitalization regime deals with the position of financial institutions (other than New Zealand registered banks, which have their own regime) that traditionally operate on relatively high debt percentages by way of an on-lending concession (which applies to all entities).

Section FE 13 of the ITA requires a NZ company that holds debt issued by:

(i) A non-associated New Zealand tax resident;

(ii) A New Zealand tax resident associated with the NZ company that is not a member of the New Zealand group and is subject to the thin capitalization regime; or

(iii) A nonresident that does not carry on business in New Zealand through a fixed establishment,

to exclude the debt amount from the NZ company's total debt and total assets when calculating its New Zealand group debt percentage, provided that an arm's-length amount of consideration is provided for the debt. The on-lending concession's effect is that loan assets may be 100% debt-funded without giving rise to a denial of interest deductions.

A similar rule must be applied when calculating the NZ company's worldwide debt percentage, although in this case the rule operates to the NZ company's disadvantage (since it will tend to reduce the worldwide debt percentage).

Comment: A number of New Zealand's double tax agreements, including the New Zealand-United States double tax agreement,[504] may arguably override the thin capitalization regime. Those treaties contain non-discrimination provisions that:

(i) Prohibit New Zealand from disallowing a deduction for interest paid to tax residents of the treaty partner country; and

(ii) Prohibit New Zealand from imposing, on a NZ company owned or controlled (directly or indirectly) by tax residents of the treaty partner country, tax or requirements in connection with tax more onerous than those faced by a New Zealand-owned NZ company.

The exact effect of these provisions on the thin capitalization regime is a matter of some complexity, and care needs to be taken before any NZ company with foreign owners relies on such a treaty override.

(b) Thin Capitalization Regime as It Applies to New Zealand Registered Banks and Their Banking Groups

A special thin capitalization regime applies to a New Zealand registered bank. The regime (found in Subpart FE of the ITA) is based on the capital adequacy rules applied by non-tax banking regulations, and requires such a bank to have a minimum level of equity to support its assets.

This contrasts with the test under the thin capitalization regime applying to nonbanks, which compares the total debt of the worldwide group to total assets. If the bank and its banking group do not have the required level of equity, the bank will be denied interest deductions attributable to the shortfall.

The regime applies to the "New Zealand banking group" of the registered bank. The New Zealand banking group comprises:

[504] Convention between the United States of America and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on July 23, 1982 (the "New Zealand-United States double tax treaty").

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(i) The registered bank, if it is a New Zealand tax resident, otherwise the fixed establishment in New Zealand of the registered bank;

(ii) All New Zealand tax resident entities or branches of nonresident entities that would be required to be included in the consolidated accounts of the registered bank if it were a New Zealand tax resident (with some minor adjustments), or are in the same 66%-owned group as the registered bank.

The registered bank must calculate its New Zealand banking group's "net equity." The net equity is compared to the bank's "net equity threshold." If the net equity figure is less than the net equity threshold, then a portion of the interest deductions claimed by the New Zealand banking group's reporting bank[505] will effectively be denied, as additional income will arise to the bank.

The New Zealand banking group's "net equity threshold" is 6% of its risk-weighted assets less certain deductions.

The risk-weighted assets of the New Zealand banking group are defined as the total regulatory value of the group's assets plus any exposures not included in its banking sheet. The items deducted in calculating "net equity" are also deducted from the total risk-weighted assets (with the exception of the notional amount for the group's foreign tax credits).

The effect of deducting the value of an asset in calculating both the "net equity" and the "net equity threshold" is that such assets will require 100% equity funding.

Banks cannot disregard "on-lending" transactions, as is the case under the on-lending concession in the general thin capitalization regime. Therefore, on-lent debt must be in part equity funded, thus increasing the total amount of equity a banking group is required to hold.

(3) Restricted Transfer Pricing Rule

The restricted transfer pricing rule buttresses the thin capitalization regime by limiting the interest rate that can be applied to certain cross-border related party borrowing. The restricted transfer pricing rule was enacted because a NZ company was able to comply with the thin capitalization rules by ensuring its total level of debt remained below the specified thresholds, but still generate excessive interest deductions by borrowing at high interest rates from related parties.

New Zealand's existing transfer pricing rules (described in XIV.A., below) were suggested to be unable to counteract this practice because it was possible to gear up a NZ company or add features to the related party borrowing to justify a higher interest rate than the NZ company would be prepared to pay to a third party.

The restricted transfer pricing rule applies to certain related party loans between a nonresident lender and a New Zealand resident borrower. The rule is complex, but broadly allows the Commissioner of Inland Revenue to alter the terms and conditions of a borrower and/or the loan instrument to determine the appropriate rate of interest. In particular, the Commissioner may:

(i) Adjust the credit rating of the New Zealand borrower if the New Zealand borrower has more than NZ$10 million of cross-border related borrowing and:

- The borrower's New Zealand group debt percentage is greater than 40% and greater than 110% of its worldwide group debt percentage; and/or
- The borrowing is from a low-tax jurisdiction different from the ultimate parent's (generally, borrowing from a lender resident in a country where the interest is subject to a lower than 15% tax rate).

(ii) Disregard uncommercial features, including debt subordination, a loan term greater than five years and certain other features that are not typically found in third party debt.

Comment: This rule is controversial in a cross-border context because it may result in the denial of interest deductions in New Zealand while the foreign related counterparty is still required to include the corresponding amounts as income.

g. Royalties

Although a royalty is deemed to be gross income (see V.B.3.h.(3), above), it does not follow that royalties paid for the acquisition of a capital asset are deductible.[506]

A NZ company's payment of a royalty can be deducted if the payment is made in carrying on a business for the purpose of deriving the NZ company's gross income, or is incurred for the purposes of deriving gross income.

A royalty paid by a NZ company to acquire a capital asset is not deductible.

The asset can be depreciated if the asset is included in Schedule 14[507] to the ITA. See V.B.4.i., below, for further discussion on depreciation.

h. Taxes

Payments of income tax are not deductible, but most other taxes incurred in the derivation of a NZ company's gross income are deductible. Examples of deductible taxes include fringe benefit tax, GST not recovered by way of an input tax credit, and customs duties.

i. Depreciation and Amortization

New Zealand's depreciation regime allows a NZ company to amortize or depreciate the cost of certain capital assets that are used or available for use by the NZ company in deriving gross income or in carrying on a business for the purpose of deriving gross income.

The cost of an asset is deductible over the asset's life, with the amount of the depreciation deduction available each year calculated by applying prescribed rates to the cost of the asset.

[505] The New Zealand banking group's "reporting bank" is the registered bank (where there is a New Zealand tax resident registered bank in the group) or the nonresident registered bank's fixed establishment in New Zealand (where there is not a New Zealand tax resident registered bank in the group). If there is more than one New Zealand registered bank or fixed establishment in the group, then the "reporting bank" is the registered bank/fixed establishment (as applicable) that so elects.

[506] *IRC v. Ramsay* [1935] All ER 847.

[507] Schedule 14 to the ITA includes the right to use a copyright, a patent, the right to use a trademark, and the right to use a design or model, plan, secret formula or process, or other like property or right.

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The depreciation regime recognizes that assets become less valuable over time and will eventually wear out and need to be replaced. The deteriorating value of the asset is considered to be a cost of deriving gross income or carrying on a business for the purpose of deriving gross income.

(1) Depreciable Property

Sections EE 1 and EE 11 of the ITA allow a NZ company to claim a deduction for depreciation on depreciable property. This deduction must be taken in full in the relevant income year.

The term "depreciable property" means any property that might reasonably be expected to decline in value while available for use in gaining or producing gross income, or in carrying on a business for the purpose of gaining or producing gross income.

The following are excluded from the definition of "depreciable property:"

(i) Trading stock;

(ii) Land (except buildings and certain improvements to land);

(iii) A lease of land with a perpetual right of renewal;

(iv) Financial arrangements; and

(v) Intangible property, other than intellectual property that has a finite useful life (for example patents, or the right to use a copyright, patent, or trademark), licenses to use land and machinery, and software-related rights.

Comment: The ability to claim depreciation on non-residential buildings that have an estimated useful life of 50 years or more has been removed again with effect from the 2024–25 income year (it had been previously removed with effect from the 2011–12 income year and subsequently reinstated with effect from the 2020–21 income year).

The term "building" can have various meanings, but ordinarily is defined by reference to the permanency or size of a structure, whether that structure has enclosed walls and roof and a variety of other considerations (for more detailed explanation of "building," see IS 10/02 — Meaning of 'building' in the depreciation provisions[508]). A transitional provision for commercial fit-out is available for buildings acquired in or before the 2010–11 income year.

(2) Depreciation Rates

The CIR prescribes depreciation rates for a wide range of assets based on the asset's estimated useful life. These rates vary depending on when the property was acquired. For assets acquired on or after April 1, 2005, the applicable rates are listed in Part 2 of IR's "General Depreciation Rates" document (see Worksheet 7).

Note: New property acquired on or before May 20, 2010, will generally qualify for 20% depreciation loading, which allows the depreciation rate to be multiplied by 1.2.

A NZ company is entitled to apply for either a special depreciation rate different from that specified by the CIR or a provisional depreciation rate where no rate is specified by the CIR.

Special rules apply to intangible property where the useful life of the property matches its legal life. Generally, the cost is deductible on a straight-line basis over the life of the asset.

(3) Depreciation Methods

A NZ company can depreciate assets using one of three methods: the straight-line method, the diminishing value method, and (in certain cases) the pool method. The NZ company's election is subject to a determination by the CIR that one method only may be used with respect to a particular asset. A brief description of the three methods is as follows:

(i) Straight-line method — under this method, a constant percentage of the cost of the asset is deducted from the property's adjusted tax value each year;

(ii) Diminishing value method — under this method a constant percentage of the adjusted tax value of the asset is deducted from the property's adjusted tax value each year; and

(iii) Pool method — this method may only be used where assets of NZ$5,000 or less are combined in a pool. The average value of the pool of assets is depreciated using the diminishing value method in accordance with the formula prescribed in Section EE 21 of the ITA.

Special rules apply when an asset is acquired or disposed of during the year. An apportionment of depreciation must be made when an asset is acquired part way through an income year. Under Sections EE 40 to EE 47 of the ITA, if the asset is acquired from an associated person, the acquirer is not allowed any greater deduction for depreciation than that which would have been allowed to the associated person if the asset had not been transferred (subject to the CIR exercising his or her discretion to the contrary). No such limit applies if the vendor and the purchaser are not associated.

When depreciated property is sold for more than its depreciated value, the excess is deemed gross income of the vendor, up to the total amount of depreciation deducted with respect to the property.

If the property is sold for less than its depreciated value, the shortfall is deductible, although special rules apply to the sale of buildings and offshore oil exploration or drilling property.

In certain circumstances, the CIR may deem depreciable assets to have been sold at market value where they are sold for other than market value.

Special rules also apply to:

(i) Property not used wholly for business purposes; and

(ii) Part interests in depreciable property.

Under Section EE 39 of the ITA, a NZ company can write off the adjusted tax value of a depreciable asset if the asset is no longer used in the company's business and the cost of disposing of the asset would be more than any consideration the NZ company could derive from disposing of it. The asset cannot be a building (unless the requirements in Section EE 39(2) are met) and cannot have been depreciated under the pool method.

[508] https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/interpretation-statements/is1002.pdf.

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(4) Obsolete Equipment

Section EE 63 of the ITA defines the term "estimated useful life." An asset's estimated useful life determines the depreciation rate for the asset. Obsolescence is a factor taken into account when determining an asset's estimated useful life.

The CIR considers an asset to be obsolete if it is no longer useful in deriving assessable income before the end of its physical life. Obsolescence is caused by reasons other than physical deterioration or wear and tear, such as technological changes or improvements.

Comment: The CIR has provided the following example illustrating the effect of obsolescence on an asset's estimated useful life and depreciation rate:[509]

> E Ltd owns and operates a business renting buses to the public. Some of E Ltd's buses have diesel engines, and those buses are all five years old with an estimated useful life of another seven years.
>
> New research shows that these types of diesel engines in buses, when they are over 10 years old, are extremely harmful to the environment.
>
> As a result, the Government decides to pass new environmental emissions laws for buses with this type of engine over 10 years old. These new laws mean E Ltd's buses with diesel engines that are over 10 years old are not allowed to be registered to be driven on the road.
>
> The effect of the new law is that the estimated useful life of these diesel engine buses of E Ltd has been decreased from 12 years to 10 years.
>
> The CIR considers that this is an example of economic obsolescence, such that the applicable rate of depreciation on E Ltd's buses with this type of engine may no longer be appropriate.
>
> Therefore, E Ltd may wish to apply to the CIR for a depreciation determination setting new depreciation rates for these buses.

j. Charitable Donations

A NZ company can deduct a gift of money made to a donee organization. Generally, an entity will qualify as a donee organization if it is not carried on for the private pecuniary profit of an individual, and its funds are applied wholly or mainly to charitable, benevolent, philanthropic or cultural purposes within New Zealand.[510]

Certain other entities may also qualify as donee organizations, such as a school board of trustees, tertiary education institutes, or community housing entities. The deduction is limited to the NZ company's net income in the corresponding tax year.[511]

Comment: Charitable donations should be distinguished from sponsorship expenses, which are generally deductible without restriction. The NZ company would need to show that it incurred the sponsorship expense to promote its business.

k. Casualty Losses

Irreparable damage to a business asset is treated as a "disposal" of the asset, and the resulting loss may be deductible under Section EE 48(2) of the ITA.

Insurance proceeds are treated as proceeds from the sale of the lost asset, and depreciation adjustments (including a recapture of amounts previously deducted) are made.

l. Reserve Accounts

A NZ company can deduct an expense or loss only if the expense or loss has actually been incurred (see V.B.2.(c)(2), above).

The general position is that a reserve account that recognizes a future incurring of an expense or loss is not deductible.

However, the CIR has recognized that certain reserves may be deductible, such as reserves for debtor discounts and hire purchases.

Comment: The Privy Council in *CIR v. Mitsubishi Motors New Zealand Ltd*[512] held that the taxpayer company could deduct a reserve for future payments to be made under a vehicle warranty, despite the requirement that customers provide notice to the taxpayer company when claiming under the warranty.

The Privy Council based its decision on the grounds that the percentage of vehicles sold with defects covered by the warranty could be reliably estimated.

The taxpayer's practice was to recognize its anticipated liabilities under its warranties that remained unexpired at the end of the income year in which the cars were sold.

The Privy Council accepted the taxpayer's argument that, as statistical records showed 63% of cars sold had a defect, the amount of liability relating to that 63% could be deducted in the year of sale.

m. Bad Debts

A deduction for bad debts will be allowed only if:[513]

(i) The CIR is satisfied that bad debts have genuinely been written off on a realistic basis in the income year in question, and there is no reasonable expectation of recovery;

(ii) The debtor is released from making all payments under the Insolvency Act 2006 (but excluding Part 5, Subparts 1 and 2 of that Act), under the Companies Act 1993, or under the laws of a country other than New Zealand; or

(iii) The debtor is a company that is released from making all remaining payments by a deed or an agreement of composition.

Section DB 31 of the ITA imposes additional restrictions on claiming a bad debt deduction relating to a financial arrangement:

[509] Inland Revenue, *Interpretation Statement: Income Tax — Depreciation: Meaning of "Obsolescence" in the Definition of "Estimated Useful Life"* (IS 11/01) at paras. [74]–[75].

[510] Inland Revenue, *Interpretation Statement: Income tax: Donee organisations — meaning of wholly or mainly applying funds to specified purposes within New Zealand* (IS 18/05) provides that IR considers "wholly or mainly" to mean at least 75% for this purpose.

[511] ITA, s. DB 41(3).

[512] (1995) 17 NZTC 12,351.

[513] ITA, s. DB 31.

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(i) The creditor should be allowed a deduction for an unpaid amount owing under the financial arrangement that the creditor has previously recognized as income (i.e., a deduction is allowed for accrued interest, but not for the principal of the bad debt) if the creditor is not associated with the debtor;

(ii) The creditor should also be allowed a deduction for an amount of unpaid principal owing under the financial arrangement if the creditor is a dealer or holder in financial arrangements and is not associated with the debtor;[514] or

(iii) The financial arrangement is an agreement for the sale and purchase of property or services, and the creditor carries on a business of dealing in the property or services that are the subject of the agreement for the purpose of deriving assessable income.

Where a NZ company acquired the debt from another person, the NZ company is allowed a deduction only to the extent of the consideration it paid to acquire the debt.

Bad debts that are funded by "limited recourse arrangements" are subject to further restrictions to ensure deductions can only be taken by holders of debt to the true economic cost. The restrictions prevent a timing advantage that could otherwise arise prior to the calculation performed when the financial arrangement comes to an end (the base price adjustment).

A bad debt written off and subsequently recovered is treated as income in the year of recovery.

n. Inventory Write-downs

A NZ company is allowed a deduction in an income year for the value of its inventory (or "trading stock" as it is known in the ITA) at the end of the previous income year, but must recognize the value of its trading stock at the end of the income year as income. The effect is that the change in the value of its trading stock during the income year is an amount of net income or loss for the NZ company.

There are different definitions of "trading stock" for different parts of the ITA. For purposes of trading stock valuation purposes, "trading stock" means property that a person that owns or carries on a business has for the purpose of sale or exchange in the ordinary course of the business.[515]

Trading stock includes, for example, partly-completed work, materials to produce trading stock, and property on which the person has incurred expenditure if the property would be trading stock if the person had possession of it. Certain assets are excluded from the definition of trading stock, including land, depreciable property and materials completely consumed or rendered unusable in the production of goods or performance of services.

The requirements for valuing trading stock differ depending on whether or not the taxpayer is a "small taxpayer." A "small taxpayer" is a taxpayer whose business has a gross annual turnover of NZ$3 million or less.

A taxpayer that is not a "small taxpayer" must value trading stock using a cost valuation method, unless the market selling value is less than cost, in which case the taxpayer may use the market selling value.

Replacement price and discounted selling price methods may be used, but only if the taxpayer uses these methods in its financial statements. Small taxpayers may choose to value trading stock using market selling value even when this value is above cost, provided they do so consistently from year to year.

Replacement price and discounted selling price methods may be used to calculate the value of stock if the small taxpayer uses these methods in its financial statements, or if it does not prepare financial statements.

o. Rents

A NZ company can deduct its rental payments if they are incurred in deriving its gross income, or in the course of carrying on a business for the purpose of deriving its gross income.

A NZ company's payments made under a "finance lease" are governed by special provisions that treat the lease as a purchase with a deferred payment. A "finance lease" is a lease of a personal property lease asset that:

(i) When the NZ company enters the lease, involves or is part of an arrangement which involves:

- The transfer of ownership of the leased asset to the NZ company or its associate during or at the end of the lease term;
- The NZ company or its associate having the option of acquiring the leased asset for an amount likely to be substantially lower than the leased asset's market value of the date of acquisition; or
- A right of the NZ company's associate to acquire the asset, or the right of the lessor to require the associate to acquire the asset, during the term of the lease under an arrangement that does not entitle the associate to receive all of the personal property lease payments that may fall due after the acquisition;

(ii) When the NZ company enters the lease, or from a later time, involves a term of the lease that is more than 75% of the leased asset's estimated useful life (as determined under Section EE 63 of the ITA); or

(iii) The NZ company enters into on or after June 20, 2007, and is, or is part of, an arrangement that, when the NZ company enters the lease or when a change in the terms of the arrangement changes the allocation or size of the risks and rewards incidental to owning the leased asset:

- Involves using the asset outside of New Zealand for all or most of the term of the lease;
- Involves income of any person that is not the lessor, arising from the use of the asset by any person, that is exempt income, excluded income, or nonresidents' foreign-sourced income; and
- Is a finance lease under New Zealand International Accounting Standard 17 for the lessor, or for a company in the same group of companies as the lessor and derives assessable income from the arrangement, or is an

[514] The capital limitation does not prevent a deduction for a bad debt for both accrued interest and the principal amount of a financial arrangement that was entered into in the normal course of the creditor's business.

[515] ITA, s. EB 2(1).

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arrangement under which persons that do not include the lessor bear substantially all the risks and rewards incidental to owning the lease asset, determined at the time the NZ company enters the lease and taking into account later changes to the arrangement.

Comment: The finance lease definition was extended to include arrangements described in the third bullet point above to target arrangements that were being carried out to enable a New Zealand resident lessor to claim depreciation deductions for assets in which they have no economic interest that are leased to nonresident lessees who are not subject to tax in New Zealand.

Expenditure under a finance lease is calculated under the financial arrangements rules (see V.B.3.h.(1), above). Generally it will be split between repayment of a notional loan of the purchase price and "interest."

The "interest" component will generally be deductible to the lessee, while the principal component is non-deductible but the notional purchase price may establish a right to depreciation for the lessee.

Section FA 12 of the ITA governs the deductibility of payments made under hire purchase agreements. Payments made under hire purchase agreements are essentially treated in a similar manner as payments made under finance leases.

p. Salaries and Wages

An NZ company that is an employer can usually deduct salaries and wages paid to its employees if the NZ company is carrying on business for purposes of deriving gross income.

Generally, an NZ company that provides a benefit under an employee share scheme will be deemed to have an amount of expenditure equal to an employee's income under an employee share scheme that arises after the "share scheme taxing date" (see X.C.2.a.(2), below) and will be entitled to deduct this expenditure subject to the ordinary rules for claiming deductions.

Excessive payments to an employee shareholder or a relative of an employee shareholder may be deemed a dividend paid to the employee or relative and therefore not deductible.

Salaries and wages may not be deductible if they are incurred in relation to a capital project.

In *Christchurch Press Co. Ltd v. CIR*,[516] the High Court held that salaries and wages were not deductible because they were paid to employees for the period in which the employees were engaged in installing new equipment and renovating existing equipment. The costs were required to be capitalized into the cost of the equipment.

q. Other Deductions from Gross Income

(1) Emissions Units

A deduction is allowed for an expenditure or loss incurred on acquiring emissions units (unless they were acquired at a price of zero), or on converting emissions units.

(2) Payments Under a Restrictive Covenant

Payments under a restrictive covenant for the restraint of the performance of services by a person and exit inducement payments that are specifically taxable under Sections CE 9 and CE 10 of the ITA are generally deductible (see Section DC 9 of the ITA).

(3) Black Hole Expenditure

A "black hole expenditure" is an expenditure that is of a capital (and thus not deductible) nature, but does not give rise to a depreciable asset capable of being depreciated over time.

Black hole expenditures will often arise when a NZ company incurs expenditure to determine the practicality of an investment or new proposal, but subsequently abandons the investment or proposal such that no asset is acquired for the purposes of the depreciation regime.

Comment: In *TrustPower Limited v. CIR*,[517] the Supreme Court upheld the Court of Appeal's decision not to allow the company to deduct the costs of obtaining resource consents for four projects in its "development pipeline."

The Supreme Court concluded that the expenditure was capital in nature, and therefore nondeductible, on the grounds that obtaining the resource consents represented "tangible progress" towards the completion of projects that would be on capital account if they came to fruition.

The Supreme Court's decision narrowed the circumstances in which "feasibility" type expenditure is immediately deductible as revenue expenditure relative to IR's previous position of allowing an immediate deduction for "feasibility" type expenditure incurred before the taxpayer became definitely committed to proceeding with the project.

This decision extended the cases of "black hole" expenditure where neither an immediate deduction nor depreciation deduction is available. IR released a revised interpretation statement in light of this decision on February 27, 2017 (IS 17/01).

Specific statutory provisions have been enacted that expressly allow a deduction for certain types of expenditure that would otherwise constitute black hole expenditure. For example, a deduction is available if a NZ company incurs expenditure for the purposes of:

(i) Applying for a resource consent under the Resource Management Act 1991, and the NZ company does not obtain the consent, or obtains the consent but does not use the resource consent;[518]

(ii) Applying for a patent or plant variety rights, and the NZ company does not obtain the right;[519]

(iii) Developing software that would have resulted in depreciable property if it was completed, and the development is abandoned before the copyright in the software is depreciable property.[520]

[516] (1993) 15 NZTC 10,206.

[517] [2016] NZSC 91.

[518] ITA, s. DB 19.

[519] ITA, ss. DB 37 and DB 40BA. Note also that ITA, s. DB 34 allows a one-off deduction for capitalized R&D expenditure on intangible assets developed by the taxpayer that are not depreciated for tax purposes.

[520] ITA, s DB 40B.

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Comment: The Taxation (Annual Rates for 2020–21, Feasibility Expenditure, and Remedial Matters) Act 2021 introduced changes to the deductibility of "black hole" expenditure incurred in 2020–1 and later income years.

Following those changes, a NZ company is allowed to deduct:

(i) Expenditure incurred in completing, creating, or acquiring depreciable or revenue account property, if progress on that property is abandoned with the outcome that the property is not completed, created or acquired, and a deduction is not otherwise allowed under any other provision in the ITA.

The deduction must be spread in equal proportions over a five-year period from the income year in which progress is abandoned.

If the property or similar property is subsequently completed, created or acquired, deductions previously allowed may be clawed back as income and the depreciation regime would apply to the completed property.

(ii) Expenditure incurred in completing, creating or acquiring depreciable or revenue account property, if the total expenditure is less than NZ$10,000 and is not otherwise deductible.

The deduction would be available immediately (i.e., there would be no need for abandonment).

(4) Employer's Superannuation Contribution

Contributions made by an employer to a superannuation scheme are deductible for the employer if the scheme is a "superannuation scheme" as defined in Section YA 1 of the ITA (which includes registered superannuation schemes under the Superannuation Schemes Act 1989 and KiwiSaver schemes).[521]

The contributions are subject to "employer's superannuation contribution tax" (ESCT), which is discussed further at V.C.8., below.

5. Loss Carryovers, Carrybacks, and Grouping

a. Carrying Losses Forward

Losses incurred by a taxpayer in an income year may be carried forward to future income years and set off against the net income of that taxpayer in a later income year.[522] No time restriction applies to the carryforward of losses.

A loss that is not wholly absorbed in one year may be carried forward and set off against the net income of later years. Where more than one year's losses are carried forward, they must be set off in the order incurred.

For a company to carry forward losses, ordinarily 49% continuity of ownership must be maintained from the beginning of the period of loss through to the eventual offset. Continuity of shareholding is calculated by reference to the shareholders' interests in the company as determined by their lowest percentage voting interests, or their lowest percentage market value interests (where a market value circumstance applies).

From April 1, 2020 onwards (with respect to losses incurred from the 2013–4 income year onwards), a company may continue to carry forward losses despite breaching the 49% ownership continuity requirement, provided there is no major change in the company's business activities for a period of five years after the breach (or until the relevant losses are used, if earlier) other than a permitted major change described in section IB 3(5).

Some relaxation of these rules is permitted in the case of companies listed on any stock exchange, special corporate entities and widely held companies.

Comment: In practice, some uncertainty will remain as to whether a "major change in the nature of the business activities" has occurred and, if so, whether it was a "permitted major change." Inland Revenue has published some guidance that is intended to assist companies with applying the continuity rules and the rules for the carry forward of losses.[523]

b. Grouping of Losses

Where a NZ company is a member of a group of companies, a loss incurred by the company may, instead of being carried forward by that company, be transferred to another group company and set off against the profits of that other company.[524]

Loss offsets may be made either by way of a subvention payment or a loss offset election.

A subvention payment is made to cancel or reduce the loss incurred by the loss company. Such a payment gives rise to a reduction in the available net losses of the loss company (in the same order the losses arose)[525] and a deductible expense for the profit company.

A subvention payment requires an actual payment to be made from the profit company to the loss company. A loss offset election merely requires notice of the offset to be made to the Commissioner of Inland Revenue (CIR).

The following requirements must be met before a loss company may offset its loss by way of offset election or subvention payment:

(i) The profit company and the loss company must maintain 66% commonality of ownership from the start of the income year in which the loss was incurred until the end of the year of offset. Part-year loss offsetting is permitted.

(ii) The loss company must maintain 49% continuity of ownership or meet the continuity of the business activities requirements.

(iii) The amount of the loss offset or subvention payment must not exceed the taxable income of the profitable company in the year of offset.

(iv) Any subvention payment must be made by March 31 of the year following the year of offset.

[521] ITA, s. DC 7(1).

[522] ITA, s. IA 5.

[523] IS 22/06: Loss carry-forward — continuity of business activities and IS 22/07: Company losses — ownership continuity, sharing and measurement.

[524] ITA, s. IC 1. Note that the Taxation (Annual Rates for 2016–2017, Closely Held Companies, and Remedial Matters) Act introduced an amendment to allow commonly owned companies to transfer imputation credits as part of loss grouping. These imputation credits would allow the profit company to impute the dividend paid to its shareholders. The amendment applies from the 2017–2018 income years.

[525] ITA, s. IC 5.

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(v) Notice of the offset or subvention payment must be given to the CIR by March 31 of the year following the year of offset.

Losses that have been carried forward from a part year by a loss company may be grouped with profit from a profit company if the grouping requirements are met for the part year in which the loss was incurred.

Where losses arise from transactions funded by intragroup debt or equity, the lender may not both group the loss against other group company income and claim a deduction with respect to the bad debt or the share loss. If it were otherwise the taxpayer would, in effect, be claiming a double deduction with respect to the same expense.[526]

Inland Revenue has published further guidance for companies on the rules for grouping of tax losses.[527]

c. Cashing Out Research and Development Losses

To incentivize innovation, research and development, startup companies in a tax loss position are permitted to cash-out up to 28% of their tax losses from R&D expenditures in any given year. To be eligible, the company must be a loss-making company resident in New Zealand, with a sufficient proportion of labor expenditure on R&D.

The amount of losses that can be cashed out is capped at NZ$500,000 for the 2015–16 year, increasing by NZ$300,000 in each of the next five years, to NZ$2 million. The initiative is intended to provide a temporary timing benefit. When businesses make a return on their R&D, they will be required to repay some or all of the amounts cashed out.[528]

6. Tax Credits

A tax credit is a credit for tax paid, tax withheld, or other circumstances calculated under Parts L and M of the ITA, that may be used to satisfy a NZ company's income tax liability for a tax year as far as the credits extend.

a. Foreign Tax Credit

The ITA permits a NZ company to claim a credit for foreign taxes paid on its foreign-source income if that income is also subject to tax in New Zealand. A credit for foreign tax paid is limited to the New Zealand tax payable on the "segment of foreign-source income," which is the amount of assessable income from one foreign country that comes from one source or is of one nature.

The foreign tax must be either:

(i) Covered by a tax treaty and a credit may be allowed under, and in accordance with, the terms of that treaty; or

(ii) Of substantially the same nature as New Zealand income tax.[529] The NZ company must claim a foreign tax credit against its New Zealand income tax liability within four years after the end of the tax year in which the credit arises (although the CIR can extend the four-year period by up to two years) and its claim must be supported by appropriate information.

Section LJ 7 of the ITA denies the NZ company a foreign tax credit (and requires the NZ company to repay the amount of any foreign tax credit previously claimed) if and to the extent the NZ company (or its associate) receives a refund or repayment of the foreign tax, or a benefit of any kind that is determined directly or indirectly by reference to the amount of foreign tax paid.

The section's purpose is to counteract schemes whereby the NZ company receives a foreign tax credit but does not bear the economic burden of the foreign tax.

b. R&D Tax Credit

A person is eligible for research and development (R&D) tax credits if the person or a joint venture of which the person is a member:[530]

(i) Performs a "core R&D activity" in New Zealand, either itself or through a local R&D contractor that carries on business in New Zealand through a fixed establishment in New Zealand.

A "core R&D activity" is broadly an activity conducted using a systematic approach that has a material purpose of creating new knowledge, new or improved processes, services or goods and resolving scientific or technological uncertainty.

(ii) Carries on a business in New Zealand through a fixed establishment (unless the person is a tax charity or levy body).

(iii) Owns the results of its R&D activities (or a member of their corporate group that is resident in New Zealand or a jurisdiction with which New Zealand has a double tax agreement owns the results) or has the right to use the results of the activities for no further consideration.

(iv) Obtains approval of its R&D activities.

(v) Incurs at least NZ$50,000 of eligible R&D expenditure in the relevant income year or carries on R&D activities on behalf of certain approved research providers.

Certain persons are not eligible for an R&D tax credit, including persons that fail to file a return of income on time, are an R&D contractor for another person who carries on a business in New Zealand through a fixed establishment, are a nonresident member of a joint venture or partnership, or derive only certain types of exempt income.

A person that meets the above eligibility requirements may claim R&D tax credits for an income year equal to 15% of its eligible R&D expenditure (with eligible R&D expenditure capped at NZ$120 million, unless the person has received CIR approval to exceed this amount) incurred in the income year.

Eligible R&D expenditure includes most types of expenditure incurred on R&D activities, including expenditure on wages and salaries, consumables, depreciation and the costs of

[526] ITA, ss. GC 4 and IC 5.

[527] IS 22/07: Company losses — ownership continuity, sharing and measurement.

[528] ITA, s. MX 7.

[529] See Inland Revenue, *Interpretation Statement: Income tax — Foreign tax credits — What is a tax of substantially the same nature as income tax imposed under s BB 1?* (IS 14/02) for a discussion of when a tax will be considered to be of substantially the same nature as New Zealand income tax.

[530] ITA, s YL 3.

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creating intangible property. Some expenditure is expressly excluded or is capped.

Where a taxpayer has R&D tax credits for an income year, but is in a tax loss position or has insufficient income tax liability to use all of its R&D tax credits in the relevant income year, the taxpayer may claim a refund to the extent its R&D tax credits do not exceed the amount of labor-related taxes (e.g., PAYE, FBT and ESCT) paid by the taxpayer and certain group companies for the relevant income year.

Any non-refundable R&D tax credits unable to be used by the taxpayer in the relevant income year may be carried forward, provided 49% continuity of ownership is maintained if the taxpayer is a company.

c. Imputation Credits

The rationale behind imputation credits is to ensure that, as far as possible, company income distributed to a shareholder is taxed at the shareholder's marginal tax rate only (i.e., economic double taxation is prevented).

Imputation credits are generated from the tax paid by a NZ company on its income. These imputation credits may be attached to dividends paid by the NZ company. Where a NZ company (the "recipient") receives a dividend from another NZ company that has an imputation credit attached, and the recipient is subject to tax on the dividend, the recipient is entitled to a tax credit equaling the imputation credit, to reduce the tax payable by the recipient on the dividend.[531]

The imputation credit attached to the dividend is credited to the recipient's imputation credit account,[532] and may be attached to dividends paid by the recipient to its shareholders.

The effect is that income tax paid by a NZ company is essentially a withholding tax for shareholders on the dividends they receive from the NZ company. However, because imputation credits cannot be refunded to shareholders, the income tax paid by the NZ company will be a final tax for shareholders that do not pay income tax in New Zealand (for example, nonresident shareholders and New Zealand resident shareholders that are tax-exempt) as they will have no New Zealand income tax liability against which to offset the imputation credits.

The ITA contains anti-streaming rules that prevent imputation credits from being directed only to those New Zealand resident tax-paying shareholders that are able to use them.

(1) Imputation Credit Accounts

A NZ company must establish and maintain an imputation credit account (ICA). The ICA is a memorandum account only. Upon payment of company tax by the NZ company, an amount equal to the tax paid is credited to the ICA.

Any dividends paid by the NZ company may have imputation credits attached, up to a maximum of 38.88% of the net dividend (based on the corporate tax rate of 28%). If the NZ company pays dividends with imputation credits attached, the amount of the imputation credits is debited to the ICA.

If the NZ company receives dividends with imputation credits attached, the amount of the imputation credits is credited to the ICA.

If the NZ company's imputation credits exceed its tax liability, the unused imputation credits can be converted into a loss and carried forward for offsetting against future assessable income (subject to the loss continuity requirements being met).

The first dividend paid in a tax year is called the "benchmark dividend." The benchmark dividend establishes the imputation ratio (i.e., the amount of credits attached to the dividend) for all dividends subsequently paid during the year. Any divergence from this ratio requires a declaration to the CIR stating that the later dividend has not been paid to secure a tax advantage.

A company dividend statement must be completed upon the declaration of a dividend and forwarded to IR. A shareholder dividend statement must also be sent to each shareholder when the dividend is paid.

(2) Trans-Tasman Imputation Regime

The trans-Tasman imputation regime allows Australian tax resident companies to maintain New Zealand ICAs and to attach imputation credits to dividends they pay.

The regime allows imputation credits to be passed up a chain comprising both New Zealand and Australian companies to the ultimate shareholder in New Zealand who can use those credits.

Further details of the regime are as follows:

(i) Taxes that give rise to imputation credits in Australian companies' ICAs include NRWT and nonresident contractors' withholding tax;

(ii) Imputation credits must be attached pro rata to all dividends, not solely to dividends paid to New Zealand shareholders; and

(iii) Australian companies must comply with New Zealand law relating to imputation credits.

The Australian government has a similar regime so a NZ company that pays tax in Australia may maintain franking accounts and attach franking credits to dividends.[533]

Comment: Before the regime was enacted, imputation credits arising from tax paid by Australian tax resident companies in New Zealand could not be used. This meant that if an Australian company's earnings had been taxed in New Zealand and then distributed by the Australian company to New Zealand shareholders, the earnings were taxed in New Zealand at a very high effective tax rate. However, the application of a *pro rata* allocation rule reduces the benefit of the regime because the imputation credits attached to dividends paid to non-New Zealand shareholders are effectively lost.

7. Assessment and Filing

Taxpayers assess their own tax liabilities. Taxpayers required to file annual returns of income (which include New Zealand companies) are also required to furnish notices of self-assessment with their returns.

A NZ company that has a balance date approved by the CIR falling between October 1 and the following March 31 (inclusive) must file returns by the following July 7.

[531] ITA, s. LE 1.
[532] ITA, s. OB 4.
[533] Franking accounts and credits are the Australian equivalent to an imputation credit account and imputation credit.

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Where the NZ company's balance date falls between April 1 and the following September 30 (inclusive), the returns must be filed by the seventh day of the fourth month after the balance date.

The CIR may approve the electronic filing of returns.

A NZ company that has not finalized its annual accounts may, through its agent or a chartered accountant, apply for an extension of time in which to furnish its return. Extensions may be given up to the March 31 following the date on which the return would otherwise have to be filed.

a. Non-active Companies

A "non-active company" is not required to file an annual income tax return.

An NZ company may notify IR that it is a "non-active company" if it has not derived any gross income, has no allowable deductions, has not disposed of any assets and has not been a party to any transactions that give rise to income, fringe benefits or a debit in its ICA (for purposes of determining whether an NZ company is non-active, statutory company filing fees and associated costs, bank charges and other minimal administration costs totaling less than NZ$50 per year, and interest income earned on a bank account that does not exceed the bank charges and administration costs may all be ignored).

b. Payment of Tax

All NZ companies are subject to the provisional tax regime. The provisional tax regime requires installments of income tax to be paid to the CIR during the year in which the income is derived.

Provisional tax is not a separate tax — when the taxpayer completes its tax return and calculates its income tax liability for the income year, any provisional tax paid during the income year is deducted.

Taxpayers must determine their provisional tax liability using one of the following methods:

(i) The provisional tax liability of a provisional taxpayer that does not elect another method will be equal to its residual income tax for the previous year increased by 5% (standard method). The taxpayer will be required to pay use-of-money interest to the extent its income tax liability for the income year exceeds provisional tax paid.

(ii) A provisional taxpayer may elect to estimate its provisional tax liability for the income year (estimation method).

The estimation method may be desirable for taxpayers that expect their income to be lower than the previous year and would therefore overpay provisional tax under the standard method. If the provisional tax liability calculated under the estimation method is unreasonably low, the taxpayer may be subject to penalties with respect to any underpayment. The taxpayer will be required to pay use-of-money interest if its income tax liability for the income year exceeds provisional tax paid by NZ$5,000 or more.

(iii) A provisional taxpayers with annual turnover of less than NZ$5 million can elect to use the Accounting Income Method (AIM).

Under the AIM, accounting software estimates a taxpayer's provisional tax liability using its accounting records and aims to align the amount and timing of provisional tax payments with the taxpayer's profit for the income year.

If the provisional tax liability calculated under the AIM method is unreasonably low, the taxpayer may be subject to penalties in respect of the underpayment. A taxpayer that has paid all provisional tax payments in full and on time during the income year will not be required to pay use of money interest with respect to underpaid provisional tax.

(iv) Certain provisional taxpayers will also be able to elect to base their provisional tax payments on a percentage of their annual GST turnover (this method will not be available to taxpayers who pay their GST on a six-monthly basis) (ratio method).

This option may be desirable for taxpayers whose income fluctuates during the income year as it aims to align provisional tax payments with cashflow. A taxpayer that has used the ratio method for the entire income year will not be required to pay use-of-money interest with respect to underpaid provisional tax.

(v) The provisional tax liability of a provisional taxpayer that fails to file its income tax returns may be determined by the CIR.

The provisional tax instalment dates are aligned with the payment dates for GST.

For example, for a taxpayer with a standard income year of April 1 to March 31, the due dates for provisional tax payments during that year (as stated above) are:

Taxpayer Type	Provisional Tax Due Dates
GST taxpayers who pay GST every month or every two months using the standard or estimation method	Three compulsory payments on August 28, January 15, and May 7, and able to make voluntary payments at any time
GST taxpayers who pay GST every six months using the standard or estimation method	Two compulsory payments on October 28 and May 7, and able to make voluntary payments at any time
Taxpayers who adopt the GST ratio method	Six compulsory payments on June 28, August 28, October 28, January 15, February 28, and May 7, and able to make voluntary payments at any time
Provisional taxpayers who are not GST-registered and use the standard or estimation method	Three compulsory payments on August 28, January 15, and May 7, and able to make voluntary payments at any time

In its first year of business, a company that would otherwise be subject to the provisional tax regime generally does not

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pay provisional tax, as its residual income tax for the previous year is zero. Instead, it pays terminal tax (for standard year taxpayers, due on February 7 (or April 7 in certain circumstances) following the end of the first tax year) and pays provisional tax during the second and each subsequent income year.

However, if the company is exposed to use-of-money interest, it may be advantageous for the company to voluntarily pay provisional tax.

8. *Audit Process and Statute of Limitations for Assessment and Collection of Taxes*

The CIR has wide powers to obtain information to assist in carrying out his or her statutory functions. These powers include the right to full and free access to all land, buildings and places to inspect and copy all books and documents.[534] The CIR also has the power to remove documents for copying if it is not practicable to copy them at the premises where the documents are located.[535]

The CIR may request any information or records in the control of a New Zealand tax resident, including information or records held by an offshore entity controlled by a New Zealand tax resident.[536]

The primary statutory limit on the CIR's right to access documents is the taxpayer's right to legal professional privilege. Section 20 of the Tax Administration Act 1994 (TAA) provides a statutory privilege from disclosure in certain circumstances. This privilege only extends to correspondence to and from a taxpayer's lawyer. It does not generally extend to correspondence between a taxpayer and its accountant. Correspondence between a taxpayer and its accountant is afforded a narrower form of protection under Section 20B of the TAA, which provides for the non-disclosure of tax advice documents that would otherwise be required to be disclosed in certain circumstances.

Other extra-statutory forms of privilege may also apply to protect documents from disclosure, notably litigation privilege. See, for example, *Dinsdale v. CIR*.[537]

The CIR may amend an assessment at any time, subject to the time limitation contained in Section 108 of the TAA. Section 108 provides that where a taxpayer has provided a tax return and has been assessed, the CIR may not make a reassessment that increases the amount assessed after the period of four years from the end of the income year in which the taxpayer filed the tax return.[538]

This limitation period does not apply where the returns are, in the opinion of the CIR, fraudulent or misleading or do not mention gross income of a particular nature or from a particular source.[539]

The CIR may request offshore information held by large multinational groups and impose a fine of up to NZ$100,000 on a large multinational group member that fails to comply with an information request.[540]

The IR may also collect tax owed by a member of a large multinational group from any wholly-owned (local) group member.[541]

a. *Disputes Resolution*

The disputes resolution procedures aim to reduce the likelihood of disputes going to court by encouraging open and full communication between the parties, and to promote the early identification of the basis for, and the prompt and efficient resolution of, any dispute.

In broad terms:

(i) Both parties are required to disclose their facts and legal arguments early on in the process;

(ii) The parties are generally prevented from raising in court legal arguments that are not disclosed early on in the process; and

(iii) An assessment is required to be issued at the end, rather than near the beginning, of the process.

The manner in which the procedures are intended to work is broadly as follows:

(i) During or at the end of an audit of a taxpayer's tax returns, if there are matters on which the parties cannot agree, IR will generally issue the taxpayer a notice of proposed adjustment (NOPA).

The NOPA sets out the matter in dispute, the CIR's legal arguments and the adjustment sought in relation to the taxpayer's tax return.

The NOPA commences the formal disputes process.

(ii) The taxpayer then has two months to file a notice of response (NOR).

(iii) Although there is no legislative requirement that a conference be held at any stage, the Commissioner's practice is to hold a conference if the parties still disagree after the NOPA and NOR have been exchanged.

A conference can be either a formal or an informal discussion between the parties to clarify and, if possible, resolve differences in their understanding of facts, laws and legal arguments.

The conference may be facilitated by a senior IR officer who has not previously been involved in the dispute to promote and encourage structured discussion.

(iv) If the conference does not resolve the issue, IR will issue a disclosure notice and statement of position (SOP) to the taxpayer.

The SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the position taken by IR. The SOP contains more detail than the NOPA and, more importantly, issues and propositions of law not disclosed in the SOP cannot be introduced later, should the matter proceed to court.

[534] TAA, s. 17(1).
[535] TAA, s. 17C.
[536] TAA, s. 17E(1).
[537] (1998) 18 NZTC 13,583 (CA).
[538] TAA, ss. 108 and 113.
[539] TAA, s. 108(2).
[540] TAA, ss. 17E(2) and 139AB.
[541] ITA, s. HD 30.

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(v) The taxpayer then has two months to respond with its SOP.

(vi) If the issue remains unresolved after the exchange of SOPs, the dispute may be referred to the Disputes Review Unit (DRU), a separate unit of IR.

The DRU reconsiders the issue and is intended to provide an impartial review of the dispute within IR. One of the biggest constraints on the DRU is that it has limited fact finding powers and will generally assume IR's view of the facts is correct where the parties disagree as to factual matters. The DRU may therefore be of limited utility where the dispute involves questions of fact.

(vii) If the DRU agrees with the position taken by the taxpayer, the CIR is prohibited from challenging that decision and the dispute will come to an end. If the CIR agrees with the position taken by IR, IR will implement that decision by issuing a notice of assessment.

IR has stated that, as a general rule, it will follow the steps set out above.

However, it also states that it may abbreviate the process in certain cases. This generally involves skipping the conference phase and not referring the dispute to the DRU. This might occur, for example, where all the steps could not be completed before the CIR is time-barred from issuing an assessment.

Once an assessment is issued, the disputes procedures cease to apply, and the matter is dealt with pursuant to the challenges provisions in Part VIII A of the TAA.

The disputes procedures provide taxpayers with discretion to extend the time-bar by a period of 12 months (with the potential to extend the time-bar for a further six months from the end of the 12-month period by giving written notice).

In the past, the CIR has often been effectively forced to issue an assessment if he or she was about to be time-barred.

The taxpayer might agree to extend the time-bar if, for example, it sees a benefit from the dispute going to the DRU (which might not otherwise be possible because of the time-bar).

Comment: IR generally must issue a NOPA before issuing an assessment. However, where the taxpayer has not filed a tax return, the CIR can make a default assessment of the taxpayer without first issuing a NOPA to the taxpayer. To dispute a default assessment, the taxpayer must file a tax return for the period to which the default assessment relates and issue a NOPA to the Commissioner within four months of the default assessment. If the CIR agrees with the tax return and NOPA, the CIR will amend the default assessment. If the CIR disagrees, the CIR must issue a NOR and the dispute then follows the same disputes process as set out above, although the roles are reversed.

b. Challenges Procedure

A taxpayer who disagrees with:

(i) An assessment issued following the disputes process; or

(ii) A disputable decision (i.e., a decision of the CIR under a tax law that is not one declining a binding ruling or a decision that may not be the subject of an objection or challenged) that was the subject of an adjustment proposed by the taxpayer that the CIR has rejected,

may challenge that decision by filing proceedings with the Taxation Review Authority (TRA) or the High Court.

It is the taxpayer's responsibility to initiate court proceedings.

Proceedings must be filed within two months following the issue of the assessment (in the case of (i) and (ii), below) or the date the CIR issues a written notice that the adjustment will not be made (in the case of (iii), below), if:

(i) The assessment includes an adjustment that imposes a fresh liability or increases an existing liability and the taxpayer has rejected the adjustment;

(ii) The assessment was the subject of an adjustment proposed by the taxpayer that was rejected by the CIR and the taxpayer is subsequently issued with an amended assessment; or

(iii) The CIR rejects an adjustment proposed by the taxpayer and does not subsequently issue an amended assessment.

Tax disputes in the High Court are governed by the High Court Rules. The taxpayer must draft and file a statement of claim and notice of proceeding. The statement of claim must identify all facts and propositions of law that the taxpayer is relying on in sufficient detail to fairly inform the CIR and the Court. Copies of the statement of claim must be served on the CIR.

The CIR then has 25 days from the date of service in which to file a statement of defense and serve it on the taxpayer, either admitting or denying each allegation of fact that the taxpayer relies on.[542] The High Court should then set a timetable for the proceedings.

The CIR may designate a challenge as a test case, if the CIR considers that determination of the challenge is likely to be determinative of all or a substantial number of the issues involved in one or more other challenges. The proceedings in similar cases will be stayed pending a decision in the test case. Test cases are always held in the High Court in the first instance.

In *Lloyds Bank Export Finance v. CIR*,[543] it was held that a taxpayer may dispute any assessment of taxation liability, regardless of whether the assessment results in a tax liability, a refund, or a nil result. In *Richardson v. CIR*,[544] a taxpayer challenged, by way of judicial review proceedings, a decision of

[542] High Court Rules, rule 5.47.
[543] (1991) 13 NZTC 8,134 (PC).
[544] (1986) 8 NZTC 5,109.

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the CIR not to reopen an assessment based on fresh information provided by the taxpayer.

The Court analyzed the relevant legislation and concluded that a taxpayer in these circumstances (i.e., where the challenge period has expired and the CIR's discretion to reopen the dispute was the only avenue available) had to show that the CIR had no tenable basis for his actions or had made such fundamental errors that his decision could not stand.

This case demonstrates the difficulty in overcoming the effects of the statutory scheme if challenges are not made within the proper time.

In *Farnsworth Ltd v. CIR*,[545] the issue considered by the Court of Appeal was whether the CIR could change his grounds of appeal at the time of the High Court hearing. The Court of Appeal concluded that the CIR could not change his grounds of appeal at such a late stage in proceedings. Central to the Court's analysis was the forerunner of Section 108 of the Tax Administration Act 1994, which imposes a four-year limitation period on IR issuing an assessment that increases a taxpayer's liability. In *Farnsworth*, this period had expired and the CIR could not reassess the taxpayer's tax liability.

In *Westpac Securities NZ Ltd v. CIR*,[546] the High Court held that if a taxpayer has made a mistake by adopting a correct, but disadvantageous, tax position, then the CIR can amend the taxpayer's tax position if requested to do so under Section 113 of the TAA.

(1) Issues and Propositions of Law Exclusion Rule

The issues and propositions of law exclusion rule means that the taxpayer and the CIR are limited to issues and propositions of law that have been disclosed to the other party in the earlier statement of position. This rule prevents either party from attempting to raise new issues or arguments at the last minute, unless statements of position have not been prepared. Final disclosure for all proceedings in the High Court must therefore generally occur early in the disputes resolution procedures.

There is limited opportunity for parties to have evidence admitted by leave of the court at a later stage. This causes parties to draft their propositions as broadly as possible, with the result that later refinements in arguments in many cases are not prevented by the exclusion rule.

(2) Payment of Tax in Dispute

A taxpayer is generally not liable to pay tax in dispute (the "deferrable" tax) until the due date for payment of that tax following resolution of the dispute.

However, the CIR has discretion to require a taxpayer to pay all tax in dispute if the CIR considers that there is a significant risk that the tax in dispute will not be paid should the taxpayer not succeed in dispute proceedings.[547]

Use of money interest will continue to accrue in respect of the tax in dispute throughout the disputes process even though it is "deferrable" tax, but no late payment penalties will accrue unless the taxpayer does not pay the required amount by the due date following resolution of the dispute.

Comment: A quirk in the legislation is that, where the CIR issues a default assessment without first issuing a NOPA to the taxpayer, the tax in dispute is not "deferrable" tax and the taxpayer becomes liable to pay the tax in dispute on the date of the default assessment. This will be the case even if the taxpayer disagrees with the default assessment and issues a NOPA. If the taxpayer does not pay the tax in dispute, late payment penalties will accrue throughout the disputes process in addition to use of money interest. However, the late payment penalties should be eliminated if the taxpayer commences a challenge by filing a statement of claim in the TRA or the High Court (see V.B.8.b.(3), above).

If a dispute is finally determined in the taxpayer's favor and the taxpayer has paid any of the tax in dispute, IR repays all tax paid in relation to the disputed matter, together with interest at a rate prescribed from time to time. If the dispute is decided in IR's favor, interest is payable by the taxpayer on the deferred tax.

(3) Appeals

There is a right of appeal from the TRA to the High Court.[548] The TRA may also transfer a case to the High Court, either by its own election, or at the request of either the taxpayer or the CIR.

All decisions of the High Court (whether at first instance or on appeal from the TRA) may be appealed to the Court of Appeal on questions of law only. Leave may be sought to appeal a decision of the Court of Appeal to the Supreme Court.

c. Penalties

The penalties regime imposes civil monetary penalties for noncompliance, and establishes substantial criminal tax offenses and penalties, such as not keeping the necessary books and documents.

(1) Civil Penalties

The principal civil penalties are imposed for:

(i) Late filing of returns.

This is a flat penalty of:

(a) NZ$50 for the late filing of a return by a taxpayer with annual net income of less than NZ$100,000;

(b) NZ$250 for the late filing of a return by a taxpayer with annual net income from NZ$100,001 to NZ$1 million; and

(c) NZ$500 for the late filing of a return by a taxpayer with annual net income exceeding NZ$1 million.

The late filing penalty will be charged only after the CIR has given 30 days' notice of its intention to impose the penalty.

GST returns filed late will attract a late filing penalty of:

[545] (1984) 6 NZTC 61,770.
[546] [2014] NZHC 3377.
[547] TAA, s. 138I(2B).
[548] Taxation Review Authorities Act 1994, s. 26.

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(a) NZ$50 for taxpayers who account for GST on a payments basis; and

(b) NZ$250 for taxpayers who account for GST on an invoice- or hybrid basis.

(ii) Late payment of tax.

This penalty comprises:

(a) 1% of the unpaid tax imposed on the day after the tax was due;

(b) 4% of the amount of tax to pay (which includes the amount under (a), above) at the end of the sixth day after the amount under (i), above is imposed; and

(c) 1% of the amount of tax to pay (which includes any late payment penalty already imposed) on each day that falls one month after the day the amount in (a), above, is imposed.

(iii) Tax shortfall penalties.

A "tax shortfall" is the difference between the taxpayer's tax payable as calculated by the taxpayer in its return and the correct tax ultimately assessed and payable.

There are five categories of "tax shortfall" penalties arising from the miscalculation of the taxpayer's tax liability.

Taxpayers may not be liable for more than one type of shortfall penalty in relation to a particular underpayment. The penalties also apply to taxpayers in a loss situation.

The five types of tax shortfall penalties are:

(a) Lack of "reasonable care:" a taxpayer will be liable for a shortfall penalty of 20% of the tax shortfall if the taxpayer does not take "reasonable care" in calculating its tax position and that results in a "tax shortfall."

"Reasonable care" is not defined in the ITA, but IR has indicated it considers that the standard equates with the concept of negligence in the law of torts.

(b) Taking an "unacceptable tax position:" a taxpayer will generally be liable to pay a shortfall penalty of 20% of the tax shortfall if the tax shortfall results from the taxpayer taking an unacceptable tax position and the tax shortfall exceeds both NZ$50,000 and 1% of the taxpayer's total tax figure for the relevant return period.

A tax position is defined as being unacceptable if the tax position fails to meet the standard of being, viewed objectively, about as likely as not to be correct.

The unacceptable tax position shortfall penalty applies to income tax only (i.e., it does not apply to GST and certain other taxes).

Taxpayers who rely on official IR advice received on or after September 7, 2010, will not be subject to use-of-money interest or to the unacceptable tax position penalty.

(c) "Gross carelessness:" a taxpayer that is grossly careless in calculating its tax position will be liable for a penalty of 40% of the resulting tax shortfall.

"Gross carelessness" is defined as doing or not doing something, in a way that, in all the circumstances, suggests or implies complete or a high level of disregard for the consequences.

(d) Taking an "abusive" tax position: a taxpayer that takes an "abusive" tax position will be liable for a penalty of 100% of the tax shortfall (this penalty is reduced to 20% where it arises as a result of the taxpayer's investment in a "promoted" arrangement with respect to which the taxpayer has less than a NZ$50,000 tax shortfall and has received independent advice stating that the taxpayer's position is not an abusive tax position).

An "abusive" tax position is one that is an "unacceptable tax position" and, viewed objectively, is a position the taxpayer took with a dominant purpose of avoiding tax.

(e) Evasion: a taxpayer that is guilty of "evasion" will be liable for a penalty of 150% of the resulting tax shortfall.

These shortfall penalties may be increased by 25% where the taxpayer deliberately obstructs IR in determining the taxpayer's correct tax position. On the other hand, the shortfall penalties may be reduced by:

(i) 100% (if the shortfall penalty is for not taking reasonable care, for taking an unacceptable tax position or for an unacceptable interpretation) or 75% (in all other cases) if the taxpayer makes full voluntary disclosure of the tax shortfall to IR prior to receiving notification of an audit or investigation;

(ii) 40% if the taxpayer makes full voluntary disclosure of the tax shortfall to IR after the taxpayer receives notification of an audit or investigation, but before the audit or investigation starts;

(iii) 50% if the taxpayer is deemed under Section 141FB to have previously exhibited good behavior (which generally requires the taxpayer to have not previously been liable for a similar shortfall penalty); or

(iv) 75% (if the shortfall penalty is for taking an unacceptable tax position or an abusive tax position) if the taxpayer makes adequate disclosure of its tax position at the time it took that tax position.

There is also a cap on shortfall penalties of NZ$50,000 where the penalty arises as a result of a taxpayer not taking reasonable care or taking an unacceptable tax position, if the taxpayer voluntarily discloses the shortfall or the CIR determines the shortfall within a certain timeframe.

(2) Promoter Penalties

A person is liable to pay a promoter penalty if the person is a party to, or is significantly involved in, formulating a plan or program from which an arrangement is offered or who sells, issues, or promotes the arrangement, where:

(i) A taxpayer that becomes a party to the arrangement is charged with a shortfall penalty for taking an abusive tax position; and

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(ii) The arrangement is offered, sold or promoted to 10 or more persons in an income year.

The total promoter penalty is equal to the sum of all participants' tax shortfalls resulting from taking an abusive tax position on the arrangement.

A person who is a party to, or is significantly involved in, formulating a plan or program under which an arrangement is offered is jointly and severally liable for the total promoter penalty.

A person who only sells, issues or promotes the arrangement, is jointly and severally liable for the portion of the total promoter penalty that is associated with the arrangement entered into by taxpayers to whom that person sold, issued or promoted the arrangement.

Promoters may apply for product rulings for prospective arrangements.

(3) Criminal Penalties

The penalties regime also imposes criminal penalties for various offenses.

For example:

(i) Persons convicted of not keeping the documents required to be kept by a tax law are liable to a fine not exceeding NZ$4,000 if it is their first offence;[549] and

(ii) Persons convicted of obstructing the Commissioner in the exercise of his or her duties are liable to a fine not exceeding NZ$25,000.[550]

d. Use-of-Money Interest

Taxpayers are required to pay use-of-money interest (UOMI) on tax underpaid and the CIR is required to pay UOMI on tax overpaid.

The UOMI payable/receivable is calculated on a daily basis, does not compound, and will generally run from the day after the original due date for payment of the tax.

The UOMI rates are amended regularly by order in council. From August 29, 2023, the UOMI rate payable by the CIR on overpaid tax is 4.67% and the rate payable by the taxpayer on underpaid tax is 10.91%.

9. Consolidated Returns

Consolidated company tax returns are permitted for companies in a wholly-owned group that are resident in New Zealand and have elected to be treated as consolidated.

Companies seeking to consolidate must have the same balance date and must either be all qualifying companies or all non-qualifying companies. Subject to these requirements, any two companies may consolidate as long as they are commonly wholly-owned, or would be commonly wholly-owned if certain nominal and minor shareholdings were disregarded. Where subsidiary companies wish to consolidate, there is no requirement that the parent company (or any other group company) be part of the consolidated group.

Companies wishing to consolidate must make an election in writing to IR. The election must nominate one of the companies to act as an agent for the consolidated group. This "nominated company" then becomes liable on consolidation to make income returns for the entire consolidated group.

On election, all companies in the proposed group must agree to be jointly and severally liable for all tax payable by members of the group. Accordingly, while IR initially looks to the nominated company for satisfaction of any outstanding tax with respect to all consolidated group members, it also has recourse to other members on a joint and several basis.

The CIR has the discretion to waive requirements for joint and several liability of specified companies in the group where he or she is satisfied that this will not significantly prejudice the recovery of tax.

It is not possible for a company to be a member of more than one consolidated group at any one time.

Eligible companies may elect to join an existing consolidated group, and similarly members of a consolidated group may elect to leave the group. However, such companies will usually continue to be jointly and severally liable for tax on income derived by the group while those companies were members of the group.

In addition, a company may be required to leave a consolidated group upon the happening of certain events, such as the company ceasing to be eligible to be a member of the consolidated group, or the departure of the nominated company from the relevant group.

There are special rules relating to the entry and exit of a company from a consolidated group part way through an income year. The part year in which a company is not a member of the consolidated group is treated as an entire income year for tax purposes, for which that company must file a return.

A consolidated group is in some senses treated as if it were a single company for tax purposes. Accordingly, only one tax return need be filed for the entire group, and only one assessment is issued by the CIR.

The "single company" concept is implemented in a series of complex provisions and care needs to be taken in determining outcomes. In broad terms, the following consequences are provided for in the legislation.

First, most intra-group transfers of property have no taxation consequences at the time they take place. Instead, tax consequences are deferred until either the property that has been the subject of an intra-group transaction is disposed of outside the consolidated group or until a relevant member company leaves the group. The taxation consequences of an intra-group transaction (for example, income tax and depreciation clawback (recapture) crystallize on the happening of such an event. Those tax consequences are determined according to the market value of the property at the time of that event, rather than at the time of the intra-group transaction.

There is an exception in relation to trading stock, with respect to which intra-group transactions are only ignored at the CIR's discretion. There is also a general anti-avoidance provision to prevent the intra-group transfer rules from being abused.

Second, the single company concept means that only income or expenditures of each member company — which would be assessable or deductible if the member company were a division of the notional single company comprising all the members of the group — is assessable or deductible.

[549] TAA s. 143(3)(a).
[550] TAA s. 143H.

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An exception to this rule applies to interest paid on money borrowed from a non-group person to purchase shares in a subsidiary company within the same consolidated group, which is still deductible as if the two companies were not members of the consolidated group.

Members of consolidated groups are not jointly and severally liable for other taxes, such as:

(i) Fringe benefit tax (FBT);

(ii) Pay as you earn (PAYE);

(iii) Resident withholding tax (RWT); and

(iv) Employer's superannuation contribution tax (ESCT).

Special rules apply to the calculation of provisional tax obligations for consolidated groups. Essentially, provisional tax obligations are calculated based on the residual income tax liability of each member of the group in the preceding income year.

Complex rules apply in relation to dividend imputation credits and other tax credits and branch equivalent tax accounts under the international tax regime. Broadly speaking, these rules provide for group ICAs and branch equivalent tax accounts.

However, member companies also maintain separate accounts relating to pre-consolidation credits. Special rules govern the manner in which pre-consolidation credits may be used in relation to group taxation liabilities.

Special rules also apply in relation to carrying losses forward and grouping losses within consolidated groups. Any loss incurred by a member of a consolidated group is treated as a group loss.

Pre-consolidation losses of a group member may be set off only against group income if it would have been possible to do so without consolidating.

10. Reorganizations

a. Change of Legal Form

If a NZ company wishes to change its legal form, it must liquidate and remove itself from the New Zealand Companies Office Register.

The tax consequences of a liquidation are discussed in V.B.10.d., below.

b. Mergers, Spin-offs, Etc.

(1) Mergers ("Amalgamations")

The Companies Act 1993 (CA) provides that two or more companies may amalgamate and continue as one company (which may be one of the amalgamating companies, or may be a new company).

There is a long form and a short form of amalgamation, the latter of which is only applicable if the companies are 100% commonly owned.

On the date shown in the certificate of amalgamation, the amalgamating companies (other than the amalgamated company) must be removed from the New Zealand register, the amalgamated (i.e., the continuing or new) company succeeds to all the property, rights, powers, and privileges of each of the amalgamating companies, and the amalgamated company succeeds to all the liabilities and the obligations of each of the amalgamating companies.

If shares of one of the amalgamating companies are held by, or on behalf of, another amalgamating company, those shares must be cancelled (without consideration) on amalgamation and must not be converted into shares of the amalgamated company.

For income tax purposes, an amalgamation may be a "resident's restricted amalgamation" or an "other than resident's restricted amalgamation," and some tax consequences differ accordingly.

A resident's restricted amalgamation involves only companies resident in New Zealand (not including a company that is treated as a nonresident for the purposes of any double tax agreement), and that are not exempt from income tax.

The amalgamated company must give notice of the amalgamation within 63 working days of filing the evidencing documents with the Registrar of Companies. The notice process includes an election not to be a resident's restricted amalgamation.

(a) Tax Obligations

The amalgamated company must comply with all obligations of the amalgamating company in the year of amalgamation, and in all preceding years.[551]

(b) Available Subscribed Capital and Shares

Where an amalgamated company is one of the amalgamating companies, and shares issued by that company that are held by another amalgamating company are cancelled on the amalgamation, the available subscribed capital (ASC) in the amalgamated company is reduced by an amount equal to the product of the number of shares cancelled multiplied by the ASC per share before the amalgamation.[552]

In a short form amalgamation between sister companies (rather than parent/subsidiary companies,) the ASC of the amalgamated company includes an amount equal to the amount of ASC of equivalent shares issued by the amalgamating company (not including shares held directly or indirectly by the amalgamated company).

"Capital gains amounts" of an amalgamating company that would have been able to be distributed tax-free if the amalgamating company had been liquidated become part of the amalgamated company's own capital gain amount available to be distributed tax-free (in most cases) on a liquidation.

Notwithstanding that the Companies Act 1993 requires shares held by one amalgamating company in another amalgamating company to be cancelled on amalgamation without consideration, for income tax purposes there is a deemed disposal of the shares for a deemed consideration equal to the cost of the shares.[553]

(c) Transfers of Property

Where an amalgamating company ceases to exist on an amalgamation, the surviving amalgamated company is not

[551] ITA, s. FO 4.
[552] ITA, s. CD 43(24)–(25).
[553] ITA, s. FO 6.

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deemed to have derived a dividend from the acquisition of any property, or from the relief from any obligation owing to the amalgamating company.

On an amalgamation other than a resident's restricted amalgamation, where the amalgamated company acquires property of an amalgamating company, the amalgamating company is treated as having disposed of the property immediately prior to the amalgamation for a market value consideration, and the amalgamated company is treated as having acquired the property for that market value consideration.[554]

On a resident's restricted amalgamation:

(i) Property that is trading stock for both the amalgamating and the amalgamated company is deemed to have been acquired by the amalgamated company for the value of the trading stock under Subpart EB of the ITA to the amalgamating company, at the time of the amalgamation;[555]

(ii) Property acquired by the amalgamated company that is not revenue account in its hands, but that is revenue account property in the hands of the amalgamating company, is deemed to have been disposed and acquired for a market value consideration on the date of the amalgamation.[556]

This ensures that any gain or loss from the property up to that time is brought into the tax net;

(iii) For depreciable property, the amalgamated company steps into the shoes of the amalgamating company.[557]

(d) Deductions and Income

Where an amalgamating company ceases to exist, the amalgamated company is entitled to take a deduction in the following circumstances:

(i) The amalgamated company writes off any debt acquired from the amalgamating company that would have been a deductible item for the amalgamating company;[558]

(ii) The amalgamated company incurs any expenditure, loss, or depreciation by virtue of anything done or not done by the amalgamating company that would have been deductible for the amalgamating company;[559] and

(iii) Interest paid by a company on money borrowed to acquire shares in a company within the same group of companies and the second company is amalgamated.[560]

The unexpired portion of any amount of accrual expenditure of an amalgamating company is deemed to be an unexpired portion of accrual expenditure for the amalgamated company.[561]

Any amount derived by the amalgamating company that would have been gross income of the amalgamating company but for the amalgamation is gross income of the amalgamated company.[562]

(e) Financial Arrangements

Special provisions apply where an amalgamated company succeeds to the obligations of an amalgamating company's financial arrangements that are subject to the financial arrangements rules.

On a resident's restricted amalgamation within a wholly-owned group of companies where the method of calculating income and expenditure from the financial arrangement remains the same despite the amalgamation, the financial arrangement will be treated as if the amalgamated company had entered into the financial arrangement, and had incurred all expenditure and derived all income from that arrangement, instead of the amalgamating company.[563]

In any other resident's restricted amalgamation where the method of calculating income or expenditure during the term of a financial arrangement remains the same after amalgamation, the consideration for the disposition for the purposes of the base price adjustment is such as will result in a fair and reasonable amount of income and expenditure being allocated between the companies.[564]

In any other case, the consideration on disposal is the market value of the financial arrangement at the date of amalgamation.[565]

(f) Tax Losses and Credits

On a resident's restricted amalgamation, losses (including normal losses, attributed foreign net losses, and FIF losses) of the amalgamating company are treated as having been incurred by the amalgamated company, if, immediately before the amalgamation, they could have been deducted by the amalgamating company and offset against income of the amalgamated company. There is an ordering process for use of the losses (which requires them to be used in the same order in which they were incurred).[566]

Similarly, CFC tax credits of the amalgamating company are treated as being credits of the amalgamated company on a resident's restricted amalgamation if, immediately prior to the amalgamation, they could have been used by the amalgamating company and by the amalgamated company. There is an ordering procedure for use of the credits (which requires them to be used in the same order as that in which they arose).[567]

In all amalgamations, losses (including normal losses, attributed foreign net losses, and FIF losses) and tax credits of the amalgamated company may be carried forward to years following the amalgamation, only if, immediately prior to the amalgamation, they could have been used by the amalgamated and amalgamating companies, and if the continuity and commonality of ownership tests continue to be passed.[568]

On a resident's restricted amalgamation, credits or debits in the amalgamating company's ICA, foreign dividend payment account, or policyholder credit account must be treated

[554] ITA, ss. FO 11 and FO 15.
[555] ITA, s. FO 10(5).
[556] ITA, s. FO 10(6).
[557] ITA, s. FO 16.
[558] ITA, s. FO 8.
[559] ITA, s. FO 8.
[560] ITA, s. DB 8.
[561] ITA, s. FO 9.
[562] ITA, ss. CV 4 and FO 7.
[563] ITA, s. FO 12.
[564] ITA, s. FO 13.
[565] ITA, ss. FO 14 and FO 15.
[566] ITA, ss. IA 9, IE 1, IE 2, and IE 5.
[567] ITA, ss. LK 12, LK 13, and LK 14(2).
[568] ITA, ss. IE 1, IE 3, and IQ 1(4).

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as credits or debits in equivalent accounts of the amalgamated company.[569]

(g) Provisional Tax

After amalgamation, the residual income tax of the amalgamated company, on which provisional tax is payable, is equal to the amount that would have been residual income tax if the amalgamating and the amalgamated companies were one company.[570]

(2) Spin-offs

There are no special provisions in the ITA that apply to spin-offs (or "spin-outs" as they are referred to in the ITA,) other than a relaxation of the shareholder continuity rules for the purpose of loss carryforwards and special rules that treat certain transfers of shares received by New Zealand shareholders as a result of a spin-off by a listed Australian company as not being dividends.[571]

c. Cross-Border Transactions

See XIV., below, for tax issues affecting cross-border transactions.

d. Liquidation

There are primarily two mechanisms for liquidating a NZ company:

(i) Applying to remove the NZ company from the Companies Register under section 318(1)(d) of the CA on the grounds that the NZ company has ceased to carry on business, discharged its debts in full to all known creditors, and distributed any surplus assets to its shareholders (commonly referred to as a "short-form liquidation"); and

(ii) Voluntarily appointing a liquidator under Section 241 of the CA to realize the NZ company's assets, repay debts, and distribute surplus assets to the NZ company's shareholders.

A distribution to a shareholder on the liquidation of a NZ company will be included as dividend income of the shareholder only to the extent that it exceeds the ASC per share calculated under the ordering rule and (unless the shareholder is an associated nonresident company) the ACDA calculated under Section CD 44 of the ITA (see V.B.3.c.(2)(e), above).

If a shareholder holds its shares in the liquidating company on revenue account (for example, it acquired the shares for the purpose of disposing of them,) the shareholder will have gross income equal to the amount distributed to that shareholder for the cancellation of its shares, except to the extent the distribution gives rise to dividend income for the shareholder.

11. Advance Rulings

In New Zealand, "advance rulings" are called "binding rulings" and any person may apply to IR in writing for a binding ruling. A binding ruling provides certainty around the tax consequences of an arrangement.

See IV.A.2.d., above.

C. Other Taxes

1. Resident Withholding Tax

Where a NZ company derives passive income (such as dividends and interest) from a New Zealand resident payer or a nonresident payer with a fixed establishment in New Zealand, the payer of that passive income will generally be required to deduct RWT at the time of payment and pay the amount of RWT deducted to IR in the month following payment.

The obligation to deduct RWT is eliminated in certain circumstances.

The most common exclusions are:

(i) RWT will not be required to be deducted where the New Zealand company deriving the dividends or interest has RWT-exempt status;

(ii) RWT will not be required to be deducted from a fully imputed dividend derived by a New Zealand company if the paying company chooses to not deduct RWT;

(iii) RWT will not be required to be deducted from a dividend derived by a New Zealand company from a nonresident company (subject to certain limited exceptions); and

(iv) RWT will not be required to be deducted from dividends or interest paid between companies that are part of the same group of companies (i.e., 66% commonality of ownership).

RWT is not an additional tax, but rather a mechanism for early tax collection that ensures the payment of tax on passive income at source.

RWT is deducted at a specified rate from the gross amount of passive income at the time of payment.

At year-end, the recipient of the passive income pays tax on the gross amount of the passive income (including the amount of RWT deducted), but receives a tax credit for the RWT deducted.

The rates of RWT on passive Income derived by a NZ company are as follows:

Type of Income	Withholding Tax Rate
Interest	28%
Dividends	33% (less any imputation credits attached)

Comment: Where a NZ company deriving passive income has not notified its IRD number to the payer of the passive income, a 45% no-notification rate applies.

a. Cash Dividends

The amount of RWT to be deducted from a dividend paid in cash is calculated by multiplying the "gross" dividend (including any imputation credits attached) by 33% and then deducting from that amount any imputation credit and/or dividend withholding payment credit attached to the dividend.

[569] ITA, s. OA 10.
[570] ITA, s. RM 11.
[571] ITA, ss. YC 13 and CD 29C.

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b. Non-cash Dividends

RWT cannot be deducted from a non-cash dividend as the dividend is not paid in money. Instead, the ITA requires the payer of the non-cash dividend to calculate and pay RWT in addition to payment of the non-cash dividend.

The amount of RWT required to be paid is calculated using a formula based on the "amount" (determined under the dividend rules) of the non-cash dividend.[572]

(1) Other than Bonus Issues in Lieu and Shares Issued Under a Profit Distribution Plan

Where a NZ company derives a non-cash dividend that is not a bonus issue in lieu or a share issued under a profit distribution plan, the amount of RWT required to be paid by the payer of the dividend is equal to 33% of the "amount" of the dividend grossed up for RWT, less any imputation credit or foreign withholding tax paid or payable.

This results in RWT equal to 49.25% of the amount of the non-cash dividend, less any imputation credit or foreign withholding tax paid or payable.

(2) Bonus Issues in Lieu and Shares Issued Under a Profit Distribution Plan

Where a NZ company derives a non-cash dividend that is a bonus issue in lieu or a share issued under a profit distribution plan, the amount of RWT required to be paid by the payer of the dividend is 33% of the sum of the amount of money offered as an alternative to the bonus issue or shares and any imputation credit or foreign withholding tax paid or payable, less the imputation credit or foreign withholding tax paid or payable.

2. Capital Investment Tax

New Zealand does not impose a capital investment tax.

3. Goods and Services Tax

The GST Act imposes GST on all goods and services supplied in New Zealand by a registered person in the course or furtherance of a taxable activity, and on goods imported into New Zealand, on or after October 1, 1986, unless specifically exempted.

The main exemptions are for supplies of financial services, residential accommodation and services as an employee.

The rate of tax levied on taxable supplies is 15% or, if the supply is a zero-rated supply (see V.C.3.c., below), 0%.

Exempt supplies (see V.C.3.b., below) are not subject to GST.

The key difference between zero-rated supplies and exempt supplies is that a registered person may claim a refund of input tax arising on the acquisition of goods and services used by the registered person in the course of making zero-rated supplies, whereas no refund can be claimed of input tax arising on the acquisition of goods and services used in the course of making exempt supplies.

For further research on New Zealand's GST, see also the VAT Navigator.

a. Taxable Supplies

(1) General

GST must be charged on a taxable supply. A taxable supply is a "supply" in New Zealand of goods or services by a GST-registered person in the course or furtherance of a taxable activity.

A fundamental principle of the GST Act is that it is the supplier, not the recipient, of a taxable supply that is responsible for accounting for GST to IR. There are certain exceptions to this principle where the recipient of the supply is required to account for GST to IR:

(i) Certain supplies made by nonresident suppliers to GST-registered New Zealand recipients that are subject to a "reverse charge" (see V.C.3.a.(6), below);

(ii) The importation of goods with a customs value of more than NZ$1,000 (see V.C.3.a.(7), below); and

(iii) Incorrectly zero-rated supplies of land where the incorrect treatment is discovered after settlement (see V.C.3.c.(2), below).

As it is generally the supplier that is responsible for accounting for GST, it is important to ensure that the agreement correctly reflects whether the stated price includes GST or whether GST is payable in addition to the stated price. The appropriate wording to be used is either "$X plus GST (if any)" or "$X inclusive of GST." The use of the phrase "exclusive of GST" should be avoided as it has been interpreted in differing ways by the courts. If the agreement is silent as to GST, the purchase price will generally be treated as being inclusive of GST.[573] This may result in the supplier's net profit being less than it expected because the supplier will be required to account to IR for GST output tax of an amount equal to 3/23 (i.e., the GST component of a GST inclusive amount where GST is chargeable at the rate of 15%) of the consideration received.

The consequences of this rule were demonstrated in *Tri-Star Customs and Forwarding Ltd v. Denning*.[574] In this case, Tri-Star held an option to purchase a commercial property from Denning for NZ$720,000. The contract was silent as to GST, but Denning had the belief, from a prior dealing between the parties, that GST would be added to the price. The Court of Appeal held that the High Court should not have exercised its discretion under the Contractual Mistakes Act 1977 to vary the contract to require GST to be paid in addition to the purchase price. Accordingly, Denning was not entitled to be paid GST in addition to the NZ$720,000 purchase price.

Where a contract is expressed to be "plus GST," the vendor and purchaser may disagree as to whether any GST is in fact payable on the supply. This raises the issue as to whether, given the disagreement, the purchaser is still required to pay the disputed GST to the vendor under the terms of the contract.

[572] *Question We've Been Asked* QB 17/07 confirms that RWT is not withheld from a non-cash dividend as it is not paid in money. Instead, s. RE 14, ITA, requires a person paying a non-cash dividend to calculate and pay RWT using a formula based on the "amount" of the non-cash dividend (as per s. CD 38, ITA).

[573] *Pyne Gould Guinness Ltd v. O'Gorman & Anor* (1990) 12 NZTC 7,001.

[574] (1998) 18 NZTC 13,982.

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This situation was considered by the Court of Appeal in *Hawkins Construction Ltd v. Chan*.[575] The Court stated that, as an assessment of GST is deemed to be correct under the GST Act until overturned, the purchaser was required to pay the GST to the vendor under the contract once the vendor had been assessed for that GST. The GST assessment was made when the relevant GST return was processed by IR, even though no formal notice of assessment was issued. So, as between vendor and purchaser, whether GST is charged is a matter that the vendor will determine, absent an agreement between the parties.

(2) Registration

A "registered person" is a person who is registered for GST or is liable to be registered. Persons whose taxable supplies exceed NZ$60,000 per annum (broadly speaking) are liable to be registered for GST.

A taxpayer whose taxable supplies fall below the NZ$60,000 threshold may still register for GST provided they satisfy the CIR that they carry out a taxable activity or intend to do so.

(3) Taxable Activity Defined

A "taxable activity" is any activity carried on "continuously or regularly by any person whether or not for pecuniary profit, [that] involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for consideration."

Taxable activities include those activities carried on by a business, trade, manufacturer, profession, vocation, association, or club.

The requirement that goods and services be supplied "in the course or furtherance" of a taxable activity is broad enough to cover any supplies made "in connection with" a taxable activity. It will often include, for example, the sale of capital assets used in the carrying on of a taxable activity.

(4) Goods and Services Defined

The term "goods" is defined in Section 2(1) of the GST Act as "… all kinds of personal or real property; but does not include choses in action, money, cryptocurrency or a product that is transmitted by means of a wire, cable, radio, optical or other electromagnetic system or by means of a similar technical system."

"Services" means anything that is not goods, money or cryptocurrency.

The exclusion of cryptocurrency from the definitions of "goods" and "services" in the GST Act means that cryptocurrencies are not subject to GST. "Cryptocurrency" is defined to mean a "cryptoasset" (i.e., a digital representation of value that exists in a database that is secured cryptographically and contains ledgers, recording transactions and contracts involving digital representations of value that are maintained in decentralized form and shared across different locations and persons, or another application of the same technology performing an equivalent function) that is not a "non-fungible token."[576] A "non-fungible token" is in turn defined to mean "a cryptoasset that contains unique distinguishing identification codes or metadata."[577]

Supplies of non-fungible tokens and supplies of services related to cryptocurrency (excluding cryptocurrency brokerage services, which are exempt financial services)[578] are subject to GST.

(5) Supply Defined

The term "supply" is defined broadly in section 5 of the GST Act to include all forms of supply. This will cover most types of transactions, including sales, gifts, loans and transfers under wills.

Section 5 of the GST Act also deems a supply to take place in a number of situations where a supply would not otherwise occur, and deems other supplies not to have occurred until a certain event transpires.

The situations and events identified in Section 5 of the GST Act as giving rise to deemed supplies include sales in satisfaction of a debt (the provisions in this case are directed at procedural issues, rather than deeming a supply to occur), ceasing to be registered for GST purposes, door-to-door sales and layby sales, supplies by public authorities, payments in the nature of a grant or subsidy, betting on races or games of chance, disposing of a taxable activity, and indemnity payments pursuant to contracts of insurance.

(6) Supplies Made in New Zealand

With the exception of imported goods (see V.C.3.a.(8), below) and certain supplies subject to a reverse charge (see V.C.3.a.(7), below), GST is charged only on supplies made in New Zealand. Goods and services supplied by a NZ company are deemed to be supplies made in New Zealand.

(7) Reverse Charge

Where the GST Act levies GST on taxable supplies of goods and services, the GST is generally required to be collected and returned to IR by the supplier of those goods and services. However, a "reverse charge" applies to certain supplies of goods and services by a nonresident to a NZ company.

Where a NZ company receives a supply of goods and services that is subject to the reverse charge, the NZ company will be treated as the supplier of such goods and services and must pay GST with respect to the supply to IR.

A supply of goods and services by a nonresident that is deemed to be supplied outside New Zealand (and therefore not subject to GST) on the basis that the supply is made to a GST-registered NZ company able to claim back the GST from IR (see VI.D.2., below) will be subject to the reverse charge if:

(i) The NZ company's percentage intended use or percentage actual use of the goods or services is less than 95%;

(ii) Where the supply is a supply of goods, the goods are imported by the NZ company in a consignment with a total value of NZ$1,000 or less and the NZ company does not pay GST in respect of the supply of goods to New Zealand Customs or to the supplier of the goods; and

[575] (2000) 19 NZTC 15,710.
[576] GST Act, s. 2.
[577] GST Act, s. 2.
[578] GST Act, s. 3(1)(lb).

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(iii) The supply would have been a taxable supply if it were made in New Zealand by a registered person in the course or furtherance of that person's taxable activity.

In other words, the reverse charge will apply to certain supplies by a nonresident to a GST-registered NZ company of goods that are in New Zealand at the time of supply, goods that are "distantly taxable goods," services that are physically performed in New Zealand, and services that are "remote services."

There are special rules for related party transactions, including deemed supplies by a foreign head office to a New Zealand branch.[579]

(8) Imported Goods

Section 12 of the GST Act levies GST on the importation of goods into New Zealand with a value of more than NZ$1,000. The value of imported goods for GST purposes is the aggregate of the value of the goods for duty purposes, insurance, freight and customs duty (if any).

GST levied on imported goods under Section 12 (often referred to as "Customs GST") is required to be paid by the importer, rather than the supplier, to New Zealand Customs.

An importer of goods into New Zealand may claim a GST input credit with respect to GST charged on importation if the importer is a GST-registered person and has imported the goods for the principal purpose of making taxable supplies.

b. Exempt Supplies

Exempt supplies are expressly excluded from the GST regime. Exempt supplies are defined in Section 14 of the GST Act as:

(i) The supply of financial services, together with the supply of any other goods and services reasonably incidental and necessary to that supply of financial services (but excluding zero-rated supplies of financial services (see V.C.3.c.(5), below), and other supplies that do not constitute a supply of financial services between the supplier and the recipient);

(ii) The supply of donated goods and services by any nonprofit organization;

(iii) The letting of leasehold land used for residential accommodation (and certain related types of supply of residential property, other than sales);

(iv) The sale of a house, or the reversionary interest in leasehold land, that has been used for a period of at least five years, by the GST-registered supplier, for the exclusive purpose of supplying residential accommodation; and

(v) The supply of fine metal (but excluding zero-rated supplies of fine metal).

c. Zero-Rated Supplies

(1) General

Some supplies, rather than being exempt from the GST regime, have GST levied at the rate of 0%. Sections 11 and 11A of the GST Act provide that the following goods and services are zero-rated:

(i) Exported goods and goods situated overseas;

(ii) Certain goods and services supplied in connection with the transportation of goods or passengers outside New Zealand;

(iii) Taxable activities sold as a going concern (see V.C.3.c.(4), below);

(iv) Certain supplies consisting wholly or partly of land (see V.C.3.c.(2), below);

(v) New fine metal;

(vi) Certain financial services (see V.C.3.c.(5), below); and

(vii) Certain "exported" services (see V.C.3.c.(3), below).

Two considerations underlie the concept of a zero-rated supply:

(i) First, in the case of exported supplies, that the ambit of the GST regime be confined to goods and services consumed in New Zealand. Hence, the GST regime imposes a localized consumption tax rather than a comprehensive value added tax.

(ii) Second, the zero-rating of various commodities supplied in New Zealand ensures that arbitrary results do not ensue. For example, the zero-rating of the supply of new fine metal prevents the cost of internationally priced commodities in New Zealand from being arbitrarily inflated.

(2) Land

The zero-rating of land rules were introduced to prevent avoidance schemes under which a GST-registered purchaser, in transactions involving land, claims an input tax credit without IR receiving the corresponding output tax owing by the supplier due to the supplier's insolvency.

"Land" includes an estate[580] or interest in land, a right that gives rise to an interest in land, an option to acquire land or an estate or interest in land, and a share in the share capital of a flat-owning or office-owning company.

Mortgages and residential leases are not "land" for the purposes of the GST Act.

Section 11(1)(mb) zero-rates a supply that wholly or partly consists of land, if at settlement:[581]

(i) Both the supplier and the recipient are registered for GST;

(ii) The supply is being made by the vendor in the course or furtherance of its taxable activity;

[579] GST Act, ss. 8(4B) and 56B.

[580] "Estate" is not defined for GST purposes. It is defined in the Income Tax Act 2007 as an estate in the land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder; and includes a right, whether direct or through a trustee or otherwise, to the possession of the land, the receipt of the rents or profits from the land, the proceeds of the disposal of the land, and does not include a mortgage.

[581] GST Act, s. 11(1)(mb) and (8B).

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(iii) The recipient acquires the goods (including the land) with the intention of using them (wholly or partly) for making taxable supplies; and

(iv) The recipient does not intend any part of the land to be used as a principal place of residence of the recipient or a relative of the recipient.

Section 11(1)(mb) is not limited to the supply of land by way of sale.

Commercial leases with characteristics making them substitutable for land sales and transactions involving the assignment, surrender or procurement of commercial leases may also be zero-rated if the conditions in section 11(1)(mb) are met.[582]

Where the supplier or the Commissioner discovers after settlement that a supply of land was incorrectly zero-rated under Section 11(1)(mb), a domestic reverse charge applies to treat the purchaser as though it were the vendor and the purchaser is required to account for the GST to IR with respect to the supply in the taxable period in which the error was found.[583]

Comment: A supply consisting wholly or partly of land must be zero-rated when the conditions in Section 11(1)(mb) are met, even where the land forms only one part of the supply. For example, if land and other assets are sold together as a single supply, the whole of the supply must be zero-rated and not just the land component.

(3) Exported Services

Certain categories of "exported" services are zero-rated.

The most common categories of "exported" services are services that are:

(i) Supplied to a nonresident that is outside New Zealand at the time the services are supplied (a company or unincorporated body with a presence in New Zealand will be deemed to be outside New Zealand where the presence is minor or unconnected with the services,) provided the services are not:

(a) Supplied directly in connection with any land situated in New Zealand or with an improvement to such land;

(b) Supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement;

(c) Supplied directly in connection with movable personal property situated in New Zealand; or

(d) Received in New Zealand by a person other than the nonresident recipient (unless it is reasonably foreseeable that the recipient will receive the services in the course of making a taxable or an exempt supply).

(ii) Supplied directly in connection with land situated outside New Zealand, or an improvement to such land, or in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement.

(iii) Telecommunications services supplied to an overseas telecommunications supplier or to a person where the telecommunications services are initiated outside New Zealand.

(iv) Performed outside New Zealand, provided the services are not "remote services" (see VI.D.2.a., below) supplied to an unregistered New Zealand tax resident.

Comment: Two issues have arisen with the zero-rating of services described in (i), above:

(i) The first is whether a supply of services is zero-rated if the supply results in a benefit to a New Zealand person; and

(ii) The second is the meaning of the phrase "directly in connection with."

In *Wilson & Horton Ltd v. CIR*,[584] the Court of Appeal held that the provision focuses on the contractual relationship between the supplier and the recipient. Accordingly, services that are contractually supplied to a nonresident may be zero-rated even if the services also benefit a New Zealand resident.

The meaning of the phrase "directly in connection with" was considered in *Case T54*.[585] In *Case T54*, a New Zealand company was contracted by a Japanese company to video Japanese honeymooners skiing on Mt. Hutt. The CIR argued that the videotaping services were supplied "directly in connection with" the videotape equipment used to perform those services, and so could not be zero-rated. The TRA rejected the CIR's argument, holding that it is only property that is the object or objective of a service to which a service may be directly connected. Accordingly, the TRA held that the services were not supplied directly in connection with any property in New Zealand.

Comment: While the authors do not necessarily agree with the result (on the basis that the object of the services appeared to be the video tape, which was clearly property in New Zealand), they agree with the approach adopted by the TRA.

With an increasing number of films and videos being made in New Zealand, the CIR made it clear that fees paid to filmmakers should be zero-rated when the services are supplied to a nonresident who is not in New Zealand at the time the services are performed (this is consistent with the result in *Case T54*).[586] The supply will still be zero-rated even if a representative of the nonresident purchaser physically collects the film in New Zealand (which is sometimes done for security reasons). However, zero-rating will be lost if a representative of the nonresident purchaser is in New Zealand at the time of film production and his or her presence is more than a "minor presence" (which is a question of fact and degree in the particular circumstances).

[582] GST Act, s. 118D.
[583] GST Act, s. 5(23) and (23B).
[584] (1995) 17 NZTC 12,325.
[585] (1998) 18 NZTC 8,410.
[586] Inland Revenue, *Tax Information Bulletin* (Vol. 19, No. 1), at p. 47.

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(4) Supply of a Taxable Activity as a Going Concern

Section 11(1)(m) of the GST Act zero-rates a supply of a taxable activity as a going concern if:

(i) The supply is to a GST-registered person;

(ii) The supply is of a going concern at the time of supply;

(iii) The supplier and the recipient agree in writing that the supply is of a going concern; and

(iv) The supplier and the recipient intend the supply to be a taxable activity or part of a taxable activity that is capable of being carried on as a going concern by the recipient.

"Going concern" is defined to mean the situation where:

(i) There is a supply of a taxable activity, or part of a taxable activity where that part is capable of separate operation;

(ii) All of the goods and services necessary for the continued operation of that taxable activity are supplied to the recipient; and

(iii) The supplier carries on, or is to carry on, that taxable activity up to the time of its transfer to the recipient.

Thus, for the supply of a taxable activity to be zero-rated, the supplier must carry on the activity up to the time of transfer, but there is no requirement for the recipient to carry on the taxable activity after it has been transferred.

In addition, Section 78E of the GST Act provides that, where a supplier and a recipient have agreed in writing that a supply is the supply of a going concern, and the agreement does not contain a gross-up in the event GST is chargeable on the supply, then the GST charged may be recovered by the supplier from the recipient. The purpose of Section 78E is to protect a supplier who agrees a supply is one of a going concern and negotiates a price on that basis, without including a gross-up provision in the event the supply is not a going concern.

If Section 78E did not exist, the supplier would have to account for GST on the supply and the recipient would receive an unexpected input tax credit equal to 3/23rds of the purchase price. Section 78E enables the supplier to claim the GST from the recipient so the parties do not incur unexpected gains or losses if the supply is judged not to be a going concern.

Comment: The importance of Section 11(1)(m) was greatly reduced by the introduction of Section 11(1)(mb), because a supply of a taxable activity as a going concern will generally include a supply of land (for example, an assignment of a commercial lease) and therefore be zero-rated under Section 11(1)(mb).

(5) Financial Services

For a supply of financial services to be zero-rated, the supplier must make an election, and the supply must be made to another registered person that:

(i) Makes taxable supplies that are equal to or exceed 75% of total supplies made in a given 12-month period or a period acceptable to the CIR; or

(ii) Does not meet the 75% threshold, but is part of a group[587] that does meet the 75% threshold in a given 12-month period or a period acceptable to the CIR.

d. Time of Supply

(1) General Rule

Section 9 of the GST Act provides rules for determining when a supply is treated as having been made for GST purposes. The general rule is that the time of supply is the earlier of:

(i) The time an invoice is issued by the supplier or the recipient; or

(ii) The time some payment is received by the supplier.

That is, a supply is deemed to be made when a supplier issues an invoice for goods sold on credit, or when a deposit is paid on goods purchased but an invoice is not issued until a later date.

Special rules have been developed to apply to the supply of goods and services in some particular circumstances. The more important of these rules are discussed in V.C.3.d.(2) to V.C.3.d.(5), below.

(2) Associated Persons

Where a registered person makes a supply to an associated person, the time of supply will be the time at which:

(i) The goods are removed, if the goods are to be removed;

(ii) The goods are made available to the recipient of the supply, if the goods are not to be removed; or

(iii) The services are performed, if the supply is made with respect to services.

If, however, payment is made, or an invoice is issued to the associated person before the last day for furnishing the return in relation to the taxable period during which the supply would have been made under (i)–(iii), above, the time of supply is determined under the general rule (see V.C.3.d.(1), above).

(3) Hire Agreements and Periodic Payments

Special rules apply when goods are supplied under an "agreement to hire" (other than a hire purchase agreement or an agreement transferring the title in goods to a bailee). The same rules apply to services supplied under an agreement requiring periodic payments. In both these cases, a separate supply is deemed to have been made at the time each periodic payment is due. The time of supply for each successive supply is the date the payment is due or (if earlier) received.

Example: This rule will apply to a sale of intellectual property (which is a service for GST purposes) if payment is made in more than one installment.

(4) Hire Purchase Agreements

Goods and services supplied under a hire purchase agreement are deemed to have been supplied at the time the agreement is entered into.

[587] A "group" is two or more companies, in relation to which a person or a group of persons holds common voting interests that add up to at least 66%, and if a market value circumstance exists, then a person or a group of persons holds common market value interests that add up to at least 66%.

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(5) Progress Payments

Where progress payments are made, the supply is deemed to have been made at the earliest of:

(i) The time the progress payment is made;

(ii) The time the progress payment is due; or

(iii) When an invoice is issued for the progress payment.

This rule applies only if:

(i) Goods and services are supplied directly in the construction, major reconstruction, manufacture, or extension of a building or civil engineering work and are paid for in installments relating to progress in the work; or

(ii) Goods are supplied progressively or periodically under an agreement or enactment that provides for installment payments (but not in the case of land sales paid for in installments).[588]

e. Value of Supply

The "value of supply" is important as it is this amount on which GST is calculated.

Section 10(2) of the GST Act provides that the value of a supply is such amount as, with the addition of the GST, is the aggregate of:

(i) To the extent that the consideration for the supply is money, the amount of the money; and

(ii) To the extent that the consideration for the supply is not money, the open market value of that consideration.

"Open market value" is defined in Section 4 of the GST Act as the monetary consideration that the supply of those goods and services would generally realize if supplied in similar circumstances in New Zealand.

The balance of Section 10 of the GST Act provides rules for determining the value of zero-rated supplies, the value of supplies of goods and services between associated persons, the value of supplies made pursuant to a credit contract, and other situations where specific rules have been thought necessary.

f. Input Tax

A registered person is generally entitled to deduct input tax from output tax when calculating the amount of GST required to be returned to IR for a taxable period.

"Input tax" is defined in Section 3A of the GST Act as:

(i) GST charged on the supply of goods or services to the registered person;

(ii) GST levied on goods imported by the registered person; or

(iii) An amount determined by Section 3A(3) of the GST Act (the "secondhand goods credit") in respect of purchases by the registered person of certain secondhand goods situated in New Zealand where there is no GST impost on the transaction.[589]

Comment: As a general rule, the amount of the secondhand goods credit calculated under Section 3A(3) will be equal to 3/23 of the consideration in money paid by the registered person for the supply of secondhand goods. However, where the supplier and the recipient are associated persons, the amount of the secondhand goods credit will be the least of:

(i) Where the goods were received by the supplier from a person that, at the time, was not an associated person, the tax fraction of the purchase price for the supplier;

(ii) Where the goods were received by the supplier from a person that, at the time, was an associated person, the tax fraction of the purchase price for the most recent non-associated acquisition;

(iii) 3/23 of the purchase price; or

(iv) 3/23 of the open market value of the supply.

The registered person will only be entitled to deduct an amount of input tax "to the extent to which the goods or services are used for making taxable supplies." Therefore, the registered person must apportion the input tax where the relevant goods or services are going to be applied only partly to make taxable supplies.

The GST Act contains complex rules in relation to the method of apportionment, but it will generally require the registered person to estimate at the time of acquisition how it intends to use the goods or services. For example, a registered person who acquires a new car intending to use it 60% for business purposes and 40% for private purposes can deduct only 60% of the input tax.

The registered person may be required to make an adjustment in subsequent taxable periods where the actual use of the goods or services in subsequent periods differs from the intended use of those goods or services. This may result in the registered person becoming entitled to an additional deduction for input tax (where the actual taxable use exceeds the intended taxable use), or becoming liable to account for output tax (where the actual taxable use is less than the intended taxable use).

g. Returns and Assessments of GST

(1) Calculation and Payment of GST

Section 20 of the GST Act provides the basic framework for calculating GST payable. The amount of GST payable is calculated as follows:

GST payable = Output tax − Input tax

Where:

"Output tax" is the GST component of supplies made by the registered person; and

"Input tax" is the GST component of supplies made to the registered person.

Where "input tax" exceeds "output tax," a refund will result. Otherwise, the taxpayer must pay the difference to the IR

[588] *Case L67* (1989) 11 NZTC 1,391.

[589] GST Act, s 3A(2). A registered person will be entitled to a secondhand goods credit in respect of a purchase of secondhand goods if the supply is by way of sale, the supplier is a New Zealand tax resident, the supply is not a taxable supply, and no registered person has previously claimed an input tax credit for GST levied on the importation of the goods.

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no later than the last day of the month immediately following the return period.

(2) GST Invoicing and Record-keeping

The invoicing and record-keeping requirements for GST have been modernized and simplified to provide greater flexibility with effect from April 1, 2023.

Formal documents (tax invoice, credit note and debit note) are no longer required to support output tax returned and input tax claimed in a GST return. The new rules require the supplier and the recipient of a taxable supply to retain a minimum set of information relating to the supply (termed "taxable supply information" and "supply correction information") but do not require the information to be retained in the form of a single business record.

(3) Accounting Basis

The accounting basis adopted determines when output tax and input tax are taken into account for the purposes of calculating the taxpayer's GST liability for the taxable period.

GST is ordinarily accountable for on an invoice basis. Under the invoice basis, output tax must be returned, and input tax may be claimed, in the taxable period in which the time of supply occurs (see V.C.3.d., above). This means that if the registered person issues an invoice for a taxable supply in a taxable period, the registered person must return output tax with respect to that supply in that taxable period even if it has not yet received that GST amount from the recipient.

Under the payments basis, output tax must be returned, and input tax may be claimed, when and to the extent that payment has been made for the relevant supply.

A GST-registered NZ company may account for GST on a payments basis only if:

(i) It is a nonprofit body;

(ii) The total value of its taxable supplies in the last 12 months did not exceed NZ$2 million, or is not likely to exceed NZ$2 million in the next 12 months; or

(iii) The CIR is satisfied due to the nature, volume, and value of taxable supplies and the nature of the accounting system employed by the New Zealand company that it would be appropriate for a payments basis to be adopted.

A GST-registered NZ company that is eligible to use the payments basis may elect to account for GST on a hybrids basis. Under the hybrids basis, the registered person must return GST output tax on an invoice basis but claim GST input tax on a payments basis.

Notwithstanding the above, a NZ company must account for GST on an invoice basis for any supply it makes for which the consideration is more than NZ$225,000, even if it usually accounts for GST on a payments basis.

(4) GST Returns

The standard period for filing GST returns is every two months.

A registered person may account for GST on a six-month basis if the value of the person's taxable supplies in any 12-month period does not exceed NZ$500,000, or, if the person's taxable supplies do exceed that figure, the person has obtained permission from the CIR to do so.

A registered person, the value of whose annual taxable supplies exceeds NZ$24 million, must file a monthly GST return.

Other registered persons also may apply to account for GST on a monthly basis.

(5) Assessments and Challenges

The provisions governing the assessment of tax and the challenge procedure in the GST Act are similar to those contained in the ITA (see V.B.7. and V.B.8., above).

4. Trade Tax

New Zealand does not have a trade tax.

5. Real Estate Tax

New Zealand does not have a real estate tax.

6. Local Taxes

See IV.I., above.

7. Pay As You Earn (PAYE)

Under the PAYE regime, a NZ company is required to deduct tax (commonly referred to as "PAYE") at source from all salaries and wages and extra emoluments paid to its employees (which can include amounts paid in cryptoassets,) as well as from certain other "schedular payments" paid by the NZ company. Common examples of schedular payments include director's fees, payments to sportspersons and entertainers, and payments to nonresident contractors that perform services in New Zealand. For a discussion of "schedular payments," see X.E.2.b., below.

The amount of the PAYE deduction depends on the gross salary or wage paid to the employee or, in the case of schedular payments, the type of schedular payment.[590]

Comment: The distinction between an employee and an independent contractor who is self-employed (discussed at X.C.2.b.(1), below) is of critical importance in the application of the PAYE rules. Wages and salaries paid to an employee are subject to PAYE, whereas payments made to an independent contractor are not, unless the payment to the independent contractor falls within one of the categories of schedular payments.

The *Challenge Realty* case, discussed at X.C.2.b.(1) below, specifically concerned the imposition of PAYE.

Comment: The Court of Appeal confirmed the broad scope of the PAYE provisions in *Shell NZ Limited v. CIR*,[591] by holding that payments made by an employer to recompense loss related to housing on transfers of employees was subject to PAYE as an "extra emolument."

8. Fringe Benefit Tax

An employer is liable to pay Fringe Benefit Tax (FBT) on the value of fringe benefits provided to its employees, and claim a deduction for the FBT paid. The obligation to pay FBT

[590] Schedule 4 of the ITA sets out the applicable withholding tax rates for the different classes of schedular payment.

[591] (1994) 16 NZTC 11,303.

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is imposed on the employer and any FBT paid is a final tax (i.e., the value of the fringe benefit is not included as gross income of the employee).

The purpose of the FBT regime is to ensure that noncash benefits provided to employees are subject to approximately the same amount of tax as monetary remuneration.

A "fringe benefit" is broadly a non-cash benefit provided by an employer to employees in connection with their employment, where that benefit is not otherwise included in the gross income of the employees.

Certain non-cash benefits are expressly included within the definition of "fringe benefit," including:

(i) The availability of a business vehicle for private use;

(ii) Loans to employees where interest is charged at a rate below the specified FBT rate (currently 8.41%);

(iii) Subsidized transport;

(iv) Payment of superannuation contributions and insurance premiums, except where this is an employer contribution to a specified superannuation scheme; and

(v) Discounted goods and services.

Certain non-cash benefits are expressly excluded from the definition of "fringe benefit," including distinctive work clothing, business tools, and benefits provided on premises.

The applicable FBT rate (depending on whether the default rate or the alternate rate is adopted) is applied to the GST-inclusive value of the fringe benefit (reduced by an amount paid by the employee for the non-cash benefit). Where the fringe benefit falls into one of the categories listed above, the ITA provides a detailed formula for computing the value of the benefit. For all other fringe benefits, the value of the benefit is equal to its market value or an amount determined by the CIR.

The default rate of FBT is 63.93%, which equates to approximately 39% of the grossed-up amount of the fringe benefit.

To avoid the disparity that arises where the relevant employee's marginal tax rate is lower than 39%, an employer may elect to pay FBT at rates that vary depending on the marginal tax rate of the individual employee receiving the benefit, otherwise known as the "alternate rate" method.

Comment: For a NZ company that provides significant fringe benefits to employees who have an FBT rate of less than 63.93%, there may be a material benefit in adopting the "alternate rate" method.

A limited exemption from FBT exists where the total taxable value of fringe benefits provided for each employee per quarter does not exceed NZ$300, or NZ$22,500 for all employees per year.

Ordinarily, FBT is payable on a quarterly basis. Employers must file an FBT return within 20 days from the end of each quarter for quarters one to three (June 30, September 30, December 31), and May 31 for the final quarter ending on March 31.

The return must set out the following:

(i) Details of fringe benefits provided to each employee; and

(ii) A calculation of the amount of FBT payable with respect to the taxable value of those benefits.

However, employers may elect to file FBT returns on an annual basis if the amount of PAYE and ESCT deducted in the preceding year did not exceed NZ$500,000, or where the employer has only commenced business in the current tax year.

In these circumstances, an annual FBT return must be filed by May 31, disclosing all fringe benefits provided in the previous year ended March 31.

Other points of interest are as follows:

(i) Penalties apply to the nonpayment or late payment of FBT;

(ii) The standard dispute procedures apply to FBT assessments (see V.B.9. and V.B.10., above); and

(iii) The FBT regime contains a specific anti-avoidance provision. The ITA's general anti-avoidance provision also applies to FBT.

9. Employer's Superannuation Contribution Tax

Employer contributions to registered superannuation schemes (see V.B.4.q.(4), above) are subject to ESCT at the rate of 39%, unless the employer chooses to use the progressive rate system. Under the progressive rate system, the employer may choose to withhold at one of the following rates based on the employee's level of salary, wages and superannuation contributions in the previous year (or the employer's estimate of the salary, wages and superannuation contributions that the employee will derive in the year of the relevant employer contribution):

(i) 39%, if the employee received more than NZ$216,000 of salary, wages, and superannuation in the previous year;

(ii) 33% if the employee received more than NZ$84,000 of salary, wages, and superannuation contributions in the previous year;

(iii) 30% if the employee received more than NZ$57,600 but not more than NZ$84,000 of salary, wages, and superannuation contributions in the previous year;

(iv) 17.5% if the employee received more than NZ$16,800 but not more than NZ$57,600 of salary, wages, and superannuation contributions in the previous year; and

(v) 10.5% if the employee received NZ$16,800 or less of salary, wages and superannuation contributions in the previous year.

Nonmonetary contributions are taxed under the FBT regime.

If the employer agrees, the employee may elect that the employer's contributions be treated as salary or wages (subject to the PAYE rules) instead of employer's superannuation contributions. This allows the employer's contributions to be taxed at the employee's marginal tax rate.[592]

Employer contributions to nonregistered, non-KiwiSaver superannuation schemes are subject to FBT.

[592] ITA, s. RA 8.

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VI. Taxation of Foreign Corporations

A. What Is a Foreign Corporation

A foreign corporation is a company that is not a New Zealand company. See V.A., above, for a discussion of what is a New Zealand company.

B. Determination of Taxable Income

Unless otherwise provided in an applicable double tax agreement, a foreign corporation is subject to New Zealand tax on all income that has a source in New Zealand, including business profits.[593] Section YD 4 of the ITA specifies the classes of income that have a source in New Zealand ("NZ-sourced income").

Classes of NZ-sourced income commonly derived by a foreign corporation includes:

(i) Income derived from any business carried on in New Zealand;

(ii) Income derived from the ownership of land in New Zealand;

(iii) Income derived from shares or debentures in a New Zealand company, and debentures and other securities issued by the New Zealand Government;

(iv) Income derived from the sale of any tangible or intangible property situated in New Zealand;

(v) Income derived from money lent in New Zealand;

(vi) Income derived from money lent outside New Zealand where:

- The money is lent to a New Zealand resident, unless the loan is used with respect to business activities carried on by the New Zealand tax resident outside New Zealand through a fixed establishment overseas; or
- The money is lent to a nonresident, to be used by the nonresident in business activities carried on in New Zealand through a fixed establishment in New Zealand;

(vii) Income derived from contracts made, or wholly or partly performed, in New Zealand;

(viii) Royalties and similar payments that are paid by:

- A New Zealand tax resident but not with respect to a business the New Zealand tax resident carries on outside New Zealand through a fixed establishment overseas; or
- A nonresident and for which the nonresident is allowed a deduction when calculating its gross income for New Zealand tax purposes;

(ix) Income attributable to a permanent establishment (PE), as defined in Section YD 4B, ITA, in New Zealand of the foreign corporation (except where the income is a dividend from a share in a foreign corporation that is not revenue account property of the shareholder); and

(x) Income of the foreign corporation that may be taxed in New Zealand under a double taxation agreement (except where the income is a dividend from a share in a foreign corporation that is not revenue account property of the shareholder).

Where one of the specific source rules in Section YD 4, ITA does not apply, the source of income will depend on the facts of the case.[594]

C. Method of Taxation

Except for schedular gross income subject to final withholding (certain interest, dividends and royalties set out in Section RF 2 of the ITA; see VI.C.1.b., below), a foreign corporation's NZ-source income is taxed on the same basis as the income of a NZ company, at the rate of 28%.

Where the foreign corporation is resident in a jurisdiction with which New Zealand has a double tax treaty, the applicable double tax treaty may modify the scope and application of New Zealand tax to the foreign corporation's NZ-sourced income.

1. Investment Income

a. Resident Withholding Tax

Where a foreign corporation derives interest from a New Zealand resident, the payer of the interest will generally be required to deduct RWT from the payment of interest (unless the foreign corporation has Resident Withholding Tax (RWT)-exempt status) if:

(i) The interest is derived from money lent by the foreign corporation for the purposes of a business it carries on in New Zealand through a fixed establishment in New Zealand; or

(ii) The interest is derived from money lent by the foreign corporation to an unassociated person and the foreign corporation is a registered bank engaged in business in New Zealand through a fixed establishment in New Zealand.

RWT must be deducted at the rate of 28%, unless that rate is reduced by a tax treaty between New Zealand and the jurisdiction in which the foreign corporation is tax resident. For example, the New Zealand-U.S. double tax treaty would limit New Zealand tax on interest derived by a U.S. company from New Zealand to 10% of the gross interest payment.

RWT is not an additional tax, but a mechanism for the collection of tax.

The foreign corporation will be required to file a New Zealand income tax return and may claim a refund to the extent the RWT deducted exceeds 28% of its net interest income after allowing for deductions (or pay additional New Zealand tax if 28% of its net interest income exceeds the amount of RWT deducted, and no tax treaty applies to limit the applicable New Zealand tax rate).

Comment: Generally, the approved issuer levy (AIL) can only be paid with respect to interest that is subject to NRWT and so cannot be used to reduce the rate of New Zealand tax to 0% on interest derived by a foreign corporation with a

[593] ITA, ss. BD 1, BD 2, and YD 4.

[594] See *Nathan v. FCT* [1918] 25 CLR 183; *FCT v. Mitchum* [1965] 9 AITR 559; *CIR v. NV Philips Gloeilampenfabrieken* [1955] NZLR 868.

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branch in New Zealand. However, certain of New Zealand's tax treaties (for example, the New Zealand-Australia tax treaty) contain an exemption from New Zealand tax for interest derived by a foreign bank with a branch in New Zealand (in which case RWT, not NRWT, applies) provided the interest is not connected with the foreign bank's New Zealand branch (so that the treaty's Interest Article rather than its Business Profits Article applies). The availability of this exemption depends on AIL having been paid with respect to the interest. The ability to obtain the benefit of an exemption under a tax treaty by paying AIL with respect to interest subject to RWT is therefore limited.

b. Nonresident Withholding Tax

Where a foreign corporation derives passive income, such as interest (other than interest described in VI.C.1.a., above), dividends or royalties, that has a source in New Zealand (see VI.B., above), the payer of that passive income will generally be required to deduct NRWT at the time of payment and pay the NRWT deducted to IR.

The rate at which NRWT is required to be deducted from a payment of passive income will depend on the type of income. The rate of NRWT specified in the ITA may be reduced where the foreign corporation is resident in a jurisdiction with which New Zealand has a tax treaty, and that treaty limits the rate of New Zealand tax that may be imposed on the payment. This reduction in the tax rate is generally provided by way of a direct reduction in the amount of NRWT deducted from the payment, rather than by way of a refund to the foreign corporation.

Like RWT, NRWT is not an additional tax, but a mechanism for the collection of tax. NRWT is generally a final tax with respect to passive income, such as dividends, interest and royalties. Where NRWT is a final tax, the foreign corporation is not required to file a New Zealand income tax return or pay any additional New Zealand tax with respect to the income concerned.

However, NRWT is a minimum tax with respect to interest paid between associated persons and certain industrial or commercial royalties. Where NRWT is a minimum tax, the foreign corporation must file an New Zealand income tax return and pay additional tax in New Zealand if New Zealand tax calculated at 28% of its net NZ-sourced passive income exceeds the amount of NRWT deducted.

(1) Interest Income

NRWT must be deducted from NZ-sourced interest derived by a foreign corporation at the rate of:

(i) 15%, which may be reduced by a double tax treaty between New Zealand and the jurisdiction in which the foreign corporation is tax-resident; or

(ii) 0% if the payer has paid AIL with respect to the interest (see IV.K.4., above, for a discussion of when AIL is payable).

Comment: If a foreign corporation derives interest jointly with a New Zealand tax-resident, AIL cannot be paid with respect to the interest and NRWT must be deducted at the RWT rate (currently 28%). The foreign corporation may be able to claim a refund if the NRWT deducted exceeds the rate under an applicable tax treaty, but only on application to IR for a refund of over-deducted tax.

The New Zealand-United States tax treaty generally limits New Zealand tax on interest derived by a U.S. company from New Zealand to 10%. However, a 0% rate may apply in certain circumstances, for example if the foreign corporation is in the business of lending (for example, a bank) and AIL has been paid with respect to the interest.

To reduce mismatches between the NRWT and financial arrangement rules, the definition of "interest" includes a payment (whether of money or money's worth) received by a nonresident from an associated New Zealand resident (or a New Zealand branch of a nonresident), to the extent the payment gives rise to expenditure in the borrower's hands under the financial arrangement rules.

(2) Dividend Income

The rates of NRWT on dividends paid by a New Zealand company to a foreign corporation are set out in the table below, although these rates may be reduced where the foreign corporation is tax-resident in a jurisdiction with which New Zealand has a tax treaty.

Type of Income	Withholding Tax Rate
Fully imputed cash dividend where the foreign corporation has a 10% or more direct voting interest in the NZ company	0%
Fully imputed cash dividend where the foreign corporation has a less than 10% direct voting interest in the NZ company, and an applicable double tax treaty limits tax on the interest to less than 15%	0%
Fully imputed cash dividend where the foreign corporation has a less than 10% direct voting interest in the NZ company, where there is no applicable tax treaty or an applicable treaty limits tax on the interest to 15% or more	15% (see description of FITC regime, below)
Fully imputed non-cash dividend	0%
Supplementary dividend	15% (see description of FITC regime, below)
Most other dividends	30%

The New Zealand-United States tax treaty limits New Zealand tax on dividends derived by a U.S. company from New Zealand to either:

(i) 0% if the U.S. company owns directly or indirectly 80% or more of the voting power of the NZ company (measured over as 12-month period up to the date of the dividend);

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(ii) 5% if the foreign corporation owns directly at least 10% of the voting power of the New Zealand company; or

(iii) 15% in all other cases.

The foreign investor tax credit (FITC) applies to a dividend paid by a NZ company to a nonresident shareholder that holds less than a 10% voting interest in the NZ company and a post-tax treaty tax rate on the dividend is 15% or more. If the dividend is fully imputed, then such a nonresident shareholder receives a supplementary dividend from the NZ company. The supplementary dividend is equal to 54/119 multiplied by the attached imputation credit (as provided under Section LP 2(2), ITA). The NZ company funds the supplementary dividend by claiming a credit against taxes owing in the relevant income year.

A NZ company that has no income tax available against which to claim the credit may elect to use the credit against its own tax liability or against the tax liability of other companies in the same wholly owned group as the NZ company, in both cases in any of the four preceding years.[595]

Alternatively, the NZ company may carry the credit forward to later income years provided 49% shareholder continuity is maintained.

The purpose of the FITC regime is to negate the effect of the NRWT payable on a fully imputed dividend paid to a nonresident shareholder where the dividend has effectively borne full New Zealand corporate tax. Such nonresident shareholder may receive in cash the same amount that it would have received had NRWT not been deducted from the normal dividend.

Example:

	New Zealand Shareholder	**Foreign Shareholder (without FITC)**	**Foreign Shareholder (with FITC)**
Profit before tax	100	100	100
Tax	(28)	(28)	(28)
Add back FITC	NA	NA	12.71
Net company tax	(28)	(28)	(15.29)
Profit after tax	72	72	84.71
Dividends	72	72	84.71
Less shareholder tax	(28)	NA	NA
Add back imputation credits	28	NA	NA
Less NRWT @ 15%	NA	(10.80)	(12.71)
Net deductions	0	(10.80)	(12.71)
Net dividend	72	61.2	72
Tax paid to IR	28	38.8	28

Comment: Following the introduction of the 0% NRWT rate on fully imputed dividends paid to nonresident shareholders with a 10% or more direct voting interest in the New Zealand company, the importance of the FITC regime has been greatly reduced.

(3) Royalty Income

NRWT must be deducted from NZ-sourced royalties derived by a foreign corporation at the rate of 15%, unless that rate is reduced by an applicable tax treaty.[596] For example, the New Zealand-United States tax treaty would limit New Zealand tax on royalties derived by a U.S. company from New Zealand to 5% of the gross royalty payment.

2. Business Income

a. Corporate Income Tax

A foreign corporation will generally be subject to New Zealand corporate income tax on its NZ-sourced business income in the same way as a NZ company, at the rate of 28%.

However, where the foreign corporation is tax-resident in a jurisdiction with which New Zealand has a tax treaty, the relevant treaty will usually provide that the foreign corporation's business profits (or industrial or commercial profits) will only be taxed in New Zealand to the extent they are attributable to a New Zealand permanent establishment (PE) of the foreign corporation.

Business profits of a foreign corporation attributable to a New Zealand PE are taxed in New Zealand at the corporate tax rate of 28%, whereas business profits of a foreign corporation that does not have a New Zealand PE or are not attributable to its New Zealand PE are not generally taxable in New Zealand.

Comment: This rule generally only applies where the foreign corporation's business profits do not fall within a category of income that is expressly dealt with by a more specific rule in the applicable double tax treaty. For example, income derived from the disposal of real property is generally dealt with by a specific article in a double tax treaty.

Whether a foreign corporation has a New Zealand PE (and therefore whether New Zealand has a right to tax the foreign corporation's business profits) is determined by refer-

[595] ITA, s. LP3.

[596] ITA, s. RF 7.

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ence to the definition of a PE in the applicable tax treaty (see XVI.D.1.a., below). However, New Zealand's domestic law has an anti-avoidance rule that may deem a foreign corporation that is a member of a large multinational group (i.e., a group with at least 750 million euros of annual global turnover) to have a New Zealand PE (even if it does not satisfy the PE definition in the applicable treaty) if:

(i) The foreign corporation supplies goods or services to a person in New Zealand;

(ii) A person (the "facilitator") carries out an activity in New Zealand to bring about that particular supply, and those activities are more than preparatory or auxiliary;

(iii) The facilitator is associated with the foreign corporation, an employee of the foreign corporation, or is commercially dependent on the foreign corporation;

(iv) The applicable tax treaty does not contain the OECD's latest PE article (or equivalent) (see XVI.D.1.a., below); and

(v) A more than merely incidental purpose of the arrangement is to avoid New Zealand tax, or a combination of New Zealand tax and foreign tax, for the nonresident.

The purpose of the PE anti-avoidance rule is broadly to target foreign corporations that sell goods or services directly to New Zealand customers, where those sales are assisted by efforts of associated persons with an "on the ground" presence in New Zealand.

Comment: New Zealand's enactment of the PE anti-avoidance rule was controversial as it unilaterally overrides bilaterally negotiated double tax treaties by treating a foreign corporation as having a New Zealand PE for the purposes of an applicable double tax treaty even where the foreign corporation does not satisfy the definition of a PE in that double tax treaty.

Where a foreign corporation has a New Zealand PE, it is only those business profits that are "attributable to" the New Zealand PE that are taxable in New Zealand. For further discussion on determining when a foreign corporation's business income is "attributable to" a New Zealand PE, see VII.A., below.

b. Nonresident Contractor's Tax

Payments (other than payments that are royalties) received by a foreign corporation under a contract or arrangement will generally be subject to nonresident contractor's tax (NRCT) if the payments are for:

(i) Work performed or services rendered by the foreign corporation in New Zealand; or

(ii) Providing the use, or right to use, in New Zealand of any personal property of the foreign corporation or services of another person.

Notwithstanding the above, such payments will not be subject to NRCT where:

(i) The foreign corporation does not have a New Zealand PE, and is present in New Zealand for less than 93 days in a 12-month period;

(ii) The payments to the foreign corporation are NZ$15,000 or less in a 12-month period; or

(iii) The foreign corporation has applied for and obtained from IR a certificate of exemption on the grounds that the foreign corporation does not have a New Zealand PE and an applicable double tax treaty would completely eliminate New Zealand's right to tax the payments.

Where a payment to a foreign corporation is subject to NRCT, the payer must deduct NRCT from the gross amount of the payment at the rate of 15% (or at the non-declaration rate of 20% if the foreign corporation does not provide the payer with a New Zealand tax file number).[597]

NRCT is an interim tax only. The foreign corporation will be required to file a New Zealand tax return and pay tax on the net income arising from these payments at the rate of 28%, with a credit for any NRCT deducted.

If the amount of NRCT deducted is more or less than the foreign corporation's net income tax liability, the foreign corporation will either claim a refund or be required to pay additional tax.

For the rates of source country taxation applying to investment income, services income and capital gains under New Zealand's domestic law and tax treaties and the context for the application of those rates, see the Withholding Tax Chart.

D. Goods and Services Tax

1. Registration

As with a NZ company, a foreign corporation is liable to register for Goods and Services Tax (GST) if its taxable supplies in New Zealand exceed NZ$60,000 in a 12-month period.

In addition, a foreign corporation that is not liable to be registered for GST may voluntarily register for GST under Section 54B of the GST Act even where it does not make taxable supplies in New Zealand. A foreign corporation may voluntarily register under Section 54B if:

(i) It is registered for a consumption tax in the jurisdiction in which it is resident (or, if it is resident in a jurisdiction that does not have a consumption tax, it carries on an activity that would make it liable to be registered for GST if that activity were carried on in New Zealand);

(ii) Its New Zealand input tax deduction is likely to exceed NZ$500 in the first taxable period after registration;

(iii) It does not make or intend to make taxable supplies in New Zealand (or supplies to unregistered recipients that would be taxable supplies if it was GST-registered) and is not a member of a group of companies that carry on a taxable activity in New Zealand; and

(iv) Its activities do involve supplying services where it is reasonably foreseeable that the services will be received in New Zealand by a person other than in the course of making taxable or exempt supplies.

Where a foreign corporation is registered under Section 54B, it will be able to claim GST input tax credits in broadly the same way as a NZ company.

[597] ITA, s. RD 10B.

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For the purpose of calculating its GST input tax deduction, the foreign corporation will be treated as making all of its supplies in New Zealand.

Comment: Before the introduction of Section 54B, a nonresident business that did not make taxable supplies in New Zealand could not register for GST purposes, which meant it could not claim an input tax deduction (see V.C.3.f., above). The result was that GST represented an irrecoverable cost for the nonresident, creating distortionary effects as a New Zealand tax resident incurring the same cost can claim the amount as an input tax deduction. All things being equal, this deterred nonresidents from consuming services in New Zealand.

Comment: For practical purposes, there is no disadvantage in a nonresident voluntarily registering and charging GST if the nonresident supplies to GST-registered purchasers. The purchasers will be able to claim back from IR the GST paid to the nonresident. If the person is GST-registered, it will be able to claim back the GST component of any costs incurred by it in New Zealand.

2. Taxable Supplies

A GST-registered foreign corporation will be required to collect and account for GST to IR in respect of supplies made in New Zealand by that foreign corporation in the course or furtherance of its taxable activity.

A supply of goods and services by a foreign corporation is deemed to be a supply made in New Zealand (and therefore subject to GST, if all other requirements are met) if it is a supply of:

(i) Goods that are "distantly taxable goods" (see VI.D.2.b., below);

(ii) Goods that are in New Zealand at the time of supply;

(iii) Services (other than telecommunications services) that are "remote services" (see VI.D.2.a., below);

(iv) Services that are physically performed in New Zealand;[598] or

(v) Services that are telecommunications services if a person physically present in New Zealand (other than a telecommunications supplier) initiates the supply, or if the services are "outbound mobile roaming services" received by a person whose usual mobile network is in New Zealand.[599]

The initiator is determined by taking into account who pays for the services, who controls the commencement and termination of the supply and who contracts for the supply.

Notwithstanding the above, a supply of goods and services described in (i) to (v), above, by a foreign corporation to a GST-registered recipient that is able to claim back the GST from IR will generally be deemed to be supplied outside New Zealand (and therefore not subject to GST), unless the nonresident supplier unilaterally (or, in the case of supplies described in (ii) and (iv), above, by agreement with the recipient) decides that GST will be charged.[600]

a. "Remote Services"

GST applies to cross-border "remote services" supplied by nonresident suppliers to New Zealand-resident consumers. Nonresident suppliers are required to register and account for GST on these supplies if the supplies in aggregate exceed, or are expected to exceed, NZ$60,000 in a 12-month period.

GST is not required to be charged on a business-to-business transaction, although a nonresident supplier can unilaterally, or by agreement with a GST-registered recipient, treat such a supply as zero-rated.

"Remote services" are broadly defined as any service where there is no necessary connection between the physical location of the recipient and the place of physical performance of the services. This will generally include digital services, such as internet downloads and online services, together with more traditional services, such as legal and accounting services that are supplied remotely.

b. Supplies of "Distantly Taxable Goods"

GST applies to "distantly taxable goods" supplied by nonresident suppliers to New Zealand resident consumers. Nonresident suppliers are required to register and account for GST on these supplies if the supplies in aggregate exceed, or are expected to exceed, NZ$60,000 in a 12-month period.

GST is not required to be charged on business-to-business supplies of "distantly taxable goods," although a nonresident supplier can unilaterally choose to charge GST on such a supply if the supplier expects that more than 50% of their supplies in New Zealand in the next 12 months will be made to unregistered recipients.

"Distantly taxable goods" are defined as goods that:

(i) Individually have a customs value of NZ$1,000 or less;

(ii) Are located outside New Zealand at the time of supply;

(iii) Are supplied by a nonresident supplier; and

(iv) Are delivered to New Zealand.

In certain circumstances, an operator of an online marketplace or a redeliverer (instead of the underlying nonresident supplier) will be required to register and account for GST on supplies of "distantly taxable goods" made through the marketplace or by the redeliverer.

Nonresident suppliers of "distantly taxable goods" may elect to charge GST on supplies of goods with a customs value of more than NZ$1,000 to New Zealand consumers, but only if more than 75% of their supplies in New Zealand in the next 12 months will be "distantly taxable goods."

Comment: New Zealand Customs will collect GST on the importation into New Zealand of goods with a customs value of more than NZ$1,000 (see V.C.3.a.(7), above). To prevent double taxation, nonresident suppliers must take reasonable steps to ensure import documentation is provided that includes relevant GST information (including whether GST has been charged) so that New Zealand Customs does not also charge GST. GST refunds from suppliers can be obtained in the event GST is incorrectly charged by New Zealand Customs.

[598] GST Act, s. 8(3).
[599] GST Act, s. 8(6) and 8(8B).
[600] GST Act, ss. 8(4) and 8(4E).

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c. Supplies of "Listed Services" Through an Online Marketplace

With effect from April 1, 2024, GST applies to supplies of "listed services" performed, provided or received in New Zealand that are made through an online marketplace, irrespective of whether the underlying supplier of the services is registered for GST.

The following services are within the scope of "listed services:"[601]

(i) Accommodation, other than accommodation that would be exempt under the GST Act (broadly, accommodation provided in a dwelling that is used by a person as his or her principal place of residence and for which he or she has rights of quiet enjoyment);

(ii) Ride-sharing or ride-hailing services;

(iii) Delivery services for food, beverages or both; and

(iv) Services that are closely connected with a listed service if the services are advertised, listed or otherwise available through the online marketplace.

The operator of an online marketplace through which a supply of listed services is made is treated as making the supply if the services are performed, provided or received in New Zealand.[602] The operator will be required to register and account for GST on supplies of listed services made through the marketplace if its total supplies in New Zealand (including supplies of the listed services that it is treated as making) exceed, or are expected to exceed, NZ$60,000 in a 12-month period.

The listed services rules apply to online marketplace operators regardless of whether they are resident in New Zealand.

Underlying suppliers of listed services are not required to separately register for GST or account for GST on the listed services. Underlying suppliers that are not registered for GST will be entitled to a flat-rate credit of 8.5% of the value of the supply of the listed services.[603]

The flat-rate credit represents the average amount of GST that underlying suppliers, if registered for GST, would be able to recover as input tax on goods and services that they purchase and use to make supplies of listed services.

Underlying suppliers that are GST registered will be entitled to deduct input tax with respect to their actual expenditure. GST-registered underlying suppliers that are required to have a monthly or bi-monthly taxable period (i.e., those that make taxable supplies of more than NZ$500,000 in a 12-month period) can opt out of the marketplace rules by notifying the marketplace operator, which would enable them to continue accounting for GST on supplies of listed services that they make through an online marketplace.[604]

An underlying supplier that satisfies specific criteria may also be able to enter into an opt-out agreement with the marketplace operator.[605]

New rules have also been introduced to require New Zealand-based platform operators to collect and report information to IR annually about income earned by sellers on their platform. The rules give legislative effect in New Zealand to the Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy and Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods (Part II) developed by the OECD, and took effect from January 1, 2024 for the 2024 and later calendar years.

E. Employment-related Taxes

IR has issued an Operational Statement that provides that a foreign corporation has an obligation to withhold PAYE from payments made to employees and may have FBT or ESCT liabilities for benefits provided to, or contributions made for, employees if:

(i) The employer has made itself subject to New Zealand tax law by having a sufficient presence in New Zealand; and

(ii) The services performed by the employees are properly attributable to the employer's presence in New Zealand.[606]

IR considers that the nature and extent of presence required for a foreign corporation to have a "sufficient presence" in New Zealand may vary depending on the facts in each case.

For example, a sufficient presence could range from a nonresident employer having a permanent office or site in New Zealand where trading operations are performed to a nonresident employer having a single employee in New Zealand working from home and performing contracts in New Zealand on its behalf, utilizing labor and resources in New Zealand to perform those contracts.[607]

The Taxation (Annual Rates for 2023–24, Platform Economy, and Remedial Matters) Act introduced amendments to clarify the application of the PAYE, FBT and ESCT rules in cross-border employment arrangements (effective April 1, 2023) and to enable more flexible PAYE, FBT and ESCT arrangements for employers of cross-border workers (effective April 1, 2024).

The amendments include:

(i) Introducing a new definition of a "cross-border employee" into the ITA to mean, for a person providing a service in New Zealand, an employee of a nonresident employer, and to include a secondee or a person who provides a service for or on behalf of a person who is not resident in New Zealand;[608]

(ii) In line with the existing rules with respect to PAYE, providing that where a nonresident employer does not have an obligation under the rules, liability for FBT and ESCT obligations may transfer to a cross-border employee

[601] GST Act, s. 8C(2).
[602] GST Act, s. 60C(2)(ab).
[603] GST Act, s. 20(3N).
[604] GST Act, s. 60C(2BF).
[605] GST Act, s. 60C(2BB), (2BC), (2BD) and (2BE).
[606] Operational Statement, OS 21/04, *Non-resident employers' obligations to deduct PAYE, FBT and ESCT in cross-border employment situations.*
[607] See IR's Operational Statement OS 21/04, *Non-resident employers' obligations to deduct PAYE, FBT and ESCT in cross-border employment situations*, para. 9.
[608] ITA, s. CE 1F(4).

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working in New Zealand if the employer and employee agree that the employee is liable;[609]

(iii) Providing a 60-day grace period for a nonresident employer to meet or correct its PAYE, FBT and ESCT obligations where a cross-border employee breaches the threshold for an exemption from the rules or receives an unexpected payment;[610] and

(iv) Providing a nonresident employer of cross-border employees with the ability to apply to the CIR for a bespoke PAYE arrangement in special circumstances that would allow the employer to pay PAYE annually by May 31 following the end of the tax year.[611]

F. Assessment and Filing

A foreign corporation liable to pay New Zealand tax broadly has the same assessment and filing obligations as a New Zealand company. See V.B.7.a., above.

[609] ITA, ss. RD 62B and RD 71B.
[610] ITA, s. CE 1F(3B)–(3E).
[611] ITA, s. RA 15(4B).

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VII. Taxation of a Branch

A. Determination of Taxable Income

A New Zealand branch of a foreign enterprise is a New Zealand permanent establishment (PE) under New Zealand's double taxation agreements and a fixed establishment in New Zealand for purposes of the ITA. As it is not legally or economically separate from the rest of the enterprise, a branch will be a nonresident (unless the enterprise is a life insurer and elects for its New Zealand branch to be a New Zealand tax resident) and so will only be subject to New Zealand tax on income "attributable to" the New Zealand PE.

Determining the income that is attributable to a New Zealand PE and therefore subject to New Zealand tax involves hypothesizing the New Zealand PE as a "distinct and separate enterprise" to which profits are attributed. This can be a conceptually difficult task, as a New Zealand PE is not legally or economically "distinct and separate" from the foreign corporation to which it belongs.

As a practical matter, the following general principles can be applied:

(i) The financial statements of the New Zealand PE are the starting point, as these should be a fair reflection of the real economic functions performed and assets used by the New Zealand PE;

(ii) Internal transfers of goods and services may be recognized at full market price (including a mark-up), provided the goods and services are of the same kind as those that the foreign corporation would normally sell to third parties;

(iii) Deductions for other expenditure is limited to actual costs incurred with no allowance for internal mark-ups or notional payments (for example, no allowance for a notional interest charge); and

(iv) The profit calculated for the New Zealand PE must be consistent with what would be expected if the PE were a distinct and separate business engaged in the same or similar activities under the same or similar conditions as, and dealing wholly independently with, the enterprise of which it is a part.[612] The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022 will be of assistance in this regard.

(See XIV.A. See, also, XVI.D.1. for a discussion of PEs and New Zealand's double taxation agreements).

Comment: IR does not follow the current "authorized OECD approach" to the attribution of profits to a PE contained in the 2010 and later versions of the OECD Model Tax Convention. Rather, IR follows the version of the OECD's approach to profit attribution set out in the 2008 OECD Model Tax Convention (subject to New Zealand's observation against the 2008 version). The OECD's "Additional Guidance on the Attribution of Profits to a Permanent Establishment under BEPS Action 7" of March 22, 2018 should also be noted as an interpretive guide.

B. Method of Taxation

The net NZ-sourced income (other than dividends and royalties) attributed to the New Zealand branch of a foreign corporation is taxable at the company tax rate of 28%. Dividends and royalties paid to a branch are not included in the branch's net NZ-sourced income, as dividends and royalties are subject to NRWT and the NRWT deducted is a final tax (see VI.C.1.b., above).

Comment: NZ-sourced interest paid to a New Zealand branch of a foreign corporation is not subject to NRWT.[613] Instead, the interest is subject to RWT and the RWT deducted would be claimable as a credit against the branch's net NZ-sourced income tax liability at the end of the income year (see VI.C.1.a., above).

C. Subsidiary v. Branch

A subsidiary of a foreign corporation incorporated in New Zealand is a New Zealand tax resident. Accordingly, a subsidiary is subject to New Zealand tax on its worldwide income.

A branch is only subject to New Zealand tax on income attributable to New Zealand.

Comment: In most tax jurisdictions, losses incurred by overseas branches may be set off against the gross income of the domestic parent company. Many companies investing overseas expect to incur losses in the first few years of operation. The ability to set off is therefore an important consideration in determining the type of investment. In New Zealand, many offshore investments have been initially structured through branches, and then, when the operations become profitable, converted to New Zealand tax-resident subsidiaries.

Comment: A branch of a foreign corporation is not a separate entity, with the result that there is no New Zealand tax on the repatriation of branch profits to the foreign parent company. It is purely an internal transfer that does not give rise to NRWT on dividends. In contrast, a New Zealand subsidiary must consider NRWT on dividends when it repatriates cash to its foreign parent company (see VI.C.1.b.(2), above).

[612] ITA, s. YD 5B.

[613] ITA, s. RF 2(1)(d) and s. RF 2(1)(2B)(a).

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VIII. Taxation of Partnerships

A. General Partnerships

In contrast to a company, a partnership does not pay tax on its income. Instead, the partnership is treated as transparent (unless the context requires otherwise) so the partners are taxed directly on their own share of the partnership income.

This is achieved by allocating income, expenses, tax credits, rebates, gains and losses to the partners in proportion to each partner's share in the partnership's income.

Comment: One of the effects of transparent status is that capital gains derived by a partnership and distributed to the partners are not subject to New Zealand tax either at the partnership level or the partner level. This can be contrasted with capital gains derived by a company, which can generally only be distributed to the company's shareholders tax-free on liquidation of the company.

Despite its transparent status, a partnership (rather than its partners):

(i) Must register for GST if its taxable supplies exceed NZ$60,000 per annum (see V.C.3.a.(2), above);

(ii) Must register as a payer of interest for RWT and/or NRWT purposes, if and where applicable;

(iii) Must register as an employer and deduct and withhold tax from payments to employees and contractors to be paid to IR, if and where applicable;

(iv) Can elect to be an approved issuer if it will pay interest to a nonresident non-associated lender (see IV.K.4., above); and

(v) Must file an income tax return.

Partnership income is generally calculated by the partnership as if the partnership were an individual, but without any reductions allowed for losses brought forward (because the partners themselves carry forward losses), special exemptions or tax credits.

Other special rules also apply to the calculation of partnership income.

Where a partnership makes a loss, each partner may offset their share of that loss against income from other sources (rather than schedular gross income). Should a partner be unable to fully absorb the loss against other income, the remaining losses may be carried forward by the partner and set off against the partner's income in later income years.

When a partner contracts to provide services to the partnership, payments made to the working partner in accordance with the contract of service are deducted when calculating partnership income.[614] However, for a deduction to be allowed to the partnership for any payment to a working partner, the following requirements must be met:

(i) The payment must be made pursuant to a written contract of service signed by all the partners;

(ii) The contract must specify the amount payable to the working partner for the services to be provided;

(iii) The working partner must personally and actively perform the contractual services for the partnership, although provision of those services need not be the partner's principal occupation; and

(iv) The partnership must not engage in investment as a major activity.

Comment: Section DC 4 of the ITA is necessary because, under partnership law, a payment made by a partnership to one of its partners is treated as a distribution of partnership profits rather than as an expense of the partnership. A partnership, therefore, could not claim a deduction for "wages" paid to a working partner. This becomes particularly significant when the payment of a tax-deductible salary to a working partner has placed the partnership in a loss position for a particular income year. The CIR's practice used to be to disallow the loss to the extent that it constituted a payment to a working partner.

As a result of a partnership's transparent status, partners are treated as holding the partnership's property directly and having the status and intention of the partnership. Therefore, when a partner disposes of part or all of its interests in the partnership, the partner will be treated as disposing of its proportionate share of the partnership's property. The partner may be subject to tax associated with that deemed disposal (for example, depreciation recapture income on the deemed disposal of depreciable property or gains on the deemed disposal of property held by the partnership on revenue account), unless the tax arising on the deemed disposal is below certain safe harbor thresholds.

B. Limited Partnerships

The New Zealand tax treatment of a limited partnership is generally similar to the tax treatment of a general partnership, as discussed above, with one key difference. A limited partner's share of any tax loss of a limited partnership is limited to the amount of the limited partner's "basis" in the limited partnership.[615]

[614] ITA, s. DC 4.
[615] ITA, s. HG 11.

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Generally speaking, a limited partner's basis is the total of:

(i) The amount paid or contributed by the limited partner for his or her partnership interest; plus

(ii) The limited partner's share of partnership debts to the extent the limited partner has guaranteed them; plus

(iii) The limited partner's share of partnership income from the current year and prior years; plus

(iv) Realized capital gain amounts that the limited partner has from the partnership in the current year and prior years; less

(v) The limited partner's share of the partnership's prior year deductions; less

(vi) The limited partner's share of the partnership's capital losses in the current year and prior years; less

(vii) All distributions made by the partnership to the limited partner; less

(viii) Amounts paid to the partner for the assignment of his or her partnership interest.

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IX. Taxation of Other Business Entities

A. Trusts

1. Trustee Income Versus Beneficiary Income

The principle underlying the taxation of the income of a trust is that the income should be taxed only once, i.e., that it should not be taxed both in the hands of the trustee and then again in the hands of the beneficiary.[616] This principle is implemented in the ITA.

Income derived by a trust is classified either as "trustee income" or as "beneficiary income."

Trustee income is defined as gross income derived by a trustee of a trust that is not beneficiary income.

Beneficiary income is defined as gross income derived in an income year by a trustee of a trust to the extent that it is vested absolutely in the beneficiary in the income year or is paid or applied for the beneficiary's benefit by the later of either the date the trustee files or is required to file the return for the income year or within six months after the income year.

New Zealand's trust rules constitute a settlor-based regime, with tax imposed on trustee income based on the residence of the settlors rather than the residence of the trustees. Trustees are liable for income tax on all NZ-sourced trustee income regardless of the residence of the settlor. However, trustees are generally only liable for income tax on non-NZ-sourced trustee income if the settlor is resident in New Zealand (excluding a transitional resident) at any time during the income year.

Trustees are liable for income tax at a rate of 39%[617] with respect to trustee income as if they were individual beneficiaries entitled to the income. Trustees may use tax credits, such as imputation credits, to satisfy the trustee's income tax liability in relation to trustee income.

The rate of tax payable on beneficiary income depends on the beneficiary's marginal tax rate. Income tax on beneficiary income is paid by the trustee as agent for the beneficiary, although, as a practical matter, tax on beneficiary income is often paid by the beneficiaries.

Liability for income tax with respect to beneficiary income depends on the residence of the beneficiary and the source of the income. New Zealand resident beneficiaries are liable for income tax with respect to beneficiary income derived from both inside and outside New Zealand.

Nonresident beneficiaries are liable for income tax only with respect to NZ-sourced beneficiary income. If an amount of income derived by a trustee had a New Zealand source, that income will have a New Zealand source in the hands of the beneficiary when it becomes beneficiary income.

An exception to the general rule applies where the beneficiary is a New Zealand resident minor (defined as a person who is under 16 years of age on the balance date of the trust) and a settlor of the trust is a relative or legal guardian of the minor (or associated with a relative or legal guardian). In this case, the beneficiary income is subject to tax as trustee income (which is currently taxed at 39%), rather than as beneficiary income (which could be taxed at a lower rate depending on the minor's total taxable income). This rule is designed to restrict the use of trusts as income-splitting devices. It is subject to a number of exceptions.

Expenses incurred by a trustee may only be claimed by the trustee, and not the beneficiary. Section DV 9(1) of the ITA denies a beneficiary a deduction for expenditure or loss incurred by a trustee in deriving beneficiary income.

Section DV 9(2) provides that, for purposes of determining the allowable deductions of a trustee, all amounts that are beneficiary income in that year are deemed to be trustee income.

Note: From 2021–2022 and later income years, trustees of trusts — except for trustees of non-active, foreign and charitable trusts — are required to file with Inland Revenue a more comprehensive return that includes, for that year:

(i) Financial accounts; and

(ii) Prescribed information about:

- the amount and nature of each settlement on the trust;
- each settlor that makes a settlement on the trust;
- the amount of any distributions, and identifying information about beneficiaries; and
- persons holding powers to appoint or remove trustees and/or beneficiaries.

2. Trust Distributions

The underlying principle is that trust income should be taxed only once (either as "trustee income" or as "beneficiary income"). Therefore, trust income that has been fully subject to New Zealand tax should not be taxed when distributed to a beneficiary.

Income is taxed in the hands of trustees if it is:

(i) Not vested in the beneficiaries in the relevant income year; and

(ii) Not distributed to beneficiaries within the later of:

- Six months after the end of the income year; and
- The earlier of the due date for the trustee's income tax return and the date the return is filed.

For complying trusts, income having been taxed as trustee income at 39% (or the historic 33%), subsequent distributions/vesting to beneficiaries are not subject to tax again in the hands of the beneficiaries.

For trusts other than complying trusts a gain that has not been taxed and is distributed by the trustee to a beneficiary may be characterized as a "taxable distribution" and may be taxable in the hands of the beneficiary. The trustee frequently pays the income tax with respect to the taxable distribution as an agent for the beneficiary.

For purposes of determining whether a distribution from a trust is taxable, trusts fall into three categories:

[616] *Commissioner of Taxes v. Luttrell* [1949] NZTC 823.

[617] Effective April 1, 2024, applicable to the 2024–25 and later income years (bringing alignment with the top marginal personal income tax rate). Prior to this change, the trustee tax rate was 33%. The trustee tax rate remains 33% for certain disabled beneficiaries trusts, estates in their first three years, certain lines energy trusts and certain *de minimis* trusts with income under NZ$10,000 in a year.

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(i) Complying trusts;

(ii) Foreign trusts; and

(iii) Non-complying trusts.

a. Complying Trusts

A complying trust is any trust from which a distribution is made, where all of the trustee income derived by the trustees since the trust was first settled has been liable to New Zealand income tax, and New Zealand income tax has been paid on that income.

Additionally, a trust is a complying trust where it has income that has not been liable to New Zealand income tax because the trust was exempt from tax pursuant to Subpart CW of the ITA.

The fact that a trust has no income in a particular year or that it has been using tax losses that have been carried forward does not prevent the trust from being a complying trust.

A taxable distribution may not be made from a complying trust. Income accumulated by the trustees has already been liable to New Zealand income tax as trustee income, and it is not appropriate to tax it again on distribution to the beneficiaries.

The only distributions from a complying trust that are taxable in the hands of the beneficiaries are distributions of beneficiary income.

Note: A capital gain made by a complying trust will not be taxable as trustee income or beneficiary income, and will not be a "taxable distribution" when distributed to a beneficiary.

b. Foreign Trusts

A foreign trust is a trust where at all times, from the later of December 17, 1987, or the date on which settlement (where money, goods or services provided are more than incidental) was first made on the trust, there has been no settlor of that trust resident in New Zealand.

When a distribution is made from a foreign trust, and the distribution does not constitute beneficiary income, it may be a taxable distribution. The distribution is a taxable distribution if it is not beneficiary income and if it does not consist of a distribution of any part of the corpus of the trust or of capital profits or capital gain realized by the trustee (unless the capital profit or gain was realized in a transaction with a person associated with the trustee). Taxable distributions from foreign trusts are included in the beneficiary's income and taxed at their marginal tax rate.

Foreign trusts with resident trustees and any trusts where a trustee has benefited from the foreign-sourced income exemption in Section HC 26 of the ITA ("foreign exemption trusts") are subject to certain registration and disclosure requirements in New Zealand, including a requirement to register with IR and disclose certain information on an ongoing basis. The consequence of failing to comply with these disclosure obligations is that the trust may, subject to the CIR's discretion, cease to be eligible for the tax exemption in Section HC 26 of the ITA, under which non-NZ-sourced income derived by resident trustees is exempt from New Zealand tax where no settlor is resident in New Zealand at any time during the income year. A civil penalty of up to NZ$1,000 may also apply.[618]

c. Non-complying Trusts

Non-complying trusts are residually defined as being those trusts that are neither complying trusts nor foreign trusts.

Where a distribution is made from a non-complying trust, and the distribution does not constitute beneficiary income, it is a taxable distribution to the beneficiary to the extent it does not represent a distribution of any part of the corpus of the trust. "Corpus" is defined to mean an amount equal to the market value of any property settled on the trust at the date of settlement, subject to certain exclusions.

A taxable distribution from a non-complying trust is taxed at a rate of 45%.

Comment: Where no settlor of a trust is a New Zealand tax resident at any time in the income year, and the New Zealand tax resident trustee of the trust derives foreign-source income that is not distributed as beneficiary income, the trust will be a non-complying trust.[619] That foreign-source income, together with all other non-beneficiary income of the trust, when distributed, will be a taxable distribution. However, Interpretation Statement IS 24/01 makes it clear that a non-NZ-sourced taxable distribution derived by a nonresident beneficiary from a non-complying trust will not be subject to New Zealand income tax.

B. Superannuation and KiwiSaver Schemes

Superannuation schemes that are registered under the Superannuation Schemes Act 1989 are taxed under a modified version of the trust regime. Such schemes only derive "trustee income." Accordingly, all income derived by a registered superannuation scheme is taxed at a rate of 28% if the scheme is widely held and 33% if not (for schemes that have elected to become portfolio investment entities (PIEs), see IX.E., below). All foreign income of a registered superannuation scheme is assessable trustee income, and there can be no taxable distributions made by a registered superannuation scheme.[620]

C. Unit Trusts

A unit trust is defined as any scheme or arrangement made for the purpose of providing facilities for the participation by subscribers or purchasers, as beneficiaries under a trust, in income or gains (whether in the nature of capital or income) arising from the money, investments and other property that are for the time being subject to the trust.[621] This definition includes any superannuation scheme that is not registered under the Superannuation Schemes Act 1989.

A unit trust is treated in the same way as a company for income tax purposes:

(i) A unit trust is taxed on all of its income;

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[618] TAA, s. 139AC.

[619] ITA, ss. HC 10 and HC 26.

[620] ITA, ss. HC 10(1)(b) and HC 15.

[621] ITA, s. YA 1, definition of "unit trust." In Interpretation Statement 16/02, the CIR considers whether a unit trust can have a single unit holder. The CIR's view is that this is possible provided the trust scheme or arrangement is "made for the purpose" or "has the effect" of providing facilities for multiple unit holders.

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(ii) A unit trust operates an imputation credit account (ICA);

(iii) The unit holders are deemed to be shareholders; and

(iv) The unit holders' interests are deemed to be shares.

D. Mutual Associations

Mutual associations, whether incorporated or not, are taxable on profits derived from transactions with both members and nonmembers.[622] However, profits are deductible to the extent they are attributable to members' transactions, when they are actually paid or credited to members as rebates. The deduction is limited to the lesser of actual profits from members' transactions and the rebates paid. Rebates are taxable in the hands of the members.

E. Portfolio Investment Entities

New Zealand has a concessionary tax regime for collective investment vehicles.

An investment entity that satisfies the relevant criteria (discussed in IX.E.2., below) may elect to become a portfolio investment entity (PIE). The PIE regime, which provides significant tax advantages, is voluntary.

1. Principal Components of the PIE Regime

The PIE regime has three key elements:

(i) It provides a tax exemption for all gains on the sale of shares in NZ companies, and in Australian companies that are listed on certain approved indices of the Australian stock exchange.

(ii) It generally adopts a hybrid flow-through approach.[623] In particular:

- Income earned by a PIE and attributable to a New Zealand tax resident investor who is not a natural person is taxable in the hands of the investor at the time it is earned by the PIE (i.e., whether or not it is distributed);
- Income earned by a PIE and attributable to a New Zealand tax resident natural person investor is taxable in the hands of the PIE, but at more or less the investor's marginal tax rate, subject to a cap of 28%;
- Income earned by a PIE and attributable to an electing trustee or a nonresident (other than a nonresident who is a notified foreign investor in a foreign investment PIE (discussed in IX.E.3.e., below)) is taxable in the hands of the PIE at 28%; and
- Foreign-source income earned by a foreign investment PIE (see IX.E.3.e., below) and attributable to notified foreign investors is taxed at a rate of 0%.

(iii) It excludes from taxable income all distributions from a PIE, other than certain imputed dividends from a listed company PIE.

[622] ITA, s. CB 33.

[623] There are exceptions for PIEs that are listed companies and certain defined benefit superannuation schemes.

2. PIE Eligibility Requirements

A number of requirements must be met by an entity to qualify as a PIE.

These may be categorized as:

(i) Entity requirements;

(ii) Investment-in requirements; and

(iii) Investment-out requirements.

a. Entity Requirements

An entity wishing to become a PIE must:

(i) Be a company (including a unit trust), a group investment fund, or a defined benefit or superannuation fund;[624]

(ii) Not carry on a life insurance business, unless it elects to be a life fund PIE;[625]

(iii) Be a New Zealand tax resident under both the ITA and any applicable double taxation agreement (unless it is a foreign investment PIE);[626] and

(iv) Give investors rights to all types of income arising from their investment.[627]

For example, a PIE cannot issue a unit that gives a right to dividends on a share and another unit that gives a right to gains on sale of the share.

b. Investment-in Requirements

A PIE, other than a listed PIE, must have 20 or more members per investor class (an investor class is broadly defined as one or more investors holding interests in the PIE that carry the same rights to distributions).[628]

This requirement does not apply if:

(i) At least one investor in each investor class is one of the following: a PIE (or an entity eligible to be a PIE); a foreign collective investment vehicle that is equivalent to a PIE, a life insurer, certain government funds, a boutique investor class, or a community trust;[629] or

(ii) All of the investors in the class are registered charities that derive exempt charitable income.

There are also restrictions on the size of the interest that investors may hold in a PIE.

The general rule is that an investor may not hold more than 20% of any investor class, but there are certain exceptions that allow certain investors (for example, other PIEs) to hold up to 100% of a PIE.[630]

In determining whether the above investment-in requirements are met, the interests of associated persons that hold 5% or more of the PIE are aggregated.[631]

[624] ITA, s. HM 9.

[625] ITA, s. HM 10.

[626] ITA, s. HM 8.

[627] ITA, s. HM 17.

[628] ITA, s. HM 5(2).

[629] ITA, s. HM 14(3).

[630] ITA, s. HM 15.

[631] ITA, s. HM 16.

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c. Investment-out Requirements

There are restrictions on the type of investments that a PIE may make.

90% or more of the PIE's assets must be invested in land, financial arrangements, excepted financial arrangements (which excludes physical assets), or a right or option over the above.[632]

Also, 90% or more of the income allocated by the PIE to an investor class must be dividends, income from financial arrangements or excepted financial arrangements, income from a lease of land, proceeds from the disposal of property meeting the investment type requirement above, replacement payment under a share loan, income from other PIEs, distributions from superannuation funds, or FIF income.[633]

There are also restrictions on the size of a PIE's share investments. Generally, a PIE must hold no more than 20% of a company or a unit trust (determined by reference to voting interests).[634]

The investment size requirement does not apply to investments in other PIEs or entities that qualify for PIE status, foreign PIE equivalent funds or land investment companies.[635]

There is also an exception for portfolio investor classes making up, in aggregate, less than 10% of the PIE, provided certain other conditions are met.[636]

These investment-out requirements are modified for foreign investment PIEs (discussed under IX.E.3.e., below).

3. Tax Treatment of Different Types of PIEs and Their Investors

a. Listed PIEs

Portfolio listed companies continue to be taxed as if they were not PIEs, except for the exemption from tax for gains on the sale of New Zealand and certain Australian listed shares.

They maintain an imputation credit account, and any losses are carried forward to be used against income in future years.

However, their shareholders are subject to a significant change, with respect to the taxation of dividends:

(i) Unimputed dividends are excluded from income for both residents and nonresidents; and

(ii) Imputed dividends are also excluded for New Zealand tax residents, natural persons and trustees, unless such persons elect to include them in their tax returns. The only persons who would generally do so are natural persons on a marginal tax rate under 28%, who would be able to use the imputation credits to reduce the tax on their other income.

b. Life Fund PIEs

A life fund PIE is a separate, identifiable fund that is part of a life insurer and holds investments linked to life insurance policies under which benefits are directly linked to the value of the fund's investments. Life fund PIEs receive the exclusion from tax for gains on the sale of shares in New Zealand companies or Australian companies listed on an approved index of the Australian stock exchange. Such funds are otherwise taxed under the standard life insurance regime (see IX.G., below).

c. Benefit Fund PIEs

Other than with respect to the exemption from tax for gains on the sale of New Zealand and Australian listed equities, the tax treatment of defined benefit funds[637] that elect to be PIEs will not change significantly. These funds will continue to pay tax at 28%. Distributions from such funds are already tax-free to investors.

d. Multi-Rate PIEs

An entity that is eligible to be a PIE but cannot be a listed PIE, a life fund PIE, or a benefit fund PIE, must pay tax as a multi-rate PIE.

A multi-rate PIE is required to notionally attribute income to investors in the PIE based on their interests in the PIE. Income tax must then be paid by the multi-rate PIE on its income by reference to the income attributed to each investor and each investor's prescribed investor rate (PIR).

The PIRs are:

(i) 0% for NZ companies, registered charities, PIEs and trustees who do not elect a higher rate ("zero-rate investors");

(ii) 10.5% for New Zealand resident individuals who fall below certain income thresholds and testamentary trusts;

(iii) 17.5% for New Zealand resident individuals who do not qualify for the 10.5% rate and fall below certain income thresholds and trustees that elect this rate; and

(iv) 28% for New Zealand resident individuals who do not qualify for the 10.5% or 17.5% rates, New Zealand resident trustees that elect this rate, and nonresidents.

The multi-rate PIE is required to pay New Zealand tax with respect to the attributed income of investors that are not zero-rated investors at the investors' PIR. The Fund would then be required to make an adjustment to such investors' interests in the multi-rate PIE and/or the amount of distributions the investors are entitled to receive to reflect the tax liability paid by the multi-rate PIE in relation to them.

The investors should not be taxed separately on their attributed income, except where an investor has used an incorrect PIR, in which case the investor will be eligible for a refund of overpaid PIE tax or, in the case of an underpayment of PIE tax, be liable for additional tax at its marginal tax rate (capped at 28%). The investors will not be taxed separately on distributions from the multi-rate PIE.

The multi-rate PIE does not pay New Zealand tax with respect to zero-rated investors' attributed income. Instead, those investors must include their attributed income as gross income on their tax returns and pay New Zealand tax on that income

[632] ITA, s. HM 11.
[633] ITA, s. HM 12.
[634] ITA, s. HM 13(3) and (4).
[635] ITA, s. HM 13(1).
[636] ITA, s. HM 13(5).

[637] Defined in s.YA 1 of the ITA as meaning a superannuation scheme registered under the Superannuation Schemes Act 1989 that must comply with s.15(1)(a) of that Act.

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themselves. A multi-rate PIE effectively acts as a transparent entity in respect of such investors.

e. Foreign Investment Portfolio Investment Entity

The underlying principle of the foreign investment PIE regime is that nonresident investors should only be subject to New Zealand tax on their NZ-sourced income, not their foreign-sourced income.

Generally, an entity can elect to become a foreign investment PIE if it meets the requirements of a multi-rate PIE (described in IX.E.3.d., above) and it has, or intends to have, nonresident investors. During this election process, the entity must choose to become one of the following two types of foreign investment PIEs:

(i) A foreign investment zero-rate PIE; or

(ii) A foreign investment variable-rate PIE.

Both nonresidents and New Zealand residents can invest in foreign investment PIEs. Resident investors will continue to be taxed as if they were investing in a multi-rate PIE (described in IX.E.3.d., above).

Both types of foreign investment PIEs are able to access a concessionary 0% PIR for foreign-sourced income that is attributed to investors who are "notified foreign investors." Generally, a notified foreign investor is a person other than: a New Zealand resident; a controlled foreign company; or a nonresident trustee of a trust, other than a foreign trust that informs the PIE that it elects to be a notified foreign investor and provides certain information to the PIE.

(1) Foreign Investment Zero-Rate PIE

A foreign investment zero-rate PIE pays tax at 0% on its income attributed to "notified foreign investors" (and continues to pay tax at the same rate as a multi-rate PIE on income attributed to any New Zealand investors). However, a foreign investment zero-rate PIE may only derive:[638]

(i) Foreign-sourced income; and

(ii) A *de minimis* level of NZ-sourced income.

If a foreign investment zero-rate PIE derives an amount that exceeds the *de minimis* threshold for NZ-sourced income, then the PIE is treated from the date on which the amount is derived as a foreign investment variable-rate PIE.[639]

(2) Foreign Investment Variable-Rate PIE

A foreign investment variable-rate PIE is able to derive both foreign-sourced amounts and NZ-sourced amounts but is subject to some restrictions regarding investment in New Zealand land and other entities. A foreign investment variable-rate PIE pays tax at 0% on its foreign-sourced income attributed to notified foreign investors.

For NZ-sourced income attributed to notified foreign investors, tax is paid according to the following PIRs:

- 15% for unimputed dividends, if the investor is tax resident in a country with which New Zealand has a double tax agreement, or 30% otherwise;
- 0% for fully imputed dividends;
- 1.44% for interest and other income from debt; and
- 28% for all other New Zealand-sourced amounts.

F. Look-Through Companies

Under the Look-Through Companies (LTC) regime:

(i) An LTC's income, expenses, tax credits, refundable tax credits, gains and losses are attributed to its shareholders ("owners"). These items will generally be attributed to owners in proportion to the number of shares they have in the LTC.

(ii) An owner's share of net income is taxed at the owner's marginal tax rate. The owner can use any losses against their other income, subject to the loss limitation rule.

(iii) The loss limitation rule applies only to LTCs that are in partnership or are members of a joint venture and ensures that the losses claimed reflect the level of an owner's economic loss in the LTC. Owners' excess losses are carried forward to future income years, subject to the application of the loss limitation rule in those years.

A NZ company may elect to be an LTC if it has no more than five "look-through counted owners."

For the purposes of determining the number of "look-through counted owners" in an LTC, relatives' ownership interests are treated as being held by a single person and, where a trust holds shares in the LTC, trustees are treated as a notional single person and any beneficiary who has received a distribution from the trust in the current and preceding three income years is included as a look-through counted owner.

Only a natural person, trustee, or another LTC is permitted to hold shares in an LTC. To bolster the prohibition on direct corporate or charitable ownership of LTCs, a trust that owns shares in an LTC cannot make any distributions to corporate or charitable beneficiaries.

The foreign income that can be earned by an LTC that is controlled by foreign LTC holders (i.e., where the LTC is owned more than 50% by nonresidents) is limited to the greater of NZ$10,000 and 20% of the LTC's gross income in the relevant income year.

G. Life Insurers

A life insurer is any person who carries on the business of providing life insurance.

Life insurance means insurance (including reinsurance and the provision of annuities for a term contingent upon human life) where consideration is provided by the insured in return for benefits contingent upon the death or survival of a human being, but it excludes medical or accident insurance and lump-sum superannuation fund benefits where the lump-sum equals total contributions, plus allocated investment earnings.

Under the current regime, a life insurer derives two categories of income:[640]

[638] ITA, s. HM 55G.
[639] ITA, s. HM 55H.
[640] Inland Revenue, *Tax Information Bulletin* (Vol. 21, No. 8) Part II, at pp. 46–47.

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(i) Policyholder base income, comprising investment income (less expenses) from policyholder funds. The policyholder base income is ordinarily taxed at 28%, although the life insurer can elect to attribute the income to each policyholder at the policyholder's PIR (i.e., 10.5% or 17.5%).

Losses are carried forward to the next income year, and excess imputation credits are grossed-up and are applied against policyholder base income as a loss in the subsequent income year. The carryforward of losses is not subject to any continuity rules.

(ii) Shareholder base income, comprising risk profits, fees, share of participating profits, investment income on shareholder funds and other income. The shareholder base income is taxed at the prevailing corporate tax rate of 28%.

Ordinary tax rules apply to losses carried forward or subject to grouping, and imputation credit account balances being carried forward.

The CIR has summarized the process of calculating tax liability as follows:[641]

> The recognition of income and expenditure under the Income Tax Act 2007 relies in the first instance on amounts that result from using generally accepted accounting practices. These amounts are then modified according to ordinary income tax principles to determine whether an asset is held on revenue account by the life insurer and whether any expenditure incurred is deductible. These amounts are then allocated under subpart EY to the two tax bases using formulas that are consistent with actuarial principles.

A nonresident life insurer may elect for its New Zealand life insurance business to be treated as if it were the life insurance business of a New Zealand tax resident by giving a notice in writing to the CIR not less than 20 working days prior to the commencement of the specified income year.[642] The effect of the election is that the life insurance business is deemed to be carried on by a New Zealand company in which the life insurer holds all of the shares, the life insurer is deemed to carry on the business as agent for the deemed company, and the life insurer and the deemed company are deemed to be separate persons.

H. Mining and Petroleum Mining Companies

1. Mining Companies (Other than Petroleum Miners)

Special rules apply to a company (whether New Zealand tax resident or nonresident) whose sole or principal source of income is the business of mining in New Zealand minerals that are specified either in the ITA or by the Minister of Finance. The special rules also apply to exploration or searching for specified minerals, or performing development work relating to exploring, searching, or mining. Subject to the special rules, the mining company is assessable and liable for income tax as if it were not a mining company.

Key parts of the special rules include the following:

(i) Mining companies can be assessed on four categories of income:

- Amounts derived from "mining operations" or "associated mining operations;"
- Amounts derived from the disposal of land;
- Consideration from disposing of a mineral mining asset (which does not include land);
- Amounts recovered if deductions are taken when, in hindsight, those deductions should not have been taken when the expenditure was incurred but spread over the life of the mine (see below);

(ii) Expenditures are split into seven categories:

- "Mining prospecting expenditure," which is deductible in the year incurred.
- "Mining exploration expenditure," which is deductible in the year incurred. However, a deduction claimed as a mining exploration expenditure can be recaptured (i.e., treated as income) in a future income year if that expenditure results in an asset used for the commercial production of a listed industrial mineral.
- "Mining development expenditure," which is deductible over the life of the mine created.
- "Mining rehabilitation expenditure," which is deductible in the year it was spent (rather than incurred).
- Expenditure on land, which is deductible in the year the land is disposed of.
- Expenditure on acquiring mineral mining assets. The timing of the deduction depends on the stage of the operations. If the asset is acquired before a mining permit for the permit area to which the asset relates is obtained, the expenditure is deductible in the year in which it is incurred. Otherwise, the expenditure is treated as a "mining development expenditure."
- All other expenditures, which are subject to other provisions in the ITA and the capital/revenue distinction.

(iii) There are special rules in relation to loss grouping, losses carried forward and shareholder continuity.

2. Petroleum Mining Companies

Special rules apply to petroleum miners in relation to deductions for exploration and development expenditures and assessable receipts:

(i) Amounts of "exploration expenditure" are deductible in the year in which they are incurred.

(ii) Amounts of "development expenditure" are treated as a deferred deduction, and deductible in equal amounts over seven years, beginning with the income year in which the expenditure was incurred in the case of offshore development, and beginning with the latter of the income year in which the expenditure was incurred or the first year of commercial production in the case of onshore developments.

[641] Inland Revenue, *Tax Information Bulletin* (Vol. 21, No. 8) Part II, at p. 48.

[642] ITA, s. EY 49.

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(iii) Expenditures incurred for removal or restoration operations are allowed as a deduction in the year that they are incurred.

(iv) Amounts of "petroleum mining decommissioning costs" give rise to refundable tax credits.

(v) The consideration received by a petroleum miner from the disposal of a petroleum mining asset or exploratory material is gross income in the year of derivation.

Deferred deductions (development expenditures) are immediately deductible on relinquishment of a petroleum permit, the sale of a petroleum mining asset, and the sealing and abandoning of an exploratory well prior to the date of first commercial production.

Special rules govern sales to associated persons — the vendor's allowable deduction is limited to the gross income derived on the sale, and any deferred deductions with respect to the asset are reduced accordingly.

Where an exploratory well is used by the petroleum miner for commercial production, an amount equal to the amount of exploratory expenditure directly attributable to the drilling or acquisition of the well that has been fully deducted (or will be fully deducted) is recaptured as gross income in the first year of commercial production. That amount of deemed income is treated as an amount of development expenditures and is deductible in equal installments over seven years.

Special rules apply to so-called farm-out arrangements. A farm-in expenditure is deductible to the farm-in party in accordance with the rules for petroleum miners. The farm-in expenditure does not constitute gross income of the farm-out party.

Any consideration received for damage to a permit-specific asset is gross income of the petroleum miner in the year of derivation. The costs of repairs to a damaged permit-specific asset are deductible in the year they are incurred.

Any consideration derived by a person from the disposal of shares or trust interests in a controlled petroleum mining entity (i.e., a petroleum mining entity, the beneficial ownership of which is held by five or fewer persons, and 75% of the net market value of the assets (less liabilities) of which is attributable to a petroleum permit including permit specific assets) pursuant to a contract entered into on or after December 3, 2001, is not gross income of the vendor, and no deduction is allowed for the cost of such shares or trust interests.

A specific anti-avoidance rule applies for purposes of the petroleum mining regime, special rules apply for petroleum mining operations carried on outside New Zealand by New Zealand residents (the above New Zealand rules apply with modifications) and there are special rules for protected petroleum mining companies (which cover the Maui joint ventures).

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X. Taxation of Individuals — Residents

A. Scope of Taxation

The taxable income of a New Zealand tax resident individual is calculated in the same way as that of a NZ company but with an important difference.

Self-employed individuals may deduct their business expenses generally on the same basis as companies, but employees (that is, wage and salary earners) are not permitted to deduct expenses that they incur in deriving their monetary remuneration. Identifying whether an individual is an employee or self-employed is of fundamental importance.

B. Residence

An individual is deemed a tax resident in New Zealand if his or her permanent place of abode is in New Zealand, or if he or she is physically present in New Zealand for more than a total of 183 days in any 12-month period (183-day test).[643] The individual's residence will start on the earlier of the day the individual has a permanent place of abode in New Zealand and (where the individual has satisfied the 183-day test) the first of those 183 days in New Zealand.

Once an individual is deemed a resident in New Zealand, that status may be changed only if the individual is absent from New Zealand for a total of more than 325 days in any 12-month period (325-day test) and does not retain a permanent place of abode in New Zealand.

The individual will cease to be a New Zealand resident on the later of the date on which the individual ceases to meet the permanent place of abode test and (once the 325-day test has been satisfied) the first of those 325 days outside New Zealand.

The concept of a "permanent place of abode" is not defined in the ITA. It has been described by the Court of Appeal as meaning a place where a taxpayer habitually resides from time to time even if he or she spends periods of time overseas.[644]

The CIR has indicated a number of factors to be considered when determining whether a person habitually resides at a place of abode in New Zealand such that it is a permanent place of abode for him or her, which include:[645]

(i) Continuity and duration of presence in New Zealand; and

(ii) Durability of association with the place of abode and how close are the connections with that place, which in turn is determined by:

- The nature and use of the individual's dwelling in New Zealand and his or her connection with the dwelling;
- His or her intention regarding his or her presence in or absence from New Zealand;
- The location of the individual's family;
- Whether the individual's employment, business interests, and economic ties are present in or carried out in New Zealand; and
- Where the individual's personal property is located in New Zealand.

Comment: The Court of Appeal in *CIR v. Diamond*[646] considered whether the taxpayer was resident in New Zealand on the basis of whether he had a permanent place of abode in New Zealand. The Court dismissed the CIR's appeal and upheld the decision of the High Court that the taxpayer, Mr. Diamond, did not have a permanent place of abode in New Zealand in the relevant years. The Court held that "permanent place of abode" requires more than the mere availability of a place of abode and focused on whether there is an actual and continuing connection between a taxpayer and a specific place. Following the decision, the CIR released a revised Interpretation Statement IS 16/03, the key change from the previous Interpretation Statement being the emphasis placed on the nature and quality of the use a person habitually makes of his or her place of abode in New Zealand.

The residence rules in the ITA are subject to the various tax treaties that New Zealand has entered into with many of its trading partners. These treaties provide "tie-breaker" rules for determining the country in which an individual is deemed a resident when, as a result of domestic legislation, he or she is deemed a resident in more than one country. Generally, the rules laid down by the treaties use a "permanent home" or "center of vital interests" test for determining residence.

Comment: The New Zealand legislation has been criticized for not retaining a similar type of domestic residence test.

Where a tax treaty applies, it will normally prevent an individual from being taxed twice on the same income. However, the treaty will not avert the compliance costs of an individual determining to which country he or she must pay tax, and the time and effort taken to submit tax returns to both countries.

C. Determination of Taxable Income

1. Taxation of Worldwide Income

As in the case of companies, a New Zealand tax resident individual ("NZ individual") is taxable on his or her worldwide income. There is a limited exception to this rule with respect to NZ individuals who are "transitional residents."

A nonresident individual that becomes a New Zealand resident will be a transitional resident for a period of 48-months after the month in which he or she became a New Zealand resident, if the individual has not been a New Zealand resident at any time in the preceding 10 years and the individual has not opted out of the transitional residence regime.

A transitional resident is not taxable in New Zealand on foreign-sourced income, unless that foreign-sourced income is derived in connection with employment or services performed in the transitional residence period.

[643] ITA, s. YD 1.
[644] *CIR v. Diamond* [2015] NZCA 61.
[645] Inland Revenue, *Interpretation Statement: Tax residence* (IS 16/03).
[646] [2015] NZCA 61.

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2. Calculation of Taxable Income

The method pursuant to which a NZ individual calculates his or her income tax liability for a given income year is the same as that for NZ companies. See V.B.2.b., above.

The individual's income tax liability may be satisfied by subtracting the individual's tax credits. If the income tax liability is greater than the total available tax credits, the difference is the individual's terminal tax, and this must be paid to satisfy the individual's income tax liability.

a. Classes of Gross Income

All of the classes of gross income identified for companies are relevant for individuals.[647] The following are additional regimes under which individuals may derive income.

(1) Employment Income

Certain amounts derived by a NZ individual in connection with the NZ individual's employment or service is employment income of the NZ individual, including:

(i) Salary or wages, an allowance, bonus, extra pay or gratuity;

(ii) Payments made by an employer relating to expenditure incurred by an employee (other than expenditure on certain work-related items);

(iii) The provision of accommodation (other than certain types of excluded accommodation, such as lodging provided on mobile workplaces, lodging for shift workers or lodging provided to an employee required to work at a distant workplace for a limited period of time);

(iv) A benefit received under an employee share scheme (discussed at X.C.2.a.(2), below);

(v) Compensation for loss of employment or service; and

(vi) Any other benefit in money.

Where the employment income consists of amounts described in (i) to (iii) above, the employer is required to deduct PAYE from the payment of employment income and account to IR for the PAYE deducted within certain specified timeframes (see V.C.7., above).

(2) Employee Share Schemes

An "employee share scheme" is an arrangement with a purpose or effect of issuing or transferring shares (including cryptoassets that are shares as defined in the ITA) to a past, present or future employee in that employee's employing company (or a company in the same group of companies as the employee's employing company), if that arrangement is connected to the employee's employment. The definition is broad and is intended to include, for example, direct transfers of shares, loans or bonuses to buy shares, put and call options, and transfers to associated persons of employees. Certain arrangements are expressly excluded from the definition.

Where an employee receives shares under an employee share scheme, the employee will have an amount of employment income equal to the market value of those shares on the "share scheme taxing date" (or the amount received by the employee for the disposal of the shares if the shares are cancelled or sold to a non-associated person before the "share scheme taxing date") less any amount paid by the employee for those shares. There are complex rules for determining the "share scheme taxing date," but broadly it is the date on which the employee holds the shares in the same way as any other shareholder. The employee will generally not be treated as holding the shares in the same way as any other shareholder if, for example, the employee has downside protection with respect to a fall in the value of the shares or the employee is required to forfeit the shares in the event he or she ceases to be an employee.

An employer is not required to calculate and pay an amount of income tax with respect to a benefit provided to an employee under an employee share scheme, unless the employer elects to do so.

(3) Attributed Income from Personal Services

The personal attribution rule applies when a person acquires services from an entity if those services are personally performed by an individual associated with that entity, and the following threshold tests are met:

(i) 80% or more of the entity's total income from personal services during the income year is derived from the supply of services to one person;

(ii) 80% or more of the entity's total income from personal services during the income year is derived from services personally performed by the individual and/or a relative of the individual;

(iii) The individual's net income for the income year exceeds NZ$70,000 (including any amount that would be attributed to the individual under the personal attribution rules); and

(iv) Substantial business assets are not a necessary part of the business structure used to derive the entity's assessable income.

Where the rule applies, the lesser amount of the entity's net income from personal services in the relevant income year and the entity's net income in the relevant income year (reduced by any amounts actually distributed to the individual in the income year) will be attributed to the individual and taxed to the individual at their marginal tax rate.

Comment: The personal attribution rules were introduced to prevent an individual avoiding paying tax on his or her income at the highest marginal tax rate by interposing an entity between the individual and the recipient of the individual's services. The Government has indicated that the scope of the personal attribution rules may be expanded following the increase of the top marginal tax rate to 39% from April 1, 2021, but no decision has yet been made.

[647] There are no special exemptions for individual taxpayers.

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(4) Withdrawals or Transfers from Foreign Superannuation Regimes

A "foreign superannuation scheme" is a superannuation scheme constituted outside New Zealand.[648]

The FIF regime (see V.B.3.e.(2)(c), above) applies to a NZ individual's interest in a foreign superannuation scheme if the interest was acquired when the NZ individual was a New Zealand tax resident or the interest has been treated as an interest in an FIF in the 2014 and subsequent income years.

Where the FIF regime does not apply, a NZ individual will only be taxed on his or her interest in a foreign superannuation scheme when:

(i) He or she actually receives an amount from the scheme, either as a pension (which is fully taxable on receipt)[649] or as a cash lump sum;[650]

(ii) He or she transfers his or her interest into a New Zealand or an Australian superannuation scheme, unless that transfer occurs within 48 months of the individual becoming New Zealand resident;[651] or

(iii) There is a transfer of his or her interest to another person (unless rollover relief is available).[652]

Lump sums received or transferred in the first four years of the NZ individual becoming tax resident in New Zealand are generally exempt from tax in New Zealand.

b. Allowable Deductions

As in the case of companies, a NZ individual will generally only be allowed a deduction for expenditure that satisfies the general expenditure test and is not excluded under any of the general limitations (discussed in V.B.4.a. to c., above).

After the general test for deductibility has been considered, the next step is to consider the application of specific deduction provisions which may exclude or modify the right to a deduction otherwise allowable under the general deductibility test, or authorize a deduction not otherwise permitted.

The deductibility of expenditure incurred by NZ individuals is subject to a number of additional limitations. Some of the most important limitations are discussed in (1) to (3), below.

(1) Distinction Between Employees and Independent Contractors

A NZ individual who is an employee is not permitted to claim deductions for expenses incurred in relation to earning employment income (for example, for trade fees and subscriptions; expenditures on books and periodicals, special work-related clothing, equipment, and technical aids; and expenses relating to obtaining degrees and other qualifications).

The ITA specifically excludes the deduction of expenses from employment income. Self-employed individuals may deduct expenditures incurred in the production of their gross income. Like wage and salary earners, however, they may not deduct any private or domestic expenditures.

Comment: The inability of an employee to deduct his or her employment-related expenses has focused attention on the distinction between an independent contractor who is self-employed and an employee. As employees may not deduct any expenses incurred in deriving their income, but independent contractors may, real difficulty may arise where it is not clear whether or not a person is an employee. Some of the tests used in making the distinction are:

(i) The control test, which involves an examination of the nature and degree of control over the person employed.

(ii) The organization or integration test, where the focus is on whether the person employed is an integral part of the business or whether his or her work is not integrated into the business but is accessory to it (in which case the individual is more likely to be classified as an independent contractor).

(iii) The fundamental test, where consideration is given to whether the person engaged to perform the services is performing the services as a person in business on his or her own account.

(iv) The intention test, which involves an examination of the intention of the parties at the time they contracted for the taxpayer's services.

(v) The mixed or multiple test, which is an amalgam of all the above tests, and is best described as leading to the result a reasonable person would reach after all the relevant factors have been considered.[653]

In *Enterprise Cars Ltd v. CIR*,[654] a case concerning the distinction between employees and independent contractors, it was held that each of these tests must be applied to determine the relationship between the parties. The taxpayer engaged the services of a number of mechanics. Each mechanic was self-sufficient, could turn down jobs offered to him by the taxpayer, and was solely responsible for the number of hours he worked. The taxpayer had little control over the mechanics, who could complete jobs without interference. The Court held that the mechanics were independent contractors.

In *Challenge Realty Ltd, W.E. Simes & Co. Ltd and Harcourts Real Estate v. CIR*,[655] the taxpayers were substantial real estate firms. The CIR's long-standing policy had been that salespersons in receipt of commissions from real estate firms were independent contractors rather than employees. However, the CIR changed its policy and the taxpayers sought judicial review of that change. After applying the various legal tests described above, the High Court found that the salespersons were employees and not independent contractors. That decision was affirmed by the Court of Appeal.

The same view was taken by the Supreme Court in the case of *Bryson v. Three Foot Six Ltd*.[656] The taxpayer was a miniature-model maker offered a permanent position by Three

[648] ITA, s. YA 1, definition of "foreign superannuation scheme."
[649] ITA, s. CF 1(1)(g).
[650] ITA, s. CF 3(2)(a).
[651] ITA, s. CF 3(2)(b) and (c).
[652] ITA, s. CF 3(2)(d).
[653] Interpretation Guideline 16/01 sets out the Commissioner's approach to determining an individual's employment status for tax purposes.
[654] (1988) 10 NZTC 5,126.
[655] (1990) 12 NZTC 7,212.
[656] [2005] 3 NZLR 721 (SC).

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Foot Six. He was not given a written contract of employment but signed a memorandum referring to him as a contractor. He worked regular hours of work in return for an hourly rate of pay, submitted invoices for payment and was taxed as a contractor. The Court held that he was an employee, noting that in deciding whether a relationship was one of contract service or a contract for service, all relevant matters must be considered and that the determination is a question of fact. This would include examining whether the terms of the written agreement reflected the reality of the relationship.

The distinction between an employee and an independent contractor who is self-employed is also of critical importance in the application of the PAYE provisions.

(2) Deduction for Mixed-Use Assets

New Zealand has "mixed-use assets" rules that limit the deduction that a NZ individual can claim for expenditure incurred with respect to land, boats and aircraft that are used in an income year partly to earn income and partly for private use, and are unused for at least 62 days in an income year.

There are complex rules for determining the amount of the allowable deduction, but broadly, the proportion of the NZ individual's expenditure with respect to a mixed-use asset that is deductible is calculated by dividing the number of days in which the mixed-use asset was actually used to earn income by the total number of days the asset was actually used either to earn income or for private use (excluding days where the asset was unused).

(3) Deduction for Residential Rental Properties

From the 2019–20 income year, deductions for expenditure incurred in relation to residential rental properties in an income year are ring-fenced to the extent the expenditure exceeds the income from those properties in the relevant income year.

Excess amounts cannot be offset against the NZ individual's other income (for example, salary or wages) to reduce his or her tax liability. Instead, excess deductions may be carried forward and are ring-fenced such that they can only be used to offset against specific types of future income from residential properties. The ring-fencing rules only apply to "residential rental property," which is defined to exclude the main home, revenue account property, mixed-use assets and certain properties provided as employee accommodation.

Government enterprises and non-close companies are expressly excluded from the new ring-fencing rules.

The interest limitation rules were introduced on October 1, 2021, to limit a taxpayer's ability to claim deductions for interest expenditure in relation to residential property. However, these provisions will be substantially repealed as from April 1, 2025.

The ability to claim interest deductions has been phased back in, with 80% of deductions being allowed with effect from April 1, 2024 and 100% being allowed with effect from April 1, 2025 (see V.B.4.f.(1), above).

D. Tax Credits

A tax credit is a credit for tax paid, tax withheld, or other circumstances calculated under Parts L and M of the ITA, which may be used to satisfy a NZ individual's income tax liability for a tax year as far as the credit extends.

Where a NZ individual has tax credits remaining after offset against his or her income tax liability for the income year, those remaining tax credits must be dealt with as follows:

(i) If the remaining tax credits are non-refundable credits, the credits are extinguished;

(ii) If the remaining tax credits are imputation credits, the credits are carried forward to the next year;

(iii) If the remaining tax credits are refundable tax credits, the credits are refunded to the NZ individual (although in certain circumstances they may first be applied against any unpaid tax liabilities of the NZ individual in earlier or later income years).

1. PAYE

PAYE deducted from employment income and schedular payments (see X.E.2., below) derived by a NZ individual in an income year will give rise to a tax credit for the NZ individual for the income year equal to the amount of PAYE deducted. PAYE tax credits are refundable.

2. Charitable Donations

A NZ individual who makes a cash gift of NZ$5 or more to a "donee organization" (see V.B.4.j., above) during an income year may claim a tax credit equal to 33.3% of the amount of the gift (except to the extent the amount of gifts made by the NZ individual during the relevant income year exceeds the NZ individual's taxable income for the year). Charitable donation tax credits are refundable.

3. Imputation Credits and Resident Withholding Tax Credits on Interest and Dividends

Imputation credits (see V.B.6.c., above) attached to dividends received by a NZ individual are included in income but offset dollar for dollar the NZ individual's liability for income tax. If they exceed that liability, they may be carried forward to future years.

Resident Withholding Tax (RWT) deducted from interest and dividends derived by a NZ individual will give rise to RWT credits for the NZ individual. RWT credits also offset an individual's income tax liability. If they exceed that liability, they are refundable.

4. Working for Families Tax Credits

A NZ individual that is the primary caregiver in a low- or middle-income family may be entitled to a series of tax credits (the family tax credit, in-work tax credit, parental tax credit, minimum family tax credit and Best Start tax credit) known as Working for Families Tax Credits (WFF tax credits). To calculate the amount of WFF tax credits that a NZ individual is entitled to, the individual's net income or loss may need to be adjusted to take account of certain items not usually included when determining income for tax purposes. WFF credits are therefore calculated by the CIR.

WFF tax credits are refundable. Refunds arising from WFF tax credits may be received at year-end upon filing a tax

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return, or by way of interim instalments paid either weekly or fortnightly.

5. Independent Earners

A NZ individual with a net income for a tax year equal to or more than NZ$24,000 is entitled to a tax credit of NZ$520 if certain requirements are met (for example, the individual did not receive certain other benefits; the individual did not receive overseas benefits; and the spouse, civil union or *de facto* partner did not receive a Working for Families credit). The amount of tax credit is reduced by 13 cents for each dollar of net income over NZ$66,000.

E. Method of Taxation

1. Income Tax

Individuals are subject to tax on their income at progressive rates. This means that when income increases over a rate change threshold, the rate of tax payable on that income increases also.

The tax thresholds rates applying to individuals changed on July 31, 2024. The tax thresholds applicable to subsequent income years are as follows:

Income in NZ$	Tax Rate
Up to NZ$15,600	10.5%
NZ$15,601 to NZ$53,500	17.5%
NZ$53,001 to NZ$78,100	30%
NZ$78,101 to NZ$180,000	33%
NZ$180,001 and higher	39%

2. PAYE

PAYE is not additional tax, but a mechanism for the collection of tax. The amount of PAYE deducted will be included as income of the NZ individual, although the PAYE deducted will give rise to tax credits that will offset dollar for dollar the NZ individual's income tax liability.

a. PAYE on Employment Income

NZ individuals receiving employment income are subject to the PAYE system of tax collection. PAYE is required to be deducted from most types of employment income derived by a NZ individual. See V.C.7. and X.C.2.a.(1), above.

As employees are not entitled to deductions for expenditure incurred in deriving their employment income, PAYE will effectively be a final tax for NZ individual employees, unless PAYE has been deducted at the incorrect withholding tax rate.

b. PAYE on Schedular Payments

In addition, PAYE is required to be deducted from "schedular payments." "Schedular payments" are payments to a person in connection with the provision of certain types of work or services where the relationship between the payer and the person is not strictly one of employer and employee (see X.C.2.b.(1), above for a discussion of the distinction between an employee and an independent contractor).

Where a schedular payment is made to a NZ individual, the payer is required to deduct PAYE from the payment and account to IR for the PAYE deducted. PAYE must be deducted at the rate prescribed in the ITA for the type of schedular payment, unless the NZ individual has elected a different rate (subject to a minimum 10% rate) or the NZ individual has not provided their IRD number to the payer, in which case a 45% "no-notification rate" applies.

The full list of schedular payments and their prescribed withholding tax rates is set out in Schedule 4 of the ITA, but common classes of schedular payments are as follows:

Type of Schedular Payment	Prescribed Withholding Rate
Payments to entertainers and sportspersons	20%
Commission paid to insurance agents or salespersons	20%
Director's fees	33%
Payments for most forms of agricultural, horticultural and forestry work	15%
Payments for commercial cleaning and maintenance work	20%
Payments for the supply of certain types of labor to building projects	20%

3. Fringe Benefit Tax

The liability to pay Fringe Benefit Tax (FBT) with respect to fringe benefits provided to employees is imposed on the employer, rather than the employee.

NZ individuals are not separately taxable with respect to fringe benefits received from their employer. See V.C.8., above.

4. Resident Withholding Tax

Where a NZ individual derives interest or dividends from a New Zealand resident payer or a nonresident payer with a fixed establishment in New Zealand, the payer must deduct Resident Withholding Tax (RWT) from the payment to the NZ individual, unless the NZ individual has RWT-exempt status.

RWT is not an additional tax, but a mechanism for the collection of tax. The amount of RWT deducted will be included as income of the NZ individual, although the RWT deducted will give rise to tax credits that will offset dollar for dollar the NZ individual's income tax liability. Therefore, RWT will effectively be a final tax for NZ individuals, unless RWT has been deducted at the incorrect withholding tax rate.

F. Assessments and Filing

At the end of each tax year ending on March 31, IR prepares an account for each NZ individual that is pre-populated with the NZ individual's employment and investment income from which tax has been deducted at source ("reportable in-

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come"). Where an NZ individual derives income from which tax has not been deducted at source ("other income") of more than NZ$200, the NZ individual must amend his or her pre-populated account to include his or her other income, correct any errors in their reportable income and finalize the account.

A NZ individual who derives other income of NZ$200 or less generally will not be required to provide any information and the CIR will finalize the account and automatically issue the NZ individual with a refund or tax bill (as applicable). However, the NZ individual will be required to provide further information if he or she knows the pre-populated account is incorrect or if the CIR is not satisfied that the pre-populated account completely and correctly records the NZ individual's income for the year. In that case, the NZ individual can finalize the pre-populated account by confirming it is correct or correcting any errors. If the NZ individual fails to provide the further information requested by the CIR, the CIR may assess the NZ individual for the amount of income the CIR considers ought to be subject to tax by issuing a default assessment.

G. Audit Process and Statute of Limitations for Assessment and Collection of Taxes

As with companies, where an assessment of a NZ individual's income tax liability has been made for an income year, the CIR may not reassess the NZ individual for an increased tax liability after the period of four years from the end of the income year in which the assessment was made. A NZ individual will be treated as making an assessment of his or her income tax liability on the date the pre-populated account is finalized. If the pre-populated account is not finalized (for example, because the CIR requested information from the NZ individual and the NZ individual has not provided any information,) the assessment will be treated as made on the date the CIR issues a default assessment.

The CIR may reassess a NZ individual who derives only reportable income without first issuing a notice of proposed adjustment (NOPA) by amending the NZ individual's final account at any time before the end of the four-year time bar period. If the NZ individual disagrees with the reassessment, the CIR must issue a NOPA within four months of the reassessment and follow the formal disputes process.

In the case of a NZ individual who derives other income, the CIR must issue a NOPA and complete the formal disputes process before reassessing the NZ individual. See V.B.8., above, for a discussion on the formal disputes process and the statute of limitations.

H. KiwiSaver and Superannuation

All New Zealand citizens between the ages of 18 and 65 who commence new employment in New Zealand are automatically enrolled in a registered KiwiSaver scheme, unless the employee "opts out" during weeks two to eight of their new employment. Other NZ individuals (including self-employed individuals, unemployed individuals and individuals over 65) may voluntarily join a registered KiwiSaver scheme by "opting in."

The scheme operates by employers deducting a set portion of an employee's earnings (in much the same way as PAYE) and contributing the amount deducted (via IR) to a registered KiwiSaver scheme for investment on the employee's behalf. This is a separate regime from any registered superannuation scheme that the employee's employer may choose to offer access to.

Employees may elect for their employer to deduct 3%, 4%, 6%, 8% or 10% of their gross salary or wages to be contributed to a registered KiwiSaver scheme. Salary or wages for KiwiSaver contribution purposes include most employment-related income that is subject to the PAYE tax regime — for example, total salary, bonuses, gratuities, overtime or commissions. They exclude amounts such as redundancy payments and expenditures or allowances for accommodation overseas or other costs of living overseas.

Trans-Tasman portability of retirement savings allows an individual who has retirement savings in both Australia and New Zealand to consolidate them in one account in his or her current country of residence, without the consolidation giving rise to a tax cost. The arrangements remove an impediment to labor movement between the two countries, as retirement savings were previously unable to be transferred if a person permanently migrated to the other country.

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XI. Taxation of Nonresident Aliens

A. Nonresident Individuals

See X.B., for a discussion of when an individual is not tax resident in New Zealand.

B. Determination of Taxable Income

Unless otherwise provided in an applicable tax treaty, an individual not tax resident in New Zealand ("nonresident individual") is taxable in New Zealand on his or her NZ-sourced income. The classes of income that are deemed to have a source in New Zealand are set out at VI.B., above.

C. Method of Taxation

Except for schedular gross income subject to final withholding (certain interest, dividends, and royalties,) a nonresident individual's NZ-sourced income is taxed on broadly the same basis as the income of a NZ individual.

Where the nonresident individual is resident in a jurisdiction with which New Zealand has a tax treaty, the applicable treaty may modify the scope and application of New Zealand tax to the nonresident's NZ-sourced income.

1. Business Income

a. Income Tax

As in the case of a foreign corporation, a nonresident individual is subject to New Zealand income tax on all NZ-sourced income, including business profits, unless otherwise provided in an applicable tax treaty.

New Zealand's treaties will usually provide that, in the case of business profits, New Zealand will tax only those profits relating to a New Zealand PE of the nonresident individual. See VI.C.2.a., above.

b. Nonresident Contractor's Tax

As in the case of a foreign corporation, payments (other than royalty payments) made to a nonresident individual under a contract for the provision of services (or the right to use personal property or services of another person) in New Zealand will generally be subject to NRCT, unless one of the exemptions in the ITA applies. See VI.C.2.b., above.

The payer must deduct NRCT from the gross payment at the rate of 15%. The nonresident individual will be required to file a New Zealand tax return and pay tax on the net income arising from these payments at their marginal tax rate, with a credit for any NRCT deducted.

Comment: NRCT does not apply if the payment falls within one of the more specific categories of "schedular payments" (for example, payment to a nonresident entertainer or nonresident director).

2. Employment Income and Schedular Payments

PAYE on employment income and schedular payments is not additional tax, but a mechanism for the collection of tax. The amount of PAYE deducted will be included as income of a nonresident individual, although the PAYE deducted will give rise to tax credits that will offset dollar for dollar the nonresident individual's income tax liability.

a. PAYE on Employment Income

Where a nonresident individual derives employment income that relates to work performed in New Zealand by the nonresident individual under an employment contract, his or her employer will generally be required to deduct PAYE from the payment of employment income (see X.E.2.a., above,) unless that employment income is exempt. Employment income will be exempt if the nonresident individual performs the services during a visit to New Zealand that is less than 93 days, the nonresident individual is present in New Zealand for less than 93 days in each 12-month period that includes the visit, and the employment income is subject to tax outside New Zealand.

If the nonresident individual is resident in a jurisdiction with which New Zealand has a tax treaty, the treaty may eliminate New Zealand's right to tax the nonresident individual's NZ-sourced employment income in certain circumstances. For example, the New Zealand-United States tax treaty provides full relief from New Zealand tax where the employer is not resident in New Zealand, the nonresident employee is present in New Zealand for less than 184 days in any consecutive 12-month period and the employment income is not deductible in determining the profits of a New Zealand PE of the nonresident employer.

b. PAYE on Schedular Payment

Where a nonresident individual derives a "schedular payment" (see X.E.2.b., above,) the payer will generally be required to deduct PAYE from the payment if that payment has a source in New Zealand. See VI.B., above, for a discussion of the classes of income that have a source in New Zealand.

Comment: IR's view is that directors' fees paid by a New Zealand company to a nonresident individual will, in most cases, have a source in New Zealand and therefore be subject to PAYE, regardless of whether the directorship services are performed in New Zealand. This is on the basis that most of New Zealand's tax treaties permit New Zealand to tax directors' fees paid by a New Zealand company to a nonresident individual who provides the directorship services as an independent contractor. Therefore, such payments would have a source in New Zealand under Section YD 4(17D), which provides that income that may be taxed in New Zealand under a treaty has a source in New Zealand.

3. Investment Income

a. Nonresident Withholding Tax

Where a nonresident individual derives passive income (such as interest, dividends, or royalties) that has a source in New Zealand, the payer of that passive income will generally be required to deduct Nonresident Withholding Tax (NRWT) at the time of payment and pay the NRWT deducted to IR. The NRWT deducted will generally be a final tax. See VI.C.1.b., above.

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b. Exemption for Venture Capital Investment

From April 1, 2005, gains made by Qualifying Foreign Equity Investors (QFEI) on the sale of shares or options to buy shares in unlisted New Zealand companies are exempt from tax.[657] The QFEI exemption is only available if the QFEI has held the shares or options for at least 12 months and the unlisted company invested in does not have any of certain activities as its main activity (for example, land ownership, mining or the provision of financial services).

The definition of "QFEI" targets two categories of investor:

(i) Direct nonresident investors; and

(ii) Foreign funds of funds (FFOF).

A direct nonresident investor must be resident in a territory that is approved by regulation. The list of approved countries includes all countries with which New Zealand has tax treaties, provided the applicable treaty contains an information exchange article. The investor must also be unable to claim in its home jurisdiction a tax credit or other compensation for any New Zealand tax that would have been paid but for the exemption.

4. Capital Gains

New Zealand does not currently impose a tax on capital gains, although the ITA expressly includes certain amounts as gross income that would otherwise be treated as capital gain amounts (for example, certain amounts derived from the disposal of land). See V.B.3.b., above.

[657] ITA, s. CW 12.

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XII. Estate/Inheritance/Transfer and Gift Tax

New Zealand does not impose an estate/inheritance/transfer tax or a gift tax.

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XIII. Tax Avoidance

A. Income Tax

1. General Anti-Avoidance Rule

The ITA contains a general anti-avoidance rule (GAAR), Section BG 1, which governs the treatment of arrangements entered into to avoid New Zealand income tax. The purpose of Section BG 1 is to protect the tax system from tax avoidance arrangements.

As a result of the GAAR, judicial or civil law anti-avoidance doctrines such as the business purpose test, fiscal nullity or abuse of laws have not been adopted or developed in New Zealand. In particular, Section BG 1 provides that a tax avoidance arrangement is void against the CIR.

A "tax avoidance arrangement" is defined in Section YA 1 to mean an "arrangement," whether entered into by the person affected by the arrangement or by another person, that directly or indirectly:

(i) Has tax avoidance as its purpose or effect; or

(ii) Has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the tax avoidance purpose or effect is not merely incidental.

Section YA 1 defines "arrangement" very broadly as meaning any contract, agreement, plan, or understanding (whether enforceable or not), including all the steps and transactions by which it is carried into effect. The Privy Council in *Peterson v. CIR* stated that "their Lordships do not consider that the 'arrangement' requires a consensus or meeting of the minds; the taxpayer need not be privy to its details either."[658] Therefore, the taxpayer need not have knowledge of a particular tax avoidance arrangement; it is sufficient that the taxpayer is affected by it.

Section YA 1 defines "tax avoidance" as being any one of the following:

(i) Directly or indirectly altering the incidence of tax;

(ii) Directly or indirectly relieving any person from liability to pay tax; or

(iii) Directly or indirectly avoiding, reducing, or postponing any liability to income tax.

Where a tax avoidance arrangement is voided under Section BG 1, the CIR can counteract the tax advantage obtained by the taxpayer under that arrangement under Section GA 1.

Comment: The definition of a tax avoidance arrangement is phrased very broadly, and on a literal interpretation, many seemingly legitimate transactions might appear to fall within its ambit. As a rule of thumb, transactions entered into with little or no real economic effect other than the reduction of New Zealand income tax are likely to be ineffective for taxation purposes under Section BG 1. However, taxpayers may structure genuine commercial transactions in the most tax efficient manner without any adverse consequences provided the use of specific provisions of the ITA falls within "Parliamentary contemplation."

The "Parliamentary contemplation" test is the leading judicial approach to applying Section BG 1 and was enunciated by the Supreme Court in New Zealand's leading tax avoidance case, *Ben Nevis Forestry Ventures Ltd & Ors v. CIR; Accent Management Ltd & Ors v. CIR* ("*Ben Nevis*");[659] *Frucor Suntory New Zealand Limited v Commissioner of Inland Revenue "Frucor."*)[660] The majority judgment in *Ben Nevis* described the Parliamentary contemplation test as follows:[661]

> "If … it is apparent that the taxpayer has used the specific provision [in the ITA], and thereby altered the incidence of income tax, in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision, the arrangement will be a tax avoidance arrangement …
>
> The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is consistent with Parliament's purpose. If that is so, the arrangement will not, by reason of that use, be a tax avoidance arrangement. If the use of the specific provision is beyond Parliamentary contemplation, its use in that way will result in the arrangement being a tax avoidance arrangement."

The majority emphasized that Section BG 1 does not limit the factors that the courts can consider in determining whether an arrangement is a tax avoidance arrangement. However, the following factors may be particularly relevant in the analysis:[662]

(i) The manner in which the arrangement is carried out;

(ii) The role of all relevant parties and any relationship they may have with the taxpayer;

(iii) The economic and commercial effect of documents and transactions;

(iv) The duration of the arrangement and the nature and extent of the financial consequences that it will have for the taxpayer;

(v) The particular combination of various elements in the arrangement; and

(vi) Whether the arrangement has been structured so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way.

The Supreme Court made it clear that in considering the factors above, the courts are not limited to purely legal considerations stating that they "should also consider the use made of the specific provision in the light of the commercial reality and the economic effect of that use."[663]

In the recent *Frucor* decision, the Supreme Court put increased focus on what the economic substance of an arrangement is.

[658] (2005) UKPC 5 at para. [34].

[659] (2009) 24 NZTC 23,188 (SC).

[660] (2022) NZSC 113.

[661] (2009) 24 NZTC 23,188 (SC) at paras. [107]–[109].

[662] (2009) 24 NZTC 23,188 (SC) at para. [108].

[663] (2009) 24 NZTC 23,188 (SC) at para. [109].

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Comment: Even though the Supreme Court in *Ben Nevis v. CIR* clarified the approach to applying Section BG 1, there is still (necessarily) a degree of uncertainty when applying Section BG 1 to specific transactions because of the section's general nature. While it is often easy, in extreme cases, to tell whether an arrangement is within Section BG 1 or not, there is a great deal of uncertainty at the margins. In these marginal cases, determining whether a transaction has tax avoidance consequences is a complex task and even the courts' decisions have not always been consistent. Accordingly, advice should be obtained if there is any possibility that Section BG 1 might apply to an arrangement.

Inland Revenue has also released a number of Question and Answer (Q&A) documents that consider the application of Section BG 1 to various scenarios.[664]

Examples: The following are some examples of significant New Zealand cases where the arrangements were held by the courts to be tax avoidance arrangements:

(i) *Ben Nevis*[665] involved an elaborate scheme whereby investors undertook to pay an inflated license fee in 2047 to use certain forestry land to develop a Douglas fir forest. The investors also entered into a captive insurance arrangement so that if the net proceeds of the sale of harvested trees were not sufficient to fund the payment of the license premium in 2048, the investors could still meet the payment. The bulk of the license and insurance premium payment obligations were satisfied by the issue of promissory notes by the taxpayers in 1998, so that, per year, for a cash outlay of NZ$50 per hectare, they could obtain tax deductions of approximately NZ$41,000 per hectare.

(ii) "JG Russell template cases: for example, *Miller v. CIR*[666] and *O'Neil v. CIR*[667] — in these cases, an accountant named JG Russell offered to take the entire annual net profits of his client's companies and immediately make a return to them (less remuneration for his services) in the form of a tax-free capital payment. He did this broadly as follows:

- The client agreed to sell his or her shares in a successful trading company to a company controlled by JG Russell;
- The purchase price was left outstanding;
- The trading company paid its profits to a JG Russell group company as an "administration charge;"
- The administration charge was offset against accumulated tax losses in the JG Russell group; and
- The tax-free profits were then paid to the client as an installment of the purchase price (and JG Russell received a fee for his services).

(iii) The conduit cases: *BNZ Investments Ltd v. CIR*[668] and *Westpac Banking Corporation v. CIR*[669] — in these cases, New Zealand's major trading banks entered into financing arrangements using the conduit tax relief rules in the ITA (no longer in force), whereby the banks could effectively:

- Lend money to overseas counterparties by subscribing for redeemable preference shares (RPS) in the counterparties (or related entities);
- Receive tax-exempt dividends (instead of assessable interest); and
- Claim deductions for interest on funds borrowed to subscribe for the RPS.

The banks also paid a deductible "Guarantee Procurement Fee" (GPF) to the counterparty in exchange for the counterparty procuring a guarantee with respect to the borrowing from its parent company. The dividend on the RPS and the GPF were calculated by reference to the prevailing tax rate and the bank's "tax capacity" to effectively split the tax benefit of the arrangement between the bank and the counterparty.

(iv) *Penny v. CIR*[670] involved two surgeons who restructured their practices so that the income from the performance of their services was derived by companies that were wholly owned by their family trust. As a result, the surgeons' income was taxed at the lower company or trust tax rate (30% or 33%) instead of the higher personal marginal tax rate of the surgeons (39%). The Supreme Court agreed with the CIR that the surgeons' restructuring was a tax avoidance arrangement. It held that the restructuring of the surgeons' businesses was a legitimate business choice. However, combined with the payment of a commercially unrealistic salary and the continued access to the benefit of the businesses' profits (through the family trusts) for the surgeons and their families, the arrangements amounted to tax avoidance.

(v) *Alesco New Zealand Ltd v. CIR*:[671] the taxpayer was a company that was wholly-owned by Alesco Corporation, an Australian company. The taxpayer issued 10-year optional convertible notes (OCNs) to Alesco Corporation in return for NZ$78 million. ON maturity, the taxpayer could either repay the NZ$78 million or convert the OCNs into shares in the taxpayer. No interest was payable on the OCNs. Determination G22 was applied to the OCNs, resulting in deemed interest deductions for the taxpayer. The Court of Appeal held that the OCN arrangement was tax avoidance as the taxpayer did not suffer an economic cost (i.e., pay interest in cash) when it claimed interest deductions under Determination G22, and the

[664] See, for example, QWBA 15/11 *Income Tax: Scenarios on Tax Avoidance — 2015.*
[665] (2009) 24 NZTC 23,188 (SC).
[666] [2001] 3 NZLR 316 (PC).
[667] (2001) 20 NZTC 17,051 (PC).
[668] (2009) 24 NZTC 23,582 (HC).
[669] (2009) 24 NZTC 23,834 (HC).
[670] [2011] NZSC 95.
[671] [2013] NZCA 40.

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conversion of the OCNs into shares on maturity had no commercial purpose as the taxpayer was a wholly owned subsidiary.

(vi) *CIR v. Frucor Suntory NZ Ltd*:[672] this case concerns cross-border mandatory convertible notes. The $298 million purchase price paid by Frucor was funded by $150 million of equity from Danone Asia and a $148 million loan from Danone Finance SA (Danone Finance). That funding was restructured in March 2003. Under the restructure, Frucor borrowed approximately $204 million from the New Zealand branch of Deutsche Bank by issuing a note that was convertible at the election of Deutsche Bank into non-voting shares in Frucor at the end of its five-year term. On the same day, Deutsche Bank entered into an agreement with Danone Asia to sell the Frucor shares that it would receive in five years' time if it elected to convert the note, in consideration for an upfront payment of $149m. Frucor paid Deutsche Bank interest totaling $66 million over the term of the note, calculated on an interest only basis on the $204 million face value of the note. The Supreme Court held that the arrangement was tax avoidance and Frucor's use of the relevant tax provisions was outside Parliament's contemplation, because those provisions were intended to provide relief in relation to interest incurred and $55 million of Frucor's payments were not interest because, in effect, $149m of the $204m was an equity investment from Frucor's then parent Danone Asia (even though the tax rules applicable at the time treated such convertible debt as debt prior to conversion).

Comment: To remove an apparent conflict between the general anti-avoidance rule and the provision that empowers New Zealand's tax treaties, the Taxation (Annual Rates for 2016–2017, Closely Held Companies, and Remedial Matters) Act 2017 amended the ITA to make it clear that the anti-avoidance rules are taken into account in interpreting the application of the treaties and arguably are not overridden by the treaties.

2. Specific Anti-Avoidance Provisions

The ITA contains a number of anti-avoidance provisions governing the validity of specific transactions. These are to be complied with in addition to Section BG 1, not in substitution for Section BG 1.

Some of the more important specific anti-avoidance provisions include:

(i) Section GB 2, which allows the CIR to apply the transfer pricing regime in the case of an arrangement that has a purpose or effect (with respect to any taxpayer) of defeating the intent and application of that regime;

(ii) Sections DB 57 and DC 5, which limit the deductibility of payments made between spouses;

(iii) Section IP 3, which defeats arrangements entered into to take advantage of the loss carryforward provisions;

(iv) Section GB 4, which prohibits the grouping of losses where the CIR is of the opinion that there has been an arrangement to include the loss company within the group of companies;

(v) Section FM 38, which prevents group companies from consolidating during an income year rather than at the start of an income year, where the purpose of the arrangement is to defeat the intent and application of the consolidation regime;

(vi) Sections EX 3(2) and GB 7, which concern arrangements made for the purpose of preventing a foreign company from being a CFC under the CFC regime;

(vii) Sections GB 9–GB 14, which concern variations of control interests as part of an arrangement to defeat the intent and application of the CFC regime;

(viii) Section EX 62, which concerns taxpayers changing their basis for calculating income derived under the FIF regime;

(ix) Section GB 31, which applies to arrangements entered into to avoid FBT; and

(x) Sections GB 34–GB 38, which apply to arrangements entered into to obtain a tax advantage under the imputation credit regime.

3. Purchase Price Allocation Rules

The purchase price allocation rules are generally applicable to agreements for the disposal and acquisition of property entered into on or after July 1, 2021 — see sections GC 20 and GC 21. One of the main provisions of the new regime is that parties to an agreement for the sale and purchase of multiple assets should always include in their agreement a purchase price allocation that allocates the total purchase price between:

(i) Trading stock, other than timber or a right to take timber;

(ii) Timber or a right to take timber;

(iii) Depreciable property, other than buildings;

(iv) Buildings that are depreciable property;

(v) Financial arrangements; and

(vi) Purchased property the disposal of which does not give rise to assessable income for the vendor or deductions for the purchaser.

Purchasers and vendors that properly agree a purchase price allocation will, for income tax purposes, be required to treat each class of purchased property as being bought/sold for the agreed amount.

The changes have been enacted to address officials' concern that purchasers and vendors in some transactions have adopted inconsistent allocations for tax purposes, to the detriment of the tax base. The new rules set out the consequences for parties not agreeing a purchase price allocation when required to do so.

Parties that have not agreed an allocation must use the vendor's allocation (provided the vendor notifies the purchaser and IR of that allocation within three months of the sale) or,

[672] [2022] NZSC 113.

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if the vendor fails to make an allocation, the purchaser's allocation (provided the purchaser notifies the vendor and IR of that allocation within six months of the sale). If no allocation is made by the parties within the set time frames, the Commissioner can make an allocation, and importantly, the purchaser will not be entitled to deductions with respect to the purchased property until the Commissioner has made the allocation. In all cases, the allocations should be broadly based on relative market values.

The consequences of not agreeing a purchase price allocation, when required to do so, do not apply in certain *de minimis* situations where:

(i) The total consideration for purchased property in the disposal is less than NZ$1 million; or

(ii) The only purchased property in the disposal is residential land together with its chattels and the total consideration for them is less than NZ$7.5 million.

B. Goods and Services Tax

The Goods and Services Tax Act 1985 (the "GST Act") contains an anti-avoidance rule. The rule is based on the general anti-avoidance section in the ITA. The goods and services tax (GST) anti-avoidance rule provides that a tax avoidance arrangement entered into by a person is void against the CIR.

A "tax avoidance arrangement" and an "arrangement" have the same meanings as they do under the ITA (see XIII.A.1., above). "Tax avoidance" is defined for purposes of the section as:

(i) A reduction in the liability of a registered person to pay tax;

(ii) A postponement of the liability of a registered person to pay tax;

(iii) An increase in the entitlement of a registered person to a refund of tax;

(iv) An earlier entitlement of a registered person to a refund of tax; or

(v) A reduction in the total consideration payable by a person for a supply of goods and services.

Where an arrangement is voided under Section 76 of the GST Act, the CIR will adjust the amount of GST payable by, or refundable to, a registered person affected by the arrangement (whether or not that person is a party to the arrangement) in the manner the CIR considers appropriate to counteract any tax advantage obtained by the person. For these purposes, the CIR may (among other things):

(i) Treat any person as a registered person;

(ii) Treat a supply of goods or services that is affected by, or is part of, the arrangement as made to or by a registered person;

(iii) Change the taxable period in which the supply was made; or

(iv) Treat a supply as being made or the consideration as being given at open market value.

In addition, Section 76 of the GST Act contains a specific anti-avoidance rule dealing with arrangements to avoid the GST registration threshold. The section provides that, where the same taxable activity is carried on in any 12-month period by different persons that are associated with each other, the value of the supplies made by each associated person with respect to the taxable activity during that 12-month period is equal to the total value of all supplies made by all the associated persons with respect to the taxable activity during the period. The CIR may determine that this anti-avoidance provision does not apply if the CIR considers it equitable to do so.

Example: *Glenharrow Holdings Ltd v. CIR*[673] is an example of the application of Section 76. The taxpayer purchased a greenstone mining license in 1996 from a Mr. Meates for NZ$45 million. The license was due to expire in 2000. The taxpayer paid a deposit of NZ$80,000, with the balance advanced by Mr. Meates in return for a mortgage debenture over the license, the taxpayer's assets and the taxpayer's shares. The taxpayer claimed an input tax credit for the full NZ$45 million. The Supreme Court held the arrangement to be a tax avoidance arrangement because the taxpayer had no intention of making full payment when the license only had three years to run. The taxpayer could not have mined enough stone during those three years to repay the balance. The taxpayer was also a shell company and its obligation was not guaranteed by its shareholder. Accordingly, the arrangement had the purpose and effect of producing a GST refund that was "totally disproportionate to the economic burden undertaken by [the taxpayer] or the economic benefit obtained by Mr. Meates."[674]

[673] [2008] NZSC 116.
[674] [2008] NZSC 116 at para. [54].

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XIV. Cross-border Transactions

A. Transfer Pricing

1. Adjustment of Transfer Prices

a. Scope of the Provisions

New Zealand's transfer pricing regime is based on the arm's-length principle. This is contained primarily in Sections GC 6 to GC 13 of the ITA. Also relevant is Section YD 5 of the ITA, which deals with the apportionment of certain business income from activities carried on both inside and outside of New Zealand. The section requires an apportionment of such income so as to allocate that amount of income or loss to New Zealand that might be expected if the New Zealand activities were carried on by an independent person dealing at arm's length. This allocation will apply both for purposes of determining the income subject to New Zealand income tax, and also for the purpose of determining certain matters pertaining to foreign tax credits.

For further discussion of New Zealand's transfer pricing system, see also Chapter 120 of 6965 T.M., *Transfer Pricing: Rules and Practice in Selected Countries (M–P).*

The transfer pricing regime is principally aimed at cross-border transactions between associated parties (for corporate groups, generally 50% or more common ownership) involving the acquisition or supply of goods, services, money or other intangible property. In accounting for such transactions, taxpayers are required to apply an arm's-length price. This requirement generally does not apply if the effect of applying an arm's-length price would be to decrease the taxpayer's New Zealand net income. Nor do the rules apply to payments of interest, royalties or insurance premiums received by nonresidents (other than through a New Zealand fixed establishment) that are deductible for the payer.

If the transfer pricing regime applies to a transaction, this may have a flow-on effect on the price at which other transactions are treated as having taken place, under Sections GC 9 to GC 11, ITA. Sections GC 9 and GC 10 allow a taxpayer that has been required by the regime to substitute an arm's-length price for an actual price, but that has been party to another transaction where the taxpayer paid less than, or received more than, an arm's-length price (referred to as a "compensating adjustment transaction") to substitute an arm's-length price in that compensating adjustment transaction in certain circumstances. Section GC 11 allows a party to a transaction the price of which has been recalculated under the regime with respect to another party also to adopt the arm's-length price. This will have the effect of reducing the first party's net income (in many cases, of course, the first party will not be subject to New Zealand net taxation on the income). The first party must apply to the CIR in writing for a Section GC 11 adjustment within six months of the other party receiving an assessment or determination reflecting the adjustment. The CIR will allow the adjustment if he considers it fair and reasonable to do so.

Taxpayers subject to a transfer pricing adjustment may be deemed to have paid or derived a dividend constituting the difference between the price paid or received and the arm's-length price. Companies may be able to attach imputation credits retrospectively to deemed dividends arising under the transfer pricing adjustment.

The transfer pricing rules do not override the transfer pricing rules in New Zealand's double tax agreements.

Comment: Increasing the amount of interest, royalties or premiums under the transfer pricing regime would increase the withholding tax imposed on the payment. However, it would also, if the payer made an election under Section GC 11 of the ITA, reduce the payer's New Zealand gross income. Since the payer is likely to be subject to tax at the rate of 28%, which is higher than the nonresident withholding tax rates applicable to these payments, this would result in a net tax loss to New Zealand.

Some amendments enacted in 2018 strengthened New Zealand's transfer pricing rules to align them with the OECD's latest guidelines and Base Erosion and Profit Shifting (BEPS) recommendations, as follows:

(i) The economic substance and actual conduct of the parties, along with the legal contract, inform the transfer pricing analysis. In certain circumstances, the economic substance and actual conduct will have priority over the terms of the legal contract.

(ii) The 2022 OECD transfer pricing guidelines will be used as guidance for how the transfer pricing rules are applied.

(iii) The arm's length amount is determined using arm's length considerations. This makes it clear that it may be necessary to adjust some conditions of the arrangement other than the price, in order to determine the arm's length price.

(iv) Where a transfer pricing arrangement is not commercially rational because it includes unrealistic terms that unrelated parties would not be willing to agree to, the transaction may be disregarded and, if appropriate, replaced.

(v) In addition to applying to transactions between associated parties, the transfer pricing rules also apply when there are transactions between members of nonresident owning bodies and companies (in situations where a group of nonresident owners are acting together), and to restrict interest deductions on certain cross-border related-party borrowing (with the effect that interest deductions for the New Zealand borrower may be limited based on a restricted credit rating rule that may have regard to implicit parent support or overall group credit rating, and set having regard to rates for long-term senior unsecured funding, irrespective of the terms of the actual debt instrument).

(vi) Country-by-country reporting requirements apply to larger multinational groups (with at least 750 million euros in annual gross revenues), where the ultimate owner is New Zealand resident (approximately 20 groups). Such groups report annually to IR on, *inter alia,* gross revenues, profit or loss, and income tax paid. IR collects this information and exchanges it with other countries. Failure to provide the required information may be subject to criminal penalties that include fines of up to NZ$4,000 (for the first offence of failure to provide the required information); up to NZ$25,000 (for the first offence of knowing-

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ly failing to provide the requested information); or a civil penalty of up to NZ$100,000.[675]

(vii) The onus of proof is placed on the taxpayer to provide evidence (such as transfer pricing documentation) that its transfer pricing positions are correct.

(viii) The time bar that limits IR's ability to adjust a taxpayer's transfer pricing position can be increased to seven years, in situations where the CIR has notified the taxpayer that a tax audit or investigation has commenced within the usual four-year time bar.

(ix) Sections 17B, 17E, and 17G of the TAA give IR the ability to request information from large multinational groups (with at least 750 million euros annual gross revenues) and, in the event of a failure to comply, consequences include the ability of IR to issue default assessments and impose civil penalties.

Comment: The OECD Transfer Pricing Guidelines were updated in 2022. The 2022 edition of the OECD Transfer Pricing Guidelines replaced the previous guidelines with effect from January 20, 2022. However, a taxpayer may choose to apply the 2017 OECD Transfer Pricing Guidelines for the 2022–2023 and earlier income years. If the taxpayer has an existing binding ruling based on the 2017 guidelines, the 2017 guidelines may be applied even if the period of the ruling extends beyond the 2022–2023 income year.

b. Determination of Arm's-Length Price

The methods that may be used by a taxpayer to calculate the arm's-length transfer price are the comparable uncontrolled price method, the resale price method, the cost plus method, the profit split method and the comparable profits method. The method providing the most reliable price must be used, and in ascertaining the appropriate method regard must be had to the comparability, accuracy and completeness of the data.

2. Documentation Requirements

There is no formal statutory requirement for taxpayers to keep transfer pricing documentation. Nevertheless, IR considers a taxpayer that does not keep transfer pricing documentation to be at risk of:[676]

(i) Greater IR scrutiny, because it is more likely that IR would examine the taxpayer's transfer pricing;

(ii) Being unable to rebut IR's substitute arm's-length amount before IR or a court; and

(iii) Suffering penalties, if IR successfully demonstrates a more reliable measure of the arm's-length amount. IR's view is likely to be that the taxpayer has not exercised reasonable care (carrying a 20% penalty) or has been grossly careless (carrying a 40% penalty).

If the taxpayer decides to prepare transfer pricing documentation, IR would expect to see:[677]

(i) A functional analysis;

(ii) An appraisal of potential comparables;

(iii) An explanation of the process used to select and apply the method used to calculate the prices, and why the method used yields an arm's-length price; and

(iv) Any other details influencing the prices.

Given that the burden of proof is on the taxpayer, each group should carefully consider the need to create contemporaneous transfer pricing documentation and the extent to which offshore-created documentation can assist with/substitute for NZ-specific documentation.

IR recommends that a taxpayer retain transfer pricing documentation for at least seven years after the income year for which the documentation applies.[678]

3. Availability of Advance Pricing Agreements or Rulings on Pricing

An Advance Pricing Agreement (APA) is a prospective agreement between a multinational taxpayer and one or more tax authorities that provides certainty to the taxpayer that a transfer price will be acceptable to IR. The APA specifies a set of criteria (for example, the method, comparables, appropriate adjustments and assumptions as to future events) that determine the transfer pricing for a particular transaction over a given period.

A taxpayer wishing to apply for an APA must first contact IR's transfer pricing specialists to discuss the requirements of the APA application process. Subsequent to discussions, the taxpayer must complete an IR 713 form and an IR 713A form and e-mail them to:

Team Manager
Technical Services
Tax Counsel Office
rulings@ird.govt.nz

4. Competent Authority

New Zealand has entered into double taxation agreements with many of its trading partners. If a foreign tax authority initiates or proposes a transfer pricing adjustment, the New Zealand Competent Authority may:

(i) Arrange corresponding adjustments or deductions in New Zealand; or

(ii) Assist the taxpayer in presenting its case to the foreign tax authority.

For further discussion of the New Zealand competent authority functions and procedures, see Chapter 120 of 6892 T.M., *Income Tax Treaties: Competent Authority Functions and Procedures of Selected Countries (L–N).*

B. Hybrid and Branch Mismatch Rules

Hybrid and branch mismatch arrangements are cross-border arrangements that exploit differences in the tax treatment of an instrument, entity or branch under the laws of two or more

[675] TAA, ss 139AB, 143 and 143A.

[676] Inland Revenue, *Tax Information Bulletin* (Vol. 12, No. 10), Appendix A, at p. 43.

[677] Inland Revenue, *Tax Information Bulletin* (Vol. 12, No. 10), Appendix A, at p. 45.

[678] Inland Revenue, *Tax Information Bulletin* (Vol. 12, No. 10), Appendix A, at p. 46.

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countries. A hybrid or branch mismatch arrangement can result in a deduction with no corresponding taxable income inclusion or a single payment leading to a double deduction. The result of a hybrid mismatch arrangement is less aggregate tax revenue collected in the jurisdictions to which the arrangement relates.

The OECD in its BEPS Action Plan made a number of recommendations to help countries deal with hybrid and branch mismatches. The Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018, enacted on June 27, 2018, amended the ITA to include a comprehensive adoption of the OECD recommendations.[679]

Where there are two or more parties to a mismatch, the hybrid and branch mismatch rules in the ITA will generally only apply if there is some degree of association between the relevant parties to the arrangement, or if the arrangement has been structured to achieve a mismatch. The rules in the ITA are designed to address and negate the following hybrid and branch mismatches:

(i) Hybrid financial arrangements: a payment under a hybrid financial instrument is a deductible interest payment in the jurisdiction of the payer, and is not fully taxed as interest in the jurisdiction of the payee, or is taxed at a later time.[680]

(ii) Disregarded hybrid payments: a hybrid entity is an entity that is transparent for tax purposes in the jurisdiction of an investor (country A) but opaque for tax purposes in another jurisdiction, generally the jurisdiction in which it is established (country B). An interest payment from a hybrid entity to its investor will be deductible in country B and disregarded in country A.[681]

(iii) Structures producing double deductions: a hybrid entity can also generate a double deduction mismatch if it makes a deductible payment to a third party, because the expenditure is attributed to its owners under the laws of the owner country, while the same expenditure is treated as deductible in the country of the hybrid entity.[682]

(iv) Reverse hybrids: a reverse hybrid entity is an entity that is opaque for tax purposes in the country of an investor (country A) but transparent for tax purposes in another country, generally the country in which it is established (country B). If the reverse hybrid entity receives a payment that is deductible for the payer, that payment may not be taxed in country A (because country A views the payment as being earned by the entity) or in country B (because country B views the payment as being earned by the investor).[683]

(v) Dual resident entities: in certain circumstances, companies that are resident in two countries may produce double deduction outcomes.[684]

(vi) Imported mismatches: an imported mismatch occurs when a payment that does not directly result in a hybrid mismatch outcome funds another payment that creates a hybrid mismatch outcome.[685]

As part of the annual tax return filing process, a taxpayer is required to identify whether it has any arrangements subject to the hybrid rules and, if so, is required to complete a BEPS disclosure form (form IR1250) to disclose information regarding such arrangements.

C. Tax Issues on New Zealand Acquisitions

There are certain tax matters, that should be considered when buying or selling a business in New Zealand. In broad terms, an acquisition may be effective by way of a purchase of shares or assets.

1. Asset Purchases

In a purchase of assets, the purchase price must be allocated across the assets in a manner consistent with the market value and New Zealand's purchase price allocation rules (see XII.A.3. on the purchase price allocation rules). Such an allocation should generally be set out in the sale and purchase agreement or, at the very least, agreed before the filing of the annual tax returns relevant to the acquisition. Generally, a purchaser will benefit from an asset purchase by virtue of stepping up the tax cost of the assets in the purchase price. This allows the purchaser a higher tax depreciation or tax deductions in case of a potential sale. Also, a vendor may have tax liabilities in an asset sale (for example, depreciation recovery income) (see V.B.4.i., above, on tax depreciation).

2. Share Purchases

New Zealand does not have a comprehensive capital gains tax. As a result, generally, New Zealand taxes do not arise from a vendor's perspective on a share sale, as long as the shares are held on capital account. However, unlike in the case of an asset purchase, the purchaser cannot step up the purchase price on assets and they remain in the target company at their historic tax book value.

3. Holding Company as Acquisition Vehicle

Most frequently, a New Zealand holding company is used by purchasers to acquire the New Zealand target company or group. Broadly, the New Zealand holding company allows purchasers to set up their own equity and debt profile in New Zealand, without being constrained by the existing capital structure of the target company or group (but still being required to meet thin capitalization debt constraints for the new New Zealand group where the purchaser is a non-New Zealand group, as discussed in V.B.4.f.(2), above).

4. Choice of Debt and Equity Funding

So long as it is within thin capitalization constraints (see V.B.4.f.(2), above), interest paid to a non-New Zealand resident on related-party debt has a lower overall New Zealand tax burden than dividend returns on equity for a nonresident company shareholder.

[679] ITA, s. FH 1.
[680] ITA, ss. FH 3 and FH 4.
[681] ITA, ss. FH 5 and FH 6.
[682] ITA, ss. FH 8 and FH 9.
[683] ITA, s. FH 7.
[684] ITA, s. FH 10.
[685] ITA, s. FH 11.

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See, below, for the effective tax rates that may apply for different funding structures, assumptions as set out in the footnotes below.

Effective Tax Rates Applying to Non-resident Purchasers Through New Zealand Holding Company[686]		
	Minimum Effective Tax Rate (%)	**Maximum Effective Tax Rate (%)**
Related party debt funded — interest payments[687]	0%[688]	10/15%[689]
Equity funded purchases — New Zealand tax on purchases	0%[690]	28%[691]

[686] All calculations assume the effective company tax rate of 28%.

[687] Funding arrangement will need to be within the 60% thin capitalization constraint (see, V.B.4.f.2.).

[688] Assumes that non-resident withholding tax is withheld on interest (10% or 15%) and a full foreign tax credit is available in the foreign jurisdiction.

[689] Assumes that non-resident withholding tax is withheld on interest and a foreign tax credit is not available and an approved issuer levy is not available (see K.4. for commentary on approved issuer levy).

[690] Possible that the effective rate could be 0% on the assumption that the non-resident shareholder has a direct voting interest greater than 10%, the 0% non-resident withholding tax rate is available, and there is an underlying foreign tax credit in the foreign jurisdiction for the NZ tax paid, and that this is a fully imputed dividend. See Income Tax Act 2007 s RF 11B.

[691] Assumes that no foreign tax credit is available for non-resident withholding tax on dividends or for underlying New Zealand corporate tax.

5. Joint Ventures via Limited Partnerships

Where an asset acquisition is made by two or more investors rather than by a single purchasing group, consideration should be given to using a limited partnership as the acquisition vehicle. A limited partnership can offer limited liability for its members but flow-through tax treatment (see III.A.3.b., above, for further information on limited partnerships).

6. Consolidated Income Tax Groups

Complexities can arise where the target company is a part of the vendor's consolidated income tax group (see V.B.9, above, for commentary on consolidated income tax groups). The purchaser needs to consider potential exposure to tax liabilities of the vendor group unrelated to the business of the target company and how to minimize that exposure (members of a consolidated income tax group become jointly and severally liable for the whole group's taxation liability[692] and seeking IRD approval to limit such joint and several liability should be considered).[693]

[692] Income Tax Act 2007 s FM 3(5).

[693] See, for example, Income Tax Act 2007 s. FM 4(3).

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XV. Special Provisions Relating to Multinational Corporations

A. Global Minimum Tax

1. Current Status of Legislation and Regulations

The Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Act 2023 gives legislative effect to the OECD's Global Anti-Base Erosion (GloBE) rules in New Zealand. Section HP 3 of the ITA provides for the application of the GloBE rules in New Zealand by incorporating:

(i) The Model Rules published by the OECD (the "Model Rules");[694]

(ii) The Commentary on the Model Rules developed by the OECD/G20 Inclusive Framework ("Commentary");[695] and

(iii) The guidance on the interpretation or administration of the Model Rules issued by the Inclusive Framework (the "Administrative Guidance")

into the ITA by reference. For New Zealand law purposes, the Model Rules are modified by Schedule 25B of the ITA. The term used in the ITA to describe New Zealand's GloBE rules is the "applied global anti-base erosion rules" (or the "applied GloBE rules,") and the term used for tax imposed under the applied GloBE rules is "multinational top-up tax."

It is expected that the OECD, through the Inclusive Framework, will continue to publish Administrative Guidance and update the Commentary from time to time.

Section HP 3(3) of the ITA provides that the applied GloBE rules apply for a fiscal year in accordance with the Commentary and the Administrative Guidance published by the OECD prior to the start of that fiscal year. Accordingly, where there is an inconsistency between the Model Rules and the Commentary or Administrative Guidance, it is the Commentary and the Administrative Guidance that take precedence.[696] The Governor-General may, by Order in Council, on the recommendation of the Minister of Revenue, make regulations providing for the non-application in New Zealand of a change to the Commentary or the Administrative Guidance.[697]

2. Application of the Income Inclusion Rule and Undertaxed Profits Rule

The applied GloBE rules apply to:

(i) New Zealand headquartered multinational enterprises (MNEs) and their constituent entities (CEs) located in New Zealand (including branches) with over 750 million euros in global consolidated revenues in at least two of the four immediately preceding fiscal years; and

(ii) New Zealand located CEs of foreign-headquartered MNEs above the 750 million euros threshold that have New Zealand operations or a New Zealand intermediate parent entity.

The GloBE rules apply a minimum tax on excess profits in each jurisdiction that are taxed below the minimum 15% rate.

The applied GloBE rules consist of:

(i) The Income Inclusion Rule (IIR);

(ii) The domestic IIR (DIIR); and

(iii) The Undertaxed Profits Rule (UTPR),

as set out in the Model Rules, Commentary and Administrative Guidance.

Broadly:

(i) The IIR applies to a New Zealand headquartered MNE (or a MNE headquartered outside New Zealand if the MNE has an intermediate parent located in New Zealand) when it earns undertaxed income from its foreign operations;

(ii) The DIIR applies to a New Zealand headquartered MNE with respect to its New Zealand operations when it has undertaxed mobile income in New Zealand; and

(iii) The UTPR applies to a MNE headquartered outside New Zealand if no parent is subject to the IIR and the mNE has tangible assets and employees in New Zealand.

New Zealand's UTPR does not operate as a denial of income tax deductions but is, instead, a separate tax liability independent of income tax. The UTPR liability for a fiscal year is capped at the lesser of the group's taxable deductions and available tax losses for the tax year corresponding to the fiscal year, in order to meet the "equivalent adjustment" requirement in the Model Rules. When the UTPR liability exceeds these amounts, it is carried forward to the next fiscal year.[698]

The applied GloBE rules come into force in New Zealand on January 1, 2025, with the IIR and UTPR components applying for fiscal years beginning on or after January 1, 2025. The DIIR component of the rules applies for fiscal years beginning on or after January 1, 2026.[699]

Section HP 1 of the ITA is the charging provision for the multinational top-up tax in New Zealand. Under the IIR, the tax is generally imposed on the ultimate parent entity (UPE) of the MNE group (or, if the UPE is not subject to a qualified IIR, the intermediate parent entities,) but all CEs located in New Zealand are jointly and severally liable for the payment of the tax. Under the UTPR, the tax is imposed on all New Zealand CEs in the MNE group.

In accordance with the Model Rules, covered taxes in New Zealand are generally limited to taxes on net income, which reflects the intention of the GloBE rules to ensure a minimum level of tax is paid on the profit in each jurisdiction. Although

[694] OECD (2021), *Tax Challenges Arising from the Digitalisation of the Economy — Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

[695] OECD (2022), *Tax Challenges Arising from the Digitalisation of the Economy — Commentary to the Global Anti-Base Erosion Model Rules* (Pillar Two), First Edition: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

[696] Income Tax Act 2007, s. HP 3(4).

[697] Tax Administration Act 1994, s. 226G.

[698] ITA, Schedule 25B Item 2.

[699] See Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Act 2023, s. 123, inserting item 1B into ITA, Schedule 25B for fiscal years starting on or after January 1, 2026.

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New Zealand has an imputation credit system, New Zealand's corporate income tax meets the definition of a "Qualified Imputation Tax" in the Model Rules and is therefore a covered tax. Similarly, withholding taxes and other taxes imposed in lieu of a corporate income tax are also covered taxes. However, payroll taxes (such as PAYE and ESCT) and GST are not covered taxes because they are not charged on a measure of income of the CEs.

3. Computation of GloBE Income and Loss

Broadly, the applied GloBE rules require in-scope MNEs to:

(i) First, calculate their effective tax rate (ETR) for each jurisdiction annually (by identifying the CEs in the jurisdiction, calculating the "GloBE income" or profit of each CE in the jurisdiction, determining the covered taxes of the CEs in the jurisdiction, and subsequently deriving the ETR by dividing the total covered taxes of the CEs by the total net GloBE income of the CEs in the jurisdiction);

(ii) Second, determine the top-up tax percentage (being the difference between the minimum rate of 15% and the ETR in the jurisdiction) and subsequently apply the top-up tax percentage to the MNE's GloBE income in the jurisdiction, reduced by the "Substance-Based Income Exclusion," to calculate the top-up tax; and

(iii) Finally, allocate the top-up tax between the MNE's CEs under the IIR, DIIR and UTPR.

In accordance with the Model Rules, the starting point for calculating a CE's GloBE income is the entity's financial accounting income. The general rule is that financial accounting income should be calculated according to the accounting standard of the CE's UPE and therefore reflects the amount that feeds into the UPE's consolidated financial statements before consolidation adjustments. This is subject to a requirement that the UPE prepares its accounts under an acceptable accounting standard, or that it adjusts any material differences in its accounting treatment of an item that could result in the MNE obtaining an unfair competitive advantage when compared with the IFRS treatment. New Zealand IFRS is an acceptable accounting standard for the GloBE rules. The financial accounting income is then subject to certain mandatory and elective adjustments to reflect differences between accounting and tax measures of profit.

The elective adjustments available to an MNE group include an election to offset a net realized gain on local tangible assets against a net realized loss on local tangible assets in the four preceding years and spread any remaining net realized gain equally over the current year and four preceding years. The election allows untaxed gains to be matched against prior year untaxed losses and is likely to be useful in a jurisdiction, such as New Zealand, that does not have a capital gains tax.

Similarly, the amount of covered taxes paid by a CE is calculated in accordance with the Model Rules, which starts with the current tax expense recorded in the financial statements and subsequently makes certain adjustments to that amount, for example to exclude any tax paid with respect to income excluded from GloBE income and to adjust for timing differences.

An adjustment is also required when an amount of covered tax is refunded or credited and the refund or credit is not treated as a reduction in the current tax expense in the financial accounts. An example of this in the New Zealand context is a tax credit for a supplementary dividend, which is typically accounted for directly in equity instead of being accounted for as a reduction in the current tax expense.

4. Qualified Refundable Tax Credits

The treatment of incentive tax credits in the Model Rules depends on their refundability.

Incentive tax credits that must be paid in cash or cash equivalents within four years are referred to as "Qualified Refundable Tax Credits" and can be treated as GloBE income. Refundable tax credits that do not satisfy that requirement are referred to as "Non-Qualified Refundable Tax Credits." This means that an adjustment must be made to increase covered taxes when a Qualified Refundable Tax Credit is accounted for as a tax credit or to reduce covered taxes when a Non-Qualified Refundable Tax Credit is accounted for as income.

New Zealand's research and development tax (R&D) credit is designed so that it must be partially refunded within four years.[700] The portion that must be refunded within four years can be treated as GloBE income and any remaining credit must be treated as a reduction in covered taxes.

5. Transitional Safe Harbor

As the Model Rules, the Commentary, and the Administrative Guidance are incorporated into the ITA by reference, the transitional safe harbor and the applicable tests set out in those documents apply in New Zealand.

6. Compliance Framework

Section BF 1(bb) of the ITA provides that the multinational top-up tax is an "ancillary tax" and not an income tax, with the result that a separate administrative regime and compliance framework has been introduced in New Zealand to deal with the multinational top-up tax.

All MNE groups that include an in-scope entity located in New Zealand must register with New Zealand IR within six months after the end of the fiscal year in which they come within the scope of the applied GloBE rules.[701] As part of the registration process, the MNE group must provide the name and taxpayer identification number of the UPE as well as the identity and location of the entity that will be filing the GloBE Information Return. A MNE that fails to comply with the requirement to register may be liable to pay a civil penalty of up to NZ$100,000.[702]

A CE located in New Zealand must file a GloBE Information Return for the MNE group with Inland Revenue within 18 months following the end of the first fiscal year, and subsequently 15 months following the end of each fiscal year thereafter. This does not apply if the GloBE Information Return for the MNE group has been submitted on time by the UPE (or a designated filing entity) of the group to a foreign competent au-

[700] ITA, s. LA 5(4B)(a).
[701] TAA, s. 78H.
[702] TAA, s. 139ABB.

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thority that is obliged to exchange that information with IR.[703] Failure to comply with the GloBE Information Return filing requirements may result in a civil penalty of up to NZ$100,000.[704]

All CEs located in New Zealand must file a multinational top-up tax return annually with the Inland Revenue.[705] The return is due 20 months after the end of the first fiscal year for which the CE is required to file the return, and subsequently 16 months following the end of each subsequent fiscal year. A CE may be subject to a penalty of NZ$500 for the late filing of a multinational top-up tax return.[706]

Payment of multinational top-up tax is due on the same day that the multinational top-up tax return is due. As the multinational top-up tax is an ancillary tax and not an income tax, it is not subject to the provisional tax rules. The standard rules in Parts 7 (Interest) and 9 (Penalties) of the TAA apply to late payments of the multinational top-up tax.

New Section 94BB, 94BC and 94BCB of the TAA have been introduced to empower the Commissioner of Inland Revenue to assess the penalties in relation to the applied GloBE rules. The Commissioner has also been empowered to make binding rulings with respect to the applied GloBE rules, including the Commentary and the Administrative Guidance.[707]

7. Differences in Interpretation and Application

As the Model Rules, the Commentary, and the Administrative Guidance are incorporated into the ITA by reference, there are minimal differences in New Zealand's interpretation and application of the GloBE rules. The key differences are outlined above.

8. Qualified Domestic Minimum Tax Top-up

New Zealand has not enacted a Qualified Domestic Minimum Top-up Tax (QDMTT) but will introduce a New Zealand DIIR applicable with effect from January 1, 2026.

The DIIR means that New Zealand headquartered MNEs will not have to pay GloBE top up tax on understated New Zealand income to other jurisdictions under the UTPR. The DIIR is similar to a QDMTT, but there are differences. If a New Zealand UPE has a minority interest in a direct subsidiary and a New Zealand ETR of less than 15%, the DIIR will only apply to the portion of the jurisdictional top-up tax that is allocated to that direct subsidiary and attributable to the New Zealand MNE's ownership. In contrast, under a QDMTT, the top-up tax would be paid based on 100% ownership.

B. Digital Services Tax

The Digital Services Tax (DST) Bill was introduced into Parliament on August 31, 2023 to enable the Government to quickly impose a DST if sufficient progress was not made towards implementing an internationally agreed solution. The DST Bill lapsed ahead of the New Zealand General Election held on October 14, 2023, but has been reinstated by the current Government.

If passed, the DST Bill would allow the Government to impose a flat 3% DST on the gross revenue of large MNE groups with highly digitized business models from in-scope activities or services provided in New Zealand.

Application of the DST in New Zealand is subject to two thresholds:

(i) The group must have at least 750 million euros of global revenue from taxable digital services (including the provision of intermediation platforms, social media and context sharing platforms, and internet search engines) per annum; and

(ii) The group must have at least NZ$3.5 million of digital services revenue per year that is attributable to New Zealand users or connected to New Zealand land.

The DST Bill proposes that the DST becomes applicable on January 1, 2025. However, the Government can defer the commencement date for up to five years by Orders in Council. The Government's intention is that the commencement date would be deferred if sufficient progress is made on implementing an acceptable global solution. Despite the Bill's reinstatement, the Minister of Revenue has indicated that a global solution remains the preferred solution to address the issue of taxing digital services.

[703] TAA, s. 78I.
[704] TAA, s. 139ABB.
[705] TAA, s 78J.
[706] TAA, s 139A.
[707] TAA s 91C(1)(ed).

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XVI. Avoidance of Double Taxation

New Zealand, like many other countries, imposes taxes on New Zealand residents on their worldwide income and on non-residents only on their NZ-sourced income. This may lead to double taxation where both residence and source countries seek to assert taxing rights. Such double taxation may be eliminated:

(i) Unilaterally (for example, by the residence country providing tax credits for tax paid in the source country); or

(ii) Bilaterally through the international network of tax treaties.

A. Foreign Tax Credits

The ITA permits a New Zealand tax resident that is taxable on worldwide income to claim a credit[708] for foreign taxes paid on that income. That is the case irrespective of whether there is a tax treaty between New Zealand and the country that also taxes the income.

Treaties, which are made pursuant to Section BH 1 of the ITA, provide a further, more detailed basis for eliminating double taxation. Where a tax treaty applies, individual and corporate taxpayers that are tax resident in either New Zealand or in the country with which New Zealand has entered into that treaty may claim certain benefits under the treaty.

B. Tax Treaties

1. General

New Zealand has entered into tax treaties with 40 countries. New Zealand's treaty network has tended to follow the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention, subject to certain modifications.

For the texts and status of New Zealand's tax treaties, see International Tax Treaties.

a. Tax Treaty Negotiation and Ratification Process

The New Zealand Government, advised by the Tax Policy department of IR, negotiates New Zealand's tax treaties with foreign governments. Once a treaty text has been finalized between the two governments, it is subject to parliamentary scrutiny by way of a Select Committee conducting a national interest analysis.[709] The national interest analysis details the advantages and disadvantages for New Zealand of entering into the treaty concerned.

Once the Select Committee reports back to Parliament with its findings and recommendations, and the tax treaty is ready to be implemented into New Zealand law, the Governor-General makes an Order in Council to bring the treaty into force.

Finally, the New Zealand Government exchanges diplomatic notes with the other party to the tax treaty confirming the Order in Council has been made.

[708] New Zealand operates a system of credit for foreign taxes on foreign income, not an exemption system.

[709] http://taxpolicy.ird.govt.nz/tax-treaties (text can be found under each of New Zealand's tax treaties).

b. Administrative Measures Dealing with Tax Treaty Provisions

Section BH 1(4) generally provides that New Zealand's tax treaties override New Zealand domestic tax law, except as regards the section BG 1 avoidance rule. There are no general administrative rules or regulations that deal with the application of treaties.

As regards the mutual agreement procedure (MAP) in New Zealand's tax treaties, New Zealand has two individuals at IR who are delegated as New Zealand's competent authority for purposes of dealing with foreign countries, one for dealing with double taxation cases from audit compliance activities, and another for treaty interpretation issues. Taxpayers can initiate a MAP process and New Zealand's tax dispute procedures simultaneously. New Zealand's tax treaties generally follow the OECD recommended three-year time limit for initiating MAP processes.

c. Treaty Interpretation

In broad terms, the authors note the following broad principles that apply in interpreting New Zealand's tax treaties:[710]

(i) First, determine the position under domestic law and then consider the extent to which the applicable tax treaty overrides or restricts the application of New Zealand domestic law.

(ii) New Zealand courts are likely to interpret treaties under "broad principles of general acceptation,"[711] and have regard to the OECD Model Commentary on the OECD Model Convention and any *travaux preparatoires* (preparatory or working papers in negotiating the treaty concerned).

(iii) The OECD Model Commentary may not be regarded as legally binding but is a useful aid for the interpretation of a treaty.

(iv) A New Zealand court will have regard to the purpose of a treaty including the adoption of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (discussed below). New Zealand has elected to incorporate Article 6.1, which is automatically adopted into a treaty where the other contracting state has also elected to do so. Article 6.1 includes preamble text for the purpose of a treaty "[i]ntending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance."[712]

[710] For a detailed analysis of issues relating to the interpretation of New Zealand's tax treaties, see "International and Cross-Border Taxation in NZ" Professor Craig Elliffe, Chapter 6, pg 583–681.

[711] *C of IR v United Dominions Trust Ltd* [1973] 2 NZLR 555; *C of IR v JFP Energy Inc* [1990] 3 NZLR 536; Legislation Act 2019; Vienna Convention (Articles 31 and 32); see, also, *Thiel v Commissioner of Taxation* (1990) 171 CLR 338 (Australia).

[712] https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf at Article 6.

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(v) The OECD Model Commentary in existence at the time of adoption of the treaty in question seems most obviously useful as an aid to interpretation, although the latest version of the OECD Model Commentary itself asserts that a treaty adopted before a revised OECD Model Commentary should be interpreted in the spirit of the revised commentary (i.e., the issue is whether the approach to the interpretation of a treaty is static or ambulatory as regards the OECD Model Commentary).

(vi) The equivalent of Article 3(3) of the New Zealand-United States tax treaty occurs in many of New Zealand's treaties and provides that the meaning of an undefined term in the treaty, unless the context requires otherwise, has the meaning it has under the law of the State applying the treaty concerning the taxes to which the Convention applies. In that regard a New Zealand court is likely to apply the ordinary meaning of the expression "having regard to the 'broad intentions' of the framers as they emerge from the text" of the treaty concerned.[713] Again, a question of static versus ambulatory meaning arises — the OECD Model Commentary chooses the ambulatory approach, that the domestic interpretation of a treaty evolves as the domestic law evolves following the adoption of the treaty.

2. Multilateral Instrument

When applying an applicable tax treaty, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) must be considered. The OECD and G20 developed the MLI as a way to amend quickly and efficiently the more than 3,000 existing tax treaties to implement the BEPS package without the need for burdensome and time-consuming bilateral negotiations.

The MLI contains some provisions that are "minimum standards," which all signatories to the MLI must adopt. The minimum standards include the anti-treaty abuse provisions contained in the report on Action 6 and certain elements of the dispute resolution provisions contained in the report on Action 14. All other provisions in the MLI (including those in relation to the PE Article) are optional but are considered "best practice" and reflected in the updated 2017 OECD Model.

Signatories to the MLI may choose which of their existing tax treaties are "covered tax agreements" that they wish to modify through the MLI and which of the "best practice" standards in the MLI they wish to adopt. Choices are made by making formal notifications and reservations at the time the signatory deposits its instrument of ratification with the OECD, with such choices generally applying to all "covered tax agreements" (i.e., there is no ability to pick and choose).

New Zealand signed the MLI on June 7, 2017, and it entered into force under New Zealand law on October 1, 2018. However, the MLI will modify a tax treaty that New Zealand has entered into only to the extent that:

(i) The other party has signed and ratified the MLI and the MLI has entered into force for that party;

(ii) Both parties have chosen to include that treaty as a "covered tax agreement" under the MLI;

(iii) Both parties have chosen to adopt a particular article in the MLI and have not entered any reservations against that article in a way that is incompatible with the other party's choice; and

(iv) The MLI has come into effect for that treaty (for income tax, the MLI will apply to income years beginning on or after the date that is six months after the date on which the MLI has entered into force for both parties).

New Zealand has listed 37 of its 40 tax treaties as "covered tax agreements" (excluding the New Zealand-Samoa, -Taiwan and -United States tax treaties because the countries concerned have not indicated an interest in signing the MLI). New Zealand has also chosen to adopt all applicable optional provisions, including the provisions that implement the changes to the PE definition in Article 5 of the OECD Model Convention.

The MLI's impact for New Zealand still depends on the adoption of the MLI by other countries, and a number of significant countries in the context of New Zealand trade (including the United States) have not yet adopted the MLI.

C. Procedure to Claim Reduced or No Withholding, or Refund

If a nonresident is entitled to a reduced or 0% rate of withholding under a tax treaty, the payer to that nonresident of nonresident passive income simply deducts NRWT at the treaty rate and pays the NRWT to IR. To ensure that IR is aware of who is claiming treaty relief and whether that person is entitled to do so, a payer of nonresident passive income must file an annual NRWT withholding certificate for each recipient. The NRWT withholding certificate contains, among other things, the recipient's full name and full overseas address, the country code, the gross nonresident passive income liable for NRWT and the amount of NRWT deducted.

A nonresident organization can request permission from IR to treat its nonresident passive income as exempt from NRWT on the basis that it has tax-exempt status in its country of residence. IR will allow the organization's nonresident passive income to be exempt from NRWT if a tax treaty expressly provides for an exemption. The nonresident must write to the Nonresident Centre[714] requesting an exemption from NRWT and provide with its written application:

(i) The provisions under which the nonresident seeks exemption;

(ii) A copy of the constituting documents of the nonresident (such as a trust deed or a memorandum and articles of association); and

(iii) Evidence of the nonresident's tax exemption in its country of tax residence.

The Nonresident Centre would then provide the payer with a letter granting the exemption.

[713] *JFP Energy Inc* at 540, citing Eichelbaum CJ in the High Court.

[714] The Nonresident Centre's postal address is PO Box 39010, Wellington Mail Centre, Lower Hutt 5045.

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D. Taxation of Business Income

1. Permanent Establishment

a. Definition in New Zealand's Tax Treaties

New Zealand's tax treaties generally contain a definition of PE that is based on, or similar to, the definition in the OECD Model Convention. The OECD Model broadly provides that an enterprise will have a PE in a jurisdiction in which it has:

(i) A fixed place of business through which the business of an enterprise is wholly or partly carried on (a "situs PE.") This may include, for example, a place of management, branch, office, factory, workshop, mine, oil well, and a place of extraction of natural resources.

(ii) A dependent agent that habitually plays the principal role leading to the conclusion of contracts in the name of the enterprise or for the provision of goods or services by the enterprise, where those contracts are routinely concluded without material modification.

Comment: Prior to the 2017 amendments to the OECD Model Tax Convention, a dependent agent PE required the dependent agent to have, and habitually exercise, authority to conclude contracts in the name of the enterprise. However, it was considered that reliance on the formal conclusion of contracts in the name of the enterprise made it easy for enterprises to avoid having a PE. For example, commissionaire arrangements were often utilized under which the agent contracts with customers in its own name but on behalf of the enterprise that takes on the risks and obligations of the sale under a separate contract with the agent.

(iii) A building site or construction or installation project that lasts more than 12 months.

Certain specified activities will not result in a PE where those activities are of a "preparatory or auxiliary" character, which requires them to be carried on in contemplation of the carrying on of, or carried on to support (without being part of), what constitutes the essential and significant part of the activity of the enterprise as a whole.

Comment: Where a nonresident is relying on the Permanent Establishment Article in a tax treaty to eliminate New Zealand tax on its income, it will be IR's interpretation (not the interpretation of the taxing authority of the country in which the nonresident is resident) of the PE definition in the treaty that will be determinative.

The relevant definition of PE will vary depending on the applicable tax treaty. For example, the PE definition in the New Zealand-United States tax treaty is fairly standard, in that it includes a place of management, branch, office, factory, workshop, mine, oil, gas well, quarry or any other place where natural resources are extracted.

However, the following points should be noted:[715]

(i) A building site or construction or installation projects situated in New Zealand lasting for 12 months or more are New Zealand PEs;

(ii) A New Zealand PE will exist if a foreign corporation conducts supervisory activities in connection with a building site, or a construction or installation project situated in New Zealand; and

(iii) A foreign corporation will be deemed to have a PE in New Zealand if, for more than six months in any 12-month period, it carries on activities in connection with the exploration or exploitation of natural resources situated in New Zealand.

Comment: Wise v. CIR[716] is one of only two New Zealand cases that addresses the issue of whether a U.S. company has a PE in New Zealand.[717] A company incorporated in the United States called Sub Sea International Incorporated (SSI) incorporated a subsidiary to, among other things, repair and maintain a platform operating in the Maui natural gas field. The general manager of the subsidiary signed the agreement to repair and maintain the platform in the Maui natural gas field on behalf of SSI and the subsidiary; it later came to light that the general manager never had any authority to sign the agreement on behalf of SSI.

The subsidiary was registered in New Zealand as an overseas company. SSI, at the subsidiary's request, sent staff to New Zealand. SSI in the United States looked after all administration regarding staff, in particular paying the staff salaries, and charged its subsidiary for its staff's services. The CIR argued that either SSI should be deemed to have a PE in New Zealand by virtue of Article 5(5)(a) or 5(7), or that the New Zealand subsidiary should be regarded as SSI's PE in New Zealand, having regard to the provisions of Article 5(1) and (2).

The High Court held that SSI did not have a PE in New Zealand. The High Court rejected the argument that SSI carried on activities in New Zealand by virtue of its subsidiary's general manager signing an agreement on behalf of SSI. The act of signing was an "unusual event" and only occurred once. In addition, SSI had no control over the staff located in New Zealand, so the High Court also rejected the argument that the staff's acts were "in a vicarious sense the acts of SSI." Furthermore, the subsidiary was not SSI's PE in the nature of a branch. The two companies' legal relationship could not be described as a joint venture, and SSI received no profit from the work undertaken by its staff in New Zealand.

Comment: Australian case law supports a very wide interpretation of the term "business" in the context of "Business Profits" articles of that country's tax treaties (Article 7 is the "Business Profits" article of the New Zealand-United States tax treaty). The High Court of Australia in *Thiel v. FC of T*[718] considered the application of the Business Profits article in the Australia-Switzerland tax treaty. Although the article was entitled "Business Profits," it applied to "the profits of an enterprise" (i.e., the word "profits" was not qualified by the word "business.") However, the High Court interpreted the article as though it did refer to business profits.

Justice Dawson stated:[719]

[715] New Zealand-United States tax treaty, Art. 5.

[716] (1992) 14 NZTC 9,032.

[717] The other case is *CIR v. JFP Energy, Inc.* [1990] 3 NZLR 536 (CA). See VII.A., above.

[718] 90 ATC 4,717.

[719] *Id.* at 4,724.

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> "Article 7 is headed "Business Profits" and, as that heading indicates, it deals with business profits. But once it is recognised that "enterprise" includes an isolated activity as well as a business, business profits may not be confined to profits (or taxable income) derived from carrying on of a business but must embrace any profits of a business nature or commercial character. Profit from a single transaction may amount to a business profit rather than something in the nature of a capital gain even if it does not involve the carrying on of a business."

Comment: Although *Thiel* has not been applied by a New Zealand court or cited by IR, in the authors' view it would be considered persuasive by a New Zealand court considering the term "business profits" in the Business Profits Article of New Zealand's tax treaties.

b. Multilateral Instrument (MLI)

The MLI entered into force for New Zealand on October 1, 2018, triggering the inclusion of the OECD's new widened PE definition in New Zealand's tax treaties, provided the other country concerned has signed and ratified the MLI and elected to adopt the new Permanent Establishment Article.

c. New Zealand's Domestic PE Anti-avoidance Rule

Given concerns that several of New Zealand's trading partners are unlikely to elect to include the widened PE definition, the Government has adopted a domestic anti-avoidance rule similar to that passed in Australia and the United Kingdom. The rule widens the circumstances in which the activities in New Zealand of an agent would give rise to a PE for the nonresident for purposes of the ITA and under any applicable tax treaty.[720] See VI.C.2.a., above.

2. Industrial or Commercial Profits

See VI.C.2.a., above, for a discussion on industrial or commercial profits (otherwise known as business profits).

In summary, business profits are only taxed in the enterprise's country of tax residence, unless the enterprise is engaged in business in the other country through a PE. Even then, only profits that may be specifically attributed to the PE are taxable in that other country, with expenses incurred in the production of that income being deductible.

3. Planning to Minimize Taxation of Business Income Under the Treaty

New Zealand's ability to tax a nonresident's business income depends on whether the nonresident has a PE in New Zealand. The nonresident can minimize its exposure to New Zealand tax by ensuring that it has no PE in New Zealand.

The most common methods of deriving income sourced in New Zealand without the nonresident having a PE in New Zealand are the following:

> (i) A nonresident can incorporate a subsidiary in New Zealand with which it has no joint venture relationship, and the subsidiary carries out business in New Zealand. The nonresident lends to the subsidiary, and the subsidiary pays interest (subject to thin capitalization and transfer pricing constraints) and dividends to the nonresident parent. The interest and dividends would be subject to withholding tax rates prescribed by the ITA or the applicable tax treaty.
>
> (ii) The nonresident can engage an independent broker, general commission agent, or any other agent of an independent status, to carry out the nonresident's business in New Zealand. The person engaged by the nonresident must act in the ordinary course of his or her business when carrying out the nonresident's business.

E. Taxation of Investment Income

"Investment income" in New Zealand encompasses interest payments, dividends and royalties. Investment income sourced in New Zealand would be subject to New Zealand withholding tax at a rate provided under an applicable tax treaty.[721]

For more information on applicable withholding rates, see the Bloomberg Tax International Tax Chart Builders: Withholding Tax.

Note: New Zealand does not currently impose tax on capital gains.

F. Income Tax Treaty with the United States

The Double Taxation Relief (United States of America) Order 1983 gave effect to the New Zealand-United States tax treaty. The treaty, which is based on the 1977 OECD Model Convention, replaced the 1948 treaty between the two countries.

The New Zealand-United States tax treaty applies to New Zealand and U.S. tax residents. Although it effectively overrides the provisions of the domestic income tax legislation (at least from a New Zealand perspective), it should not be interpreted as taking away any benefits given under domestic law by way of exclusion, exemption, deduction, credit or other allowance.

Under the New Zealand-United States tax treaty, the United States expressly retains the right to tax its citizens and residents on their worldwide income.

See, generally, VI.C.1.b.(2), above regarding the taxation of dividends, VI.C.1.b.(1), above regarding the taxation of interest, VI.C.1.b.(3), above regarding the taxation of royalties, and XVI.D.1.a., above regarding the taxation of business income and the definition of a PE under the New Zealand-United States tax treaty.

G. Estate and Gift Tax Treaty

New Zealand has not entered into an estate and gift tax treaty with the United States.

[720] ITA, s. GB 54. See VI.C.2., above.

[721] From April 1, 2020, the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act requires payers of investment income to provide IR with taxpayer specific information on a monthly basis (or for the months that they pay investment income if less often than monthly) including the amount of income paid to the taxpayer and the amount of tax withheld (if any).

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H. New Zealand-U.S. Inter-Governmental Agreement to Improve International Tax Compliance and to Implement FATCA

The Foreign Account Tax Compliance Act (FATCA) is a U.S. federal law that aims to recoup U.S. tax from funds held by U.S. citizens and U.S. tax residents outside of the United States. New Zealand and the United States signed the New Zealand-United States IGA on June 12, 2014, under which the New Zealand government agrees to implement FATCA in New Zealand. To implement FATCA, the New Zealand Parliament amended the Tax Administration Act 1994, with effect from July 1, 2014.

Under the New Zealand-United States IGA, specified New Zealand financial institutions (which include banks, superannuation funds, and private equity firms) (called "Reporting New Zealand Financial Institutions" (RNZFIs)) must undertake due diligence with respect to their accounts to identify accounts that are held by customers who are, or are likely to be, U.S. taxpayers, or by customers that are passive non-financial institutions with one or more controlling persons who are, or are likely to be, U.S. taxpayers ("reportable accounts"). RNZFIs must collect information on reportable accounts and report it annually to IR by June 30 for the reporting year ending March 31. IR then collates and exchanges the information with the U.S. Internal Revenue Service (IRS) by September 30. The information required to be reported includes:

(i) The name, address, and U.S. taxpayer identification number (TIN) of the customer;

(ii) The customer's account number with the financial institution;

(iii) The name and identifying number of the financial institution;

(iv) The account balance or value as at the end of the reporting year or immediately before the account's closure, whichever is earlier; and

(v) The gross amount of interest, dividends, and proceeds from sales or redemptions of property paid or credited to the account.

To ensure FATCA is effective outside the United States, 26 U.S. Code Section 1471 requires that a "withholdable payment" (defined as including U.S.-sourced interest, dividends, rent, salaries, wages, and proceeds from sales or redemptions of property) made to a noncompliant financial institution is subject to 30% withholding tax. However, Article 4(1) of the New Zealand-United States IGA deems an RNZFI to be FATCA-compliant and not subject to 26 U.S. Code Section 1471 provided:

(i) New Zealand complies with its obligations under the New Zealand-United States IGA; and

(ii) The IRS does not treat the RNZFI as a "nonparticipating financial institution" for significant noncompliance.

If a customer refuses to provide the RNZFI with information that would allow the RNZFI to determine whether the customer is a U.S. citizen or a U.S. tax resident, the RNZFI must treat the customer's account as reportable.

The New Zealand-United States IGA contains some New Zealand-specific exemptions from FATCA, including for:

(i) Entities that manage or operate an employee stock option or a share purchase plan if they are not otherwise a financial institution;

(ii) The New Zealand Superannuation Fund, the Guardians of New Zealand Superannuation, and any wholly-owned subsidiary authorized to carry out their investment functions; and

(iii) Tax pooling accounts.

I. Implementation of Automatic Exchange of Information

In September 2013, in response to growing concerns about offshore tax evasion, G20 leaders announced an initiative to implement a new global standard for the Automatic Exchange of Financial Account Information in Tax Matters (AEOI).[722]

The AEOI standard draws on the U.S. FATCA standard to impose due diligence, collection, reporting and exchange obligations on jurisdictions and financial institutions. The tax authorities of those jurisdictions can then use that information to verify that their residents have correctly reported their financial assets and income for tax purposes.

New Zealand made its initial commitment to implement AEOI on May 7, 2014, and the first exchanges of information with other tax authorities were made by September 30, 2018.

The Taxation (Business Tax, Exchange of Information and Remedial Matters) Act enacted on February 14, 2017, amended the Tax Administration Act 1994 to implement the G20/OECD standard for AEOI in New Zealand. The AEOI standard for the due diligence and reporting obligations is known as the "Common Reporting Standard" (CRS). The legislation provides that CRS obligations apply in New Zealand from July 1, 2017. All AEOI exchanges will be made under New Zealand's tax treaties. The principal tax treaty will be Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the "Multilateral Convention"), which New Zealand signed in 2012. To facilitate automatic exchanges of financial account information under the Multilateral Convention, the OECD developed a Multilateral Competent Authority Agreement (MCAA), which New Zealand signed in 2015.

[722] The published AEOI standard can be accessed at http://www.oecd.org/tax/automatic-exchange.

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