New Zealand

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

This guide provides an overview of the law and practice dealing with private M&A transactions in New Zealand. This guide does not constitute legal advice. Anyone involved in private M&A transactions should seek specialist advice.

2. BRIEF NOTE ON NEW ZEALAND

New Zealand has a common law legal system. In addition to legislation made by Parliament and local rules made by local councils, the law is also made up of the common law, which is developed by judges through their decisions in different cases. Although the British monarch remains New Zealand's head of state, New Zealand is a completely independent self-governing democracy. New Zealand adopted the Westminster system of government when it was a British colony and does not have a written constitution or a federal system.

From 1984, New Zealand underwent an intense period of deregulation. Government subsidies and tariffs were removed, import regulations liberalised, exchange rates freely floated (ie, no exchange controls remain in place), controls on interest rates and prices eliminated, and marginal rates of taxation reduced. New Zealand is now almost entirely unprotected by import controls and subsidies. New Zealand has strong trade relationships with Asia, the Pacific, the Americas, the United Kingdom and the European Union. It actively lobbies for free trade and the removal of anti-competitive restrictions. Significantly, in April 2008, New Zealand became the first country to negotiate a free trade agreement with China.

New Zealand has a generally *laissez-faire* approach to private M&A, which is regulated as a matter of contract subject to foreign investment approvals and anti-trust considerations. Moreover, public M&A is regulated through the Takeovers Code and scheme of arrangement processes.

3. RECENT M&A TRENDS

The M&A market in New Zealand has remained robust through the Covid-19 pandemic. To illustrate, the New Zealand Private Capital Monitor reported 2020 as a year of record activity in terms of combined investments and divestments across private equity and venture capital funds, particularly in the buy-out space.

The current environment is a 'seller's market' – we are seeing formal sale processes being contested by domestic and offshore private equity (PE) and trade buyers. There has also been consolidation across sectors – particularly those that were particularly impacted by the Covid-19 pandemic – for example media and tourism assets have seen fast transactions at relatively low prices, sometimes in distressed scenarios.

We believe the strong private M&A market is attributable to:

a) the availability of quality domestic assets;
b) a perception of New Zealand as a relatively safe and stable governmental/regulatory environment;
c) relatively easier access to financing sources, at favourable lending rates; and
d) the availability of 'dry powder' of domestic and offshore private equity funds.

Although borders were generally closed to foreigners during 2020 and 2021, offshore investors have still found ways to conduct due diligence and contractual negotiations through both local representation and online meetings.

4. NEW ZEALAND LEGISLATIVE FRAMEWORK

4.1 General legal framework

4.1.1 Private M&A

New Zealand private M&A is generally conducted in the typical way of a privately negotiated share or asset sale and purchase agreement.

This is regulated by general law of contract, with some statutory overlay with relevant provisions of the Financial Markets Conduct Act 2013 (FMCA) and the Fair Trading Act 1986 prohibiting misleading and deceptive conduct.

4.1.2 Public M&A

The primary rules governing takeover activity in New Zealand are contained in the Takeovers Code (Code) and the Takeovers Act 1993 (Takeovers Act).

In addition to the Code and the Takeovers Act, the Companies Act 1993 (Companies Act) provides for schemes of arrangement.

Takeovers Code

The Code regulates the change in control of voting rights in 'code companies'. This includes companies that:

a) are listed on the NZX; and/or
b) have 50 or more shareholders, and 50 or more share parcels, and has total assets of at least $30m or total revenue of at least $15m.

For the purposes of the Code, a 'company' is a company incorporated under the Companies Act. Therefore, the Code does not extend to overseas companies or other forms of business organisations such as unit trusts. However, the takeover provisions in the NZX Listing Rules (Listing Rules) will apply to those entities which are listed on the NZX but which are not code companies.

The 'fundamental rule' in the Code prohibits any person or groups of associated persons:

a) from acquiring more than 20 per cent of the voting rights in the code company; or
b) increasing an existing holding of 20 per cent or more of the voting rights in a code company.

A person may become the holder or controller of an increased percentage of the voting rights in a code company without contravening the fundamental rule:

a) by an acquisition under a 'full offer' made in compliance with the Code (ie, for all of the voting securities of the code company);
b) by an acquisition under a 'partial offer' made in compliance with the Code (ie, for less than 100 per cent of the voting securities of the code company);
c) by an acquisition of voting securities in the code company approved by ordinary resolution of the code company's shareholders in accordance with the Code;
d) by an allotment of voting securities in the code company which is approved by ordinary resolution of the code company's shareholders in accordance with the Code;

e) in accordance with the '5 per cent creep' exception, which, in general terms, enables a person holding more than 50 per cent but less than 90 per cent of the voting rights in a code company to acquire up to an additional 5 per cent in a 12-month period; or
f) if the person already holds or controls 90 per cent of the voting rights in a code company.

The Code aims to ensure that all shareholders are treated equally in a takeover and are able to make informed decisions as to whether to accept or reject an offer. One way the Code seeks to achieve this aim is to require that certain information to be sent to the shareholders. For example, when a takeover offer is made, the target code company is required to commission an independent adviser's report on the merits of the offer; a copy or summary of this must be provided to shareholders of the target company, along with the target company statement (which contains the board's recommendation to shareholders whether or not to accept the offer) that must be sent by or on behalf of the target company to its shareholders.

4.1.3 Schemes of arrangement

An alternative option to a full takeover offers under the Code is a court-approved scheme of arrangement under Part 15 of the Companies Act.

A scheme of arrangement involving a code company is required to be notified to the Takeovers Panel, and approved by:

a) 75 per cent of the votes of the shareholders of the code company entitled to vote in each interest class (in effect, this reduces the threshold for a full takeover from 90 per cent acceptance under the Code to 75 per cent approval of shares voting under the Companies Act); and
b) 50 per cent of the votes of the shareholders of the code company overall.

The court must be satisfied that the use of a scheme will not adversely affect the shareholders of the code company (as opposed to using the Code), or the Takeovers Panel must have provided a statement that it is has no objection to the scheme.

4.1.4 Regulatory

Antitrust or competition law considerations are regulated by the Commerce Act 1986.

The foreign investment regime is codified in the Overseas Investment Act 2005 and Overseas Investment Regulations – both of which have been subject to some significant changes in the last two years, including due to Covid-19 pandemic concerns. These are discussed further in section 5.

4.1.5 Principal regulators

The following are the principal regulators in the New Zealand market.

Takeovers Panel

The New Zealand Takeovers Panel (Panel) regulates takeovers and other transactions that are subject to the Code. The Panel has the power to provide exemptions from provision of the Code and/or modify the application of the Code in a particular case.

NZX

If the target Code Company is listed on the NZX, the NZX also has powers of supervision over a takeover, under the NZX Listing Rules. The Panel and NZX work together collaboratively. If the proposed transaction is structured by way of a scheme of arrangement, then the New Zealand High Court will be required to review and sanction the scheme.

Commerce Commission

The Commerce Commission New Zealand (NZCC) is New Zealand's regulator of competition, fair trading and consumer credit contracts. Its main role is to enforce the Commerce Act 1986. The NZCC works under a voluntary notification regime, meaning that there is no legal requirement for a seller or buyer to notify the NZCC in respect of a potential acquisition. However, such notification is encouraged, especially when the relevant transaction could substantially lessen competition in a market. A buyer can apply to the NZCC, either for clearance (that is, the NZCC is satisfied the merger will not substantially lessen competition in the market) or for a formal authorisation (allowing an acquisition even if it does substantially lessen competition in a market).

Overseas Investment Office

The Overseas Investment Office processes applications under the Overseas Investment Act 2005.

Financial Markets Authority

The Financial Markets Authority (FMA) is New Zealand's regulator for securities law and financial reporting. Most of the FMA's work is carried out under the FMCA. The FMA generally has a limited practical role in mergers and acquisitions as there is no requirement to consult with the FMA in relation to a proposed transaction or seek its consent. However, depending on the nature of the target business and the acquisition (by way of example, the form of consideration to be provided), the FMCA may be relevant.

5. OVERSEAS INVESTMENT OFFICE'S CONSENT

5.1 Overview

The Overseas Investment Act 2005 (OIA) and the Overseas Investment Regulations 2005 (Regulations) establish the overseas investment regime in New Zealand. The Overseas Investment Office (OIO) oversees the regime and is responsible for assessing applications for consent to make investments in New Zealand.

There are two broad categories for consent – consent to an investment in 'significant business assets' and consent to acquire an interest in 'sensitive land'.

5.2 Significant business assets

An overseas investment in 'significant business assets' occurs where, as a result of the transaction:

a) an overseas person acquires more than 25 per cent ownership or control interest, or increases the existing ownership or control interest by more than 25 per cent, in the target company, and the value of the securities of the target company or the consideration provided, or the value of the target company's assets in New Zealand, exceeds NZ$100m;

b) an overseas person acquires assets in New Zealand and the total consideration provided exceeds NZ$100m; or

c) an overseas person establishes a business in New Zealand where the business is carried on for more than 90 days in any year, and the total expenditure expected to be incurred, before commencing the business, ie, in establishing the business exceeds NZ$100m.[1]

5.3 Investor test:

If consent is required for an investment in significant business assets, the OIO will grant approval if it is satisfied that the overseas person or the individuals with ownership and control of the overseas person satisfy certain 'character' and 'capability' criteria in order to be deemed suitable to own or control sensitive New Zealand assets (the 'investor test').

5.4 Sensitive land

An overseas investment in 'sensitive land' is the acquisition of a freehold interest in sensitive land, or a leasehold or other interest in sensitive land where the lease or interest (including any renewals) has a term of ten or more years, either directly or through acquiring an ownership or control interest of more than 25 per cent in a person or an entity which owns or controls sensitive land. The categories of land considered sensitive are set out below.

Sensitive land includes (but is not limited to) any land which:

a) is residential land;
b) exceeds five hectares of area and is non-urban land (such as farming or other agricultural, horticultural or similar blocks);
c) is on islands other than the North and South Islands (and, in the case of certain of these islands, is more than 0.4 hectares);
d) is part of the marine and coastal area, or exceeds 0.2 hectares and adjoins the marine and coastal area;
e) is to be used as a reserve, as a public park, for recreation purposes or as open space (and exceeds 0.4 hectares); and
f) is an historic place/area or there in an application to register that land as an historic place/area (and exceeds 0.4 hectares).

5.5 National interest test

There is a relatively new national interest test which grants the Minister of Finance a broad discretion to prohibit or impose conditions on transactions that otherwise require consent or notification, and which are considered contrary to New Zealand's national interest.

There is also a national security and public call-in power which applies to investments in 'strategically important businesses', regardless of whether consent is required for the transaction under the usual consent pathways.

This allows the government to prohibit, or allow but impose conditions on, transactions that are considered contrary to New Zealand's national interest even if the transaction meets the other tests to obtain consent. This broad power is intended to be used rarely and as a 'backstop' tool, to give the government additional flexibility (that it does not have under the current regime) to

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[1] Note the NZ$100m threshold referred to above may be set at a higher amount (currently NZ$200m) if the overseas person is domiciled in a country that has obligations to New Zealand under various international agreements. In addition, the above thresholds are significantly higher for Australian 'non-government' entities (NZ$552m until 31 December 2021, adjusted upwards annually for inflation).

manage certain risks associated with overseas investment transactions. The national interest test mandatorily applies to all overseas investment transactions that require consent under the OIA, where:

a) a foreign company or its associates would acquire sensitive land or hold 10 per cent or greater interest in the target New Zealand business; or
b) where the transaction involves land or assets used in a 'strategically important business'.

The national interest test may also be applied to any other transaction that requires consent or is notified under the temporary notification regime if the Minister determines, on a discretionary basis, that the proposed investment poses a risk to New Zealand's national interest.

5.6 Overseas persons

For the purposes of the regime, an overseas person is any person who is not a New Zealand citizen and is not ordinarily resident in New Zealand. This includes (1) any body corporate that is incorporated, registered or established outside New Zealand and (2) any company, partnership, body corporate or trust, in each case more than 25 per cent owned or controlled by overseas persons (or in the case of a managed investment scheme, where the manager is an overseas person).

Please note that different tests apply to New Zealand-listed issuers and certain managed investment schemes.

5.7 Consent

Consent is required:

a) if the transaction involves significant business assets, the investor will need to meet the 'investor test'; and
b) if the transaction involves sensitive land (irrespective of value), the investor will need to meet both the 'investor test' and demonstrate that the overseas investment will, or is likely to, benefit New Zealand.

In assessing 'benefit to New Zealand', the OIO must have regard to a number of specific factors. Recent changes have broadened and simplified the benefit factors that previously applied, to allow consideration of any economic benefits and any benefits to the natural environment, without needing to meet the previously narrow formulations. These changes should create greater flexibility in making benefits submissions and thereby ensure the test is easier to meet. The OIO is required to take a proportionate approach in its assessment, meaning that the benefits required to be established by an investor must be proportionate to the sensitivity of the land, the size and nature of the land, and the nature of the overseas investment.

Getting the 'counterfactual' right is a key element of a sensitive land application. This has recently been changed to require reference to the current state of the land and activity on it. This will make benefit submissions more fact-based (as opposed to a future hypothesis) and, in many cases, reduce the quantum of benefits required to meet the test and obtain consent.

Special factors apply to residential land and farm land.[2] Farm land (or farm land securities) must

[2] Farm land is defined broadly as land (other than residential, but not otherwise sensitive, land) that is used exclusively or principally for agricultural, horticultural or pastoral purposes, or for the keeping of bees, poultry or livestock. It can capture a wide range of agricultural land uses, from dairy farms, to greenhouses, orchards and vineyards.

also generally be advertised on the open market before the overseas person enters into a transaction to acquire that land (although exemptions are available).

Forestry investors can take advantage of a streamlined consent pathway where the land 'will be or is likely to be used exclusively or nearly exclusively, for forestry activities' (maintaining, harvesting or establishing a crop of trees) and there is a commitment to replant following harvest.

New Zealand's overseas investment regime is known as being one of the more complex on a global scale – however, well-advised buyers can generally expect to navigate it successfully.

6. NEW ZEALAND'S COMPETITION CLEARANCE

6.1 General

The Commerce Act 1986 (Commerce Act) prohibits conduct that restricts or lessens competition. Its breach can result in significant pecuniary penalties, damages, and injunctions.

6.2 Business acquisitions

Section 47 of the Commerce Act prohibits business mergers or acquisitions that have, or would be likely to have, the effect of substantially lessening competition in a market in New Zealand.

The NZCC considers a 'substantial' lessening of competition to occur if a combined entity has a greater ability to increase prices or reduce the quality of its output, without fearing a sufficient loss of sales volume that such price increase or quality reduction would be unprofitable.

6.3 Overseas transactions

The prohibition can apply to mergers or acquisitions outside of New Zealand, where a merger or acquisition may affect a market in New Zealand irrespective of whether the parties themselves are resident of, or carry on business in, New Zealand. Therefore, if an overseas business sells into New Zealand, and it is looking to acquire another entity in the same or a related industry that also sells in New Zealand, it is prudent to assess whether competition issues could arise under section 47 of the Commerce Act.

There are also mechanisms under section 47A to assist the NZCC to enforce against such overseas transactions; for example, mechanisms whereby the NZCC can obtain orders requiring downstream New Zealand businesses to cease carrying on business in New Zealand, or to dispose of assets if the High Court declares than an overseas transaction would substantially lessen competition in the market.

6.4 'Voluntary' notification regime

Unlike many other jurisdictions, there are no formal market share or revenue thresholds when the NZCC must be notified of an acquisition. Parties can (but are not obliged to) seek the NZCC's clearance for a proposed acquisition. This puts the onus on the parties to self-assess whether a particular acquisition could potentially be regarded as having an adverse impact on competition.

If parties proceed with an acquisition without seeking the approval of the NZCC, and the NZCC finds out that an acquisition could have an adverse impact on competition, the NZCC may choose to open an investigation, and it has a range of enforcement options at its disposal, including commencing High Court proceedings to seek an injunction to prevent the acquisition from occurring, pecuniary penalties, or divestment of assets.

6.5 Market concentration

The NZCC has published market share indicators as an initial screen to identify acquisitions that are likely to warrant close consideration, namely:

a) if the combined entity would have a market share over 40 per cent (and the three largest firms in the market after the acquisition have a combined market share of less than 70 per cent); or
b) if the combined entity would have a market share over 20 per cent (and the three largest firms in the market after the acquisition have a combined market share of 70 per cent or more).

The NZCC stresses that these indicators are only initial guides, and whether an acquisition ultimately gives rise to competition concerns will depend on the specific market dynamics.

6.6 Clearances/authorisations

A buyer may seek formal clearance from the NZCC for an acquisition. Buyers typically consider seeking formal clearance where an acquisition exceeds the concentration indicators, or where there are other factors that suggest potential material impacts on competition.

The NZCC will grant clearance for a merger or acquisition where it is satisfied that the transaction would not be likely to substantially lessen competition in the relevant markets. A clearance will provide the applicants with immunity from proceedings under the Commerce Act in respect of the merger or acquisition. Acquisitions that have not been cleared or authorised prior to settlement cannot be cleared or authorised retrospectively.

Alternatively, parties may apply for an authorisation if they consider that the merger or acquisition may substantially lessen competition in a market, but nevertheless is likely to result in public benefits that outweigh that lessening of competition. This typically involves a more complex and lengthy process than a clearance application.

Where a transaction has been cleared or authorised, immunity from proceedings under the Commerce Act is valid for 12 months only. If the transaction is not completed within this timeframe, the parties must apply again for clearance or authorisation, or alternatively bear the risk of scrutiny as per the Commerce Act.

7. TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS

7.1 Transaction structuring

Private M&A negotiations will typically be negotiated under one of two structures:

a) asset sale and purchase agreement where the business assets (and potentially also liabilities) are acquired from the seller; or
b) share sale and purchase agreement, where an entire corporate entity is acquired from the seller.

7.2 Asset sale and purchase

Where a business (or part of a business) is acquired through an asset purchase, only liabilities that are specifically assumed by the seller are transferred. As can be expected, tax liability does not transfer to the buyer.

Subject to the discussion below in relation to 'vulnerable employees', employees do not automatically transfer with the business. Employment with the seller company terminates on the grounds of redundancy and new offers of employment must be made by the buyer if it wants any employees to transfer.

Any entitlements triggered by termination of employment will be payable by the seller to employees (this includes accrued holidays and redundancy compensation). The seller is, however, usually able to avoid its redundancy obligations where there is an appropriate technical redundancy clause in the employment agreements and the buyer offers employment to the affected employees on no less favourable terms.

7.3 Share sale and purchase

In a share purchase scenario, the employing entity remains the same and, therefore, all employment relationships continue to operate (meaning that the buyer takes on all employees with the business on their existing terms and conditions of employment).

7.4 Typical documentation used in each structure

The documentation for each structure is typical – and similar to that used in many other jurisdictions, with a share sale and purchase agreement for a share acquisition, and an asset sale and purchase agreement for assets. This will include privately negotiated interim obligations, closing obligations and warranties, which may be supported by an indemnity depending on the outcome of the negotiations.

It is also not uncommon for a buyer insurance policy to be used, which would then be the recourse for a breach of warranty following completion.

Where securities are offered as part of the consideration, the offer would need to come within an exception under the FMCA (eg, an offer to wholesale investors) or would require a product disclosure statement, which is broadly equivalent to a prospectus in other jurisdictions.

7.5 Tax considerations for each structure

At a high level, shares which are held on capital account are generally not subject to tax on sale. The loss of continuity of shareholding may lead to a loss of the company's imputation credit balance (which is based on a 64 per cent continuity of shareholding since the credits were accrued) and a loss of any losses (which are subject to 49 per cent continuity of shareholding since the losses were incurred). With Covid-19 relief measures in place, it may be possible to carry forward losses if the company continues in the same line of business post sale.

Of course, in a company acquisition, the risk of historical tax compliance remains with the target company, which would normally be covered by a tax indemnity that is not qualified by disclosures.

For an asset sale, the transaction will be subject to New Zealand goods and service tax (GST). The transaction will generally have GST charged at a rate of 0 per cent if the business is being sold as a going concern or where the transaction involves the transfer of an interest in land. The transaction will also require an allocation of value across the categories of assets being sold – for example goodwill, plant and equipment, and inventory. For assets held on revenue account, this will then be subject to tax in the hands of the seller and create a cost base for the buyer at the acquired value. Depreciation recapture may also be triggered for the seller for depreciable items such as plant and equipment.

In both scenarios, the seller and buyer should obtain tax advice on the tax and consequent economic implications under either structure.

There is generally no stamp duty in New Zealand – and only limited de facto capital gains tax on certain assets such as residential property. Otherwise, the New Zealand tax regime is focused on income tax and GST.

8. PRE-AGREEMENT DOCUMENTATION

It is common for parties to enter into pre-agreement documents, particularly:

a) A non-disclosure agreement providing for confidentiality of information, the ability for the seller to run the sale process and provide with information as they deem appropriate, and non-solicitation of employees, customers and suppliers. A term of up to two years is typical for obligations.
b) A non-binding indicative term sheet that sets out the principal terms of the deal and intended timeframes. These are typically non-binding other than for specific arrangements agreed to by the parties which they may express to be binding such as exclusivity, confidentiality and any cost provisions.

The courts will generally give effect to the intentions of the parties in respect of whether the agreement is intended to be binding – it is important to be clear and express on whether the agreement (or parts of it) are legally binding when expressed as a term sheet or non-binding document.

For exclusivity, the courts will equally give effect to the parties intentions with remedies ranging from damages for loss of a chance to injunctions to require specific performance for the exclusivity period.

9. DILIGENCE STAGE

9.1 General due diligence

Buyers will typically carry out detailed due diligence investigations. The extent of this review will vary, depending on the following factors:

a) the nature of the target business;
b) the buyer's existing sector expertise, and the extent to which it is already familiar with the business;
c) the proposed level of shareholding to be acquired by the buyer (ie, a minority or control stake);
d) the buyer's overall risk appetite and its budget for advisory fees;
e) the extent to which detailed seller due diligence has been undertaken and provided to the buyer, and whether the buyer is required to obtain warranty and indemnity insurance in respect of the warranties and tax indemnity (W&I) in the SPA.

9.2 Issues that are typically seen and how they are typically addressed

Due diligence will typically be undertaken in respect of financial, tax and legal aspects. In some cases (depending on the factors previously outlined), buyers will undertake diligence in respect of commercial, insurance, environmental, engineering (eg, where the target has specific critical tangible assets), ESG, anti-bribery and corruption/anti-money laundering and IT aspects.

A typical legal due diligence review for a private equity buyer will focus on the following areas:

a) corporate structure;
b) regulatory and compliance matters;
c) material contractual obligations (focusing on terms underpinning key revenue streams and the identification of material provisions such as termination rights (including on change of control);
d) exclusivity provisions/restraints of trade and liability under warranties and indemnities);
e) finance arrangements;
f) real estate;
g) employment;
h) intellectual property;
i) information technology;
j) privacy/data protection; and
k) litigation and investigations.

9.3 Seller due diligence

It is becoming increasingly common for a seller to provide seller/vendor due diligence (VDD) reports to a shortlisted group of bidders (typically accounting, tax and legal, and often commercial and insurance reports as well).

The provision of a VDD report benefits the seller in that:

a) it permits the due diligence process to be truncated (also, the process is more attractive to bidders as it reduces their transaction costs), and reduces workload on management of the business during the buyer due diligence phase;
b) key issues that may impact transaction implementation, or the value of the target business, are identified upfront and potential solutions can be investigated, or the issue can be explained away; and
c) the existence of VDD reports generally assists in ensuring that any W&I underwriting process is straightforward.

VDD reports, however, do not replace the need for a buyer to conduct due diligence. External buyer advisers will customarily conduct a full review of the VDD, including verification of sample materials and a 'gap analysis' (aside from being prudent, this will generally be required as a condition to any bank financing and as part of any W&I underwriting).

Reliance on VDD reports will customarily be given to the successful bidder via reliance letters provided by the relevant VDD advisers.

9.4 Employment matters

There are specific protections in New Zealand employment law for certain 'vulnerable employees' affected by M&A activity (including employees engaged in certain cleaning services, food services, laundry services, orderly services and caretaking services). Unlike other employees, 'vulnerable employees' have the right to transfer with the business on their existing terms and conditions, and with full recognition of continuous service.

If the transferring employee is a member of a union, the buyer will automatically become a party to that collective employment agreement. If requested, sellers must disclose certain information about any 'vulnerable employees' to potential buyers.

There has also been a recent focus on compliance with the Holidays Act 2003; the miscalculation of liability can give rise to significant and long-tailed employment claims for accrued holiday and benefit entitlements. Increasingly, there is also a focus on compliance with minimum wage legislation – especially as the minimum wage has been rising in recent times.

New Zealand's legislative framework also includes a range of other employment-related regimes, including health and safety obligations, compulsory employer contributions to employees' KiwiSaver schemes, and compulsory employer levies to New Zealand's Accident Compensation Scheme (which provides no-fault personal injury cover for New Zealand residents and visitors).

10. MAIN TRANSACTION AGREEMENT

10.1 Formal requirements

Unless the transaction is formally regulated, such as a public transaction under the Takeovers Code, there is relatively little formality required to effect a private M&A transaction. That said, most transactions would include the following formal documents.

a) For a share or asset sale and purchase agreement, a formal sale and purchase agreement (SPA) would be entered into, using either a law firm precedent document or a law society standard form of document.
b) For a share sale, a share transfer form is required to effect settlement and registration of the transfer, with the share register serving as *prima facie* evidence of legal title.
c) Trademarks are typically transferred and registered under a specific deed of assignment.

10.2 Key clauses

The key clauses in a sale and purchase agreement under any structure would include:

a) Price, accounting adjustments and payment arrangements, including any earn-out, escrow or hold back.
b) Completion arrangements, including completion deliverables.
c) Conditions – commonly OIO consent, change of control and due diligence conditions. See the discussion in Section 8.
d) Interim obligations – providing for how the seller is to run the business in the period until completion.
e) Warranties – these typically range from an information warranty and general financial warranties through to specific warranties about contracts, assets, employment matters and the absence of claims.
f) Restraints of trade – these typically require the seller to comply with restraints for a minimum period, often three years following closing. It is up to the buyer to establish that they are reasonable but under the Contract and Commercial Law Act 2017, the courts will read down the restraint period to a reasonable time, rather than rule it unenforceable if it purports to go beyond what is regarded as a reasonable period.

10.3 Completion account mechanisms

Most transactions tend to be undertaken by way of a completion accounts mechanism. There is increasing use of locked box structures in SPAs; on balance, we have observed a slight preference for using locked box arrangements in private equity buyers. Corporate buyers have typically preferred a completion accounts mechanism/working capital adjustment. Two key factors are relevant to the consideration of appropriate consideration structures in the current climate.

a) If OIO or other regulatory consents are required as a condition for completion of the acquisition, the time period required to fulfil that condition may mean that completion is set to occur at a significant time after the latest audited accounts (noting that these will customarily be the basis of the locked-box balance sheet referenced to in the SPA).
b) The impact of Covid-19 means greater risk of business disruption between the locked- box date and completion, making the position at the locked box date less reliable.

In the current climate, where there is significant uncertainty due to potential business disruption (often resulting in significant gaps between a seller's perceived deal value and what a buyer is prepared to pay), earn-outs and deferred consideration are increasingly being seen as a feature in SPAs. These are, by their nature, complicated arrangements, and care needs to be taken in terms of drafting to ensure that any such provision properly protects the commercial position of both parties.

Locked box structures

It is reasonably common for locked box consideration structures to include a requirement for the buyer to pay to the seller an additional amount from the date of the locked box accounts until completion. This will typically be calculated at interest rate on the enterprise value or equity value of the target business (to be negotiated) or at a rate reflecting the cost of capital for the target business.

In some circumstances (for example, where there is a long period between the locked-box date until completion due to OIO requirements), the parties may negotiate for the rate to ratchet upwards after a certain time-period. It is not common to see interest charged on any leakage payment.

10.4 Dispute resolution provisions

It is uncommon to have a separate dispute resolution regime for locked box disputes. These are typically subject only to the dispute resolution provisions in the SPA (customarily New Zealand courts or arbitration under the Arbitration Act 1996). Arbitration may be preferred as a private forum between the parties, with some greater control over timing of hearings, although similar procedural rules and rigour apply as would be found in a court hearing.

It is a common requirement that any dispute in relation to completion accounts should be referred to an independent expert for determination (which will be binding on the parties, except for in the event of manifest error or omission).

11. TYPICAL CONDITIONS TO CLOSING/RELEVANT REGULATORY REGIME

There are two customary categories of conditions, as follows:

a) *regulatory conditions*: any conditions required from a legal / regulatory basis - for example, OIO or NZCC consent, or shareholder approval for a listed entity in accordance with the Listing Rules; and
b) *material adverse change (MAC)*: assuming a regulatory condition is required, the buyer will usually seek protection for the period between the signing and closing of the SPA in the form of a MAC clause.

If there is a regulatory condition, a seller will typically require that as much of the work (as is possible) required to satisfy the condition is done prior to the signing of the SPA, to minimise the conditional period.

If a NZCC clearance is intended to be sought, the sale and purchase agreement for the transaction will normally include a condition stating that NZCC approval is required before the transaction can go ahead. Once notified, depending on the level of complexity for the clearance application, the NZCC will typically take between 40 and 130 days to make a decision and issue a statement.

MAC clauses are generally negotiated and tied to specific value impacts – especially in public market deals. Potentially, a MAC may be tied to breach of warranty or breach of a pre-completion covenant. In negotiating a MAC clause, parties will focus carefully on carve-outs relating to *force majeure*-type events (noting the impact of the pandemic).

Other types of conditions – for example, board/investment committee approval, shareholder approval (other than in a listed company scenario), due diligence, financing or change-of-control approval in respect of material contracts may be negotiated on a case-by-case basis.

If a due diligence condition is included, there is generally no obligation to conduct due diligence: a party can waive it and continue to rely on the warranties if they wish, even if the breach of warranty would have been discoverable in due diligence. However, if a matter is discovered in post signing due diligence, the decision to proceed may then break the chain of causation and limit the buyer in establishing any loss.

Break fees may also be negotiated if certain conditions are not satisfied.

12. CLOSING ACTIONS

12.1 Typical steps to consummate the proposed transaction

Closing of a transaction typically takes place either at the seller's solicitors' offices or by remote settlement of email copies of closing documents. Relevant documents include (1) share transfer forms, (2) specific forms required to transfer specific classes of assets, such as vehicles, notices and (3) consents to remove directors and appoint the buyer's nominated directors, discharge of encumbrances and securities over assets and payment.

For an asset sale, an invoice for GST purposes and settlement statement will also usually be prepared.

Arrangements to record and register the transfer of relevant interests in land with the New Zealand title system with Land Information New Zealand will also be put in place between the seller and buyer's solicitors, with related undertakings. It is not usual for the parties to exchange additional bills of sale, with the contract and payment records usually sufficient evidence of the transfer.

Employees cannot be transferred as part of an asset sale, so offers of employment are also required – these need to be made a suitable period in advance of closing so that the employees have suitable time to accept the offer of employment and take advice on their terms.

Payment can either occur between the parties directly, or via the trust accounts of the parties' solicitors – this is particularly convenient if borrowings of the target company need to be discharged or certain undertakings relating to completion need to be discharged.

12.2 Additional cross-border closing considerations

For cross-border closing matters, there are a few additional considerations that may apply.

The currency of payment is a matter of contract. New Zealand banks can generally handle transfers in Australian dollars, US dollars, Euros, and pounds sterling with specific accounts (as well as New Zealand dollars). Earlier daily cut-off times for payments apply to foreign currency payments; these tend to clear overnight rather than intraday, as is the case for New Zealand dollars.

A company is required to have at least one New Zealand resident director, or alternatively an Australian resident who is also a director of an Australian company. It may be desirable for tax reasons to have a majority of New Zealand directors to ensure that there is no additional tax residency offshore.

Non-resident withholding tax or approved issuer levy may apply to interest payments made offshore. Thin capitalisation rules also apply to debt levels for offshore owners. Specific structuring advice may be required.

13. POST-CLOSING

13.1 General actions to be undertaken post-closing

Typical post-closing steps include the following:

a) updating share registers and director details with the company;
b) completion of filings with the New Zealand Companies Office, which maintains an online register;
c) change of registered address and address for service;
d) updates to bank account authorities and signatories;
e) adoption of a constitution which allows the company directors to act in the best interests of the company's holding company – this is useful to support director decisions to accede to guarantees in favour of the buyer group's borrowing facilities, even if there is no direct benefit to the company. In this regard it may also be necessary to approve or whitewash any financial assistance given in connection with the acquisition of shares; and
f) the arrangement of director and officer insurance and indemnities. Insurance is particularly important, as indemnities given by a company to directors do not provide relief from liability owed to the company (in the context where most duties are owed to the company).

13.2 Regulatory requirements

For a transaction that is subject to regulatory oversight from the OIO or the Commerce Commission, the buyer will need to report that closing has occurred.

The OIO will also publish a decision sheet once consent has been granted detailing the transaction, parties, land interests involved and price. It is possible to seek redaction of the price and potentially other sensitive details on a rolling one-year period, on the ground of commercial prejudice through disclosure.

The OIO will also require annual confirmation that conditions of consent are being complied with and reporting against relevant conditions through a private letter to the OIO.