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Acquisition Finance 2025

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New Zealand: Law and Practice
David Weavers, Jesse Fairley and Matt Consedine
Russell McVeagh

NEW ZEALAND

Law and Practice

Contributed by:
David Weavers, Jesse Fairley and Matt Consedine
Russell McVeagh

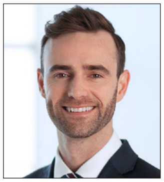
Contents

Russell McVeagh has one of New Zealand's leading leveraged and acquisition finance offerings, consistently advising on the most complex and high-profile deals in the market. The firm regularly works with regional and global private equity sponsors on their New Zealand acquisitions. It also acts as bank-panel lawyers for five of New Zealand's major banks (representing 90% of the domestic lending market) and is the go-to adviser for the growing non-bank lending market. It has well-established relationships with major firms in all key jurisdictions, with all of the banking and finance partners having worked for leading magic circle and/or US firms prior to returning to New Zealand.

Authors

David Weavers leads Russell McVeagh's acquisition finance offering and regularly acts for global and regional private equity sponsorFinancial s on their New Zealand transactions. He also acts for all of New Zealand's major financial institutions and leading credit funds/non-bank lenders. He has completed all three levels of examinations for the Chartered Analyst (CFA) programme. He has many years of experience working on acquisition finance transactions and structures in Europe, Asia and the USA, having been based for many years in London and Hong Kong where he worked for leading US firms before returning to New Zealand.

Jesse Fairley of Russell McVeagh acts for both private equity sponsors and trade buyers on market-leading leveraged and acquisition finance transactions. He also acts for all of New Zealand's major banks and a number of credit funds active in the New Zealand market. Having spent over half a decade in the structured finance team at a magic circle firm in London, he has particular expertise in complex and innovative capital structures. He is sought after for his technical excellence and tailored, commercial advice.



Matt Consedine is a senior associate at Russell McVeagh and has significant experience in advising financial institutions, non-bank/direct lenders, sponsors and corporates on a wide range of market-leading cross-border financing transactions, including acquisition finance (across the credit spectrum and including public takeovers), corporate finance, margin lending and restructurings. In addition to his experience in the New Zealand market, he spent four years working at Linklaters LLP in London, where he acted on some of the most complex and significant transactions in the market.

Contributed by: David Weavers, Jesse Fairley and Matt Consedine, **Russell McVeagh**

Russell McVeagh

Level 30, Vero Centre
48 Shortland Street
PO Box 8
Auckland 1140
New Zealand

Tel: +64 9 367 8000
Fax: +64 9 367 8163
Email: enquiries@russellmcveagh.com
Web: www.russellmcveagh.com

1. Market

1.1 Major Lender-Side Players

Banks provide the majority of funding for acquisition financing in New Zealand. The market is largely dominated by the four main Australian-owned banks operating in New Zealand, which often provide the cornerstone of debt commitments. A number of other international banks are also prevalent in the market (mostly as syndicate members or to provide underwriting capacity for large transactions) and there is increasing mid-market participation from locally owned banks.

Alternative sources of debt financing, such as direct lenders/credit funds, have not historically formed a significant part of the acquisition finance market in New Zealand. However, both international and domestic direct lenders (such as New Zealand superannuation funds) and credit funds are playing an increasingly important role in New Zealand acquisition financing transactions, particularly on private equity sponsor-led transactions or financing sectors where traditional bank lenders have shown less appetite in recent years (eg, due to ESG considerations). Given the variety of options available, private equity sponsors and their debt advisors often seek terms and pricing on alternative financing structures before deciding on a final preferred structure. Some of these alternatives may involve a combination of bank debt and direct lenders/credit funds (eg, super-senior revolving credit facilities, Holdco Mezz structures).

1.2 Corporates and LBOs

In recent years, acquisition activity has involved a mixture of corporate transactions and leveraged buyouts. On the corporate side, these transactions tend to be led by local corporates with growth-by-acquisition strategies, although investment from large Australian corporates and global trade buyers in the New Zealand market is also common. Leveraged transactions are predominantly led by international private equity firms (with an emphasis on Australasian private equity firms).

There is also an active and growing set of domestic private equity firms, which tend to focus on mid-market transactions and have enjoyed a number of successes in recent years. In comparison to their international counterparts, domestic private equity firms tend to place less emphasis on maximising leverage to enhance returns.

2. Documentation

2.1 Governing Law

New Zealand law will govern all finance documents in domestic transactions. This is the case for corporate loans, acquisition finance and leveraged buyouts.

For international transactions, the governing law of the main finance documents (aside from security) will be driven by the market where the financing is being raised. However, it is fairly uncommon for New Zealand denominated financing to be raised outside of New Zealand.

Security documents will typically be governed by the law of the jurisdiction in which the relevant assets are located.

2.2 Use of Loan Market Association (LMA) Agreements or Other Standard Loans

Financing documentation is not fully standardised in the New Zealand market. The Asia Pacific Loan Market Association (the Asia-Pacific region equivalent of the Loan Market Association) has produced a suite of standard form documents that are applicable for use in the Australasian market, although there is no specific leveraged suite of documents. While not standard across the market, the Asia Pacific Loan Market Association forms are becoming more commonly used for investment grade transactions. For leveraged transactions, it is more common to base the facility agreement on the sponsor's precedent.

Each major New Zealand law firm has its own form of facility and security documents, which are generally similar in substance across the market. Due to the large number of Australian sponsors active in the New Zealand market, New Zealand facility documentation often adopts the latest developments and technology in the Australian market (which in turn is influenced by US and European markets).

For non-New Zealand law governed financing documents, the form that the documents take depends on the market practice in the relevant jurisdiction.

2.3 Language

Financing documentation is drafted in English as a general rule although this is not a legal requirement.

2.4 Opinions

Legal opinions will typically be provided by lenders' counsel in respect of the following, among other things:

- the capacity and authority of, and due execution by, the obligor and entities party to the finance documents; and
- the validity, binding nature and enforceability of the main finance documents (including any security documents).

A legal opinion will be required as conditions precedent to initiate drawdown under the facilities agreement (in respect of the initial obligors and the initial finance documents), with an equivalent opinion delivered as a condition precedent to the subsequent accession to the finance documents of any additional obligors, such as the target (in respect of those additional obligors and any new finance documents, such as accession documentation and any new security documents).

Each major New Zealand law firm has its own form of transaction legal opinion, which are generally similar in substance across the market and consistent with the transaction opinions issued by lawyers in other common law jurisdictions.

3. Structures

3.1 Senior Loans

The structure of an acquisition financing in New Zealand will vary from transaction to transaction, depending on whether it is a corporate or leveraged transaction, the relevant sector, the purchaser and the target (among other things).

Corporate acquisitions could be as simple as utilising headroom in the purchaser's existing financing arrangements or amending its financing arrangements to include an additional certain-funds acquisition facility, although new acquisition financing arrangements are common too.

Leveraged buyouts tend to be more complex and may involve different facilities/tranches, such as a term loan acquisition facility (usually with some amortisation if the structure is a traditional bank-led deal), a term loan capex facility, a term loan acquisition facility/incremental facility (eg, for bolt-on acquisitions) and a revolving credit facility, as well as different layers of debt (see **3.2 Mezzanine/Payment-in-Kind (PIK) Loans**).

With the growing trend of direct lenders/private credit (both international and domestic) in the New Zealand market, European-style unitranche deals are becoming more common in acquisition financing. Under these structures, the acquisition facility (provided by the direct lender) is non-amortising and is coupled with a super-senior revolving facility (usually provided by a domestic bank lender). Unitranche lenders tend to offer greater leverage than available under traditional bank-led transactions, foregoing the need for multiple layers of debt. This additional flexibility results in wider pricing.

Covenant-lite transactions in the style of term loan Bs are less common in New Zealand. To date, they have only been used on a very small number of large transactions, usually with US sponsors. Given there are now more covenant-lite transactions in Australia, more of these types of transactions can be expected to be seen in New Zealand in the coming years.

3.2 Mezzanine/Payment-in-Kind (PIK) Loans

Mezzanine/PIK loans (contractual and Holdco) exist in the New Zealand market but are less common in acquisition financing. The mezzanine/PIK market is expected to grow over the next 24 months, particularly in capital restructuring and refinancing transactions.

3.3 Bridge Loans

Bridge loans are uncommon in the New Zealand leveraged market due to there being no established high-yield bond market in New Zealand. There is a strong domestic market for investment grade corporate bonds and, accordingly, corporate purchasers may enter into a bridge financing to complete an acquisition and then refinance the bridge with a bond issuance (typically, to wholesale and retail investors) or a capital raise.

3.4 Bonds/High-Yield Bonds

While there is an active debt capital market for corporate issuers in New Zealand, this market is rarely used as the primary source of funding for an acquisition (although a bond issuance may be used to refinance an acquisition bridge loan, see **3.3 Bridge Loans**).

There is no established high-yield bond market in New Zealand.

3.5 Private Placements/Loan Notes
Similar to the position noted in **3.4 Bonds/High-Yield Bonds**, there is no established private placement/loan note market in New Zealand in the context of acquisition financings. Large-cap corporate issuers (typically in the property, energy or infrastructure sectors) often access overseas private placement/institutional term markets but this type of debt is rarely used to fund an acquisition.

3.6 Asset-Based Financing
All of New Zealand's major domestic banks provide asset-based financing solutions. The legal framework around taking security (see **5 Security**) makes this straightforward. Asset-based financing is very common in the rural sector.

A growing trend of borrowing base/receivables backed facilities being implemented by corporates or portfolio companies with large trade receivable balances is also being seen.

There have also been a number of recent large acquisitions (in the leasing or commercial lending space) which have been financed by securitisation structures that have funded the completion of the acquisition.

4. Intercreditor Agreements

4.1 Typical Elements
Intercreditor agreements are common in the New Zealand market and are used to contractually govern the rights and obligations of the various financing creditors of a borrowing group.

There is no standard market intercreditor agreement in New Zealand, although the principles and structure will generally follow the Loan Market Association's form of intercreditor agreements.

Order of Priority
The ranking and order of priority of all financing creditors will be set out in the intercreditor agreement, with contractual subordination being recognised under New Zealand law. Senior debt will rank ahead of junior debt and there may be *"super-senior"* debt that ranks ahead of the senior debt on enforcement (eg, where a bank provides a revolving credit facility on a super-senior basis in a unitranche transaction). Hedge counterparties and ancillary finance providers usually rank pari passu with the senior debt providers.

Payments
The intercreditor agreement will govern what payments are permitted to be paid to, and received by, each class of creditor. Payments to senior creditors are usually not restricted. Junior creditors, on the other hand, are often restricted from receiving principal repayments until all senior debt has been repaid or, alternatively, these payments will be subject to strict parameters. Payments of interest and fees to junior creditors are usually permitted, subject to certain conditions, such as compliance with certain covenant levels and no default occurring. Repayments of shareholder loans are typically restricted on the same basis as distributions out of the borrowing group in the finance documents.

Provisions are also typically included to require a creditor to turn over receipts to the agent or security trustee where they have received more than they are contractually entitled to and to hold these receipts on trust for the agent/security trustee until they have done so.

Enforcement
The intercreditor agreement will set out which group of creditors is entitled to instruct the security trustee to take enforcement action following a default event, which is usually a specified majority of senior creditors (typically two-thirds by exposure). Junior creditors will be restricted from taking enforcement action during an agreed standstill period. If the senior creditors fail to take enforcement action during this period, the junior creditors will be permitted to step in and undertake their own enforcement process, subject to certain conditions and time periods being met.

4.2 Bank/Bond Deals
As outlined in **3.4 Bonds/High-Yield Bonds**, there is no high-yield bond market in New Zealand. However, it is relatively common for investment grade corporate issuers to have a bond or private placement as part of their debt capital structure. In these circumstances, the instrument will usually rank pari passu with the corporate issuer's senior bank debt.

4.3 Role of Hedge Counterparties
Where a borrowing group has hedging in place (which is common), hedge counterparties will typically benefit from any security and will rank pari passu alongside the senior lenders.

The hedge counterparties' rights to terminate hedging transactions or otherwise take enforcement action may be restricted and will often be governed by an intercreditor agreement.

5. Security

5.1 Types of Security Commonly Used
Leveraged acquisition finance transactions will almost always be secured.

The security package will be dependent on the acquisition but will typically involve the following.

- On or prior to closing:
  - (a) all-asset security being granted by the special purpose vehicle bidco; and
  - (b) specific security being granted by the special purpose vehicle holding company of the special purpose vehicle bidco over the shares in the bidco, any intercompany receivables owing to the special purpose vehicle holding company by the bidco and any bank account of the special purpose vehicle holding company.
- Within a certain period after closing, all-asset security being granted by the target and other target group entities to the extent required to comply with the guarantor coverage test.

A guarantor coverage test will typically require that, subject to any agreed security principles, members of the target group owning between 80% and 95% of the target group's assets and contributing between 80% and 95% of the target group's earnings before interest, taxes, depreciation and amortisation (EBITDA) must grant all-asset security and become guarantors.

For corporate transactions, on or prior to completion of the acquisition, the security package will typically reflect the purchaser's existing security arrangements (if the purchaser is using headroom in its existing financing arrangements, no new security will be required). Post-closing, whether members of the target group are required to grant security and the nature of that security will vary on a deal-by-deal basis, as some strong corporate borrowers borrow on an unsecured/negative pledge basis. Where security is provided, it is common for a guarantor coverage test to be included, as for leveraged transactions.

In New Zealand, property is generally classed into two separate asset types: real property (real estate) and personal property (in general terms, all property other than real property) and the systems that govern security interests in each are fundamentally different. Real property is governed by the Property Law Act 2007 (the *"PLA"*) and the Land Transfer Act 2017 while personal property is governed by the Personal Property Securities Act 1999 (the *"PPSA"*).

Real Property

A mortgage over freehold or leasehold interests in land (real estate) takes effect as a charge in favour of the secured party (mortgagee) rather than a transfer of an interest in the land charged. A mortgage can be either *"equitable"* (unregistered) or *"legal"* (registered).

Although an all-assets security agreement will create a security interest over both personal property and real property, a registered mortgage will also be taken where land is a material part of the collateral package. Registration is not mandatory. However, a registered mortgage will have priority over an unregistered mortgage, except where the mortgagee's conduct was fraudulent in respect of the prior interests.

Registration is a largely online process facilitated through Land Information New Zealand (a government department). To register a mortgage, both the mortgagor and mortgagee sign prescribed forms which authorise their respective solicitors to complete the electronic registration against the relevant properties.

Personal Property

The PPSA applies to all tangible and intangible property (including shares, bank accounts, inventory etc) other than real property (interests in land) and a limited set of specific types of personal property (eg, certain aircraft and ships and fishing quotas) which are governed by other regimes.

Security over personal property can be taken by an all-asset security deed (which would extend to all personal property and real property owned by the obligor) or a specific security deed (ie, a security deed limited to certain classes of personal property, such as shares, bank accounts or receivables).

Financiers in a leveraged context would typically require:

- the special purpose vehicle holding company of the bidco to grant specific security over the shares in the acquisition vehicle, its bank account and any receivables owing to it by the bidco and
- all asset security to be provided by the bidco and, post-closing, the target and these members of the target group to grant all-asset security so as to comply with the guarantor coverage test. The security interest will usually operate in relation to both current and future assets as well as any proceeds of the collateral.

A security interest *"attaches"* to personal property to which the PPSA applies when:

- value is given by the secured party (*"value"* means consideration that is sufficient to support a simple contract and includes an antecedent debt or liability);
- the security provider has rights in the collateral (eg, the debtor is the legal owner of the assets subject to the security); and
- the security agreement is enforceable against third parties (a security agreement is enforceable against third parties when the collateral

is in the possession of the secured party or the debtor has signed or assented to the security agreement which contains a description of the secured collateral). *"Attachment"* is the point at which a secured party acquires an in rem/proprietary interest in the collateral (ie, a security interest is created).

Once *"attachment"* has occurred, security over personal property will be *"perfected"* when:

- the secured party has taken possession of the collateral; or
- a financing statement has been registered on the Personal Property Securities Register (the *"PPSR"*).

It is customary for each security interest to be perfected by registering a financing statement on the PPSR. However, a secured party will usually also take possession of certain types of collateral, such as shares, in order to give the secured party the best protection against other potential secured creditors or third parties claiming an interest in the collateral. In respect of shares, secured parties will typically obtain all share certificates (if the shares are certificated), record the security interest over the shares in the share register of the company or with the relevant clearing house or securities depository (with respect to listed securities) and, to assist enforcement, obtain blank executed stock transfer forms.

Under the PPSA, the general priority rules are as follows.

- A perfected security interest has priority over an unperfected security interest in the same collateral.
- If competing security interests are all perfected, priority will then be given to the secured party that was the first to register a financing statement or take possession of the collateral (this is the case even if the security interest had not yet attached at the time of registration).
- If none of the competing secured interests are perfected, priority then goes to the first security interest that attached to the collateral.

The PPSA contains a number of exceptions to these general priority rules.

5.2 Form Requirements

There is no particular form of security agreement that must be used when taking security over personal property.

Security agreements governed by New Zealand law will be in the form of deeds (rather than simple contracts). This is because a security agreement typically contains a power of attorney granted by the grantor in favour of the security party. Under New Zealand law, an attorney can only execute a deed if it itself has been appointed by a deed.

See **5.1 Types of Security Commonly Used** in relation to registration of security over real property.

5.3 Registration Process

Personal Property

As mentioned in **5.1 Types of Security Commonly Used**, a registration will be made to perfect a security interest over personal property. Certain key information is recorded in the financing statement that is registered on the PPSR. This includes the names and addresses of the debtor and the secured party and a description of the collateral. The registration can be made instantly for a nominal fee. The maximum registration period for a financing statement is five years but it may be renewed at or before the expiry of this period for an additional nominal fee.

It is critical that the prescribed information recorded in a financing statement is correct, otherwise there is a risk of the financing statement (and security perfection) being invalid for perfection purposes. For example, if the debtor's name has been incorrectly recorded, this will be deemed to be *"seriously misleading"* and the financing statement will be deemed to be invalid under the PPSA.

Real Property

See **5.1 Types of Security Commonly Used** for a summary of the registration process in respect of mortgages over real property.

5.4 Restrictions on Upstream Security

See **5.5 Financial Assistance** and **5.6 Other Restrictions.**

5.5 Financial Assistance

The Companies Act 1993 (the *"Companies Act"*) regulates a company giving financial assistance (which includes giving a loan or guarantee or the provision of security) to a person for the purposes of, or in connection with, the purchase of a share in the company, or its holding company, whether directly or indirectly. This restriction is relevant in an acquisition finance context where members of the target group guarantee or secure the acquisition debt.

Financial assistance is permitted where the Section 107 test or the Section 76 test are complied with and, in each case, a modified solvency test is also complied with. No whitewash standstill period applies under either option.

Section 107 Test

The simplest, and least onerous, financial assistance procedure is pursuant to Section 107 of the Companies Act. The only two requirements are that:

- all *"entitled persons"* of the company (being all the shareholders of the company and all other persons (if any) upon whom the constitution of the company confers any of the rights and powers of a shareholder) must agree in writing to the financial assistance being given; and
- the board of the company must resolve that it is satisfied, on reasonable grounds, that the company will, immediately after the giving of the financial assistance, satisfy a modified solvency test.

For most companies, the only entitled persons are the shareholders.

The Section 107 method is used by wholly-owned companies, with the related documentation being fairly straightforward to prepare and quick to implement.

Section 76 Test

The Section 76 test requires that, prior to the financial assistance being given, the board must resolve that:

- the company should provide the assistance;
- giving the assistance is in the best interests of the company; and
- the financial assistance was given on fair and reasonable terms and conditions.

One of the following procedures must also be followed:

- all shareholders must have consented in writing to the giving of the assistance;
- the board resolves that the giving of the financial assistance is of benefit to the shareholders not receiving the assistance and that the terms and conditions under which the assistance is given are fair and reasonable to those shareholders not receiving the assistance. Under this method, a disclosure document must be sent to each shareholder and the assistance cannot be given less than ten working days or more than 12 months after the disclosure document has been sent to each shareholder; or
- the financial assistance is given under Section 80 of the Companies Act, which permits an aggregate amount of financial assistance under this Section up to 5% of the aggregate amounts received by the company in respect of the issue of shares and reserves, as disclosed in the most recent financial statements of the company. The company must also receive fair value in respect of the assistance and must circulate a disclosure notice to all shareholders.

Solvency Test

Before financial assistance is given under either of these tests, the board must be satisfied on reasonable grounds that the company will, immediately after the giving of the financial assistance, satisfy a modified version of the statutory solvency test found in Section 4 of the Companies Act.

A company will satisfy the solvency test if:

- it is able to pay its debts as they become due in the normal course of business; and
- the value of its assets is greater than the value of its liabilities, including contingent liabilities.

In the context of financial assistance, the test is modified so that *"assets"* excludes all amounts of financial assistance given by the company at any time in the form of loans and *"liabilities"* includes the face value of all outstanding liabilities, whether contingent or otherwise, incurred by the company at any time in connection with the giving of financial assistance. This requires careful analysis, including the treatment of rights of contribution in the case of cross-guarantees.

5.6 Other Restrictions

A director of a New Zealand company has a number of duties. These exist in common law by way of fiduciary duties, and in most instances have been codified under the Companies Act. These duties include the duty to act in good faith and in the best interests of the company under Section 131 of the Companies Act.

Directors should turn their mind to this duty when entering into financial transactions. This becomes particularly important when contemplating subsidiaries of a borrower who make up part of the security package. If the borrower is a subsidiary of another company, it is permissible under Section 131 of the Companies Act for directors to act in the best interests of the company's holding company if this is expressly permitted by the company's constitution. However, if the company is not a wholly-owned subsidiary, the prior agreement of the shareholders must also be obtained. Similarly, where a company is carrying out a joint venture the directors may act in the best interests of the shareholder if they are permitted to do so by the company's constitution.

5.7 General Principles of Enforcement

A lender's right of enforcement under a financing transaction is governed by the contractual arrangements agreed with the borrowing group and the other financing creditors. The right of enforcement can generally be undertaken without application to the court. In addition to what is agreed contractually, the lender will also be entitled to certain enforcement rights (and subject to certain obligations) under the PPSA (in respect of personal property) and the PLA (in respect of real property).

The loan documentation will typically provide that upon the occurrence of an event of default, the lender will have the right to accelerate the debt owing to it, cancel any undrawn commitments and exercise its rights to enforce its security under the security documents. The security documentation will then govern the process for enforcement and to the extent provisions of the PPSA and/or the PLA apply these will supplement the process for enforcement.

The general principles of enforcement within the security documentation are as follows.

- Power of possession and/or sale: the security documentation should contain a right for the secured party to take possession of the collateral and/or sell it to recover debts owed. This right also exists as a matter of law under the PPSA (in respect of personal property) and the PLA (in respect of real property). The secured party has a duty to obtain the best price reasonably obtainable (and it is not possible to contract out of this duty).
- Appointment of a receiver: security documentation will usually include provisions for the lender to appoint a receiver upon an enforcement event. A security agreement will typically include contractual rights which permit an appointed receiver to take charge of the grantor's assets and business to the extent covered by the security agreement, to run the business and/or to sell off secured assets and to repay the creditor from the earnings or sale proceeds. A receiver is appointed in respect of property and not the company itself, which differs from the liquidation process. The key benefits of appointing a receiver (rather than the secured party enforcing directly) include that the secured party will not be *"mortgagee in possession"* and accordingly will not be subject to associated duties or related risks (including in connection with a sale of the secured property).
- Voluntary administration: a secured creditor who has a security interest over substantially the whole of a company's property (as may be the case if a secured creditor takes all-asset security over a company) can place a company into voluntary administration, during which an administrator takes control of the company's business and property (except for property in respect of which a secured creditor has appointed a receiver). Upon doing so, a moratorium on enforcement applies so that creditors of the company cannot take steps to enforce any debts or security against the company without the consent of the administrator or leave of the court. Notwithstanding this, a secured creditor who has a security interest over the whole or substantially the whole of a company's property can elect to enforce its security within ten working days of the commencement of the administration.
- PPSA: the enforcement section of the PPSA contains certain debtor rights and secured party obligations that can be contracted out of. It is expected that a well-drafted security document would contract out of these provisions to the extent it benefits the lender. For example, the parties will typically contract out of the lender's obligation to give notice to the debtor that it intends to sell the collateral and the debtor's right to reinstate the security agreement prior to sale of the collateral

by remedying all defaults (Sections 114(1)(a) and 133 of the PPSA). Importantly, the enforcement regime under the PPSA does not apply to a receiver. That is, the PPSA enforcement regime only applies if the secured party enforces directly rather than via receivership.

6. Guarantees

6.1 Types of Guarantees

Guarantees are typically required to be provided by all material companies in the target group. Material companies are companies owning or contributing a certain percentage of assets or EBITDA of the group. In addition, sufficient members of the target group to satisfy the guarantor coverage test (as described at **5.1 Types of Security Commonly Used**) must become guarantors.

Guarantees will typically be cross-guarantees and indemnities, extending to all obligations owed by all obligors under the finance documents.

6.2 Restrictions

Financial assistance includes the giving of upstream guarantees. See **5.5 Financial Assistance**.

The corporate benefit test will also apply to any guarantees given, as detailed in **5.6 Other Restrictions.**

6.3 Requirement for Guarantee Fees

There is no requirement in New Zealand for a guarantee fee to be paid to a guarantor. To avoid consideration issues, guarantees are often granted in deed form, although this is not a legal requirement.

7. Lender Liability

7.1 Equitable Subordination Rules

There is no concept of equitable subordination in New Zealand.

7.2 Claw-Back Risk

When a company enters liquidation proceedings in New Zealand, the recovery by that company's creditors is not always limited to the pool of assets at the date of liquidation. Liquidators are able to void transactions that meet certain criteria under the Companies Act.

Insolvent Transactions

A transaction by a company is voidable if:

- it was entered into within six months of the commencement of liquidation proceedings (or, in the case of related party transactions, within two years);
- it was entered into when the company was insolvent; and
- it enables another person to receive more towards satisfaction of a debt owed by the company than the person would be likely to receive in the company's liquidation.

Voidable Charges

A charge is voidable where it is created within the relevant time periods for an insolvent transaction and if the giving of that charge means the company is unable to pay the debts it owes.

A charge will not be voidable where it:

- secures valuable consideration given at the time of, or after, the giving of the charge; or
- is a substitute for a charge created before the relevant restricted period.

Transactions at an Undervalue
Transactions at an undervalue are voidable to the extent of the difference in the value received by the company and the value given by the company provided that the transaction occurred within two years of the company's liquidation and the company was either insolvent at the time or became insolvent as a result of the transaction.

Inadequate or Excessive Consideration
The Companies Act also aims to prevent companies from siphoning away their assets in anticipation of future liquidation. Liquidators can therefore pursue related persons of a company (directors, company controllers or related companies) who have entered into certain transactions with the company within three years of the commencement of liquidation.

The following transactions are considered voidable under this provision:

- where a related person receives consideration from the company considered excessive for the company to have given; or
- where a related person gives consideration to the company considered inadequate for the company to have received.

Innocent Creditor Defence
The Companies Act provides for an innocent creditor defence to creditors who have dealt with the company. A liquidator or other creditors cannot pursue a creditor party to one of the specified transactions if the creditor satisfies the three limbs of the test.

- It must have acted in good faith.
- There must be no reasonable grounds for suspecting the company was or would become insolvent.
- It must have provided value or materially altered its position on reasonable belief the transaction was valid.

PLA Voidability
The PLA operates independently of the Companies Act and allows creditors or liquidators to apply to the court to set aside a disposition of property that prejudices a creditor (or creditors). The court may set aside a disposition of property if the company:

- was insolvent at the time, or became insolvent as a result of the disposition;
- would be left with an unreasonably small pool of assets; or
- at least would reasonably have believed it was incurring debts beyond its ability to pay.

The disposition must also have been made with the intention to prejudice a creditor or have been a gift or been made at an undervalue. There is therefore a degree of overlap with voidability for transactions at an undervalue in the Companies Act.

Solvency Confirmation
Companies provide a certification of solvency within the customary director's certificate given by a director of the company as a condition precedent to a financing transaction. This is intended to provide some comfort to the creditor to the transaction that the innocent creditor defence may apply to them.

8. Tax Issues

8.1 Stamp Taxes
No stamp taxes are applicable in New Zealand.

8.2 Withholding Tax/Qualifying Lender Concepts

The concept of a qualifying lender does not exist within New Zealand tax law.

New Zealand has two types of withholding tax that apply to interest:

- resident withholding tax (RWT); and
- non-resident withholding tax (NRWT).

RWT

RWT must be withheld on payments of interest made by New Zealand tax residents or non-residents carrying on a taxable activity in New Zealand through a fixed establishment in New Zealand, to a New Zealand tax resident or a non-resident where:

- the non-resident lends the money for the purpose of a business they carry on in New Zealand through a fixed establishment; or
- the non-resident is a New Zealand registered bank operating through a New Zealand branch and is not associated with the payer.

RWT is required to be withheld at the marginal rate of the payee of the interest (28% for companies) or at a default rate of 45% if information is not provided by the payee regarding the appropriate withholding rates. However, if the relevant payee of interest holds RWT-exempt status, RWT is not required to be withheld on the interest payment (regardless of whether the lending is provided by a New Zealand or offshore branch).

NRWT

Subject to certain exceptions, New Zealand sourced interest paid to non-resident lenders will generally be subject to NRWT (at a rate of 15% under New Zealand law). This rate may be reduced under an applicable double tax agreement (typically to 10%).

A payer may elect to reduce the rate of NRWT to 0% and instead register for and pay an approved issuer levy (AIL) at a rate of 2% of the gross amount of interest. The AIL regime is not available where interest is derived jointly by a resident and a non-resident or paid between associated persons (unless the approved issuer is a member of a New Zealand banking group) or in instances of related party debt.

8.3 Thin-Capitalisation Rules

Thin-capitalisation rules in New Zealand apply to both inbound and outbound investment. Broadly speaking, the inbound thin-capitalisation rules can apply to non-residents and New Zealand entities controlled by non-residents. The rules may apply to outbound investment when a New Zealand company has an interest in a controlled foreign company or non-portfolio foreign investment fund.

The rules operate to deny interest deductions in circumstances where an entity subject to the thin-capitalisation rules has excessive levels of debt in New Zealand in comparison to its level of worldwide indebtedness. An excessive level of debt is determined according to specific debt-to-asset ratios, known as the *"safe harbour"* thresholds. For inbound investment, the *"safe harbour"* thresholds will be breached if the New Zealand group debt percentage is greater than 60% and greater than 110% of the worldwide group debt percentage.

9. Takeover Finance

9.1 Regulated Targets

Transactions in particular industries may give rise to specific requirements (such as notification and/or regulator approval requirements), including banking, financial services, insurance and oil and gas.

The following also applies.

Competition Rules

A merger or acquisition that substantially lessens competition in a market is illegal under the Commerce Act 1986, unless it is authorised by the Commerce Commission. The Commerce Commission will clear a merger or acquisition if it is satisfied that the transaction is not likely to substantially lessen competition in any New Zealand market. The Commerce Commission may also authorise a transaction that is likely to substantially lessen competition if it is satisfied that the transaction is likely to result in such a public benefit that it should be permitted.

Overseas Investment

The approval of the Overseas Investment Office may be required for an acquisition by an *"overseas person"* if it will result in an overseas investment in significant business assets, sensitive land (which includes residential land), farm land or fishing quotas. The Overseas Investment Office's processes and approach to applying the regime is currently undergoing a comprehensive review and overhaul, with changes being aimed at simplifying assessments and streamlining processes to encourage more overseas investment in New Zealand. Legislation is expected to be enacted by the end of 2025.

Certain Funds

See **9.2 Listed Targets**.

9.2 Listed Targets

There are two options for structuring change of control transactions in relation to listed companies in New Zealand and certain other widely-held private companies that are deemed to be *"code companies"*. These are:

- takeover offers under the Takeovers Regulations 2000 (the *"Takeovers Code"*) and
- schemes of arrangement (*"Schemes"*) under Part 15 of the Companies Act.

Takeover Offers Under the Takeovers Code

An offer under the Takeovers Code involves the offeror notifying the target of its intention to make an offer by issuing the target with a takeover notice, which must contain certain prescribed information. The target must then notify the exchange that a takeover notice has been received and provide this notice to any person that requests it. The offeror may then proceed by submitting an offer to offerees within the prescribed time period. There is no *"put up or shut up"* rules so a notice can lapse without an offer being made and a further notice of intention could also be given.

An offer could be either:

- a full offer (ie, an offer for all of the voting securities in the target): such an offer must be conditional on acceptances taking ownership or control over 50%; or
- a partial offer (ie, an offer for less than 100% of the voting securities in the target): such an offer must be for sufficient shares to take the offeror's holding over 50% of the voting rights.

Schemes Under Part 15 of the Companies Act

A Scheme is a court supervised mechanism that allows the restructuring of a group of companies (including by way of amalgamation) to be undertaken so that it is not subject to the Takeovers Code. It is a common way for a bidder to seek to take over a company that has a widely held share register. To be exempted from the Takeovers Code, a Scheme requires:

- consent from the boards of the companies involved, as the Scheme is technically proposed by the target and accordingly would only be available for a recommended takeover and not in a hostile situation;
- shareholder approval from 75% of shares held in each interest class and 50% of all shares; and
- approval of the court: the court must be satisfied that the shareholders of the target will not be adversely affected by using a Scheme (as opposed to the Takeovers Code) to effect the change of control unless the Takeovers Panel issues a no-objection statement with regards to the Scheme.

Certain Funds Requirements

Where an offer is conditional on finance from a third party, the ability to terminate the arrangement must not be *"in the power or under the control of"* the offeror (see Rule 25(1) of the Takeovers Code). The list of conditions to the financing will typically be limited to conditions that are bona fide required by the third-party financier to protect its interests and which cannot be used as a device to avoid the takeover offer.

Within the offer, an offeror must also confirm that sufficient resources will be available to them to meet the consideration in connection with full acceptance of the offer and to pay any debts incurred in connection with the offer (see Clause 9 of Schedule 1 of the Takeovers Code). To satisfy this requirement, the grounds upon which the financing could be withdrawn will need to be very limited.

10. Jurisdiction-Specific Features

10.1 Other Acquisition Finance Issues

There is no applicable information in this jurisdiction.

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