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Acquisition Finance 2026

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New Zealand: Law and Practice

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NEW ZEALAND

Law and Practice

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Contents

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

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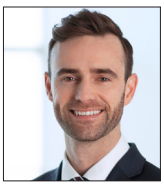
Jesse Fairley of Russell McVeagh acts for both private equity sponsors and trade buyers on market-leading leveraged and acquisition finance transactions. He also advises all of New Zealand's major banks and a number of credit funds active in the New Zealand market. Having spent over half a decade in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



Matt Consedine is a special counsel at Russell McVeagh with extensive experience advising financial institutions, non-bank and 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, fund finance, real estate finance, margin lending and restructurings. In addition to his experience in the New Zealand market, he spent four years at Linklaters LLP in London, where he acted on some of the most complex and significant transactions in the market.

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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 and credit funds, have not historically formed a significant part of the acquisition finance market in New Zealand. However, both international and domestic direct lenders (including 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 in sectors where traditional bank lenders have shown reduced appetite in recent years (eg, due to ESG considerations). Given the variety of options available, private equity sponsors and their debt advisers often seek terms and pricing on alternative financing structures before determining a preferred structure. Some alternatives may involve a combination of bank debt and direct lender or credit fund financing (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 are typically 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 cohort of domestic private equity firms, which tend to focus on mid-market transactions and have enjoyed considerable success in recent years. Compared 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 (other than security) will be determined by the market in which the financing is raised. However, it is fairly uncommon for New Zea-

land-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 applicable for use in the Australasian market, although there is no specific leveraged suite of documents. Whilst not standard across the market, the Asia Pacific Loan Market Association forms are increasingly 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 technologies from the Australian market (which, in turn, is influenced by the US and European markets).

For non-New Zealand law-governed financing documents, the form they take depends on 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 Legal 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 is 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 them 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 presence of direct lenders and private credit providers (both international and domestic) in the New Zealand market, European-style unitranche structures 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 (typically provided by a domestic bank lender). Unitranche lenders tend to offer greater leverage than is available under traditional bank-led transactions, reducing the need for multiple layers of debt. This additional flexibility is reflected in wider pricing.

Covenant-lite transactions in the style of term loan Bs remain less common in New Zealand. To date, they have only been utilised on a small number of large transactions, typically with US sponsors. Given the increasing prevalence of covenant-lite transactions in Australia, more such transactions can be expected in New Zealand in the coming years.

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

Mezzanine and PIK loans (both contractual and Holdco structures) exist in the New Zealand market but are less common in acquisition financing. However, there has been an increase in mezzanine and PIK financings in capital restructuring and refinancing transactions.

3.3 Bridge Loans

Bridge loans are uncommon in the New Zealand leveraged market because there is no established high-yield bond market. There is a strong domestic market for investment-grade corporate bonds and accordingly, corporate purchasers may enter into 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

As noted in **3.4 Bonds/High-Yield Bonds**, there is no established private placement/loan note market in New Zealand for 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 acquisitions.

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.

There is also a growing trend of borrowing base and receivables-backed facilities being implemented by corporates or portfolio companies with significant trade receivable balances.

There have also been a number of recent significant acquisitions (in the leasing or commercial lending sectors), which have been financed by securitisation structures that funded the acquisitions' completion.

4. Intercreditor Agreements

4.1 Typical Elements

Intercreditor agreements are common in the New Zealand market and 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 priority of all financing creditors will be set out in the intercreditor agreement, with contractual subordination 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 in 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 which payments may be made to and received by, each class of creditors. 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, are subject to strict parameters. Payments of interest and fees to junior creditors are usually permitted, subject to conditions such as compliance with covenant levels and no default. 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 requiring 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 the security and rank pari passu with 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 depend on the acquisition, but will typically include the following.

On or prior to closing:

- all-asset security being granted by the special purpose vehicle BidCo; and
- 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 is 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 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 arrange-

ments (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 to include a guarantor coverage test, as in leveraged transactions.

In New Zealand, property is generally classified into two asset types: real property (real estate) and personal property (in general, all property other than real property). 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 largely an online process facilitated by Land Information New Zealand (a government department). To register a mortgage, both the mortgagor and mortgagee sign prescribed forms that authorise their respective solicitors to complete the electronic registration of the mortgage 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, ships and fishing quotas) which are governed by other regimes.

Security over personal property can be taken by an all-asset security deed (which extends to all personal 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 with respect 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, to provide the secured party with 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 all competing security interests are perfected, priority will be given to the secured party that was the first to register a financing statement or take possession of the collateral (even if the security interest had not yet attached at the time of registration).
- If none of the competing secured interests is 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. Registration can be completed instantly for a nominal fee. The maximum registration period for a financing statement is 5 years, but it may be renewed at or before its expiry for an additional nominal fee.

It is critical that the prescribed information recorded in a financing statement is correct; otherwise, the financing statement (and security perfection) may be 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 is 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, on reasonable grounds, that it is satisfied 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 assistance cannot be given for 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 cross-guarantees.

5.6 Other Restrictions

A director of a New Zealand company has a number of duties. These exist in common law as 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 minds to this duty when entering into financial transactions. This becomes particularly important when considering the borrower's subsidiaries that form 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 shareholders' prior agreement must also be obtained. Similarly, where a company is carrying out a joint venture, the directors may act in the best interests of the shareholders if 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 enforcement process and, to the extent that provisions of the PPSA and/or the PLA apply, they will supplement that process.

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

Power of Possession and/or Sale

The security documentation should grant the secured party the right 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 a "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 administrator's consent or the court's leave. 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 provi-

sions 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 PPSA's enforcement regime does not apply to a receiver. That is, the PPSA enforcement regime applies only if the secured party enforces directly rather than through receivership.

6. Guarantees

6.1 Types of Guarantees

Guarantees are typically required from sufficient target group members to satisfy the guarantor coverage test (as described at **5.1 Types of Security Commonly Used**). New Zealand domestic financing transactions don't typically include a requirement that material companies (being companies that own or contribute a certain percentage of the group's assets or EBITDA) provide guarantees. This is just a feature of market convention rather than there being a legal reason to not include a material company test.

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 providing 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 guarantor to pay a guarantee fee. 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 may 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 if it is created within the relevant time periods for an insolvent transaction and giving that charge means the company is unable to pay its debts.

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 that is considered excessive for the company to have given; or
- where a related person gives consideration to the company, which is 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 following 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; and
- it must have provided value or materially altered its position on a reasonable belief that 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 in 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 NRWT rate to 0% and instead register for and pay an approved issuer levy (AIL) at 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 relative to its 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 exceeds 60% and the worldwide group debt percentage exceeds 110%.

Changes have been proposed to the Income Tax Act to ease the burden of the thin capitalisation rules for investments in New Zealand infrastructure projects. Genuine third-party lending with respect to eligible infrastructure entities may be entitled to full interest deductibility under these changes, subject to certain requirements. This targeted exemption is elective and is expected to apply from the 2026-27 income year.

9. Takeover Finance

9.1 Regulated Targets

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

The following also applies.

Competition Rules

New Zealand's competition law (the Commerce Act 1986) prohibits any acquisition of assets of a business or shares if the acquisition would or is likely to, substantially lessen competition in a New Zealand market. There is no mandatory merger control regime in New Zealand, but merging parties may voluntarily seek 'clearance' or 'authorisation' from the Commerce Commission (NZCC) for an acquisition.

To grant clearance, the NZCC must be satisfied that an acquisition is unlikely to substantially lessen competition in a New Zealand market. To grant authorisation, the NZCC must be satisfied that an acquisition is likely to result in sufficient public benefits to justify permitting it (despite its anti-competitive effects).

If merging parties proceed with an acquisition that affects a market in New Zealand without receiving clearance or authorisation from the NZCC and the NZCC considers that the acquisition could have an adverse impact on competition, it may open an investigation and take enforcement proceedings.

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. Notification to the Overseas Investment Office may also be required for an investment by an "overseas person" in a "strategically important business" (which

includes certain sensitive sectors and business activities). The Overseas Investment Office's processes and approach to applying the regime have undergone a comprehensive review and overhaul, with changes aimed at simplifying assessments and streamlining processes to encourage greater overseas investment in New Zealand.

Certain Funds

See **9.2 Listed Targets**.

9.2 Listed Targets

There are two options for structuring change of control transactions for listed companies in New Zealand and certain other widely held private companies 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 a takeover notice, which must contain certain prescribed information, including the terms and conditions on which the offer would be made. Upon sending the takeover notice, the offeror must at the same time send a copy to the licensed market operator (if the target is listed) and must provide a copy of the notice and its accompanying documents to any person who requests them (the target must also notify the licensed market operator upon receipt of a takeover notice that a notice has been received and send it a copy. The offeror may then proceed by submitting an offer to offerees within the prescribed time period. There is no "put up or shut up" rule, so a notice can lapse without an offer being made and a further notice of intention could also be given (there is no stand-down period if a notice lapses).

An offer could be either:

- a full offer (ie, an offer for all of the voting securities in the target): where the offeror does not already hold or control more than 50% of the voting rights, 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 or, if the offer would leave the offeror at or below 50%, it may proceed if approved by "entitled" shareholders under the Takeovers Code's partial–offer voting mechanism.

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 the following.

- An application to the Court, which may be made by the company or by a shareholder (although in practice, schemes are typically board–supported rather than used in a hostile situation).
- Shareholder approval by a majority of 75% of the votes of shareholders in each interest class who are entitled to vote and actually vote and by a simple majority of the votes of all shareholders entitled to vote.
- Approval of the court: the court must either 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 or the applicant must produce a no-objection statement from the Takeovers Panel. In either case, the Court retains its discretion to approve or not approve 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 bona fide requirements imposed by the third-party financier to protect its interests and that 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 for withdrawing the financing 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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