NEW ZEALAND

Investment rules of the world

DLA PIPER

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At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please contact us if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via investmentrules@dlapiper.com.

New Zealand

Last modified 13 December 2019

Capital markets and structured investments

Issuing and investing in debt securities

Are there any restrictions on issuing debt securities?

Issues of debt securities to retail investors are regulated under the Financial Markets Conduct Act 2013 (FMCA). Debt securities must be issued under a compliant trust deed and offers must be made in a registered product disclosure statement, and a licensed supervisor must be appointed to act on behalf of the holders of the debt security and supervise the issuer's performance. The supervisor is a party to the trust deed, with certain rights held in trust by the supervisor for the benefit of the holders of the debt securities.

Non-bank deposit takers (NBDT) are regulated under the Non-Bank Deposit Takers Act 2013. NBDTs make regulated offers of debt securities to retail investors and carry on the business of borrowing and lending money, but are not registered banks. NBDTs are licensed and prudentially regulated by the Reserve Bank of New Zealand. Issues of debt securities by NBDTs are regulated under the FMCA (as above).

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What are common issuing methods and types of debt securities?

The most common types of debt securities issued in New Zealand are bonds or notes issued on a stand-alone basis or under a program. These can be as corporate or State-Owned Enterprise bonds, bills of exchange, commercial paper and promissory notes.

Many different types of debt securities are offered in New Zealand. Some common forms include:

- debt securities characterized by the type of interest or payment such as fixed-rate securities, floating-rate securities, variable-rate securities, zero-coupon securities and high-yield bonds;
- guaranteed securities, subordinated securities, perpetual debt securities (i.e. debt securities that have no specified redemption date);
- asset-backed securities;
- derivative securities such as securities linked to the value of one or more reference asset including shares, commodities, interest rate, currency rate or index, and credit-linked notes;
- hybrid securities (securities with both debt and equity features);
- equity-linked securities such as convertible bonds (debt securities convertible into the equity of the issuer);
- exchangeable bonds (debt securities convertible into the equity of a third party);
- depositary receipts (a security issued by a depositary conferring on the holders beneficial ownership of certain underlying assets held by the depositary for the holders); and

- warrants (securities giving the holders the option to purchase the equity of the issuer or a related company).

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What are the differences between offering debt securities to institutional / professional or other investors?

The Financial Markets Conduct Act 2013 (FMCA) regulates the issuing of debt securities to retail investors. Retail investors are investors who do not fall within the definitions of wholesale investors in the FMCA. Wholesale investors include:

- investment businesses;
- a person who meets certain 'investment activity' criteria;
- a person who is 'large' (net assets or turnover of more than NZD5million);
- a government agency; and
- an eligible investor who certifies that they fall within certain criteria.

A person is also a wholesale investor if the minimum amount payable by the person on acceptance of the offer is at least NZD750,000.

Warning statements and acknowledgements need to be given to eligible investors. Otherwise issuers of debt securities to wholesale investors only need to comply with the conduct obligations in Part 2 of the FMCA, which apply to all financial service providers.

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When is it necessary to prepare a prospectus?

It is necessary to register a product disclosure statement for all regulated offers of managed investment products, derivatives, debt securities and equity securities. A regulated offer is an offer made to a retail investor.

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What are the main exchanges available?

The main exchange is the NZX Main Board. It is privately owned by NZX Limited, which itself is a listed company. NZX operates five other markets – NZX Debt Market, NZX Dairy Derivatives Market, NZX Equity Derivatives Market and the Fonterra Shareholders' Market. Market operators are licensed by the Financial Markets Authority under the Financial Markets Conduct Act 2013.

There are three other licensed market operators in New Zealand – ASX 24 (operated by Australia Securities Exchange Limited), ICE Futures USA and ICE Futures Europe. There are also some smaller unlicensed secondary markets such as Unlisted.

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Is there a private placement market?

Both New Zealand banks and some non-financial corporates make use of private debt markets.

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Are there any other notable risks or issues around issuing or investing in debt securities?

Issuing debt securities

Debt securities may only be issued to retail investors under a product disclosure statement that complies with the Financial Markets Conduct Act 2013 (FMCA). Misleading or deceptive statements in a product disclosure statement or any advertising can lead to civil and criminal liability under the FMCA.

Investing in debt securities

Debt security terms and conditions typically contain provisions which may permit their modification without the consent of all investors and confer significant discretions on the trustee, which may be exercised without the consent of investors and without regard to the individual interests of particular investors. The conditions also provide for meetings of investors to consider matters affecting the investors interests. These provisions typically permit defined majorities to bind all investors including investors who did not attend and vote at the relevant meeting and investors who voted against the majority.

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Establishing and investing in debt / hedge funds

Are there any restrictions on establishing a fund?

The establishment, management and offering of funds (managed investment schemes) are regulated under the Financial Markets Conduct Act 2013.

A managed investment scheme means a scheme to which each of the following applies:

- the purpose or effect of the scheme is to enable persons taking part in the scheme to contribute money, or to have money contributed on their behalf, to the scheme as consideration to acquire interests in the scheme;
- those interests are rights to participate in, or receive, financial benefits produced principally by the efforts of another person under the scheme (whether those rights are actual, prospective, or contingent, and whether they are enforceable or not); and
- the holders of those interests do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

An interest in managed investment scheme is a managed investment product.

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What are common fund structures?

The most common fund structures are open-ended (managed funds) and closed-ended (e.g. property funds), both retail and non-retail. Most are established as unit trusts although limited partnerships are becoming more common, particularly for property-related funds. Funds will also typically become Portfolio Investment Entities to obtain certain New Zealand tax benefits.

Discretionary investment management services are an alternative investment mechanism whereby a financial advisor (authorized under the Financial Advisors Act 2008 or licensed under the Financial Markets Conduct Act 2013) can acquire and dispose of assets on behalf of an individual using the investor's funds in accordance with an agreed Investment Authority.

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What are the differences between offering fund securities to professional / institutional or other investors?

Retail funds

Retail funds must comply with a range of registration requirements, have a licensed manager and a licensed supervisor, and have compliant offering documents. The fund's assets must be held by the supervisor or an independent custodian, and investments must be undertaken in accordance with a registered statement of investment policy and objectives. Retail funds are subject to a high level of regulatory oversight by the Financial Markets Authority (FMA).

Institutional/professional funds

Funds offered to wholesale investors (as defined in the Financial Markets Conduct Act 2013 (FMCA)) do not have to comply with the same requirements as retail schemes. The FMA's oversight of wholesale funds is limited to conduct obligations under the Fair Dealing provisions in Part 2 of the FMCA. Indications are that FMA will look to increase its scrutiny of wholesale funds in the future.

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Are there any other notable risks or issues around establishing and investing in funds?

Establishing funds

Funds that are offered to retail investors must comply with a range of compliance obligations in the Financial Markets Conduct Act 2013 (FMCA), including having a licensed manager and licensed supervisor.

Currently discretionary investment management service (DIMS) providers must be either authorized under the Financial Advisors Act 2008 (FAA) or licensed under the FMCA. From 29 June 2020 all DIMS providers will need to be licensed under the FMCA.

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Managing and marketing debt / hedge funds

Are there any restrictions on marketing a fund?

Marketing of retails funds is strictly regulated under the Financial Markets Conduct Act 2013. Disclosure documents must comply with heavily prescribed regulatory requirements, and a great deal of information must be placed on the public register.

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Are there any restrictions on managing a fund?

The manager of a retail fund must be licensed by the Financial Markets Authority (FMA). The licensing process is comprehensive with significant ongoing monitoring by the licensed supervisor of the fund and the FMA. Capital adequacy requirements must be met and restrictions apply to related party transactions. Investment must be made in accordance with the fund's registered statement of investment policy and objectives.

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Entering into derivatives contracts

Are there any restrictions on entering into derivatives contracts?

Derivatives contracts can only be offered to retail investors by a licensed derivatives issuer. Licenses are issued by the Financial Markets Authority (FMA) under the Financial Markets Conduct Act 2013 (FMCA). The licensing process is comprehensive with significant ongoing monitoring by the FMA.

There are no restrictions for offering derivatives contracts to wholesale investors apart from conduct obligations under the Fair Dealing provisions in Part 2 of the FMCA.

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What are common types of derivatives?

Derivatives contracts are entered into in New Zealand for a range of reasons including hedging, trading and speculation.

The four most common types of derivatives are futures, forwards, options (call options and put options) and swaps (such as interest rate or currency swaps).

These are either privately traded over-the-counter derivatives or exchange-traded derivatives.

The value of the derivatives contracts is based on the value of the underlying assets. The main classes of underlying asset seen in the New Zealand are:

- equity;
- fixed income instruments;
- commodities;
- foreign currency; and
- credit events.

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Are there any other notable risks or issues around entering into derivatives contracts?

The issuing of derivatives in New Zealand was largely unregulated until the coming into effect of the Financial Markets Conduct Act 2013 (FMCA) on 1 December 2014. A small number of issuers were approved as Authorized Futures Dealers by the previous regulator, the Securities Commission, under the now-repealed Securities Markets Act 1988. Those issuers were transitioned to the FMCA by 1 December 2016, and there are currently 25 licensed derivatives issuers. The FMA has taken enforcement action against derivatives issuers operating from outside of New Zealand who have registered to the Register of Financial Service Providers and claimed to be regulated in New Zealand without being licensed. Several of these businesses have been struck off the register.

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Debt finance

Lending and borrowing

Are there any restrictions on lending and borrowing?

Lending

Yes.

The Credit Contracts and Consumer Finance Act 2003 places restrictions on advertising content related to consumer loans.
The Responsible Lending Code imposes on lenders of consumer finance and credit contracts obligations to abide by when issuing loans.

Financial institutions do not have to be registered banks in order to take deposits and make loans.

Banks may face restrictions on residential home loan lending due to Loan to Value Ratio (LVR) restrictions imposed via bank registration conditions. These restrict banks on the amount of low deposit lending they can do. Note that this only applies to residential investment and would exclude commercial transactions.

Borrowing

When borrowing money secured over residential homes by mortgage, certain LVR restrictions exist. These restrictions specify the minimum deposit requirements when buying an owner-occupied property to live in or when buying residential investment property. Certain exceptions do apply.

Non-bank deposit takers must comply with the Non-Bank Deposit Takers Act 2013.

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What are common lending structures?

Lending in New Zealand can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents and trustees which fulfil certain roles for the finance parties), are more highly structured and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicate taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, e.g. term loans, working capital loans, equity bridge facilities, project facilities and letter of credit facilities etc.

Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

Loan security

A loan can either be secured, unsecured or guaranteed or limited resource. For more information, see Giving and taking guarantees and security.

Loan commitment

A loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan.

Loan repayment

A loan can also be repayable on demand, on an amortizing basis (in instalments over the life of the loan) or scheduled (usually meaning the loan is repayable in full at maturity).

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What are the differences between lending to institutional / professional or other borrowers?

Lending to institutional/professional borrowers is subject to less regulatory oversight and therefore is less burdensome from a compliance perspective.

Lender Responsibility Principles will only apply to consumer credit contracts (except for consumer leases). Subject to this, parties are generally free to contract on their own terms and conditions subject to restrictions which apply generally (for example in relation to penalties, and oppressive conduct).

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Do the laws recognize the principles of agency and trusts?

Yes, both principles are recognized as a matter of New Zealand law.

For instance, it is possible to appoint an agent to act on behalf of other parties and a trustee to hold rights and other assets on trust for the lenders or secured parties.

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Are there any other notable risks or issues around lending?

Generally

Loan agreements and other finance documents are subject to general contractual principles. There are few general risks or issues particular to lending transactions (such as usury laws or similar), beyond these risks which generally arise in other jurisdictions.

There is a renewed focus on conduct with new standards being imposed on financial service providers to ensure that they serve the needs of customers, treat customers fairly, recognise and prioritise customer interests and effectively manage conflicts of interest. The FMA is expecting this to be actively monitored and managed by boards and senior management with legislation implementing new conduct licensing regime expected to be introduced in Parliament by the end of 2019.

Specific types of lending

Loan-to-value ratios limit New Zealand banks on the amount of low-deposit residential mortgage lending. Banks and other institutions must abide by prudent lending standards.

Standard form documentation

Banks and other consumer finance providers typically use their own standard form loan agreements and security documents for transactions under NZD2 million, and often for larger transactions also.

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Are there any other notable risks or issues around borrowing?

A range of legislative protections and standards exist in relation to consumer finance transactions, or transactions with individuals (as distinct from companies, trusts or other entities), such as those under the Credit Contracts and Consumer Finance Act 2003, Fair Trading Act 1986 and the Consumer Guarantees Act 1993.

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Giving and taking guarantees and security

Are there any restrictions on giving and taking guarantees and security?

Some of the key areas affecting the giving of guarantees and security are as follows.

There are no general restrictions in New Zealand on the giving and taking of guarantees. Guarantees are usually taken in the form of a deed, with appropriate witnessing, to avoid the need for the guarantor to receive consideration or benefit in order to enforce the guarantee.

Lender responsibility principles

Lender responsibility principles exist when giving and taking guarantees in relation to a consumer credit contract. Every creditor that takes a guarantee of a consumer credit contract has disclosure obligations to the guarantor as part of this obligation.

Capacity

It is important to check the constitutional documents of a company giving a guarantee or security to ensure it has an express or ancillary power to do so and there are no restrictions on the directors' powers that would be preventative. Under New Zealand law, directors have a general duty to promote the success of the company for the benefit of its members as whole; as such, they will need to be able to show that adequate corporate benefit is derived from the company giving the guarantee or security. This is often more difficult in the case of upstream or cross-stream guarantees or security provided by a subsidiary to its parent or sister company. The safe approach is often to have the members of the company approve the giving of the guarantee or security by resolution.

Insolvency

Guarantees and security may be at risk of being set aside under New Zealand insolvency laws if the guarantee or security was granted by a company or individual within a certain period of time prior to the onset of insolvency. This would be the case if the company giving the guarantee or security received inadequate consideration, and as such, the transaction was at an undervalue. For such a transaction to be set aside, certain statutory criteria would have to be met, including that the guarantee or security was given within two years of the onset of insolvency of the affected party. Guarantees and security may also be challenged on other grounds relating to insolvency.

Major transactions

In respect of companies incorporated in New Zealand, if the amount guaranteed is greater than half the value of the gross assets of the company, the approval of 75% of the shareholders of the company is generally required before the grant of the guarantee, unless the grant is conditional on later approval in that manner.

Financial assistance

It is unlawful for a company to provide financial assistance for the purchase of its own (or of its holding company's) shares unless relevant shareholder and director approvals are obtained and a certificate from directors relating to solvency given. Financial assistance in this context would include giving a guarantee or security in connection with the share purchase.

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What are common types of guarantees and security?

Common forms of guarantees

Guarantees can take a number of forms.

A particular distinction worth remembering is between a performance guarantee and a payment guarantee:

- A performance guarantee is a term used to describe both performance bonds (in the context of trade finance) and 'see to it' guarantees (in other contexts):
  - A performance bond describes a financial undertaking used to protect a buyer against the failure of a supplier to deliver goods or perform services in accordance with the terms of a contract. The issuer of the bond undertakes to pay to the buyer a sum of money if the seller fails to deliver the goods or perform the contracted services on time or in accordance with the terms of the contract.

    - A 'see to it' guarantee is a promise by the guarantor to see to it that the primary obligor fulfils its obligations under the primary contract. If the primary obligor fails to fulfil its obligations under the primary contract, the guarantor will be in breach of its obligations under the guarantee.

- A payment guarantee is narrower in scope than a performance guarantee as it only covers the payment of money rather than other contractual obligations.

Other types include rental guarantees, advance payment bonds, collateral guarantees, bid, tender, warranty bonds, custom bonds and shipping guarantees.

Common forms of security

Common forms under New Zealand law include:

- a mortgage over interest in land;
- a security interest over personal (i.e. non-land) assets; such as inventory, goods, plant and investment securities such as shares;
- possessory security such as a pledge; and
- rights of set-off.

Different types of security are suitable for securing different types of assets.

Under New Zealand law it is possible to grant security over all of the assets of a New Zealand company or individual assets. Granting security over all of a company's assets will tend to be achieved by way of a debenture which will include:

- a mortgage over real estate;
- a fixed charge over assets which are identifiable and can be controlled by the creditors (such as equipment);
- a floating charge over fluctuating and less identifiable assets (such as stock); and
- an assignment by way of charge over receivables and contracts.

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Are there any other notable risks or issues around giving and taking guarantees and security?

Giving or taking guarantees

To be valid, a guarantee needs to be in writing, signed by the guarantor and provided for good consideration.

Consideration for a guarantee is subject to general contractual principles. In the case of a guarantee, the underlying obligations will usually be the consideration for the guarantee and so it is advisable to execute the guarantee at the same time as executing the underlying obligations to avoid any suggestion of past consideration. Often the guarantee is included in the loan agreement and so this should not be an issue. Also it can be difficult to establish consideration for a guarantee as the primary obligations are between the underlying obligor and beneficiary, for example between the borrower and lender. As a result, guarantees are often executed as deeds to avoid any argument about whether good consideration was provided. Deeds have particular execution requirements under New Zealand law which need to be observed.

Additionally, there is a risk that a guarantee may be set aside if it was procured by undue influence by a borrower or lender. A party being provided with a guarantee should be alive to this issue and take steps to avoid claims of undue influence by, for example, requiring the guarantor to take separate legal advice.

Lender responsibility principles exist when taking guarantees. Failure to abide by these could result in issues for the guarantor. Every creditor that takes a guarantee of a consumer credit contract has disclosure obligations to the guarantor as part of this obligation.

Giving or taking security

A security document may need to be executed as a deed if it:

- contains a mortgage over land;
- confers a statutory power of sale and power to appoint a receiver; or
- contains a power of attorney.

Once granted, security needs to be properly perfected before it is valid against third parties. Perfection formalities can range from having the secured asset delivered to the security holder, registration of the security and notice being given to third parties. Mortgages over land are registered on on-line electronic land titles register - Land Information New Zealand, also known as LINZ. Security interests over non-land assets are protected by registering a finance statement on the New Zealand Personal Property Securities Register.

There are no general notarization requirements for security documents under New Zealand law.

Like guarantees, for a period after a new security interest has been granted (known as the hardening period), it is at risk of being set aside in certain circumstances under insolvency laws. Reviewable transactions include those conducted at an undervalue and preferences and invalid floating charges.

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Financial regulation

Law and regulation

What are the main laws and regulations that apply to entities that are involved in finance and investments generally?

Generally

Anti-Money Laundering and Countering Financing of Terrorism Act 2009
Personal Property Securities Act 1999
Fair Trading Act 1986
Consumer Guarantees Act 1993
Corporations (Investigation and Management) Act 1989
Commerce Act 1986

Consumer credit

Credit Contracts and Consumer Finance Act 2003
Land Transfer Act 2017
Property Law Act 2007

Mortgages

Credit Contracts and Consumer Finance Act 2003

Corporations

Companies Act 1993
Limited Partnerships Act 2008

Funds and platforms

Financial Markets Conduct Act 2013
Financial Markets Conduct Regulations 2014

Financial Service Providers (Registration and Dispute Resolution) Act 2008
Financial Advisors Act 2008
Financial Advis0rs (Custodians of FMCA Financial Products) Regulations 2014
Financial Services Legislation Amendment Act 2019

Other key market legislation

Non-Bank Deposit Takers Act 2013
Reserve Bank of New Zealand Act 1989
Income Tax Act 2007

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Regulatory authorization

Who are the regulators?

The Financial Markets Authority (FMA) regulates the conduct of financial service providers in both retail and wholesale markets markets and is responsible for enforcing securities, financial reporting and company law as they apply to financial services and securities markets. The FMA also authorizes and regulates licensed financial product markets.

The Reserve Bank of New Zealand regulates banks, insurers and non-bank deposit takers and manages monetary policy to maintain price stability, promotes the maintenance of a sound and efficient financial system, and supplies New Zealand banknotes and coins.

The Commerce Commission enforces competition, fair trading and consumer credit laws. Together with the Ministry of Business, Innovation and Employment (MBIE) and the Treasury, these five regulators form the Council of Financial Regulators in New Zealand.

The Inland Revenue has responsibility for the collection of tax and the administration of the Inland Revenue Acts in New Zealand, including the Income Tax Act 2007.

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What are the authorization requirements and process?

The Financial Markets Conduct Act 2013 (FMCA) includes a licensing regime for providers of market services in New Zealand. Application fees range from NZD2,139 to NZD10,695.

All financial service providers with a place of business in New Zealand (including those who do not need to be licensed under the FMCA) must register under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Annual registration fees apply. From 29 June 2020 the registration requirements will change requiring every person who is in the business of providing a financial service to retail clients to register if those financial services are provided to persons in New Zealand, regardless of where the financial services are provided from.

Registration under the Reserve Bank of New Zealand Act 1989 is required if an entity wishes to use a name or title that includes restricted words ('bank', 'banker', 'banking' or any other derivatives) for banks or classes of banks licensed overseas, representative bodies and associated persons of a registered bank, unit trust associated with a registered bank or non-financial institutions. Specific conditions of authorization are required for each of the different types of entity.

Any entity can apply to become a registered bank with the Reserve Bank of New Zealand. They take into account a number of factors (qualitative and quantitative) when determining an application.

To become an Authorized Financial Advisor you must meet a number of eligibility requirements prescribed by the Financial Markets Authority. This includes registering on the Financial Service Providers Register and joining a dispute resolution scheme. From 29 June 2020, any person who provides a financial advice service will be required to be licensed under new provisions in the FMCA.

Non-bank entities that take deposits from the public need to obtain a license under the Non-Bank Deposit Takers Act 2013.

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What are the main ongoing compliance requirements?

Registered banks are required to meet minimum prudential, reporting and other standards on an ongoing basis, and comply with specific and standard conditions of registration.

Failure to comply can result in sanctions for banks and, in serious cases, loss of registration.

Key prudential requirements for banks operating in New Zealand relate to capital, liquidity, governance, disclosure, credit ratings, outsourcing, connected exposures, open bank resolutions and macro prudential issues. The Reserve Bank of New Zealand has the discretion to take enforcement action and to decide what enforcement action to take for non-compliance.

There is also legislation expected to be introduced into Parliament by the end of 2019 which would implement a new conduct licensing regime (regulated by the Financial Markets Authority) for banks, insurers and non-bank deposit takers requiring these entities to meet high standards of fair customer treatment and regulating sales target-based incentives. Providers of financial services in New Zealand must be registered under the Financial Services Provider (Registration and Dispute Resolution) Act 2008 and, if those services are provided to retail clients, must join an approved dispute resolution scheme.

When entering into a consumer credit contract, lenders must comply with 'lender responsibilities'. This includes providing clear and concise information, helping the borrower make informed decisions, assessing afordability, ensuring that the credit agreement is not oppressive and that the borrower is not treated oppressively.

Any financial advisor has disclosure obligations to meet and must exercise care, diligence and care when carrying out its required conduct obligations.

Reporting entities have obligations imposed on them by the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. These obligations include: carrying out a risk assessment, design; implementation and maintenance of a compliance program that sets out procedures, policies and internal controls ; undertaking customer due diligence; and monitoring and reporting suspicious transactions.

Audits, reviews and an annual report must be submitted to the relevant anti-money laundering/countering financing of terrorism supervisor.

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What are the penalties for failure to be authorized?

An unregistered individual that knowingly breaches the Financial Service Providers (Registration and Dispute Resolution) Act 2008 by providing a financial service without being registered, or is not a member of an approved dispute resolution scheme could be liable to a term of imprisonment of up to 12 months and/or a fine of up to NZD100,000. For a person that is not an individual this fine cannot exceed NZD300,000.

Providing a financial advisor service without permission can lead to a fine between NZD10,000 and NZD50,000 whereas holding out as an authorized financial advisor can result in a fine for the individual of up to NZD10,000 and of up to NZD50,000 for an entity.

Providing a market service without a license may give rise to civil liability for a pecuniary penalty of up to NZD200,000 for an individual and up to NZD600,000 in any other case. A range of other civil liability orders are available, including compensatory orders. From 29 June 2020 this will also apply to persons providing financial advice service without a license.

A person that falsely holds itself out as a registered bank can be penalized. An individual can be imprisoned for up to 18 months or to a fine of up to NZD200,000. A body corporate can be fined up to NZD2 million.

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Regulated activities

What finance and investment activities require authorization?

Generally

The Financial Markets Conduct Act 2013 (FMCA) requires managers of managed investment schemes, supervisors of managed investment schemes and debt issuers, independent trustees of restricted superannuation schemes, issuers of derivatives, providers of discretionary investment management services, and crowd funding and peer-to-peer lending platform providers to be licensed. From 29 June 2020 providers of financial advice services will also be required to be licensed under the FMCA.

Consumer credit

The Financial Services Providers (Registration and Dispute Resolution) Act 2008 requires businesses that provide a financial service to be registered and be a member of an approved dispute resolution scheme.

A financial service means:

- a financial advisor service;
- a broking service;
- a licensed non-bank deposit taker;
- a registered bank;
- dealing with investment portfolios and securities;
- being a creditor under a credit contract;
- operating a money or value transfer service;
- issuing and managing means of payments such as credit and debit cards;
- a licensed market service;
- acting as a custodian of a registered scheme;
- operating a financial product markets;
- changing foreign currency;
- trading financial products or foreign exchange on behalf of other persons;
- providing forward foreign exchange contracts;
- acting as an insurer;
- giving financial guarantees;
- participating in a regulated offer of financial products as the issuer or offeror; and
- acting in any of the following capacities in respect of an offer of regulated products or financial products:
  - as an issuer;
  - as a supervisor; or
  - as an investment manager.

A person or entity wishing to use the word 'Bank' or related words in its name is required to be registered under the Reserve Bank of New Zealand Act 1989.

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Are there any possible exemptions?

The Governor General may make regulations exempting any service or person from registration under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP). He or she can prescribe specific terms and conditions of the exemption if required.

The minister responsible for the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 may exempt requirements of the Act such as reporting obligations.

The Financial Markets Authority (FMA) can grant exceptions to having to register under the FSP or to having to comply with obligations under the Financial Advisors Act 2008; this is provided when the cost of compliance would be unreasonable or not justified by the benefit of compliance or that the relevant person, transaction or service was adequately regulated by an overseas jurisdiction to the standard of the FMA.

Under the Financial Markets Conduct Act 2013 general exemptions apply for services being provided to wholesale investors and for certain other types of offers. Specific exemptions can also be granted by the FMA on an individual or class basis.

Exemptions exist regarding the use of a restricted word under the Reserve Bank of New Zealand Act 1989 where the word signifies a geographic place name, the name of a natural person or that it could not be reasonably mistaken as being the name of a financial institution.

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Do any exchange controls or other restrictions on payments apply?

There are no exchange controls on foreign-exchange transactions undertaken in New Zealand, either by New Zealand residents or non-residents. The New Zealand dollar has a floating exchange rate and there are no restrictions on the amount of funds which may be brought into or taken out of New Zealand.

Anti-money laundering controls may apply in certain circumstances.

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What are the rules around financial promotions?

Rules

Regulated offers of managed investment products, debt securities and equity securities are required to be made in a registered product disclosure statement prepared in accordance with the Financial Markets Conduct Act 2013. A regulated offer is an offer made to a retail investor. General fair dealing provisions also apply with respect to disclosure.

Exemptions

Exemptions apply to offers made to wholesale investors and certain other types of offers.

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Entity establishment

What types of legal entity are generally used to undertake financial or investment activity?

Generally

The most common form of legal entities are limited liability companies established under the Companies Act 1993. Another common form of investment entity is a limited partnership. Both are bodies corporate with separate legal personality that limit the liability of their members (shareholders/limited partners). Trusts, often with corporate trustees, are also commonly used as a vehicle for private investment.

Funds

Managed investment schemes are usually established as unit trusts. Limited partnerships are becoming more commonly used as investment entities, particularly for closed-ended schemes.

Managers and other type of issuers are usually established as companies.

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Is it possible to conduct lending or investment business through a branch or establishment?

Yes.

Overseas companies can register branches of their companies in New Zealand. Consent may be required from the Overseas Investment Office (OIO) if the business involves the acquisition of a 'significant business assets' or 'sensitive land' in New Zealand.

Standard compliance requirements will apply to the branches.

Any reporting entity under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) must ensure its branches in a foreign country comply. Failing to ensure branches and subsidiaries comply with the AML/CFT Act could result in civil liability.

Specific tax rules apply to loans made by or to a New Zealand branch.

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FinTech

FinTech products and uses

What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?

Peer-to-peer funding platforms and marketplace lending

Peer-to-peer (P2P) funding matches people who want loans with people who are potentially willing to fund those loans. The matching is done through an intermediary platform – a P2P lending service.

In New Zealand, the provision of a P2P lending service is a market service that requires a license from the Financial Markets Authority under the Financial Markets Conduct Act 2013.

A person provides a P2P lending service if:

- they provide a facility by means of which offers of debt securities are made; and
- the principal purpose of the facility is to facilitate the matching of lenders with borrowers who are seeking loans for personal, charitable or small-business purposes.

HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes P2P-type structures often operated through an electronic platform provider as well as crowdfunding and also direct-to-retail financing mechanisms. The increase in demand for credit through these marketplace platforms has also been appealing to larger pools of available capital, such as private equity and venture capital funds as well as institutional sponsors. Funding platforms will often be backed by institutional finance in addition to, or rather than, individual investors on a traditional P2P basis. However, it is relevant to note that there is currently no permitted secondary market for investments in marketplace lending platforms in New Zealand.

ISSUES FOR STARTUP MARKETPLACE LENDERS

The requirements for a P2P lending service license (including governance and management requirements, as well as operational functionality) are not insignificant; and New Zealand currently offers no regulatory sandbox or testing period. The integrity of credit scoring and servicing/collections processes have been critical to establish funding support for existing marketplace lenders.

It is also important for startup marketplace lenders to ensure that the platform's interest and fees structure is fully compliant with applicable consumer credit regulation, while still providing sufficient revenue for the platform (and yield for investors). Anti-money laundering and fraud prevention processes must also be considered.

As well as the initial incorporation, licensing and startup funding for a new marketplace lending business, there will be a need to establish funding lines which can accommodate growth of the ongoing lending activities of the platform (for instance, through securitization).

Blockchain, smart contracts and cryptocurrencies

WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the block using sophisticated algorithms and add the verified block to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (e.g. in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third-party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized, can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

WHAT IS A CRYPTOCURRENCY?

A cryptocurrency is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

Initial coin offerings and token-based products

WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer’s business. Other forms may be more focused on raising initial funding.

It is essential to examine the legal and regulatory basis for any ICO as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- a prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors', are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized

outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

Personalised 'robo advice' is currently prohibited in New Zealand under the Financial Advisors Act 2008 (FAA). An exemption was granted in June 2018 to allow entities to provide personalised digital advice on approval by the Financial Markets Authority. Currently 8 entities have been approved to provide digital advice facilities under the exemption. From 29 June 2020 new provisions in the Financial Markets Conduct Act 2013 will come into effect which provide for licensing of entities wishing to provide digital financial advice services.

Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

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Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?

General financial regulatory regime

All persons providing financial services by way of business must be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA) and, if providing services to retail customers, be a member of an approved disputes resolution scheme.

The Financial Markets Authority (FMA) is the licensing body and market conduct regulator for persons who are registered, licensed, appointed, accredited or authorized under the Financial Markets Conduct Act 2013 (FMCA) (discussed below), the Financial Markets Supervisors Act 2011, the Financial Advisors Act 2008 and the FSPA.

The Reserve Bank of New Zealand (RBNZ) is the conduct regulator for registered banks, non-bank deposit takers and licensed insurers.

GENERAL

Under the FMCA, a person must not provide a market service without holding, or being authorized to provide the service under, a market services license from the FMA that covers the service. A 'market service' includes acting as a:

- manager of a registered managed investment scheme;
- provider of a discretionary investment management service;
- peer-to-peer (P2P) lending intermediary;
- crowdfunding intermediary; and
- from 29 June 2020, a financial advice service.

An offer of financial products that is received by a retail investor in New Zealand will require disclosure and will be regulated under the FMCA unless the issuer demonstrates that it has taken all reasonable steps to ensure that retail investors in New Zealand may not accept the offer.

Where FinTech products and applications involve financial activity which requires regulatory authorization, then firms providing such products and applications must be authorized by the FMA.

THE FMA'S APPROACH TO FINTECH

It is an express purpose of the FMCA to promote innovation and flexibility in the financial markets.

The FMA has stated that it wants to see innovative financial products and services coming to market, delivering customer benefits and supporting the integrity of New Zealand's capital markets. It will encourage innovation where it improves the range or quality of financial services in New Zealand. The amendment of the FMCA to provide for licensed digital financial advice services is an example of this.

The FMA has so far discounted the use of a regulatory sandbox in New Zealand but has said that it will maintain an open and flexible approach for businesses that wish to engage with the FMA at an early stage on innovation in financial services and that it will also ensure that it supports an appropriate environment for innovation to flourish.

Electronic payments platforms and regulation of peer-to-peer lenders

ELECTRONIC PAYMENT PLATFORMS

Retail payment systems are used to transfer funds from consumers to merchants in exchange for goods and services. They include credit and debit cards, the EFTPOS system, as well as cash, checks and bank transfers.

Retail payment systems are subject to relatively light-handed regulation in New Zealand.

PEER-TO-PEER LENDERS

A P2P lending service is one where a person provides a facility by means of which offers of debt securities may be made, and the principal purpose of the facility is to facilitate the matching of lenders with borrowers who are seeking loans for personal, charitable or small business purposes.

Providing a P2P lending service requires a market services license from the FMA. The eligibility criteria for a P2P lending services license under FMCA include the following.

- The provider has fair, orderly and transparent systems and procedures for the service.
- The service is designed primarily for offers by persons other than the provider.
- The provider has adequate systems and procedures for checking the identity of each issuer of debt securities, assessing the risk of investors not being repaid in full or not receiving interest and for disclosing information about that checking and assessment to investors.
- The provider has a fair dealing policy to exclude issuers that have engaged in misleading or deceptive conduct.
- The provider has adequate systems and procedures for ensuring that each issuer does not raise more than NZD2 million in any 12-month period under the service.
- The provider has adequate systems and procedures for handling conflicts of interest.

Regulation of payment services

Retail payment systems are used to transfer funds from consumers to merchants in exchange for goods and services. They include credit and debit cards, the EFTPOS system, as well as cash, checques, bank transfers and new forms of app-based payment.

Retail payment systems are subject to relatively light-handed regulation in New Zealand:

- RBNZ has a mandate to promote the maintenance of a sound and efficient financial system; however the performance and efficiency of retail payment systems are not the primary focus of the RBNZ.
- Payments New Zealand is the operator of a number of payment systems in New Zealand (including the Consumer Electronic Clearing System, which includes proprietary EFTPOS) but has no role in determining the allocation of costs or incentives within retail payments systems or the business models that schemes operate under. It was established in 2010 by eight banks with a mandate to open access to and preserve the integrity of New Zealand's payment systems. Forty organisations now make up the Payments NZ community - 12 Participants (banks and financial institutions) and 28 Members (payment system organisations (such as card schemes, merchants, smaller non-shareholding banks, tech providers, retailers, fintechs and payments infrastructure owners) that want to be actively involved in the ongoing development and strategic direction of payment systems.

In February 2016, the New Zealand government asked the Ministry of Business, Innovation and Employment (MBIE) to examine whether New Zealand's retail payment systems were producing good economic outcomes. In particular, MBIE asked are:

- consumers and merchants benefiting from ongoing innovation in payment systems;
- card payment systems being used efficiently; and
- consumers and merchants bearing a fair share of the costs?

Following a public consultation process, Payments NZ have been working with industry to advance the Payments Direction strategic initiative and engaging with banks and card schemes to improve the transparency of merchant service and interchange fees. The Payments Direction initiative aims to deliver a core payments system that:

- simplifies and removes friction from customers' payment experiences;
- gives customers choice across a greater range of value propositions;
- enables newcomers to partner and compete with existing players
- ensures relevant opinions are heard in relation to design and governance matters; and
- balance innovation with preserving security and need to meet increasingly complex compliance requirements.

By 2020, Payments NZ is expecting to have endorsed the implementation of a shared application programming interface (API) framework and a 365-day service availability for the settlement before interchange (SBI) system - both of which are key initiatives aimed at future-proofing the core payments system. Other key priorities include investigating and developing opportunities relating to the use of proxy identifiers to identify bank accounts, request to pay (API-enabled push payments), speeding up payments and the ISO 20022 payments messaging format.

Application of data protection and consumer laws

The Privacy Act 1993 governs the collection, use and disclosure of personal information and the access by individuals to that information. Following a comprehensive review, this will be repealed and replaced with a new Privacy Act which is currently progressing through Parliament and expected to come into force in 2020. Amongst other things, the new legislation proposes stronger powers for the Privacy Commissioner, mandatory reporting of privacy breaches, new offences and increased penalties.

The Unsolicited Electronic Messages Act 2007 regulates and prohibits unsolicited commercial electronic messages with a New Zealand link from being sent and requires commercial electronic messages to include accurate information about the person who sent the message and a functional unsubscribe facility. The act also prohibits address-harvesting software or a harvested-address list from being used to send unsolicited messages in contravention of the act.

The Credit Contracts and Consumer Finance Act 2003 sets out the requirements for borrower disclosure, responsible lending processes and reasonable fees in the context of consumer lending.

New Zealand has trade practices and fair dealing legislation that requires all businesses to ensure that they do not engage in misleading or deceptive conduct, make unsubstantiated claims or enter into unfair contract terms with consumers.

Money laundering regulations

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 has the purposes of:

- detecting and deterring money laundering and the financing of terrorism;
- maintaining and enhancing New Zealand's international reputation by adopting (where appropriate in the New Zealand context) recommendations issued by the Financial Action Task Force; and
- contributing to public confidence in the financial system.

Generally, where a firm provides a financial service by way of business and is required to be registered under the FSPA, it will be supervised by the FMA for compliance with anti-money laundering requirements.

If a reporting entity establishes a business relationship or conducts an occasional transaction or activity that involves new or developing technologies, or new or developing products, that might favor anonymity (such as bitcoin and other cryptocurrencies), the reporting

entity must take any additional measures that may be needed to mitigate and manage the risk of such technologies or products being used in a money laundering offence.

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What type of funding arrangements and incentives are available to FinTech businesses?

Early stage

SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family, friends and close business associates of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

Offers of financial products by a FinTech business to its close business associates (directors, senior managers, etc) or to relatives of directors do not generally require disclosure under the Financial Markets Conduct Act 2013 (FMCA).

SMALL OFFERS

Offers of financial products by a FinTech business to persons who are likely to be interested in the offer (having regard to previous contact with that person or that person's statements or actions) do not require disclosure under the FMCA if the financial products are equity or debt securities and provided that not more than NZD2 million is raised from not more than 20 investors in any 12-month period.

CROWDFUNDING

The crowdfunding sector is well established in New Zealand, and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through a licensed crowdfunding service, such as Snowball Effect or Equitise.

In New Zealand, a person provides a crowdfunding service if they provide a facility by means of which offers of shares in a company are made and the principal purpose of the facility is to facilitate the matching of companies who wish to raise funds with many investors who are seeking to invest relatively small amounts. Providing a crowdfunding service in New Zealand requires a market services license issued by the Financial Markets Authority (FMA). The eligibility criteria for a license for a crowdfunding service include requirements that the provider has:

- fair, orderly and transparent systems and procedures for providing the service;
- an adequate anti-fraud policy;
- adequate disclosure arrangements to give investors information to assist in the decision to acquire shares;
- an adequate fair dealing policy;
- adequate systems to ensure that each issuer does not raise more than NZD2 million in any 12-month period under the service; and
- adequate systems for handling conflicts of interest.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access. Offers of shares are limited to NZD2 million in any 12-month period.

ACCELERATORS

There are various angel networks, incubators or accelerators in the New Zealand market which offer support, facilities and funding for startups, often in return for an equity stake.

Venture capital and debt

Venture capital (VC) funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. VC provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of VC and involves an equity investment by a corporate fund. The benefit of having a CVC as an investor for a FinTech startup is that the fund is able to share its knowledge and expertise of the FinTech sector with the company and act as an advisor.

An additional funding option is venture debt, which is typically structured as a three-year term loan (or series of loans), which is secured against a company's assets and includes an equity element allowing the debt provider to purchase shares in the company. However, venture debt providers will usually only invest into companies that have already received investment through VC.

NEW ZEALAND VENTURE INVESTMENT FUND

The New Zealand Venture Investment Fund (NZVIF) was established by the New Zealand government in 2002 to build a vibrant early stage investment market in New Zealand. It has NZD245 million of funds under management which are invested through two vehicles: the NZD195 million Venture Capital Fund of funds and the NZD50 million Seed Co-investment Fund.

NZVIF does not invest directly into companies but makes its investments either through privately managed VC funds, or alongside experienced angel investors, who it partners with to invest into New Zealand-originated, high-growth potential companies. NZVIF can invest up to NZD25 million into a new VC fund, provided there is at least matching private sector support, a demonstrable track record and an experienced team.

Warehouse and platform funding

FinTech platforms (such as peer-to-peer (P2P) lending platforms) may be able to source institutional funding lines from domestic and international lenders and investors, with those funds available to be lent out through the platform. Access to this type of platform funding depends on the availability of funders with an understanding of, and risk appetite for, exposure to the relevant asset class (e.g. P2P loans).

Warehouse financing may be available for FinTech companies which own or can offer exposure to a sizeable portfolio of assets. The funding is secured by assets acquired by a special purpose trust from the originator. The senior lenders will typically only fund a portion of the assets, with the remainder being financed by way of mezzanine lending and/or subordinated lending from the originator.

Senior bank debt and capital markets funding

SENIOR BANK DEBT

FinTech companies will often start out with overdraft arrangements from a bank supported by the company's directors or shareholders.

Once a FinTech company is more established and has a track record and asset base, bank debt becomes a more viable source of funding for working capital, accounts management and liquidity purposes. In contrast to capital markets funding, which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility.

CAPITAL MARKETS FUNDING

New Zealand has both debt and equity capital markets which are accessible to businesses (usually of a certain size).

Raising finance by way of an Initial Public Offering (IPO) is a potential funding arrangement for FinTech companies that have grown to a certain size. An IPO is the initial sale of company shares on a public exchange, such as the NZX.

Larger FinTech companies may also access funding by issuing bonds to wholesale or retail investors as a way of raising more competitive funding, but retail issues involve significant regulatory compliance costs under the FMCA.

Another potential funding tool for fast-growing FinTech businesses is to issue convertible bonds or loan notes which are essentially a hybrid between debt and equity. Convertible instruments begin as a loan accruing interest and are convertible into shares in the issuing company at prescribed prices in certain circumstances.

Incentives and reliefs

CALLAGHAN INNOVATION

Callaghan Innovation is a government agency in New Zealand and is tasked with supporting hi-tech businesses in New Zealand with innovation. It is one of the government's key priorities to build a stronger, more competitive economy for New Zealand and to boost the growth of firms in the manufacturing and services sector.

Callaghan Innovation's main objective is to support science and technology based innovation and its commercialization by businesses in order to improve their growth and competitiveness. It achieves this objective by providing research and development grants, access to experts and undertaking collaborative projects to reduce research and development costs and share industry knowledge.

RESEARCH AND DEVELOPMENT LOSS TAX CREDIT

The aim of the research and development (R&D) loss tax credit is to allow startup companies (with an R&D focus) to refund tax losses caused by qualifying R&D expenditure.

To 'cash out' any tax losses from R&D expenditure the startup must meet the eligibility criteria. To be eligible the company must:

- be a tax resident in New Zealand;
- have a net loss in the corresponding tax year;
- have eligible R&D expenditure for the income year;
- have sufficient R&D wage intensity;
- meet the corporate eligibility criteria; and
- own (solely or jointly) the intellectual property and know-how that results from the R&D activity.

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Portfolio sales

Loan transfers and portfolio sales

What are common ways of buying and selling loans?

Buying and selling loans is common.

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio subject to overarching terms.

The most common ways of selling loans are as follows.

Assignment

An assignment is a transfer of rights only, not obligations. Subject to any contractual restrictions, assignment may be able to be achieved without the consent of the debtor. An assignment can be effected as either an equitable assignment or legal assignment depending on whether certain statutory requirements have been satisfied.

Novation

A novation is a full legal transfer of the party's rights and obligations by agreement. It is a tripartite arrangement between the existing parties and the transferee and results in a fresh contract being formed between the continuing party and the transferee and the transferor being released from its obligations.

Sub-participation

A sub-participation is a transfer of the economic interest in a loan without changing the legal relationship between the existing parties. Sub-participations involve the buyer taking on double credit risk, both on the seller as well as the borrower.

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What are the main considerations when transferring a loan and related security?

There are a number of issues to consider before transferring a loan or portfolio of loans. These issues are often covered as part of a due diligence exercise by the seller's legal advisors. Some of the key considerations include:

- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser;
- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms; and
- **consent** – whether a transfer requires the consent of or notification to any other parties. Unless the debtor is notified of the assignment, the debtor can still repay the assignor and be released from the debt despite the assignment to the assignee.

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Projects

Financing / investing in energy / infrastructure

To what extent are energy and infrastructure assets publicly or privately owned?

Generally

The extent of public and private infrastructure ownership varies significantly between the five key infrastructure sectors in New Zealand: energy, telecommunications, transport, water and social sectors.

Each of these sectors is considered below.

It is also worth noting that in 2019 New Zealand created its own Infrastructure Commission. A new independent infrastructure body, the New Zealand Infrastructure Commission - Te Waihanga, has been established to ensure that New Zealand gets the quality infrastructure investment needed to improve its long-term economic performance and social wellbeing. It is not a delivery vehicle.

Energy

Five major companies generate 95% of New Zealand's electricity (and also themselves, or through related entities, sell electricity at retail). Three of these companies have mixed public/private ownership, with the Crown holding a majority stake. The remaining two major electricity-generating companies are privately-owned.

Transpower New Zealand Limited owns and operates the national electricity transmission infrastructure (the 'national grid') and is a state-owned enterprise. There are 29 distribution companies which own the lines connecting consumers to the national grid. These companies and their assets are owned by a mix of publicly listed companies, shareholder co-operatives, community trusts and local government.

Distributors' arrangements with retailers permit retailers to provide consumers with electricity via the distributor's lines. Retailers are privately owned – except for the three large 'gentailers' in which the Crown holds a majority share.

With the exception of one company (Genesis Energy Limited), gas and oil assets at the production, wholesale, transmission and distribution levels are owned by private sector companies.

The Electricity Authority regulates the electricity industry and the Gas Industry Company regulates the gas industry. Electricity transmission, some electricity distribution businesses and gas pipeline businesses are subject to Commerce Commission (New Zealand's competition and consumer law regulator) price-quality regulation.

Telecoms infrastructure

Telecommunications infrastructure is largely privately owned. Historically, fixed-line broadband and telephone services are mostlyhave been provided through copper-based networks, although fiber-based services are now increasingly common with the government's ultra-fast broadband initiative aiming to achieve 87% national coverage by 2022 (significant additional rural broadband and mobile coverage will also be deployed around New Zealand between 2019 and 2023 due to the expansion of the rural broadband initiative phase two /mobile black Spots fund (RBI2/MBSF) programme. Chorus, a private-sector company specifically regulated by the Telecommunications Act 2001, owns and operates the copper network on an open-access basis for retail service providers. Mobile services are wholly provided by the private sector.

As noted above, the government has invested heavily in building an ultra-fast broadband fiber (UFB) network. Crown Infrastructure Partners (CIP), a Crown-owned company, is responsible for managing the UFB network on the Crown's behalf.

Telecommunications providers are regulated by the Commerce Commission.

Transport infrastructure

ROADS

Almost all roads in New Zealand are publicly owned. The State Highway network, which connects towns and cities, is managed on behalf of central government by the New Zealand Transport Agency (NZTA). Local roads are owned and managed by local government in association with NZTA.

Roads and other land transport infrastructure are funded through the National Land Transport Fund, which is administered by the NZTA. The NZTA makes funding decisions in accordance with national and regional land transport plans. NZTA commonly outsources work on state highways to private sector suppliers.

AVIATION

Airports vary considerably in scale and utilization. New Zealand has eight civil airports designated by the New Zealand Customs Service to receive international flights, five of which have regular scheduled international services. 26 airports receive regular domestic services.

Most airports are owned by local government, while some have part ownership by central government or the private sector. Auckland International Airport is owned by Auckland International Airport Limited, a company listed on the New Zealand and Australian stock exchanges. The Auckland City Council retains a 22% ownership in the airport.

Airways New Zealand, a state-owned enterprise, provides air navigational infrastructure.

Aviation capacity is provided by the approximately 26 domestic and 20 international passenger carriers which operate in New Zealand. This infrastructure is for the most part privately provided. Air New Zealand, the national airline, carries approximately 80% of domestic traffic and 40% of international traffic. Air New Zealand is listed on both the New Zealand and Australian stock exchanges, while the Crown retains a 52% ownership.

RAIL

KiwiRail, a state-owned enterprise, owns and controls the rail tracks, associated infrastructure and rolling stock. The rail corridor is technically owned by New Zealand Railways Corporation (also a state-owed enterprise) with KiwiRail licensed to manage the land for a nominal fee.

Wellington and Auckland are the only cities in New Zealand with metropolitan rail services. The metropolitan rolling stock is owned by the respective local government organizations, each of whom contracts the operation of its passenger rail services to the private sector. Transdev is currently contracted to operate both the Wellington and Auckland passenger rail services.

SHIPPING AND PORTS

New Zealand has 16 ports servicing both domestic and international movements. Many are 100% owned by local government, while others have part private ownership.

KiwiRail owns and operates the Interislander, a passenger and freight ferry service connecting the North and South Islands of New Zealand. The Interislander competes with Bluebridge, a private sector company also offering freight and passenger service between the two islands.

Other infrastructure

EDUCATION

School infrastructure ownership varies among the three types of school: state school, 'state-integrated' school and private school. State schools are entirely owned and funded by the government, with boards of trustees responsible for their governance. Private schools are entirely privately owned, typically by a trust, and are not required to offer the national curriculum.

State-integrated schools are former private schools which are regulated like state schools (for example, they follow the national curriculum) but the ownership of school land and buildings is retained by the private owners. Representatives of the private owners sit as trustees on the school's board of trustees.

Historically, opportunities have existed for investment in education infrastructure through New Zealand's Public-Private Partnership (PPP) program (although, at the time of writing, the current Labour-led government has ruled out PPPs in the social infrastructure space). In the New Zealand context, a PPP is a long-term contract for the delivery of a service, where provision of the service requires the construction of a new asset, or enhancement of an existing asset, that is financed from external (private) sources on a non-recourse basis, and full legal ownership of the asset is retained by the Crown.

PPP contracts in the education sector have typically involveinvolved the Ministry of Education engaging a private partner to design, finance, build and maintain a particular school. The Crown still owns the land and buildings.

HOSPITALS

New Zealand has both a public and private healthcare system. Public hospitals are owned by District Health Boards, who receive central government funding and are responsible for providing and funding health services in their district. Private hospitals are owned and operated by private owners, typically trusts or companies.

SOCIAL HOUSING AND HOUSING RELATED INFRASTRUCTURE

Social housing in New Zealand is provided by a combination of central government (through Kinga Ora), local government and private sector Community Housing providers.

Created in 2019, Kinga Ora brings together the people, capabilities and resources of the Government's KiwiBuild Unit, Housing New Zealand and its development subsidiary HLC. This change has been designed to enable a more cohesive and joined-up approach to delivering the government's priorities for housing and urban development in New Zealand. These priorities include addressing homelessness and making homes more affordable for New Zealanders.

Kinga Ora has two key roles:

- being a public housing landlord; and
- partnering with the development community, Mori, local and central government, and others on urban development projects of all sizes.

At the time of writing, new Infrastructure Funding and Financing (IFF) legislation has been recently introduced to Parliament with bi-partisan support. IFF is a new, user-pays tool for funding local roading and water infrastructure. Crown Infrastructure Partners is expected to play a major role in facilitating investment and projects using this legislation.

WATER

Much of New Zealand's water infrastructure is used for agricultural purposes. According to the World Bank, 74% of New Zealand's fresh water withdrawals go towards agriculture. Ownership of agricultural irrigation infrastructure varies. Many irrigation projects are owned by farming co-operatives with varying degrees of investment from local government. Historically central government has played a role in accelerating the development of rural water infrastructure projects through the Irrigation Acceleration Fund (although, this fund was closed by the Labour-led government in 2019).

Domestic water supply infrastructure is owned by local government. Many local authorities directly manage the supply of drinking water, while others contract out the operational and maintenance services.

At the time of writing, the government is in the process of creating an independent water body to regulate drinking water in New Zealand (noting this is a quality, rather than an economic, regulator).

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Are there special rules for investing in energy and infrastructure?

Generally

New Zealand has an open economy which operates on free market principles. New Zealand maintains specific foreign investment restrictions in only a few areas of critical interest. There are no specific restrictions on foreign direct investment in the energy and infrastructure industries. Overseas persons investing in New Zealand energy and infrastructure assets or businesses must:

- comply in all respects with the general law of New Zealand in the same way as a New Zealand investor; and
- if applicable, apply for and receive consent from the Overseas Investment Office (OIO) in respect of the particular investment.

Overseas investments in New Zealand assets are screened if they are defined as 'sensitive' within the Overseas Investment Act 2005. Three broad classes of asset are currently defined as sensitive within the Act: acquisition of a 25% or more ownership interest in business assets valued at over NZD100 million, all fishing quota investments, and investment in 'sensitive land' as defined in Schedule One of the Act. Examples of sensitive land include: residential land, rural land over five hectares; or land bordering or containing foreshore, seabed, river or the bed of a lake.

Proposed investments must meet certain statutory criteria before requiring OIO consent. Once met, this will usually require investors to show their business experience, that they are of good character and, for sensitive land, demonstrate the benefits to New Zealand of their investment.

Investors who need OIO consent:

- generally do not have New Zealand citizenship or are persons who are not ordinarily resident in New Zealand;
- are entities, such as companies, trusts and joint ventures, with more than 25% overseas ownership or control; and
- can include associates (including New Zealanders) of overseas investors.

The most effective way for an overseas person to invest in New Zealand will depend upon practical matters relating to the nature of the investment and the resulting tax consequences in New Zealand and elsewhere.

Overseas persons generally undertake business in New Zealand by:

- incorporating a local company as the subsidiary of an overseas company;
- registering a branch of an overseas company in New Zealand; or
- establishing a joint venture or partnership.

Subject to tax and anti-money laundering reviews, there are no specific restrictions on the movement of funds in or out of New Zealand, or on repatriation of profits. Other than under the terms of any OIO consent, no additional performance measures are imposed on foreign-owned enterprises.

Energy

The energy markets in New Zealand are heavily regulated by the Electricity Authority, the Gas Industry Company and the Commerce Commission. Securing licenses and consents to develop certain natural resources may trigger a process which requires consultation with local *iwi* (Maori tribes).

Although a central body manages the electricity market, electricity generation is separated from electricity distribution. Transpower, a state-owned enterprise, owns and operates the entire transmission infrastructure. Electricity generators cannot transmit electricity unless directly to a customer. Distributors enter into transmission agreements with Transpower, as prescribed by the Electricity Industry Participation Code. This code also provides for the processes by which purchasers and generators submit and revise bids and offers for electricity.

The majority of electricity in New Zealand is generated through hydroelectric dams. There is increasing pressure on the country's freshwater resources, resulting in the Land and Water Forum making ongoing recommendations to the government about freshwater management and preservation. Government implementation of these recommendations will influence the allocation of freshwater for electricity generation.

Geothermal energy is an emerging industry governed by unusual rules. No individual or business can own a geothermal resource, but consents can be awarded for development and use under the Resource Management Act 1991. There is no licensing regime under which rights to investigate geothermal resources can be secured.

The oil industry is regulated by New Zealand Petroleum and Minerals. The government has rights to all oil in New Zealand and in the country's Exclusive Economic Zone. The Crown Minerals Act 1991 and its related regulations governs the allocation rights to oil resources.

Telecoms infrastructure

The telecommunications industry is essentially separated into network owners, who own the infrastructure (including fixed line and fibre), and retail service providers, who purchase wholesale broadband and voice services from network owners to on-sell to consumers. The wholesale price that network owners can charge to retail services providers is controlled by the Commerce Commission. Due to 'unbundling' of local loop infrastructure (cabling which connects an exchange to an end consumer), retail service providers are also able to install their own infrastructure in exchanges, giving them more control over the quality of their service.

There is some regulation in place to support new mobile service providers. However, retail service providers looking to enter the market face limited choices when looking for commercial agreements for roaming and co-location on mobile towers. Competition regulations do not impose price controls on owners of mobile infrastructure. The Commerce Commission undertook a mobile market study in 2019.

Transport infrastructure

Opportunities exist for investment in transport infrastructure through the government's Public-Private Partnership (PPP) program. There are currently two major transport PPPs underway for the construction of major expressways. A PPP is one option for the light rail project proposed for Auckland and it is expected that further projects will be identified as the Infrastructure PlanCommission develops a 30 year infrastructure plan.

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What is the applicable procurement process?

Private sector procurement is governed by the ordinary laws of New Zealand. As noted above, foreign investors may need to obtain consent from the Overseas Investment Office before entering into certain transactions. Foreign investment is otherwise generally not subject to any further restrictions.

Public sector entities must comply with good public sector procurement practices when contracting with private sector suppliers. The Government Rules of Sourcing (GRS), issued by the Ministry of Business Innovation and Employment, provide a broad framework of rules and best practice guidelines for government procurement. The GRS apply on a mandatory basis to almost all executive government organizations and a number of Crown entities. Other non-core public sector and local government organizations may also be obliged to take the GRS into account as guidance for good practice. In addition to the GRS, each public sector entity has its own procurement policy.

The GRS apply to government contracts when the maximum total estimated value meets or exceeds:

- in relation to contracts for goods and services, NZD100,000 or more; or

- in relation to contracts for construction works, NZD9 million or more.

The broad objective of the GRS is to ensure that procurement decisions are fair, transparent, lawful and provide value for tax payer money. A decision not to award a contract to tenderer cannot be made on the basis that they are a foreign-owned or controlled entity.

Government procurement opportunities are advertised on a web-based service called Government Electronic Tender Service (GETS). GETS is accessible to all interested suppliers, both domestic and international. It meets New Zealand's commitments under free trade agreements. Government agencies are also permitted to consider unsolicited proposals from the private sector, subject to certain restrictions.

Construction procurement guidelines have recently been developed which set out the standards of good practice for government agencies to apply to their construction projects.

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What are the most common forms of funding / investing in energy and infrastructure?

The principal forms of sector funding in energy and infrastructure in New Zealand are:

- loans made on a corporate finance basis (balance sheet debt);
- loans made on a project-finance basis (to a special purpose project company) on medium- to long-term bases. Such loans may later be syndicated to other funders;
- bond finance;
- mezzanine debt (in some sectors);
- refinancing of the debt in operational projects; and
- asset financing.

Funding is often sourced from offshore.

The most common form of investment in energy and infrastructure is equity investment in joint ventures, special purpose vehicles or entities that may have a portfolio of interests (share capital and subordinated sponsor loans).

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Restructuring

Enforcement and sanctions

When can there be regulatory investigations?

The Reserve Bank of New Zealand has the power to appoint any person to carry out an investigation of the affairs of a registered bank or an associated person of that registered bank when it is satisfied that it is:

- necessary or desirable to give directions when it has reasonable ground to believe that the registered bank or associated person is insolvent, likely to be insolvent, is about to suspend payment or is unable to meet obligations;
- the business of the bank is not being carried out in a prudent manner;
- the affairs or circumstances surrounding the bank or associated person are such as to be prejudicial to the soundness of the financial system; and
- the bank or associated person fails to comply with a requirement under the Financial Markets Conduct Act 2013 (FMCA) or has been convicted of an offence under the Reserve Bank of New Zealand Act 1989.

Similar powers exist under the Corporation (Investigation and Management) Act 1989 in relation to the statutory management of companies and other entities. Enforcement of a security may be suspended while a company or other entity is subject to statutory management.

The Financial Markets Authority (FMA) has extensive powers under the Financial Markets Authority Act 2011 to:

- obtain information, documents and evidence where FMA considers it necessary or desirable for the purposes of performing its functions, powers or duties under that Act or any financial markets legislation (including the FMCA);
- enter and search places, vehicles and other things for the purpose of ascertaining whether a person has engaged in or is engaging in conduct that constitutes or may constitute a contravention of any provision of financial markets legislation where there are reasonable grounds to suspect that there is a contravention and that the search will find evidential material; and
- share information and documents with other law enforcement agencies, regulators or overseas regulators that the FMA considers may assist those agencies' performance or exercise of their functions, powers or duties under an enactment or foreign law (but only where the overseas regulator can provide appropriate protections for the purpose of maintaining the confidentiality of anything provided).

FMA may also use any information, or copy of any documents, provided to it by a law enforcement or regulatory agency under any enactment, or by an overseas regulator, in the FMA's performance of its functions, powers or duties.

The FMA also has powers under the FMCA to intervene in debt securities offered under a regulated offer and in registered managed investment schemes. Auditors and other parties such as investment managers and custodians have a duty to report serious problems in respect of debt securities or managed investment schemes to the FMA (or the supervisor of a managed investment scheme). The FMA can direct the supervisor, issuer or manager to take action in respect of serious problems reported to it, or apply for court orders to remedy problems. There is a wide range of civil liability provisions in the FMCA relating to contraventions of the FMCA by issuers and managers. Criminal liability only applies where there has been a deliberate breach.

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What regulatory penalties may apply?

The Reserve Bank of New Zealand has the discretion to take enforcement action and to decide what enforcement action to take. Registered banks could be subject to de-registration.

Examples of penalties in the Financial Markets Conduct Act 2013 are:

- fines of up to NZD50,000 for infringement offences;
- injunctions;
- banning orders;
- loss of license;
- pecuniary penalty orders (the maximum being the greater of the consideration for the transaction, three times the amount of the gain made or loss avoided, or NZD1 million for an individual and NZD5 million in any other case);
- compensatory orders; and
- other civil liability orders.

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What criminal penalties may apply?

Criminal offences can apply under the Reserve Bank of New Zealand Act 1989 when the offences relate to:

- the supply of information;
- the registration of banks;

- disclosure statements; and
- the prudential supervision of registered banks (amongst other miscellaneous provisions).

The maximum term of imprisonment can be up to 18 months or a fine of NZD200,000 for an individual or in the case of a body corporate of up to NZD2 million.

Criminal offences under the Financial Markets Conduct Act 2013 apply for deliberate defective disclosure and making false statements. The maximum penalty for individuals is 10 years' imprisonment and/or a NZD1 million fine, and in any other case a NZD5 million fine.

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Tax

Tax issues

Are stamp, registration, transfer or other similar taxes applicable?

Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?

There are no stamp duties, registration or transfer-type taxes currently imposed in New Zealand. In some circumstances a loan that comes within the Approved Issuer Levy ('AIL') regime will need to be registered with Inland Revenue.

Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?

There are no stamp duties, registration or transfer-type taxes currently imposed in New Zealand. In some circumstances a mortgage, debenture or other security that comes within the Approved Issuer Levy ('AIL') regime will need to be registered with Inland Revenue.

Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (e.g. a bond)?

There are no stamp duties, registration or transfer-type taxes currently imposed in New Zealand. In some circumstances debt securities that come within the Approved Issuer Levy ('AIL') regime will need to be registered with Inland Revenue.

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Do tax authorities take priority on enforcement?

On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (e.g. secured bond holders)?

Generally not, but whether or not the Inland Revenue has priority over secured lenders/secured debt security holders will depend on a number of factors (including whether and when the security interest has been perfected, the nature of the tax owed to the Inland Revenue and the status of the debtor (e.g. whether it is in liquidation)). On a liquidation, the Inland Revenue can have priority in some circumstances.

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Is withholding tax on interest payments applicable?

Is there withholding tax on interest payments under a loan?

Yes, generally New Zealand imposes withholding tax on interest payments under a loan.

If so:
What is the rate of withholding?

The rate of withholding varies.

For interest paid to recipients resident for tax purposes in New Zealand, the rate of resodent withholding tax (RWT) differs according to the type of recipient. For most corporates, the rate is 28% (or 33% if it chooses the higher rate), whereas individuals can elect a rate which reflects their marginal tax rate (10.5%, 17.5%, 30% or 33%). However, if the recipient (corporate or individual) has not provided its taxpayer identification (IRD) number to the payer, the rate defaults to 33%.

For interest paid to recipients not resident for tax purposes in New Zealand, the rate of non-resident withholding tax (NRWT) is 15% unless either:

- the approved issuer levy (AIL) regime has been applied to the loan and the requirements of the regime are met (including payment of a 2% or 0% levy), in which case NRWT is reduced to 0%; or
- a reduced rate applies under an applicable double tax treaty.

What are the key exemptions?

The key exemptions from the requirement to deduct withholding tax from interest payments to recipients resident for tax purposes in New Zealand apply where the recipient holds a certificate of exemption (or, from 1 April 2020, has RWT-exempt status) – persons who may apply for a RWT exemption certificate (or, from 1 April 2020, RWT-exempt status) include registered banks, those in the business of borrowing and lending money, portfolio investment entities (a tax status for certain collective investment vehicles), certain large taxpayers (gross income in excess of NZD2 million), and certain persons deriving exempt income (e.g. charities).

The key exemptions from the requirement to deduct withholding tax from interest payments to recipients not resident for tax purposes in New Zealand apply where:

- the loan is under the AIL regime and the requirements of the regime have been met (including payment of the 2% levy or the loan is NZD dominated listed debt that qualifies for AIL at a rate of 0%), then NRWT is reduced to 0% (note: this is a reduction as opposed to an exemption);
- the interest is paid by a transitional resident and other requirements are met;
- the Commissioner of Inland Revenue has relieved the person of the obligation to withhold NRWT (although it is unlikely that this power would be exercised); or
- an applicable double tax agreement provides an exemption, in whole or in part.

Would the same analysis apply to interest payments under a debt security (e.g. a bond)?

Yes.

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Are foreign lenders and debt security holders subject to tax on interest payments?

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding tax (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (e.g. by virtue of incorporation, residence or local branch)?

No.

Would the same analysis apply to interest payments under a debt security (e.g. a bond)?

Yes.

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