New Zealand

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

In New Zealand, acquisitions and disposals are either structured as share sales (where the shareholders of the target company sell all of the shares in the target company to the buyer) or business asset sales (where the business assets are sold by the target company to the buyer, usually as a going concern).

A common deal process would involve the following:

- term sheet or heads of agreement: after the negotiation of confidentiality agreements, the parties agree a term sheet or heads of agreement that sets out the key commercial terms of the deal;
- due diligence: the seller undertakes due diligence on the target company;
- sale agreement: negotiation and signing of the sale and purchase agreement and ancillary documentation; and
- conditions satisfied: the parties work to satisfy the conditions precedent in the sale and purchase agreement; and
- completion: completion occurs.

A deal of medium complexity would generally involve a period of two to three months, although timetables can differ considerably depending on a range of factors.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Acquisitions and disposals of privately owned companies or assets are largely unregulated in New Zealand (with the exception of certain provisions of the New Zealand Companies Act 1993, which require various corporate approvals to be entered into and where consent of Overseas Investment Office or New Zealand Commerce Commission is required). Accordingly, the rights and obligations of parties in private acquisitions and disposals are largely governed by contract law and the terms of the sale and purchase agreement entered into between the parties.

There is no legal requirement that the acquisition of shares in a company, a business or assets must be governed by New Zealand law. However, it is uncommon for other laws to apply unless one or more parties are located outside New Zealand or the transaction is part of a broader global transaction. In these circumstances, the parties would need to comply with all relevant New Zealand laws (such as in relation to employment matters arising from the transaction).

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

In the context of a share sale, the sale and purchase agreement would include various representations and warranties that clear legal title to the shares will transfer to the buyer. Under the New Zealand Companies Act 1993, entry of a person's name in the share register of the company is prima facie evidence that legal title to the share vests in that person. Accordingly, the buyer should seek from the seller evidence of the entry of the buyer's name into the target company's share register as a completion deliverable under the share sale agreement (in addition to corporate resolutions approving the share transfer).

In a business asset sale agreement, title to the business assets will pass in accordance with the terms of the sale and purchase agreement. The agreement would specify when title and risk to the assets pass. It would also include a requirement to deliver the assets free of security interests or encumbrances. Certain assets may also require the parties to undertake a specific transfer of ownership process stipulated by a third-party regulator or authority (ie, motor vehicles or licences).

In New Zealand, legal and beneficial title are distinct concepts and a bare trust arrangement is sometimes used particularly in the context of a share sale (ie, where legal title to the shares is held by one party, who is named as the shareholder in the target company's share register, and beneficial title to the shares is held by another party).

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

If a buyer wishes to acquire all of the shares in the target company this will require all shareholders to sign and agree to be bound by the sale and purchase agreement.

Unless the target company is a 'code company' under the Takeovers Act 1993, there is no legal requirement on the minority shareholders to sell to a buyer. However, where there are multiple shareholders, the target company will often have in place a shareholders' agreement that includes a drag along clause. A drag-along clause, in effect, requires the minority shareholders to sell to the buyer where the majority

shareholders have agreed to sell. A drag-along clause can also be included in the target company's constitution.

If the target company is a 'code company' under the Takeovers Act 1993, and the buyer acquires 90 per cent of more of the shares in the target company, the buyer can compulsorily acquire the minority shareholder's shares.

Exclusion of assets or liabilities

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

In relation to a business asset sale, it is possible to exclude any of the target company's assets that the parties agree may be excluded. However, in practical terms, we would generally expect all of the assets of the target company to transfer under the business sale agreement (other than assets that may have been used by the owners of the target company, such as laptops and motor vehicles). It is also possible to exclude all liabilities of the target company from the sale. We generally see most liabilities of the target company being excluded in a business asset sale, other than certain liabilities relating to employee entitlements (which are often set-off against the purchase price) and liability under business contracts arising after the completion date.

Conversely, with a share sale, the assets and liabilities of the target company generally transfer (although it is possible to transfer assets out of the target prior to the sale occurring and to exclude certain liabilities). It is obviously more difficult to exclude assets and liabilities in the context of a share sale as these rights and obligations sit with the target company (such as all obligations to employees).

Consents

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

There are two key regulatory bodies that have jurisdiction over M&A transactions in New Zealand, being the Overseas Investment Office (OIO) and the New Zealand Commerce Commission (Commerce Commission).

Foreign investment in New Zealand that meets certain monetary thresholds, or involves the acquisition of an interest in 'sensitive land', will require OIO approval. Depending on the type of transaction, if OIO approval is not obtained, the OIO has the power to unwind the transaction or impose significant fines and potential criminal penalties.

The New Zealand government recently passed the Overseas Investment (Urgent Measures) Amendment Act 2020, which introduced into New Zealand law a 'national interest' test. This new test allows the New Zealand government to decline consent to certain overseas investments if it is considered that it is contrary to New Zealand's national interest. In applying the national interest test, a broad range of factors may be considered and will vary, depending on the nature and likely impact of the proposed investment. For example:

- investments in large businesses, businesses that have significant market share, or businesses that hold unique assets or operate in particularly sensitive areas of the economy (for example, dual-use or military technology, the health sector, and other critical national infrastructures) may raise more national interest concerns than investments in other types of businesses; and
- investments that enhance economic prosperity by, for example, increasing New Zealand's productivity, bringing in new technologies or creating jobs, are less likely to be contrary to New Zealand's national interest.

If consent is granted to a transaction that is regarded as being in the 'national interest', the consent holder must not, in relation to the sensitive assets in which the relevant investment is made, act or omit to act with a purpose or an intention of adversely affecting national security or public order.

The Commerce Commission oversees competition law in New Zealand. In general terms, New Zealand law prohibits an acquisition of shares or business assets if that acquisition is likely to have the effect of substantially lessening competition in New Zealand. The Commerce Commission may apply to the High Court of New Zealand to unwind a transaction and for significant civil and criminal penalties.

If a transaction requires OIO or Commerce Commission approval, this should be included as a condition precedent in the sale and purchase agreement.

7 Are any other third-party consents commonly required?

The New Zealand Companies Act 1993 provides that approval by shareholders holding 75 per cent, or such high number of shares as specified in the constitution, of a company is required to undertake a 'major transaction'. The sale by a target company of all, or substantially all, of its business assets will constitute a major transaction. Accordingly, a business asset sale will require at least 75 per cent shareholder approval of the target company's shareholders.

In addition, the sale and purchase agreement will generally include as a condition precedent various third-party consents being obtained. These include regulatory consents (such as Overseas Investment Office consent or Commerce Commission Approval), consents from landlords and consents from key customers and suppliers. In the context of a business sale, the consent of third parties will generally be to an assignment of the relevant contract. Conversely, in the context of a share sale, the consent of the third party to a change of control of the target company will generally be required.

Regulatory filings

8 Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

For private share acquisitions, the New Zealand Companies Office must be updated for changes to shareholders, directors, ultimate holding company and registered office details. There are different time periods that apply in relation to such notifications. There is no fee payable for updating the New Zealand Companies Office for such changes.

There may be other filings or notifications required, such as to the New Zealand Intellectual Property Office. The nature of these filings or notifications will vary depending on the nature of the business and whether the transaction is a share sale or business asset sale.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Buyers and sellers would customarily appoint their own accountants or tax advisers to assist with the transaction. Accounts would

normally assist with financial due diligence of the target and review the accounting and tax implications of the transaction, including providing input on the transaction documents.

The seller may appoint a broker or an investment bank to assist with the sale process. It is not uncommon for a broker to be appointed on a commission basis.

Duty of good faith

10 Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

The term sheet or heads of agreement will often include a term requiring the parties to negotiate the sale and purchase agreement in good faith. This is a contractual obligation only and will not bind a party to agree to any particular term or to enter into a sale and purchase agreement on terms that they do not accept.

The directors of each of the buyer and the seller are also subject to a number of duties set out in the New Zealand Companies Act 1993, including the duty to act in the best interests of the company and in good faith.

Documentation

11 What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

The parties to a business asset or share sale agreement will generally enter into the following documentation:

a term sheet or heads of agreement setting out the key commercial terms of the agreement between the parties. This will generally be non-binding except for confidentiality (and sometimes exclusivity); a sale and purchase agreement setting out the terms under which the sale will occur. The terms of the sale and purchase agreement will differ depending on whether the transaction is a business asset sale or a share sale. For example, a business asset sale will include additional provisions in relation to the position of employees whose employment will be terminated by the seller on completion and who will generally be offered employment with the buyer (whereas in a share sale the position of employees would generally not be impacted by the sale) and for the assignment of business contracts. For a share sale agreement, a tax indemnity and tax warranties will be included as these liabilities will be assumed by the buyer (whereas in a business asset sale they would generally not be acquired); other ancillary document may be entered into such as a transitional services agreement pursuant to which the seller agrees to provide various services to the buyer post completion of the sale; and transfer documents, including deeds of assignment of material contracts (including leases), deeds of assignment of intellectual property and various corporate resolutions approving share transfers will be provided at completion.

12 Are there formalities for executing documents? Are digital signatures enforceable?

Section 180 of the New Zealand Companies Act 1993 governs the manner in which a company may enter into a binding agreement. In particular, section 180(1)(a) specifies that a deed must be entered into either by two directors of the company; if there is only one director of the company, that director whose signature must be witnessed; if the company's constitution permits, one director or other person whose signature must be witnessed or one or more attorney's in accordance with section 181 of the Companies Act.

Electronic signatures for the execution of agreements are enforceable in some instances under the Electronic Transactions Act 2002 provided certain conditions are met.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The scope of a buyer's legal due diligence investigation in New Zealand will generally address matters such as: title to the shares in a target company or assets of the business of the target company (including security interests that will be required to be released at completion); the key terms of material contracts; employment arrangements; compliance with laws; ownership of information technology, intellectual and real property, employment arrangements, material litigation and compliance with the law.

A seller due diligence report is generally only prepared in large transactions or transactions of highly regulated businesses. These are generally prepared on an 'exceptions-only' basis. We would generally expect the buyer to still conduct a due diligence investigation that would be more in depth than the seller's due diligence process.

Liability for statements

14 Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

Under the New Zealand Fair Trading Act 1986, a seller can be liable for pre-contractual misrepresentations if they are misleading or deceptive or are likely to mislead or deceive.

It is possible for the parties to exclude liability under the Fair Trading Act 1986 provided that certain criteria are satisfied. This includes that both the buyer and seller must be 'in trade', that the sale and purchase agreement includes a specific provision that the parties agree to contract out of the terms of the Fair Trading Act and that it is fair and reasonable for this to occur.

Publicly available information

15 What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

In New Zealand, there is a significant amount of information available in relation to private companies that can be obtained from searches of various public registers. For example, the New Zealand Companies Office includes information that can be obtained (at no cost) in relation to the directors and shareholders of a company (including the ultimate holding company of a company). In addition, some private companies (that meet certain criteria in relation to being 'large') are required to file their financial statements with the New Zealand Companies Office.

To the extent a private company has registered trademarks, patents or designs, this information is publicly available in New Zealand by means of searching the New Zealand Intellectual Property Office records (at no cost).

Further, the New Zealand Personal Properties Security Register includes details of security interests registered against a company that can be searched for a small cost. Land Information New Zealand also includes details of the ownership of real property, mortgages and other charges over land.

In addition to searches of the public registers listed above, it is not uncommon for a buyer to also undertake court searches to determine whether the seller is involved in any material litigation.

Impact of deemed or actual knowledge

16 What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

The sale and purchase agreement will often seek to exclude matters within the buyer's actual knowledge and such knowledge will qualify the seller's warranties. The position regarding whether a buyer's deemed knowledge should also be excluded is a topic that is often subject to negotiation in New Zealand transactions.

PRICING, CONSIDERATION AND FINANCING

Determing pricing

17 How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Pricing is generally determined on a cash free, debt-free basis based, on a multiple of normalised earnings before interest and tax (EBIT) or normalised earnings before interest, tax, depreciation and amortisation (EBITDA).

Closing accounts are sometimes used where the purchase price is adjusted to reflect the difference between estimated working capital and actual working capital. Locked-box structures are less common in New Zealand.

Form of consideration

18 What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash is the most common form of consideration. However, a combination of cash and vendor note or shares is also sometimes used.

There is no overriding obligation to pay multiple sellers the same consideration, although this would generally be the position.

Earn-outs, deposits and escrows

19 Are earn-outs, deposits and escrows used?

Earn-outs are relatively common in New Zealand M&A transactions. These are generally structured over a 12- to 24-month period and are often linked to EBITDA targets.

Deposits are not common with larger M&A transactions. They are, however, sometimes used in smaller transactions.

Escrows are relatively common and are generally used as a form of security for a warranty claim being made. Escrow periods are generally between 12 months and 24 months. Sometimes escrows are partially repaid after a certain period of time. For example, one-half of the escrow may be released after one-half of the escrow time has expired. Escrow amounts vary depending on the nature of the transaction.

Financing

20 How are acquisitions financed? How is assurance provided that financing will be available?

Private M&A acquisitions are often funded by a financier, such as a registered bank. Often the buyer will arrange finance before it enters into the sale and purchase agreement. The sale and purchase agreement may be conditional on the buyer obtaining finance on terms acceptable to it. It is not that common for the buyer to provide evidence of funding to the seller. However, if the seller has concerns about the seller's ability to fund the acquisition, in particular, if the buyer is using a newly incorporated entity, then the seller may request that a buyer's guarantor is included in the sale and purchase agreement to guarantee payment of the purchase price (such as a guarantee from the buyer's parent company).

Limitations on financing structure

21 Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

The New Zealand Companies Act 1993 restricts the provision of financial assistance to a buyer in the connection with the purchase of shares issued, or to be issued, in the company or its holding company. Financial assistance includes a loan and guarantee or provision of security.

The requirements of the Companies Act in relation to giving financial assistance include that the Board considers that the company should provide the financial assistance, that the giving of the financial assistance is in the best interests of the company and the terms on which the financial assistance is to be given is fair and reasonable to the company.

There are a number of ways in which financial assistance may be authorised. One-way financial assistance can be authorised under the Companies Act is if all shareholders consent to the giving of the financial assistance. Another method involves the board resolving that giving the assistance is in the best interests of the company, is of benefit to the shareholders not receiving it and that the terms on which it is given are fair and reasonable to those shareholders not receiving it. Before the financial assistance can be given, the company must provide each shareholder with a disclosure document setting out the details of the financial assistance and the text of a resolution required to be passed together with such information that may be necessary to enable the reasonable shareholder understand the nature and implications for the company and the shareholders of the proposed transaction.

In addition, financial assistance, not exceeding 5 per cent of the aggregate amount received by the company in respect of the issue of shares, is permitted under the Companies Act provided the company receives fair value in connection with the assistance. Further procedural requirements are also still required to be met in this regard.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Transactions are often subject to conditions precedent. Common conditions precedent include:

- due diligence;
- Overseas Investment Act consent;
- Commerce Commission approval;
- a landlord consents to the assignment of any leased properties (or to a change of control of the target company);
- third party consents to the assignment of material contracts (or change of control of the target company);
- board approval; and
- shareholder approval.

Generally, a seller will want to limit conditions where the buyer has discretion whether to approve the condition or not. In smaller transactions, finance can also sometimes be included as a condition.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Generally, parties are required to use reasonable endeavours to procure satisfaction of the conditions. More specific requirements can be used in relation to certain conditions, such as requiring that applications for regulatory approvals are made within a certain time period.

Pre-closing covenants

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Pre-closing covenants are common. Covenants are intended to maintain the value of the business between signing and closing. They are often made up of requirements on the seller to do certain things and to refrain from doing certain things. Examples of common pre-closing covenants include:

- to operate and conduct the business in the normal course and taking all steps necessary or desirable to preserve the goodwill, trading reputation and profitability of the business;
- to keep the business and the assets fully insured on a full replacement basis against all risks normally insured;
- not to enter into, vary or terminate any business contract with a value over a certain amount, without the prior written consent of the buyer;
- not to change key terms of employment or employ any new employee who has an annual remuneration package in excess of a certain amount;
- not to vary levels of stock from normal levels for the period in question;
- not to change the company's established practice as to the payment of creditors or collection of debtors;
- not to create or permit an encumbrances over any assets material to the business other than in the normal course of business;
- not to acquire or dispose of, or enter into any agreement for the acquisition or disposal of, any asset with a value over a certain amount; and
- not to alter share capital or make any distributions.

The remedy for failing to comply with a pre-closing covenant is generally damages being able to be claimed for the breach of the sale and purchase agreement. If the seller defaults in these requirements to a material extent then the buyer may have the right to cancel the sale and purchase agreement.

Termination rights

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Generally, there will only be limited circumstances where a party can terminate the transaction after signing the sale and purchase agreement. Failure for a condition to be satisfied or waived is a common circumstance where the transaction can be terminated. Other circumstances that may give rise to the ability to terminate include where a material breach has occurred of the sale and purchase agreement that cannot be remedied or a material adverse event has occurred.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break fees and reverse break-up fees are used to a certain extent, but are currently not that common.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

It is usual for a seller to provide representations and warranties to a buyer. The scope of the representations and warranties depends on the context of the transaction. Usual warranties include, warranties in relation to the title, assets, accounts, business premises, litigation and disputes, compliance with laws, employment, contracts and intellectual property. In share acquisitions, there will also be tax warranties. A breach of warranty is a breach of a term of the sale and purchase agreement and accordingly, damages are the usual remedy. The level of damages for a breach of the agreement will be limited to putting the party in the position that they would have been had the breach not occurred. A claim would also be subject to the requirement of the claimant to mitigate losses and to meet remoteness requirements (ie, being reasonably foreseeable).

Generally, a buyer will seek indemnities. However, the seller will want to resist providing general indemnities where possible and limit any indemnities to particular matters. For example, it is common for a seller in a share sale to provide a tax indemnity. Indemnities generally extend liability beyond what would be recoverable under a breach of contract claim and, subject to the terms of the agreement, are not subject to mitigation and remoteness requirements.

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Limitations are subject to negotiations between the parties, common limitations include:

- monetary thresholds on total liability;
- de minimis threshold that must be met in relation to individual claims and claims in aggregate;
- before a claim can be made;
- time limit on when claim can be brought;
- use of knowledge qualifiers; and
- qualifying warranties by disclosure matters and information available on public registers.

Processes concerning how claims are made and handling of third-party claims are also often covered in sale and purchase agreements.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty and Indemnity (W&I) insurance is relatively common for larger transactions. Either the buyer or seller may take out, and pay for, this

type of insurance. A buy-side policy generally allows for recovery by the buyer directly from the insurer and a sell-side policy allows the seller to reimbursed from the insurer in relation to claim made by the buyer.

The cost of W&I insurance is often in the range of 1 to 3 per cent of the purchase price. Common policy exclusions include:

- fraud;
- criminal penalties and fines;
- matter disclosed in due diligence;
- environmental matters; and
- consequential loss.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Parties will often agree on post-closing restraint, not to compete with the company or business being sold. Non-solicitation clauses, prohibiting the solicitation of employees and customers are also common. Confidentiality covenants requiring both parties to keep each other's information confidential often survive termination.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

New Zealand does not levy any transfer taxes. Stamp duty has been abolished in New Zealand. Accordingly, such taxes are not payable on the transfer of shares, land, buildings and other tangible or intangible assets in New Zealand.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares are generally not taxable unless the shares were purchased for the purpose of resale or the seller is in the business of trading in shares, in which case the profit from the sale would be taxable as income to the seller (the corporate tax rate is 28 per cent). The tax consequences of a sale of a business or assets (by way of asset sale) will depend on how the purchase price is allocated between the various types of assets, such as taxable assets, depreciable assets and capital (non-taxable) assets.

Goods and Services Tax (GST) is a form of value added tax chargeable at a rate of 15 per cent on supplies of goods and services in New Zealand. Generally, the cost of GST is borne by the buyer of the goods or services but GST is collected and passed on to the Inland Revenue Department by the supplier. GST is chargeable on the sale of a business or assets by way of asset sale whereas supplies of shares are exempt supplies for GST purposes. It is possible, however, to zero-rate an asset sale transaction for GST purposes (charge GST at a rate of 0 per cent) when the assets include land or where the sale constitutes the supply of a 'going concern'.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Yes. The legal entity of the target company that employs the employees remains unchanged in a share sale. Only the ownership of the target company has changed. Therefore, the employees of the target company ordinarily continue to be employed by the target company following the sale.

No. Employees do not automatically transfer employment to a buyer where the buyer acquires only the business or assets of the target company. The employees of the seller will be made redundant by the seller on completion of the sale. If the buyer wishes to employ the employees following the sale, the employees can be offered employment with the buyer (which the employees are free to accept or decline). However, in certain circumstances, specified categories of employees as detailed in the Employment Relations Act 2000 have the right to elect to transfer employment to the buyer.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There is a general obligation to consult where a change may affect the employment of an employee under statute. There are often contract consultation obligations in collective agreements and individual employment agreements.

Generally, these consultation obligations do not apply where there is a share sale but will apply to the sale and reorganisation of a business or assets.

Under the Employment Relations Act 2000 the duty of good faith requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide employees with access to information, and an opportunity to comment on the information, before the decision is made. In an asset sale, this obligation will be enlivened.

Every collective agreement and individual employment agreement is also required to contain an employee protection provision (unless the agreement binds an employee who is in the specified categories of employees detailed in the Employment Relations Act 2000). An employee protection provision has the purpose of providing protection for the employment of employees affected by a transfer of business or asset sale.

Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Following a share sale, as employees remain employed by the same company, length of service, benefits and entitlements will continue unaffected.

In an asset sale, the buyer can decide whether an offer of employment will include a commitment to recognise an employee's service with the target company prior to the sale or whether the employee's leave balances and entitlements can transfer to the buyer. Where this occurs, and the employee accepts the offer of employment, the employee's leave balances and entitlement can usually, with the employee's

consent, transfer with them to the buyer. Under the Holidays Act 2003, annual holiday entitlements are required to be paid out on termination of employment.

If an employee is in the specified categories of employees detailed in the Employment Relations Act 2000, the employment of an employee who elects to transfer to the buyer is treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

There is usually no requirement to transfer superannuation/KiwiSaver balances, as most employees place their superannuation/KiwiSaver in independent schemes or fund. There may be a need to transfer superannuation/KiwiSaver balances if the fund is an employer-based fund and the employing entity changes.

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

2019 was a strong year in M&A activity in New Zealand, with a record high level of activity of investments and divestments in private equity and venture capital transactions. While M&A activity has been subdued in 2020 as result of the covid-19 pandemic, the reduction in activity is not as significant in comparison with that of other countries.

From a regulatory perspective, the key change has been the introduction of amendments to New Zealand's overseas investment regime, which now requires a wider range of transactions to be subject to review by the government prior to completion. The amendments were introduced to protect key New Zealand businesses and assets as the economy recovers from covid-19.

The changes to the overseas investment legislation have resulted in the increased inclusion of regulatory approval conditions in sale and purchase agreements. Other key legal trends as a result of the pandemic include increased negotiations around material adverse change conditions, interim period covenants, price protection mechanisms and warranties and indemnities. The impact of the pandemic is also reflected in due diligence processes, with buyers seeking to understand the impact of the pandemic on the target business and its future operations, including in relation to its compliance with the wage subsidy scheme and other relevant government relief measures (where relevant).

Owing to the increased uncertainty of the current market conditions, consideration has been given to pricing mechanisms that reduce the risk of the uncertain market conditions, including by parties making any adjustment to the purchase price subject to a floor or ceiling amount or utilising a locked-box approach as an alternative pricing mechanism.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to the covid-19 pandemic, the government has introduced amendments to New Zealand's overseas investment legislation. These amendments, among other things, establish a temporary emergency notification regime under which the government reviews overseas investments not ordinarily screened under the overseas investment regime. This now requires a wide range of transactions to be notified to the Overseas Investment Office, and a direction be given by the Overseas Investment Office that the transaction can proceed.

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The government has also implemented a number of measures to reduce the impact of the covid-19 pandemic on businesses. These include a wage subsidy scheme, various tax relief measures, a business finance guarantee scheme, business debt hibernation scheme and a small business cash flow scheme. This area is subject to change and government websites such as https://www.business.govt.nz/covid-19 are generally useful resources for businesses.