

**A discussion of New Zealand's response to the global financial crisis, including evolution of law and policy changes that will encourage overseas businesses seeking to operate here.**

***New Zealand has to “create advantages” and set up policies that are “attractive and welcoming enough to overcome the geographic handicap and attract the drivers of prosperity – investment, skills and ideas – to New Zealand” – OECD***

This paper reviews timely and important legal issues that are aimed at stimulating economic recovery and includes an overview of recent and proposed changes to our overseas investment regime that governs the entry of capital into New Zealand.

The New Zealand Government has selected particular aspects of our domestic and international law for attention in order to try to provide an advantage in the exit from the recession and to try to overcome the effects of the global financial crisis. The response has been wide ranging. This paper will elaborate on:

- policy changes aimed at maintaining confidence in New Zealand's financial institutions
- the reduction in regulatory barriers faced on capital raising
- progress towards a free trade agreement with the USA
- the business structures available for inwards capital
- changes to the business migrant rules
- the review of our tax system
- the introduction of the Anti-counterfeiting Trade Agreement (ACTA)
- consideration of legislation that aligns New Zealand with international standards for Intellectual Property Rights (“IPR’s”)

- changes to the anti-money laundering legislation, and
- amendments to the overseas investment rules.

## Background

A recent OECD economic survey<sup>1</sup> highlighted New Zealand's special geographic situation and a large amount of new regulation that has been poorly designed, coordinated and focused as some of the contributing factors to New Zealand's poor productivity performance in recent years. The report suggested that over the past few years, regulatory measures implemented by the Government have increased the costs of doing business and sent bad signals to foreign investors. In reality then, New Zealand was facing a 'home-grown crisis' long before the global financial crisis even took its toll. New Zealand experienced a serial crash of finance companies that in turn initiated a very serious impact in investor confidence,<sup>2</sup> that only became worse with the looming shadow of the global crisis. Notwithstanding the grim reality of New Zealand's economic situation over the past year and a half, this country has still managed to achieve a ranking of second out of 181 economies for "ease of Doing Business" in 2009 according to a recent World Bank report.<sup>3</sup>

The OECD survey recognised that New Zealand's new Government, since it came into office in November 2008, has taken some steps to reverse this trend. These steps include establishing a new ministerial portfolio of regulatory reform, reviewing key regulations thought to have adverse effects on productivity and the creation of a task force to develop the principles for future regulatory management.

Like most major economies in the world, New Zealand has been in recession since the

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<sup>1</sup> OECD. "Economic Survey of New Zealand 2009: Structural policies to overcome geographic barriers and create prosperity" [2009]

<sup>2</sup> Diplock, J "The financial crisis and corporate governance" [22 June 2009] <<http://www.sec-com.govt.nz/speeches/2009/220609.shtml>>

<sup>3</sup> World Bank "Doing Business 2009 – Country Profile for New Zealand" p 2 <<http://www.doingbusiness.org/Documents/CountryProfiles/NZL.pdf>>

beginning of 2008. Recent comments from the Prime Minister indicate that the recession may be nearing an end. However, there is still a long road of recovery ahead. If the OECD's advice is taken, that road of recovery will have to be paved with incentives to generate international interest in doing business in New Zealand and to overcome the inescapable geographic hurdle.

The OECD, as we have said, has suggested that New Zealand has to create advantages and set up policies that are attractive and welcoming enough to overcome the geographic handicap and attract the drivers of prosperity – investment, skills and ideas – to New Zealand.<sup>4</sup> New Zealand's response to the global financial crisis has, necessarily, included attempting to bring the country in line with its global counterparts and showing the world that it is open for business. Effectively, if New Zealand hopes to improve its economic performance then it needs to have institutions and policies that are not simply good but are comparable to the best in the world.

Despite the current global gloominess, financial crises and recessions do not last forever. The future in New Zealand is looking bright. The new Government has demonstrated, during its short time in office, that it is willing to implement the necessary changes to set up a framework that will stimulate confidence and put the country on the road to recovery. It has proven that it can adapt swiftly to amend and introduce policies that will encourage business back to a more normal environment.

To date, New Zealand has made many changes that are aimed at pulling its regulations and policies in line with international standards to encourage confidence and ease of investment in New Zealand and, although there is always room for improvement, New Zealand has been largely successful in implementing changes that should have the effect of attracting overseas businesses to come and operate here.

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<sup>4</sup> Supra at 1.

So the big question is whether New Zealand has done enough in responding to the global financial crisis?

## **Government Guarantee Schemes**

The New Zealand Government has endeavoured to maintain confidence in its financial institutions by introducing schemes that set out to assure investors of the safety of their investments. The two schemes that were introduced in October 2008 are the retail deposit scheme and the wholesale funding scheme. These schemes, as originally established, were to be effective for a period of two years.

According to New Zealand's Finance Minister recently, "the retail Deposit Guarantee Scheme was introduced as a direct response to international financial market turbulence. Immediate concerns about the stability of the financial system are now abating"<sup>5</sup>. However, despite this, the Government recently announced an extension of the scheme for a further year until 31 December 2011. The extension is intended to help maintain confidence and certainty in New Zealand's financial institutions during the early stages of recovery.

### Retail Deposit Scheme

The retail deposit scheme guarantees deposits made by retail investors with three types of financial institutions. The first of these is trading banks, whether locally incorporated or overseas banks which operate through New Zealand branches. Deposits to these are covered, as are non-resident deposits made in branches of overseas banks. However, for

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<sup>5</sup> NZ Government. "Government to extend retail deposit guarantee" [25 August 2009] <<http://www.beehive.govt.nz/release/government+extend+retail+deposit+guarantee>>

approved local branches of overseas banks existing at the introduction of the scheme, the guarantee for non-resident depositors is capped at the total amount owed to such depositors at the date of introduction, allowing for growth of 10% per year. The second type is Non-Bank Deposit Takers and the third type is Collective Investment Schemes. The scheme guarantees principal and interest for those guaranteed financial institutions that go into default between 12 October 2008 through to 12 October 2011. The cap on the value of deposits is \$NZ1 million for individual investors.<sup>6</sup>

### Wholesale Funding Scheme

The objective of the wholesale funding scheme was to facilitate access to international markets by New Zealand financial institutions in a global environment where international investors remain highly risk adverse and because it was in line with what other Governments had offered.<sup>7</sup>

The aim of this scheme is to support the re-entry of New Zealand banks to regular foreign markets on a scale commensurate with the economy's overall financing needs. It is available to financial institutions that have an investment grade credit rating and have substantial New Zealand borrowing and lending operations involving non related entities.<sup>8</sup> The facility operates on an opt-in basis by institution and by instrument. New issues of senior unsecured negotiable or transferable debt securities are eligible for inclusion. A guarantee fee is charged, differentiated by the credit rating of the issuer and the term of the security being guaranteed.<sup>9</sup> There are also other conditions that apply.

The Wholesale Guarantee Scheme is to remain the same during the extended period.

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<sup>6</sup> New Zealand Treasury, "Questions and Answers: Retail Deposit Guarantee Scheme Extension" [25 August 2009] <<http://www.treasury.govt.nz/economy/guarantee/retailextension/qanda>>

<sup>7</sup> New Zealand Treasury, "The Economy of New Zealand: Overview" [2009], 14 <<http://www.treasury.govt.nz/economy/overview/2009/nzefo-09-2.pdf>>

<sup>8</sup> New Zealand Treasury, "Crown Wholesale Funding Guarantee Scheme" [23 December 2008], 1 <<http://www.treasury.govt.nz/economy/guarantee/pdfs/wfg-policyguid-dec08.pdf>>

<sup>9</sup> New Zealand Treasury, "New Zealand Wholesale Funding Guarantee Facility" [1 November 2008] <<http://www.treasury.govt.nz/economy/guarantee/wholesale/operationalguidelines>>

However, the new Retail Deposit Guarantee will include changes to the fees paid by institutions and changes to the cap on deposits. Bank deposits will be capped at \$500,000 per depositor per institution and non banks will have a cap of \$250,000 per depositor per institution.<sup>10</sup>

Anecdotally, the scheme is achieving its aim of providing confidence to overseas investors. In the writers' experience, there have been several instances since the schemes' inception where its existence has encouraged the deposit of funds into New Zealand banks.

### **Changes to the Securities Regulations**

The Government has reduced regulatory barriers faced on raising capital in New Zealand. It has achieved this through amending our securities rules.

The Securities Act 1978 and related Regulations regulate capital raising and the offer of securities to the public in New Zealand. The Act contains specific rules on whether an offer is to be treated as an offer made to the public and thus to be regulated.<sup>11</sup> The Act seeks to protect the investing public by requiring issuers to provide certain information to investors to ensure they are adequately informed by means of registered prospectuses when offering new securities to the public.<sup>12</sup>

In light of the current economic climate, it was inevitable that regulation of this nature be reviewed and changes considered. As a result of the review, in July 2009 the Securities (Disclosure) Amendment Act 2009 was enacted making changes to the disclosure requirements under the Act. We understand also that the Government intends to conduct a further review of the Securities Act later this year.

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<sup>10</sup> New Zealand Treasury, "Regulatory Impact Statement Extending the Retail Deposit Guarantee Scheme" <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-tsy-erdgs-sep09.pdf>>

<sup>11</sup> *Securities Act 1978*, s 3(2).

<sup>12</sup> *Securities Act 1978*, s 33(1)(c).

The amendment Act reduces some of the regulatory barriers by introducing a simplified disclosure prospectus regime (SDP) for listed issuers who are subject to the New Zealand Exchange (“NZX”) Listing Rules' continuous disclosure obligations. The simplified disclosure prospectus aims to reduce compliance costs for issuers by removing in certain circumstances the requirement to disclose, in offer documents, information that is already disclosed to the market.<sup>13</sup>

The SDP regime provides for:

- Listed issuers who are already subject to continuous disclosure requirements to be required to produce only one disclosure document for a securities offering, instead of a full prospectus and an investment statement.
- A simplified disclosure prospectus for offers of securities of the same class as listed securities (which will rely more strongly on continuous disclosure).
- A simplified disclosure prospectus for offers of securities that rank equally or in priority to listed securities (which will rely on continuous disclosure to a slightly lesser extent).
- Listed unit trusts to use the simplified disclosure prospectus for offers of additional listed securities, and to offer higher ranking debt securities.<sup>14</sup>

Despite the amendment Act and its changes, we are aware that the disclosure regulations are considered to still be at variance with accepted securities law practices in other countries. There have been doubts raised as to whether the new SDP regime will have a significant impact on the time and cost associated with securities offerings.

The amendment Act is intended, nevertheless, to attract and retain more companies to New

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<sup>13</sup> Power, S, “ New securities regulations will improve disclosure” [26 August 09]  
<<http://www.beehive.govt.nz/release/new+securities+regulations+will+improve+disclosure>>

<sup>14</sup> Ibid.

Zealand because their capital market needs can be effectively met here<sup>15</sup> and attract overseas companies to do business in New Zealand, as they will be encouraged to do so by the strengthened New Zealand economy.

### **Trans-Pacific Strategic Economic Partnership Agreement**

The Trans-Pacific Strategic Economic Partnership Agreement (“SEP”) was signed by New Zealand, Chile and Singapore on 18 July 2005 and by Brunei on 2 August 2005.<sup>16</sup> The SEP is aimed at assisting improvement to the business environment and opening up business opportunities. Under the SEP the parties are to apply preferential duty rates to other parties’ originating goods in accordance with the SEP rules of origin provisions.<sup>17</sup> It is the first multi-party free trade agreement linking the Americas with the Pacific.

Under the SEP, the initial signatories have agreed to phase out duties on exports by member parties no later than 2017. For New Zealand’s part, it has agreed to phase out all its tariffs by 2015.<sup>18</sup>

The SEP contains rules that govern the area of free trade, including rules that deal with trade preferences and rules on which goods will qualify. In addition, the SEP also covers a wide range of services.<sup>19</sup>

Comprehensive negotiations for the United States to join the Trans-Pacific Agreement were announced in September 2008. Other countries including Australia, Peru and Vietnam are also expected to take part in the negotiations, bringing the total number of members from

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<sup>15</sup> Supra at 2.

<sup>16</sup> Ministry of Foreign Affairs and Trade, “Trans-Pacific Strategic Economic Partnership Agreement” <<http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/index.php>>

<sup>17</sup> New Zealand Customs, “Fact Sheet 31” <<http://www.customs.govt.nz/library/Fact+Sheets/Fact+Sheet+31+-+Questions+1+to+3.htm>>

<sup>18</sup> Supra at 16.

<sup>19</sup> NZPD Vol 630, 2006 : 1993

four to up to eight. These negotiations were scheduled to begin in March 2009. However they have been put on hold to give the US Administration time to review US trade policy before proceeding.<sup>20</sup>

A free trade Agreement with the United States of America has been high on New Zealand's policy goals for a very long time. The addition of the United States as a party to the SEP would provide New Zealand with a good prospect of achieving stronger investment and free trade opportunities with USA.<sup>21</sup>

### **Business Structures - Limited Partnerships**

The importance of being able to utilize appropriate business structures has attracted significant attention in the wake of the financially turbulent times. Investors and business owners will naturally look for greater certainty, protection and benefits through their business structures. Alongside the common business structures, such as sole traders, partnerships and limited liability companies, New Zealand has recently permitted the establishment of limited partnerships.

The New Zealand Government introduced the Limited Partnerships Act (LPA) during early 2009. This legislation introduced the limited partnership and the overseas limited partnership vehicles. The stated purpose of the LPA is to establish a modern regulatory regime of limited partnerships that give the business community the option of a flexible and internationally recognised business structure similar to those in overseas jurisdictions and to facilitate the development of the venture capital industry in New Zealand.<sup>22</sup> The regime has been based on the best practice from a number of overseas jurisdictions including United States (Delaware and California), Australia (New South Wales), Canada (Ontario, Jersey,

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<sup>20</sup> Supra at 16.

<sup>21</sup> Ministry of Foreign Affairs and Trade, "The Trans Pacific Strategic Economic Partnership Agreement - fact sheet" <<http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/transPac-Factsheet-2Mar09.pdf>>

<sup>22</sup> Limited Partnerships Act 2008, s 3

Guernsey and the United Kingdom.<sup>23</sup>

The introduction of limited partnerships in New Zealand will undoubtedly appeal to investors. This structure involves a mixture of partnership and company law principles and provides greater protection for investors than a partnership while still receiving the benefits of being taxed as a partnership.<sup>24</sup>

Features of the limited partnership regime in New Zealand include:

- a separate legal personality
- an indefinite lifespan if desired
- safe harbour activities (various activities that the limited partners can be involved in while not participating in the management of the limited partnership)
- tax treatment for limited partnerships.<sup>25</sup>

On overseas limited partnership is a one that has been formed outside New Zealand but must register under the LPA because it is engaged in business activities in New Zealand.<sup>26</sup>

This step introduces a structure of international standard that is already familiar and used widely in many other countries with the intention that it will encourage potential investment partners who may desire discretion because of its confidentiality provisions. The structure recognises that limited partners may not wish to publicly disclose their interest in a limited partnership and as a result limited partner information and details relating to limited partners is not available for public search on the limited partnership register.<sup>27</sup>

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<sup>23</sup> Plunket, C and Wells, N, "Limited Partnerships" *NZLS Seminar* [April 2008], 3

<sup>24</sup> Ibid.

<sup>25</sup> The Companies Office, "Introducing Limited Partnerships" <<http://www.companies.govt.nz/cms/other-registered-entities/limited-partnerships/introducing-limited-partnerships/>>

<sup>26</sup> Limited Partnerships Act 2008, s 4.

<sup>27</sup> Limited Partnership Act 2008, s 115.

One of the significant attractions in using a limited partnership is the flow-through tax status which makes it a useful vehicle for investments expected to make losses early in the investment period, where capital gains are expected or where some participants have special tax status (i.e. non-resident or tax exempt).<sup>28</sup>

It is vital, however, that limited partners be aware of the safe harbour activity restrictions, which are provided under the schedule to Act. The safe harbour activities are those that do not constitute participation in the management of a limited partnership. Limited partners are only liable to the extent of their capital contributions unless they take part in the management of the limited partnership.<sup>29</sup> If they breach the restrictions they could be liable to the same level as a general partner.<sup>30</sup>

The use of limited partnerships is intended to remove some of the barriers to foreign capital investment, and allow New Zealand businesses to compete internationally on a level playing field for venture capital funds.<sup>31</sup>

## **Review of the Tax system**

The tax environment has a significant impact on the attractiveness of New Zealand's business environment and it is considered that as presently structured it does not seem to encourage growth.<sup>32</sup>

New Zealand currently has a

- number of international double tax treaties

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<sup>28</sup> Supra at 23, p 1.

<sup>29</sup> Supra at 27, s 31 and Schedule.

<sup>30</sup> Ibid, s 30

<sup>31</sup> Supra, at 25.

<sup>32</sup> Whitehead, J "Positioning New Zealand for a Post-Recession World" a speech by the Secretary to the Treasury [3 June 2009]

- large proportion of total revenue raised through personal and corporate taxes
- company tax rate among the highest in the smaller OECD economies, and a
- wide variety of effective tax rates on capital investment income depending on the type of investment and its source.<sup>33</sup>

New Zealand is responding to the worldwide trend of lowering withholding taxes via double tax treaty agreements. It has recently entered into a revised NZ/US treaty, which is likely to become New Zealand's new standard for double tax agreements with the lower capped rate of withholding taxes as being one of the major features of the agreement.<sup>34</sup> The reduction of withholding tax rates on interest, dividends and royalties has been welcomed by businesses and is one more step in the right direction of encouraging economic recovery.

The Government released its tax policy work programme in April 2009. The Finance and Revenue Ministers have announced that over the next 18 months, the primary emphasis of the work programme would be on tax policy that will help New Zealand to be more competitive in world markets. The Ministers also advised that the next step will be "considering extending the exemption of active income arising from the offshore operation of New Zealand-based businesses to non-portfolio investment funds, branches of New Zealand companies, and financial institutions".<sup>35</sup>

A tax working group made up of officials and both business and academic experts has been set up to look at and advise on medium-term policy options for the taxation system.

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<sup>33</sup> Whitehead, J "Tax working group session: the Fiscal Framework" a speech by the Secretary to the Treasury [5 June 2009].

<sup>34</sup> New Zealand Government, "Protocol updates US-NZ double tax agreement" Government Release by Minister of Finance [2 December 2008] <<http://www.beehive.govt.nz/release/protocol+updates+us-nz+double+tax+agreement+0>>

<sup>35</sup> New Zealand Government, "Tax Policy Work Programme focused on international competitiveness, retaining revenue" Government release [20 March 2009] <<http://www.beehive.govt.nz/release/tax+policy+work+programme+focused+international+competitiveness+retaining+revenue>>

Although capital gains tax is widely a standard practice in most OECD countries, New Zealand has never had a general capital gains tax. It is a topic that has often debated and consequently rejected. We understand that this is one of the primary options that the working group is considering.

There is a system in New Zealand for taxing some capital gains, however, it is dependent on the circumstances and involves an objective assessment on whether there is an intention to re-sell at the time of the investment. The result of a capital gains tax on investment property could mean a possible reduction of personal tax rates in particular the top tax rate of 39 cents.<sup>36</sup>

The Government has identified that it must create a world-class tax system to increase productivity and beat the recession. There has been obvious hesitance from the Government surrounding the introduction of a general capital gains tax, but it has confirmed that it will not rule out that option. It seems that the possibility of New Zealand introducing a general capital gains tax is more likely now than ever before.

## **Business Migrant Rules and Changes**

The Government recently released a new business migrant policy. This supports the idea that investor migrants bring business experience, international connections and financial capital and they make a significant contribution to New Zealand's economic situation.<sup>37</sup>

The new policy aims to attract financial capital to local firms or Government by providing residence to people who wish to make a significant financial contribution to New Zealand's

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<sup>36</sup> Dann, C "Few Friends for Capital Gains Tax" TVNZ, 5 June 2009 <<http://tvnz.co.nz/business-news/few-friends-capital-gains-tax-2769939>>

<sup>37</sup> New Zealand Government, "Active Investor Migrant Policy" Cabinet Paper <<http://www.dol.govt.nz/PDFs/Immigration-Act-Review-Active-Investor-Migrant-Policy-Cabinet-Paper.pdf>>

economy.<sup>38</sup> The investor category has received a complete revamp. The policy is divided into two categories: The old Global Investor Category has been replaced with Investor Plus (Investor 1 Category) the old Active Investor Category has been replaced with Investor (Investor 2 Category).<sup>39</sup>

Investor Plus requires a minimum of NZ\$10 million in investments that must be retained for three years. In addition, the applicant must spend at least 20% of the second and third years of the investment period in New Zealand. There are no requirements in this category for age, business experience or English language.

Investor requires a minimum of NZ\$1.5 million be invested in New Zealand for four years and an additional NZ\$1 million for settlement purposes. The applicant must be aged 65 years or under, have a minimum of three years business experience and there are also English language requirements. If successful, an applicant must spend 40% of the second, third and four years of the investment period in New Zealand.

This new scheme is anticipated to boost New Zealand's economic performance by making it more attractive for business and entrepreneurial migrants due to the lower thresholds for investment. The changes are designed to attract migrants who want to invest or set up business in New Zealand.

The last revamp of the scheme was in 2007, but only attracted 23 migrants through the policy changes.<sup>40</sup> It will be interesting to review the statistics in two years time to see if the new changes have brought about increased migration.

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<sup>38</sup> Immigration New Zealand "Migrant Investment Policy – an overview"  
<<http://www.immigration.govt.nz/migrant/stream/invest/migrantinvestment/>>

<sup>39</sup> Ibid.

<sup>40</sup> New Zealand Government, "Business Migrant Scheme Revamped"  
<<http://www.beehive.govt.nz/release/business+migrant+scheme+revamped>>

## Anti- Counterfeiting Trade Agreement

New Zealand, along with a number of trading partners, including Australia, Canada, the European Union, Japan, Korea, Mexico, Singapore, Switzerland and the United States, is currently in negotiations to enter into a new Anti-Counterfeiting Trade Agreement (“ACTA”). It is a plurilateral agreement for the protection and enforcement of intellectual property rights (“IPRS”). It has been perceived by the Government that a co-operative effort is now required by governments to respond to the increase in global trade of counterfeit goods and pirated copyright protected works.<sup>41</sup> The Agreement is expected to:

- Increase international co-operation.
- Establish the best practices for enforcement.
- Strengthen the legal framework to combat breaches of IPR, especially copyright and trademarks infringement.
- Illustrate the Government’s resolution, that strong IP rights make an important contribution to economic development.<sup>42</sup>

Part of the focus of the legal framework for the ACTA is increased jurisdiction both in civil and criminal enforcement legislation to thwart the growing problem of counterfeiting and piracy. The legislative changes will be quite sweeping, as they include not only a revamp of the New Zealand Customs legislation but also financial reporting and criminal legislation.

The perceived benefit for overseas investors and businesses from countries (who are parties to ACTA) when dealing with New Zealand, is that they can be confident that there is an agreed protocol in place for the prevention and detection of counterfeit and pirated goods and enforcement of related sanctions. Thus ensuring that there is sustainable

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<sup>41</sup> Ministry of Economic Development, “Anti-Counterfeiting Trade Agreement”, 1  
<[http://www.med.govt.nz/templates/ContentTopicSummary\\_34357.aspx](http://www.med.govt.nz/templates/ContentTopicSummary_34357.aspx)>

<sup>42</sup> Ibid.

development of the world economy by combating global infringements of IPR's.<sup>43</sup>

### **Legislation amending Copyright Act and Trademarks Act**

#### Copyright Act

In combination with the changes to stem from the ACTA agreement, there is a focus on increased IPR protection with a new Copyright Act, which largely came into effect on 28th February 2009. But due to large public outcry and national and international criticism, one particular section (Section 92A) has been delayed indefinitely and is currently the subject of public submission and review.

Section 92A required Internet Service Providers ("ISP's") to have an account termination policy in appropriate circumstances for copyright infringers.

The concerns were multiple and included:

- How to provide guidance for ISPs and rights-holders on how section 92A would operate. There were no agreed guidelines as they were still being negotiated in a voluntary *ISP Copyright Code of Practice*.<sup>44</sup>
- Whether there would be penalties if the accuser turns out to be mistaken?
- Concern was also raised as to whether internet disconnection was a proportional response to copyright infringement.<sup>45</sup>

Trade Marks (International Treaties and Enforcement) Amendment Bill which will amend

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<sup>43</sup> Ministry of Economic Development, "Information Sheet: Anti-Counterfeiting Trade Agreement", 1  
<[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_34358.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_34358.aspx)>

<sup>44</sup> Ministry of Economic Development, "Invitation for Further Submissions, 15 May 2009", 1  
<[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_41169.aspx - A2](http://www.med.govt.nz/templates/MultipageDocumentTOC_41169.aspx - A2)>

<sup>45</sup> Ministry of Economic Development, "Section 92A Review Policy Proposal Document" 1  
<[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_41169.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_41169.aspx)>

The Copyright Act 1994 and the Trade Marks Act 2002

Amongst the proposed basket of new intellectual property reforms the New Zealand Customs Service legislation will be given greater powers to prosecute intellectual property rights (IPR) infringements. It is considered that such reforms are necessary, as the practical realities of border protection have increased significantly. Since 2001, NZ Customs' annual number of interceptions at the border for counterfeit or pirated goods has increased by more than 300 per cent.<sup>46</sup>

At present Customs has no ability to prosecute IPR infringement. Under the proposed legislation, staff of the Ministry of Economic Development's enlarged National Enforcement Unit will be empowered to investigate offences, detain goods, and obtain search warrants. Customs officers will also gain additional powers to deal primarily with importing offences.<sup>47</sup>

Currently, the primary tool for combating counterfeit goods entering New Zealand is the Customs' border protection notice system.<sup>48</sup> Under this system, the owner or the owner's authorised agent of a registered trademark or a copyright work can give a notice to Customs, showing ownership of the trademark or work and requesting the detention of any goods bearing infringing signs or pirated copies of the work.<sup>49</sup>

Customs will then detain any goods that may be subject to a notice, and will carry out an investigation into them. A determination is made as to whether the goods appear to be goods to which a notice relates. The determination is issued to the rights owner, and includes details of the importer, the supplier, and the goods. A copy is also sent to the importer. The rights owner can then commence action in the High Court against the

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<sup>46</sup> Ministry of Economic Development, "Amendments Targets Counterfeit and Pirated Goods- Minister of Customs and Associate Minister of Commerce Media Statement", 1

<[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_32536.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_32536.aspx)>

<sup>47</sup> New Zealand Customs Service, "Countering Counterfeiting"

<<http://www.customs.govt.nz/about/News/Countering+counterfeiting.htm>>

<sup>48</sup> Ibid, Trade Marks Act 2002, in Sub Part 3, and Copyrights Act 1994 in Part 7

<sup>49</sup> Supra, at 47.

importer, including an order to obtain possession of the goods.<sup>50</sup>

Lodging a notice is currently the only way that Customs can help stop counterfeit goods entering the marketplace.<sup>51</sup>

It is considered that the proposed amendments will not only provide better protection of IPR's but will be good for both businesses and consumers alike by:

- Reducing business costs associated with protecting trademarks and copyright.<sup>52</sup>
- Assisting the holders of IPR's to obtain a return on the research and design investments they have made and consumers to have greater confidence that the products are genuine and authentic.<sup>53</sup>
- Ensuring that border interceptions of counterfeit and pirated goods contribute to a global partnership aimed at reducing this trade.<sup>54</sup>

When the Bill passes it will enable New Zealand to join three international trade mark treaties aimed at reducing business costs associated with protecting trade marks, especially for firms looking to market their goods and services overseas.<sup>55</sup>

The three treaties in question are the Singapore Treaty on the Law of Trademarks, the Nice Agreement Concerning the International Classification of Goods and Services for the

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ministry of Economic Development, "Government Looking to Reduce Trade Mark Compliance Costs- Associate Minister of Commerce Media Statement", 1  
<[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_22051.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_22051.aspx)>

<sup>53</sup> Ministry of Economic Development, "Amendments Targets Counterfeit and Pirated Goods- Minister of Customs and Associate Minister of Commerce Media Statement", 1  
<[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_32536.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_32536.aspx)>  
The New Zealand Government, "anti-counterfeiting bill passes first reading"  
<<http://www.beehive.govt.nz/release/anti-counterfeiting+bill+passes+first+reading>>

<sup>54</sup> Ministry of Economic Development, "Regulatory Impact Statement", 1  
<<http://www.med.govt.nz/upload/52996/ris.pdf>>

<sup>55</sup> Supra, at 52.

Purposes of the Registration of Marks, and the Madrid Protocol Relating to the Madrid Agreement.<sup>56</sup>

### ***Anti-Money Laundering and Countering Financing of Terrorism Bill (“AML/CFT”)***

This Bill, if passed, will have wide-ranging effects on financial institutions, their customers and lawyers. As part of New Zealand’s involvement in the international Financial Action Task Force (“FATF”) New Zealand needs to comply with the FATF recommendations at the risk of being blacklisted.<sup>57</sup>

The Bill will amend the existing Anti Money Laundering and Countering Financing of Terrorism (“AML/CFT”) regime and require that “*Reporting Entities*”<sup>58</sup>:

- upgrade their customer due diligence (CDD) measures;
- produce, implement and maintain a detailed written AML/CFT risk assessment and compliance programme and prepare Codes of Practice;
- appoint an AML/CFT compliance officer;
- enhance their obligations in relation to suspicious transactions, record keeping, and cross-border transportation of cash;
- prohibit facilities involving anonymity or false customer names and being involved with “shell banks”; and
- impose civil and criminal penalties for non-compliance on businesses and their directors and senior managers.<sup>59</sup>

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<sup>56</sup> Trade Marks (International Treaties and Enforcement) Amendment Government Bill (Number 245-1), Explanatory Note

<sup>57</sup> Kavanagh, L., & Lloyd, A. (2009, August). “NZ wakes up to Anti-money laundering risks-you should too” *NZ Lawyer On Line*, 118  
<<http://www.nzlawyermagazine.co.nz/Archives/Issue118/118F7/tabid/1905/Default.aspx>>

<sup>58</sup> Anti-money Laundering and Countering Financing of Terrorism Government Bill 2009 No 46-1 Which defines reporting entities as meaning:

- (a) “*Financial institutions*”, as defined in the Bill
- (b) Casinos.

- (c) Any other person required by any other Act to comply with the legislation.

<sup>59</sup> Supra, at 56.

The expanded definition of reporting entities may have the unexpected effect of capturing previous entities that were not previously reporting entities under the Financial Transactions Reporting Act 1996. Critics have noted that this new Bill will add a cost to doing business in New Zealand and such cost and preparation will potentially affect not just the financial sector but also other members of industries and professions where money laundering could occur such as lawyers, accountants, real estate agents, casinos and jewelers.<sup>60</sup>

The Bill follows closely the format and content of the Australian Anti-Money Laundering and Counter-Terrorism Financing Act 2006, but it should be noted that there are differences to be aware of.<sup>61</sup>

The Bill is a significant piece of proposed legislation that will go some way to ensuring New Zealand complies with the financial regulatory and enforcement FATF guidelines. By doing so, New Zealand ensures it will continue to participate in the global trade markets at an internationally accepted standard. Which has the flow on effect of providing confidence to overseas entities proposing to invest and do business in New Zealand.

## **Overseas Investment Act 2005**

### Introduction

The Government announced earlier this year that it would be reviewing the overseas investment rules with a view to making them simpler to use and have more transparency in their application for overseas investors while at the same time protecting sensitive land, assets and resources and making it easier for local businesses to access scarce global funds. Both legal firms and business commentators have applauded these moves.<sup>62</sup>

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<sup>60</sup> KPMG New Zealand, “Anti-Money Laundering/counter-Terrorist financing-Act now or it may cost you dearly says KPMG director” <<http://www.kpmg.co.nz/pages/103016.html>>

<sup>61</sup> Greenwood, P, Shrive, C, and Beaumont, I, “The new anti--money laundering regime is coming soon” [December 2008], 103 *NZ Lawyer On Line* <<http://www.nzlawyermagazine.co.nz/Archives/Issue103/F6/tabid/1507/Default.aspx>>

<sup>62</sup> Kloeten, N, “Overseas Investment Act review- “keep it simple” says lawyer” *National Business Review*, 19 March 2009 <[www.nbr.co.nz/print/85563](http://www.nbr.co.nz/print/85563)>

## Regime Overview

Consent is required before an “overseas person” invests in “sensitive land” or “significant business assets” or fishing quota.

Overseas persons are defined under the Overseas Investment Act 2005 as someone who is not a New Zealand citizen or resident and captures all overseas companies. The definition also captures New Zealand companies or entities with 25% or more foreign ownership or control.

Sensitive land includes non-urban land areas greater than five hectares or other land classified as sensitive because it contains or adjoins waterways, parks, conservation areas, islands, or areas of historic significance.

## Current Issues

Broadly there are five areas in which the Act, as it stands, gives rise to legal issues. They are:

- the definition of “sensitive land”, which often captures small and unforeseen transactions.<sup>63</sup>
- the operation of the crown buy back procedure for “special land”.<sup>64</sup>
- the threshold definition of “overseas person” is quite low. Currently an “overseas person” is defined as a:
  - person who is not a citizen of nor ordinarily resident in New Zealand;
  - company or body corporate incorporated outside of New Zealand;
  - company incorporated in New Zealand where 25 percent of any class of shares are owned or controlled by an overseas person; and

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<sup>63</sup> The New Zealand Government, “Government simplifies overseas investment” [23 July 2009] <<http://www.beehive.govt.nz/release/government+simplifies+overseas+investment>>

<sup>64</sup> Ibid.

- person acting on behalf of or under the control or direction of an overseas person. In particular a 25% interest in a company does not usually represent a controlling interest in the company.<sup>65</sup>
- the Act does not provide for fluidity and discretion when an overseas person who has subsequently been through the Overseas Investment Office (“OIO”) application process transfers or sells the interest to another overseas person.<sup>66</sup>
- legislative uncertainty, as evidenced by some recent amendment to the related Regulations is seen as diminishing New Zealand’s ability to attract overseas investment.<sup>67</sup>

#### Definition of “Sensitive Land”

The Act requires that the Regulator must compile and keep a list of reserves and public parks, and other areas that are held under statute with a primary purpose of protecting natural and physical resources or historic heritage, providing public access to natural and physical resources or historic heritage.<sup>68</sup> To date, no such list has been compiled but guidelines have been issued by the OIO<sup>69</sup> giving a broad definition of what is considered to be sensitive areas. This broad definition coupled with the fact that the definition of ‘sensitive land’ is deemed to be an objective test i.e. there are no degrees of sensitivity, the land is either sensitive or it is not and having the onus placed on the applicant to establish if the land is sensitive or not, creates uncertainty for the applicant. It is indicated that the applicant, in establishing if land is sensitive or not, should engage a LINZ accredited crown

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<sup>65</sup> Ibid.

The New Zealand Treasury, “Background Paper for the review of the Overseas Investment Act” <<http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment/pdfs/bp20july04.pdf>>

<sup>66</sup> Supra, at 65.

<sup>67</sup> Ibid.

<sup>68</sup> Cullen, Dr. Hon M “Ministerial Directive” [31 October, 2007] <<http://www.linz.govt.nz/docs/overseas-investment/oio-publications-ministerial-directive-letter.pdf>>

<sup>69</sup> Land Information New Zealand, “List of Reserves, Parks and Other Sensitive areas under Section 37 of the Overseas Investment Act 2005” [2005] <<http://www.linz.govt.nz/docs/overseas-investment/oio-publications-s37-list.pdf>>

Land Information New Zealand, “Sensitive Land Retrieved” [2005] ><http://www.linz.govt.nz/overseas-investment/applications/technical-resources/sensitive-land/index.aspx>>

property supplier or a legal firm with OIO expertise.<sup>70</sup>

The major criticism of the broad definition is that it catches land of low or minor national interest. Often commercial or industrial sites not worthy of protection are caught by the application of the definition of “sensitive land”.

We understand that there is some indication from the OIO that a list will never be compiled and if that is correct then it has been suggested that the previous standard setting the minimum area for adjacent parks and reserves before the Act was introduced be reinstated.

Crown buy back procedure for “special land”

The purchaser is obliged to offer “special land” back to the Crown as a first option when it sells. There are problems with the definition of special land as:

- It is often difficult to determine who owns the beds of waterways.
- The process of survey, valuation and negotiation set out in the Regulations is not adhered to.
- Often insignificant waterways are caught in the definition of “special land”.<sup>71</sup>

One way of ameliorating this issue is to amend the legislation so it only deals with access and ownership of significant bodies of water and separate legislation is enacted that deals with Crown ownership and public access to waterways.

Definition of “overseas person”

It has been considered that the threshold for triggering a general net benefit review at \$NZD 100 million is too low and ought to be increased. Canada has changed its threshold and the review is triggered when the enterprise value of the business is at or above \$CND 600

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<sup>70</sup> Morgan, P, “The Overseas Investment Act” in NZLS (Ed) *Property Law-Looking to the Future* (2008) 144.

<sup>71</sup> Land Information New Zealand, “Offer Back of Special Land” [9 April 2009]  
<<http://www.linz.govt.nz/overseas-investment/applications/technical-resources/offer-back-special-land/index.aspx>>

million. Its previous threshold was “book value“ of \$CND 312 million value of the business.<sup>72</sup>

The review of the Act will also consider whether the acquisition of “significant business assets” or “sensitive land” with more than a 25% ownership or control by an overseas applicant is set at the right level. We understand that criticism has been leveled at the 25% threshold on the basis that such percentage of ownership does not truly represent actual control.<sup>73</sup>

### *Legislative Certainty*

Early in 2008, a change was made to Regulations under the Act to provide that Ministers, when considering applications in relation to sensitive land, may take into account the benefits of maintaining local control in relation to important strategic infrastructure. This amendment was in direct response to the Canadian Pension Plan Investment Board intentions to acquire a significant shareholding in the Auckland International Airport Limited. The net effect of that amendment was to create legislative uncertainty, as it would be hard to imagine when overseas investment would ever be able to assist New Zealand to maintain control of important infrastructure on sensitive land and accordingly, how this criteria could ever be met.

It is suggested that this change be revoked in favour of creating certainty.<sup>74</sup>

### Immediate Changes

Some rule changes were made soon after the announcement this year that the Act would be simplified.

In July 2009, the Regulations were amended to provide that certain specified transactions are exempt from the requirements of the Act to obtain consent for overseas investment in

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<sup>72</sup> US Department of State, “Investment Climate Statement- Canada” [2009]  
<<http://www.state.gov/e/eeb/rls/othr/ics/2009/117420.htm>>

<sup>73</sup> The New Zealand Government, “Government simplifies overseas investment” [23 July 2009]  
<<http://www.beehive.govt.nz/release/government+simplifies+overseas+investment>>

<sup>74</sup> Ibid.

sensitive land, significant business assets or fishing quota.<sup>75</sup> The amendments also changed to increase its application to intra-group transactions where the companies are at least 95% owned by overseas companies.

In addition, three new exemptions were provided:

- an overseas person may acquire two or more security arrangements if they are acquired together as a portfolio or bundle and the total value of consideration provided does not exceed \$NZD100 million;
- temporary acquisition of securities for underwriting or sub-underwriting purposes; and
- an overseas person who has previously been granted consent to acquire securities may acquire more of those securities provided the subsequent acquisition increase the overall holding by less than 5% and occur within five years of the date on which the overseas person was granted consent for the initial acquisition of the securities.<sup>76</sup>

However, it is noted that despite simplification of the process and procedure for granting overseas applications, the application fees have been increased with effect from 3 September 2009. The fees are determined by the nature of the application, and the vast majority of applications are consents for:

- a land transaction determined by the relevant Minister - \$NZD 8,700.00;
- a land transaction determined by the OIO under delegation - \$NZD 8,200; or
- a significant business assets transaction determined by the Regulator under delegation - \$NZD 2,100.00.<sup>77</sup>

Making an application has become, increasingly, a specialist area. Without specialist

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<sup>75</sup> Land Information New Zealand, "Amendments to Overseas Investment Regulations" [9 July 2009] <<http://www.linz.govt.nz/overseas-investment/about-oio/news/2009/0709-regulations-amendment/index.aspx>>

<sup>76</sup> Ibid.

<sup>77</sup> Land Information New Zealand, "New Overseas Investment Office Fees Set" [6 August 2009] <<http://www.linz.govt.nz/overseas-investment/about-oio/news/2009/0806-new-oio-fees-set/index.aspx>>

assistance, it has been noted that a reasonably straightforward application can become a lengthy and costly process.<sup>78</sup>

Factors often overlooked are timing issues, such as clients who enter into a sale and purchase agreement using the New Zealand standard REINZ/ADLS agreement for sale and purchase of real estate and tick the box noting the agreement is conditional on the granting of the OIO application. The time limit for fulfilling the condition is two months after the date of the agreement. However, the current turnaround time for an application in the OIO is 50 days, therefore the time frame in the agreement needs to be extended or risk losing the contract. Even though the stated turnaround is 50 days<sup>79</sup> for a straightforward application there is no statutory timeframe within which an application must be decided. Anecdotally it is understood that in practice it is more likely to be around 12 to 16 weeks to process the application, so practically it is best to amend the condition to provide consent to be extended.<sup>80</sup>

## Statistics

In support of the basis for the rationalisation of the Act is statistical evidence that presently 98% of all applications are approved.<sup>81</sup> The Government considers that by simplifying the overseas applications for investors, it would not only make the process easier but also the time approval swifter. Presently, the applications are processed on a first-come, first served basis, but the OIO aims to make a decision on well-prepared and straightforward applications, where no third party consultation is required or special land is involved, within 50 working days of the date of registration.<sup>82</sup>

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<sup>78</sup> Petersen, A, "The Overseas Investment Act" in NZLS (Ed) *Property Law-Looking to the Future* (2008) 185.

<sup>79</sup> Land Information New Zealand, "Application Assessment & Timeframes"  
<<http://www.linz.govt.nz/overseas-investment/applications/assessment/index.aspx>>

<sup>80</sup> Supra, at 78.

<sup>81</sup> The New Zealand Government, "Government simplifies overseas investment" [23 July 2009]  
<<http://www.beehive.govt.nz/release/government+simplifies+overseas+investment>>

<sup>82</sup> Supra, at 79.

Assisting the process for investment application is the introduction of a revised OIO website which is accessed through the LINZ (Land Information New Zealand) website, which was launched on 23 June 2009. The website is useful for lawyers as it can be used to either provide a reference for clients needing an explanation of the legislation, and for up to date guidance on the OIO's interpretation of the overseas investment legislation.<sup>83</sup> The site has non-technical information for laypersons and more layers for practitioners. It is considered that this is an additional tool for simplifying the application process.

Concluding remarks on the reforms to the Act

The amendments to the Act and potential for further reforms form an important part of the Government's policy response to the economic recession and the international financial crisis. It is vitally important that overseas investment be encouraged. The value of overseas investment cannot be underestimated. As recent statistics from the OIO show, during the first six months of 2009 over 68 applications were approved with a combined asset value of \$NZD 11,454,999,858.00.<sup>84</sup> That, when considering New Zealand's size and economic relativity, is a very significant level of investment.

### **Conclusion: Has New Zealand done enough?**

The big question is whether New Zealand's response to the global financial crisis has removed enough stops, introduced enough incentives and overall done enough to induce investors and businesses to enter and operate here? Only time will reveal the true extent of the Government's success.

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<sup>83</sup> Land Information New Zealand, "New & Improved OIO section now live" [23 June 2009] <<http://www.linz.govt.nz/about-linz/news-publications-and-consultations/news-and-notice/corporate/2009/0623-oio-section-live/index.aspx>>

<sup>84</sup> Land Information New Zealand, "Decision Summaries & Statistics" <<http://www.linz.govt.nz/overseas-investment/decisions/decision-summaries/2009-06/index.aspx>>

One indicator is the NZ Roy Morgan Consumer Confidence Survey, which indicated that consumer confidence rose to its highest level in early September 2009 since March 2008, which was the first quarter in which New Zealand entered recession.<sup>85</sup> The Business confidence index is also reported to be at a 10 year high.<sup>86</sup> Predictions are for the New Zealand economy to exit recession in the September quarter this year, although subsequent growth is set to be subdued into 2010.<sup>87</sup>

Therefore, after more than one and a half years on, it appears that NZ may be emerging from recession, albeit slowly.<sup>88</sup> Nevertheless, there are barriers that remain, which prevent businesses seeking to operate in New Zealand.

The Government has set up a Capital Market Development Taskforce (“the Taskforce”) to review the current state of New Zealand's capital markets, the international context, future risks and opportunities and key changes necessary to deliver the best possible financial system for New Zealand.<sup>89</sup>

An interim report was issued by the Taskforce on 31 July 2009. The issues and observations they have identified include:

- thin public capital markets;
- patchy private markets that are not well linked to public matters;
- low levels of investment in capital market produces;

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<sup>85</sup> Roy Morgan Research, “New Zealand Roy Morgan consumer Confidence gains 2.2 pts to 114.5” <http://www.roymorgan.com/news/polls/2009/929/>>

<sup>86</sup> Hickey, B, “interviewed on TV3 midday news about business confidence” in *interest.co.nz* [2009] <<http://www.interest.co.nz/ratesblog/index.php/2009/09/01/bernard-hickey-interviewed-on-tv3-midday-news-about-business-confidence/>>

<sup>87</sup> Tarrant, A, “Consumer confidence highest since beginning of recession, survey shows” in *interest.co.nz* [2009] <<http://www.interest.co.nz/ratesblog/index.php/2009/09/07/consumer-confidence-highest-since-beginning-of-recession-survey-shows/>>

<sup>88</sup> NZPA, “NZ coming out of recession, says Key” in *Television New Zealand Limited* [2009] <<http://tvnz.co.nz/politics-news/nz-coming-recession-says-key-2846183>>

<sup>89</sup> Ministry of Economic Development, “CMD Taskforce Capital Market Development” <[http://www.med.govt.nz/templates/ContentTopicSummary\\_37568.aspx](http://www.med.govt.nz/templates/ContentTopicSummary_37568.aspx)>

- investor outcomes undermined by poorly regulated financial intermediaries and advisors and their practice;
- significant problems in the market for financial advisors; and
- outdated regulation an unnecessary compliance costs for issuers.<sup>90</sup>

So it appears that there are further regulatory and policy changes that would promote accessibility and incentives to overseas companies seeking to operate in New Zealand and these still need to be addressed.

Undoubtedly, New Zealand has moved with the rest of the international trading community to address the global financial crisis by amending, passing and initiating a raft of legislation aimed at stimulating economic recovery and encouraging overseas investment. New Zealand has achieved much success with its ability to evolve and adapt to overcome the difficulties of the global financial crisis and recession. Although in many aspects New Zealand is merely keeping up with the rest of the world, it is forging ahead with free trade agreements, double tax treaties and enabling itself despite its unique geographical “handicap”. However, as with anything, further improvement is always possible.

Although far from a robust recovery, there are green shoots indicating that the reforms are encouraging economic recovery rather than stifling it.

This paper has been prepared by Katrina Wilson and Rachel Lewis who are staff solicitors at Clendons North Shore, Auckland, New Zealand, and is necessarily a greatly condensed view of the laws referred to. You should seek further information and advice before taking any steps in reliance on any of the statements made in this paper. If you have any questions on the matters discussed in this paper please contact in the first instance the New Zealand Mackrell Partner, Brian Joyce at Clendons North Shore by email to [brian.joyce@clendons-ns.co.nz](mailto:brian.joyce@clendons-ns.co.nz) or phone 64 9 377 8419

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<sup>90</sup> Ministry of Economic Development Capital, “Market Development Taskforce - Progress Report” [31 July 2009] <<http://www.med.govt.nz/upload/69666/Interim-report.pdf>>