# FDI and M&A Legal Guidelines[i]: M&A in New Zealand

**The below summary of foreign investment regulation in New Zealand is a high level summary only and is not intended to be legal advice. The application of the laws relating to investment in New Zealand will differ depending upon, amongst other things, the structure of the investment and the business of the target. Specific legal advice should be sought from a lawyer qualified in New Zealand before making any investment into New Zealand.**

## 2. M&A laws and regulations & regulatory approvals

### 2.1. What are the principal laws and regulations applicable to M&A transactions in relation to listed and private company in your jurisdiction? What are the major issues dealt with in such laws and regulations?

*There are a number of ways in which an overseas investor can acquire a New Zealand business or entity. The investor could acquire the company itself, or just the business assets. The acquisition structure will depend on various factors, such as whether the target is a private (closely held) or public entity. The most common means of acquisition in New Zealand is by private treaty, between vendor and purchaser.*

*However, if the target is listed on the New Zealand Stock Exchange, or is a private entity above a certain size, then the acquisition must be done by way of a takeover offer, or through a scheme of arrangement.*

*If the Takeovers Code does not apply (see further below), the parties can agree by private treaty the terms on which a company's shares, or its business assets (as appropriate), will be bought and sold. The terms are usually set out in a sale agreement recording the assets being sold, the price – including how purchase price is calculated – and all other conditions of sale.*

*Overseas investors can generally expect the terms of a sale and purchase agreement in New Zealand, whether for shares or assets, to be similar to those of an equivalent transaction conducted in Australia or the UK. Use of warranty and indemnity insurance is not unusual.*

***In addition to the requirements of the OIA (referenced earlier in this article) and the Takeovers Code implications, referenced below, many other New Zealand laws may also be relevant depending upon transaction structure and the industry in which the target operates. Specific local legal advice will be required in each case in order to determine the requirements of any relevant laws.***

### 2.2. Are there any foreign investment review required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

*See responses to section 1 above.*

### 2.3. Are there any merger control required in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

*Yes, where an acquisition is likely to affect competition in a New Zealand market, it may require approval by the Commerce Commission (**Commission**). The Commission administers a voluntary clearance regime for mergers and acquisitions but can also take enforcement action to prevent anti-competitive transactions from going ahead if prior clearance is not sought. If*



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*the Commission grants a clearance, the merger is protected from legal action under New Zealand's competition laws.*

*The Commission may give clearance for a business acquisition if it is satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market. When making this assessment, the Commission considers whether a merger is likely to substantially lessen competition in a relevant New Zealand market by comparing the likely state of competition in that market if the merger proceeds, with the likely state of competition if the merger does not proceed. The relevant "market" is a market in New Zealand for the relevant goods and services, as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them. Any acquisition by one person or business of the assets or shares of another business is considered to be a merger.*

*Mergers between competitors are more likely to result in a substantial lessening of competition, particularly where the merger would remove a competitive constraint from the market or where the merger may increase the likelihood of coordination between competitors in the market. Mergers between businesses at different levels of a supply chain may also result in a substantial lessening of competition where the merged entity would have the ability or incentive to engage in total or partial foreclosure.*

*While there is no "trigger threshold" for seeking clearance, the Commission has adopted certain "concentration indicators" to give guidance as to whether a business acquisition may raise competition issues. These indicators provide that a merger is unlikely to require a clearance application where, post-merger, either:*

- *the three largest firms in the market have a combined market share of less than 70%, and the merged entity will have less than 40% of market share; or*
- *the three largest firms in the market have a combined market share of 70% or more, and the merged entity will have less than 20% of market share.*

*These "concentration indicators" are not hard and fast rules, and cannot be entirely relied on when assessing the competitive effects of a merger.*

*The prohibition on anti-competitive mergers applies to all mergers that affect a market in New Zealand. This includes a merger that takes place outside New Zealand involving non-New Zealand firms, provided the merger affects a market in New Zealand.*

*The clearance process requires the acquiring party to submit an application on a prescribed form that sets out the key competition issues, the rationale for the merger and evidence that the merger will not breach the Commerce Act. Current filing fees for a clearance application are NZ$3,680.*

***Businesses contemplating a merger should seek legal advice.***

*Once an application is filed, the Commission has 40 working days to make its decision. This timeframe is often extended – typically it takes around three to four months from filing to obtain clearance.*

*The Commission can also authorise a merger that would result in a substantial lessening of competition, if the public benefits resulting from the merger are found to outweigh the competitive harm. Current filing fees for an authorisation application are NZ$36,800.*

*Clearance and authorisation applications can only be granted before a transaction is completed (ie unconditional). It is quite common for acquisition agreements to be subject to a Commerce Act condition.*



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*Proceeding with an anti-competitive merger without the necessary clearance or authorisation risks enforcement action, which can result in a lengthy investigation and significant penalties (up to NZ$500,000 for an individual and NZ$5 million for a company), or a Court reversing a merger by ordering divestment of assets or shares. The New Zealand government recently proposed increasing penalties for companies to NZ$10 million.*

**2.4. Are there any other governmental and regulatory approvals required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?**

*The main governmental and regulatory approvals are from the Overseas Investment Office and Commerce Commission (as referenced above).* ***Additional regulatory approvals may be required for acquisitions with a specific structure (e.g. where securities are offered as consideration) or within specific industries (e.g. from the Reserve Bank of New Zealand for certain acquisitions in the financial sector), and will need to be considered on a case-by-case basis.***

## 3. M&A in relation to listed company

### 3.1. What are the principal methods of acquisition?

*The Acquisition of "Code Companies"*

*If an investor wishes to acquire the shares of a company listed on the New Zealand Stock Exchange (see further below), or the shares of a company above a certain size, that acquisition must be done in accordance with New Zealand's takeovers regime, set out in the Takeovers Code, unless a statutory scheme of arrangement is undertaken (see below).*

*The Takeovers Code applies to the proposed acquisition of shares in any "code company", being a company that:*

- *is listed on a New Zealand stock exchange (or has been listed in the previous 12 months); or*
- *has 50 or more shareholders holding voting rights and 50 or more share holdings, and is at least "medium sized".*

*A company will be "medium sized" if, together with its subsidiaries, it has total assets of at least NZ$30 million and/or it has total annual revenue of at least NZ$15 million (including its subsidiaries) based on its latest annual accounts.*

*The "Fundamental Rule"*

*The Takeovers Code's "fundamental rule" prohibits any person and its associates from acquiring more than 20% of the voting rights in a code company, or increasing its stake beyond 20% of the voting rights, other than through the permitted pathways.*

*The permitted pathways (set out in the Takeovers Code) include:*

- *acquisitions by means of a full or partial offer made in accordance with the provisions of the Takeovers Code;*
- *an acquisition or allotment approved by an ordinary resolution of shareholders of the code company in accordance with the provisions of the Takeovers Code; and*
- *an increase, of up to 5% a year, by a person holding between 50% and 90% of the voting rights in a code company.*



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*Where a full or partial offer is to be made for the shares in a "code company", the Takeovers Code specifies the process and terms to be followed by the bidder and the target entity. The Code also sets out the timetable for an offer. If additional regulatory consents are required (including under the Commerce Act or Overseas Investment Act) the bidder will need to factor those into the prescribed timetable. This may require engagement with the Takeovers Panel. The rules are highly prescriptive.*

***Scheme of Arrangement***

*As an alternative to an offer under the Takeovers Code, the acquisition of a widely held company may be achieved via a scheme of arrangement under Part 15 of the Companies Act 1993.*

*A scheme of arrangement is essentially a contract between the target company and its shareholders and / or creditors to reconstruct the company's share capital, assets or liabilities. This can include transferring the shares to a third party.*

*A scheme of arrangement occurs only by virtue of statute, and the process is strictly regulated by the Companies Act 1993 and approved by the High Court. A scheme requires complete co-operation between bidder and target, as the company involved must create the documents setting out the terms of the scheme, call a meeting of shareholders to vote on whether to approve the scheme, and apply to the High Court to have the terms of the scheme approved. Transaction timelines can be affected by Court timetabling, and by whether the transaction requires approval from the Overseas Investment Office, or any other regulator.*

**3.2. In what circumstances (if any) is a mandatory bid obligation incurred?**

*The New Zealand Takeovers Code does not include a "mandatory bid regime" (i.e. a requirement that, if a party moves through a specified threshold, it must bid for the remainder of the shares). Instead, the Takeovers Code includes a prohibition on exceeding the prescribed threshold (other than by permitted pathways).*

*However, it does include a "Compulsory Acquisition" regime whereby, a shareholder of a Code Company which, following an acquisition, holds 90% or more of the shares, may compulsorily acquire the remaining shares (or may be required to do so by the residual shareholders).*

**3.3. Is there a minimum price at which the offer must be made?**

*In context of code offer – there are no minimum pricing requirements for a Takeover Offer.*

*There are truth in takeovers rules that prevent a bidder from taking an action that is inconsistent with a clear contrary statement (eg, increasing the bid price after saying there would be no increases).*

*Under the compulsory acquisition rules (whereby a dominant owner (>90% shareholder) can squeeze out minorities), there are fair pricing mechanisms and rules to be followed.*

**3.4. How can the function of the board of directors of the target impact a proposed acquisition?**

*In all contexts, directors must act honestly and in what they consider to be the best interests of the company. Boards of companies targeted for acquisition may either be considered friendly or hostile (see below). The context will be very relevant.*

*Boards cannot take actions designed to frustrate an imminent or live takeover offer (eg establishing poison pills or selling off key assets) without shareholder approval.*



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*A "friendly" takeover will typically involve the offeror approaching the target company with an indicative offer to acquire 100% (or a specified percentage) of the target company by way of a takeover offer. In these types of takeovers, the Board of the target company will allow a period of due diligence (on either an exclusive or non-exclusive basis). The board's directors (especially its independent directors) will also recommend that its shareholders accept the offer.*

*In "hostile" takeovers, the offeror will not have access to confidential information or be able to do due diligence on the target company. It must base its offer price and terms on publicly available information and annual reports. Directors of the target company will engage in defensive tactics e.g. announcements to reject the offer and disclose information to the market which weaken the offer. As there are no restrictions on shareholdings up to 20%, offerors will often build a "pre-bid" stake of 19.9% to provide itself with some momentum prior to the offer going to the shareholders.*

*Further, a "scheme of arrangement" under Part 15 of the Companies Act 1993 may be put into place with approval by shareholders and the High Court. This is becoming the preferred way in which takeovers of Code Companies are effected because it is akin to a friendly takeover and provides certainty in the success of the acquisition. Scheme of arrangements have greater certainty in the outcome but introduce additional execution risks as they are a court-driven process whereby the court must approve the scheme of arrangement (and will always require shareholder approval as a condition of its approval).*

### 3.5. What key documentation is needed in the acquisition?

*In both friendly and hostile takeovers, the key documents prepared are the same:*

- *Takeover notice from potential purchaser – a short statement of intention to make an offer and contains the terms and conditions on which the purchaser is prepared to make that offer.*
- *Offer document to shareholders of target company – a long form document that contains all of the specific details of the takeover offer and other information which is material to a shareholder's decision on whether or not to accept the offer.*
- *Target company statement – this will contain the directors' recommendation on whether or not the company supports the takeover offer (this will be driven by whether it is a friendly or hostile takeover).*
- *Independent adviser's report on the merits of the offer, as prepared by the target company for the shareholders including the value of the offer being made to the shareholders.*

*In a scheme of arrangement, the key documents are:*

- *Scheme implementation agreement – this sets out the terms of the scheme. It also usually commits the target company's directors to recommend to the shareholders to vote in favour of the scheme (subject to a better proposal/offer from a third party).*
- *Notice of meeting of the target company's shareholders to vote to approve the offer.*
- *Scheme booklet on the offer to the target company's shareholders, which is provided at the same time as the notice of meeting. The scheme booklet contains all of the relevant dates, details and conditions of the scheme.*
- *Takeovers Panel:*



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  - *Letter of intention – letter to the Courts that indicate that it does not intend to object to the scheme of arrangement*
  - *Letter of no-objection – letter issued to the parties confirming the Panel's non-objection of the scheme of arrangement.*

- *Court documents submitted pursuant to Part 15 Companies Act 1993 by both the target company and potential purchaser to seek leave to approve the scheme of arrangement.*

**3.6. Do acquisition documents require pre-approval by any regulatory body prior to publication?**

*The Takeovers Panel will review the draft Target Company Statements, segments of any offer document and any other documents (e.g. under any schemes of arrangements) that have Takeover Code requirements.*

*In a scheme of arrangement, the Takeovers Panel approval is not required but it is market practice to seek its no-objection of the scheme – as such, it will review the draft scheme documents prior to release to market.*

*NZX will also review any documents (e.g. notices of meetings and offer documents) prior to release to the shareholders and the wider market for compliance with the NZX Listing Rules.*

***The contents of most of these documents are highly prescribed and you should seek specific legal advice if you are considering any of these proposed acquisition structures.***

## 4. M&A in relation to private company

**4.1. Are there any special rules in relation to the transferring of a business (compare with the simple share or asset acquisition)?**

*No (although note the comment above to the effect that, in addition to the Overseas Investment Act and Commerce Act, additional legislative requirements may be relevant depending upon the structure of the transaction and the industry in which the target operates).*

*In addition, we note that, consistent with other similar jurisdictions, the legal and administrative requirements for the implementation of an asset sale are likely to be more onerous than for a share sale given that the assets will need to be transferred individually (and all resulting requirements satisfied).*

**4.2. Do labor unit, works councils and other stakeholders (other than the vendors of the target) play a role in M&A?**

*If employees are part of a union, there may be obligations on the selling entity to consult with the union prior to give effect to an acquisition (this is particularly relevant in an acquisition of assets). Engagement with wider stakeholders is not typically required.*

**4.3. What are the principle minority shareholder rights given by law?**

*Under the Companies Act 1993, there are certain matters which require a special (75% majority) shareholder resolution. Where that matter is approved and there are shareholders who vote against it, those shareholders may be entitled to minority buy-out rights. The relevant matters are:*

*(a) adopting a constitution or, if it has one, altering or revoking the company's constitution;*

*(b) approving a major transaction;*



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*(c) approving an amalgamation of the company; or*

*(d) putting the company into liquidation.*

*A "major transaction" under the Companies Act means:*

*(a) the acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than half the value of the company's assets before the acquisition; or*

*(b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the company's assets before the disposition; or*

*(c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is more than half the value of the company's assets before the transaction.*

*(Assets includes property of any kind, whether tangible or intangible)*

*Minority buy-out rights apply in the same way for listed companies.*

*In addition to these minority buy out rights, a shareholder or former shareholder who considers that the affairs of a company have been, or are likely to be, conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial, may make an application to the court, and the court may take such steps as it considers just and equitable.*

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[i] ***The series on the investment and M&A laws in the member countries of RCEP is launched by DeHeng Law Offices. In each article of the series, a leading local law firm is invited to offer an overview of investment and M&A laws in the jurisdiction.***

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