# New Zealand Mergers & Acquisitions

## TRENDS AND INSIGHTS

February 2019

CHAPMAN TRIPP

# Contents



Large Law Firm of the Year *New Zealand Law Awards 2018*

Deal Team of the Year (>100 lawyers) *New Zealand Law Awards 2018*

New Zealand Law Firm of the Year *Chambers Asia Pacific Awards 2018*

Most Innovative National Law Firm (New Zealand) *IFLR Asia Awards 2018*

We look back at New Zealand's mergers and acquisitions (*M&A*) activity last year and identify the likely trends for 2019.

# Plain sailing for now but choppy waters ahead

## Continued strong M&A activity in the near term but risks are accumulating.

2018 was a good year for M&A activity, both globally and in New Zealand, with strong demand from cashed up buyers and generally benign economic conditions providing a tail wind.

The outlook for this year is for continuing high buyer interest, buoyed by the opportunity to obtain high-value acquisitions in a slightly less seller-friendly market.

But concerns around geopolitical and economic volatility, although present last year, are now becoming much more immediate – and this is likely to infect sentiment as the year progresses.

Brexit appears increasingly shambolic, Italy could soon be at the forefront of a new European debt crisis, Venezuela's political calamity is reaching boiling point and the US and China have escalated their trade war – with New Zealand a possible casualty.

The US Federal Reserve looks unlikely to raise interest rates in the near future (which could drive a fall in the US dollar, leading to less offshore M&A activity by US companies) and China's growth slowdown continues.

And, closer to home, factors such as the Reserve Bank's regulatory capital review is likely to lead to further tightening in debt markets.

New Zealand has been insulated to some extent from international developments by our geographic remoteness, and our reputation as a "safe haven" may make us an attractive investment destination in turbulent times.

So we approach 2019 with optimism but mindful that, with so many potentially destabilising factors in play, some of them capable of producing very large consequences, the prospect of a downturn in M&A volumes and values is a real possibility.

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# 2018 – New Zealand trumps global statistics

In 2018, on the global front, the number of M&A deals continued to increase. The total deal value was also strong at $US3.5tn and the average deal size was $US384.8m.

This reflected the impact of a number of mega-deals, in particular cross-border takeovers valued at more than $5bn.  Examples include:

- US cable group Comcast's takeover of Sky for US$39bn, outbidding Twenty-First Century Fox
- T-Mobile's acquisition of Sprint for US$26.5bn, and
- Japan pharmaceutical company Takeda's US$59bn takeover of Shire.

In New Zealand, total deal value bounced back to 2016 levels, increasing from US$3.5bn to US$8.2bn. Deal volume was also up, from 119 transactions in 2017 to 135 in 2018.

New Zealand M&A activity remained steady throughout the year, with particularly strong second and fourth quarters. There were a number of large deals and – somewhat unexpectedly – an increase in cross-border transactions, particularly with Europe-based buyers. This was despite a significant increase in Overseas Investment Office (*OIO*) processing times for consent applications.

Mergermarket statistics show that 29% of deals, where the value was disclosed, were over US$100m in New Zealand in 2018 – up from 21% in 2017.

Significant New Zealand deals included Apax Partners' intended acquisition of Trade Me for $2.56bn, the sale of Shell's New Zealand upstream oil and gas operations to OMV for $794m, ANZ Bank's sale of OnePath Life New Zealand for $700m to Cigna Corporation, Blackstone Group's acquisition of seven large central Auckland office blocks (the VXV commercial precinct) from Goodman Property Trust for $635m, and the sale of PGG Wrightson's seeds business to DLF Seeds for $421m.

| | GLOBAL | | | NEW ZEALAND | | |
|---|---|---|---|---|---|---|
| | 2016 | 2017 | 2018 | 2016 | 2017 | 2018 |
| Total value (US$) | 3.2tn | 3.1tn | 3.5tn | 8.34bn | 3.50bn | 8.21bn |
| Total volume | 17,369 | 18,433 | 19,232 | 98 | 119 | 135 |

Source: Mergermarket

# Top 10 deals[1]

1. Apax Partners' takeover of TradeMe

2. Finaccess Capital, S.A. de C.V's partial takeover offer of Restaurant Brands New Zealand

3. Shell's sale of New Zealand upstream oil and gas operations to OMV

4. ANZ Bank's sale of OnePath Life (NZ) to Cigna Corporation

5. Bounty Fresh Foods' takeover of Tegel

6. PGG Wrightson's sale of its seeds business to DLF Seeds

7. Hong Leong Financial Group Berhad's acquisition of Manuka Health New Zealand

8. Mercury NZ's sale of Metrix to intelliHUB Group

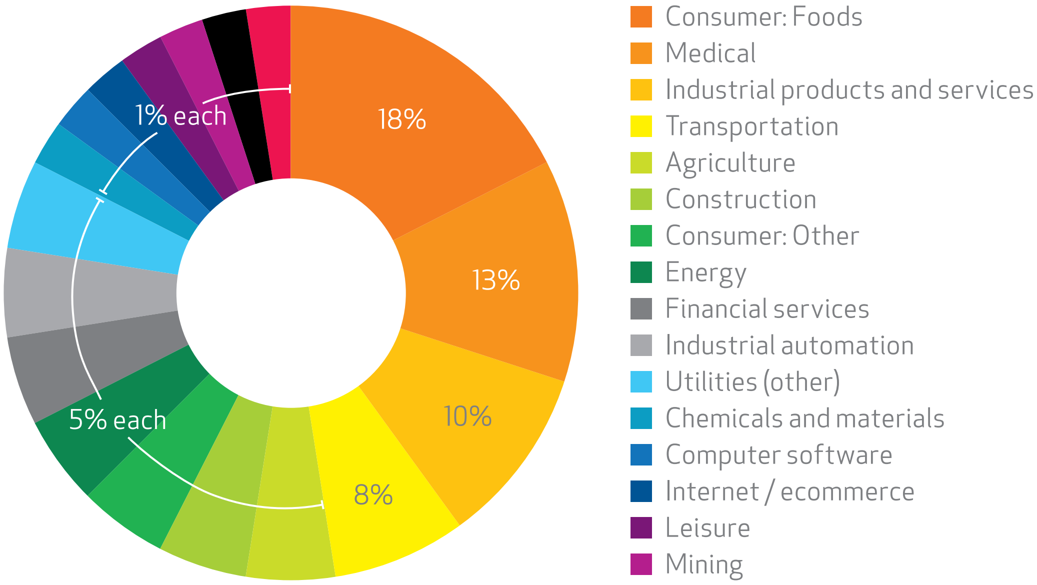
9. First Gas's acquisition of Rockgas's LPG business from Contact Energy

10. HgCapital's acquisition of Orion Health's majority stake in the Rhapsody business

[1] Note 2018's largest deals announced by Mergermarket where the value has been disclosed.

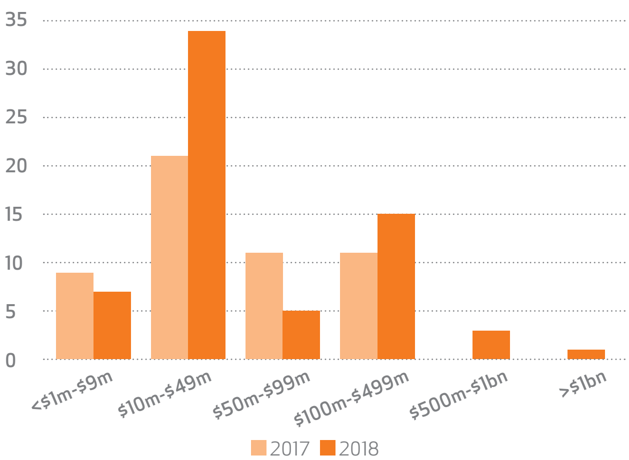
# 2018 by the numbers

## Sector spread of top 40 New Zealand deals by disclosed purchase price



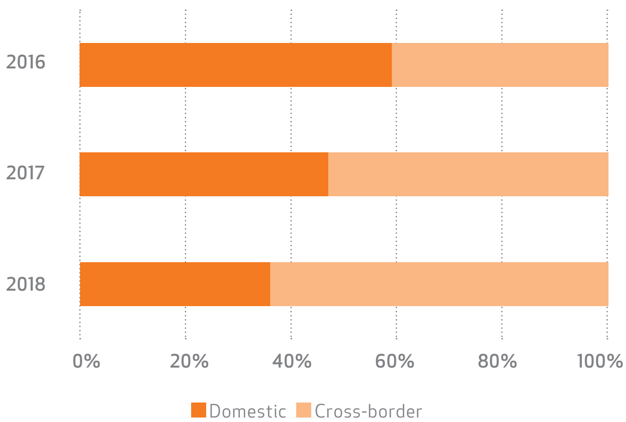

Source: Mergermarket

## All New Zealand deals by disclosed purchase price (USD)




Source: Mergermarket

## All New Zealand deals cross-border/domestic split




Source: Mergermarket

# 2019 – cautious optimism

## "We are picking continued robust M&A activity in 2019, although the pace will slacken."

Our predictions:

- Deal momentum to remain strong, but accumulation of local and international geopolitical and regulatory issues will begin to weigh on optimism.
- Buyers in M&A transactions to take back some control as we reach the peak of seller-friendly deal terms.
- The Commerce Commission to increasingly investigate non-notified transactions, being of the view that these are being used more often (and not always appropriately) as parties seek to avoid the greater scrutiny the Commission is now applying to clearance applications.
- New Zealand to become an increasingly attractive investment destination in a volatile geopolitical climate given our "safe haven" image, offsetting the deterrent effects of the increased complexity of cross-border transactions arising from recent changes to the Overseas Investment Act.
- The new Overseas Investment Act requirements to require foreign investors to seek additional support from domestic advisors, especially in transactions involving residential land, rural land or forestry rights.
- Increased Comprehensive and Progressive Trans Pacific Partnership (*CPTPP*) thresholds to give overseas buyers based in certain jurisdictions an easier run.
- Increased Ministerial activism in relation to overseas investment matters to continue.
- The NZX to continue to be a hunting ground for opportunistic takeover targets, particularly if global equity markets suffer a setback.
- China to remain quiet due to both increased regulation and an economic slowdown. Growing New Zealand-China tensions also likely to have an impact on inbound Chinese investment.
- Political uncertainty in Australia arising from the federal and state elections scheduled to take place this year is likely to dampen deal activity.

## KEY SECTORS TO WATCH

### Tourism

We expect New Zealand to remain a relatively popular tourist destination despite softening consumer confidence in the rest of the world. Investments in the tourism sector ought to provide good returns for buyers willing to take a longer term view.

### "Kiwi" businesses

Businesses that are able to leverage New Zealand's national brand and its associations with health and natural beauty (e.g. skincare, natural health and manuka honey), whether standalone or divisions of larger corporates, should prove popular, due in part to their perceived high growth potential in the Asia-Pacific region.

### Infrastructure

New Zealand-based infrastructure assets – in the broadest sense – will command a premium – but buyers will need to keep an eye on impending changes to the Overseas Investment Act to limit offshore ownership of assets that have "strategic significance".

### Defensive plays

Given the potential economic slowdown and dip in domestic consumer confidence, businesses which appeal to households looking to rein in spending (e.g. discount brands and lower-end consumer goods) would be sound investments.

### Early stage/high tech businesses

New Zealand's science and technology sector continues to produce businesses with real global growth potential and innovative and disruptive businesses continue to be attractive targets for overseas VC investors.

### Media

Further consolidation of media businesses is likely, as falling profits drive a search for synergies – though there are complex antitrust issues to navigate.

### Healthcare/aged care

New Zealand's aging population is setting our health care and aged care sectors up for further growth.

### Financial services

The regulatory headwinds faced by financial services businesses should drive further M&A activity in the sector.

## KEY MACROECONOMIC THEMES IN 2019

**Dive in business confidence –** Business confidence spent most of last year on the floor, or even in the basement, hitting a nine year low in October. It began to pick up in December, but is still in negative territory, and will probably remain wobbly through most of this year as it is buffeted by international trade volatility.

**Change in consumer confidence –** Consumer confidence at the start of the year was sitting steady, slightly above the historical average in the ANZ-Roy Morgan survey and slightly below on the Westpac-McDermott Miller index. Reasons offered were lower petrol prices, falling mortgage rates and firming housing markets in some regions.

**Escalating trade tensions –** Although New Zealand has yet to feel any serious effects from the trade war between the US and China, Chinese investment into New Zealand seems set to reduce.

**Softening housing market –** House prices, particularly in Auckland, have dipped – signalling the overheated housing market is coming to an end. Any further drops could have significant flow on effects for consumer spending.

## DISRUPTION IN PROGRESS

The M&A process will continue to be disrupted by technology, which will ultimately lead to much greater efficiency through tools such as artifical intelligence-enhanced due diligence, automated completion checklist software and more.

M&A transactions require due diligence and post-transaction compliance review processes that are time consuming, labour intensive, and therefore costly. Many leading companies have been focusing on mainstreaming them with automation.

Chapman Tripp's technology business, Zeren, leverages the leading artificial intelligence (*AI*) platform for both due diligence and compliance, using machine learning technology to speed up these processes by sorting, clustering and classifying an entire data room. It presents the processed data in an intuitive visualisation dashboard, giving lawyers immediate insight into areas of risk or concern.

One of the most exciting aspects of this technology is that the speed of the process is improved, as are the relevance and accuracy of outputs – making it ideal for reviewing large numbers of documents prior to entering into a transaction and also integration of the acquired business after completion of the transaction.

This efficiency is likely to translate into faster deal making and more informed parties when it comes to mergers and acquisitions on a global scale.

Zeren BY CHAPMAN TRIPP

# Deal terms – the party may be over for vendors

## Although vendors remain in the driver's seat for now, the advantage may be about to pass to buyers.

Our analysis of the deals we worked on in 2018[2] indicates that the trends which dominated 2017 continued largely unabated. Some deal terms moved slightly to the buyer's advantage but this was due in part to the greater prevalence of warranty and indemnity (*W&I*) insurance in 2018.

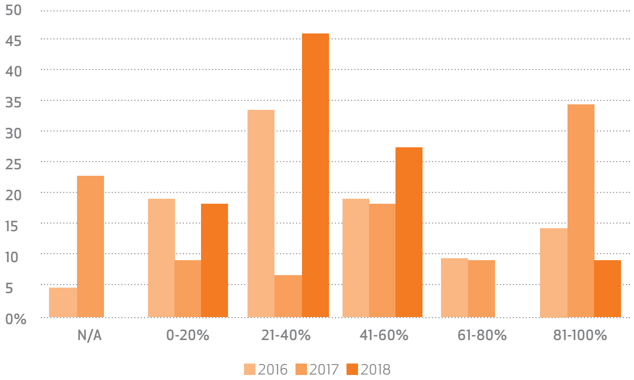
## Warranties and indemnities

### Warranty claims – caps and collars

The seller's liability for warranty claims (other than in relation to fundamental warranties such as those relating to title to the assets or shares being sold) is typically capped at a percentage of the enterprise value of the target. In the deals we acted on in 2018, there was a pronounced seller-favourable swing towards the 21-40% bracket (with fewer than 10% of deals having caps higher than 60%).

To rule out trivial or vexatious warranty claims, sale agreements usually provide for minimum warranty claim amounts (both on a per claim basis – the "de minimis", and on an aggregate basis – the "basket"). Our data indicates that de minimis and baskets were most often set at 0.1% and 1% of the target's enterprise value, respectively, in 2018 – consistent with past years, and in line with the typical deductibles in W&I insurance policies.

### Warranty liablity cap as percentage of purchase price (warranties other than title and tax) – % of deals




### Warranty claim time limits

We saw a greater proportion of deals with longer warranty claim time limits in 2018.

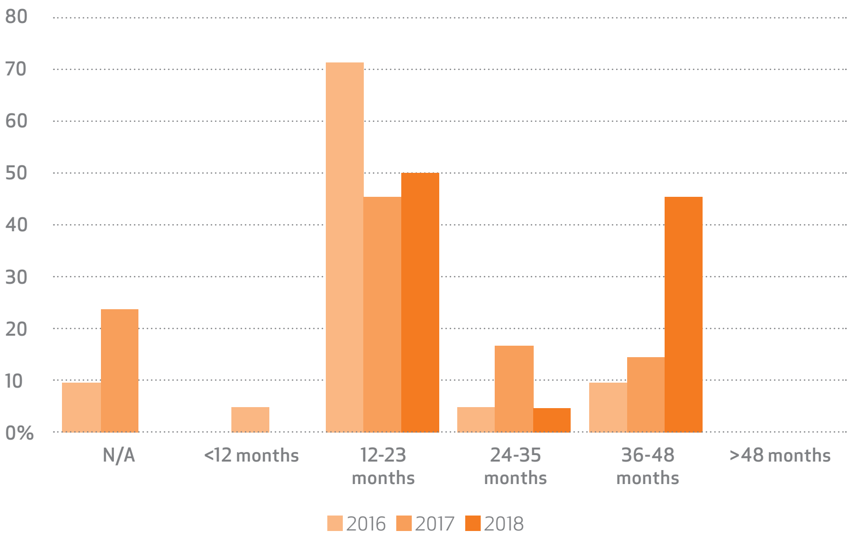
Although a more buyer-friendly position, this change may be a function of the prevalence of W&I insurance. Longer periods are more palatable to sellers if they do not remain "on the hook", while buyers want to maximise the possibility of making claims for latent issues, given the high prices being paid in the current market.

Unlike 2017, all the deals we were involved in over the course of 2018 included a time limit of some sort on claims, indicating a slightly more seller-friendly environment in this regard.

As we would expect, timeframes for claims under tax indemnities were generally longer than for other claims, with more than 90% of deals having timeframes of more than 48 months.

[2] Note that we excluded partial sales and listed company takeovers from our data set for this year's analysis.

### Time periods for warranty claims (other than title and tax) (% of deals)

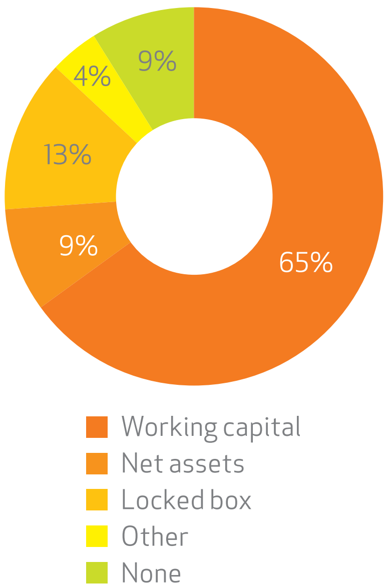



## Purchase price adjustment mechanisms

Purchase price adjustment mechanisms (designed to address the time lag between signing and settlement of a transaction) were more common in 2018, featuring in 91% of deals compared to only 69% in 2017.

Traditional adjustments, taking into account movements in working capital against an agreed target, were the most popular (65% of deals), but we also saw an increase in locked box mechanisms (13%) which may indicate increasing familiarity with these in the Australian and New Zealand markets.

### Purchase price adjustment mechanism



## Deposits

A slightly higher proportion of deals featured deposits in 2018 (12%, versus 8% in 2017), though it would be premature to suggest this indicates a seller-friendly trend. Sellers typically only insist on deposits where there is a perceived risk that offshore regulatory requirements could be used to frustrate a deal.

## Deferred consideration and earn-outs

Deferred consideration (in the form of an earn-out or other deferred payment), was a feature of less than 10% of the deals we were involved with last year. This is surprising. Given vendors' robust price expectations, we would expect parties to have looked to earn-outs as a way of closing value gaps where agreement on price cannot be reached.

On the other hand, earn-outs can be complex beasts and have resulted in some high-stakes litigation in recent times, so some wariness is understandable.

## Escrows

We saw a further drop in the proportion of deals featuring an escrow or retention amount (17%, down from 27% in 2017). This is a seller-friendly trend and is unsurprising, given that one of the main uses for retentions is to ensure assets are available to satisfy W&I claims – and this is not an issue where there is a W&I insurer in the picture.

## Material Adverse Change (*MAC*) clauses

The proportion of deals which included a provision allowing the buyer to walk away from a deal in the event of a material adverse change in the target's business (known as "MAC clauses") dropped from 35% to 22% in 2018.

## Warranty and Indemnity (*W&I*) insurance

W&I insurance grew in popularity in 2018, featuring in nearly 60% of the potentially insurable deals we worked on. As we would expect, it was particularly popular in transactions involving private equity (*PE*) vendors but seems to be finding favour even among trade buyers in jurisdictions such as the US, where the product has historically not been as widely used and understood as in Australia and New Zealand.

With more insured deals out in the market we're also getting a better understanding of the risk areas for claims. Claims are made most often in relation to losses that are relatively easy to quantify, such as tax liability and inaccuracies in financial statements.

Based on our discussions with underwriters, we understand that potential claims are notified under about 20% of policies and actual claims made under about 8-10% of policies, and most claim notifications are delivered within 18 months after inception of a policy. It's possible that with the high valuations seen recently, W&I claims may be seen as a potential salve for buyers remorse, resulting in an uptick in claims over the next few years.

W&I insurers run fairly compact local teams (although they are expanding), which can result in capacity constraints, particularly where several competitive sale processes are being run at the same time. This issue has been partially mitigated by the continuing trend towards "pre-packed" W&I insurance solutions, prepared by sellers and then rolled out to preferred bidders. Insurers have flagged that automation and AI are also being closely considered as a way of making the underwriting process more efficient.

In terms of coverage trends, Holidays Act compliance was a hot-button issue in 2018 and is likely to remain so this year. Insurers were generally reluctant to cover warranties in relation to this without extensive due diligence, sometimes leaving sellers bearing the risk of outstanding holiday pay liability by way of an uninsured indemnity. Other common exclusions were product liability, environmental contamination, and liability relating to transfer pricing.

# Private equity and venture capital

## Private equity firms still writing big cheques

In New Zealand last year, PE firms invested US$2.55bn across 19 deals (skewed by the Trade Me deal worth US$1.88bn) and divested US$618m. We expect the buying trend to continue, with a particular interest in financial services businesses, aged care, healthcare, Internet of Things and business services.

NZX has put in place a number of initiatives to foster New Zealand equity capital markets and the IPO market is tipped to improve in 2019 and 2020, which is likely to bear on the assets on offer for PE buyers.

We are also reaching the end stage of the "lifecycle" for some PE investments, and it may be that PE sellers revert back to exiting by IPO or dual track processes instead of by trade sale.

Several PE firms, both in New Zealand and Australia, had a strong fundraising year in 2018 and will be looking to deploy capital in quality deals.

## 2018 private equity highlights by sector

### Food

**EPICUREAN DAIRY CO. LIMITED**
Pencarrow (NZ)

**HELLERS LIMITED**
Adamantem Capital (AU)

### Healthcare

**ORION HEALTH GROUP'S RHAPSODY AND POPULATION HEALTH BUSINESSES**
Hg (UK)

### Medical

**TRG IMAGING AND AUCKLAND BREAST CENTRE**
Waterman Capital (NZ)

### Technology/ e-commerce/automation

**SEEQUENT LIMITED**
AKKR (US)

**TRADE ME GROUP LIMITED**
Apax Partners LLP (UK)

**METRIX LIMITED**
intelliHUB Holdings Pty Ltd (AU)

### Transport

**HIWAY GROUP LIMITED**
The Riverside Company (US)

**NEW ZEALAND BUS**
Next Capital Pty Ltd (AU)

[3] Based on Mergermarket data, which does not include non-disclosed transactions (e.g. smaller bolt-on acquisitions by PE-owned businesses).

## The start-up sector – from strength to strength

New Zealand's early stage investment ecosystem is an important contributor to M&A deal activity over the longer term, so it's pleasing that 2018 is likely to have hit the ball out of the park – breaking the 2017 record of over $85m invested.

We have advised the New Zealand Venture Investment Fund (*NZVIF*) in relation to more than 30 investments in early stage companies since August last year, as well as several divestments. This represents only a subset of the sector, but it's clear that there is no shortage of transaction activity.

In addition to continued growth in investment volumes, other noteworthy trends in the sector include:

- growth in the number and sophistication of early stage investment funds (as opposed to Angel networks and family offices), including the Matū Fund and Pacific Channel
- tech incubators (such as WNT Ventures and Astrolab) and commercialisation arms of universities (such as Auckland UniServices and WaikatoLink) becoming increasingly active dealmakers
- an increase in sidecar funds (such as the Tuhua Fund and Enterprise Angels Fund 3), which allow larger amounts of capital to be deployed in shorter timeframes
- the continuing relative scarcity of venture capital to fund businesses beyond the seed/start-up stage, resulting in offshore VC funds, particularly those based in Australia and Asia, filling the niche, and
- an increasing number of New Zealand businesses migrating to the US and elsewhere to access much more extensive capital raising opportunities.

The high-risk nature of early stage companies means they are not usually attractive targets for PE firms or trade buyers, or appealing IPO candidates. A key challenge for New Zealand's early stage investment sector is to source the capital needed to facilitate the creation of more home-grown success stories like PushPay and Rockit Apples.

Whether this can be achieved through the application of normal market forces or requires a more interventionist approach remains to be seen. We will be watching the Government's policy settings in this regard with great interest.

**"The quality of early-stage companies continues to improve and attract an increasing presence of international VC funds. Between these two dynamic forces lies the ambition of local micro-VC fund managers to build trusted teams for larger domestic funds."**

– Colin McKinnon, Executive Director, New Zealand Private Equity and Venture Capital Association

# Focus on financial services

**The banking and financial services sector has been under the spotlight in the last twelve months, with significant reviews both in New Zealand and Australia.**

Deal volumes in this sector were down last year from 2017, Mergermarket identified nine New Zealand financial services deals with a combined value of US$856m. In 2018, there were three, with a combined value of US$524m (which excludes the sale of AMP Life to Resolution Life Group for AU$3.3bn, which includes a significant New Zealand component). Key deals included:

- ANZ Bank's sale of its New Zealand life insurance business to US company Cigna Corp for $700m
- Bain Capital's acquisition of a 19.999% stake in Tower Limited from Vero Insurance New Zealand Limited, and
- Camelot Limited' acquisition of Lifetime Group Limited.

We expect increased M&A activity in this sector this year as banks seek to divest higher-risk life insurance and advice business units. Many PE firms are showing strong interest in purchasing financial services businesses.

This activity will be catalysed by impending regulatory and legislative reform and renewed scrutiny arising out of:

- the findings of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (dubbed the *Hayne report*, after Commissioner Kenneth Hayne) – although the Hayne report did not go as far on the question of structural separation as some expected, and
- the Financial Markets Authority (*FMA*) and Reserve Bank of New Zealand (*RBNZ*) review into the conduct and culture of domestic banks, identifying major shortfalls in governance and risk management.

The New Zealand Government has flagged that it is considering legislating in response to the recommendations from both these inquiries.

Another development which will have real consequences for the 'Big Four' banks (and for M&A activity) is the RBNZ proposal to substantially increase the level of "high quality" or tier 1 capital that they must hold. If banks are required to hold more capital it would be logical to expect a tightening in the availability of debt funding and that the cost of that debt will rise in order that banks can maintain profitability.

RBNZ Governor Adrian Orr has indicated that he is open to argument on whether or not to proceed with this change but if he does, and interest rates rise as a result, some companies may seek new sources of debt outside the traditional banking system.

The RBNZ has extended the submission period on the proposals to 3 May 2019.

**"We expect increased M&A activity this year as banks seek to divest higher-risk life insurance and advice business units."**

# ComCom – scrutiny on non-notified mergers

## The Commerce Commission has made non-notified mergers a 2018/2019 priority.

Commerce Commission timeframes have been getting longer over the last few years, due in part to an increase in the number of complaints and submissions from third parties on merger clearance processes. There is also a perception that the decline rate has increased (although there have been no declines since March last year).

The Commission has made non-notified transactions a priority i.e. commencing enforcement investigations where parties choose not to notify transactions of a kind the Commission would expect to see under the clearance regime.

The Commission's "Priorities 2018/19" state, "In the last two years we have seen an increase in non-notified mergers that we need to investigate further… We will act quickly in these cases to prevent any significant consumer harm or adverse impact on competition in markets."

It is possible this priority reflects a concern that parties are consciously avoiding Commission processes to manage their transaction timeframes and avoid the risk of a decline.

### What happens when a non-notified transaction is investigated

The Commission has a range of powers to intervene where it considers a non-notified merger requires scrutiny. Where a deal has not settled, it may ask the parties to undertake not to close, or seek an injunction to prevent them from doing so. It may also use its statutory information gathering powers to require parties (and others) to produce relevant information.

And, ultimately, if it considers there has been a breach of the Commerce Act, it may seek remedies in Court, including penalties and orders for divestiture (to "unscramble" the deal).

In an investigation context, compared with a voluntary clearance:

- timeframes are much less certain
- the parties have much less say in the process because the Commission leads and structured opportunities for submissions are not necessarily available, and
- the Commission is in "enforcement mode" and is much less collaborative.

## How this is playing out

There have been seven merger investigations over the last couple of years, with four currently open. Some points of interest:

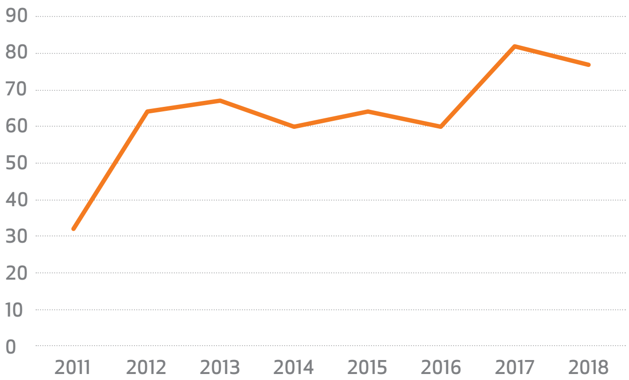
- The Commission has filed proceedings in relation to First Gas' acquisition of the Bay of Plenty assets of GasNet, relating to (among other things) breach of section 47 (which makes anti-competitive acquisitions unlawful). First Gas filed admissions and was ordered to pay a penalty of $3.4m on 21 February.
- Platinum Equity's (via Winc) acquisition of OfficeMax was investigated because of competition concerns, resulting in a settlement where Platinum undertook to divest Winc.
- An investigation of Vero Insurance's non-notified acquisition of a 19.9% stake in rival Tower was closed after Vero sold down the shareholding.

In many jurisdictions, all transactions with certain characteristics (say, over a specified monetary value) are compulsorily required to go through a clearance application. The Commission has not to date expressed a preference for a compulsory regime but it is coming down hard on parties who do not voluntarily apply for clearance where the Commission considers they should have.

The Commission is acting entirely within its enforcement powers to scrutinise these deals but, depending how this phase plays out, it may ultimately be that compulsory clearances would better reflect how the Commission would like to see the regime working.

> **"New Zealand is relatively unique in that it is one of a small number of jurisdictions with a voluntary clearance regime. The success of a voluntary regime relies on the credible threat of enforcement proceedings when businesses do not apply for clearance or authorisation for a merger that may substantially lessen competition"**
>
> Commerce Commission, "Priorities 2018/19"

## Average working days to decision (financial years)




Source: Commerce Commission

# Overseas investment – complexity is (currently) king

**Recent legislative amendments driven by the Labour-led coalition government have resulted in a more complex set of rules for overseas investors to navigate.**

## Legislative reform has increased complexity

The Overseas Investment Amendment Act came into effect on 22 October 2018. The primary effect of the Act is to regulate purchases of residential land by overseas persons. But it also included significant changes to forestry rights and profits à prendre, and new exemptions in respect of large apartment developments and hotels.

The Overseas Investment Regulations have also been amended: first, in conjunction with the Amendment Act; and second, as part of the CPTPP coming into force at the end of 2018.

The CPTPP-related changes have increased from $100m to $200m the threshold above which transactions involving overseas acquirers from countries which are parties to the CPTPP (and certain other countries as a result of New Zealand's obligations under existing international agreements) will require OIO consent (as acquisitions of "significant business assets").

These changes came at the cost of a substantial increase in the complexity of the rules applying to investments by overseas persons, introducing new categories of sensitive land, different pathways to consent, and new exemptions with which to contend.

The upshot for 2019 is that foreign investors will need additional support to guide them through the overseas investment regime, particularly for transactions involving residential land, rural land or forestry rights.

Consents relating to sensitive land are expected to remain difficult to obtain within commercially reasonable timeframes (see our analysis of processing timeframe trends below), which may lead to more sellers being prepared to leave some money on the table to secure a certain and timely exit from a domestic acquirer.

## Second stage review a chance to address longstanding issues

Consultations will be held this year on a further review of the Overseas Investment Act aimed at ensuring investments are consistent with New Zealand's national interest, reducing complexity and cutting unnecessary red tape. The current timeline is to have the reforms enacted by mid-2020.

The review will consider, among other matters, whether the regime should apply to water rights and whether a "national interests test", similar to that used in Australia, should be introduced (for example, in relation to investments in infrastructure assets with monopoly characteristics).

It should also be used as an opportunity to simplify the legislation and fix longstanding issues, including:

- the breadth of the definition of "overseas person", and its application to companies listed on NZX and to limited partnerships
- its impact on upstream transactions occurring offshore, where New Zealand is not a focus on the investment
- where the regime deems certain land adjacent to sensitive land to be sensitive itself, even where the transaction would have no effect on the sensitive area
- the inability of investors to take advantage of increased consent thresholds (such as those applying to CPTPP investors) if they choose to structure their acquisition using a New Zealand SPV, and
- the application of the benefits test on the sale of mature assets, which currently disadvantages financial investors who have run an asset well.

## Current application processing timeframes

2018 saw a marked increase in processing times for consent applications, with the OIO having difficulty meeting its processing KPIs.

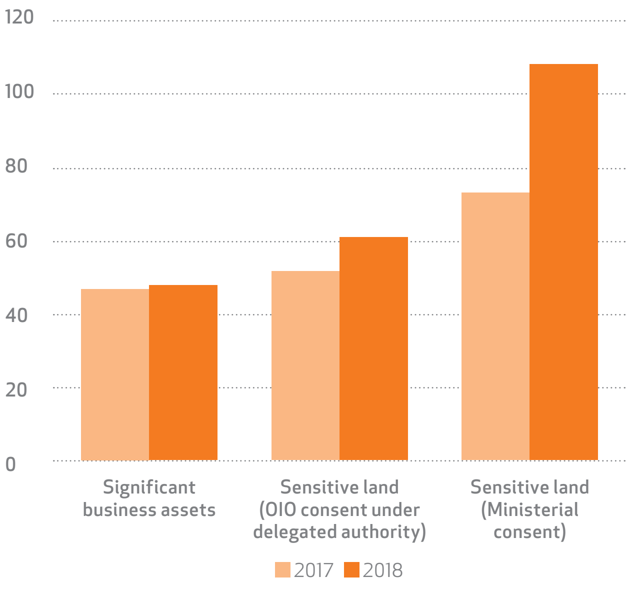
This has been common to all application categories but was most stark in the OIO's internal processes and its consultation with third parties in relation to sensitive land applications being decided by Ministers. There has also been a material increase in the average time taken by Ministers to reach a decision (discussed further, below).

Two other trends we have observed are:

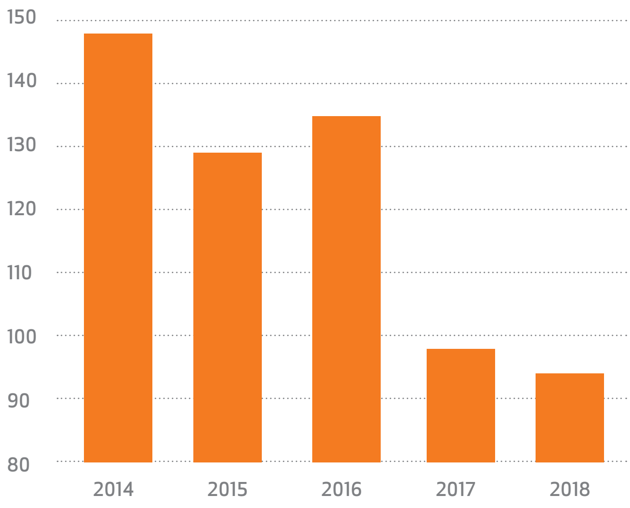
- an increase in the number of 'work-in-progress' applications (reflecting the increased processing times), and
- a notable decrease in the total number of consents issued each year since the change of government.

Approvals in 2017 were keeping pace with 2016 until three months before the election, following which they have remained at lower levels. It is not clear if fewer applications are being made (perhaps as a result the regime's bad reputation), or if an increasing number is being withdrawn before a decision is made.

### Average OIO consent timeframes by working days




### OIO consents granted by year



A welcome development was the decision to establish and resource a separate team within the OIO to handle residential land applications. So far, this appears to have prevented the system grinding to a halt as a result of the potential influx of applications for transactions involving residential land.

### A new trend of Ministerial activism?

There are signs of increased Ministerial involvement in overseas investment matters since the 2017 election.

The time required for consideration and approval by the Ministers, after the application has been processed by the OIO, is approaching five weeks on average. It appears that the days of expecting a Ministerial decision within a couple of weeks are long gone.

As we noted last year, a new Ministerial Directive Letter came into effect in late 2017 raising the threshold for acquiring rural land and forest land. This was followed, in October 2018, by a new Ministerial Delegation Letter, which revised the categories of decision that are delegated to the OIO.

The Ministerial Delegation Letter expressly reserves the Ministers' right to choose to make a delegated decision themselves. This creates a degree of uncertainty for an applicant, which may be near the end of its process with the OIO only for a Minister to decide to intervene, pushing out the timing for a decision.

We expect such Ministerial interventions to be limited to politically sensitive applications, for example, involving industries close to the heart of the one of the coalition parties.

Two recent decisions to decline consent also point towards the Ministers being more willing to intervene and impose their own political views in relation to applications:

- in late 2017, Bathurst was refused consent to acquire a coal mine despite the OIO having recommended that consent be granted, and
- in September 2018, Tegel was refused consent to acquire land to build a large broiler chicken facility, on the basis that it was unlikely to obtain the resource consent required (despite that process not having run its course), and therefore the benefit from the proposed investment could not be considered likely.

**"This creates a degree of uncertainty for an applicant, which may be near the end of its process with the OIO only for a Minister to decide to intervene, pushing out the timing for a decision."**

# Takeovers, schemes of arrangement still fashionable

**Despite expectations that strong takeover activity in 2017 would carry over to 2018, there weren't as many successful transactions as anticipated.**

We expect takeovers will remain in vogue – but not at the levels we saw in 2017. Transactions that did go ahead in 2018 saw shareholders receive a high premium, a trend that looks likely to continue into 2019.

Schemes of arrangement remained a popular structure for large 'takeover' transactions.

- Trilogy completed a scheme of arrangement with Chinese investment giant CITIC Capital and delisted from the NZX in April 2018 for NZ$205m.
- Trade Me announced in December last year that it entered into a scheme implementation agreement for Apax Partners, a British PE firm, to acquire it for $2.56bn.
- In the same month, household consumer products distribution company GWA announced its proposed acquisition of NZX-listed Methven via a scheme of arrangement.

Other notable takeovers included Bounty Fresh Foods $437.8m takeover of Tegel Group Holdings, ESW Holdings $41.4m takeover of SLI Systems, and Global Valar's, a subsidiary of Mexico's Finaccess Capital, offer of $881.5m (at 24% premium) under a partial takeover offer to buy 75% of Restaurant Brands New Zealand.

There was also the unsuccessful full takeover offer of Tilt Renewables by an unincorporated joint venture of Infratil and Mercury – although it did result in Infratil increasing its stake from 51% to 65% and Mercury maintaining its holding at 20%, leaving a small free float of 15%.

An interesting scenario was Fletcher Building's unsolicited bid to acquire Steel & Tube by a scheme of arrangement, which was rebuffed by Steel & Tube's board. Fletcher ultimately withdrew its offer, after raising its price from $1.70 to $1.90 a share.

In April 2018, the High Court clarified the law around reimbursement of expenses relating to unsuccessful takeovers. The ruling, on the unsuccessful hostile partial takeover attempt of Abano Healthcare Limited by Healthcare Partners, established that the target company could recover all of the nearly $1m costs sought.

As a result of this decision, the Takeovers Panel has updated its guidance on the costs recovery regime.

# Chapman Tripp's M&A team

**Chapman Tripp's national M&A team partners with clients to successfully execute some of the biggest, most complex and challenging transactions in New Zealand.**

Our team has advised on more M&A work than any other New Zealand law firm, including many of New Zealand's most significant cross-border deals.

Clients value our long history of innovation, strong relationships with regulators and proven ability to get even the most challenging deals across the line. We maximise opportunity, identify and manage risk early on and work strategically with our clients to achieve the outcome they want.

We play a significant role in merger, acquisition and disposal transactions for international and New Zealand clients, large multinationals and leading PE players across many industries. We regularly advise on the structure, strategy and implementation of takeovers, schemes, joint ventures and other complex transactions.

Chapman Tripp's work for international clients has involved some of the most high profile OIO applications in recent times.

# Chapman Tripp recent M&A highlights

The firm's 2018 M&A highlights include advising:

## Agriculture

- PGG Wrightson on the sale of its seeds business to Danish company DLF Seeds for $421m

## Construction

- Canadian roofing company IKO on the acquisition of Fletcher Building's international roofing products manufacturer, Roof Tile Group
- ASX-listed company SRG on the acquisition of TBS Group, a leading industrial maintenance and services business, for AU$33m
- Direct Capital on the sale of its 60% interest in Hiway Group Limited to US PE firm, The Riverside Co

## Consumer

- CHAMP Private Equity on the sale of Accolade Wines to Carlyle Group LP for AU$1bn
- Tegel Group on the full takeover made by Philippines-based Bounty Fresh Foods
- Pencarrow Private Equity on the sale of Icebreaker to US-based VF Corporation for $288m
- Trilogy International on its sale to China-based CITIC for $250m

## Education

- Academic Colleges Group on the sale of its school operations to UK-based Inspired Education Holdings

## Energy

- Shell on the sale of its NZ upstream oil & gas operations to Vienna-based OMV for $794m
- Mercury NZ on the sale of Metrix, its smart-metering business, to intelliHUB Group for $270m
- First Gas (and its associated company Gas Services NZ) on the $260m acquisition of the Rockgas LPG business from Contact Energy
- Gas Services NZ on the $200m acquisition of the Ahuroa Gas Storage Facility from Contact Energy

## Financial services

- AMP on the sale of AMP Life to Resolution Life Group for AU$3.3bn
- ANZ Bank on the sale of OnePath Life NZ for $700m to Cigna Corporation

## Healthcare

- Evolution Healthcare on the sale of a 87% stake to Pacific Equity Partners for an estimated consideration of over AU$300m
- HgCapital on the acquisition of Orion Health's majority stake in its core Rhapsody business for $205m, and a 24.9% stake in Population Health for $20m
- ASX-listed Integral Diagnostics on the acquisition of Specialist Radiology Group, Trinity MRI and Cavendish Radiology for $105m
- the shareholders of REM Systems on the sale of that entity to Australia's Paragon Care for NZ$54.4m
- Datamars SA on its acquisitions of Simcro, a market leader in livestock pharmaceutical delivery devices
- Waterman Fund 3 on the acquisition of 100% of TRG Imaging Limited and 50% of Auckland Breast Centre Limited

## Media

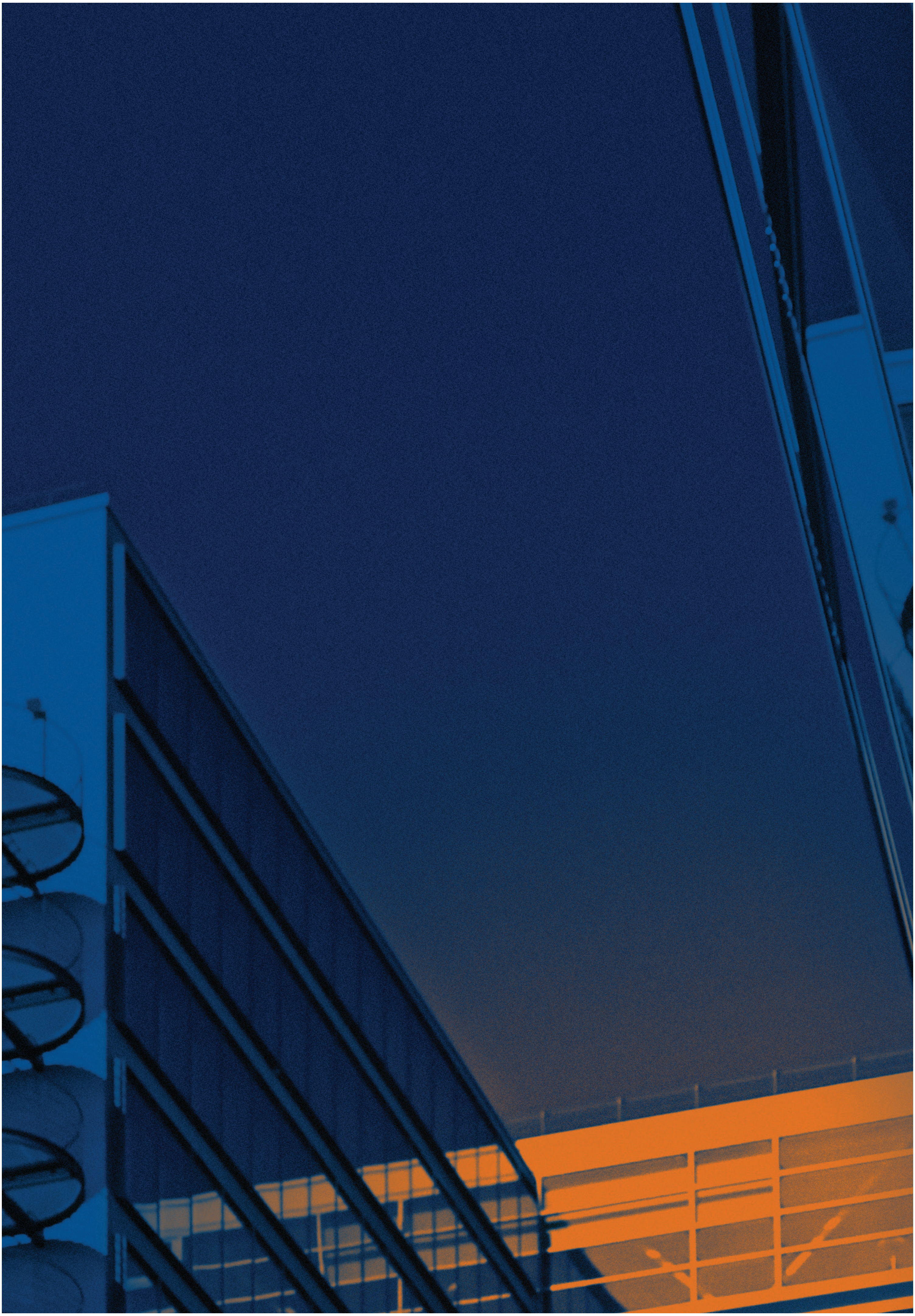
- QMS Media on the merger with Mediaworks

## Property

- The Blackstone Group on the acquisition of seven big central Auckland office blocks (the VXV commercial precinct) for $635m from Goodman Property Trust

## Technology

- Paris-based Ingenico Group on the acquisition of Paymark, NZ's largest electronics payments network, for $190m
- Datamars SA on its acquisitions of the retail solutions and milk meters businesses of Tru-Test, a leading agricultural technology business
- Pencarrow Private Equity on the sale of its 75% stake in Seequent, a NZ-based geological 3D modelling technology firm, to Accel-KKR LLC, the US-based PE firm
- SLI Systems on the full takeover made by US-based ESW Holdings



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Chapman Tripp is New Zealand's leading full-service commercial law firm, with offices in Auckland, Wellington and Christchurch. Our lawyers are recognised leaders in corporate and commercial, mergers and acquisitions, capital markets, banking and finance, restructuring and insolvency, litigation and dispute resolution, employment, government and public law, intellectual property, telecommunications, real estate and construction, energy and natural resources, and tax law.

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