Commercial real estate in New Zealand: overview

Paul Calder
Duncan Cotterill

THE CORPORATE REAL ESTATE MARKET

1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

New Zealand’s commercial property sector continues to perform strongly but has experienced a period of stabilisation in line with global trends. There was a slowing of activity over the first five months of 2017 compared with the same period in 2016 due, in part, to banking sector constraints on access to finance, a shortage of good quality listings taken to market and a perception that the market was close to the peak of its current cycle, all of which made buyers more cautious. It has also been an election year in New Zealand. The loan-to-value ratio restrictions (LVR Rules) implemented in New Zealand which restrict lending in the residential arena have also impacted the commercial property market, meaning that access to bank finance remains an issue for investors who are having to look to alternative forms of lending, such as peer-to-peer facilities.

The Property Council New Zealand/IPD New Zealand Quarterly Property Index Q1 (for the year ended March 2017) shows a total annualised return of 10.4%, down from 13.9% for the year ended March 2016. However, this is still well above the ten-year average of 8.5%.

The total annualised return for the retail sector to March 2017 was 8.3% (14.3% for March 2016), office is 10% (11.3% for March 2016) and industrial is 13.7% (15.8% for March 2016).

Interest rates remain at low levels, vacancy rates are low in the main cities, and there is still strong construction activity, population growth and a supportive monetary policy. In the year ended July 2017, non-residential building consents totalled NZD 6.2 billion, down 1.5% from the July 2016 year. While consenting activity for some forms of commercial buildings was down slightly from 2016, some areas did experience growth. For example, there was growth of 4.6% in consenting activity for office, administration and public transport buildings.

Property funds have continued to be an important factor in the market.

In terms of local and overseas investment, Colliers International (a global commercial real estate services organisation) has indicated that the higher yield on New Zealand commercial properties (compared to yields in other countries) has meant that there has been increased interest this year from overseas buyers interested in purchasing high value commercial property, particularly from investors in the Asia-Pacific region.

Recent deals
Some of the more significant deals for the 12 months ending August 2017 included:

- The sale of The Warehouse retail premises in Newmarket, Auckland for more than NZD100 million to a mainland Chinese investor for a mixed use residential/retail/office complex development on the site.
- Oyster Property Group’s purchase of the Millennium Centre Business Park in Auckland for NZD210 million.
- The syndication of 1050 $50,000 investment units in Buildings B and C in the BDO centre in Auckland’s CBD raising a total of NZD70 million in equity, which followed on from the syndication of Building A (also this year) which attracted NZD52.5 million in equity.
- The sale of Bayleys House in the Wynyard Quarter in Auckland for NZD63.3 million.
- The sale of Bunnings Warehouse in Grey Lynn, Auckland for approximately NZD37.7 million.

REAL ESTATE INVESTMENT

2. What structures do investors typically use for real estate investment in your jurisdiction and what are the main advantages and disadvantages of each (for example, flexibility and tax transparency)?

A range of investment vehicles are used to acquire and hold commercial property in New Zealand including:

- Limited liability companies.
- Limited partnerships.
- Partnerships.
- Trusts.
- Unit trusts.
- Joint ventures.

The appropriate structure in each case will depend on a variety of factors, including:

- The nature and extent of the property being held.
- The number and nature of the investors.
- Tax.
- Funding.
- Management.

There is no specific legislation to regulate the activities of real estate investment trusts (REITs) in New Zealand.

Listed property trusts and companies on the New Zealand Stock Exchange are governed by:
• The Listing Rules.
• The Financial Markets Conduct Act 2013.
• The Companies Act 1993.
• Their trust deed or constitution.

REITs can also take other forms, such as unlisted property trusts, in the form of unit trusts or limited partnerships, and these are governed by legislation specific to that form.

3. What are the main sources of finance and types of investors for real estate investment in your jurisdiction? Does your government encourage overseas investment into real estate in your jurisdiction, for example through real estate investment legislation?

The main sources of finance for investment in commercial property are bank funding, private funding, and private and public investment.

Private investors use a range of investment vehicles (see Question 2) and financing can take the form of equity or debt, or a combination of both.

Commercial property remains an important part of investment portfolios, and institutional investors (both domestic and overseas) remain active in the market.

Commercial real estate remains an attractive option for overseas investors due to New Zealand’s relative political and economic stability, transparency, lack of corruption and the relatively few barriers to purchasing or holding commercial property (see Question 4).

Restrictions on foreign ownership or occupation

4. Are there restrictions on foreign ownership or occupation of real estate (including foreign ownership of shares in companies holding real estate)? Are there restrictions on foreign guarantees or security for ownership or occupation and on lending for the purchase of real estate?

Certain investments in real estate by non-residents or their associates (called “overseas persons”) require the consent of the Overseas Investment Office under the Overseas Investment Act 2005.

Consent is required for acquisitions by overseas persons of 25% or more of the direct or indirect ownership and/or control of interests in land that is considered to be “sensitive” or “special” under the Overseas Investment Act. These categories of land are very specific but include:

• Non-urban land of more than five hectares in area.
• The foreshore, seabed, riverbed or lakebed.
• Land on certain specified Islands.
• Land over 0.4 hectares that includes or adjoins any reserve land, which is a historic place, any regional park or a lake.
• Land over 0.2 hectares that adjoins the foreshore.

Consent is also required for acquisitions by overseas persons of 25% or more of the direct or indirect ownership and/or control of interests in significant business assets (exceeding NZ$100 million, although higher thresholds apply for Australian investors).

Leases for a term of three years or more (including renewals) are an interest in land for the purposes of the Overseas Investment Act, and may require consent where sensitive or special land is involved as outlined.

Unless a party is in the business of lending money, there are no specific regulations concerning lending money to finance commercial property. However, if an overseas person (or an associate of one) lends money and the finance relates to sensitive land covered by the Overseas Investment Act, the approval of the Overseas Investment Office is required to hold a mortgage interest over such land.

Any required Overseas Investment Office consent must be obtained before the transaction becomes effective.

Recently some new exemptions to the Overseas Investment Act 2005 have come into force, including:

• An exemption for leasehold land from screening (see above), where a previously consented lease is being re-granted on substantially the same terms and conditions, and the substantive ownership of the property is unchanged.
• An exemption when the land has already been approved under the Overseas Investment Act, the land is in an urban area and is adjoining other sensitive land (which is the reason consent is required).

TITLE TO REAL ESTATE

5. What constitutes real estate in your jurisdiction? Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

In New Zealand real estate covers both land and any buildings or other structures on the land. It also includes the subsoil below (subject to certain statutory restrictions) and airspace above (to such height as is necessary for the ordinary use and enjoyment of the land and the structures on it).

Generally, land and buildings are registered together in the same title. However, it is possible to separate the ownership of land from the ownership of all or part of the building(s) on the land.

6. How is title to real estate evidenced? What is the name of the public register of title and the authorities responsible for managing it? Is electronic access and electronic conveyancing available?

Title to land is evidenced by entry on a fully electronic, Internet based land registry, maintained by a government agency called Land Information New Zealand (LINZ). This land registry is known as Landonline.

Electronic registration of all land titles is now mandatory in New Zealand. The e-dealing system operated through Landonline is now the main method for dealing with conveyancing transactions in relation to land.

The LINZ website can be found at www.linz.govt.nz. Landonline is accessible from this website.

Electronic access to titles is available through Landonline. Anyone can order a copy of a title for a specified fee. However, the Landonline system is not otherwise designed for public access or use. The survey, title filing and registration functions can only be accessed by authenticated registered users (usually lawyers, surveyors or other land professionals).

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7. What are the main information and documents registered in the public register of title? Can confidential information or documents be protected from disclosure in the public register of title?

Each parcel of land held in Landonline has its own individual electronic title record called a computer register. Each title has a unique reference number and includes:

- The nature of the interest in the land.
- The legal description of the land.
- The registered proprietor.
- Any interests registered against the title.

For unincorporated trusts, trustee(s) name(s) will appear on the public register. It is not possible to register the name of any unincorporated trust.

8. Is there a state guarantee of title? Is the authority that manages the public register liable to pay compensation for any errors it makes in relation to title registration? Is title insurance available and is it commonly used?

The land register is evidence of legal title. The government in effect guarantees the accuracy of the interests recorded on the land register maintained by Land Information New Zealand. Persons who have been wrongfully deprived of an estate or interest in land through fraud or errors of the land registration system can apply for compensation.

At least one insurance company offers title insurance in New Zealand, but it is not commonly used.

9. How can real estate be held (that is, what types of tenure and other main ownership rights exist over land)?

There are the following categories of land ownership in New Zealand:

- Fee simple (freehold) title.
- Leasehold title.
- Stratum estate (unit title).
- Composite titles (generally involving both freehold and leasehold interests, such as a cross-lease).

SALE OF REAL ESTATE
Preliminary agreements

10. What types of preliminary agreements are typically used in the sale of real estate? Are they legally binding?

Listing agreement

It is common for sellers to employ real estate agents to market commercial property and engage in the initial phases of commercial negotiation. This normally requires the seller to enter into a listing agreement with the relevant agent. Confidentiality and exclusivity agreements may also be entered into. There is no requirement for these agreements to be in writing in order to be binding, but they usually are.

Sale agreement

Commercial negotiations usually result in an agreement for sale and purchase of real estate being signed by the relevant parties. Such agreements are typically subject to various conditions, but once signed become legally binding on the parties. A contract for the sale of land must be in writing and signed by the seller and the buyer to be enforceable.

Heads of agreement

In some commercial property transactions the parties may enter into binding or non-binding heads of agreement setting out the principal terms, before referring the transaction to lawyers to complete the formal sale and purchase agreement.

Sale contract

11. Briefly outline the typical main provisions of a corporate real estate sale contract and main real estate provisions of a typical share purchase agreement.

A contract for the sale of land must be in writing and signed by the seller and the buyer to be enforceable in New Zealand.

Most commercial property sale contracts are documented using the standard form of agreement for sale and purchase of real estate produced by the Auckland District Law Society Incorporated (ADLS Agreement). The ADLS Agreement contains standard provisions covering the sale and purchase of the land, including:

- Price and payment.
- Description of the land.
- Conditions.
- Possession and settlement.
- Warranties.
- Default.

There are also special provisions covering tax, unit titles and cross leases. Parties can add transaction specific clauses as required.

In a share sale transaction, any real estate will usually transfer as one of the assets of the company. To establish any potential liabilities associated with the real estate a buyer will usually undertake due diligence, and the share sale agreement is likely to include some warranties about the company including its real estate. The nature and extent of these provisions is subject to negotiation.

Due diligence

12. What real estate due diligence is typically carried out before an acquisition and what key areas does it cover? Which specialist advisers are usually involved and which reports do they typically produce?

For a typical commercial property transaction, a prudent buyer will (as a minimum) undertake the following due diligence:

- Investigate the title and the terms of any leases.
- Obtain a registered valuation of the property.
- Review zoning and planning matters in respect of the property.
- Obtain a Land Information Memorandum from the local authority.
- Obtain appropriate engineering reports in respect of the land and buildings. This may include geotech, environmental and structural (including weathertightness and earthquake prone status).

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• Search public registers, including the Personal Property Securities Register (PPSR) and the Listed Land Use Register.
• Check the availability and cost of insurance.

Sellers’ warranties

13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover? What are the main limitations on warranties, for example are they typically qualified by disclosure?

The Auckland District Law Society Incorporated (ADLS) Agreement includes seller warranties in respect of various matters, including (without limitation):
• Notices and demands received by the seller affecting the property.
• Chattels, plant and equipment included in the sale.
• Building works undertaken by the seller.

In addition to these standard warranties, commercial property buyers often seek to include further warranties, particularly regarding lease(s) of any tenanted property.

Warranties about real estate holdings are also common in share sale agreements.

Warranties can be limited by disclosure. Also, the seller’s liability in respect of warranties can be limited to a maximum sum, and/or to claims made within a certain time-frame.

Liability

14. Does a seller have any statutory or other liability to the buyer in a disposal of real estate?

Generally, the concept of caveat emptor (let the buyer beware) applies to the sale of land in New Zealand, and the seller is not under an obligation to make disclosure in relation to the land to the buyer.

However, if the seller is “in trade” (that is, carries on the business of buying and selling real estate) the prohibitions on misleading and deceptive conduct (among other things) set out in the Fair Trading Act 1986 apply to a contract for the sale of land.

In addition, if the property being sold is a unit title, the Unit Titles Act 2010 requires the seller to make certain mandatory disclosures to the buyer within particular timeframes. The disclosure requirements include pre-contractual disclosure (prior to the buyer signing the agreement) and pre-settlement disclosure (prior to the buyer completing the purchase under the agreement).

Real estate agents are subject to certain statutory rules and a code of conduct, which require that they do not mislead buyers or provide false information in relation to property being sold. Real estate agents are also required to disclose any defects which they know (or ought to know) about to potential buyers.

Contracts for the sale of land do not generally include provisions regarding the environmental state of the property. Buyers should consider obtaining a report from an environmental engineer as part of their due diligence, and/or including appropriate warranties from the seller in the agreement.

16. Can an owner or occupier inherit liability for other matters relating to the real estate even if they occurred before it was bought or occupied? Can a seller or occupier retain any other liability relating to the real estate after it has disposed of it?

A buyer can inherit liability in relation to the real estate if there is a continuing breach after the sale, particularly in relation to regulatory, compliance, environmental and lease matters. A buyer should conduct due diligence before confirming the purchase, and/or seek appropriate warranties from the seller on this basis.

While less likely, an occupier can also inherit liability in relation to the real estate if there is a continuing breach, particularly in relation to regulatory, compliance and environmental matters. A potential occupier should conduct due diligence before confirming the occupation agreement, and/or seek appropriate warranties from the landowner on this basis.

In addition to any liability the buyer may inherit, a seller of real estate will generally remain liable for past breaches after the sale, although not necessarily to the buyer.

An occupier will generally remain liable for past breaches on the expiry, termination or assignment of a lease of commercial property.

Completion arrangements

17. What are the typical arrangements and main documents required for completion of the sale? When does title transfer and what are the formal legal requirements to execute the sale documents, transfer the real estate and register the change of title? Is notarisation required?

The parties to an agreement for the sale of real estate are generally bound on entry into the agreement. Such agreements must be in writing and are usually subject to conditions (such as finance, title and due diligence). If the conditions are not satisfied within the time-frame prescribed, either party can usually terminate the agreement. If the agreement becomes unconditional, the parties will proceed to settlement on the settlement date prescribed in the agreement.

On the settlement date, the buyer must pay the balance of the purchase price (less any deposit) and the seller must transfer clear title to the buyer (free of any mortgage).

The transfer of title is processed electronically through the e-dealing facilities of Landonline as follows:
• Buyers and sellers must sign authority and instruction forms, which authorise their lawyers or conveyancing professionals to create and electronically register the necessary documents to reflect the transfer of title in Landonline.
• Photo identification is required to verify the signatures on these forms.
• Once the transfer is completed through the electronic system, a title search will be completed confirming registration of the transfer.
• Notarisation of the authority and instruction forms is not required.

The main environmental legislation in New Zealand is the Resource Management Act 1991, which governs the use of physical resources including land, water, minerals and air.

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Before the title can be transferred (subject to certain limited exceptions), as part of the Landonline system sellers and buyers must provide to Land Information New Zealand (LINZ) a signed statement containing certain tax information. To satisfy this requirement:

- Buyers and sellers must provide their New Zealand tax (IRD) number and other details.
- Those who are tax resident in another jurisdiction must also provide the equivalent of their IRD number in that country.
- Offshore persons who need to apply for a New Zealand IRD number must have an operational New Zealand bank account.

After settlement, if funds remain on interest bearing deposit through a law firm or otherwise with a financial institution, a seller can be asked to provide tax residency information under the OECD Common Reporting Standard and Foreign Account Tax Compliance Act rules, which are both now in force in New Zealand (if this information has not previously been provided by the seller).

**REAL ESTATE TAX**

18. Is stamp duty/transfer tax (or equivalent) payable on the purchase of real estate? Who pays, what are the rates and are there any exemptions? Does it apply to the transfer of shares in a company holding real estate and at what rate?

Transfers of real estate are not subject to any stamp duty or transfer tax in New Zealand. However, income tax may be payable on a gain on the sale of real estate if any of the following apply:

- The business of the seller consists of dealing in real estate.
- The real estate was acquired for the purpose of resale.
- Residential property is sold within two years of purchase (unless an exemption applies, known as the "bright-line" test).

A Residential Land Withholding Tax (RLWT) applies where an offshore person sells residential property within two years of purchase.

19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios? What is the general approach of the tax authorities in your jurisdiction to such schemes?

Various corporate structures, such as companies or limited liability partnerships, can be used and structured to reduce or minimise tax obligations in relation to the sale of real estate.

20. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?

In New Zealand goods and services tax (GST) is a consumption tax charged at 15% on the supply of most goods and services.

In most commercial property transactions, both the seller and buyer will be GST-registered and GST will be charged at 0% (zero rated). However, if the seller is GST-registered and the buyer is not, GST is likely to be payable by the seller on the supply (sale) of the property.

In all cases, the seller and buyer should consider the GST position before entering into the agreement, and ensure that the purchase price is recorded as excluding GST (if any) or including GST (if any).

21. Are municipal taxes paid on the occupation of business premises? Are there any exemptions?

Landlords as the owners of business premises are charged rates by the local authority in respect of the land and buildings that comprise the premises. This cost is generally passed on to tenants in most commercial leases.

**CLIMATE CHANGE ISSUES**

22. Are there targets or incentives to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria?

In addition to internationally recognised binding emissions reduction targets, the government has set domestic targets for reducing New Zealand’s greenhouse gas emissions, including:

- A provisional post-2020 target of 30% below 2005 greenhouse gas emissions levels, by 2030.
- An unconditional target of 5% below 1990 greenhouse gas emissions levels, by 2020.
- A long-term target of 50% below 1990 greenhouse gas emissions levels, by 2050.

The main mechanism by which the government seeks to reduce emissions is the New Zealand Emissions Trading Scheme (ETS). The ETS (created by the Climate Change Response Act 2002) puts a price on greenhouse gases, to provide an incentive to reduce emissions and invest in clean technology and renewable power generation. However, it only applies to specific industry sectors such as energy, fishing, forestry, liquid fossil fuels, industry, horticulture, agriculture, synthetic gases and waste.

In terms of buildings, the Building Code (under the Building Act 2004) sets out the standards for all building work in New Zealand. The Building Code includes minimal requirements as to energy efficiency. However, these only apply to new building work (including additions or alterations to existing buildings).

23. Are provisions relating to the energy efficiency of buildings commonly included in contracts for the sale of real estate or in leases (for example, green leases)?

The inclusion of “green” provisions in commercial leases is becoming increasingly common in New Zealand. There are a range of approaches, from being purely aspirational and non-binding, through to being binding, legally enforceable obligations.

Leases where a government entity is the tenant typically impose binding green obligations on the landlord. These obligations might include an obligation on a landlord to achieve a target rating for the building issued by an appropriate agency such as NABERS NZ (www.nabersnz.govt.nz) or the New Zealand Green Building Council, and obligations to maintain that rating during the term of the lease.
REAL ESTATE FINANCE
Secured lending involving real estate

24. Briefly outline the typical security package required by lenders in relation to real estate lending. How are the most common forms of security interest relating to real estate created and perfected (that is, made valid and enforceable)?

Most lenders insist on the registration of a mortgage against the title to any real estate being financed by them. Mortgages that are registered against the title to land take priority in the order in which they are registered, and a registered mortgage normally takes priority over an unregistered one.

In addition, lenders may also take additional security such as:
- Security over the assets of the borrowing entity, as a general security agreement registered on the Personal Property Securities Register.
- Personal guarantees from the directors/shareholders of the buyer.

25. What other real estate related measures do lenders typically take to protect themselves against default by the borrower?

Protection sought by lenders depends on the circumstances, however the following measures are typical:
- Covenants in lending agreements, including conditions precedent, real estate covenants, financial covenants and continuing disclosure obligations.
- Valuations of the relevant property.
- Guarantees from directors/shareholders.
- General security agreements over all assets.

26. Can lenders incur environmental liability? What measures do lenders typically take to manage potential environmental liability?

If the borrower defaults, a lender may incur environmental liability if it enters into possession of the property, in the same way as the landowner may incur such liability. The lender will be bound, as a mortgagee in possession, to comply with the relevant laws while they are in possession of the property.

One way in which a lender may seek to reduce this risk is to appoint a receiver rather than entering into possession of the property (if it can do so under the relevant security documentation).

27. Briefly outline the main remedies for lenders in relation to the secured real estate if the borrower defaults on the loan. What is the effect of the borrower’s insolvency on the lender’s remedies?

If a borrower defaults on a loan in relation to real estate, the lender can immediately demand repayment of the loan. If the default is not remedied, the lender can take steps to enforce the security.

If the relevant security is a mortgage, a mortgagee must realise the mortgaged properties through a mortgagee sale. This process is set out in the Property Law Act 2007. Court proceedings are not necessary, unless the mortgagee wishes to purchase the mortgaged property.

As an alternative, the lender can appoint a receiver (if the documentation allows) in relation to the relevant assets, and the security document and the Receiverships Act 1993 will apply.

If the borrower is a company and insolvent when the lender is seeking to enforce its security, a liquidator might be appointed and the lender is entitled to receive notice of the company’s intention to appoint a liquidator. Once the liquidation process starts, the lender is no longer able to take enforcement action, and must instead prove itself as a secured creditor.

28. Briefly outline key additional issues for lenders in relation to construction and development projects.

In relation to construction and development projects in New Zealand, lenders usually require approval of material development documentation as a condition precedent to drawdown of any monies lent. They generally appoint their own lawyers to undertake due diligence, or may in some cases rely on the borrowers’ lawyers.

Lenders may also require:
- Construction contracts and professional appointments to be assigned by way of security.
- Collateral warranties or third party rights from contractors, designers and key sub-contractors.
- The right to step in and take over the contract/appointment, in the event of a borrower event of default under the financing documentation.
- Construction contracts to be entered into on a fixed price basis, with clear allocation of risks.

Other real estate financing techniques

29. Are other real estate finance techniques commonly used in your jurisdiction? For example, real estate securitisation and sale and leasebacks.

Acquisitions of commercial property are often financed through a combination of debt and equity. Since the global financial crisis banks have typically required higher loan-to-value ratios of at least 60%. Sale and leaseback transactions do occur, where the underlying real estate is sold to a third party and leased back to the seller at a market rent. Real estate securitisation is possible but not common in New Zealand.

REAL ESTATE LEASES
Negotiation and execution of leases

30. Are contractual lease provisions regulated or freely negotiable? Which legislation applies?

The terms of commercial leases are generally freely negotiable in New Zealand. The Property Law Act 2007 implies certain terms into leases and covers remedies for breach. Various standard lease forms are typically used, covering general commercial leases and also specific to retail, industrial and office leases.
31. What are the formal legal requirements to execute a lease? Does the lease have to be executed by certain parties or as a deed? How do the formalities differ for a company, partnership and for individuals?

All commercial leases must be in writing and signed by the parties to be enforceable in New Zealand under the Property Law Act 2007. They are not required to be, but commonly are, executed as deeds. However, short-term leases under the Property Law Act 2007 do not have to be in writing. A short-term lease is one which is meets all of the following criteria:

- Is unregistered.
- Commences no later than 20 working days after the date of the contract to lease.
- Is for a period of one year or less.

Lease formalities do not differ whether the parties are an individual, partnership or company, unless the relevant constitutional document so provides.

Rent payments

32. How are rent levels usually reviewed and are there restrictions on this? Is stamp duty and VAT (or equivalent) payable on rent? Is a rent security deposit required and does it have to be managed in a certain way?

It is usual for the lease to provide for the rent to be reviewed according to market levels, consumer price index movements, fixed increases, or a combination of them.

The various standard form leases used contain rent review provisions. There is no statutory restriction on rent reviews.

There is no stamp duty payable on rent in relation to commercial premises, but goods and services tax (GST) is payable. The current GST rate is 15%.

Generally, a landlord will require security from the tenant in the form of a guarantee from a third party (such as the directors and/or shareholders of the tenant) or a bank bond. The weaker the covenant of the tenant, the more likely it is that the landlord will require security.

Length of term and security of occupation

33. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term?

The term of a lease is generally a matter of negotiation between the landlord and tenant, and depends on the specific circumstances. Subject to the subdivision provisions of the Resource Management Act 1991 (which require subdivision consent for any lease of part of an allotment which is for a term, including renewals, of more than 35 years), there are no legal restrictions on the lease term.

An average lease term is typically three to six years, and up to 15 years where a landlord is spending money on the premises to fit-out a particular tenant.

Leases often include the right for the tenant to extend the lease term by exercising one or more “rights of renewal”. Like the term itself, whether a lease contains rights of renewal, and if so how many and for what term, are matters for negotiation between the landlord and tenant, and depend on the circumstances.

Tenants do not have any statutory rights to renew a lease at the end of the lease term.

By law, commercial tenants are granted the exclusive right to quiet enjoyment of the leased premises during the term of the lease (this is a term implied into all leases by the Property Law Act 2007), provided they comply with their obligations under the lease.

Disposal

34. What restrictions typically apply to the disposal of the lease by the tenant? Can the tenant assign or sublet the lease with the landlord's consent? Can tenants share their premises with companies in the same group? What is the effect of a legal reorganisation or transfer/sale of the tenant on the lease and on a guarantee of the lease?

Most commercial property leases require the tenant to obtain the landlord's consent to an assignment of the lease or any subletting of the leased premises. In those circumstances, the Property Law Act 2007 provides that the landlord cannot unreasonably withhold its consent.

Changes in the tenant's structure that result in a change in the effective management or control of the tenant generally require the landlord's consent, as a deemed assignment of the lease.

While less common, some commercial leases include an absolute prohibition on assignment or subletting by the tenant.

35. Does a landlord or tenant retain any liability under the lease after the lease is assigned?

If a landlord disposes of its interest in the leased property, it will generally only remain liable for breaches occurring before the transfer to the new owner.

If a tenant assigns or transfers its interest under a commercial lease, unless the parties agree otherwise the tenant will continue to be liable for its obligations under the lease.

The Property Law Act 2007 provides that, on an assignment or transfer of a lease after 1 January 2008, the assignor or transferor of the lease remains liable to the landlord for payment of the rent and performance of the tenant's obligations.

Repair and insurance

36. Who is usually responsible for keeping the leased premises in good repair and for insuring the leased premises? Are there provisions for the ownership of lease improvements?

Under most standard lease forms:

- The tenant is required to maintain the interior of the premises, subject to fair wear and tear.
- The landlord is usually required to maintain the exterior of the premises (but can recover some or all of these costs under the lease) and keep the premises watertight.
- The landlord is also generally responsible for structural maintenance and for the replacement (as opposed to repair) of building services.

The landlord usually insures the premises but insurance premiums are generally included as an outgoing payable by the tenant. Landlords also typically take out loss of rent insurance.

The tenant is responsible for insuring its own property. Tenants are also typically required to hold public liability insurance.

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Under most leases the tenant must reinstate the premises at the end of the lease. Ownership of any tenant improvements that are not removed generally passes to the landlord without compensation.

**Landlord’s remedies and termination**

37. What remedies are available to a landlord for a breach of the lease by the tenant? On what grounds can the landlord usually terminate the lease and what restrictions and procedures apply? What is the effect of the tenant’s insolvency under general contract terms and insolvency legislation?

A landlord can terminate a lease for non-payment of rent or material default by the tenant, under the terms of the lease and the Property Law Act 2007.

The procedure that must be followed is set out under the Property Law Act:

- A landlord must give notice to the tenant. The notice must contain certain prescribed matters, otherwise the landlord may be unable to rely on it.

- A landlord can cancel the lease and re-enter the premises if the notice expires and the breach has not been remedied. However, the tenant may have the right to apply to a court for relief against cancellation of the lease.

If there are rent arrears, the landlord can claim as an unsecured creditor if the tenant is a company in liquidation, or may be able to pursue a guarantor, depending on the terms of the guarantee. If the liquidator or receiver remains in possession of the leased premises, the liquidator becomes liable for payment of rent and performance of the obligations under the lease.

If the tenant company has simply ceased trading, without a liquidator or receiver being appointed, leases generally remain unaffected. Rent will continue to accrue, for which the tenant and any guarantors will be liable.

38. Can the tenant withhold rent payments in certain circumstances, for example for serious damage to the leased premises? Can the tenant terminate the lease in certain circumstances?

Most leases will not allow a tenant to withhold rent, except where the leased premises have suffered partial destruction or damage, are not accessible due to an emergency, or are being repaired by the landlord. In these cases, a fair proportion of the rent and outgoings may be reduced or cease to be payable, under the terms of the lease.

A tenant can generally only terminate a lease if it contains an express right to do so, or in the event of a breach by the landlord. Most standard form leases only provide a limited opportunity for tenants to terminate, for example if they cannot get access to the premises after a specified period following an emergency.

The Contractual Remedies Act 1979 provides that a tenant can cancel a lease in certain circumstances, including:

- Where the landlord makes it clear by words or conduct that it does not intend to perform or complete performance under the lease.

- If there has been a misrepresentation, breach or expected breach of a term that is essential to the tenant.

**PLANNING AND DEVELOPMENT CONTROLS**

39. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?

The government and local authorities have the ability to compulsorily acquire privately owned land, if it is required for a public work under the Public Works Act 1981. Generally, compensation is payable to the property owner, based on the current market value. In addition to compensation other costs and expenses, such as disturbance and professional advice costs, can also be claimed from the acquiring authority in certain circumstances.

Regenerate Christchurch (an entity jointly controlled by the Christchurch City Council and the government) is charged with leading the regeneration of Christchurch and the surrounding districts following the Canterbury earthquakes of 2010 and 2011, superseding the previous Canterbury Earthquake Recovery Authority. Regenerate Christchurch has the power to compulsorily acquire land in the context of the regeneration, subject to the statutory requirements set out in the Greater Christchurch Regeneration Act 2016.

40. What authorities regulate planning control and which legislation applies? Is there specific protection for special categories of buildings such as historic buildings?

The main legislation regulating planning control is the Resource Management Act 1991 (RMA) which governs the use of physical resources in New Zealand, including land, water, minerals and air.

In addition to covering environmental matters, the Resource Management Act also governs:

- Subdivision of land.
- Management of activities using land, including:
  - building;
  - earthworks and other land modification;
  - noise and dealing with waste; and
  - control of activities that use water.

Central government and local government (consisting of regional councils and territorial/authorities) have jurisdiction over different aspects of the implementation of the Resource Management Act.

The rules for local land use activity are set by local authorities in their district plans. Regional councils have regional plans governing the use of water, coastal matters and the discharge of contaminants.

Heritage monuments and places can be protected by heritage covenants under the Heritage New Zealand Pouhere Taonga Act 2014, but this legislation does not generally prohibit the transfer of real estate.

In Christchurch, Regenerate Christchurch also has the ability to develop Regeneration Plans in relation to different aspects of the post-earthquake rebuild in the region. It has wide powers in relation to the erection, alteration or removal of buildings.
41. What planning consents are required for building works and the use of a building?

In addition to any building consent required, a new development or substantial alteration to an existing development is also likely to require consent(s) under the Resource Management Act.

The Resource Management Act classifies activities in general terms into six primary categories: permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited. These different categories determine aspects such as:

- Whether a resource consent is required before carrying out the activity.
- What will be considered when making a decision on a resource consent application.
- Whether a resource consent must, can or cannot be granted.

Rules in regional and district plans determine within which category an activity falls. Different types of consent include land use consents, coastal permits, water permits and discharge permits.

42. What are the main authorisation and consultation procedures in relation to planning consents?

Initial consents

Applications for resource consents (see Question 41) are generally made to the relevant local authority. The length of time taken to determine the application varies, depending on:

- The nature and scale of the development.
- Whether the authority decides that the application must be publicly notified, requires limited notification or does not need to be notified.

Limited notified applications usually take about four and a half months to process, while publicly notified applications take about six months.

Third party rights and appeals

Sometimes written approval from affected neighbours and other parties is needed for an application for a resource consent to be processed on a non-notified basis. If the council determines a resource consent is required, it will also determine from which neighbouring or other properties consent is required.

In addition, the RMA recognises that Maori have a special cultural and spiritual relationship with the environment, and a role in helping to safeguard it on behalf of all New Zealanders.

When considering an application for resource consent, local authorities are required to recognise and provide for the relationship of Maori with their ancestral lands, water, sites, waahi tapu (sacred areas) and other taonga (treasures). This may oblige applicants to consider such matters and values, and to consult with local iwi as part of their application.

In the case of public or limited notification consents, a resource consent hearing may be held if submissions are received. Resource consent decisions can be appealed to the Environment Court.

43. Are there proposals to reform real estate law and are they likely to come into force and, if so, when?

**Land Transfer Act 2017**

A New Land Transfer Act 2017 was passed by Parliament in July 2017. This updated legislation aims to modernise, simplify and consolidate existing land transfer legislation. Unless bought into force earlier by Order in Council, the new legislation will come into effect on 10 January 2019 (18 months after passing).

The Land Transfer Act 2017 retains the core principles of the Torrens land registration system from the Land Transfer Act 1952, being that title to land should be acquired by registration and should, as far as possible, be secure and indefeasible.

Key aspects of the new Land Transfer Act include:

- The new legislation gives the court limited discretion, in the event of fraud or other illegality, to restore a landowner’s registered title in rare cases where such intervention is warranted to avoid a manifestly unjust result. The threshold for this is very high and fraud will not necessarily of itself be an indication of manifest injustice.
- Some terminology will change. For example, the concept of the “computer register” will become “record of title”.
- The state compensation system that previously operated to compensate those who suffered loss due to the operation of the land transfer system is retained with a few amendments. Compensation will be available for loss through Registrar’s error, the operation of the land registration system and having acted in reliance on a guaranteed search. This is broadly consistent with the previous legislation but the guaranteed search periods have been shortened to 20 working days to reflect the automated conveyancing environment.
- Under the Land Transfer Act 1952, compensation is based on land value at the date of loss. This can be problematic. The new Land Transfer Act 2017 aims to address this problem by providing for compensation to be generally based on the value of the land at the date when the claim is discovered, or should reasonably have been discovered, subject to judicial discretion to change the valuation date and add a loss adjustment allowance (based on property market movement) where the value is inappropriate.
- The concept of “fraud” is defined in the Land Transfer Act 2017. Fraud is not defined in the 1952 Act, which has resulted in uncertainty and increased litigation. Fraud is now defined as “forgery or other dishonest conduct by the registered owner or the registered owner’s agent in acquiring a registered estate or interest in land”.
- Land Information New Zealand (LINZ) will be the sole administrator of the new Land Transfer Act. Currently the Land Transfer legislation is jointly administered by LINZ and the Ministry of Justice.
- A more streamlined process is introduced with less onerous notice requirements to apply when adjoining neighbours seek ownership of land that is in a limited title on the basis of adverse possession. This should reduce costs and speed up the process.
- The Land Transfer Act 2017 contains provisions clarifying that the electronic register is a public register under the Privacy Act 1993 and is subject to the relevant privacy principles. The Act also extends the Registrar-General of Land’s statutory powers to withhold an individual’s personal information to protect his or her personal safety or that of his/her family in specified circumstances.

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• There are also a number of savings and transitional provisions. Specifically:
  - the register kept under the current legislation immediately before commencement of the new Act continues.
  - instruments or applications lodged but not fully dealt with before commencement will continue to be dealt with under the old Land Transfer Act as if it were not repealed.
  - the provisions of the old Act in relation to guaranteed searches obtained before commencement of the new Act will continue to apply.

- until a "record of title" is created for an estate or interest in land for which there is a computer register or certificate of title, the computer register or certificate of title is to be treated as if it were a record of title created under the Land Transfer Act 2017.

Over the next year LINZ will be consulting on a raft of regulations, standards and guidance designed to support the introduction of the Land Transfer Act 2017.

ONLINE RESOURCES

legislation.govt.nz
W www.legislation.govt.nz

Description. Contains acts, bills, legislative instruments and supplementary order papers. It is owned and updated by the Parliamentary Counsel Office.

New Zealand Legal Information Institute (NZLII)
W www.nzlii.org

Description. Contains free access to New Zealand legal information, including case law, legislation and law review articles.

Practical Law Contributor profile

Paul Calder, Partner
Duncan Cotterill
T +64 3 372 6493
F +64 3 379 7097
E paul.calder@duncancotterill.com
W www.duncancotterill.com

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Professional associations/memberships. Presenting seminars on various matters relating to leasing in New Zealand, and involvement in the review and development of standard lease forms, taking into account the issues identified by the Christchurch earthquakes.