

# New Zealand

Garry Downs and Andrew Brown

Bell Gully

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## Policy

**1** Broadly speaking, what is the governmental policy and legislative framework for the electricity sector?

The New Zealand government has put in place a government policy statement outlining its expectations for the effective operation of the electricity market in New Zealand and has established an Electricity Commission. The government policy statement sets the objectives and outcomes required of the Electricity Commission. The principal objectives of the Electricity Commission are to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable and environmentally sustainable manner, and to promote and facilitate the efficient use of electricity. Consistent with those principal objectives, the Electricity Commission is required to seek to achieve a number of specific outcomes.

Key pieces of legislation for the electricity sector include:

- The Electricity Act 1992, which establishes the Electricity Commission to govern the electricity industry in New Zealand.
- Under the Electricity Industry Reform Act 1998, no person involved in an electricity supply business (ie that sells or generates electricity, or trades in rights to sell or generate electricity) may be involved in an electricity distribution business, unless certain conditions are met or an exemption is granted.
- Under New Zealand's Commerce Act 1986, the Commerce Commission is required to assess distribution lines businesses against thresholds set by the Commission, determine whether those thresholds have been breached and to administer the electricity information disclosure regime for lines businesses.

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## Organisation of the market

**2** In general, what is the organisational structure for the generation, transmission, distribution and sale of power (including electric energy and other electric products)?

New Zealand's electricity sector has four main components—generation, transmission, distribution and retail. Buying and selling wholesale electricity occurs via a pool, where electricity generators offer electricity to the market and retailers bid to buy the electricity. New Zealand's electricity transmission system is via a single high voltage national grid owned by Transpower New Zealand Limited, a state-owned enterprise constituted under the State-Owned Enterprises Act 1986 and accountable to its shareholding ministers. The national grid connects electricity genera-

tion to substations feeding the local networks that distribute electricity to consumers. The New Zealand transmission system is interconnected between the country's North and South Islands via a 'high voltage direct current link' (HVDC). Distribution lines companies own the local distribution networks throughout New Zealand. The lines companies either sell their lines services to retailers who manage the electricity contractual arrangements directly with end consumers, or contract their lines services directly to the end consumers. Electricity generation stations connect directly to the national grid. Of the six main generation companies, three of them are state-owned enterprises. Retailers buy electricity from the generation companies and supply to the end consumer. Many of New Zealand's electricity generators are also retailers, including the three state-owned enterprises.

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## Regulation of electricity utilities – power generation

**3** What governmental or administrative authorisations are required to construct and operate generation facilities?

There are no specific government or administrative authorisations required to construct and operate generation facilities in New Zealand. However, there is a range of New Zealand legislation which is required to be complied with. This includes: for overseas investor, the possible need to obtain Overseas Investment Act consent to invest in New Zealand (please see question 25); for all generation facilities, the need to obtain consent for the project under New Zealand's Resource Management Act (New Zealand's principal planning legislation for regulating activities and controlling environmental impacts); a restriction on line distribution companies from being able to own and operate generation facilities over certain size thresholds (please see more detail on New Zealand's Electricity Industry Reform Act in questions 1, 11, 13, 26 and 27); and compliance with construction and wiring standards contained in New Zealand's Building Act and Electricity Act. Generators are required to become a participant under the Electricity Governance Rules and Regulations and to comply with the relevant requirements of those rules and regulations.

**4** What are the policies with respect to interconnection of generation to the transmission grid?

Part 4A of the Commerce Act contains an industry-specific regulatory regime for distribution lines businesses (both Transpower and large distribution businesses). For further detail please see question 8.

New Zealand's Electricity Commission has put in place Electricity Governance Rules 2003. Part F of the rules set out the

rules around transmission in New Zealand, including: the structure of, and matters to be included in, transmission agreements; benchmark agreements that act as a default transmission agreement; rules around grid upgrades and investments (Transpower must obtain approval from the Electricity Commission for any investments it wishes to make for which the costs will be passed on to participants through the pricing methodology, and a 'net benefits' economic test is applied to grid investment proposals); a reliability standard for the grid; and rules around transmission pricing methodology.

- 5 Does the governmental policy (or legislation) foster power generation based on alternative energy sources such as renewable energies or combined heat and power?

The government policy statement fosters power generation based on alternative energy sources by including an objective of the removal of barriers to investment in new generation technology, renewables and distributed generation. Other policy initiatives of the New Zealand government to foster investment in this area are:

- the introduction of the government's Sustainable Development Policy of Action in 2003 (this has the intention of establishing a framework for long-term sustainable energy decisions);
- the introduction of carbon tax in New Zealand from 2007;
- the creation of a Climate Change Office under New Zealand's Ministry for the Environment (to coordinate and implement the New Zealand government's climate change policy following its ratification of the Kyoto Protocol);
- two tender rounds for 10 million emission credit units being awarded to a number of wind farm projects;
- the introduction of the requirement for the Electricity Commission to encourage the development of small generation projects for connection to New Zealand's national grid;
- the enactment of the Energy Efficiency and Conservation Act 2000 (which created the Energy Efficiency and Conservation Authority as a standalone independent Crown entity having a role to promote energy efficiency, energy conservation and renewable energy across all sectors of the economy); and
- an amendment to New Zealand's Resource Management Act requiring that all persons exercising functions and powers under that Act have particular regard to the efficiency of energy end use.

### **Regulation of electricity utilities – transmission**

- 6 What governmental or administrative authorisations are required to construct and operate transmission networks?

Under part F of the EGRs, Transpower must obtain approval from the Electricity Commission for any investments it wishes to make for which the costs will be passed on to participants through the pricing methodology, and a 'net benefits' economic test is applied to grid investment proposals.

- 7 Who is eligible to obtain transmission services and what are the requirements that must be met to obtain access?

To obtain access to transmission services, parties need to enter into a transmission agreement with Transpower that complies with the relevant conditions in Part F of the EGRs.

- 8 Is there any tariff or other regulation regarding the rates, terms or conditions for the provision of transmission services?

Under Part 4A of the Commerce Act, the Commerce Commission assesses lines businesses against thresholds (a price path threshold and a quality threshold) set by the Commission and determines whether those thresholds have been breached.

The purpose of the targeted control regime, as set out in section 57E of the Commerce Act, is to promote the efficient operation of markets directly related to electricity distribution and transmission services through targeted control for the long-term benefit of consumers by ensuring that suppliers: are limited in their ability to extract excessive profits; face strong incentives to improve efficiency and provide services at a quality that reflects consumer demands; and share the benefits of efficiency gains with consumers, including through lower prices.

The Commission's first threshold period covered August 2001 to March 2004. For Transpower it was August 2001 to June 2004. A new price period (implemented in December 2003) covers the regulatory period of five years beginning on 1 April 2004 to 31 March 2009. Transpower has a one-year threshold from 1 July 2004 to 30 June 2005. In effect, the thresholds are a screening mechanism to identify lines businesses whose performance may require further examination. If one or more of the thresholds are breached by a lines business, the Commission can further examine the business through a post-breach inquiry and, if required, control their prices, revenue or quality.

- 9 What entities are responsible for assuring reliability of the transmission grid and what are their authorities and responsibilities?

The Electricity Commission is responsible under the Electricity Act 1992 for complying with the government policy statement on electricity, which includes the requirement to manage the electricity sector so that electricity demand can be met in a one-in-60 dry year, without the need for emergency conservation campaigns.

Transpower has a contract with the Electricity Commission to coordinate and manage the real time transmission of electricity, and is responsible under Part C of the EGRs to ensure that real time security of electricity supply is maintained and that the system is operated to meet certain quality objectives. To do this, Transpower enters into agreements with generators for ancillary back-up services.

New Zealand's national grid was built in the 1950s and 1960s and is nearing its capacity. Transpower is planning a major investment programme to address: strong growth in electricity demand over the last six years and projected growth over the next 40 years; the need to connect a diverse range of new sources of generation; and the ageing of the national grid.

New transmission investments are awaiting the approval of the Electricity Commission (see question 6 above). Under the EGRs, the Electricity Commission is required to undertake a review and consult with interested parties on the grid investments proposed in Transpower's grid upgrade plan. This process must also consider whether alternatives to transmission might defer or replace transmission investments. Following various steps in the consultation process over the coming months, the Commission's final decision on the proposed transmission upgrade is due in June 2006.

### Regulation of electricity utilities – distribution

#### 10 What governmental or administrative authorisations are required to construct and operate distribution networks?

No governmental authorisations are required to construct and operate local distribution networks in New Zealand. Distributors may obtain ‘electricity operator’ status under the Electricity Act, which entitles that person to construct and maintain network assets on, over, along, across or under any road. For network assets constructed on private land prior to 1 January 1988, the network owner has the right of access over that land to maintain and operate those assets under the Electricity Act. Maintenance can include, where certain criteria are met, enhancement of the assets. For network assets constructed on private land after that date, the consent of the landowner is required, and the right to access for ongoing maintenance must be specifically obtained from the landowner.

Construction of network assets may require consents under the Resource Management Act, and other local territory authority construction consents.

#### 11 Who is eligible to obtain access to the distribution grid and what are the requirements that must be met to obtain access?

All electricity retailers are able to access distribution grids for the purpose of supplying electricity to their customers in the distributor’s grid area. All that is required is that the retailer execute (in most instances) a retailer interposed use of system agreement. At the time of corporatisation of electricity suppliers into integrated retail and distribution businesses in the early 1990s, virtually all companies adopted a relatively standard form of agreement. Most of these agreements were amended when those companies were required to sell either their retail business, or their distribution businesses under government reforms required by the Electricity Industry Reform Act 1998. In general terms the distributor is obliged under these agreements to maintain and operate the grid to the standards of a reasonable and prudent grid operator. The retailer must ensure its customers’ premises are metered to enable reconciliation of electricity use and calculation of line charges. In 2005 the Electricity Commission and industry participants developed a ‘model’ use of system agreement, but it is not clear to what extent the model agreement has been adopted by local distributors.

#### 12 Is there any tariff or other regulation regarding the rates, terms or conditions for the provision of distribution services?

Under 4A of the Commerce Act, which came into force on 8 August 2001, the Commerce Commission has introduced a targeted control regime for distribution services tariffs. The Commission has set two thresholds—a price threshold and a quality threshold. If either threshold is breached, the business will be subject to investigation and possibly, control. The price path threshold is a CPI-X threshold and each distributor has been assigned an X factor. That factor reflects expected industry-wide improvements and the relative performance of each distributor in comparison with the productivity and profitability of other distributors. The threshold is expected to apply for five years from February 2004. The quality threshold is based on average historical disruption of supply figures over the preceding five years, and likewise is expected to apply for a period of five years, although it will be reviewed after three years. In August 2005 the Commission took control of the prices of one electricity distributor.

### Regulation of electricity utilities – sales of power

#### 13 What governmental or administrative authorisations are required for the sale of power to customers and which are the responsible authorities to grant such approvals?

No governmental or administrative authorisations are required to become an electricity retailer, although the Electricity Industry Reform Act provides that an electricity retailer cannot be involved in electricity distribution. As a ‘participant’ under the Electricity Governance Regulations 2003, an electricity retailer of any significance must register with the Electricity Commission. While there is no statutory requirement, all current electricity retailers are voluntary members of the Electricity and Gas Complaints Commission. Members of the Commission must adhere to the Code of Practice. The Code sets out the minimum obligations and standards of behaviour and how complaints will be resolved.

#### 14 Is there any tariff or other regulation regarding power sales?

Electricity retailers, together with generators and lines companies, pay a levy to fund the operation of the Electricity Commission. The impact of these levies on consumers depends on the extent to which each retailer chooses to pass the levy on to its customers. Most electricity retailers pass on the full cost of the levy to consumers. The amount of the levy varies between generators, retail companies and lines companies and according to the anticipated operational costs of the Electricity Commission. There is no regulation of the prices that electricity retailers charge. As publicly-held companies and state-owned enterprises, electricity retailers are free to determine their own charges. The Code of Practice referred to in question 13 requires retailers to give domestic consumers at least 30 days’ notice of an increase in price, providing some degree of rigidity to the price charged. Many industrial consumers purchase electricity at ‘spot prices’ directly from the national grid. These spot prices fluctuate according to levels of supply and demand.

#### 15 To what extent are electricity utilities that sell power subject to public service obligations?

Electricity retailers must have a low fixed charge tariff option available for each electricity package that it offers to domestic consumers. Such tariffs have a lower fixed charge and a higher variable rate for the electricity consumed. The variable charges must be at a level that ensures the average domestic consumer does not pay more in total per year for electricity than the average domestic consumer would pay on an alternative tariff option.

The Code of Practice referred to in question 13 sets out a retailer’s obligations to consumers in areas such as billing obligations, services provided, the reading of meters, payment options (including policies for consumers that are having problems paying bills), disconnections and reconnections and the consumer complaint process.

### Regulatory authorities

#### 16 Which governmental or administrative authorities determine the regulatory policy with respect to the electric sector?

The electricity industry is principally regulated by three bodies:

- the Electricity Commission, which regulates the operation of the electricity industry and wholesale and retail electricity

- markets;
- the Commerce Commission, which is required to implement a targeted control regime for electricity lines businesses; and
- the Electricity and Gas Complaints Commission, which deals with consumer complaints.

In addition, under the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004, the Minister of Energy is able to exempt electricity retailers or distributors from being required to make low fixed charge tariff options available to customers.

#### 17 What is the scope of each regulator's authority?

All electricity businesses are subject to the regulatory regime administered by the Electricity Commission. As identified, the Electricity Commission's principal objective is to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable and environmentally sustainable manner. The Electricity Commission is also required to promote and facilitate the efficient use of electricity.

The Electricity Commission has a statutory obligation to formulate recommendations for regulations concerning certain specified subject matters (eg wholesale market, transmission of electricity, information on hedge price and a complaints resolution system). In doing so the Electricity Commission must have regard to any ministerial directions to give effect to government policy. There are process and consultation obligations around the exercise of powers in respect of both the Electricity Commission and the minister.

The Commerce Commission is required to implement a targeted control regime for electricity lines businesses. Electricity distribution assets are subject to performance thresholds set by the Commerce Commission that are focused on price and service quality. If either of these thresholds is breached, the relevant business will be subject to investigation and possibly, control (in which case electricity lines services cannot be supplied except in compliance with the authorisation or undertaking).

In addition, the Commerce Commission has both an enforcement and adjudication role, and exemption granting power under the Electricity Industry Reform Act, which contains statutory limits on the ability of electricity lines businesses to be involved in electricity supply businesses and vice versa.

The Electricity and Gas Complaints Commission provides a forum for consumers to access an independent dispute resolution service for complaints about their electricity lines or retail companies. The Electricity and Gas Complaints Commission also oversees the Electricity Consumer Code of Practice, which sets out the minimum terms that must be included in a customer contract. The commissioner is authorised to handle claims for amounts less than NZ\$20,000 (or NZ\$10,000 if the act giving rise to the complaint first occurred before 18 April 2005), however her jurisdiction can be increased to NZ\$50,000 with the agreement of the member company involved.

#### 18 How is each regulator established and to what extent, if any, is it considered to be independent of the regulated business and of elected officials?

The Electricity Commission is a Crown Entity set up under the Electricity Act 1992. It is governed by an executive chair and five other members appointed by the minister of energy. The Electricity Commission must operate in a manner that is consistent with government policy statement for electricity. Under the Electric-

ity Governance Regulations 2003, the Electricity Commission appoints members of the Rulings Panel, the body which deals with formal complaints regarding breaches of the Electricity Governance Regulations and the Electricity Governance Rules 2003 (together, the EGRs) by market participants as referred to by the Commission.

The Commerce Commission was established under the Commerce Act. The governor-general, on the recommendation of the minister of commerce, appoints Commission members for their knowledge of, and experience in, areas relevant to the Commission's interests. The Commerce Commission is an independent crown entity and is not subject to direction from the government in carrying out its enforcement and regulatory control activities.

The Electricity and Gas Complaints Commission is a voluntary scheme that was originally set up in late 2001 by electricity industry participants. The office is funded by member companies, but remains independent of the industry in its investigation processes and decision-making.

#### 19 To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

Industry participants affected by a decision of the Rulings Panel of the Electricity Commission can appeal to the High Court of New Zealand on grounds of lack of jurisdiction. There is also a right of appeal to the High Court: by way of case stated for the opinion of the Court on a question of law against a decision of the board, or the Rulings Panel under the EGRs, or against a suspension or termination order made by the board or the Rulings Panel.

Generally, appeals must be made by giving notice of appeal within 20 working days from the date of the decision or order appealed against, or within any further time that the Court allows. In certain cases further appeals may be made to the Court of Appeal.

There is a right of appeal to the High Court against all determinations of the Commerce Commission made under the Commerce Act, except declarations under section 57F of the Commerce Act to control goods or services supplied by a large electricity lines business in markets directly related to electricity distribution and transmission services. All appeals must be made by giving notice of appeal within 20 working days after the date of the determination appealed against, or within such further time as the Court may allow. In certain cases further appeals may be made to the Court of Appeal.

Judicial review proceedings can also be brought against Electricity Commission and Commerce Commission decisions on the basis of: illegality (ie, acting outside the scope of authority); irrationality (ie, where a decision is so unreasonable that no reasonable authority would come to it); or procedural impropriety (ie, a breach of natural justice or inadequate consultation).

The Electricity and Gas Complaints Commission's decisions are binding on the member company involved, but if the consumer doesn't accept a decision, they can lodge a claim with the Disputes Tribunal (a forum where a referee hears and determines disputes up to NZ\$7,500 (or NZ\$12,000 if both parties agree)) or go through the court system. If the company is a state-owned Enterprise, the consumer can make a complaint to the Office of the Ombudsmen.

### Acquisition and merger control; competition

- 20** Which governmental body(ies), if any, have the authority to approve/disapprove mergers or other changes in control over businesses in the sector (including the acquisition of ownership interest in an electric utility) or acquisition of utility assets?

The Commerce Commission is the relevant competition regulatory authority for the approval/disapproval of mergers or other changes of control.

- 21** What criteria and procedures are applied with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or disapproving the transaction?

The Commerce Act prohibits the acquisition of assets of a business or shares if the acquisition would have the effect or likely effect of substantially lessening competition in any New Zealand market.

The Commerce Act provides for a voluntary pre-transaction notification regime permitting the person proposing to acquire assets or shares to apply to the Commerce Commission for a 'clearance' or an 'authorisation' of the transaction. A clearance will be granted if the Commerce Commission is satisfied that the transaction will not be likely to substantially lessen competition in any market. Published guidelines outline the analytical approach followed by the Commerce Commission when determining whether a transaction would be likely to substantially lessen competition. If an acquisition would be likely to substantially lessen competition, the Commerce Commission may grant an authorisation if it is satisfied that the economic benefits from the acquisition would be likely to outweigh any anti-competitive detriments.

The Commerce Commission is obliged by statute to reach decisions regarding clearance and authorisation applications within 10 and 60 working days respectively. However, in practice, these periods are almost always extended by the agreement. For a clearance application, the Commission typically takes about 25 to 30 working days to consider the application.

- 22** Which governmental or administrative authorities have the power to prevent or prosecute anti-competitive practices in the electricity sector (other than through the exercise of authority over acquisitions and mergers)?

The Commerce Commission is the authority responsible for investigating anti-competitive market behaviour. The Commerce Commission can commence proceedings in the High Court against persons alleged to have infringed the competition laws. The Commerce Commission can also issue a 'cease and desist' order in respect of anti-competitive behaviour. This is a temporary administrative injunction that can only be issued where it is necessary to act urgently in the interests of the public to prevent serious loss and damages. (Private parties can also bring proceedings for anti-competitive practices.)

- 23** What substantive standards are applied to determine whether a conduct is anti-competitive?

The Commerce Act contains an overriding prohibition against any provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in any market. In addition, the Commerce Act specifically prohibits: price-fixing; exclusionary provisions; retail price maintenance; and a firm with a substantial degree of mar-

ket power from taking advantage of that market power for an anti-competitive purpose.

As with mergers, if a practice would be likely to substantially lessen competition, the Commerce Commission may grant an authorisation if it is satisfied that the economic benefits flowing from the practice would outweigh any anti-competitive detriment.

- 24** What authority does the governmental body have to preclude or remedy anti-competitive practices?

Except in the case of cease and desist orders the Commerce Commission must bring High Court proceedings to preclude or obtain a remedy for breaches of the Commerce Act. However, rather than issue proceedings the Commerce Commission can, and frequently does, issue warnings or enter into settlements.

### International

- 25** Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

Under the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005, overseas investment transactions which result in an 'overseas person' acquiring an interest in 'significant business assets' (acquisitions or investments in New Zealand having a value in excess of NZD\$100 million) and/or 'sensitive land' in New Zealand require government consent.

Overseas persons include foreign companies (incorporated outside of New Zealand) and non-New Zealand citizens, together with any New Zealand companies, joint ventures (incorporated or unincorporated), partnerships or trusts in which an overseas person (or persons) holds an interest of 25 per cent or more.

Sensitive land includes farmland and other non-urban land (ie land that is not used for commercial, industrial or residential purposes) of more than five hectares in size, and other land which has environmental, cultural or historic significance for New Zealand. Leasehold interests having a term of more than three years fall within the scope of the Act.

Consent will be granted where the overseas person can demonstrate that they have the business experience, acumen and financial commitment to the overseas investment to make it successful and that the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) and such benefits will be or are likely to be substantial and identifiable, having regard to a range of economic and policy factors.

Where an interest is acquired in farmland (as may be the case with greenfield power projects) the farmland must have first been offered for acquisition on the open market to persons who are not overseas persons in accordance with a prescribed procedure, unless the overseas investment is exempted from the requirement.

- 26** What rules, if any, apply to cross-border electricity supply, especially interconnection issues (including cross-border fees)?

Not applicable to New Zealand (it is an island country).

### Update and trends

There are a number of challenges facing New Zealand's electricity industry, giving rise to a range of opportunities:

- The decline of the Maui Field, as New Zealand's primary and low cost source of natural gas has resulted in higher prices, new gas fields being developed/under exploration and increasing interest in alternative fuels such as geothermal and wind. Importation of LNG is also under active consideration.
- Strong domestic economic growth has accelerated the need for additional generation capacity.
- There is urgent need for investment in New Zealand's national transmission grid, in particular in relation

to upgrades required into Auckland, New Zealand's largest city. The Electricity Commission is charged with identifying an optimal solution which will need to be balanced against the environmental concerns of landscape impact.

- The economics underpinning New Zealand's commitment to the Kyoto Protocol have changed since New Zealand first became a signatory. Now, rather than being a new recipient of funds under the Protocol, New Zealand will be a net player.

### Transactions between affiliates

**27** What restrictions, if any, exist on transactions between electric utilities and their affiliates?

As mentioned, under New Zealand's Electricity Industry Reform Act, no person involved in an electricity supply business (which includes retail and generation) can be involved in an electricity distribution business and vice versa unless certain conditions are met or an exemption granted.

**28** Who enforces the affiliate restrictions and what are the sanctions for non-compliance?

The Commerce Commission enforces breaches of the Electricity Industry Reform Act. Sanctions include pecuniary penalties, Commerce Commission injunctions to restrain a breach, actions for loss or damage caused, divestiture of assets or voting power, and a penalty of three times the commercial gain produced from the breach.



## Electricity Industry Expertise

### AUCKLAND

Garry Downs  
garry.downs@bellgully.com  
64 9 916 8932

Clive Taylor  
clive.taylor@bellgully.com  
64 9 916 8943

### WELLINGTON

Andrew Brown  
andrew.brown@bellgully.com  
64 4 915 6848

Chris Gordon  
chris.gordon@bellgully.com  
64 4 915 6836

Peter Castle  
peter.castle@bellgully.com  
64 4 915 6988

Auckland, New Zealand Ph 64 9 916 8800 Fax 64 9 916 8801  
Wellington, New Zealand Ph 64 4 473 7777 Fax 64 4 473 3845

**Bell Gully**

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