

# NEW ZEALAND

A Legal Guide for Business  
Investment and Expansion



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# NEW ZEALAND

## A Legal Guide for Business Investment and Expansion

Welcome to the 2019 edition of the Meritas Legal Guide for Business Investment and Expansion in New Zealand.

New Zealand is a land of opportunity for foreign investors and those wanting to conduct business in the country. Globally successful in a number of key industries, such as resources, agribusiness, financial services, education and tourism, the nation's diverse economy is expanding and producing globally significant research, innovation and development. With strong economic and cultural ties and a strategic location in the growing Asia-Pacific region, New Zealand's low-risk business environment hosts a diverse and highly skilled workforce.

To assist foreign investors and businesses operate to their full potential in New Zealand, the New Zealand firms in the global legal network Meritas is proud to present this guide. Designed to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses wanting to operate in New Zealand, this guide will consider:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?
3. How does the government regulate commercial joint ventures between foreign investors and local firms?
4. What laws influence the relationship between local agents or distributors and foreign companies?
5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g. energy and telecommunications)?
6. How do labour statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?
10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

The network of Meritas firms offers clients the ability to access high-quality legal services throughout New Zealand, Australia and worldwide. With over 7,600 business lawyers in over 240 cities, Meritas gives your company access to local counsel around the world.

We hope this Guide for Business Investment and Expansion in New Zealand is a valuable resource that will assist your business in reaching its full potential in New Zealand.

Please note that the following currency notations are used in this book:

- NZD New Zealand Dollar

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# TABLE OF CONTENTS

<b>New Zealand</b> .....	<b>2</b>
<b>About Meritas</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>6</b>
<b>Top 10 Questions</b> .....	<b>6</b>
A. <b>Government</b> .....	<b>8</b>
B. <b>Court and Legal System</b> .....	<b>8</b>
C. <b>Major Forms of Business Organisation</b> .....	<b>9</b>
D. <b>Regulation of Foreign Investment</b> .....	<b>12</b>
E. <b>Company Law</b> .....	<b>14</b>
F. <b>Taxation</b> .....	<b>16</b>
G. <b>Intellectual Property</b> .....	<b>19</b>
H. <b>Trade Practices and Consumer Protection</b> .....	<b>21</b>
I. <b>Entry to New Zealand</b> .....	<b>22</b>
J. <b>Exchange Control</b> .....	<b>24</b>
K. <b>Employment and Industrial Laws</b> .....	<b>24</b>
L. <b>Personal Property Securities Register</b> .....	<b>26</b>
M. <b>Protection of Personal Information</b> .....	<b>26</b>
<b>Firm Profile &amp; Contact</b> .....	<b>29</b>

*Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.*

# ABOUT MERITAS

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As an invitation-only alliance, **Meritas firms must adhere to our uncompromising service standards** to retain membership status. Unlike any other network or law firm, Meritas collects peer-driven reviews for each referral, and has for more than 25 years.



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# INTRODUCTION TO NEW ZEALAND

New Zealand is an island nation in the South Pacific with a population of approximately four million eight hundred thousand people from a diverse range of ethnic backgrounds. A significant majority of the population lives in

urban areas with almost one-third living in the greater Auckland region in the North Island. The largest ethnic group is of European descent with English being the major language. English, Maori and sign language are New Zealand's official languages.

## TOP 10 QUESTIONS

### 1. **What role does the government play in approving and regulating foreign direct investment?**

The New Zealand government regulates foreign direct investment primarily through the Overseas Investment Act 2005 administered by the Overseas Investment Office (OIO). Generally, overseas investment in New Zealand is actively encouraged but the rules have been tightened under the Labour-Greens coalition government.

The OIO reviews applications by "overseas persons" seeking to make substantial investments, whether in land or otherwise. Investments below the set thresholds do not usually require OIO approval in New Zealand.

### 2. **Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?**

Yes. Overseas persons or foreign investors may conduct business in New Zealand without a local partner.

A locally incorporated subsidiary of a foreign company is the most commonly used corporate structure for conducting business in New Zealand by foreign investors (although registered branches may also be used).

It is important to note that New Zealand incorporated companies must have either a New Zealand resident director or a director who is both resident in Australia and a director of a company incorporated in Australia.

### 3. **How does the government regulate commercial joint ventures between foreign investors and local firms?**

Other than through specific financial reporting, taxation and overseas investment rules, the government does not regulate commercial joint ventures between foreign investors and local firms.

### 4. **What laws influence the relationship between local agents or distributors and foreign companies?**

The law of contract and the Common Law regulate the relationship between local agents or distributors and foreign companies. Prices are expected to be set on an "arms-length" basis and where such pricing is not received, duties may be imposed.

### 5. **What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g. energy and telecommunications)?**

Mergers with, and acquisitions by, foreign investors are regulated by a range of statutes including the Companies Act 1993, Takeovers Act 1993 and Overseas Investment Act 2005 as well as through the Financial Markets Authority, the Commerce Commission and the New Zealand Stock Exchange. Relatively high thresholds are in place and it is generally only when those thresholds are exceeded that active steps are taken by government.

The only specifically regulated national resource which places additional regulation on foreign investment is the fishing industry. Under these rules an overseas person is prohibited from having an interest in fishing quota or having interests in a business (where the overseas person owns a 25% or more interest) that owns or controls interests in fishing quota.

## **6. How do labour statutes regulate the treatment of local employees and expatriate workers?**

The Employment Relations Act 2000 is the major statute governing the treatment of employees in New Zealand. Various other Acts must also be considered in dealings with employees such as the Holidays Act 2003 (which regulates annual leave and public holidays), the Parental Leave and Employment Protection Act 1987 (which regulates parental leave), the Health and Safety at Work Act 2015 (governing workplace health and safety), the KiwiSaver Act 2008 (a quasi-superannuation scheme), the Accident Compensation Act 2001 (a no fault insurance and compensation scheme for workplace injuries) and the Privacy Act 1993 (in relation to personal information).

Expatriate workers are not treated any differently than New Zealand employees and are subject to the same laws in addition to being subject to immigration criteria which will generally require visas to entitle them to work. If a person is only in New Zealand for a short term or for a specific purpose, New Zealand employment law may not apply, but if the person is employed by an overseas company that is conducting business in New Zealand, local employment laws will almost certainly apply.

## **7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit and other basic financial transactions?**

There are no government-imposed controls on foreign exchange. New Zealand has a floating currency. Private companies and individuals may exchange the New Zealand Dollar (NZD) for foreign currencies, repatriate funds (subject to complying with company law regarding solvency, distributions and any tax payable), organise letters of credit and all other financial transactions simply and easily. The New Zealand banking system is extremely efficient and transparent with little government regulation. However the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 does impose some restrictions on transfer of money to detect and deter money laundering and the financing of terrorism.

## **8. What types of taxes, duties and levies should a foreign investor expect to encounter?**

The New Zealand taxation system is administered by the Inland Revenue Department. The general tax rate applicable for companies is 28% and most (there are some exceptions) goods and services sold in New Zealand attract a goods and services tax of 15%. Generally, interest, dividend and royalty payments to a non-resident (company/individual) are subject to non-resident withholding tax (NRWT) at between 5%-30%. New Zealand has double taxation agreements with various countries which limit the amount of NRWT that must be paid. There is no capital gains tax as such or stamp duty in New Zealand. There are very few import taxes or duties although there are some dumping and countervailing duties imposed. Depending upon the choices made by New Zealand employees of foreign businesses in New Zealand, the employer may be required to make compulsory KiwiSaver payments.

## **9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?**

New Zealand has a comprehensive set of intellectual property statutes and regulations including the Patents Act 2013, Copyright Act 1994, Trade Marks Act 2002, Designs Act 1953, Layout Designs Act 1994 and Fair Trading Act 1986. There are functional and accessible government websites relating to each of these Acts. Nationality of the parties plays little or no role in enforcement by local courts.

## **10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?**

Access to local courts or arbitration hearings are the same for local and foreign investors. There is no preferential treatment for or among investors in New Zealand. Whether formal court procedure or alternative dispute resolution methods would be appropriate will depend very much upon the nature of the dispute and any governing documentation.

# A. Levels of Government

New Zealand has a Westminster system of government based on the UK system. Representatives, or members of parliament, are elected on a three year basis, using a mixed member proportional representation (MMP) system, to a single house of parliament. The government is led by the Prime Minister, elected by the caucus of the governing party (or governing coalition, as has largely been the case since the first MMP election in 1996).

The government, based in the capital city of Wellington, has the power to regulate for all New Zealand residents and businesses. In addition, local and territorial authorities make various regulations and bylaws which may affect residents living and businesses operating within their respective territories.

Accordingly, residents and businesses in New Zealand must be aware of and comply with the laws enacted by the central government and the regulations and bylaws of each local and territorial authority of the region where they are located.

# B. Court and Legal System

The New Zealand legal system is modelled on the English common law system of judge-made (or case) law and statutory law made by the central government.

There is a hierarchy of courts, which includes:

- Disputes Tribunal (dealing with small claims);
- District Court;
- High Court;

- Court of Appeal; and
- Supreme Court (which has replaced the previous system of appeals to the UK Privy Council as the highest level of the judiciary)

There are also a variety of specialist courts, tribunals and authorities including the Financial Markets Authority, Environment Court, Employment Authority and Employment Court.

# C. Major Forms of Business Organisation

A foreign company or investor proposing to establish a business in New Zealand may choose from a number of different entities or forms of business organisation. Each of these forms has its advantages and disadvantages. Business owners will need to carefully consider them to determine which is the most appropriate for their business.

The major forms of business organisation available to a foreign company or investor in New Zealand are:

## Company

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company

## Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

## Partnership

- Ordinary Partnership
- Limited Partnership

## Trust

- Discretionary Trust
- Unit Trust

## I. COMPANY

A foreign company seeking to conduct business in New Zealand must be registered under the Companies Act 1993. The foreign company may choose between two main forms of corporate organisation. These are:

### Locally Incorporated Subsidiary of a Foreign Company

A local subsidiary is a separate legal entity from its foreign company (its parent or holding company). It must be incorporated in New Zealand and is required to comply with all relevant New Zealand laws.

It is fully taxed in New Zealand on all its income and profits, whether that income arises from its business activities conducted in New Zealand or overseas.

A local subsidiary is a separate legal entity with separate legal personality, the liability of the foreign company parent for its subsidiary's indebtedness is, in the case of a limited liability company and in absence of any guarantees given by the parent

or other contractual arrangements, generally limited to any unpaid amounts on share capital subscribed for by the parent (although under the Companies Act 1993 a parent can be liable for debts of its subsidiary in certain exceptional circumstances).

The foreign company parent may, however, also be liable for insolvent trading by its subsidiary in circumstances where it ought to have known that the subsidiary was insolvent. Liability in such cases will depend upon the degree of control and knowledge.

There is no minimum capitalisation requirement for New Zealand incorporated companies under company law.

All companies must have at least one New Zealand resident director or a director who is both resident in Australia and a director of a company incorporated in Australia. The New Zealand incorporated company must have a physical registered office in New Zealand along with a New Zealand address for service.

A local subsidiary of a company or body corporate incorporated outside New Zealand will be required to file audited accounts if, in each of the two preceding accounting periods the total assets of the local subsidiary and its subsidiaries exceed NZD60 million or the total revenue exceeds NZD30 million.

### Branch Office of a Foreign Company

A branch office is simply a local New Zealand office of the foreign parent company and does not have a separate legal identity from its parent. However, the foreign company must still be registered in New Zealand as an overseas company and must comply with all relevant New Zealand laws.

The overseas company will be taxed in New Zealand on all its income and profits which arise from its business activities carried on in New Zealand, although the provisions of applicable Double Taxation Agreements between New Zealand and the overseas company's country of incorporation may reduce the tax otherwise payable in New Zealand.

Under the Financial Reporting Act 2013, the overseas company must file an annual report and audited accounts not only for the activities of its branch office but also for its overseas operations if, in each of the two preceding accounting periods the total assets of the overseas company and its subsidiaries exceed NZD20 million or the total revenue exceeds NZD10 million.

As a branch office is not a separate legal entity from the foreign company, the foreign company will be liable for the debts of the branch office.

Some of the principal advantages of operating a business in New Zealand through a local subsidiary or branch office are:

- Direct control over the business in New Zealand
- Potential cost reductions achieved by operating locally
- Identification and profile with local business partners and customers
- Opportunities to establish or build a local corporate identity
- Access to other markets from a base in New Zealand.

## 2. JOINT VENTURE

Forming a joint venture with a New Zealand organisation is an increasingly popular form of business organisation for foreign companies and investors. A joint venture is a business organisation where two or more entities become involved in a specific project or jointly participate in the conduct of a business operation.

The two main forms of joint venture are:

### *Unincorporated Joint Venture*

An unincorporated joint venture is not a separate legal entity. Rather it is a contractual agreement between two or more entities who agree to conduct business for a particular purpose. Care must be taken to avoid structuring the joint venture as a partnership as this may affect the tax liabilities of each joint venture participant.

Usually, unincorporated joint ventures do not make the participants jointly liable for costs and losses and the participants deal separately with their share of the income from the joint venture.

### *Incorporated Joint Venture*

More commonly, a separate special purpose company is incorporated to operate the joint venture and each participant becomes a shareholder in the company. This confers on them the protection of the company's limited liability status. New Zealand company law regulates this type of joint venture.

There are many different ways to structure a joint venture, which may require specific treatment depending on the type

of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture.

## 3. PARTNERSHIP

A partnership is an arrangement between two or more entities to carry on a business with a view to profit. It may be formed by a written or oral agreement between the partners. In the absence of a written agreement, the Partnership Act 1908 sets out many of the partnership rules that apply to the arrangement.

Ordinarily, partnerships are not separate legal entities and the partners have an unlimited personal liability, both jointly and severally, for the debts and obligations of the partnership. In addition, each partner is deemed to be an agent for the others and so may act on behalf of the other partners.

Limited partnerships are separate legal entities which are registered under the Limited Partnership Act 2008. A limited partnership consists of general partners, who like partners in ordinary partnerships, have unlimited personal liability for the debts and obligations of the limited partnership and limited partners who, provided certain requirements are met, enjoy limited liability for the debts and obligations of the limited partnership. General partners transact the business of the limited partnership while limited partners are passive investors and are liable only to the extent of their capital contribution in the limited partnership. A limited partnership can be formed with a minimum of one general partner and one limited partner. Limited partnerships are commonly used where, for example, one partner provides only capital while another partner is responsible for the operation and management of the business.

All limited partnerships are required to have at least one general partner who is resident in New Zealand or Australia. A resident general partner must be one of the following:

- A natural person who lives in New Zealand or Australia. If the person lives in Australia, they must also be a director of a company registered in Australia;

- A limited partnership that has at least one general partner who is a natural person living in New Zealand or Australia;
- A partnership governed by the Partnership Act 1908 that has one or more partners who live in New Zealand or an enforcement country;
- A New Zealand registered company under the Companies Act 1993; or
- An overseas company registered under the Companies Act 1993 that has one or more directors who are natural persons living in New Zealand or Australia.

Partnerships, other than limited partnerships, are not subject to taxation in their own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits, which are assessed at the partners' marginal tax rates.

Ordinary partnerships do not require registration. Limited partnerships must be registered.

#### 4. TRUSTS

Trusts are widely used within New Zealand to hold assets and as trading vehicles. Foreign companies and investors sometimes use trusts in New Zealand. The two main forms of trust are:

##### *Discretionary Trust*

A discretionary trust enables property to be held by a trustee who has discretion as to how to invest and direct the capital and income of the trust fund. The role and power of the trustee, the purposes of the trust fund and the rules regarding its use are generally contained in a trust deed. Discretionary trusts are often used in family and private business arrangements as they can confer tax benefits on the beneficiaries and they are often relatively simple to create and operate.

##### *Unit Trust*

A unit trust is an investment vehicle that allows the pooling of investment funds and the investment of those funds through a trustee, whose powers are clearly defined in the trust deed. The trustee may be assisted by a separate entity known as a manager, whose job is to select and manage the investments while the trustee acts as guardian of the unit holders' interests.

Trust beneficiaries, known as unit holders, have set interests in the income and capital of the trust. These interests can often be on-sold by the unit holders.

Many unit trusts invite the subscription of public funds, which are then pooled and invested in specified items for income purposes or capital gain.

In certain circumstances there may be advantages in selecting a trust as the form of business organisation, particularly from a taxation viewpoint. However, care must be taken to determine that it is appropriate for, among other things, the type of business, the taxation status desired, the required return, the degree of control required and the flexibility needed.

# D. Regulation of Foreign Investment

One of the first matters a foreign company or investor must consider when planning to invest in New Zealand is the impact of New Zealand's foreign investment policy.

## I. REGULATION

Foreign investment in New Zealand is principally governed by the Overseas Investment Act 2005 and is administered by the Overseas Investment Office (OIO).

The main function of the OIO is to review applications for consent from foreigners who intend to make investments in New Zealand, to make decisions regarding business (non-land) transactions under delegated authority from the Minister of Finance and to make recommendations to the Minister of Finance and Minister of Land Information regarding land transactions (who will in turn make a decision).

## 2. OIO CONSENT

Under the Overseas Investment Act, a transaction requires consent if it will result in an investment by an "overseas person" in:

- Significant business assets;
- Sensitive land; and
- Fishing quota.

### *Significant Business Assets*

A transaction involving significant business assets (being more than NZ\$100 million) may take the form of an acquisition of shares, the establishment of a new business or a takeover of an existing business.

Transactions that involve business assets worth less than NZ\$100 million do not require consent from the OIO. The only exception to this is for Australian investors for whom the threshold is higher. For the 2019 calendar year the threshold for private Australian investors is NZ\$530 million and the threshold for Australian government investors is NZ\$111 million threshold (although these thresholds are increased each year based on a formula).

### *Sensitive Land*

A transaction involving sensitive land may take the form of a purchase of the land itself or of shares or other securities in an entity that owns sensitive land.

Sensitive land is exhaustively defined in the Overseas Investment Act but importantly includes:

- Residential land;
- Non-urban land of five or more hectares in area;
- Foreshore or seabed;
- Land on most off-shore islands;
- Land over:
  - 0.4 of a hectare that adjoins sensitive land (for example, reserve or public park, lakes, certain heritage or historic areas); or
  - 0.2 of a hectare that adjoins the foreshore.

If the above applies to a proposed purchase, OIO consent must be obtained. The purchaser must seek legal advice before signing any sale and purchase agreement to avoid any inadvertent breach of this legislation.

### *Residential Land*

Residential land is land that is categorised as "residential" or "life style" under the District Valuation Roll which will include most houses, flats and apartments. However, not all acquisitions of residential land will require OIO consent as there are various exemptions available.

### **Who is an Overseas Person**

An overseas person is:

- An individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand; and
- A company, a partnership or a trust where 25% or more of that entity is owned or controlled by an overseas person or persons.

A person is ordinarily resident in New Zealand, if the person holds a New Zealand residence class visa and has:

- Been residing in New Zealand for at least the immediately preceding 12 months;
- Physically lived in New Zealand for 183 days or more in total in the last year; and
- Obtained "tax resident" status.

Australian and Singaporean citizens and permanent residents are overseas persons but they are largely exempt from the requirements to obtain consent for residential land transactions and share similar rights as New Zealand citizens and permanent residents.

**What Does Acquiring an Interest Mean?**

Acquiring an interest means coming into ownership or possession of an interest of 25% or more in the land, a lease of the land of three years or more or certain other interests in the land such as a mortgage.

**What Will the OIO Consider Before Giving Consent**

Gaining consent is basically a question of whether the acquisition would be of benefit to New Zealand as assessed against a range of statutory criteria.

For residential land, the applicant must demonstrate one or more of the following:

- A commitment to reside in New Zealand;
- The proposed transaction will increase housing stock in New Zealand;
- The residential property will not be used for residential purposes (i.e. will be converted to a non-residential use);
- The residential use of the property is part of the applicant's business; or
- The investment will benefit New Zealand.

For non-residential land the criteria require that:

- The applicant has business experience relevant to the overseas investment;
- The applicant has demonstrated a financial commitment to the overseas investment;
- The applicant is of good character; and
- Either (and this is particularly relevant to applicants wanting to purchase a lifestyle block or other larger blocks of land):
  - The applicant is ordinarily resident in New Zealand or intends to reside indefinitely in New Zealand; or
  - The investment will benefit New Zealand. The OIO will look at factors such as employment created, introduction of new technology or skills, introduction of investment capital and creation of new export markets. A business plan will be needed to show what is proposed and how it may benefit New Zealand.

The OIO may also consider factors such as protection of indigenous vegetation or fauna, protection of trout or salmon and their habitats, protection of conservation or heritage areas, improved public access over land and any offer (which is mandatory) of foreshore, seabed, lake or river back to the Crown.

An investment plan addressing each relevant benefit factor together with such professional reports as may be needed to verify the rationale for the investment must be included with the application.

**Farmland**

If the land being purchased is used principally for farming (other than forestry but including horticultural and viticultural use), then the land must be advertised for sale on the open market in New Zealand for at least 20 working days. This advertising forms part of the consent criteria and the results must be included in the application for consent.

**Vendors Selling Land to an Overseas Person**

The Crown is granted a right of first refusal to purchase at its market value land referred to as special land.

Special land is the foreshore, seabed, a river bed or a lakebed.

Owners of land containing special land are required to notify the Minister of any overseas investment transaction before proceeding with it.

**Penalties**

There are significant penalties that can be imposed for failure to comply with the OIO regulations. These can range from imprisonment, to fines of up to NZ\$300,000 to enforced sale.

# E. Company Law

Some general matters relating to company law in New Zealand are discussed below.

## I. REGULATORY SCHEME

The Companies Act principally regulates companies.

The Companies Act, together with major pieces of legislation such as the Financial Markets Conduct Act (which replaces, amongst other legislation, the Securities Act and the Securities Markets Act), Takeovers Act (and Takeovers Code) and the Listing Rules of the New Zealand Stock Exchange Limited (NZX), form a uniform regulatory scheme for companies.

## 2. REGULATORY AGENCIES

There are various agencies involved in administering this regulatory scheme including:

- The Companies Office of the Ministry of Business, Innovation and Employment which is responsible for administering the Companies Act and maintaining the register of companies (as well as various other registries);
- The Financial Markets Authority (FMA) which is responsible for administering securities and is co-regulator with NZX of the New Zealand Stock Exchange. The FMA is responsible for financial regulation in New Zealand including consumer protection, regulating all financial market participants, exchanges and the setting and enforcing of regulations;
- The Takeovers Panel which is responsible for administering the Takeovers Act and Takeovers Code; and
- NZX which is responsible for publicly-listed companies and ensuring compliance with the Listing Rules

## 3. INCORPORATION

A company has a separate legal identity from its shareholders and directors, who are usually not liable for the company's debts. A company can own property, enter into contracts and commence legal proceedings in its own name. It is the most common form of business organisation in New Zealand.

Companies are incorporated under the Companies Act. Incorporation involves reserving the company name, issuing shares, appointing one or more directors, nominating a registered office and address for service in New Zealand and sometimes lodging copies of the company's constitution (its governing document, if it elects to adopt one) with the Companies Office. Registration for tax can also be obtained

at the time of incorporation. Due to the fact that companies can be incorporated very quickly, shelf companies are generally no longer used in New Zealand.

Each properly incorporated company is registered by the Companies Office and receives a unique seven-digit company number and a unique thirteen-digit New Zealand Business Number (NZBN). There is no requirement that either number appear on the company's public documents.

## 4. TYPES OF COMPANIES

- Public (Listed) Company: A listed company may offer its shares for sale to the public.
- Private Company

A private company is the most commercially used form of company in New Zealand. Private companies are designed for a relatively small group of people who do not (usually) seek to raise funds from the public and who may seek to restrict the ability to transfer company shares. A private company must have at least one director and one shareholder

## 5. SHARES AND SHAREHOLDERS

The great majority of companies are limited liability companies which are limited by shares (although some companies are limited by guarantee or are incorporated as no-liability or unlimited liability companies). The liability of shareholders of limited liability companies is limited to any unpaid amount in respect of shares held by them.

Limited liability companies must have at least one share and one shareholder. There is no upper limit on the number of shares or shareholders in a company (although where the number of shareholders is 50 or more the company may be a code company for the purposes of the Takeovers Code (discussed below).

Most companies are incorporated with ordinary shares, although companies may establish different classes of shares and regulate the rights attached to those classes of shares.

## 6. DIRECTORS AND OFFICERS

Companies must have at least one director. A New Zealand incorporated company must also have either at least one New Zealand resident director or a director who is both resident in Australia and a director of a company incorporated in Australia.

There is no legal requirement to appoint a company secretary. Directors of companies conducting business in New Zealand, and others acting in the capacity of directors, owe certain duties to the company itself and, in certain circumstances, to other people associated with the company such as the shareholders and the creditors of the company. Director's duties arise under both the general law and the Companies Act.

## 7. REPORTING REQUIREMENTS AND RECORDS

Companies conducting business in New Zealand are under various obligations to:

- Maintain their accounts in accordance with New Zealand international financial reporting standards;
- Prepare annual financial statements and reports and distribute copies to their shareholders;
- In the case of certain companies, lodge copies of those statements with the Companies Office and, if applicable, the NZX;
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies;
- In the case of certain companies, have their accounts audited; and
- In the case of listed companies, disclose significant matters affecting their performance or prospects to NZX under the continuous disclosure rules contained in the Financial Markets Conduct Act.

The extent of the reporting obligations will depend on the nature and ownership of the company.

In addition, companies are obliged to keep various records and maintain various registers in respect of their activities. The shareholders may inspect these records and registers.

## 8. NEW ZEALAND STOCK EXCHANGE (NZX)

Listed (public) companies may seek to raise funds from the public by listing on the NZX. The NZX quotes the shares of listed companies and enables trading of those shares to take place. Listing is an option that is also available in limited circumstances to companies incorporated overseas.

In order to list on the NZX, companies must meet various stringent financial criteria set out in the Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the Companies Act and the Financial Markets Conduct Act. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects.

Small to medium-sized companies, which are fast growing or looking for additional sources of capital and seek to list without the expense and requirements of a full listing, could previously list on the New Zealand Alternative Exchange (NZAX) operated by the NZX but the NZAX has ceased to accept new applications. However, such companies may still list on the Unlisted Securities Exchange (USX) which is a privately owned platform.

A company that does not seek listing is not subject to any minimum capital requirements and can be structured in various ways to suit the financing requirements of the shareholders.

## 9. ACQUISITION OF COMPANIES

A company may be acquired in one of two principal ways:

- Its assets can be acquired (in which case the company itself is not acquired); or
- Its shares can be acquired.

Each of these methods has its advantages, depending on the outcome that is sought. Acquiring companies is complex and a discussion of the details is beyond the scope of this guide.

The acquisition of private (unlisted) companies is relatively unregulated except where the company being acquired has 50 or more shareholders, in which case the Takeovers Act will apply.

For listed companies, both the Takeovers Act and Listing Rules will apply.

Furthermore, the Commerce Act prohibits an acquisition of shares or assets in a company where the acquisition has the effect of substantially lessening competition in the market in which the company operates.

In addition, taxation consequences (discussed in the following Taxation section) must be carefully considered.

# F. Taxation

It is not possible to give a complete outline of the scope of the taxation system in this guide. A brief outline of the basic taxation principles and some of the major forms of taxation are discussed below.

In all cases, we strongly recommend that you obtain professional tax and legal advice before structuring or implementing your investment or business plans in New Zealand.

## I. NEW ZEALAND INLAND REVENUE

The Inland Revenue Department (IRD), a government body with broad powers, administers the taxation system.

The IRD has offices throughout New Zealand. It assesses and collects national taxes, enforces many of the laws that relate to the payment of taxes, hears objections to tax assessments and issues public tax rulings and determinations.

## 2. INCOME TAX

New Zealand imposes taxation on the worldwide income of New Zealand resident individuals, companies and other entities. Non-residents are generally taxed on the New Zealand sourced income (although this may be reduced by double taxation agreements). Profits arising from business in or with New Zealand may be taxable even where the entity in question does not have an established place of business in New Zealand.

Individuals are treated as tax residents if they:

- Have a permanent place of abode in New Zealand (even if they have a permanent place of abode overseas); or
- Are physically present in New Zealand for more than 183 days in any 12 month period.

The Income Tax Act 2007 governs income tax.

### Calculation Of Taxable Income

Tax is payable on taxable income which is calculated by determining the taxpayer's assessable income (being the taxpayer's gross income, excluding exempt income) and deducting from that amount those deductions that are allowed. Allowable deductions include losses and expenses incurred in producing the assessable income or in carrying on a business but do not include those losses or expenses which are of a capital, private or domestic nature.

### Deductions

Deductions may be allowed for some capital expenditure, for example, depreciation for plant and equipment. Special provisions apply to certain types of expenditure.

### Losses

New Zealand residents and non-residents are generally entitled to carry forward domestic income tax losses and offset them against future income. However, this entitlement is subject to certain anti-avoidance provisions including a requirement that ownership of the entity being taxed is continuous.

A New Zealand resident company that incurs a loss is permitted to transfer the right to claim a deduction for that loss to another New Zealand resident member of the same consolidated group, provided certain common ownership tests are met. Losses incurred by a non-resident company operating through a branch in New Zealand are deductible only against future income earned by the branch but may be immediately available to the non-resident company in its own jurisdiction, subject to its local taxation rules.

### Tax Year

The income tax year generally commences on 1 April and terminates on 31 March of the following year. It is possible to apply to the IRD for a different income tax year.

## 3. TAX RATES

### Residents

The general rates of tax applicable to resident individual taxpayers are:

<b>TAXABLE INCOME THRESHOLD(NZ\$)</b>	<b>MARGINAL RATE</b> % on excess up to next taxable income threshold
Up to 14,000	10.5
14,001 – 48,000	17.5
48,001 – 70,000	30
70,001 up	33
No notification (subject to amendment)	45

### *Companies*

The general rate of tax applicable to companies is 28% (subject to amendment), payable on all taxable income.

### *Double Taxation Agreements*

There are Double Taxation Agreements between New Zealand and a number of countries. These agreements mean that, in most cases, taxation is only imposed by the country of residence and not by the country where the income is sourced. However, the country where the income is sourced may impose withholding tax on dividends, interest and royalties (see below). If a non-resident has a permanent establishment in New Zealand, then it is liable for tax on income referable to that branch.

### *Payment of Tax*

Entities earning assessable income must lodge a tax return with the IRD (although this requirement is relaxed for certain individuals). The IRD will usually accept the assessment but may conduct an audit of the tax return.

Income received in the form of salary or wages is collected by employers under a pay-as-you-earn (or PAYE) system and paid to the IRD on a regular basis. This is done by filing employment information each payday (Payday Filing).

For the self-employed, provisional tax and company tax is generally paid in advance instalments based on a person/company's likely tax liability for the income tax year.

### *Capital Gains Tax*

New Zealand does not have capital gains tax per se. However, care needs to be taken in accruing profit on the resale of an asset if that asset was originally acquired with resale in mind, in such cases income tax may be payable. Also where a property is acquired for investment purposes and subsequently sold within a stipulated period you may be subject to tax on any profit. The stipulated period was previously two years from the date of acquisition but was increased with effect from 29 March 2018 to five years from the date of acquisition.

### *Taxation of Payments to Non-residents*

Interest income, dividends and royalties paid to non-residents are subject to withholding tax as discussed below.

### *Interest*

Interest payments made to a non-resident who does not have a permanent establishment in New Zealand are generally subject to a flat rate of interest withholding tax of 10%. The tax is payable regardless of whether a Double Taxation Agreement applies. Certain exemptions may apply.

## **4. THIN CAPITALISATION**

New Zealand businesses controlled by non-residents may not be able to claim a tax deduction for interest paid on their debts owing to "foreign controllers" and certain associates. This depends in part on the ratio between debt and equity.

## **5. DIVIDENDS**

Profits of New Zealand resident companies are taxed under an "imputation system." The effect of the system is that tax paid by the company (at 28%) is imputed (or allocated) to shareholders by way of imputation credits attaching to the dividends paid out of after-tax profits.

Shareholders receiving imputed dividends can claim a credit for the tax already paid by the company so that the dividends are not further taxed in the hands of the shareholders except, in the case of residents, to the extent that their marginal rate of taxation exceeds the company rate.

Imputation credits are not available to non-resident shareholders. Rather, imputed dividends paid to non-residents are not liable to dividend withholding tax in New Zealand. Dividends that do not carry an imputation credit are subject to dividend withholding tax at a general rate of 30%. If a Double Taxation Agreement applies, the rate is normally reduced to 15% or less.

## **6. ROYALTIES**

Royalties paid to a non-resident who does not have a permanent establishment in New Zealand are subject to a flat rate withholding tax of 30%. In most cases where a Double Taxation Agreement applies, that rate is limited to 5%, 10% or 15% of the gross royalty income.

Most payments for the use of intellectual property (such as computer software, sound recordings and brands) are royalties.

## 7. TRANSFER PRICING

There is a comprehensive transfer pricing regime in place to prevent New Zealand entities from reducing income by inflating deductions through non-arms-length transactions with non-resident associates.

## 8. OTHER TAXES

There are a variety of other taxes that affect businesses operating in New Zealand, including:

- **Goods and Services Tax (GST)**

GST is a tax of 15% on all goods and services and other items sold or consumed in New Zealand. Entities must register for a GST number when annual turnover has exceeded NZ\$60,000 in any 12 month period. Depending on turnover, you can elect to file returns every six months, two months or monthly. Registered suppliers are generally entitled to claim a credit for GST paid on their purchases.

Imports are subject to GST and exports are exempt. Certain supplies are zero-rated.

- **Fringe Benefits Tax (FBT)**

FBT is payable by employers on the value of certain “fringe” benefits provided to employees in connection with their employment. Employers must elect which option they will use for calculating FBT, which is 49.25% (subject to adjustment) using the single rate option, and is calculated on the tax-inclusive value of the fringe benefits provided in the tax year. Such benefits are widely defined to include a range of privileges, services and facilities including private use or enjoyment of motor vehicles, low interest loans, subsidised or discounted goods and accommodation.

- **Customs Duty**

Customs Duty is levied on a range of imported goods determined in accordance with the New Zealand Tariff. However, in comparison to many other countries relatively few goods are subject to tariff protection and generally speaking the rates of duty are fairly low.

- **ACC Levies**

Accident compensation (ACC) levies are payable by New Zealand employers and self employed to fund New Zealand's accident compensation system (no-fault accident compensation regime). The rate of the ACC levy depends upon the nature of the business undertaken.

It may be possible to legitimately minimise some of these taxes.

There is no stamp duty, land tax or gift duty in New Zealand.

# G. Intellectual Property

There are a variety of laws dealing with the protection of intellectual property in New Zealand. These laws permit the creation of legal rights to the exclusive use or ownership of copyright works, designs, patentable inventions, trade marks and other forms of intellectual property.

Some of the principal laws protecting intellectual property are briefly discussed below.

## I. PATENTS

The law relating to patents is governed by the Patents Act 2013.

Persons seeking to obtain the exclusive and enforceable right to make, use or sell their invention in New Zealand may apply under the Act for “letters patent” that grant such rights for a stipulated period.

A patent confers the sole right to make, use or sell the invention for a period of up to 20 years upon payment of the relevant renewal fees.

In order to be “patentable,” an invention generally must be novel, not obvious, of some use and involve an inventive step which has not been previously used.

Artistic creations, mathematical models, plans, schemes or other purely mental processes cannot be patented; however, it is possible to patent business methods and processes, provided that the above criteria are satisfied.

Special care must be taken when filing an application to obtain a patent for an invention, particularly to ensure that the invention is accurately and completely described.

The ability to patent an invention may be lost where an invention is demonstrated, sold, published or discussed in public before an application is filed. It is permissible to talk to employees, business partners or advisers on a confidential basis; however, it is advisable to have these persons first enter into written confidentiality agreements.

In all circumstances, it is advisable to consult a patent attorney before preparing a patent application. In New Zealand, patent attorneys are not necessarily qualified legal attorneys but rather specialists in the preparation and ongoing prosecution of patent applications.

## 2. COPYRIGHT

The Copyright Act 1994 governs copyright.

Copyright gives the owner an exclusive right in New Zealand to reproduce, publish, perform, communicate to the public (which includes broadcasting and electronic transmission), adapt and thereby benefit from original literary works (including various original computer programs), dramatic works, musical works and artistic works, together with other protected works such as films and sound recordings. Rights vary according to the nature of the work.

Copyright does not rely on a system of registration but rather arises automatically on the creation of the original work.

Copyright continues to subsist in the work for a period of 50 years from the date of the death of the author, other than broadcasts where copyright continues for a period of 50 years from the year in which they were made.

## 3. TRADE MARKS

A trade mark (being a word, symbol, name, brand, letter, colour, smell, shape, sound or aspect of packaging or a combination of any of them) used in relation to goods or services provided in New Zealand is registrable under the Trade Marks Act 2002.

In order to be registrable, a trade mark must generally be distinctive or capable of becoming distinctive, in that it is not descriptive of the goods or services to which the trade mark is applied and that it is dissimilar to any existing trade marks, whether they are registered or pending.

The person first using or applying to register the trade mark in New Zealand is generally entitled to be registered as the owner of the trade mark, subject to any third party’s prior use of the mark either in New Zealand or overseas. Accordingly, care must be taken to ensure a trade mark can be validly registered on behalf of a foreign investor before that person contemplates operating a business in connection with that trade mark in New Zealand.

Registration of a trade mark gives exclusive usage rights for a period of 10 years. If the registration is renewed every 10 years as required, the owner of the trade mark may obtain exclusive usage rights in perpetuity.

New Zealand is a signatory to the Madrid Protocol which provides for the international registration of trade marks, allowing a single application to be filed for protection in any or all signatory countries, based on a New Zealand trade mark application.

#### **4. DESIGNS**

New and distinctive industrial designs used in mass-produced articles may be protected by registration under the Designs Act 1953 and the Designs Amendment Act 2010.

A registered design for which a certificate of registration has been issued gives the owner exclusive and legally enforceable rights in respect of the design initially for a period of five years. Registration can then be extended for up to two additional periods of five-years each providing a total protection period of 15 years.

Once registered, a design owner obtains exclusive rights in relation to the design and is able to enforce those rights against third parties.

#### **5. GEOGRAPHICAL INDICATIONS**

A sign used on products that come from a particular geographical indication (place) and which possess a quality, reputation or other characteristic linked to that location may be able to be registered as a geographical indication. Presently only local and international wines and spirits are able to be registered as geographical indications but this could change.

Geographical indications are collective rights. There is no “owner” as such. Any trader who complies with the provisions governing the use of the geographical indication (including any registration conditions) is entitled to use it.

Once registered there are no restrictions on its use.

Geographical indications are effective for five years but can be renewed for successive periods of 10 years each.

#### **6. PLANT VARIETY RIGHTS**

Plant varieties (except algae, bacteria and fungi) which are now distinct, stable and homogenous, may be entitled to protection in New Zealand under the Plant Variety Rights Act 1987. The grant of a plant variety gives the grantee the exclusive right to produce, sell, propagate and authorise others to produce, sell and propagate the variety concerned.

The Plant Variety Rights Act 1987 is under review.

#### **7. LAYOUT DESIGN RIGHTS**

In New Zealand, protection is provided for the layout design of integrated circuits through the Layout Designs Act 1994. Layout design rights protect the layout of integrated circuits and semi-conductors.

These rights are based on copyright law principles but are a separate and unique form of protection. Like copyright protection, there is no requirement for registration for the granting of rights to the owner of a layout design.

The owner of an original circuit layout has exclusive right to:

- Copy the layout in a material form;
- Make integrated circuits from the layout; and
- Exploit it commercially in New Zealand.

The Layout Designs Act gives the owner protection for 10 years from the date when the layout design was first commercially exploited.

#### **8. TRADE OR BUSINESS NAMES**

New Zealand does not have a register of business or trade names. Accordingly a business or trade name can only be protected by registration as a trade mark.

#### **9. TRADE OR BUSINESS NAMES**

Other intellectual property rights may be protected under the law of passing off and/or the Fair Trading Act 1986.

# H. Trade Practices and Consumer Protection

New Zealand has extensive laws dealing with trade practices and consumer protection matters.

## I. TRADE PRACTICES

Competitive business activity in New Zealand is principally regulated by the Commerce Act 1986. The purpose of the Act is to promote competition in markets for the long-term benefit of consumers within New Zealand and covers a number of areas, including:

- “Anti-trust law” including the regulation of mergers and acquisitions which are likely to cause a substantial lessening of competition in a New Zealand market;
- Misuse or taking advantage of market power;
- Resale price maintenance; and
- Price fixing.

The Act is overseen by the Commerce Commission, which monitors competitive market conditions throughout the New Zealand economy. Penalties for breach of the anti-competitive provisions of the Act are onerous.

The Act does not attempt to restrict fair business dealings. Certain types of conduct, which may otherwise be deemed as anti-competitive, may be authorised or granted a clearance by the Commerce Commission in certain circumstances.

The Commerce (Criminalisation of Cartels) Amendment Act which criminalises cartel conduct was enacted in April 2019 but will not come into force until April 2021.

## 2. CONSUMER-PROTECTION

New Zealand consumers are protected by a wide variety of statutes (including Fair Trading Act 1986, Consumer Guarantees Act 1993, Credit Contracts and Consumer Finance Act 2003, Financial Service Providers [Registration and Dispute Resolution] Act 2008 and Financial Advisors Act 2008), which, among other things:

- Prohibit misleading or deceptive conduct;
- Prohibit unsubstantiated representations and unfair contract terms;
- Impose certain conditions and warranties into contracts for the sale of goods and services to consumers;
- Regulate the provision of credit finance to consumers;
- Impose product liability on manufacturers and importers in favour of consumers;
- Prohibit certain restrictive trade relationships;
- Supervise the setting and maintenance of prices for a broad range of consumer goods and services;
- Restrict the dissemination of certain private information relating to consumers and others;
- Require financial service providers to be registered and to be members of a dispute resolution scheme;
- Regulate competency of financial advice provided to consumers;
- Require financial advisers and brokers to take an appropriate degree of care in providing services to investors and consumers and prohibits certain conduct by financial advisers and brokers; and
- Regulate minimum disclosure by financial advisers and brokers.

## 3. AGREEMENTS WITH COMPETITORS AND TRADE RESTRICTIONS

Foreign companies and investors who propose either of the following are strongly advised to obtain professional legal advice before entering into such agreements.

- Entering into any agreement with a competitor; and
- Imposing restrictions on trading relationships with their customers, suppliers or distributors

# I. Entry to New Zealand

A visa or permit is not required to visit New Zealand if the visitor is an Australian citizen, British citizen, or a citizen of a country which has a visa waiver agreement with New Zealand. New Zealand has visa waiver agreements with a number of countries.

There are various classes of visa. Each class of visa has special conditions that must be met before the visa can be obtained. The type of visa applied for will depend on the reasons a person has for visiting New Zealand.

A person seeking to work in New Zealand must obtain a work visa. Work visas allow a person to work for a limited period.

## I. WORK VISAS

There are a number of categories under which work visas are available including:

- Essential Skills – allows people to work temporarily in New Zealand in areas where people are needed to fill shortages and New Zealanders are not available;
- Work to Residence – allows people whose skills and talent are wanted to work in New Zealand and provides them with a way to get residence in New Zealand. There are four different options:
  - Talent (Accredited Employers) Work – for people with a job offer from an accredited employer;
  - Talent (Art, Culture and Sports) Work – for people with exceptional talent in their field of art, culture or sport;
  - Long Term Skill Shortage List Work – for people working in an occupation on the Long Term Skill Shortage List; and
  - Entrepreneur Work Visa – discussed below.
- Partners – allows partners of New Zealand citizens or residence class visa holders, and the partners of people who hold work or student visas, to work temporarily in New Zealand;

- Study to Work – allows overseas students who have completed a qualification in New Zealand to work here after their studies and get practical experience suitable to their qualification;
- Specific Purpose or Event – allows people to come to New Zealand to work for a specific purpose or event for a particular period;
- Horticulture and Viticulture Seasonal Work – allows people to come to New Zealand for horticulture and viticulture seasonal work (planting, maintaining, harvesting or packing crops);
- Religious Work – facilitates the entry of religious workers to provide New Zealand communities the opportunity to practice, maintain and advance their religious beliefs;
- Crew of Foreign Fishing Vessels – allows foreign crew on fishing vessels;
- Students and Trainees – allows certain overseas students and trainees to gain practical work experience in New Zealand as part of their studies;
- Silver Fern Practical Experience – for young, highly skilled people from overseas who hold a Silver Fern Job Search visa or a first Silver Fern Practical Experience visa who have found skilled employment in New Zealand; and
- Free Trade Agreement – facilitates the entry of nationals of certain countries who are qualified and experienced in specific occupations and who have a genuine job offer in that occupation.

Work visas, regardless of type, require the person to satisfy certain criteria including basic health and character requirements and to have a passport valid for at least three months past the date the person is due to leave New Zealand. As well as these criteria, each category of visa has different specific criteria.

### *Entrepreneur Work Visa (EWV)*

Persons having a minimum of NZ\$100,000 capital investment (excluding working capital) and who seek to create business in New Zealand can apply for an EWV. It establishes a points-based system to actively assess potential business migrants and to choose those who can create high growth and innovative businesses. Points are given for:

- Business experience;
- Employment creation;
- Export potential;
- Innovation;
- Capital investment;
- Age; and
- A plan to invest and reside outside of Auckland.

## **2. RESIDENCY**

To permanently live in New Zealand, or set up a business, a person will need to apply for residency. A person holding a Work to Residence Visa may apply for residency after holding the visa for 24 months.

The main paths to New Zealand residency are:

### *Skilled Migrant*

This category works on a point system. Points are earned on the basis of qualifications, work experience or job offers in New Zealand. The person must be between 20–55 years old and satisfy the general requirements discussed above.

### *Entrepreneur*

To be eligible to apply under the entrepreneur category, a person must have successfully established a business in New Zealand, been “self-employed” in that business for at least two years and the business must have benefited New Zealand.

### *Investor*

There are two investor categories:

- **Investor** – This category requires an investment of NZ\$3 million for four years. The investor must spend at least 146 days in New Zealand each year of the last three years of the four-year investment period or 438 days in New Zealand over the four-year investment period. The investor must be under 66 years of age, have at least three years business experience, meet the required English language skills and the health and character requirements; and
- **Investor Plus** – This category requires an investment of NZ\$10 million for three years. The investor must spend at least 44 days in New Zealand each year in years two and three of the three-year investment period or 88 days in New Zealand over the three-year investment period. There are no requirements as to age, business experience or English language, but the investor must meet the health and character requirements.

### *Other Categories – Temporary Visas*

This category allows a person to live in New Zealand temporarily.

- **Student Visa** – a person coming to New Zealand to study on a full-time basis for more than three months will need a student visa which allows the person to study and work up to 20 hours per week.
- **Working Holiday** – there are a number of different working holiday schemes in place with varying requirements and time frames. Most working holiday visas require medical and chest x-ray certificates. Work must be on a casual basis.
- **Visitor** – temporary entry to New Zealand for holiday only.

# J. Exchange Control

Currency movements in and out of New Zealand are subject to certain controls. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 imposes restrictions on transfer of money to detect and deter money laundering and the financing of terrorism.

A cash transaction involving the transfer of currency (whether New Zealand or foreign that is in the form of notes or coins) of more than NZ\$10,000 must be reported to New Zealand Customs. This reporting requirement applies to cash transactions made within New Zealand as well.

In addition, a person taking more than NZ\$10,000 in currency into or out of New Zealand must report the transfer to a customs officer.

Generally there are no further restrictions on exchange flows, although in certain circumstances the approval of the Reserve Bank of New Zealand (RBNZ) may be required. The RBNZ is New Zealand's central bank and the bank of the New Zealand government. It is responsible for administering control over New Zealand's monetary system and its foreign exchange transactions.

# K. Employment and Industrial Laws

## **TERMS AND CONDITIONS OF EMPLOYMENT**

Terms and conditions of work performed by employees in New Zealand are governed by:

- Legislation governing employment terms and working conditions, including legislation regulating annual leave and other leave entitlements;
- Collective agreements;
- Individual employment agreements; and
- KiwiSaver.

## **2. LEGISLATION**

The main pieces of legislation are the Employment Relations Act 2000 (which governs the relationship between employer and employees in a contractual relationship), the Holidays Act 2003 (governing annual leave, sick leave and bereavement leave), the Parental Leave and Employment Protection Act 1987 (governing parental leave), the Health and Safety at Work Act 2015 (governing workplace health and safety), the KiwiSaver Act 2008 (a quasi-superannuation scheme), the Accident Compensation Act 2001 (a no fault insurance and compensation scheme for workplace injuries) and the Privacy Act 1993 (in relation to personal information).

## **3. COLLECTIVE AGREEMENTS**

Collective agreements are agreements entered into between an employer and the workforce, or part of the workforce. Only registered unions and employers can bargain for collective agreements. The Employment Relations Act requires parties to bargain in good faith.

## **4. INDIVIDUAL EMPLOYMENT AGREEMENTS**

Employees and employers may also be bound by an individual employment agreement, which by law is required to be in writing. A large proportion of the workforce is engaged under individual employment agreements.

Such agreements take different forms and/or contain different provisions depending on whether the employees are employed on a permanent full-time or part-time basis, a casual basis or under a fixed-term arrangement.

## **5. KIWISAVER**

KiwiSaver is a voluntary savings initiative established by the government in 2006. Employers are required to, among other things:

- Check whether new employees are eligible to join;
- Check whether new employees should be automatically enrolled;

- Provide a KiwiSaver employee information pack;
- Automatically en-roll all new employees who are eligible; and
- Deduct contributions at the correct rate and forward to the IRD.

Employers are required to contribute 3% of their employees' gross salary or wages annually and may voluntarily contribute a greater percentage for those enrolled in KiwiSaver.

## **6. TRIAL PERIODS**

Employers with fewer than 20 employees are able to employ new employees (subject to certain rules) on a trial period of up to 90 days. This enables an employer to dismiss an employee during the trial period and the employee is not able to raise a personal grievance for unjustified dismissal (although they may raise a personal grievance on other grounds – for example discrimination).

Employers with 20 or more employees may employ new employees on a probationary period of the employer's choosing. However, if they dismiss an employee during the probationary period, the employee is able to raise a personal grievance for unjustified dismissal..

## **7. REDUNDANCY COMPENSATION**

There is no requirement in New Zealand for an employer to pay redundancy compensation (except to vulnerable employees as defined under section 6A of the Employment Relations Act 2000). This is a matter of contract between the employer and employee.

## **8. TERMINATION OF EMPLOYMENT**

Employment in New Zealand can only be terminated for cause and any termination must comply with the requirements set out in the Employment Relations Act and the applicable employment agreement.

# L. Personal Property Securities Law

The Personal Property Securities Act 1999 (PPSA) came into force in New Zealand on 1 May 2002. At the heart of this legislation is the Personal Property Securities Register (PPSR), a register where security interests over personal property can be registered and searched in real time. It is a single online register for all security interests over personal property. It replaced a number of previous registers including the Chattels Register, Motor Vehicle Securities Register and the Register of Company Charges.

Security interests over personal property include chattels securities, retention of title arrangements, leases of goods for a period of greater than 12 months and commercial consignments.

The failure of the holder of a security interest to register their security interest on the PPSA or to do so within the prescribed time limits may cause the security holder to lose priority to competing interests. It is therefore important for holders of security interests to register their security interest on the PPSA and to do so as soon as practicable.

The PPSA is publically searchable and lenders are generally advised to search the register when taking security over personal property.

The implications of the legislation are wide ranging and legal advice should always be sought regarding its potential particularly in commercial transactions.

# M. Protection of Personal Information

The protection of personal information is seen as important in New Zealand with robust privacy laws which are generally observed and enforced. New Zealand privacy laws were traditionally seen as “adequate” under the European Union’s 1995 Data Protection Directive, however with the advent of the GDPR, New Zealand now lags behind the EU. Consequently, New Zealand’s privacy laws are under review with changes designed to ensure that New Zealand is aligned with the EU and other major trading partners likely to come into force later in 2019 or 2020.

The principal personal information protection law in New Zealand is the Privacy Act 1993. A number of more specific privacy Codes of Practice have been issued pursuant to the Privacy Act 1993 for certain industries; namely:

- Civil Defence National Emergencies (Information Sharing) Code;
- Credit Reporting Privacy Code;
- Health Information Privacy Code;
- Justice Sector Unique identifier Code;

- Superannuation Schemes Unique Identifier Code; and
- Telecommunications Information Privacy Code.

There are also relevant provisions in the Unsolicited Electronic Messages Act 2007 which prohibit address harvesting software or harvested-address lists being used in connection with unsolicited commercial electronic messages (i.e. spam emails).

Under the Privacy Act 1993, “personal information” means “information about an identifiable individual”. An “individual” is defined to mean a “natural person, other than a deceased natural person”, which excludes legal entities such as companies but would include the individual partners of a partnership or the trustees of a trust.

## I. PRIVACY PRINCIPLES

The Privacy Act 1993 centres around 12 information privacy principles. The wording of these principles contains a number of qualifications and exceptions, but they can be summarised as follows:

- Principle 1: An agency may only collect personal information necessary for a lawful purpose which is connected with a function of the agency;

- Principle 2: An agency must collect personal information directly from the individual, unless one of several exceptions applies;
- Principle 3: An agency must take reasonable steps to ensure an individual is aware of a number of matters, including the fact that the personal information is being collected, the purpose of the collection, the recipients of the information, the name of the agencies which will collect and hold the information, whether the supply of information is voluntary or mandatory (and under what laws), and the individual's rights under the Act;
- Principle 4: Personal information must not be collected in a way which is unlawful, unfair or unreasonably intrusive;
- Principle 5: An agency that holds personal information must ensure it is securely stored and protected from loss or misuse;
- Principle 6: If readily retrievable, an individual is entitled to confirmation from an agency of whether it holds their personal information and to be given access to it;
- Principle 7: Individuals have the right to request correction of personal information held, and if no correction is made may have a statement attached to the information noting that a correction was sought and not made;
- Principle 8: An agency must not use personal information without first taking reasonable steps to ensure it is up to date, complete, relevant and not misleading;
- Principle 9: An agency must only hold personal information as long as required for lawful purposes;
- Principle 10: An agency cannot use information for any purpose other than the purpose that it was obtained for, unless an exception applies;
- Principle 11: An agency must not disclose collected personal information unless pursuant to one of the purposes for which it was collected, or another exception applies;
- Principle 12: A unique identifier (such as tax identifiers and passport numbers) cannot be assigned to an individual unless it is necessary for the agency to carry out one of its functions efficiently, and the sharing of these identifiers is restricted.

## **2. COLLECTION OF PERSONAL INFORMATION**

An agency collecting personal information must ensure it is doing so for a legitimate purpose connected to its functions, should seek to obtain the information directly from the individual if possible, and must take steps to inform the individual about the collection and their rights in accordance with principle 3.

## **3. PROCESSING, USE AND DISCLOSURE OF PERSONAL INFORMATION**

As a general rule, the use and disclosure of personal information must be connected to the legitimate purpose for which it was collected. An agency should have processes in place to ensure information is up to date and complete before being used. Information must be securely processed and stored, kept only for so long as necessary, and the agency needs to have the ability to correct and modify stored personal information in case a correction request is received from an individual.

## **4. RESTRICTIONS ON PERSONAL INFORMATION BEING TRANSFERRED TO OTHER JURISDICTIONS**

There is no general restriction on the transfer of personal information to other jurisdictions. However, the Privacy Commissioner has authority to prohibit a transfer of information from New Zealand to another State if satisfied the information would not be adequately protected or the transfer would lead to a breach of the relevant OECD Guidelines.

Where personal health information is to be stored in the Cloud the Ministry of Health requires that the agency undertake a cloud service risk assessment and for certain agencies there are enhanced requirements.

## **5. INDIVIDUAL RIGHTS**

As per privacy principles 6 and 7, individuals have the right to know whether an agency holds their information, to access the information, and to request that corrections be made. Agencies must notify individuals of these rights. There is no right to have information deleted or to withdraw consent to its retention.

Employees' personal information is not protected differently and is subject to the same privacy principles.

## **6. IMPLEMENTATION AND ENFORCEMENT OF PERSONAL INFORMATION PROTECTION LAWS IN NEW ZEALAND**

The Act establishes the Office of the Privacy Commissioner, an independent Crown Entity which is responsible for implementing and enforcing the Act. In particular, the Privacy Commissioner has a role in receiving and determining privacy complaints, investigating breaches and authorising specific exemptions from the privacy principles. The Office of the Privacy Commissioner maintains a comprehensive website at <https://www.privacy.org.nz> with links to the relevant legislation and Codes of Practice.

### **7. REMEDIES FOR BREACH**

Complaints regarding breaches of privacy are to be made in first instance to the Privacy Commissioner, which will review the complaint, investigate if necessary and if possible settle the complaint between the individual and the agency. The role of the Privacy Commissioner is to facilitate or mediate a settlement; the Privacy Commissioner cannot force the parties to settle. Most settlements take the form of an apology or release of information. Financial settlements are relatively uncommon.

If it is not possible to settle the complaint, or the agency contravenes an earlier assurance not to repeat a breach of the privacy principles, the Privacy Commissioner may refer the matter to the Director of Human Rights Proceedings for civil action in the Human Rights Review Tribunal (essentially a specialist court). If the Privacy Commissioner or Director of Human Rights Proceedings decline to take action, the individual may bring the claim themselves.

The Human Rights Review Tribunal has a broad discretion in the orders it can make, which include an order restraining the defendant, costs and damages. There is no stated limit to the maximum damages awardable on a claim, but the awards to date are modest. Perhaps the most high-profile case to date has involved the internet tycoon, Kim Dotcom. In this 2018 case the Human Rights Review Tribunal made an award of NZ\$90,000 plus costs in favour of Mr Dotcom.

### **8. LIKELY DEVELOPMENTS**

In March 2018 a new Privacy Bill was introduced to replace the existing Act and is currently working its way through Parliament. Much of the new Bill is remaining the same, with updates and clarification to the wording. The key amendments are:

- Mandatory reporting of privacy breaches that pose a risk of harm;
- A new requirement for New Zealand agencies to take reasonable steps to ensure personal information disclosed overseas will be subject to acceptable privacy standards;
- New powers for the Privacy Commissioner, including strengthened information gathering powers, an ability to issue enforceable compliance notices to agencies, and the ability to make binding decisions on access to information complaints; and
- New criminal offences of misleading an agency in a way that affects a third party's information, and knowingly destroying documents containing personal information where a request has been made for it.

The Justice Select Committee presented a report on the Bill in March 2019 and it seems likely that there will be further amendments before the Bill is enacted.



# AUCKLAND

## **FIRM PROFILE:**

## **MARTELLI MCKEGG**

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