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 PUBLIC SECTOR  
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**TOURISM &  
 SERVICES PRIMARY**  
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# Doing Business in New Zealand

December 2009  
[www.simpsongrierson.com](http://www.simpsongrierson.com)

# Doing Business in New Zealand

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This guide introduces you to New Zealand's business and trading environment, with particular focus on legal and regulatory matters. The information in this guide is in summary form, and is intended as an introductory guide only. The information is accurate as at 1 December 2009, and will be updated regularly.

This is a general guide only and is not to be relied upon. Detailed advice should be obtained to cover the specific factual situation.

If you would like any help with your business activities in New Zealand, please contact us.

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We are a full service law firm and are proud of our reputation for providing expert yet practical advice across all areas of commercial law. We are a "plain English" firm.

We have excellent international connections. We are New Zealand's only member of Lex Mundi (the world's largest affiliation of independent law firms). We are a co-founder of the Pacific Rim Advisory Council, and a member of the International Bar Association and the Inter-Pacific Bar Association.

Our website is at [www.simpsongrierson.com](http://www.simpsongrierson.com).

We welcome any queries you may have about your New Zealand business venture.

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# New Zealand in a Nutshell

# 1

- New Zealand is made up of two main islands (the North and South Islands), Stewart Island (at the bottom of the South Island) and some smaller outlying islands. The combined area of these islands is 268,000 square kilometres (similar to the size of Japan, Great Britain or Colorado).
- New Zealand is a culturally diverse nation, with a population of approximately 4.3 million. English is the everyday language. Maori is the other official language, but is not spoken widely. We have no official religion.
- We have a culture of innovation and adaptability, and New Zealanders are famous for their "can-do" attitude. Although geographically isolated, travel is deeply embedded in the New Zealand psyche. Many New Zealanders work overseas at some stage in their lives, and many return home inspired by what they have seen.
- The New Zealand dollar is the unit of currency. The dollar is freely floated against all major currencies.
- The capital city and seat of government is Wellington (at the bottom of the North Island). The largest city is Auckland (at the top of the North Island).
- New Zealand is proud of its reputation as one of the least corrupt nations for conducting business.
- New Zealand has a largely temperate climate. The warmest summer months are typically January to March. New Zealand's traditional summer holiday period is over Christmas and the New Year. Many businesses close for two weeks over that period.
- Public holidays are:

New Year:	1 and 2 January
Waitangi Day:	6 February
Easter:	Friday and Monday of Easter weekend (dates vary)
Anzac Day:	25 April
Queen's Birthday:	First Monday in June
Labour Day:	Last Monday in October
Christmas Day:	25 December
Boxing Day:	26 December
- Flying direct, it takes about 23 hours to fly from Auckland to London, 12 hours to Los Angeles or San Francisco, 10 hours to Singapore, Hong Kong or Tokyo, and three hours to Sydney or Melbourne.
- The scenery in New Zealand is superb, varied and un-obscured by pollution. Much of the country is sparsely populated, and we generally enjoy an exceptional quality of life.

For more general information about New Zealand, Tourism New Zealand and New Zealand Trade and Enterprise have created a helpful website at [www.newzealand.com](http://www.newzealand.com). See also Investment New Zealand at [www.investmentnz.govt.nz](http://www.investmentnz.govt.nz)

# Business Landscape

# 2

## 2.1 Government

New Zealand is a parliamentary democracy and constitutional monarchy in the British "Westminster" tradition. The New Zealand government is led by the Prime Minister, although Her Majesty Queen Elizabeth II is New Zealand's official head of state. The Governor-General is the Queen's personal representative in New Zealand and fulfils constitutional, ceremonial and community leadership roles.

## 2.2 Legal system

The legal system is based on the English common law system. Many New Zealand statutes are based on English and/or Australian statutes.

The court system is hierarchical, with the courts of first instance being the District Court and the High Court. There are rights of appeal from the District Court to the High Court, and from the High Court to the Court of Appeal. The Supreme Court is New Zealand's final appeal court. There are also a number of specialist courts and tribunals, including the Environment Court, the Employment Court and the Employment Tribunal.

Arbitrations are an increasingly common means of resolving disputes. Arbitration is governed by the Arbitration Act 1996 (based on the UNCITRAL Model Law) unless the parties agree otherwise. If parties have agreed to submit a dispute to arbitration, the court must uphold that agreement and stay any court proceedings that are within the scope of an arbitration agreement. The High Court will enforce an arbitral award as though it was a judgment of the court.

## 2.3 Principal regulators

- (a) The **Overseas Investment Office** administers foreign investment policy, in accordance with relevant overseas investment legislation (see section 3 of this guide);
- (b) The **Securities Commission** is the main regulator of investments, and is co-regulator (with NZX Limited) of the New Zealand Stock Exchange (see section 6 of this guide);
- (c) The **Commerce Commission** enforces anti-trust and consumer protection legislation, and the legislation specific to the telecommunications, dairy and electricity industries (see section 8 of this guide); and
- (d) The **Accident Compensation Corporation** administers New Zealand's no-fault accident compensation regime (described below).

## 2.4 Monetary policy

New Zealand's monetary policy is operated by the **Reserve Bank of New Zealand** (the central bank). The Reserve Bank is required to formulate and implement monetary policy with the aim of achieving and maintaining price stability. Under current policy the Reserve Bank must aim to keep inflation within a 1-3% range on average over the medium term. **Treasury** acts as the Government's principal adviser on financial and economic issues.

## 2.5 Foreign exchange controls

There are no restrictions on the flow of capital or earnings of a New Zealand business to overseas investors. Profits, dividends, interest, royalties or management fees can be moved freely either into or out of New Zealand, although payments out of New Zealand may be subject to non-resident withholding tax (see section 7 of this guide).

No special licences or permits are required to buy or sell foreign currency.

## 2.6 Registered banks

Registered banks may conduct banking operations in New Zealand, and there is a relatively open policy on the entry of new registered banks to the market.

The banks with the largest presence in New Zealand are:

- (a) ANZ National Bank Limited;
- (b) ASB Bank Limited;
- (c) Bank of New Zealand;
- (d) Westpac (Westpac Banking Corporation and Westpac New Zealand Limited); and
- (e) Kiwibank (owned and operated through New Zealand's national postal operator).

Of these, all but Kiwibank are owned by larger Australian banks.

## 2.7 "No fault" accident compensation system

New Zealand has a statutory no-fault accident compensation scheme providing cover for those who suffer a personal injury in New Zealand. The scheme (which originated in the Accident Compensation Act 1972) is set out in the Injury Prevention, Rehabilitation and Compensation Act 2001 (**IPRCA**). The IPRCA covers personal injuries suffered by any person in New Zealand, including visitors, and wherever they occur – whether at work or otherwise.

The IPRCA prohibits legal claims for compensation arising out of or relating to personal injury suffered in New Zealand as a result of an accident.

A wide range of cover is available under the IPRCA for most types of personal physical injury suffered as a result of an accident. Means of compensation include payments for loss of earnings, medical treatment, rehabilitation costs, disability allowances and death benefits for dependants. Accident compensation benefits are available to visitors who are injured in New Zealand, although earnings related compensation is not available where the visitor's income is derived outside New Zealand.

The accident compensation scheme is funded largely through levies on employers, employees, and taxes on vehicle registration and petrol. The scheme is administered by the Accident Compensation Corporation.

## 2.8 Limited regulation of financial services industry

New Zealand does not (yet) have an overarching licensing, registration and regulation regime applicable to providers of financial services.

Currently, the regulation to which financial advisers are subject principally concerns disclosure only. "Investment advisers" and "investment brokers" are required to disclose certain specified information before giving any investment advice or providing service as an investment broker to members of the public in New Zealand. Generally speaking (and with some exceptions), these disclosure requirements will not apply if the advice or services are being provided to those who are excluded from the "public" for the purposes of the Securities Act 1978 (see section 6 of this guide).

However, a new and comprehensive regulatory regime which will affect all "financial advisers" is expected to come into force in late 2010. A "financial adviser" will be someone who gives financial advice, makes an investment transaction or provides a financial planning service.

The new regime is expected to:

- (a) impose professional conduct and competency requirements;
- (b) impose disclosure obligations on financial advisers;
- (c) require that all financial advisers be registered and/or authorised;
- (d) require the adviser to be a member of an approved dispute resolution scheme; and
- (e) provide a regime to regulate financial advisers.

## 2.9 Money laundering

Money laundering is illegal in New Zealand. The money laundering rules are set out in several different statutes. Breach of these rules can give rise to both civil and criminal liability.

A comprehensive money laundering regime (including customer due diligence, reporting and record keeping and enhanced surveillance powers and enforcement) is provided for in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, although at the time of writing this Act is not yet in effect.

## 2.10 Contract law

There is relatively little regulation of contracting in New Zealand. Parties are generally free to contract on their own terms.

Contract law in New Zealand is largely made up of common law principles, subject to certain statutory parameters. For example:

- (a) certain statutory consumer protection measures will apply irrespective of the terms of the contract (see section 8 of this guide);

- (b) contracts with minors are subject to the Minors' Contracts Act 1969;
- (c) credit contracts with consumers are regulated by the Credit Contracts and Consumer Finance Act 2003;
- (d) certain contracts must be in writing (including those involving interests in land, employment and mortgages); and
- (e) the Contractual Remedies Act 1979 allows parties to cancel a contract for misrepresentation (in certain circumstances, and provided that the terms of the contract do not provide for their own regime), and gives the courts power to grant a wide variety of relief.

Contract law will apply to overseas-owned entities in the usual way, provided they have obtained any consents necessary under the overseas investment rules (described briefly in section 3 of this guide). There are no separate requirements for contracts involving foreign-owned entities.

The governing law of a contract between an overseas-owned entity and a New Zealand entity will be determined by the terms of the contract, interpreted in light of the usual common law "conflict of laws" principles.

# Overseas Investment Regime

# 3

## 3.1 Regulation of foreign investment in New Zealand

Foreign investment in New Zealand is generally encouraged, although there are certain rules in place designed to ensure that sensitive New Zealand assets (land in particular) are protected.

The overseas investment rules are set out in the Overseas Investment Act 2005 (**Overseas Investment Act**) and the Overseas Investment Regulations 2005, and are administered by the Overseas Investment Office (**OIO**). The OIO screens all defined categories of "overseas investments" and then monitors "sensitive" assets to ensure they are being managed appropriately going forward.

## 3.2 When is OIO consent required?

The OIO (and, in some cases, the Ministers of Finance and Land Information) must consent to an acquisition by an "overseas person" of "sensitive land", "significant business assets" or fishing quota. Consent must be obtained before the transaction is carried out.

### (a) *What is an "overseas person"?*

An "overseas person" includes:

- an individual who is not a New Zealand citizen or resident;
- an overseas registered company; and
- a New Zealand registered company with 25% or more of its shares held by an overseas person or persons.

### (b) *What is "sensitive land"?*

"Sensitive land" is:

- non-urban land areas greater than 5 hectares;
- land on certain specified islands; or
- other parcels of land that are classified as "sensitive" due to their inclusion of or proximity to waterways, parks, conservation areas, or areas of historic significance.

An acquisition of "sensitive land" will include an investment in a business which owns or leases sensitive land. Acquiring rights or securities of a person which controls "sensitive land" in circumstances which cause that person to become an "overseas person" will also trigger the need for OIO consent, even if that acquisition is immaterial. This needs to be taken into account when investing in any company.

**(c) What are "significant business assets"?**

An acquisition of "significant business assets" includes:

- a transaction in which the investor buys 25% or more of a business where the consideration paid for the New Zealand part of the investment exceeds NZ\$100 million;
- a transaction in which the investor buys 25% or more of a business where the value of the New Zealand assets of the business exceed NZ\$100 million;
- an investor acquires any property in New Zealand (including goodwill and other intangible assets) for more than NZ\$100 million; or
- incurring expenditure in establishing a business exceeding NZ\$100 million.

**3.3 What is involved in obtaining OIO consent?****(a) Application**

The process starts with the investor submitting an application to the OIO (in the prescribed form) along with an application fee. Template applications letters are available from the OIO.

**(b) Timing**

The OIO aims to process consent applications within 55 working days, plus a 5 day initial review period. Simple "significant business asset" applications can usually be completed more quickly than this, but complex "sensitive land" applications can take much longer.

**(c) Matters in a consent application**

The application for consent focuses on whether the overseas person:

- has relevant business acumen and experience;
- is financially committed to the investment; and
- is of good character.

If the investment involves an interest in sensitive land, the applicant must also demonstrate that the purchase will bring a net benefit to New Zealand, and so be in the national interest. The OIO looks at several factors when assessing such an acquisition, including whether the investment will:

- create new job opportunities;
- create new technology, or introduce new managerial or technical skills;
- develop new export markets or increased market access;

## Overseas Investment Regime

- add to competition, and create greater efficiency or productivity;
- enhance services available in New Zealand;
- introduce into New Zealand additional investment for development purposes; or
- increase processing of primary products.

Other factors which the OIO regularly considers include:

- whether mechanisms are in place to protect or enhance indigenous vegetation and wildlife, historic heritage and walking access;
- whether refusal of consent would result in an adverse effect on New Zealand's image/trade relations or a breach of international obligations;
- whether the overseas person plans other significant investment or has previously undertaken investment in New Zealand; and
- whether the investment gives effect to and/or advances government policy or enhances ongoing viability of other investments undertaken.

The application for consent should address all of these factors. The applicant may also be asked to provide a management plan and supporting statements detailing how it will manage any sensitive land going forward.

### **(d) *Special rules for farm land, waterways and foreshore***

If an overseas person wishes to acquire farm land, or shares in a company owning farm land, that land must be marketed for sale in New Zealand for 20 working days (to persons who are not overseas persons) *before* the OIO is able to consent to the purchase by an overseas person.

The Crown has a right of first refusal to purchase certain land which constitutes the beds of certain waterways or foreshore and seabed land.

### **(e) *On-going monitoring of compliance***

The OIO monitors the activities of the overseas person post-acquisition to ensure that the investor is complying with the law, any representations made in its application for consent and any conditions of consent imposed by the OIO.

The overseas person is required to report on compliance.

## **3.4 Review of overseas investment regime**

The overseas investment regime is currently under review, and may be changed fundamentally as a result.

The review is considering particular aspects of the current regime, including whether the thresholds for investment are set at the right level, whether the ability to change relevant rules during an application

## Overseas Investment Regime

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process should remain, and whether means by which screening of investments in sensitive land can be simplified, while ensuring overseas investors are subject to a higher standard than domestic investors.

No strict timetable exists for completion of the review, but results of the review are expected in late 2009 or early 2010.

### **3.6 Extracting or exploiting New Zealand's natural resources**

Mining activities (including prospecting, exploration and extraction) require a permit under the Crown Minerals Act 1991. If the land in question is conservation land, then the Minister of Conservation must consent to the proposed activities.

# Immigration

There are a number of options available for non-New Zealanders wishing to work and live in New Zealand on a permanent or temporary basis. Current immigration policy focuses on migrants who can add economic value and enhance the creative industries in New Zealand.

For further information on current immigration policies, guides and forms, please see the New Zealand Immigration website at [www.immigration.govt.nz](http://www.immigration.govt.nz).

## 4.1 Work permits and visas

A person who is not a New Zealand or Australian citizen, or does not hold a New Zealand residence permit or returning resident's visa, must have a work visa or work permit to work in New Zealand.

- (a) A work visa is a passport endorsement allowing the holder to travel to and from New Zealand in order to work.
- (b) A work permit allows the holder to work in New Zealand for a limited period of time. Generally the permit will state the expiry date and any conditions of the permit, including the type of employment and where in New Zealand the holder may work.

Work visas and permits are issued for a limited period, up to three years, from the date of arrival in New Zealand. For someone seeking to settle permanently in New Zealand, or set up a business, residency is likely to be more appropriate (discussed briefly below).

There are a number of policies under which work visas or permits are available, including the Essential Skills Work Policy, Work to Residence Policy, Specific Purpose or Event Policy and Horticulture and Viticulture Seasonal Workers Policy. These are described in more detail on Immigration New Zealand's website ([www.immigration.govt.nz](http://www.immigration.govt.nz)).

To qualify for a work permit or visa, under any policy, the applicant must satisfy basic health and character requirements and have a passport that is valid for at least three months past the date the applicant is due to leave New Zealand.

As well as satisfying these requirements, the applicant must also satisfy the specific requirements of the policy under which they are applying. For example, if applying under the Essential Skills Work Policy, the applicant must have a job offer from a New Zealand employer who is either approved to recruit foreign workers or able to prove that there are no suitable New Zealand candidates for the job.

## 4.2 Long Term Business visa

The Long Term Business visa provides an opportunity to those who are interested in residence (under the Entrepreneur category, described below), and interested in establishing a business in New Zealand, to assess the viability of their business and determine whether or not they want to live in New Zealand.

To qualify for a Long Term Business visa the applicant must meet certain health, character and English language requirements, have a sound business plan, and provide evidence that he or she has sufficient funds (aside from investment funds) to support themselves and any partner or children coming with them.

If an application for a Long Term Business visa is successful, the holder will initially be issued a nine month permit which can be extended to three years provided the business has been started within the initial visa period. The holder can then apply for residency under the Entrepreneur category (described below).

### 4.3 New Zealand Residency

The two most commonly used categories of business-related residency applications are the Skilled Migrant and Business categories.

#### (a) *Skilled Migrant*

The Skilled Migrant category is designed to ensure that people migrating to New Zealand have the skills the country needs. This category works on a points system – applicants may only apply for residency if they have enough points. Points are earned on the basis of qualifications, work experience or job offers, in New Zealand. Applicants must also satisfy health and character requirements, English language proficiency and be aged from 20 – 55 (inclusive).

#### (b) *Business*

There are several different ways in which a business migrant may apply for residency in New Zealand. Principally these are to apply for residency having obtained a Long Term Business visa (described above), apply under the Entrepreneur category or fall within the one of the two Investor categories.

- **Entrepreneurs**

To obtain residence under the Entrepreneur category, applicants must establish a business that benefits New Zealand, or be working in a business that is benefiting New Zealand. Those who hold a Long Term Business visa may apply for residency under this category.

A new Entrepreneur Plus category has been introduced that offers a faster path to residence for applicants who create three full time jobs and invest NZ\$500,000 in their business.

- **Investors**

There are two categories under the Investor category (Investor One and Investor Two).

Under "Investor One", the applicant must invest NZ\$10 million in New Zealand for three years and must stay in New Zealand for at least 73 days in each of the last two years of the three year period. There are no requirements as to age, business experience or English language.

Under "Investor Two", the applicant must invest NZ\$1.5 million for four years in New Zealand. The applicant must also stay in New Zealand for at least 146 days in each of the last three years of the four year period. The applicant must be under 65 years of age, have at least three years of business experience and have the required English language skills.

The above is a general summary only of the current immigration policies. Policies can and do change. We recommend that anyone seeking to live or work in New Zealand start by reading the relevant guides and forms available on the Immigration New Zealand's website ([www.immigration.govt.nz](http://www.immigration.govt.nz)), and seek expert advice before embarking on the application process.

# Structuring the Business

# 5

## 5.1 Common business structures

Commonly, offshore entities establish a New Zealand business by using one of the following structures:

- (a) establishing a local subsidiary company (or purchasing an existing local company); or
- (b) registering a branch of an overseas company.

Recently, limited partnerships have become more widely used by offshore entities to set up business in New Zealand (particularly in the venture capital and private equity industry).

## 5.2 Establishing a local subsidiary company

Incorporating a company in New Zealand is generally a quick and simple process. It can be done online (at the Companies Office website [www.companies.govt.nz](http://www.companies.govt.nz)). Once the company name has been reserved and appropriate documents are lodged, incorporation can be confirmed within a matter of hours. The necessary documents are an application to incorporate a company, director consent(s) and shareholder consent(s).

The basic incorporation and annual filing requirements are as follows:

- (a) The registered office (and address for service) must be in New Zealand. A solicitor or accountant can provide the company's registered office. The company does not need to have a physical place of business in New Zealand.
- (b) The company must have at least one shareholder and one director – neither of whom need be resident in New Zealand. Signed consents (in the prescribed form) of both the director(s) and shareholder(s) are required for the incorporation process.
- (c) There is no need for a formal constitution (equivalent to articles of association or corporate bylaws). The rights and obligations set out in the Companies Act 1993 (**Companies Act**) apply by default. A company is free to adopt a constitution modifying those rules which would otherwise apply under the Companies Act.
- (d) Annual filing and on-going compliance requirements include the following:
  - annual return to the Companies Office confirming certain company particulars (including the registered office, directors and shareholders of the company);
  - annual meeting of shareholders confirming the appointment of the company's auditors (or a written resolution of shareholders in substitution for a meeting); and
  - annual financial statements if the company is a subsidiary of an overseas company or a "large" company, in which 25% or more of the voting shares are held by an overseas person or company. Annual financial statements must comply with the relevant requirements of the Financial Reporting Act 1993 (**Financial Reporting Act**).

The tax rules which apply to New Zealand companies are explained in section 7 of this guide.

### 5.3 Establishing a New Zealand branch of an overseas entity

An overseas company carrying on business in New Zealand must register as an "overseas company" with the New Zealand Companies Office.

The term "carrying on business" is not exhaustively defined in the Companies Act. Courts have determined "carrying on business" to include the following:

- (a) having a physical place of business in New Zealand;
- (b) having employees in New Zealand;
- (c) maintaining bank accounts in New Zealand;
- (d) having a degree of regular involvement in transactions in New Zealand; or
- (e) having some form of "permanence" in New Zealand.

An overseas company must file annual financial statements with the New Zealand Companies Office. The financial statements must satisfy the requirements for overseas companies set out in the Financial Reporting Act. Generally, the financial statements must be audited and include accounts for each overseas company, the New Zealand branch operation and the consolidated group (if the overseas company has subsidiaries).

The tax rules applicable to overseas companies which operate a branch in New Zealand are explained in section 7 of this guide.

### 5.4 Purchasing a business in New Zealand

An overseas entity seeking to acquire a local company, or the assets of a local company, will need to confirm:

- (a) whether consent from the OIO will be necessary (explained in section 3 of this guide); and/or
- (b) whether the acquisition will have the result of substantially lessening competition in the relevant market, and so require the approval of the Commerce Commission (explained in section 8 of this guide).

No stamp duty is payable on the transfer of shares, assets (including goodwill) or commercial land in New Zealand.

If a transaction involves acquisition of assets (and not shares) goods and services tax may be payable (explained in section 7 of this guide).

### 5.5 Agency arrangements

An entity that conducts only a small amount of business in New Zealand may wish to appoint a local agent rather than establishing a branch or subsidiary.

Agency appointments can be informal, capable of termination on short notice, or can be recorded in a more comprehensive written agreement. New Zealand agency law will apply unless the parties agree to the contrary.

A local agent may benefit from employment rights depending upon the nature of the relationship and the terms of the appointment of the agent.

## 5.6 Limited partnership

New Zealand's limited partnership regime is based on the limited partnership regimes operating in the United States (the "Delaware Model") and the United Kingdom. It is governed by the Limited Partnerships Act 2008 (**Limited Partnerships Act**).

Key features of a limited partnership (**LP**) include:

- (a) it enjoys separate legal personality;
- (b) it must have at least one general partner and one limited partner (who cannot be the same person);
- (c) the general partner is responsible for the day to day management of the LP, and is liable for all of the LP's debts and liabilities;
- (d) the limited liability partner (generally a "silent" investor) is liable only to the extent of its capital contribution to the LP;
- (e) limited partners (who wish to preserve their limited liability status) must not be involved in the management of the LP, although there are certain "non-management" activities in which the limited partners may participate and retain their limited liability protection;
- (f) it can have an indefinite lifespan (if desired); and
- (g) it is subject to "flow-through" tax treatment, where the profits and losses of the LP flow through to the partners who have made a capital contribution to the LP.

An LP is effective upon registration with the New Zealand Companies Office. It is governed by a partnership agreement (which does not need to be filed publicly) and by the Limited Partnerships Act.

# Capital Markets and Takeovers

# 6

## 6.1 Overview of public markets

New Zealand has a small but well developed capital market, on which securities are actively traded. NZX Limited (**NZX**) operates New Zealand's only registered securities exchange. NZX operates three main markets:

- (a) New Zealand Stock Market (**NZSX**), the premier equities market;
- (b) New Zealand Alternative Market (**NZAX**), for smaller and growing companies; and
- (c) New Zealand Debt Market (**NZDX**), for corporate and Government bonds and fixed-income securities.

There are three ways by which a company can list on one of the NZX markets. A "primary listing" is designed for companies which are listed on one of the NZX markets only. A "dual primary listing" enables companies to have a full listing on an NZX market as well as an overseas exchange. An "overseas listing" allows companies with a full listing on an overseas exchange (which is their home exchange) to list on an NZX market - but does not require the company to comply with the majority of the NZX Listing Rules (and for this reason is different than a dual primary listing).

## 6.2 Regulators of market activity

The key regulators of New Zealand's capital markets are the Securities Commission, NZX and the Takeovers Panel.

The Securities Commission is responsible for administering the law in relation to:

- (a) offers of securities to the public in New Zealand, governed by the Securities Act 1978 (**Securities Act**) and its associated regulations; and
- (b) market conduct (including insider trading, market manipulation, continuous disclosure and financial adviser disclosure and compliance), governed by the Securities Markets Act 1988 (**Securities Markets Act**).

NZX operates and is co-regulator (with the Securities Commission) of New Zealand's registered securities exchange, comprising both equity and debt markets (NZSX, NZAX and NZDX respectively). Listed companies are required to comply with the applicable listing rules.

Accredited market participants must comply with the NZX Participant Rules.

The Takeovers Panel administers the conduct of takeover activity in relation to "code companies" in accordance with the Takeovers Code (issued under the Takeovers Act 1993) (**Takeovers Code**).

### 6.3 Issuing securities in New Zealand

As a general rule, securities may only be offered to members of the public in New Zealand if the issuer of the securities has a registered prospectus and investment statement (concerning those securities) which comply with the prescribed disclosure requirements of the Securities Act and its associated regulations.

If securities are offered and allotted to a member of the public in breach of the Securities Act and its associated regulations, the allotment can be void and the issuer required to repay subscription money, with interest. There is also potential criminal liability for breaches of the Securities Act.

The "public" includes any section of the public in New Zealand, however selected – and can be one person. A person who purchases goods from an issuer, or is an employee or client of an issuer, or who already holds securities previously issued by the issuer, is not precluded from being a member of the public.

A security will be considered as being offered in New Zealand if the offer is received by a person in New Zealand, unless an issuer can demonstrate that it took all reasonable steps to ensure that members of the public in New Zealand may not accept an offer.

### 6.4 Exemptions from the public offer disclosure requirements

Offers made to certain persons will not trigger the public offer requirements. The principal exemptions are offers made to any of the following persons:

- (a) relatives and close business associates of the issuer or its directors;
- (b) those whose principal business is the investment of money or who, in the course of and for the purposes of their business, habitually invest money;
- (c) those who are each required to pay a minimum subscription price of at least NZ\$500,000 for the securities;
- (d) those who have already subscribed for securities issued by the same issuer making the present offer, and have paid a minimum subscription price of NZ\$500,000 for those securities (in a single transaction), but only if the second offer is made within 18 months of the initial NZ\$500,000 subscription; and
- (e) people certified as either "wealthy" or "experienced". The wealthy certification requires the relevant person to have net assets of at least NZ\$2 million or an annual gross income of at least NZ\$200,000 for each of the last two financial years.

There is no general "sophisticated investor" exemption from the public offer disclosure requirements, nor a "safe harbour" number of people to whom an offer can be made without triggering the public offer disclosure requirements.

There are a series of class exemptions, exempting specific issuers (or groups of issuers) from certain provisions of the Securities Act. A number of these exemptions relate to, or focus on, offers made in New Zealand by overseas companies as part of a global offering and employee incentive schemes offered by offshore entities to New Zealand employees. The Securities Commission is also able to grant individual exemptions from the requirements of the Securities Act.

### 6.5 Takeovers regime

New Zealand's takeovers regime is governed by the Takeovers Code. This regime focuses on protecting minority shareholders in a takeover situation.

The regime applies to any "code company" being a company that is listed on a New Zealand stock exchange (or has been listed in the previous 12 months), or has 50 or more shareholders.

The Takeovers Code's "Fundamental Rule" prohibits any person and its associates from either acquiring more than 20% of the voting securities in the code company, or increasing the percentage of securities it holds or controls where the person holds or controls more than 20% of the voting securities.

Exceptions to the Fundamental Rule are:

- (a) a full or partial offer made in accordance with the provisions of the Takeovers Code;
- (b) an acquisition or allotment approved by an ordinary resolution of shareholders of the code company in accordance with the provisions of the Takeovers Code;
- (c) an increase, by up to 5% a year, by a person holding between 50% and 90% of shares on issue in a code company;
- (d) a requirement by a person holding 90% or more of the shares on issue in a code company to the remaining shareholders to sell their shares through the compulsory acquisition provisions in the Takeovers Code; and
- (e) acquisitions permitted under an exemption granted by the Takeovers Panel.

### 6.6 Private equity and venture capital

New Zealand's private equity and venture capital industry has grown substantially in recent years. A variety of private equity and venture capital funds (both overseas and New Zealand based) are actively involved in the New Zealand market.

Since the introduction of the new limited partnership regime (discussed briefly in section 5 of this guide), a number of funds have been established as limited partnerships (rather than limited liability companies or unincorporated joint ventures). Several "angel" investor networks, focused on investing in early stage companies with high growth potential, operate throughout New Zealand.

The Government actively supports the private equity and venture capital industry by co-investing with private investors through the New Zealand Venture Investment Fund.

More information about the New Zealand private equity and venture capital market is available from the New Zealand Private Equity & Venture Capital Association Inc's website ([www.nzvca.co.nz](http://www.nzvca.co.nz)).

# Tax

The principal means of taxation in New Zealand are income tax (including withholding tax) and goods and services tax. There is no general capital gains tax and no stamp or estate duties, although there is a gift duty regime.

## 7.1 Income tax generally

### (a) *Scope of income tax*

New Zealand income tax is imposed on the world-wide income (subject to certain exceptions) of New Zealand residents. Income of non-residents is also subject to income tax to the extent that income has a New Zealand source (although the liability may be reduced by operation of an applicable double tax agreement (**DTA**) (discussed below)). "Income" includes most receipts on revenue account as well as some capital gains.

### (b) *Income tax rates*

The current marginal tax rates for individuals for income (including personal services income) are as follows:

- 12.5% for income up to NZ\$14,000 per annum;
- 21% for income between NZ\$14,001 and NZ\$48,000 per annum;
- 33% for income between NZ\$48,001 and NZ\$70,000; and
- 38% for income in excess of NZ\$70,000.

All forms of employment income are taxable on a gross basis. No deductions are allowed for expenditure incurred in deriving their income. Employers withhold tax from salary and wage payments under the Pay As You Earn (**PAYE**) system. Self-employed individuals pay tax at the same rates, but on a net basis - they are allowed deductions for expenditure incurred in deriving their income.

Companies (including New Zealand subsidiaries of foreign companies) and other business taxpayers are taxed on their net income after allowable deductions. The current company tax rate is 30%.

Trustees are taxed on their net income at 33%.

### (c) *Income tax residence*

Individuals are resident in New Zealand for income tax purposes if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode overseas. Further, an individual is resident if he/she spends more than 183 days in aggregate in any 12 month period in New Zealand, regardless of whether or not he/she has a permanent place of abode in New Zealand. Resident tie-breaker provisions also apply for the purpose of DTAs.

A company incorporated in New Zealand is automatically resident in New Zealand for income tax purposes. A company incorporated outside New Zealand is tax resident in New Zealand if its head office, centre of management, or the place from which the directors exercise control of the company (whether or not exclusively) is in New Zealand.

If a company is resident in New Zealand and also resident under the domestic laws of the country with which New Zealand has a DTA (discussed further below), the "tie-breaker" provision in that agreement will determine where the company is considered resident for the purposes of applying the DTA.

## 7.2 Company income tax

### (a) *Imputation system*

The dividend imputation system allows companies to pass on the benefit of income tax paid at company level as credits attached to dividends distributed to shareholders. ("Dividend" is widely defined and includes most benefits provided by a company to a shareholder or any associate.)

Imputation credits can be used by New Zealand resident shareholders to offset their income tax liabilities (including the liability in respect of the dividend paid). Credits attached to dividends paid to one company by another can be used to offset the recipient company's tax liability and credited to that company's imputation credit account for subsequent distribution to the recipient company's shareholders. Non-resident shareholders receiving an imputed dividend may receive a supplementary dividend under the foreign investor tax credit (**FITC**) regime.

### (b) *Inter-company dividends*

Most inter-company dividends are taxable. However, those received by one member of a wholly owned group from another, and those received by a New Zealand company from a foreign companies, are exempt. Currently, while foreign sourced dividends paid to most New Zealand companies are exempt from income tax, a special tax regime, known as the foreign dividend payment (**FDP**) rules, imposes a "de facto" income tax on such dividends in some circumstances. Legislation has, however, been passed that repeals the FDP rules from 1 April 2010 (for most taxpayers). From that date, foreign sourced dividends received by most New Zealand companies will be free of all tax.

### (c) *Branch taxation*

New Zealand branch operations are liable to income tax on branch profits at the rate of 30% (unless New Zealand has a DTA with the jurisdiction in which the head office is located, and the New Zealand branch is not a "permanent establishment" for the purposes of that agreement). Branches are taxed on their net income, after allowable deductions. Any loss or expenditure deducted must be directly attributable to the branch operations.

Income tax paid by branches is a final tax. No withholding tax is payable on subsequent repatriation of the tax-paid profit overseas. Any tax free capital gains realised by the branch can be repatriated overseas without any New Zealand tax cost.

Non-resident withholding tax (**NRWT**) is imposed on the payment of royalties (broadly defined under the New Zealand legislation), and NRWT or an approved issuer levy (**AIL**) on payment of interest, by a branch operation to non-residents.

**(d) *Thin capitalisation***

New Zealand's thin capitalisation regime can apply where either a branch or a New Zealand resident subsidiary owned by non-New Zealand residents is debt funded (whether by associated or non-associated party debt, and whether from onshore or offshore). Under this regime, the branch or New Zealand resident subsidiary will be denied a deduction for interest to the extent that its ratio of debt to assets exceeds 75%, and 110% of the branch or subsidiary's world-wide debt to asset ratio.

A similar set of thin capitalisation rules will apply from 1 April 2010 (for most taxpayers) to inhibit excessive gearing of New Zealand resident entities relative to the gearing of their Controlled Foreign Companies (**CFCs** – see below).

**(e) *Transfer pricing***

New Zealand has a comprehensive transfer pricing regime dealing with transactions between associated parties. The objective of the transfer pricing regime is to prevent New Zealand tax-paying entities reducing income by inflating deductions through non-arm's length transactions with non-resident associates.

**(f) *Taxation of offshore subsidiaries***

New Zealand has a "branch equivalent" CFC regime. The CFC regime applies where five or fewer New Zealand residents directly or indirectly control more than 50% of a foreign company, or if a single New Zealand resident controls 40% of such a company and no non-resident controls the same or a greater percentage.

Currently, an exemption from the CFC regime applies in respect of investments in certain "high tax" jurisdictions (currently United States, United Kingdom, Germany, Canada, Australia, Japan, Spain and Norway). These are referred to as the "grey list" countries.

Legislation that has recently been enacted will remove the "grey list" exemption (except for Australian CFCs) from 1 April 2010 (for most taxpayers). The new legislation introduces an exemption for "active" CFCs, so that only "passive" income of CFCs (such as interest and dividends, royalties and some rent) will be attributed to New Zealand resident CFC shareholders as taxable income. The new rules are complex, with a number of exemptions and qualifications.

Under a similar regime, income tax is imposed on foreign investment fund (**FIF**) interests held by New Zealand residents, regardless of the level of control held by the New Zealand resident. There is no similar grey list exemption for FIF interests. However, interests in some Australian listed companies and other Australian entities are exempted, as are interests costing less, in aggregate, than NZ\$50,000.

### **7.3 Withholding taxes**

**(a) *Resident withholding tax (RWT)***

Interest and dividend income paid to a New Zealand resident taxpayer is subject to RWT (unless the recipient holds a valid certificate of exemption, and subject to certain other exemptions).

RWT is deducted at the following rates:

- 19.5%, 33%, 38% or 39% on interest paid to individuals;
- 33% on interest paid to companies; and
- 33% on all dividends.

It is proposed that the RWT rates on interest (not dividends) be aligned with the current personal income tax rates and the company income tax rate from 1 April 2010.

**(b) *Non-resident withholding tax (NRWT)***

New Zealand sourced dividends, interest and royalties paid to non-residents are subject to NRWT.

The rate of NRWT is:

- 30% in respect of dividends, other than "fully imputed" dividends, for which the rate is 15% (and the rate is in any event capped at 15% in most of New Zealand's DTAs, and in some cases less);
- 15% in respect of interest (capped at 10% in most DTAs and, in some cases, 0%) unless the non-resident has a New Zealand branch, and subject to the AIL regime (below); and
- 15% in respect of royalties (subject to 5%, 10% or 15% caps, in DTAs).

To the extent that the dividends are fully imputed, the FITC regime eliminates the cost of NRWT through the supplementary dividend mechanism (see section 7.3(a)).

Where a New Zealand tax resident borrows from a non-resident, non-associated lender (that does not have a New Zealand branch) the New Zealand resident may, by completing certain registrations, opt-in to the AIL regime. The AIL regime requires both registration of the borrower as an approved issuer, and registration of the loan as a registered security. Under this regime, if the New Zealand resident borrower pays the 2% AIL in respect of the gross interest payment, NRWT is zero-rated. AIL is a duty payable by the New Zealand resident borrower and so is not likely to be creditable in a non-resident lender's home jurisdiction. The levy is deductible to the borrower for income tax purposes.

Various other withholdings are required from payments such as directors' fees, honoraria, salespersons' commission and non-resident contractors' fees.

#### **7.4 The DTA network**

New Zealand has entered into DTAs with 35 trading partners. The DTAs are designed to remove the double taxation (ie tax in two jurisdictions in respect of the same income) which would, in their absence, be suffered by New Zealand residents investing overseas and non-residents investing in New Zealand. DTAs have been entered into with Australia, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Fiji, Finland, France, Germany, India, Indonesia, Ireland, Italy, Japan, Korea, Malaysia, Mexico, Netherlands, Norway, Philippines, Poland, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, the United Kingdom, the United Arab Emirates and the United States.

As a member of the OECD, New Zealand has adopted the OECD Model Convention as the basis of its DTAs, although it has made a number of reservations to the model.

New Zealand has also entered into nine Tax Information Exchange Agreements with Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey and Netherland Antilles (although only the last one is in force at present).

### 7.5 No capital gains tax

There is no general capital gains tax in New Zealand. However, gross (taxable) income includes amounts derived from certain transactions which would be taxed as capital gains in other jurisdictions. These transactions include the following:

- (a) profits from the sale of land in certain circumstances;
- (b) profits from the sale of any personal property acquired with the purpose of sale or pursuant to a profit-making scheme;
- (c) certain royalty payments; and
- (d) certain gains in the value of "financial arrangements" under the accrual regime.

### 7.6 Goods and Services Tax (GST)

GST is a value added tax imposed on supplies of goods and services in New Zealand by a GST registered person. The rate of GST is generally 12.5% of the value of a supply.

A supplier of goods and/or services must be registered for GST if the annualised value of taxable supplies made by that supplier exceeds or is likely to exceed NZ\$60,000 in a 12 month period.

GST charged by registered persons on supplies of goods or services is known as "output tax". A registered person reduces output tax charged on supplies made in a taxable period by GST paid by the registered person in the course of making those supplies ("input tax"). The net amount is paid to Inland Revenue or claimed as a refund.

In some circumstances, a New Zealand recipient of imported services must account for GST to Inland Revenue under the "reverse charge" rules.

Some supplies, most importantly supplies of financial services, are exempt from GST (although some supplies of financial services will be treated as zero-rated supplies). In addition, certain supplies (including sales of businesses as going concerns) are zero-rated (ie GST is reduced to 0%).

The main difference between exempt and zero-rated supplies is that a registered person making zero-rated supplies may claim input tax credits for tax paid in the course of making those supplies, whereas a maker of exempt supplies may not.

GST returns must be filed every one, two or six months, depending on the level of turnover of the business.

## 7.7 Other taxes

### (a) *Fringe Benefit Tax (FBT)*

FBT is payable by employers on the value of most non-cash benefits provided to their employees, eg motor vehicles, low interest loans. The FBT rate depends on the marginal tax rate of the employees.

### (b) *ACC levy*

New Zealand employers are charged a levy under New Zealand's universal no-fault accident compensation regime. The rate of the levy depending on the nature of the employer's business activity. Self-employed persons also pay these levies.

### (c) *Gift duty*

Gift duty is payable on all property, wherever situated, to the extent it is disposed of for less than adequate consideration by an individual donor domiciled in New Zealand at the date of the gift or by a body corporate donor incorporated in New Zealand.

Gift duty is also payable on property situated in New Zealand, to the extent it is disposed of for less than adequate consideration by an individual donor not domiciled in New Zealand or by a body corporate donor not incorporated in New Zealand. Gift duty applies only to gifts made by a donor in excess of NZ\$27,000 in any 12 month period. There are exemptions available for some dispositions.

# Trade Practices



## 8.1 Overview

New Zealand's trade practices regime is principally provided for in the following three statutes:

- (a) Commerce Act 1986 (**Commerce Act**);
- (b) Fair Trading Act 1986 (**Fair Trading Act**); and
- (c) Consumer Guarantees Act 1993 (**Consumer Guarantees Act**).

## 8.2 Competition law

The Commerce Act sets out the competition law principles in New Zealand. The Commerce Act is enforced by the Commerce Commission.

### (a) *Restrictive trade practices*

The following restrictive trade practices are prohibited:

- contracts, arrangements, or understandings which have the purpose, effect or likely effect of "substantially lessening competition" in a relevant market;
- price fixing arrangements or understandings between competitors (certain joint ventures may be exempt from this);
- taking advantage of a substantial degree of power in a market for an anti-competitive purpose;
- resale price maintenance (when a supplier controls retail pricing); and
- collective boycotts.

### (b) *Acquisitions that substantially lessen competition*

The general rule is that mergers and acquisitions that would have, or would be likely to have, the effect of substantially lessening competition in a market are prohibited.

"Market" is a market in New Zealand for goods and services as well as other goods or services that, as a matter of fact and commercial commonsense, are substitutable for them.

#### *Safe harbours*

The Commerce Commission has adopted certain "safe harbours" to give guidance as to whether a business acquisition is **unlikely** to substantially lessen competition in a market. These are where either:

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

"Vertical" acquisitions (whether upstream or downstream) are also subject to the Commerce Act, although there are no safe harbours available for such acquisitions.

#### *Clearance*

New Zealand has a voluntary notification and clearance regime. Parties contemplating an acquisition may apply for clearance if they are in doubt as to whether or not the acquisition will result in substantial lessening of competition.

Clearance for an international merger given by offshore anti-trust regulators does not protect the transaction in New Zealand. If the merger involves a New Zealand business, and the transaction may result in substantially lessening of competition in the relevant New Zealand market, parties should consider whether it is appropriate to seek clearance from the Commerce Commission.

#### *Authorisation*

If the merger will result in a substantial lessening of competition, the parties can apply to the Commerce Commission for authorisation. However, authorisation is very rarely granted as the parties must convince the Commerce Commission that the public benefits associated with the merger outweigh the anti-competitive harm.

#### *Penalties for breach*

If parties choose to proceed with an acquisition without seeking prior clearance or authorisation, and the Commerce Commission considers that the acquisition would substantially lessen competition, the Commission is able to seek an injunction (preventing the acquisition going ahead), a "cease and desist" order and/or a divestment order.

Large financial penalties can also be ordered. An individual who breaches the Commerce Act can be penalised up to NZ\$500,000. Penalties for a company can be up to the greater of:

- NZ\$10 million;
- three times the value of any commercial gain resulting from the contravention; or
- 10% of the turnover of the company (and all of its interconnected companies).

### **8.3 Fair Trading Act**

The Fair Trading Act applies generally in New Zealand. This Act seeks to:

- (a) prohibit conduct that is misleading or deceptive or is likely to mislead or deceive, and to prohibit conduct that is unfair; and

- (b) require disclosure of consumer information which relates to the supply of goods and services and which promotes product safety.

There are some generally stated prohibitions against misleading and deceptive conduct and false or misleading misrepresentations. Whether the conduct in question was deliberate or accidental is largely irrelevant to any question of breach.

There are also specific rules concerning:

- employment advertising;
- pyramid selling schemes;
- bait advertising;
- offering gifts and prizes; and
- referral selling.

Product safety standards apply to specific products (such as the supply of baby walkers, cots and bicycles).

The Commerce Commission is responsible for administering the Fair Trading Act. It actively monitors business conduct in New Zealand to check compliance, and has the power to bring proceedings for breach in its own right. Breach carries civil and criminal liability.

#### **8.4 Consumer Guarantees Act**

The Consumer Guarantees Act sets out a series of guarantees which apply to all sales to consumers of goods or services in New Zealand of a type ordinarily acquired for personal or household use.

The guarantees create a minimum standard of quality which businesses selling such goods or services must meet, including:

- (a) being of acceptable quality;
- (b) being fit for a particular purpose (when the consumer has informed the supplier about that purpose);
- (c) matching a description;
- (d) ensuring spare parts are available; and
- (e) complying with a sample or demonstration model (where relevant).

A consumer may seek redress from either the supplier or manufacturer of goods or services that do not meet the statutory guarantees.

Suppliers of goods or services cannot contract out of the Consumer Guarantees Act unless goods or services are being sold for the purposes of a business.

# International Trade

# 9

Goods can flow into New Zealand fairly freely, and New Zealand's export markets are extensive and broadening. New Zealand is particularly focused on securing free trade agreements with key trading partners.

## 9.1 Importing goods

Goods can be imported into New Zealand easily. No import licences are required, although tariffs arise on a range of products (tariffs being the New Zealand government's main trade protection mechanism). Tariffs are still fairly high in relation to some goods, and clothing and footwear in particular. New Zealand is a party to the General Agreement on Trade and Tariffs (**GATT**).

No other charges apply exclusively to imported products, although GST is charged on all imported goods (normally payable when the goods are cleared through customs). GST is discussed in section 7 of this guide.

Parallel imports of nearly all goods is permitted.

## 9.2 Product labelling

Goods sold in New Zealand, whether imported or manufactured locally, must comply with relevant labelling requirements. For example:

- (a) All products must comply with the general requirements of the Fair Trading Act that labelling cannot mislead or deceive, or be likely to mislead or deceive;
- (b) Food and drugs must comply with the requirements of the Food Act 1981 and the Medicines Act 1981; and
- (c) All imported products must display their country of origin.

## 9.3 Anti-dumping

Dumping of products on the New Zealand market is regulated by the Dumping and Countervailing Duties Act 1988.

## 9.4 Trade between Australia and New Zealand

Agreements entered into between Australia and New Zealand in 1983 – called Australia and New Zealand Closer Economic Relations (**CER**) – have resulted in free trade between Australia and New Zealand of goods and services, and the parties have agreed to increase trade freedom in other areas.

The recently introduced Joint Food Standards allow food products to be manufactured in Australia or New Zealand to a single standard. The Trans Tasman Mutual Recognition Regime paves the way for other goods and services to be provided in either country. Recently, mutual recognition of securities offerings was achieved.

### 9.5 Other free trade agreements

New Zealand is a strong proponent for free trade, and has entered into a number of trade agreements with its trading partners. New Zealand has free trade agreements with Singapore, Thailand, Malaysia, and a comprehensive free trade agreement was recently completed between New Zealand and the People's Republic of China. In February 2009 New Zealand entered into a free trade agreement with each of the member states of the Association of South East Asian Nations (**ASEAN**), although this is not yet in force.

### 9.6 International Sale of Goods

New Zealand is a party to the United Nations Convention on Contracts for the International Sale of Goods 1980, effective (in New Zealand) in 1995.

The Convention regulates all aspects of international sales contracts, including contract formation and the rights, obligations and remedies of both buyer and seller. The Convention will apply to contracts for the sale of particular goods when both parties are from countries that are parties to the Convention, or where the party contracting with a New Zealand entity is from a country that is not a party to the Convention, but the contract is governed by New Zealand law. Parties can, however, specifically (by contract) exclude the Convention.

# Intellectual Property Rights

# 10

## 10.1 Overview

New Zealand has a well developed system of intellectual property rights, which are governed by statute, case law and international agreements.

Trade marks, patents, designs and plant variety rights can be registered at the Intellectual Property Office of New Zealand, which maintains a register of these rights and interests.

New Zealand is a signatory to a number of intellectual property treaties and conventions, including the Paris Convention, the Patent Co-operation Treaty, the Berne Convention, and TRIPS (Trade-Related Aspects of Intellectual Property Rights).

## 10.2 Trade marks

Trade marks can be registered in 45 classes of goods or services consistent with the internationally adopted Nice Classification System (9th edition).

A trade mark registration is valid for a term of 10 years from the date of application. Registration can then be renewed, in perpetuity, in successive 10 year periods. A trade mark can be removed from the register for non-use during a continuous period of three years.

New Zealand is currently in the process of acceding to the Madrid Protocol. This will allow persons in Madrid Protocol countries to file international registrations designating New Zealand as country to which trade mark protection would extend. Conversely, New Zealanders will be able to file international registrations designating one or more overseas Madrid Protocol countries.

## 10.3 Copyright and designs

New Zealand copyright law protects original works, including original artistic, literary, dramatic or musical works (in all their various forms), from being copied. The period of protection under New Zealand law is generally the life of the author plus 50 years. For industrially applied works, protection lasts for 16 years (or 25 years in some cases), depending on the nature of the work. There is no form of registration of copyright in New Zealand.

In addition to copyright protection, the appearance of an article can be protected by registering a new and original design under the provisions of New Zealand's design legislation. The maximum period of protection is 15 years.

## 10.4 Patents

New Zealand patent law provides a system for the filing, examination and grant of protection for patent applications. To be granted, a patent application must meet the definition of "invention". This requires that the proposed invention:

- (a) be a manner of manufacture;

- (b) be new; and
- (c) involve an inventive step.

The period of protection for patents in New Zealand is a maximum of 20 years.

New Zealand patent law currently adheres to a "local novelty" standard, meaning that the invention must not be known or used in New Zealand before filing. This is different from most countries, where an invention cannot be patented if it has been publicly disclosed anywhere in the world (ie "worldwide novelty").

The New Zealand patent regime is currently under review. The proposed regime will, if passed into law, introduce some significant changes including a shift to a requirement of absolute (or worldwide) novelty and examination regarding inventive step. This will bring New Zealand's patent regime into line with international trends.

### **10.5 Passing off and the Fair Trading Act**

The common law tort of "passing off" and provisions of the Fair Trading Act also provide general protection against misleading conduct in the course of trade. The misleading use of trade marks, get-up and other indicia which cause damage to another trader's reputation or goodwill may accordingly give rise to liability. More detail about the Fair Trading Act is in section 8 of this guide.

### **10.6 Other rights**

New Zealand legislation also specifically addresses, and provides protection for, the following intellectual property rights:

- (a) plant varieties;
- (b) layout designs;
- (c) geographical indications (not yet in force); and
- (d) ambush marketing.

# Employee Relations

# 11

## 11.1 Overview

New Zealand has a reasonably flexible system of employment law, regulated by a combination of statute and common law. The emphasis in New Zealand legislation is on freedom of contract, with employees being protected by a "minimum floor" of statutory rights.

## 11.2 Employment Relations Act

The Employment Relations Act 2000 (**ERA**) is the key statute regulating employment law in New Zealand. It governs the employment relationship for all persons employed within New Zealand. The ERA covers collective, individual and fixed term employment agreements, collective bargaining and union related issues, flexible working arrangements and personal grievances.

Some aspects of employment relations provided for by the ERA are unique to New Zealand, including those explained briefly below.

### *(a) Duty of good faith*

The duty of good faith requires the parties to:

- not mislead or deceive each other;
- be active and constructive; and
- be responsive and communicative in their employment relationship.

An employer proposing to make a decision that will, or may, have an adverse effect on the continuation of an employee's employment (such as a restructure or sale of the business) must give each affected employee information about the relevant proposal and an opportunity for that employee to comment on the proposal before any decision is made.

### *(b) Unions*

Unions are entitled to represent their members in relation to any matter involving their collective interests, including negotiating a collective employment agreement and representing their members' individual rights (eg at mediation and in court actions).

Union membership is voluntary, but if an employee wants to be involved in a collective agreement and to bargain collectively, he or she must be a member of a union.

If an employee is not a member of a union, each employee will negotiate an individual or fixed term employment agreement with his or her employer.

**(c) Trial period**

An employer who employs 19 or fewer employees is able to engage new employees on a trial period of up to 90 calendar days. During this trial period, an employee may be dismissed and cannot raise a personal grievance on the grounds of unjustified dismissal. The employee may, however, raise a personal grievance on other grounds, such as discrimination or harassment.

**(d) Employee protection provision**

All employment agreements must contain an "employee protection provision". This is designed to protect employees in situations where business undertakings are sold, transferred or contracted out. Absence of such a provision may affect the employer's ability to implement a business transaction.

**11.3 Terminating employment**

As a general rule, employment may only be terminated for cause in New Zealand. There is no concept of termination "at will". Cause for terminating employment includes poor performance, repeated misconduct, serious misconduct, redundancy, medical incapacity, incompatibility and frustration of contract.

The test of whether the dismissal or action causing disadvantage is justifiable is objective. The employer must have acted in the way a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

An employee can bring a personal grievance claim if he or she has been unjustifiably dismissed or disadvantaged in his or her employment.

**11.4 Redundancy compensation**

There is no compulsory redundancy compensation regime in New Zealand. It is a matter of contract between the employee and employer as to whether an employer is required to pay compensation if the employee is made redundant.

**11.5 Employing an overseas person**

All New Zealand citizens and residents are eligible to work in New Zealand. Otherwise, a person must hold a work permit (issued by Immigration New Zealand). A work permit entitles the holder of the permit to be in New Zealand, or within the exclusive economic zone of New Zealand, for the sole purpose of undertaking the employment specified in the permit. (See section 4 of this guide.)

**11.6 Kiwisaver**

Participation in superannuation schemes is not compulsory in New Zealand. Employees are eligible to participate in KiwiSaver – a voluntary, work-based retirement savings initiative (governed by the KiwiSaver Act 2006). Participants in KiwiSaver must contribute a minimum of 2% of their gross salary or wages to a superannuation scheme of their choice, and employers must make a contribution of 2% on behalf of all participating employees.

**11.7 Accident compensation**

New Zealand has no workers' compensation scheme. Workplace accidents are instead covered by the IPRC (discussed briefly in section 2 of this guide). Personal injury costs are met by the ACC and not the employer.

Both employers and employees contribute towards the costs of the accident compensation scheme through levies.

**11.7 Other legislation**

Other legislation regulates holidays, parental leave, minimum wage, health and safety, privacy, superannuation, minimum working conditions and human rights.

# Real Property and Resource Management

# 1 2

## 12.1 Purchasing land in New Zealand

There is no restriction on who can own land in New Zealand, subject to any requirement for OIO approval (discussed in section 3 of this guide). Foreign individuals and companies can purchase land without a local partner.

## 12.2 Land ownership based on registration

Land ownership in New Zealand is based on a land registration system (called the "Torrens System"). Central to this system is a public register which records all material facts relative to any given land title, including ownership, registered mortgages and caveats. Once information is accepted for registration, the validity of information appearing on that register is guaranteed. A purchaser of land in New Zealand is therefore able to rely on the information recorded on that public register.

## 12.3 Sale of land

Purchasing land in New Zealand is relatively straight-forward. Many agreements to sell land are recorded on standard form documentation.

The general law of contract applies once a sale and purchase agreement has been entered into between the parties. Once the parties enter into an agreement to sell and purchase land, the purchaser's offer becomes legally binding between the parties. The seller cannot (without breaching the contract) then accept a higher offer from another purchaser following entry into this agreement.

## 12.4 Resource management overview

Use and development of resources, from an environmental perspective, is controlled by the Resource Management Act 1991 (**RMA**). The RMA focuses on the sustainable management of New Zealand's natural and physical resources, including land, water, coastal and air resources.

## 12.5 Environmental controls under the RMA

Planning rules (relating to activities and development) are provided for in publicly notified statutory planning documents administered by local authorities.

Activities controlled by the RMA include:

- (a) use of land and water;
- (b) subdivision and historic places;
- (c) use and development of coastal resources;
- (d) discharges to air, land or water; and

- (e) hazardous wastes.

Activities are classified into a hierarchy of activity types and this classification determines whether a resource consent is required in relation to any proposed activity (eg subdivision or use of a waterway).

### 12.6 Resource consents

Resource consents can take the form of land use consents, subdivision consents, water permits, coastal permits and discharge permits, depending on the nature of the proposed activity.

Consents are granted by the relevant local authority. The level of discretion that the local authority may exercise, and the stringency of the tests an applicant must meet, in order to obtain consent depend on the nature of the consent sought. The local authority also has wide powers to impose conditions on any resource consent it grants.

The consenting process starts with an application to the relevant local authority (in the required form and including all required supporting information). The local authority will then decide whether the general public should be notified of the application. If notified, any member of the public may make submissions in respect of that application, regardless of whether that person has a direct interest in the application. (The RMA in its current form includes a presumption in favour of public notification. These requirements are under review. The review suggests that the presumption in favour of public notification will be reversed.)

Both applicants for resource consents, and those who make submissions in respect of an application, have a right of appeal to the Environment Court from a local authority's decision on a resource consent application. A hearing in the Environment Court is "de novo" – meaning that the Court takes the place of the council and determines the whole application completely afresh, on the basis of the evidence before it.

### 12.7 Penalties for breach

A person who breaches the RMA (eg by undertaking an activity not permitted by a district or regional plan without a resource consent) commits an offence. Non-compliance with the RMA is a strict liability offence. A person convicted of an offence can be subject to a maximum fine of NZ\$200,000 plus NZ\$10,000 per day for continuing offences, and a prison term of no more than two years.

Liability is not limited to the party that actually commits the offence. The RMA extends liability to any party who allows the offence to take place. Therefore if a body corporate, trust, company employee or contractor is convicted of an offence against the RMA, a director, trustee or any person concerned in the management of that party can also be held liable for that offence.

# Taking Security Over Personal Property

# 13

## 13.1 Overview

The regime for creating and enforcing security interests over personal property is set out in the Personal Property Securities Act 1999 (**PPSA**). This regime is similar that operating in North America.

The PPSA impacts financing and corporate insolvency in New Zealand and anyone who deals with personal property in New Zealand.

## 13.2 Application of the PPSA

The PPSA applies to all "security interests" in "personal property".

A security interest under the PPSA is an interest created or provided for by a transaction that in substance secures payment or performance of an obligation, regardless of the form of the transaction and who has title to the property.

### (a) *Personal Property*

Personal property is virtually all property other than land (and several other specific exceptions) and includes:

- chattel paper (eg hire purchase agreement);
- documents of title (eg bill of lading);
- goods (eg consumer goods, inventory and equipment);
- intangibles (eg trademarks, copyright and patents);
- investment securities (eg shares);
- money; and
- negotiable instruments (eg cheques).

### (b) *Security interests*

The PPSA also deems the following transactions to be security interests:

- leases of goods for a term of more than one year;
- transfers of accounts receivable or chattel paper; and
- commercial consignments that do not secure payment or performance of an obligation.

### 13.3 Priority under the PPSA

To protect a secured party's priority to personal property in New Zealand against claims from other parties, a security interest must "attach" to the personal property and a secured party must "perfect" its security interest in the personal property.

In order for a security interest to attach to personal property, the security interest must be in the form of a valid security agreement. A valid security agreement must:

- (a) be signed or agreed to in writing by the debtor;
- (b) contain a description of the personal property to be secured so that it is reasonably capable of identification; and
- (c) contain appropriate language creating the security interest.

Perfection of a security interest is generally achieved by registering a financing statement on the online Personal Property Securities Register. Priority between competing securities is determined by order of perfection. There are a number of specific priority rules under the PPSA which modify this general rule.

### 13.4 Enforcement

The PPSA provides remedies to a secured party who has priority over all other parties to personal property. Security agreements can modify and negate some of the enforcement provisions under the PPSA, and can provide for remedies in addition to those provided for under the PPSA.