

# REGULATION OF FOREIGN INVESTMENT



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## GUIDE TO DOING BUSINESS IN NEW ZEALAND





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LAW FIRMS WORLDWIDE

# GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

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PREPARED BY MERITAS LAWYERS  
IN AUSTRALIA AND NEW ZEALAND



Published by Meritas, Inc. • 800 Hennepin Avenue, Suite 600

Minneapolis, Minnesota 55403 USA

+1.612.339.8680 | +1.612.337.5783 FAX | [www.meritas.org](http://www.meritas.org)

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## Guide to Doing Business in Australia and New Zealand

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Australia and New Zealand. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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There are over 170 lawyers in six firms across Australia and New Zealand providing clients a local legal partner with deep international resources. Our lawyers are supported by knowledgeable and conscientious patent agents, trade mark agents, notaries, administrative legal assistants, real estate law clerks, corporate clerks and litigation support specialists. We are closely integrated and strategically placed to deliver coordinated, efficient legal services.

The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

*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.*

This book is intended to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses:

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 labor 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?

Contributing to this book are the law firm members of the Meritas alliance in Australia and New Zealand. Each firm is comprised of local lawyers who possess extensive experience in advising international clients on conducting business in their respective countries. The firms were presented with these 10 questions and asked to provide specifics about their jurisdiction along with timely insights and advice. In a very concise manner, the book should provide readers with a solid overview of the similarities and differences, strengths and weaknesses of the states and territories of Australia and New Zealand.

*Peter Kennedy, Managing Partner  
Madgwicks Lawyers  
Melbourne, Victoria*

## AUCKLAND - NEW ZEALAND

Tel: +64 (9) 379 7333 | [www.martellimckegg.co.nz](http://www.martellimckegg.co.nz)



**Mike Worsnop**

[mcw@martellimckegg.co.nz](mailto:mcw@martellimckegg.co.nz)



**Craig Nelson**

[can@martellimckegg.co.nz](mailto:can@martellimckegg.co.nz)

## Martelli McKegg

lawyers

Martelli McKegg is a reputable, well-established mid-tier law firm based in downtown Auckland, the major city and commercial capital of New Zealand.

Our firm provides quality legal services to New Zealand and foreign domiciled businesses, organisations, trusts and private individuals. We've been doing so since 1921.

As a mid-tier firm, we operate a flat business model, promoting a collaborative and pragmatic approach to work where partner availability and turnaround is paramount.


We are a firm of 28 lawyers, led by 11 partners. This means we are big enough to always have a solicitor available with exactly the right level of expertise to meet our client's needs and can deliver a quality yet cost effective service to our clients.

Our areas of expertise cover a wide range but are divided into four broad departments:

**Commercial:** including, Overseas Investment in Business Assets, Mergers and Acquisitions, Corporate and Business Advisory, Commercial Contracts, Banking & Finance, Franchising and Licensing, Intellectual Property, Information Technology and Telecoms, Forestry and Wood Processing, Climate Change and Emissions Trading.

**Litigation:** including, Insolvency and Creditors' Rights, Dispute Resolution, Court and Tribunal Hearings and Employment Relations.

**Property:** including, Overseas Investment in Real Estate, Property Conveyancing (Sales and Purchases), Subdivision and Development, Resource Management, Commercial and Industrial Leasing, Body Corporate Matters, Leaky Building Claims and Disputes (Property, Building and Construction).



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**Trusts/Estates:** including, Trusts and Asset Planning and Preservation, Wealth Management, Relationship Property, Wills and Estate Administration, Trust and Estate Litigation,.

Our current clients range from private clients and small family-owned businesses through to multi-national organisations a number of whom are stock-exchange listed. We are accustomed to working with international clients and firms and in particular with other Meritas firms and their clients having been a part of the Meritas network for over 22 years.

## TOP 10 QUESTIONS

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### 1. WHAT ROLE DOES THE GOVERNMENT PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

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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.

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.

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### 2. CAN FOREIGN INVESTORS CONDUCT BUSINESS WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

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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 from 1 May 2015, 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. Existing companies have until 28 October 2015 to comply with this requirement.

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### 3. HOW DOES THE GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

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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?**

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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.

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#### **5. WHAT STEPS DOES THE GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATIONAL RESOURCES AND KEY SECTORS (E.G. ENERGY AND TELECOMMUNICATIONS)?**

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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 government steps are taken.

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?

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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 *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 in Employment Act 1992* (governing workplace health and safety), *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.

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## 7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT IN CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

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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 nonresident (company/individual) are subject to nonresident 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 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*, *Design 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 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.

## 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.

### 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 substantial 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).

### 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
- Fishing quota

#### **Significant Business Assets**

A transaction involving significant business assets (being more than NZD100 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 NZD100 million do not require consent from the OIO. The only exception to this is for private Australian investors for whom the threshold increased to NZD477 million on 1 March 2013 as part of the New Zealand government's ongoing commitment to ensuring closer economic relations with Australia. Australian government investors remain subject to the NZD100 million threshold.

#### **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:

- 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.

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

An overseas person may be a natural person, or could be a company, a partnership or a trust where 25% or more of that entity is owned or controlled by an overseas person or persons.

An overseas person is a person who is neither a New Zealander nor ordinarily resident in New Zealand.

An ordinarily resident person is one who holds a New Zealand residence class visa and:

- Is domiciled in New Zealand, or
- Is residing in New Zealand with the intention of residing there indefinitely and has done so for the immediately preceding 12 months

### **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 in the national interest. Lifestyle blocks are treated the same as any other 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
- 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
  - 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 (a river having an average width for the length on or adjoining the relevant land of three meters or more measured as the width from bank to bank at the highest flow of the river before it over tops its banks) or a lakebed (a lake of over eight hectares [12.35 acres] including any artificial lake).

Owners of land containing special land are required to notify the Minister of any overseas investment transaction before proceeding with it. Failure to notify the Minister may result in a fine of up to NZD 100,000.

## **Penalties**

There are significant penalties that can be imposed for failure to comply with the OIO regulations. These can range from fines to enforced sale.

# MERITAS FIRM CONTACTS

## AUSTRALIA

### AUSTRALIAN CAPITAL TERRITORY

Deakin

#### **Snedden Hall & Gallop Lawyers**

43-49 Geils Court  
Locked Bag 3003  
Deakin ACT 2600

*Dennis Martin*  
*lawyers@sneddenhall.com.au*  
Tel: +61 (2) 6285 8000  
*www.sneddenhall.com.au*

### NEW SOUTH WALES

Sydney

#### **Swaab Attorneys**

Level 1, 20 Hunter Street  
Sydney NSW 2000

*Fred Swaab*  
*fxs@swaab.com.au*  
*Mary E. Digiglio*  
*med@swaab.com.au*  
Tel: +61 (2) 9233 5544  
*www.swaab.com.au*

### VICTORIA

Melbourne

#### **Madgwicks**

Level 33, 140 William Street  
Melbourne VIC 3000

*Peter Kennedy*  
*peter.kennedy@madgwicks.com.au*  
Tel: +61 (3) 9242 4744  
*www.madgwicks.com.au*

### QUEENSLAND

Brisbane / Cairns / Townsville

#### **MacDonnells Law**

Cnr Shields & Grafton Streets  
PO Box 5046  
Cairns QLD 4870

*Russell Beer*  
*rbeer@macdonnells.com.au*  
*Luckbir Singh*  
*lsingh@macdonnells.com.au*  
Tel: +61 (7) 4030 0600  
*www.macdonnells.com.au*

### WESTERN AUSTRALIA

Perth

#### **Williams + Hughes Pty Ltd.**

25 Richardson Street  
Perth WA 6005

*Damian Quail*  
*damian.quail@whlaw.com.au*  
*Tully Carmady*  
*tully.carmady@whlaw.com.au*  
Tel: +61 (8) 9481 2040  
*www.whlaw.com.au*

### NEW ZEALAND

#### **Martelli McKegg**

Level 20, PWC Tower  
188 Quay Street  
Auckland 1141

*Mike Worsnop*  
*mcw@martellimckegg.co.nz*  
*Craig A. Nelson*  
*can@martellimckegg.co.nz*  
Tel: +64 (9) 379 7333  
*www.martellimckegg.co.nz*



800 Hennepin Avenue, Suite 600  
Minneapolis, Minnesota 55403 USA  
+1.612.339.8680 [www.meritas.org](http://www.meritas.org)

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