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ESTABLISHING A BUSINESS ENTITY IN NEW ZEALAND

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TYPES OF BUSINESS ENTITIES

There are various entities available in New Zealand from which a business can be operated. The most commonly adopted entities are:

1. Company (including Incorporated Joint Venture (JVC))
2. Partnership
3. Limited Partnership (LP)
4. Unincorporated Joint Venture (JV)
5. Trading Trust

Each has its advantages and disadvantages, and each pose different obligations and requirements, both from a regulatory perspective and an internal perspective.

The following summarises the general characteristics, obligations, and requirements of each.

COMPANY

A company is the most common form of business entity adopted in New Zealand. A company has separate legal identity and provides limited liability protection for its shareholders.

Companies in New Zealand are governed by the Companies Act 1993 ('Companies Act'), and the company's constitution (if adopted). It is optional for a company to adopt a constitution. Where there are numerous shareholders, it is also common for a shareholder's agreement to be implemented.

The Companies Act applies to all companies. It contains mandatory, default and optional provisions. Mandatory provisions cannot be contracted out of, and include provisions relating to minority protection, major transactions, and directors' duties. Default provisions however can be contracted out through the company's constitution, and apply by default where the company has not adopted a constitution or are not otherwise dealt with in the constitution.

The regulatory body is the Companies Office. The process to incorporate a company is completed online through the Companies Office website. The basic requirements for incorporation of a company are:

1. The company must have at least 1 director and at least 1 shareholder, and at least 1 director must either be a NZ resident or a director of an Australian company who is living in Australia;
2. A registered office and address for service in New Zealand;
3. A minimum of 1 share. There are no capitalisation or minimum share value requirements; and
4. Registration with the Companies Office.

The online process for registration with the Companies Office is relatively fast and simple.

The process is effectively two-part. The process and information required to be disclosed is simplified as follows:

1. Step 1 – Reserve the company name. This is completed online through the Companies Office website.
2. Step 2 – Submit application for incorporation, which includes:
   (a) Providing addresses and shareholder and director information
   (b) Providing consent forms signed by each shareholder and director
   (c) Pay the minimal registration fee

You can choose to register the company for tax at the time of incorporation and basic tax elections made. If so, New Zealand IRD numbers need to be provided for each New Zealand resident director and shareholder. IRD and tax matters are discussed in more detail below.

Notable advantages and disadvantages of companies are as follows:

Advantages	**Disadvantages**
Separate legal identity • Company itself can hold assets and incur obligations and liabilities Limited liability • Shareholders liable only to the value of their investment; no liability for directors (except when breach of duties) Perpetual succession • Continues to exist unless removed from the Companies Office register (in spite of changes in control/ownership/management) A constitution and/or shareholders agreement can be implemented to cater to the specifics of the company (except to vary	Ongoing statutory administrative obligations, including: • Filing annual returns – failing which, the company will be removed from the Companies Office register • Maintaining a share register • Keeping minutes of meetings • In some cases, preparing and/or auditing financial statements; financial reporting obligations Mandatory provisions in the Companies Act cannot be contracted out of, by a constitution or otherwise From the board's perspective – whilst the company has limited liability, directors can be held personally liable when there is a breach of duties

mandatory provisions in the Companies Act) Suited to passive investors, reasons include: • Board handles management and day to day operations • Board has strict duties to company/shareholders – both under the Companies Act and under common law – must act in the best interests of the company; avoid conflict of interest; disclose personal interests • Under the Companies Act shareholders maintain certain powers – including appointment/removal of directors and the approval of "major transactions" which require a 75% shareholder resolution • The Companies Act provides some limited protection for minority shareholders, including "minority buy-out rights" in certain circumstances Flexibility to introduce/raise new capital The Board may delegate responsibilities	Certain details must be registered with the Companies Office, and are thus publicly available and viewable, including: • Company's name • Directors – name and address • Shareholders – name and address • Company's registered office and address for service • Constitution Dividends/distributions can only be paid if the company meets the solvency test. The solvency test essentially requires that the company can pay its debts as they fall due and has assets that exceed its liabilities
Tax: Company income is taxed at a flat rate of 28% Losses can be carried forward (subject to 49% shareholder continuity) Imputation credits can be applied to shareholder dividends (however limits apply)	**Tax**: Dividends are subject to a RWT taxed at a flat rate of 33%

Overseas companies

An overseas company is defined in the Companies Act as "a body corporate incorporated outside NZ".

If you already operate an overseas company (with exceptions for Australian companies), that overseas company can then operate in New Zealand in any one of the following three ways:

1. Setting up a subsidiary (i.e. incorporating a company in New Zealand, with the shareholding held entirely by the parent company); or
2. Becoming a New Zealand company (i.e. transferring incorporation to New Zealand); or
3. Registering a branch in New Zealand.

The process for registering a branch in New Zealand is a two-part online process, completed through the Companies Office website, and again is relatively fast and simple. The process is as follows:

1. Step 1 - Reserve the overseas company's name – only then can the overseas company commence carrying on business in New Zealand; and
2. Step 2 – Submit an application for registration within 10 working days of commencing business in New Zealand.

Financial reporting obligations

There are specific financial reporting obligations for certain companies. This includes companies deemed to be "large" public companies, large overseas companies, and companies with 10 or more shareholders.

Those reporting obligations are statutory obligations, however would, for the most part, foreseeably be complied with in any event in the ordinary course of business.

Generally, a company is deemed "large" if at the balance date of the past two accounting periods:

1. In the case of a New Zealand company:
   - (a) Assets of entity and subsidiaries > $60m OR
   - (b) Revenue of entity and subsidiaries > $30m
2. In the case of an overseas company (with exceptions for Australian companies):
   - (a) Assets of entity and subsidiaries > $20m OR
   - (b) Revenue of entity and subsidiaries > $10m

NZX Listing

New Zealand's securities markets are operated by NZX. There are three securities markets:

1. New Zealand Stock Market (NZSX)
2. New Zealand Debt Market (NZDX)
3. New Zealand Alternative Market (NZAX)

If you are interested in listing a company in New Zealand, you must apply for listing through the NZX and comply with the NZX listing rules. The same requirements apply to overseas companies as apply to New Zealand companies, and NZX recognises dual listing.

Takeovers

The Takeovers Act 1993 ('Takeovers Act') and its regulations apply to a "code company" (i.e. either a New Zealand listed company or a New Zealand company with 50 or more shareholders and 50 or more share parcels). The Takeovers Act provides minimum standards which must be complied with if you are attempting to acquire shares in a code company. The Takeovers Act established the "Takeovers Code" and implemented the "Takeovers Panel" which sits in deliberation on takeover offers.

Generally, the Takeovers Code must be complied if you attempt to acquire (or increase to) more than 20% voting rights in a code company.

PARTNERSHIP

A partnership is deemed to exist when two or more 'partners' carry on business in common with a view to profit. Generally, a partnership agreement is drawn up to reflect the terms of the partnership. A partnership agreement is however optional, and in the absence of a partnership agreement, the provisions of the Partnership Act 1908 apply by default.

There are no formal registration requirements in New Zealand. There are also little statutory obligations and requirements, and for the most part, partners have the flexibility and freedom to structure and operate their partnership as they wish.

Often the obvious disadvantages of partnerships are the absence of a separate legal identity and limited liability protection. Partnerships are therefore becoming less common now as the 'hybrid' limited partnership option (discussed below) provides similar benefits without these two main disadvantages.

Notable advantages and disadvantages of partnerships are as follows:

Advantages	**Disadvantages**
Flexibility and freedom in drafting partnership agreement No registration requirements No statutory ongoing administrative obligations The partnership agreement and other information relating to partnership structure and operations can remain confidential The partners' capital contributions can be in any form – including cash, loans, skills, or assets	The partnership does not have a separate legal identity from the partners No limited liability protection – partners can be personally sued and held liable (however subject to the partnership agreement, partners can be indemnified by the partnership) Subject to the partnership agreement: • Any partner can bind all other partners – partners have unlimited joint and several liability

Subject to the partnership agreement, there is flexibility as to distribution of profits/income; specifically, there is no solvency test requirements From each individual partners' perspective, all partners owe fiduciary obligations to each other	• Partners are beneficial and equal co-owners of all the partnerships' property and assets, regardless of contributions • Partners are entitled to equal share in profits, regardless of contributions • There are often difficulties in raising additional capital as unanimous consent is required to introduce a new partner • Not suited to passive investors – subject to partnership agreement, all partners participate in management and day to day operations • The partnership is technically dissolved each time a partner retires, replaced and/or a new partner is introduced
Tax: Partnerships are fiscally transparent for tax purposes – the partnership is not a separate legal entity, so each partner's income share is taxed according to its own tax status Tax losses can be passed through, utilised or carried forward No RWT/NRWT payable Loss limitation rule does not apply The partnership can register for GST	**Tax:** As a partnership, not a separate legal entity, partners are jointly and severally liable for GST obligations

LIMITED PARTNERSHIP (LP)

Limited partnerships (LP) were only recently introduced into New Zealand. They are governed by the Limited Partnership Act 2008 ('Limited Partnerships Act') and are regulated by the Companies Office.

Whilst only recently introduced into New Zealand, LPs have existed in other jurisdictions for some time. The LP model in New Zealand is much the same as that in other jurisdictions. In essence, they are a 'hybrid' of a company and partnership, integrating the limited liability and separate legal identity benefits of a company, and some of the flexibility and the look-through tax benefits of a partnership.

In place of a director, is a 'general partner'. They are responsible for the management and day to day operations of the LP, effectively taking on the role of the agent for the LP. Generally, a corporate entity is appointed as a general partner. In place of shareholders, are 'limited partners' whose identity is not publicly available. They contribute capital to the LP and their liability is limited only to the extent of such contributions. Under the Limited Partners Act, limited partners are generally prohibited from being involved in the management and day to day operations of the LP outside specified 'safe harbours'. Limited partners that take part in management risk losing their limited liability protection.

The Limited Partnerships Act requires that a LP have a limited partnership agreement, and sets out the minimal provisions that must be provided for therein. The LP has the freedom and flexibility to include other provisions as appropriate to cater to the specifics of the LP.

LPs are incorporated entities. The process to register a LP is completed by submitting a written application to the Companies Office. The requirements for registration are:

1. Limited partnership agreement;
2. At least 1 general partner and at least 1 limited partner, and at least 1 general partner must:
    (a) If a natural person, either be a New Zealand resident, or a director of an Australian company who is living in Australia; or
    (b) If an entity, either be a New Zealand company or partnership, or an overseas company with a director who is either a New Zealand resident or a director of an Australian company who is living in Australia
3. A registered office and address for service in New Zealand;
4. Registration with the Companies Office.

Notable advantages and disadvantages of LPs are as follows:

Advantages	**Disadvantages**
Separate legal identity • LP itself can hold assets and incur obligations and liabilities Limited liability	Ongoing statutory administrative obligations, including: • Filing annual returns – failing which, the LP will be removed from the Companies Office register

• Limited partners liable only to the value of their investment Perpetual succession • Continues to exist unless removed from the Companies Office register (despite changes in control/ownership/management) Confidentiality • Details of limited partners are not publicly available • Limited partnership agreement not publicly available Flexibility and freedom in drafting the limited partnership agreement (provided it does not contravene the Limited Partnerships Act Limited partners' capital contributions can be in any form – including cash, skills, or assets (excluding loans) Suited to passive investors, reasons include: • Separation between ownership and management/control – the general partner handles management and day to day operations; limited partners simply investors and have no power to bind the LP • The general partner has fiduciary duties to the LP and limited partners – basic duties are prescribed under the Limited Partnerships Act and general agency law, however they can be avoided or added to under the limited partnership agreement Subject to the limited partnership agreement:	• Keeping minutes of meetings • In some cases, preparing and/or auditing financial statements; financial reporting obligations Certain mandatory provisions in the Limited Partnerships Act cannot be contracted out of, by the limited partnership agreement or otherwise (although less when compared with the mandatory provisions relating to companies) From the general partner's perspective – whilst the LP has limited liability, general partners can be held personally liable for the obligations of the LP (however this can be mitigated by having a corporate general partner) Certain details must be registered with the Companies Office, and are thus publicly available and viewable, including: • LP's name • Details of the general partner • LP's registered office and address for service

• There is flexibility to introduce and raise new capital • There is flexibility as to distribution of profits/income; specifically, there is no solvency test requirements	
Tax: LPs are fiscally transparent for tax purposes – each limited partner's income share is taxed according to its own tax status Tax losses can be passed through, utilised or carried forward No RWT/NRWT payable The LP can register for GST, and as it is a separate legal entity, the LP is liable for GST	**Tax**: Loss limitation rule applies (i.e. limited partners' tax deductions are limited to their contribution to the LP)

UNINCORPORATED JOINT VENTURE

An unincorporated joint venture (JV) is often described as a "creature of contract". There is no statutory governance, and no statutory obligations or requirements. It exists when an association of participants come together to achieve a common goal, the terms of which are generally recorded in a joint venture agreement or similar contract. You may find this entity option most suitable in the early stages of a business, when there are still uncertainties as to long term prospects and commitments.

A JV is very similar to a partnership. Some of the differences are however significant, most notably the joint and several liability that exists between partners in a partnership. Care must therefore be taken to ensure that the joint venture agreement is carefully drafted to be consistent with the characteristics of a JV and not otherwise deemed to be a partnership. A key characteristic differentiating a JV from a partnership is that participants in a JV maintain their independence. A common reason that a JV may be deemed to be a partnership (where that may not have been the parties' intention) is when an element of joint management or liability exists.

Notable advantages and disadvantages of JVs are as follows:

Advantages	Disadvantages
Flexibility and freedom in drafting joint venture agreement – no statutory requirements Subject to the joint venture agreement, no joint liability (as is the case with partnerships) No registration requirements No statutory ongoing administrative obligations Confidentiality – no registration requirements whatsoever Subject to the joint venture agreement: • The participants' capital contributions can be in any form – including cash, loans, skills, or assets • Participants own a proportionate share in the JV's assets as tenants in common • There is flexibility to introduce and raise new capital • There is flexibility as to distribution of profits/income; specifically, there is no solvency test requirements	The JV does not have a separate legal identity No limited liability protection – participants can be personally sued and held liable (however indemnities can be provided for in the joint venture agreement) There is a very fine line between unincorporated JV and partnership – care must be taken in drafting the joint venture agreement, including: • Ensuring that management decisions are made independently of the participants • A clear lack of partnership or agency
Tax: JVs are fiscally transparent for tax purposes – each participant's income share is taxed according to its own tax status Tax losses can be passed through, utilised or carried forward No RWT/NRWT payable Loss limitation rule does not apply	**Tax:** As a JV is not a separate legal entity, participants are jointly and severally liable for GST obligations

The JV can register for GST	

Incorporated joint venture (JVC)

Incorporated Joint Ventures (JVC) in New Zealand effectively take the form of a company (as discussed above). The same governance, requirements, advantages, and disadvantages apply.

TRADING TRUST

Trusts are relatively common in New Zealand, especially in a family setting. A trust formed and existing for a business purpose is referred to as a 'trading trust'.

As with any trust in New Zealand, a trust requires a settlor, at least one trustee, and at least one beneficiary, and is governed by a specifically drafted trust deed and the Trustee Act 1956 ('Trustee Act'). Please note: the Trustee Act will foreseeably be replaced by the Trusts Bill, which is intended will inter alia clarify and simplify trust law in New Zealand.

The settlor is the person or entity which establishes the trust – they appoint the trustees and beneficiaries, and contribute the initial capital. The trustees are effectively the agents for the trust. They handle all the management and day to day operations, including distribution of income to the beneficiaries, and get no direct benefit from the trust. Often a company is specifically enacted to take on the role of trustee, referred to as a 'corporate trustee'. As the name suggests, the beneficiaries of the trust receive the benefits (i.e. income and assets) of and generated by, the trust.

Trading trusts share many of the advantages and disadvantages of partnerships and joint ventures. Similarly trusts have no registration requirements and little statutory obligations and requirements, which mean benefits of confidentiality and flexibility. However, trusts are not separate legal entities and do not have limited liability protection.

Notable advantages and disadvantages of trading trusts are as follows:

Advantages	**Disadvantages**
Flexibility and freedom in structuring the trust and drafting trust deed – no statutory requirements No registration requirements No statutory ongoing administrative obligations	The trust does not have a separate legal identity The trust cannot own property or assets in the trust's name – ownership of all property or assets are recorded in the name of the trustee(s) No limited liability protection – the trustee (as effectively the agent of the trust) can be personally sued and held liable (however

Confidentiality – no registration requirements whatsoever, and the trust deed can remain confidential In the case of a corporate trustee, benefits associated with companies would apply in respect to the trustee, such as limited liability Flexibility to introduce/raise new capital Flexibility as to distributions of profits/income to beneficiaries; specifically, there are no solvency test requirements From the beneficiaries' perspective, trustees have fiduciary obligations to the beneficiaries and the trustee can be held personally liable for a breach of obligations and trust (from the trustee's perspective, this can be mitigated by having a corporate trustee)	this can be mitigated by having a corporate trustee) Limited existence – a trust can only exist for a maximum of 80 years (anticipated to increase to 125 years under the Trusts Bill) Ongoing statutory administrative obligations, including: • Record keeping • Updating property titles when trustees change In the case of a corporate trustee, disadvantages associated with companies would apply in respect to the trustee There are some perceived complexities and uncertainties relating to trust law from an overseas perspective
Tax: The trust is not a separate entity for tax purposes, and the trust's profit and income is therefore either taxed at a flat rate of 33% on income deemed trustee income or at a rated based on the beneficiary's tax status on income deemed beneficiary income Tax losses remain at the trust level and can be utilised or carried forward by the trust No RWT/NRWT payable Loss limitation rule does not apply The trust can register for GST	**Tax**: Tax losses cannot be passed through to beneficiaries (because they remain at the trust level)

TAXATION

In New Zealand, the Government collects and administers tax through the Inland Revenue Department ("IRD"). The IRD collects tax under two primary pieces of legislation. They are:

1. The Income Tax Act 2007; and
2. The Goods and Services Tax Act 1985.

The latter is a consumption tax commonly called "GST", charged at a flat rate of 15%. In addition, import tariffs, miscellaneous excise duties and rates are collected.

Some of the important features of the New Zealand tax system and policy environment are that:

1. There is generally no capital gains tax (however what is effectively a capital gains tax can apply to some foreign debt, financial arrangements, and property investments);
2. There is no employee payroll tax;
3. There is no social security tax;
4. New Zealand is a party to numerous double agreements – currently 39; and
5. Personal tax rates vary, depending on income;
6. A New Zealand resident company is taxable on its worldwide income at a flat rate of 28%;
7. All companies, whether resident or non-resident, are taxed at the same rate (however it should be noted that an overseas company is taxed at the same rate but only in respect of its income that has a New Zealand source)

FINANCIAL SERVICE PROVIDERS (FSP)

Any New Zealand entity or person in the business of providing 'financial services' (in NZ or overseas) must register as a Financial Service Provider (FSP) on the Financial Service Providers Register (FSPR).

Financial services

What qualifies as a 'financial service' is vast, and is defined in the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Financial services include:

1. Financial advisors,
2. Brokering;
3. Providing credit under a credit contract;
4. Issuer or offeror of financial products;
5. Changing foreign currency;
6. Trading financial products or foreign exchange on behalf of other persons.

Registration process

The FSPR is a branch of the Companies Office. Registration as an FSP is an online process. It is somewhat more involved and sometimes lengthy than the process for registering a company or limited partnership.

Points to note are that:

1. Once your business entity is incorporated/established, you can then apply for FSP registration
2. The complexity of the registration process (and what is required) varies depending on the relevant financial service(s), in most cases however:
   (a) It will be mandatory for the FSP to join an approved

dispute resolution scheme; and

(b) The entity will be expected to be aware of and agree to comply with New Zealand's anti-money laundering and countering financing of terrorism requirements.

OVERSEAS INVESTMENT

Generally New Zealand is open to overseas investment, and restrictions and requirements on investment are much the same for overseas persons or entities as they are for New Zealand persons or entities.

Recently a requirement was introduced for every person acquiring land to be registered with IRD.

There are certain exceptions which require the consent of the Overseas Investment Office ('OIO') and which are set out in the Overseas Investment Act 2005 ('Overseas Investment Act').

The Overseas Investment Act applies to three categories of investment by overseas persons in New Zealand to the following (as defined in the Act):

1. Sensitive land (which includes farmland greater than 5 ha, reserves, islands, and historic land);
2. Significant business assets (generally assets, shares, or securities greater than $100m); and
3. Commercial fishing quotas.

The Overseas Investment Act requires consent to be obtained for a transaction before the overseas investment is given effect under the transaction. Overseas persons are all persons who are not ordinarily resident in New Zealand, any company that is not incorporated in New Zealand and any company incorporated in New Zealand the shares of which are controlled as to 25% or more by an "overseas person".

Every person or associate making an overseas investment must apply to the OIO for consent to the overseas investment transaction. A considerable amount of information is required to be included in any application for consent, including information about the applicant, details of the investment, the rationale for the investment and evidence that the investment meets the relevant criteria in the Overseas Investment Act. The consent process takes, on average, three months. If the application involves Sensitive Land it will most likely be referred to the Ministers of Finance and Land Information for final approval.

IMMIGRATION

It is not necessary for you to have a visa to invest in New Zealand.

However, should you wish to work or reside in NZ, you would require:

1. New Zealand or Australian citizenship; or
2. New Zealand or Australian residence visa; or
3. A New Zealand work visa.

Available visas

New Zealand's immigration laws are regularly changing. Generally, however there are always specific work visa or residence visa categories suitable for those wishing to work or reside in New Zealand.

Generally, most relevant for overseas investors are the following visa categories:

1. Entrepreneur work visa / residence visa (applicable to those seeking to 'self-employ' in New Zealand)
2. Investor category residence visa (applicable to those wanting to gain New Zealand residence through investment in NZ), which is subcategories into:

   (a) Investor Plus (Investor 1) category – requires a minimum investment in New Zealand of NZ$10 million;

   (b) Investor (Investor 2) category – requires a minimum investment in New Zealand of NZ$3 million.