

COMPANY LAW



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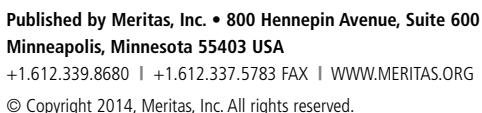
GUIDE TO DOING BUSINESS IN NEW ZEALAND





GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
IN AUSTRALIA AND NEW ZEALAND



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 150 lawyers in five 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.

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TOP 10 QUESTIONS

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

The New Zealand government regulates foreign direct investment primarily through the *Overseas Investment Act 2005* administered by the Overseas Investment Office (OIO). Generally, overseas investment in New Zealand is actively encouraged.

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

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

Yes. Overseas persons or foreign investors may conduct business in New Zealand without a local partner. However, there is a bill currently before Parliament which when passed, will require a company to have either a New Zealand resident director, or to appoint a New Zealand resident agent.

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).

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

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

4. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS OR DISTRIBUTORS AND FOREIGN COMPANIES?

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

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

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

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), *KiwiSaver Act 2008* (a quasi-superannuation scheme), *Privacy Act 1993* (in relation to personal information) and the *Accident Compensation Act 2001* (a no-fault insurance and compensation scheme for workplace injuries).

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

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

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

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER?

The New Zealand taxation system is administered by the Inland Revenue Department. The general tax rate applicable for companies is 28% and most (there are some exceptions) goods and services sold in New Zealand attract a goods and services tax of 15%. Generally, interest, dividend and royalty payments to a 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 1953* (to be replaced effective 13 September 2014 with 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.

COMPANY LAW

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

REGULATORY SCHEME

The *Companies Act* principally regulates companies.

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

REGULATORY AGENCIES

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

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

INCORPORATION

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

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

be obtained at the time of incorporation. Due to the fact that companies can be incorporated very quickly, shelf companies are generally no longer used in New Zealand. Incorporation generally costs about NZD600 - NZD1,000 plus GST and Companies Office fees of approximately NZD160.

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

TYPES OF COMPANIES

- **Public (Listed) Company**

A listed company may offer its shares for sale to the public.

- **Private Company**

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

SHARES AND SHAREHOLDERS

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

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

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

DIRECTORS AND OFFICERS

Companies must have at least one director. At the time of writing, there is a bill before Parliament which will require a New Zealand incorporated company to have either at least one New Zealand resident director or a director resident in an enforcement country. The resident agent is not a *de facto* manager but will be responsible for ensuring companies provide accurate information to the

Registrar of Companies, and will be liable if companies breach their record-keeping and filing requirements under the *Companies Act 1993*.

There is no legal requirement to appoint a company secretary.

Directors of companies conducting business in New Zealand, and others acting in the capacity of directors, owe certain duties to the company itself and, in certain circumstances, to other people associated with the company such as the shareholders and the creditors of the company. Director's duties arise under both the general law and the *Companies Act*.

REPORTING REQUIREMENTS AND RECORDS

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

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

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

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

NEW ZEALAND STOCK EXCHANGE (NZX)

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

In order to list on the NZX, companies must meet various stringent financial criteria set out in the NZX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the

Companies Act and the *Financial Markets Conduct Act*. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects.

Small to medium-sized companies, which are fast growing or looking for additional sources of capital and seek to list without the expense and requirements of a full listing, can list on the NZAX (the New Zealand Alternative Exchange).

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

ACQUISITION OF COMPANIES

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

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

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

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

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

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

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

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