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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

Guide to Doing Business in Australia and New Zealand

Prepared by Meritas Lawyers in Australia and New Zealand

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About This Book

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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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.

From the Editor

This book is intended to provide an overview of the legal system within Australia and New Zealand as it relates to doing business in these countries. It provides 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 hopes to provide readers with a solid overview of the similarities and differences from a legal perspective in relation to doing business within the states and territories of Australia and New Zealand.

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TOP 10 QUESTIONS

Question 1: What role does the government play in approving and regulating foreign direct investment?

The government regulates foreign investment through the Foreign Investment Review Board (FIRB), which is a Board within the Commonwealth Department of Treasury. One of its roles is to examine proposals by foreign interests to undertake direct investment in Australia and to make recommendations to the government whether the proposals are suitable for approval under the Australian government's policy. The ultimate decision whether a proposal is approved lies with the Treasurer.

FIRB is also responsible for monitoring and ensuring compliance with foreign investment policy.

Different rules apply depending on the nature of the proposed foreign investment, for example, an investment in residential real estate or commercial real estate, versus in an Australian business. Whether FIRB approval is required to a proposed foreign investment may also depend on whether the proposed investment exceeds certain set monetary thresholds.

The application process for obtaining FIRB approval is fairly rigorous but is generally determined within 30 days of lodgement of the application, although this period may be extended.

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

Yes, there is no general legal requirement for a foreign investor to conduct a business with a local partner.

The most common corporate structure used in conducting business in Australia is a company, although other structures such as joint ventures, partnerships and trusts may also be used.

Even with a local partner, FIRB approval may be required.

Question 3: How does the government regulate commercial joint ventures between foreign investors and local firms?

Generally, the government does not regulate commercial joint ventures between foreign investors and local firms; however, the government may regulate the foreign investor through other laws such as the Corporations Act (which regulates companies generally) and taxation laws.

Question 4: What laws influence the relationship between local agents or distributors and foreign companies?

Broadly speaking the relationship between an Australian agent or distributor and an overseas supplier would be a contractual one governed by the same principles of contract law as the UK and other English speaking jurisdictions.

Under Australian tax law, the pricing of goods and services supplied under contract between an Australian agent or distributor and an overseas supplier is expected to be set on an "arms-length" basis. There are comprehensive and complex tax laws dealing with transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting the revenue.

Where the Commissioner of Taxation forms the opinion that cross-border transactions have not been priced on an arms-length basis, the Commissioner has power to make compensating adjustments and impose penalties.

Question 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)?

FIRB controls whether a foreign investor may invest in certain sectors. There are certain sectors where foreign investment will be prohibited or restricted or otherwise restricted as being against the national interest or as being against Australia's national security. These include residential real estate, media, telecommunications and military.

Even if a proposed foreign investment does not fall within a sensitive sector, FIRB has an overriding policy where approval may be declined where the proposed investment is against the national interest or is against Australia's national security.

Question 6: How do labor statutes regulate the treatment of local employees and expatriate workers?

Local Employees

Australia's system is strongly regulated by state and federal legislation. Companies that are trading corporations fall within the federal system of industrial relations presently administered pursuant to the Workplace Relations Act 1996 (as amended). There has been substantial revision of this legislation in recent years and further major changes are proposed for implementation by 1 January 2010.

Most blue collar and clerical workers have their employment terms and conditions determined by reference to minimum legislated standards and various awards and collective agreements approved by the Australian Industrial Relations Commission, a third party tribunal.

Senior executives and management more commonly have their terms and conditions of employment determined by reference to common law agreements negotiated directly between the employer and the employee. The terms of such agreements must still exceed the statutory minimum standards.

There is a plethora of other legislation covering workplace health and safety; discrimination; workers' compensation for workplace injury; privacy; and legislation strongly regulating the ability of employers to terminate employees.

Expatriate Workers

The terms and conditions for expatriate workers will greatly depend upon the type of visa arrangements approved by the Australian immigration authorities. Business people visiting from overseas can continue to enjoy the benefits of their home-based employment arrangements while undertaking short-term business activities in Australia. However, where visas are required, the employees will most commonly be required to be engaged as if they were employees fully covered by the Australian industrial relations regime and legislation referred to above. In any event, key legislation covering such issues as workplace health and safety will apply to any person working in Australia.

Question 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?

Australia does not have any exchange controls. The Australian Dollar (AUD) is a floating currency widely and transparently traded, although the Reserve Bank may, from time to time, buy or sell AUD to smooth out unusual market events.

There are no restrictions on repatriation of profits back to overseas parents by way of dividends or loan repayments other than:

- The usual requirement that the Australian entity meet the solvency test of being able to meet its debts as and when they fall due
- In some cases, making sure the company does not fail the thin capitalisation test to ensure that its interest expense is fully deductible for tax purposes

Local banks are generally well capitalised and sophisticated financial institutions. As such, they are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.

Question 8: What types of taxes, duties and levies should a foreign investor expect to encounter?

For most operating companies the following taxes would be encountered by an Australian operation:

- Company tax at 30 percent on net income
- Withholding tax on any dividends to the extent that these are unfranked (i.e., franked dividends to overseas shareholders are free of withholding tax)
- Withholding tax at 10 percent on interest payable to an overseas party
- Withholding tax on royalties payable to an overseas party
- State duties on the acquisition of land
- In some cases, payroll tax on wages and salaries (a state-based impost)
- Resource Rent Tax (oil and gas only)
- Pay-as-you-Go withholding tax (on the salaries and wages of employees which is remitted directly to the Commissioner and a

credit allowed to respective employees on filing their income tax return)

- In some cases, Fringe Benefits Tax on non-cash compensation paid to employees

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

Australia has a comprehensive intellectual property regime. It includes legislative regimes (e.g., Copyright Act, Trade Marks Act, Patents Act, Designs Act, etc.) and common law regimes (e.g., the protection of confidential information). Australia is a member country of a number of international intellectual property conventions and treaties (for example, the Berne Convention—the aim of which is to provide copyright protection among member countries and the Madrid Protocol—the purpose of which is to facilitate international trade mark applications). Where applicable, Australian intellectual property laws are enforced objectively and are enforced regardless of the nationality of the parties.

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

All Australian Courts including Federal, State, and Territory Courts offer well-regulated dispute resolution processes. Increasingly these Courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution processes be implemented as early as possible to resolve disputes without the costs and delays involved in full-blown trials. While arbitration is also available, with well regulated commercial arbitration procedures in most jurisdictions, the growth in alternative dispute resolution processes has meant that in general terms litigants are less attracted to arbitration than they may have been in the past. The fact that arbitration is no longer seen as a significantly less expensive alternative than traditional court-based litigation is likely a contributing factor to this.

AN INTRODUCTION TO AUSTRALIA

Australia is a federation comprised of six states and two territories. The federal government, based in the capital city of Canberra, is known as the Commonwealth of Australia. Australia has a population of approximately 20 million people, from a diverse range of ethnic backgrounds. Over 70 percent of Australians live in the major cities located on its coastline.

LEVELS OF GOVERNMENT

The Australian constitution divides responsibilities between the federal government and the states and territories. Australia's system of government is similar in many respects to other federal systems such as the United States of America and Canada.

Each state and territory makes laws in its areas of responsibility, as does the federal government. Federal matters include some areas of taxation, marriage, divorce, foreign investment, defence, interstate and overseas trade, trade mark and patent registration, and the banking and monetary system. The states and territories regulate matters such as health, education, police, road construction, and railways within their respective borders.

In addition to federal and state or territory laws, local or municipal governments may make various regulations and bylaws which may affect businesses operating within their respective jurisdictions. Town planning usually falls within the province of local government.

Accordingly, businesses in Australia must be aware of and comply with federal laws, the laws of each state or territory in which the business operates and the bylaws of each city, town or shire where the business is located.

COURT AND LEGAL SYSTEM

The Australian legal system is modelled on the English common law system of judge-made (or case) law and statutory law made by the various parliaments.

The federal and state courts have separate and shared jurisdictions. The Federal Court generally has jurisdiction over matters arising under Commonwealth legislation, which include bankruptcy, aspects of consumer and competition law, federal taxation and intellectual property.

Both federal and state courts have jurisdiction over corporations, including insolvency matters.

The state courts generally have jurisdiction over matters arising under state legislation and common law, including commercial law, contract, equity, torts and criminal law and state taxation.

The typical hierarchy of state courts is:

- Magistrates' or Local Court (dealing with small disputes and minor offences)
- District Court or County Court
- Supreme Court
- Court of Appeal
- High Court of Australia

The federal system has a similar hierarchy:

- Federal Magistrates' Court
- Federal Court
- Full Federal Court
- High Court

Extensive cross-vesting arrangements mean that the Federal Court can hear a matter involving a mixture of state and federal matters. Similarly, a state court can usually determine a matter that involves federal issues.

MAJOR FORMS OF BUSINESS ORGANISATION

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

The major forms of business organisation are:

Company

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company
- Incorporation Transferred from Country of Origin

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

Trust

- Discretionary Trust
- Unit Trust

Company

A foreign company wishing to establish a business in Australia may choose between three main forms of corporate organisation.

- **Locally Incorporated Subsidiary of a Foreign Company**

  A local subsidiary is a separate legal entity from its foreign parent or holding company. It must be incorporated in Australia and is required to comply with all relevant Australian laws. Australia has a uniform national corporations law, as such there is no geographical restriction upon the territorial operation of an Australian company, nor a requirement to register in each Australian state in which it wishes to operate.

  An Australian company will usually be fully taxed in Australia on all its income and profits, whether that income arises from its business activities conducted in Australia or elsewhere in the world. However, income of an Australian company that is from a non-Australian source that flows through to an Australian non-resident shareholder will, in certain circumstances be outside the Australian tax net. An Australian company must file an annual report and accounts, although many smaller companies may be exempt from many reporting requirements.

  As a local subsidiary is a separate legal entity, the liability of the foreign company parent for its subsidiary's indebtedness is, in the absence of guarantees given by the parent or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent. However, the parent may also be liable for insolvent trading by its subsidiary in circumstances where the parent ought to have known that the subsidiary was insolvent.

There is no minimum capitalisation requirement imposed by Australian company laws on an Australian company, although in certain circumstances various taxation acts may impose capitalisation requirements. Nonetheless, in Australia, a company with paid up capital of AUD2 is very common.

The cost of incorporating an Australian company is modest. Incorporation is quick.

- **Branch Office of a Foreign Company**

  A branch office is simply a local Australian office of the foreign company and does not have a separate legal identity from its parent. The foreign company must be registered in Australia as a foreign company and must comply with all relevant Australian laws.

  The branch office will be taxed in Australia on all its income and profits which arise from its business activities conducted in Australia, although the provisions of applicable Double Taxation Agreements between Australia and the foreign parent's country of incorporation may reduce the tax otherwise payable in Australia.

  The branch office must file an annual report and accounts. If the accounts are not in English then a translation must be filed.

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

  Some advantages of having a local subsidiary or branch compared with appointing an agent include:

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

- **Corporation Transferred from Country of Origin**

  A less common option is for a foreign company to transfer its incorporation from its original country of incorporation to Australia. It will then be treated as an Australian company.

Australian company law is generally discussed under the **Company Law** section.

Joint Venture

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

There are two main forms of joint venture.

- **Unincorporated joint venture**

  An unincorporated joint venture is not a separate legal entity. Rather it is a contractual agreement between two or more people who agree to conduct business for a particular purpose.

  Where the participants share profits of the joint venture, the joint venture may, in certain circumstances, be classified as a "partnership." If it is possible to structure the arrangements so that the participants share output rather than profit, then the joint venture may not be a partnership.

- **Incorporated joint venture**

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

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

Partnership

A partnership is an arrangement between two or more people to carry on a business with a view to profit. It may be formed by an agreement between the partners. In the absence of an agreement, the Partnership Acts in the states and territories set out many of the partnership rules that apply to the arrangement. The Partnership Acts follow the well-established common law model. If the

partnership does not conduct business under the actual names of its partners, the partnership name in which the partnership operates must be registered in each state or territory in which the partnership proposes to conduct business.

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

The laws of some states permit limited liability partnerships, which limit the liability of some partners who do not manage the partnership business. They are generally used for specialist investment activities.

A non-limited liability partnership is not subject to taxation in its own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits, which are assessed at the partners' marginal tax rates. A limited liability partnership is taxed as a company.

Trusts

Trusts are widely used in Australia as a trading vehicle. The two main forms of trust are:

- **Discretionary Trust**

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

- **Unit Trust**

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

Trust beneficiaries, known as unit holders, have set interests in the income and capital of the trust. The unit holders can sell these interests.

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

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

REGULATION OF FOREIGN INVESTMENT

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

Regulation

Foreign investment in Australia is principally governed by the Foreign Acquisitions and Takeovers Act and is administered by the Foreign Investment Review Board (FIRB).

The FIRB is a division of the Federal Treasury. Its function is to review foreign investment proposals and to make recommendations to the Federal Treasurer. The Treasurer will then make a decision, based on these recommendations, which will either permit or prevent the proposed foreign investment in Australia. This decision is commonly referred to as FIRB approval.

Foreign Interest

Foreign investment regulation applies to investment proposals in Australia by a foreign interest. This term is defined to include:

- A person who is not ordinarily resident in Australia
- An Australian company, business or trust where 15 percent or more of the voting shares are held by a foreign corporation or non-resident person (even if that foreign interest does not exercise control), or where non-residents hold a total of 40 percent or more

If you fall within one of these categories, and are proposing to make any of the types of investment described below, it is likely that you will need to apply for FIRB approval.

Categories of Foreign Investment

The main categories of foreign investment which are regulated by FIRB are:

- **Acquisition of Shares**

  Subject to certain minimum limits, any foreign interest proposing to acquire, increase or alter a 'substantial interest' in an Australian company, the value of whose assets exceeds AUD100 million or, where the proposal values the business at over AUD100 million, must first obtain FIRB approval.

  For U.S. investors, a notification threshold of AUD953 million applies except for investments in certain sectors (e.g., media, telecommunications, transport, human resources or training, manufacture or supply of military goods or equipment, development, manufacturing and supply of securities technology goods, extraction or rights to uranium, plutonium or operation of nuclear facilities). U.S. entities controlled by a U.S. government are subject to an AUD110 million threshold.

  A 'substantial interest' is an interest acquired (either directly or indirectly) by a foreign entity that amounts to 15 percent or more of the issued shares or voting power of the Australian company. It also arises where associated foreign interests hold 40 percent or more in aggregate of the issued shares or voting power of the Australian company.

- **New Businesses Proposals**

  Proposals to establish new businesses in most industry sectors in Australia involving a total investment of AUD10 million or more require prior FIRB approval. Proposals by U.S. investors, except U.S. entities controlled by a U.S. government, do not require notification but remain subject to other relevant policy requirements.

- **Offshore Takeovers**

  Takeovers by a non-U.S. foreign interest in an offshore company that holds Australian assets or conducts business in Australia are subject to FIRB approval where the proposal exceeds AUD100 million if the Australian assets or businesses in Australia are valued at less than 50 percent of the total assets of the offshore company.

  Where the value of Australian assets or businesses of the offshore company exceed 50 percent, the AUD200 million threshold will apply.

- **Acquisition of Real Estate**

  Prior FIRB approval is required for foreign acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and acquisition of interests in urban land corporations and trusts) that involve:
  - Developed non-residential commercial real estate, where the property is subject to heritage listing valued at AUD5 million or more and the acquirer is not a U.S. investor
  - Developed non-residential commercial real estate, where the property is not subject to heritage listing but is valued at AUD50 million or more, or AUD953 million for U.S. investors
  - Accommodation facilities, vacant, and residential real estate irrespective of value

  Proposals for acquiring developed residential real estate by foreign interests are normally rejected except in limited circumstances.

- **Foreign Government Investments**

  All types of direct investments by foreign governments and their agencies require prior FIRB approval and notification to the Australian government.

- **Special Cases**

  Separate rules apply to foreign interests participating in certain sensitive industry sectors in Australia without express approval. These sectors include: media, civil aviation, telecommunications, banking, airports, shipping, holding rights to extract plutonium or uranium, and operating a nuclear facility.

Review of Investment Proposals by FIRB

The FIRB's review process of investment proposals is generally prompt. Forwarding an investment proposal to the FIRB activates a 'time clock' so that if action is not taken within 30 days (or an extended time period), the FIRB cannot withhold its approval.

In most cases a decision is made within the 30 day period and FIRB approval is normally granted unless the proposal is judged to be contrary to the national interest. This judgment may be made in consultation with other government departments, such as the Australian Taxation Office. Generally the FIRB is required to satisfy itself that the investment is for a legitimate purpose benefiting Australia. If an investment proposal is on a large scale, political considerations may become important.

In some cases, FIRB approval may be subject to the foreign interest meeting certain conditions. If FIRB approval is conditional, the foreign interest must comply with the conditions. For example, in real estate investments such conditions may include obtaining feasibility studies and environmental impact reports and providing evidence that the foreign interest has planned for the long term management of the development.

Penalties

There are heavy penalties for failure to comply with the Foreign Acquisitions & Takeovers Act or with conditions imposed by the FIRB. Accordingly, we strongly recommend that you always seek legal advice before structuring or submitting a proposal to the FIRB to make an investment in Australia.

COMPANY LAW

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

Regulatory Scheme

The Corporations Act principally regulates companies, the acquisition of shares, securities, and the futures industry.

The Corporations Act, together with major pieces of legislation such as the Australian Securities and Investments Commission Act, the Australian Securities and Investments Commission Guidelines and the Listing Rules of the Australian Stock Exchange Limited, form a uniform regulatory scheme for companies which applies in all Australian states and territories.

The regulatory scheme in relation to companies has been and continues to be the subject of reform.

Australian Securities and Investments Commission (ASIC)

A federally funded body, the Australian Securities and Investments Commission is responsible for administering the regulatory scheme throughout Australia. ASIC has broad-ranging powers and functions (alongside the Australian Stock Exchange (ASX) for publicly-listed companies) as the regulator and enforcer of company law and is the principal registry and information source for company matters.

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 Australia.

Companies are incorporated under the Corporations Act. Incorporation involves appointing directors (one of whom must be resident in Australia), usually issuing shares, nominating a registered office in Australia (which can be in any state or territory of Australia) and sometimes lodging copies of the company's constitution (its governing document, if it elects to adopt one) with the ASIC. Alternatively, companies that are already incorporated may be purchased for immediate use. These companies are known as 'shelf companies' and are available from the Meritas member firms in Australia. A shelf company generally costs about AUD1,000. The ASIC is required to make certain company records available for public inspection.

Each company, which is properly incorporated, is registered by the ASIC and receives a unique nine-digit Australian Company Number (ACN). The ACN must appear on all of the company's public documents. Foreign companies and certain other bodies required to register under the Corporations Act also receive identification numbers known as the Australian Registered Body Number (ARBN).

All companies incorporated under the Corporations Act are able to conduct business in all states and territories of Australia without meeting further registration requirements.

Types of Companies

There are two principal types of companies under the Corporations Act. These are public and proprietary companies limited by shares.

The liability of shareholders of such companies is limited to any unpaid amount in respect of shares held by them.

Both proprietary and public companies must have a registered office in Australia where communications can be sent and where, in respect of a public company, the registered office must be opened to the public (usually between 10am - 12 noon and 2pm - 4pm each business day or at least for three hours between 9am - 5pm each business day). All companies must also have a 'public officer' who is responsible for discharging obligations required by Australian taxation law. One

of the directors of a company, the public officer of a company and the secretary of a public company must be ordinarily resident in Australia. The same person may, but need not fulfill the roles of director, secretary, and public officer.

The distinguishing features of these types of companies are:

- **Public Company**

  A public company may offer its shares for sale to the public. It must have at least three directors, no fewer than two of whom must be ordinarily resident in Australia. In addition, it must have at least one shareholder but there is no maximum limit on the number of shareholders. It is not necessary for a public company to be listed on the ASX.

  There can be no restriction on the transfer of shares in a public company. A public company must be audited.

- **Proprietary Company**

  A proprietary company is the most commonly used form of company in Australia. It is designed for a relatively small group of people (not exceeding 50) who do not wish to raise funds from members of the public by inviting them to become shareholders and who wish to restrict the transfer of the company's shares. A proprietary company must have at least one director and one shareholder (who can be the same person). At least one director must ordinarily reside in Australia.

  Proprietary companies are further classified as either large or small proprietary companies. To be classified as a small proprietary company, and so qualify for reduced financial reporting requirements, the company must satisfy at least two of the following criteria:

  - The company and the entities it controls, if any, must have a consolidated gross operating revenue of less than AUD10 million for the financial year
  - The value of its consolidated gross assets and the assets of any entities it controls, if any, total less than AUD5 million at the end of the financial year
  - The company and any entities it controls, if any, have fewer than 50 employees at the end of the financial year

Other forms of companies, including companies limited by guarantee, no liability and unlimited liability companies, are also available, depending on the purposes for which the companies are required. (A no liability company is one where the

holder of partially paid shares can choose to forfeit the partially paid shares without further liability rather than pay a call in respect of those shares. They are commonly used in mining projects.)

Directors and Officers

Directors of companies conducting business in Australia, 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. The directors' duties arise under both the general law and the Corporations Act. Of particular importance in Australia are two duties imposed by the Corporations Act on "officers," defined to mean not only the directors, but also people in accordance with whose directions or instructions the directors customarily act; company secretaries and executive officers of the company; and employees. The two duties require officers to act honestly, carefully and diligently and to prevent the company from trading when it is insolvent, that is, when it cannot pay its debts as and when they fall due. Breaching these duties can have severe consequences.

Reporting Requirements and Records

Companies conducting business in Australia are under various obligations to:

- Maintain their accounts in accordance with generally accepted accounting principles consistently applied in Australia
- Prepare annual financial statements and reports and distribute copies to their shareholders
- Lodge copies of those statements with ASIC and, if applicable, the Australian Stock Exchange (ASX)
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies
- Procure the preparation of reports by the directors on the company's performance
- For some companies, have their accounts audited regularly by an independent expert resident in Australia
- Disclose significant matters affecting their performance or prospects to ASIC and, if applicable, the ASX

The extent of the reporting obligations will depend on the size and activities 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.

Australian Stock Exchange (ASX)

Public companies may seek to raise funds from the public by listing on the ASX. The ASX quotes the shares of the large public companies on electronic trading boards in the major cities of Australia and enables trading of those shares to take place. Listing on the ASX is an option that is also available in limited circumstances to companies incorporated overseas.

In order to list on the ASX, companies must meet various stringent financial criteria set out in the ASX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the Corporations Act. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects. The company must also have a minimum of 500 shareholders each having shares (or another form of security which is the company's main type of security) to the value of at least AUD2,000 and the issue or sale price for all securities (except options) for which the company seeks a quotation must be at least AUD0.20.

A company that does not seek listing on the ASX 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 Businesses

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

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

Each of these methods has its own advantages, depending on the outcome that is sought.

Complex rules apply in relation to listed companies. For instance, special takeover laws apply once a party has a 20 percent interest in a listed company.

In addition, taxation and stamp duty consequences (discussed under **Taxation**) must be carefully considered.

TAXATION

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

In all cases, we strongly recommend that you obtain professional tax and legal advice before structuring or implementing your investment or business plans in Australia. Meritas law firms have considerable tax expertise.

All levels of government in Australia levy tax.

Federal Taxes

The most important federal taxes are:

- Income tax (including capital gains tax)
- Company tax
- Goods and services tax
- Customs duties
- Fringe benefits tax

State or territory governments levy none of these taxes.

State and Territory Taxes

These taxes include:

- Stamp duty
- Land tax
- Payroll tax

The federal government levies none of these taxes.

Local Government Taxes

Local or municipal governments raise revenue by levying a “rate” on land located within their district. The rate is proportional to the value of the land. Some municipalities rate on the basis of land value while others rate on the basis of land value and improvements.

In Australia there are no death or probate duties or taxes. Gifts of assets are also not subject to any specific gift tax but may be subject to capital gains tax if not in cash.

Income Tax

Australia taxes residents on worldwide income. Non-residents are taxed on the basis of Australian source income only. Temporary resident individuals are taxed as though they are non-residents – i.e., only on Australian source income and gains.

The financial or income reporting year in Australia is generally from 1 July to the following 30 June though substituted accounting periods can be arranged where there is a good reason – e.g., to align Australian reporting with an overseas parent company.

A company will generally be a resident of Australia for taxation purposes if it is incorporated in Australia or if its central management or control is located in Australia. Double Tax Treaties may treat companies as resident at the place of effective control to avoid treating them as residents of more than one country.

Taxable income in Australia is the difference between assessable income and allowable deductions. The notion of "assessable income" is broader than the accounting notion of "income." For instance, assessable income includes capital gains.

The notion of "allowable deductions" includes most things that would be allowed as a deduction for accounting purposes. However, it does not include entertainment expenses or outgoings of a private or domestic nature, e.g., interest on a mortgage used to purchase a private property.

Losses may be carried forward from one year to the next but cannot be carried back. Company losses must meet either a "continuity of ownership" test or a "continuity of business" test to remain deductible in subsequent years.

Capital Gains Tax (CGT)

Assessable income may include net capital gains. Net capital gains derived by companies are taxed at the usual corporate rate of 30 percent.

Australian residents are liable for tax on worldwide capital gains. In many cases these gains may qualify for a 50 percent discount and in some small business cases a further 50 percent discount is available.

The CGT rules allow a number of indefinite deferrals of tax by allowing rollover relief. This is a matter on which your Meritas firm can provide more detailed advice and assistance.

Overseas investors, however, are now largely exempted from CGT except on the limited class of assets known as "taxable Australian property." Broadly, this refers to interests in Australian real estate and related property interests. Where an overseas investor sets up an active Australian business that is not "land rich" the capital gain made on the disposal of that business would generally be tax free. Again, this is an area where expert advice is strongly recommended from your Meritas firm.

- **Individual Tax Rates**

  Taxable income is treated differently for individuals compared with companies.

  Residents

  The tax rates for resident individuals for the 2008-09 year are set out below:

Taxable Income (AUD)	Tax Payable
Nil - 6,000	Nil
6,001 - 34,000	15% of excess over 6,000
34,001 - 80,000	4,200 + 30% of excess over 30,000
80,001 - 180,000	18,000 + 40% of excess over 75,000
180,001 +	58,100 + 45% of excess over 150,000

  Non-Residents

  The tax rates for non-resident individuals for the 2008-09 year are set out below:

Taxable Income (AUD)	Tax Payable
Nil - 34,000	29%
34,001 - 80,000	9,860 + 30% of excess over 30,000
80,001 - 180,000	23,660 + 40% of excess over 75,000
180,001 +	63,660 + 45% of excess over 150,000

- **Companies**

  Companies are taxed at a flat rate of 30 percent on their taxable income. If no dividend is declared, no further tax is payable. Australia does not impose either excess profits tax or adopt any alternative minimum tax rules.

  If a dividend is declared, and the dividend comes from funds on which the company has paid tax, then a resident shareholder will be taxed on an amount that consists of the cash received or credited plus an amount called a "franking credit" which represents the tax paid by the company. The resident shareholder can use the company tax (that is the franking credit) to offset any liability to pay the individual's personal tax.

  If the shareholder is a resident individual with a tax rate of less than 30 percent, and has income consisting of only fully-franked dividends, the resident individual will be entitled to a tax refund.

  No tax will be payable if the resident shareholder is another resident company.

  For example:

  Assume a company has AUD100 profit and one shareholder. The company pays AUD30 company tax (being 30% of AUD100). The board of the company may choose to pay a dividend. Assume it chooses to pay an AUD100 dividend. In that case, the shareholder receives AUD70 cash and a tax credit of AUD30 ("franking credit"). For income tax purposes the shareholder has received taxable income of AUD100. The shareholder must pay income tax on the AUD100 at his marginal rate but is entitled to an AUD30 tax credit for the franking credit.

- **Withholding Tax**

  Australia levies income tax on remittances of certain types to non-residents. The three types of withholding tax are:

  - Interest withholding tax at 10 percent
  - Dividend withholding tax at 30 percent
  - Royalty withholding tax at 30 percent

  Where an Australian resident remits income of the type mentioned above to a non-resident, *prima facie* tax at the rate set out above must be deducted from the payment by the Australian resident remitter.

  These rates are reduced for the various Double Tax Treaties to which Australia is a signatory. In the case of the U.S., the Australia-U.S. Free Trade Agreement further reduces the rates.

- **Dividend Withholding Tax** (DWT)

  Where an Australian resident is a company that pays a dividend out of profits in respect of which tax has been paid at 30 percent as outlined above to a non-resident shareholder (i.e., the dividend is fully franked) then no DWT is levied.

  To the extent to which distributions to a non-resident are unfranked, these are subject to DWT at 30 percent, reduced by tax treaties where applicable. Most treaties provide for 15 percent DWT. Special rules apply for New Zealand under the Triangular Tax Rules to provide an element of mutual recognition of trans-Tasman franking credits.

  Certain unfranked dividends may be paid to non-resident shareholders under the "conduit foreign income" rules. Generally, conduit foreign income represents income and gains made by or through an Australian company that are not taxed at the company level – e.g., foreign non-portfolio dividends and gains on the disposal of certain foreign shares. These generous exemptions now make Australia an ideal place to base an intermediary holding company.

- **Interest Withholding Tax** (IWT)

  Interest paid to non-residents by Australian residents generally attracts IWT at 10 percent unless either reduced by a tax treaty or covered by certain limited exemptions.

- **Royalty Withholding Tax**

  Royalties are defined very broadly to include fees for the supply of certain property or rights. Royalties paid will generally be deductible to an Australian company, subject to the transfer pricing rules if paid to a related party or on non-arms-length terms.

  Royalties are subject to withholding tax at 30 percent unless reduced by a tax treaty, where the rate is generally 10 percent.

Double Tax Treaties

Australia is party to a comprehensive range of double tax agreements with a number of countries. One effect of all double tax agreements is that the dividend and royalty withholding tax rates specified above are substantially reduced. Where treaty rates are higher than domestic rates, the lower rate prevails.

Withholding tax rates under Australia's tax treaties are set out below.

Country	Dividends	Interest	Royalties
Argentina	10% - 15%	12%	10% - 15%
Austria	15%	10%	10%
Bulgaria	Proposed		
Canada	5% -15%	10%	10%
Chile	Proposed		
China (not HK or Macau)	15%	10%	10%
Czech Republic	5% - 15%	10%	10%
East Timor	15%	10%	10%
Fiji	20%	10%	10%
Finland	0 - 15%	0 - 10%	5%
France	0 - 15%	1% - 10%	5%
Germany	15%	10%	10%
Hungary	15%	15%	10%
India	15%	15%	10% - 15%
Indonesia	15%	10%	10% - 15%
Ireland	15%	10%	10%
Italy	15%	10%	10%
Japan	0 - 15%	0 - 10%	5%
Kiribati	20%	10%	15%
Korea	15%	15%	15%

Country	Dividends	Interest	Royalties
Malaysia	0 - 15%	15%	15%
Malta	15%	15%	15%
Mexico	0 - 15%	10% - 15%	10%
Netherlands	15%	10%	10%
New Zealand	5% - 15%	10%	10%
Norway	0 -15%	0 - 10%	5%
Papua New Guinea	15% - 20%	10%	10%
Philippines	15% - 25%	10% - 15%	15% - 25%
Poland	15%	10%	10%
Romania	5% -15%	10%	10%
Russian Federation	5% - 15%	10%	10%
Singapore	15%	10%	10%
Slovak Republic	15%	10%	10%
South Africa	5% - 15%	0 - 10%	5%
Spain	15%	10%	10%
Sri Lanka	15%	10%	10%
Sweden	15%	10%	10%
Switzerland	15%	10%	10%
Taipei (Taiwan)	10% - 15%	10%	12.5%
Thailand	15% - 20%	10% - 25%	15%
Turkey	Proposed		
United Kingdom	0 - 15%	0 - 10%	5%
United States	0 - 15%	0 - 15%	5%
Vietnam	10% - 15%	10%	10%

Intermediary or Regional Holding Companies

Changes made to both the taxation of foreign income received or earned by Australian resident companies together with both an extensive network of tax treaties and CGT exemptions for overseas gains have made Australia a very competitive place to base intermediary or regional holding companies.

Transfer Pricing

Australia's transfer pricing rules are based on the OECD Guidelines. These rules are set out in Div 13 ITAA36, tax treaties and published rulings issued by the ATO. These rules are both complex and comprehensive and allow the ATO to adjust the outcome of transactions where it believes that non-arms-length prices have been charged to the detriment of the revenue.

While all taxpayers are required to keep comprehensive records for tax purposes, there is a special need to document transfer pricing decisions to establish that prices are reasonable and commercially justifiable.

This is a complex area on which specialist tax advice is recommended from your Meritas firm.

Thin Capitalization

Thin capitalization rules operate to restrict interest deductions allowable against Australian source income for both foreign-controlled Australian investments (inbound investors) and Australian entities investing overseas (outbound investors) where the entity's debt exceeds certain levels.

Generally the maximum permitted gearing for both inbound and outbound investors is set at a debt-to-equity ratio of 3-to-1 (20-to-1 ratio for financial institutions).

Taxpayers with interest deductions of less than AUD250,000, or outbound investors with 90 percent or more of its total average asset value consisting of Australian assets, are exempt from the thin capitalization rules.

Consolidation Rules

These rules allow wholly owned corporate groups to prepare and lodge tax returns on a consolidated basis to reflect the fact that they generally operate as a single economic unit. Where consolidated returns are prepared, the head company acts as a representative taxpayer for the whole group and all losses can be offset against income derived by other group members. Similarly, the tax law

disregards all intra-group transactions and allows the free movement of assets between group members without recognizing any taxable gains or losses or needing to meet any formal rollover requirements.

There are also discrete rules relating to certain Australian resident wholly owned foreign subsidiaries of overseas parent companies know as MEC groups.

While the election to form a consolidated group is optional, once made it cannot be rescinded.

Goods and Services Tax

The Goods and Services Tax (GST) regime in Australia operates in a manner which is very similar to the GST regimes in Canada and New Zealand or the VAT regime in the United Kingdom.

GST in Australia is levied at the rate of 10 percent with exemptions for certain food stuffs, certain educational expenditure, medical expenditure, and some religious activities.

As in the countries mentioned above, the tax is intended to be levied on the final consumption of a good or service with the tax being progressively collected along the manufacturing and distribution chain.

Customs Duties

Customs duty is levied on the importation into Australia of some goods. It is payable by the importer.

Fringe Benefits Tax

In Australia, if an employee receives a non-cash benefit as a consequence of his employment, then that benefit is taxed separately from income tax under a regime known as fringe benefits tax. Basically, the employer is assessed for the fringe benefits tax. The tax is calculated by reference to the value of fringe benefits paid to the employee.

As a consequence, many employees in Australia do not receive fringe benefits as part of their remuneration arrangements. Where an employee receives a taxable fringe benefit, the employer usually takes the amount of fringe benefits tax into consideration when determining the total remuneration package payable to the employee.

Other Taxes

- **Stamp Duty**

  This is levied by the states and territories. There is no federal duty. Depending on the relevant state or territory, duty may be levied on:

  - A transfer of property (including a transfer of land)
  - A lease of land
  - A mortgage or other security
  - A transfer of shares (especially where the company is "land rich")

  This is not a comprehensive list. Generally speaking this is a tax which is payable by the purchaser.

  Many components of this tax are being phased out.

  For instance, in Victoria, only transfers of land will attract stamp duty unless the company's assets consist principally of land in which case the transfer of its shares may attract duty under the "land rich" provisions. However, in New South Wales, transfers of land, of business including intellectual property and shares in non-listed companies will attract duty, as will some mortgages.

- **Land Tax**

  Land tax is an annual tax levied only by the states and territories on the value of a landholder's total holding of land in that state at a particular date, commonly 31 December. The tax is levied at a percentage of the value of all land owned by that landholder in the state. The maximum rate in Victoria is 2.25 percent for a landholder who holds land exceeding AUD3 million in value and a flat rate of 1.7 percent applies in New South Wales.

  Certain classes of land, for instance farming land and principal place of residence, may be exempt from the tax. Where land is used for income producing, the relevant land tax expense would generally be deductible for income tax purposes.

- **Payroll Tax**

  This is a tax levied only by the states and territories on the wages and similar benefits paid by employers to their employees. It was generally not levied on payments to contractors but recent amendments now incorporate certain payments under "relevant contracts" in certain states.

  Generally, payroll taxes will be deductible to an employer entity for income tax purposes.

INTELLECTUAL PROPERTY

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

There are also various rights under the general law which protect, among other things, trade names, goodwill and confidential information.

Some principal laws protecting intellectual property are briefly discussed below.

Patents

The law relating to patents is contained in the Patents Act 1990. If a person wishes to obtain the exclusive and enforceable right to make, use or sell their invention in Australia, they may apply under the Act for 'letters patent' which grant such rights for a stipulated period.

The Act provides for a grant of two distinct types of patent:

- A **Standard Patent** confers the sole right to make, use or sell the invention for a period of up to 20 years upon payment of the annual registration fees.
- An **Innovation Patent** which replaced the petty patent in Australia on 24 May 2001, is a relatively fast, inexpensive protection option. Protection lasts for up to a maximum of eight years. The innovation patent system has been designed to provide protection for new products and improvements that, although not vastly different from existing technology, have significant commercial value. Applying for an innovation patent requires a lower inventive threshold than is required for a standard patent.

Prior to applying for either a standard or innovation patent, it is possible to make a provisional patent application to establish a priority date for an invention which gives you 12 months to file either:

- An Australian standard or innovation patent application
- An international patent application
- A patent application in one or more foreign countries

In order to be 'patentable' an invention generally must be novel, not obvious, of some use and involve an inventive step (or innovative step in the case of innovation patents) that has not been previously used.

You cannot patent artistic creations, mathematical models, plans, schemes or other purely mental processes; however, recently it has become possible to patent business methods and processes, provided the above criteria are satisfied.

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

If you demonstrate, sell, publish or discuss your invention in public before you file your application, you will lose the right to patent your invention. You can talk to employees, business partners or advisers on a confidential basis; however, it is advisable to have these persons enter into written confidentiality agreements with you first.

In all circumstances, it is advisable to consult a patent attorney before preparing the patent application. In Australia, patent attorneys are not qualified legal attorneys but rather specialists in the preparation and on-going prosecution of patent applications. All Meritas member firms in Australia have excellent contacts with patent attorneys.

Copyright

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

Copyright also subsists in:

- Unpublished original works where the author of the work is an Australian citizen or resident, or a citizen or resident of a member state of the Berne Convention
- Published original works where first publication of the work takes effect in Australia, or the author of the work is a citizen or resident of a member state of the Berne Convention at the time the work is first published

The Copyright Act 1968 governs copyright. This law is federal and operates Australia-wide. It does not rely on a system of registration but rather arises automatically on the creation of the original work. 'Fair dealing' in original works

for the purposes of research or study, criticism or review, parody or satire and reporting news is permitted by the Act.

The Copyright Act was amended in 2000 to provide for protection of electronic copyright material, and to allow digital copying of copyright material in certain circumstances. The amendments also reserved to the author of a copyright work certain moral rights, which remain with the author despite the assignment or licence of copyright in the work.

Copyright continues to subsist in most works for a period of 70 years from the date of the death of the author on first production depending on the material in question other than broadcasts where copyright continues for a period of 50 years from the year in which they were made.

Additionally, amendments to the Copyright Act came into force on 1 January 2005, resulting from Australia's obligations under the Free Trade Agreement with the U.S.

Circuit Layout Rights (CLR)

CLR automatically protect original layout designs for integrated circuits and computer chips.

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

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

- Copy the layout in a material form
- Make integrated circuits from the layout
- Exploit it commercially in Australia

The maximum possible protection period is 20 years. The attorney-general's department administers legislation relating to CLR.

Trade Marks

A trade mark (such as a word, symbol, name, brand, letter, colour, scent, shape, sound or aspect of packaging or a combination of any of them) used in relation to goods or services provided in Australia is registrable under the Trade Marks Act 1995.

In order to be registrable, a trade mark must generally be distinctive or capable of becoming distinctive, in that it is not descriptive of the goods or services the

trade mark is applied to and that it is dissimilar to any existing trade marks, whether they are registered or pending.

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

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

Australia is a signatory to the Madrid Protocol which came into effect in 2001. This provides for the international registration of trade marks, allowing a single application to be filed for protection in any or all signatory countries, based on an Australian trade mark application.

Designs

New and distinctive industrial designs applied to mass produced articles may be protected by registration under the Design Act 2003. Protection is granted for the appearance of the article and not how it works.

Registration is initially obtained by coupling with certain threshold formalities. This however does not provide the owner with enforceable rights. Registered designs for which a certificate of examination has been issued give the owner exclusive and legally enforceable rights in respect of the design initially for a period of five years. Registration can then be extended for an additional five-year period providing a total protection period of 10 years.

Under the Designs Act 2003 a person may register as a design the overall appearance of a product resulting from one or more visual features.

Once registered, a design owner obtains exclusive rights in relation to the design and can elect to have the registration examined and upon being certified, provides the design owner with enforceable rights against third parties.

Plant Breeder's Rights (PBR)

PBR are used to protect new varieties of plants by giving exclusive commercial rights to market a new variety or its reproductive material. Registered owners of PBR can direct the production, sale and distribution of the new variety,

receive royalties from the sale of plants or sell their PBR to a third party. PBR protection lasts for up to 25 years for trees or vines and 20 years for other species.

Plant varieties can only be protected if they are a new variety or have been recently exploited. A new variety is one which has not previously been sold with the breeders consent.

A recently exploited variety of plant is one which has been sold in Australia for a period no longer than 12 months before the lodgement of the application. These timeframes are extended for sales outside Australia as follows:

- Trees and vines up to six years
- Other varieties up to four years

The Department of Agriculture, Fisheries and Forestry administers PBR.

To be eligible for PBR protection in Australia, the applicant must:

- Show that the new variety is distinct, uniform and stable
- Be able to demonstrate, by a comparative trial, that its variety is clearly distinguishable from any other variety, the existence of which is a matter of common knowledge

Overseas breeders are required to appoint an Australian agent to represent their interest.

Trade or Business Names

Any individual or company conducting business under a name that is different from that person's personal or company name (referred to as a trade or business name) must register the trade or business name in each state or territory in which the person conducts business.

Registration does not provide the registrant with any proprietary interest in the trade or business name and is a statutory obligation under the Business Names Act of each state and territory as well as the Corporations Act.

Registration does not protect the trade or business name *per se* but does ensure that an identical name cannot be registered by another person.

TRADE PRACTICES AND CONSUMER PROTECTION

Australia has extensive trade practice laws dealing with, among other things, the promotion of competition and consumer protection. This section provides an introduction to this area of Australian law.

Competition Law

The Trade Practices Act provides the primary source (though not the only source) of competition regulation in Australia. It is supplemented in some respects by state legislation and, in addition, some industries are governed by industry-specific legislation.

The competition law provisions of the Trade Practices Act include regulatory control over, for example:

- Mergers and acquisitions
- Price fixing arrangements (e.g., price fixing agreements between competitors or the fixing by a supplier of the minimum price at which goods supplied by it can be re-sold)
- Misuse of market power by a corporation with a substantial degree of power in a market
- Customer, supplier and territorial arrangements (for example, arrangements which control the suppliers which a party to the arrangement can use and/or which allocate particular customers or exclusive territories to a party)
- Anti-competitive arrangements between competitors (e.g., bid rigging between tenderers in the course of a tender process) or between organisations in general
- Unconscionable conduct, which is expressly prohibited

Some of the regulated conduct is only prohibited if it has the purpose or the effect of substantially lessening competition in a market. However, there are other types of regulated conduct (e.g., most price fixing arrangements between competitors) that are prohibited outright irrespective of the effect on competition.

Policing compliance with the Trade Practices Act is the responsibility of the Australian Competition and Consumer Commission (ACCC). Its Web site is www.accc.gov.au. There are provisions in the Trade Practices Act allowing the

ACCC to, in effect, sanction (e.g., "authorise") in certain circumstances proposed conduct which would otherwise, or which might otherwise, breach the competition law provisions of the Act.

Consumer Protection

The Trade Practices Act and other Australian legislation provides various types of protection for Australian consumers including, for example:

- Control over the manner in which a total price is to be brought to the attention of a consumer where a component part of a price (e.g., a price exclusive of taxes, postage and handling) is referred to
- A prohibition on misleading or deceptive conduct in trade or commerce (e.g., a prohibition on misleading advertising)
- The implication of certain terms into contracts for the sale of goods or services to consumers (e.g., the implication of a term in consumer service contracts that the services will be provided with due care and skill)
- The regulation of the provision of credit finance to consumers
- The imposition of product liability on manufacturers and importers in favour of consumers
- Restrictions on the dissemination of certain private information relating to consumers and others

ENTRY TO AUSTRALIA

Before reading this information, please be aware the information provided is not intended to be legal advice or to be acted upon without further consultation. Because of the complex maze of legislation, regulations and policy that comprise Australia's immigration system, we strongly recommend that prospective applicants or sponsors seek specific legal advice before making any applications or representations to the Department of Immigration or any overseas post.

The Australian government gives permission for people who are not citizens of Australia to enter and remain in Australia by the issue of a visa. There are over 100 different types of visa and they are of four broad categories – visitors, temporary residence, permanent residence, and bridging. There are detailed rules governing entry in each visa category that are clearly laid down in the migration legislation.

Business Visit Visa Options

- Business (Short Stay) Visa
  This visa is created for business people intending to make a short business visit to Australia for up to three months. Business activities may include a conference, negotiation, or exploratory business visit.
- Electronic Travel Authority (ETA)
  This is an electronically stored authority for short-term visits to Australia of up to three months. It is available to passport holders from only a specific number of countries and regions. Applications must be made from outside Australia.
- Business Visitor (Long Validity) ETA
  This visa is created for business people who need to make regular short business visits to Australia for up to three months. This ETA may be granted for the life of the person's passport.
- APEC Business Travel Card
  The APEC Business Travel Card streamlines travel for business people from participating economies in the Asia Pacific Economic Cooperation (APEC) region. APEC Business Travel Card holders can stay for a period of up to three months.
- eVisitor
  This visa is created for business people or tourists from European countries intending to make a short business visit or holiday/recreational visit to Australia for up to three months. To be eligible for a eVisitor visa, you must apply from outside Australia and hold an eligible eVisitor passport.
- Sponsored Business Visitor (Short Stay) Visa
  This visa is created for business people who have an approved sponsor in Australia and may not be eligible to apply for an Electronic Travel Authority (ETA). It entitles the holders to travel and stay in Australia for short business visits up to three months.
- Temporary Business Long Stay – Standard Business Sponsorship
  This is the most commonly used program for employers to sponsor overseas workers to work in Australia on a temporary basis. Employers can be either Australian or overseas businesses and can nominate a number of positions for different occupations under the same sponsorship application. The occupation must be listed on a specific list of occupations considered "skilled" and relevant to this visa.

Visa holders can be employed in Australia for a period of between three months and four years. The overseas workers are not allowed to change the employer who originally sponsored them without obtaining a new visa from the Department of Immigration and Citizenship (DIAC)

In most cases the overseas employees will be entitled to bring their immediate family members to Australia who will be allowed to work and study and have no limit on the number of times they travel in and out of country.

Skilled Workers Permanent Visa Options

- Employer Nomination Scheme
  Australian employers may nominate skilled foreign nationals for a permanent residency visa. The nominated occupation must be included on the Employer Nomination Skilled Occupation List published by the Department of Immigration and Citizenship. The employer must commit to full-time employment for a minimum period of three years. This visa entitles its holders to live and work in Australia on a permanent basis.

  A variation on this visa exists for employers in regional Australia. Those employers enjoy relaxed requirements.

- Options for Skilled Workers
  There are a variety of visas, both permanent and temporary (provisional visas which offer a pathway to permanent residency) for those with skills recognised by the Australian government as being relevant to Australia. These skills are on the Skilled Occupations List. Applicants must meet a points test, as well as health, character and English ability requirements. The criteria vary depending on the type of visa applied for (i.e., independent, sponsored, regional, etc).

- Options for People Intending to Establish, Manage or Develop a New or Existing Business, or Invest in Australia
  These visas are known as “Business Skills visas” and most of them are temporary (provisional) visas that offer a pathway to permanent residency. They can be applied for with or without sponsorship by a state or territory of Australia, though those visas which are sponsored enjoy relaxed approval requirements.

- Business Owners
  This visa is created for people who have a successful business career, and have a genuine and realistic commitment to be involved as an owner in a new or existing business in Australia. Currently, minimum assets required to be transferred to Australia within two years from the day of the visa grant are as low as AUD250,000, depending on the visa applied for.
- Senior Executives
  For senior executive employees of a major overseas business who have minimum of AUD250,000 in net assets and a genuine and realistic commitment to participate in the management of a new or existing business in Australia.
- Investors
  For people who have a successful business or investment career. With state sponsorship, the minimum net assets (business and personal) of the applicant, the applicant's spouse, or the applicant and his or her spouse together, must be at least AUD1,125,000 and the minimum amount required to be invested in Australia is AUD750,000.

  Without state sponsorship, the relevant figures are AUD2,250,000 and AUD1,500,000, respectively.
- Investor Retirement Visa
  A temporary visa for people aged 55 years or older who are able to make a significant long-term financial investment in Australia. This visa is not a pathway to a permanent visa.

This information is current as of January 2009.

EXCHANGE CONTROL

There are no exchange controls in Australia. However, taking currency notes (in any currency) to the value of AUD10,000 or more is restricted. Furthermore, a person who has a tax debt may be prevented from sending money out of Australia until the tax debt is paid.

EMPLOYMENT AND INDUSTRIAL LAWS

Terms and Conditions of Employment

Employment relationships in Australia are regulated at a number of levels and by a range of statutory and quasi-statutory instruments. Which instruments apply primarily depends upon whether the employer is a "trading or financial corporation." A corporation that derives a significant proportion of its revenue from the sale of goods and/or services will fall within this definition.

Employment in trading and financial corporations is regulated by a combination of federal and state employment and industrial laws. Other employment is regulated almost entirely by state employment and industrial laws.

Levels of Regulation

Broadly, the levels of regulation are:

- The employment contract (its terms are often modified or overridden by other levels of regulation)
- Statutory minimum conditions derived from federal or state minimum conditions statutes
- Awards (i.e., arbitrated determinations) of industrial relations tribunals
- Federal statutory individual agreements (these are to be phased out by 1 January 2010 if the current government's election manifesto is reflected in subsequent statutory enactments)
- Statutory collective agreements (known as workplace agreements)

'Standard' Employment Conditions

The 'standard' set of statutory minimum conditions for full-time employees usually includes:

- A statutory minimum hourly rate of pay
- An average of 38 working hours per week (working beyond the 38-hour average is, to some extent, at an employee's discretion)
- Paid annual leave of four weeks
- Paid personal leave of up to two weeks per year (available for personal ill health and to care for members of an employee's household who are ill or injured)
- Unpaid parental leave of up to 12 months
- Paid long-service leave of eight and two-thirds weeks after 10 years of continuous service

The above summary reflects typical conditions, but there can be substantial variation depending on the terms of the contract and the nature of the work in which the employee is engaged.

Legislation

The majority of current federal employment legislation is contained in the Workplace Relations Act 1996 (Cth) (WR Act). As of February 2009, the government was attempting to repeal the WR Act and to replace it with a completely re-written statute to be called the Fair Work Act (FW Act). If the FW Act is enacted in the anticipated form, it will commence operating in part on 1 July 2009 and in full by 1 January 2010. Its main features will include:

- A revised set of minimum conditions to be called "National Employment Standards"
- A revised role for awards (as a supplementary set of minimum standards relevant to particular industries), and the 'modernisation' of those awards
- An enterprise-level bargaining regime with an overt bias for collective agreements with industrial organisations (i.e., unions), rather than collective agreements made directly with an employer's employees
- The creation of a new institution, to be called Fair Work Australia, to play a central role in facilitating and supervising industrial relations under the FW Act
- Enhanced rights for employees aimed at discouraging and remedying unfair dismissals
- Provisions enabling industrial organisations to readily access workplaces (including workplaces where the organisation has no members)

Some employment law matters will remain within the province of state laws. Each Australian state will have its own unique legislation covering the following areas:

- Occupational health and safety
- Workers' compensation (a form of statutory injury insurance)
- Discrimination
- Long-service leave

Non-corporate employers will also be subject to state minimum conditions and industrial relations laws.

Awards

An award is a binding order (usually arising from arbitration) made by an industrial tribunal setting the minimum employment terms and conditions of certain employees. Awards regulate a large percentage of the workforce in Australia.

An employment contract cannot exclude award provisions, but it can confer additional (non-award) benefits on an employee. Awards don't usually apply to management positions.

The Australian Industrial Relations Commission (to be replaced by Fair Work Australia) is currently modernising and consolidating its awards so that, by 1 January 2010, Australia's suite of federally-arbitrated settlements can operate pervasively within the relevant industry.

Collective Agreements

The WR Act provides for an employer and its employees to make collective agreements either directly, or indirectly by involving industrial organisations. It also permits employers to make greenfields agreements for new projects or enterprises as long as it does so prior to engaging any employees.

The FW Act will also provide for collective bargaining with employees and with industrial organisations. However, the proposed collective agreement-making regime will be different from the WR Act regime in at least the following respects:

- Employers can be compelled to bargain collectively even if they do not want to do so
- Any collective bargaining must be undertaken subject to 'good faith' obligations that will create significant strategic advantages to the industrial organisations participating in those negotiations
- In some circumstances, an industrial organisation will be able to seek arbitration of outstanding matters in incomplete negotiations

Superannuation (Pension Plans)

Employers are required to pay superannuation contributions on behalf of their employees, amounting to a prescribed proportion of each employee's earnings. The contribution rate is currently nine percent of the employee's earnings.

It is strongly recommended that you seek professional advice in the complex and ***constantly changing*** area of employment and industrial law.

TOP 10 QUESTIONS

Question 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.

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

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

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

Question 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.

Question 4: What laws influence the relationship between local agents or distributors and foreign companies?

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

Question 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 1993 as well as through the Securities Commission, 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.

Question 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 Rehabilitation Compensation Insurance Act 1992 (no fault insurance and compensation scheme for workplace injuries and illnesses).

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. If 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 carrying on business in New Zealand, the local employment law will almost certainly apply.

Question 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.

Question 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 30% and most (there are some exceptions) goods and services sold in New Zealand attract a goods and services tax of 12.5%. Generally, interest, dividend and royalty payments to a non-resident (company/individual) are subject to non-resident withholding tax (NRWT) at between 10%-30%. New Zealand has double taxation agreements with various countries which limits 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.

Question 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, Copyright Act 1994, Trade Marks Act 2002, Design Act 1953, Layout Designs Act 1994 and Fair Trading Act 1986 and functional and accessible government Web sites relating to each. Nationality of the parties plays little or no role in enforcement by local courts.

Question 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.

THE COUNTRY

New Zealand is an island nation in the South Pacific with a population of approximately four million people from a diverse range of ethnic backgrounds. A significant majority of the population lives in urban areas with almost one-third living in the greater Auckland region. The largest ethnic group is of European descent with English being the major language. English and Maori are New Zealand's official languages.

GOVERNMENT

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

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

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

COURT AND LEGAL SYSTEM

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

There is a hierarchy of courts, which includes:

- Disputes Tribunal (dealing with small claims)
- District Court
- High Court
- Court of Appeal
- Supreme Court (which has replaced the previous system of appeals to the UK Privy Council as the highest level of the judiciary)

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

MAJOR FORMS OF BUSINESS ORGANISATION

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

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

Company

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

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

Trusts

- Discretionary Trust
- Unit Trust

Company

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

- **Locally Incorporated Subsidiary of a Foreign Company**

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

  It is fully taxed in New Zealand on all its income and profits, whether that income arises from its business activities conducted in New Zealand or overseas. It must file an annual report and accounts, although some exemptions are available.

As a local subsidiary is nevertheless a separate legal entity with separate legal personality, the liability of the foreign company parent for its subsidiary's indebtedness is, in the absence of any guarantees given by the parent or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent.

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

There is no minimum capitalisation requirement for New Zealand incorporated companies under company laws. In addition there is no requirement that a New Zealand incorporated company has New Zealand resident directors or shareholders although it must have a physical registered office in New Zealand along with a New Zealand address for service.

A local subsidiary is required to file accounts under the Financial Reporting Act 1993 if it is a subsidiary of a company or body corporate incorporated outside New Zealand.

- **Branch Office of a Foreign Company**

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

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

  The branch office must file an annual report and accounts not only for the branch office but also for its foreign parent.

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

All overseas companies (including Australian overseas companies) are required to file financial statements under the Financial Reporting Act 1993, including branch offices of an overseas company.

Advantages

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

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

Joint Venture

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

The two main forms of joint venture are:

- **Unincorporated Joint Venture**

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

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

- **Incorporated Joint Venture**

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

  There are many different ways to structure a joint venture, which may require specific treatment depending on the type of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management

and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture.

Partnership

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

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

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

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

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

Trusts

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

- **Discretionary Trust**

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

- **Unit Trust**

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

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

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

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

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 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 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 OIO.

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 having an area of five or more hectares.

Any proposed purchase by an overseas person of the following types of land will require OIO consent:

- Land over two hectares (4.94 acres) on certain named islands
- Land over two hectares (4.94 acres) on or adjoining the foreshore
- Land over 0.4 of a hectare (0.99 of an acre) adjoining a road that adjoins the foreshore or a lake over 0.4 hectares (0.99 of an acre)
- Land over 0.4 of a hectare (0.99 of an acre) that includes or adjoins:
    - Reserve or public park over 0.4 of a hectare (0.99 of an acre)
    - Any lake over 0.4 of a hectare (0.99 of an acre)
    - Reserve or public park over 0.4 of a hectare (0.99 of an acre)
    - Certain heritage or historic areas over 0.4 of a hectare (0.99 of an acre)
- Land over five hectares (12.36 acres) that is not urban land

If the above applies to your proposed purchase, you need to get OIO approval and seek advice before signing the sale and purchase agreement.

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 percent 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.

A person is ordinarily resident if they are either:

- An Australian citizen who is domiciled in New Zealand or has lived in New Zealand for at least 12 months
- A person who holds a New Zealand residence permit and is domiciled in New Zealand or has lived in New Zealand for at least 12 months

What does acquiring an interest mean?

Acquiring an interest means coming into ownership or possession of an interest in 25 percent 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 purchase 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.

Farmland

If the land being purchased is used principally for farming (other than forestry) then the land must be advertised for sale on the open market in New Zealand for at least a month before OIO approval will be given.

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 metres 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 NZD100,000.

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.

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 Securities Act, 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 Economic Development which is responsible for administering the Companies Act and maintaining the register of companies (as well as various other registries)
- The Securities Commission which is responsible for administering the Securities Act
- The Takeovers Panel which is responsible for administering the Takeovers Act and Takeovers Code
- NZX 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, usually 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 NZD500 - NZD1,000.

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

Types of Companies

- Public Company

  A public 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) wish to raise funds from the public and who may wish 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. Companies may have a company secretary although there is no legal requirement for one.

Directors of companies carrying on 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 Securities Markets 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 Securities 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 wish to list but 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 and NZD20 million or more in assets, 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 **Taxation** section) must be carefully considered.

TAXATION

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

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

New Zealand Inland Revenue

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

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

Income Tax

New Zealand imposes taxation on the worldwide income of individuals, companies and other entities that are resident in New Zealand and on the New Zealand sourced income of non-residents. Profits arising from business in or with New Zealand may be taxable even where the entity in question does not have an established place of business in New Zealand.

Income tax is governed by the Income Tax Act.

Calculation of Taxable Income

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

Deductions

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

Losses

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

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

Tax year

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

Tax Rates

Residents

The general rates of tax applicable to resident individual taxpayers as of February 2009 are (subject to amendment):

Taxable Income Threshold (NZD)	**Marginal Rate** (% on excess up to next taxable income threshold)
Up to 14,000	12.5
14,001 – 40,000	21
40,001 – 70,000	33
70,001 up	39

The above rates are legislated to change on 1 April 2010 to:

Taxable Income Threshold (NZD)	**Marginal Rate** (% on excess up to next taxable income threshold)
0 – 17,500	12.5
17,501 – 40,000	21
40,001 – 75,000	33
75,001 up	39

These rates are however expected to reduce further following the change of government in late 2008.

Companies

The general rate of tax applicable to companies for the 2008-09 tax year is 30 percent (subject to amendment), payable on all taxable income.

Double Taxation Agreements

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

Payment of Tax

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

Income received in the form of salary or wages is collected by employers under a pay-as-you-earn (or PAYE) system and paid to the IRD on a regular basis.

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

Capital Gains Tax

New Zealand does not have capital gains tax. However, care needs to be taken in accruing profit on the resale of an asset if that asset was originally acquired with resale in mind—in such cases income tax may be payable.

Taxation of Payments to Non-Residents

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

Interest

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

Thin Capitalisation

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

Dividends

Profits of New Zealand resident companies are taxed under an 'imputation system.' The effect of the system is that tax paid by the company (at 30 percent) is imputed (or allocated) to shareholders by way of imputation credits attaching to the dividends paid out of after-tax profits.

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

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

Royalties

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

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

Transfer Pricing

Arms-length prices should be used in transactions between New Zealand businesses and related non-residents.

Other Taxes

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

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

  GST is a tax of 12.5 percent on all goods and services and other items sold or consumed in New Zealand. Entities must register for a GST number when annual turnover has exceeded NZD40,000 (to rise to NZD60,000 on 1 April 2009) in any 12 month period. Depending on turnover, you can elect to file returns every six months, 12 months or monthly. Registered suppliers are generally entitled to claim a credit for GST paid on their purchases.

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

- **Fringe Benefits Tax** (FBT)

  FBT is payable by employers on the value of certain 'fringe' benefits provided to employees in connection with their employment. Currently the rate of FBT is 48.5 percent and is calculated on the tax-inclusive value of the fringe benefits provided in the tax year. Such benefits are widely defined to include a range of privileges, services and facilities including motor vehicles, low interest loans, and accommodation.

- **Customs Duty**

  Customs Duty is levied on a range of imported goods determined in accordance with the New Zealand Tariff. However, in comparison to

many other countries relatively few goods are subject to tariff protection and generally speaking the rates of duty are fairly low.

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

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

INTELLECTUAL PROPERTY

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

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

Patents

The law relating to patents is governed by the Patents Act 1953.

If a person wishes to obtain the exclusive and enforceable right to make, use or sell their invention in New Zealand, they may apply under the Act for ‘letters patent’ that grant such rights for a stipulated period.

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

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

You cannot patent artistic creations, mathematical models, plans, schemes or other purely mental processes; however, recently it has become possible to patent business methods and processes, provided that the above criteria are satisfied.

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

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

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

Copyright

The Copyright Act 1994 governs copyright.

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

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

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

Trade Marks

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

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

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

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

New Zealand is a signatory to the Madrid Protocol which provides for the international registration of trade marks, allowing a single application to be filed for protection in any or all signatory countries, based on an New Zealand trade mark application. However, the legislation necessary to implement the Madrid Protocol has yet to be passed and become law.

Designs

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

Registered designs for which a certificate of registration has been issued gives the owner exclusive and legally enforceable rights in respect of the design initially for a period of five years. Registration can then be extended for an additional five-year period providing a total protection period of 10 years.

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

Plant Variety Rights

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

Layout Design Rights

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

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

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

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

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

Trade or Business Names

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

Other Intellectual Property Rights

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

TRADE PRACTICES AND CONSUMER PROTECTION

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

Trade Practices

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

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

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

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

Consumer Protection

New Zealand consumers are protected by a wide variety of statutes (including Fair Trading Act 1986, Consumer Guarantees Act 1993, and Credit Contracts and Consumer Finance Act 2003), which, among other things:

- Prohibit misleading or deceptive conduct
- Impose certain conditions and warranties into contracts for the sale of goods and services to consumers
- Regulate the provision of credit finance to consumers
- Impose product liability on manufacturers and importers in favour of consumers
- Prohibit certain restrictive trade relationships
- Supervise the setting and maintenance of prices for a broad range of consumer goods and services
- Restrict the dissemination of certain private information relating to consumers and others

Agreements with Competitors and Trade Restrictions

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

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

ENTRY TO NEW ZEALAND

You do not need a visa or permit to visit New Zealand if you are an Australian citizen, British citizen, or a citizen of a country which has a visa waiver agreement with New Zealand (entitles up to a three-month visit). New Zealand has visa waiver agreements with 55 countries.

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

Skilled Migrant - Visas available

- Residency
- Work to Residency
- Temporary Work Visa / Permit

Allows visitors to migrate to New Zealand permanently via one of the above pathways. In order to apply you:

- Must be 55 or under when applying
- Must have recognised trade or tertiary qualifications relevant to the job you are seeking in New Zealand. In the absence of qualifications, three to five years relevant experience may be taken into account.
- Must obtain professional registration in New Zealand prior to application, if applicable
- Must obtain applicable bona-fide job offer

Long Term Business Visa (LTBV)

LTBV is generally open to business owners, managers or directors with a successful history of business ownership. To apply under this category applicants must:

- Have a satisfactory business plan
- Have sufficient funds for maintenance and accommodation
- Meet health and character requirements
- Have obtained professional or occupational registration in New Zealand, if registration was required for operating the proposed business
- Principal applicant must satisfy the English language standard
- Have had relevant business experience

- Demonstrate a genuine commitment to undertake the planned business

Investor (Active Investor Migrant Category)

Allows permanent migration. There are three sub-categories under this heading:

- Global – need to invest NZD20 million with at least NZD5 million in active investment
- Professional – need to invest NZD10 million with at least NZD2 million in active investment
- Active – need to invest a minimum of NZD2.5 million and is points tested. You do not need to own and operate a business in New Zealand under this category.

Under each category visitors must satisfy other criteria, e.g., English language and age.

Other Categories - Temporary Visas

Allows you to live in New Zealand temporarily.

- Student Visa – allows you to study and work up to 20 hours per week
- Working Holiday – available to people 18 to 30 years of age. Allows you to work and travel for up to one year (two years for UK citizens). Work must be on a casual basis.
- Visitor – temporary entry to New Zealand for holiday only

EXCHANGE CONTROL

Currency movements in and out of New Zealand are subject to certain controls.

A cash transaction involving the transfer of currency (whether New Zealand or foreign that is in the form of notes or coins) of more than NZD10,000 must be reported to New Zealand Customs. This reporting requirement applies to cash transactions made within New Zealand as well.

In addition, a person taking more than NZD10,000 in currency into or out of New Zealand must report the transfer to a customs officer.

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

EMPLOYMENT LAWS

Terms and Conditions of Employment

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

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

Legislation

The main pieces of legislation are the Employment Relations Act 2000 (which governs the relationship between employer and employees in a contractual relationship), the Holidays Act 2003 (governing annual leave, sick leave and bereavement leave), the Parental Leave and Employment Protection Act 1987 (governing parental leave), and Health and Safety in Employment Act 1992 (governing workplace health and safety).

Collective Agreements

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

Individual Employment Agreements

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

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

It is strongly recommended that you seek professional advice in this complex area.

Kiwisaver

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

- Check whether new employees are eligible to join
- Check whether new employees should be automatically enrolled
- Provide a Kiwisaver employee information pack
- Automatically enroll all new employees who are eligible
- Deduct contributions at the correct rate and forward to IRD

From 1 April 2008 employers are required to contribute 1 percent of their employees' gross salary or wage, rising to 4 percent by 2011. Employers' contributions increase by 1 percent on 1 April 2009, 2010 and 2011.

Employers are eligible for an employer tax credit to offset the cost of their contributions. This credit consists of up to NZD20 per week per employee.

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