

MAJOR FORMS OF BUSINESS ORGANISATION



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GUIDE TO DOING BUSINESS IN NEW ZEALAND





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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
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Guide to Doing Business in Australia and New Zealand

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

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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 practical and useful insights into the 10 most common questions facing foreign investors and businesses:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?
3. How does the government regulate commercial joint ventures between foreign investors and local firms?
4. What laws influence the relationship between local agents or distributors and foreign companies?
5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g., energy and telecommunications)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?
10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

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

*Matthew Hall, Partner
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TOP 10 QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

The only specifically regulated national resource which places additional regulation on foreign investment is the fishing industry. Under these rules an overseas person is prohibited from having an interest in fishing quota or having interests in a business (where the overseas person owns a 25% or more interest) that owns or controls interests in fishing quota.

6. HOW DO LABOUR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

The *Employment Relations Act 2000* is the major statute governing the treatment of employees in New Zealand. Various other Acts must also be considered in dealings with employees such as *Holidays Act 2003* (which regulates annual leave and public holidays), *KiwiSaver Act 2008* (a quasi-superannuation scheme), *Privacy Act 1993* (in relation to personal information) and the *Accident Compensation Act 2001* (a no-fault insurance and compensation scheme for workplace injuries).

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

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

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

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

The New Zealand taxation system is administered by the Inland Revenue Department. The general tax rate applicable for companies is 28% and most (there are some exceptions) goods and services sold in New Zealand attract a goods and services tax of 15%. Generally, interest, dividend and royalty payments to a nonresident (company/individual) are subject to nonresident withholding tax (NRWT) at between 5%-30%. New Zealand has double taxation agreements with various countries which limit the amount of NRWT that must be paid. There is no capital gains tax or stamp duty in New Zealand. There are very few import taxes or duties although there are some dumping and countervailing duties imposed. Depending upon the choices made by New Zealand employees of foreign businesses in New Zealand, the employer may be required to make compulsory KiwiSaver payments.

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS? DO LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY REGARDLESS OF THE NATIONALITY OF THE PARTIES?

New Zealand has a comprehensive set of intellectual property statutes and regulations including the *Patents Act 1953* (to be replaced effective 13 September 2014 with the *Patents Act 2013*), *Copyright Act 1994*, *Trade Marks Act 2002*, *Design Act 1953*, *Layout Designs Act 1994* and *Fair Trading Act 1986*. There are functional and accessible government websites relating to each of these Acts. Nationality of the parties plays little or no role in enforcement by local courts.

10. IF A COMMERCIAL DISPUTE ARISES, WILL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

Access to local courts or arbitration hearings are the same for local and foreign investors. There is no preferential treatment for or among investors in New Zealand. Whether formal court procedure or alternative dispute resolution methods would be appropriate will depend very much upon the nature of the dispute and any governing documentation.

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 (Overseas Company)

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

- Ordinary Partnership
- Limited Partnership

Trusts

- Discretionary Trust
- Unit Trust

COMPANY

A foreign company seeking 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 law. In addition there is currently no requirement that a New Zealand incorporated company has New Zealand resident directors or shareholders. However, at the time of writing there is a bill before Parliament which will require a New Zealand incorporated company either to have at least one New Zealand resident director or to appoint a New Zealand resident agent. The resident agent is not a *de facto* manager but will be responsible for ensuring companies provide accurate information to the Registrar of Companies. A resident agent will be liable if companies breach their record-keeping and filing requirements under the *Companies Act 1993*.

The New Zealand incorporated company 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. However, as of 1 April 2014, the provisions of the *Financial Reporting Act 2013* will apply and a local subsidiary will only be required to file audited accounts if, in each of the two preceding accounting periods the total assets of the local subsidiary and its subsidiaries exceed NZD60 million or the total revenue exceeds NZD30 million.

- **Branch Office of a Foreign Company (Overseas 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 as an overseas company and must comply with all relevant New Zealand laws.

The overseas company 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 overseas company's country of incorporation may reduce the tax otherwise payable in New Zealand.

Under the *Financial Reporting Act 1993*, the overseas company must file an annual report and audited accounts not only for the activities of its branch office but also for its overseas operations. However, as of 1 April 2014, the provisions of the *Financial Reporting Act 2013* will apply and an overseas company will only be required to file audited accounts if, in each of the two preceding accounting periods the total assets of the overseas company and its subsidiaries exceed NZD20 million or the total revenue exceeds NZD10 million.

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.

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. New Zealand 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 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 1908* 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 are separate legal entities which are registered under the *Limited Partnership Act 2008*. A limited partnership consists of general partners, who like partners in ordinary partnerships, have unlimited personal liability for the debts and obligations of the limited partnership and limited partners who, provided certain requirements are met, enjoy limited liability for the debts and obligations of the limited partnership. General partners transact the business of the limited partnership while limited partners are passive investors and are liable only to the extent of their capital contribution in the limited 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. Foreign companies and investors sometimes use trusts in New Zealand. 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 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 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.

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