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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
IN AUSTRALIA AND NEW ZEALAND



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Guide to Doing Business in Australia and New Zealand

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

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

The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

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

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

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

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

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

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


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

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

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

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

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



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

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

TOP 10 QUESTIONS

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.

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

It is important to note that from 1 May 2015, New Zealand incorporated companies must have either a New Zealand resident director or a director who is both resident in Australia and a director of a company incorporated in Australia. Existing companies have until 28 October 2015 to comply with this requirement.

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), the *Parental Leave and Employment Protection Act 1987* (which regulates parental leave), the *Health and Safety in Employment Act 1992* (governing workplace health and safety), *KiwiSaver Act 2008* (a quasi-superannuation scheme), the *Accident Compensation Act 2001* (a no-fault insurance and compensation scheme for workplace injuries) and the *Privacy Act 1993* (in relation to personal information).

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

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 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.

THE COUNTRY

New Zealand is an island nation in the South Pacific with a population of approximately four million five hundred thousand 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, Maori and sign language 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 year 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 governing 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 bylaws 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 bylaws of each local and territorial authority of the region where they are located.

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 New Zealand resident individuals, companies and other entities. Nonresidents are generally taxed on the New Zealand sourced income (although this may be reduced by double taxation agreements). 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.

Individuals are treated as tax residents if they:

- Have a permanent place of abode in New Zealand (even if they have a permanent place of abode overseas); or
- Are physically present in New Zealand for more than 183 days in any 12 month period.

The *Income Tax Act 2007* governs income tax.

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 nonresidents 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 nonresident 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 nonresident 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 are:

Taxable Income Threshold (NZD)	Marginal Rate (% on excess up to next taxable income threshold)
Up to 14,000	10.5
14,001 – 48,000	17.5
48,001 – 70,000	30
70,001 up	33
No notification	45

(subject to amendment)

Companies

The general rate of tax applicable to companies is 28% (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 nonresident 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 advance instalments based on a person/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 Nonresidents

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

Interest

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

THIN CAPITALISATION

New Zealand businesses controlled by nonresidents 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 28%) 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 nonresident shareholders. Rather, imputed dividends paid to nonresidents 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%. If a Double Taxation Agreement applies, the rate is normally reduced to 15% or less.

ROYALTIES

Royalties paid to a nonresident who does not have a permanent establishment in New Zealand are subject to a flat rate withholding tax of 30%. In most cases where a Double Taxation Agreement applies, that rate is limited to 5%, 10% or 15% 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

There is a comprehensive transfer pricing regime in place to prevent New Zealand entities from reducing income by inflating deductions through non-arms-length transactions with nonresident associates.

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 15% 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 NZD60,000 in any 12 month period. Depending on turnover, you can elect to file returns every six months, two 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. Employers must elect which option they will use for calculating FBT, which is 49.25% (subject to adjustment) using the single rate option, 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 private use or enjoyment of motor vehicles, low interest loans, subsidised or discounted goods 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.

- **ACC Levies**

Accident compensation (ACC) levies are payable by New Zealand employers and self employed to fund New Zealand's accident compensation system (no-fault accident compensation regime). The rate of the ACC levy depends upon the nature of the business undertaken.

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

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

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