

INTELLECTUAL PROPERTY



MERITAS[®]
LAW FIRMS WORLDWIDE

GUIDE TO DOING BUSINESS IN NEW ZEALAND





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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
IN AUSTRALIA AND NEW ZEALAND



Published by Meritas, Inc. • 800 Hennepin Avenue, Suite 600
Minneapolis, Minnesota 55403 USA
+1.612.339.8680 | +1.612.337.5783 FAX | WWW.MERITAS.ORG
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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
Swaab Attorneys
Sydney, New South Wales*

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.

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 currently governed by the *Patents Act 1953* although new legislation in the form of the *Patents Act 2013* has been passed and will come into force on 13 September 2014. This is intended to bring New Zealand into line with its major trading partners.

Persons seeking to obtain the exclusive and enforceable right to make, use or sell their invention in New Zealand 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.

Artistic creations, mathematical models, plans, schemes or other purely mental processes cannot be patented; 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 ongoing 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 has long been 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 a New Zealand trade mark application. However, legislation implementing the Madrid Protocol was passed and became effective 10 December 2012.

DESIGNS

New and distinctive industrial designs used in mass-produced articles may be protected by registration under the *Designs 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*.

MERITAS FIRM CONTACTS

AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

Deakin

Snedden Hall & Gallop Lawyers

43-49 Geils Court
Locked Bag 3003
Deakin ACT 2600

Dennis Martin
lawyers@sneddenhall.com.au
Tel: +61 (2) 6285 8000
www.sneddenhall.com.au

NEW SOUTH WALES

Sydney

Swaab Attorneys

Level 1, 20 Hunter Street
Sydney NSW 2000

Fred Swaab
fxs@swaab.com.au
Matthew Hall
mdh@swaab.com.au
Tel: +61 (2) 9233 5544
www.swaab.com.au

VICTORIA

Melbourne

Madgwicks

Level 33, 140 William Street
Melbourne VIC 3000

Peter Kennedy
peter.kennedy@madgwicks.com.au
Tel: +61 (3) 9242 4744
www.madgwicks.com.au

QUEENSLAND

Brisbane / Cairns / Townsville

MacDonnells Law

Cnr Shields & Grafton Streets
PO Box 5046
Cairns QLD 4870

Russell Beer
rbeer@macdonnells.com.au
Tel: +61 (7) 4030 0600
www.macdonnells.com.au

NEW ZEALAND

Martelli McKegg

Level 20, PWC Tower
188 Quay Street
Auckland 1141

Mike Worsnop
mcw@martellimckegg.co.nz
Philip Wells
psw@martellimckegg.co.nz
Tel: +64 (9) 379 7333
www.martellimckegg.co.nz



800 Hennepin Avenue, Suite 600
Minneapolis, Minnesota 55403 USA
+1.612.339.8680 www.meritas.org

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