

# Doing Business In New Zealand

## Hesketh Henry – Supporting Your Investment in New Zealand

New Zealand has an excellent international reputation for investment opportunities. If you are looking to invest in New Zealand for the first time, finding a trusted legal adviser is your first step. The regulatory and taxation regimes can appear complex and good advice is essential if you are to successfully navigate your way to success.

As one of the leading and longest established commercial law firms in New Zealand, Hesketh Henry has developed an excellent reputation for advising international clients. Many of our lawyers are multi-lingual. Over the years, we have fostered a network of international contacts, including international corporations, advisers and offshore law firms.

We are focused on developing great long-term relationships with clients. The first step is to understand your needs and your investment objectives and strategies.

You need to feel confident that your choice of law firm is the right one. That your concerns are understood and acted upon. That you are dealing with someone who is easy to work with and is interested in building a great, long-term relationship. That you have an expert on your side who knows the law but speaks plainly.

At Hesketh Henry, our aims are to build a lasting and trusted relationship with you, understand your business and your objectives, and support you in a way that achieves success.

This document contains an overview of New Zealand's investment environment from a legal perspective. This is intended as a guide only and we encourage you to seek our advice before proceeding.

I invite you to talk to us about any aspect of investment in New Zealand, or any other legal matter. Please give me a call on +64 9 375 8709.

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# Legal Aspects of Doing Business and Investing In New Zealand

## 1. General

- 1.1 New Zealand is a unique country. Its geographic and economic situation, together with its legal and financial system, make it stand out in the South Pacific. New Zealand's economy is market-focused. New Zealand encourages foreign investment not only through its laws but indirectly through government policy and its foreign exchange and financial markets. This is evidenced by the significant level of foreign investment in New Zealand's stock exchange and in property.
- 1.2 New Zealand lies in the south-west Pacific Ocean and consists of two large islands and a number of smaller islands, with a combined area of 268,000 square kilometres, similar to the size of the British Isles or Japan. The current population is approximately 4.5 million.
- 1.3 New Zealand is a parliamentary democracy with a centralised one-chamber Parliament situated in the capital city, Wellington. General elections are held every three years. Since 1996, the country has been subject to a mixed member proportional representation electoral system. The maximum number of parliamentary seats stands at 120, with a provision for "*overhang*" seats. This system is similar to that which currently operates in Germany.
- 1.4 All legislation relating to the conduct of business and the operation of companies in New Zealand is enacted by New Zealand's Parliament and administered by government agencies.
- 1.5 New Zealand's legal system is based on the common law similar to that operating in England and many other western countries. Most criminal and smaller civil matters are dealt with by the District Court. The High Court largely attends to civil matters and more serious crimes. There are two appeal courts, the Court of Appeal and, in certain circumstances, the Supreme Court.

## 2. Establishment of enterprises

2.1 Overseas companies or corporations can establish their presence in New Zealand by:

- registering a branch of the overseas company in New Zealand;
- incorporating a local subsidiary in New Zealand; or
- acquiring a New Zealand registered company, which then becomes a subsidiary of the overseas company.

### Registering an overseas company in New Zealand

2.2 An overseas company which seeks registration of a branch in New Zealand must first reserve its name with the Registrar of Companies. It must then file an application for registration within ten working days of starting to carry on business in New Zealand, stating the name of the overseas company, its country of incorporation, the full names and residential addresses of the directors of the overseas company, the address of the place of business in New Zealand of the overseas company, the full name and physical address of at least one person resident or incorporated in New Zealand who is authorised to accept service of documents in New Zealand on behalf of the overseas company and provide evidence of incorporation of the overseas company. The application for registration must be accompanied by a copy of any constitutional documents of the overseas company.

### Incorporating a subsidiary

2.3 A subsidiary company incorporated in New Zealand must have at least one shareholder and one director. The subsidiary must have an address for service and a registered office at physical addresses in New Zealand. Recent changes to the New Zealand Companies Act 1993 now require companies incorporated in New Zealand to have at least one director resident in either New Zealand or in an *enforcement country*. Directors who are resident in an *enforcement country* must also be a director of a registered company (excluding a branch of an overseas company) in that country. *Enforcement countries* will be determined by regulations. Currently, the only listed *enforcement country* is Australia.

2.4 The changes came into effect on 1 May 2015, with all existing companies having an additional 180 days to comply with the new requirements. The changes form part of a raft of amendments to the New Zealand Companies Act which are aimed at maintaining New Zealand's reputation as a trusted place to do business.

2.5 The changes also require a subsidiary to disclose certain details of its ultimate holding company.

2.6 New Zealand companies do not have a par or nominal value attached to their shares. There is no minimum requirement as to the value of a company's share capital. Company directors are required under the Companies Act 1993 to determine the issue price for new shares and that the price is, in their opinion, fair and reasonable to both the company and its shareholders.

2.7 As with a branch, an application must commence with a name reservation request. Once name approval has been obtained, the following incorporation documents must be filed:

- a consent to act as a director for each director;
- a consent to being a shareholder for each shareholder;

- a copy of the constitution of the company if it is proposed to have one (the default provisions of the Companies Act 1993 will otherwise prevail in the absence of a constitution);
- details of the address for service of documents and the registered office (both of which must be physical addresses situated in New Zealand) and details of the postal address to which communications from the Registrar of Companies may be sent;
- details of the names and addresses of shareholders and directors; details of the date and place of birth of each director ;
- if a director lives in an *enforcement country* details of the company that the director is also a director of in the *enforcement country*;
- the proposed company's ultimate parent company information. This information includes the name, registration number, country of registration and any other prescribed information; and
- any additional documents requested by the New Zealand Companies Office, including verification of directors' and shareholders' identification and addresses.

## Registration of an overseas company in New Zealand or incorporation/acquisition of subsidiary

2.8 The decision whether to establish a branch of an overseas company by registering the overseas company in New Zealand or to incorporate or acquire a New Zealand subsidiary company will depend on matters such as legal structure, taxation consequences (both in New Zealand and overseas) and other commercial considerations. The following should also be considered:

- Financial reporting requirements (as further detailed below);
- there is more administrative work involved for a subsidiary as opposed to a branch because of the necessity to keep records and statutory registers in New Zealand. Compliance is also required with New Zealand's company laws as contained in the Companies Act 1993;
- significantly, a limited liability subsidiary will have limited liability in respect of its New Zealand operations. A branch does not because it does not have a separate legal identity from the overseas company.

We recommend that advice should be sought on which entity best suits your circumstances.

## Financial Reporting

2.9 Financial reporting requirements in New Zealand have recently undergone significant change. The Financial Reporting Act 2013, which applies to accounting periods commencing on or after 1 April 2014, contains financial reporting requirements that result in decreased and simplified financial reporting obligations for small to medium-sized companies. Companies are no longer required to prepare full, general-purpose financial statements unless they fall within certain categories. These categories include:

- *large* companies;
- public companies;
- *large overseas* companies that carry on business in New Zealand;

- companies with more than 10 shareholders, unless the company has opted out of compliance;
- companies with fewer than 10 shareholders if the company has opted into compliance;

2.10 The requirements relating to which companies must file financial statements with the New Zealand Companies Office have also changed. A *large overseas company* will generally still need to file statements with the Companies Office.

## Consents

2.11 Unless New Zealand's overseas investment thresholds are triggered (as detailed in section 3 below), generally the only government consent that is required is consent from the Registrar of Companies for the use of the company name (both in the case of a subsidiary and a branch). Name approval will generally be readily available unless there is already an identical, or almost identical, name on the register.

2.12 While there are very few restrictions imposed on foreign companies as to the type of business operations permitted in New Zealand, foreign investment is controlled in New Zealand by the Overseas Investment Act 2005 (OI Act) and the Overseas Investment Regulations 2005 made pursuant to the OI Act (OI Regulations). In essence, they regulate investment in New Zealand by overseas persons. The OI Act replaced the Overseas Investment Act 1973 and came into force on 25 August 2005.

2.13 The definition of an "*overseas person*" is set out in full in section 7 of the OI Act, but examples include any:

- individual not a New Zealand citizen and not ordinarily resident in New Zealand;
- body corporate incorporated outside New Zealand or any New Zealand subsidiary owned 25 per cent or more by any such body corporate;
- body corporate of which 25 per cent or more of any class of shares is held by an overseas person;
- body corporate of which the power to control the composition of 25 per cent or more of the governing body of the body corporate is held by an overseas person; and
- body corporate of which the right to exercise or control the exercise of 25 per cent or more of the voting power at any meeting of the body corporate is held or owned 25 per cent or more by an overseas person.

2.14 Some business transactions, such as investment in fishing quota or the purchase of certain sensitive real estate, will always require consent. Otherwise, consent is only required by an overseas person if a threshold of NZ\$100 million is exceeded (or \$498 million in the case of an Australian non-Government investor). A more detailed discussion is set out in section 3 below.

## 3. Acquisition of enterprises

### The OI Act and OI Regulations

3.1 Under the OI Regulations, the consent of the New Zealand Overseas Investment Office (OIO) is required in the case of certain investments by overseas persons. Non-land investments requiring consent include:

- establishing a new business for a period exceeding 90 days in any year (either alone or in partnership with another person) where the total expenditure expected to be incurred in setting up the business exceeds NZ\$100 million;
- acquiring 25 per cent or more ownership or control of the securities of a New Zealand company where the value of the securities, the consideration for the transfer, or the value of the assets of the New Zealand target company or the target company and its 25 per cent or more subsidiaries, exceeds NZ\$100 million;
- increasing the proportion of ownership or control of the securities of such a company where the overseas person already has 25 per cent or more ownership or control); and
- acquiring property (including goodwill and other intangible assets) used in carrying on a business in New Zealand where the consideration provided for the acquisition exceeds NZ\$100 million.

Where an overseas person acquires shares in a company which owns land, and that acquisition requires consent under the OI Regulations, the issues raised in Section 4 (Acquisition of real estate), below, will also be relevant.

3.2 The NZ\$100 million consent threshold for non-land acquisitions does not apply to certain Australian investors. On 1 January 2016, the threshold increased to \$498 million for 'Australian non-Government investors' (being an Australian individual or an Australian entity that either carries on substantive business operations in Australia or in relation to one or more specified investors (one or more Australian or New Zealand individuals) has more than 75% ownership or control interest and is not an Australian or foreign Government investor). The amount is adjusted annually for inflation. The threshold for 'Australian Government investors' was increased to \$104 million (being the Australian Government or an entity or branch located in Australia and which is 25 per cent or more owned or controlled by the Australian Government) but is also adjusted annually for inflation. These thresholds will increase to \$501 million and \$105 million respectively from 1 January 2017.

3.3 Where consent is required for an investment, it may only be given if certain criteria are satisfied by the applicant. These include that the overseas person or, if that person is not an individual, the individuals with control of the relevant overseas person must:

- have business experience and acumen relevant to the investment;
- have demonstrated financial commitment to the investment;
- be of good character; and
- not be an individual of the kind referred to in sections 15 or 16 of the Immigration Act 2009 (which lists persons not eligible for exemptions or permits under that Act, usually because of criminal or terrorist records).



- 3.4 The 25 per cent threshold as it relates to an overseas person is not intended by the New Zealand government to represent a limitation on preferred levels of foreign investment. It is merely a point at which official involvement will be triggered.
- 3.5 While 100 per cent ownership by an overseas person can be approved in all industry sectors, some New Zealand based companies have restrictions relating to foreign ownership, notably in the area of New Zealand's fishing quota.
- 3.6 The Minister of Finance is responsible for policy relating to controls over foreign investments in New Zealand, although this is shared with the Minister for Land Information in respect of certain land applications and the Minister of Fisheries in respect of certain applications relating to the acquisition of New Zealand's fishing quota.
- 3.7 The OI Regulations also provide for procedures in relation to applications, fees, reporting and monetary requirements in respect of approved applications.

## 4. Acquisition of real estate

### Consent to purchase

- 4.1 The OIO is also responsible for regulating the purchase of certain types of land in New Zealand. The particular types of land and interests in land for which the consent of the OIO is required are set out in the OI Act. Examples include:
- over five hectares of non-urban land;
  - land on most off-shore islands;
  - over 0.4 hectares of land that includes or adjoins sensitive land, for example, certain islands, reserves, historic or heritage areas or lakes; and
  - over 0.2 hectares of land that includes or adjoins the foreshore.
- 4.2 The purchase of commercial or industrial land in New Zealand is, subject to not being or adjoining sensitive land, generally not subject to many restrictions.
- 4.3 In relation to land (as detailed in paragraph 4.1 above) it is important to note that:
- the OI Regulations cover both rural and urban land;
  - the purpose for which the land is acquired is not relevant; and
  - where an overseas person (or a person associated with an overseas person) purchases land adjoining land that is already owned by the overseas person, a separate consent is required.
- 4.4 In addition to the criteria to be met by the applicant in respect of the purchase of a business (being relevant business experience and acumen, financial commitment, good character and not being an individual to which sections 15 or 16 of the Immigration Act 2009 refers), it is also necessary that:
- the overseas person, or if that person is not an individual, the individuals with control of the relevant overseas person, ordinarily reside in New Zealand or intend to reside in New Zealand indefinitely; or
  - the proposed land investment (the subject of any application) will, or is likely to, benefit New Zealand and, if the land is non-urban, such benefit will be, or is likely to be, substantial and identifiable; and
  - if the relevant land is or includes farm land, that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons.
- 4.5 The relevant government ministers must consider whether the investment will, or is likely to, result in both substantial and identifiable benefits to New Zealand. Consideration will only be given to:
- whether the overseas investment will, or is likely to, result in:
    - the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
    - the introduction into New Zealand of new technology or business skills; or

- increased export receipts for New Zealand exporters; or
- added market competition, greater efficiency or productivity, or enhanced domestic services in New Zealand; or
- the introduction into New Zealand of additional investment for development purposes; or
- increased processing in New Zealand of New Zealand's primary products;
- whether there are or will be adequate mechanisms in place for:
  - protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna;
  - protecting or enhancing existing areas of significant habitat for trout, salmon and other protected wildlife and providing, protecting or improving walking access to such habitats for the public;
  - protecting or enhancing historic heritage within the relevant land;
  - providing, protecting, or improving walking access over the relevant land (or any part of that land);
- if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed or lakebed has been offered to the Crown in accordance with the relevant regulations; and
- any other matters prescribed in the OI Regulations.

4.6 The OI Regulations set out a number of factors that the ministers must have regard to in assessing whether the overseas investment in sensitive land will, or is likely to, benefit New Zealand. For example, the ministers must have regard to whether the investment will, or is likely to, result in other consequential benefits to New Zealand; whether the overseas person has previously undertaken investment in New Zealand; and whether the investment is likely to give effect to or advance a significant policy or strategy of the New Zealand Government. The OI Regulations were amended in March 2008 to provide that the ministers must also have regard to whether the overseas investment will, or is likely to, assist New Zealand to maintain New Zealand control of '*strategically important infrastructure*' on sensitive land. Other considerations include whether New Zealand's economic interests will be adequately promoted by the overseas investment and the extent to which New Zealanders will be, or are likely to be able to oversee, or participate in, the overseas investment.

4.7 The February 2012 High Court decision in the case of *Tiroa E and T Hape B Trusts and another v Chief Executive of Land Information and others* [2012] NZHC 147 provided guidance as to the method of assessment that must be adopted by the OIO and relevant government ministers when determining whether an overseas investment in sensitive land will, or is likely to, benefit New Zealand. Prior to the decision the OIO and relevant government ministers had been assessing the benefits of a proposed overseas investment against the status quo - i.e. the situation before the overseas investment is made as compared to the likely situation after the overseas investment has been made. The High Court held that the OIO and relevant government ministers had erred in adopting this method of assessment and instead directed the OIO and relevant government ministers to assess the benefits of a proposed overseas investment against what would happen if the overseas investment for which consent is being applied for is not made.

- 4.8 This change in interpretation now requires overseas investors to take into account the presence of other potential investors (be they New Zealand resident or overseas investors) and the likely benefits that the proposed investment of the other potential investors will offer and demonstrate to the OIO and relevant government ministers that their proposed investment will bring a benefit to New Zealand greater than that which will result from other potential investors. In situations where no other potential investors are known to exist, an assessment against the status quo will remain appropriate.

## Registration Requirements

- 4.9 New requirements came into effect on 1 October 2015 in relation to the transfer of land.

- 4.10 The new requirements are:

- Property buyers and sellers must provide their New Zealand Inland Revenue Number (IRD Number) and other details when a property is transferred (with the exception of the main house (this exception does not apply in the case of overseas persons or trusts));
- Persons who are tax resident in another country, must also provide the equivalent of their IRD Number from that country;
- Overseas persons (who do not already have an IRD Number) will need to have a New Zealand bank account in order to apply for an IRD number.

## Torrens land registration system

- 4.11 New Zealand operates under the Torrens land registration system where each parcel of land generally has its own title which records dimensions and ownership. The New Zealand government guarantees the accuracy of titles, which can be searched by the public for a small fee. There are no longer physical certificates of title. The registration system is an electronic system.

## Contracts for the sale and purchase of land

- 4.12 Under New Zealand law, a contract for the sale of any land must be in writing signed by the parties involved in order to be legally enforceable under law.

## Resource Management Act 1991

- 4.13 The Resource Management Act 1991 has combined the laws relating to the use of New Zealand's natural resources such as land, water, minerals, coastline and air. The preamble to the Act states that it is to promote the *"sustainable management of natural and physical resources"*. As such, any new major development relating to industrial property, for instance, must give careful consideration to the legislation and may require a number of consents before it will be permitted to proceed. Each investment proposal will, therefore, need to be separately considered in the light of this legislation, applicable regional and district plans, and specialist legal and related expert advice. The Government is currently looking at reform of the Act in order to foster economic growth through a more efficient resource management system and thus a reduction in need for consents and the associated requirements appear to be on the horizon.

## Building Act 2004

- 4.14 All buildings are regulated and controlled by the application of the Building Act 2004. Every new building must comply with a requisite building code to ensure safe habitation and accessibility.

## Land claims

- 4.15 Other than the requirement to seek consent under the OI Act and OI Regulations, it is to be noted that certain lands within New Zealand may be subject to return to the Crown to satisfy claims by New Zealand's indigenous Maori peoples under the Treaty of Waitangi Act 1975. Privately owned land is not subject to return to Crown ownership unless it has been tagged. Any such tag would be shown on the title to the land itself and would, upon the requisite search, be made clear to any potential purchaser. The Crown would have to pay the current market price for any land it required to be returned to it.

## 5. Taxation

### Income tax

- 5.1 As a general rule, residents in New Zealand are taxed on their worldwide income whereas non-residents are only taxed on income derived from New Zealand sources.
- 5.2 Individuals are treated as New Zealand tax residents if they:
- have a permanent place of abode in New Zealand, whether or not they have such an abode outside New Zealand; or
  - are physically present in New Zealand for more than 183 days within any twelve month period.
- 5.3 Companies are treated as New Zealand tax residents if:
- they are incorporated in New Zealand;
  - they have their head office situated in New Zealand;
  - they have their centre of management in New Zealand; or
  - control of the company by their directors is exercised in New Zealand whether or not decision-making by their directors is confined to New Zealand.
- 5.4 Income will be treated as having been derived from New Zealand if:
- it is derived from any business wholly or partly carried out in New Zealand;
  - it is derived from the disposition of property situated in New Zealand; or
  - it is derived from a contract made or wholly or partly performed in New Zealand.
- 5.5 As of 1 April 2011, New Zealand residents pay the following rates of tax:
- for individuals (subject to certain provisions relating to low income families):
    - income up to NZ\$14,000 – 10.5%;
    - income from NZ\$14,001 up to NZ\$48,000 – 17.5%;
    - income from NZ\$48,001 up to NZ\$70,000 – 30%; and
    - income of NZ\$70,001 or more – 33%;
  - for all companies, a flat rate of tax of 28% applies; and
  - a withholding tax applies to non-residents that receive certain types of non-resident withholding income derived from New Zealand, namely interest, dividends and royalties.
- 5.6 The following exceptions should be noted in respect of non-resident withholding tax:
- all of the double tax agreements to which New Zealand is a party provide that the maximum withholding tax rate that New Zealand can impose on dividend income is 15%;
  - most of the double tax agreements to which New Zealand is a party provide a maximum withholding tax rate on interest and royalties of 10%;
  - in certain circumstances, a levy of two per cent of any interest payments may be paid instead of paying non-resident withholding tax (see paragraph 5.8 below); and

- special rules apply to payments made to related overseas parties.
- 5.7 New Zealand has entered into double tax agreements with a number of countries including Australia, Austria, Belgium, Canada, China, Chile, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hong Kong, India, Indonesia, Ireland, Italy, Japan, Korea (Republic of), Malaysia, Mexico, Netherlands, Norway, Papua New Guinea, Philippines, Poland, Russian Federation, Samoa, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Taiwan, Turkey, the United Arab Emirates, the United States of America, the United Kingdom and Vietnam.
- 5.8 If funds are borrowed by a New Zealand resident company from a non-resident not associated with the New Zealand resident company, and the non-resident lender does not have a fixed establishment in New Zealand, the interest payable to the non-resident lender can be paid free of non-resident withholding tax, provided that a levy of two per cent on the interest payable is paid by the New Zealand resident company. However, the New Zealand resident company must have obtained approved issuer status from the Commissioner of Inland Revenue. If approved issuer status has been obtained, the New Zealand resident company can elect to either pay the levy or non-resident withholding tax, depending on the circumstances and preferences of the non-resident lender. To the extent that the approved issuer levy is not paid on any interest payment, non-resident withholding tax is payable.
- 5.9 Transfer pricing and thin capitalisation rules also apply. The two main features are:
- the transfer pricing regime requires that an arms length price be applied to any supply of goods and services to and from New Zealand between associated parties; and
  - under the thin capitalisation regime, a business which is controlled by a single non-resident or, non-residents acting together who own or control 50% or more of the company, will only be entitled to deduct interest expenditure on borrowings to the extent that total debt does not exceed 60% of total assets.

## Goods and services tax

- 5.10 Goods and services tax (GST) is payable at the rate of 15% on the value of any goods or services supplied in New Zealand by a GST registered person. It is an indirect consumption tax based on a value-added principle.
- 5.11 GST is levied on goods and services supplied by a person carrying on a taxable activity. GST is also levied on imported goods. Persons who are registered for GST must charge GST on all of their taxable supplies (or sales), and can claim a credit for any GST paid on expenditure incurred in carrying on their taxable activity. The net difference results in either a payment to or a refund from the New Zealand Inland Revenue Department.
- 5.12 The following supplies are exempt from GST:
- financial services;
  - residential rentals;
  - exported vessels (ships);
  - foreign-based pleasure craft;
  - household goods;
  - imported services;

- internet sales;
- restraint of trade;
- services performed outside New Zealand;
- temporary imports;
- transport of goods or people to or from New Zealand;
- donated goods and services supplied by a non-profit body; and
- fine metals.

5.13 The following supplies are subject to GST at a rate of zero per cent:

- exported goods;
- goods situated overseas;
- taxable activities disposed of as "going concerns";
- newly refined precious metal;
- "exported" services;
- certain supplies in respect of which excise duty and petroleum tax are payable;
- the supply of certain telecommunications services;
- contributions of land made as a condition of a resource consent or as a development contribution;
- business-to-business supplies of financial services; and
- a supply from one GST registered person to another GST registered person, which includes land, where the person who has acquired the land has the intention of using it to make taxable supplies and the land will not be used as a primary residence of that person or an associated person.

5.14 A limited range of goods are subject to further indirect taxation in the form of an additional sales tax, for example, motor vehicles, fuel, alcohol and tobacco.

## **Customs and excise duty**

5.15 The Government also taxes specified imported goods by way of customs and excise duty. The rates vary widely according to the country of origin of the goods and the type of goods being imported. Any business venture which involves the importation of goods, the exportation of components to be assembled overseas, or the re-importation of the made-up product should be carefully checked with the New Zealand Customs Department.

## **Fringe benefit tax**

5.16 It is a requirement to pay fringe benefit tax (FBT) on the value of fringe benefits provided by employers to their employees including the private use or enjoyment of a motor vehicle (including its availability for use), subsidised or discounted goods and services and low-interest loans to employees.



### **Stamp duty**

- 5.17 Stamp duty is not payable in New Zealand on transactions. In particular transactions involving transfers of land, leases, share transfers and securities are free from stamp duty.

### **Capital gains**

- 5.18 Some capital gains on certain land transactions may be taxable, for instance, where land has been acquired by persons carrying on the business of dealing in land for that purpose. Gains on share transactions are also taxable where the person making the gains is deemed to be a share trader or the shares were acquired for the purpose of resale.
- 5.19 Under the Taxation (Bright-line Test for Residential Land) Act 2015 gains made from the sale of a residential property within two years of it having been purchased will be taxed. Exceptions to this include if the property is the seller's main home, if it was transferred as part of a relationship property settlement or if it was inherited from a deceased estate.

### **Gift duty**

- 5.20 No gift duty is payable in New Zealand it was abolished with effect from 1 October 2011.

### **Death duties**

- 5.21 No estate or death duties are payable in New Zealand.

## 6. Currency regulation, capital and profit transfer, investment incentives

### Exchange regime

- 6.1 New Zealand has a largely unrestricted currency exchange regime. Almost all exchange controls were lifted at the end of 1984. Since March 1985, the New Zealand dollar, known as the "Kiwi", has been allowed to float freely.
- 6.2 The absence of exchange controls has had significant effects on the New Zealand economy, including:
- all remittances of money can be made through registered banks (subject to UN sanctions, disclosures required under New Zealand's financial transaction reporting rules and anti-terrorism financing rules);
  - interest, profits and dividends earned in New Zealand can be freely remitted to non-resident persons (subject to non-resident withholding tax considerations and other taxation issues discussed in section 5 above); and
  - no approval is required in respect of the repatriation of non-resident capital, including financial gains or capitalised profits.
- 6.3 New Zealand does, however, have foreign investment control under the OI Act and the OI Regulations. These controls have already been discussed in detail in sections 3 and 4 above.
- 6.4 While there are no specific economic incentive regimes operating in New Zealand due to New Zealand's unequivocal policy on free trade, foreign companies investing in New Zealand in certain sectors such as tourism or the exportation of locally manufactured goods (which directly contribute to foreign exchange earnings), are particularly welcomed by the New Zealand government through such bodies as Tourism New Zealand and New Zealand Trade and Enterprise, which provide assistance in these areas. Some regional authorities also provide limited assistance to investors in their particular area.

### Banking and financial services

- 6.5 Most commercial banking services are provided by the major registered trading banks, namely ANZ Bank New Zealand Limited, ASB Bank Limited, Bank of New Zealand, The Hongkong and Shanghai Banking Corporation Limited and Westpac Banking Corporation. These banks offer a variety of services. Most financial accommodation is secured by way of security over the assets of the company, and often personal guarantees from major shareholders are required.
- 6.6 There are also a wide range of other financial lending or related finance service institutions such as building societies, merchant banks, finance companies, trustee companies, insurance companies, credit unions, and stock and station agents. Legislation has recently been enacted to promote confidence and participation in financial markets by investors and institutions and to promote a sound and efficient non-bank financial sector. The legislation establishes a registration system for financial service providers. The main aims of the legislation are to:
- identify financial service providers;
  - allow more effective monitoring and evaluation of financial service providers;
  - provide easy access to information about financial service providers;

- assist in meeting New Zealand's anti-money laundering obligations;
- ensure that controlling owners, directors and senior managers of financial service providers do not have certain criminal convictions, are not bankrupt and are not the subject of a management ban under companies, securities or consumer legislation;
- establish a comprehensive industry-based dispute resolution system to improve consumer access to redress in the financial sector.

6.7 The major commercial banks also provide other common commercial services, including letters of credit, bills of exchange, commercial bill facilities, term loans and foreign exchange.

## Reserve Bank

6.8 The Reserve Bank of New Zealand is New Zealand's central bank and operates under the Reserve Bank of New Zealand Act 1989 and other ancillary legislation.

6.9 The Bank's three main functions are:

- the operation of monetary policy for the purposes of maintaining price stability. The legislation provides that the Minister of Finance and the Governor of the Reserve Bank must have a separate agreement setting out specific targets. The current policy target requires the maintenance of underlying annual inflation within a one to three per cent range, but must also have due regard to the government's overall broader economic goals;
- the promotion of a sound and efficient financial system. This is essentially effected by registering and regulating banks, and monitoring each bank's practices and ongoing condition;
- meeting the currency needs of the public, as well as providing a range of payment and clearing services.

## Financial markets

6.10 Generally speaking, New Zealand's financial markets (equity, debt, futures and options) are principally regulated by industry regulators via a layer of statutory regulation. Securities and stock exchanges are required to be registered and are regulated by the Financial Markets Authority (FMA). Currently, New Zealand has one registered exchange, NZX Limited, which operates the main stock exchange (NZSX), a debt market (NZDX) and an alternative exchange (NZAX) for smaller issuers. The FMA regulates New Zealand's financial markets. The FMA oversees company law, securities and financial reporting in relation to financial services and securities markets.

6.11 The FMA authorises futures dealers. No person may deal in futures (widely defined and including options) unless authorised by the FMA. NZX Limited's NZX Futures and Options Rules allows it to authorise dealers to be futures and options participants.

## 7. Competition law and regulation

- 7.1 The Commerce Act 1986 (Commerce Act) provides the framework for promoting competition in markets for the long-term benefit of consumers. The Commerce Act is regulated by the Commerce Commission (Commission). The Commerce Act prohibits certain anti-competitive behaviour or practices, including:
- collective behaviour by two or more persons or businesses which has, or is likely to have, the effect of substantially lessening competition, which includes taking action to exclude competitors or price fixing; and
  - unilateral behaviour by a single person or business which takes advantage of a business' market power (defined as a substantial degree) or results in the specification of minimum prices at which a supplier's goods can be sold by other businesses.
- 7.2 There are certain exceptions including:
- practices which have been authorised by other statutes;
  - agreements between business partners who are in partnership where none of the partners are body corporates;
  - non-competition provisions such as on the sale of a vendor's shares in a business or an employee's restraint of trade under an employment contract;
  - intellectual property rights.
- 7.3 The Commerce Act also prohibits any mergers or acquisitions which would have or would be likely to have the effect of substantially lessening competition in a market. The term "*market*" is defined to mean a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial commonsense, are substitutable for those goods and services. Therefore, if, as a result of an acquisition, there is an increase in the scope of the exercise of unilateral or either non-coordinated or coordinated market power, it is likely that the acquisition will be deemed to substantially lessen competition in a market.
- 7.4 The Commerce Act provides a mechanism for the seeking of clearance from the Commission (*prior* to the implementation of any agreement) that the proposed acquisition will not result in a substantial lessening of competition and, therefore, will not constitute a breach of the Commerce Act. An authorisation may be sought where, even though a particular transaction may be deemed to substantially lessen competition in the market, its benefits to the public outweigh its detriments.
- 7.5 The penalties for a breach are substantial by New Zealand standards, being NZ\$500,000 for individuals and for companies the greater of NZ\$10 million or 3 times the commercial gain resulting from the breach or 10 per cent of the turnover of the company and its subsidiaries. The Commission also has power to unwind a transaction that is subsequently found to be in breach of the Commerce Act.
- 7.6 The Commerce Act also specifically regulates the electricity industry.

## 8. Intellectual property protection

### Copyright, trade marks, designs and patents

- 8.1 New Zealand's intellectual property legislation is essentially derived from English legislation and common law. However, the government has been increasingly reviewing the copyright legislation in light of the new digital and electronic world.
- 8.2 There is a discussion in section 10 below of the Electronic Transactions Act 2002.

### Copyright

- 8.3 The Copyright Act 1994 (Copyright Act) gives copyright protection to original works of literary, dramatic, musical or artistic works, sound recordings, films, communication works and typographical arrangements of published editions. Copyright subsists in any work to which labour, skill or independent judgement has been expended and does not require that the expression of an idea should be in an original or novel form.
- 8.4 The right attaches to the work itself and vests in the author or creator, unless the author has been commissioned to create the work or creates the work in employment. In accordance with the Berne Convention, to which New Zealand is a signatory, copyright vests as soon as the work is created – it does not need to be registered.
- 8.5 The owner of the copyright in a work has the exclusive right to do the following acts in New Zealand:
- copy the work;
  - issue copies of the work to the public;
  - perform, play or show the work in public;
  - communicate the work to the public;
  - make an adaptation of the work; or
  - authorise another person to do any of these acts.
- 8.6 The copyright in literary, dramatic, musical and artistic works generally lasts for the life of the author plus fifty years. Although a copyright notice © is not required in New Zealand, it is desirable to display the notice for better international protection under international convention.

### Trade marks

- 8.7 The Trade Marks Act 2002 (Trade Marks Act) provides a system of trade mark protection. In summary, the Trade Marks Act:
- defines the scope of rights protected by trade marks;
  - outlines the process for registering a trade mark;
  - defines what may be registered as a trade mark;
  - provides enforcement mechanisms for registered trade marks;
  - contains measures to deter pirating of copyright works and counterfeiting of trade marks; and
  - contains protections for well known trade marks.

- 8.8 The registration of a trade mark under the Trade Marks Act is effective for a period of ten years commencing at the date of registration. Trade marks may be renewed for further periods of 10 years with the onus being on the applicant or owner of the trade mark to renew the trade mark before the expiry date.

## Designs

- 8.9 Registered design protection under the Designs Act 1953 (Designs Act) provides an exclusive right to create a marketing advantage from the visual design of products. A registered design prevents others from using the design without consent.
- 8.10 A registered design must be novel and have some visual appeal rather than be entirely related to the use or function of the product. Shapes, configurations, patterns or ornaments applied to an article by an industrial process and having visual appeal are permitted designs that may qualify for registration.
- 8.11 Under the Designs Act, the period of protection is for an initial five years, with rights of renewal for two further five year periods. International protection requires registration of the design in each country of use.

## Patents

- 8.12 Patents protect new inventions. An invention must be original, useful and something that is not obvious to anyone trying to achieve the same purpose and who has knowledge in the subject area.
- 8.13 New products, manufacturing processes, chemical compounds and biotechnology can all be patented. Medicines and machines are other inventions that can be patented.
- 8.14 Applying for a new patent registration is an effective strategy where an invention is significant and may result in long-term commercial gains. The patent gives an exclusive right to manufacture, sell, import and use the patented invention for a twenty year period. After that time, anyone is free to use the invention.
- 8.15 International protection requires registration of the invention in each country of use.

## Business and company names - passing-off

- 8.16 There is presently no register of business names in New Zealand. Although a company name can be registered under the Companies Act 1993, this gives no right to the exclusive use of the name as a trade mark. There may, however, be passing-off issues to consider if a company trades under a brand name or trade mark that is also a registered company name.
- 8.17 Passing-off is generally concerned with protecting business goodwill. The purpose of a passing-off action is to prevent unfair competition between businesses that can result when one business seeks to benefit by usurping another's reputation or goodwill. While the Fair Trading Act 1986 similarly prohibits misleading and deceptive conduct in trade, it focuses largely upon consumer protection. Passing-off on the other hand is concerned more with unfair business competition and focuses on business or trade protection. The two actions are often invoked together.

## Web or domain names

- 8.18 It is no longer unusual for domain names to be the subject of applications for registration as a trade mark. The focus when accepting a domain name for trade mark registration is on any identifier

that is the distinctive portion of the mark, as opposed to the standard address code matter, for example, www, com and in New Zealand, .co.nz.

- 8.19 The Courts in New Zealand have considered domain name issues, in particular, protecting businesses against cybersquatting.

### **Parallel importation**

- 8.20 The Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998 has relaxed the parallel importing laws in New Zealand and amended the definition of an "*infringing*" copy under the Copyright Act 1994.
- 8.21 Articles that are not infringing copies when and where they are manufactured will not be infringing copies in New Zealand when they are imported. However, non-genuine or pirated goods are still prohibited from being imported and the penalties have been increased under the amended legislation. Parallel imported goods are sometimes confused with pirated and counterfeit goods. Parallel imported goods are legitimately manufactured goods that are sourced from an authorised or licensed overseas supplier rather than the owner of the intellectual property right in the importing country. Pirate or counterfeit goods, on the other hand are infringing manufactured goods that are produced without the authorisation of the owner of the intellectual property right.

## 9. Labour and employment

### History

- 9.1 The New Zealand industrial relations system was historically based on the principle of collective bargaining, with trade unions and employer representatives negotiating minimum employment terms and conditions on an annual basis.
- 9.2 The New Zealand labour market, since the Industrial Conciliation and Arbitration Act 1894, was dominated by trade unions. Trade unions had statutory recognition, compulsory membership and monopoly rights to represent employees. In 1991, the Employment Contracts Act 1991 made trade union membership entirely voluntary and removed monopoly bargaining rights. It imposed a contractual regime and made no reference to unions.

### Employment Relations Act 2000

- 9.3 The Employment Relations Act 2000 (ER Act) replaced the Employment Contracts Act 1991. It recognises unions and focused on the employment relationship rather than on the employment agreement. The ER Act includes a key principle that parties to employment relationships must deal with each other in good faith. This applies in all dealings between an employer, employee and a union.
- 9.4 Although there are certain minimum statutory conditions, the majority of terms and conditions of employment can continue to be negotiated directly between an employer and an employee or an employer and a registered union on behalf of a group of employees.
- 9.5 The ER Act promotes collective bargaining between unions and employers and requires bargaining 'in good faith'. A collective agreement is a contract between an employer and a union. An individual that is a member of a union may negotiate extra individual terms provided that they are not inconsistent with the collective agreement.
- 9.6 The ER Act recognises the right to strike but limits the circumstances in which a strike will be lawful.
- 9.7 Unions have the right to enter and access workplaces at reasonable times for union-related purposes as long as they have given notice of their intention to do so and have received the employer's consent to do so. This consent cannot be unreasonably withheld and a request to access the workplace must be responded to within one working day. Failure to respond in two working days will be deemed consent to the proposed access.
- 9.8 The ER Act requires written employment agreements. Employers are required to keep signed (or intended) copy of employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment.. There are minimum requirements as to what the parties must include in an employment agreement.

### Contractors

- 9.9 Contractors have a different legal status to employees. The statutory test for defining whether a person is an employee or not involves an examination not just of the agreement, but of the "*real nature*" of the relationship. Therefore, regardless of what the written agreement says, if the relationship is actually one of employer and employee in substance, the employer will be liable for all employee entitlements and for any actions that may have otherwise been permissible under a contractor / principal relationship as opposed to an employee/ employer one. .



## Fixed Term Agreements

- 9.10 Fixed term agreements are permitted but are regulated. At the time of entering the agreement an employer must have genuine reasons based on reasonable grounds for bringing the agreement to an end on a set date or after a specified period and the reasons and way in which employment will end must be recorded in the agreement.

## Trial Periods

- 9.11 Trial periods are permitted but are strictly regulated. A trial period is for a specified period not exceeding 90 days, and must be recorded in the employment agreement, signed by the employee. If an employer dismisses an employee during a trial period, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

## Minimum Code

- 9.12 New Zealand provides a number of minimum statutory entitlements for employees, including the following legislation:
- The ER Act provides remedies for unjustified dismissal and unjustified actions during employment;
  - The Human Rights Act 1993 prohibits discrimination on a wide range of grounds, including sex, race and disability. There is no retirement age in New Zealand. The Human Rights Act 1993 prohibits sexual harassment;
  - The Minimum Wage Act 1983 establishes minimum wages for workers, including an adult wage, an age-related starting out wage, an age-related starting out wage and training minimum wage (that applies to certain classes of employees).
  - The Equal Pay Act 1972 prohibits unequal payment for work of substantially the same type for men and women;
  - The Holidays Act 2003 provides sick leave, bereavement leave, annual holidays of four weeks per annum and recognises statutory holidays such as Christmas and Easter;
  - The Parental Leave and Employment Protection Act 1987 provides for up to 52 weeks parental leave. This period includes paid leave of 18 weeks. The period of paid parental leave is funded by the New Zealand government and can be taken by either parent on the birth or becoming a Primary Carer of a child under 6 years of age. In most situations the employer must keep the employee's position open and a temporary replacement may be obtained;
  - The Wages Protection Act 1983 sets out how wages must be paid and prevents deductions from an employee's wages, except for tax and other government deductions, without the employee's written consent;
  - The Privacy Act 1993 governs how personal information is collected, stored, used and disclosed; and
  - The Health and Safety at Work Act 2015 sets requirements to keep the workplace safe.

## Problem Resolution

- 9.13 Workplace disputes include disputes around issues that arise in the course of the employment relationship. The majority of these disputes are dealt with through ER Act mechanisms which

defines these as "*employment relationship problems*" and the employee can raise a "*personal grievance*" in respect of these problems (including unjustified dismissals) which can lead to legal proceedings.

- 9.14 The ER Act supports and promotes successful employment relationships and the parties to an employment relationship are usually required to attempt to resolve employment relationship problems through a government funded mediation process before proceeding to the Employment Relations Authority (which investigates and makes determinations on employment relationship problems).
- 9.15 The appropriate remedy for an unjustified dismissal personal grievance will be determined by the Employment Relations Authority.

## Health And Safety

The primary purpose of the Health and Safety at Work Act 2015 (Health and Safety Act) is to encourage people in business to take responsibility for the management of the health and safety at work. The primary duty falls on a person/entity conducting a business or undertaking ('PCBU') to ensure, so far as reasonably practicable, that the health and safety of its workers and/or the safety of any other person who may be put at risk by the work. A PCBU includes:

- a. a company;
- b. partnership;
- c. other entity; or
- d. in limited cases, an individual,

regardless of whether the PCBU acts for profit or not.

- 9.16 The Health and Safety Act requires that "Officers" of a company (including directors, partners or those who occupy a position which allows them to exercise significant influence over the management of the PCBU) conduct due diligence to ensure that the PCBU complies with its duties under the Health and Safety Act.
- 9.17 The duties imposed on a PCBU include providing and maintaining a safe work environment without risks to health and safety, safe systems of work, safe use of substances, and the provision of training, instruction and supervision that is necessary to protect all persons from risks to their health and safety arising from their work. PCBUs must also consult, cooperate and coordinate with other PCBUs that have a duty in respect of the same work or workplace. PCBUs have a general obligation to engage with workers on health and safety matters, and allow opportunities for workers to participate in improving work health and safety.
- 9.18 A breach of the Health and Safety Act may result in significant penalties, including fines, reparations and imprisonment. These penalties can be awarded against the PCBU and/or its Officers, depending on what duty has been breached.

## Redundancy

- 9.19 Genuine redundancy is a legitimate cause for termination of employment. Redundancy occurs where the employee's position is superfluous to the needs of the business. There must be genuine business reasons for the redundancy that can be justified in accordance with the law. The employer must not declare the employee "*redundant*" for other reasons such as poor performance, incompatibility or misconduct.

- 9.20 The employer is usually expected to consult with any potentially affected employees before a decision is made. An employer must show that there was a genuine reason for the position being superfluous, that an adequate notice period was given, and that all contractual compensation entitlements have been paid.
- 9.21 If the relevant employment agreement states that the employee is entitled to redundancy compensation then this must be paid (sometimes the employment agreement states that the compensation is not payable in the event of a technical redundancy; that is, if the employer (or a purchaser of the business during a sale and purchase transaction) offers the employee terms that are no less favourable to the employee than his/her current role. If there is no redundancy compensation entitlement in an employment agreement, the employer has no obligation to pay redundancy compensation.
- 9.22 A redundancy situation may arise on the sale or transfer of a business. If the business is acquired as a going concern through a different entity, technically that means the employer has changed, and therefore a redundancy takes place. When this happens, the employees of the vendor's business are made technically redundant and the purchaser usually has the option of whether to take them on or not (except for certain classes of employees who are protected under the ER Act as set out below). A redundancy situation will not occur if only the shares of a company (as opposed to the assets) are being purchased, as the staff continue to be employed by the same company.
- 9.23 The ER Act specifically deals with the transfer of employees. Affected employees are divided into two categories under the ER Act:
- vulnerable employees (who are generally those employed in the cleaning or the food catering services); and
  - other employees.
- 9.24 Vulnerable employees have a right to transfer to a new employer on the same terms and conditions of employment. Note that employers with 19 or fewer employees may be exempt from this requirement.
- 9.25 For employees that are not vulnerable employees an employer must negotiate with a new purchaser about the prospect of employing its employees if the business is being acquired as a going concern by a different entity. An employee protection provision is required in every employment agreement and relates to negotiations between the employer and the new employer about the affected employees.

## The Accident Compensation Act 2001

- 9.26 New Zealand's compensation system for personal injury is unique. The Accident Compensation Act 2001 is a no-fault accident scheme that has been in place in New Zealand since 1974. Compensation for work related and non-work related injuries is provided by the New Zealand government through the Accident Compensation Corporation. The effect of this system is that no person has the right to sue for personal injuries suffered in New Zealand, except in very limited cases.

## KiwiSaver

- 9.27 KiwiSaver is a government initiative involving employers, scheme providers and several government agencies. This is governed by the KiwiSaver Act 2006.

- 9.28 This voluntary long term savings initiative is designed to help New Zealanders increase their financial independence and save for their retirement.
- 9.29 KiwiSaver members build up their savings account through regular contributions of their gross wage or salary. KiwiSaver members making contributions to their account are also entitled to a compulsory employer contribution equal to 3% of the employee's pay.

## 10. Other applicable commercial legislation

10.1 This section provides a brief overview of some of the key commercially related pieces of legislation, in addition to those referred to elsewhere in this document.

### **Companies Act 1993**

10.2 New Zealand's company law principally comprises the:

- Companies Act 1993 (Companies Act), which governs the formation and operation of companies in New Zealand; and
- Financial Reporting Act 2013, which governs the financial reporting requirements of companies and other entities (see comments in paragraph 2.9).

10.3 The Companies Act is distinct from the previous law, and most Commonwealth jurisdictions, in the following ways:

- there is no distinction between public and private companies;
- a company need only have one shareholder and there is no concept of par value, nominal value or the maintenance of share capital;
- companies are not required to have a constitution (similar to memorandum and articles of association), but a constitution does enable a company to adopt certain permissive provisions under the Companies Act and also provides greater clarity and certainty for the company. As a result, having a constitution is generally advisable;
- before a company can make distributions to its shareholders and undertake certain other transactions, the company must satisfy a "solvency test" as detailed in the Companies Act;
- subject to protections for shareholders and creditors, a company may buy its own shares and finance the acquisition of its own shares;
- the approval of 75 per cent of shareholders is required prior to the company entering into a major transaction (generally being a transaction which involves more than half the value of a company's assets); and
- shareholders who vote against a major transaction which is approved by a 75% or more majority can in some circumstances require the company to buy back their shares.

10.4 The Companies Act also governs matters such as the powers of a company and its officers, the duties of directors, the conduct of meetings and liquidations.

### **Limited Partnership Act 2008**

10.5 This legislation came into effect in May 2008. Its purpose is to repeal the special partnership provisions of the Partnership Act 1908 and to establish a modern regulatory regime for partnerships that:

- gives the business community in New Zealand the option of a flexible and internationally recognised business structure similar to that which is in use in overseas jurisdictions; and
- facilitates the development of the venture capital industry in New Zealand.

## Financial Markets Conducts Act 2013

The Securities Act 1978 (Securities Act) and Securities Markets Act 1988 (Securities Markets Act) have been repealed and replaced by the Financial Markets Conduct Act 2013 (FMC Act). The FMC Act provides for a two year transitional period (ending 1 December 2016) which applies to certain transactions. Which will come into force in stages throughout 2014,.

The FMC Act governs how financial products are established, promoted and sold. It also specifies the ongoing requirements of those in the financial industry who offer, deal and trade in financial products as well as regulating the provision of some financial services.

The FMC Act provides new disclosure requirements and has moved to requiring a product disclosure statement that is more tailored to retail investors, as opposed to the previous prospectus and investment statements required under the Securities Act.

The FMC Act addresses issues of insider trading, market manipulation and disclosure of the relevant interests of substantial security holders as well as the disclosure requirements for directors and senior managers which were previously addressed in the Securities Markets Act.

## Takeovers Act 1993

- 10.6 New Zealand has a takeovers regime governing changes of control in Code companies, being companies listed on a registered stock exchange, companies listed in the previous 12 months, and entities over the shareholder threshold of 50 or more shareholders.
- 10.7 Under the Takeovers Act 1993 and the Takeovers Code (Code), no person is permitted to become the holder or controller of 20 percent or more of the voting rights in a Code company. The Takeovers Panel regulates the Code and has the power to grant exemptions.
- 10.8 Where a person seeks to go beyond or increase above the 20 percent threshold, this can be done by:
- a full offer for all of the securities in the Code company;
  - a partial offer to all holders so that more than 50 percent of the voting rights are acquired (or a lesser per centage approved by shareholders not associated with the offerer); or
  - an authorisation of non-associated shareholders.
- 10.9 The Code requires all shareholders to be treated equally, including as to price. If a shareholder holds or controls more than 50 percent, it may creep up to 5 percent per year. Beyond 90 percent, compulsory acquisition provisions apply. The Code also prohibits defensive tactics. The penalties for breaches of the Code are fines up to NZ\$500,000 for individuals and NZ\$5 million for body corporates.

## Electronic Transactions Act 2002

- 10.10 The Electronic Transactions Act 2002 (ET Act) is based on the United Nations Commission on International Trade Law model which is intended to enable or facilitate the use of electronic technology in commerce and provide equal treatment of paper based documentation and computer based information.
- 10.11 The ET Act was formulated to adapt New Zealand legislation to developments in communications technology without necessitating the wholesale removal of the paper-based requirements or

disturbing the legal concepts and approaches underlying those requirements. That is, the ET Act does not change the nature of legal obligations, rather it enables the use of electronic technology in transactions and information management. It achieves this in two ways. First, the ET Act reduces the uncertainty surrounding the legal effect of electronic information, the time and place of dispatch, and the receipt of electronic communications. Secondly, the ET Act allows certain paper-based legal requirements, such as the requirement to be in writing, to include a signature or to retain documents, to be met by using functionality that is equivalent to electronic technology.

- 10.12 The ET Act does not attempt to define a computer-based equivalent to any paper-based legal requirement, rather the focus is on functions and how these can be fulfilled through electronic technology techniques. The ET Act covers technologies that are not strictly electronic, including electric, digital, magnetic, optical, electromagnetic, biometric and photonic means of communication.

## **Fair Trading Act 1986**

- 10.13 The Fair Trading Act 1986 (Fair Trading Act) applies to all aspects of the promotion and sale of goods and services. It is intended to ensure that customers are given full and accurate information about goods and services. It prohibits certain unfair practices and sets out consumer information and product safety standards. It prohibits persons in trade engaging in misleading or deceptive conduct. The Fair Trading Act provides a significant degree of consumer protection. A breach of the Fair Trading Act can result in a substantial fine.

## **Consumer Guarantees Act 1993**

- 10.14 The Consumer Guarantees Act 1993 (Consumer Guarantees Act) creates statutory guarantees to protect the consumer when purchasing goods and services. The Consumer Guarantees Act applies to the supply of goods or services by persons in trade (including manufacturers, importers and distributors) to a consumer.
- 10.15 A consumer is a person who buys goods or services of a kind ordinarily bought for their personal, domestic or household use, but not for resale, use in production or, in the case of goods, repair to goods or fixtures on land.
- 10.16 The Consumer Guarantees Act establishes statutory guarantees or remedies which include repair, replacement and refund. In addition, a consumer may seek damages for reasonably foreseeable losses resulting from the failure of goods or services to meet a statutory guarantee. Attempts to contract out of the Consumer Guarantees Act as between a person in trade and a consumer are prohibited and may lead to substantial fines.

## **Privacy Act 1993**

- 10.17 The Privacy Act 1993 (Privacy Act) is designed to protect the privacy of individuals in relation to the collection, use, access, correction and disclosure of personal information about individuals. The Privacy Act establishes 12 privacy principles for the protection of personal information. In business, the application of the Privacy Act arises in areas such as sales and marketing, credit control and employment.

## **Personal Property Securities Act 1999**

- 10.18 The Personal Property Securities Act 1999 (PPSA) prescribes a system for the recognition and regulation of security interests in personal property. A "*security interest*" is an interest in personal property created or provided for by a transaction that secures payment of money or performance

of an obligation. This includes, for example, a retention of title clause in terms of supply, and a lease or bailment of a term of one year or more.

- 10.19 All security interests are ranked in accordance with statutory priority rules. The general principles being that security interests registered on the Personal Property Securities Register ([www.ppsr.govt.nz](http://www.ppsr.govt.nz)) take priority over unregistered interests. Between registered interests, in general the security interest registered first in time will have priority. In a situation where a company goes into receivership or liquidation, the company's assets will be distributed in accordance with the priority of the registered interests. There are however, some exceptions to this rule. Where goods are supplied and the security interest is taken solely for securing the obligation to pay all or part of the collateral's purchase price, this is a "Purchase Money Security Interest", which confers a "super priority" over the particular goods.

## **Anti-Money Laundering and Countering Financing of Terrorism Act 2009**

- 10.20 This Act places obligations on "*reporting entities*" (which includes financial service providers and casinos) to detect and deter money laundering and the financing of terrorism. The requirements include undertaking risk assessments and customer due diligence (including customer identification verification). It provides a risk based approach to dealing with money laundering and terrorism financing, including a supervision, monitoring and enforcement regime. The Act has also introduced new civil and criminal offences.

## **Financial Service Providers Act 2008**

- 10.21 This legislation requires all financial service providers to be registered. It establishes a public register to enable the public to access information about, and allows for the regulation of financial service providers. The Act also aims to prohibit certain people from being involved in the management or direction of registered financial service providers and ensures New Zealand conforms with its obligations under the Financial Action Task Force Recommendations.



## 11. Immigration

11.1 The migration of people into New Zealand is controlled by the New Zealand Government through the New Zealand Immigration Service. The applicable regulations are subject to relatively frequent change. Licensed immigration consultants can provide up-to-date advice.

### Entry requirements

11.2 As a general rule, foreign visitors to New Zealand (except Australians) must arrange a current visa before they enter New Zealand. Nationals of certain countries may visit for up to three months without a visa.

11.3 The types of visas that are likely to apply to migrants are:

- residence visa - for those wishing to reside in New Zealand permanently;
- entrepreneur work visa - for those wishing to own and operate their own business in New Zealand (up to three years with the ability to apply for residency after either six months or two years).
- work visa - for those wishing to work in New Zealand on a temporary basis (up to three years with further extensions possible);
- visitor's visa - for the purposes of a temporary visit only and not work (up to nine months with a possible further extension of three months); or
- student's visa - for temporary study (available for the duration of any study course which is longer than three months).

### New Zealand residence

11.4 The objective of New Zealand's immigration policy is to contribute economic growth with social cohesion. The principles underlying this objective are the:

- enhancement of New Zealand's human capital;
- strengthening of international links;
- encouragement of enterprise and innovation; and
- maintenance of social cohesion.

11.5 At the same time, the policy aims to maintain provision for migrants to enter New Zealand for social and humanitarian reasons.

11.6 Residence permits and visas are required for potential migrants who wish to settle permanently in New Zealand.

11.7 New Zealand residence can be obtained through the following categories:

- "Skilled Migrant" category (in which an applicant may qualify for residence under a points system);
- "Family" category (in which an applicant may qualify on the basis of their relationship with a New Zealand resident or citizen);
- "Investor" category (in which an applicant may qualify for residence on the basis of investments made in New Zealand); and

- "Entrepreneur" category (in which an applicant may qualify for residence on the basis of having owned and operated a business in New Zealand).

## Immigration policies in more detail

11.8 There are two different investor categories:

	Investor Plus	Investor
<b>Investment funds</b>	NZ\$10 million invested in New Zealand for three years	NZ\$1.5 million invested in New Zealand for four years
<b>Minimum settlement funds</b>	None	NZ\$1 million
<b>Maximum age</b>	None	65
<b>Minimum English language</b>	None	IELTS with an overall band score of three or more or English speaking background or competent user of English
<b>Minimum time in New Zealand</b>	44 days in each of the last two years of the three-year investment period (evidence to be submitted after year 2 and three)	146 days in each of the last three years of the four-year investment period (evidence to be provided after year two and four)
<b>Business experience</b>	None	Minimum of three years

## After residence is approved

- 11.9 If a residence application is approved, the applicant must retain the investment funds in an acceptable investment for either three or four years depending on the category. The principal applicant must meet the requirements for minimum amount of time spent in New Zealand each year in years 2, 3, and 4 of the four-year investment period for "Investor " migrants or in years 2 and 3 of the three-year investment period for "Investor Plus " migrants.
- 11.10 The skilled migrant category is also a points-based system with an emphasis on applicants who have high academic qualifications and work experience and who have an offer of employment in New Zealand. Applicants first have to submit an Expression of Interest in which points are claimed for various factors. Those applicants with the highest point scores are then invited to apply for residence.
- 11.11 The family category focuses on an existing family relationship between a New Zealand resident or citizen and an overseas person. Spouses/de-facto partners, parents, dependent children or siblings of New Zealand residents or citizens may apply for residence if the application is sponsored by a New Zealand relative.

- 11.12 The entrepreneur category focuses on an applicant's ability to successfully operate a business that benefits New Zealand in certain ways. Before they can apply for residence under this category, applicants must have either (i) established and been employed in their own business in New Zealand for at least two years or (ii) held a long-term business permit, successfully established a business in New Zealand, been self employed in that business, invested NZ\$0.5 million in that business and created a minimum of three new full-time jobs for New Zealand citizens or residents.
- 11.13 All categories are subject to health and character requirements and, apart from the family category, a minimum standard of English language ability.

## 12. Legal System and Dispute Resolution

- 12.1 A sound and predictable legal system is an essential requirement for any significant investment in a foreign country. New Zealand's laws have been historically based upon those of the United Kingdom and, like the United Kingdom, New Zealand remains a common law jurisdiction with its civil laws comprising "*common*" or judge-made law and statutes of New Zealand's one chamber Parliament.
- 12.2 More recently, New Zealand has drawn upon other countries, particularly those of the Commonwealth such as Australia and Canada, to formulate its statutes. For instance, New Zealand's Companies Act 1993 and Personal Property Securities Act 1999 have a distinct North American flavour and the Fair Trading Act 1986 and Commerce Act 1986 closely follow Australia's Trade Practices Act (since renamed the Competition and Consumer Act 2010).
- 12.3 At the heart of New Zealand's business laws is a sound contract law structure that closely mirrors the systems of other well developed nations. In essence, commercial promises will be enforced or the failure to perform them will be compensated. A range of widely accepted defences exists but, in general, it can be said that these follow commercial common sense.
- 12.4 A well developed system of laws is important, but will those laws be enforced? New Zealand's Courts are well run and, compared to the courts of many other nations, are efficient and effective. There are no known cases of corruption by judges of any court. Judges are appointed by the Attorney-General, rather than by election. They are generally drawn from a respected group of highly experienced lawyers who have expressed their interest in judicial appointment.
- 12.5 New Zealand has four main tiers of court: the lowest is the District Court with a jurisdiction that allows it to handle cases where the dispute is worth up to NZ\$200,000. Next is the High Court, with a jurisdiction to deal with commercial disputes of any value. The third tier is the Court of Appeal and fourth is the Supreme Court. There is a right of appeal to the High Court from the District Court and a right to appeal further to the Court of Appeal with permission of the High Court or Court of Appeal, a matter may be appealed to the Supreme Court only if the court gives leave. High Court decisions can be appealed to the Court of Appeal and, with leave, to the Supreme Court. The High Court has an overall supervisory role and is able to review decisions of any administrative or judicial tribunal on grounds of bias, lack of jurisdiction or unreasonableness.
- 12.6 There are separate specialist courts and tribunals in a number of areas. Notably, minor disputes can be referred to the Disputes Tribunal; employment matters are dealt with in the Employment Court; planning and environmental matters are dealt with in the Environment Court; and disputes concerning the traditional rights of New Zealand's indigenous people, the Maori, in relation to land (or concerning other traditional Maori rights) are handled at first instance by the Waitangi Tribunal. Certain construction disputes are heard by the Weathertight Homes Resolution Service.
- 12.7 Typically, cases are disposed of by the Court of first instance within 12 - 18 months. Clear-cut cases can be handled much more quickly as all Courts have summary judgment and strike out jurisdictions. The Courts now have extensive rights to manage the cases before them and to prescribe the extent and nature of document discovery and other procedural steps. The Courts cannot require parties to use other resolution methods such as mediation, but they do have the

ability to conduct judicial settlement conferences aimed at settling disputes under the supervision and with the assistance of judges.

- 12.8 New Zealand is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and has arbitration legislation which creates consistency between international and domestic arbitration. The Courts will uphold references to arbitration and proceed on an assumption of reduced judicial intervention in arbitration. New Zealand has a considerable pool of international and domestic arbitrators who are capable of giving sound, high quality, decisions.
- 12.9 New Zealand is also a signatory to the ICSID convention on the settlement of disputes about international investment and the International Convention on the Sale of Goods. As a result, it is a willing adherent to international standards in these areas. There is an appreciation among judges that New Zealand is a part of a global economy and increasingly reference is made to international legal conventions and agreements such as the Unidroit Principles of Contract Law.
- 12.10 Overall it can be said that a new entrant to the New Zealand business environment is unlikely to be met with any surprises about basic contract laws, contract enforceability or Court procedure.

## 13. Important

- 13.1 This paper provides a general overview of the legal aspects of doing business in New Zealand as at October 2016. While Hesketh Henry has made every effort to ensure that the contents of this document are accurate in all material respects, this commentary should not be relied upon without seeking further advice specific to your situation. Hesketh Henry would be delighted to assist you. Please visit our website at [www.heskethhenry.co.nz](http://www.heskethhenry.co.nz).