

## Doing Business in New Zealand

SHIEFF ANGLAND LAWYERS

### Guide to Doing Business in New Zealand

This guide has been prepared by Shieff Angland as an introduction to New Zealand business law. It is intended to assist overseas people wishing to do business in New Zealand. It is not intended to provide comprehensive information on all aspects of the relevant law.

We have made every effort to ensure the accuracy of this publication, however, it should not be relied upon as a basis for making business decisions as circumstances, business conditions, government policy and interpretation of the law may change.

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We would be happy to assist anyone who wishes to obtain advice or information on matters contained in this brochure.

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### 1. GOVERNMENT AND THE LEGAL SYSTEM

New Zealand is a parliamentary democracy with general elections held every three years. It is a fully independent nation and has effectively been so for nearly a century. It does nevertheless choose to retain the British Queen as Queen of New Zealand. She is represented in New Zealand by a Governor General who is appointed on the advice of the New Zealand ministers.

The New Zealand parliament consists of a single house, the House of Representatives. This is composed of members elected on a “mixed member proportional” (MMP) electoral system, similar to the system adopted in Germany.

It does not have a written constitution, in the form of a single entrenched legislative instrument. There are however some statutes of a constitutional nature which spell out some of the rights of citizens, while other civil rights are safeguarded by the operation of common law. Terms relating to the protection of the indigenous Maori people are contained in the Treaty of Waitangi signed in 1840.

There is a system of local government through “territorial authorities” – city and other councils having responsibility for different geographic areas.

New Zealand has a common law legal system similar to that in the United Kingdom. Its law is a combination of statutes passed by Act of Parliament and judge made law established by the New Zealand Courts. It also draws on Court decisions from other common law countries such as England, Australia and Canada.

New Zealand law in the area of trade, competition and intellectual property tends to closely follow that of other western countries, the common law countries in particular. New Zealand is party to most of the international treaties and is a member of most of the international organisations affecting business such as World Intellectual Property Organisation.

### 2. BUSINESS ENVIRONMENT

New Zealand has a deregulated economy. Following extensive reforms to free up the economy much greater reliance is placed on the operation of market forces to determine results than on state influence or support. Direct Government intervention has been greatly reduced or eliminated in many areas affecting business.

There is now a “user pays” philosophy which means that in many areas it is left mainly to the individual or business concerned to enforce their rights within the legal framework provided, but this is often balanced by laws requiring higher performance standards for businesses.

The principal tool used to control economic growth is the Reserve Bank of New Zealand Act 1989, under which the Director of the Reserve Bank is required through monetary policy to keep inflation within a narrow range (currently 1% to 3%) as measured by the Consumers Price Index (“CPI”). The CPI is calculated by Statistics New Zealand.

### COMMERCIAL LAW

#### 3. Competition Law

Business competition is regulated, in the interests of market place efficiency and the long term benefit of consumers, by the Commerce Act 1986, which is administered by the Commerce Commission.

This Act prohibits business acquisitions that would substantially lessen competition in the relevant market, unless prior Commerce Commission consent is obtained. The Commerce Act also prohibits a range of anti-competitive trade practices, including collective practices (eg price fixing, collective boycotts, arrangements that substantially lessen competition) and unilateral practices (resale price maintenance, and the prohibition on companies with a substantial degree of market power taking advantage of that power for anti-competitive purposes).

The Commerce Act was amended effective 26 May 2001 to give the Commerce Commission more power to act and to bring it more into line with the competition law provisions of the Australian Trade Practices Act 1974. In particular, the previous “market dominance” test for acquisitions and for anti-competitive use of market power, was replaced with the “substantial lessening of competition” (SLC) and “substantial degree of market power” tests. However, whilst the Commerce Act is comparable with the Australian Trade Practices Act, it is not the same.

Franchising Agreements are not exempt from the Commerce Act and must be carefully drafted so as to avoid breaching the Act.

#### 4. Consumer Protection

Consumer protection is principally regulated through the Fair Trading Act 1986 and the Consumer Guarantees Act 1993. These Acts, together with the Commerce Act, attempt to ensure that business in New Zealand is fair and competitive, and make remedies available to consumers prejudiced by unfair business practices. This legislation also applies to dealings between businesses. Once again there are similarities with Australian law in this area.

The Fair Trading Act 1986 provides or operates:

- To ensure that consumers receive fair and accurate information about what they purchase, to enable purchasers to take advantage of the competitive market encouraged by the Commerce Act.
- To prohibit people in trade from making false representations or from engaging in conduct that is misleading or deceptive (whether intentional or not), or which amounts to an unfair trade practice.
- Standards for consumer information and product or service safety.
- Remedies for breaches of the Act which are available to both consumers and to competing traders.

Penalties for breaching the Act are severe.

The Commerce Commission is responsible for administering the workings of the Fair Trading Act and is of major influence in the New Zealand market place.

The Consumer Guarantees Act 1993, administered by the Ministry of Consumer Affairs, applies to the sale of consumer goods and services. Its underlying policy is to give greater consumer protection through information and therefore to create a more informed and competitive market.

It establishes a set of statutory guarantees and gives the consumer rights of redress where those guarantees are not complied with. The New Zealand Act is similar to (but not the same as) the consumer protection provisions of the Australian Trade Practices Act.

It does not apply to sales to businesses where the business is going to on sell the product or service. However, despite its name, it does apply to business-to-business sales where the purchaser is going to use the product or service supplied for its own consumption rather than resale.

Any attempt to contract out of the Consumer Guarantees Act (except as permitted under the Act for business-to-business transactions) breaches the Fair Trading Act, and will expose the seller to heavy penalties. Care must therefore be taken where business documents attempt to contract out of the Act, to ensure that they are written and applied strictly within the terms of the exemption allowed by the Act.

See our "[Fair Trading Act and Commerce Act 2004 Compliance Guide](#)".

### 5. Company Law

Company law is regulated principally through the Companies Act 1993 and its associated legislation.

Features of the legislative environment for owners and managers of companies in New Zealand include:

- The abolition of fixed capital and "par" values for shares. Companies can now issue shares at any price that is not contrary to the best interests of the company.
- The introduction of a concept of asset maintenance to provide more effective protection for creditors and shareholders. As part of this, compliance with the solvency test is required in various situations where a company is about to make a distribution of its wealth or where the solvency of the company may be threatened as a result of certain corporate action.
- Companies need not have a constitution, and where a company chooses not to have one, the directors and shareholders have the rights, powers, duties and obligations set out in the Act. Most companies will want and need a constitution, and that constitution must have regard to certain requirements of the Act. A constitution may provide directors and shareholders with certain benefits and protections which may not otherwise be available under the Act.
- The power to companies to give financial assistance (in certain circumstances) for the purchase of shares in the

company, their holding company or subsidiaries. Companies can also buy their own shares under certain conditions. There are related shareholder safeguard provisions.

- A clearer, positive statement of the duties and powers of directors. In certain circumstances, the Act imposes new duties on directors in relation to creditors and minority shareholders. In addition, in certain circumstances where directors' actions may prejudice shareholders' interests, the Act requires directors to certify that their actions are in the best interests of the company, the potential sanction being liability on directors.
- Shareholders are given greater access to remedies against both the company and the directors where a wrong is done to the company, or there has been a breach of a duty imposed by the Act. In addition, the minority of shareholders in a vote on a major transaction proposed for a company have the right to require the company to buy out their shares. These shareholders can take such action without the need to show that they would be prejudiced by the proposed transaction.

In New Zealand, a corporate business vehicle is set up by either:

- incorporating a new company in New Zealand; or by
- registering an overseas company, about to commence business in New Zealand, as an "overseas company".

Non-business, non-profit international or multinational entities have additional options including becoming an incorporated society under the Incorporated Societies Act 1908.

### 6. Takeover Law

The Takeovers Act 1993 governs most takeover offers. Exceptions are generally available to smaller, closely held companies.

If the company subject to a takeover offer is a listed company then the offer will also be subject to the Stock Exchange Takeover Regulations and subject to a notice and pause requirement.

The Takeovers Code came into force on 1 July 2001. The Code governs all “Code Companies” which are essentially companies that are or have recently been listed and have \$20 million of assets together with more than 50 shareholders. The Companies Amendment Act 1963 continues to apply to smaller companies not covered by the Code.

The terms of the Code allow the unrestricted acquisition of voting rights in such companies of up to 20% of the total voting rights. Any offer to acquire shares beyond that point must, except for some limited exceptions, be for all the voting rights, or for more than 50% of the voting rights, or for more than 50% of the voting rights (if a partial offer is made). A partial offer is required to be made to the holders of all voting rights. An offer made in compliance with the Code must be made to the holders of all voting securities on the same terms. There are no restrictions on the price or consideration that may be offered under a full or partial bid except that the same price or consideration must be offered to all security holders of the same class.

The Takeovers Code is designed to encourage efficiency, competition, and fair treatment of security holders at a minimal cost while continuing to grant freedom of choice to investors. The essential feature of the Code is the provision of various thresholds of shareholding which a company must provide public notice before crossing. In addition to these procedures it also provides penalties for non-compliance. The Code is enforced by a panel set up under the Takeovers Act 1993.

In summary, there will be six ways that a person may buy or increase shareholdings in a company subject to the Code beyond 20% of voting rights:

- With the approval of shareholders;
- By an offer for all of the other shares (a full offer);
- By an offer for a percentage of the total company (a partial offer). Such an offer must be made to all shareholders, at the same price;
- For acquisitions in the 50% to 90% range, at an incremented rate of 5% in any 12 month period;
- In the 90% to 100% range, by a compulsory acquisition, at the purchaser’s discretion;
- Under an exemption granted by the Takeovers Panel.

### 7. Securities Legislation

The Securities Act 1978 and the corresponding Securities Regulations 1983 regulate the offering of equity and debt securities in New Zealand. The Securities Commission administers that legislation and oversees the securities industry with a view to protecting investors.

Central to the investor protection concept is the requirement that when an offer to invest is made to the public, sufficient information must be made available to enable the investor to make an informed and reasoned decision. This information must be provided in the form of an approved and registered prospectus.

The class of issuers who must provide a prospectus is extremely broad, and the Act also details the information which must be included (and that which is not to be included).

The prospectus requirement does not apply to franchises, but the Franchise Association of New Zealand Inc. (the voluntary industry body for franchises in New Zealand) requires its franchisor members to issue a disclosure statement to prospective franchise purchasers as a condition of membership.

The Securities Amendment Act 1988 restricts insider trading in the shares of companies which are public issuers. In addition, when a person becomes a substantial security holder in such a company (that is, holds at least 5% of the voting securities of that company) or where a substantial security holder changes either the nature or extent of its interest in a public issuer, then notice of that fact must be given to the company and the stock exchange on which the securities are listed.

### 8. Personal Property Securities Regime

The Personal Property Securities Act 1999 (PPSA) has radically changed New Zealand's previously fragmented laws relating to securities over personal property, replacing them with a unified system based on the Canadian and United States legislative models.

The definition of personal property does not include land, but does include practically every other form of property. Businesses which have "security interests" in any personal property/collateral need to ensure that they can and do register those interests, or risk losing their priority to a secured party.

The meaning of security interest is very wide. It includes transactions previously secured by debentures, chattel mortgages, hire purchase agreements, equipment and vehicle leases and other specialised forms of security. However it also includes (eg) the supplier's interest under retention of title clauses and in goods sold on consignment, leases of personal property for longer than one year, transfers of chattel paper, accounts receivable. Indeed, virtually any situation in which personal property is being placed in another party's possession as part of some transaction involving payment or performance of some obligation at a later date, is likely to be a security interest that needs to be registered.

The general scheme of the PPSA is to provide that priority as between competing interests in the collateral, will go to the first party to either register a financing statement or take possession of the collateral. There are important situations (eg retention of title and consignment sale situations, the loan of money to purchase stock) in which the owner/holder of the security interest needs to register prior to parting with possession of the personal property/collateral.

The core of the system is the internet-based Personal Property Securities Register (the "PPSR" which is at [www.ppsr.govt.nz](http://www.ppsr.govt.nz)) for searching and registration. The online register had to be developed before the PPSA could be brought into force, which was not until 1 May 2002. The registration process is cheap and virtually instantaneous.

It has already been held by the New Zealand High Court that a company which leased out portable buildings for a period of longer than one year but did not register, lost its (ownership) interest in those buildings to the holder of a (registered) debenture covering the lessee company's assets and undertaking. Holders of unregistered "security interests" will no doubt suffer further expensive lessons, before this important new regime is properly understood by persons doing business in New Zealand.

### 9. Business Entities

Businesses may be operated as a company, as an incorporated or unincorporated joint venture, a partnership, a branch or subsidiary, under a trust or as a sole trader. Each business entity is subject to various legislation and regulations and the best options for an overseas investor or foreign company needs to be examined on a case by case basis.

### 10. Banking

The deregulation of the New Zealand banking industry has encouraged competition and market driven efficiency.

There is no restriction on the import or export of capital (except for commencement or acquisition of businesses and the currency transfer restrictions referred to below) and the exchange rate is not fixed but fluctuates according to market forces.

The Financial Transactions Reporting Act 1993 provides for the monitoring of currency movements within New Zealand as well as in and out of the country. Financial Institutions are required to report any suspicious transaction to the Commissioner of Police.

Every person entering or leaving New Zealand who is carrying more than NZ\$10,000 is required to declare this to the New Zealand Customs.

Proposed bank account holders require identification while business entities require appropriate documentation such as certificates of incorporation.

### 11. Insurance

New Zealand is well served by a variety of insurance companies, including major UK and Australian insurers, and has access to underwriters worldwide.

The insurance industry in New Zealand is regarded as somewhat less regulated than the industry in Australia. Under the Insurance Companies (Ratings and Inspections) Act 1994 insurers are required to either have a rating of their financial standing and advise the public of that rating, or to elect not to be rated. The Insurance Intermediaries Act 1994 protects customers in relation to defaults by insurance brokers and other intermediate parties. There is an Insurance Ombudsman.

### 12. Foreign Trade

New Zealand is now one of the world's most open economies in foreign trade terms. Producer boards for the sale and export of primary products are increasingly a thing of the past. While the sale and export of some primary products (eg. dairy, kiwifruit, apples) is controlled to a significant extent by grower-owned companies, most other products can be freely exported and imported. Customs practice is in line with the World Trade

Organisation Agreement. Tariffs on imported goods are being progressively reduced, or phased out.

### 13. Investment Advice

Some protection to investors is given by the Investment Advisers (Disclosure) Act 1996. This imposes an obligation on investment advisers (a category which is widely defined) to make initial disclosure to clients before providing advice and to make further disclosure of certain matters upon request.

Matters to be disclosed initially include details of convictions for dishonesty, adjudication in bankruptcy and involvement in companies which have been convicted of dishonesty within the period of 5 years before the date of giving investment advice is required. Before receiving any investment money or property information, to be disclosed includes the procedures relating to the transaction and the use of the money including whether or not it will be held in trust and the uses to which the money or property can be put.

Other details about advisers must be supplied if requested. These include details of relevant experience and qualifications and the remuneration to be received by the adviser from parties other than the investor.

Investments should not be made without obtaining competent, independent, professional advice before any money is paid or commitment is made.

## FOREIGN INVESTMENT AND LAND PURCHASE AND IMMIGRATION

### 14. The Overseas Investment Commission (OIC)

The Overseas Investment Act 1973 established the framework for the administration of the Government's Foreign Direct Investment ("FDI") policy in relation to land and non land investments. The Act contains the main definitions, establishes the OIC, provides for regulations to be made, sets out criteria for investments to meet and lists the category of land which can be subject to FDI regulations. However most of the policy content is contained in the regulations made under the Act and in any written directions given to the OIC by Government.

An overseas person may require the consent of the OIC before undertaking certain business activities in New Zealand. An "overseas person" means any:

- Person who is neither a New Zealand citizen or ordinarily resident in New Zealand;

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- Company or body corporate incorporated outside of New Zealand;
- Company incorporated in New Zealand where 25% of any class of shares are owned or controlled by an overseas person;
- Person acting on behalf or under the control or direction of an overseas person.

An “overseas person” will be required to obtain OIC consent in order to acquire or take “control” of 25% or more of:

- Business or property worth more than NZ\$50m;
- Land over 5 hectares and/or worth more than NZ\$10m;
- Any land on most offshore islands;
- Certain sensitive land over 0.4 hectares (eg. on specified islands, containing or next to reserves, historic or heritage areas, the foreshore or lakes).

With respect to the New Zealand dollar thresholds:

- In the case of setting up a new business, the threshold relates to the total expenditure involved in establishing the business;
- In the case of an asset or business acquisition, the threshold relates to the amount paid for the assets or business;
- In the case of the acquisition of shares, the threshold applies to both the amount paid for the shares and the gross value of the assets of the company whose shares are being acquired. Therefore, if either exceeds the NZ\$50m threshold, OIC consent will be required.

The primary function of the Commission is to assess applications from overseas investors who intend making substantial investments in New Zealand.

New Zealand has generally welcomed and encouraged foreign investment from all countries. This has been part of the strategy to maintain strong international linkages and to reduce barriers to international capital flows. Provided that the essential criteria are met, OIC consent is normally forthcoming,

but consent is a prerequisite to the acquisition of the asset or commencement of business.

In considering an application under the regulations the Commission will consider matters which include:

- The creation of new job opportunities in New Zealand;
- The introduction of new technology or business skills;
- The introduction into New Zealand of additional investment for development purposes;
- The development of new export markets or increased export market access for New Zealand exporters;
- Whether an individual investor intends to reside permanently in New Zealand.

In addition to the economic impact of the proposed investment, the Commission will also consider the environmental impact, as well as the effect on New Zealand ownership of natural resources.

### 15. Land Title and Use

The vast majority of land in New Zealand is registered under the Torrens system with Government guaranteed titles issued for each block or section of land. This system of registration provides a clear record of ownership and of all interests, restrictions or easements affecting the title. It is publicly searchable.

There are still very occasional pockets of land registered under the old deeds system. Some Crown land and land held as reserves is also still outside the Torrens system. There are also areas of land (mainly in rural areas) which are held on Maori land titles for which special rules apply.

The country is divided into a number of districts, each with separate district land registries. Computerised title searching and other procedures have been introduced.

Land use is controlled mainly by the Resource Management Act 1991, and building and construction by the Building Act 1991. Both are administered by the local councils for the area.

### 16. Immigration

Australian citizens and residents, and citizens of some Pacific Islands have the right to enter and work in New Zealand on a temporary or permanent basis without any immigration

formalities. However strict immigration rules apply for the citizens of all other countries.

### Temporary Entry

Citizens of most western (and many Asian) countries can travel to New Zealand without a visa and on arrival will usually be granted visitor permits of up to 3 months. These can be extended to 6 or 9 months if the person is a genuine visitor and has sufficient funds to remain here.

Temporary work visas/permits can be granted for up to 3 years but are subject to a labour market test (ie evidence that no New Zealand residents are immediately available to fill the position) unless the type of job appears on the Immigration Service's current occupational shortages list.

Temporary student permits may be granted for the full term of the course, and New Zealand has now become established as a popular destination for tertiary education, especially for people from north and south east Asia.

A visitor permit enables a business visitor to engage in consultations or negotiations in New Zealand for up to 3 months in any one year period, but if they are going beyond that 3 months, or if they are actually "employed" in New Zealand, they need to obtain a work permit. There is provision for business people and executives to obtain work permits if they are seconded to work in New Zealand.

### Permanent Residence

Most permanent residence applications were made under the "General Skills Category, a points system that favoured applicants with formal qualifications and work experience. However this category was discontinued in November 2003 and (from February 2004) replaced with the "Skilled Migrant Category". Like the old GSC, the SMC is a points based system. People interested in applying can register an on-line "Expression of Interest". NZ Immigration ranks these people based on points for work experience, qualifications, skilled employment offers, plus bonus points for special ability to contribute to future economic growth or growth in the provinces, and other factors. The highest ranking are "invited" to apply for residence.

The other ways of obtaining permanent residence are: the Family Category, the Refugee Policy, the Business Immigration Policy, and the "Work to Residence" policies.

The Business Policy is divided into subgroups. The “Investor Category” is a points system favouring applicants with business experience and an ability to invest a minimum of NZ\$1m. The “Entrepreneur Category” simply requires establishment of a successful business that is benefiting the country in some way. A Long Term (up to 3 years) Business Visa enables establishment of a successful business here so that an application can then be made under the Entrepreneur Category. There is a policy to grant residence to employees of overseas businesses that are relocating to New Zealand.

Finally, there are the “Work and Residence” policies. “Accredited employers” can recruit certain highly “talented” people for residence. Prominent people in the arts, culture or sport may be sponsored for residence. People with skills in proven short supply may be recruited for residence. People recruited under these policies are granted work permits and can then “work to residence” over a 2-3 year period.

The specific regulations and policies governing immigration applications may be complex and we strongly advise any interested applicant to seek legal advice from a specialist immigration lawyer at Shieff England.

### INTELLECTUAL PROPERTY and INFORMATION TECHNOLOGY

#### 17. Intellectual Property

New Zealand has modern intellectual property laws which provide business people with the ability to protect their intellectual property to much the same extent as in Australia, North America, Europe and Japan. New Zealand is a signatory to the World Trade Organisation “TRIPS” (Trade Related Intellectual Property) Agreement. However parallel importation is in most (but not all) circumstances lawful.

Intellectual property protection is under a mix of statutes and common law (judge made) principles including:

- Protection of patents, designs and copyright under the Patents Act 1953, Designs Act 1953 and the Copyright Act 1994 for limited terms.
- Protection of trade marks by registration under the Trade Marks Act 2002 for an unlimited time so long as periodic renewal fees are paid. This Act is more in line with the modern UK, EU and Singapore trade mark laws than with the Australian law. Common law remedies such as the tortious remedy for “passing off”

may also be invoked for unauthorised uses of trade marks. Such uses may also be “misleading and deceptive conduct in trade” and thus subject to the remedies of the Fair Trading Act 1986. Registered trade mark proprietors can invoke border protection measures against pirate imports.

- The Layout Designs Act 1994 specifically provides copyright type protection for integrated circuits, subject to proof of originality, but without any registration requirement.
- There is a Geographical Indications Act 1994 to establish a system to protect geographical indications in relation to goods (eg wines), but it has still not been brought into force 10 years on.
- Common law principles as applied by the New Zealand Courts recognise the importance of, and enforce obligations of, confidentiality and the fiduciary obligations of employees, so as to protect trade secrets and confidential information.

### 18. Information Technology

New Zealand has experienced a high uptake of information technology and enjoys an international reputation in creative digital content including film, animation and web design. New Zealand’s open, transparent regulatory environment, low cost base and government policies supporting the knowledge economy have all contributed to this. Doing business on-line is supported by the Electronic Transactions Act 2002. The Crimes Amendment Act 2003 implemented hacking offences which enable the Police to prosecute perpetrators of electronic crime more easily. There are proposals to amend the Copyright Act 1994 to take into account recent developments in information technology, and to implement anti-spam legislation.

## EMPLOYMENT LAW

### 19. The Employment Relations Act 2000

The Employment Relations Act 2000 (“the ERA”) is the principal statute governing employment in New Zealand. It is based on the International Labour Organisation (ILO) principles and has put New Zealand employment law more in line with that of the USA and Western Europe.

The ERA's underlying principle is the concept of "good faith" within employment relationships. The Government has established codes of good faith in relation to bargaining for collective employment agreements between unions and employers.

The ERA is supported by a number of other statutes relating to different aspects of employment. In addition, large areas of the law, especially relating to the procedures to be followed in employment relations, remain as determined by Judge-made common law.

### **20. Minimum Employment Conditions**

As set out in legislation these are currently as follows:

- Employees must have written contracts ("employment agreements").
- Annual Leave: full-time employees are entitled to 3 weeks paid holidays every year, due to increase to 4 weeks in 2007.
- Sick Leave: employees who have worked for more than 6 months are entitled to a total of up to 5 days paid leave in each year if they, their spouse or a dependant is sick.
- Bereavement Leave: employees who have worked for more than 6 months are entitled to 3 days leave on the death of any of the specified close family members, and may be entitled to 1 day's leave in the event of any other genuine bereavement.
- Public Holidays: there are 11 public holidays in every year. Employees who would otherwise have worked on that day must be paid for the holiday at their normal rate. Employees working on a public holiday must be paid time and a half.
- Minimum Wages: are specified for all employees (depending on age).
- Parental Leave: there are various provisions for different types of parental leave.
- Overtime: there remains a provision retaining the concept of a 40 hour/ 5 day working week and a requirement for overtime to be paid for additional time worked. The employer can contract out of this provision

where there is a suitable written employment agreement (however time and a half must still be paid for public holidays worked).

### 21. The Employer and Employee Relationship

In the New Zealand system of employment law, the relationship of employer and employee can come into existence even though the parties may agree that the person performing the work is an independent contractor (who does not have the benefit of certain employee protections and holiday entitlements) and is not an employee. However with care, and depending on the particular circumstances, it is possible in many situations to provide by contract that the relationship is not to be one of employer and employee with the provider of services being classed as an independent contractor.

This can have significant advantages for the parties involved both in relation to employment law and for taxation and other purposes.

### 22. Termination, Change and Redundancy

The parties are free to agree to a redundancy formula providing for a defined minimum period of advance notice (or possibly none at all) and for a defined redundancy payment (or possibly none at all). If no payment is provided for then none is required although there may be future disputes on this topic.

The laws of procedural fairness are strictly applied to the redundancy process, however the common law now indicates that employment contracts do not have to provide for a redundancy compensation payment as such.

Employees can be dismissed for misconduct or non-performance, but only if very strict conditions are met. Unless an employment contract contains a valid provision for termination on the basis of expiry of a trial, or fixed period, or failure to perform, or in a redundancy situation, employers are generally not permitted to dismiss employees on notice.

Claims for unfair dismissal are treated as personal grievances. Strict procedural fairness requirements are imposed. Failure to observe these requirements may invalidate an otherwise justifiable dismissal and entitle the employee to compensation and/or reinstatement. Personal grievance claims will in the first instance be heard by the Employment Relations Authority. The ERA strongly encourages mediation beforehand.

### **23. Occupational Health and Safety**

There is, in general, no provision in New Zealand law for personal injury claims, including claims by employees against employers. However, there are strict health and safety in employment laws and breaching these may result in substantial fines and awards of compensation to employees.

### **24. Accident Compensation**

A limited level of compensation is provided for personal injuries, whether sustained in or outside employment, under the Accident Rehabilitation and Compensation Insurance Act 1992 as amended by the Accident Insurance Act 1998. As noted under "tax", this is funded by levies charged on employers and also the self-employed. It is a substitute for personal injuries claims and litigation, which are generally not permitted (although limited amounts can be awarded to victims from financial penalties awarded against employers under the Health and Safety in Employment Act 1992 and moderate amounts are occasionally awarded by way of exemplary damage in some civil litigation).

### **25. Anti-discrimination Provisions**

The Human Rights Act 1993 contains a number of provisions prohibiting discrimination based on race, gender, age and other factors (and there are some similar provisions in the Employment Relations Act). There is also legislation requiring equal pay for women in the workforce.

### **26. Superannuation**

There is no compulsory superannuation requirement in New Zealand. Employers are not required to contribute towards employee superannuation schemes and employees are not required to have or contribute to any form of superannuation.

A government Superannuation Fund was established in 2001. However, funding for this is allocated out of normal taxation. Even when the Fund is fully established it is intended to be only a partial contributor (between 15-30%) to total annual superannuation needs.

### **27. Industrial Climate**

The power of the union movement in New Zealand was greatly reduced as a result of a combination of the removal of special protective statutes and other changes in the 1990s. Union

membership and the incidence of industrial disputes in New Zealand has fallen accordingly.

The Employment Relations Act 2000 attempts to facilitate a greater union involvement, but has not changed that position to any great extent. This is because of a general shift in attitudes among the general public, the unions themselves changing to be more in the role of service providers, and the impact of the “good faith” requirement that underpins the new law.

New Zealand is not a highly unionised country, except in some specific industries and for the larger employers.

However, it is important for prospective employers in New Zealand to obtain detailed advice and to require the preparation and execution of proper employment agreements before staff are engaged and likewise to do so before taking any disciplinary or other action involving staff. Employers also need to be aware of and observe ERA requirements in relation to collective employment agreements.

### TAXATION

#### 28. Income Tax

Individual New Zealand residents, New Zealand resident settlors of trusts, and resident companies are taxed on all income not otherwise exempt from taxation. Non-residents (whether they are individuals, companies or trusts) will be subject to New Zealand tax on all income sourced in or “derived from” New Zealand. The rate at which income tax is payable will however be affected by the type of income and any Double Taxation Agreements existing between New Zealand and the overseas taxpayer’s country of residence. In general, all income is taxable, and deductions are allowed for losses and business expenses.

As in most countries, tax rates change from time to time. The tax rates shown are correct at the time of preparing this commentary but are subject to change and should be confirmed before reliance is placed on them. In addition, detailed advice relating to each individual situation must always be taken.

#### 29. Company Tax

The company tax rate in New Zealand is currently 33%.

Companies, both resident in New Zealand and non-resident but deriving income through a fixed establishment in New Zealand,

or otherwise subject to annual assessment in respect of income sourced in New Zealand, are subject to company income tax at the standard rate. Standard OECD withholding taxes apply on interest, royalty (including know-how) and dividend income. Withholding taxes will also apply to non-residents performing contracts in New Zealand, but may under certain circumstances be avoided by application to the New Zealand Inland Revenue Department.

The intricacies of the imputation system are too complex to consider adequately in this overview but potential investors should be aware of its existence and should seek specific advice on it and its related Foreign Investor Tax Credit ("FITC") system.

International tax measures have been implemented which limit opportunities for tax avoidance through the attribution of unearned offshore income. These should be considered in detail in appropriate circumstances and include the Controlled Foreign Company ("CFC") regime; the Foreign Investment Fund ("FIF") regime; and the Settlor Trust regime.

### **30. Personal Tax**

At present income tax on personal income applies on a progressive marginal tax rate basis, with rates of 19.5% up to a threshold of \$38,000, at 33% on the excess up to a threshold of \$60,000, and at 39% on the excess over this threshold.

### **31. Trusts**

A New Zealand resident who settles assets on a foreign trust is generally attributed with the income of the foreign trust and is required to pay tax as agent for the foreign trustee at 33%.

Current year income derived by trustees and allocated to New Zealand residents (beneficiary income) is subject to normal income tax based on the beneficiary's personal tax rates as noted above, but with a minimum of 33% for most minor (ie under 16 years) beneficiaries. Income derived by resident trustees which is not allocated as beneficiary income (accumulated income) is taxed at a flat rate of 33%. Subsequent distributions to beneficiaries of accumulated income and some capital gains are taxed as follows:

- New Zealand resident trusts are generally exempt;
- Foreign trusts with no New Zealand resident settlor at the personal tax rates of the beneficiary;

- Foreign trusts with a New Zealand resident settlor at 45% penal tax rate.

The term “settlor” is broadly defined in this context to include anyone who either directly or indirectly transfers value to a trust.

### 32. Payment of Tax

Tax payable by employees is deducted by employers throughout the financial year, with employees receiving a net after tax wage or salary (referred to as “Pay As You Earn” or “PAYE”).

Self employed individuals, trustees and corporates pay tax on a self assessed basis, with a comprehensive provisional (or advance) tax regime which requires tax to be paid in 3 instalments during the year, based on expected income. An end of year top-up, or refund of any overpaid provisional tax, is determined upon the filing of self employed and corporate taxpayers’ income tax returns.

### 33. Resident Withholding Tax / Income Tax Withholding Payments

Certain categories of payments made between New Zealand residents, are required to have tax withheld at source by the payer, who accounts to the Inland Revenue Department for the tax on a monthly basis, to be credited against the recipient’s ultimate tax liability. Rates of withholding tax will vary depending upon the nature of the payment and the recipient’s expected level of income.

### 34. Non Resident Withholding Tax

Where certain categories of payments having a New Zealand source, are made to non-residents, tax must be deducted by the payer at the appropriate non-resident withholding tax rates. These rates vary depending on the nature of the income. Rates include the following:

Interest	15% of the gross
Royalty	15% of the gross
Dividends	30% of the gross
Contract Activities	15% of the gross

Depending upon specific circumstances of the payer and/or the payee these rates may be reduced under Double Taxation Agreements and may be either a final tax or an amount on

account of a final tax liability, to be determined upon the payee's filing of an annual tax return.

Points to note are:

- (i) If the payer of the interest and the recipient are not associated persons, a 2% approved issuer levy can be paid by the payer in place of levying a withholding tax on the payee. This is particularly useful where the payee is otherwise unable to obtain credit for New Zealand tax withheld, in their home jurisdiction.
- (ii) Generally, where the payer and recipient are associated persons, the withholding tax is a minimum tax unless a Double Taxation Agreement applies. The recipient's ultimate New Zealand tax liability is the higher of the withholding tax (on gross payment) and income tax (payable at normal rates) on the recipient's **net** income.

### 35. Foreign Investments

The New Zealand tax legislation contains detailed and comprehensive provisions requiring New Zealand tax resident investors to pay income tax on income derived from investment in foreign entities. Care should be taken in selecting and structuring offshore investments as tax can be payable in some instances where no real economic gain has been realised.

### 36. Goods & Services Tax (GST)

GST is a value added domestic consumption tax and applies at the rate of 12.5% on all supplies of goods or services made in New Zealand. There are however two areas where GST is not charged. The provision of financial services and residential accommodation (which are termed "exempt" supplies) are effectively outside of the GST net completely, with the consequence that the supplier is unable to obtain any credit for GST paid in the course of making such supplies. Exports from, but not imports to, New Zealand are termed "zero-rated" supplies as are most services provided to non-residents who are outside New Zealand when the service is performed. Suppliers making zero rated supplies are not precluded from claiming credits for GST paid in the course of making their supplies.

The suppliers of goods and services must furnish to the Government on a regular basis, a GST return recording the supplies they make ("outputs"), less the credits to which they

are entitled for GST paid on supplies of goods and services made to them (“inputs”). The difference between the GST on outputs and inputs is paid to, or paid by the Government via the Inland Revenue Department.

Whilst GST is not charged on the provision of long term residential accommodation, nor on the sale by one private house-owner to another, it is charged on the first sale of residential land by a developer and on the sale of building materials for building private residences.

In some industries, due to the mixture of taxable supplies at 12.5% (eg. the provision of meals and medical services) and exempt services (eg. the provision of long term residential accommodation) special blended rates have been set to reflect an average apportionment.

This applies to larger duration stays in motels, hotels, retirement homes and private hospitals offering a greater service than merely accommodation. These rates vary between 7.5% and the full rate of 12.5%, depending on the circumstances.

### **37. Entertainment Tax**

Entertainment tax is not in fact a “tax” but is described as such because it reduces the amount of deductions that may otherwise be made by a business in respect of expenditure on “entertainment”. Entertainment is a defined term within the legislation, with the allowable level of deduction generally being reduced to 50%.

### **38. Capital Gains Tax**

There is no general capital gains tax in New Zealand, although certain gains made on capital assets can be brought within the income tax net. This is generally where the assets form part of an income generating activity, such as subdivision of land or assets acquired with an intention of resale at a profit.

### **39. Accident Compensation**

Accident Compensation Corporation levies are payable by employers at rates varying each year and depending on employer industrial classification.

Levies are also payable by employees and other “earners” currently at the rate of 70 cents per \$100 of income for any one employee. The premium ceases when liable earnings per employee reach a certain threshold.

## Doing Business in New Zealand

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### 40. Other Taxes

Other taxes relevant for doing business in New Zealand include:

- Local body rates
- Gift duty
- Customs duties
- Fringe benefit tax (payable by the employer but tax deductible as an expense).
- Specified superannuation contribution withholding tax payable on employer contributions to superannuation funds.

Stamp duty has been abolished in New Zealand.

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