Establishing a business in New Zealand

A guide for international business

2010

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Introduction

New Zealand is an open and competitive economy with a population of just over 4.3 million.

New Zealand has a range of strong manufacturing and service sectors which complement a highly efficient agricultural sector. The economy is strongly trade-oriented with the agricultural, horticultural, forestry, mining, energy, and fishing sectors all playing an important role in the export sector and employment. Overall, the primary sector contributes over 50% of New Zealand's export earnings.

Foreign investment is welcomed and all levels of government are keen to promote business, economic development and employment growth. Minister of Finance Hon. Bill English reiterated this in the December 2009 economic update, where he stated that "the Government's firm focus in 2010 will be achieving higher economic growth and giving businesses the confidence to invest and create jobs".

In the most recent World Bank Doing Business 2010 survey report, New Zealand was ranked as the second best country in terms of the ease of doing business, just behind Singapore [and ranked 1 in the Starting a Business category]. The findings in this survey compliment the findings in the 2010 Index of Economic Freedom, compiled by the Wall Street Journal and the Heritage Foundation, which ranked New Zealand fourth in the world on the economic freedoms measured.

New Zealand has also been ranked the least corrupt country by Transparency International in its Corruption Perceptions Index 2009.

New Zealand's economic growth before the global financial crisis was strong. New Zealand's strong primary sector has also meant New Zealand has weathered the crisis better than a number of other developed nations.

The strength and durability of New Zealand's economy can largely be attributed to the following factors:

- a strong primary sector that is quick to respond to global opportunities
- a marked increase in the flexibility of the economy, which has led to a much more dynamic economy able to respond to shifts in markets and manage significant economic shocks
- a generally sound and sustainable macroeconomic framework, which has led to a marked reduction in economic volatility, allowing households and businesses to plan for greater certainty, and
- a marked increase in the efficiency of the government sector.

All of this highlights that, notwithstanding the international credit crunch and downstream issues, the New Zealand business environment is sound. Aspects such as a reasonably predictable policy environment, clear property rights, and high levels of trust and transparency provide a sound basis for sustained growth.

This guide for international business 2010 is intended to:

- provide an introductory overview to doing business in New Zealand
- answer some preliminary questions frequently asked by those unfamiliar with the New Zealand economy.

For more comprehensive professional advice, please contact either the Auckland or Wellington offices of Minter Ellison Rudd Watts, details of which can be found at the back of this guide.

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System of government

New Zealand has a democratic parliamentary government system, based on the Westminster system of the United Kingdom. New Zealand is a common law country, whose law is developed and shaped by legislation and, through the decisions of an independent judiciary.

Parliament and Government

The New Zealand Parliament makes law through a process of examining, debating and passing Bills. It has a single chamber, the House of Representatives. This means that for a Bill to be enacted into law it only needs to be passed through this one House, currently made up of 122 Members of Parliament, or MPs. The Governor General carries out a formal constitutional function by signing Acts into law once they have been passed by the House.

Every three years, Parliament is elected using the Mixed Member Proportional ("MMP") system, which replaced the previous First Past the Post system in 1996. MMP works using two votes. The first is the 'Party Vote', which determines each party's share of seats in Parliament, and the second is the 'Electorate Vote', which determines who will represent each geographical electorate in Parliament. Generally, a majority of 61 seats is required to govern, which can be made up by a single majority party or a group of parties. After an election the party (or group of parties) with the majority of seats in the House forms a Government. The leader of the largest party in Government will generally become the Prime Minister and lead a Cabinet of around 20 Ministers.

The MMP system allows for minor parties to have a place in Government. Previously, the two main political parties – the centre-right National Party and the centre-left Labour Party – had been alternately creating one party majority Governments. Since the introduction of MMP both major parties have consistently required the support of smaller parties to form a Government.

New Zealand currently has a minority National Government, after the general election in November 2008. The Government was formed immediately following the election and is built on support agreements between National and three minor parties. Prime Minister Hon. John Key is the current leader of the National Party.

Rather than a formal coalition arrangement, National has negotiated 'confidence and supply' agreements with ACT, United Future and the Maori Party. These parties are outside Government, but have each agreed to provide the National Party with support on confidence and supply matters (votes that a Government must win to stay in power), receiving in return consultation and cooperation on a variety of issues. In addition, the leaders of the three parties, and the deputy leader of the ACT Party, have been given Ministerial positions outside Cabinet, despite not formally being part of the minority Government.

According to the Prime Minister, "at the heart of the Government's economic plan lies six main policy drivers: a growth-enhancing tax system; better public services; support for science, innovation and trade; better regulation, including regulations around natural resources; investment in infrastructure; and improved education and skills."

The next election must be held before the end of 2011. Recent opinion polls suggest the Government retains a high level of public support.

Complementing the roles of the executive Government and Parliament, the judiciary applies the law by interpreting the legislation passed by Parliament. It hears and decides cases by applying the relevant law and undertakes judicial review of administrative decisions. The judiciary is independent and generally operates under an open system. Most courts are public and New Zealanders are free to comment on the outcomes of any dispute resolution process. This feature aims to enhance public confidence and accountability in the process.

The court of final appeal is the Supreme Court, which was established by the *Supreme Court Act 2003* and replaced the Judicial Committee of the Privy Council which was based in the United Kingdom. The Supreme Court is made up of five judges and is presided over by the Chief Justice.

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New Zealand's international trade profile

With a population of just over 4.3 million, trade is essential to New Zealand's continued prosperity and is a fundamental component of the Government's broader economic policies, designed to promote higher sustainable growth. New Zealand therefore has one of the more open economies in today's global trading system.

New Zealand's top five export destinations, as well as import sources, are Australia, the People's Republic of China, the United States of America, Japan, and the United Kingdom. New Zealand's export profile continues to be dominated by agricultural commodities, with dairy, meat and forestry products constituting the top three export commodities.

New Zealand is committed to an open, rules-based international trading system and, in this regard, is an active participant in the World Trade Organization ("WTO"). Its market access commitments are among some of the most extensive and liberal in the WTO.

New Zealand is also party to a range of regional, bilateral and multilateral free trade agreements ("FT Agreements"). The most notable of these is its long-standing Closer Economic Relations Agreement with Australia where almost all barriers to trade in goods and services have been eliminated. Australia and New Zealand have one of the most open economic and trade relationships between any two countries, with both countries moving progressively towards much closer integration of policies, laws and regulatory regimes through processes of coordination, mutual recognition and harmonisation. New Zealand has FT Agreements with a range of its trading partners, including Brunei, Chile, Singapore, Thailand, the People's Republic of China and the Association of South East Asian Nations, all of which tend to reinforce the relatively open nature of the New Zealand economy. More recently, FT Agreements with Hong Kong and Malaysia have been signed but are not yet in force. Negotiations on a FT Agreement with the Gulf Cooperation Council (comprising Bahrain, Oman, Kuwait, Saudi Arabia, the United Arab Emirates and Qatar) have concluded but the agreement is not yet signed. New Zealand is currently negotiating FT Agreements with Korea and India.

Establishing a business presence

Overview

Trading with New Zealand

It is possible to do business with New Zealand companies without setting up a formal business structure in New Zealand. The following issues will require consideration:

- New Zealand tariffs apply to a limited range of goods imported from overseas. If, however, a local manufacturer is licensed to produce the goods in New Zealand, the issue of tariffs will only apply to any imported components
- agency and distribution arrangements can be entered into freely and are not the subject of specific regulation. The terms of any contract between agent and principal must therefore carefully address all aspects of the relationship.

Other legal issues that may arise include:

- protection of intellectual property rights
- the law that the parties choose to govern the contract, the relevant forum for enforcing the contract and the possible impact of the United Nations' *Convention on Contracts for the International Sale of Goods* (New Zealand is a party to that Convention)
- security for payment, including title retention
- dispute resolution and the relevant forum for settling disputes
- currency of payment and protection against exchange rate fluctuations
- potential product liability claims.

There are no exchange controls at the border. Persons arriving in or leaving New Zealand must declare if they are carrying in excess of NZ$10,000 cash or foreign currency equivalent in cash or cash equivalent.

There are anti-money laundering requirements for financial institutions to report cash transactions over a certain limit, as well as suspicious transactions. In 2009 new anti-money laundering legislation was introduced to New Zealand creating significant new obligations for financial institutions. The legislation is not yet fully in force. The Government have yet to advise when the legislation will be fully in force, but we expect this to occur in late 2011 or early 2012. New requirements include an obligation to carry out 'customer due diligence' on every new customer, and to maintain an ongoing anti-money laundering programme.

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Trading in New Zealand

Foreign companies usually establish a business presence in New Zealand by:

- establishing or acquiring a New Zealand subsidiary company, or
- establishing a branch office.

The decision on whether to establish a subsidiary or branch office will generally depend on commercial and perhaps taxation considerations, rather than legal considerations.

The following table sets out the main legal differences between establishing a company in New Zealand and doing business through a branch office established in New Zealand.

Subsidiary company	Branch office
Companies law	
• separate legal entity registered with the Registrar of Companies and given a unique identifying number • liabilities remain with the subsidiary in the absence of guarantees and like arrangements, or if the subsidiary trades while insolvent	• not a separate legal entity (i.e. part of the foreign company) • registered with the Registrar of Companies as an overseas company and given a unique identifying number • liabilities remain with the foreign company • must not commence business until the name of the foreign company has been reserved
Overseas investment regulations	
• approval may be required before subsidiary is acquired or established	• approval may be required before assets or land are acquired
Taxation	
• resident for New Zealand tax purposes • taxed on all income wherever sourced at the corporate tax rate of 30%* • dividends paid by the subsidiary will be subject to New Zealand non-resident withholding tax ("NRWT") at a rate of 30% which may be reduced under a double tax agreement. NRWT on dividends can be eliminated to the extent that the dividend is paid out of fully taxed profits	• taxed on all income attributable to the branch at the corporate tax rate of 30%* • may be affected by double taxation agreement • no New Zealand tax on repatriation of branch profits • to parent
Debt: equity funding ratio	
• subsidiary's interest deductions will be limited if the ratio of debt to assets of its New Zealand group exceeds both 75% in New Zealand and 110% of the debt to assets ratio of its worldwide group • from the start of the 2011/12 income year, the permitted debt to assets ratio of the New Zealand group will decrease to 60%	• branch's interest deductions will be limited if the ratio of debt to assets of its New Zealand group exceeds both 75% in New Zealand and 110% of the debt to assets ratio of its worldwide group • from the start of the 2011/12 income year, the permitted debt to assets ratio of the New Zealand group will decrease to 60%
Exchange controls	
• financial institutions must report significant cash transactions and transfers and any suspicious transactions	• restrictions and reporting requirements apply to transactions between a company's branch and head office
Ongoing administrative responsibilities	
• must lodge annual returns and audited financial statements with the Registrar of Companies • must hold a shareholder meeting (or pass a resolution in lieu of meeting) each year • required to maintain certain registers (e.g. directors, shareholders)	• must lodge annual returns and audited financial statements (including audited branch financial statements) with the Registrar of Companies • the New Zealand branch is not required to hold annual shareholder meetings or maintain registers

* The corporate tax rate will decrease to 28% from the start of the 2011/12 income year.

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Companies

Regulation

Company law is regulated by the provisions of the *Companies Act 1993*.

The activities of companies listed on the New Zealand Stock Exchange ("NZSX") are also regulated by the NZSX Listing Rules.

Certain activities of companies, for example issuing securities to the public, are regulated by the New Zealand Securities Commission and the *Securities Act 1978*.

Financial reporting is regulated by the *Financial Reporting Act 1993*.

Takeovers are regulated by the Takeovers Code which is administered by the Takeovers Panel.

Registration

Any person, either alone or together with another person, may apply to register a company under the *Companies Act 1993*. A company, unless restricted by its constitution, has the full capacity of a natural person.

Each company is allocated a unique identifying number on registration.

Registration entitles the company to carry on business anywhere in New Zealand.

Each company must:

- register its name
- have a registered office
- have at least one director and one shareholder (who may be the same person)
- usually file appropriate financial information on an annual basis.

Provided that all necessary information is available, companies can be registered and trading within one business day.

Additional business registrations for income tax and goods and services tax purposes will also usually be required.

Partnerships

In New Zealand, a partnership is the relationship which exists between persons carrying on a business in common, with a view to profit.

Partnerships (other than limited partnerships) are regulated by the *Partnership Act 1908*, together with the terms of any agreement between the partners.

Because a partnership (other than a limited partnership) is not a separate legal entity:

- each partner is the agent of the other partners and may make contracts, undertake obligations, and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business
- arrangements between partners will protect partners in their relationship with each other. Third parties without knowledge to the contrary, however, are protected from actions committed by partners beyond their authority
- each partner is personally liable, jointly and severally, for the liabilities of the partnership. The liability of each partner is unlimited
- the property of the partnership is owned by the partners personally as joint owners
- each partner is liable personally, jointly and severally, for torts committed by the partners.

Different rules, however, apply to limited partnerships (see below).

The partnership must submit a joint return of income to the New Zealand Inland Revenue disclosing its income, allowable deductions and the distribution of profits to partners, although the partnership itself will not be assessed for income tax. The partners individually must submit a separate return of income to Inland Revenue and pay tax on their share of partnership profits.

A partnership, other than a limited partnership, does not have to be formally registered.

Limited Partnerships

The *Limited Partnerships Act 2008* established a new international standard limited partnership vehicle, replacing and repealing the existing form of limited partnership known as a special partnership.

A limited partnership must have at least one general partner and one limited partner. A person may not be both a general partner and a limited partner of the same limited partnership at the same time.

General partners are responsible for the management of the limited partnership and have unlimited liability for the unpaid debts and liabilities of the limited partnership incurred while that person is a general partner.

Limited partners' liability for the debts or other liabilities of the partnership will generally be limited to the amount of any unpaid committed capital. This limited liability may be lost in certain circumstances where a limited partner involves itself in the management of the partnership, when it will have unlimited liability as a general partner with respect to the relevant transactions.

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"Safe harbours", such as investor involvement on an advisory committee, are provided for in the legislation.

Limited partnerships are formally registered in a similar manner to companies. However, the partnership agreement is not registered and details of limited partners (although required to be filed) may not be searched by the public.

A limited partnership is a separate legal entity. For New Zealand tax purposes a limited partnership is not a tax paying entity and is treated as fiscally transparent (subject to certain limits on utilisation of tax losses). The loss limitation rules specific to limited partnerships act to limit the amount of deductions a limited partner can claim up to the amount of their capital contributions (amounts over which they are not personally liable for). Deductions denied in one income year may be able to be carried forward and claimed in a subsequent income year. There are also anti-streaming rules which prevent the streaming of particular items of income or expenditure to individual limited partners.

Limited partnerships are also subject to the general tax implications of carrying on a partnership business (for example, the tax treatment of partners and partnership property on entry to and exit from the partnership, and disposals of partnership property).

New Zealand's business rules

Foreign investment rules

Generally speaking, New Zealand's foreign investment law encourages foreign investment in New Zealand. The regulatory regime reflects this general policy while maintaining a minimal level of control to discourage undesirable investment.

Foreign investment is regulated by the *Overseas Investment Act 2005* ("*OIA*") and the *Overseas Investment Regulations 2005* ("*OIR*"). Penalties for failure to comply with any of the requirements of the *OIA* or the *OIR* are set out in the *OIA*.

The Overseas Investment Office ("OIO") is responsible for screening all investment proposals that fall within the criteria set out in the *OIA* and the *OIR* and monitoring compliance with any conditions of a consent granted under the *OIA*.

Certain overseas persons who propose to acquire, or acquire control of, significant or strategic assets in New Zealand will require the consent of the OIO (given either by the relevant minister(s) or under delegation). Certain transactions do not require the consent of the OIO. The OIO makes its decisions in accordance with the criteria set out in the *OIA* and the *OIR*.

'Overseas persons'

The *OIA* defines an 'overseas person' as:

- an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand, or
- a body corporate that is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand, or
- a body corporate (A) if overseas person(s) have 25% or more of any class of A's securities or the power to control the composition of 25% or more of A's governing body or the right to exercise or control the exercise of 25% or more of the voting power at a meeting of A, or
- a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or a unit trust) (B), where 25% or more of B's partners or members are overseas persons, or the overseas person(s) have a beneficial interest in or entitlement to 25% or more of B's profits or assets (including on B's winding up), or the overseas person(s) have the right to exercise or control the exercise of 25% or more of the voting power at a meeting of B, or
- a trust (C) where 25% or more of C's governing body are overseas persons, or the overseas person(s) have a beneficial interest in or entitlement to 25% or more of C's trust property, or 25% or more of the persons having the right to amend or control the amendment of C's trust deed are overseas persons or 25% or more of the persons having the right to control the composition of C's governing body are overseas persons, or
- a unit trust (D) where the manager or trustee, or both, are overseas persons, or where overseas person(s) hold 25% or more of the beneficial interest in or entitlement to D's trust property.

An associate of an overseas person may also be treated as if they were an overseas person for certain purposes.

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Transactions requiring consent of Overseas Investment Office

In general, an overseas person is required to obtain the consent of the OIO if it proposes to acquire, or acquires 'control' of sensitive land or significant business assets in New Zealand. Control is generally associated with an overseas person obtaining a 25% or more ownership or controlling interest in any asset or land.

Consent required for the acquisition of sensitive land

- Consent is required if an overseas person or an associate of an overseas person wishes to acquire sensitive land. (Refer page 29 where sensitive land is defined and further discussed).

Consent required for the acquisition of significant business assets

An overseas investment in significant business assets is the:

- acquisition of the control of 25% or more of the securities or voting power in a New Zealand company (or any New Zealand individual, corporation, association or combination of those), or the increase of its beneficial interest in the securities or voting power of the company (having previously exceeded the 25% threshold), or the acquisition of control of the appointment of 25% or more of the board or management of the company, and where, in each case, the value of the securities or the consideration for the transfer of the securities or the value of the assets of the company (and its subsidiaries, if any) exceeds NZ$100 million, or
- establishment of a business in New Zealand where the business is carried on for more than 90 days in any one year (whether consecutively or in aggregate) and the total expenditure expected to be incurred in setting up the business exceeds NZ$100 million. However, consent is not required if the overseas person was lawfully carrying on business in New Zealand on 15 January 1996, if the investment requires consent only because it falls within this category, and
- acquisition of property (including goodwill and other intangible assets) in New Zealand used in carrying on business where the total consideration paid or payable for the assets exceeds NZ$100 million.

Review of foreign investment rules

The Government is currently reviewing the foreign investment rules in order to make foreign investment in New Zealand simpler and more attractive to investors, while at the same time safeguarding New Zealand's sensitive land, assets, and resources.

Matters which the Government has indicated it will consider amending are the current rules around 'strategic assets', the $100 million threshold for business assets and the scope of the definition of 'sensitive land'.

The detail of such changes to the *OIA* has not yet been announced.

Transactions not requiring consent of Overseas Investment Office

Certain transactions are exempt under the *OIR*, from the requirement to obtain the consent of the OIO. These transactions include, among other things and under certain circumstances:

- transactions where there is internal restructuring but no change in the ultimate beneficial ownership, or
- certain financing transactions, particularly the enforcement of a security arrangement, or
- certain trust transactions, or
- transfer of assets to the overseas beneficiaries of a deceased estate, or
- certain transactions of life insurance companies, and superannuation schemes (of whom at least 75% of the beneficiaries are New Zealand citizens or residents), or
- assets acquired as a result of the *Property (Relationships) Act 1976*
- certain underwriting and sub-underwriting transactions, or
- certain small increases in shareholding where there is already a consent in place.

The OIR also give the Minister of Finance (in conjunction with the Minister of Lands in the case of transactions involving land) a discretionary power to exempt any person or transaction from any requirement or requirements provided in the *OIA* or the *OIR* (although this discretion is likely to be exercised only in exceptional circumstances).

Criteria for transaction consent

Consent must be attained before a transaction takes effect. A retrospective application may be made, subject to fines and penalties. Consent will only be granted to a proposal for the acquisition of significant business assets if the relevant Ministers or the OIO are satisfied that:

- the overseas person or the individuals with control of the overseas person have business experience and acumen relevant to the proposal,

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- the overseas person has demonstrated financial commitment to the proposal, and
- the overseas person or the individuals with control of the overseas person are of good character and are acceptable under the *Immigration Act 1987*.

Offences and penalties

Potential investors should note that it is an offence under the *OIA* to:

- enter into investments requiring consent without gaining consent
- directly or indirectly defeat, evade or circumvent the operation of the *OIA*
- resist or obstruct, or deceive any person who is exercising any power or function under the *OIA* the *OIR*
- make a false or misleading statement or material omission in any communication with the OIO or in relation to the *OIA* or Regulations
- fail to comply with the *OIA* or the *OIR*, or a notice, requirement, or condition given or imposed under the *OIA* or the *OIR*.

An individual who commits an offence under the *OIA* may be liable to imprisonment for a term not exceeding 12 months, or to a range of civil penalties or fines not exceeding NZ$300,000.

Where a person acts in contravention of, or fails to comply with any condition of, any approval granted under the *OIA* or the *OIR*, the OIO may seek a Court order that securities or land, or the rights or interests in the securities or land, among other things, be disposed of.

International Transactions

Transactions involving the acquisition of an offshore entity which owns, either itself or through its subsidiaries, sensitive land or significant business assets in New Zealand (described as 'international transactions' by the OIO) may require consent under the *OIA* despite the transaction taking place outside of New Zealand.

Guidance issued by the OIO under the previous legislation indicated this would not generally be the case and 'international transactions' did not require consent. The purpose of the current legislation differs to the previous legislation, primarily focusing on the acknowledgement that it is a privilege for overseas persons to own or control sensitive New Zealand assets. Accordingly, the OIO now advise that under the current legislation such 'international transactions' will require consent.

Acquisitions of companies and businesses

Regulation

Acquisitions of shares and businesses are regulated by:

- the *Companies Act 1993*
- the *Securities Act 1978* and the *Securities Markets Act 1988*
- the *Takeovers Act 1993* and the Takeovers Code (where the target company is a 'Code Company', being a company that:
  - is (or was in the prior 12 months) listed on a registered exchange and has voting securities on issue; and/or
  - has 50 or more shareholders)
- the Listing Rules of the New Zealand Exchange Limited ("NZX") (where either a party to the acquisition is listed or the target company is listed but not a Code Company)
- the *OIA*, the Regulations and legislation (if any) affecting the relevant industry of the corporation or business being acquired.

Matters which may need to be considered

Under the *Companies Act 1993* the following factors need to be considered:

- if the acquisition is a 'major transaction' and the purchaser and/or vendor is registered under the *Companies Act 1993*, the acquisition will require the approval of a 'special resolution' of the shareholders of the purchaser and/or vendor
- generally, a company can only give financial assistance to a person to acquire shares in the company if the board has previously resolved that the company should provide the assistance, giving the assistance is in the best interests of the company, the terms and conditions under which the assistance is given are fair and reasonable to the company, and the company can satisfy the solvency test.
- The solvency test requires that a company be able to pay its debts as they become due in the normal course of business and that the value of the company's assets is greater than the value of its liabilities, including contingent liabilities
- the acquisition by a company of its own shares is regulated and the *Companies Act 1993* requires that the solvency test be satisfied, and
- dealings by directors in the securities of companies which are not listed on the NZSX are restricted.

A company proposing to offer securities to the public for subscription must comply with the *Securities Act 1978* and the *Securities Regulations 2009*. Unless an exemption applies, prior to the allotment of securities offered to the

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public for subscription, a registered prospectus must be prepared and an investment statement must be circulated to potential subscribers. The *Securities Regulations 2009* allow a short form prospectus or a simplified disclosure prospectus to be used in specified circumstances. This is a new option that was not previously available under the *Securities Regulations 1983*.

The *Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008* have established a mutual recognition scheme which allows issuers to extend offers of securities and certain other products to members of the public in their trans-Tasman counterpart country, without needing to prepare a separate offer document.

Under the scheme New Zealand issuers can offer securities and interests in collective investment schemes into Australia by way of their New Zealand compliant prospectus. Australian issuers can offer securities and interests in managed investment schemes into New Zealand by way of their Australian compliant disclosure statement.

Under the *Securities Markets Act 1988*:

- every person who is, or becomes, the holder of a 'relevant interest' in 5% or more of any class of voting securities of a company listed on the NZSX (a 'substantial security holder'), or who ceases to be a substantial security holder, is required to give notice of that to the listed company and to NZX, the operator of the NZSX
- a substantial security holder must notify the listed company and the NZX of changes in the number of voting securities in which the holder has a relevant interest of 1% or more or changes in the nature of the holder's relevant interest
- the language used in the definition of 'relevant interest' is very wide, extending to many interests in addition to registered ownership
- trading in securities of a company listed on the NZX by a person who is in possession of information about that company which is not publicly available, but if it were publicly available would, or would be likely to, affect materially the price of the securities ("information insiders"), is prohibited. Similarly information insiders may not disclose such information or advise or encourage others to trade or continue holding securities of that company
- making statements or disseminating information about a company listed on the NZX which is false or misleading and which may influence trading of that company's securities is prohibited. It is also prohibited to take action which will, or is likely to have, the effect of creating a false or misleading appearance of trading in the securities of a company listed on the NZX.

Under the Takeovers Code, no person can:

- become the holder or controller of more than 20% of the voting rights in a Code Company (taking into account shares in the Code Company held by 'associates'); or
- increase an existing holding or controlling interest of 20% or more of the voting rights in a Code Company,

except by means of:

- an acquisition under a 'full offer' or 'partial offer' in accordance with the Takeovers Code, or
- an acquisition or allotment approved by an ordinary resolution of the shareholders of the Code Company, or
- in accordance with the Takeovers Code
- a 'creeping' acquisition, which allows a shareholder who already holds or controls between 50% and 90% of the voting rights in a Code Company to acquire up to an additional 5% of the voting rights in a 12 month period, or
- a compulsory acquisition, which allows a shareholder who already holds or controls 90% or more of the voting rights in a Code Company to compulsorily acquire the remaining voting rights in the Code Company.

Under the NZSX Listing Rules, companies listed on the NZSX cannot enter into certain major transactions and transactions involving related parties without the prior approval of the shareholders of that listed company.

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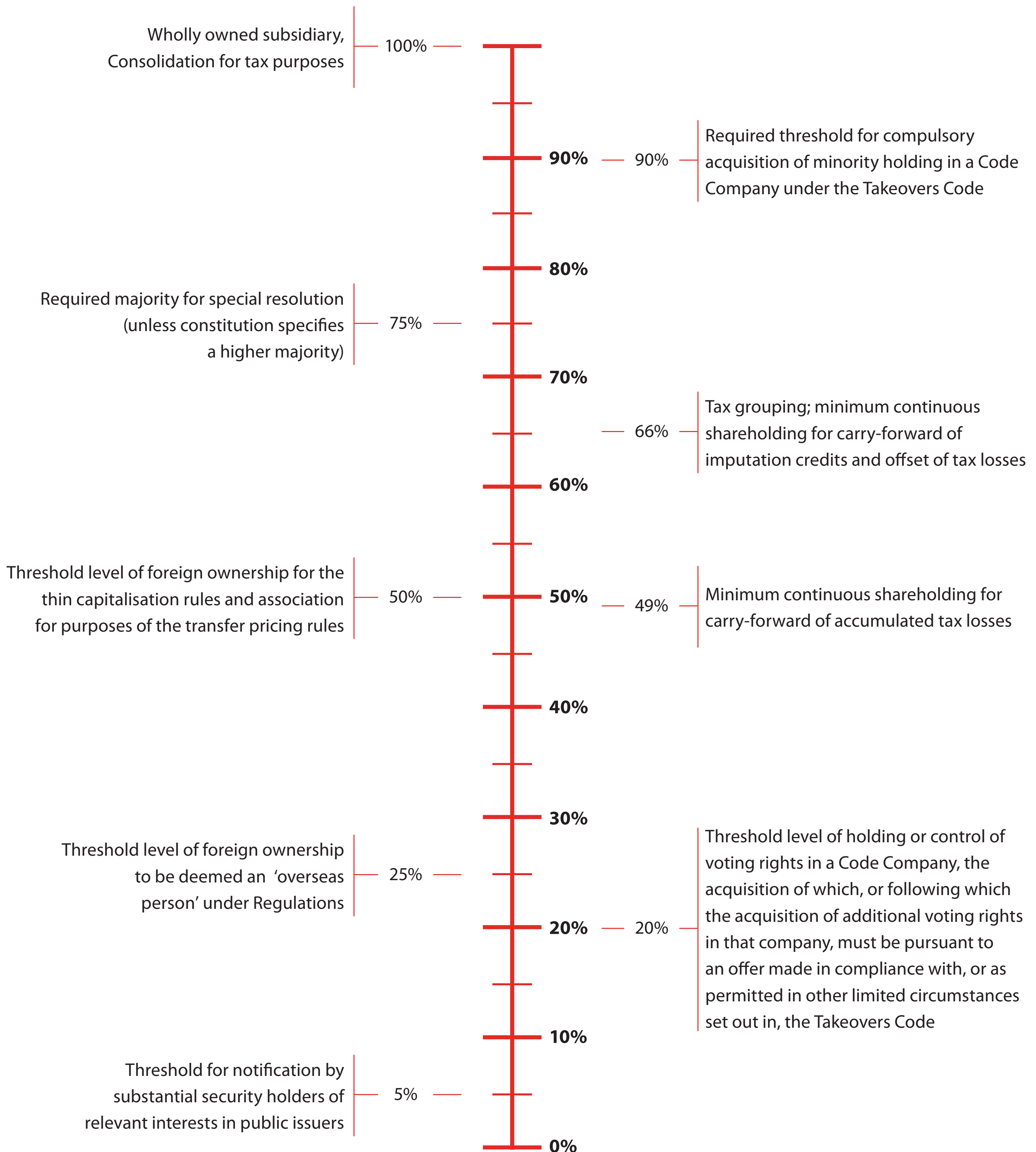
Company thresholds

The following shareholding thresholds are relevant to acquisitions of shares and/or businesses in New Zealand.



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Taxation

New Zealand imposes taxation on the worldwide income of persons (including companies and unincorporated bodies) resident in New Zealand for taxation purposes and on the New Zealand-sourced income of non-residents.

Income can have a New Zealand source even if paid outside New Zealand. Accordingly, companies and individuals doing business in or with New Zealand should be aware that income could become subject to New Zealand taxation, even though they may not have an established place of business in New Zealand.

There are double taxation agreements ("DTAs") between New Zealand and a number of countries as outlined in the table opposite. These agreements mean that, in most cases, tax is imposed only by the country of residence of the taxpayer. However, New Zealand may impose limited withholding taxes on dividends, interest and royalties and may also tax in full the profits of any commercial enterprise carried on through a 'permanent establishment' in New Zealand.

Recently New Zealand concluded new or revised DTAs with Australia, the United States of America and Singapore. These DTAs provide for reduced or no withholding tax on interest, dividends and royalties in particular circumstances. Each DTA may provide for different results.

Countries with which New Zealand has a double taxation agreement

Australia	**India**	**Russian Federation**
Austria	**Indonesia**	**Singapore**
Belgium	**Ireland**	**South Africa**
Canada	**Italy**	**Spain**
Chile	**Japan**	**Sweden**
China	**Korea**	**Switzerland**
Czech Republic	**Malaysia**	**Taiwan**
Denmark	**Mexico**	**Thailand**
Fiji	**Netherlands**	**Turkey***
Finland	**Norway**	**United Arab Emirates**
France	**Philippines**	**United Kingdom**
Germany	**Poland**	**United States of America**

* **Not yet in force**

Residence

A company is a resident of New Zealand for tax purposes if:

- it is incorporated in New Zealand, or
- it has its head office in New Zealand; or
- it has its centre of management in New Zealand; or
- the directors exercise control of the company from New Zealand (acting in their capacity as directors, whether or not decision-making by directors is confined to New Zealand).

An individual is a resident of New Zealand for tax purposes if he or she:

- has a permanent place of abode in New Zealand (whether or not he or she has a permanent place of abode elsewhere); or
- is in New Zealand for a cumulative period of at least 183 days in a rolling 365 day period.

Source of income

The determination of the source of particular items of income is dependent in most cases on the particular facts. New Zealand income tax law also lays down rules in a number of instances which deem income to have a New Zealand source. Examples include where contracts are performed in New Zealand.

Taxable income and rates of tax

Taxable income is generally computed in the same manner for both individuals and companies. It is necessary to calculate the gross income and deduct from it the allowable deductions, and any available losses to arrive at the taxable income on which tax is charged. The tax liability can be satisfied by way of tax credits to the extent they are available.

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In principle, capital gains are not subject to tax in New Zealand, although a number of types of capital gain (arising from the disposition of land or personal property) can be included in taxable income (for example where land or personal property was acquired for the purpose of disposal).

The deductions allowable are generally all those expenditures and losses incurred in gaining or producing the taxpayer's gross income, or necessarily incurred in carrying on business for that purpose. Certain expenditure is not deductible, including that of a capital, private or domestic nature.

Certain tax deductions can be claimed by a taxpayer notwithstanding that they may be of a capital nature, such as depreciation and interest.

The standard taxation year runs from 1 April each year to 31 March in the following year.

The following is a summary of the current principal rates of taxation in New Zealand for natural persons. These rates will decrease with application from 1 October 2010.

Taxable income range NZ$	Marginal rate of taxation	Marginal rate of taxation from 1 October 2010
0 – 14,000	12.5%	10.5%
14,001 – 48,000	21%	17.5%
48,001 – 70,000	33%	30%
70,001 and over	38%	33%
Companies are taxed at the flat rate of 30%, decreasing to 28% from the start of the 2011/12 income year.		
Trusts are taxed on trustee income at 33%.		

Portfolio Investor Entity regime

The portfolio investor entity ("PIE") regime came into existence on 1 October 2007 and encourages taxpayers to make investments through a managed fund, unit trust or company. This means that taxpayers will potentially pay less tax than they would by investing directly themselves. An entity that meets the definition and satisfies the requirements to be is able to elect to enter into the PIE rules. There are three kinds of PIE, the most common being the multi-rate PIE. All PIEs are not taxable on gains from trading in shares in New Zealand and certain Australian companies. Tax is paid on any income derived by a multi-rate PIE on the investors' behalf by the PIE at either 0%, 12.5%, 21% or 30%, which reflects the tax rates for individuals. For individuals this tax paid by the multi-rate PIE generally represents the final tax. Individuals do not generally need to pay any further tax to reflect their personal tax rates. There are also rules to ensure that the benefit of tax credits and other tax benefits are passed to investors by the multi-rate PIE.

From 1 October 2010, the rates at which tax is paid by a multi-rate PIE on the investors' behalf will change to 0%, 10.5%, 17.5%, or 28%.

International transfer pricing

There is legislation specifically aimed at preventing tax minimisation through transfer pricing. This can affect pricing policies between a New Zealand company and an overseas parent, subsidiary or associated company.

Companies and dividends

New Zealand imposes tax on company distributions under an 'imputation system'. Dividends are generally taxable, but can be imputed with the tax paid by the company. This tax is then allowed as a credit to shareholders against their own tax liability. Imputed dividends pass between resident companies in a manner that also transfers the imputation credit.

Dividends paid between New Zealand resident companies which are 100% commonly owned are exempt from tax in most cases.

There is a 'qualifying company' regime which may apply to a company that is closely held by five or fewer natural persons. It may also apply to a company that is held by individual shareholders who are entitled to the occupation or use of a residential property in New Zealand where the property is the only significant asset of the company. In order to be a qualifying company the company must make the appropriate elections to the New Zealand Inland Revenue.

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The qualifying company regime exempts from income tax unimputed dividends paid by the qualifying company to New Zealand resident shareholders and allows for company losses to be attributed to shareholders. The qualifying company regime will be amended from the start of the 2011/12 income year to treat these companies as fiscally transparent for income tax purposes.

When a New Zealand resident company pays a dividend to a non-resident shareholder, the dividends are subject to non-resident withholding tax ("NRWT") of 30%, 15% or the relevant DTA rate (which can be 0% in some circumstances) if an applicable DTA applies (which is a final tax in the case of dividends).

Where the non-resident shareholder has a substantial holding in the New Zealand company, to the extent that the dividend is fully imputed, a 0% NRWT rate can apply. A 0% NRWT rate will apply where the non-resident has a 10% or more direct voting interest in the company or, if not, where the NRWT under a DTA would have been less than 15% (if the 0% NRWT rate would not otherwise have applied).

Alternatively, if the company attaches imputation credits to the dividend, it may then be allowed a tax credit for all or part of the NRWT it has to withhold from the dividend. The tax credit must be passed on to the non-resident shareholder as a supplementary dividend. A supplementary dividend allows the non-resident to receive the same net amount as if there was no NRWT. The regime offers tax credit benefits in their country of residence to some non-residents.

Branch offices

A non-resident company carrying out business in New Zealand through a branch, or a permanent establishment, is subject to New Zealand income tax at the rate of 30% on the net taxable income attributable to that branch. From the start of 2011/12 income year, this rate will reduce to 28%.

Interest

Interest paid by a New Zealand resident to a non-resident with no permanent establishment in New Zealand is subject to a flat withholding tax of 15%. The person paying the interest is required to withhold and pay the withholding tax.

The withholding tax is the only tax on the interest, unless the lender and the borrower are 'associated'. In the case of two companies, they will generally be associated if there is a group of persons who:

- have a 50% or greater voting interest in both companies; or
- have a 50% or greater common market value interest; or
- control both companies by any other means.

New Zealand's DTAs generally limit the withholding tax to 10% (or 15% in some cases and in others such as the new New Zealand/Australia DTA, New Zealand/United States of America DTA and New Zealand/Singapore DTA to 0% in some circumstances).

If the lender and borrower are not associated and applicable registrations are done, the withholding tax can be avoided by the payment of a 2% approved issuer levy.

The interest paid by the New Zealand taxpayer is usually allowed as a deduction against gross income. Accordingly, there may be advantages in financing a New Zealand subsidiary by way of debt rather than equity capital. However, thin capitalisation rules can limit tax deductions for interest.

Thinly capitalised New Zealand companies, which are 50% or more controlled by a single foreign shareholder and its associated persons, are not permitted a tax deduction for interest to the extent that the debt:asset ratio exceeds the prescribed level. This is currently where the company's group debt percentages exceed both 75% of total assets of the New Zealand group to which the taxpayer belongs and 110% of the assets of the worldwide group to which the New Zealand group belongs. The permissible ratio can be increased for a company which is part of a group that is highly leveraged on a world-wide basis. From the start of the 2011/2012 income year, the prescribed debt to assets ratio for the New Zealand group to which the taxpayer belongs will decrease to 60%.

Similar rules also apply to trusts and direct investment by a foreign investor (i.e. branches and permanent establishments). There is a concession for companies that enter into financial arrangements with third parties for the purpose of on-lending. However, the concession does not apply to foreign owned banks, which are subject to a separate and more complex thin capitalisation regime.

Interest on debt substituted for equity, calculated by reference to the borrower's profits or stapled to equity, is generally non-deductible.

Royalties

Royalties are deemed to have a source in New Zealand if they are paid by a New Zealand resident (unless paid in respect of a business carried on outside New Zealand by the New Zealand resident through a fixed establishment outside New Zealand) or are paid by a non-resident and deductible for New Zealand tax purposes.

In the absence of any DTA applying, royalties derived by non-residents from New Zealand sources are subject to a 15% withholding tax on the gross royalty.

The person paying the royalty is required to withhold and account for the tax.

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The withheld tax is a final tax if the royalty is paid in respect of an artistic work (i.e. literary, drama, music).

In the case of residents of countries with which New Zealand has a DTA, New Zealand withholding tax is generally limited to an amount not exceeding 10% of the gross royalty income unless the royalties are connected with a New Zealand branch (although this depends entirely on the DTA, for example the DTA between New Zealand and Canada limits tax to 15% and the new DTA between New Zealand and Australia limits tax to 5%).

Losses

Provided shareholder continuity requirements are met, a company can carry forward its New Zealand tax losses indefinitely and can offset those losses against future taxable income.

The right of a company to carry forward tax losses is lost if a continuity of ownership test is not met. The test requires that 49% or more of all voting (and in some cases market value) rights are beneficially owned by the same persons from the beginning of the year of loss to the end of the year of offset (although part-year offsets are also allowed).

Losses can also be transferred between companies that are members of the same group, provided that certain ownership tests and other conditions are met. A 66% commonality of ownership from the beginning of the year of loss to the end of the year of offset is required (although part year offsets are also allowed).

Foreign sourced income

New Zealand residents are subject to tax on their worldwide income, with any double taxation generally being relieved by means of a foreign tax credit system. New Zealand residents holding interests in certain types of overseas entities may be subject to New Zealand tax on deemed income from those entities regardless of whether it is distributed or not, under the controlled foreign company ("CFC") or foreign investment fund ("FIF") regimes. These regimes establish methods to calculate any such income and subject it to New Zealand tax.

There have been changes to the FIF regime over the last few years. This regime applies to foreign portfolio share investments (i.e. investments of less than 10% in foreign companies). These changes were applicable from 1 April 2007. Prior to that date, a taxpayer holding a portfolio investment in a company resident in a grey list country (i.e. Australia, Canada, Federal Republic of Germany, Japan, United Kingdom, United States of America and Norway) was generally not subject to New Zealand's FIF rules.

Under the FIF regime applicable, to foreign portfolio share investments, the 'grey list' is no longer applicable. New Zealand residents will generally be entitled to apply the 'fair dividend rate' method to determine how deemed income arises for their FIF investment (although other methods are available). Under the fair dividend rate method deemed income equal to 5% of the opening market value of their total offshore share portfolio arises at the start of the tax year. The fair dividend rate method does not allow for losses to be claimed for tax purposes, but some New Zealand resident investors may be entitled to switch FIF methods and use the comparative value method which provides the ability to claim losses. The regime works on a 'pooled investment' approach for applicable investments and not on an investment by investment approach. This means all such investments must be grouped together when performing this calculation. The FIF regime does not apply to, amongst other investments, total pooled investments with a cost of NZD$50,000 or less, investments in certain Australian resident companies listed on the Australian Stock Exchange, certain Australian unit trusts, certain employee share schemes, certain Australian superannuation schemes, and investments in some New Zealand start-up or venture capital companies that migrate offshore to gain access to finance.

There have been recent changes to New Zealand's CFC regime. A CFC is a foreign company which (broadly) is controlled by five or fewer New Zealand residents, or in which a New Zealand resident has a 40% or greater control interest. Under the previous regime CFCs resident in 'grey list' jurisdictions were not subject to the CFC rules. The changes recently enacted to the CFC regime scrapped the 'grey list', and now subject New Zealand taxpayers to tax on attributed income from CFCs if the CFC generates 'passive income'. Dividends and attributed income from active CFCs are now exempt from New Zealand tax. There are a number of tests to determine whether a CFC is a passive or active CFC.

In addition thin capitalisation rules have been adapted to ensure that CFC investments are not excessively debt funded with interest deductions being claimed in New Zealand.

A regime similar to the new CFC regime will be implemented for non-portfolio interests in FIFs where there is an interest of 20% or more in the FIF.

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The proposed regime is still in the development phase and full details are yet to be finalised.

Tax concessions

New Zealand does not generally offer tax incentives to encourage investment in New Zealand.

Investors seeking to use New Zealand as an intermediary in their investment strategy should seek professional advice as to the effect of the foreign tax credit system.

Under the transitional resident tax exemption, natural persons who become a tax resident in New Zealand for the first time (or after a 10 year absence from New Zealand) are exempt from New Zealand taxation on foreign source income for the first four years of their tax residency.

New Zealand has recently introduced incentives to encourage donations to charities and non-profit organisations. The concessions are similar to those offered in the United Kingdom and Australia, with the ability of natural persons to receive refundable tax credits up to the amount of their annual net income.

A voluntary payroll giving regime has also been recently established, which allows employees to have their charitable donations deducted from their pay by their employers. This regime aims to make charitable giving easier for employees.

Goods and services tax

Goods and services tax ("GST") of 12.5% (increasing to 15% from 1 October 2010) applies generally to the supply of goods and services by businesses in New Zealand. A significant exception is for financial services which are exempt from GST. GST must be charged by New Zealand residents and by non-residents in relation to supplies made by a New Zealand branch.

Non-residents may also be required to charge GST on goods which are in New Zealand when supplied, or services which are physically performed in New Zealand (subject in both cases to an option not to charge GST if the purchaser is able to claim an input tax credit – this will be the case for most business purchasers other than those conducting exempt activities). GST is also charged on the importation of goods into New Zealand.

Exports of goods, and the provision of services to non-residents which are not consumed in New Zealand, are generally zero rated (i.e. GST is charged at the rate of 0%).

Other taxes

New Zealand operates a no-fault, Accident Compensation Corporation insurance scheme ("ACC") covering all persons (including non residents) injured in New Zealand Compensation for workplace and non-workplace accidents is provided by the New Zealand Government. This compensation is funded by levies imposed on employers, employees and motorists.

Fringe benefit tax ("FBT") is payable by all employers on any non-cash benefits provided to employees or persons associated with employees. A fringe benefit may take the form of private use or enjoyment of a motor vehicle (or the availability of a motor vehicle for such use), employment related loans, subsidised transport, contributions to certain insurance or superannuation schemes, or any benefit of any kind received by an employee. Employers will generally pay FBT on a quarterly basis (although an employer may elect to pay FBT on an annual basis). FBT is generally payable at either 49% or 61% (from 1 April 2009) of the GST inclusive value of the benefit, although if the 49% rate is used for the first three quarters the employer will have to use a multi rate calculation for the final payment, or alternatively pay FBT at 61% for that quarter. Due to changes in the marginal tax rates, from the start of the 2010/11 income year the FBT rates have changed. Under the single rate option, the 61% rate will only apply to the two first two quarters and will then decrease to 49.25%. Under the alternative rate option, the 49% rate will apply only to the first two quarters and a 43% rate will apply for the third quarter and subsequent income years. Under the options for a small business or close company the rate will decease to 55.04% and, from the start of the 2011/12 income year, further decrease to 49.25%.

Local body revenues are raised through rates levied on land owners.

There is no stamp duty or other similar document taxes in New Zealand.

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Competition (anti-trust) and consumer protection law

In New Zealand, competition and consumer protection law is largely regulated by the *Commerce Act 1986* ("*Commerce Act*"), the *Fair Trading Act 1986* ("*FTA*"), the *Consumer Guarantees Act 1993* ("*CGA*"), and the *Credit Contracts and Consumer Finance Act 2003* ("*CCCFA*").

The *Commerce Act* was closely modelled on the provisions of Australia's *Trade Practices Act 1974* which was, in turn, influenced by US antitrust law. The core principles of New Zealand's competition law are similar to those of the European Union. The *Commerce Act*:

- prohibits anti-competitive behaviour and agreements, including the taking advantage of substantial market power;
- regulates mergers and acquisitions; and
- governs the imposition of price control on particular goods and services.

The New Zealand Commerce Commission ("NZCC") is responsible for administering and enforcing the *Commerce Act*.

The NZCC may grant clearances for mergers or acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The NZCC may grant an authorisation, on public benefit grounds, for a proposed acquisition or for certain conduct that would otherwise result in a substantial lessening of competition.

In May 2009, the NZCC introduced a new 'streamlined' authorisation process whereby 'straightforward' authorisation applications can be assessed in a timely manner. This 'streamlined' authorisation process exists in parallel to the standard authorisation process, applying only if certain criteria are met. However, the 'streamlined' process is yet to be tested.

Only the Courts can impose penalties for breaches of the *Commerce Act*.

Competition provisions

Anti-competitive behaviour

The *Commerce Act* contains a broad prohibition on contracts, arrangements or understandings which have the purpose, effect, or likely effect, of substantially lessening competition in a market.

The *Commerce Act* also contains a number of specific prohibitions. Under the *Commerce Act*, the following conduct is anti-competitive and illegal:

- agreements between competitors that are likely to fix, maintain or control prices
- resale price maintenance (i.e. requiring resellers to sell products at a specified retail price), and
- excluding competitors – agreements between competitors to restrict supply to/from a party who is also a competitor, unless those agreements do not substantially lessen competition in a market, or it is not the purpose of the relevant agreement.

The Ministry of Economic Development released a discussion paper in January 2010, inviting submissions on the possibility of following international trends and criminalising cartel conduct in New Zealand. Submissions closed on 31 March 2010.

Substantial market power

It is illegal for a person with substantial market power to take advantage of that power for the purpose of:

- preventing someone from entering a market
- deterring or preventing a person from competing, and
- eliminating a person from a market.

Mergers and acquisitions

The *Commerce Act* prohibits the acquisition of shares or business assets if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

The acquisition of a foreign company by another foreign company may be subject to the *Commerce Act* if the acquisition affects a market in New Zealand.

Consumer protection

The consumer protection provisions of the *FTA*, *CGA* and *CCCFA* aim to protect consumers by:

- prohibiting misleading or deceptive conduct. This veto is extremely broad and includes not only the making of untrue claims or statements but also omitting to give all relevant details and failing to correct mistaken impressions; and
- implying warranties into sales transactions with consumers. The *CGA* implies warranties into sales transactions relating to the quality and standard of goods and services supplied. These warranties cannot be excluded from supply transactions with consumers other than where goods or services are acquired for commercial purposes and this is stated in the supply contract; and

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- requiring creditors who enter into consumer credit contracts to provide consumers with a written disclosure statement containing specific information about the terms of the contract. The *CCCFA* places restrictions on the means of applying interest and provides rules and guidelines for fees, payments, credit-related insurance, repayment waivers, extended warranties and cancellation.

Specific industry regulation

The NZCC also administers certain sector-specific regulations which apply to electricity lines businesses, gas pipelines, telecommunications companies, airports, and the dairy industry.

Penalties for breaching the Commerce and Fair Trading Acts

The penalties for breaching the *Commerce Act* are substantial. The maximum penalty (per contravention) for a corporation breaching the restrictive trade practices provisions of the *Commerce Act* is the greater of NZ$10 million, three times the value of any commercial gain resulting from the contravention or, if the commercial gain cannot be readily ascertained, 10% of group turnover.

A corporation may be liable for a maximum penalty of NZ$5 million for breaching the business acquisition provisions of the *Commerce Act*.

A breach of the *FTA* exposes a corporation to a maximum penalty of NZ$200,000 per offence.

Individuals can also incur penalties of up to NZ$500,000 (per contravention) for breaching the *Commerce Act* and up to NZ$60,000 per offence for breaching the *FTA*.

In addition, other remedies such as compensatory damages, exemplary damages, injunctions, divestment orders and orders excluding individuals from management may be awarded by a court.

The NZCC also has the power to apply to a Cease and Desist Commissioner to obtain Cease and Desist orders to restrain anti-competitive conduct or to require a person to do something to restore competition or the potential for competition in a market. These powers have only been used once by the NZCC since their introduction in 2001. A Cease and Desist order may be made where an independent Cease and Desist Commissioner, appointed for this sole purpose, is satisfied that:

- a prima facie case has been made out that there is anti-competitive conduct that contravenes the *Commerce Act*, and
- it is necessary, and in the public interest, to act urgently to prevent a particular person or consumers suffering serious loss or damage.

Leniency and co-operation

In December 2004, the NZCC introduced a Leniency Policy to encourage the reporting of cartels. This policy was subsequently revised in March 2010. Under the revised Leniency Policy, immunity from NZCC initiated proceedings will be granted to the first person involved in a cartel to inform and co-operate fully with the NZCC provided the following conditions are met:

- the applicant must be the first person in the cartel to approach the NZCC;
- all relevant available information must be provided to the NZCC;
- the applicant must fully and truthfully co-operate with the NZCC on a continuing basis;
- individuals must appear as a witness if required by the NZCC and body corporates must encourage current and former directors, officers or employees to give evidence if required;
- the applicant must confirm that their involvement in the cartel has ceased, unless the NZCC requires cartel participation to continue for evidentiary purposes; and
- confidentiality in respect of the leniency application must be maintained.

The revised Leniency Policy introduced a marker system, allowing leniency applicants to preserve their position at the front of the line for a limited time while they collect further information to submit a formal leniency application to the NZCC. If an applicant is not eligible for immunity, the revised Leniency Policy provides for an 'amnesty plus' regime where an applicant reports another separate (new) cartel for which they secure immunity for the new cartel and increased cooperation discounts for the first cartel. An applicant may be eligible for immunity even if the NZCC is already aware of or investigating a particular cartel if the NZCC determines that it has insufficient evidence to warrant initiating proceedings.

The NZCC's Co-operation Policy (i.e. where immunity is unavailable) is now formally included in the revised Leniency Policy.

The NZCC also has a general Co-operation Policy which operates in relation to the *CCCFA*, *Dairy Industry Restructuring Act 2001*, *Electricity Industry Reform Act 1998* ("*EIRA*") and *FTA* (the *EIRA* limits the ability of electricity generators to be involved in distribution and vice versa; the NZCC has the ability to grant exemptions).

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Under this policy, the NZCC may take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete co-operation.

The *Commerce Act* implications for business conduct and transactions can often be complex. It is for this reason that it is advisable to seek professional advice on the issue before carrying on business in New Zealand or entering into a transaction which may affect a market in New Zealand.

Intellectual property

Laws dealing with the protection of intellectual property in New Zealand can be classified into the following areas:

- patents
- registered designs
- trade marks
- domain names
- copyright
- circuit layout
- plant variety rights
- trade secrets, confidential information
- geographical indications
- unfair competition, passing off and *FTA* actions.

Much of New Zealand's intellectual property legislation has undergone reform to ensure that New Zealand meets its international obligations under the *WTO's Agreemen*t on *Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement").

Patents

The New Zealand law relating to patents is contained in the *Patents Act 1953*. A patent is a monopoly right giving exclusive use of an invention.

A patent application can be filed with a provisional (followed by a complete) specification or a complete specification. The term of a patent, if granted, runs for 20 years from the date of filing of the complete specification, provided renewal payments are made when due. For a patent application to be successful, the invention must:

- be industry applicable
- contain an inventive step that is 'non-obvious', and
- be new or novel.

A patent application can also be filed in New Zealand for protection overseas through the *Patent Co-Operation Treaty* ("*PCT*"). Under the *PCT* system, a patent application can be made that designates other countries that participate in the *PCT*. This application will simultaneously seek protection for the invention in each of the designated countries.

Since a Court of Appeal decision in 2000, Swiss-type claims, for example, "*The use of composition X in the manufacture of a medicament for treating disease Y*", have been allowed in New Zealand.

Also, since an amendment to the *Patents Act 1953* in 2002, it has been possible to rely on a regulatory review exception to establish that a patent is not infringed by acts done for the purposes of developing and submitting information required under New Zealand law or the law of any other country that regulates the manufacture, construction, use or sale of any product.

A draft *Patents Bill*, intended to replace the *Patents Act 1953*, is currently progressing through Parliament. The changes proposed by the Bill include:

- strengthening the criteria for granting patents to ensure that patents are only granted for genuine innovations. There will be an absolute novelty standard. Novelty will be measured against all matter made available to the public anywhere in the world, rather than the present 'local' novelty test
- computer programs cannot be patented to be excluded from patenting (the full extent of the exclusion is currently being considered)
- methods of medical treatment for humans (including therapeutic, surgical or diagnostic methods) cannot be patented
- examination for inventive step and usefulness (as well as novelty) i.e. allowing the refusal of an application if the claimed invention is considered by the Examiner to be obvious, or not useful, and
- establishment of a Māori advisory committee.

Registered designs

New and original features of shape, configuration, pattern or ornament, as they are applied to an article, may be registered under the *Designs Act 1953*. The *Regulatory Improvement Bill* proposing amendments to the *Designs Act 1953* has had its second reading in Parliament. The Bill will have a third reading before it is passed into law. Proposed changes include:

- provision of a statutory basis for the restoration of lapsed design applications, and
- provision of a statutory basis for the restoration of lapsed design registrations.

Design registration gives the owner the exclusive right to use that design in New Zealand. 'Use' of the design includes the exclusive rights to make, import/sell or hire the article to which the design has been applied, or license out the design.

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Registered protection is for an initial period of five years, renewable for two additional five-year periods, giving a possible total protection period of 15 years.

In New Zealand, industrial designs, for example designs which are industrially applied, may also be protected through copyright law. The period of protection given to industrial designs under the *Copyright Act 1994* ("*Copyright Act*") is 16 years. One advantage of design registration, over copyright protection, is that the certificate of registration serves as evidence in court of ownership of, and the right to, the design. In a copyright action, the 'owner' will have to prove that copyright exists in the design in order to establish an enforceable intellectual property right.

Industrial designs may also receive some protection through trade mark registration where the logo or shape marks include a design aspect.

Copyright

Copyright protects the expression of ideas, not the ideas themselves.

It is the exclusive right to reproduce or to otherwise deal with original literary, artistic, dramatic or musical works, together with other protected subject matter, such as films, sound recordings, and computer programmes. It is governed by the *Copyright Act* and does not rely on a system of registration, but arises automatically on the creation of a qualifying work.

For copyright to exist, the product/object in question must 'qualify', i.e. fall into a category of work under the *Copyright Act* and be original. In order for a work to be original, there must have been a sufficient exercise of skill, judgement and labour put into the work.

Generally, the original copyright in a work will be owned by the person who actually performs or creates the work. Exceptions include work produced in the normal course of employment, and for some works, where produced under commission.

New Zealand's copyright regime is unusual in the protection it extends to industrially applied designs, although the term of such copyright is limited to 16 years. For other works, copyright generally subsists for 50 years following the death of the author/creator of the work. For films, sound recordings and broadcasts, the 50 year term runs from the end of the year the work is made or, if made available to the public, from the end of that year.

In 1998, the *Copyright Act* was amended to remove the protection previously available to copyright owners against parallel imports. However, in 2003 the *Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act* came into force, which introduced a limited nine month ban on the parallel importation of films made primarily for public showings in cinemas. The ban runs for nine months from a title's first international release, and was intended to allow studios to recoup money from cinema sales before a title becomes available for public hire.

Further reform has recently taken place acknowledging how digital technology impacts on copyright law, in the form of the *Copyright (New Technologies) Amendment Act 2008*. The definition of "copying" has been amended to include copying digital works. Other provisions include the prohibition on the manufacture of devices which circumvent technological protection measures.

Further changes balance the right of access and use by the community.

Changes to the fair dealing provisions allow format-shifting for personal use. However, this is limited to music, and permits only a single copy for each device of the music owner.

Amendments covering internet service providers' ("ISPs") obligations and liability in regard to repeat copyright infringement by internet account holders have proved controversial. Public protests have resulted in the National Government delaying the introduction of the new section 92A of the *Copyright Act,* to allow for it to be redrafted. In response, the *Copyright (Infringing File Sharing) Amendment Bill ("Bill")* was introduced into Parliament in February 2010. The *Bill* repeals section 92A of the *Copyright Act 1994* and replaces it with a three tier notice system to deter illegal file sharing. Changes proposed under the Bill include:

- copyright owners will contact internet account holders through ISPs to report misuse of their copyright works
- internet users caught illegally downloading copyright material will be given up to three infringement notices
- a *detection* notice informs the user that they have downloaded copyright material and that their actions are illegal
- a *warning* notice will be sent to the user if they infringe copyright again (and have already received a detection notice)
- an *enforcement* notice will be sent to the user if, having received both detection and warning notices, they infringe copyright once more
- after issuing an enforcement notice, the copyright owner may:
  - seek reparation costs of up to NZ$15,000 through the Copyright Tribunal

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  - apply to the District Court to suspend, for a period of up to six months, the internet accounts of the infringing user, and
- internet users will have the right to challenge any notice, make submissions to the Copyright Tribunal refuting the copyright owner's claims, and request a hearing.

Trade marks

A trade mark can be a sign, logo, colour, smell, sound or shape (provided that it can be represented graphically), which is used by a business to identify and distinguish its goods or services from those of others in the market.

The registration of a trade mark under the *Trade Marks Act 2002* gives the owner the exclusive use of that trade mark for a specified class of goods and services. For a trade mark to be registered it must have a distinctive character and not be confusingly similar to any previously registered or unregistered trade marks.

The protection period is 10 years from the date of registration. Registrations can be renewed for further periods of 10 years. Registrations are vulnerable to removal for non-use if there is a continuous period of non use for three years or more post registration.

In New Zealand generally the first person to use the trade mark or, in the absence of use, the first person to file an application to register the mark is entitled to be registered as the owner of that mark. However, applications can be challenged if a third party has sufficient reputation in New Zealand.

Traders outside of New Zealand planning a new venture in New Zealand should check the ability to use a mark in New Zealand without infringing third party rights and apply for trade mark protection in New Zealand for valuable marks prior to entering into discussions with New Zealand parties, or as soon as trading in New Zealand is planned, otherwise the right to trade under the mark could be lost to another party who first uses or applies for the mark in New Zealand. It is also important that agreements including distribution, franchise, licence, joint venture and agency agreements with local New Zealand parties clearly cover ownership of trade marks in New Zealand.

Licensed use should be authorised and controlled by the registered proprietor of the marks. Licences can be registered – this is not mandatory but is often recommended.

The *Trade Marks (International Treaties and Enforcement) Amendment Bill* ("*Bill*") was introduced into Parliament in September 2008 to implement obligations arising from joining the *Singapore Treaty*, the *Madrid Protocol*, and the *Nice Agreement*. It will also support the enforcement of criminal offence provisions relating to counterfeit goods and pirated works. The *Bill* is currently progressing through Parliament.

Major Events Management Act

The *Major Events Management Act 2007* came into force in late 2007. It is intended to counter the problem of ambush marketing that undermines official events. The *Major Events Management Act 2007* is designed to address ambush marketing:

- by association, where a person or organisation misleads the public that it is an authorised partner or somehow associated with the event, and
- by intrusion, where an advertiser intrudes on the attention of the audience gathered solely for the event and thereby gains exposure or publicity to which it is not entitled.

Domain names

The Domain Name Commissioner is responsible for the oversight of the .nz domain name registration system. Domain names within the '.nz' space are registered on a 'first-come, first-served' basis. Registration can be done through an authorised registrar who registers the domain name on the Shared Registry system. Registration of a domain name does not create any proprietary rights in the name. New Zealand Courts will recognise rights in domain names where there is reputation or goodwill in the name.

Disputes about who should be the registrant of a domain name have often been handled by court action, including by claims for breach of the *FTA* and through passing off actions. Since 2006, the Office of the Domain Name Commissioner has offered a Dispute Resolution Service ("DRS") to assist with disputes of this nature. Anyone who wishes to make a complaint about the registration of a '.nz' domain name may use this system.

Complainants must demonstrate that:

- the Complainant has rights to a name which is identical or similar to the domain name in dispute; and
- the registration of the domain name by the current registrant is unfair.

To succeed, the complainant must prove that "on the balance of probabilities" both factors are present.

The DRS operates three tiers of resolution:

- the first is informal mediation (applicable only if there is a response to a complaint);

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- the second is Expert Determination; and
- the third arises if an appeal is lodged, where a panel of three Experts is appointed to make a final decision.

The mediation process is free to use, but if an Expert Determination is required, then the person making the complaint must pay a fee. A further fee is required if an appeal is lodged.

Circuit layouts

Protection is provided for circuit layouts and integrated circuits. The protection is provided by the creation of copyright-style intellectual property rights in original circuit layouts, or integrated circuits made in accordance with a circuit layout.

No provision is made for registration of the rights, and the owner has the exclusive right to copy the layout, make an integrated circuit in accordance with the layout and exploit the layout commercially in New Zealand.

Trade secrets

Trade secrets and confidential information are protected under New Zealand law.

When preparing a contract, careful consideration should be given to the protection of trade secrets and confidential commercial information.

In the absence of an express contract (in which all elements of the contract are specially stated), some protection is given by a long-established principle of equity, whereby a person may be forced to respect the circumstances of a confidence. Nevertheless, it is prudent to make specific provision for confidentiality in all agreements.

Plant varieties

Plant varieties are protected in New Zealand by the *Plant Variety Rights Act 1987*. Since this *Plant Variety Rights Act 1987* was passed, there have been significant advances in plant breeding techniques and international developments. In light of these developments, the *Plant Variety Rights Act 1987* has been reviewed to determine whether the *Act* provides adequate protection for new plant varieties. A draft *Plant Variety Rights Amendment Bill* was released for public consultation in August 2005, but is yet to be introduced into Parliament.

Geographical indications

New Zealand provides protection for Geographical Indicators ("GIs") by the general provisions of the *FTA* and the law of passing off. GIs are geographical names which identify goods as originating in a territory, region or locality, where a given quality, reputation or other characteristic of the goods is essentially attributable to those geographical origins.

The *Geographical Indications (Wine and Spirits) Registration Act 2006* ("*Registration Act*") introduced a legislative framework that brings New Zealand into line with its obligations under the *TRIPS Agreement* in relation to wine and spirits.

The *Registration Act* provides a new definition of 'geographical indication' to ensure that only those GIs that meet the *TRIPS Agreement* definition may be registered under the *Registration Act*. It also establishes a registration system for GIs for wines and spirits and streamlined the process for registering GIs.

Protection for GIs for other goods and non-registered GIs will continue to be dealt with under the *FTA* and the tort of passing off.

Unfair competition

The general law and some statutes such as the *FTA* and the *Commerce Act* provide a basis for restraining some forms of unfair competition. For example, the *FTA* can be used to prevent one trader misrepresenting that his goods or services are those of another.

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Employment and industrial relations

Employment relationships in New Zealand are primarily governed by minimum entitlement legislation, written employment agreements and common law.

Employment Relations Act 2000

The principal legislation is the *Employment Relations Act 2000* ("ERA"). Underpinning New Zealand's employment relations system is a statutory obligation on employers, employees and unions to deal with each other in 'good faith' in most employment matters, including bargaining for employment agreements, discussing any proposal which may affect employees, allowing workplace access to union members and making employees redundant. This duty of good faith contains several specific requirements that parties must comply with.

Under the *ERA*, employment relationships for all employees in New Zealand are governed by either:

- an individual employment agreement ("IEA"), being a contract between an employer and a single employee, or
- a collective agreement ("CA"), being a contract between one or more employers and one or more unions, which binds members of the union(s) who come within the agreement's coverage clause.

Both IEAs and CAs must contain certain minimum terms, which are set out in the *ERA* and incorporated by other legislation. In all other respects, terms of employment are for negotiation between the employee (or the union on his/her behalf) and the employer. For example, entitlements to redundancy payments, penal or overtime rates, and long service leave are matters for negotiation. A number of procedural requirements also apply to bargaining for IEAs and CAs.

Under the *ERA*, any dismissal or other action by an employer must meet the statutory test of justification – the employer's actions, including how the employer acted, must be what a "fair and reasonable" employer would have done in all the circumstances.

The *ERA* also provides protection for employees when their employer's business is restructured and their work will be performed by or on behalf of a new employer. Certain categories of employee (such as those engaged in the cleaning or food catering industries) are deemed "vulnerable" to the effects of restructuring. When the employer's business is restructured, those vulnerable employees have the right to transfer to the new employer on identical terms and conditions of employment. The CAs and IEAs of other employees must contain employee protection provisions. These provisions set out the procedures that the employer will follow when negotiating with the new employer in relation to the effects of the restructuring upon employees.

Employment relationship problems

Disputes, grievances and other employment relationship problems are determined by specialist institutions (the Employment Relations Authority and the Employment Court). Mediation provided by the Department of Labour is required in almost all situations as the first forum for dispute resolution. Employees can take claims against their employers for a number of reasons including unjustified dismissal, unjustified disadvantage, discrimination, sexual or racial harassment or duress in respect of union membership, or over a breach of the *ERA*, an IEA or a CA. In addition, 'disputes' may be pursued in respect of the interpretation, application or operation of an IEA or a CA.

Fixed term and casual agreements

Most employees are employed on a permanent basis (that is for an on-going and indefinite period). However, in some circumstances, employers are able to enter into a fixed term or casual employment agreement with employees. In respect of fixed term employment, specific requirements, set out in the *ERA*, must be complied with. In particular, the employer must have genuine reasons based on reasonable grounds for engaging the employee on a fixed term, rather than a permanent, basis (e.g. specific project work, covering parental leave) and the employee must be advised of these reasons.

Where a fixed term agreement is entered into, the employer must ensure that the agreement includes a written description of the way in which the employment will end and the reasons for this. A failure to do so will mean that the employer cannot rely on the fixed term provisions to end the employment relationship and the employee can elect to be a permanent employee.

Employees may also be employed on a casual basis. There is no definition of 'casual' employment in the *ERA*, but a number of characteristics have been generally assessed as indicating a casual employment arrangement.

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These include that the employee works only 'as and when required' and that there is no obligation on the employer to provide work or for the employee to accept work.

Employee Unions

Where an employer employs a non-union member, whose work is covered by the coverage clause of a CA, that employee's terms and conditions of employment are based on the CA for the first 30 days of employment. The parties may agree different terms and conditions if the employee has not joined the union after the expiry of this period.

Union membership is voluntary. It is unlawful to discriminate against employees or prospective employees due to their membership or non-membership of a union.

Under current law, employees may only strike, and employers may only lock-out employees, in relation to collective bargaining for a CA which will bind the employees concerned (provided that at least 40 days have passed since the bargaining was initiated), or in some other strictly limited situations. Strike action in response to a dispute under an existing CA, sympathy strikes or political strikes are unlawful.

Independent contractors

Businesses can engage independent contractors to provide services where this is appropriate. The provisions of the *ERA* and other minimum employment-related entitlements will not apply to an independent contractor.

However, in determining whether a person is an independent contractor or an employee, the courts will look at the true nature of the relationship in practice rather than allowing anything in writing to be determinative. There are a number of indications that will be considered in determining the true nature of the relationship. In limited situations, industry practice may also be used as a measure of the true nature of the relationship. If the relationship between the parties is more akin to an employment relationship then it is likely that the provisions of the *ERA* and other employment related legislation could apply.

Holidays and sickness

The *Holidays Act 2003* provides for 11 specified public holidays to be taken as paid days on holiday if the employee ordinarily works on those days.

If an employee works on a public holiday that is a normal day of work for that employee, he/she is entitled to be paid at least time and a half of his/her normal pay for the hours worked and also receive an alternative paid day's holiday. If an employee works on a public holiday that is not a normal day of work, he/she is entitled to at least time and a half for the hours worked, but no alternative holiday.

All employees are entitled to a minimum of four weeks' paid annual leave after each year of continuous employment with the same employer (including part-time and casual employees). Timing of annual holidays is to be agreed between the employer and the employee, but the employer must not unreasonably withhold consent to a request for annual leave. The employer can direct the employee to take annual leave on 14 days' notice if agreement is not reached.

When an employee leaves a job, he/she is entitled to be paid accrued holiday pay upon termination.

After six months' employment with the same employer, an employee is entitled to a minimum of five paid days' sick leave during each subsequent 12 month period of employment. This sick leave covers sickness or injury of the employee, the employee's spouse or partner, or a dependent of the employee, and is able to be accumulated from year to year up to a maximum of 20 days.

After six months' employment an employee is also entitled to bereavement leave. Bereavement leave is of either one or three days' duration per bereavement, depending on the proximity of the relationship between the employee and the deceased.

Parental leave

To be eligible for parental leave, the employee needs to have worked for the same employer for at least six months before the expected date of delivery or adoption and for an average of at least 10 hours per week.

There are four types of unpaid leave which can be taken: special leave, maternity leave, partner's leave, and extended leave. Where the employee has been employed at least 12 months (at the expected date of delivery) prior to the expected date of delivery, an employer can be required to hold an employee's job open for up to 52 weeks in total while parental leave is taken. When an eligible employee has been employed for less than 12 months they are not entitled to extended leave, so the employer is only required to hold the job open for up to 14 weeks.

Eligible employees and self-employed people are also entitled to up to 14 weeks of Government funded payments during their parental leave, paid at the lesser of the employee or

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self-employed person's earnings or an annually specified rate. Instead of paid parental leave, employees and self-employed people may choose to take a parental tax credit. This entitlement can be transferred to an employee or self-employed person's spouse or partner.

Flexible working arrangements

Employees have the right to request flexible working arrangements from their employer to enable them to care for dependent people.

An employee who has the care of any person, and who has been employed by his or her employer for the preceding six months, may make a request (in writing) for a variation to their working arrangements to better care for that person. Any such request must include particular details set out in the *ERA*, and cannot be made within 12 months of a prior request.

The *ERA* outlines the circumstances in which an employer may refuse an employee's request for flexible working arrangements. An employer may decline the request if the employee is not eligible to make the request, and/or if grounds relating to an inability to rearrange the workplace without having a negative effect on the business are made out. An employer *must* decline the request if the employee is bound by a collective agreement, the request relates to working arrangements to which the collective applies, and the employee's requested working arrangements (if accepted) would be inconsistent with the collective agreement.

An employer must consider the employee's request for flexible working arrangements and advise the employee of the outcome as soon as possible (but no later than three months after receiving the request). If the request is refused, the employer must notify the employee of the refusal and the reason(s) for it, and must specify and explain the grounds relied upon relating to the effect on the employer's business (if any). The *ERA* also sets out a process for resolution of disputes relating to requests for flexible working arrangements.

Wages or salary

Subject to certain taxation and other legislation, under the *Wages Protection Act 1983* an employer must pay the entire amount of any wages/salary to an employee without deduction, unless the deduction is requested by or consented to by the employee. Wages/salary must be paid in cash unless otherwise agreed to by the employee. Most wages are paid to an employee by direct credit.

The *Minimum Wage Act 1983* allows minimum wages to be set by Order in Council. The *Act* also provides for a 40 hour, 5 day week (not including overtime), but this can be varied by agreement between the employee and the employer.

The current minimum wage is NZ$12.75 per hour, before tax, for an 'adult worker' (an employee aged 16 years and over and who is not a 'trainee' or 'new entrant'). Workers who are aged either 16 or 17 years of age and who meet certain employment history criteria will also be entitled to the 'adult' minimum wage.

Workers who are "new entrants", or who are undergoing particular types of training, will be entitled to a minimum wage no less than 80% of the "adult" minimum wage (i.e. NZ$10.00 per hour, before tax).

KiwiSaver work-based saving scheme

The *KiwiSaver Act 2006* introduced a voluntary, work-based savings scheme in New Zealand. The purpose of the scheme is to encourage New Zealanders to save and help improve their financial wellbeing, particularly in retirement. The scheme is administered by the New Zealand Inland Revenue Department through the 'pay as you earn' ("PAYE") system. The Inland Revenue forwards participants' contributions to their KiwiSaver scheme for investment.

The *Kiwisaver Act 2006* applies to employers who are New Zealand residents or carrying on business from a fixed establishment in New Zealand (as defined in particular sections of the *Income Tax Act 2007*).

As KiwiSaver is a work-based savings plan, employers play an important role. From an administrative stand point, employers are required to give new employees, and others who are interested, a KiwiSaver information pack (provided by the Inland Revenue). Employers pass on employees' details to the Inland Revenue to enable them to be enrolled, and deduct KiwiSaver contributions from employees' before-tax pay. Employers also hand out investment statements for their preferred KiwiSaver provider, if they have one. If an employer does not comply with their obligations under the *Kiwisaver Act 2006*, they may be liable to pay a monetary penalty.

Employers are required to make compulsory employer contributions to KiwiSaver for employee members. The employer contribution is only for those employees who are enrolled in KiwiSaver and actually making contributions. From 1 April 2009, the rate of compulsory employer

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contributions became 2% of the employee's gross salary or wages and the employee also has a minimum 2% contribution rate. The definition of 'gross salary or wages' is very wide, and includes bonuses, commission, overtime, extra salary, gratuity or other remuneration of any kind.

More information about KiwiSaver can be found at the KiwiSaver information website: www.kiwisaver.govt.nz.

Employment trial periods

Employers with fewer than 20 employees are able to include voluntary trial periods in their employment agreements with new employees. A trial period must be agreed to by the employee and can be for a maximum period of 90 days. During the agreed trial period, the employer may terminate the employment relationship at anytime and the employee will have no recourse to any of the ordinary procedures that exist under the ERA in respect of unjustified dismissal.

Employees will, however, still be able to bring a claim against their employer which is not based on unjustified dismissal (for example unjustified disadvantage, discrimination, or sexual or racial harassment).

Health and safety

The *Health and Safety in Employment Act 1992* ("*HS Act*") imposes duties on employers to identify and, where practicable, eliminate, isolate, or minimise significant hazards in the workplace. One example hazard listed in the *HS Act* is stress in the workplace. Employers are also required to take all practical steps to ensure that persons in the workplace are protected from harm. An employer who hires a contractor or subcontractor also has to take all practical steps to ensure that those persons, and their employees, are not harmed while working for the principal.

There are over 30 employer duties in the *HS Act*, including duties in respect of hazard identification and management, training, supervision, employee participation in health and safety management and accident recording. There are also duties on employees, contractors, volunteers, principals and those in control of workplaces. Offences under the *HS Act* can carry a maximum penalty of NZ$500,000. There is also provision for more minor infringement fines of up to $4,000. In addition, the most serious type of offence may result in imprisonment.

Accident compensation

All employers are required by law to contribute to a Government controlled ACC insurance fund in respect of personal injuries suffered at work. These entitlements are available to employees on a "no fault" basis. Similar funds also cover personal injuries incurred outside of work. The legislation prohibits actions for damages as a result of personal injury.

The ACC fund provides rehabilitation, weekly compensation, lump sum compensation for permanent impairment and funeral grants, survivors' grants, weekly compensation for dependents and child care payments. Employers are required to provide the employee with the first week's compensation, consisting of 80% of their salary for work related injuries.

As an alternative to contributing under the general ACC scheme, employers can apply for entry to the ACC Partnership Programme. Under this programme employers provide for their own insurance cover for work place injuries. In return for 'standing in the shoes of ACC' and taking on these responsibilities, the employers pay a significantly reduced ACC levy. Any employer can apply for entry, although it is more suited to large employers who can meet the specified criteria set by ACC.

General

Many aspects of employment law in New Zealand are governed to some extent by case law. In particular, case law sets out the process employers are required to follow in respect of disciplinary procedures, dismissals and termination for redundancy. In some cases these steps are relatively stringent. It is important that all employers in New Zealand have a good understanding of the current case law.

There is also other employment relations legislation which we have not discussed specifically here (e.g. human rights, privacy and whistleblowers legislation). It is recommended that any employer establishing a business in New Zealand obtains a full description of the relevant legal obligations which apply to employers.

It is also important for anyone planning to establish or acquire a business in New Zealand to ascertain the current terms in all relevant employment agreements, the content of existing workplace policies and practices, any contingent liability on the employer and the requirements of New Zealand's employment legislation. Where there is any likelihood of a conflict of laws, all employment agreements and other contractual documentation (e.g. confidentiality agreements) should expressly indicate the law which is to govern the agreement and the employment relationship.

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New Zealand's real estate rules

Land law in New Zealand

In New Zealand, a system of title by registration is used, known as the Torrens System. Under the Torrens System the State maintains a full set of records disclosing all interests in land and its use is compulsory. No legal interest in land may be created except by registration under the *Land Transfer Act 1952*.

The land titles system in New Zealand has recently undergone a process of computer automation, beginning with the introduction of the *Land Transfer (Automation) Amendment Act 1998*, which came into force on 1 February 1999. Land titles are now stored in a computer register and, as of 23 February 2009, all land dealings must now be completed electronically on the national Land Registry. This is located on Land Information New Zealand's website: www.landonline.govt.nz. Original titles to land are no longer issued.

Foreign investment rules

There are restrictions on foreign investment in land in New Zealand as certain types of land require the consent of the OIO. The foreign investment rules are set out on pages 9 and 10.

Criteria for consent

Proposals for transactions in land require evidence that the overseas investors intend to reside in New Zealand indefinitely or that the proposal is to the benefit of New Zealand. In determining whether the proposal for ownership or control of land, is for the benefit of New Zealand, the OIO will have regard to a number of factors including whether the proposal will have the effect (in New Zealand) of providing economic or environmental benefits as outlined in the table:

Economic benefits	Environmental benefits
Creating new job opportunities	Providing mechanisms for protecting or enhancing significant indigenous vegetation and significant habitats of indigenous fauna
Introducing new technology or business skills	Mechanisms for protecting and enhancing existing areas of significant habitats of trout, salmon and other wildlife
Developing or increasing export markets for exporters	Mechanisms for protection and enhancement of historic heritage
Improving market competition, efficiency or productivity or enhanced domestic services	Mechanisms for providing, protecting, or improving walking access over the relevant land by the public
Introducing new investment for development purposes	If the relevant land is or includes foreshore or seabed, or a bed of a lake or river, whether that land has been offered to the Crown
Increasing the processing of New Zealand's primary products	

Penalties for failing to comply with any of the requirements of the *OIA* or the *OIR* are set out on page 10.

The *OIR* also gives the Minister of Finance (in conjunction with the Minister of Lands in the case of transactions involving land) a discretionary power to exempt any person or transaction from any requirement or requirements provided in the *OIR* (although this discretion is likely to be exercised only in exceptional circumstances).

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Foreign investment in land

Consent is required if an overseas person wishes to invest in sensitive land, land that adjoins sensitive land, or farm land.

Sensitive land and adjoining land

An interest in sensitive land, or land which adjoins sensitive land, will require consent if it is for a term of three years or more and is not an exempted interest. To determine whether land is sensitive refer to the flowcharts attached as Schedules 1 and 2 (refer pages 35 and 36). Schedule 1 determines if land is sensitive land and Schedule 2 determines if the land adjoins sensitive land.

Farmland

Farmland is defined as land which is exclusively or principally used for agricultural, horticultural or pastoral purposes, or for the keeping of bees, poultry or livestock. This definition does not include forestry or forestry rights but includes farmland acquired to develop new forestry. OIO consent is required for the acquisition of either farmland or securities in an entity which owns or controls farmland. Before the OIO will give consent, the farmland or interest in farmland must have been offered for sale on the open market to New Zealanders. The sale advertisement must be published within the 12 month period that precedes the earlier of the date on which an application for consent is made, or the date on which the transaction is given effect.

Treaty of Waitangi

The *Treaty of Waitangi* (“*Treaty*”) is a treaty that was entered into between the British Crown and the indigenous Māori population in 1840. The relevance of the Treaty to a broad range of New Zealand’s laws and regulations has progressively increased since the 1970s.

In respect of land, the Treaty can be an important consideration in relation to land that may be the subject of a ‘Waitangi claim’ by Māori, and a specialist body – the Waitangi Tribunal – can make recommendations to the Government regarding the resolution of any grievances.

It should be noted that recommendations for the return of land to Māori generally only relate to land owned by the Government or state owned enterprises. Privately owned land is not subject to return to Māori ownership, unless the title to the land in question provides for such a possibility. This is only where there is a memorial on the title providing that section 27B of the *State Owned Enterprises Act 1986* applies, and the Waitangi Tribunal can make a binding order requiring the Crown resume the land and return it to Māori.

New Zealand’s environment and resource management law

New Zealand’s environment and resource management law provides for the sustainable management of natural and physical resources whilst recognising the importance of New Zealand’s unique biodiversity and environment.

Resource Management Act 1991

The *Resource Management Act 1991* (“*RMA*”) is the principal environmental and development statute in New Zealand. The *RMA* establishes a comprehensive regime for dealing with resource management issues and sets out the roles and responsibilities of decision makers, including:

- District and Regional Councils
- Minister for the Environment
- Minister of Conservation
- Environment Court (a specialist Court with jurisdiction established under the *RMA*), and
- Environmental Protection Authority.

Resource consents

The *RMA* introduces a hierarchy of governing documents:

- National Policy Statements
- National Environmental Standards
- Regional Policy Statements
- Regional Plans, and
- District Plans.

These documents contain rules that determine whether resource consents may be required for certain activities, and policies against which applications for resource consents must be assessed. Generally, the greater the adverse effects of the proposed activity on the environment the greater the complexity in the processing and determining of the application for resource consent.

Resource consents are granted to allow the consent holder to undertake an activity which is otherwise restricted. There are five main types of resource consent:

- land use consent
- subdivision consent
- coastal permit
- water permit, and
- discharge permit.

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Enforcement under the Resource Management Act

The *RMA* allows for a range of enforcement action (including the prosecution of offences) to be taken if there is non-compliance with the *RMA*. Such matters could be the subject of an abatement notice or enforcement order (which is a Court order requiring action or non-action to be taken); or could be subject to a prosecution or infringement notice.

Offences

Major offences occur where there are, amongst other things, breaches of:

- duties and restrictions concerning activities on land, within beds of rivers and lakes and the coastal marine area, the use of water, and discharges of contaminants, or
- resource consents, or
- enforcement orders, or
- an abatement notice which is issued by a district or regional council.

Minor offences relate to such matters as obstructing an enforcement officer, or breaching a summons.

Penalties

Offences under the *RMA* are criminal in nature and are heard in the District Court by an Environment Court Judge.

The *RMA* imposes a strict liability regime, and it is, therefore, not necessary for the prosecution to establish that the defendant intended to commit an offence. Generally, once responsibility for the act or omission in question is established, then (subject to the limited statutory defences established by the *RMA*), conviction follows.

The major offences discussed above carry a maximum fine of NZ$300,000 or a term of imprisonment, not exceeding two years for a natural person and a maximum fine of NZ$600,000 for a legal person. In circumstances where the offence is a continuing one, the offender can be subject to a further fine not exceeding NZ$10,000 for each day the offence continues. To date, maximum fines imposed under the *RMA* have not approached the upper limit, although terms of imprisonment are occasionally imposed (e.g. in a prosecution relating to deliberate acts by a repeat offender).

RMA reform

Parliament passed the *Resource Management (Simplifying and Streamlining) Amendment Act 2009* which introduced measures to streamline the resource consent process.

Further reforms of the *RMA* are expected to be completed by the end of 2010. These reforms focus on aquaculture issues, fresh water allocation and management, urban design and the interface between infrastructure and public works legislation. Reform options are currently being considered by Technical Advisory Groups established by Cabinet.

Liability of principals or directors

Where an offence is committed by a person acting as an agent, contractor, or employee, the principal is also liable in the same terms and to the same extent as if the offence had been committed personally by the principal.

Where the defendant is a corporate entity, it is possible for its directors and/or management to face liability for the acts of the company. However, the *RMA* does provide a defence for directors/management in situations where it can be established that:

- neither the directors nor any person concerned in the management of the corporation knew or could reasonably be expected to have known that the offence was to be, or was being, committed, or
- the corporation took all reasonable steps to prevent the commission of the offence.

Contaminated site liability

At present, there is no specific statutory (or regulatory) regime governing liability and responsibility for contaminated sites in New Zealand. Equally, there are a limited number of civil cases (regarding disputes in contract and tort) in which site contamination issues have been addressed and tested.

Local councils have a mandate to control the effects of contaminated land and controlling activities that cause land to become contaminated. Regional councils have limited powers relating to 'contaminated sites', which relate to carrying out investigations of contaminated land. Pursuant to s 314(1)(da) of the *RMA*, regional councils also have the ability to take enforcement action to require a person to do something that would be considered:

'necessary to avoid remedy or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier.'

The *RMA*, however, does not presently specify whether:

- regional council power with respect to such sites can be exercised in relation to pre-1 October 1991 contamination, or
- which party (polluter, owner, occupier or all parties) should be properly targeted when the regional council is exercising its powers.

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The Ministry for the Environment has developed several contaminated land management guidelines, including guidelines about site investigation and reporting on contaminated sites. These guidelines are not mandatory and are not applied consistently throughout the country. However, the Ministry for the Environment is working on a National Environmental Standard for Assessing and Managing Contaminants in Soil ("Standard") which is expected to be finalised by the end of 2010. Once in force, the Standard will require landowners to assess contamination levels of potentially contaminated sites before being granted resource consent for a change in land use. The responsibilities under the Standard attach to the land, so a current landowner will need to comply with the Standard regardless of whether they were responsible for the contamination.

Hazardous Substances and New Organisms Act 1996

Businesses in New Zealand also need to consider issues and potential issues relating to any other statutory or planning authorisation outside of the realms of the *RMA*. For example, special authorisation is required for trade waste discharges and, in situations where hazardous chemicals are being stored or handled at a particular site, a Location Test Certificate may be required under the *Hazardous Substances and New Organisms Act 1996* ("*HSNO*").

The *HSNO* regime covers specific substances which are classified according to their potential hazardous properties. Those properties include:

- explosiveness
- flammability
- ability to accelerate a fire
- toxicity to humans or the environment
- ability to corrode human tissue or metal, and
- capacity to develop one or more of the above properties on contact with air or water.

New organisms are also covered by the *HSNO* regime and authorisation is required for introduction or development of the following:

- micro-organisms, or
- reproductive cells, or
- genetically modified organisms, or
- all species not currently in New Zealand.

The *HSNO* also established the Environmental Risk Management Authority (ERMA), which is responsible for the assessment and regulatory approval process for hazardous substances and new organisms. The future reforms to the *RMA* (see above) will result in ERMA transforming into the Environmental Protection Agency.

Climate change

New Zealand ratified the *Kyoto* Protocol ("Protocol") on 19 December 2002 and the Protocol came into force on 16 February 2004.

The Protocol is intended to address global climate change by setting the global target of reducing the total greenhouse gas emissions worldwide to 5% of those that existed in 1990. To do this, targets were set for individual countries and during the first committed period of the Protocol (2008-2012) New Zealand is committed to reducing its greenhouse gas emissions back to 1990 levels (on average over the five-year period). If this domestic target is not achieved, then New Zealand will have to take responsibility for the excess emissions by purchasing emission units on the international market or using forest sink credits to do so.

To address New Zealand's obligations under the Protocol, the previous Parliament passed the *Climate Change (Emissions Trading) Amendment Act 2008*, which establishes an Emissions Trading Scheme ("ETS"). Under the ETS, mandatory participants that emit greenhouse gases are required to pay for all greenhouse gas emissions. The 'currency' of the ETS is a New Zealand Unit ("NZU"). This is the equivalent of one Kyoto unit. A participant will be required to surrender one NZU per tonne of greenhouse gas emitted. However, participants from some sectors may receive free allocations of NZUs for a certain period. Further, activities that remove those greenhouse gases from the atmosphere may earn NZUs under the ETS. During a transitional phase, until 1 January 2013, participants will only be required to surrender NZUs equivalent to half their emissions levels, and may take advantage of a NZ$25 fixed price NZU option.

The ETS has a small number of mandatory participants. The mandatory participants largely include those high up the production chain. Households or small/medium businesses (with the exception of some parts of forestry and agriculture) will therefore not face any direct obligations under the ETS, just increased costs for products and services that involve greenhouse gas emissions.

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Entry into New Zealand

The new *Immigration Act 2009* was passed on 29 October 2009 and is expected to come into force in late 2010. Until then, New Zealand entry, work and residence entitlements continue to be granted under the *Immigration Act 1987*. The New Zealand Immigration Service ("NZIS") administers the entitlements.

The legislative changes under the *Immigration Act 2009* aim to improve the immigration system to ensure that:

- New Zealand has the skills, talent and labour it needs, now and in the future
- New Zealanders are confident of the security of our border, and
- migrants and refugees settle well and integrate into communities.

One important change under the *Immigration Act 2009* is the simplification of visas into two main categories: residence class visas and temporary entry class visas. Residence class visas consist of permanent resident and resident visas. Entry class visas consist of temporary, interim and limited visas.

Another important change is that the *Immigration Act 2009* will establish a universal visa system that will remove distinctions between the categories of 'visa', 'permit' and 'exemption', and use the single term 'visa' to refer to the authority to travel to, enter and stay in New Zealand. A universal visa system means that all foreign nationals will require a visa to be in New Zealand.

Visiting New Zealand

A visitor's visa or permit is required for entry into New Zealand by any person other than:

- a New Zealand citizen or residence permit holder, or
- an Australian citizen or resident who holds a current Australian permanent residence visa or a current Australian resident return visa, or
- a person who is exempt from the requirement to hold a permit to be in New Zealand, or
- a citizen of a country which has a visa waiver agreement with New Zealand in which case the person does not need to get a visitor's visa if visiting New Zealand for three months or less (or six months if from the United Kingdom).

Working in New Zealand

Any person who is not a New Zealand or Australian citizen or resident or subject to an exemption, and wants to work in New Zealand, must hold a valid work visa or work permit.

A work visa or permit may be granted if the person meets health and character requirements. They must then also meet the work and skill requirements that are set out in the various categories that a person may apply under to work in New Zealand.

People wanting to live and work permanently in New Zealand can apply for a work visa and permit under the following categories:

- Skilled Migrant category
- Work to Residence
- Residence from Work, and
- Employee of Relocating Company.

People wanting to work temporarily in New Zealand can apply under the following categories: Temporary Work, Working Holiday and further categories relating to seasonal work in horticulture and viticulture.

The maximum term of a work visa is three years.

There are special categories for people (for example, crews of foreign fishing vessels, or members of approved exchange schemes) who need to meet a special set of criteria before the work visa or permit will be granted.

Long term business visa/ permit

This is part of the Work to Residence work visa category, and is also applicable to those interested in establishing a business in New Zealand but who do not wish to live permanently in New Zealand.

A holder of a long term business visa or permit will be granted a work visa for up to three years. After that time an application for residence may be made under the Business (Entrepreneur) Category (see below).

The applicant must:

- have a satisfactory business proposal plan
- have a sound business record and a sound business character
- have, in addition to investment capital, sufficient funds for their maintenance and accommodation and that of any non principal applicants
- have obtained professional or occupational registration in New Zealand if registration is required for the proposed business
- meet health and character requirements
- meet English language requirements, and
- satisfy the business immigrations specialist that they are genuinely interested in establishing a business in New Zealand.

A business plan is a proposal to establish a specific business in New Zealand and must be supported by appropriate documentation. The proposal form should cover the following:

- an outline of the proposed business and of its viability

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- financial information (forecast and financing options)
- the business experience of the applicant (including English language ability), and
- the applicant's knowledge of the New Zealand market.

Residence in New Zealand

Every person who wishes to immigrate to New Zealand needs to apply for residence. Residence entitles the person to live, study and work indefinitely in New Zealand.

The main categories for residency applications are Business, Skilled Migrant, Family, and Family Quota. Both the Business and Skilled Migrant have a minimum English language level requirement. There are also health and character requirements.

Skilled Migrant category

To be granted residency under the Skilled Migrant category, an applicant must be under 56 years of age and score at least 100 points to register an expression of interest. Expressions of interest are then collected into a pool over a certain period and ranked. Those with over 140 points are automatically invited to apply for residency. After this, lower scoring expressions of interest with certain factors, such as skilled employment in New Zealand, are selected, followed by other lower scoring expressions of interest.

When asked to apply for residency, applicants are required to provide proof of the claims made in their expression of interest. The application will be assessed based on the proof provided by the applicant and on their ability to settle successfully and make a real contribution to New Zealand's social and economic development.

If an applicant is unsuccessful in receiving an invitation to apply for residency the first time, they will remain in the pool for three months, and if unsuccessful after then, their application will be withdrawn. However, if they wish, they can lodge another application.

Points and bonus points are awarded for the following:

Points	Bonus points
Offer of employment or current employment in New Zealand	Awarded if employment is in an identified future growth area or cluster, an area of absolute skills shortage, a region outside Auckland, or their partner has employment or an offer of employment in New Zealand
Work experience	Awarded for having at least two years' work experience in New Zealand
Qualifications	Awarded for a recognised New Zealand qualification, a qualification that is in an identified future growth area or identified cluster, a qualification that is in an area of absolute skills shortage, and partner qualifications
Close family in New Zealand	
Age	

Business categories

There are three business categories used for the purposes of residency applications, as follows:

- Migrant Investor category
- Entrepreneur category, and
- Employees of Relocating Company category.

The objective of the business immigration policy is to attract migrants who will contribute to New Zealand's economic growth by increasing the country's skills base, encourage enterprise and innovation and foster international linkages.

Migrant Investor category

Investors can apply under either the Investor Plus (Investor 1 Category) or the Investor (Investor 2 Category) categories, depending on their intended level of investment.

- Investor Plus – those investing a minimum of NZ$10 million in an acceptable investment for three years. The key features are: no age limit; no English language requirements; applicants must spend 20% of the year, in each of the last two years of the three year investment period, living in New Zealand.

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- Investor – those investing a minimum of NZ$1.5 million. The key features are: investors up to the age of 65; three years' business experience; reasonable English language skills; applicants must live in New Zealand for 40% of the year in each of the last three years of the four-year investment period; investors must have a minimum of NZ$1million in settlement funds (but transfer not required).

Entrepreneur category

This category is divided into the Entrepreneur category and the Entrepreneur Plus category.

The Entrepreneur category has been set up to grant residence to those people who have successfully established a business in New Zealand, been 'self-employed' in that business for at least two years, and [it is deemed that] the business is benefiting New Zealand.

The Entrepreneur Plus category provides a faster track to residence for applicants who have successfully established a business in New Zealand, are 'self-employed' in that business, have invested at least NZ$500,000 in the business, and created a minimum of three full-time jobs for New Zealand citizens or residents.

Employees of Relocating Companies category

This category aims to promote New Zealand as a place in which to relocate companies. To be considered under this category the owner(s) of the relocating company must demonstrate that the business will operate in New Zealand and be of benefit to New Zealand. The applicant must be a key employee of that company.

Residence from work policy

This policy provides additional pathways to gaining residence in New Zealand. Applicants must still meet lodgement, bona fide applicant, health, character, and English language requirements. The pathways are:

- talent policy (employment with accredited employers)
- talent policy (for individuals with exceptional talent in a field of art, culture or sport), and
- long-term skill shortage list (employment in an occupation on this list, available from NZIS).

Family category

The objective of this category is to allow individuals to maintain, and be part of, a family unit.

This category is available to those applicants who:

- are in a genuine and stable marriage, or a de facto or homosexual relationship, with a New Zealand citizen or resident who sponsors their application, or
- are a parent of an adult child who is a New Zealand citizen or resident, and their family's 'centre of gravity' is in New Zealand, or
- have a New Zealand citizen or resident parent, brother or sister who is living in New Zealand, and no other siblings or parents are living in the same country in which the applicant is currently living in, and have an acceptable offer of employment in New Zealand, or
- are a dependent child of a New Zealand citizen or resident and who want to live permanently in New Zealand.

There is also a family quota category run by ballot.

More information on the current requirements for entry to and work in New Zealand can be found at the NZIS website: www.immigration.govt.nz.

Disclaimer

A guide for international business: Establishing a business in New Zealand 2010 is prepared by Minter Ellison Rudd Watts. It is not intended to be fully comprehensive, nor is it intended to be a substitute for legal advice.

Minter Ellison Rudd Watts can update you with the most current information on request. Professional advice should be sought before applying the information to particular circumstances. Whilst care has been taken in the preparation of this guide, no liability is accepted for any errors.

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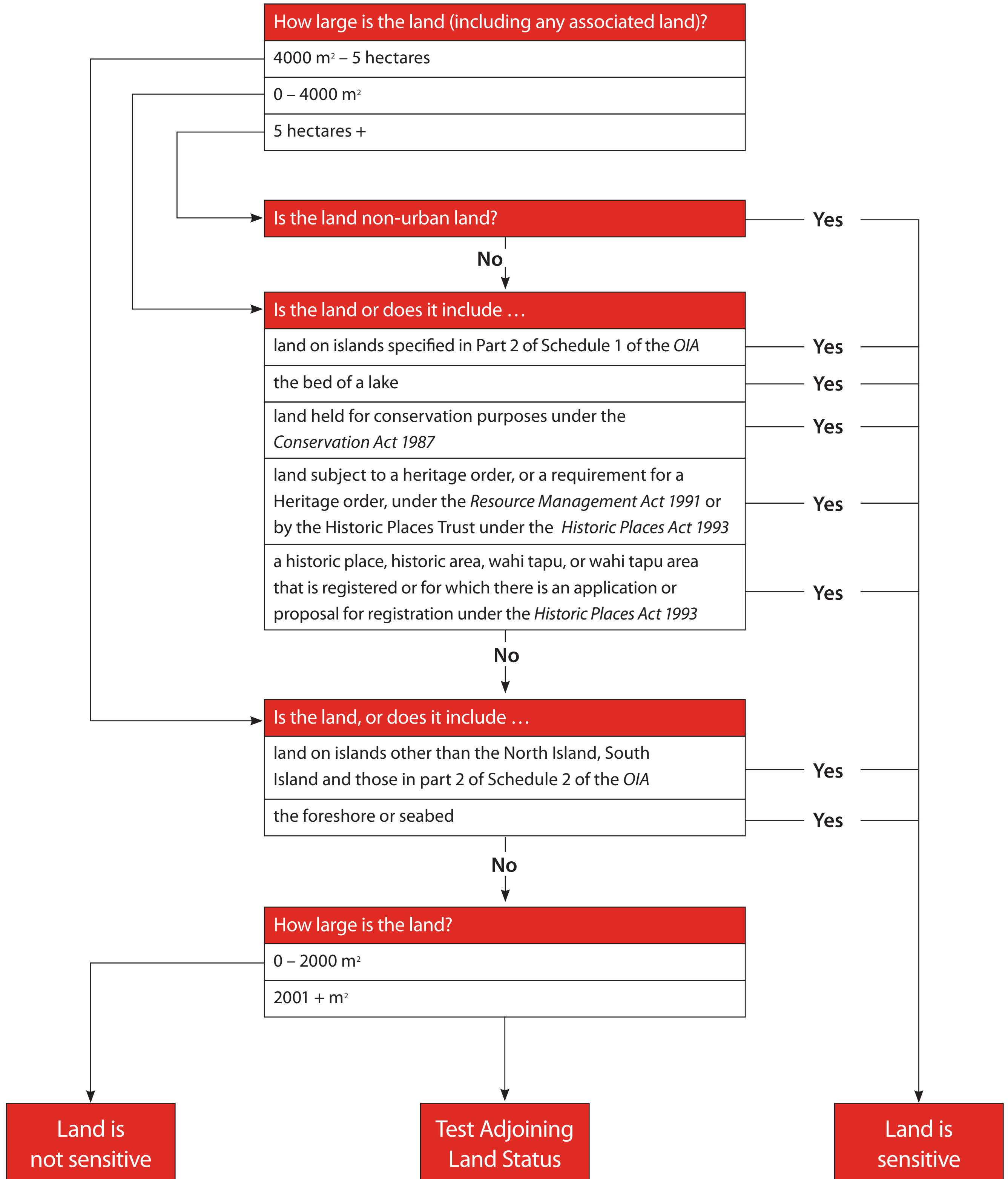
Schedule 1

To determine whether land is sensitive under the *Overseas Investment Act 2005 ("OIA")*



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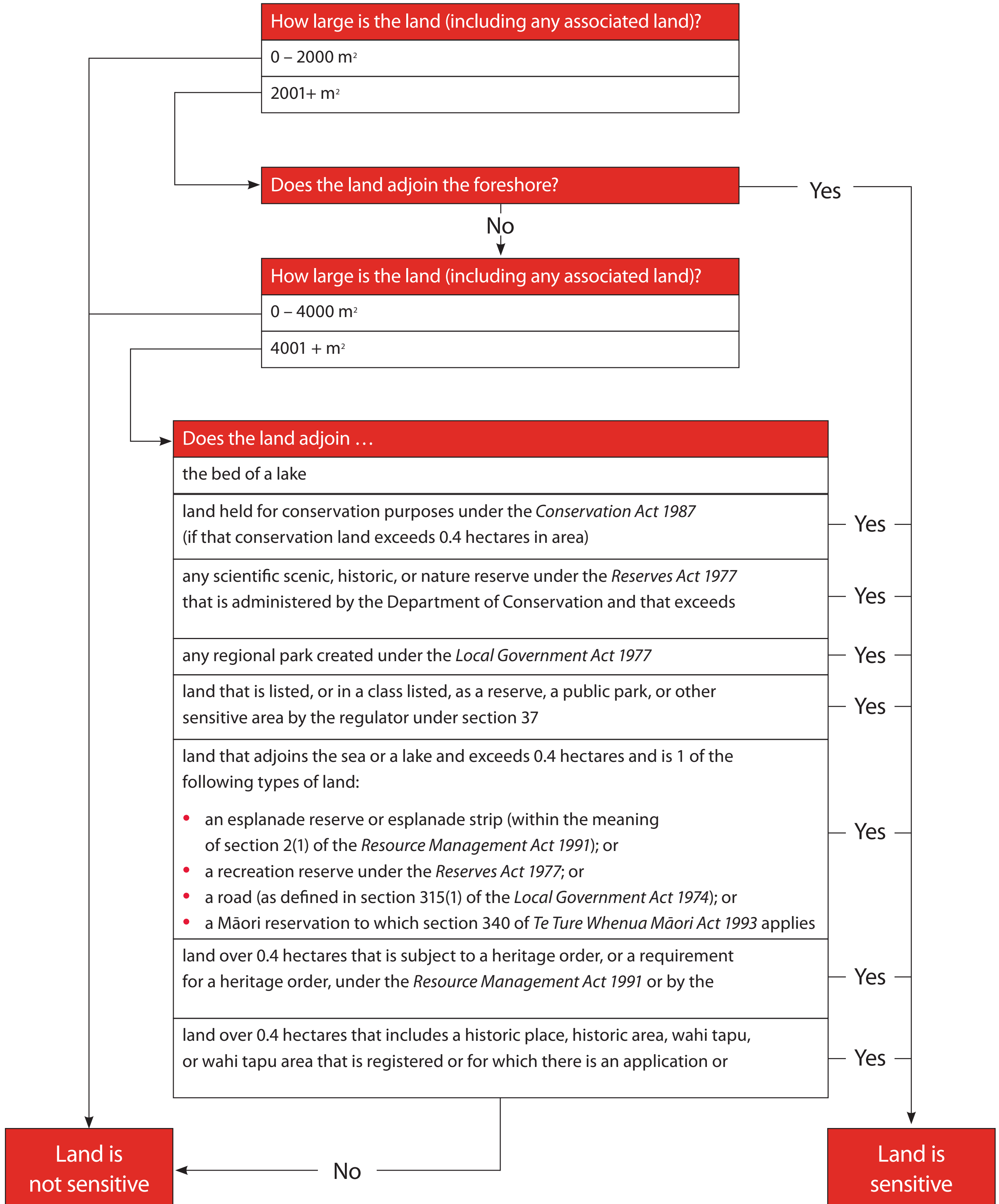
Schedule 2

To determine whether land adjoins sensitive land under the *OIA*



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