



BELL GULLY

Doing Business in New Zealand

MARCH 2008

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1 A BRIEF INTRODUCTION TO NEW ZEALAND

1.1 Outline of the guide

Bell Gully has produced this guide in response to demand from overseas investors and their professional advisers for information about investing in and trading with New Zealand.

SECTION 1 presents an overview of matters of general interest to an overseas investor in the form of a brief introduction to New Zealand.

SECTION 2 discusses the law governing overseas investment.

SECTION 3 discusses the regulatory regime that controls immigration.

SECTION 4 provides a guide to starting a business in New Zealand.

SECTION 5 outlines New Zealand's competition (antitrust) laws.

SECTION 6 comments on contracts.

SECTION 7 discusses employment matters of interest to an overseas investor.

SECTION 8 discusses aspects of New Zealand law applicable to international trade.

SECTION 9 summarises relevant tax issues.

This guide sets out the law as at 3 March 2008. Advice should be sought from Bell Gully on any proposal.

We hope this guide assists you to understand the law relating to overseas investment in New Zealand and that you take the opportunity to invest in this country.

BELL GULLY

Bell Gully is New Zealand's leading law firm, with more than 160 lawyers, including 43 partners.

The firm has offices in Auckland and Wellington and provides comprehensive legal advice on all commercial matters nationwide.

You can read more about Bell Gully online at www.bellgully.com.

1.2 The government and legal system

A GOVERNMENT POLICY ENCOURAGING OVERSEAS INVESTMENT

Since 1984, the New Zealand economy and regulatory framework have undergone radical changes. The New Zealand economy was once highly regulated, centrally controlled and sheltered from international market forces by import controls, tariffs and subsidies.

Today, New Zealand has a deregulated, decentralised economy directly exposed to international competition and virtually unprotected by import controls and unsupported by subsidies. As part of the process of deregulation, there have been changes in the government's attitude to the rules regulating overseas investment.

OVERSEAS INVESTMENT IN NEW ZEALAND IS NOW ACTIVELY ENCOURAGED

During the economic restructure, political alignments and trade relationships were reviewed. Since the United Kingdom joined the European Union (the EU), New Zealand has looked to strengthen its ties with the Americas, Asia and Pacific Rim countries.

NEW ZEALAND'S POLITICAL SYSTEM

New Zealand is an independent sovereign state and a member of the British Commonwealth of Nations. Parliament is triennially democratically elected. New Zealand does not have a written constitution.

New Zealand is not a federal state. All legislation is passed by a single body, the House of Representatives, which is the highest lawmaking body in the country. In 1993, New Zealanders voted to change their electoral system from "First Past the Post" to a "Mixed Member Proportional" representation system.

NEW ZEALAND'S LEGAL SYSTEM

New Zealand is a common law jurisdiction. The law is developed from case law (the decisions of the courts) and from statutes enacted by the New Zealand Parliament. Case law may be superseded by statute.

1.3 Investing in New Zealand - an overview

INVESTMENT INCENTIVES

As part of its economic philosophy, the New Zealand Government believes that overseas investors will be attracted to New Zealand because of sound, consistent economic policies and good rates of economic growth.

One downside of this is that, unlike many countries, New Zealand does not provide incentives for people to invest in approved activities or in specific geographic areas. There are no internal free trade zones for the encouragement of overseas investment. However, where goods exported from New Zealand include imported components on which duty has been paid, credit for the duty may be allowed.

OVERSEAS INVESTMENT CONTROLS

Like most other countries, New Zealand has overseas investment controls that require overseas persons to obtain approval before they can invest in the country in certain types of assets.

The principal controls on overseas investment are governed by the Overseas Investment Act 2005 (the Act) and the Overseas Investment Regulations 2005 (the Regulations). There are, in principle, no restrictions on the level of foreign investment in New Zealand. The New Zealand political environment is such that foreign investment in New Zealand is looked upon favourably.

GENERAL CONTROLS

An overseas investor is required to comply with the general law of New Zealand in the same way as a New Zealand investor. For example, the Companies Act 1993, the

Partnership Act 1908 (regulating partnerships), the Commerce Act 1986 (regulating competition or antitrust law) and the Reserve Bank of New Zealand Act 1989 (regulating banking) affect overseas and New Zealand investors in the same way.

This guide does not deal with the law regulating company takeovers or the New Zealand Stock Exchange Listing Requirements. If this information is required, please contact Bell Gully (See further information at the end of this guide for contacts).

FOREIGN EXCHANGE REGULATIONS

New Zealand has revoked all foreign exchange controls. Accordingly, there are no such restrictions on the transfer of capital, profits, dividends, royalties or interest into, or from, New Zealand.

GENERAL MEANS OF UNDERTAKING A BUSINESS IN NEW ZEALAND

The three main ways in which overseas investment can be undertaken in New Zealand are:

- establishing or purchasing a local company (creating a local subsidiary);
- registering a branch of an overseas company; or
- establishing a joint venture or partnership.

In addition to establishing a business:

- an individual can carry on business in his or her own name as a sole proprietor; and
- an overseas investor can establish a trust, a building society or a provident society.

The most effective way for an overseas person to invest in New Zealand will depend upon practical matters relating to the nature of the investment and the resulting tax consequences in New Zealand or otherwise.

In this guide, our comments are limited to the establishment of a local subsidiary, a branch of an overseas company or a joint venture. If you require information on any other method of establishing a business in New Zealand, please contact Bell Gully.

2 THE LAW GOVERNING OVERSEAS INVESTMENT IN NEW ZEALAND

2.1 General

INTRODUCTION

The principal restrictions on an overseas person establishing or acquiring a New Zealand business are contained in the Overseas Investment Act 2005 (the Act) and the Overseas Investment Regulations 2005 (the Regulations). This legislation applies to all types of investment.

Broadly speaking, an overseas person is a person who is not a New Zealand citizen and is not ordinarily resident in New Zealand (this can include a company, partnership or other body corporate if it is 25% (or more) owned or controlled by an overseas person or persons). The Act and the Regulations prescribe the circumstances where an overseas person is required to obtain consent before investing in New Zealand. Approvals are not always required. Whether or not approval is required will depend on:

- the amount of money involved;
- the type of investment proposed; and
- the sector in which the investment is to be made.

There are important exemptions to the requirement to obtain consent.

The Overseas Investment Office (OIO) is responsible for approving applications by overseas persons to invest in New Zealand. The Act and the Regulations confer a broad discretion on the OIO to grant consent, with or without conditions, or to refuse consent to an application. The OIO operates under the Minister of Finance in all situations except those relating to land and fisheries, in which cases the Minister of Land Information and the Minister of Fisheries respectively are also responsible.

TYPE OF INVESTMENT

The Act and the Regulations impact on all contracts entered into on or after 25 August 2005. The Act will require consent for a transaction if it involves an overseas investment in:

- sensitive land;
- significant business assets;
- farm land; and
- fishing quotas.

ACQUISITION OF SECURITIES

No approvals under the Act or the Regulations are required by an overseas person to acquire securities in a New Zealand company unless:

- the proposal exceeds the financial thresholds (described below); or
- the company owns land or fisheries or an interest in land or fisheries where that land or fishery would attract the requirement for consent;

and

- the overseas person has a 25% or more ownership or control interest in that company or the overseas person is increasing an existing 25% or more ownership or control interest in the company.

FINANCIAL THRESHOLDS

Consent will be required if:

- the amount to be paid for the securities exceeds NZ\$100 million; or
- the total value of the shares on issue exceeds NZ\$100 million; or
- the gross value of the target company's assets exceeds NZ\$100 million.

OVERSEAS INVESTMENT IN SENSITIVE LAND

Consent will be required for an overseas person to purchase or acquire an interest (for greater than three years) in land which is "sensitive", either directly or through the purchase of securities in a company that owns land (with the overseas person owning or controlling more than 25% of the company) which, together with any associated land:

- exceeds five hectares and is non-urban land (being farm land or any land other than land in an urban area that is used for commercial, industrial or residential purposes);
- is part of the foreshore and/or seabed;
- exceeds 4000 m² and:
 - is held for conservation purposes, is provided as a reserve, a public park, for recreation purposes or as a private open space;
 - is subject to a heritage order or a requirement for a heritage order, is an historic place, historic area or registered wahi tapu (sacred to Maori) site or area or an registration as such;
 - is part of the bed of a lake;
 - is part of certain named islands; or
 - is part of any island other than islands named in the Regulations.
- exceeds 2000 m² and adjoins the foreshore; or
- exceeds 4000 m² and adjoins land which:
 - is held for conservation purposes, is provided as a recreational, scientific, scenic, historic or nature reserve, regional park, a public park, reserve or other sensitive area under section 37 of the Act, for recreation purposes or as a private open space, is subject to a heritage order or is an historic place;
 - is a lake bed;
 - is subject to a heritage order or a requirement for a heritage order, an historic place, historic area over 4000 m², wahi tapu site or area or an application or proposal for registration as such; or
 - in itself adjoins the sea or a lake and exceeds 4000 m² where such land is an esplanade reserve or strip, a recreation reserve, a road or a Maori reservation.

OVERSEAS INVESTMENT IN FARM LAND

The OIO cannot approve the purchase of farm land by an overseas person unless it has first been offered on the open market in New Zealand in accordance with the procedures set out in the Regulations. The Minister of Land Information can waive this requirement, but only if the purchase is likely to result in substantial and identifiable benefits to New Zealand.

OVERSEAS INVESTMENT IN SIGNIFICANT ASSETS/BUSINESS

If an overseas person plans to acquire securities in a business, establish a business or to purchase assets in New Zealand that does not involve the acquisition of sensitive land, then no overseas investment consent will be required unless the investment is expected to exceed NZ\$100 million.

If the proposed investment is expected to exceed NZ\$100 million then the investment will be considered an overseas investment in significant business assets and overseas investment consent will need to be obtained.

OVERSEAS INVESTMENT IN COMMERCIAL FISHING

In addition to the Act and the Regulations, overseas investment in commercial fishing in New Zealand is controlled by the Fisheries Act 1996 and certain sections of the Fisheries Act 1983 (together the Fisheries Act).

The Fisheries Act regulates commercial fishing of most species of fish within the territorial waters of New Zealand. Generally speaking, all important commercial species of fish are regulated by the Fisheries Act.

New Zealand operates a quota management system to achieve sustainable management of its fisheries resources.

Fishing quota are issued under the Fisheries Act. A fishing quota entitles the holder to fish commercially for the species and quantity of fish set down in the quota. No commercial fishing for a species controlled by the Fisheries Act can be undertaken within the territorial waters of New Zealand by persons who do not own fishing quota, without obtaining approval.

The Act, the Regulations and the Fisheries Act prohibit an overseas person from having an interest in fishing quota or rights or interests in a business (where the overseas person owns 25% or more securities) that owns or controls (directly or indirectly) an interest in a fishing quota.

The overseas person, as that term is used in the Fisheries Act, has the same meaning as used in the Act and the Regulations. The OIO also has responsibility for administering the overseas person provisions of the Fisheries Act. In determining the grant of permission to an overseas person to acquire any quota, the OIO will have regard to similar considerations as those outlined in section 2.2 of this guide.

CONCLUSION

An overseas investor considering investing in New Zealand should contact Bell Gully for advice on controls regulating their proposed area of investment.

2.2 Factors considered by the Overseas Investment Office

CRITERIA FOR OVERSEAS INVESTMENT IN SIGNIFICANT BUSINESS ASSETS

When considering a non-land application, the OIO will grant approval if it is satisfied that the overseas person involved or (if that person is not an individual) the individuals with control of the relevant overseas person collectively:

- have the necessary business experience and acumen; and
- have demonstrated financial commitment to the investment; and
- are of good character; and
- are not individuals of the kind listed in section 7(1) of the Immigration Act 1987.

CRITERIA FOR INVESTMENT IN SENSITIVE LAND

When considering an application for an overseas investment in sensitive land (either a direct interest or securities giving an indirect interest in sensitive land), in addition to the criteria used for overseas investment in significant business assets, the OIO must be satisfied that:

- Either:
 - the overseas person is, or (if that person is not an individual) all the individuals with control over the overseas person are, New Zealand citizens, ordinarily resident in New Zealand or intending to reside in New Zealand indefinitely; or
 - the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders) (see below) and, if the relevant land includes non-urban land that in area (either alone or together with any associated land) exceeds five hectares, that the benefit will be, or is likely to be, substantial and identifiable.
- If the relevant land is or includes farm land, (subject to limited exceptions) either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedures set out in the associated regulations.

Benefit to New Zealand

In assessing benefit to New Zealand, consideration must be had to all the following factors:

Whether the overseas investment will, or is likely to, result in:

- the creation of new, or the retention of existing, jobs in New Zealand;
- the introduction into New Zealand of new technology or business skills;
- increased export receipts for New Zealand or exporters;
- added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand;
- introduction into New Zealand of additional investment for development purposes;
- assisting New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land.

FORESHORE/SEABED/RIVERBED/LAKEBED

Where the relevant land is or includes foreshore, seabed, river bed or a lake bed, the land must first be offered back to the Crown in accordance with the procedures set out in the Regulations and the Act.

FARMLAND

In addition to the criteria used for overseas investment in significant business assets and investment in sensitive land, the following requirements must also be considered when dealing with any farm land application:

- whether the investor intends to reside in New Zealand;
- whether experimental or research work will be undertaken on the land;
- the proposed use of the land;
- whether the investor intends to farm the land and is capable of doing so; and
- whether the land has first been advertised on the open market for at least 20 days in accordance with the Act and the Regulations.

CRITERIA FOR OVERSEAS INVESTMENT IN FISHING QUOTA

In addition to the criteria used for overseas investment in significant business assets the following criteria for an overseas investment in fishing quota must be considered:

- whether the relevant overseas person is a body corporate;
- whether the interest in the fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register; and
- whether the granting of consent is in the “national interest” (see below).

NATIONAL INTEREST

In assessing whether or not an overseas investment in fishing quota is in the national interest, consideration must be given to all the factors listed in “Benefit to New Zealand” (see above), and also the following factors:

- whether the overseas investment will, or is likely to, result in increased processing of New Zealand fish, aquatic life or seaweed; and
- any other factors set out in the Regulations or that the Minister of Finance and the Minister of Fisheries, having regard to the circumstances and nature of the application, think fit.

INVESTMENT PLAN

The OIO requires an investment plan for investments in sensitive land that addresses the relevant factors listed in “Benefits to New Zealand” (see above), and, at a minimum, includes:

- a business plan relating to any business to be undertaken on the land (including major proposed developments, proposed level of capex and likely business income and expenditure in each of the first five years); and
- reports identifying whether each of the specified factors are likely to be addressed including (if applicable) detail on and conservation plans for indigenous vegetation/fauna, wildlife, historic heritage and walking access; and

- a report identifying the nature of any current business undertaken on the land (including current productivity and gross annual income, operating expenses and net surplus).

An application is decided by:

- in the case of a sensitive land decision, the Minister of Finance and the Minister for Land Information (although some decisions are delegated); and
- in the case of a significant business assets decision, by the OIO (under delegation from the Minister of Finance).

The OIO may consult with any third party (for example, the Historic Places Trust) and may also receive submissions from third parties. Such consultation or submissions will extend the time taken by the OIO to consider an application.

An early decision is more likely where all relevant information is made known to the OIO at the time of application. What is relevant varies with the investment being undertaken. However, sufficient information should be given to enable the OIO to evaluate the proposal.

2.3 Specific activities not requiring consent

COMMERCIAL PROPERTIES

Generally, overseas persons are free to purchase a commercial building in New Zealand situated on land without any need for consent from any regulatory body. If the value of the commercial building as a business exceeds NZ\$100 million, OIO consent is required under the Regulations.

RESIDENTIAL PROPERTIES

An overseas person is free to purchase a residence or holiday house in New Zealand without any prior regulatory consent, provided the property does not fall within the types of land requiring consent (set out in the land section above, particularly coastal land over 2000 m²).

FINANCIAL INSTITUTIONS

Any financial institution wishing to commence business in New Zealand may do so without any specific consents (other than any consent required under the Act and the Regulations) unless the financial institution wishes to use the words “bank” or “banking” in its name. In this case, the institution must apply to the Reserve Bank of New Zealand (the central bank) under the Reserve Bank of New Zealand Act 1989 (the Reserve Bank Act) either for authorisation to use those words in its name or for registration as a registered bank. As a registered bank, it will then be supervised by the Reserve Bank.

The Reserve Bank Act sets out the criteria that it must consider when reviewing an application for registration as a registered bank. These factors include:

- the applicant and the applicant’s owner’s standing in the financial market;
- the incorporation and ownership structure of the applicant;
- the amount of capital that the applicant has;

- the size and nature of the applicant's business or proposed business, or any part of the applicant's business or proposed business;
- the applicant's ability to carry on its business or proposed business in a prudent manner;
- the legal requirements of the applicant or owner's country of domicile if it is an overseas person;
- the suitability of the positions of the directors and senior managers of the applicant; and
- any other matters that may be relevant.

By law, the Reserve Bank is required to publish the criteria it uses to assess applications for registration as a bank. There is no limit on the number of organisations able to qualify for banking status, nor is there any limit on the banking activities that a bank may offer. In addition, an applicant may be a branch or a local subsidiary of an overseas company.

The Reserve Bank Act also imposes requirements on banks in respect of:

- supervision by the Reserve Bank; and
- supply of information.

These requirements apply to all banks and not just those owned by overseas investors.

Financial institutions that are not required to be registered as banks are not subject to any statutory supervision or regulation. However, if the institution takes deposits from the public, then the institution must comply with the procedural and documentary requirements of the Securities Act 1978.

The financial services sector has recently been subject to several reviews by the Ministry of Economic Development, which is expected to lead to increasing regulation, including for non-bank deposit takers, financial services providers and financial advisers. In the short to medium term, new legislation is expected to come into force in 2008 which will require all non-bank deposit takers to be licensed by the Reserve Bank. They will also be required to have a credit rating from a ratings agency approved by the Reserve Bank. Long term, all financial services providers will be required to register with the Companies Office. These changes have only been discussed at a policy level, and legislation is yet to be drafted. Therefore, the final shape of this regulation could differ to that indicated here.

2.4 General measures regulating business

Like other jurisdictions, New Zealand has legislation regulating specific business activities. This legislation applies equally to New Zealand investors and to overseas investors.

COMMERCE ACT 1986

New Zealand's competition or antitrust laws are contained in the Commerce Act 1986. The restrictive trade practice provisions in this Act are based largely on the Australian Trade Practices Act 1974, which is in turn based substantially upon United States federal antitrust law. For a more detailed account of New Zealand's competition laws, please see section 5 of this guide.

FAIR TRADING ACT 1986

The Fair Trading Act 1986 sets standards of trading behaviour and protects consumers by preventing misleading and deceptive conduct in trade. The Fair Trading Act complements the Commerce Act by setting standards of trading conduct. Penalties may be imposed upon those traders who fall below the standards set out in the Fair Trading Act.

CONSUMER GUARANTEES ACT 1993

The Consumer Guarantees Act 1993 applies to goods or services ordinarily acquired for personal, domestic or household use or consumption. Under the Consumer Guarantees Act, manufacturers, suppliers and importers guarantee their products or services as a matter of law.

SECURITIES MARKETS ACT 1988

Under the Securities Markets Act 1988, if an investor directly or indirectly acquires 5% or more of the shares in a company whose shares are quoted on the New Zealand Stock Exchange, then the investor must file a substantial security holder notice in the prescribed form with the company concerned and with the Exchange. The notice must include information about the investor and the shares in which it has the interest. After a substantial security holder notice is filed, public disclosure of changes in the investor's shareholding equal to 1% or more of the total shares on issue is also required.

RESOURCE MANAGEMENT ACT 1991

Environmental law is regulated in New Zealand by the Resource Management Act 1991 and other specific legislation. Under this Act, all uses of land, air and water are regulated by local and regional government.

A consent process has been established for approval of any development proposal.

3 IMMIGRATION

New Zealand's immigration policy offers a number of routes to residency and employment, depending on your skills, circumstances and goals.

Visas and permits are available for those coming to work for an employer, while there are a range of schemes available to those intending to settle permanently and invest or set up a business in New Zealand.

As in most countries, immigration policy changes frequently and we recommend that you check current policies and procedures before applying.

Immigration New Zealand's (INZ) website at www.immigration.govt.nz contains current information on the application process and requirements. All INZ forms can be downloaded from this website.

Bell Gully can advise you on your eligibility for the various work and business migration schemes and can assist with your application if required.

3.1 Work permits and visas

If you are not a New Zealand or Australian citizen/resident, you will need a work visa or permit to work in New Zealand.

A **work visa** allows you to enter and re-enter New Zealand in order to work.

A **work permit** allows you to work in New Zealand. It will normally include an expiry date and any conditions, such as the type of employment, your employer's name and where you are permitted to work in New Zealand.

Work permits and visas are issued for periods of up to three years from the date of your arrival. There is no limit on the number of subsequent work permits/visas that you can obtain.

If you are coming to New Zealand to settle permanently and invest in or set up a business, there are a number of **business residency** and **work to residency schemes** that may be more appropriate (see below).

3.1.1 APPLICATION

The time required to process a work visa/permit application varies depending on where you apply, application levels and your particular circumstances. Usually offshore applications are quicker.

All INZ forms can be downloaded from the INZ website and are also available from Bell Gully.

Successful applicants will need to:

- satisfy health and character requirements; and
- provide evidence of a job offer; and
- provide evidence that your employer is unable to fill your position from the New Zealand labour market.

3.1.1.1 Health, character and English language requirements

Medical

If you intend to be in New Zealand for six months and are from a country, area or territory not listed as a low incidence TB country (or have spent a combined total of three months or more in these countries, areas or territories), you will be required to provide a Temporary Entry X-ray certificate.

All people entering New Zealand for 12 months or more will be required to undergo a full medical.

A list of international medical practitioners authorised to complete medical certificates is available from the INZ website.

Police

If you intend to stay in New Zealand for longer than 24 months, you must provide police certificate(s) from your country of citizenship and from any country in which you have lived for five or more years since the age of 17.

At the time of submitting your application, medical certificates and X-rays must be less than three months old and police certificates must be less than six months old.

English language

Current English language requirements for each category can be checked online at the INZ website.

3.1.1.2 Offers of employment

You will need to provide evidence of an offer of employment, which must contain a full job description, including:

- job title;
- address of place of employment;
- type of work;
- duties and responsibilities involved;
- details of pay and conditions;
- any qualifications, registration, experience or training required;
- duration of the job; and
- how long the offer will remain open.

If there is a known regional labour market skills shortage of your skills of occupation, the Immigration New Zealand (INZ) Occupational Shortages scheme can help streamline the work permits and visa process. You can check the current list of Occupational Shortages on the INZ website (www.immigration.govt.nz).

3.1.1.3 Employers' evidence

You will also need to supply details and evidence provided by your prospective employer of their efforts to find suitable New Zealanders for this position and the reasons why they are unable to employ or readily train suitable New Zealanders for this position.

As employers wishing to employ foreign workers to work in New Zealand must comply with all relevant employment and labour law in force in New Zealand, they may be required to provide evidence and/or confirmation of past and future compliance with employment and labour law.

INZ must be satisfied that job offers made to foreign workers are both genuine and sustainable for the period of the proposed employment contract.

3.1.1.4 What about your family members?

Your accompanying partner and children should apply for either a work, visitor or student visa – more details are available on the INZ website.

3.2 Specific purpose or events visas and permits

You can be considered for a specific purpose or events visa/permit if you intend to come to New Zealand for a specific purpose or event. These could include:

- senior or specialist business people on short-term secondments who have a job offer either in a substantial New Zealand company or a New Zealand subsidiary of an overseas company;
- a business person seconded to New Zealand as an intra-corporate transferee to take up a position in a multi-national company as:
 - an executive; or
 - a senior manager; or
 - specialist personnel.

3.3 Coming to New Zealand to set up business

If you want to set up business in New Zealand and live here permanently you will need to apply for residency.

INZ assesses residency applications in four main categories:

- skilled migrant;
- business (including Investor, Entrepreneur and Long Term Business Visa);
- family; and
- family quota.

In this section, we will focus on the business categories. Further information on the other categories is available on the INZ website (www.immigration.govt.nz).

If you are coming to work in New Zealand for an employer or to work for shorter periods of time, a work visa and permit may be more appropriate (see above).

3.3.1 APPLICATION FOR RESIDENCY THROUGH THE BUSINESS CATEGORIES

The New Zealand Government's Business Migration Policy is designed to attract migrants who will contribute to the country's economic growth by increasing the country's skills base, encourage enterprise and innovation, and foster international linkages.

There are several ways of migrating to New Zealand as a business migrant:

- by obtaining a Long Term Business Visa;
- by meeting the key criteria in the Investor category;
- via the Entrepreneur category;
- through the Employees of Relocating Businesses category; or
- through the Work to Residence policies.

3.3.1.1 Health, character and English language requirements

All business migrants and their spouses/dependants must also meet health, character and English language requirements.

Medical

If you intend to be in New Zealand for six months and are from a country, area or territory not listed as a low incidence TB country (or have spent a combined total of three months or more in these countries, areas or territories), you will be required to provide a Temporary Entry X-ray certificate.

All people entering New Zealand for 12 months or more will be required to undergo a full medical.

A list of international medical practitioners authorised to complete medical certificates is available from the INZ website.

Police

If you intend to stay in New Zealand for longer than 24 months, you must provide police certificate(s) from your country of citizenship and from any country in which you have lived for five or more years since the age of 17.

At the time of submitting your application, medical certificates and X-rays must be less than three months old and police certificates must be less than six months old.

English language

Current English language requirements for each category can be checked online at the INZ website.

3.3.1.2 Long Term Business Visa (LTBV)

The LTBV is essentially a look-and-see visa. It is ideal if you are interested in residence under the Entrepreneur category and interested in establishing a business in New Zealand, but do not yet know whether you wish to live in New Zealand permanently.

It enables you to establish a business, assess its viability and determine whether or not you want to live in New Zealand.

To apply for an LTBV, you must:

- have a satisfactory business plan;
- have, in addition to investment capital, sufficient funds for your maintenance and accommodation and that of any spouse or partner and/or dependent children included in the application;
- meet health, character and English language requirements; and

- satisfy the NZIS that you are genuinely interested in establishing a business in New Zealand.

Successful applicants for an LTBV are granted a work visa for up to three years and can then make an application for residence under the Entrepreneur category.

3.3.1.3 Investor category

The Immigration Minister recently announced changes to the Investor category. Applications under the old Investor category closed on 31 July 2007.

The new Active Investor Migrant policy is divided into three sub-categories:

- Global investors
This is a top priority category for high value investors investing NZ\$20 million (including at least \$5 million in active investment).
- Professional investors
A second priority category for migrants investing NZ\$10 million (including at least \$2 million actively).
- General (Active) investors
A category for those investing a minimum of NZ\$2.5 million.

Applicants are selected through a points system which will recognise:

- the importance of having both financial and human capital;
- the benefit of active investment;
- the value of export linkages, technology transfer, entrepreneurship and management skills.

There is an annual cap on the number of places available under the new policy at 1000 people (around 300 applications). Global and Professional investors will be selected first, with the remaining places available to the General (Active) investors.

The new policy will be implemented in late 2007. There are still some operational details that require further development in the interim. This includes consideration of options for those with applications under the current policy. More information will be available from INZ.

If your application under the Investor or Entrepreneur categories is successful, you will receive a resident's visa to allow you to enter New Zealand initially and a returning resident's visa to allow you to travel to and from New Zealand. A returning resident's visa is issued for two years in the first instance and can then be renewed for different periods depending on your residency status.

3.3.1.4 Entrepreneur category

The intention of the Entrepreneur category is to attract migrants who can demonstrate they have been actively participating in business and contributing to New Zealand's economic development. If you need further information on the Entrepreneur category, contact Bell Gully.

3.3.1.5 Employees of Relocating Businesses category

The Employees of Relocating Businesses category grants residence to key employees of businesses relocating to New Zealand who would not otherwise qualify under other categories.

You and any family included in your application must meet health, character, and English language requirements.

A key employee is an employee of the business whom the chief executive officer (CEO) of the relocating business reasonably considers will be essential to the operation of the relocated business in New Zealand.

3.3.1.6 Work to Residence category

INZ also operates a Work to Residence policy which provides residence in New Zealand through the following policies and schemes:

- Talent Policy (Accredited Employers) – employment with accredited employers;
- Talent Policy – for people with exceptional talent in a field of art, culture, or sport;
- Priority Occupations List Policy – employment in an occupation on the Priority Occupations List.

The key requirements under each of the Work to Residence policies are set out below, but all applicants must also meet health, character and English language requirements.

Talent (Accredited Employers) Work Policy

Applicants should be:

- aged 55 years or under; and
- have an offer of employment in New Zealand for at least 24 months with an accredited employer and a minimum base salary of NZ\$50,000 per annum; and
- have met, or are able to meet, any of the necessary New Zealand registration requirements if these are required to take up the offer.

A current list of accredited employers is available from the INZ website. More information can be provided on becoming an accredited employer.

Talent (Arts, Culture and Sports) Work Policy

Applicants should be:

- aged 55 years or under; and
- satisfy the INZ that they have exceptional talent in a declared field of art, culture or sport; and
- be sponsored by a New Zealand organisation of national repute in the applicant's field.

Priority Occupations List Work Policy

Applicants should have:

- an offer of employment in New Zealand in an occupation that is included on the Priority Occupations List that meets the specifications for that occupation; and

- be suitably qualified by training and/or experience to undertake their offer of employment as well as meeting any specific requirements set out in the Priority Occupations List; and
- have met or be able to meet any of the necessary New Zealand registration requirements if these are required to take up the offer.

A current list of priority occupations is available from the INZ website.

If your application under a Work to Residence policy is successful, you will be issued with a work visa allowing the grant of a work permit as follows:

Talent (Accredited Employers) Work Policy	30 months
Talent (Arts, Culture and Sports) Work Policy	30 months
Priority Occupations List Policy	30 months
Business Policy - LTBV/permit category	36 months

Once you have held these permits, you may become eligible for residency in New Zealand if you:

- have held a work permit and work visa granted under one of the Work to Residence policies for at least 24 months; and
- have employment in New Zealand with a minimum base salary of NZ\$50,000 per year; and
- your employment is in New Zealand, full time, ongoing and genuine.

4 HOW TO START A BUSINESS IN NEW ZEALAND

4.1 General

INTRODUCTION

The Companies Act 1993 regulates the incorporation, management and liquidation of companies and provides for the incorporation of limited and unlimited liability companies. The most common type of company is a company limited by shares. This guide discusses only this type of company.

COMPANIES LIMITED BY SHARES

Under the Companies Act, the liability of each shareholder of a company limited by shares is limited to the amount of share capital that the shareholder has agreed to contribute to the company. When a shareholder has paid all of the money payable on its shares, that shareholder has no additional liability to contribute to the capital of the company.

The Companies Act does not distinguish between public and private companies. Under the Companies Act, companies have no limitation on the number of shareholders or on their power to raise money from the public (although the process is regulated). Commercially, companies can be classified as listed (i.e. their shares are quoted on the New Zealand Stock Exchange) and un-listed (i.e. their shares are not quoted).

A company may be incorporated in New Zealand by registering certain documents with the Registrar of Companies and paying a prescribed fee. The documents required to incorporate a company are listed below.

APPLICATION FOR RESERVATION OF NAME

An application for reservation of a company name must be made to the Registrar of Companies in the prescribed form.

The Registrar of Companies must refuse to reserve names that the Registrar considers would contravene another New Zealand statute, are identical or almost identical to the name of another company, or are offensive.

Once granted, a name reservation remains in force for 20 working days from the date of the reservation. A name reservation is provisional and does not give any proprietary right to the reserved name. The Registrar of Companies can revoke a reservation at any time.

REGISTRATION OF DOCUMENTS

Upon reservation of a name by the Registrar of Companies, a company can be incorporated by paying the prescribed fee and filing the following documents with the Registrar of Companies:

- notice of name approval;
- application for registration;
- consents of shareholders and directors; and
- constitution (optional).

You can also apply for a company IRD number and register for GST at the same time as incorporating.

APPLICATION FOR REGISTRATION

The application must be in the prescribed form and signed by each applicant. The application must include:

- the full name and address of each applicant;
- the full name and residential address of each director and each shareholder;
- the number of shares to be issued to each shareholder;
- the company's address for service.

Alternatively, this information can be submitted online.

CONSENTS OF SHAREHOLDERS AND DIRECTORS

Every company must have at least one shareholder and one director. Each director must be at least 18 years of age.

Shareholders are required to consent to being a shareholder and to taking the shares specified in the consent. Directors are required to consent to act as a director and certify that they are not disqualified from being appointed to hold the office of director.

CONSTITUTION

A company is not required to have a constitution (or articles of association). If a company does not have a constitution, the rights, powers, duties and obligations of the company, the board, each director and each shareholder will be as set out in the Companies Act. A company will need to have a constitution if there are provisions in the Companies Act 1993 that shareholders wish to negate, add to or alter. However, a constitution must not contravene, or be inconsistent with, certain provisions of the Companies Act.

INCORPORATING A COMPANY

When the Registrar is satisfied that the prescribed documents are in order and the formalities prescribed have been complied with, the Registrar must incorporate the company.

On registration, the Registrar gives a certificate that the company is incorporated and, in the case of a company limited by shares, that the liability of the company is limited.

A company may commence trading from the date of incorporation.

4.2 Establishing a joint venture

STRUCTURE OF JOINT VENTURES

The term joint venture is used in New Zealand to mean an arrangement between two or more parties who combine together to invest capital or resources in a particular project. A joint venture can be carried out in one of three ways:

- by a company incorporated under the Companies Act;
- by a partnership; or

- by an unincorporated contractual joint venture.

Tax issues will affect the choice of appropriate structure.

A COMPANY USED FOR A JOINT VENTURE

A company can be used to undertake a joint venture. The requirements of the Companies Act already discussed in this guide apply to joint venture companies.

The structure and operation of a joint venture may be dealt with in the joint venture company's constitution and/or by way of a separate shareholders' agreement.

A PARTNERSHIP USED FOR A JOINT VENTURE

A partnership is defined in the Partnership Act 1908 as the relationship that subsists between persons who carry on a business in common with a view to profit.

Each partner is liable jointly and severally for the liabilities of the partnership (although there is provision to create special partnerships which can limit liability). In addition, the acts of every partner in carrying on the business of the partnership will bind the partnership and the other partners.

A partnership is established by partners entering into a partnership agreement in writing or otherwise. The Partnership Act 1908 and the common law regulate partnerships. However, the general rules in the Partnership Act 1908 can be varied by written agreement between the partners.

The partnership agreement may set down all of the elements of the relationship including:

- the objective of the partnership;
- each partner's contribution;
- each partner's rights and obligations;
- the rules setting down how the partnership will operate, including the management structure;
- the term; and
- events of termination.

Legislation is currently before Parliament to introduce a limited partnership regime which is expected to take effect from April 2008. Limited partnerships are a form of partnership involving general and limited partners. General partners transact the business of the partnership while limited partners are passive investors and are liable only to extent of their capital contribution to the partnership.

UNINCORPORATED JOINT VENTURES

In special and limited circumstances, the parties can establish an unincorporated joint venture that is not a partnership. As in the case of a partnership, the parties to an unincorporated joint venture enter into a written joint venture agreement. Whether any particular unincorporated joint venture is a partnership is a question of fact. Generally speaking, most unincorporated joint ventures, unless carefully structured, are partnerships.

There is no distinct body of law in New Zealand governing unincorporated joint ventures that are not partnerships. The assets of an unincorporated joint venture are owned by the joint venture parties as tenants in common in the proportions agreed between them. The

joint venture agreement entered into for an unincorporated joint venture usually includes similar provisions to those in a partnership agreement.

REGULATIONS APPLYING TO JOINT VENTURES

Any investment in a joint venture by an overseas person would be subject potentially to the Overseas Investment Regulations 1995 and, depending on the investment, the Fisheries Act 1983, and/or the Territorial Sea and Exclusive Economic Zone Act 1977. There are no additional special regulations governing the establishment of joint ventures by overseas persons in New Zealand.

It is unlikely that an overseas company could involve itself directly in an ongoing joint venture business in New Zealand without registering either as a branch or establishing a local subsidiary.

4.3 Branches of overseas companies and local subsidiaries

REGISTERING A BRANCH

The Companies Act requires every overseas company that carries on business in New Zealand to register as an overseas company under the Companies Act.

An overseas company is a company that is incorporated outside New Zealand. Generally, the provisions of the Companies Act relating to companies incorporated in New Zealand do not apply to overseas companies.

An overseas company may not commence business within New Zealand unless the name of the overseas company has been reserved. In addition, within 10 working days of commencing business in New Zealand, the Companies Act requires an overseas company to deliver to the Registrar of Companies an application for registration in the prescribed form that is signed by or on behalf of the overseas company. The application must:

- state the name of the overseas company and the full names and residential addresses of its directors;
- state the address of the principal place of business in New Zealand of the overseas company and the name and address of at least one person resident or incorporated in New Zealand authorised to accept service of documents on behalf of the overseas company;
- attach the notice of name approval; and
- attach evidence that the company is incorporated outside New Zealand and a copy of the instrument constituting or defining the constitution of the company and, if these documents are not in English, a certified translation.

A subsequent alteration to any of the above documents or details must also be filed with the Registrar of Companies within 20 working days of the alteration. Overseas companies that are incorporated in Australia do not need to file constitution and director changes with the Registrar of Companies due to information sharing facilities implemented by the New Zealand Companies Office and the Australian Securities and Investment Commission.

CONTINUING STATUTORY OBLIGATIONS FOR A BRANCH

The continuing statutory obligations of an overseas company carrying on business in New Zealand through a branch are:

Filing of accounts

Under the Financial Reporting Act 1993, directors of overseas companies must, within 20 working days after the financial statements of the company and any group financial statements have been signed (which must be within five months of balance date), ensure that audited copies of those financial statements are filed with the Registrar of Companies. Financial statements include:

- an audited statement of financial position and an audited statement of financial performance for its total business (that is, its business both inside and outside New Zealand) and, if it is a holding company, an audited group or financial statement (Overall Accounts). Overall Accounts must be signed by two directors of the overseas company and accompanied by an auditor's report.
- an audited statement of financial position and audited statement of financial performance for its business operation conducted in or from New Zealand (Local Accounts) unless the Registrar of Companies decides that the Overall Accounts contain all necessary information. Local Accounts must be signed by two directors of the overseas company and be accompanied by an auditor's report.
- a statement of cashflows may also be required for each set of financial statements.

The Financial Reporting Act (Overseas Incorporated Companies – United States of America) Exemption Notice 2007, which is expected to come into force in 2007, will provide limited relief to US incorporated companies from the Financial Reporting Act requirement to prepare and file unconsolidated financial statements (i.e., stand-alone parent company financial statements) with the Registrar of Companies.

Updating details

Changes in company details or changes to documents that have been filed with the Registrar of Companies must be notified to the Registrar of Companies within 20 working days.

Annual return

Each year (except in the year of its registration), during the month specified by the Registrar of Companies, every overseas company carrying on business in New Zealand must lodge an annual return in the prescribed form with the Registrar. The annual return sets down the name and number of the overseas company together with the country in which it is incorporated.

Annual filing fee

An annual filing fee is payable each time the overseas company delivers copies of its financial statements to the Registrar.

Use of name

An overseas company must have its name and its country of incorporation on all written communications and on every document issued or signed that creates a legal obligation.

CONTINUING STATUTORY OBLIGATIONS FOR A LOCAL SUBSIDIARY

The continuing statutory obligations of a New Zealand incorporated subsidiary of an overseas company (the local subsidiary) are:

Filing of accounts

Under the Financial Reporting Act 1993, directors of the Local Subsidiary must, within 20 working days after the financial statements of the company and any group financial statements have been signed (which must be within five months of balance date), file audited copies of those financial statements with the Registrar of Companies. Financial statements include a statement of financial position and statement of financial performance and, unless differential financial reporting applies, a statement of cashflows.

Annual return

Each year (except in the year of its incorporation) the local subsidiary must file an annual return that must include:

- the address of the registered office of the company;
- the address for service and the postal address of the company;
- a summary of share capital;
- particulars of directors;
- a list of shareholders; and
- the date of the last annual general meeting.

Annual filing fee

A local subsidiary is required to pay an annual filing fee each time it delivers its financial statements to the Registrar of Companies.

Annual report

In addition to an annual return, companies are required to prepare an annual report within five months of the balance date. The company must send to all shareholders (not less than 20 working days before the date fixed for the local subsidiary's annual general meeting) a notice advising shareholders that they have a right to receive a copy of the annual report, and stating how the shareholder can receive the annual report by electronic means. The annual report must include, among other things:

- copies of financial statements;
- the directors' report;
- any auditor's report required;
- details of directors; and
- the numbers of employees receiving benefits over NZ\$100,000 in bands of NZ\$10,000.

Use of name

Once a company has been incorporated, it must have its name stated in legible characters in all written communications and on every document issued or signed by the company that creates a legal obligation.

5 COMPETITION LAW

5.1 General

INTRODUCTION

In New Zealand, competition law is governed by the Commerce Act 1986. The Act aims to promote competition in New Zealand markets for the long-term benefit of consumers.

Certain conduct and business arrangements that have the purpose or effect of lessening competition within New Zealand are prohibited. The restrictive trade practices provisions in the Act concern the manner in which businesses compete with each other. Separate provisions regulate business acquisitions that lessen competition.

The New Zealand Commerce Commission (the Commission) is the regulatory body that oversees compliance with the Act.

MARKET DEFINITION

Market definition is pivotal in the application of the Act. The effect that an acquisition or restrictive trade practice has on a market may depend on how narrowly or broadly that market is defined. Generally, the narrower the market definition, the greater the effect an acquisition or a practice will have. The Commission has tended to adopt narrow definitions when considering the effects of an acquisition or a practice on competition.

EXTRA-TERRITORIAL EFFECT

An interesting feature of New Zealand competition law is that the Act applies to certain conduct outside New Zealand. The Act's ambit includes conduct that occurs outside New Zealand by persons resident or carrying on business in New Zealand that affects a market in New Zealand.

5.2 Business acquisitions

CERTAIN BUSINESS ACQUISITIONS PROHIBITED

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

This determination involves an analysis of the market concerned. There are two broad steps that must be taken when assessing whether an acquisition substantially lessens competition:

- the market must be defined. The Commission defines markets in terms of five possible dimensions: product, geographical extent, functional level (e.g. manufacture, wholesale, retail), consumer dimension and time (e.g. seasonal, peak/off-peak). Demand-side and supply-side substitutions are key considerations when the Commission defines the boundaries of the market; and
- the impact of the merger on competition in the market must be assessed. The Commission will review whether the acquisition will increase the scope for the exercise of unilateral and co-ordinated market power.

SAFE HARBOURS

The Commission has published guidelines detailing how it will assess whether an acquisition will substantially lessen competition. Within those guidelines it sets out safe harbours based on market shares. The Commission's view is that an acquisition is unlikely to breach the Act if:

- the combined market share of the three largest firms is below 70% and the market share of the combined entity is less than 40%; or
- the combined market share of the three largest firms is above 70% and the market share of the combined entity is less than 20%.

Even if an acquisition falls outside the safe harbours, it still may not substantially lessen competition in the relevant market. Generally, an acquisition that falls outside the safe harbours may not breach the Act if:

- there are low barriers to entry or expansion in the market; and/or
- buyers or suppliers can exercise countervailing power against the merged entity; and/or
- there is limited or no opportunity for co-ordinated behaviour between market participants (i.e. limited or no opportunities for collusion and discipline in the market).

If an acquisition falls within the safe harbours, in some circumstances, there may still be a substantial lessening of competition. If the acquisition is close to the safe harbours the application of the above factors to the relevant market should be considered.

SEEKING CLEARANCE OR AUTHORISATION FROM THE COMMISSION

In New Zealand there is no compulsory requirement to notify the Commission of acquisitions. Instead businesses can voluntarily submit proposed acquisitions to the Commission for review.

Businesses that believe a proposed acquisition may result in a substantial lessening of competition in a market should seek clearance or authorisation from the Commission before proceeding.

Clearance will be granted by the Commission when it is satisfied that the acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

Once an application for clearance is registered, the statutory timeframe for the Commission to make a decision is 10 working days (although this period is invariably extended at the Commission's request. Recent experience suggests a minimum of 50-70 working days should be provided for).

Alternatively, a business may apply for authorisation when an acquisition may have the effect of substantially lessening competition.

Authorisation will only be granted if the Commission is satisfied that the detriments from any substantial lessening of competition are outweighed by sufficient public benefits. Once an application for authorisation is registered, the Commission has 60 working days in which to make a decision (or longer if the Commission and the applicant agree).

If an acquisition proceeds in accordance with a clearance or authorisation within 12 months from the date on which it is issued, the acquisition is protected from challenge under the Act by either the Commission or a third party.

5.3 Restrictive trade practices

The restrictive trade practices provisions can be broadly classified as prohibiting either:

- collective anti-competitive behaviour; or
- unilateral anti-competitive behaviour.

Some restrictive trade practices can also be authorised, on a similar basis to that set out above for acquisitions.

COLLECTIVE BEHAVIOUR

There are three broad categories of collective behaviour that are prohibited by the Act.

The Act prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. This prohibition is broad, incorporating prohibitions that may not be caught by other more specific provisions in the Act. Whether an agreement has an anti-competitive effect depends on an analysis of both the market and the impact the agreement has had, or is likely to have, on the market.

For the purposes of restrictive trade practices, the contract, arrangement or understanding need not be a formal (i.e. legally enforceable) agreement. In some cases an informal agreement, or even those concluded with a “wink or a nod”, may suffice.

COLLECTIVE BOYCOTTS

This restriction prohibits competitors from entering into exclusionary provisions or collective boycotts.

Competitors cannot get together and threaten a supplier to, for example, stop supplying a rival business. Similarly, a group of suppliers could not threaten a business to stop buying from a competing supplier.

Exclusionary provisions or collective boycotts must also have either the purpose, effect, or likely effect, of substantially lessening competition in a market.

PRICE FIXING

Contracts, arrangements or understandings among competitors that have the purpose, effect or likely effect of fixing, controlling or maintaining prices are prohibited under the Act. This prohibition also applies to fixing, controlling or maintaining, discounts, credit and rebates.

Price fixing can occur in seemingly innocuous situations. Benchmarking agreements, formulae for ascertaining price and arrangements regarding terms of credit all potentially give rise to price fixing if agreed to by competitors. A breach occurs irrespective of whether the arrangement is successful.

Once price fixing is established, the agreement is deemed to have the purpose, effect or likely effect of substantially lessening competition.

5.4 Unilateral behaviour

There are two types of unilateral behaviour prohibited by the Act.

RESALE PRICE MAINTENANCE

Suppliers cannot fix the price at which goods may be sold by other businesses. A supplier will be maintaining the resale price if it:

- specifies a minimum price;
- takes or threatens to take action against a reseller who sells below a minimum price; or
- restricts the ability of resellers to discount (e.g. “discounts must not be greater than 20% of the recommended retail price”).

TAKING ADVANTAGE OF MARKET POWER

A company with a substantial degree of market power must not take advantage of its market strength for an anti-competitive purpose.

Generally, a firm will have a substantial degree of power in a market if it can operate in a market substantially independently of its competitors. The anti-competitive purposes are:

- restricting the entry of a person into a market;
- preventing or deterring a person from engaging in competitive conduct; or
- eliminating a person from a market.

5.5 Penalties

RESTRICTIVE TRADE PRACTICES

In relation to restrictive trade practices, an individual may be penalised up to NZ\$500,000. In the case of a body corporate, the penalty can be up to the greater of NZ\$10 million, three times the value of any commercial gain resulting from the contravention, or 10% of the turnover of the body corporate and all its interconnected body corporates if the commercial gain cannot be established.

Following significant changes to the Act in 2001, price fixing now attracts an increased personal risk for those involved. The courts are required to impose a monetary penalty of up to NZ\$500,000 on an individual breaching the Act in the absence of good reasons to the contrary. Other provisions that increase the risk to individuals include:

- companies are prohibited from indemnifying a current or former director, employee or agent for penalties or costs incurred in defending a breach of the price fixing prohibition (unless successfully defended); and
- by order of the court, individuals can be banned from involvement in the management or promotion of a company for up to five years for engaging in price fixing or a collective boycott.

BUSINESS ACQUISITIONS

Pecuniary penalties for breaching the business acquisition provisions are a maximum of NZ\$500,000 for individuals and NZ\$5 million for a body corporate.

6 CONTRACTS

6.1 Contracts with overseas persons

New Zealand does not have a separate legal regime for contracts involving overseas-owned or controlled entities that carry on business in New Zealand.

Once an overseas investor has received any necessary consents to invest in New Zealand, the overseas investor and its New Zealand business are subject to the same regulations and legislation that apply to New Zealand investors and to their businesses.

6.2 Determining applicable law

The New Zealand courts apply common law conflict of law principles when determining which country's law applies to dealings between New Zealand-based businesses and overseas entities. Generally speaking, the parties to a contract are free to decide which country's law shall govern the contract.

The New Zealand courts will not give effect to the choice of law of the parties unless the choice is reasonable, genuine, made in good faith and legal.

New Zealand has adopted the United Nations Convention on Contracts for the International Sale of Goods 1980 (the Convention). This Convention will apply to some international contracts for the sale of goods. The Convention is discussed in the section on International Trade.

6.3 Settlement of disputes

The parties to a contract can decide to submit any dispute to court or to arbitration. Any choice to submit to arbitration must be in writing.

7 EMPLOYMENT

7.1 General

The general employment laws of New Zealand apply to workers from overseas who are employed in New Zealand. Statute and the common law regulate all employment agreements in New Zealand.

The Employment Relations Act 2000 is the principal statute regulating employment in New Zealand. There are other statutes regulating holidays, minimum wages and minimum working conditions for factories and offices.

7.2 Employment agreements and collective bargaining

Under the labour relations system in New Zealand, an employee can agree to enter into an individual employment agreement with their employer. Alternatively, employees can join a trade union, which may then negotiate a collective agreement with the employer.

Collective agreements are usually limited to a particular work place, although some industries have multi-employer collective agreements.

The Employment Relations Act promotes collective bargaining and strengthens the role of trade unions in labour relations in New Zealand. Only unions are able to negotiate collective agreements (on behalf of their members) with employers. There is an obligation on employers and unions to negotiate in good faith.

Bell Gully can provide advice on all New Zealand employment law matters.

7.3 Employing an overseas person

WORK PERMITS AND VISAS FOR OVERSEAS PERSONS

All overseas nationals who are not permanent residents of New Zealand must have a visa and a work permit to enter and work in New Zealand. Short-term visas to enter New Zealand can usually be obtained at relatively short notice. However, work permits are more difficult to obtain.

Generally speaking, work permits are granted if the overseas investor can establish that the employee has special experience or skills and that the employer requires the employee's services in New Zealand. In some circumstances local labour market checks will be required.

Section 3 of this guide provides further information on immigration. Bell Gully can also provide additional information on visas and work permits and can prepare and file the necessary applications.

8 INTERNATIONAL TRADE

8.1 General

IMPORTATION

As part of the New Zealand government's policy on exposing the economy to international competition, New Zealand moved some years ago from using import licensing protection to using tariffs as the principal trade policy measure. Import licence protection was removed. Subsequently tariff protection has been substantially liberalised. In recent years parallel importation of nearly all goods has been allowed.

Government policy is to reduce and simplify tariff rates, although it has held off moving to a zero tariff regime and the rate of duty on some goods (clothing and footwear in particular) is still relatively high by world standards.

New Zealand is a member of the General Agreement on Tariffs and Trade (GATT) and is a signatory to the WTO and Agreements on technical barriers to trade, subsidies and countervailing duties, anti-dumping, customs valuation and intellectual property.

ADDITIONAL COSTS OF IMPORTATION

Apart from tariffs, New Zealand has no taxes, levies or other charges which apply exclusively to imported products. Goods and Services Tax (GST) is payable on most goods sold in New Zealand and is also charged on the CIF (cost, insurance and freight) value plus duty on all goods imported into New Zealand.

GST is normally payable when the goods are cleared through customs but payment can be deferred when the importer participates in the deferred duty payment arrangements operated by New Zealand Customs.

GST is discussed further in the section 9 of this guide.

REGULATION OF IMPORTERS

There are no special requirements for the registration of importers. However, some goods, including agricultural products, chemicals, foods and medicines may require import permits.

8.2 International influences on New Zealand Law

DUMPING AND COUNTERVAILING DUTIES

With the elimination of import controls and the reduction in tariffs, imported goods can compete against New Zealand-made goods in the New Zealand market. While international trade has been liberalised, the New Zealand government has decided that New Zealand business should not be put at risk by unfair competition from overseas suppliers.

Consequently the government enacted the Dumping and Countervailing Duties Act 1988 to regulate the dumping of products on the New Zealand market. The Act (as amended) is based on the WTO Agreements on Anti-dumping and Countervailing Duties.

CLOSER ECONOMIC RELATIONS BETWEEN NEW ZEALAND AND AUSTRALIA (CER)

In 1983, New Zealand and Australia signed an agreement setting out a timetable for establishing closer economic relations and a free trade zone between the two countries. This was so successful that the initial timetable was brought forward. Today a free trade zone exists between Australia and New Zealand in respect of goods and most services.

For New Zealand goods to be exempt from tariffs and duties when imported into Australia, the goods must have either been wholly manufactured, produced or have originated in New Zealand or, where the goods consist of materials from third countries, the goods must have been processed or manufactured so that the tariff classification of the goods has changed from the imported materials. This is a shift from the previous rules which required the goods must be made up of at least 50% of materials which originated in New Zealand.

As a result of CER, anti-dumping duties are not available between New Zealand and Australia. Instead, competition law is intended to deal with unfair trade practices between the two countries with expanded jurisdiction to cover trans-Tasman markets.

Agreements such as the Trans-Tasman Mutual Recognition Arrangement and the Joint Food Standards system have allowed manufacturers to produce goods at a single standard for both Australia and New Zealand. Both countries are currently working towards a Single Economic Market through standardising laws on competition and consumer protection, intellectual property, accounting standards, securities offerings, cross-border insolvency and company registrations. A proposed trans-Tasman therapeutic goods regulatory regime has not yet been passed due to insufficient Parliamentary support in New Zealand.

OTHER TRADE RELATIONSHIPS

New Zealand is active in promoting free trade at international bodies such as the WTO, APEC and ASEAN. New Zealand has also entered into bilateral Free Trade Agreements (FTA) with Thailand, Singapore, Chile and Brunei Darussalam. New Zealand is currently in FTA negotiations with China, ASEAN, the Gulf Co-operation Council and Malaysia. Preliminary FTA talks have begun with Japan and South Korea. Mutual Recognition Agreements have also been entered into with some APEC members and with the EU.

INTERNATIONAL SALE OF GOODS CONVENTION

New Zealand has adopted the United Nations Convention on Contracts for the International Sale of Goods 1980 which became effective on 1 October 1995. The Convention regulates the formation of international sales contracts and regulates the rights, obligations and remedies of the buyer and seller under these contracts.

The Convention applies to contracts for the sale of certain goods when:

- both buyer and seller are located in countries that are signatories to the Convention; or
- where the party contracting with the New Zealand entity is from a country which is not a signatory to the Convention but the contract for sale is governed by New Zealand law.

However, the Convention will not apply if the seller and purchaser agree that the Convention will not apply to their contract.

Overseas persons trading with New Zealand should establish whether or not the overseas country has adopted the Convention and decide if they want the Convention to apply to their contract.

AGRICULTURAL PRODUCTS

The New Zealand economy relies on agriculture. To maintain New Zealand's agriculture base, strict requirements governing the importation of materials that may be detrimental to the agricultural economy are in place. Certain products require clearance from the Ministry of Agriculture and Forestry and must comply with the Hazardous Substances and New Organisms Act.

PACKAGING REQUIREMENTS

Certain materials may not be used as packaging for goods imported into the country. These include soil, peat, hay and other grasses, moss, sacking or hessian and any material which may have been in contact with animals or soil or which was produced as an agricultural waste product.

Some packaging materials such as plywood or wooden packing cases, cargo pallets and crates must be free from bark and visible signs of infection by fungal attack or insects if they are to be used for imported goods.

LABELLING REQUIREMENTS

New Zealand has laws regulating the labelling of certain goods. For example, food and drugs must comply with the labelling requirements set out in the Regulations under the Food Act 1981 and the Medicines Act 1981. In addition, the Fair Trading Act 1986 generally prohibits misleading and deceptive conduct and false representations in trade. For example, importers should ensure that the country of origin of the goods is clearly and accurately identified.

The Consumer Information Standards (Country of Origin (Clothing and Footwear) Labelling) Regulations 1992, which came into force on 1 July 1993, require that the country of origin be placed on certain articles of clothing and footwear.

The Consumer Guarantees Act 1993 also imposes statutory guarantees on goods ordinarily acquired for personal, domestic or household use or consumption.

9 TAXATION

9.1 General

INTRODUCTION

In New Zealand, income tax is levied under the Income Tax Act 2004. Income tax for individual and corporate taxpayers is levied on annual gross income from all sources, less annual total deductions and any losses carried forward. This net amount is the taxable income.

Gross income broadly includes items that would be regarded as income in commercial terms and includes all gains on financial instruments and short-term or planned profits on land or share transactions. Allowable deductions are all expenses incurred in gaining the income or in carrying on business for the purpose of gaining income. Individuals, companies and trusts are subject to different taxing regimes.

Incomes of husbands and wives are treated separately for tax purposes. Partnerships are not taxed in their own right but individual partners are taxed on their share of partnership income. Trust income is taxable to either the trustees or the beneficiaries depending on the outcome of rules determining who derives the relevant income.

To be subject to tax in New Zealand, the entity must be:

- resident in New Zealand, in which case their worldwide income is taxable in New Zealand; or
- non-resident but deriving income from a source in New Zealand.

Where income does not fall into either of the above categories, but is derived by a foreign entity that is considered to be under the control of New Zealand residents, the New Zealand residents may be taxed on the income of that foreign entity.

Where applicable, New Zealand allows a tax credit for foreign tax paid equal to the lesser of that foreign tax paid or the New Zealand income tax payable on the relevant portion of the total income. These rules may be modified by the application of particular Double Tax Agreements that New Zealand has with other countries.

There is no capital gains tax in New Zealand. However, some classes of transaction, which could be capital in nature, are subject to tax. These include:

- particular sales of land and personal property;
- gains on any financial arrangement, including forgiveness of debt; and
- a specified percentage of the value of certain foreign investments owned by New Zealand residents (in some cases annual increases in the value of such investments are taxable).

Every taxpayer makes an annual return of income for a year ended 31 March. The exception to this balance date is where the taxpayer (other than an individual) is given approval to adopt a different balance date for business reasons.

New Zealand has a consumption-based tax called Goods and Services Tax (GST). GST is levied on all goods and services supplied in New Zealand, with a few exceptions, including financial services and domestic rents.

9.2 Corporate income tax

A New Zealand resident company is taxable on its worldwide income at the rate of 33% (reducing to 30% from the 2008/2009 income year). An overseas company is taxable at the same rate but only in respect of its income that has a New Zealand source.

New Zealand has a full dividend imputation system under which tax paid by New Zealand resident companies can be allocated as imputation credits to dividends paid to shareholders.

New Zealand resident shareholders are able to offset these imputation credits against their tax liability in respect of those dividends. These imputation credits can also be utilised by non-residents to reduce non-resident withholding tax otherwise payable on dividends. Fully imputed dividends paid to non-residents can be effectively paid free of non-resident withholding tax.

Certain New Zealand resident companies are able to maintain an Australian franking credit account (similar to a New Zealand imputation account). This allows tax paid in Australia by New Zealand resident companies to be allocated as franking credits to dividends paid to shareholders.

Where a New Zealand resident company receives dividends from a foreign company, in some instances Foreign Dividend Withholding Payments (FDWP) may be payable.

In calculating the FDWP, credit is given for foreign withholding taxes and, in certain circumstances, for underlying company tax payable by the foreign company. Where the foreign company is resident in Australia, Canada, Germany, Japan, Norway, the United States, the United Kingdom or Spain, there is a presumption that full tax has been paid so no FDWP is payable.

The FDWP credits can also be allocated to dividends paid by the company as withholding payment credits. These credits are refundable to shareholders, including non-resident shareholders.

New Zealand has a conduit tax relief regime. Conduit investment is the investment by foreign investors through a New Zealand company into a third country.

The conduit tax regime provides relief from New Zealand tax on income derived by New Zealand companies from controlled foreign companies and foreign investment funds to the extent that such income is indirectly owned by non-resident shareholders. The tax saving is paid as an additional dividend. However, non-resident withholding tax at the rate of 15% is still imposed at the time this conduit tax relief dividend is paid.

To ensure that overseas-owned companies pay the appropriate level of tax on their New Zealand-sourced profits, a transfer pricing regime has been introduced. There are also thin capitalisation rules for foreign-owned (50% or more) companies operating in New Zealand. Generally, interest will be deductible where the debt-to-asset ratio does not exceed 75%.

When certain conditions are met, a company can carry forward its tax losses and set them off against future taxable income. To maintain the right to carry forward losses, a 49% continuity of ownership test must be satisfied. The test must be satisfied from the beginning of the year in which the loss was incurred to the end of the year in which the loss is offset against taxable income.

New Zealand resident group companies may transfer losses provided that certain conditions are met. A 66% commonality of ownership must be maintained, from the

beginning of the year in which the loss was incurred to the end of the year in which the loss is offset against taxable income.

9.3 Personal income tax

Individuals are taxed for the year ended 31 March. Those required to file returns must do so by 7 July each year. New Zealand residents are taxed on their worldwide income. Non-residents are liable to New Zealand tax only on income deemed to be derived from New Zealand.

Individuals will be resident in New Zealand for tax purposes if:

- they have a permanent place of abode in New Zealand, whether or not they have any permanent place of abode outside New Zealand (in very general terms a permanent place of abode is a fixed or habitual home);
- they are physically present in New Zealand for more than 183 days in aggregate in any 12-month period; or
- they are absent from New Zealand in the service of the New Zealand government.

In most situations, if an individual is resident in more than one country at the same time, Double Tax Agreements (DTAs) will govern in which country the person will be resident for tax purposes.

Individuals on short-stay secondments may be exempt from New Zealand tax if they are not present in New Zealand for more than 183 days, their overseas employer is resident in a country with which New Zealand has a Double Tax Agreement, and their remuneration is not borne by the non-resident's place of business in New Zealand.

Where New Zealand does not have a Double Tax Agreement, the individual cannot be in New Zealand for more than 92 days aggregate in any 12-month period if they wish to maintain non-resident tax status.

For the income year ended 31 March 2007, the rates of tax applying to individuals are:

Income	Rates of tax
NZ\$0 to NZ\$38,000	19.5%
NZ\$38,001 to NZ\$60,000	33%
NZ\$60,001 or more	39%

A low-income rebate may be available to natural person taxpayers who are resident in New Zealand for any part of an income year where certain criteria are met. To qualify for the rebate a taxpayer's gross income must be less than NZ\$9,500 per annum. The rebate effectively reduces the marginal tax rate on income up to NZ\$9,500 to 15%. For income between \$9,501 and \$38,000 the rebate reduces by a minimum of 1.5% giving an effective marginal tax rate of between 16% and 19.5% for income at this level.

A non-resident who is present in New Zealand for only part of an income year will have the rebate pro-rated in terms of the period for which they are working. In order to claim the rebate a non-resident must be personally present in New Zealand for part of an income year and have been engaged in paid work for at least 20 hours per week.

An attribution rule is in place to ensure that, in defined circumstances, the income from the personal services of an individual is attributed to that individual, rather than being diverted to an associated person, such as a company, that pays tax at a lower rate.

Specifically, the attribution rule will apply when a provider of personal services interposes an intermediary between himself or herself and the person to whom the services are provided, so as to escape the top 39% marginal tax rate. Income is allocated to the provider of the service, rather than the intermediary.

9.4 Income derived from trusts

Income derived by trusts is separated into trustee and beneficiary income. Trustee income is defined to mean all income derived by a trustee other than income distributed to beneficiaries as beneficiary income. Income retained by the trust and taxed as trustee income is taxed at the rate of 33%.

Beneficiary income is income that is distributed in the same income year in which it is derived by the trust or within six months from the end of that income year. Beneficiary income is taxed at the particular rate of tax applying to the beneficiary concerned. Income of minor beneficiaries is taxed at a flat rate of 33%.

Foreign trusts are also subject to New Zealand tax rules if the settlor is resident in New Zealand. Taxable distributions from certain foreign trusts (i.e. non-qualifying trusts) are taxed at a penal rate of 45%, so as to discourage New Zealand resident settlors from diverting what would otherwise be taxable income. Non-resident beneficiaries of foreign trusts are only taxed on income derived from New Zealand.

9.5 Non-resident withholding tax

Dividends, interest and royalties paid by a New Zealand resident company to non-residents are subject to non-resident withholding tax (NRWT).

The rates of NRWT are:

- dividends – 30% but reduced to 15% for fully imputed dividends; and
- interest and royalties – 15%.

These rates may be reduced if New Zealand has entered into a Double Tax Agreement with the country of residence of the recipient.

NRWT on dividends, cultural royalties and interest paid to a non-associated person is a final tax on that income. In other cases, NRWT is a minimum tax in which case the recipient must file a New Zealand tax return in respect of the income received. Expenses attributable to that income are deductible and the balance of income is then subject to tax at standard rates.

If a non-resident owns shares in a New Zealand company that pays a fully imputed dividend, a supplementary dividend can be paid by the company. This effectively refunds the NRWT payable on the dividend.

Where a non-resident company operates a branch in New Zealand, it is subject to tax on branch profits at the rate of 33% (reducing to 30% from the 2008/2009 income year). No withholding tax is imposed on profits remitted by a branch operation to its non-resident head office or on dividends paid by that head office to the company's shareholders.

If interest is payable on debt which is registered under the Approved Issuer Regime, an approved issuer levy equal to 2% of the interest payable by the borrower can be paid in lieu of NRWT. This regime only applies where loans are between non-associated parties.

Where a payment is made by a New Zealand resident company to a non-resident contractor, non-resident contractors withholding tax (NRCWT) must be withheld, at the rate of 15% of the payments. The NRCWT is an interim liability and the non-resident must lodge a tax return to determine its final tax liability. Credit will be given for any NRCWT withheld. The New Zealand Inland Revenue Department will issue an exemption from this liability if, for example, by operation of a Double Tax Agreement no New Zealand tax is ultimately payable. An exemption can also be obtained if the non-resident posts a bond or demonstrates that it has at least two years' tax compliance without default.

9.6 Tax obligations of employers

Employers must deduct PAYE tax (pay as you earn) from payments of wages or salaries made to employees. The PAYE is deducted on account of the employee's final tax liability for an income year. The employee is able to obtain a refund or be required to pay additional tax depending on the amount deducted.

New Zealand has an accident compensation and rehabilitation insurance scheme, ACC, which abrogates the right to sue for damages for accidental injuries. Both the employer and employee must pay a levy towards this compensation scheme.

Employees pay an earners' premium which is currently 1.3% of earnings up to a maximum leviable earnings of NZ\$99,817 per annum. The employer levy is calculated on the total salaries paid to employees, with a maximum leviable earnings per employee of NZ\$99,817. Different industries have different employer levy rates.

Employers who provide non-cash benefits to employees by reason of employment pay Fringe Benefit Tax (FBT). These benefits include company vehicles, low-interest loans and subsidised goods. FBT is payable quarterly at the rate of 64%, 49%, 27% or 18% (depending on the employee's marginal tax rate) on the taxable value of fringe benefits provided to employees during the calendar quarters. FBT is deductible, resulting in a maximum after-tax expense to the employer of 39%.

Employers have the option of paying FBT for the first three-quarters of the income year at either a flat 64% rate or a 49% rate on all fringe benefits provided. There is an adjustment in the fourth quarter for attributed fringe benefits, with the FBT rate based on the marginal tax rate of the employee to whom the benefits have been attributed.

Any contributions made by an employer to a registered superannuation scheme (not being a complying superannuation fund, see below) is deductible to the employer but subject to a withholding tax levied at the rate of 33% or 39% if the employee has so elected. If no such election is made then an employer may elect to pay withholding tax at the lower rate of 15%, 21% or 33% depending on the employee's annual salary or wages.

Schemes registered under the Superannuation Schemes Act 1989 are treated as trusts for tax purposes. Earnings of the scheme are taxed at the rate of 33% and benefits paid to beneficiaries are currently exempt, whether they are in the form of a lump sum or a pension. A tax of 5% is imposed on withdrawals from schemes in certain circumstances, but is limited to the amount of employer contributions where these can be identified.

Employers must deduct KiwiSaver employee contributions from payments of wages and salaries made to employees who are members of a KiwiSaver scheme (unless the employee is taking a contribution holiday). Existing employees may opt into KiwiSaver at any time. New employees are automatically enrolled in KiwiSaver but may opt out within a specified time period.

KiwiSaver employer contributions or contributions to a complying superannuation fund made by an employer are deductible to the employer and are exempt from withholding tax (where certain criteria are satisfied).

9.7 Goods and Services Tax (GST)

GST is charged at a rate of 12.5% on the supply of most goods and services. The supply of financial services and the supply of residential rental accommodation are the principal exemptions from GST. GST is intended to be borne by the final consumer of goods and services.

Businesses are able to register for GST and claim a credit for any GST they incur in conducting their business (input credits) while charging GST on their sales (output tax). Where output tax exceeds input credits, the difference is payable to the Inland Revenue Department. Conversely, where the credit claimed on inputs exceeds the GST payable on outputs, the Inland Revenue Department refunds the difference.

GST is charged on exported goods and the provision of services to non-residents at 0%, provided certain criteria are satisfied. GST is levied by New Zealand Customs at 12.5% on all goods imported into New Zealand.

Certain supplies of business-to-business financial services (among other goods and services) are charged with GST at a rate of 0%, as opposed to being exempt from GST. A reverse charge mechanism means that certain supplies of imported services give rise to a charge, in respect of GST, levied on the importer.

A person can register for GST provided that they conduct or intend to conduct a taxable activity. A taxable activity is any activity carried on continuously or regularly involving the supply of goods and services to another person for money or moneys worth. Registration is compulsory when taxable supplies made in New Zealand have exceeded or are likely to exceed NZ\$40,000 in any 12-month period.

All GST-registered entities are required to file regular returns of the GST collected by them. In most situations, returns are made every two months. Where supplies are in excess of NZ\$24 million per annum, returns are required monthly.

9.8 Tax compliance

Taxpayers are required to comply voluntarily with the New Zealand tax system. They are encouraged to make honest and accurate returns of income.

New Zealand has a resident withholding tax (RWT) regime that applies to interest and certain dividend payments paid by New Zealand residents to other New Zealand residents (and, in the case of interest, non-residents that have a fixed place of business in New Zealand) and to certain distributions made by Maori authorities.

The RWT is deducted by the payer of interest or dividends and remitted to the Inland Revenue Department unless the recipient holds an exemption from RWT. The recipient

obtains a tax credit for the amount deducted. RWT on interest payments is deducted by payers at the rate of 19.5% of the gross amount of interest paid or credited, if the recipient is a natural person or trustee and has provided the payer with their Inland Revenue Department tax file number. RWT on interest payments is deducted by payers at the rate of 33% of the gross amount of interest paid or credited, if the recipient is a company (not being a corporate trustee) and has provided the payer with their Inland Revenue Department tax file number.

If a tax file number has been supplied a taxpayer can elect to have RWT deducted at the rate of 33% or 39%. Where a tax file number is not provided, tax is deducted at the rate of 39% of the gross interest paid. RWT is deducted at the rate of 33% from gross dividends paid. Any imputation credits allocated to the dividend are taken into account in calculating the RWT.

Tax is also payable under a provisional tax payment system. Provisional tax is payable by taxpayers, including individuals who are not salary and wage earners who have an income tax liability for a particular year exceeding NZ\$2,500. Provisional tax is paid in three instalments over an income year, with the payment dates depending on the balance date of the taxpayer.

Taxpayers who are required to file tax returns must disclose all income liable to tax in their New Zealand income tax returns. Taxpayers must also disclose certain inter-related financial arrangements. There are also requirements to disclose interests in controlled foreign companies, foreign investment funds and foreign trusts.

Individuals who derive their income from salary or wages that have been subject to the correct deductions under the PAYE rules are not generally required to file annual tax returns. There are exceptions for individuals who earn over a de minimis threshold amount of income from other sources, including interest and dividends.

10 FURTHER INFORMATION

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