Mayne Wetherell

Doing Business in New Zealand

www.maynewetherell.com

Introduction

- New Zealand is comprised of two main islands – the North Island and the South Island. These islands have a combined area of approx. 270,000 square kilometres (similar in size to the United Kingdom and Italy).

- New Zealand has extensive marine resources and its Exclusive Economic Zone is one of the largest in the world, covering more than 15 times its land area.

- A developed country with a market economy, New Zealand is dominated by the exports of dairy products, meat and wine, along with tourism. New Zealand is a high-income economy and ranks highly in international comparisons of national performance, such as health, education, economic freedom and quality of life.

- New Zealand is a predominantly urban country with a population of approximately 4.8 million. Our four largest cities are Auckland (the largest city), Christchurch, Wellington (the capital), and Hamilton.

- The New Zealand dollar is the currency of New Zealand, and one of the 10 most-traded currencies in the world.

Government and legal system

- New Zealand is a constitutional monarchy with a parliamentary democracy. Elizabeth II is the Queen of New Zealand and the head of state.

- The democratically elected Parliament holds legislative power and consists of the Queen and the House of Representatives.

- The Governor-General of New Zealand is the representative of the Queen and is widely viewed as the de facto head of state.

Legal system – key features

- New Zealand's legal system is based on the English common law.

- There are two main sources of law:

  - statutes (the laws passed by Parliament); and

  - 'the common law'.

  Common law has been developed by judges over the centuries, and may be amended and developed by the courts to meet changing circumstances. Parliament may repeal, modify, or develop the common law by statute.

- New Zealand's general courts are structured like a pyramid. At the top is the Supreme Court. Below it, in descending order, are the Court of Appeal, the High Court and the district courts. These are 'courts of general jurisdiction'. They are the main courts in our justice system.

- A number of specialist courts and tribunals for environmental and employment matters also operate.

Map of New Zealand

Overview

The Overseas Investment Office (**OIO**) assesses applications from overseas persons who intend on investing in significant and/or sensitive New Zealand assets.

The regulatory framework principally includes the *Overseas Investment Act 2005*. Essentially, a transaction requires consent if it will result in the direct acquisition by an overseas person of, or the acquisition by an overseas person of 25% or more ownership and/or control of interests in, sensitive land (including farm land) or significant business assets. The *Act* also, with the *Fisheries Act 1996*, regulates the acquisition of fishing quota by overseas persons.

Significant business assets

An overseas investment in significant business assets includes:

- The acquisition by an overseas person (or associate) of rights or interests in securities of a person (the **Target**) if:
  - as a result of the acquisition, the overseas person (or associate) has a 25% or more ownership or control interest in the Target; and
  - the value of the securities or consideration provided, or the value of the assets of the Target alone, or the assets of the Target and its 25% or more subsidiaries, exceeds NZ$100 million; or
- The acquisition by an overseas person (or associate) of property (including goodwill and other intangible assets) in New Zealand used in carrying on business in New Zealand if the total value of consideration provided exceeds NZ$100 million.

Sensitive land

The consent process for sensitive land (residential land, non-urban land, foreshore or seabed, land subject to heritage, reserve and conservation status, or land adjoining such land) is a much more involved and prolonged process.

An overseas investment in sensitive land includes the acquisition by an overseas person (or associate) of an interest in sensitive land, or rights or interests in securities of a person (the **Target**) if the Target owns or controls an interest in land and, as a result of the acquisition, the overseas person (or associate) has a 25% or more ownership or control interest in the Target.

In addition:

- if an investor wishes to acquire sensitive land and that sensitive land includes any special land (being foreshore, seabed, lakebed or riverbed), the special land must first be offered to the Crown by the vendor; and
- where a proposed acquisition involves farm land, that farm land must first have been offered by the vendor on the open market to New Zealand residents.

Application process

All applications are made by way of a letter from the applicant to the OIO with supporting information. Commonly we prepare applications for our clients, with our clients providing commercial details where necessary. In relation to sensitive land applications, this includes a detailed business plan addressing the benefits to New Zealand, assessed against a scenario of what is likely to happen without the proposed investment (known as the "counterfactual").

All applications for consent are tested against prescribed investment criteria. Applicants must be of good character, have relevant business experience or acumen, be able to demonstrate a financial commitment to the investment, and be eligible for visa or entry permission under NZ's immigration laws.

Expected timing

The current expected timing for consent for significant business asset acquisition applications is 80 working days from application. Investors can expect sensitive land applications to be processed in 80 to 100 working days, or up to 6 months or longer if special land or Ministerial approval is involved.

Mayne Wetherell maintains a close working relationship with senior management at the OIO, greatly assisting application timing and process management.

Privacy / confidentiality

Applications submitted to the OIO are a public record and confidential information such as financial information relating to the applicant, and any sale and purchase documentation, is likely to be required.

Overview

Overseas persons wishing to work or invest, and live, in New Zealand on a permanent or temporary basis have a number of options, including New Zealand's visa framework (an authority for an individual to travel to, or stay in, New Zealand).

Working and living in New Zealand

There are two main categories if you want to live in New Zealand permanently and your application is based on your occupation or skills. These are:

- ***Skilled Migrant Category visas***: for people who have the skills, qualifications and experience New Zealand needs.

- ***Work to Residence visas***: for people who meet one of the following criteria:

  - are qualified in occupations that are in demand in New Zealand;
  - have a job offer from an accredited employer, or
  - have exceptional talent in sports or the arts.

  A Work to Residence visa is a temporary work visa that allows you to apply for a ***Resident visa*** later.

Resident visas granted under the Skilled Migrant Category and most visas granted under Residence from Work will allow you to travel outside New Zealand in the first two years of your residence. After this time you will need to apply for a ***Permanent Resident*** visa (usually the next step after obtaining a resident visa noted above). A Permanent Resident Visa allows unrestricted travel. This means that you can travel outside New Zealand with no limit on time spent out of New Zealand, and return as a resident.

Investing and living in New Zealand (investors and entrepreneurs)

People wishing to invest funds in a business and live in New Zealand can apply for residence under ***Investor/Investor Plus*** categories (up to NZ$10 million invested in New Zealand for three to four years in addition to other assessment criteria including business experience, and health and character requirements).

The visa for people who wish to run their own business in New Zealand is the ***Entrepreneur Work Visa***.

People who are granted an Entrepreneur Work Visa will also be able to apply for an ***Entrepreneur Residence Visa*** once they have run their businesses for 2 years (or 6 months if they meet extra conditions). An Entrepreneur Work Visa is a three year work visa in two stages:

- Start-up stage (12 months); and
- Balance stage (a further 24 months once you have shown that you have taken steps to establish your business).

Overview

Common structures for offshore entities investing in New Zealand include:

- Incorporating or acquiring a local subsidiary company.
- Registering a branch of an existing overseas company.
- Establishing a local limited partnership (useful for managed investments with passive investors and allowing flow through tax treatment).

Incorporation process

Incorporating a company in New Zealand is quick and simple.

New Zealand has two types of company available under its *Companies Act 1993*:

- A limited liability company (in respect of which shareholders' liability for the company's obligations is limited to their capital contribution).

- An unlimited liability company (in respect of which shareholders' liability for the company's obligations is unlimited).

In either case, the company must have at least one shareholder and one director who lives in New Zealand, or who lives in Australia and is a director of a company registered in Australia.

The registered office and address for service must be in New Zealand (service agents can fulfil this function).

A constitution is not mandatory but is useful to permit certain corporate actions.

Account filings

Public filing requirements for accounts, including audit requirements, and other details vary in relation to the size and activities of any particular investment vehicle.

Limited Partnerships

New Zealand's limited partnership regime, governed by the *Limited Partnerships Act 2008*, is very similar to the limited partnership regimes operating in the United States and the United Kingdom.

Limited partnerships in New Zealand:

- Have separate legal personality.

- Must be subject to a partnership agreement.

- Must have at least one general partner and one limited partner.

- Limited (passive) liability partners are liable only to the extent of their capital contributions.

Overview

Banking operations are conducted by registered banks in New Zealand, administered by the Reserve Bank of New Zealand.

The Financial Markets Authority and the Reserve Bank of New Zealand regulate New Zealand's financial markets.

Generally there are no exchange controls on foreign-exchange transactions undertaken in New Zealand, either by New Zealand residents or non-residents.

"Financial service" providers are registered on a central registry and all providers of "financial adviser services" (including brokers and other providers of tailored or generic advice) are regulated by a statutory financial advisers regime.

The financial advisers regime imposes authorisation requirements, minimum conduct, disclosure, trust accounting and registration obligations, and dispute resolution scheme membership.

Taking security over property

In New Zealand, the *Personal Property Securities Act 1999* governs:

- the enforceability of interests in personal property securing payment of money or the performance of obligations; and

- the priority between such security interests.

The Act also creates the Personal Property Securities Register, a register where security interests over personal property may be registered and can be searched by the public.

Mortgages over real property can be registered on a central registry of land title holdings maintained by the state.

Corporate insolvency

Subject to certain exceptions, creditors are ranked in the following hierarchy:

1. Secured creditors.
2. Preferential unsecured creditors.
3. Unsecured creditors.
4. Shareholders.

Distributions to unsecured creditors are based on the proportion of debt owed.

Debtors and creditors typically have a number of options when a debtor is unable to pay its debts, including:

- Liquidation (voluntary or otherwise).
- Appointing receivers over the debtor or specific assets.
- Creditors' compromises.
- Voluntary administration.

Overview

Taxation in New Zealand is broadly comprised of:

- Goods and services tax.
- Income tax (including withholding tax).

There is no comprehensive capital gains tax, or gift, stamp, or estate duties, in New Zealand.

Goods and services tax

Goods and services tax (**GST**) is a tax on most goods and services in New Zealand, most imported goods, and certain imported services. GST is added to the price of taxable goods and services at a rate of 15%.

Various goods and services are exempt or zero rated (including the supply of financial services).

GST is a tax that businesses collect on behalf of the government. Businesses charge GST in their sales and income and claim it back for their purchases and expenses.

Income Tax

New Zealand's income tax is imposed on:

- New Zealand sourced income of non-residents, subject to double tax agreements between countries.
- World-wide income of New Zealand residents.

Employees are subject to a 'pay as you earn' (PAYE) system where employers withhold tax from salary and wage payments. Marginal tax rates for employees range from 10.5% to 33%.

Companies are taxed on net income after allowable deductions. New Zealand's company tax rate currently is 28%.

Withholding

Resident withholding tax, subject to available exemptions, applies to interest and dividend income paid to a New Zealand resident taxpayer.

Non-resident withholding tax (**NRWT**) is deducted from non-resident passive income derived from New Zealand and paid to non-residents. Non-resident passive income generally includes interest, dividends and royalties.

If a borrower pays interest to a (non-associated) non-resident lender, and wants to pay it at a zero rate of NRWT, the borrower can apply to Inland Revenue to become an 'approved issuer'. Instead of deducting NRWT, approved issuers pay a flat-rate levy on the securities they register with Inland Revenue.

That approved issuer levy is calculated at the rate of 2% of the interest paid on a registered security.

Imputation

Companies can pass the benefit of income tax paid as imputation credits attached to dividends to shareholders. New Zealand resident shareholders use imputation credits to offset income tax liabilities.

Thin capitalisation

New Zealand's thin capitalisation rules are designed to protect New Zealand's tax base.

The rules place limits on the ability of New Zealand taxpayers controlled by non-residents, including branches of non-residents, to claim interest deductions to avoid non-residents moving profits out of New Zealand to lower the amount of New Zealand tax they would otherwise pay.

A branch or New Zealand resident subsidiary will only be able to claim tax deductions for interest payments on debt for up to 60% of the New Zealand group's ratio of debt to assets, or 110% of the branch or subsidiary's world-wide group debt to assets ratio.

Transfer pricing

New Zealand has an established transfer pricing regime, regulating the setting of prices for the transfer of goods, services and intangibles between associated parties across borders.

If these rules are manipulated, profits may be shifted out of New Zealand, inflating deductions or reducing income through non-arm's length transactions.

Other taxes

- New Zealand's ACC provides comprehensive, no-fault personal injury cover for all New Zealand residents and visitors to New Zealand. ACC collects levies and funding from employers, businesses' payrolls (employees), petrol and fees from vehicle licensing, and Government funding.

- Fringe benefit tax is a tax on benefits that employees receive as a result of their employment, including those benefits provided through someone other than an employer. Most benefits given to employees on top of their salary or wages are fringe benefits (perks).

No comprehensive capital gains tax

- New Zealand has no capital gains tax, although it can apply to some specific investments including limited sales of land (deemed "bright line" tests for property sales within 5 years of acquisition), property acquired for the purposes of sale and certain gains in the value of "financial arrangements".

Overview

New Zealand has a small but active capital market.

Public trading

NZX Limited (**NZX**) operates New Zealand's registered securities exchange with:

- A main equities market (New Zealand Stock Market).
- An equities market for growth companies (NXT Market).
- A debt market (New Zealand Debt Market, for bonds and fixed-income securities.

Key regulators

The Financial Markets Authority (**FMA**) is an agency with a critical role in regulating capital markets and financial services in New Zealand. The FMA promotes and facilitates the development of fair, efficient and transparent financial markets in New Zealand.

The NZX is responsible for monitoring and enforcing the rules under which NZX's markets operate. This applies directly to issuers, market participants and indirectly (through market participants) to investors.

The Takeovers Panel is responsible for administering and enforcing the Takeovers Code in New Zealand.

Issuing / offering securities

An offer of financial products (including shares and debt securities) must comply with the *Financial Markets Conduct Act 2013* (New Zealand's key financial markets regulation).

- Information about 'regulated offers' must be disclosed in a product disclosure statement and the Disclosure Register. Together, this information must include all material information about the offer of a financial product and be up-to-date, accurate and understandable.
- Exclusions to this requirement include offers made to close business associates, wholesale investors, employee incentive schemes and small offers (NZ$2 million from 20 investors in any 12 month period).

Takeovers

The *Takeovers Code* sets out New Zealand's takeovers regime, being transactions and events that impact on the voting rights attaching to the shares owned by shareholders of "Code companies".

Code companies are New Zealand-registered companies that are listed on the NZX (or have been listed in the previous 12 months), or that have 50 or more shareholders and 50 or more share parcels.

The Code divides levels of voting control in a Code company into different thresholds and prescribes the methods available to increase voting control.

The rules of the Code ensure that shareholders will be given accurate and up-to-date information by a takeover offeror for their company's shares and also by the Code company's directors.

The disclosure requirements are quite prescriptive and require disclosure of any relationships, arrangements or agreements between the offeror and the company's directors or senior managers, and all material financial information.

Overview

New Zealand has a central intellectual property register operated by the Intellectual Property Office of New Zealand, and recognises certain unregistered rights such as copyright, trade secrets and unregistered trade marks.

Patents, trade marks, designs and plant variety rights can be registered.

New Zealand is a signatory to, among others, the Paris Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Madrid Protocol (a treaty administered by the International Bureau of the World Intellectual Property Organization).

Trade marks

- All applications to register trade marks are examined to ensure they comply with all requirements of the *Trade Marks Act 2002*.
- For trade mark purposes, goods and services are divided into 45 classes under the Nice international system of classification.
- Trade mark registrations must be renewed every 10 years and trade marks can be removed from the register for non-use if they are not used for a continuous period of three years.
- The Madrid Protocol facilitates the filing of applications overseas in one easy step, allowing trade mark owners to apply for their trade mark in over 90 participating countries by simply filing one application directly with their local trade mark office.

Copyright and designs

- In New Zealand, copyright protects original literary, dramatic, musical and artistic works, sound recordings, films and communication works.
- Copyright comes into existence automatically under the *Copyright Act 1994* when a work is put into material form e.g. manuscript or audio/video recording.
- No registration is necessary (or even possible), nor is any other formality required for securing copyright protection.
- Copyright in literary, dramatic, musical and artistic works continues for 50 years after the end of the calendar year in which the author died. Other works have similar protection periods.

Patents and designs

- A patent is a right that is granted for an invention (such as a new product or process, the material it is made from, or how something is made).
- Owning a patent gives the exclusive right to commercially exploit an invention for up to 20 years. During that time the owner of the patent can take legal action to prevent others from using the invention without their permission.
- Designs relate to the visual appearance of an article. A registrable design in New Zealand is defined as the new or original features of shape, configuration, pattern or ornament that are applied to an article by any industrial process or means. The full term of a design registration is 15 years.

Overview

The *Employment Relations Act 2000* is the legislative foundation of all relationships between employees and employers in New Zealand. If you are a business owner employing staff in New Zealand you have certain obligations to meet under the Act.

The Act seeks to promote collective bargaining, regulate the operation of unions, address the inherent inequality of power in employment relationships, provide a framework for personal grievances and disputes, and prescribe basic protections for individual employees.

The Act regulates a range of topics including:

- Recruiting and selecting employees.
- Employment agreements and their content.
- Trial and probation periods.
- Union membership.
- Workplace training and development.

The object of the Act is to maintain fair and productive relationships between employers and their employees.

Every employee in New Zealand must have a written employment agreement that is agreed upon and signed by an employee before they start work. Employment agreements come in a variety of forms depending on the job description, but there are certain mandatory clauses that every employment agreement must contain by law.

Dismissal and redundancy

A “dismissal” is the termination of employment by the employer. There must be a good reason for a dismissal and the dismissal must be carried out fairly. Otherwise, the employee may have a personal grievance claim against the employer.

A “redundancy” is when an employer terminates someone’s employment because the position is no longer required. An employer must have a genuine work-related reason for a redundancy.

A redundancy must be about the employee’s position, not the employee personally. A concern about how a particular employee may be performing is a performance issue and not a legal reason for pursuing a redundancy.

There is no compulsory redundancy compensation regime in New Zealand.

KiwiSaver / superannuation

Participation in superannuation schemes is not compulsory in New Zealand. However, KiwiSaver is a voluntary, work-based savings initiative with a range of membership benefits (governed by the *KiwiSaver Act 2006*).

Participants in KiwiSaver can choose to contribute either 3%, 4% or 8% of their gross salary or wages to a superannuation scheme of their choice. Employers must contribute a minimum of 3%.

Overview

There is no restriction on who can own land in New Zealand (foreign or domestic), subject to any requirement for *Overseas Investment Act 2005* approval for "sensitive" land (e.g. many coastal properties) as outlined in "Overseas Investment" above.

The acquisition and leasing of land in New Zealand is a relatively simple process. Agreements for the sale and purchase, and leasing, of land in New Zealand must be in writing and signed by the parties involved.

Land ownership is registered on a public central registry with Land Information New Zealand (otherwise known as the "Torrens System").

No stamp duty is payable on the transfer of land in New Zealand. However, the New Zealand Government has recently legislated to tax certain property sales occurring within five years of acquisition.

Resource management

Use and development of environmental resources (air, land and water) is controlled by the *Resource Management Act 1991* and local and regional government.

The Act's principal purpose is the sustainable management of New Zealand's natural and physical resources. A consent process applies for the approval of any development and these resource consents apply to land use, subdivision, water permits, coastal permits, and discharge permits.

Applications are made to local authorities in accordance with the Act.

Overview

The Commerce Commission is New Zealand's competition enforcement and regulatory agency. The Commission administers:

- ***Commerce Act 1986***: promotes competition in markets within New Zealand. The Act prohibits conduct that restricts competition (restrictive trade practices) and the purchase of a business's shares or assets if that purchase leads to a substantial lessening of competition.

- ***Fair Trading Act 1986***: protects consumers from misleading and deceptive conduct and unfair trading practices. The Act applies to all aspects of the promotion and sale of goods and services - from advertising and pricing to sales techniques and finance agreements.

- ***Credit Contracts and Consumer Finance Act 2003***: provides a framework for information for credit transactions that consumers must be given, sets minimum standards for contractual terms and rules on credit fees and credit related insurance.

Commerce Act

Mergers and acquisitions

- Prohibits mergers and acquisitions that substantially lessen competition.
- Allows the Commission to clear acquisitions where it is satisfied that the proposed acquisition will not have or would not be likely to have the effect of substantially lessening of competition in a market.
- Allows the Commission to authorise acquisitions that would result in a substantial lessening of competition, if the public benefits resulting from the acquisition are found to outweigh the detriments.

Anti-competitive practices

- Prohibits anti-competitive agreements between businesses such as agreements to fix prices or to carve up markets. It also makes it illegal for companies to abuse a dominant market position. Consumers and businesses can end up paying higher prices or having reduced choice of goods or services as a result of such agreements.
- Prohibits agreements that can involve two or more businesses colluding (coordinated conduct).

Fair Trading Act

- Prohibits certain conduct in trade, provides for the disclosure of consumer information relating to the supply of goods and services and promotes product safety.
- Businesses are obliged to ensure the information they do provide is accurate, and important information is not withheld. This enables consumers to make informed choices about goods and services.
- Businesses cannot contract out of their obligations under the Act.

Credit Contracts and Consumer Finance Act

- Designed to protect retail consumers who borrow money.
- Ensures consumers can make informed choices, know what they're agreeing to, and can keep track of their debts.
- Covers a range of transactions where money is loaned for personal use, including consumer credit contracts (mortgages, credit cards, arranged overdrafts, personal or cash loans), consumer leases (contract for leasing goods for personal use) and buy-back transactions.
- Covers all other credit transactions, including business transactions, by protecting borrowers from oppressive behaviour by lenders.

Mayne Wetherell is a leading New Zealand commercial law firm.

We advise on New Zealand's most significant and complex business transactions and we pride ourselves on driving successful outcomes for our clients.

This *Doing Business in New Zealand* paper provides you with a general overview of New Zealand's business environment, and identifies key areas of New Zealand business and investment regulation. Advice should be sought from Mayne Wetherell on any proposal to invest in New Zealand where we can assess your specific requirements.

Find out more about Mayne Wetherell online at www.maynewetherell.com.

Matthew Olsen, Partner
ddi +64 9 921 6097
matthew.olsen@maynewetherell.com

Michael Pritchard, Partner
ddi +64 9 921 6073
michael.pritchard@maynewetherell.com

Will Tipping, Partner
ddi +64 9 921 6074
will.tipping@maynewetherell.com

Dave Wetherell, Partner
ddi +64 9 921 6003
dave.wetherell@maynewetherell.com