Doing Business in New Zealand

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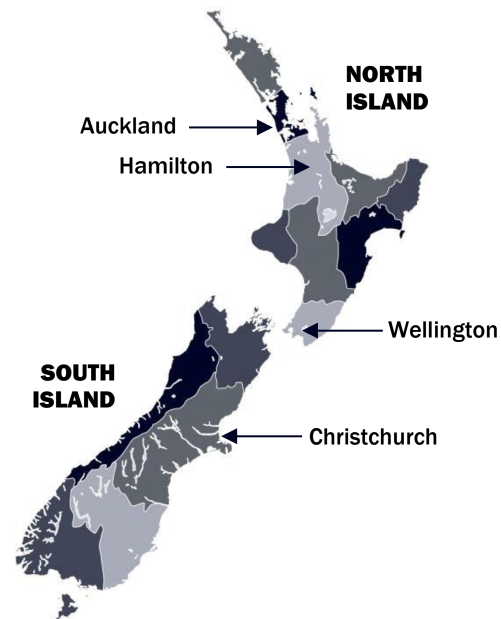
Geography and demographics

- New Zealand is situated in the South Pacific Ocean and comprises two main islands: the North Island and the South Island. These islands have a combined area of approximately 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 (at approximately 4.1 million square kilometres), covering more than 15 times its land area.
- New Zealand has a resident population of just over five million people. The four largest cities are Auckland, Christchurch, Wellington (the capital city), and Hamilton.



Economy

- A developed country, New Zealand's market economy is dominated by agriculture (predominantly the exports of dairy products, meat, and timber), as well as tourism.
- New Zealand's major trading partners include China, Australia, the United States, Japan, and South Korea.
- The New Zealand dollar is the currency of New Zealand, and one of the 10 most traded currencies in the world.

Political system

- New Zealand is a sovereign state with a democratic parliamentary government. The British monarch (King Charles III) is the titular Head of State. The King's representative in New Zealand is the Governor-General.
- Legislative power in New Zealand is vested in Parliament. There are currently 120 members of the House of Representatives, each of whom is elected for a three-year term through general elections.
- New Zealand has a mixed-member proportional electoral system, which (since its introduction in the 1996 general election) has typically (though not always) resulted in coalition governments.

Legal system

- New Zealand's legal system is based on the British model with an independent judiciary.
- New Zealand has a number of general and specialist courts and tribunals, including the Employment Court, the Environment Court, the Māori Land Court, and the Waitangi Tribunal.
- Most criminal cases and civil cases (where the amount in dispute is less than NZ$350,000) are heard in the District Court. The High Court is the court of first instance for more serious criminal and civil cases, and it also hears appeals from lower courts and tribunals.
- The intermediate appellate court is the Court of Appeal, which hears civil and criminal appeals from the High Court, criminal appeals from the District Court, and appeals on questions of law from the Employment Court.
- The Supreme Court is the highest and final court in New Zealand. The Supreme Court was established in 2004 to replace the Privy Council.

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Overseas investment regime

Certain foreign investments in certain categories of New Zealand assets require notification, or for Government consent to the investment to be obtained.

The legislative framework setting out the consent requirements and criteria for obtaining consent is contained in the *Overseas Investment Act 2005* (**OIA**) and accompanying regulations, which are administered by the Overseas Investment Office (**OIO**). The ultimate decision whether to grant consent rests with relevant Government Ministers, although in some cases, the OIO may itself consent to applications under delegated authority.

There are two major categories of overseas investment for which OIO consent is required:

- Overseas investment in significant business assets.
- Overseas investment in sensitive land.

Consent is also required (under the *Fisheries Act 1996*) for a transaction that will result in an overseas investment in fishing quota.

Overseas persons

For the purposes of New Zealand's overseas investment regime, an "overseas person" is defined in the OIA, broadly, to include:

- An individual who is neither a New Zealand citizen nor "ordinarily resident in New Zealand".
- A body corporate that is incorporated outside New Zealand, or is a more than 25% subsidiary of a body corporate incorporated outside New Zealand.
- A body corporate that is a New Zealand listed issuer if:
  - an overseas person(s) has (or cumulatively have) a beneficial entitlement to, or beneficial interest in, 50% or more of the listed issuer's securities; or
  - one or more overseas persons (alone or together with associates) has a beneficial entitlement to, or a beneficial interest in, 10% or more of any class of the listed issuer's securities that confer control rights, and either control the composition of 50% or more of the listed issuer's governing body, or exercise (or control the exercise) of more than 25% of the voting power at a meeting of the listed issuer.
- A body corporate (other than a New Zealand listed issuer) if an overseas person(s) has (or have):
  - more than 25% of any class of the body corporate's securities;
  - the power to control the composition of more than 25% of the body corporate's governing body; or
  - the right to exercise (or control the exercise) of more than 25% of the voting power at a meeting of the body corporate.
- Certain partnerships, unincorporated joint ventures (and other unincorporated bodies), trusts, unit trusts, managed investment schemes, and limited partnerships, which meet prescribed overseas ownership thresholds and tests (as applicable).

Overseas investment in significant business assets

An "overseas investment in significant business assets" is defined in the OIA, broadly, as:

- The acquisition by an overseas person (or associate) of rights or interests in securities of a person if:
  - as a result of the acquisition, the overseas person or associate (either alone or together with its associates) has a more than 25% ownership or control interest (or an increase in certain existing more than 25% ownership or control interests) in the person; and
  - the value of the securities or consideration provided, or the value of the assets of the person (either alone or together with its more than 25% subsidiaries), exceeds NZ$100m.
- The establishment by an overseas person (or associate) of a business in New Zealand if the business is carried on for more than 90 days in total in any year and the total expenditure expected to be incurred, before commencing the business, in establishing the business, exceeds NZ$100m.
- The acquisition by an overseas person (or associate) of property (including goodwill and other intangible assets) in New Zealand that is used in carrying on business in New Zealand (whether by one transaction or a series of related or linked transactions), if the total consideration provided exceeds NZ$100m.

Note: For some investors from certain jurisdictions (including Australia, as well as others with which New Zealand has trade or investment treaties specifying a higher threshold), the monetary threshold may be higher than NZ$100m. The higher amounts are specified in regulations.

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Overseas investment in sensitive land

Overview

An "overseas investment in sensitive land" is defined in the OIA as the acquisition by an overseas person (or associate) of any or all of the following:

- An estate or interest in "sensitive land", where the estate or interest acquired is:
  - a freehold estate;
  - an interest (other than an easement or certain profits à prendre) in residential land for a total term of three years or more; or
  - an interest (other than an easement or certain profits à prendre) in non-residential land for a total term of 10 years or more.
- Rights or interests in securities of a person (**Target**) if the Target owns or controls (directly or indirectly) an estate or interest in land described above, and, as a result of the acquisition:
  - The overseas person (or associate) (either alone or together with its associates) has a more than 25% ownership or control interest in the Target.
  - The overseas person (or associate) (either alone or together with its associates) has an increase in an existing more than 25% ownership or control interest in the Target that:
    - results in an ownership or control interest in the Target that is equal to or exceeds a "control interest limit";
    - is in securities of the Target of a different class to that in which their existing interest is held; or
    - provides any or more disproportionate access to, or control of, a strategically important business.
  - The Target becomes an overseas person (in certain prescribed circumstances).

What is "sensitive land"?

The definition of "sensitive land" is highly prescriptive. Land may be "sensitive" based on its size, usage, and/or location. Sensitive land includes:

- All residential land (being land categorised as either "residential" or "lifestyle" on the District Valuation Roll).
- Non-urban land (over five hectares) (eg, farms).
- Land on specified islands.
- Marine and coastal areas.
- Lakebeds (over 0.4 hectares).
- Various other forms of land (over 0.4 hectares) held for conservation or recreational purposes, or which is culturally or historically significant.
- Land adjoining or "associated" with specified types of land.

OIO applications

Process, fees, and timing

Prospective overseas investors must submit an application to the OIO (in the prescribed form). A lodgement fee is payable on lodging an application. Upon receipt of a complete application, the OIO will provisionally accept it and send an invoice for the applicable fee. Once that fee is paid, the application will be fully accepted and OIO assessment will begin.

The total fees charged by the OIO for an application for consent depend on the nature of the relevant application. For example, an application involving significant business assets only has a total fee of NZ$38,800 (including GST). Fees for more complex applications and/or those requiring Ministerial decisions vary, but may be up to ~NZ$150,000 (including GST).

The OIO is subject to statutory timeframes to process applications. After an initial 15-working day assessment period (for almost all applications), the timeframe in which the OIO must complete an application depends on the nature of the application. As examples, for an application involving significant business assets only, the statutory timeframe is 35 days; whereas for an application involving the benefit to New Zealand test (see further below) the timeframe is 70 working days (or 100 working days if the application involves farmland). Extensions to the OIO's statutory timeframes are permitted in various circumstances, including for applications of "significant complexity".

Consent pathways and key tests

Overview: consent pathways

There are different "consent pathways" which an application for consent to overseas investment must go through, depending on the nature of the proposed investment. Each consent pathway has different criteria that the decision maker considers and applies. It is possible that more than one pathway can apply to an application.

The following is an outline of certain of the key tests which may apply under the various consent pathways.

Investor test

Generally, all applicants (and persons with control of an applicant) must meet the investor test. The purpose of the investor test is to determine whether investors are unsuitable to own or control sensitive New Zealand assets. The investor test is made up of two groups of factors: character and capability.

The character factors include:

- convictions resulting in imprisonment or significant fines;
- corporate fines (both in New Zealand and abroad); and
- being ineligible to come to New Zealand.

The capability factors include:

- prohibitions on being a director, promotor, or manager of a company;
- penalties for tax avoidance or evasion; and
- unpaid tax of NZ$5 million or more (or an equivalent amount due and payable in another jurisdiction).

Benefit to New Zealand test

The benefit to New Zealand test is applied to transactions involving sensitive land (that do not fall within another pathway). The benefit test will be satisfied where:

- the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders); and
- if the relevant land is, or includes, residential land, the relevant Minister(s) are satisfied that the conditions imposed on the consent will be, or are likely to be, met.

Whether an investment is likely to benefit New Zealand is assessed against seven factors: economic factors, benefits to the natural environment, public access, protection of historic heritage, advancing a significant Government policy, oversight or participation by New Zealanders, and consequential benefits. A separate benefit to New Zealand test applies in respect of fishing quota.

National interest assessment

Certain applications for consent are (or may be) subject to a national interest assessment. These transactions are reviewed by the Minister of Finance to determine whether they are contrary to New Zealand's national interest, having regard to factors including (eg) national security, competition and market influence, economic and social impact, and alignment with New Zealand's values and interests.

Transactions that are subject to mandatory national interest assessment involve either:

- land or assets used for strategically important businesses (eg, critical intelligence or security suppliers, businesses involved in military or dual-use technology, ports or airports, utilities businesses, important financial institutions, and significant media businesses); or
- certain levels of investment by an overseas investor that are made by, or are associated with, a foreign government.

Special cases

For prospective overseas investments involving farmland, generally, the relevant farmland must first be offered on the open market for 20 working days.

Special land (being the foreshore, seabed, riverbeds, or lakebeds) must first be offered to the New Zealand Government as part of the consent process.

Tax information requirements

For prospective investments in significant business assets, overseas investors must submit a form with their application to the OIO containing certain (high-level) tax information regarding the proposed investment, including (eg) the proposed capital structure for the investment, the likely nature and extent of any transfer pricing arrangements, and any relevant double tax agreements.

The OIO sends the tax form directly to Inland Revenue for assessment and for "monitoring and compliance" purposes. The OIO does not use the information in the form to decide whether or not to grant consent (although an incomplete form may result in delay to the processing of the application for consent).

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Visas

Non-New Zealand or Australian nationals require a visa to live or work in New Zealand. There is a wide range of visas available depending on the circumstances. More information can be found at: www.immigration.govt.nz.

Residency

A Resident Visa is required to live in New Zealand permanently. There are a number of pathways for obtaining a Resident Visa, many of which begin with the holding of a temporary visa allowing the holder to work, study or own a business in New Zealand. Certain visas, including those granted under the Skilled Migrant Category, may grant the holder residency automatically.

Note: Specific rules apply to determine whether a person is resident in New Zealand for tax purposes, which do not depend on the person's residency for immigration purposes. See our further comments below in the Tax section of this guide.

Citizenship

There are a number of requirements to obtain New Zealand citizenship under the *Citizenship Act 1977*, including requirements relating to an applicant's:

- physical presence in New Zealand;
- knowledge of the English language; and
- good character (ie, conviction history, both in New Zealand and abroad).

Special requirements apply in respect of children and for citizens of Samoa.

Generally, the requirements with respect to presence in New Zealand require an applicant to:

- have been living as a New Zealand resident for at least the last five years;
- have been physically present in New Zealand (ie, not travelled outside New Zealand) for a prescribed number of days during each of, and in aggregate across, the last five years; and
- intend to live in New Zealand once they become a citizen.

Immigration advisors

Generally, under the *Immigration Advisers Licensing Act 2007*, any person that provides immigration advice about New Zealand (whether that advice is given from within New Zealand or abroad) must be licensed by the Immigration Advisers Authority.

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Overview of common investment structures

Common structures for inbound foreign investment in New Zealand include:

- Incorporating or acquiring a New Zealand subsidiary company.
- Establishing a New Zealand limited partnership.
- Registering an existing overseas limited partnership or branch of an existing overseas company.

Overseas companies and limited partnerships that intend to carry on business in New Zealand must register with the New Zealand Companies Office. These entities must also obtain a New Zealand tax number, and may (depending on the volume of their business activities) be required to register for GST (see our further comments below in the Tax section of this guide).

Note: Establishing a business in New Zealand may be subject to consent or notification requirements under New Zealand's overseas investment regime (see our further comments above in the Overseas Investment section of this guide).

Incorporating a company

Incorporating a company in New Zealand is generally a straight-forward process, which can be completed online through the Companies Office website.

Under the *Companies Act 1993*, every New Zealand company must have:

- at least one New Zealand resident director, or one Australian resident director who is also a director of an Australian company;
- at least one shareholder, having either limited or unlimited liability for the obligations of the company (however, there are no restrictions on the residency of a New Zealand company's shareholders, nor on the size of its share capital); and
- a registered office and address for service.

A New Zealand company is required to maintain certain statutory records, including its constitution (if the company has one), a register of directors, share register, minutes of all meetings and resolutions of shareholders within the last seven years, as well as minutes of all meetings and resolutions of directors and directors' committees within the last seven years.

Note: The New Zealand Companies Register is maintained by the Companies Office and is publicly available, including information regarding directors and shareholders.

Establishing a limited partnership

New Zealand's limited partnership regime is governed by the *Limited Partnerships Act 2008*. New Zealand's limited partnership rules are similar to equivalent regimes in Australia, the United States (Delaware), and the United Kingdom.

The key features of limited partnerships in New Zealand are as follows:

- Limited partnerships are separate legal entities, which can provide the protection of limited liability to their members.
- Every limited partnership must have a partnership agreement.
- Limited partnerships must have at least one general partner and one limited partner (they cannot be the same person). A general partner may be an overseas company registered in New Zealand with at least one New Zealand resident director, or one Australian resident director who is also a director of an Australian company. A limited partner can be an overseas person.
- A general partner is jointly and severally liable with any other general partners and the limited partnership itself for the unpaid debts and liabilities of the limited partnership.
- The liability of a limited (passive) partner for the unpaid debts and liabilities of the limited partnership is limited only to the extent of that limited partner's financial contribution, provided they do not take part in the management of the limited partnership.
- Limited partnerships have 'flow-through' tax treatment (see our further comments below on page 13 of this guide).

Financial reporting requirements

Public filing requirements for financial statements, including audit requirements, vary depending on the size and activities of the particular entity.

Generally, all "large" overseas companies, and some "large" New Zealand companies, must file annual audited financial statements under the *Companies Act*. A company will be "large" for this purpose if, at the balance date for the two preceding accounting periods, the company meets certain thresholds with respect to the value of the total assets of the company and its subsidiaries, and/or the company's total revenue.

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Regulation of financial services

Overview

Various compliance, licensing, registration, disclosure, and financial reporting requirements / obligations can apply to persons undertaking a wide range of financial services, including:

- registered banks;
- insurers;
- fund managers and derivatives issuers;
- supervisors;
- financial advice providers;
- discretionary investment management service (**DIMS**) providers;
- crowd funding and peer-to-peer lending service providers;
- market operators (eg, stock exchanges); and
- auditors.

Banks

Financial institutions that carry out any activity (directly or indirectly) with a name or title that includes “bank”, “banker”, or “banking” must be authorised to use that name in New Zealand by the Reserve Bank of New Zealand.

Registered banks are subject to regulatory oversight, including prudential supervision, by the Reserve Bank. Registered banks are listed on a publicly-available register (there are currently 27 registered banks in New Zealand). There are certain criteria in order to register as a registered bank:

- **Qualitative criteria**, relating to the applicant’s financial standing and ability to prudently manage its business.
- **Quantitative criteria**, being prudential requirements intended to provide objective evidence of the applicant’s ability to meet the qualitative criteria.

Overseas applicants must also have the approval of their home supervisor to conduct banking business in New Zealand, and must meet the prudential requirements of that home supervisor.

Non-bank deposit takers

Persons, other than registered banks, that take deposits or offer debt securities to retail investors and carry on the business of borrowing and lending money and/or providing financial services, are required to be licensed as a “non-bank deposit taker” by the Reserve Bank. Non-bank deposit takers must comply with a range of conduct and prudential requirements under the *Non-bank Deposit Takers Act 2013* and *Financial Markets Conduct Act 2013*.

Anti-money laundering regulation

The *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (and accompanying regulations) requires certain reporting institutions (including financial institutions, financial advisors, lawyers, accountants, and real estate agents) to undertake certain activities (including preparation of risk assessments and compliance programmes, customer monitoring and due diligence, and reporting) to detect and deter money laundering and the financing of terrorist activities.

Taking security over property

The *Personal Property Securities Act 1999* (commonly referred to as the **PPSA**) is a code which regulates the validity and priority of security interests in personal property, including traditional security interests (eg, mortgages, charges, pledges, and liens) as well as other forms of security interest, such as retention of title clauses, and leases of 12 months or more.

Generally, a “perfected” security interest has priority over an “unperfected" security interest. A security interest is typically perfected by registration on the online Personal Property Securities Register. Priority as between perfected security interests is typically (though subject to certain exceptions) determined by which secured party is the first to either register or take possession of the collateral.

Corporate insolvency

The most common insolvency procedures for companies in New Zealand are:

- **Receivership**, where a receiver is appointed (typically by a secured creditor) to collect and sell the company’s assets over which the secured creditor has a financial claim.
- Liquidation, where a liquidator is appointed (either by special resolution of shareholders, the board, court order, or by a resolution of creditors at a watershed meeting) to take possession of, guard, realise, and distribute a company’s assets (or the proceeds from the sale of those assets) to the company’s creditors.
- Voluntary administration, where an administrator is appointed (by the board, the liquidator, a secured creditor holding a charge over the whole, or substantially the whole, of the company’s property or the court) to take control of, and investigate, the company’s business and financial affairs. The administrator then reports their findings and puts forward recommendations to creditors to vote on at a watershed meeting.

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- **Farm debt mediation,** where parties to farm debt use mediation to reach an agreement on the present arrangements and future conduct of financial relations between them before an enforcement action is taken in relation to farm property.

- **Creditors compromises**, where the board, a receiver (appointed over the whole or substantially the whole of the assets), a liquidator or with the leave of the court, any creditor or shareholder of the company propose a compromise for approval by the company's creditors, or a class of creditors.

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Overview

New Zealand's tax system broadly includes:

- income tax; and
- goods and services tax (**GST**).

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

Income tax

Key features

New Zealand income tax is imposed on:

- the worldwide income of New Zealand residents; and
- income of non-residents that has a New Zealand source (which must be determined according to statutory definitions of source applicable to different categories of income).

New Zealand has a network of 40 double tax agreements (**DTAs**), which wholly or partly relieve from tax certain New Zealand-sourced income of non-residents.

Income tax is levied on "taxable income", being annual gross income less annual total deductions and any losses carried forward.

Tax residence of individuals

An individual will be resident in New Zealand if the individual has a "permanent place of abode" in New Zealand, or if the individual is personally present in New Zealand for more than 183 days in total in any 12-month period (in which case, the person is deemed to have been New Zealand resident from the first such day of the 183 days).

An elective concessionary regime, known as the transitional residents regime, allows a New Zealand tax resident individual (who has not been tax resident in New Zealand during the preceding 10-year period) to be taxed only on their New Zealand-sourced income (rather than worldwide income) for approximately the first four years of being New Zealand tax resident. The concession may be used only once. It does not provide relief in respect of non-New Zealand sourced income arising from employment and other personal services.

Tax residence of companies

A company will be resident in New Zealand if:

- it is incorporated in New Zealand;
- its head office is in New Zealand;
- its centre of management is in New Zealand; and/or
- its directors, in their capacity as directors, exercise control of the company in New Zealand.

Tax rates

New Zealand's income tax rate for companies is currently 28%.

For individuals, the current tax rates are:

- 10.5% on income up to NZ$14,000;
- 17.5% on income from NZ$14,000 to NZ$48,000;
- 30% on income from NZ$48,000 to NZ$70,000;
- 33% on income from NZ$70,000 to NZ$180,000; and
- 39% on income over NZ$180,000.

Trustees (other than of unit trusts, which are taxed as companies) are taxed at 33% on trustee income.

Taxation of capital gains

New Zealand does not have a comprehensive capital gains tax. There are, however, numerous provisions that deem what would otherwise be non-taxable capital receipts to be income subject to tax in particular cases.

The proceeds of disposing of property will generally be deemed to be income if the person is in the business of dealing in property of that kind, if the person acquired the property for the purpose of disposing of it, or if the proceeds are derived from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit.

A number of provisions apply specifically to disposals of land, deeming what would otherwise be non-taxable capital proceeds to be taxable in various situations. These provisions can (for example) deem what would otherwise be capital proceeds to be taxable if the taxpayer, or an associated person of the taxpayer, carries on a business connected with developing or dealing in land.

The deeming provisions applicable to land have been extended in recent years in relation to gains from the disposal of residential land. Under those provisions, gains on the sale of residential land will be taxable if the land is: (i) purchased on or after 27 March 2021, and sold within 10 years; or (ii) purchased between 29 March 2018 and 26 March 2021, and sold within five years. Some exceptions to this rule apply, including where the property has been used as the vendor's "main home".

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The deeming provisions applicable to land have been extended in recent years in relation to gains from the disposal of residential land. Under those provisions, gains on the sale of residential land will be taxable if the land is: (i) purchased on or after 27 March 2021, and sold within 10 years; or (ii) purchased between 29 March 2018 and 26 March 2021, and sold within five years. Some exceptions to this rule apply, including where the property has been used as the vendor's "main home".

Finally, gains or losses arising from holding or dealing in debt instruments or other financial arrangements will (with limited exceptions) be brought to tax under the financial arrangements regime, regardless of whether such gains or losses would be capital in nature under ordinary concepts.

Imputation regime

New Zealand income tax paid by a New Zealand resident company (or, in certain circumstances, an Australian tax resident company) generates 'imputation credits', which can be attached to dividends paid by the company. Imputation credits can then be used by the recipient to offset its New Zealand income tax liability, thereby relieving economic double taxation that would otherwise arise if earnings distributed by a company were taxed at the company level, and then again as dividends derived by the shareholder.

Thin capitalisation

The thin capitalisation rules apply to non-residents (including branches of non-residents), and to any New Zealand resident that is owned as to 50% or more, or otherwise controlled, by a non-resident (or in certain cases, by a group of non-residents acting together). The rules may apply to limit interest deductions if total debt to total assets (the debt percentage) for the New Zealand group exceeds both 60% and 110% of the debt percentage for the worldwide group.

In calculating the debt percentage:

- all debt (whether or not the lender is an associated person) is taken into account;
- assets must be determined net of non-debt liabilities (with some exceptions); and
- an on-lending concession applies, such that assets that are financial arrangements and meet certain criteria can be netted off against both total assets and total debt.

The thin capitalisation rules can also apply to New Zealand residents not otherwise subject to the rules in respect of outbound investments. For groups subject to the rules on this basis, various de minimis rules apply, and the safe harbour New Zealand group debt percentage is 75% (rather than 60%, as is the case under the rules applicable in the inbound context). In addition, such groups, if they meet certain criteria, may use an interest coverage ratio as an alternative to the debt percentage test.

Transfer pricing

New Zealand has transfer pricing rules, potentially applicable to cross-border arrangements entered into between associated persons. The definition of associated person for this purpose is broad; it extends to arrangements in which an entity is owned as to 50% or more by a group of non-residents acting together and transacts with a member of that group, as well as where the parties to the arrangement are associated due to being commonly owned to the extent of 50% or more or on some similar basis under the usual association tests.

Until 2018, New Zealand's rules for determining an arm's length price were generally consistent with international practice (including OECD guidance). Since 2018, however, special rules have applied for determining the permitted interest rate in relation to inbound related-party lending. For example, the rules may require the permitted interest rate to be determined on the basis that the borrower has a credit rating that is higher than its actual credit-worthiness, and that certain provisions of the loan (such as a term of longer than five years, or subordination to other debt instruments) must be disregarded. These rules can result in the market interest rate as determined for transfer pricing purposes being less than the arm's length rate determined on ordinary principles.

Base erosion and profit shifting

New Zealand has enacted a number of reforms to implement the OECD's proposals to prevent base erosion and profit shifting (**BEPS**), including measures directed at hybrid mismatch arrangements.

In addition, New Zealand is a signatory to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (**MLI**), which amends certain of New Zealand's DTAs (to the extent the relevant treaty partner has also elected to include the MLI provision). New Zealand's positions on ratification of the MLI have generally been consistent with comprehensive adoption of the MLI provisions, as opposed to reserving against the application of optional provisions.

RWT-exempt status or another exclusion (such as for dividends or interest payments between companies in the same 66% group) applies. RWT operates as a collection mechanism, reflecting the fact that for most individual taxpayers in New Zealand, it is intended that tax be collected at source in respect of the main sources of income.

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Withholding taxes and other collection mechanisms

Domestic withholding taxes

Resident withholding tax (**RWT**) generally applies to interest and dividends paid to New Zealand residents, unless the taxpayer has RWT-exempt status or another exclusion (such as for dividends or interest payments between companies in the same 66% group) applies. RWT operates as a collection mechanism, reflecting the fact that for most individual taxpayers in New Zealand, it is intended that tax be collected at source in respect of the main sources of income.

Withholding taxes on cross-border payments

Non-resident withholding tax (**NRWT**) generally applies to interest, dividends, and royalties derived from New Zealand and paid to non-residents. In the case of interest paid to non-resident associated persons, and certain types of royalties, NRWT is a minimum, rather than a final, tax. Where this is the case, it may be necessary (if DTA relief does not apply) for the non-resident to return the interest or royalty income on an assessment basis, even when NRWT has been deducted.

Dividends

The starting point is that a dividend paid to a non-resident is subject to NRWT at the rate of 30%, subject to any available DTA relief. To the extent the dividend is fully imputed, however:

- where the recipient has a 10% or greater direct voting interest in the payer, the rate of NRWT is reduced to 0%;
- otherwise, the recipient may be entitled to a "supplementary dividend", which effectively offsets the NRWT impost on the dividend.

Most of New Zealand's DTAs limit source country tax on dividends to 15%. Some DTAs further limit source country tax to 5%, and (in a few cases) to 0%, where the recipient is a company and holds a sufficient voting interest in the company (usually at least 10%).

Interest

Interest derived by a non-resident (other than in connection with a business the non-resident is carrying on in New Zealand through a fixed establishment in New Zealand) is subject to NRWT at 15%. Most of New Zealand's DTAs limit source country tax on interest to 10%.

If a borrower pays interest to a (non-associated) non-resident lender, the borrower may (by applying to Inland Revenue) be eligible to reduce the rate of NRWT to 0% by paying the approved issuer levy. The approved issuer levy is a deductible levy, imposed at the rate of 2% of the amount of the interest. In limited situations, the levy applies at the rate of 0% (meaning neither the approved issuer levy nor NRWT is payable).

Royalties

Royalties derived by a non-resident are subject to NRWT at the rate of 15%. Most of New Zealand's DTAs limit source country tax on royalties to 10%, or (in the case of a small number of recently concluded DTAs) 5%.

Payments for services rendered, or for the use of personal property, in New Zealand

A withholding tax (known as non-resident contractors' tax (**NRCT**)) may also apply to payments made to non-residents for services performed, or for the use of (or right to use) personal property, in New Zealand. NRCT does not apply to employment income (as to which see the comments below), or to certain other payments (such as to non-resident entertainers (including sports-persons)) to which separate withholding taxes may apply.

Unlike NRWT on dividends, interest, and royalties, DTA relief is not allowed at source in respect of NRCT. Instead, the recipient of such payments may (unless a de minimis exemption applies) apply to Inland Revenue for an exemption certificate, usually on the grounds that either the payments qualify for DTA relief, or that the recipient has a two-year track record of compliance with its New Zealand tax obligations.

Residential land withholding tax

Proceeds from the disposal by an "offshore RLWT person" of residential land may be subject to residential land withholding tax (**RLWT**). Offshore RLWT person has a detailed definition. In the case of companies and limited partnerships, it (broadly) includes any company or partnership incorporated, registered or constituted outside New Zealand, or for which more than 25% of its governing body are offshore RLWT persons, or that has more than 25% of its voting shares or other ownership interests held by offshore RLWT persons.

RLWT is usually required to be deducted by the vendor's conveyancing agent. The amount of withholding is the lesser of 10% of the purchase price and a prescribed tax rate applied to the gain.

RLWT is not a final tax. An offshore RLWT person must return the proceeds of disposal of the land and claim a credit for RLWT deducted.

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Taxation of employment income

Employees are subject to a 'pay as you earn' (**PAYE**) system under which tax (together with certain other amounts, including accident compensation levies and KiwiSaver (retirement account) employee contributions) payable by employees is collected by the employer. Non-cash benefits provided to employees are generally subject to fringe benefit tax, which is payable by the employer.

Treatment of particular entities and investment structures

Companies

A company, for income tax purposes, generally means any body corporate or other entity that has a legal existence separate from that of its members, whether incorporated or created in New Zealand or elsewhere. A company also includes a unit trust.

Companies are generally taxable at the flat rate of 28%. As noted previously, New Zealand income tax paid by a New Zealand resident company (or, in certain circumstances, an Australian tax resident company) generates imputation credits, which can be attached to dividends paid by the company. A company's imputation credit balance is subject to a continuity of ownership requirement, such that a credit may be carried forward only if the company continues, from the date the credit arose, to be owned to the extent of 66% or more by the same group of persons.

A company that has a net loss in an income year may carry the loss forward for so long as it continues to be owned to the extent of 49% or more by the same group of persons (the ownership continuity test) or, if the ownership continuity test is not satisfied, if it satisfies a business continuity test. The alternative business continuity test has applied since the commencement of the 2020-21 income year. The test generally requires (subject to some exceptions) there to have been no cessation of, or major change in the nature of, the business activities carried on by the company during the relevant period.

Net losses may be offset against net income of another company if the companies have been in the same group of companies (which requires common ownership at least to the extent of 66%) from the date at which the loss to be offset arose. It is also possible for companies in the same wholly-owned group to elect to consolidate for income tax purposes, with the effect that most transactions within the consolidated group are disregarded.

PIEs

Most collective investment vehicles in New Zealand are documented as unit trusts (which are deemed to be companies for tax purposes), but elect to be taxed as 'portfolio investment entities' (**PIEs**). The criteria for electing into the PIE regime are detailed, but generally require the entity to be widely held, and to hold an investment portfolio generating predominantly passive income.

A PIE is exempt from tax on a gain on the sale of shares in a New Zealand resident company, or in an Australian resident company that is listed on the official list of the ASX and meets certain other criteria.

Unless the PIE is a listed PIE (in which case the PIE is taxed largely in the same way as any other company, but with certain differences in relation to how dividends are taxed), a PIE is not taxed as an entity but instead attributes income to investors. In the case of individual and some trust investors, the PIE pays tax on that attributed income at the investor's "prescribed investor rate", which corresponds to the investor's marginal tax rate, capped at 28% (a concession for investors who would otherwise be taxable at the 30%, 33% or 39% rate). For other investors (including companies), PIE income is attributed to the investor and the investor must pay the tax on it.

Limited partnerships

As noted above (on page 7 of this guide), limited partnerships formed in New Zealand (under the *Limited Partnerships Act 2008*) are separate legal entities, but have 'flow-through' tax treatment. That is, each partner is treated as holding the assets, deriving the income, and incurring the expenditure, of the limited partnership to the extent of that partner's partnership interest. However, the ability to pass through taxes losses to a limited partner is limited to the extent of the limited partner's exposure to the loss.

Trusts (other than unit trusts)

Trusts that are not unit trusts (including most family trusts) will be taxed under the 'trust rules'. Under the trust rules, trust income is taxed either as beneficiary income (to the extent the income vests absolutely in interest in, or is paid to, a beneficiary within a specified period), or trustee income (to the extent it is not beneficiary income). Generally, beneficiary income is taxed as if it were derived by the beneficiary and subject to tax at the beneficiary's marginal rate.

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New Zealand has a "settlor" regime for the taxation of trusts. If a New Zealand tax resident is a settlor of a trust, that trust will generally be subject to New Zealand tax on its worldwide income. If a trust has no New Zealand settlor, the income of the trust will generally be subject to New Zealand tax only to the extent the income has a New Zealand source or is derived as â €œbeneficiary incomeâ€ by a New Zealand resident beneficiary.

A "resident foreign trustee" (ie, a person who, either alone or jointly with another person, acts as a trustee of a foreign trust, and is resident in New Zealand) must comply with foreign trust registration and disclosure rules, and with general record-keeping obligations. A failure to comply will result in the foreign trust losing the benefit from the exemption from tax on foreign-sourced amounts.

Goods and services tax

GST is a broad-based, value-added tax on the supply of most goods and services in New Zealand, including imported goods, and certain imported services. New Zealand is considered to have one of the simplest and most comprehensive value-added taxes in the world. GST is charged at the flat rate of 15%, with only limited exceptions for zero-rated and exempt supplies.

Zero-rated supplies include most exports of goods and services, and (in most cases) the supply of an interest in land by one GST registered person to another GST registered person. Exempt supplies include the supply of financial services (other than business-to-business financial services treated as zero-rated), and the supply of residential accommodation. A GST registered person may claim a credit for GST on inputs relating to the making of zero-rated supplies, but not on inputs relating to the making of exempt supplies.

A person is required to register for GST if the person carries on a taxable activity and the total value of supplies made in New Zealand exceeds NZ $60,000 per year. Amendments made in recent years have the effect that a foreign supplier of remote services (such as digital products), or of low value goods (ie, goods with a value of NZ$1,000 or less), must register for and collect GST if total sales to New Zealand residents (excluding businesses that are themselves GST registered) exceeds the NZ$60,000 threshold.

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Employment relations

Overview

The *Employment Relations Act 2000* is the foundation of workplace regulation in New Zealand. All employment relationships (including senior and executive employee relationships) are governed by the *Act*. Independent contractors, however, are not.

The *Employment Relations 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 build and maintain fair and productive relationships between employers and their employees, promote effective enforcement of New Zealand's employment standards, as well as the observance of New Zealand's international labour law obligations.

Good faith

There is a general good faith obligation as between parties to an employment relationship. The parties must be "active and constructive" and "responsive and communicative" in their dealings, and must not mislead or deceive each other. Employers must provide information and consult with their employees before deciding to act in a way that may have an "adverse effect" on their employees.

Employment agreements

Agreements under the *Employment Relations Act* must be in writing, and may be individual (ie, between an individual employee and their employer) or collective (ie, between one or more unions and one or more employers). Individual employment agreements will ordinarily be for an indefinite period, although it is also possible for agreements to be casual or fixed-term (subject to certain restrictions).

Termination

Employees may end an indefinite employment agreement by providing notice. An employer can terminate an employee's employment only for legitimate reasons (eg, redundancy, misconduct or poor performance, or incapacity), and only by following due legal process. An employee may raise a personal grievance claim against their employer within 90 days of their termination.

There is an exception for businesses with fewer than 20 employees, who may employ employees for a 90-day trial period (subject to certain conditions).

There is not (at present) a general statutory right to redundancy compensation in New Zealand, although compensation may be available under the terms of a specific employment agreement.

Fair Pay Agreements Act 2022

The Fair Pay Agreements Act 2022 establishes a framework for bargaining between employers and employees across entire occupations or industries for fair pay agreements (**FPA**) that would set minimum employment standards across these occupations or industries. To initiate an FPA, certain criteria must be met and a relevant union must apply to the Ministry of Business, Innovation and Employment. If the requirements are satisfied, bargaining then occurs.

A resultant agreement sets standards as to hours, pay rates, training and development, leave and governance arrangements for the FPA. Importantly, employers and employees can be covered by an FPA whether or not they have participated in the bargaining.

KiwiSaver / superannuation

Participation in superannuation schemes is not compulsory in New Zealand. KiwiSaver is the government's superannuation scheme. All new employees must be automatically enrolled in KiwiSaver, although employees may choose to opt out of the scheme within the first six weeks. Existing employees can also choose to join KiwiSaver at any time.

Employers must contribute a minimum of 3% of an employee's gross earnings to the employee's selected KiwiSaver scheme.

Health and safety

The *Health and Safety at Work Act 2015* is New Zealand's primary workplace health and safety law.

A "Person Conducting a Business or Undertaking" (or **PCBU**) has the "primary duty of care" under the Act; ie, the primary responsibility for people's health and safety at work, including the health and safety of its workers, other workers it influences or directs, as well as persons who could be put at risk by its work (eg, customers, visitors, children and young people, or the general public).

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Accident compensation

The *Accident Compensation Act 2001* contains a statutory, no-fault scheme, which provides broad-based coverage for persons suffering personal injury, including most physical injuries at the workplace or elsewhere (though mental injury is generally not covered).

Compensation under the scheme may include payments for loss of earnings, medical treatment and rehabilitation, allowances for disabilities, as well as funeral expenses and death benefits for dependents.

The scheme is funded from a range of sources, including levies on employers and employees, as well as levies on vehicle registration and vehicle fuels.

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Competition and anti-trust law

The New Zealand Commerce Commission (**NZCC**) administers competition and anti-trust law in New Zealand under the *Commerce Act 1986*. The purpose of the Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.

Part 2 of the *Commerce Act* prohibits certain (unilateral and collective) restrictive trade practices, including (broadly):

- Contracts, arrangements, or understandings that have the purpose, effect, or likely effect of substantially lessening competition in a market.
- Cartel arrangements that have the purpose, effect, or likely effect of price-fixing, restricting output, or market allocating among competitors (subject to certain exclusions for collaborative activities).
- Arrangements by suppliers which fix minimum resale prices for goods.
- Taking advantage of a substantial degree of market power in order to restrict entry into a market, deter competitive conduct, or eliminate a competitor from a market.

Engaging in a restrictive trade practice can result in penalties of up to NZ$500,000 for individuals, or for body corporates, the greater of:

- NZ$10 million;
- three times the value of any commercial gain resulting from the relevant practice; or
- 10% of the turnover of the body corporate (and related bodies corporate).

Part 3 of the *Commerce Act* prohibits the purchase of the shares in, or assets of, a business where the effect (or likely effect) of the acquisition would be a substantial lessening of competition in a market. Pre-transaction clearance to an acquisition which raises competition concerns may be obtained from the NZCC, which can prevent the acquisition from subsequent challenge by the NZCC or by third parties.

Part 4 of the *Commerce Act* provides for the imposition of price control on providers of particular goods and services where there is limited competition. Airports, electricity lines companies, and the gas pipeline industry are currently subject to price regulation under Part 4. Other industries (including telecommunications, fuel, and dairy) are regulated by the NZCC under industry-specific legislation.

Consumer legislation

Fair Trading Act 1986

The *Fair Trading Act* applies to persons "in trade". The Act is enforced by the NZCC and prohibits a number of trade practices, including, as examples:

- Engaging in conduct that is likely to mislead or deceive.
- Making false, misleading or unsubstantiated representations in relation to goods or services.
- Engaging in conduct that is liable to mislead as to the nature, manufacturing process, characteristics, suitability for purpose, or quantity of goods and services.

The *Fair Trading Act* also contains certain other consumer protections in relation to (eg) layby sales, direct sales, product recalls, and extended warranty agreements.

Suppliers of goods and services to consumers cannot contract out of the *Fair Trading Act*, and suppliers to businesses may only do so in certain prescribed circumstances.

Consumer Guarantees Act 1993

The *Consumer Guarantees Act* provides consumers with a basic guarantee as to title to goods, as well as specified minimum guarantees as to the quality, suitability, and certain other aspects of, goods and services. If goods or services fail to comply with a statutory guarantee(s), the *Act* provides remedies for consumers against suppliers or (in some cases) against the original manufacturer.

Credit Contracts and Consumer Finance Act 2003

The *Credit Contracts and Consumer Finance Act* (commonly referred to as the **CCCFA**) regulates the provision of credit to consumers, including (eg) the provision of personal loans or mortgages, the use of a credit card, the lending of money on an agreed overdraft, or the sale of goods and services on credit.

The CCCFA contains disclosure requirements for contracts, allows debtors to have the terms of a contract varied due to hardship, and also allows a court to 're-open' and vary the terms of an "oppressive contract".

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This *Doing Business in New Zealand* summary provides you with a general overview of New Zealand's business environment, and identifies key areas of New Zealand business and investment regulation. It is intended only to provide a summary of the subject covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this summary without first obtaining specific professional advice. If you require any advice or further information, please contact us.

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