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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

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Guide to Doing Business in Australia and New Zealand

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in Australia and New Zealand

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Guide to Doing Business in Australia and New Zealand

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Australia and New Zealand. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

This book is intended to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?
3. How does the government regulate commercial joint ventures between foreign investors and local firms?
4. What laws influence the relationship between local agents or distributors and foreign companies?
5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g., energy and telecommunications)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?
10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

Contributing to this book are the law firm members of the Meritas alliance in Australia and New Zealand. Each firm is comprised of local lawyers who possess extensive experience in advising international clients on conducting business in their respective countries. The firms were presented with these 10 questions and asked to provide specifics about their jurisdiction along with timely insights and advice. In a very concise manner, the book should provide readers with a solid overview of the similarities and differences, strengths and weaknesses of the states and territories of Australia and New Zealand.

Matthew Hall, Partner
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TOP 10 QUESTIONS

1. WHAT ROLE DOES THE GOVERNMENT PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The government regulates foreign investment through the Foreign Investment Review Board (FIRB), which is a Board within the Commonwealth Department of Treasury. One of its roles is to examine proposals by foreign interests to undertake direct investment in Australia and to make recommendations to the government whether the proposals are suitable for approval under the Australian government's policy. The ultimate decision whether a proposal is approved lies with the Treasurer.

FIRB is also responsible for monitoring and ensuring compliance with foreign investment policy.

Different rules apply depending on the nature of the proposed foreign investment, for example, an investment in residential real estate or commercial real estate versus in an Australian business. Whether FIRB approval is required for a proposed foreign investment may also depend on whether the proposed investment exceeds certain set monetary thresholds.

The application process for obtaining FIRB approval is fairly rigorous but is generally determined within 30 days of lodgement of the application, although this period may be extended.

2. CAN FOREIGN INVESTORS CONDUCT BUSINESS WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

Yes, there is no general legal requirement for a foreign investor to conduct a business with a local partner.

The most common corporate structure used in conducting business in Australia is a company, although other structures such as joint ventures, partnerships and trusts may also be used.

Even with a local partner, FIRB approval may be required.

3. HOW DOES THE GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Generally, the government does not regulate commercial joint ventures between foreign investors and local firms; however, the government may regulate the foreign investor through FIRB and other laws such as the *Corporations Act* (which regulates companies generally) and taxation laws.

4. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS OR DISTRIBUTORS AND FOREIGN COMPANIES?

Broadly speaking the relationship between an Australian agent or distributor and an overseas supplier would be a contractual one governed by the same principles of contract law as the UK and other English speaking jurisdictions.

Under Australian tax law, the pricing of goods and services supplied under contract between an Australian agent or distributor and an overseas supplier is expected to be set on an "arms-length" basis. There are comprehensive and complex tax laws dealing with transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting the revenue.

Where the Commissioner of Taxation forms the opinion that cross-border transactions have not been priced on an arms-length basis, the Commissioner has power to make compensating adjustments and impose penalties.

5. WHAT STEPS DOES THE GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATURAL RESOURCES AND KEY SECTORS (E.G., ENERGY AND TELECOMMUNICATIONS)?

FIRB controls whether a foreign investor may invest in certain sectors. There are certain sectors where foreign investment will be prohibited or restricted or otherwise restricted as being against the national interest or as being against Australia's national security. These include residential real estate, media, telecommunications and military (albeit FIRB approval may be granted in these areas in certain circumstances).

Even if a proposed foreign investment does not fall within a sensitive sector, FIRB has an overriding policy where approval may be declined where the proposed investment is against the national interest or is against Australia's national security.

6. HOW DO LABOR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

LOCAL EMPLOYEES

Australia's system is strongly regulated by state and federal legislation. Companies that are trading corporations fall within the federal system of industrial relations presently administered pursuant to the Fair Work Act 2009. A review of the Act is currently underway with the Review Panel scheduled to report to the federal government by 31 May 2012

Most blue-collar and clerical workers have their employment terms and conditions determined by reference to the National Employment Standards, and various awards and collective agreements approved by Fair Work Australia, a third party tribunal.

Senior executives and management more commonly have their terms and conditions of employment determined by reference to common law agreements negotiated directly between the employer and the employee. The terms of such agreements must still exceed the statutory minimum standards.

Workplace health and safety, discrimination, and workers' compensation for workplace injury are regulated by state or territory legislation.

EXPATRIATE WORKERS

The terms and conditions for expatriate workers will greatly depend upon the type of visa arrangements approved by the Australian immigration authorities. Business people visiting from overseas can continue to enjoy the benefits of their home-based employment arrangements while undertaking short-term business activities in Australia. However, where visas are required, the employees will most commonly be required to be engaged as if they were employees fully covered by the Australian industrial relations regime and legislation referred to above. In any event, key legislation covering such issues as workplace health and safety and worker's compensation will apply to any person working in Australia.

7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

Generally, Australia does not have any exchange controls. The Australian Dollar (AUD) is a floating currency widely and transparently traded, although the Reserve Bank may, from time to time, buy or sell AUD to smooth out unusual market events.

There are no restrictions on repatriation of profits back to overseas parents by way of dividends or loan repayments other than:

- The usual requirement that the Australian entity meet the solvency test of being able to meet its debts as and when they fall due, or
- In some cases, making sure the company does not fail the thin capitalisation test to ensure that its interest expense is fully deductible for tax purposes.

Local banks are generally well capitalised and sophisticated financial institutions. As such, they are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.

There are, however, some reporting requirements in relation to the movement of large sums of money and there may also be financial sanctions imposed in relation to transactions involving certain countries, entities or individuals.

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER?

For most operating companies the following taxes would be encountered by an Australian operation:

- Company tax at 30% on taxable income
- Withholding tax on any dividends to the extent that these are unfranked (i.e., franked dividends to overseas shareholders are free of withholding tax)
- Withholding tax at 10% on interest payable to an overseas party
- Withholding tax on royalties payable to an overseas party
- State duties on the acquisition of land and other assets including shares in a company
- In some cases, payroll tax on wages and salaries (a state-based impost)
- Resource Rent Tax (oil and gas only)
- Pay-as-you-Go withholding tax (on the salaries and wages of employees which is remitted directly to the Commissioner of Taxation and a credit allowed to respective employees on filing their income tax return)
- In some cases, Fringe Benefits Tax on non-cash compensation paid to employees

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS? DO LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Australia is a member of World Trade Organisation and TRIPS, as well as the Berne, Paris and Rome Conventions, the Patent Co-Operation Treaty, the Madrid Protocol (for trade marks) and a member of other international IP treaties administered by the World Intellectual Property Organisation. As a result, Australia has a comprehensive intellectual property regime. It includes legislative regimes (e.g., *Copyright Act, Trade Marks Act, Patents Act, Designs Act, Plant Breeders Rights Act* and *Circuit Layouts Act*) and common law regimes (e.g., the protection of confidential information and common law trade marks). Australia's intellectual property statutes create both civil and criminal liability for infringements, but criminal prosecutions are rare. Where applicable, Australian intellectual property laws are enforced objectively (principally in the federal jurisdiction) and are enforced regardless of the nationality of the parties, subject to a principal of reciprocity in respect of copyright infringement such that Australia counts will only recognise copyrights of foreign nationals to the extent that courts of that national's country recognise an Australian copyright.

10. IF A COMMERCIAL DISPUTE ARISES, WILL LOCAL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

All Australian courts including federal, state and territory courts offer well-regulated dispute resolution processes. The *Federal Civil Dispute Resolution Act 2011* requires parties to litigation to certify that they have taken genuine steps to resolve a dispute prior to commencing proceedings in the Federal Court. Increasingly these courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution processes be implemented as early as possible to resolve disputes without the costs and delays involved in full-blown trials.

Further, in September 2010, the Federal Attorney General's Department established a Mediation Standards Board for the accreditation and regulation of Australian mediators. Accredited commercial mediators may be sourced through accrediting organisations such as LEADR and Institute of Arbitrators and Mediators Australia.

Mediation is cross-jurisdictional and therefore increasingly attractive for the resolution of international disputes.

While arbitration is also available, with well-regulated commercial arbitration procedures in most jurisdictions, the growth in alternative dispute resolution processes has meant that in general terms litigants are less attracted to arbitration than they may have been in the past. The fact that arbitration is no longer seen as a significantly less expensive alternative than traditional court-based litigation is a likely contributing factor to this.

AN INTRODUCTION TO AUSTRALIA

Australia is a federation comprised of six states and two territories. The federal government, based in the capital city of Canberra, is known as the Commonwealth of Australia. Australia has a population of approximately 23 million people,[1] from a diverse range of ethnic backgrounds. Over 70% of Australians live in the major cities located on its coastline.

LEVELS OF GOVERNMENT

The Australian constitution divides responsibilities between the federal government and the states and territories. Australia's system of government is similar in many respects to other federal systems such as the United States of America and Canada.

Each state and territory makes laws in its areas of responsibility, as does the federal government. Federal matters include some areas of taxation, marriage, divorce, foreign investment, defence, interstate and overseas trade, trade mark and patent registration, and the banking and monetary system. The states and territories regulate matters such as health, education, police, road construction, and railways within their respective borders.

In addition to federal and state or territory laws, local or municipal governments may make various regulations and bylaws affecting businesses operating within their jurisdictions as well as delivering a range of services to communities. They provide corporate governance for communities including environmental aspects, zoning and building approvals.

Accordingly, businesses in Australia must be aware of and comply with federal laws, the laws of each state or territory in which the business operates and the bylaws of each city, town or shire where the business is located.

Australia adheres to the principles of responsible government. The federal constitution has guarantees to protect freedom of interstate commerce and prevent government acquisitions on other than just terms.

[1] Source: Australian Bureau of Statistics. Australia's estimated resident population reached 23,235,800 persons on 30 September 2013 (released 27 March 2014).

COURT AND LEGAL SYSTEM

The Australian legal system is modelled on the English common law system of judge-made (or case) law and written (statutory) law made by the various parliaments.

The federal and state courts have separate and shared jurisdictions. The Federal Court generally has jurisdiction over matters arising under Commonwealth legislation, which include bankruptcy, aspects of consumer and competition law, federal taxation and intellectual property.

Both federal and state courts have jurisdiction over corporations, including insolvency matters.

The state courts generally have jurisdiction over matters arising under state legislation and common law, including commercial law, contract, equity, torts and criminal law and state taxation.

The typical hierarchy of state courts is:

- Magistrates' or Local Court (dealing with small disputes and minor offences)
- District Court or County Court
- Supreme Court
- Court of Appeal
- High Court of Australia

The federal system has a similar hierarchy:

- Federal Magistrates' Court
- Federal Court
- Full Federal Court
- High Court

Extensive cross-vesting arrangements mean that the Federal Court can hear a matter involving a mixture of state and federal matters. Similarly, a state court can usually determine a matter that involves federal issues.

MAJOR FORMS OF BUSINESS ORGANISATION

A foreign company or investor proposing to establish a business in Australia may choose from a number of different entities or forms of business organisation. Each of these forms has its advantages and disadvantages. Business owners will need to carefully consider them and take advice to determine which is the most appropriate form for their business.

The major forms of business organisation are:

Company

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company
- Incorporation Transferred from Country of Origin

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

- Australian states recognise limited liability partnerships

Trust

- Discretionary Trust
- Unit Trust

COMPANY

A foreign company seeking to establish a business in Australia may choose among three main forms of corporate organisation.

- **Locally Incorporated Subsidiary of a Foreign Company**
  A local subsidiary is a separate legal entity from its foreign parent or holding company. It must be incorporated in Australia and is required to comply with all relevant Australian laws. Australia has a uniform national corporations law; as such there is no geographical restriction upon the territorial operation of an Australian company, nor a requirement to register in each Australian state in which it seeks to operate.

  An Australian company will usually be fully taxed in Australia on all its income and profits, whether that income arises from its business activities conducted in Australia or elsewhere in the world. However, income of an Australian company that is from a non-Australian source that flows through to an Australian

nonresident shareholder will, in certain circumstances be outside the Australian tax net. An Australian company must file an annual report and accounts, although many smaller companies may be exempt from many reporting requirements.

As a local subsidiary is a separate legal entity, the liability of the foreign company parent for its subsidiary's indebtedness is, in the absence of guarantees given by the parent or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent. However, the parent may also be liable for insolvent trading by its subsidiary in circumstances where the parent ought to have known that the subsidiary was insolvent.

There is no minimum capitalisation requirement imposed by Australian company laws on an Australian company, although in certain circumstances various taxation acts may impose capitalisation requirements. Nonetheless, in Australia, a company with paid up capital of AUD1 is very common.

The cost of incorporating an Australian company is modest. The incorporation process is quick and easy, with same day incorporations possible.

- **Branch Office of a Foreign Company**
  A branch office is simply a local Australian office of the foreign company and does not have a separate legal identity from its parent. The foreign company must be registered in Australia as a foreign company and must comply with all relevant Australian laws.

  The branch office will be taxed in Australia on all its income and profits which arise from its business activities conducted in Australia, although the provisions of applicable Double Taxation Agreements between Australia and the foreign parent's country of incorporation may reduce the tax otherwise payable in Australia.

  The branch office must file an annual report and accounts. If the accounts are not in English then a translation must be filed.

  As a branch office is not a separate legal entity from the foreign company, the foreign company will be liable for the debts of the branch office.

  Some advantages of having a local subsidiary or branch compared with appointing an agent include:

  - Direct control over the business in Australia
  - Potential cost reductions achieved by operating locally
  - Identification with local business partners and customers
  - Opportunities to establish or build a local corporate identity
  - Access to other markets from a base in Australia

- **Corporation Transferred from Country of Origin**
  A less common option is for a foreign company to transfer its incorporation from its original country of incorporation to Australia. It will then be treated as an Australian company.

Australian company law is generally discussed under the **COMPANY LAW** section.

JOINT VENTURE

Forming a joint venture with an Australian organisation is an increasingly popular form of business organisation for foreign companies and investors. A joint venture is a business organisation where two or more people become involved in a specific project or jointly participate in the conduct of a business operation.

There are two main forms of joint venture.

- **Unincorporated Joint Venture**
  An unincorporated joint venture is not a separate legal entity. Rather it is a contractual agreement between two or more people who agree to conduct business for a particular purpose.

  Where the participants share profits of the joint venture, the joint venture may, in certain circumstances, be classified as a "partnership." If it is possible to structure the arrangements so that the participants share output rather than profit, then the joint venture may not be a partnership.

- **Incorporated Joint Venture**
  More commonly, a separate special purpose company is incorporated to operate the joint venture and each participant becomes a shareholder in the company. This confers on them the protection of the company's limited liability status. Australian company law regulates this type of joint venture.

  There are many different ways to structure a joint venture, which may require specific treatment depending on the type of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture.

PARTNERSHIP

A partnership is an arrangement between two or more people to carry on a business with a view to profit. It may be formed by an agreement between the partners. In the absence of an agreement, the Partnership Acts in the states and territories set out many of the partnership rules that apply to the arrangement. The Partnership Acts follow the well-established common law model. If the partnership does not conduct business under the actual names of its partners, the partnership name in which the partnership operates must be registered in each state or territory in which the partnership proposes to conduct business.

Ordinarily partnerships are not separate legal entities and the partners have an unlimited personal liability, both jointly and severally, for the debts and obligations of the partnership. In addition, each partner is deemed to be an agent for the others and so may act on behalf of the other partners.

The laws of some states permit limited liability partnerships, which limit the liability of some partners who do not manage the partnership business. They are generally used for specialist investment activities and are not commonly used.

A non-limited liability partnership is not subject to taxation in its own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits, which are assessed at the partners' marginal tax rates. A limited liability partnership is taxed as a company.

TRUSTS

Trusts are widely used in Australia as a trading vehicle. The two main forms of trust are:

- **Discretionary Trust**
  A discretionary trust enables property to be held by a trustee who has discretion as to how to invest and direct the capital and income of the trust fund. The trustee also has discretion to determine the beneficiary or beneficiaries who will benefit from the income or capital of the trust. The role and power of the trustee, the purposes of the trust fund and the rules regarding its use are generally contained in a trust deed. Discretionary trusts are typically used in family and family-owned business arrangements as they can confer tax benefits on the beneficiaries and they are relatively simple to create and operate.
- **Unit Trust**
  A unit trust is a common investment vehicle that allows the pooling of investment funds and the investment of those funds through a trustee, whose powers are clearly defined in the trust deed. The trustee may be assisted by a separate entity known as a manager, whose job is to select and manage the investments while the trustee acts as a guardian of the interests of the unit holders.

  Trust beneficiaries, known as unit holders, have set interests in the income and capital of the trust. The unit holders can sell these interests.

  Many unit trusts invite the subscription of public funds, which are then pooled and invested in specified items for income purposes or capital gain. Seeking public subscription of funds in Australia requires detailed disclosure under comparatively complex disclosure laws.

In certain circumstances there may be advantages in selecting a trust as the form of business organisation, particularly from a taxation viewpoint. However, care must be taken to determine that it is appropriate for, among other things, the type of business, the taxation status desired, the required return, the degree of control required and the flexibility needed.

REGULATION OF FOREIGN INVESTMENT

One of the first matters a foreign investor must consider when planning to invest in Australia is the impact of Australia's foreign investment policy.

REGULATION

Foreign investment in Australia is principally governed by the *Foreign Acquisitions and Takeovers Act* and is administered by the Foreign Investment Review Board (FIRB).

The FIRB is a division of the Federal Treasury. Its function is to review foreign investment proposals and to make recommendations to the Federal Treasurer. The Treasurer will then make a decision, based on these recommendations, which will either permit or prevent the proposed foreign investment in Australia. This decision is commonly referred to as FIRB approval.

FOREIGN INTEREST

Foreign investment regulation applies to investment proposals in Australia by a foreign interest. This term is defined to include:

- A person who is not ordinarily resident in Australia
- An Australian company, business or trust where 15% or more of the voting shares are held by a foreign corporation or nonresident person (even if that foreign interest does not exercise control), or where several nonresidents hold a total of 40% or more

If you fall within one of these categories, and are proposing to make any of the types of investment described below, it is likely that you will need to apply for FIRB approval.

CATEGORIES OF FOREIGN INVESTMENT

The main categories of foreign investment which are regulated by FIRB are:

- **Acquisition of Shares**
  Subject to certain minimum limits, any foreign interest proposing to acquire, increase or alter a "substantial interest" in an Australian company, the value of whose assets exceeds AUD248 million or, where the proposal values the business at over AUD100 million, must first obtain FIRB approval.

  For U.S. investors, a notification threshold of AUD1078 million applies except for investments in certain sectors (e.g., media, telecommunications, transport, human resources or training, manufacture or supply of military goods or equipment, development, manufacturing and supply of securities technology goods, extraction or rights to uranium, plutonium or operation of nuclear facilities). U.S. entities controlled by a U.S. government (state and/or federal) are subject to an AUD248 million threshold.

  A "substantial interest" in an Australian company is an interest acquired (either directly or indirectly) by a foreign entity that amounts to 15% or more of the issued shares or voting power of the Australian company. It also arises where associated foreign interests hold 40% or more in aggregate of the issued shares or voting power of the Australian company.

- **New Businesses Proposals**
  Proposals by private investors to establish new businesses do not require notification or approval under the Act or the policy. Direct investments by foreign governments and their agencies, including proposals to establish new businesses, require approval.

- **Offshore Takeovers**
  Takeovers by a non-U.S. foreign interest in an offshore company that holds Australian assets or conducts business in Australia are subject to FIRB approval where the proposal exceeds AUD248 million.

- **Acquisition of Real Estate**
  Prior FIRB approval is required for foreign acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and acquisition of interests in urban land corporations and trusts) that involve:

  - Developed nonresidential commercial real estate, where the property is subject to heritage listing valued at AUD5 million or more and the acquirer is not a U.S. investor
  - Developed nonresidential commercial real estate, where the property is not subject to heritage listing but is valued at AUD54 million or more, or AUD1078 million for U.S. investors
  - Accommodation facilities, vacant, and residential real estate irrespective of value

  Proposals for acquiring developed residential real estate by foreign interests are normally rejected except in limited circumstances.

- **Foreign Government Investments**
  All types of direct investments by foreign governments and their agencies require prior FIRB approval and notification to the Australian government.

- **Special Cases**
  Separate rules apply to foreign interests participating in certain sensitive industry sectors in Australia without express approval. These sectors include: media, civil aviation, telecommunications, banking, airports, shipping, holding rights to extract plutonium or uranium, and operating a nuclear facility.

REVIEW OF INVESTMENT PROPOSALS BY FIRB

The FIRB's review process of investment proposals is generally prompt. Forwarding an investment proposal to the FIRB activates a "time clock" so that if action is not taken within 30 days (or an extended time period as notified by the FIRB), the FIRB cannot withhold its approval.

In most cases a decision is made within the 30 day period and FIRB approval is normally granted unless the proposal is judged to be contrary to the national interest. This judgment may be made in consultation with other government departments, such as the Australian Taxation Office. Generally the FIRB is required to satisfy itself that the investment is for a legitimate purpose benefiting Australia. If an investment proposal is on a large scale, political considerations may become important.

In some cases, the FIRB's approval may be subject to the foreign interest meeting certain conditions. If the FIRB's approval is conditional, the foreign interest must comply with the conditions. For example, in real estate investments such conditions may include obtaining feasibility studies and environmental impact reports and providing evidence that the foreign interest has planned for the long-term management of the development.

PENALTIES

There are heavy penalties for failure to comply with the *Foreign Acquisitions and Takeovers Act* or with conditions imposed by the FIRB, including fines or an order requiring the foreign entity to sell its interest. Accordingly, we strongly recommend that you always seek legal advice before structuring or submitting a proposal to the FIRB to make an investment in Australia.

COMPANY LAW

Some general matters relating to company law in Australia are discussed below.

REGULATORY SCHEME

The *Corporations Act* principally regulates companies, their incorporation, the acquisition of shares, securities, and the futures industry.

The *Corporations Act*, together with major pieces of legislation such as the *Australian Securities and Investments Commission Act*, the Australian Securities and Investments Commission Guidelines and the Listing Rules of the Australian Stock Exchange Limited, form a uniform regulatory scheme for companies which applies in all Australian states and territories.

The regulatory scheme in relation to companies has been and continues to be the subject of ongoing reform and it is to be expected that the process will continue.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

A federal body, the Australian Securities and Investments Commission is responsible for administering the regulatory scheme throughout Australia. ASIC has broad-ranging powers and functions (alongside the Australian Stock Exchange [ASX] for publicly listed companies) as the regulator and enforcer of company law and is the principal registry and information source for company matters.

INCORPORATION (also called "registration")

A company has a separate legal identity from its shareholders and directors, who are usually not liable for the company's debts. A company can own property, enter into contracts, and commence legal proceedings in its own name. It is the most common form of business organisation in Australia.

Companies are incorporated under the *Corporations Act*. Incorporation involves appointing directors (one of whom must be resident in Australia), usually issuing shares, nominating a registered office in Australia (which can be in any state or territory of Australia) and sometimes lodging copies of the company's constitution (its governing document, if it elects to adopt one) with ASIC. Alternatively, companies that are already incorporated but have never traded may be purchased for immediate use. These companies are known as "shelf companies" and are available from the Meritas member firms in Australia. A shelf company generally costs about AUD1,000. ASIC is required to make certain company records available for public inspection.

Each company, which is properly incorporated, is registered by ASIC and receives a unique nine-digit Australian Company Number (ACN). The ACN must appear on all of the company's public documents. Foreign companies and certain other bodies required to register under the *Corporations Act* also receive identification numbers known as the Australian Registered Body Number (ARBN).

All companies incorporated under the *Corporations Act* are able to conduct business in all states and territories of Australia without meeting further registration requirements.

TYPES OF COMPANIES

There are two principal types of companies under the *Corporations Act*. These are public and proprietary companies limited by shares.

The liability of shareholders of such companies is limited to any unpaid amount in respect of shares held by them.

Both proprietary and public companies must have a registered office in Australia where communications can be sent and where, in respect of a public company, the registered office must be opened to the public (usually between 10 a.m.–12 noon and 2 p.m.–4 p.m. each business day or at least for three hours between 9 a.m.–5 p.m. each business day). All companies must also have a "public officer" who is responsible for discharging obligations required by Australian taxation law. One of the directors of a company, the public officer of a company and the secretary of a public company must be ordinarily resident in Australia. The same person may, but need not fulfil the roles of director, secretary and public officer.

The distinguishing features of these types of companies are:

- **Public Company**
  A public company may offer its shares for sale to the public. It must have at least three directors, no fewer than two of whom must be ordinarily resident in Australia. In addition, it must have at least one shareholder but there is no maximum limit on the number of shareholders. It is not necessary for a public company to be listed on the ASX.

  There can be no restriction on the transfer of shares in a public company. Generally, a public company must be audited.

- **Proprietary Company**
  A proprietary company is the most commonly used form of company in Australia. It is designed for a relatively small group of people (not exceeding 50) who do not seek to raise funds from members of the public by inviting them to become shareholders and who seek to restrict the transfer of the company's shares. A proprietary company must have at least one director and one shareholder (who can be the same person). At least one director must ordinarily reside in Australia.

  Proprietary companies are further classified as either large or small proprietary companies. To be classified as a small proprietary company, and so qualify for reduced financial reporting requirements, the company must satisfy at least two of the following criteria:

  - The company and the entities it controls, if any, must have a consolidated gross operating revenue of less than AUD10 million for the financial year
  - The value of its consolidated gross assets and the assets of any entities it controls, if any, total less than AUD5 million at the end of the financial year
  - The company and any entities it controls, if any, have fewer than 50 employees at the end of the financial year

Other forms of companies, including companies limited by guarantee, no-liability and unlimited liability companies, are also available, depending on the purposes for which the companies are required. (A no-liability company is one where the holder of partially paid shares can choose to forfeit the partially paid shares without further liability rather than pay a call in respect of those shares. They are commonly used in mining projects.)

DIRECTORS AND OFFICERS

Directors of companies conducting business in Australia, and others acting in the capacity of directors, such as managers, owe certain duties to the company itself and, in certain circumstances, to other people associated with the company such as the shareholders and the creditors of the company. The directors' duties arise under both the general law and the *Corporations Act*. Of particular importance in Australia are two duties imposed by the *Corporations Act* on "officers," defined to mean not only the directors, but also people in accordance with whose directions or instructions the directors customarily act, and company secretaries and executive officers. The two duties require officers to act honestly, carefully and diligently and to prevent the company from trading when it is insolvent, that is, when it cannot pay its debts as and when they fall due. Breaching these duties can have severe consequences.

REPORTING REQUIREMENTS AND RECORDS

Companies conducting business in Australia are under various obligations to:

- Maintain their accounts in accordance with generally accepted accounting principles consistently applied in Australia
- Prepare annual financial statements and reports and distribute copies to their shareholders
- Lodge copies of those statements with ASIC and, if applicable, the Australian Stock Exchange (ASX)
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies
- Procure the preparation of reports by the directors on the company's performance
- For some companies, have their accounts audited regularly by an independent expert resident in Australia
- Disclose significant matters affecting their performance or prospects to ASIC and, if applicable, the ASX

The extent of the reporting obligations will depend on the size and activities of the company. In addition, companies are obliged to keep various records and maintain various registers in respect of their activities. The shareholders may inspect these records and registers.

AUSTRALIAN STOCK EXCHANGE (ASX)

Public companies may seek to raise funds from the public by listing on the ASX. The ASX quotes the shares of the large public companies on electronic trading boards in the major cities of Australia and enables trading of those shares to take place. Listing on the ASX is an option that is also available in limited circumstances to companies incorporated overseas.

In order to list on the ASX, companies must meet various stringent financial criteria set out in the ASX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the *Corporations Act*. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects. The company must also have a minimum of 500 shareholders each having shares (or another form of security which is the company's main type of security) to the value of at least AUD2,000, and the issue or sale price for all securities (except options) for which the company seeks a quotation must be at least AUD0.20.

A company that does not seek listing on the ASX is not subject to any minimum capital requirements and can be structured in various ways to suit the financing requirements of the shareholders.

Over the last decade, a number of specialist and "second board" exchanges have been set up in Australia, including:

- National Stock Exchange of Australia (NSX)
- Chi-X Australia
- Asia Pacific Stock Exchange (APX)

While the ASX remains the largest exchange in Australia, listings on the other exchanges continue to grow. The emerging exchanges offer listing options that target small-to-medium enterprises. These exchanges also provide opportunities for trading of other tradeable rights, such as water licenses.

MANAGED INVESTMENT SCHEMES

The *Corporations Act 2001* regulates managed investment schemes which are defined to include any arrangement where an operator manages an investment made by one or more passive investors, other than through the issue of shares or other securities in a company. These provisions aim to protect the interests of passive investors who do not have day-to-day control over the operation of the scheme in which they invest.

The managed investment scheme provision impose extensive licensing requirements. These usually require the appointment of a professional custodian to hold assets and the provision of a comprehensive compliance plan. Operators must demonstrate they have personnel who meet a "fit and proper person" test, who have the appropriate skills, qualifications and experience to operate the scheme. A product disclosure statement (similar to a company prospectus) must be issued to potential investors in the scheme. Licensed entities must satisfy a strict net tangible asset test.

As a result of this extensive regulation, there is substantial cost involved in setting up and running a licensed managed investment scheme. That cost is only warranted where there are substantial funds under management.

There are a number of exemptions from the managed investment scheme rules. These include exemptions for small-scale schemes and schemes that only have sophisticated investors. These exemptions have strict limits to their application. If a specific exemption does not apply, then the full managed investment scheme provisions apply.

ACQUISITION OF BUSINESSES

A business may be acquired in one of two principal ways:

- Its assets can be acquired (in which case the company itself is not acquired)
- The shares of the company which owns the business can be acquired

Each of these methods has its own advantages, depending on the outcome that is sought.

Complex rules apply in relation to listed companies. For instance, special take-over laws apply once a party has acquired a 20% interest in a listed company.

In addition, taxation and stamp duty consequences (discussed under **TAXATION**) must be carefully considered. Note in some jurisdictions stamp duty, which is a state tax, is simply called duty.

TAXATION

It is not possible to give a complete outline of the scope of the taxation system in this guide. A brief outline of the basic taxation principles and some of the major forms of taxation are discussed below.

In all cases, we strongly recommend that you obtain professional tax and legal advice before structuring or implementing your investment or business plans in Australia. Meritas law firms have considerable tax expertise.

All levels of government in Australia levy tax.

FEDERAL TAXES

The most important federal taxes are:

- Income tax (including capital gains tax)
- Company tax
- Goods and services tax
- Customs duties
- Fringe benefits tax

State or territory governments levy none of these taxes.

STATE AND TERRITORY TAXES

These taxes include:

- Stamp duty
- Land tax
- Payroll tax

The federal government levies none of these taxes.

LOCAL GOVERNMENT TAXES

Local or municipal governments raise revenue by levying a "rate" on land located within their districts. The rate is proportional to the value of the land. Some municipalities rate on the basis of land value while others rate on the basis of land value and improvements.

PROBATE, DEATH DUTIES AND GIFTS

There are no probate or death duties in Australia. Gifts of assets are also not subject to any specific gift tax but may be subject to capital gains tax if not in cash.

INCOME TAX

Australia taxes residents on worldwide income. Nonresidents are taxed on the basis of Australian source income only. Temporary resident individuals are taxed as though they are nonresidents (i.e., only on Australian source income and gains).

The financial or income reporting year in Australia is generally from 1 July to the following 30 June though substituted accounting periods can be arranged where there is a good reason (e.g., to align Australian reporting with an overseas parent company).

A company will generally be a resident of Australia for taxation purposes if it is incorporated in Australia or if its central management or control is located in Australia. Double Tax Treaties may treat companies as resident at the place of effective control to avoid treating them as residents of more than one country.

Taxable income in Australia is the difference between assessable income and allowable deductions. The notion of "assessable income" is broader than the accounting notion of "income." For instance, assessable income in Australia includes capital gains.

The notion of "allowable deductions" includes most things that would be allowed as a deduction for accounting purposes. However, it does not include entertainment expenses or outgoings of a private or domestic nature (e.g., interest on a mortgage used to purchase a private property).

Losses may be carried forward from one year to the next but cannot be carried back. (A limited, company loss carry back rule was repealed in Australia after one year of operation.) Company losses must meet either a "continuity of ownership" test or a "continuity of business" test to remain deductible in subsequent years.

Capital Gains Tax (CGT)

Assessable income may include net capital gains. Net capital gains derived by companies are taxed at the usual corporate rate of 30%.

Australian residents are liable for tax on worldwide capital gains. In many cases these gains may qualify for a 50% discount and in some small business cases a further 50% discount is available.

The Australian CGT rules allow a number of indefinite deferrals of tax by allowing rollover relief. This is a matter on which your Meritas firm can provide more detailed advice and assistance.

Overseas resident investors, however, are now largely exempted from Australian CGT except on the limited class of assets known as "taxable Australian property." Broadly, this refers to interests in Australian real estate and related property interests. Where an overseas entity incorporates an Australian company which conducts an active Australian business that is not "land rich" the capital gain on sale of the Australian company shares would generally be tax free. Again, this is an area where expert advice is strongly recommended from your Meritas firm.

Individual Tax Rates

Taxable income is treated differently for individuals compared with companies.

Residents

The tax rates for resident individuals for the 2013-14 year are set out below:

Taxable Income (AUD)	**Tax Payable**
Nil - 18,200	Nil
18,201 - 37,000	19% of excess over 18,200
37,001 - 80,000	3,572 + 32.5% of excess over 37,000
80,001 - 180,000	17,547 + 37% of excess over 80,000
180,001 +	54,547 + 45% of excess over 180,000

Nonresidents

The tax rates for nonresident individuals for the 2013-14 year are set out below:

Taxable Income (AUD)	**Tax Payable**
Nil - 80,000	32.5%
80,001 - 180,000	26,000 + 37% of excess over 80,000
180,001 +	63,030 + 45% of excess over 180,000

Companies

Companies are currently taxed at a flat rate of 30% on their taxable income. On 1 July 2015, it is expected that the Australian company tax rate will be reduced to 28.5%.

If no dividend is declared, no further tax is payable. Australia does not impose either excess profits tax or adopt any alternative minimum tax rules.

If a dividend is declared, and the dividend comes from funds on which the company has paid tax, then a resident shareholder will be taxed on an amount that consists of the cash received or credited plus an amount called a "franking credit" which represents the company tax paid by the company. The resident individual shareholder can use the company tax (that is the franking credit) to offset any liability to pay the individual's personal tax.

If the shareholder is a resident individual with a tax rate of less than 30%, and has income consisting of only fully franked dividends, the resident individual will be entitled to a tax refund.

No tax will be payable if the resident shareholder is another resident company.

For example: Assume a company has AUD100 profit and one shareholder. The company pays AUD30 company tax (being 30% of AUD100). The board of the company may choose to pay a dividend. Assume it chooses to pay an AUD100 dividend. In that case, the shareholder receives AUD70 cash and a tax credit of AUD30 ("franking credit"). For income tax purposes the shareholder has received taxable income of AUD100. The shareholder must pay income tax on the AUD100 at his marginal rate but is entitled to an AUD30 tax credit for the franking credit.

WITHHOLDING TAX

Australia levies a withholding tax on remittances of the following types to nonresidents at the rates set out:

- Interest: 10%
- Dividend: 30%
- Royalty: 30%

Where an Australian resident remits income of the type mentioned above to a nonresident, prima facie tax at the rate set out above must be deducted from the payment by the Australian resident remitter.

These rates are reduced for the various Double Tax Treaties to which Australia is a signatory. In the case of the United States, the Australia-U.S. Free Trade Agreement further reduces the rates.

Dividend Withholding Tax (DWT)

Where an Australian resident is a company that pays a dividend out of profits in respect of which company tax has been paid at 30% as outlined above to a nonresident shareholder (i.e., the dividend is fully franked) then no DWT is levied.

To the extent to which distributions to a nonresident are unfranked, these are subject to DWT at 30%, reduced by tax treaties where applicable. Most treaties provide for 15% DWT. Special rules apply for New Zealand under the Triangular Tax Rules to provide an element of mutual recognition of trans-Tasman franking credits.

Certain unfranked dividends may be paid to nonresident shareholders under the "conduit foreign income" rules. Generally, conduit foreign income represents income and gains made by or through an Australian company that are not taxed at the company level (e.g., foreign non-portfolio dividends and gains on the disposal of certain foreign shares). These generous exemptions now make Australia an ideal place to base an intermediary holding company.

Interest Withholding Tax (IWT)

Interest paid to nonresidents by Australian residents generally attracts IWT at 10% unless either reduced by a tax treaty or covered by certain limited exemptions.

Royalty Withholding Tax

Royalties are defined very broadly to include fees for the supply of certain property or rights. Royalties paid will generally be deductible to an Australian company, subject to the transfer pricing rules if paid to a related party or on non-arms-length terms.

Royalties are subject to withholding tax at 30% unless reduced by a tax treaty, where the rate is generally 10%.

Double Tax Treaties

Australia is party to a comprehensive range of double tax agreements with a number of countries. One effect of all double tax agreements is that the dividend and royalty withholding tax rates specified above are substantially reduced. Where treaty rates are higher than domestic rates, the lower rate prevails.

Withholding tax rates under Australia's tax treaties are set out in the following table.

Country	Dividends	Interest	Royalties
Argentina	10% - 15%	12%	10% - 15%
Austria	15%	10%	10%
Belgium	15%	10%	10%
Canada	15%	10%	10%
Chile	15%	10%	10%
China (not HK or Macau)	15%	10%	10%
Czech Republic	5% - 15%	10%	10%
Denmark	15%	10%	10%
Fiji	20%	10%	15%
Finland	15%	10%	5%
France	15%	10%	5%
Germany	15%	10%	10%
Hungary	15%	10%	10%
India	15%	15%	10% - 15%
Indonesia	15%	10%	10% - 15%
Ireland	15%	10%	10%
Italy	15%	10%	10%
Japan	10%	10%	5%
Kiribati	20%	10%	15%
Korea	15%	15%	15%
Malaysia	15%	15%	15%
Malta	15%	15%	10%
Mexico	15%	10% - 15%	10%
Netherlands	15%	10%	10%
New Zealand	15%	10%	5%
Norway	15%	10%	10%
Papua New Guinea	15% - 20%	10%	10%
Philippines	15% - 25%	10% - 15%	15% - 25%
Poland	15%	10%	10%
Romania	5% -15%	10%	10%
Russian Federation	5% - 15%	10%	10%
Singapore	15%	10%	10%
Slovakia	15%	10%	10%
South Africa	15%	10%	10%
Spain	15%	10%	10%
Sri Lanka	15%	10%	10%
Sweden	15%	10%	10%
Switzerland	15%	10%	10%
Taiwan	10% - 15%	10%	12.5%
Thailand	15% - 20%	10% - 25%	15%
Turkey	15%	10%	10%
United Kingdom	0 - 15%	0 - 10%	5%
United States	0 - 30%	0 - 10%	5%
Vietnam	10% - 15%	10%	10%

INTERMEDIARY OR REGIONAL HOLDING COMPANIES

Changes made to both the taxation of foreign income received or earned by Australian resident companies together with both an extensive network of tax treaties and CGT exemptions for overseas gains have made Australia a very competitive place to base intermediary or regional holding companies.

TRANSFER PRICING

Australia's transfer pricing rules are based on the OECD Guidelines. These rules are set out in Div 13 of the ITAA36, tax treaties and published rulings issued by the ATO. These rules are both complex and comprehensive and allow the ATO to adjust the outcome of transactions where it believes that non-arms-length prices have been charged to the detriment of the revenue.

While all taxpayers are required to keep comprehensive records for tax purposes, there is a special need to document transfer pricing decisions to establish that prices are reasonable and commercially justifiable.

This is a complex area on which specialist tax advice is recommended from your Meritas firm.

THIN CAPITALIZATION

Thin capitalisation rules operate to restrict interest deductions allowable against Australian source income for both foreign-controlled Australian investments (inbound investors) and Australian entities investing overseas (outbound investors) where the entity's debt exceeds certain levels.

The following changes have been announced for application from 1 July 2014.

- Generally the maximum permitted gearing for both inbound and outbound investors will be set at a debt-to-equity ratio of 1.5-to-1 or 60% debt to total assets (15-to-1 ratio for financial institutions or 93.75% debt to total assets).
- Taxpayers with annual interest deductions of less than AUD2,000,000 will be exempt from the thin capitalisation rules.

CONSOLIDATION RULES

These rules allow wholly owned corporate groups to prepare and lodge tax returns on a consolidated basis to reflect the fact that they generally operate as a single economic unit. Where consolidated returns are prepared, the head company acts as a representative taxpayer for the whole group and all losses can be offset against income derived by other group members. Similarly, the tax law disregards all intra-group transactions and allows the free movement of assets between group members without recognizing any taxable gains or losses or needing to meet any formal rollover requirements.

There are also discrete rules relating to certain Australian-resident wholly owned foreign subsidiaries of overseas parent companies know as MEC groups.

While the election to form a consolidated group is optional, once made it cannot be rescinded.

GOODS AND SERVICES TAX

The Goods and Services Tax (GST) regime in Australia operates in a manner which is very similar to the GST regimes in Canada and New Zealand or the VAT regime in the United Kingdom.

GST in Australia is levied at the rate of 10% with exemptions for certain food stuffs, certain educational expenditure, medical expenditure, and some religious activities.

As in the countries mentioned above, the tax is intended to be levied on the final consumption of a good or service with the tax being progressively collected along the manufacturing and distribution chain.

CUSTOMS DUTIES

Customs duty is levied on the importation into Australia of some goods. It is payable by the importer.

FRINGE BENEFITS TAX

In Australia, if an employee receives a non-cash benefit as a consequence of his employment, then that benefit is taxed separately from income tax under a regime known as fringe benefits tax. Basically, the employer is assessed for the fringe benefits tax. The tax is calculated by reference to the value of fringe benefits paid to the employee.

As a consequence, many employees in Australia do not receive fringe benefits as part of their remuneration arrangements. Where an employee receives a taxable fringe benefit, the employer usually takes the amount of fringe benefits tax into consideration when determining the total remuneration package payable to the employee.

OTHER TAXES

- **Stamp Duty**
  This is levied by the states and territories. There is no federal stamp duty. Depending on the relevant state or territory, duty may be levied on:
  - A transfer of property (including a transfer of land)
  - A lease of land
  - A mortgage or other security
  - A transfer of shares (especially where the company is "land rich")
  - A transfer of a business (in some states)

  This is not a comprehensive list. Generally speaking this is a tax which is payable by the purchaser. Many components of this tax are being phased out.

For instance, in Victoria, only transfers of land will attract stamp duty unless the company's assets consist principally of land in which case the transfer of its shares may attract duty under the "land rich" provisions. However, in New South Wales, transfers of land, of business including intellectual property and shares in non-listed companies will attract duty, as will some mortgages.

- **Land Tax**
  Land tax is an annual tax levied only by the states and territories on the value of a landholder's total holding of land in that state at a particular date, commonly 31 December. The tax is levied at a percentage of the value of all land owned by that landholder in the state. The maximum rate in Victoria is 2.25% for a landholder who holds land exceeding AUD3 million in value and a flat rate of 1.7% applies in New South Wales.

  Certain classes of land, for instance farming land and principal place of residence, may be exempt from the tax. Where land is used for income producing, the relevant land tax expense would generally be deductible for income tax purposes.

- **Payroll Tax**
  This is a tax levied only by the states and territories on the wages and similar benefits paid by employers to their employees. It was generally not levied on payments to contractors but recent amendments now incorporate certain payments under "relevant contracts" in certain states.

  Generally, payroll taxes will be deductible to an employer entity for income tax purposes.

INTELLECTUAL PROPERTY

There are a variety of laws dealing with the protection of intellectual property (IP) in Australia. These laws provide for the creation of legal rights to the exclusive use or ownership of copyright works and other subject matter, registered designs, patentable inventions, trade marks and other forms of intellectual property.

There are also various rights under the general law which protect, among other things, goodwill and confidential information.

Some principal laws protecting intellectual property are briefly discussed below.

For all IP rights, if a right is created by an employee during the course of and in performing the duties of employment, those rights are owned by the employer. Independent contractors own all rights in anything created under the contract.

PATENTS

The law relating to patents is contained in the *Patents Act 1990*. This law is federal and operates throughout Australia. If a person seeks to obtain the exclusive and enforceable right to make, use or sell their invention in Australia, they must apply under the Act for a patent which gives the rights for a defined period (subject to maintenance fees). IP Australia administers patents in Australia.

The Act provides for granting of two distinct types of patent:

- A **Standard Patent** confers the exclusive right to make, use or otherwise exploit the invention claimed for a period of 20 years (upon payment of the annual maintenance fees).
- An **Innovation Patent** which replaced the petty patent in Australia on 24 May 2001, is a relatively fast, inexpensive protection option. Protection lasts for up to a maximum of eight years. The innovation patent system has been designed to provide protection for new products and improvements that, although not vastly different from existing technology, have significant commercial value. Applying for an innovation patent must also cover novel subject matter but does not require an inventive step, but rather only an innovation step.

Prior to applying for either a standard or innovation patent, it is possible to make a provisional patent application to establish a priority date for an invention which provides 12 months to file either:

- An Australian standard or innovation patent application
- An application under the Patent Co-Operation Treaty (PCT) designating Australia
- A patent application in one or more foreign countries

A complete application can also be made based on and claiming priority from an overseas provisional application or a PCT application that designates Australia.

In order to be "patentable" an invention must be a "manner of manufacture" that involves an inventive step (or innovative step in the case of innovation patents) and be commercially useful.

You cannot patent artistic creations, mathematical models, plans, schemes or other purely mental processes; however, Australia does consider software and certain business methods to be patentable subject matter.

Special care must be taken when filing a specification to ensure that the invention is accurately and completely described, and that nothing is disclosed prior to securing a valid priority date, as this publication will destroy novelty (subject to a limited grace period).

In all circumstances, it is advisable to consult a patent attorney before preparing the patent application. In Australia, only inventors or patent attorneys can file and prosecute patent applications. Only lawyers can prepare patent licences or other commercial documents and take enforcement proceedings in the courts. Registered patent attorneys are not lawyers but specialists in the preparation and ongoing prosecution of patent applications. All Meritas member firms in Australia have excellent contacts with patent attorneys.

Infringement proceedings are generally taken in the Federal Court of Australia.

COPYRIGHT

Copyright gives the owner the exclusive right in Australia to reproduce, publish, perform, communicate to the public (which includes broadcasting and electronic transmission), adapt from original literary works (including original computer programs) and original artistic, dramatic and musical works together with other protected subject matter such as films and sound recordings. Rights vary according to the nature of the work or subject matter.

Copyright subsists in:

- Unpublished original works where the author of the work is an Australian citizen or resident, or a citizen or resident of a member state of the Berne Convention
- Published original works where first publication of the work takes place in Australia, or the author of the work is a citizen or resident of a member state of the Berne Convention at the time the work is first published

The *Copyright Act 1968* governs copyright. This law is federal and operates throughout Australia. It does not rely on a system of registration. Protection arises automatically on the creation of an original work or protected subject matter.

"Fair dealing" in copyright works for the purposes of research or study, criticism or review, parody or satire, legal advice and reporting news is permitted by the *Copyright Act* without the owner's permission.

The *Copyright Act* was amended in 2000 to provide for protection of electronic copyright material, and to allow digital copying of copyright material without permission in certain circumstances.

Copyright generally lasts for a period of 70 years after the end of the calendar year of the date of the author's death for works (provided the work is published at the date of death), and 70 years from the date of publication for sound recordings and films (provided the work is published at the date of death). Copyright in broadcasts continues for a period of 50 years from the year in which the broadcast is first made.

Infringement proceedings are generally taken in the Federal Court of Australia.

Australia also grants to authors certain moral rights, which are separate from the economic rights of reproduction, publication and communication.

These rights are owned by authors even if the author never had any interest in the copyright. The rights cannot be assigned. Authors of works (and producers and directors of films) have each of the following moral rights:

- To be attributed as the author of the work or films
- Not to be falsely attributed as the author of the work or the film
- To prevent the work or film from being the subject of "derogatory treatment"

Each of these rights is only infringed if the act that is undertaken is, in all of the circumstances, unreasonable.

While these moral rights cannot be assigned, an author can consent to acts or omissions that would, but for the consent, amount to an infringement of those moral rights.

CIRCUIT LAYOUT RIGHTS (CLR)

CLR automatically protect original layout designs for integrated circuits and computer chips.

Like copyright protection, there is no requirement for registration for the granting of rights to the owner of an eligible circuit layout design.

The owner of an original circuit layout has exclusive right to:

- Copy the layout in a material form
- Make integrated circuits from the layout
- Exploit it commercially in Australia

The maximum possible protection period is 20 years. The Attorney General's Department administers legislation relating to CLR.

TRADE MARKS

A sign (such as a word, symbol, name, brand, letter, colour, scent, shape, sound or aspect of packaging or a combination of any of them) used as a trade mark in relation to goods or services provided in Australia is registrable under the *Trade Marks Act 1995*. This law is federal and operates throughout Australia. IP Australia administers trade mark applications and registrations.

In order to be registrable, a trade mark must be distinctive or capable of becoming distinctive, in that it is not directly descriptive of the character or quality of goods or services the trade mark is applied to, and must be dissimilar to any existing registered trade marks or pending applications.

The person who first uses (by use or by applying to register the trade mark in Australia) is entitled to be registered as the owner of the trade mark.

Trade mark clearance or entitlement to use searches can be a valuable part of the registration process, as they will identify marks that may potentially block acceptance or possible opposition or infringement actions.

It is also important to ensure that where an application is being filed following prior use in Australia, that application is made in the name of the entity that has used the mark; or the rights in the mark, including the right to file the application, have been validly assigned by the first user to the applicant entity. Failure to ensure that the application is made in the name of the correct applicant can lead to an invalid registration.

Registration of a trade mark gives exclusive rights for a period of 10 years. If the registration is renewed every 10 years, the owner of the trade mark may obtain exclusive rights in perpetuity.

It is also important to ensure that a registered trade mark is used, so as to prevent another party from seeking to remove the mark. Any person is entitled to bring removal proceedings for any mark that has been on the register for more than five years and has not been used for a continuous period of three years, ending on one month before the date the removal application is made. It is also possible to seek to remove a registered trade mark if it has been registered for less than five years, if it was filed without any intention in good faith to use or authorise the use of the mark in Australia, and it has not been used at any time since filing.

Infringement proceedings are generally taken in the Federal Court of Australia.

In addition to registered trade mark rights, use of a mark, or name, may generate common law rights, which may entitle the user of that common law mark to restrain use, or oppose registration, of a deceptively similar mark.

Australia is a signatory to the Madrid Protocol which came into effect in 2001. This provides for the registration of trade marks in other countries, allowing a single application to be filed for protection in any or all signatory countries, based on an Australian trade mark application.

DESIGNS

The look or shape of new and distinctive industrial designs applied to mass produced articles may be protected by registration under the *Designs Act 2003*. This law is federal and operates throughout Australia. Protection is granted for the appearance of the article and not how it works.

In order to be valid, the design must be new and distinctive when compared with the prior art base of the design as it existed before the priority date of the design. The design must be a visual feature, which includes the shape, configuration, pattern and ornamentation of the product. That feature may, but need not, serve a functional purpose. The feel of, or materials used, in the product are not visual features.

A registered design is unenforceable unless and until it is certified by the Registrar of Designs. Certification does not take place as a matter of course during the application process. Examination for the purposes of certification must be requested. This can be done by the applicant, or by any third party.

Registered designs for which a certificate of examination has been issued give the owner exclusive and legally enforceable rights in respect of the design initially for a period of five years. Registration can then be extended for an additional five-year period providing a total protection period of 10 years.

IP Australia administers designs in Australia.

Enforcement proceedings are generally instituted in the Federal Court of Australia. Infringement occurs if, during the term of the registration, and without the licence of the owner, a person makes, imports, sells, hires or otherwise disposes of, uses or keeps a product in relation to which the design is registered which embodies a design that is identical to or substantially similar in overall impression to the registered design.

PLANT BREEDER'S RIGHTS (PBR)

PBR are used to protect new varieties of plants by giving exclusive commercial rights to propagate, market and sell a new variety or its reproductive material. Registered owners of PBR can direct the production, sale and distribution of the new variety, receive royalties from the sale of plants or sell their PBR to a third party. PBR protection lasts for up to 25 years for trees or vines and 20 years for other species.

Plant varieties can only be protected if they are a new variety or have been recently exploited. A new variety is one which has not previously been sold with the breeder's consent.

A recently exploited variety of plant is one which has been sold in Australia for a period no longer than 12 months before the lodgement of the application. These timeframes are extended for sales outside Australia as follows:

- Trees and vines up to six years
- Other varieties up to four years

IP Australia administers PBR.

To be eligible for PBR protection in Australia, the applicant must:

- Show that the new variety is distinct, uniform and stable
- Be able to demonstrate, by a comparative trial, that its variety is clearly distinguishable from any other variety, the existence of which is a matter of common knowledge

If the breeder is an overseas resident, the breeder must either appoint an agent or an Australian address to receive service of notices.

Enforcement proceedings are generally taken in the Federal Court of Australia. The PBR in a plant variety is infringed by producing or reproducing, conditioning for the purposes of propagation, selling, offering, importing, exporting or stocking the material (or claiming that the person has a right to do each of those things) without the licence of the owner. PBR is also infringed if the person uses the name of the variety that is entered in the Register in relation to any other plant variety of the same plant class or a plant of a variety of the same plant class.

TRADE OR BUSINESS NAMES

Any individual or company conducting business under a name that is different from that person's personal or company name (referred to as a trade or business name) must register the trade or business name in each state or territory in which the person conducts business.

Registration does not provide the registrant with any proprietary interest in the trade or business name and is a statutory obligation under the Federal *Business Names Registration Act 2011*. Prior to 2011, business name registration was controlled separately by each of the states and territories. In order to obtain national coverage, a business had to register separate business names in each state and territory. Under the Federal *Business Names Registration Act 2011*, there is now a single, national register, administered by the Australian Securities and Investments Commission (which also regulates corporations).

Registration does not protect the trade or business name but does ensure that an identical name cannot be registered by another person.

Registration of a business name or a company name is also one of the eligibility requirements for obtaining a .com.au domain name.

COMPETITION AND CONSUMER PROTECTION

Australia has extensive competition and consumer laws dealing with, among other things, the promotion of competition and consumer protection. This section provides an introduction to this area of Australian law.

COMPETITION LAW

The *Competition and Consumer Act 2010* (CCA) provides the primary source (though not the only source) of competition regulation in Australia. It is supplemented in some respects by state legislation and, in addition, some industries are governed by industry-specific legislation.

The competition law provisions of the CCA include regulatory control over, for example:

- Mergers and acquisitions
- Price fixing arrangements (e.g., price fixing agreements between competitors or the fixing by a supplier of the minimum price at which goods supplied by it can be resold)
- Misuse of market power by a corporation with a substantial degree of power in a market
- Customer, supplier and territorial arrangements (for example, arrangements which control the suppliers which a party to the arrangement can use and/or which allocate particular customers or exclusive territories to a party)
- Anti-competitive arrangements between competitors (e.g., bid rigging between tenderers in the course of a tender process) or between organisations in general
- Third party access to essential infrastructure

Some of the regulated conduct is only prohibited if it has the purpose or the effect of substantially lessening competition in a market. However, there are other types of regulated conduct (e.g., most price fixing arrangements between competitors) that are prohibited outright regardless of the effect on competition.

Policing compliance with the CCA is the responsibility of the Australian Competition and Consumer Commission (ACCC). Its website is *www.accc.gov.au*. There are provisions in the CCA allowing the ACCC to authorise, in certain circumstances, proposed conduct which would otherwise, or which might otherwise, breach the competition law provisions of the CCA.

CONSUMER PROTECTION

The CCA provides various types of protection for Australian consumers including:

- Control over the manner in which a total price is to be brought to the attention of a consumer where a component part of a price (e.g., a price exclusive of taxes, postage and handling) is referred to
- A prohibition on misleading or deceptive conduct in trade or commerce (e.g., a prohibition on misleading advertising)
- A number of consumer guarantees that every "consumer" has the benefit of, and which cannot be contracted out of by manufacturers or suppliers
- Unsolicited consumer contracts
- The regulation of the provision of credit finance to consumers
- The imposition of product liability on manufacturers and importers in favour of consumers
- Restrictions on the dissemination of certain private information relating to consumers and others

The consumer guarantees that are granted are available regardless of any warranty that the consumer may purchase or may be given. These statutory guarantees apply to all consumers, which includes any person who acquires goods or services, where the contract price is under AUD40,000. It also applies where the contract price is more than AUD40,000 if the goods or services purchased are normally used for personal, domestic or household purposes. A warranty against defects that may be provided by a manufacturer or supplier is in addition to any of the consumer guarantees and does not limit or replace them. All documents (including any material on which there is any writing or printing or on which there are any marks or symbols) evidencing a warranty against defects, including any description of the features or terms of a warranty against defects, must adhere to the requirements of the Australian Consumer Law.

In addition to civil liability for contraventions of the competition and consumer provisions of the CCA, courts can impose significant pecuniary fines and criminal penalties for contraventions. For example, criminal fines and imprisonment for up to 10 years is available for contraventions of the cartel provisions of the CCA. Maximum fines of AUD1.1 million can be imposed on corporations for any misleading and deceptive representations.

PRIVACY AND SPAM

Australia has a number of rules that limit the use and disclosure of personal information. The principle underlining the regime is one of informed consent. Presently, there is no right to privacy. Individuals have the right to be fully informed prior to disclosing information as to how and why an organisation collects personal information, and the uses made of it, so as to be able to make a fully informed decision as to whether to agree to those information-handling practices. The primary statute governing privacy is the *Privacy Act 1988*.

Following recommendations from the Australian Law Reform Commission, there is now a uniform approach to privacy through a single set of 13 privacy principles applying to the public and private sectors. These are known as the Australian Privacy Principles (APPs) and came into effect on 12 March 2014, with the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

Private sector businesses that turn over more than AUD3 million, provide health services and hold health information, commercially deal in personal information or are contracted service providers under a Commonwealth contract, must comply with the APPs. The APPs:

- Require APP entities to manage personal information in a transparent way, including having an up to date and available privacy policy and to take reasonable steps to ensure the information's security (APPs 1 and 11);
- Allow individuals the option to operate anonymously or pseudonymously (APP 2);
- Apply higher standards for APP entities collecting solicited personal information and outline how unsolicited information must be handled (APPs 3 and 4);
- Outline how personal information may be used or disclosed and place strict conditions on the use of personal information for direct marketing purposes (APPs 6 and 7);
- Require certain steps to be taken to ensure protection of personal information before it is sent overseas (APP 8);
- Place obligations on APP entities to ensure that information collected is up to date, can be corrected and require reasonable steps to be taken to ensure its accuracy (APPs 10 and 13);
- Allow individuals to better access their personal information by including a requirement to provide, unless a specific exception applies (APP 12).

Where an organisation in Australia deals in information, the Act applies to that organisation's handling of information inside and outside Australia. The Act also applies to foreign organisations if the foreign organisation conducts business in Australia and collects information in Australia.

In addition to the commonwealth regime, each state and territory has differing requirements for businesses operating within each particular jurisdiction.

The Australian Federal Parliament has also legislated to control or prohibit in certain circumstances direct marketing activities, including using telephone numbers listed on the Do Not Call Register, commercial or electronic messages (spam) and unsolicited consumer contracts by telephone.

The *Spam Act 2003* covers email, instant messaging, SMS and MMS or any other electronic messaging of a commercial nature. It does not cover faxes, internet pop ups or voice telemarketing. There are three essential requirements that must be met in order to ensure that a commercial electronic message is not spam, namely:

- The sender is identified
- The message is sent with consent
- The message includes a functional unsubscribe facility

Spam compliance is an area that is the subject of significant activity by the regulator, the Australian Media and Communications Authority. The maximum penalty for an initial offence is AUD68,000 per day for an individual and AUD340,000 per day for a body corporate. For repeat offences, the maximum penalty increases to AUD340,000 per day for an individual and AUD1,700,000 for a body corporate.

Under the *Do Not Call Register Act 2006* individuals can only place private, fixed-line or mobile phone numbers on the Register. Businesses are prohibited from making telemarketing calls to numbers listed on the Register, subject to some exceptions. In addition to these requirements, the Telemarketing Industry Standard sets out a number of requirements that must be followed by any business that is making a telemarketing call, including those numbers not on the Register.

Again, this regime is administered by the Australian Communications and Media Authority which is entitled to seek civil penalty orders from the Federal Court of Australia or the Federal Circuit Court of Australia for breaches.

In addition to this regulatory regime, the Australian Direct Marketing Association has adopted a number of principles in its codes of practice that apply to association members making telemarketing calls from fixed-line and mobile phones.

There is also a Fax Marketing Industry Standard, which is similar to the Telemarketing Standard, that applies to all participants in the fax marketing industry regardless of whether or not the numbers are on the Register.

The Australian Consumer Law also contains similar (but not identical) provisions in relation to calling or contacting a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, either in person or by telephone.

Failure to comply with the requirements can lead to significant fines, in addition to any reputational loss or damage.

ENTRY TO AUSTRALIA

Before reading this information, please be aware the information provided is not intended to be legal advice or to be acted upon without further consultation. Because of the complex maze of legislation, regulations and policy that comprise Australia's immigration system, we strongly recommend that prospective applicants or sponsors seek specific legal advice before making any applications or representations to the Department of Immigration and Border Protection (DIBP) or any Australian overseas mission.

The Australian government gives permission for people who are not citizens of Australia to enter and remain in Australia by the issue of a visa. There are over 100 different types of visa and they are of four broad categories: visitors, temporary residence, permanent residence and bridging visas. There are detailed rules governing entry in each visa category that are clearly laid down in the migration legislation.

BUSINESS VISIT VISA OPTIONS

- **Electronic Travel Authority (ETA)**
  This is an electronically stored authority for short-term visits to Australia of up to three months. It is available to passport holders from only a specific number of countries and regions. Applications must be made from outside Australia and enjoy relaxed criteria specifically designed to streamline entry to Australia. Holders of ETA visas may engage in business visitor activities but must not work.

- **Business Visitor (Long Validity) ETA**
  This visa is created for business people who need to make regular short business visits to Australia for stays of up to three months at a time. This ETA may be granted for the life of the person's passport.

- **APEC Business Travel Card**
  The APEC Business Travel Card streamlines travel for business people from participating economies in the Asia Pacific Economic Cooperation (APEC) region. APEC Business Travel Card holders can stay for a period of up to three months at a time.

- **eVisitor**
  This visa is created for business people or tourists from European countries intending to make a short business visit or holiday/recreational visit to Australia for up to three months. To be eligible for an eVisitor visa, applicants must apply from outside Australia and hold an eligible eVisitor passport.

- **Temporary Work (Short Stay) Visa**
  This visa is created for business people intending to make a short business visit to Australia for up to three months to engage in highly specialised non-ongoing work or to participate in a non-ongoing event.

- **Temporary Work (Long Stay) Visa**
  This visa allows the holder to travel to and remain in Australia for up to two years to work only in specific industries including sport, religious and domestic workers.

- **Temporary Work (Skilled) Visa** – Standard Business Sponsorship
  This is the most commonly used program for employers to sponsor overseas workers to work in Australia on a temporary basis (three months to four years). Employers can be either Australian or overseas businesses operating in Australia and can nominate a number of overseas employees for different skilled occupations under the same sponsorship application. The occupation must be listed on a specific list of occupations considered "skilled" relevant to this visa and must be shown to be a genuine vacancy through Labour Market Testing. The employer must pay a minimum salary and the applicant must have English skills.

  Visa holders can be employed in Australia for a period of between three months and four years. The overseas workers are not allowed to cease working for the employer who originally sponsored them without their prospective new employer obtaining a sponsorship and nomination approval from DIBP.

  In most cases the overseas employees will be entitled to bring their immediate family members to Australia who will be allowed to work and study. This visa has no limit on the number of times the visa holder can travel in and out of country.

SKILLED WORKERS PERMANENT VISA OPTIONS

- **Employer Nomination Scheme**
  Australian employers may nominate skilled foreign nationals for a permanent residency visa. The nominated occupation must be included on the Skilled Occupation List published by DIBP. The employer must commit to full-time employment for a minimum period of three years. This visa entitles its holders to live and work in Australia on a permanent basis. Applicants must demonstrate that they have the skills relevant to the occupation and must meet health, character and English ability requirements. The criteria for this visa vary depending on whether the applicant has already been working in Australia for the nominating employer for the required time.

  A variation on this visa exists for employers in regional Australia (the Regional Sponsored Migration Scheme). Those employers (and the visa applicants) enjoy relaxed requirements but there can be serious consequences, including visa cancellation, for applicants who obtain a visa under the RSMS but take up employment in a non-regional area of Australia within the first two years of their residency.

- **Options for Skilled Workers**
  There are a variety of visas, both permanent and temporary (provisional visas which offer a pathway to permanent residency) for those with skills recognised by the Australian government as being relevant to Australia. These skills are on the Skilled Occupations List. Applicants must meet a points test, as well as health, character and English ability requirements. The criteria vary depending on the type of visa applied for (i.e., independent, sponsored, regional, etc). Typically these visas require potential applicants to submit an Expression of Interest and wait for an invitation to apply for a visa.

- **Options for People Intending to Establish, Manage or Develop a New or Existing Business, or Invest in Australia**
  These visas are known as "Business Skills visas" and most of them are temporary (provisional) visas that offer a pathway to permanent residency. They can be applied for with or without sponsorship by a state or territory of Australia, though those visas which are sponsored enjoy relaxed approval requirements.

- **Business Innovation and Investment**
  This visa is created for people who have a successful business career, and have a genuine and realistic commitment to be involved as an owner in a new or existing business in Australia or to make an investment in Australia. Relaxed rules exist for those willing to make a significant investment (over AUD5 million). These applicants are subject to a points test which awards points for age, business experience, assets and innovation. The visa appliant, if successful, is granted a provisional visa of four years and is entitled to permanent residency if certain criteria are met within that time.

- **Business Talent Visa**
  This is a permanent visa for applicants with a demonstrated "successful" business career and a level of assets and business ownership significantly higher than the required levels for the Business Innovation and Investment visa.

- **Investor Retirement Visa**
  This is a temporary visa for people aged 55 years or older who are able to make a significant long-term financial investment in Australia. This visa is not a pathway to a permanent visa.

OTHER PERMANENT VISA OPTIONS

Permanent visa options also exist for those who have family in Australia including partners, children, parents or last remaining relatives of Australian citizens. Australia also has a visa designed to recognise overseas applicants with a distinguished talent in their field (such as world renowned scientists, dancers, athletes, etc).

REGULATION OF THE MIGRATION ADVICE PROFESSION

The migration advice profession in Australia is regulated by the Office of the Migration Agents Registration Authority (MARA). Anyone (including lawyers) who gives immigration advice must be registered with the MARA. Registered migration agents must display their Migration Agents Registration Number and adhere to a Code of Conduct in all dealings with clients, DIBP and other stakeholders.

This information is current as of April 2014.

EXCHANGE CONTROL

Generally, there are no exchange controls in Australia. However, taking currency notes (in any currency) to the value of AUD10,000 or more must be reported.

In some cases there may be financial sanctions imposed in relation to transactions involving certain countries, entities or individuals. The sanctions are aimed at prohibiting international funds transfers and other transactions using foreign currency involving parties associated with certain activities.

Furthermore, a person who has a tax debt may be prevented from sending money out of Australia until the tax debt is paid.

EMPLOYMENT AND INDUSTRIAL LAWS

TERMS AND CONDITIONS OF EMPLOYMENT

Employment relationships in Australia are regulated at a number of levels and by a range of statutory and quasi-statutory instruments. Which instruments apply primarily depends upon whether the employer is a "trading or financial corporation." A corporation that derives a significant proportion of its revenue from the sale of goods and/or services will fall within this definition.

Employment in trading and financial corporations is regulated by a combination of federal and state employment and industrial laws. Other employment is regulated almost entirely by state employment and industrial laws.

LEVELS OF REGULATION

Broadly, the levels of regulation are:

- The employment contract (its terms are often modified or overridden by other levels of regulation)
- Statutory minimum conditions – the National Employment Standards
- Awards (i.e., arbitrated determinations) of industrial relations tribunals
- Federal enterprise or collective agreements

NATIONAL EMPLOYMENT STANDARDS (NES)

There are 10 minimum workplace entitlements for all Australian employees and these are set out in the NES.

- A maximum standard working week of 38 hours for full-time employees, plus "reasonable" additional hours
- The right to request flexible working arrangements to care for a child under school age or a person with a disability, etc.

- 12 months unpaid parental or adoption leave, with a right to request a further 12 months
- Four weeks paid annual leave
- Ten days paid personal/carer's leave per year (for personal ill health and to care for members of an employee's household who are ill or injured), two days compassionate leave and two days unpaid carer's leave
- Paid jury service leave or unpaid emergency service leave
- Paid long-service leave of 8⅔ weeks after 10 years of continuous service
- Public holidays
- Notice of termination, and redundancy pay
- New employees are to be given a Fair Work Information Statement that summarises the above conditions. Australia also has a statutory minimum wage. At 1 July 2013 it is AUD16.37 per hour or AUD622.20 per week for adults.

There can be substantial variation depending on the terms of the contract and the nature of the work in which the employee is engaged. Contract terms may improve upon the NES but not reduce them.

LEGISLATION

The current federal employment legislation is the *Fair Work Act* (*FW Act*) and Fair Work Regulations 2009. Its main features include:

- Statutory minimum conditions called "National Employment Standards"
- Modern awards (as a supplementary set of minimum standards relevant to particular industries)
- An enterprise-level bargaining system with an emphasis on collective agreements with industrial organisations (i.e., unions), rather than directly with an employer's employees
- A new institution, called Fair Work Commission, that plays a key role in facilitating and supervising industrial relations under the *FW Act*
- A Fair Work Ombudsman's office with regulatory, monitoring and educational roles
- Enhanced rights for employees aimed at discouraging and remedying unfair dismissals
- Provisions enabling industrial organisations to readily access workplaces (including workplaces where the organisation has no members)

Some other employment law matters are covered by state or territory laws. Each Australian state and territory has its own unique legislation covering the following areas:

- Occupational health and safety
- Workers' compensation (a form of statutory injury insurance)
- Discrimination
- Long-service leave

Non-corporate employers will also be subject to state minimum conditions and industrial relations laws.

OCCUPATIONAL HEALTH AND SAFETY – NEW FEDERAL MODEL LAW

The federal government has taken steps since 2009 to harmonise occupational health and safety legislation across Australia and has developed a model *Work Health and Safety Act*, to be implemented by all states and territories. As of 1 January 2014 the Commonwealth, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory have enacted the provisions of the Model Act. Victoria, Western Australia and South Australia have yet to do so.

The key provisions are:

- An expanded duty of care for a "person conducting a business or undertaking"
- "Worker" now includes employees, volunteers, contractors, sub-contractors, apprentices, work experience students and outworkers
- An expanded definition of "workplace" to include any place where a worker goes or is likely to go while at work
- Positive duties for "officers" to exercise "due diligence" and comply with their duty of care
- Increased monetary penalties for breach and a range of new orders including training and adverse publicity orders

AWARDS

An award is a binding order made by an industrial tribunal setting the minimum employment terms and conditions of certain employees. Awards regulate a large percentage of the workforce in Australia.

An employment contract cannot exclude award provisions, but it can confer additional (non-award) benefits on an employee. Awards don't usually apply to management positions.

Fair Work Commission has modernised and consolidated its awards so that Australia's suite of federally arbitrated settlements can operate pervasively within the relevant industry.

COLLECTIVE AGREEMENTS

The *FW Act* provides for an employer and its employees to make enterprise or collective agreements either directly, or indirectly by involving industrial organisations. It also permits employers to make greenfields agreements for new projects or enterprises as long as it bargains with the relevant union prior to engaging any employees.

The *FW Act* also provides for collective bargaining with employees and with industrial organisations. However, the collective agreement-making regime differs in at least the following respects:

- Employers can be compelled to bargain collectively even if they do not want to do so if the majority of their employees want to bargain
- Any collective bargaining must be undertaken subject to "good faith" obligations on bargaining representatives
- In some circumstances, an industrial organisation will be able to seek arbitration of outstanding matters in incomplete negotiations

SUPERANNUATION (PENSION PLANS)

Under the *Superannuation Guarantee (Administration) Act 1992 (Cth)* employers are required to pay superannuation contributions on behalf of their employees, amounting to a prescribed proportion of each employee's earnings. The contribution rate is currently 9.25% of the employee's earnings.

The federal government has indicated its intention (as of January 2012) to gradually increase these compulsory contributions from 9.25% to 12% between the 2013-14 and 2019-20 years.

It is strongly recommended that you seek professional advice in the complex and constantly changing area of employment and industrial law.

TOP 10 QUESTIONS

1. WHAT ROLE DOES THE GOVERNMENT PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The New Zealand government regulates foreign direct investment primarily through the *Overseas Investment Act 2005* administered by the Overseas Investment Office (OIO). Generally, overseas investment in New Zealand is actively encouraged.

The OIO reviews applications by "overseas persons" seeking to make substantial investments, whether in land or otherwise. Investments below the set thresholds do not usually require OIO approval in New Zealand.

2. CAN FOREIGN INVESTORS CONDUCT BUSINESS WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

Yes. Overseas persons or foreign investors may conduct business in New Zealand without a local partner. However, there is a bill currently before Parliament which when passed, will require a company to have either a New Zealand resident director, or to appoint a New Zealand resident agent.

A locally incorporated subsidiary of a foreign company is the most commonly used corporate structure for conducting business in New Zealand by foreign investors (although registered branches may also be used).

3. HOW DOES THE GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Other than through specific financial reporting, taxation and overseas investment rules, the government does not regulate commercial joint ventures between foreign investors and local firms.

4. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS OR DISTRIBUTORS AND FOREIGN COMPANIES?

The law of contract and the Common Law regulate the relationship between local agents or distributors and foreign companies. Prices are expected to be set on an "arms-length" basis and where such pricing is not received, duties may be imposed.

5. WHAT STEPS DOES THE GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATIONAL RESOURCES AND KEY SECTORS (E.G. ENERGY AND TELECOMMUNICATIONS)?

Mergers with, and acquisitions by, foreign investors are regulated by a range of statutes including the *Companies Act 1993, Takeovers Act 1993*, and *Overseas Investment Act 2005* as well as through the Financial Markets Authority, the Commerce Commission and the New Zealand Stock Exchange. Relatively high thresholds are in place and it is generally only when those thresholds are exceeded that active government steps are taken.

The only specifically regulated national resource which places additional regulation on foreign investment is the fishing industry. Under these rules an overseas person is prohibited from having an interest in fishing quota or having interests in a business (where the overseas person owns a 25% or more interest) that owns or controls interests in fishing quota.

6. HOW DO LABOUR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

The *Employment Relations Act 2000* is the major statute governing the treatment of employees in New Zealand. Various other Acts must also be considered in dealings with employees such as *Holidays Act 2003* (which regulates annual leave and public holidays), *KiwiSaver Act 2008* (a quasi-superannuation scheme), *Privacy Act 1993* (in relation to personal information) and the *Accident Compensation Act 2001* (a no-fault insurance and compensation scheme for workplace injuries).

Expatriate workers are not treated any differently than New Zealand employees and are subject to the same laws in addition to being subject to immigration criteria which will generally require visas to entitle them to work. If a person is only in New Zealand for a short term or for a specific purpose, New Zealand employment law may not apply, but if the person is employed by an overseas company that is conducting business in New Zealand, local employment laws will almost certainly apply.

7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT IN CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

There are no government-imposed controls on foreign exchange. New Zealand has a floating currency. Private companies and individuals may exchange the New Zealand Dollar (NZD) for foreign currencies, repatriate funds (subject to complying with company law regarding solvency, distributions and any tax payable), organise letters of credit and all other financial transactions simply and easily. The New Zealand banking system is extremely efficient and transparent with little government regulation. However the *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* does impose some restrictions on transfer of money to detect and deter money laundering and the financing of terrorism.

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER?

The New Zealand taxation system is administered by the Inland Revenue Department. The general tax rate applicable for companies is 28% and most (there are some exceptions) goods and services sold in New Zealand attract a goods and services tax of 15%. Generally, interest, dividend and royalty payments to a nonresident (company/individual) are subject to nonresident withholding tax (NRWT) at between 5%-30%. New Zealand has double taxation agreements with various countries which limit the amount of NRWT that must be paid. There is no capital gains tax or stamp duty in New Zealand. There are very few import taxes or duties although there are some dumping and countervailing duties imposed. Depending upon the choices made by New Zealand employees of foreign businesses in New Zealand, the employer may be required to make compulsory KiwiSaver payments.

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS? DO LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY REGARDLESS OF THE NATIONALITY OF THE PARTIES?

New Zealand has a comprehensive set of intellectual property statutes and regulations including the *Patents Act 1953 (*to be replaced effective 13 September 2014 with the *Patents Act 2013), Copyright Act 1994, Trade Marks Act 2002, Design Act 1953, Layout Designs Act 1994* and *Fair Trading Act 1986*. There are functional and accessible government websites relating to each of these Acts. Nationality of the parties plays little or no role in enforcement by local courts.

10. IF A COMMERCIAL DISPUTE ARISES, WILL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

Access to local courts or arbitration hearings are the same for local and foreign investors. There is no preferential treatment for or among investors in New Zealand. Whether formal court procedure or alternative dispute resolution methods would be appropriate will depend very much upon the nature of the dispute and any governing documentation.

THE COUNTRY

New Zealand is an island nation in the South Pacific with a population of approximately four million five hundred thousand people from a diverse range of ethnic backgrounds. A significant majority of the population lives in urban areas with almost one-third living in the greater Auckland region. The largest ethnic group is of European descent with English being the major language. English, Maori and sign language are New Zealand's official languages.

GOVERNMENT

New Zealand has a Westminster system of government based on the UK system. Representatives, or members of parliament, are elected on a three year basis, using a mixed member proportional representation (MMP) system, to a single house of parliament. The government is led by the Prime Minister, elected by the caucus of the governing party (or governing coalition, as has largely been the case since the first MMP election in 1996).

The government, based in the capital city of Wellington, has the power to regulate for all New Zealand residents and businesses. In addition, local and territorial authorities make various regulations and bylaws which may affect residents living and businesses operating within their respective territories.

Accordingly, residents and businesses in New Zealand must be aware of and comply with the laws enacted by the central government and the regulations and bylaws of each local and territorial authority of the region where they are located.

COURT AND LEGAL SYSTEM

The New Zealand legal system is modelled on the English common law system of judge-made (or case) law and statutory law made by the central government.

There is a hierarchy of courts, which includes:

- Disputes Tribunal (dealing with small claims)
- District Court
- High Court
- Court of Appeal
- Supreme Court (which has replaced the previous system of appeals to the UK Privy Council as the highest level of the judiciary)

There are also a variety of specialist courts, tribunals and authorities including the Financial Markets Authority, Environment Court, Employment Authority, and Employment Court.

MAJOR FORMS OF BUSINESS ORGANISATION

A foreign company or investor proposing to establish a business in New Zealand may choose from a number of different entities or forms of business organisation. Each of these forms has its advantages and disadvantages. Business owners will need to carefully consider them to determine which is the most appropriate for their business.

The major forms of business organisation available to a foreign company or investor in New Zealand are:

Company

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company (Overseas Company)

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

- Ordinary Partnership
- Limited Partnership

Trusts

- Discretionary Trust
- Unit Trust

COMPANY

A foreign company seeking to conduct business in New Zealand must be registered under the *Companies Act 1993*. The foreign company may choose between two main forms of corporate organisation. These are:

- **Locally Incorporated Subsidiary of a Foreign Company**
  A local subsidiary is a separate legal entity from its foreign company (its parent or holding company). It must be incorporated in New Zealand and is required to comply with all relevant New Zealand laws.

  It is fully taxed in New Zealand on all its income and profits, whether that income arises from its business activities conducted in New Zealand or overseas. It must file an annual report and accounts, although some exemptions are available.

  As a local subsidiary is nevertheless a separate legal entity with separate legal personality, the liability of the foreign company parent for its subsidiary's indebtedness is, in the absence of any guarantees given by the parent or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent.

  The foreign company parent may, however, also be liable for insolvent trading by its subsidiary in circumstances where it ought to have known that the subsidiary was insolvent. Liability in such cases will depend upon degrees of control and knowledge.

  There is no minimum capitalisation requirement for New Zealand incorporated companies under company law. In addition there is currently no requirement that a New Zealand incorporated company has New Zealand resident directors or shareholders. However, at the time of writing there is a bill before Parliament which will require a New Zealand incorporated company either to have at least one New Zealand resident director or to appoint a New Zealand resident agent. The resident agent is not a *de facto* manager but will be responsible for ensuring companies provide accurate information to the Registrar of Companies. A resident agent will be liable if companies breach their record-keeping and filing requirements under the *Companies Act 1993*.

  The New Zealand incorporated company must have a physical registered office in New Zealand along with a New Zealand address for service.

  A local subsidiary is required to file accounts under the Financial Reporting Act 1993 if it is a subsidiary of a company or body corporate incorporated outside New Zealand. However, as of 1 April 2014, the provisions of the *Financial Reporting Act 2013* will apply and a local subsidiary will only be required to file audited accounts if, in each of the two preceding accounting periods the total assets of the local subsidiary and its subsidiaries exceed NZD60 million or the total revenue exceeds NZD30 million.

- **Branch Office of a Foreign Company (Overseas Company)**
  A branch office is simply a local New Zealand office of the foreign parent company and does not have a separate legal identity from its parent. However, the foreign company must still be registered in New Zealand as an overseas company and must comply with all relevant New Zealand laws.

The overseas company will be taxed in New Zealand on all its income and profits which arise from its business activities carried on in New Zealand, although the provisions of applicable Double Taxation Agreements between New Zealand and the overseas company's country of incorporation may reduce the tax otherwise payable in New Zealand.

Under the *Financial Reporting Act 1993*, the overseas company must file an annual report and audited accounts not only for the activities of its branch office but also for its overseas operations. However, as of 1 April 2014, the provisions of the *Financial Reporting Act 2013* will apply and an overseas company will only be required to file audited accounts if, in each of the two preceding accounting periods the total assets of the overseas company and its subsidiaries exceed NZD20 million or the total revenue exceeds NZD10 million.

As a branch office is not a separate legal entity from the foreign company, the foreign company will be liable for the debts of the branch office.

Advantages

Some of the principal advantages of operating a business in New Zealand through a local subsidiary or branch office are:

- Direct control over the business in New Zealand
- Potential cost reductions achieved by operating locally
- Identification and profile with local business partners and customers
- Opportunities to establish or build a local corporate identity
- Access to other markets from a base in New Zealand

JOINT VENTURE

Forming a joint venture with a New Zealand organisation is an increasingly popular form of business organisation for foreign companies and investors. A joint venture is a business organisation where two or more entities become involved in a specific project or jointly participate in the conduct of a business operation.

The two main forms of joint venture are:

- **Unincorporated Joint Venture**
  An unincorporated joint venture is not a separate legal entity. Rather it is a contractual agreement between two or more entities who agree to conduct business for a particular purpose. Care must be taken to avoid structuring the joint venture as a partnership as this may affect the tax liabilities of each joint venture participant.

  Usually, unincorporated joint ventures do not make the participants jointly liable for costs and losses and the participants deal separately with their share of the income from the joint venture.

- **Incorporated Joint Venture**
  More commonly, a separate special purpose company is incorporated to operate the joint venture and each participant becomes a shareholder in the company. This confers on them the protection of the company's limited liability status. New Zealand company law regulates this type of joint venture.

  There are many different ways to structure a joint venture, which may require specific treatment depending on the type of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture.

PARTNERSHIP

A partnership is an arrangement between two or more entities to carry on a business with a view to profit. It may be formed by a written or oral agreement between the partners. In the absence of a written agreement, the *Partnership Act 1908* sets out many of the partnership rules that apply to the arrangement.

Ordinarily, partnerships are not separate legal entities and the partners have an unlimited personal liability, both jointly and severally, for the debts and obligations of the partnership. In addition, each partner is deemed to be an agent for the others and so may act on behalf of the other partners.

Limited partnerships are separate legal entities which are registered under the *Limited Partnership Act 2008*. A limited partnership consists of general partners, who like partners in ordinary partnerships, have unlimited personal liability for the debts and obligations of the limited partnership and limited partners who, provided certain requirements are met, enjoy limited liability for the debts and obligations of the limited partnership. General partners transact the business of the limited partnership while limited partners are passive investors and are liable only to the extent of their capital contribution in the limited partnership. A limited partnership can be formed with a minimum of one general partner and one limited partner. Limited partnerships are commonly used where, for example, one partner provides only capital while another partner is responsible for the operation and management of the business.

Partnerships, other than limited partnerships, are not subject to taxation in their own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits, which are assessed at the partners' marginal tax rates.

Ordinary partnerships do not require registration. Limited partnerships must be registered.

TRUSTS

Trusts are widely used within New Zealand to hold assets and as trading vehicles. Foreign companies and investors sometimes use trusts in New Zealand. The two main forms of trust are:

- **Discretionary Trust**
  A discretionary trust enables property to be held by a trustee who has discretion as to how to invest and direct the capital and income of the trust fund. The role and power of the trustee, the purposes of the trust fund and the rules regarding its use are generally contained in a trust deed. Discretionary trusts are often used in family and private business arrangements as they can confer tax benefits on the beneficiaries and they are often relatively simple to create and operate.

- **Unit Trust**
  A unit trust is an investment vehicle that allows the pooling of investment funds and the investment of those funds through a trustee, whose powers are clearly defined in the trust deed. The trustee may be assisted by a separate entity known as a manager, whose job is to select and manage the investments while the trustee acts as guardian of the unit holders' interests.

  Trust beneficiaries, known as unit holders, have set interests in the income and capital of the trust. These interests can often be on-sold by the unit holders.

  Many unit trusts invite the subscription of public funds, which are then pooled and invested in specified items for income purposes or capital gain.

In certain circumstances there may be advantages in selecting a trust as the form of business organisation, particularly from a taxation viewpoint. However, care must be taken to determine that it is appropriate for, among other things, the type of business, the taxation status desired, the required return, the degree of control required, and the flexibility needed.

REGULATION OF FOREIGN INVESTMENT

One of the first matters a foreign company or investor must consider when planning to invest in New Zealand is the impact of New Zealand's foreign investment policy.

REGULATION

Foreign investment in New Zealand is principally governed by the *Overseas Investment Act 2005* and is administered by the Overseas Investment Office (OIO).

The main function of the OIO is to review applications for consent from foreigners who intend to make substantial investments in New Zealand, to make decisions regarding business (non-land) transactions under delegated authority from the Minister of Finance and to make recommendations to the Minister of Finance and Minister of Land Information regarding land transactions (who will in turn make a decision).

OIO CONSENT

Under the *Overseas Investment Act*, a transaction requires consent if it will result in an investment by an "overseas person" in:

- Significant business assets
- Sensitive land
- Fishing quota

Significant Business Assets

A transaction involving significant business assets (being more than NZD100 million) may take the form of an acquisition of shares, the establishment of a new business or a takeover of an existing business.

Transactions that involve business assets worth less than NZD100 million do not require consent from the OIO. The only exception to this is for private Australian investors for whom the threshold increased to NZD477 million on 1 March 2013 as part of the New Zealand government's ongoing commitment to ensuring closer economic relations with Australia. Australian government investors remain subject to the NZD100 million threshold.

Sensitive Land

A transaction involving sensitive land may take the form of a purchase of the land itself or of shares or other securities in an entity that owns sensitive land.

Sensitive land is exhaustively defined in the *Overseas Investment Act* but importantly includes:

- Non-urban land of five or more hectares in area
- Foreshore or seabed
- Land on most off-shore islands
- Land over
  - 0.4 of a hectare that adjoins sensitive land (for example, reserve or public park, lakes, certain heritage or historic areas) or
  - 0.2 of a hectare that adjoins the foreshore

If the above applies to a proposed purchase, OIO consent must be obtained. The purchaser must seek legal advice before signing any sale and purchase agreement to avoid any inadvertent breach of this legislation.

Who is an Overseas Person?
An overseas person may be a natural person, or could be a company, a partnership or a trust where 25% or more of that entity is owned or controlled by an overseas person or persons.

An overseas person is a person who is neither a New Zealander nor ordinarily resident in New Zealand.

An ordinarily resident person is one who holds a New Zealand residence class visa and:

- Is domiciled in New Zealand, or
- Is residing in New Zealand with the intention of residing there indefinitely and has done so for the immediately preceding 12 months

What Does Acquiring an Interest Mean?
Acquiring an interest means coming into ownership or possession of an interest of 25% or more in the land, a lease of the land of three years or more, or certain other interests in the land such as a mortgage.

What Will the OIO Consider Before Giving Consent?
Gaining consent is basically a question of whether the acquisition would be in the national interest. Lifestyle blocks are treated the same as any other land. The criteria require that:

- The applicant has business experience relevant to the overseas investment
- The applicant has demonstrated a financial commitment to the overseas investment
- The applicant is of good character
- Either (and this is particularly relevant to applicants wanting to purchase a lifestyle block or other larger blocks of land):
  - The applicant is ordinarily resident in New Zealand or intends to reside indefinitely in New Zealand
  - The investment will benefit New Zealand. The OIO will look at factors such as employment created, introduction of new technology or skills, introduction of investment capital and creation of new export markets. A business plan will be needed to show what is proposed and how it may benefit New Zealand.

The OIO may also consider factors such as protection of indigenous vegetation or fauna, protection of trout or salmon and their habitats, protection of conservation or heritage areas, improved public access over land and any offer (which is mandatory) of foreshore, seabed, lake or river back to the Crown.

An investment plan addressing each relevant benefit factor together with such professional reports as may be needed to verify the rationale for the investment must be included with the application.

Farmland
If the land being purchased is used principally for farming (other than forestry but including horticultural and viticultural use), then the land must be advertised for sale on the open market in New Zealand for at least 20 working days. This advertising forms part of the consent criteria and the results must be included in the application for consent.

Vendors Selling Land to an Overseas Person
The Crown is granted a right of first refusal to purchase at its market value land referred to as special land.

Special land is the foreshore, seabed, a river bed (a river having an average width for the length on or adjoining the relevant land of three meters or more measured as the width from bank to bank at the highest flow of the river before it over tops its banks) or a lakebed (a lake of over eight hectares [12.35 acres] including any artificial lake).

Owners of land containing special land are required to notify the Minister of any overseas investment transaction before proceeding with it. Failure to notify the Minister may result in a fine of up to NZD100,000.

Penalties
There are significant penalties that can be imposed for failure to comply with the OIO regulations. These can range from fines to enforced sale.

COMPANY LAW

Some general matters relating to company law in New Zealand are discussed below.

REGULATORY SCHEME

The *Companies Act* principally regulates companies.

The *Companies Act*, together with major pieces of legislation such as the *Financial Markets Conduct Act* (which replaces the *Securities Act* and the *Securities Markets Act), Takeovers Act* (and Takeovers Code) and the Listing Rules of the New Zealand Stock Exchange Limited (NZX), form a uniform regulatory scheme for companies.

REGULATORY AGENCIES

There are various agencies involved in administering this regulatory scheme including:

- The Companies Office of the Ministry of Business, Innovation and Employment which is responsible for administering the *Companies Act* and maintaining the register of companies (as well as various other registries)
- The Financial Markets Authority (FMA) which is responsible for administering securities and is co-regulator with NZX Limited of the New Zealand Stock Exchange. The FMA is responsible for financial regulation in New Zealand including consumer protection, regulating all financial market participants, exchanges and the setting and enforcing of regulations.
- The Takeovers Panel which is responsible for administering the *Takeovers Act* and Takeovers Code
- NZX Limited which is responsible for publicly-listed companies and ensuring compliance with the Listing Rules

INCORPORATION

A company has a separate legal identity from its shareholders and directors, who are usually not liable for the company's debts. A company can own property, enter into contracts and commence legal proceedings in its own name. It is the most common form of business organisation in New Zealand.

Companies are incorporated under the *Companies Act*. Incorporation involves reserving the company name, issuing shares, appointing one or more directors, nominating a registered office and address for service in New Zealand and sometimes lodging copies of the company's constitution (its governing document, if it elects to adopt one) with the Companies Office. Registration for tax can also be obtained at the time of incorporation. Due to the fact that companies can be incorporated very quickly, shelf companies are generally no longer used in New Zealand. Incorporation generally costs about NZD600 - NZD1,000 plus GST and Companies Office fees of approximately NZD160.

Each properly incorporated company is registered by the Companies Office and receives a unique seven-digit company number and a New Zealand Business Number. There is no requirement that either number appear on the company's public documents.

TYPES OF COMPANIES

- **Public (Listed) Company**
  A listed company may offer its shares for sale to the public.
- **Private Company**
  A private company is the most commercially used form of company in New Zealand. Private companies are designed for a relatively small group of people who do not (usually) seek to raise funds from the public and who may seek to restrict the ability to transfer company shares. A private company must have at least one director and one shareholder.

SHARES AND SHAREHOLDERS

The great majority of companies are limited liability companies which are limited by shares (although some companies are limited by guarantee or are incorporated as no-liability or unlimited liability companies). The liability of shareholders of limited liability companies is limited to any unpaid amount in respect of shares held by them.

Limited liability companies must have at least one share and one shareholder. There is no upper limit on the number of shares or shareholders in a company (although where the number of shareholders is 50 or more the company may be a code company for the purposes of the Takeovers Code [discussed below]).

Most companies are incorporated with ordinary shares, although companies may establish different classes of shares and regulate the rights attached to those classes of shares.

DIRECTORS AND OFFICERS

Companies must have at least one director. At the time of writing, there is a bill before Parliament which will require a New Zealand incorporated company to have either at least one New Zealand resident director or a director resident in an enforcement country. The resident agent is not a *de facto* manager but will

be responsible for ensuring companies provide accurate information to the Registrar of Companies, and will be liable if companies breach their record-keeping and filing requirements under the *Companies Act 1993*.

There is no legal requirement to appoint a company secretary.

Directors of companies conducting business in New Zealand, and others acting in the capacity of directors, owe certain duties to the company itself and, in certain circumstances, to other people associated with the company such as the shareholders and the creditors of the company. Director's duties arise under both the general law and the *Companies Act*.

REPORTING REQUIREMENTS AND RECORDS

Companies conducting business in New Zealand are under various obligations to:

- Maintain their accounts in accordance with New Zealand international financial reporting standards
- Prepare annual financial statements and reports and distribute copies to their shareholders
- In the case of certain companies, lodge copies of those statements with the Companies Office and, if applicable, the NZX
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies
- In the case of certain companies, have their accounts audited
- In the case of listed companies, disclose significant matters affecting their performance or prospects to NZX under the continuous disclosure rules contained in the *Financial Markets Conduct Act*

The extent of the reporting obligations will depend on the nature and ownership of the company.

In addition, companies are obliged to keep various records and maintain various registers in respect of their activities. The shareholders may inspect these records and registers.

NEW ZEALAND STOCK EXCHANGE (NZX)

Listed (public) companies may seek to raise funds from the public by listing on the NZX. The NZX quotes the shares of listed companies and enables trading of those shares to take place. Listing is an option that is also available in limited circumstances to companies incorporated overseas.

In order to list on the NZX, companies must meet various stringent financial criteria set out in the NZX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the *Companies Act* and the *Financial Markets Conduct Act*. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects.

Small to medium-sized companies, which are fast growing or looking for additional sources of capital and seek to list without the expense and requirements of a full listing, can list on the NZAX (the New Zealand Alternative Exchange).

A company that does not seek listing is not subject to any minimum capital requirements and can be structured in various ways to suit the financing requirements of the shareholders.

ACQUISITION OF COMPANIES

A company may be acquired in one of two principal ways:

- Its assets can be acquired (in which case the company itself is not acquired)
- Its shares can be acquired

Each of these methods has its advantages, depending on the outcome that is sought. Acquiring companies is complex and a discussion of the details is beyond the scope of this guide.

The acquisition of private (unlisted) companies is relatively unregulated except where the company being acquired has 50 or more shareholders, in which case the *Takeovers Act* will apply.

For listed companies, both the *Takeovers Act* and Listing Rules will apply.

Furthermore, the *Commerce Act* prohibits an acquisition of shares or assets in a company where the acquisition has the effect of substantially lessening competition in the market in which the company operates.

In addition, taxation consequences (discussed in the following **TAXATION** section) must be carefully considered.

TAXATION

It is not possible to give a complete outline of the scope of the taxation system in this guide. A brief outline of the basic taxation principles and some of the major forms of taxation are discussed below.

In all cases, we strongly recommend that you obtain professional tax and legal advice before structuring or implementing your investment or business plans in New Zealand.

NEW ZEALAND INLAND REVENUE

The Inland Revenue Department (IRD), a government body with broad powers, administers the taxation system.

The IRD has offices throughout New Zealand. It assesses and collects national taxes, enforces many of the laws that relate to the payment of taxes, hears objections to tax assessments and issues public tax rulings and determinations.

INCOME TAX

New Zealand imposes taxation on the worldwide income of New Zealand resident individuals, companies and other entities. Nonresidents are generally taxed on the New Zealand sourced income (although this may be reduced by double taxation agreements). Profits arising from business in or with New Zealand may be taxable even where the entity in question does not have an established place of business in New Zealand.

Individuals are treated as tax residents if they:

- Have a permanent place of abode in New Zealand (even if they have a permanent place of abode overseas); or
- Are physically present in New Zealand for more than 183 days in any 12 month period.

The *Income Tax Act 2007* governs income tax.

Calculation of Taxable Income

Tax is payable on taxable income which is calculated by determining the taxpayer's assessable income (being the taxpayer's gross income, excluding exempt income) and deducting from that amount those deductions that are allowed. Allowable deductions include losses and expenses incurred in producing the assessable income or in carrying on a business but do not include those losses or expenses which are of a capital, private or domestic nature.

Deductions

Deductions may be allowed for some capital expenditure, for example, depreciation for plant and equipment. Special provisions apply to certain types of expenditure.

Losses

New Zealand residents and nonresidents are generally entitled to carry forward domestic income tax losses and offset them against future income. However, this entitlement is subject to certain anti-avoidance provisions including a requirement that ownership of the entity being taxed is continuous.

A New Zealand resident company that incurs a loss is permitted to transfer the right to claim a deduction for that loss to another New Zealand resident member of the same consolidated group, provided certain common ownership tests are met. Losses incurred by a nonresident company operating through a branch in New Zealand are deductible only against future income earned by the branch but may be immediately available to the nonresident company in its own jurisdiction, subject to its local taxation rules.

Tax year

The income tax year generally commences on 1 April and terminates on 31 March of the following year. It is possible to apply to the IRD for a different income tax year.

TAX RATES

Residents

The general rates of tax applicable to resident individual taxpayers are:

Taxable Income Threshold (NZD)	**Marginal Rate** (% on excess up to next taxable income threshold)
Up to 14,000	10.5
14,001 – 48,000	17.5
48,001 – 70,000	30
70,001 up	33
No notification	45

(subject to amendment)

Companies

The general rate of tax applicable to companies is 28% (subject to amendment), payable on all taxable income.

Double Taxation Agreements

There are Double Taxation Agreements between New Zealand and a number of countries. These agreements mean that, in most cases, taxation is only imposed by the country of residence and not by the country where the income

is sourced. However, the country where the income is sourced may impose withholding tax on dividends, interest and royalties (see below). If a nonresident has a permanent establishment in New Zealand, then it is liable for tax on income referable to that branch.

Payment of Tax
Entities earning assessable income must lodge a tax return with the IRD (although this requirement is relaxed for certain individuals). The IRD will usually accept the assessment but may conduct an audit of the tax return.

Income received in the form of salary or wages is collected by employers under a pay-as-you-earn (or PAYE) system and paid to the IRD on a regular basis.

For the self-employed, provisional tax and company tax is generally paid in advance installments based on a person/company's likely tax liability for the income tax year.

Capital Gains Tax
New Zealand does not have capital gains tax. However, care needs to be taken in accruing profit on the resale of an asset if that asset was originally acquired with resale in mind—in such cases income tax may be payable.

Taxation of Payments to Nonresidents
Interest income, dividends and royalties paid to nonresidents are subject to withholding tax as discussed below.

Interest
Interest payments made to a nonresident who does not have a permanent establishment in New Zealand are generally subject to a flat rate of interest withholding tax of 10%. The tax is payable regardless of whether a Double Taxation Agreement applies. Certain exemptions may apply.

THIN CAPITALISATION

New Zealand businesses controlled by nonresidents may not be able to claim a tax deduction for interest paid on their debts owing to "foreign controllers" and certain associates. This depends in part on the ratio between debt and equity.

DIVIDENDS

Profits of New Zealand resident companies are taxed under an "imputation system." The effect of the system is that tax paid by the company (at 28%) is imputed (or allocated) to shareholders by way of imputation credits attaching to the dividends paid out of after-tax profits.

Shareholders receiving imputed dividends can claim a credit for the tax already paid by the company so that the dividends are not further taxed in the hands of the shareholders except, in the case of residents, to the extent that their marginal rate of taxation exceeds the company rate.

Imputation credits are not available to nonresident shareholders. Rather, imputed dividends paid to nonresidents are not liable to dividend withholding tax in New Zealand. Dividends that do not carry an imputation credit are subject to dividend withholding tax at a general rate of 30%. If a Double Taxation Agreement applies, the rate is normally reduced to 15% or less.

ROYALTIES

Royalties paid to a nonresident who does not have a permanent establishment in New Zealand are subject to a flat rate withholding tax of 30%. In most cases where a Double Taxation Agreement applies, that rate is limited to 5%, 10% or 15% of the gross royalty income.

Most payments for the use of intellectual property (such as computer software, sound recordings and brands) are royalties.

TRANSFER PRICING

There is a comprehensive transfer pricing regime in place to prevent New Zealand entities from reducing income by inflating deductions through non-arms-length transactions with nonresident associates.

OTHER TAXES

There are a variety of other taxes that affect businesses operating in New Zealand, including:

- **Goods and Services Tax** (GST)

  GST is a tax of 15% on all goods and services and other items sold or consumed in New Zealand. Entities must register for a GST number when annual turnover has exceeded NZD60,000 in any 12 month period. Depending on turnover, you can elect to file returns every six months, 12 months or monthly. Registered suppliers are generally entitled to claim a credit for GST paid on their purchases.

  Imports are subject to GST and exports are exempt. Certain supplies are zero-rated.

- **Fringe Benefits Tax (FBT)**
  FBT is payable by employers on the value of certain "fringe" benefits provided to employees in connection with their employment. Employers must elect which option they will use for calculating FBT, which is 49.25% (subject to adjustment) using the single rate option, and is calculated on the tax-inclusive value of the fringe benefits provided in the tax year. Such benefits are widely defined to include a range of privileges, services and facilities

including private use or enjoyment of motor vehicles, low interest loans, subsidised or discounted goods and accommodation.

- **Customs Duty**
  Customs Duty is levied on a range of imported goods determined in accordance with the New Zealand Tariff. However, in comparison to many other countries relatively few goods are subject to tariff protection and generally speaking the rates of duty are fairly low.

- **ACC Levies**
  Accident compensation (ACC) levies are payable by New Zealand employers and self employed to fund New Zealand's accident compensation system (no-fault accident compensation regime). The rate of the ACC levy depends upon the nature of the business undertaken.

It may be possible to legitimately minimise some of these taxes.

There is no stamp duty or land tax in New Zealand and gift duty was abolished beginning 1 October 2011.

INTELLECTUAL PROPERTY

There are a variety of laws dealing with the protection of intellectual property in New Zealand. These laws permit the creation of legal rights to the exclusive use or ownership of copyright works, designs, patentable inventions, trade marks and other forms of intellectual property.

Some of the principal laws protecting intellectual property are briefly discussed below.

PATENTS

The law relating to patents is currently governed by the *Patents Act 1953* although new legislation in the form of the *Patents Act 2013* has been passed and will come into force on 13 September 2014. This is intended to bring New Zealand into line with its major trading partners.

Persons seeking to obtain the exclusive and enforceable right to make, use or sell their invention in New Zealand may apply under the Act for "letters patent" that grant such rights for a stipulated period.

A patent confers the sole right to make, use or sell the invention for a period of up to 20 years upon payment of the relevant renewal fees.

In order to be "patentable," an invention generally must be novel, not obvious, of some use, and involve an inventive step which has not been previously used.

Artistic creations, mathematical models, plans, schemes or other purely mental processes cannot be patented; however, recently it has become possible to patent business methods and processes, provided that the above criteria are satisfied.

Special care must be taken when filing an application to obtain a patent for an invention, particularly to ensure that the invention is accurately and completely described.

The ability to patent an invention may be lost where an invention is demonstrated, sold, published or discussed in public before an application is filed. It is permissible to talk to employees, business partners or advisers on a confidential basis; however, it is advisable to have these persons first enter into written confidentiality agreements.

In all circumstances, it is advisable to consult a patent attorney before preparing the patent application. In New Zealand, patent attorneys are not necessarily qualified legal attorneys but rather specialists in the preparation and ongoing prosecution of patent applications.

COPYRIGHT

The *Copyright Act 1994* governs copyright.

Copyright gives the owner an exclusive right in New Zealand to reproduce, publish, perform, communicate to the public (which includes broadcasting and electronic transmission), adapt and thereby benefit from original literary works (including various original computer programs), dramatic works, musical works and artistic works, together with other protected works such as films and sound recordings. Rights vary according to the nature of the work.

Copyright does not rely on a system of registration but rather arises automatically on the creation of the original work.

Copyright continues to subsist in the work for a period of 50 years from the date of the death of the author, other than broadcasts where copyright continues for a period of 50 years from the year in which they were made.

TRADE MARKS

A trade mark (such as a word, symbol, name, brand, letter, colour, smell, shape, sound or aspect of packaging or a combination of any of them) used in relation to goods or services provided in New Zealand is registrable under the *Trade Marks Act 2002*.

In order to be registrable, a trade mark must generally be distinctive or capable of becoming distinctive, in that it is not descriptive of the goods or services to which the trade mark is applied and that it is dissimilar to any existing trade marks, whether they are registered or pending.

The person first using or applying to register the trade mark in New Zealand is generally entitled to be registered as the owner of the trade mark, subject to any third party's prior use of the mark either in New Zealand or overseas. Accordingly, care must be taken to ensure a trade mark can be validly registered on behalf of a foreign investor before that person contemplates operating a business in connection with that trade mark in New Zealand.

Registration of a trade mark gives exclusive usage rights for a period of 10 years. If the registration is renewed every 10 years as required, the owner of the trade mark may obtain exclusive usage rights in perpetuity.

New Zealand has long been a signatory to the Madrid Protocol which provides for the international registration of trade marks, allowing a single application to be filed for protection in any or all signatory countries, based on an New Zealand trade mark application. However, legislation implementing the Madrid Protocol was passed and became effective 10 December 2012.

DESIGNS

New and distinctive industrial designs used in mass-produced articles may be protected by registration under the *Designs Act 1953*.

Registered designs for which a certificate of registration has been issued gives the owner exclusive and legally enforceable rights in respect of the design initially for a period of five years. Registration can then be extended for an additional five-year period providing a total protection period of 10 years.

Once registered, a design owner obtains exclusive rights in relation to the design and is able to enforce those rights against third parties.

PLANT VARIETY RIGHTS

Plant varieties (except algae, bacteria and fungi) which are now distinct, stable and homogenous, may be entitled to protection in New Zealand under the *Plant Variety Rights Act 1987*. The grant of a plant variety gives the grantee the exclusive right to produce, sell, propagate and authorise others to produce, sell and propagate the variety concerned.

LAYOUT DESIGN RIGHTS

In New Zealand, protection is provided for the layout design of integrated circuits through the *Layout Designs Act 1994*. Layout design rights protect the layout of integrated circuits and semi-conductors.

These rights are based on copyright law principles but are a separate and unique form of protection. Like copyright protection, there is no requirement for registration for the granting of rights to the owner of a layout design.

The owner of an original circuit layout has exclusive right to:

- Copy the layout in a material form
- Make integrated circuits from the layout
- Exploit it commercially in New Zealand

The *Layout Designs Act* gives the owner protection for 10 years from the date when the layout design was first commercially exploited.

TRADE OR BUSINESS NAMES

New Zealand does not have a register of business or trade names. Accordingly a business or trade name can only be protected by registration as a trade mark.

OTHER INTELLECTUAL PROPERTY RIGHTS

Other intellectual property rights may be protected under the law of passing off and/or the *Fair Trading Act 1986*.

TRADE PRACTICES AND CONSUMER PROTECTION

New Zealand has extensive laws dealing with trade practices and consumer protection matters.

TRADE PRACTICES

Competitive business activity in New Zealand is principally regulated by 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 and covers a number of areas, including:

- "Anti-trust law" including the regulation of mergers and acquisitions which are likely to cause a substantial lessening of competition in a New Zealand market
- Misuse or taking advantage of market power
- Resale price maintenance
- Price fixing

The Act is overseen by the Commerce Commission, which monitors competitive market conditions throughout the New Zealand economy. Penalties for breach of the anti-competitive provisions of the Act are onerous.

The Act does not attempt to restrict fair business dealings. Certain types of conduct, which may otherwise be deemed as anti-competitive, may be authorised or granted a clearance by the Commerce Commission in certain circumstances.

CONSUMER PROTECTION

New Zealand consumers are protected by a wide variety of statutes (including *Fair Trading Act 1986, Consumer Guarantees Act 1993, Credit Contracts and Consumer Finance Act 2003, Financial Service Providers [Registration and Dispute Resolution] Act 2008* and *Financial Advisors Act 2008*), which, among other things:

- Prohibit misleading or deceptive conduct
- Impose certain conditions and warranties into contracts for the sale of goods and services to consumers
- Regulate the provision of credit finance to consumers
- Impose product liability on manufacturers and importers in favour of consumers
- Prohibit certain restrictive trade relationships
- Supervise the setting and maintenance of prices for a broad range of consumer goods and services
- Restrict the dissemination of certain private information relating to consumers and others
- Requires financial service providers to be registered and to be members of a dispute resolution scheme
- Regulates competency of financial advice provided to consumers
- Requires financial advisers and brokers to take an appropriate degree of care in providing services to investors and consumers and prohibits certain conduct by financial advisers and brokers
- Regulates minimum disclosure by financial advisers and brokers

AGREEMENTS WITH COMPETITORS AND TRADE RESTRICTIONS

Foreign companies and investors who propose either of the following are strongly advised to obtain professional legal advice before entering into such agreements.

- Entering into any agreement with a competitor
- Imposing restrictions on trading relationships with their customers, suppliers or distributors

ENTRY TO NEW ZEALAND

A visa or permit is not required to visit New Zealand if the visitor is an Australian citizen, British citizen, or a citizen of a country which has a visa waiver agreement with New Zealand (entitles up to a three-month visit). New Zealand has visa waiver agreements with 56 countries.

There are various classes of visa. Each class of visa has special conditions that must be met before the visa can be obtained. The type of visa applied for will depend on the reasons a person has for visiting New Zealand.

A person seeking to work in New Zealand must obtain a work visa. Work visas allow a person to work for a limited period, generally around three years.

WORK VISAS

There are a number of categories under which work visas are available including:

- **Essential Skills** – allows people to work temporarily in New Zealand in areas where people are needed to fill shortages and New Zealanders are not available.
- **Work to Residence** – allows people whose skills and talent are wanted to work in New Zealand and provides them with a way to get residence in New Zealand. There are four different options:
  - Talent (Accredited Employers) Work – for people with a job offer from an accredited employer.
  - Talent (Art, Culture and Sports) Work – for people with exceptional talent in their field of art, culture or sport.
  - Long Term Skill Shortage List Work – for people working in an occupation on the Long Term Skill Shortage List.
  - Entrepreneur Work Visa – discussed below.
- **Family Stream** – allows partners of New Zealand citizens or residence class visa holders, and the partners of people who hold work or student visas, to work temporarily in New Zealand.
- **Specific Purpose or Event** – allows people to come to New Zealand to work at a specific purpose or event for a particular period.
- **Horticulture and Viticulture Seasonal Work** – includes a number of special instructions related to horticulture and viticulture seasonable work (planting, maintaining, harvesting or packing crops).
- **Religious Work** – facilitates the entry of religious workers to provide New Zealand communities the opportunity to practice, maintain and advance their religious beliefs.

- **Crew of Foreign Chartered Fishing Vessels** – allows foreign crew on foreign chartered fishing vessels.
- **Students and Trainees** – allows certain overseas students and trainees to gain practical work experience in New Zealand as part of their studies.
- **Silver Fern Practical Experience** – for young, highly skilled people from overseas who hold a Silver Fern Job Search visa or a first Silver Fern Practical Experience visa who have found skilled employment in New Zealand.
- **Free Trade Agreement** – facilitates the entry of nationals of certain countries who are qualified and experienced in specific occupations and who have a genuine job offer in that occupation.

Work visas, regardless of type, require the person to satisfy certain criteria including basic health and character requirements and to have a passport valid for at least three months past the date the person is due to leave New Zealand. As well as these criteria, each category of visa has different specific criteria.

Entrepreneur Work Visa (EWV)
Persons having a minimum of NZD100,000 capital investment (excluding working capital) and who seek to create business in New Zealand can apply for an EWV. This is a new visa category available beginning March 2014. It establishes a points-based system to actively assess potential business migrants and to choose those who can create high growth and innovative businesses. Points are given for:

- Business experience
- Employment creation
- Export potential
- Innovation
- Capital investment
- Age
- A plan to invest and reside outside of Auckland

RESIDENCY

To permanently live in New Zealand, or set up a business, a person will need to apply for residency. A person holding a Work to Residence Visa may apply for residency after holding the visa for 24 months.

The main paths to New Zealand residency are:

Skilled Migrant
This category works on a point system. Points are earned on the basis of qualifications, work experience or job offers in New Zealand. The person must be between 20–55 years old and satisfy the general requirements discussed above.

Entrepreneur
To be eligible to apply under the entrepreneur category, a person must have successfully established a business in New Zealand, been "self-employed" in that business for at least two years and the business must have benefited New Zealand.

Investor
There are two investor categories:

- **Investor** – This category requires an investment of NZD1.5 million for four years. The investor must spend at least 146 days in New Zealand each year in years two to four of the four-year investment period. The investor must be under 66 years of age, have at least three years business experience, meet the required English language skills and the health and character requirements.
- **Investor Plus** – This category requires an investment of NZD10 million for three years. The investor must spend at least 44 days in New Zealand each year in years two and three of the three-year investment period. There are no requirements as to age, business experience or English language, but the investor must meet the health and character requirements.

OTHER CATEGORIES - TEMPORARY VISAS

This category allows a person to live in New Zealand temporarily.

- **Student Visa** – a person coming to New Zealand to study on a full-time basis for more than three months will need a student visa which allows the person to study and work up to 20 hours per week.
- **Working Holiday** – there are a number of different working holiday schemes in place with varying requirements and time frames. Most working holiday visas require medical and chest x-ray certificates. Work must be on a casual basis.
- **Visitor** – temporary entry to New Zealand for holiday only.

EXCHANGE CONTROL

Currency movements in and out of New Zealand are subject to certain controls. The *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* imposes restrictions on transfer of money to detect and deter money laundering and the financing of terrorism.

A cash transaction involving the transfer of currency (whether New Zealand or foreign that is in the form of notes or coins) of more than NZD10,000 must be reported to New Zealand Customs. This reporting requirement applies to cash transactions made within New Zealand as well.

In addition, a person taking more than NZD10,000 in currency into or out of New Zealand must report the transfer to a customs officer.

Generally there are no further restrictions on exchange flows, although in certain circumstances the approval of the Reserve Bank of New Zealand (RBNZ) may be required. The RBNZ is New Zealand's central bank and the bank of the New Zealand government. It is responsible for administering control over New Zealand's monetary system and its foreign exchange transactions.

EMPLOYMENT LAWS

TERMS AND CONDITIONS OF EMPLOYMENT

Terms and conditions of work performed by employees in New Zealand are governed by:

- Legislation governing employment terms and working conditions, including legislation regulating annual leave and other leave entitlements
- Collective agreements
- Individual employment agreements
- KiwiSaver

LEGISLATION

The main pieces of legislation are the *Employment Relations Act 2000* (which governs the relationship between employer and employees in a contractual relationship), the *Holidays Act 2003* (governing annual leave, sick leave and bereavement leave), the *Parental Leave and Employment Protection Act 1987* (governing parental leave), and *Health and Safety in Employment Act 1992* (governing workplace health and safety).

COLLECTIVE AGREEMENTS

Collective Agreements are agreements entered into between an employer and the workforce, or part of the workforce. Only registered unions and employers can bargain for collective agreements. The *Employment Relations Act* requires parties to bargain in good faith.

INDIVIDUAL EMPLOYMENT AGREEMENTS

Employees and employers may also be bound by an individual employment agreement, which by law is required to be in writing. A large proportion of the workforce is engaged under individual employment agreements.

Such agreements take different forms and/or contain different provisions depending on whether the employees are employed on a permanent full-time or part-time basis, a casual basis or under a fixed-term arrangement.

It is strongly recommended that you seek professional advice in this complex area.

KIWISAVER

KiwiSaver is a voluntary savings initiative established by the government in 2006. Employers are required to, among other things:

- Check whether new employees are eligible to join
- Check whether new employees should be automatically enrolled
- Provide a KiwiSaver employee information pack
- Automatically enroll all new employees who are eligible
- Deduct contributions at the correct rate and forward to the IRD

As of 1 April 2013, employers are required to contribute 3% of their employees' gross salary or wages.

TRIAL PERIODS

Employers are able to employ new employees (subject to certain rules) on a trial period of up to 90 days. This enables an employer to dismiss an employee during the trial period and the employee is not able to raise a personal grievance for unjustified dismissal (although they may raise a personal grievance on other grounds – for example discrimination).

REDUNDANCY COMPENSATION

There is no requirement in New Zealand for an employer to pay redundancy compensation. This is a matter of contract between the employer and employee.

TERMINATION OF EMPLOYMENT

Employment in New Zealand can only be terminated for cause and any termination must comply with the requirements set out in the *Employment Relations Act* and the applicable employment agreement.

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