

DOING BUSINESS IN NEW ZEALAND

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1. THE COUNTRY AT A GLANCE

1.1 Geography

New Zealand lies in the southwest Pacific Ocean and consists of two main islands and a number of smaller islands. The combined area of these islands is 268,000 square kilometres, which is similar to the size of Japan or the British Isles.

The main North and South Islands are separated by Cook Strait, which is relatively narrow. They lie on an axis running from northeast to southwest, except for the Northland Peninsula. The administrative boundaries of New Zealand extend from 33 degrees to 53 degrees south latitude, and from 162 degrees east to 173 degrees west longitude. In addition to the main and nearby islands, New Zealand also includes the following smaller inhabited outlying areas:

- The Chatham Islands, 850 kilometres east of Christchurch;
- Raoul Island in the Kermadec Group, 930 kilometres northeast of the Bay of Islands; and
- Campbell Island, 590 kilometres south of Stewart Island.

New Zealand has jurisdiction over the territories of Tokelau and the Ross Dependency in Antarctica.

1.2 Population

At the last census on 6 March 2001, the population of New Zealand was as follows:

Males	1 823 007
Females	1 914 273
Total Population	3 737 277

The Capital and seat of Government in New Zealand is the city of Wellington, situated at the southernmost point of the North Island. The largest city in the country is, however, Auckland situated upon an isthmus in the upper North Island. Approximate population figures for New Zealand's major urban areas are as follows:

Auckland	1 074 510
Wellington	339 747
Christchurch	334 107

Until the late 18th Century, New Zealand's population and culture was wholly Maori, of Polynesian origin. Since the major immigration waves of the 19th Century, especially from Britain, New Zealand's culture has largely reflected these British origins, although continued immigration throughout the 20th

Century from other Pacific Islands, Asia and many European countries has resulted in an ethnically diverse population.

In the 2001 census, the largest population group was comprised of New Zealanders of European origin (80%), with Maori the next largest group at 14.7%, Asian people at 6.6% and Pacific island people at 6.5%

2. VISITING

2.1 Travel

2.1.1 Visa requirements: Under New Zealand's immigration regulations, the requirement to obtain a visa to visit New Zealand varies according to the country of origin of the visitor.

Australian citizens or residents who hold a current resident return visa issued by the Government of Australia are not required to obtain either a resident's visa or a visitor's visa.

Citizens of countries with Visa Waiver agreements with New Zealand do not require a visitor's visa for visits of up to three months. A full list of countries is provided at <http://www.immigration.govt.nz/visit>.

British citizens and other British passport holders who produce evidence of the right to reside permanently in the United Kingdom may be allowed to stay for up to six months.

2.1.2 Airlines serving the country: Airlines which serve New Zealand include: Air New Zealand, Air Canada, Air Pacific, Air Tahiti Nui, Air Vanuatu, American Airlines, Ansett Australia, Britannica Airways, British Airways, Cathay Pacific, China Airlines, EVA Airways, Garuda Indonesia, Japan Airlines, KLM, Korean Air, Lan Chile, Lufthansa, Malaysia Airlines, Polynesian Airlines, Qantas, Royal Tongan Airlines, Singapore Airlines, Thai Airways, United Airlines.

2.1.3 Customs procedures: The New Zealand Customs Service provides advice for travellers to New Zealand at <http://www.customs.govt.nz/travellers/default.asp> Customs procedures are thorough but efficient and should not cause much delay.

2.2 Communications

2.2.1 Telephone: The country code for telephoning New Zealand without operator assistance is 0064. The city codes for the major cities of New Zealand are as follows:

Auckland	09
Christchurch	03
Dunedin	03

Wellington 04

2.2.2 Fax and e-mail availability: Fax and e-mail access is widely available throughout New Zealand.

2.2.3 Courier services: International courier companies serving New Zealand include DHL Worldwide Express and TNT

2.3 Currency

The New Zealand unit of currency is the dollar. It is freely floated against all major currencies.

2.4 Language

English is the everyday language spoken in New Zealand. Maori is the other official language of New Zealand. Many other languages are spoken by the various ethnic groups which make up New Zealand's multicultural population.

2.5 Time zone and business hours

One uniform time is kept throughout New Zealand. This is a time 12 hours ahead of co-ordinated universal time, and is named New Zealand Standard Time (NZST). It is an atomic standard, and is maintained by Measurement Standards Laboratory of Industrial Research Ltd, a Crown Research Institute. One hour of daylight saving, named New Zealand Daylight Time, which is 13 hours ahead of co-ordinated universal time, is observed during the summer months (October to March inclusive). Time in the Chatham Islands is 45 minutes ahead of that in New Zealand.

Business hours are kept between the hours of approximately 8:30am to 5:30pm. Shops are generally open on both Saturdays and Sundays in the larger centres.

2.6 Holidays

Public Holidays in New Zealand are:

New Year:	January 1 and 2
Waitangi Day:	February 6
Easter:	Friday & Monday of Easter weekend (dates vary)
Anzac Day:	April 25
Queen's Birthday:	First Monday in June
Labour Day:	Last Monday in October
Christmas Day:	25 December
Boxing Day:	26 December

Many businesses close for the whole Christmas and New Year period, for up to two weeks.

3. POLITICAL AND COMMERCIAL STRUCTURE

3.1 Political System

New Zealand is a parliamentary democracy based on the British "Westminster" system. It is a unicameral system with only one legislative body, the House of Representatives.

In New Zealand, the Executive Council consists of the Prime Minister and the Cabinet of Ministers selected by the Prime Minister, and the Caucus consists of Government Members of Parliament. The English Monarch is the reigning Monarch in New Zealand. It is a constitutional Monarchy with no real political power. However, the Governor-General who is the appointee of the Monarchy (upon the recommendation of Cabinet) has (in theory) a final veto on all laws passed. The position is, in practice, one of formality. Intervention would require a most extreme case; the Governor-General did not intervene on any occasion in the 20th century.

The House of Representatives is currently made up of 120 members of whom 67 are regional representatives [including six who are elected by the Maori population (Maori may be included on the Maori roll rather than general electoral roll at their option)] and 53 who are representative of the political party vote.

Politics throughout much of last century were dominated by two political parties, the National Party (traditionally akin to the Conservative Party in Britain) and the Labour Party.

From the 1996 General Election, the election of Members of Parliament has been by a system of proportional representation called Mixed Member Proportional (MMP). This has led to an increase in the number of smaller parties represented in Parliament.

3.2 Economic System

New Zealand's economic system is comprised of two sectors: private and public.

The private sector encompasses all business that is not owned or run by the Government. This grouping of business ranges from owner-operated small business to multi-national companies.

The public sector incorporates both profit-making and non-profit-making institutions. Government departments that perform a commercial activity have generally been corporatised or privatised. The regulatory allocation, distribution and stabilisation roles of the Government are performed by the non-profit sector of Government.

The financial and fiscal deficits are presented annually and a budget is tabled in Parliament each July. The budget includes data from the previous financial year plus proposed expenditure for the forthcoming year. The financial year for the Government in New Zealand now runs from July 1 to June 30.

The New Zealand economy underwent substantial structural reform during the 1980s and 1990s. There was an economic liberalisation of the New Zealand economy and deregulation in many areas.

3.3 Financial System

There has been rapid change in the financial sector since 1984, when direct controls on the financial sector were largely removed. In November 2001 there were 17 banks registered in New Zealand, only a few of which were wholly New Zealand-owned. Monetary policy is operated by New Zealand's central bank, the Reserve Bank of New Zealand. The bank also registers and supervises banks, manages the issue of note and coin and provides policy advice to the Treasurer and Minister of Finance.

The Treasury acts as the Government's advisor under the Public Finance Act 1989. Its function is to advise and inform the Government on economic and financial matters and to assist in the implementation of those policies.

3.4 Legal System

The New Zealand legal system is based on the English common law system which is found in most countries of the Commonwealth and which underlies the system in the United States. Many New Zealand statutes are based on English and/or Australian Acts but address particularly the New Zealand situation.

The court system is hierarchical, with the courts of first instance being the District Court for civil claims of less than \$200,000 and lesser criminal offences and the High Court for more substantial claims and serious criminal offences. The High Court also has a "Commercial List" which provides a fast track procedure for the resolution of commercial disputes.

There are rights of appeal from the District Court to the High Court, and from the High Court to the Court of Appeal. A final appeal from the Court of Appeal to the Privy Council in England is available upon the granting of leave by either Court. There is debate as to whether the jurisdiction of the Privy Council should continue in the future.

There are also many administrative tribunals with jurisdiction over matters arising within the scope of their respective empowering statutes, for example the Environment Court, the Land Valuation Tribunal and the Commerce Commission (controlling trade practices and business acquisitions). The decisions of such bodies are subject to judicial review by the High Court of New Zealand.

4. INTERNATIONAL LEGAL RELATIONSHIPS

4.1 International Organisations and Agreements

4.1.1 WTO/OECD: New Zealand is a member of several major international organisations including the World Trade Organisation

(WTO), Asia Pacific Economic Co-operation (APEC) and the Organisation for Economic Co-operation and Development (OECD).

4.1.2 CER: New Zealand and Australia have, under the Closer Economic Relations Agreement (CER), provided for closer and easier access to the markets of each country.

CER has seen:

- (a) the phased removal of duty rates between the two countries;
- (b) the equalisation of all factors creating an equality of trading opportunity (e.g., subsidies);
- (c) the removal of all performance-based export incentives; and
- (d) the elimination of all quantitative restrictions (this was brought about early as a result of negotiations between the Australian and New Zealand Government on amending the original agreement on trans-Tasman trade).

4.1.3 CEP: New Zealand and Singapore recently signed a Closer Economic Partnership (CEP) agreement, with the agreed objectives of strengthening the bilateral relationship, liberalising bilateral trade in goods and services and promoting bilateral investment.

4.1.4 Intellectual Property: In respect of intellectual property, New Zealand subscribes to a number of international treaties. Please refer to section 9.3.1 for this information.

4.2 Bilateral Agreements

New Zealand has entered into double tax agreements with 26 countries. These are: Australia, Belgium, Canada, China, Denmark, Fiji, Finland, France, Germany, India, Indonesia, Ireland, Italy, Japan, Malaysia, Netherlands, Norway, Philippines, Republic of Korea, Singapore, Sweden, Switzerland, Taiwan, Thailand, United Kingdom and the United States of America.

As a member of the OECD, New Zealand has therefore largely adopted the OECD model convention as the basis of its treaties.

4.3 International Disputes

The New Zealand legal system is equipped to resolve international disputes through the process of the superior courts and through arbitration procedures pursuant to the Arbitration Act 1996. This Act has adopted a model based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration.

The High Court Rules include provision for the "Commercial List", which operates as a fast-track procedure for the hearing of commercial disputes. In addition, the Arbitration Act 1996 is currently under review, with adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration appearing likely.

5. EXPORTING TO NEW ZEALAND

5.1 General Statistics

New Zealand imports raw materials for industry and a comprehensive range of products, including medical and pharmaceutical products, motor vehicles, equipment and machinery, petroleum products, chemicals, plastics, textiles and steel products.

New Zealand's imports are predominantly sourced from Australia, United States, Japan, United Kingdom and Asia.

Foreign Trade (Year ended November 2000 - NZ \$m)

Total Exports	28,565
Total Imports	31,202
Exports to USA	4,118
Imports from USA	5,259

5.2 New Zealand Tariffs

Import licensing has been removed and tariffs are now the principal form of protection for New Zealand producers. Tariff rates on all imports have been phasing down since 1988. Importers may obtain tariff relief by duty concessions if they can show that comparable goods are not manufactured or produced in New Zealand. All duties on goods between New Zealand and Australia, and between New Zealand and Singapore, have ceased in accordance with the provisions of the Closer Economic Relations (CER) Agreement and the Closer Economic Partnership Agreement (CEP) respectively.

5.3 Special Duties

Dumping is not a common problem in New Zealand but is regulated by the Commerce Act (in regard to goods of Australian origin) and the Dumping and Countervailing Duties Act 1988, administered by the Ministry of Commerce. Dumping duties on particular products are usually reviewed every two years. The investigation of dumping and subsidisation and the imposition of anti-dumping and countervailing duties is administered at the Ministry of Economic Development by the Trade Remedies Group.

The New Zealand Customs Service collects anti-dumping and countervailing duties and this is undertaken at the time imported goods are entered and cleared for Customs' purposes.

5.4 New Zealand Customs Procedures

Imports of goods must be passed by the Customs Service and dealt with according to tariff provisions.

On January 1, 1988, New Zealand adopted the international system of Harmonised Commodity Description Coding for tariffs, which has been substantially revised to reflect changes implemented by the World Customs Organisation on 1 January 2002. The customs tariff of New Zealand consists of a manual divided into two parts, one part dealing with the standard tariff and the other part dealing with concessions. The manual is a comprehensive list of every type of commodity that might possibly be imported. This, and other information about tariffs and customs regulations, is available from the New Zealand Customs Department.

Letters of credit and other funding arrangements can be established with any of the main trading banks in New Zealand. The principal trading banks include HSBC, ANZ Banking Group (New Zealand) Ltd, Bank of New Zealand, National Bank of New Zealand Ltd and Westpac Banking Corporation.

Pursuant to the Companies Act 1993, all companies which have a permanent place of business in New Zealand are required to register with the Companies Office and have a registered office in New Zealand to which all communications and notices may be addressed. There are no representative or agent requirements in New Zealand other than normal immigration and company law requirements.

5.5 New Zealand Import Tariffs, Import Restrictions

New Zealand's tariff system aims at providing a balance between the provision of protection for locally produced goods, meeting industry's needs for raw materials, components and finished goods, and allowing consumers a reasonable choice of goods.

An overseas investor wishing to know the tariff position for any goods should contact a licensed agent of the New Zealand Customs Service and ask for the goods to be classified.

5.6 Import Taxes

Import duties are payable on an ad valorem basis on the transaction value of certain products and raw materials imported into New Zealand, in particular items such as tobacco, liquor and oil.

Goods and services tax ("GST") is generally imposed on imports of goods into New Zealand. GST is discussed in more detail in Section 9.4.

Direct sales of goods to New Zealand are not usually taxable in New Zealand, although a non-resident withholding tax may become payable in certain very limited circumstances (for further details on Taxation, refer to Section 9.4).

5.7 Documentation Requirements

The usual import and shipping documentation is required, in the form of bills of lading and other commercial shipping invoices and documentation.

5.8 Local Agent Requirements

Refer to Section 9.1, Local Agents.

6. IMPORTING FROM NEW ZEALAND

Historically, agricultural products have formed the substantial part of New Zealand's exports. While meat and dairy products such as beef and lamb, cheese, butter and hides together with forestry products still form a large part of New Zealand's exports, the country also exports carpets, textiles, manufactured items and engineering products.

Over the past decade, New Zealand has developed closer trading ties with Australia pursuant to the Australia-New Zealand Closer Economic Relations Trade Agreement (CER). This agreement, executed in 1983, gradually enabled the elimination of all trade barriers between Australia and New Zealand by July 1, 1990 (for further details on CER, refer to Section 4, International Conventions).

More recently, New Zealand and Singapore signed a Closer Economic Partnership (CEP) agreement which has eliminated tariffs on goods traded between the countries.

New Zealand's historical export market was Britain until that country entered the European Economic Community. New Zealand's exports to Britain now form a reasonably small part of the country's total exports. The growing export markets for New Zealand are Australia, Japan and other Asian and Middle Eastern countries.

6.1 New Zealand Export Restrictions

The New Zealand Government places high priority on the expansion of export production. Permits are required for export from New Zealand for animals and animal products, arms and explosives, fertilisers, grain, potatoes, timber and timber products, metals, gold and currency.

6.2 United States Tariff Treatment

United States tariff treatment of New Zealand exports varies considerably according to the particular products concerned. In general terms, the impact of tariffs upon exports of agricultural products (in conjunction with other non-tariff measures) is very restrictive, particularly in respect of dairy products. In respect of industrial products, however, tariff duties imposed by the United States are, with certain exceptions, relatively low.

6.2.1 MFN: The "Most Favoured Nation" principal of Article 1 of GATT does apply as between New Zealand and the United States. The United States has in the past claimed certain limitations to New Zealand's status as a "Most Favoured Nation" pursuant to its Protocol of Provisional Application of the GATT Subsidies Code to New Zealand.

However, the Code also now applies as between New Zealand and the United States.

6.2.2 GSP: As developed countries, neither New Zealand nor the United States are beneficiaries of each others GSP Schemes.

6.2.3 US Antidumping/CVD Duties: The United States has granted the "material injury" test to New Zealand exports with effect from October 1, 1990. According to this test the United States will impose countervailing duties on New Zealand export products which have benefited from an export subsidy where a United States producer can demonstrate that the subsidised importation will cause material injury to a United States industry.

7. ESTABLISHING A BRANCH OFFICE

Foreign companies establishing a place of business in New Zealand are required to register as overseas companies. (For details of registration requirements refer to Section 8.5, Registration and Administration.)

Name approval is a prerequisite for registration. Overseas Investment Commission and Commerce Commission consent may be required depending on the circumstances (refer to Section 8.7, Purchase by Foreign Corporations of Business in New Zealand).

The documentation required for registration of an overseas company is described in Section 8.2, Investment Methods and Vehicles.

Overseas companies must apply for registration pursuant to the Companies Act within 10 working days of commencing to carry on business in New Zealand. However, registration can be effected at any time prior to or after the commencement of business, subject always to the prescribed penalties specified in the Companies Act.

8. INVESTING IN NEW ZEALAND

8.1 Overseas Investment Commission

The Government's policy is to encourage overseas investment in New Zealand which will provide net benefits to New Zealand in the form of:

- (a) added competition, lower prices, greater efficiency;
- (b) new technology, managerial or technical skills;
- (c) development of new export markets or increased market access;
- (d) positive contribution to balance of payments;
- (e) creation of new job opportunities; and
- (f) promotion of New Zealand's economic growth.

As a result of this, there are no maximum ownership level restrictions imposed upon overseas purchasers. There are limited exceptions to this general principle where Government approval must be obtained through the Overseas Investment Commission to foreign investment in New Zealand.

The Overseas Investment Regulations provide a vehicle for monitoring the nature and extent of significant new and existing overseas investment in New Zealand and investment in specified businesses.

Overseas Investment Commission consent is required for foreign investment in any of the following categories:

- (a) the commencement of business in New Zealand where the total expenditure to be incurred in setting up the business exceeds NZ \$50 million;
- (b) the acquisition or control of 25% or more of any class of shares or voting power in a company where the consideration for the transfer or the value of the assets of the issuer of those shares (as determined in the latest accounts) exceeds NZ \$50 million;
- (c) the acquisition of the assets of a business where the total consideration paid or payable for the assets exceeds NZ \$50 million; or
- (d) the issue by a New Zealand company (in certain circumstances) of shares to an overseas person, if the total consideration paid or payable exceeds NZ \$50 million.

Overseas Investment Commission consent is also required by overseas persons wishing to hold or acquire a fishing quota, an interest in quota, provisional catch history or annual catch entitlement.

Consent is required from the Minister administering overseas investments and the Minister of Lands for any transactions that involve the acquisition of certain land in New Zealand by an overseas person where the effect of the transaction results in the direct acquisition of an interest in that land by the overseas person, or where the overseas person acquires certain amounts of specified securities or rights or interests in specified securities of any person that owns or controls, directly or indirectly, any interest in that land. The land affected by this includes the purchase or the acquiring of a leasehold interest of farm land, offshore islands, certain land that adjoins the foreshore, lakes or reserves, land that is designated as being of historical or archaeological interest and land that exceeds 5 hectares in area. Farm land or farm land securities must be offered for sale to persons who are not overseas person before consent may be given for their purchase by an overseas person.

The consent of the Commerce Commission is required for certain business acquisitions (see Section 8.7, Purchase by Foreign Corporations of Business in New Zealand).

An overseas person is an overseas company or individual not ordinarily resident in New Zealand or any New Zealand company in which overseas persons hold in aggregate 25% or more of any class of shares or have the right to exercise or control the exercise of 25% or more of the voting power.

The information required by the Overseas Investment Commission to determine whether consent will be made available will vary depending on whether the overseas person is commencing business, increasing its shareholding in a New Zealand business, proposing a takeover, acquiring assets or extending existing activities.

There are restrictions on overseas investment in the sense that approved investments are more strictly monitored and controlled both at national level and within specific industry sectors. Incentives are available for investments in activities that encourage export expansion, regional development and employment.

Incentives for export expansion are generally limited to those that involve the Government providing a service to potential exporters.

The Export Guarantee Office is a non-profit organisation which promotes a wide range of services. These include credit insurance, bank guarantees and advice and information on international markets.

The Ministry of Foreign Affairs and Trade encourages the development of links with potential exporting nations through the establishment and running of trade missions.

The government agency, Trade New Zealand, provides leadership and support to enable New Zealand to be a real force in the global economy. It facilitates trade, international investments and the exchange of knowledge into and out of New Zealand.

The Department of Labour administers subsidies for job creation programs as well as providing placement and employment advisory services along with training subsidies.

There are restrictions on natural resources extraction and various consents will be required. For mining, a permit required under the Crown Minerals Act 1991 and from the Minister of Conservation if the land is administered by it. It may also be necessary to get resource consents for land or water use from the relevant District and/or Regional Council. Delays can occur in obtaining the necessary planning consents and ministerial consents to carry out mining or other related activities.

8.2 Investment Methods and Vehicles

Investors acquiring assets rather than shares avoid taking over the liabilities of an existing business. Investors acquiring shares acquire the business inclusive of all liabilities and are obliged to rely on warranties for protection against undisclosed

liabilities. Asset acquisitions are usually effected through a New Zealand subsidiary.

An overseas company establishing a place of business within New Zealand must apply for registration as an overseas company within 10 working days of commencing to carry on business in New Zealand. Name approval must be obtained prior to registration. Registration is effected by delivering to the Registrar of Companies:

- (a) a copy of the certificate of incorporation of the foreign company which is certified correct by an officer of the company authorised to do so and a declaration made before a notary public;
- (b) a certified copy of the constitutional documents of the company (memorandum and articles of association);
- (c) a list of directors and secretary of the company containing required particulars (including full names and residential addresses);
- (d) the name and address of one or more persons resident in New Zealand authorised to accept service on behalf of the company;
- (e) the name of the overseas company and the notice of name approval; and
- (f) the full address of the place of business in New Zealand of the company (if more than one, the full address of the principal place of business in New Zealand).

Overseas companies registered in New Zealand must comply with certain local registry obligations on an ongoing basis and must file copies of their accounts (including separate audited accounts for New Zealand as if the New Zealand business were conducted by a New Zealand subsidiary).

Deregistration is a simple process and can be effected by registration and advertisement three months before the company ceases to have a place of business in New Zealand.

8.3 Subsidiaries and Joint Ventures

The registration of a New Zealand subsidiary is a relatively simple matter. Name approval must be obtained and registration of incorporation documentation effected. A New Zealand subsidiary must have an address for service in New Zealand but is not required to have New Zealand directors. The subsidiary is, however, a non-exempt private company for audit purposes and is therefore required to complete and file audited accounts annually.

A New Zealand company may have only one shareholder and one director.

Joint ventures may be undertaken through a joint venture company (of course, other structures are also available). Joint ventures are normally governed by a joint venture agreement. An incorporated joint venture involves the establishment of a private limited liability company with a constitution reflecting the terms of the joint venture arrangement.

8.4 Corporate Types

A company may have one or more directors. In the case of a foreign controlled company it must complete and file audited accounts annually.

Companies can be incorporated either with all the rights, powers and privileges of a natural person or with limited objectives.

A company may, by way of a resolution passed by means of an entry in its minute book signed in accordance with the Companies Act requirements, do everything which is required to be done by a company by way of shareholders resolution at a meeting. This convenient facility avoids the necessity for annual and extraordinary general meetings of companies.

Generally, foreign equity ownership is not restricted and joint venturing with local New Zealand companies is not required. Participation in the news media is one of the few notable prohibitions on foreign ownership.

8.5 Registration and Administration

The following fees are presently payable to the Registrar of Companies on registration:

Overseas company NZ \$100.00
New Zealand subsidiary NZ \$100.00

The annual return fee is \$30.00 and a late filing penalty fee of \$100.00 applies. These fees are inclusive of goods and services tax.

Where speed is of the essence, a shelf company will normally be acquired. To adapt this, the officers of the company need to be changed and the shares transferred. Later the capital can be increased, the name changed and the constitutional documents modified to suit the requirements of the particular circumstances.

A name approval is a prerequisite to registration. It usually takes only a matter of a few days to obtain approval of a preferred company name. Alternatively, to avoid delays, a shelf company can be used to overcome this requirement. Registration/ incorporation can usually be effected once a name approval is available subject:

- (a) in the case of an overseas company to receipt of the required documentation in the appropriate form from overseas; and

- (b) in the case of a New Zealand subsidiary to receipt of the required incorporation documentation from overseas duly executed. To expedite matters of necessity, Powers of Attorney can be used.

The allocation of Inland Revenue Department and Goods and Services Tax numbers can sometimes delay the commencement of business operations. In the case of a New Zealand subsidiary, applications cannot be lodged prior to incorporation. These allocations are increasingly becoming available without delay.

There are no onerous administrative company regulations. Obligations include the completion and filing of audited accounts annually and the completion of annual returns (in the case of New Zealand subsidiaries).

There are, however, other statutory obligations including the filing of various tax returns on an ongoing basis.

In the case of an overseas company, registration must be applied for within 10 working days of commencing to carry on of a business in New Zealand. In the case of a New Zealand registered company, incorporation should be effected as soon as possible to minimise the necessity for pre-incorporation contracts. Limited liability is only conferred by incorporation under the Companies Act, and a company is not capable of exercising the functions of an incorporated company prior to the date of incorporation stated in the certificate of incorporation.

8.6 Overseas Companies Doing Business in New Zealand

Before an overseas company can carry on business in New Zealand it must reserve its name with the Companies Office. Registration of an overseas company is then required within 10 working days of carrying on business within New Zealand. Failure to reserve an overseas company's name or to register within the prescribed time renders the company and every officer or agent of the company who knowingly and wilfully authorises or permits the default to a fine not exceeding \$10,000.00.

There is no precise definition of what constitutes the carrying on of business in New Zealand. However, it does include establishing or using a share transfer office or share registration office in New Zealand, and administering, managing or dealing with property in New Zealand through its employees or an agent or any other manner.

Failure to register does not render it impossible for a company to secure government contracts, hire local labour, open bank accounts, import equipment, obtain work permits, import materials or export materials. However, overseas companies carrying on business in New Zealand usually have a place of business in New Zealand and, accordingly, register under the Companies Act.

There are no financing restrictions imposed on foreign-owned companies.

Inter-company agreements, such as licenses, rental agreements, technical assistance agreements, management contracts, leases and the like, are permitted although agreements with tax avoidance objectives may be ineffective from a taxation point of view.

8.7 Purchase by Foreign Corporations of Business in New Zealand

As a general rule, foreign corporations can acquire local companies subject to Overseas Investment Commission consent where necessary (refer to Section 8.1, Overseas Investment Commission).

As a general rule, foreign corporations may acquire the assets of local companies subject to Overseas Investment Commission consent where necessary (refer to Section 8.1, Overseas Investment Commission).

There are few areas where foreign investment is prohibited. There are areas where foreign investment is controlled either by reference to the type of industry or by reference to the amount of the investment. These controls are exercised by the:

- (a) Overseas Investment Commission in the circumstances set out in Section 8.1, Overseas Investment Commission; and
- (b) Commerce Commission for certain business acquisitions.

Commerce Commission clearance or authorisation is required in the case of a business acquisition which will have the effect of substantially lessening competition in a market. The onus is on the parties to an acquisition to notify the Commission, seeking a clearance or authorisation. If prior clearance or authorisation to an acquisition is not obtained and it causes a substantial lessening of competition in that market, then severe penalties may be imposed.

No stamp duty is payable on the transfer of shares, assets, including goodwill, or commercial land.

9. SPECIAL ISSUES IN DOING BUSINESS IN NEW ZEALAND

9.1 Local Agents

Goods are typically imported and distributed in New Zealand by informally appointed agents who are purchasers and on-sellers of products. These agreements are often informal letters of appointment which are normally capable of termination by either party on 1-3 months' notice. If a more formal arrangement is contemplated, distribution agreements are used, typically with a 2-5 year term of exclusivity, subject to continuing performance covenants. Agency arrangements are usually capable of termination for any reason, while distribution agreements will usually only be capable of termination by the foreign person on default by the distributor.

In general, commission agents are only used for procuring importation of high value goods directly from the manufacturer, with a commission being payable

from sales. These arrangements do not give the commission agent any rights as an employee under local law. However, commission sales arrangements for the on-sale of goods and services in New Zealand (e.g., insurance, real estate, motor vehicles) are common. The rights of the commission agent and the obligations of the New Zealand employer would depend upon the nature of the relationship.

Foreign companies are subject to income tax on sales where the income from those sales has a source in New Zealand. If the foreign company is resident in a country with which New Zealand has a double tax agreement and the company does not have a permanent establishment in New Zealand, the income will not be subject to double taxation.

There are no regulations or controls upon the appointment by foreign persons of commission agents or distributors in terms of the relationship between such parties.

The appointment of an agent, whether as a re-seller or as a commission agent, will be subject to the terms of any agreement existing between the parties. In the absence of agreement, the law of agency will apply if New Zealand law is applicable.

There are no regulations or controls as to the rates of commission payable to agents.

9.2 Distribution and Franchise

The provisions of the Commerce Act 1986 apply to any agency or distribution agreement or understanding which has the purpose or effect of substantially lessening competition in a market.

Subject to provisions of the Commerce Act relating to persons with a substantial degree of power in a market taking advantage of that power, there are no regulations or controls upon termination. Most agreements of this type include the right of the distributor to terminate in the event of breach of contract on the part of the foreign person, or liquidation or receivership of the foreign person.

There is no law in New Zealand especially formulated to regulate franchise businesses. The law of contract and the provisions of the Fair Trading Act 1986 relating to misleading and deceptive conduct will apply to appointments of franchisers and franchisees. Franchising is a well-known and successful method of doing business in New Zealand.

9.3 Intellectual Property Protection

Trade Marks

The Trade Marks Act 1953 provides for registration of trade marks in one of the 45 classes for goods and services corresponding to the International Classification which is adopted by New Zealand. Trade marks, service marks, collective marks, and certification marks are able to be registered in New Zealand. The definition of trade mark in the Trade Marks Act 1953 includes any

sign capable of being registered graphically and capable of distinguishing the goods or services of one person from those of another person. Trade marks may also be registered upon evidence of acquired distinctiveness. The definition of sign has recently been expanded to include smells, sounds and tastes, so long as these are capable of being represented "graphically". For smells and sounds, this is likely to include the provision of appropriate descriptive text and chemical equations. Marks which are not able to be registered include descriptive or deceptive words, family names or geographical names, and scandalous or immoral trade marks.

Trade mark registration is valid for a term of seven years, measured from the date of application for registration. Thereafter, registration may be renewed in perpetuity in successive 14 year periods. Use is not a prerequisite to registration, although a trade mark can be removed from the register for non-use during a continuous period of five years.

Trade Mark legislation is currently under review in New Zealand. The Trade Marks Bill has recently been through the Commerce Select Committee process and is expected to come into force some time in 2003. The Bill contains a number of notable changes from the current Act including the introduction of multiple class applications, a 10 year term for trade mark registration, reduction of the non-use period relevant to removal of a trade mark to 3 years, and removal of the prohibition on comparative advertising.

Copyright

The Copyright Act 1994 protects against the copying of works including original artistic, literary, dramatic or musical works (all in various forms). Copyright will subsist in any work involving the exercise of original skill or effort without judgement as to aesthetic merit or artistic quality. The right attaches to the work itself and not to the concept, idea or creative process, so that the protected work must be an identifiable form of the work. There is no requirement for registration. The period of protection is generally the life of the author plus 50 years, or 25 or 16 years for industrially applied works, depending on the nature of the work.

In 2001, the Ministry of Economic Development ("MED") released a discussion paper seeking submissions on key copyright issues which arise from the use of digital technologies and the internet. Although the consensus view from the submissions was that statutory change is necessary, views on what form this change should take were divided. The MED has indicated further discussion and consultation is required, although the timing for this discussion and consultation is yet to be finalised.

2001 also saw the MED release a discussion paper calling for submissions on Performers' Rights. Although submissions have been received on this issue and will be considered further, the MED's current focus is on digital copyright issues.

Patents

The Patents Act 1953 provides a system of protection by registration of patents for an "invention" defined as "any manner of new manufacture and any new method or process." The invention must be "new", that is, not publicly or privately disclosed in New Zealand (i.e., local novelty) and non-obvious as at the priority date. International conventions can be used to file an application in New Zealand within 12 months of the date of a first filing in any overseas country. This obtains a priority date of the first filed foreign application. All patent applications are examined before acceptance. Grant of a patent usually takes 12-18 months from filing of the complete specification. The period of protection is initially 4 years with four rights of renewal of 3 years (subject to payment of renewal fees) up to a maximum term of 20 years. Extensions of term are available in extraordinary circumstances.

As with the Trade Marks Act, a substantial overhaul of the Patents Act 1953 is also in progress. The MED has released a discussion paper which identifies a number of key issues for discussion including:

- The definition of "invention";
- The stringency of the patent examination procedure;
- The patentability of computer software and business methods;
- The granting of patents for plants and animals, and for inventions involving genetic material and general modification; and
- Cultural issues, in particular issues relating to Maori.

The date for lodging of submissions closes in July 2002, although a timeframe for implementation of any change is still being finalised.

Plant Variety Rights

Plant Variety Rights ("PVR") are granted in New Zealand under the Plant Variety Rights Act 1987. PVR provide plant owners with the exclusive right to commercially reproduce fruit, flowers or other products derived from the "protected variety" for a period of 20 years or 23 years for woody plants or rootstocks. Since the Plant Variety Rights Act was passed there have been a number of significant advances in plant breeding techniques both in local industry and internationally. In light of these developments and concerns as to the adequacy of the current legislation, the MED has released a discussion paper on issues relation to PVR. The date for lodging of submissions closes in July 2002, although a timeframe for implementation of any change is still being finalised.

Designs

The Designs Act 1953 provides protection for features of shape, configuration and pattern applied to an article by an industrial process. The features of the design cannot be those dictated solely by function. In view of the overlap with protection under the Copyright Act 1994, design protection is not commonly

sought in New Zealand. The period of protection is 5 years with rights of renewal (subject to payment of renewal fees) up to a maximum 15-year term.

Confidential Information

The common law provides for protection of know-how when the following elements are present:

- (a) the information sought to be protected, is of a confidential nature; and
- (b) the information is communicated in circumstances importing an obligation of confidence.

If these two elements are present, then unauthorised disclosure or use of the information is actionable.

Know-how and confidential information may also be protected in some circumstances by other common law actions, such as breach of fiduciary duty or by contractual restraints of trade.

Passing Off and the Fair Trading Act 1986

The common law of New Zealand includes the tort of "passing off", that is, preventing the goods or services of a person being passed off as the goods or services of another party. In addition, the Fair Trading Act 1986 provides protection against misleading and deceptive conduct and false representations with respect to the supply of goods or services.

9.3.1 International Treaties: New Zealand subscribes to the following International Treaties:

- (a) **Trade Marks:** The Paris Convention (Lisbon version)
- (b) **Copyright:** The Berne Convention, The Universal Copyright Convention
- (c) **Patents:** The Paris Convention, Patent Co-operation Treaty
- (d) **Designs:** The Paris Convention.
- (e) **Plant Variety Rights:** International Convention for the Protection of New Varieties of Plants (Paris Text)
- (f) **Other:**
Convention Establishing the World Intellectual Property Organisation (WIPO).

Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms

International Convention for the Protection of New Varieties of Plants (Paris text).

Paris Convention For the Protection of Industrial Property (Stockholm text).

Universal Copyright Convention (Geneva text)

World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

There is no body in New Zealand from which approval must be sought before applications for intellectual property rights are filed. Procedures under the Trade Marks Act 1953, the Patents Act 1953, and the Designs Act 1953 are all regulated by the Intellectual Property Office of New Zealand.

There are no notarisation requirements for the filing of applications for trade marks patents or designs. The only requirement at the time of filing is the appointment of a New Zealand address for service, usually the patent attorney or solicitor representing the applicant. Such an appointment is executed by an authorised officer of the applicant.

There are few regulatory guidelines for licensees of intellectual property rights. Proprietors are free (with some exceptions for Patents) to negotiate the terms of any agreement. There are relevant provisions in the Trade Marks Act concerning appointment of licensees as registered users, and the Patents Act includes provisions relating to the licensed use of patents. There are also compulsory license provisions within the Patents Act. In all other respects, the law of contract will be applicable.

There are requirements relating to the license, manufacture and use of certain products in New Zealand, such as food, drugs, chemicals and toxic substances. These generally require a license to be granted by an authorised regulatory body before products can be exploited in the New Zealand market.

There are no statutory or regulatory controls relating to royalties or remission of same from New Zealand, other than deduction of non-resident withholding tax.

The provisions of the Commerce Act 1986 apply to all trade practices which have the purpose or effect of substantially lessening competition in a market, or fix prices, or relate to the use of a dominant position in a market. There is an exemption for contracts or arrangements concerning the exploitation or enforcement of statutory intellectual property rights where such provisions might otherwise be anti-competitive.

Informal arrangements between foreign corporations and wholly-owned subsidiaries are common. More formal arrangements include service agreements, license arrangements (where applicable), and other debt and equity instruments.

9.4 Taxation

9.4.1 Income Taxes:

Income Tax Generally

New Zealand income tax is imposed on the world-wide income (subject to certain exceptions) of New Zealand residents (including individuals, companies and other entities). It is also imposed on the income of non-residents to the extent that that income has a New Zealand source (although the liability may be reduced by operation on an applicable double tax agreement (discussed further below) or foreign tax credit provisions). "Income" includes most receipts on revenue account as well as some capital gains.

Tax Residence - Individuals

Individuals are resident in New Zealand for income tax purposes if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode overseas. Moreover, an individual is resident if he/she spends more than 183 days in aggregate in any contiguous 12 months period in New Zealand, regardless of whether or not he/she has a permanent place of abode in New Zealand. If an individual is resident in New Zealand and also resident under the domestic laws of the country with which New Zealand has consummated a double tax agreement (discussed further below), the "tie-breaker" provision in that agreement will determine where the person is to be considered resident for the purposes of applying the agreement for the relief of double taxation.

Tax Residence – Companies

A company is automatically resident in New Zealand for income tax purposes if it is incorporated in New Zealand. A company not incorporated in New Zealand is resident in New Zealand if its head office, centre of management, or the place from which the directors exercise control of the company, is situated in New Zealand. Again, tie breaker provisions apply for the purpose of double tax agreements.

Income From Employment and Self-Employment

All forms of employment income are taxable on a gross basis (i.e. no deductions are allowed in respect of the derivation of such income). The current marginal tax rate for individuals for income (including personal services income) up to \$38,000 per annum is 19.5%, for income between \$38,000 and \$60,000, 33%, and income in excess of \$60,000, 39%. These rates compare to a flat 33% rate on all income of companies and trustees.

Employers withhold tax from salary and wage payments under the Pay As You Earn ("PAYE") system. The amount withheld is calculated by reference to the employee's annualised effective tax rate having regard to the above marginal rates. Any tax that is withheld is credited against the employee's terminal income tax liability for the relevant income year.

Self-employed individuals pay tax on a net basis (i.e they are allowed deductions for expenditure incurred in deriving their income) at the above rates. They are also generally subject to the provisional tax system. Provisional tax is payable in three instalments throughout the year. This is based either on the income tax paid for the previous year with an uplift, or on a current year estimate. Any overpayment or underpayment of provisional tax is corrected later when the taxpayer files a terminal tax return for the relevant tax year.

Because the top personal marginal tax rate (39% on income exceeding \$60,000 per annum) exceeds the rate for companies and trusts, there is an incentive for self-employed persons to "interpose" such an entity between themselves and their clients. An anti-avoidance rule exists, however, which in some circumstances requires the income of such an interposed entity to be "attributed" to the relevant self-employed person and included within his/her taxable income.

Company Taxation

Companies (including New Zealand subsidiaries of foreign companies) and other business taxpayers are taxed on their net income after allowable deductions. The current company tax rate is 33%. The provisional tax system described above also applies to companies.

Deductions

As noted above, deductions are not permitted for expenditure incurred in producing income from employment. In other cases current year deductions are allowed for expenditure or losses which meet the statutory test of either being incurred in gaining or producing assessable income, or necessarily incurred in carrying on a business for such purposes. Most companies are allowed a deduction for interest without meeting this test. Deductions are not allowed for expenditure or losses on capital.

Depreciation may be claimed in respect of the capital assets of a business taxpayer, in calculating the taxpayer's income tax liability. For tax purposes, depreciation is calculated in accordance with prescribed scale rates determined by the Commissioner of Inland Revenue and applied on a diminishing value or straight-line basis.

Dividends

The term "dividend" is widely defined and includes most benefits provided by a company to a shareholder or associate thereof. A system of dividend imputation exists to minimise the imposition of secondary

taxation of shareholders in receipt of dividends, where tax has been paid on operating profits at company level. This system allows companies to pass on the benefit of income tax paid at company level as credits attached to dividends distributed to shareholders. The credits can be used by resident shareholders to offset their income tax liabilities (including the liability in respect of the dividend paid). Imputation credits attached to dividends paid to one company by another can be used to offset the recipient company's tax liability and credited to that company's imputation credit account for subsequent distribution to the recipient company's shareholders.

Non-resident shareholders in receipt of an imputed dividend may enjoy a supplementary dividend under the foreign investor tax credit ("FITC") regime. This offsets the impost of non-resident withholding tax on the dividend.

Most inter-company dividends are taxable. However, those received by one member of a wholly owned group from another, and those received by a New Zealand company from a foreign company, are exempt. Despite the existence of the latter exemption, a special dividend withholding payment ("DWP") may be deducted and paid by a New Zealand company (essentially as a proxy for the ultimate individual resident shareholders in that company) upon receipt of a foreign-sourced dividend. This DWP liability may be reduced to the extent of foreign tax paid by the company paying the dividends (under the underlying foreign tax credit regime), or to the extent the recipient company is owned by non-residents (under the conduit tax regime). Any DWP payable gives rise to DWP credits which, like imputation credits, can be later used to offset the tax payable by shareholders when the New Zealand resident company makes a distribution.

Withholding Tax

Subject to certain exemptions, resident withholding tax is imposed on interest and dividend income paid by one resident to another unless the recipient holds a valid certificate of exemption. The rate of deduction is 19.5% on interest paid to individuals, 33% on interest paid to companies and 33% on all dividends, (although in the case of individuals higher rates may apply if elected by the recipient, or if the recipient fails to provide a tax file number to the payer) and the amount deducted is credited against the payee's residual income tax liability for the year.

Dividends, interest and royalties paid by New Zealand residents to non-residents are subject to non-resident withholding tax ("NRWT"). The rate of NRWT is 30% in respect of dividends (other than fully imputed non-cash dividends, on which the rate is 0%, and fully imputed or DWP credited cash dividends, in which case it is 15%) and 15% in respect of interest and royalties. As noted above, to the extent that the dividends carry imputation credits, the FITC regime may reduce or eliminate NRWT. Further, NRWT is reduced by virtue of most double

tax agreements to 15% in respect of dividends and 10% in respect of interests and royalties.

NRWT on interest may be replaced with a 2% "approved issuer levy" ("AIL"), payable by the borrower. The AIL regime requires both registration of the borrower as an approved issuer, and registration of the loan as a registered security. The regime cannot be used where borrower and lender are associated persons.

Various other withholdings are required from payments such as directors fees, honoraria, salesperson's commission, and non-resident contractor's fees.

Branch Taxation

New Zealand branch operations are liable to income tax on branch profits at the rate of 33% (unless New Zealand has a double tax agreement with the jurisdiction in which head office is located, and the New Zealand branch is *not* a "permanent establishment" for the purposes of that agreement). As with other business taxpayers, branches are taxed on their net income, after allowable deductions. Any loss on expenditure deducted must be directly attributable to the branch operations. Income tax paid by branches is a final tax and no withholding tax is payable on subsequent repatriation of the tax-paid profit overseas. NRWT will, however, still be imposed on the payment of royalties (broadly defined under the New Zealand legislation), and NRWT or AIL on interest, by a branch operation to non-residents.

Taxation of Certain Offshore Investments of New Zealand Residents

Under the Controlled Foreign Company ("CFC") regime, certain investments by New Zealand residents in foreign companies suffer income tax, even if no dividends or other income are actually remitted to the New Zealand resident. Thus, such investments are taxed on an unrealised basis. The CFC regime applies where five or fewer New Zealand residents directly or indirectly control more than 50% of a foreign company or other entity, or if a single New Zealand resident controls 40% of such a company or other entity and no non-resident controls the same or a greater percentage.

Under a similar regime, income tax is imposed on foreign investment fund ("FIF") interests held by New Zealand residents, regardless of the level of control held by the New Zealand resident.

Exemptions from both the CFC and FIF regimes are available in respect of investments in certain "high tax" jurisdictions (currently US, UK, Germany, Canada, Australia, Japan and Norway).

Tax on Capital Gains

While there is no general capital gains tax in New Zealand, gross (taxable) income includes amounts derived from certain transactions

which would be taxed as capital gains in other jurisdictions. These transactions include the following:

- (a) Profits from the sale of land in certain circumstances;
- (b) Profits from the sale of any personal property acquired with the purpose of sale or pursuant to a profit-making scheme;
- (c) Certain royalty payments;
- (d) Gains from any "financial arrangements" under the accrual regime; and
- (e) Certain gains brought to tax under the FIF and CFC regimes discussed above.

Thin Capitalisation

Where either a branch or a New Zealand resident subsidiary owned by non-New Zealand residents is debt funded (whether by associated or non-associated party debt, and whether from onshore or offshore) New Zealand's thin capitalisation regime must be taken into account. Under this regime, a branch or New Zealand resident subsidiary will be denied a deduction for interest to the extent that its ratio of debt to assets exceeds 75%, and 110% of the branch or subsidiary's world-wide debt to asset ratio.

Transfer Pricing

New Zealand has a comprehensive transfer pricing regime dealing with transactions between associated parties. The objective of the transfer pricing régime is to prevent New Zealand tax-paying entities reducing income by inflating deductions through non-arm's length transactions with non-resident associates.

The Treaty Network

New Zealand has entered into double tax agreements ("DTAs") with 28 trading partners. The DTAs are designed to remove the double taxation (i.e. tax in two jurisdictions in respect of the same income) which would, in their absence, be suffered by New Zealand residents investing overseas, and non-residents investing in New Zealand. DTAs have been entered into with Australia, Belgium, Canada, China, Denmark, Fiji, Finland, France, Germany, India, Indonesia, Ireland, Italy, Japan, Malaysia, Netherlands, Norway, Philippines, Republic of Korea, Russian Federation (not yet in force), Singapore, South Africa (not yet in force), Sweden, Switzerland, Taiwan, Thailand, United Kingdom and the United States of America.

As a member of the OECD, New Zealand has adopted the OECD Model Convention as the basis of its DTAs.

9.4.2 Goods and Services Tax ("GST"):

GST is a value added tax imposed on supplies of goods and services by a GST registered person. The rate of GST is generally 12.5% of the value of a supply. A supplier of goods and/or services must be registered for GST if the annualised value of taxable supplies made by that supplier exceeds or is likely to exceed \$40,000.

GST charged by registered persons on supplies of goods on services is known as "output tax". A registered person reduces output tax charged on supplies made in a taxable period by GST paid by the registered person in the course of making those supplies ("input tax"). The net amount is paid to Inland Revenue or claimed as a refund.

Some supplies, most importantly supplies of financial services, are exempt from GST. In addition, certain supplies (including sales of businesses as going concerns) are zero-rated (i.e. GST is reduced to 0%). The main difference between exempt and zero-rated supplies is that a registered person making zero-rated supplies may claim input tax credits for tax paid in the course of making those supplies, whereas a maker of exempt supplies may not.

GST returns must be filed every 1, 2 or 6 months depending on the level of turnover of the business.

9.4.3 Other Taxes:

Fringe Benefit Tax ("FBT") is payable by employers on the value of most non-cash benefits provided to their employees, e.g., motor vehicles, low interest loans. The FBT rate depends on the marginal tax rate of the employees.

Under New Zealand's universal no-fault accident compensation regime, levies are charged to employers, the rate depending on the nature of the employer's business activity. Self-employed persons also pay these levies.

New Zealand also has a gift duty regime. Gift duty is payable on all property, wherever situated, to the extent it is disposed of for less than adequate consideration by an individual donor domiciled in New Zealand at the date of the gift, or a body corporate donor incorporated in New Zealand. Gift duty is also payable on property situated in New Zealand, to the extent it is disposed of for less than adequate consideration by an individual donor not domiciled in New Zealand or a body corporate donor not incorporated in New Zealand. Gift duty applies only to gifts made by a donor in excess of \$27,000 in any 12 month period. In addition, there are exemptions for some dispositions, including those for the benefit of a charity, and some within a family.

9.5 Foreign Exchange and Currency Control

Over the last 15 years, exchange controls in New Zealand have been relaxed and the foreign exchange market deregulated. As a result, there is no statutory requirement in New Zealand requiring dealers in foreign exchange and foreign exchange products to be registered.

However, foreign exchange dealers will be financial institutions for the purposes of the Financial Transactions Reporting Act 1996.

That Act imposes an obligation on financial institutions to report suspicious transactions to the Commissioner of Police. A suspicious transaction is one where any person conducts or seeks to conduct any transaction through a financial institution and the financial institution has reasonable grounds to suspect that the transaction is or may be relevant to the investigation or prosecution of any person for a money laundering offence. As a general rule, a suspicious transaction will be a transaction which is inconsistent with a customer's known, legitimate business or personal activities or the normal business for that type of customer.

The Act also imposes reporting obligations on individuals who arrive or leave New Zealand with cash (in any currency) in excess of NZ\$10,000. Where the cash is in a foreign denomination, the amount of the cash shall be taken to be the equivalent in New Zealand currency calculated at the rate of exchange on the date of the determination.

9.6 Labour

9.6.1 The Employment Relations Act ("ERA") came into force on 2 October 2000. It heralded a new "ERA" in workplace relations in New Zealand. Given that the philosophy that underlies the legislation is substantially different to that of the Employment Contracts Act 1991 (repealed) and that there is no ability to contract out of the provisions of the ERA, some employers have had to rapidly adjust the way they approach workplace relations to ensure that they adhere to the new concepts under the ERA.

9.6.2 A key objective of the ERA is to promote unions and collective bargaining. Consistent with this objective, the ERA specifically recognises unions as the only lawful representative of employees' collective interests. The ERA entitles unions to represent their members in relation to any matter involving their collective interests, and it also allows unions (and other representatives) to represent employees in relation to their individual rights (for example, unions can represent employees at mediation and in court actions), provided that they have the employee's authorisation.

9.6.3 The main new concepts are:

- (a) The need for "good faith" in all employment relationships – existing and new.

- (b) Employment arrangements entered into after 2 October 2000 are known as employment **relationships** and employment **agreements** (as opposed to employment **contracts**).
- (c) The Employment Relations Authority has have a key role in investigating "employment problems". It may call for evidence or information from any person and follow whatever procedure it considers appropriate. It has very wide powers to grant substantial remedies (including injunctions).
- (d) A major focus is on mediation, and in many instances, it is almost mandatory to mediate.
- (e) Unions have very wide powers– only employers and unions can negotiate and settle collective arrangements; unions can enter work places at all reasonable times; they can obtain confidential information about employers during the bargaining process (unless the employer objects and an independent reviewer can be agreed to and supports the claim of confidentiality); and there is a clear preference in the legislation for collectively negotiated employment agreements.
- (f) Fixed term contracts are allowed, as long as there are "genuine reasons" for the temporary arrangement.
- (g) Reinstatement has been restored as a primary remedy.

9.6.4 An employee is "*any person of any age employed by an employer to do any work for hire or reward under a contract of service*" with a statutory test for determining whether individuals previously working as contractors have now become employees. The test emphasises the "real nature" of the working relationship between the parties; rather than the "label" given by the parties to it".

9.6.5 The parties to an employment relationship must:

- (a) deal with each other in good faith; and
- (b) not (directly or indirectly) do anything to mislead or deceive each other, or that is likely to mislead or deceive each other.

9.6.6 The duty of good faith applies to:

- (a) bargaining for a collective agreement;
- (b) matters arising under a collective agreement while the agreement is in force;

- (c) consultation about:
 - collective interests;
 - changes to an employer's business;
- (d) proposals impacting on an employer's employees including:
 - contracting out work;
 - selling or transferring all or part of an employer's business;
- (e) making employees redundant;
- (f) access to a workplace by a union representative; and
- (g) communications relating to secret ballots.

9.6.7 There is no definition of "good faith" in the ERA, although there is a Code of Good Faith. It will not be mandatory to comply with such a code – although it is likely to reflect badly on a party who fails (without good cause) to comply.

9.6.8 Significantly, the union is to be independent of, be constituted and operate at "*arm's length from any employer*".

9.6.9 Employees who are union members bound by a collective agreement are also entitled to paid education leave for the purpose of increasing the employees' knowledge about employment relations.

9.6.10 Once bargaining has been initiated, crucially, an employer cannot refuse to meet, and cannot enter negotiations adopting a "take it or leave it" stance (although "hard" bargaining is permissible). The duty of good faith requires the parties to meet, consider and respond to proposals to justify positions and make every reasonable effort to reach common ground.

9.6.11 Parties must provide each other, on request, with information that is "reasonably necessary" to support bargaining claims or responses. If necessary an independent reviewer may decide whether the information is confidential and if so, to what extent the information supports a bargaining position.

9.6.12 Employees may strike for a multi-employer collective agreement (although "sympathy" strikes are unlawful).

9.6.13 Employees who are striking (or employers who are locking out) must give 3 or 14 days' clear notice of the industrial action (depending on which category of essential service they fall into) if the proposed strike

or lockout will affect the public interest (including public safety or health).

- 9.6.14** During a lawful lockout or strike, an employer cannot require non-striking workers to perform the work normally performed by strikers nor employ another party to perform the work of the striking or locked out employees, unless that can be justified on grounds of safety or health. The employer can, however, use existing employees who agree to do the work of striking or locked out employees.
- 9.6.15** The Employment Court will determine all injunctive or damages actions in relation to strikes and lockouts, including unlawful pickets.
- 9.6.16** Striking employees can be suspended, as can non-striking employees where work is not available for them during the strike or lockout.
- 9.6.17** Individual employment agreements can only be used for new employees where the employee is not a union member and no applicable collective agreement exists.
- 9.6.18** Before a new employee starts work under an individual employment agreement, the employer must provide the employee with a copy of the intended agreement, advise the employee that the employee is entitled to seek independent advice about the intended agreement and give the employee a reasonable opportunity to seek that advice (likely to be 5-7 days).
- 9.6.19** It is permissible under the ERA to include probationary periods in employment agreements (unless an applicable collective agreement prohibits their use). However, the ERA contains procedural requirements.
- 9.6.20** An employer and employee can enter a fixed term employment arrangement provided there is a genuine reason based on reasonable grounds for limiting the period of employment. The provisions in the ERA effectively remove the use of "long-term" temps.
- 9.6.21** An overall limitation period of three years applies to the submission of personal grievances, which is less than the six year period under the Limitation Act.
- 9.6.22** The parties may agree to submit an employment relationship problem to arbitration but nothing in the Arbitration Act 1996 can apply in respect of that submission.
- 9.6.23** The Act aligns the personal grievance provisions with the Human Rights Act 1993 by introducing racial harassment as a new ground for bringing a personal grievance and amending the provisions relating to sexual harassment.

- 9.6.24** Sexual harassment may be direct or indirect; it includes the use of visual material of a sexual nature; and there is no longer the requirement that a complaint be submitted in writing.
- 9.6.25** The common law action of wrongful dismissal is removed.
- 9.6.26** In its decision, the Authority must state relevant findings of fact, state and explain its findings and relevant issues of law, express its conclusions on the matter or issues it considers require determination in order to dispose of the matter, and specify what orders (if any) it is making.
- 9.6.27** Parties who are dissatisfied with a determination from the Authority may "elect" to have the matter heard by the Court. The party can elect whether or not it wants to have the hearing "de novo" (ie a full hearing of a case again, including calling witnesses), but the Employment Court may direct that the judicial hearing is to be de novo only if it is satisfied that the applicant has participated in the Authority's investigation in a manner that was constructive to resolving the issues involved
- 9.6.28** The Employment Court does not have jurisdiction to entertain an application for summary judgment and no longer has the ability to grant injunctions (other than for strikes, lockouts and pickets). Before a party can obtain an injunction the applicant will either need to make an "adequate" attempt to resolve the matter by mediation, convince the Authority that the use of mediation services will not serve any constructive purpose or is not in the public interest or have the Authority investigate the matter with urgency.
- 9.6.29** An appeal to the Court of Appeal is only allowed with *leave* of the Court of Appeal and only where it involves a question of law that is of "general or public importance".
- 9.6.30** The Court of Appeal may also, in any case, instead of determining the appeal, direct the Employment Court to reconsider the whole or any specified part of the matter to which the appeal relates.
- 9.6.31** The powers enjoyed by Labour Inspectors have been expanded.
- 9.6.32** The ERA imposes joint and severable liability on any officer, director or agent of a company for breaches of the Minimum Wages Act and Holidays Act, if he or she "directed or authorised the default in payment", and where a Labour Inspector establishes that the amount claimed is unlikely to be paid in full because the company is in receivership or liquidation, or there are reasonable grounds for believing that the company does not have sufficient assets to pay.
- 9.6.33** The main transitional provisions are:

- (a) collective employment contracts entered into before 2 October 2000 ("CECs") will remain in force according to their tenor until they expire or 31 July 2003, whichever is the sooner. These contracts will not be deemed to become collective agreements, and will continue to cover all employees who were bound by such contracts prior to the enactment of the legislation, whether or not they are union members;
- (b) a union may conduct a secret ballot of its members to bring the expiry date forward for the CEC to 1 July 2001 (or a later date as agreed by the parties), in which case the contract will expire earlier for union members.;
- (c) individual employment contracts entered into under the Employment Contracts Act will now continue in force "according to their tenor", provided that the grievance and dispute procedures contained in those contracts shall be deemed to be replaced by the applicable provisions of the ERA;
- (d) matters already before the Court of Appeal, Employment Court, Employment Tribunal, Disputes Committee or Grievance Committee shall be determined as if the Act had not been passed;
- (e) the repeal by the Employment Relations Act of any existing Act or provision will not extinguish any existing cause of action. Where any cause of action has arisen before the commencement of the ERA under any of the provisions repealed by the ERA and at that date no proceedings have been initiated in respect of that cause of action under those provisions, those provisions continue to apply to any proceedings commenced in respect of any such cause of action as if the ERA had not been passed;
- (f) where any cause of action has arisen before the commencement of the ERA in relation to the dismissal of an employee, proceedings in the Employment Tribunal may only be commenced in respect of that cause of action other than in accordance with the personal grievance provisions in the ERA before the close of 30 June 2001.

9.6.34 The significant employment legislation applicable in New Zealand is as follows:

- (a) the Employment Relations Act 2000;

- (b) Accident Insurance Act 2000; which levies employers to cover injured workers and removes the general right to sue an employer for any injury sustained at work;
- (c) The Health and Safety in Employment Act 1993, which places strict liability on employers who fail to identify and minimise workplace hazards;
- (d) Minimum Wages Act 1983 which provides minimum rates of pay;
- (e) Human Rights Act 1993, which prohibits discrimination in employment on the basis of sex, marital status, religious belief; ethical belief, colour, race; ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation.
- (f) Holidays Act 1981, which provides for 3 weeks annual leave after 12 months service with the employer, 11 statutory holidays per year, and 5 days special leave (domestic, sick or bereavement leave) per annum;
- (g) Parental Leave and Employment Protection Act 1987, which protects the employment of parents, providing for maternity, paternity and parental leave of up to 52 weeks without pay;
- (h) Wages Protection Act 1983, which provides for the payment of wage or salary in cash unless the worker's written consent is received, prohibiting deductions from workers' wages without their consent, and recovery of overpayments in limited circumstances; and
- (i) Equal Pay Act 1972, which provides for equal pay for the same work between sexes.

9.6.35 There are various other statutes that are applicable to specific work situations in New Zealand. The above legislation, however, provides the minimum terms and conditions of employment including wages, hours of work, holiday entitlements, and leave provisions.

9.7 Bankruptcy and Insolvency

If company directors are to avoid personal liability for fraudulent or reckless trading, they must be careful to ensure that at the time debts are contracted they have an honest belief on reasonable grounds that the company is able to pay its debts as they fall due for payment. A New Zealand company which is insolvent

may be wound up either voluntarily by resolution of its members or by its creditors by petition in the normal manner. New Zealand companies which are not insolvent may be wound up voluntarily by a variety of means.

There is no procedure under New Zealand law for winding up a foreign company. However, New Zealand registration constitutes submission to the jurisdiction, and a judgment obtained in New Zealand may be enforced offshore.

There are no debt to capital ratios prescribed by New Zealand law. However, the liability of directors for reckless or fraudulent trading is intended to ensure that insolvent companies do not continue to carry on business without the injection of additional capital.

Bankruptcy laws are applicable to individuals rather than companies. Directors liable for company debts can be declared bankrupt.

Foreign companies are not required to guarantee debts on registration.

There are provisions under New Zealand law for a company to enter into a scheme of arrangement with its creditors and for schemes of arrangement to be confirmed by the High Court of New Zealand in appropriate circumstances. There is presently no equivalent of the US Chapter 11, but the provisions of the Corporations (Investigation & Management) Act 1989, at least in theory, contemplate reorganisation (although in practice, statutory managers appointed under the Act have tended to act as receivers).

9.8 Sensitive Areas

9.8.1 Resource Management: Investment in the exploration and exploitation of New Zealand's natural resources have given rise to problems for investors at a political level. The Environment Act 1987 established the office of the Minister of the Environment, and the Conservation Act 1987 the office of the Minister of Conservation. During the 1984-1990 Labour Government, the Minister of Conservation declined consent to a number of applications for mining licenses. The policy of the present Government remains to be tested.

9.8.2 Resource Consents: Resource consents are required for most uses of land. Initially, these are determined by locally elected councils with the right of appeal to a specialist court - the Environment Court. The procedure can be time consuming.

9.8.3 Consumer Protection Legislation: Consumer protection legislation is in place in New Zealand. The Fair Trading Act 1986, Commerce Act 1986 and Consumer Guarantees Act 1993 are very similar in scope to equivalent provisions of the Australian Trade Practices Act 1974. The effect is that no individual or company is able to engage in misleading or deceptive conduct. There are both civil and criminal sanctions for breaches. (Note: contractual obligations and their objectivity have also been modified by various other statutes.)

A Consumers Institute exists in New Zealand with the objectives of protecting the interests of consumers and publicising information about those who fail to take into account consumer protection and interests.

9.8.4 No Fault Personal Injury Maintenance: New Zealand has a "no fault" insurance system for personal injuries which is embodied in the Accident Rehabilitation and Compensation Insurance Act 1992. The effect of this Act is to remove the right to sue any person including manufacturers, for compensatory damages, for personal injury. The Government pays compensation to the affected individuals who suffer "injury by accident." (Note: this does not prevent suit for punitive damages, although there are very few circumstances in which such a claim has been permitted).

9.8.5 Price Controls: In the past, there have been wage and price controls imposed in New Zealand. The Government has not given any indication of a reversion to price control in the New Zealand economy.

9.8.6 Treaty of Waitangi: This treaty was entered into by the representative of the English Monarchy and the indigenous Maori people of New Zealand in 1840. By virtue of the Treaty of Waitangi (Amendment) Act 1986, a commission has been set up to consider claims to land and other New Zealand resources by Maoris.

The principles of the Treaty are becoming more important in the consideration of National Development policies. Some large projects have been delayed as a result of such claims.

9.9 Changes in the Immigration Policy: On 29 March 1999 the New Zealand Government introduced a number of changes to the residence policy for business migrants. One of the new initiatives was a new category for those who are prepared to make a substantial investment in New Zealand. Details of the Investor Category are as follows:

9.9.1 Investor Category: Fundamental changes were introduced to the former Business Investor Category which is now renamed **Investor Category**. This new policy will focus on just **three factors** - the applicant's age, business experience and investment funds.

The **Age** of the applicants is limited to 84, or younger. Applicants who are younger will be awarded more points under the age factor, whereas people who are 55 or above will not earn any points at all and those who are 65 or older will in fact have points deducted from their total score.

The amount of **Investment Funds** required starts from \$1 million. Points will be progressively awarded for funds up to \$6 million. The funds must have been earned or otherwise acquired lawfully by the applicants; loans are not acceptable. The funds are to remain in an

acceptable investment or investments in New Zealand for at least two years, and the investments should be capable of providing a commercial return. The funds are not to be used for acquiring personal assets such as a residential home, cars, boats or similar.

Business Experience of the applicants will be awarded points, one for each two years of experience up to a maximum of five points. It is, however, not mandatory to have business experience under this category.

In addition, applicants are required to meet the standard English language skills as well as the health and character requirements.

The points table for the Investor Category is listed below.

Age	Points	Business Experience	Points	Investment Funds	Points
25-29 years	10			\$1,000,000	1
30-34 years	9	2 years	1	\$1,500,000	2
35-39 years	8	4 years	2	\$2,000,000	3
40-44 years	6	6 years	3	\$2,500,000	4
45-49 years	4	8 years	4	\$3,000,000	5
50-54 years	2	10 years	5	\$3,500,000	6
55-64 years	0			\$4,000,000	7
65-74 years	-2			\$4,500,000	8
75-84 years	-4			\$5,000,000	9
				\$5,500,000	10
				\$6,000,000	11

Under the **Investor Category** applicants are required to score a minimum total of **12 points*** to qualify for residence. (* as at 4 September 2001)

Jock Irvine and Edward Woo are the immigration specialists in Simpson Grierson and they could help you to deal with any immigration issues. If you need advice concerning the new business immigration policies or any aspects of the current Government immigration policies, please contact them on phone (649) 358 2222 or fax (649) 3070331.

10. DISPUTE RESOLUTION

Arbitration is available as an alternative means of dispute resolution in New Zealand. This is governed by the Arbitration Act 1996 which promotes consistency between arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in 1985. Arbitration is becoming a major facet of commercial litigation in New Zealand.

Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the agreement is contrary to public

policy or under any other law, such a dispute is not capable of determination by arbitration.

The court will appoint arbitrators and umpires when the parties to a dispute cannot agree on an appointment and arbitration is the nominated vehicle to resolve the dispute between the parties.

The court must stay court proceedings if a party to an arbitration attempts to litigate a matter which is within the scope of an arbitration agreement.

The High Court will enforce the awards of arbitrators as though they are judgments of the court. However, the decision of an arbitrator is subject to judicial review if reasons are given and the point at issue is not solely one of law.

It is common practice for commercial agreements to contain specific provisions referring disputes on amending the agreement to arbitration. Arbitration provides a private means of resolving disputes between commercial entities. Even though the New Zealand courts have developed the "Commercial List" (refer to Section 3), arbitrations can provide a more expeditious means of resolving disputes between parties than resorting to the court process.

Mediation, as a means of dispute resolution in New Zealand through independent mediation and negotiation institutions, is still in its infancy.

There are various specialist courts that will determine disputes between the parties. These include, for example, the Employment Relations Authority and the Employment Court for any dispute concerning employment relations, and the Environment Court which determines resource management matters. The activities of both Courts are subject to review by the High Court of New Zealand or the Court of Appeal.