



Doing business in New Zealand

International companies are starting to look afresh at prospective investments and ventures in New Zealand, particularly with the current exchange rate. What factors should you be mindful of when setting up in New Zealand?

Entry methods and legal structures

Typically international companies have established their presence by:

1. Registering a branch in NZ;
2. Incorporating a local subsidiary in NZ; or
3. Acquiring an established NZ registered company

Each has its benefits and, more importantly, downsides. For example:

- Foreign branches and subsidiaries generally have to file audited accounts under the Financial Reporting Act;
- Foreign branches may have double-taxation issues;

- Acquisitions may trigger overseas investments approval requirements, competition law issues or reporting requirements where more than a 25% stake is taken.

Deciding the most appropriate entry method will need collaboration between the client, lawyers and accountants (on both sides of the ditch). Consideration to matters such as risk appetite, contributions, intellectual property ownership, revenue streams will all play a part in that decision.

Once an entry method is determined a legal structure for the venture must be decided on. The usual suspects of a limited liability company, unit trusts, partnership, limited partnership, and unincorporated joint venture all feature.

Company formation

Formation is relatively quick and inexpensive. It can be done online with the Companies Office, with director and shareholder consent forms being faxed into the Companies Office. Things to note include:

- A local director is not required (unlike Australia).
- A local registered office is required.
- Financial reporting rules apply.

- There is no default constitution if one is not adopted. The Companies Act implies certain provisions where no constitution is adopted however this is not always adequate. If a constitution is adopted, it is included on the public register which is searchable on-line by the public (at no cost).

- Shareholder Agreements are common however do not need to be recorded on a public register.

Overseas Investment Act

The Overseas Investment Office (OIO) administers foreign acquisitions into New Zealand. Investments requiring consent include:

1. Significant business assets:

- a. Acquiring 25% or more of the ownership or control of a NZ company where the value of the securities, consideration for the transfer or value of the assets of the target company (and its subsidiaries) exceeds NZ\$100m (circa AUD\$83m);
- b. Acquiring a business exceeding NZ\$100m (circa AUD\$83m);
- c. Establishing a new business with a total set-up in excess of NZ\$100m (circa AUD\$83m).

2. Sensitive land:

- a. Over five (5) hectares of non-urban land;
- b. Land which is considered sensitive (including, offshore islands; land of historical or conservation significance; and land adjacent to reserves, lakes or the foreshore).

3. Investments in a fishing quota, an interest in a quota, provisional catch history or annual catch entitlement.

The Government has recently announced plans to review the regime in an attempt to simplify some of the rules.

Capital Markets and Takeovers code

The registered stock exchange is operated by NZX Limited (NZX). Equity listings are offered on the main board (NZSX) or the alternative board (NZAX). Listing rules apply.

In addition, the Securities Act regulates the offering of securities to the public in NZ.

The Takeovers code (the Code) applies to NZX listed companies or companies which have more than 50 shareholders (a Code Company). The Code prohibits a person who controls less than 20% of voting rights in a Code Company from increasing their control to 20% or

more except as permitted by the Code. Persons who already hold 20% or more, cannot increase their holding except as permitted by the Code.

The Code contains exceptions to the above rules which may include exemptions granted by the Takeovers Panel. The Code generally has greater flexibility than comparable international standards.

It should also be noted that target companies also have obligations under the Code.

Competition law

The Commerce Act regulates business acquisitions, restrictive trade practices, and price control.

Any acquisitions of shares or business assets which would, or would likely have, the effect of substantially lessening competition in a market are prima facie prohibited. Market is defined as "a market in New Zealand for goods and services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them". This is of considerable

significance in the NZ landscape with a population of four (4) million people.

Clearance or authorisation may be granted by the Commerce Commission with onus on the party seeking the clearance or authorisation to make the application.

In addition to the Commerce Act, the Fair Trading Act regulates misleading and deceptive conduct in trade.

Intellectual Property

There is no register for business names, and the Companies Office does not actively monitor company names issued (for similar or confusing names). Conversely, registration of a company name provides no defence to infringement of third party trade mark. Trademarks are essential to the proper protection of a name and/or logo.

As would be expected, NZ also has a suite of intellectual

property legislation with specific acts dealing with Trademarks, Copyright, Patents, and Registered Designs. NZ is not at present a party to the Madrid Protocol.

The usual principles apply in respect of confidentiality and NDAs and confidentiality agreements are a common part of business.

Property transactions

NZ works on the Torrens system. The land titles system in NZ is almost completely delivered on-line through Land Information New Zealand (LINZ). The same land laws apply for the whole of NZ however land transactions are processed and broken down by LINZ into land registration districts.

Land contracts are generally entered into on a caveat emptor basis. There are limited instances where pre-contractual disclosure obligations are enshrined in

statute. No pre-contractual disclosure is required for unit titles sale, or retail shop leases but is required for contracts with credit terms.

There is a mix of freehold and leasehold land, with leasehold being prevalent in certain areas.

Maori land claims still exist, and buyers should be aware of Maori land claim issues when acquiring property from the Crown or Crown Trading entities.



Taxation

A brief overview is detailed below:

- Income tax (personal) - a sliding scale between 12.5c - 38c applies depending on income (above \$70k the top rate applies).
- Corporate tax - a flat 30c rate applies (from 1 April 2009).
- GST - a flat 12.5% applies to all goods and services, with zero rating (GST free) for 'going concerns' and zero rating for financial services (which includes share transactions) and residential accommodation.
- Stamp Duty - stamp duty is not payable on transactions in NZ.
- Capital Gains - there is no broad-based capital gains tax in NZ however capital gains on certain transactions may be taxable, where the asset was acquired with the intention of resale, for land development or

subdivision schemes or where the asset represents trading stock of the taxpayer. There are also extensive associated party provisions to prevent avoidance.

- Gift duty - applies if gifts of greater than \$NZ27k are made in any given year.

Funding and trading are also governed by thin capitalisation and transfer pricing rules. The former generally limits deductibility for interest on borrowings which exceeds 75% of equity. The transfer pricing rules provide that goods and services traded between related parties (e.g. parent/subsidiary) must be priced on an 'arms length' basis.

It is also worth noting, that funds can be lent from foreign entities into unrelated New Zealand entities under the approved issuer levy regime. This provides for a final tax of 2% on interest with no non-resident withholdings. IRD approval of the borrower is required.

Labour and employment

The Employment Relations Act (ERA) regulates the relationship between employers and employees.

Importantly the ERA places on the employment relationship an obligation of good faith. Good faith requires employers, employees and where relevant trade unions to be "open and communicative" in their dealings. Most commonly for employers the obligation of good faith requires consultation with an employee before making any decision which could adversely affect the employee's continued employment. The obligation also extends to bargaining for both individual and collective employment agreements.

Disputes (known as 'employment relation problems') are routed through a mediation service, and if that fails,

determined by the Employment Relations Authority.

In a sale or merger of a business, the outgoing employer must negotiate with the proposed buyer/new employer in relation to the existing employees. Vulnerable employees (mainly cleaning and food catering workers, and some others) are protected by special provisions with a right to transfer to the buyer/new employer as of right, and if he/she is not required the right to a redundancy payment.

There is no compulsory superannuation scheme in operation however a voluntary KiwiSaver scheme has recently been put in place. Kiwisaver is voluntary at the employee's option.

Final comments

We are finding an influx of international companies starting to look for ventures and investments in New Zealand (particularly with the current exchange rates). The benefits of investing in New Zealand are obvious:

- It is politically and financially stable;
- Its markets haven't been fully exploited;

- It is innovative most likely by virtue of isolation from the greater part of the World; and
- It represents a great "test pot".

There is real opportunity for overseas companies to enter into the New Zealand landscape in the current economic climate.

