Doing business in New Zealand

International companies are always looking for prospective investments and ventures in New Zealand. 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 a 25% or larger stake is taken.

Deciding the most appropriate entry method will need collaboration between the client, lawyers and accountants. Consideration to matters such as risk appetite, contributions, intellectual property ownership and 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. Typical options include: limited liability companies, unit trusts, partnerships, limited partnerships, and unincorporated joint ventures.

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. Certain provisions of the Companies Act apply 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 and 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;

b. Acquiring a business for consideration exceeding NZ$100m;

c. Establishing a new business with total set-up costs in excess of NZ$100m.

d. Higher thresholds are being introduced for Australian investors (expected to take effect late 2011).

2. Sensitive land:

a. Over five 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).

An application can typically take up to three months to be considered by OIO.

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 and associated disclosure requirements.

The Takeovers Code (the Code) applies to 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 through permitted Code mechanisims. Persons who already hold 20% or more are similarly restricted in increasing their holding.

Generally a person trying to acquire a 20% or more stake in a Code Company must make a takeover offer or obtain non-associated shareholder approval.

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 million people.

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

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 a third party trade mark and confers no enforceable rights. Trade marks 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 Trade marks, Copyright, Patents, and Registered Designs. NZ is not at present a party to the Madrid Protocol.

The usual common law 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.

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 10.5% - 33% applies from 1 October 2010 depending on income (above $70k the top rate applies).
- Corporate tax - a flat 28% rate generally applies (from 1 April 2011).
- GST - a flat 15% 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 trade unions (where relevant) to be "open and communicative" in their dealings. The obligation of good faith requires employers to consult 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, otherwise known as 'employment relationship 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 (such as cleaning and food catering workers) 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 NZ, however a voluntary KiwiSaver scheme has recently been put in place. KiwiSaver is voluntary at the employee's option.

Final comments

International companies are always looking for ventures and investments in New Zealand. 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.