

Buying a Business/Company in New Zealand – Standalone or as part of a Trans-Tasman Acquisition

How different is New Zealand to Australia?

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Australian business increasingly see New Zealand as part of its own economic market. It is therefore logical for Australian corporates to continue to be undertaking business/company acquisitions in New Zealand as part of establishing a wider trans-tasman presence.

The legal approach for undertaking business/company acquisitions in New Zealand is similar to that in Australia, but is not the same. The purpose of this article is to highlight some of the differences.

STATUTORY REQUIREMENTS

A critical issue for an Australian business/company acquirer and its legal counsel is to ascertain what, if any, statutory approvals are needed for the acquisition. A requirement for statutory approval can arise in New Zealand under the Overseas Investment Act 2005, the Commerce Act 1986 or the Takeovers Code.

First, under the Overseas Investment Act there may be an obligation to obtain consent from the Overseas Investment Office. This office plays a role similar to the Foreign Investment Review Board in Australia. In line with the commitment towards business law harmonisation between the New Zealand and Australian Governments¹, there is a common \$100m threshold which means, generally, only larger business acquisitions trigger the need of consent from the Overseas Investment Office.

However, this is an over-simplification of the overseas investment regime as should the business acquisition involve the acquisition of an interest in sensitive land (which can include leased land then further approval would still be required even if the acquisition cost is under the \$100m threshold). By way of example, when Wesfarmers acquired the Paykel industrial products distribution business which operated from approximately 47 commercial distribution centres around New Zealand, Overseas Investment Office approval was required because one of the distribution sites was adjacent to sensitive land.

RED FLAG: The Overseas Investment Act also applies even if the acquisition is only happening in Australia and New Zealand land interests are “indirectly” being transferred. This was a change introduced with the new Overseas Investment Act. We obtained OIO approval for CVC in respect of its DCA Healthcare Group acquisition by Australian scheme of arrangement. Approval was required due to land interests held in New Zealand by DCA. It is important for the OIO approval to be factored into the transaction timetable as land approvals can take 10-12 weeks.

Secondly, competition law issues can arise under the Commerce Act. In New Zealand we have the Commerce Commission which undertake a role similar to the Australian Competition and Consumer Commission. The general competition law test in respect of buying and selling a business is that such acquisition is permitted unless the acquisition would have, or would likely have, the effect of “substantially lessening competition in a market” in New Zealand. This is the same test that applies in Australia, and therefore the principles behind this statutory approval will be familiar to Australian legal counsel.

However, again there are some practical differences. Even with the same general competition law test, the “safe harbour” guidelines promulgated by the regulators are different. Also, in New Zealand it is very unlikely that the Commerce Commission will consider giving any “informal” approval or “no-action letter”. The Commerce Commission requires the parties to make a formal clearance application, so it can then speak publicly to representatives of the various stakeholders in the relevant market. It is important to note that immediately upon the application being lodged with the Commerce Commission, the fact of the application is in the public domain, including the application itself, albeit in a sanitized form excluding commercially sensitive information. This in particular can have important commercial ramifications where the business is being sold via a tender and/or the identification of particular potential bidders is commercially sensitive.

The third area of statutory requirements is if the business acquisition is being undertaken via an acquisition of shares and the target company is a “code company” caught by the New Zealand Takeovers Code. The Takeovers Code is administered by the Takeovers Panel.

Since the introduction of the New Zealand Takeovers Code from July 2001, the Code and the Takeovers Panel has generally received praise from New Zealand business commentators and market-players.

It is again very similar to Australia in that it operates from a 20% threshold, and has a fundamental objective of “equal treatment”.

AMBER FLAG: The critical differences between the New Zealand regime and the Australian regime is that New Zealand does not require a “compulsory auction”, because New Zealand allows irrevocable undertakings in excess of the 20% threshold. For example, when International Paper decided to sell its 50.1% interest in Carter Holt Harvey Limited, the parties were able to obtain a degree of deal certainty from the sale by entering into a “lock-up” agreement with Graham Hart’s Rank Group, whereby Rank agreed to make a takeover offer for 100% of Carter Holt Harvey and International Paper agreed to accept the takeover offer. For a purchaser, this gives deal certainty in that Rank Group knew it would be buying 50.1% of CHH as a bare minimum (the New Zealand Code requires greater than a 50% acceptance before a offer can be unconditional).

There are other differences between the New Zealand takeover regime but these are more of a technical nature. For example, the 20% threshold applies to voting rights not relevant interests, New Zealand’s takeover regime doesn’t cover listed unit trusts, and doesn’t allow for creep between 20%-50%).

BLUE FLAG: There is considerable debate and postulating currently in the New Zealand market with respect to Schemes of Arrangement which have been infrequently used as an alternative to takeovers (unlike the situation over the past decade or so in Australia). The proposed merger of Contact Energy and Origin Energy has focused the spotlight in this area. There is similar controversy with respect to the proposed merger of TransPacific with Waste Management by way of amalgamation, a Canadian concept that provides a further means of combining two or more legal entities in New Zealand. Australian corporate law does not allow for amalgamations. A recent trend developing in New Zealand is for there to be “double” offers (one offer to achieve the required

50.1% acceptance) and a second higher offer to achieve the 90% acceptance (required for accessing compulsory acquisition rights for the bidder).

DUE DILIGENCE

The financial disaster that Air New Zealand experienced with its acquisition of Ansett Airlines reinforced to the New Zealand market the importance of undertaking due diligence before making a business acquisition

GREEN LIGHT: The framework and procedure for trans-tasman due diligences is again very comparable. There are a number of due diligence areas where New Zealand has adopted an approach different to that in Australia and it is important for legal counsel to be aware of these differences. Such differences include:

- the dominant role of local government in New Zealand (as opposed to central government) in relation to resource management and environmental matters;
- understanding the New Zealand “personal property securities” regime when acquiring business assets (New Zealand adopted a Canadian model in 1999);
- how New Zealand’s accident compensation regime avoids liabilities in respect of death and injury claims, and how industry rating impacts on levies payable by a business;
- the New Zealand requirement for “just cause” for termination of employment contracts and very limited “transfer of undertaking” legislation;
- the key role that trademarks play in New Zealand to protect names or brands as New Zealand does not have any business name registration procedure;
- unique aspects involving the Treaty of Waitangi (highlighted recently by disputes involving access in the recent forestry asset sales in New Zealand and a high profile political debate over seabed and foreshore matters triggered by marine farming businesses);
- the present lack of compulsory superannuation arrangements in New Zealand. There are occasional defined benefit superannuation schemes that particularly concern Australian acquirers. The introduction of “KiwiSaver” from 1 July 2007

(including employer compulsory contributions starting at 1% from 1 July 2008) again highlights subtle differences;

the lack of any capital gains tax (per se), transfer taxes or stamp duty (to significant relief of Australian acquirers).

DRAFTING BUSINESS AGREEMENTS

The common theme is similar but not the same and this is illustrated with reference to the actual drafting of the definitive agreement. Here the differences between New Zealand and Australia are less important. It is perhaps best to compare the New Zealand and Australian general format of business or asset agreements with that of American acquirers to highlight just how much the New Zealand and Australian agreements are “interchangeable”. We would say that the form of agreement is more a product of the commercial strength of the client rather than any differences that exist between Australia and New Zealand legal requirements (the obvious difference being with statutory approvals and other relevant New Zealand “quirks”).

CONCLUSION – SIMILAR BUT NOT THE SAME

As we said from the outset, we see New Zealand as increasingly part of the Australian economic market. We are increasingly working alongside Australian legal counsel who are looking to not only expand their presence into New Zealand but also to manage their New Zealand business from Australia on a day-to-day basis. Whether the expansion of an Australian business is via acquisition, joint venture or otherwise there are the New Zealand quirks that need to be considered.

The purpose of this short paper is to signal to legal counsel that the laws and contractual approaches to governing business/company acquisitions in New Zealand are similar to that which exist in Australia, but are not the same: **SPOT THE DIFFERENCES!**